International Regulation of Interests in Aircraft: The Brazilian Reality and the UNIDROIT Proposal

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# INTERNATIONAL REGULATION OF INTERESTS IN AIRCRAFT: THE BRAZILIAN REALITY AND THE UNIDROIT PROPOSAL

Terena Penteado Rodrigues* **

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** Please be aware that this article is up-to-date as of the end of March 2000. Because this is a continually changing area of law, portions of this article may require updating.

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I. INTRODUCTION

A. AIRCRAFT INDUSTRY: PROSPECTIVE AND DEMANDS

The aircraft fleet is growing rapidly worldwide and with it, new and more diversified forms of finance are becoming available. The aircraft industry reports a continuous and increasing demand for aircraft equipment. The high price of aircraft equipment and the constant need to acquire the most current technologies make financing the usual means by which airlines and private carriers acquire equipment. The availability of aircraft financing in a particular country is heavily dependent upon the clarity and effectiveness of that country's laws governing the protection of creditors.


governing secured transactions have a direct impact on the development of the aviation industry in that country.\textsuperscript{3}

Because countries deal with creditors' rights in different ways and because the aviation industry has an inherent international character, there is a strong demand for more effective ways to ensure the international protection of interests in aircraft equipment. This protection must be effective wherever the aircraft is located or registered and whatever the nationality of the lessee or the mortgagor. The protection offered by the 1948 Geneva Convention on the International Recognition of Rights in Aircraft ("Geneva Convention")\textsuperscript{4} is now under discussion, as commentators debate its ability to encompass modern financing techniques. The UNIDROIT\textsuperscript{5} Convention on International Interests in Mobile Equipment and the Aircraft Protocol were designed to deal with these issues by establishing public and private rules to be applied internationally.\textsuperscript{6}

B. AIRCRAFT MARKET IN BRAZIL

Brazil's geographic size, huge consumer market, and strong position with its commercial partners make it a very attractive market for aviation. Brazil currently has five national airlines

\textsuperscript{3} See Gallagher, supra note 2, at 294-97.

\textsuperscript{4} The 1948 Convention on the International Recognition of Rights in Aircraft was signed in Geneva and currently has seventy-three members including Brazil, the United States, and most European Union members. Brazil ratified the Geneva Convention on October 1, 1953. See Decreto No. 33.648, del de Octobre de 1953.

\textsuperscript{5} The International Institute for the Unification of Private Law ("UNIDROIT") is an intergovernmental organization with 58 members including Brazil, United States, United Kingdom, Canada, Germany, France, Italy, the Russian Federation, and Japan. UNIDROIT's main purpose is the harmonization of private law. See Presentation of Unidroit (visited Jan. 23, 2000) <http://www.unidroit.gov>. For a general discussion on UNIDROIT's role, see Martin J. Stanford, Preliminary Draft Unidroit Convention on International Interests in Mobile Equipment: Basic Features, Address Before the IAIA the Legal Symposium (February 1998).

(VARIG, VASP, TRANSBRASIL, TAM, RIO-SUL), seventeen regional airlines, over 500 air taxi operators, and approximately 10,500 civil aircraft registered with the Civil Aviation Authority. In 1998, Brazilian acquisitions of aircraft and parts totaled US$ 969 million, a slight increase over 1997's total of $ 968 million.

The United States is the main supplier of aircraft and parts to Brazil accounting for 23.3% of the total imports. In terms of economic bloc, the European Union was responsible for the largest percentage of Brazilian imports in 1998—US$ 16.826 million (29.2% of total Brazilian imports). Germany is the main European exporter of aircraft to Brazil, and French participation has increased with Brazilian acquisition of French aircraft during November and December of 1998.

Embraer (Empresa Brasileira de Aeronáutica S.A.) is probably the best example of Brazilian participation in the aviation industry. Since its privatization in December 1994, Embraer has become an extremely successful manufacturer of advanced regional jets. The company is now recognized as a world leader in regional jets and the world's fourth largest manufacturer of commercial aircraft. Embraer's 1999 exports reached US$1.6 billion making the company Brazil's number one exporter.

Embraer customers include U.S. carriers (Continental Express, American Eagle, Wexford, Trans States), French carriers (Regional Airlines, Flandre Air), Portugalia (Portugal), British Regional (UK), National Jet (Australia), ERA (Spain), Luxair (Luxembourg), and City Air (Sweden), among others.

The trend towards stronger integration of international markets comes mostly from the private sector. Brazilian airlines are taking part in carriers' alliances, increasing routes and the flexi-

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7 There are also 434 carriers providing non-regular air services and 727 providing specialized services.
8 Embraer's headquarters are located at São José dos Campos, State of São Paulo, Brazil. Embraer's gross operating revenue increased from US$ 746.1 in 1997 to US$ 1.3 billion in 1998. See Embraer Registers Record Sales and Profit to Become the Second Largest Brazilian Exporter (visited April 5, 1999) <http://www.embraer.com.br>.
9 Embraer's U.S. supplier partnerships include Allied Signal Aerospace in Arizona, Hamilton Standard in Connecticut, Rolls-Royce Allison in Indiana, and Sundstrand Aerospace in California. Embraer's current U.S. customers include, among others: American Eagle in Texas, Continental Express in Ohio and Texas, Mesa Aviation in Minnesota, Northwest in Minnesota, Skywest Airlines in Utah, Trans States Airlines in Missouri, and Wexford Aviation in Connecticut. Embraer also produces aircraft parts for MD-11 and Boeing 767/777 aircraft and is participating with United Technologies Sikorsky Corporation (U.S.) in the project of the S-92 Helibus helicopter. See id.
bility offered to passengers. VARIG is part of the “Star Alliance,”10 VASP11 has a code-share agreement with Continental (U.S.), TRANSBRASIL has an agreement with Delta Airlines and Air Portugal, and TAM, with its Airbus aircraft acquisitions, agreed to a code-share with American Airlines. To increase its competitiveness in the international markets, in November 1999 Embraer sold 20% of its ordinary shares to a French consortium (Aerospatiale, Matra, Dassault, Sneema, Thomson, and CSF).

But how attractive is financing aircraft equipment in Brazil when we analyze variables such as perfection of security interests and enforcement of creditor’s rights, such as repossession? For instance, how do lessor and mortgagees’ rights operate in Brazil during bankruptcy proceedings?

This article analyzes certain relevant provisions of the proposed Convention/Protocol in relation to the applicable laws in Brazil. The analysis shows that the Brazilian legal system provides certainty and protection to creditor’s rights, as well as an effective registration system for aircraft equipment. Under such conditions, the article discusses whether the implementation of the Convention/Protocol is a desirable option to Brazil.12

II. MOVING TOWARDS AN INTERNATIONAL SYSTEM OF SECURITY INTERESTS IN AIRCRAFT: THE UNIDROIT PROPOSAL

Aircraft constantly move among different jurisdictions, and because aircraft are high-value assets, their acquisition often involves financing between a lessor and lessee located in different jurisdictions. Although a lessor may benefit from a more liberal understanding of rights in aircraft equipment accorded by his home country’s laws, there is still the risk that the lessee is located or the aircraft registered in an environment more hostile to creditors. How the laws of a country deal with the protection of rights and interests in aircraft is, therefore, relevant to credi-

10 “Star Alliance” also combines Air Canada, United Airlines, Lufthansa, Scandinavian Airlines System, and Thai Airways International.
11 VASP holds majority equity shares in Lloyd Aereo Boliviano, Ecuatoriana de Aviacion, and Transportes Aereos Neuquen (“TAN”).
tors' decisions of whether and under which conditions they will make financing available in a certain market.

A. **Brief Background, Purposes, and Rationale Behind the Project**

Since the initial proposal introduced by the Canadian Government in 1988 and the establishment of a study group within UNIDROIT in 1993, the number of supporters of the project have increased. Not surprisingly, the Aviation Working Group ("AWG"), led by Airbus and Boeing, has been very active in promoting the potential benefits of the Convention/Protocol. The International Air Transport Association ("IATA") has also been an active supporter of the AWG project. Together with the International Civil Aviation ("ICAO"), IATA and the AWG form the Aircraft Protocol Group ("APG"), whose work resulted in the draft Aircraft Protocol in January 1998. By request of the APG, a study was prepared to evaluate the possible economic results under the proposed system of the Convention/Protocol.

Not only were the application of the *lex rei sitae* to high-value assets constantly moving across borders and the non-recognition

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14 Professor R.M. Goode (UK) chairs UNIDROIT Study Group, and its members include Canada, United States, France, Germany, Italy, Japan, the Russian Federation, and Nigeria. Other countries participating as observers are China, Colombia, India, Indonesia and Ireland. See Stanford, *supra* note 5.

15 Among aircraft and engine manufacturers, leasing companies and lenders, the AWG has sixteen members. See Clancy & Voss, *supra* note 1, at 287.

16 Founded in 1945 and with headquarters in Montreal, IATA has more than 230 members in over 130 countries, which exceeds 98% of the worldwide scheduled international traffic.

17 Created in 1944, ICAO is a specialized agency of the United Nations devoted to the promotion of "international air transport standards and regulations." ICAO has 185 Contracting States, including Brazil, Canada, Germany, United Kingdom, and United States. See International Civil Aviation Organization (visited March 14, 2000) <http://www.icao.org>.


of non-possessory interests seen as inadequate, but also the availability of capital was seen as being subordinated to the existence of an efficient legal regime. In light of these problems, the drafters of the Convention intended to provide for an international legal framework that would encompass the modern requirements of asset finance, modernizing laws and fulfilling the existing holes in certain legal systems.

The Convention applies to different types of mobile equipment that are uniquely identifiable. Earlier drafts of the Convention contained a non-restrictive list of objects that it proposes to cover: airframes, aircraft engines, helicopters, oil rigs, containers, railway property, and space property. The current Convention/Protocol, however, replaces this specific reference by adopting a broader language that ensures more flexibility. Other categories may then be covered under future Protocols and may be treated more specifically.

As for the Aircraft Protocol, its preamble states that its objective is to promote the facilitation of cross-border asset-based financing and leasing by creating a set of rules that guarantee the protection of rights in airframes, aircraft engines, and helicopters (aircraft objects). Moreover, it contemplates the creation of an international registration system that would facilitate the registration of such interests.

The Convention/Protocol has been through numerous changes, and various provisions are still under intensive discussion. The role of the International Registry system is still not entirely defined, and it is not clear that civil law countries will feel comfortable with provisions designed under a common law perspective. Nonetheless, the project has gained more attention, and the next Joint Session is expected to occur in March 2000 in Rome.

20 See Standford, supra note 5.
21 See discussion supra Part I (A).
23 The participants of the last Joint Session held in August and September 1999 in Montreal met in Rome in November 1999. The current Convention/Protocol is a result of these meetings and discussions of the various working groups. The next Joint Session will take place in Rome in March 2000.
24 See Crans, supra note 12, at 280-81.
B. RELATION BETWEEN THE CONVENTION AND ITS PROTOCOLS: THE AIRCRAFT PROTOCOL.

The UNIDROIT proposal was structured in a set of distinct protocols, each one related to certain mobile equipment, but all linked to a main document, the Convention itself. The umbrella format was preferred because, though most of the concerns are shared and addressed jointly in the Convention, there are various particularities with regards to certain types of equipment that need further attention. For instance, the de-registration provisions expressed in the Aircraft Protocol are commonly found in agreements related to aircraft. It is this combination of common and particular issues to be regulated that justify the more complex structure.25 This structure allows the Convention to address the specific demands of each industry while at the same time modernizing the applicable commercial law.26

Another important aspect of the proposed structure is that countries may opt to adopt only certain Protocols and change their previous selections at any time. The Convention will only become enforceable from the moment that a specific protocol is adopted and only among those countries that are party to such protocol.27 Nonetheless, when applying the provisions, both the Convention and the applicable protocol are to be read and interpreted together, as a sole instrument.28

III. ANALYSIS OF CERTAIN PROVISIONS OF THE PROPOSED AIRCRAFT PROTOCOL FROM THE BRAZILIAN LAW PERSPECTIVE

Countries will face a variety of questions when examining the utility and viability of the UNIDROIT project. These questions range from public policy issues to the potential advantages of implementing a more liberal legislation towards security interests. Basically, some commentators point out that regardless of what each country takes into consideration, the decision of

25 From a practical point of view, however, examining the Convention/Protocol is not a simple task. Even with the maintenance of the umbrella format, UNIDROIT should consider providing a single document for use by practitioners. German representatives at UNIDROIT suggested the adoption of a single instrument instead of a series of protocols under a main convention.


27 See Convention, supra note 6, art. U(1)(a)-(c).

28 See id. art. U(2).
whether to adopt the Convention is mainly economic. Because some states may not be ready or willing to proceed with certain provisions of the Convention, except for the mandatory sections, there are a number of articles that may or may not be incorporated by each member. Even the most innovative proposal, however, would not necessarily fit all interests. Provisions entitling the parties to repossess the aircraft without leave of the court, for example, are contrary to the laws of Brazil. In this context, opt-out mechanisms prescribed in the Convention/Protocol play an important role and may cause different results for different countries depending on their decisions. Regardless of which sections each country chooses to adopt, however, the Convention/Protocol and the effort to bring more predictability and effectiveness in this area will bring noticeable changes within systems that lack such legislation.

A. INTERNATIONAL INTEREST

1. Definition and Applicability

The Convention is applicable to the creation and effects of an international interest in mobile equipment, when either the debtor is located in a Contracting State or the aircraft object to which the international interest relates is registered in a nationality register of a Contracting State. The uniqueness of the concept behind an “international interest” is its autonomy and independence from national laws. This characteristic ensures that Contracting States’ courts will recognize and enforce rights and interests created in accordance with the Convention/Protocol, regardless of their existence under domestic law.

International interests are identified in three categories depending on the type of agreement that creates them: security agreement, title reservation agreement, or leasing agreement.

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29 See Wool, supra note 26, at 247.
30 See discussion infra Part III (C).
31 See Convention, supra note 6, arts. V, Y, Z; Aircraft Protocol, supra note 6, art. XXX.
32 See Convention, supra note 6, arts. 1-3. Whether the creditor is situated in a non-Contracting State will not affect the applicability of the Convention. See id. art. 3(2).
33 See Wool, supra note 26, at 252.
Certain provisions of the Convention/Protocol apply to contracts of sale as well.\textsuperscript{34}

Engines receive separate treatment within the Aircraft Protocol framework.\textsuperscript{35} This is justified not only by the engine demand that follows the demand for aircraft,\textsuperscript{36} but also by the trend towards short-term engine lease agreements. Airlines are increasing the use of engine fleet management programs, which require more flexibility.\textsuperscript{37} Many civil law countries, however, do not separate aircraft ownership from engine ownership,\textsuperscript{38} and such a provision may not be acceptable in those countries.\textsuperscript{39}

According to the Brazilian Aeronautical Code, parties may establish a mortgage over an aircraft, engines, parts, and accessories.\textsuperscript{40} If there is no specific contractual exclusion, a mortgage over an aircraft will be deemed as to include all parts, accessories, and engines.\textsuperscript{41} For the registration of engine mortgages, the individual engines must be registered at the Brazilian Aeronautical Register ("RAB"). There is no impediment for having different mortgagees for the aircraft and the engine(s).\textsuperscript{42}

The preliminary draft of the Convention stated that a Contracting State may choose not to apply the Convention to a "purely domestic transaction."\textsuperscript{43} How and whether to define what is a "purely domestic transaction" is still under discussion. Considering not only that this term is unclear, but also that the operation of the International Registration system is not defined,\textsuperscript{44} it is almost impossible to predict the benefits of opting in or out such a provision. Until the role and the relationship of the International Register and domestic registries are determined, it is not clear whether countries should (or even could)

\textsuperscript{34} See Convention, supra note 6, art. 39. According to Articles IV of the Aircraft Protocol, the following Convention provisions also apply to sales contract: articles 20 (1), 25, and 38 and Chapter VIII (other than art. 27(3)).

\textsuperscript{35} For a definition of "aircraft engines" and "aircraft objects," see Aircraft Protocol, supra note 6, art. I(2). See also id. art. XXII(1)(b).

\textsuperscript{36} See Clancy & Voss, supra note 1, at 288.

\textsuperscript{37} See id. at 284-85.

\textsuperscript{38} See id.

\textsuperscript{39} See Crans, supra note 12, at 280-281.

\textsuperscript{40} See C.B.A., Lei No. 7.565, de 19 de dezembro de 1986, D.O. de 23.12.1986, art. 138. For purposes of Article 810 of the Brazilian Civil Code, aircraft are deemed to be immovable assets and, therefore, may be subject to a mortgage.

\textsuperscript{41} See C.B.A., art. 138, § 1.

\textsuperscript{42} See id. art. 138, § 3.

\textsuperscript{43} The term "a purely domestic transaction" is in square brackets. See Convention, supra note 6, art. V.

\textsuperscript{44} See discussion infra Part III (B).
separate transactions with sole local effects from the reach of the Convention/Protocol. Contracting States will probably prefer, however, to have the ability to decide whether to apply the Convention/Protocol to domestic transactions. Therefore, the relationship between the domestic registries and the International Register must be resolved.

2. Non-Consensual Rights Declaration

Under certain legal systems, some rights have priority over rights created by the parties. Therefore, the Convention/Protocol allows Contracting States to declare which non-consensual rights have priority over the international interest.\(^{45}\) For non-consensual rights and interests that already have priority under local laws, a Contracting State must file a declaration at the International Register to guarantee the preference granted by domestic law over international interests. These rights would then receive priority treatment over subsequently registered interests. The International Register will maintain such declarations in the name of the Contracting State and will be open for public consultation.\(^{46}\) Therefore, parties should consult with the registrar in relation to a country where the creditor is located. This requires a constant verification as to whether the declaration list has been modified. Nevertheless, it creates an incentive for countries willing to accept the Convention/Protocol to improve their registration systems. It will also improve access to updated information on foreign laws. Countries may guarantee the order of creditor’s preference in the way that they believe most convenient. At the same time, foreign creditors have better information to analyze their position in relation to other rights.

Although Brazilian law provides a series of remedies that may be triggered upon default or bankruptcy, preference granted to certain credits due to their peculiar nature is imperative. As examined below, Brazilian Bankruptcy Law contains a credit order qualification that Brazil is likely to declare under the Convention/Protocol. Additionally, under the Aeronautical Code mortgage credit preference must observe the preference enjoyed by other credits, such as labor credit, tax claims, and airport fees.\(^{47}\) Credit preference is a matter of policy within the

\(^{45}\) See Convention, supra note 6, art. 38.

\(^{46}\) See id., art. 23.

\(^{47}\) See C.B.A., art. 143; see also discussion on credit preference under Brazilian legal system infra Part III(D).
Brazilian legal system, and this is found in many other jurisdictions. The schedule of payment preferences established under Brazilian Law should, therefore, necessarily be absorbed within the Convention/Protocol. Otherwise, as argued by some commentators, an additional privilege would be granted to the holder of an international interest, which ultimately would frustrate the policy of the Brazilian legal system to treat creditors who are in the same position alike.

B. THE BRAZILIAN AERONAUTICAL REGISTRY WITHIN THE INTERNATIONAL REGISTRATION SYSTEM

1. The Role of the Brazilian Aeronautical Register: the RAB

Aviation in Brazil is regulated by the Brazilian Aeronautical Code ("Aeronautical Code"), enacted in 1986. The Civil Department of Aviation, a department of the Aeronautical Ministry, supervises and maintains the RAB, which applies the Aeronautical Code provisions.

The RAB is responsible for the recording of aircraft, agreements related to aircraft operation, such as lease and conditional sale agreements, respective liens, such as mortgages, and for the issuance of certificates. Registration is also a means of acquiring title to an aircraft. Once the registration is effected, any alterations to the status of the aircraft must be filed with the RAB.

The Aeronautical Code reflects the concept of aircraft nationality brought by the Chicago Convention by granting Brazilian nationality to aircraft registered before the RAB. Registration at the RAB also perfects rights over the aircraft being registered, which is annotated in the aircraft’s certificate (the Certificate of

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48 See Crans, supra note 12, at 281.
49 Brazilian Civil Department of Aviation ("DAC") was created 67 years ago and is located at the Aeronautical Club in Rio de Janeiro. Brazilian government authorities are currently discussing the creation of a National Agency for Civil Aviation ("ANAC") that would assume the DAC responsibilities.
50 The RAB’s activities are described in Title V, Chapter V of the Aeronautical Code.
51 See C.B.A., art. 115(IV). The other means by which title to an aircraft is obtained are construction, adverse possession, hereditary right or by legal transfer.
52 See id. art. 74(III).
Registration and Nationality). Additionally, registration of lease agreements exempts the owner/lessor from liability for the operation of the aircraft\textsuperscript{55} establishing presumption of ownership in his favor.\textsuperscript{56}

The Aeronautical Code provides for two types of lease transactions: finance leases ("arrendamento mercantil") and operating leases.\textsuperscript{57} Registration of liens, such as mortgages, is also filed with the RAB.\textsuperscript{58} Certain elements are required in the contract, such as the amount being secured, interest applied, date and place of payment, aircraft nationality and registration marks, aircraft's serial number, and indication of the insurance policy/certificate.\textsuperscript{59} Moreover, validity against third parties is only effective upon registration\textsuperscript{60} and annotation in the respective aircraft’s Certificate of Registration and Nationality.\textsuperscript{61}

Registration requirements vary according to the type of the transaction.\textsuperscript{62} Regardless of the type of transaction, however, any original documents in foreign language must be translated into Portuguese by a sworn translator before submission to the RAB.\textsuperscript{63} Additionally, the sworn translation accompanied by the original in the foreign language should be recorded before a "Public Registry of Titles and Documents" ("Registro Público de Títulos e Documentos,” hereinafter “RTD”).\textsuperscript{64} Fulfillment of this condition is also required if the documents are submitted to a court.

Basically, registration costs include the translation, registration at the RTD, and registration at the RAB. Translation costs and RTD’s registration are, with rare exceptions, more expensive than any of the costs incurred with registration at the RAB.\textsuperscript{65}

\textsuperscript{55} See id. art. 124.
\textsuperscript{56} See id. art. 116(V). Lease Agreements are treated as contracts of exploration under the Aeronautical Code.
\textsuperscript{57} See id. arts. 127, 137.
\textsuperscript{58} See id. art. 74(III).
\textsuperscript{59} See id. art. 142.
\textsuperscript{60} If not registered, the mortgage has effects solely among the contracting parties. See C.C., Lei No. 3.071, de 1 de janeiro de 1916, D.O. de 5.01.1916, art. 848.
\textsuperscript{61} See C.B.A., art. 141.
\textsuperscript{62} For a detailed description of registration requirements, see Brazilian Aeronautical Homologation Rules. See also DAC Online-Dívidas Frequentes (visited Dec. 12, 1999) <http://www.dac.gov.br/ingles/dividas/texto.htm>.
\textsuperscript{63} See C.P.C., Lei No. 5.869, de 11 de janeiro de 1973, D.O. de 17.01.1973, art. 157.
\textsuperscript{65} RAB fees are based on UFIR ("Unidade Fiscal de Referência") and attributed in accordance with the type of the transaction.
2. UNIDROIT Proposed International Registry: Conditions, Functions, and Effects

An agreement providing for an international interest must be in writing and relate to an object identifiable under its respective protocol. The agreement must also identify the obligations that the agreement secures. Fulfillment of these requirements creates an international interest and allows registration at the International Registry.66

The primary function of the International Registry is to give public notice of the existence of a security interest over the aircraft object and to establish priority over unregistered and subsequently registered interests.67 The International Registry will also maintain the list of non-consensual rights declared by the Contracting States. Therefore, with the observation of the priorities declared by each Contracting State,68 the priority criterion is based on a "first-to-file" rule.69

Proposing an innovative approach, the Convention also provides for registration of future interests, assignments, and sales, which are called prospective international interests.70 This would allow greater flexibility to the parties in structuring transactions.71 Aside from the requirements for registration that will be established within the International Registry regulations, other conditions will apply to the conversion of prospective international interests into registered international interests.72

Determination of the exact moment that a registration is effected is vital to the functioning of the registry. To protect the parties searching the system, the Convention adopts as the effective moment the point at which the information is searchable within the International Registry database.73 The manufacturer's serial number will be the primary searching criterion for

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66 See Convention, supra note 6, art. 7.
67 See id. art. 27(1).
68 See id. arts. 23, 37, 38.
69 See UNIDROIT, Establishment of an International Registry for the Registration of International Interests in Aircraft Objects, Joint Session (Rome, 1-12 February 1999), at 1.
70 See Convention, supra note 6, arts. 1(z), 15.
71 Upon filing of a prospective international interest, unless the parties opt to remove it before it is converted into an interest, priority over subsequent interests is assured.
72 See Convention, supra note 6, art. 17(2). See also Wool supra note 26, at 266-267.
73 See Convention, supra note 6, art. 19 (1)-(2).
aircraft objects.\textsuperscript{74} Priority of interests that were previously registered as prospective international interests, however, is protected as the registration dates back to when the prospective was first filed.\textsuperscript{75}

Under Article 21(1) of the Convention, parties are not required to register any agreements in relation to the aircraft object. Nevertheless, parties will probably seek to guarantee their priority rights by registration at the International Registry. Otherwise, there would be no assurance that the rights agreed upon could be enforced effectively because they would lack preference over others.\textsuperscript{76} The probable result will be that parties will opt not to register agreements that only work as a bridge to other transactions in relation to the same aircraft object.\textsuperscript{77}

In relation to contracts of sale, Article V(3) of the Aircraft Protocol allows either party to effect the registration. However, by requiring the consent in writing of the other party to register, the Aircraft Protocol creates an unnecessary burden that does not add any additional security. If the purpose of the Convention/Protocol is to promote predictability, sales contracts should require public notice. This is particularly true in the event that other security agreements exist over the aircraft object and will be transferred with the sale. Moreover, it is not clear whether parties may give their written consent to the registration simply by addressing this issue in the sales contract itself or the bill of sale. In view of the practical spirit of the Convention/Protocol (and the parties’ ability to modify it in a number of provisions), it is possible to interpret this provision to say that a separate document is not necessary.

The certificate issued by the International Registry is \textit{prima facie} proof that the rights indicated on it are valid and in effect.\textsuperscript{78} When registering a certain transaction at the RAB, the parties are assured with the same security. The RAB’s annotation to the aircraft’s certificate is a \textit{prima facie} evidence of the existence of

\textsuperscript{74} The aircraft registry regulations will contain supplementary information. See \textit{id.} art. 19(6); Aircraft Protocol, \textit{supra} note 6, art. XIX(1).

\textsuperscript{75} See \textit{id.} Convention, \textit{supra} note 6, art. 19(3)-(4).

\textsuperscript{76} See Aircraft Protocol, \textit{supra} note 6, article IX(2).

\textsuperscript{77} An example of this situation would be the sale of an aircraft to the parent company, which would subsequently transfer the title to an affiliate. In such situations, parties could take advantage of the simple requirements established on Article V(1) of the Aircraft Protocol: a written agreement in relation to an identifiable aircraft object executed by a transferor with power to transfer title to the aircraft.

\textsuperscript{78} See Convention, \textit{supra} note 6, art. 24.
such rights. Under the Convention, however, the parties are not required to file their agreements in relation to the aircraft object before the International Registry, whereas registration is required for Brazilian aircraft according to the Aeronautical Code.

Certainly the sophistication of the parties involved in these types of transactions favors granting the parties the ability to elect whether to register. But this argument loses its strength if the focus is to promote more predictability within the aircraft finance markets.

3. The RAB Within the International Registration System: Open Issues

The regulation and operation of the International Registry remains an open issue. Earlier drafts of the Convention/Protocol suggested two different alternatives: a "unitary" or a "binary" system, depending on whether the operation, oversight, and regulation activities would be conducted by a single entity or separated. The drafting committee adopted a binary system, by which a Supervisory Board will be responsible for the oversight and regulation and the Registrar will handle the operation of the International Registry.

Under the Convention/Protocol, the relationship between the national registers and the International Registry remains unclear. Contracting States may designate their local registration operators to "be the transmitters of the information required for registration." These local operators would then transmit information of filings to the International Registry.

By designating a local operator as an exclusive point of access, a Contracting State may preclude alternative access to the International Registry in relation to helicopters and airframes registered under its jurisdiction, as well as non-consensual rights or interests created by its domestic laws. Therefore, parties would

79 "Brazilian aircraft" for the purposes herein means, under the terms of the Chicago Convention, an aircraft registered before the Brazilian authorities. See Chicago Convention, supra note 53.
80 See C.B.A., art. 74 (II) (a).
81 See Aircraft Protocol, supra note 6, art. XVI.
82 Convention, supra note 6, art. 17(3); Aircraft Protocol, supra note 6, art. XVIII (1)(a).
83 See UNIDROIT, supra note 69, at 2.
84 See Aircraft Protocol, supra note 6, art. XVIII (1)(b), (2)(a).
have to revert to the local registry in order to accomplish filing at the International Registry.

Under the current system, the RAB would act as local operator in Brazil. If Brazil designated the RAB as the exclusive access, parties would have to file any agreements in relation to any aircraft or helicopter registered at the RAB, or any interests created by Brazilian laws, at the RAB. Subsequently, the RAB would transmit such information to the International Registry. Because in Brazil the registration system is well established and in operation, it would be better to block any alternative access to the International Registry. This would avoid duplicative register operators and allow more predictability within the system.

Because registration at the RAB is a validity requirement under Brazilian law and not an option as it is in the Convention/Protocol, there is a conflict as to whether or not parties would have an option to register their interest over an aircraft object. Within the present proposal, the Brazilian Aeronautical Code would have to be modified to adopt the terms of the Convention/Protocol and leave registration to the parties' discretion. Otherwise, assuming the coexistence of both systems, registration would continue to be a requirement under Brazilian law which, once effectuated at the RAB, would be transmitted to the International Registry.

The nationality principle established by the Chicago Convention, which will not be affected by the Convention/Protocol, provides an interesting and probably more effective way to implement the International Registry. Members of the Chicago Convention recognize the nationality of an aircraft as being the same as where it was registered. Therefore, each member has certain internal requirements for aircraft registration. When the other Contracting States recognize the nationality by virtue of registration, they are also accepting other members’ regulations in this respect.

The same principle would probably work within the Convention/Protocol in relation to the filing of rights and interests. Because the requirements presented in the Convention/Protocol for the creation of an international interest are simple and most national registers in place contain them, parties would be able to file for the registration of any agreements at the domestic register where the aircraft is registered. The national registries, then, would assume the responsibility for providing such infor-

85 See supra notes 53 and 79.
mation, on an ongoing basis, to the International Registry. The regulations of the International Registry would then need to observe such understanding. The benefits of an easy to access the International Registry would be maintained, and the un-clearness of sustaining national and international registration systems would be clarified.

Some may argue that this alternative is simply an extension of the Geneva Convention, to the extent that it deals with recognition of domestic regulations, and would deprive the international interest of its independent characteristic, i.e., not subject to any national law. However, because registration is not required, if an interest is recorded in the domestic register, as long as it fulfills the requirements established by the Convention/Protocol, it is also an international interest.

The basis for this alternative is found in the studies of the registration group discussing this issue. Although the precise function of the International Registry was not already defined, it is more likely that it will operate as a "notice filing system." The registrar would only record a notice, and the accuracy of the rights and interests being declared would depend upon the parties. Under this system, efficiency and fast access to information would prevail, but third parties would have no assurance as to the validity of the rights registered. In this sense, a mixed system as suggested by the studying group provides more predictability. Domestic registers would be responsible for recording the documents evidencing the rights and interests. These domestic registers would provide a document filing system and then transmit only the relevant registered information to the International Registry, which would operate as a "notice board" open to public consultation.

Regardless of the structure that is adopted, it is necessary to clarify how liability issues will operate within the register and how it will interact with the local operators. The extent of such determination depends on whether or not the system will operate merely as a "notice board." Although many of these issues are to be addressed within the regulations of the International Registry, it is not likely that countries would feel motivated to

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86 In accordance with the terms of the Convention, supra note 6, art. 17, and the Aircraft Protocol, supra note 6, art. XIX (5).
87 See UNIDROIT, supra note 69, at 3-4.
88 Id. at 4.
participate in the Convention/Protocol unless these open questions are settled.

Certainly, there are also various issues to be considered in relation to domestic registers if a hybrid system is adopted, such as operational ability, capacities, and technology development. Essentially the International Registry will be heavily dependent upon the information provided by the different national registers. For countries like Brazil, which have a registration system in place, unbearable obstacles are not expected. The operational changes that the RAB would have to make would probably be limited to the implementation of an on-line communication system with the International Registry. Considering the advances in technology, the RAB could easily implement such a system. The problem rests with countries that either do not have an established registration system or have a registration system that is merely a notice filing. Either the International Registry would have to perform both activities, notice and document filing, or these countries would need to establish a domestic document filing system. Whenever it is feasible for a Contracting State to have a document filing system, the International Registration system would benefit from not having to perform both activities.

The current aircraft registration system in Brazil would not benefit from a pure notice filing system alone. Because registration at the RAB provides security for the parties in relation to the rights and interests over the aircraft, there would be no apparent reason for Brazil to adopt a new system that, instead of enhancing predictability, would diminish the benefits provided by the current registration system. The Brazilian system, nevertheless, would benefit from a hybrid system, whereupon the RAB would perform a document filing, and such information would be available at the International Registry.

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89 See id.
90 See id. Most aviation registration systems are based on document filing. This is the system used in Brazil, most European countries, and the U.S. The U.K. and the Canadian systems, however, are notice-filing systems. Note, however, that although the U.S. register is based on a document filing, registration at the Federal Aviation Administration (FAA) cannot be used before a U.S. Court to prove ownership. See Aircraft FAQ (visited Jan. 3, 2000) <http://registry.faa.gov/faq.ac.htm>.
C. DEFAULT REMEDIES

1. Remedies Available in Brazil and the UNIDROIT Proposal: Possible Conflicts

Rights in rem over an aircraft are regulated by the laws of the country where the aircraft is registered. Nonetheless, any measures to secure the rights over the aircraft are regulated by the laws where the aircraft is located at such a moment.

Brazilian laws provide for a series of remedies to be exercised upon a debtor's default depending on the type of contractual relationship among the parties. These remedies are found both in the Civil Code and the Civil Procedure Code.

In a conditional sale agreement the seller retains title to the asset until the buyer makes all payments and there are no further obligations pending. Therefore, if the buyer defaults during the performance of the contract, the seller is entitled to terminate the agreement and repossess the asset. In order to be valid against third parties, the conditional sale agreement must be registered at a Public Registry of Titles and Documents where the buyer is domiciled. Aircraft conditional sale agreements, although not prescribed in the Aeronautical Code, are registered at the RAB.

Upon proof of the debtor's default, the creditor may request a court order to attach the asset. Such granting by the court does not require a previous manifestation from the debtor. As of the attachment, the debtor has five days to file an answer. The court may then order an expert to conduct an appraisal of the asset. When over forty percent of the principle has been paid under the conditional sale agreement, the debtor may request that the Court allow him thirty days to pay any overdue amounts (including interest, attorney fees, and court's expenses) and retain the asset. Otherwise, the creditor may request repossession of the asset, in which event any amounts in excess of the debt's balance plus judicial and extra-judicial expenses must be returned to the debtor.

A repossession claim ("ação de reintegração de posse") is the remedy available in a lease agreement upon lessee's default. The lessor must deliver a default notice to the lessee stating that in the event of default the lease will automatically terminate af-

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91 See C.B.A., art. 6; See Geneva Convention, supra note 4, art. 1.
92 See C.B.A., art. 7.
93 See C.P.C., arts. 1070, 1071.
94 See C.P.C., arts. 926-931.
ter a certain period if the lessee fails to cure the default. Usually, parties establish the term for such notice in the lease agreement. Once the term expires, the lessor may file for repossession by presenting to the Court proof that notice has been given to the lessee, who has failed to cure the default, causing the termination of the lease. Because the lessee is considered to unlawfully possess the aircraft, being satisfied with the documentation presented and without hearing the lessee, the Court may grant a provisional repossess order to ground the aircraft. The lessor also files a certified copy of such order at the RAB. The claim will then continue until final judgment under the ordinary procedure specified by the Civil Procedure Code. Whether or not the lessor will be able during the proceedings to lease the aircraft to another lessee, or even re-export it, depends on a case-by-case analysis by the Court.

Except for claims based on extra-judicial titles, a plaintiff not residing in Brazil or leaving the country while the claim is pending must deposit a bond with the Court. The bond works as a guarantee that if the defendant prevails, the defendant's court costs and attorney fees are paid. This is not applicable if the plaintiff has sufficient immovable assets in Brazil. A common practice among aircraft owners is to offer the aircraft itself as a bond. If the judge accepts, a public instrument is registered and attached to the court files.

The Convention/Protocol provides a series of remedies available to the parties in an event of default. These remedies were also drafted separately according to the type of agreement between the parties and may be modified or derogated by the parties in writing. This facilitates the adaptation of the Convention/Protocol to the specifics of each agreement.

For secured obligations, the chargee may exercise any one or more of the following remedies in relation to the aircraft object: take possession or control; sell or grant a lease; and col-

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95 See id. art. 836. Extra-judicial executive titles are listed in article 585, C.P.C., and include, among others: promissory notes, mortgages, public deed, particular instrument executed by the debtor and two witnesses.

96 There are, however, certain provisions that may not be modified by the parties. See Convention, supra note 6, arts. 5, 8 (2)-(5), 9 (3) and (4), 12, 14 (2).

97 See id. art. 8.

98 Id. art. 8(1).

99 Although there is no differentiation in either the Convention or the Aircraft Protocol, because of the peculiarities of each type of mobile equipment, “taking possession” applies to aircraft objects and “taking control” refers to space objects. Notwithstanding, it is advisable to include a provision in the Aircraft Protocol
lect or receive any income or profits arising from the management or use of such aircraft object. These remedies may be exercised separately or together. Parties in a lease or a title reservation agreement may terminate the agreement and take possession or control of the aircraft object.

Whether or not the lease or title reservation is a secured obligation, the chargee has the option to request a court order to exercise the remedies stated in the Convention/Protocol.\(^\text{100}\) The drafters' intention is to allow a faster and more efficient procedure to the parties without the court's interference. Foreign creditors having to make use of certain courts have various complaints on the difficulties in exercising their rights, either because their rights were not recognized or because of the delays of the judicial system.

This is certainly one of the main issues to be analyzed by each country in relation to its internal regulations. Under Brazilian law, the exercise of these remedies requires the prior approval of the court. The exercise of Articles 8(1) and 10 of the Convention, however, will not be optional depending on the jurisdiction in which the remedies are to be exercised. Under Brazilian law, exercising any of these remedies without leave of court is an offense to the public order and illegal. Brazilian courts have a very strong role in these procedures, and Brazil's codified law contains a series of provisions applicable to such events. Also, allowing a particular industry to enjoy certain privileges would require the existence of a real economic gain to the domestic market. This would be one of the situations where the Brazilian government would need to provide not an economic, but a legal subsidy to the aircraft industry by allowing a different set of procedural rules to apply.

When exercising the available remedies under the Aircraft Protocol, the creditor is subject to the previous written authorization of the holder of any priority right.\(^\text{101}\) The creditor must

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\(^{100}\) If the chargee opts to exercise any of these remedies without a court order, a minimum ten calendar days' prior written notice of a proposed sale or leasing to interested persons is required, unless the parties have established a longer period. See Aircraft Protocol, supra note 6, art. IX (4). Differently, article VII (2) (a) of the Geneva Convention establishes a minimum notice of six weeks. See discussion on the Geneva Convention infra Part IV.

\(^{101}\) See Aircraft Protocol, supra note 6, art. IX (2).
also proceed in a "commercially reasonable manner."\textsuperscript{102} Where the parties agree to the meaning of "commercially reasonable manner," it should not be subject to further interpretation by the courts.\textsuperscript{103}

The creditor may also procure de-registration and exportation of the aircraft object under the circumstances set out in the default provisions.\textsuperscript{104} For this purpose, the debtor must have issued an irrevocable de-registration and export authorization, which shall be recorded at the national registry authority.\textsuperscript{105}

Therefore, the national registry and the administrative authorities will have the accurate information, as agreed by the parties, of who is entitled to proceed with de-registration and export the aircraft when the default remedies are exercised. The Aircraft Protocol provides in its annex a model for such authorization. Because the language used in subsection (1) of Article XIII of the Aircraft Protocol states that the authorization has to be "substantially" in the format of the annex, parties may vary its general terms as more appropriate to their specific transaction.

The Aeronautical Code does not provide for the anticipated filing of undated de-registration certificates at the RAB, as its filing is dependent upon the occurrence of certain events.\textsuperscript{106} The RAB will only issue a certificate of de-registration upon the fulfillment of certain conditions, such as proof that there are no debts pending in relation to airport fees or penalties due to a violation of the Aeronautical Code and evidence of discharge of existing liens over the aircraft. The de-registration process may sometimes cause surprises to lessors that were unaware of airport fees owed by the lessee. Nonetheless, most lease and conditional sale agreements contain an undated de-registration and exportation authorization in its annex, which the lessee or conditional buyer usually executes in advance. Practice has shown that the RAB has not accepted de-registration solely based on such authorizations, but required a court order authorizing such de-registration. The argument is that the Court is more competent to determine whether an event authorizing termination of the contract and de-registration of the aircraft has oc-

\textsuperscript{102} Id. art IX (3)(b)(ii).
\textsuperscript{103} Article IX (3)(b)(ii) of the Aircraft Protocol supersedes the interpretation of commercially reasonable established in Article 8(2) of the Convention and states that the parties' agreement to such a definition shall be conclusive.
\textsuperscript{104} See Convention, supra note 6, art. IX (1).
\textsuperscript{105} See Aircraft Protocol, supra note 6, art. XXIII.
\textsuperscript{106} See C.B.A., art. 112.
curred. With the Convention/Protocol, even if the RAB files de-registra-

tion authorizations executed by the aircraft’s operator, because the repossession

process requires court authorization, it is likely that the current practice would continue. Brazil would then need to make a declaration under Article Y(2) of the Con-

vention, pursuant to Article 12 (2), stating that any exercise of such remedies require a court order.

One of the most important provisions of the Convention/Pro-

tocol requires Contracting States to provide for the assurance of speedy judicial relief. While final determination of the claim is pending, the creditor should obtain judicial relief when exercising any of the remedies outlined in Article 14(1) of the Conven-

tion, as previously agreed by the debtor. Each Contracting State shall declare the number of calendar days corresponding to the application of speedy judicial relief. Moreover, the national registry and administrative authorities should procure de-

registration and exportation of the aircraft object within a certain period (not yet defined in the Convention/Protocol) after the period established pursuant to Article X (1) of the Aircraft Protocol. Earlier drafts of the Aircraft Protocol set these periods as thirty days after the filing of the proceedings for the purposes of Article 14 (1) of the Convention and three calendar days after the court order for the de-registration and exportation of the aircraft. The new approach, however, grants more flexibility to Contracting States to declare the existing procedural terms under local law.

Certainly one of the main complaints about judicial proce-

dures is the delay with which they operate in some countries. Although the Brazilian legal system is not known as the most expeditious, it has been effective in attending to creditors’ claims. Foreign lessors “experimented” extensively with Brazilian repossession laws in 1992 when a series of cases arose from VASP’s default. The law in Brazil proved to be very effective, and lessors were able to repossess the leased aircraft in a relatively short period. For these reasons, many countries like Brazil are expected to opt into the Convention’s commitment

107 Such remedies are as follows: preservation of the aircraft object and its value; possession, control, and custody of the aircraft object; sale, lease, or management; application of the proceeds or income of the object; and immobilization of the object. See Convention, supra note 6, art. 14 (1) (a)-(e).

108 See Aircraft Protocol, supra note 6, art. X (1).

for speedy judicial relief, but will nevertheless opt out of the
time frame established within the Aircraft Protocol.

D. BANKRUPTCY ISSUES

1. Treatment of Creditors under Brazilian Bankruptcy Law

Federal Decree Law No. 7661 of June 21, 1945 governs bank-
ruptcy proceedings in Brazil ("Bankruptcy Law").110 Whether a
creditor is secured or not will determine its treatment under the
Bankruptcy Law. Additionally, creditor’s rights will also be af-
fected by the legal proceeding adopted, whether a “concordata”
or bankruptcy.

Commercial debtors that qualify under the Bankruptcy Law
for a “concordata” may either obtain a deferral of a payment
obligation or have part of their unsecured debt extinguished. A
“concordata,” which may only be initiated by the debtor, may be
either preventive111 or suspensive, depending on whether it was
requested before or after bankruptcy was declared.112 Upon its
granting, all unsecured creditors will be bound to the “con-
cordata.”113 Secured creditors, however, do not take part in
such proceedings and have the option to seek collection of due
payments or foreclose on their collateral. Nonetheless, the com-
pany may continue its business and the fulfillment of its ongoing
agreements.114 Brazilian airlines, however, are prohibited from
filing for a “concordata” under the Aeronautical Code.115

Although the Bankruptcy Law requires an insolvent debtor to
file for bankruptcy,116 usually this is done by one of the creditors
who support the claim with proof of nonpayment of a certain

110 See Decreto-lei 7.661, de 21 de junho de 1945, D.O. de 31.07.1945, arts. 156-
176. Bankruptcy Law applies only to commercial debtors. Insolvency of civil
debtor is regulated by a process of execution presented in the Code of Civil
Procedure.

111 Although not similar to the reorganization process provided for in the U.S.
bankruptcy laws, a preventive “concordata” grants an opportunity for the com-
pany to avoid the assets liquidation in bankruptcy. See Antonio Mendes, The New
Latin American Debt Regime: A Brief Incursion into Bankruptcy and the Enforcement of

112 See Decreto-lei 7.661, arts. 156-176.

113 See id. art. 147.

114 During the “concordata” the company is under the court and the “comis-
sário’s” supervision. Certain activities are restricted and others require express
authorization from the “comissário.” See id. arts. 165, 167, 169.

115 See C.B.A., art. 187.

116 See Decreto-lei 7.661, art. 8.
A Brazilian bankruptcy proceeding is basically a "court-supervised liquidation of the debtor's business." Once the court declares the debtor bankrupt, the debtor is divested of its business and all of its obligations are accelerated. Distribution of the estate under a bankruptcy proceeding follows the list of priorities set out in the Bankruptcy Law and is binding upon all creditors. The statutory list of priorities includes: (1) labor indemnities, wages, and dismissal compensation; (2) overdue taxes, social security, and other governmental programs; (3) expenses of the bankruptcy estate; (4) secured debts; and (5) unsecured debts. After the secured creditor receives the proceeds from the sale of the collateral, however, he no longer has priority over unsecured creditors for any portion of the debt not recovered from the sale. He is instead entitled to receive a pro rata share of the remaining estate.

Upon debtor's bankruptcy, the trustee may decide whether to maintain a lease or a conditional sale agreement in place. When the trustee terminates the conditional sale agreement, the conditional seller may request from the court the right to inspect and appraise the asset. Any excess proceeds in relation to his debt and expenses must be returned to the estate. If the trustee decides not to continue a lease, the lessor is entitled to repossess the asset and file a claim for damages, which will be treated as an unsecured claim.

A mortgagee is entitled to recover his debt from the proceeds resulting from the sale of the mortgaged asset. Priority among existing mortgages over the same asset is observed for the payment and determined in accordance with registration ranking. The trustee ("sindico") in a bankruptcy is responsible for procuring such sale.

The mortgage credit has preference over other credits, except for judicial expenses, wages, taxes, airport fees, salvage expenses, and expenses incurred with the conservation of the aircraft. Therefore, under bankruptcy, proceeds resulting from

117 See id. art. 9.
118 See id.; see also Mendes, supra note 111, at 111.
119 See Decreto-lei 7.661, art. 40.
120 See id. art. 102, § 1.
121 See id. art. 125.
122 See id. art. 43.
123 See id.
124 See id.
125 See C.B.A., art. 143.
the sale of the aircraft will be used first against salaries and labor indemnities, second to pay sale expenses to the estate, and then to pay the mortgagee. Upon default, the mortgagee may only take possession of the aircraft judicially, and any contractual clause that provides otherwise is unenforceable. The mortgage has to be enforced over the results of the sale of the aircraft.

2. **UNIDROIT Remedies on Insolvency: Exporting U.S. Bankruptcy Law**

An international interest recorded at the International Registry not only has priority over subsequent interests registered, but also is valid against the debtor within insolvency proceedings. Where an international interest has been assigned, the assignee will enjoy the all the assigned rights as long as such assignment has been registered at the International Registry prior to the commencement of the insolvency proceedings.

The Aircraft Protocol provides two alternatives to apply to insolvency proceedings. Both alternatives establish that, within certain specified periods, the debtor shall give possession of the aircraft to the creditor. Under Alternative "A," the debtor or the insolvency administrator (as the case may be) may opt to retain the aircraft upon the payment of the defaulted obligations and the agreement to comply with all future obligations. Alternative "B" requires that the debtor or the insolvency administrator inform the creditor within a reasonable time whether he will cure the default and agree to continue performing his obligations under the contract, or return the aircraft object to the creditor.

Parties may agree in writing to a different approach, or even derogate Article XI(1) and, in their reciprocal relations, any other provisions of the Aircraft Protocol. Nevertheless, because Contracting States have the option to declare which non-

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126 See Decreto-lei 7.661, art. 124, 125.
127 For the credit order preference, see id. art. 102.
128 See C.C., art. 765.
129 See Convention, supra note 6, art. 28 (1).
130 See id. art. 35.
131 See Aircraft Protocol, supra note 6, art. XI.
132 See id., Alternative A, art. XI(6).
133 See id., Alternative B, art. XI(1).
134 See id. art. III(3). This does not apply to Articles IX (2)-(4) of the Aircraft Protocol.
consensual rights have priority over other rights, no other rights or interests will enjoy preference in the insolvency over registered interests. There is also a provision for cooperation between the courts of a Contracting State where the aircraft object is located and the courts conducting the insolvency proceedings.

Remedies to be exercised by creditors under the Convention/Protocol were modeled after the U.S. Uniform Commercial Code, which is regarded as offering more stability. This "imperialistic flavor," as some commentators pointed out, may cause other countries, especially those with civil law systems, to be reluctant.

A bill was introduced in 1992 proposing significant changes to the Bankruptcy Law. Among these proposals is the adoption of a business reorganization proceeding similar to U.S. bankruptcy laws. According to some commentators, the tendency is to move closer the U.S. system, which is generally considered predictable and fair. Nevertheless, the same commentators recognize that the Bankruptcy Law is effective, provides for secured creditors' protection, and enables unsecured creditors to obtain a pro rata share in the estate. Because there is a trend towards revision and modification of the Bankruptcy Law, and because there is an effective ongoing system, changes are likely to come from an internal discussion rather than from a pre-established model.

IV. THE UNIDROIT AIRCRAFT PROTOCOL AND EXISTING CONVENTIONS

A. Effects of the UNIDROIT Aircraft Protocol Over Existing Conventions

The particularities of the aviation industry and its prospective for the future do not accord with what was established in previous conventions. UNIDROIT effort goes beyond mere recognition of existing practices among countries to reach another spectrum: adoption of a single system.

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135 See discussion supra Part III (A)(2).
136 See Aircraft Protocol, supra note 6, Alternative A, art. XI (11).
137 See id. art. XII.
138 See Crans, supra note 12, at 277.
140 See id.
Chapter XIII of the Convention refers to its relationship with the UNIDROIT Convention on International Financial Leasing and the UNIDROIT Convention on International Factoring. Protocols will deal with the existing conventions in relation to the particular equipment that they cover. The Aircraft Protocol under Chapter V makes reference to the Geneva Convention, the Rome Convention, and the UNIDROIT Convention on International Financial Leasing.\textsuperscript{141} The Convention/Protocol will supersede the UNIDROIT Convention on International Financial Leasing as it relates to aircraft objects.\textsuperscript{142} The Convention for the Unification of Certain Rules Relating to the Precautionary Arrest of Aircraft will also be superseded by the Convention/Protocol, unless the Contracting State declares otherwise.\textsuperscript{143}

Although not referred to in the current draft of the Aircraft Protocol, drafters of the Convention/Protocol will need to consider the possible implications of the Draft Convention on Assignment in Receivables Financing that is being discussed at the United Nations Commission on International Trade Law ("UNCITRAL").\textsuperscript{144} UNCITRAL proposes a set of uniform rules that would guarantee recognition within different legal systems of cross-border receivables assignment and the effects to third parties.

\section*{B. UNIDROIT AIRCRAFT PROTOCOL AND THE GENEVA CONVENTION: IS A NEW SYSTEM NECESSARY?}

Fifty years after its signature and ratification by sixty-five states, has the Geneva Convention accomplished its purposes? Moreover, does it fulfill the demands of the current and future aviation industry?

Article XXII of the Aircraft Protocol prescribes the effects \textit{vis a vis} the Geneva Convention. The definition of aircraft contained in Article XVI of the Geneva Convention shall be replaced by the Protocol definitions of "airframes," "engines," and

\begin{itemize}
\item \textsuperscript{141} See Aircraft Protocol, \textit{supra} note 6, arts. XXII, XXIV.
\item \textsuperscript{142} See id. art. XXIV.
\item \textsuperscript{143} Declaration shall be made pursuant to Article Y (2) of the Convention. See Aircraft Protocol, \textit{supra} note 6, art. XXIII.
\item \textsuperscript{144} Previous drafts of the Aircraft Protocol referred to Article 34 of the Convention, stating that there could be "important implications for the competing rights of a receivables financier and an asset-based financier," and that "consideration should be given to the appropriate rule in the context of aviation financing." Preliminary Draft, \textit{supra} note 22, art. XV(2) n.17. See also UNCITRAL Draft Convention on Assignment in Receivables Financing, available at \texttt{<http://www.uncitral.org>}.\end{itemize}
“helicopters.” The result is that under the Convention/Protocol, engines are a distinct asset to which rights and interests may be separately created. There is some debate as to whether certain civil law systems would incorporate such separation. However, the trend towards new commercial financing techniques involving engines is likely to create some pressure for countries to revise their position.

Because the Aircraft Protocol is to be incorporated within the internal framework of the Contracting States, there are two additional consequences over the Geneva Convention. First, the law of a Contracting State shall be deemed to include the Convention/Protocol. Second, interests registered at the International Registry shall have the same status of registrations recorded in a Contracting State. In case there is an inconsistency between the Convention/Protocol and the Geneva Convention, the Convention/Protocol should supersede the Geneva Convention.

Nevertheless, the creditor may elect to exercise the remedies specified in Articles VII and VIII of the Geneva Convention, which relate to the sale of the aircraft in execution. What is still unclear under the Aircraft Protocol is how and when such election may be exercised. Following the drafter’s intention to provide a predictable instrument, it is advisable to require such election to be made under the contracts relating to the aircraft object. Leaving it open as an creditor’s decision may create some discussion on procedural fairness that should be avoided.

Some commentators question the need for a new international legal framework in view of the current Geneva system. The argument is that the Geneva Convention already provides for the protection of lessors and mortgagees, and it is not certain that the Convention/Protocol would reach a more substantial acceptance. There are, however, strong arguments in

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145 See Crans, supra note 12.
146 See discussion supra Part III(A)(1); see also Mark Arundell & Scott Wilson, The Need for International Secured Transactions and Leasing Rules for Aircraft Engines through the Proposed Unidroit Convention, 23 AIR & SPACE LAW 283-86 (1998); Wool, supra note 26, at 272-73.
147 See Aircraft Protocol, supra note 6, art. XXII.
148 See Crans, supra note 12, at 278.
149 The U.K. example is given as one of the important absentees from the Geneva Convention. It is stated that the same reason that precluded the U.K. from ratifying the Geneva Convention (the conflict of Article I(2) of the Geneva Convention and the priority of statutory rights) will prevent it from accepting the Convention/Protocol. See id. at 280.
favor of a new system. The environment in which the Geneva Convention was drafted no longer exists. Asset-based financing and leasing techniques are spread worldwide and becoming more and more complex. Within the Convention/Protocol, Contracting States would be evolving from a recognition of rights system to a set of common substantive laws. If legislation is to keep pace with the economic changes, countries must adopt a more sophisticated system.

V. DRAFTING A NEW SCENARIO FOR AIRCRAFT FINANCE IN BRAZIL

Brazilian law itself should not be blamed for any lack of investment in the area of aviation. Over the years, Brazil has proven to be very fruitful for foreign investors and has offered an adequate legal system for those pursuing enforcement of rights. So far, the main obstacle is not the legislation itself, but the instability of the economy and the currency, as well as the numerous changes in export/import policies. Especially nowadays, most lessees/purchasers surprised by the devaluation of the Real had to either reschedule payments or simply return the aircraft.

The Central Bank’s import/export policies also vary constantly, sometimes obliging Brazilian importers to perform an agreement with conditions substantially different from those at the time the transaction was structured. For instance, in April 1997, a requirement was imposed on Brazilian importers to enter into foreign exchange contracts for import transactions to be settled on terms over 360 days. The result was that many lessees/purchasers had to enter into exchange contracts, sometimes for more than one payment, before the actual due date. Although the foreign creditor was not affected, the Brazilian importer had to deal with a new payment schedule.

Brazilian economic stabilization is a long-standing issue aside from any considerations about the legal system. Nevertheless, Brazil is both a manufacturer and a consumer country and any analysis of the Convention/Protocol should refer to both perspectives. Not only would adopting an international framework increase access to financing, but it would also benefit the local

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150 The term "foreign exchange contract" in Brazil refers to the agreement between a Brazilian bank and its customer for the remittance to another country of foreign currency or for the exchange into Brazilian currency of amounts received from abroad.

aircraft manufacturers whenever enforcement of rights abroad is necessary.

The benefits of the Convention/Protocol must be balanced, however, with what is currently offered within the Brazilian legal system. For instance, as previously discussed, creditor protection and observance of credit order are features of the Bankruptcy Law. The most appropriate approach for Brazil is to make use of the Convention/Protocol’s opting out mechanisms. By preserving the elements of the legal system that are based on policy issues and incorporating the desirable innovations, Brazil is likely to achieve better prospects with the adoption of the Convention/Protocol.

VI. CONCLUSION

The UNIDROIT Convention/Protocol proposes an innovative approach to legal systems dealing with sophisticated international transactions. The demand for aircraft equipment will increase over the next several years, as will the variety of transactions, coupled with a strong demand for financing. Under this environment it is likely that countries without an efficient and predictable legal regime will fail to attract the necessary capital to modernize their aviation sector. UNIDROIT supporters encourage the adoption of an international legal framework as the solution for investment problems. Partially, but not entirely true if dealing with countries that already offer an effective protection to creditors.

Because many relevant issues within the Convention/Protocol remain unsettled, it is not possible to fairly ascertain whether Brazil should adopt it. An affirmative answer would disregard the existence of various unsolved questions that are essential within a decision-making process. A negative answer, however, would simply bury a discussion that must take place and would leave Brazil behind the current innovations. Even if the conclusion is not to adopt the Convention/Protocol at first, the Brazilian legal system would benefit from the debate. This is no longer the time to merely wait for the results of an international discussion. Brazil needs to address the issues the Convention/Protocol raises.

The prospects for the aircraft industry and the demands of the Brazilian market, both as a manufacturer and a consumer, lead to the questioning of whether and how to attract foreign investment without jeopardizing the equality provided and expected from a legal system. The Convention/Protocol repre-
sents an advance, but its success is heavily dependent upon a broad acceptance and on how countries will exercise the Convention/Protocol’s opt in and opt out mechanisms. Otherwise, the aviation industry will remain attached to a convention drafted fifty years ago.