

PUBLIC LAW ASPECTS OF LEASE, CHARTER AND INTERCHANGE
OF AIRCRAFT IN INTERNATIONAL OPERATIONS

by

Burkhart von Erlach

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Institute of Air and Space Law
McGill University
Montreal, Canada

This thesis is dedicated to

MY WIFE AND MY SON

and my friends:

Jitendra Thaker
Alessandro Pizzino
George Petsikas

ABSTRACT

Lease, charter and interchange have become more and more important throughout the last decades. The International Civil Aviation Organization could not ignore that reality. In 1980 after a long preparatory work Article 83bis, an amendment to the Chicago Convention on International Civil Aviation was adopted by the 23rd Assembly without any negative votes. Yet, in 1990, this amendment, which enables the State of Registry, which is responsible for the operation of the aircraft even if flying with an operator of another state, to transfer its functions and duties to the State of the Operator.

This thesis takes a closer look on the history of that amendment. The reasons why Article 83bis is still not in force shall also be discussed. An attempt shall further be made to analyze the provisions of Article 83bis more thoroughly and to explain why states should no longer hesitate to ratify that amendment. Article 83bis has no controversial content and is very important for the safety of international air transportation, in establishing clearly who is responsible for a leased, chartered or interchanged aircraft.

RÉSUMÉ

Leasing, charter et échange d'aéronefs sont devenus de plus en plus important ces deux dernières décennies. L'Organisation de l'Aviation Civile Internationale ne pouvait ignorer cette réalité. En 1980, après de long travaux préparatoires, l'Article 83bis, un amendement à la Convention de Chicago sur l'Aviation Civile Internationale, a été adopté par la 23ième Assemblée sans opposition. Aujourd'hui en 1990, cet amendement permet à l'état d'immatriculation qui est responsable pour l'opération de l'aéronef, même si celui-ci effectue des vols avec une compagnie aérienne d'un autre état, de transférer ses fonctions et devoirs à l'état de l'opérateur.

Cette thèse veut discuter de plus près l'histoire de cet amendement ainsi que les raisons pour lesquelles l'article 83bis n'est toujours pas entré en vigueur. Ensuite on tentera d'analyser de plus près les provisions de l'article 83bis et d'expliquer pourquoi les états ne devraient pas hésiter plus longtemps à ratifier cet amendement. L'Article 83bis n'a pas le moindre contenu controversé, en outre, il est très important pour la sécurité du transport aérien international car il établit clairement qui est exactement responsable de l'avion leasé, affrété ou échangé.

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Burkhart von Erlach

LIST OF ABBREVIATIONS

AWST	Aviation Week and Space Technology
C-WP	Council Working Paper
FAA	Federal Aviation Administration
GPA	Guinness Peat Aviation Ltd.
ICAO	International Civil Aviation Organization
LC/SC-LCI	Special Subcommittee on Lease, Charter and Interchange of Aircraft in International Operations (1977)
LC	Legal Committee
PE-CHA	Panel of Experts on Lease, Charter and Interchange of Aircraft in International Operations (1976)
SARPS	Standards and Recommended Practices
UK	United Kingdom
USA	United State of America
USSR	Union of Socialist Soviet Republics
WD	Working Document

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INTRODUCTION

At the time of the drafting of the Chicago Convention in 1944 few aircraft were being operated pursuant to "lease", "charter" or "interchange"¹ arrangements. From the mid-sixties, the use of these practices has substantially increased. While the leasing of aircraft is the most common practice today, charter and interchange arrangements are also being used more frequently. These latter arrangements are particularly used during peak demand seasons to meet needs caused by late deliveries of new airplanes, etc.

An example shall illustrate the tremendous growth of the leasing industry in recent years: of the two main leasing companies worldwide, Guinness Peat Aviation Group Ltd. - (GPA) owned some 20 aircraft in 1983. By early 1989 their fleet had grown to 165 planes.² In the same year, GPA ordered 308 new aircraft, the biggest order of new aircraft in the history of civil aircraft manufacturing industry, for delivery over the next few years. In addition to the orders of new aircraft, already placed, the delivery of these aircraft will bring the number of aircraft in GPA's fleet to some 820 aircraft,³ thus enlarging its fleet beyond that of the largest airline of the western world, United Airlines Group.⁴

The great demand for leased aircraft is connected to the advantages of leasing arrangements. Not burdened with the enormous prices of new aircraft, companies which lease new aircraft also benefit from different and advantageous forms of financing such as the investment tax credit. In addition leasing allows airlines to have access to the latest technology at relatively low prices.⁵ It must be mentioned that apart from the "pure" leasing companies, airlines are also involved in leasing, charter and interchange arrangements among themselves.⁶

The Chicago Convention assigns functions and duties to the state in which the aircraft is registered, the State of Registry.

A State of Registry must comply with the rules and regulations of the air under Article 12 of the Chicago Convention. A State of Registry certifies the airworthiness of an aircraft pursuant to Article 31 of the Chicago Convention and it licences the personnel of an aircraft pursuant to Article 32 of the Chicago Convention.

However, a State of Registry may be unable to discharge its duties and responsibilities satisfactorily in situations where there has been a transfer of the aircraft to an operator located in another state; the original Chicago Convention of 1944 does not provide for the assign-

ment or transfer of these duties and responsibilities from the State of Registry to the State of the Operator.

"One set of acceptable international standards applicable to the manufacturing , type certification, aircraft worthiness",⁷ does not exist; rather each State of Registry has its own standard. The differentiation in standards, often considerable, "creates administrative and practical difficulties".⁸ Often a state, whether a State of Registry or a State of Operator "exercises its own discretion in determining what it will or will not accept in relation to the standards selected by another country's regulatory authority for the same aircraft."⁹ This paper considers this transfer of certain functions and duties from the State of Registry to the State of the Operator, through an examination of Article 83bis of the Chicago Convention [hereafter Article 83bis], adopted as an amendment to the Chicago Convention by the 23rd Assembly of the International Civil Aviation Organization (ICAO), in 1980. This amendment has not yet come into force due to lack of sufficient ratification.¹⁰ The history of Article 83bis will be discussed. As well, the process of its ratification will be considered. Ratification of Article 83bis is essential for its entry into force. Only then will problems relating to the state functions and duties mentioned above be resolved,

thus facilitating lease, charter and interchange undertakings.

ENDNOTES - INTRODUCTION

1. Definition of lease, charter and interchange in Chapter V, sub-chapter I, para. 6.
2. James C. Halstead & Julius Maldutis, "GPA Group Limited", Salomon Brothers, February 1989, New York, p. 20.
3. Richard G. O'Lone, "Large Leasing Company Orders Restructure Aircraft Acquisition", Aviation Week and Space Technology (AWST), 24 April 1989, p. 27 (see Attachment L).
4. Idem, p. 24; Perry Flint, "The Joy of Leasing", Air Transport World, June 1989, p. 24; U. Klee, Airline Fleets International, 23rd edition, 1989.
5. D. Bunker, The Law of Aerospace Financing in Canada, 1988, p. 58 et seq.
6. Supra, note 4.
7. E. Keating in an address to AIA Industry and Air Authorities, Washington 19-20 April 1989.
8. Idem.
9. Idem.
10. 98 ratifications are required, 98 was the 2/3 majority of the Members of ICAO in 1980; 2/3 majority being required for amendments, see Article 94(a) of the Chicago Convention.

CHAPTER I
OUTLINE OF THE HISTORY LEADING TO ARTICLE 83bis
OF THE CHICAGO CONVENTION

1. Resolution B of the Guadalajara Conference (1961)

Article 83bis created to deal with the problem of an aircraft registered in one state and operated by an operator in another state, had its origins in the 1961 Resolution B of the Guadalajara Conference.¹ The Resolution B reads as follows:

RECOGNIZING that the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier deals with certain aspects of the charter and hire of aircraft and that, further, the necessity arises also to deal with the legal problems affecting the regulation and enforcement of air safety which has been experienced by certain States when an aircraft registered in one State is operated by an operator belonging to another State,

URGES the International Civil Aviation Organization to study those problems in the light of the most recent experience, with a view to achieving greater safety of air navigation.²

It should be noted that the Guadalajara Conference was a Conference on private international air law, while Resolu-

tion B obviously deals with public international air law. While these two fields are certainly related, some Delegations to the Guadalajara Conference, such as that of Mexico, did not want to examine aspects of private international air law at all, because it would later be difficult to explain why the Conference in question had adopted a resolution on public air law problems.³

2. Subcommittee on Resolution B of the Guadalajara Conference (1964)

The Legal Committee of the International Civil Aviation Organization decided at its 14th session to establish a Subcommittee to "study legal problems affecting the regulation and enforcement of air safety which have been experienced by certain states when an aircraft registered in one state is operated by an operator belonging to another state."⁴ The Subcommittee which was convened by the Council in 1963, studied relevant provisions of the Chicago Convention, i.e. Articles 12, 26, 31, 30(a), and 32.⁵ Several possible solutions to this issue were discussed, in particular a possible amendment of the Chicago Convention,⁶ the delegation of functions from the State of Registry to the State of the Operator,⁷ or the inclusion of a standard provision calling for representation of the

State of the Operator at accident enquiries in Annex 13.⁸ The possible amendment of the Chicago Convention was not pursued. This problem was not considered to be sufficiently important to go through the amendment process. It was also stated that the time consuming process of ratification could render States reluctant to ratify such an amendment.⁹ With respect to the second possible solution (delegation of authority by a special agreement) it was believed that it could be achieved by multilateral agreement, either limited or general, or by a series of bilateral agreements,¹⁰ without prejudice to the right of third states.

The Subcommittee recommended no specific action since the problem was not considered very urgent at that time.

3. 18th Assembly of the International Civil Aviation Organization (1971)

The International Air Transport Association (IATA), the United Kingdom, as well as the United States, formed a group urging for further action towards an amendment of the Chicago Convention, which would regulate the transfer of certain functions and duties.¹¹ Some states still thought that this problem was not serious enough and that a delegation of duties could be successfully made by bilateral

agreements.¹² The Technical Commission of the 18th Assembly stated in its report that the

"...root of the problem was embedded in the Convention of the International Civil Aviation Organization, which places emphasis for the carrying out of various functions, and responsibility in respect of such functions, on the State in which an aircraft is registered and does not generally provide for the situation, of an aircraft being leased, chartered or interchanged by an operator of a State other than the State of Registry."¹³

While some difficulties were resolved by bilateral agreements, in the case of accidents, third party states are not obliged to recognize the responsibility of the State of the Operator.¹⁴ There was unanimity in the Technical Commission that the Council should undertake expeditious action to carry out a study of the Convention on International Civil Aviation and any other relevant Convention.¹⁵ This was reflected in Resolution A18-16¹⁶ adopted by the Assembly. Until that time there had been little interest in finding new solutions to these problems. Few leased, chartered, and interchanged aircraft were involved in international operations but throughout the 1970's more and more such agreements were being arranged and applied.

4. 21st Assembly of the International Civil Aviation Organization (1974)

Council's action on Resolution A18-16¹⁷

With respect to Clause 1 in Part B of Resolution A18-16, adopted by the 18th Assembly of ICAO, the Council held that the technical problems could be overcome without amendment to the Chicago Convention, simply by inserting a note to Annexes 2, 6 and 8.¹⁸ The Note which was attached reads as follows:

"Although the Convention of the International Civil Aviation allocates to the State of Registry certain functions to which that State is entitled to discharge, or obligated to discharge, as the case may be, the Assembly recognized, in Resolution A 18-16 that the State of Registry may be unable to fulfil its responsibilities adequately in instances where aircraft are leased, chartered or interchanged - in particular without crew - by an operator of another State and that the Convention may not adequately specify the rights and obligations of the State of an operator in such instances. Accordingly, the Council, without prejudice to the question whether the Convention may require amendment with respect to the allocation of functions to States, urged that if, in the above-mentioned instances, the State of registry finds itself unable to discharge adequately the functions allocated to it by the Convention, it delegate to the State of the operator, subject to acceptance by the latter State, those functions of the State of Registry that can more adequately be discharged by the State of the operator. It is understood that the foregoing action

will only be a matter of practical convenience and will not affect either the provisions of the Chicago Convention prescribing the duties of the State of Registry of any third State."¹⁹

By this note, the State of Registry would remain responsible to third states which are not involved in such an agreement of transfer of functions and duties.

In Clause 2 in Part B, lease, charter and interchange in international operations did not appear that urgent as to justify the recommendation of an amendment. It could wait to be studied by the next meeting of the Legal Committee.²⁰

As to Clause 3 in Part B the Council decided against the dissemination of the information received by the States (on national laws and regulations pertaining to lease, charter and interchange of aircraft), since there was only a limited response to that enquiry.²¹

The Technical Commission of the Assembly then prepared Resolution A21-22²² which was to supersede Part B of the Resolution A18-16 which was adopted by the Assembly.²³

5. Rapporteur's Report on Resolution B of the Guadalajara Conference (1975)

The Rapporteur on Resolution B of Guadalajara Conference, considering lease, charter and interchange of aircraft in international operation stated, that the inclusion of a Note in the Annexes, though an improvement, still left several problems to be resolved:

- The Note cannot enable States of Registry to divest themselves of their responsibility by transferring it to States of the Operator.²⁴

- In order to be able to accept a delegation by the State of Registry the State of the Operator must put its domestic law into a position to do so.²⁵

The Rapporteur introduced the idea of the creation of a separate multilateral convention but recommended that no more be done than the establishment of a check-list of matters to be considered by the State of Registry and the State of the Operator. The establishment of a Committee to discuss that problem more deeply had to be considered.²⁶

6. Recommendation by the Aircraft Accident Investigation Division (1974)

The Recommendation as to the Amendment of Annex 13 (Accident Investigation) by the Aircraft Accident Investigation Division had been adopted by the Council as Amendment No. 5 to Annex 13 to the Chicago Convention. This amendment enables the State of the Operator to participate (or to appoint participants) in an aircraft accident investigation.²⁷ Article 26 of the Chicago Convention does not specifically mention the State of the Operator as a potential participant in the accident investigation process. That Article could, however, rightly be interpreted as not excluding the possibility of such participation. Amendment 5 to Annex 13 is for that reason in full harmony with the provision of Article 26.

7. Panel of Experts on Lease, Charter and Interchange of Aircraft in International Operations (1976)

In 1976, a Panel of Experts on Lease, Charter and Interchange of Aircraft in International Operations was established by the Council on the recommendation of the Rapporteur's Report.²⁸ Its terms of reference called for:

- a preparation list of problems arising out of the lease, charter and interchange of aircraft in international operations; and

- for a study of alternative solutions to the problems and for an advise to the Council on the order of preference among them and on the further course of action to be taken.²⁹

The Panel of Experts examined, in connection with the above terms, Articles 5, 6, 12, 15, 24, 25, 26, 27, 30, 31, 32, 33 and 77 of the Convention; the Panel concluded that genuine problems in connection with the transfer of functions and duties did arise with respect to Articles 12, 25, 30, 31 and 77.³⁰ Furthermore discussion focussed on potential issues within certain Annexes.³¹ States of Registry were encountering increasing difficulties in ensuring that responsibility for performance of operating functions imposed by Annex 6 (Operation of Aircraft) were properly carried out.³² Annex 8 gives also rise to problems, since it is by no means clear that the Note³³ at the beginning of Part II of the Annex absolves the State of Registry of its responsibilities, even if delegated to the State of the Operator.³⁴

The Panel of Experts held that the Rome Convention³⁵ should also apply to damage caused in the territory of a contracting state by an aircraft operated pursuant

to lease, charter or interchange, by an operator of another contracting state.³⁶ With regard to the Tokyo Convention,³⁷ the Panel of Experts approved that the State of Operator should also be competent to exercise jurisdiction over acts and offences committed on board an aircraft.³⁸

A possible conflict between a separate multilateral convention and the Chicago Convention was also examined.³⁹ The Panel concluded and recommended:

- firstly that a study be undertaken by appropriate bodies of Annexes 9, 12 and 13 in order to cover situations of operation of an airplane by a foreign operator, which are not dealt with in Art. 25, 26;⁴⁰

- secondly that the study of Articles 12, 31 and 32 be referred to the Legal Committee;⁴¹

- thirdly, that a potential conflict between the Chicago Convention and a separate multilateral convention be examined, that a decision on the preference between a new multilateral convention or to an amendment of the Chicago Convention be taken; that a draft amendment and/or draft convention be prepared; and that Article 77 be considered;⁴²

- forthly, that a draft protocol for the amendment of the Rome Convention be prepared;⁴³ and finally,

- that the establishment of a checklist of items to be considered by the State of Registry and the State of the

Operator as potential subjects of delegation be referred to the appropriate body.⁴⁴

The Panel also recommended that this issue be given a high priority in the general work programme of the Legal Committee.⁴⁵

8. Action by the Council

The Council then decided to refer to the Air Navigation Commission the study of the Annexes 6, 12 and 13 and further to convene a meeting of a special subcommittee of the Legal Committee to study Articles 12, 31 and 32.⁴⁶

9. Special Subcommittee on Lease, Charter and Interchange of Aircraft in International Operations (1977)

On the basis of the Rapporteur's Report on Resolution B of the Guadalajara Conference, the Council decided to establish a Special Subcommittee⁴⁷ with the following terms of reference calling:

- for the study of problems raised by Articles 12, 13 and 32 of the Chicago Convention;

- for the examination of the potential conflict between Chicago Convention and a separate multilateral Convention, and to express their preference for either one;
- for the preparation of a draft amendment and/or a draft convention;
- for the consideration of the problems under Article 77 of the Chicago Convention; and finally
- for the drafting of a protocol for the amendment of the Rome and Tokyo Conventions.⁴⁸

In its conclusions, the Subcommittee expressed its preference for an amendment of the Chicago Convention rather than a separate convention, and recommended this to the Legal Committee. However, in the event a separate convention was preferred; the principles mentioned in Appendix F⁴⁹ to the Report could form the basis for such a Convention. As regards the Rome Convention of 1952, the Special Subcommittee felt it was time for the Legal Committee to study a possible amendment, taking the draft amendments in Appendix G to the Report of the Subcommittee as a basis for further work. No amendment to the Tokyo Convention of 1961 was drafted by the Special Subcommittee, it being considered premature to do so.⁵⁰

10. 22nd Assembly of the International Civil Aviation Organization (1977) and the 23rd Session of the Legal Committee (1978)

Resolution A22-28 adopted at the 22nd Assembly of ICAO in 1977⁵¹ directed the Council to study the Report of the Subcommittee of the Legal Committee and to take measures in order to facilitate lease, charter and interchange of aircraft which continued to have problems with respect to the transfer of function and duties.

The Legal Committee in its 1978 Session considered, inter alia, the Report of the Special Subcommittee and discussed the content of a possible amendment of the Chicago Convention and decided to opt for that solution. The result of the discussions was a proposal which was unanimously adopted and later was the basis of Article 83bis.⁵²

11. Action by the Council

In 1978 the Council agreed to submit the proposed text of Article 83bis for consideration and approval to the 23rd Assembly of the ICAO. The ICAO Secretary General was to seek views from the International Telecommunications Union (ITU) on the problem on Article 30 (Aircraft Radio Equipment). There was first indeed a problem which subse-

quently disappeared with the adoption of a new ITU Radio Regulation (No. 2030). The ICAO Council was informed on March 1980 of the solution.⁵³

12. 23rd Assembly of the International Civil Aviation Organization (1980)

The adoption of Article 83bis by the Assembly would solve fundamental problems experienced with the operation of an aircraft registered in one state and being operated by an operator from another state. If adopted, Article 83bis would benefit civil aviation by ensuring maintenance of highest standard of safety.⁵⁴ The Executive Committee made no changes whatsoever and recommended to the Assembly to adopt Resolution A23-2,⁵⁵ thereby adopting the new Article. The Technical Commission was of the opinion that the underlying problem would remain until an amendment was ratified by the required 2/3 of the Assembly members (i.e. 98).⁵⁶ The Protocol for the amendment of the Convention was signed on 6 October, 1980. As the problem would remain, a new Resolution A23-3⁵⁷ was adopted urging the states to ratify the new amendment. Resolution A23-13 superseding the previous resolutions 18-16, 21-22, 22-28 called for further facilitation of lease, charter and interchange arrangements

and for removal of impediments to these instances in national legislations.⁵⁸

13. 24th Assembly of the International Civil Aviation Organization

At the 24th Session of the Assembly of the International Civil Aviation Organization Resolution A24-2 was adopted⁵⁹ to accelerate the process of ratification and to encourage states toward ratification in order for Article 83bis to enter into force as soon as possible, so as to have a clear regulation of the responsibility of the State of Registry and State of Operator.

14. Today

While Dr. Gerald F. FitzGerald had concluded that since there was no dissent in the Assembly on the adoption of Article 83bis, there was a "very" good prospect of "quick" ratification,⁶⁰ he was unfortunately wrong. Today, 10 years later, hardly more than half the required ratifications have been registered. The significance of and necessity for that Article have not decreased, despite the slowness with which states are ratifying this Article.

Reasons for this lack of ratifications will be discussed in Chapter 5.

ENDNOTES - CHAPTER I

1. Guadalajara Conference was a conference dealing with Private International Air Law, particularly with the definition of "carrier" in special situations where one person concludes the contract of carriage under the Warsaw Convention of 1929, while other persons actually perform the carriage. A separate problem was addressed by the Conference which deals with the enforcement of air safety when a leased aircraft registered in one State is actually operated by an operator belonging to an other State, this problem is in the sphere of public international air law.
2. Subcommittee of the Legal Committee on Lease, Charter and Interchange of Aircraft in International Operation (LC/SC-LC1) Working Document WD-1 at p. 5.
3. ICAO Doc. 8301 LC/149.1, Guadalajara Conference August/September 1961, Minutes, Vol. I, 29th Meeting of the Legal Committee, 14 September 1961; Mexico at p. 251.
4. ICAO, Report of the Subcommittee on Resolution B of the Guadalajara Conference, March 1963; see Panel of Experts on Lease, Charter and Interchange, 11-19 October 1976, WD/1, at 1.
5. Idem, at p. 3/4.
6. Idem, at p. 5.
7. Idem, at p. 6.
8. Idem, at p. 8.
9. Supra, at p. 5.
10. Supra, at p. 6.
11. ICAO Doc. A18-Min. TE/1-11, Assembly 18th Session, Vienna, 15 June - 7 July 1971, Technical Commission Meetings, Minutes, 2nd Meeting, at p. 13.
12. Idem, Denmark at para. 36, at p. 13.

13. ICAO Doc. 8961 A18 TE, Assembly 18th Session, Vienna 15 June - 7 July 1971, Technical Commission, Report, Agenda Item No. 21, at para. 21:3, at p. 37.
14. Idem, at para. 21:5, at p. 37.
15. Idem, at para. 21:8, at p. 38.
16. ICAO Doc. 8963, A18-Min. P/11, Assembly 18th Session, Vienna, 15 June - 7 July 1971, Plenary Meetings, Minutes, 11th Meeting, at para. 8-10, at p. 114; Resolution A18-16, ICAO Doc. 8958, A18-RES., Resolutions Adopted by the Assembly and Index to Documents, Assembly 18th Session, 15 June - 7 July 1971, at p. 40/41.
17. Text of Resolution A 18-16 (Attachment A).
18. ICAO Doc. A21-Min. (TE/1-13); Assembly 21st Session, September 24 - October 15, 1979, Technical Commission Meetings, Minutes, 9th Meeting, para. 64, at p. 70.
19. Note inserted in Annexes 2, 6 and 8, see ICAO C-WP 6310, Appendix B.
20. Supra, note 18.
21. Supra, note 18.
22. Resolution A21-22 (Attachment B), ICAO Doc. 9118, A21-Res Resolutions Adopted by the Assembly and Index to Documents, Assembly 21st Session, Montreal, September 24 - October 15, 1974 at p. 75.
23. ICAO Doc. 9119, A21-Min P/1-12 (P10), Assembly 21st Session, Montreal, September 24 - October 15, 1974, Plenary Meetings, Minutes, 10th Meeting, para. 5, p. 122.
24. Report of the Rapporteur on Resolution B of the Guadalajara Conference, 18 December 1975, ICAO, see C-WP 6310, 30 July 1976, Appendix B at p. B-2.
25. Idem, at p. B-3.
26. Idem, at p. B-6.

27. Gerald F. FitzGerald, "Lease, Charter and Interchange of Aircraft in International Operations: Amendments to the Chicago and Rome Conventions", Annals of Air and Space Law, Vol. II (1977) at p. 110.
28. ICAO, Panel of Experts on Lease, Charter and Interchange of aircraft in international operations (PE/CHA), Report, at p. 1.
29. Idem, at p. 2.
30. Idem, at p. 5 and following, discussion of that choice in Chapter. II, para. 1.
31. Idem, at p. 9, para. 27.
32. Idem, para. 27.1 at p. 6.
33. See Chapter I, para. 4.
34. Supra 28, para. 27.2 at p. 9.
35. Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952) ICAO Doc. 7364.
36. Supra 28, at p. 9.
37. Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) ICAO Doc. 8364
38. Supra 28, at p. 9.
39. Supra 28, at p. 10.
40. Supra 28, para. 32, at p. 11.
41. Supra 28, para 32 at p. 11.
42. Supra 28, para. 32 at p. 11.
43. Supra 28, para. 32 at p. 11.
44. Supra 28, para 32, at p. 11.
45. Supra 28, para. 33, at p. 12.
46. ICAO, Council Minutes, C-Min. 89/11, para. 4.

47. Special Subcommittee of the Legal Committee on Lease, Charter and Interchange of Aircraft in International Operations, (LC/SC-LCI), Introductory Note, Working Document WD-1, at p. 2.
48. LC/SC-LCI-Report, para. 6 at p. 2.
49. Draft Article 83bis (Attachment H).
50. Supra 48, para. 56.1 at p. 22.
51. ICAO Doc. 9216, A22 Min/P/C Assembly 22nd Session, Montreal, 13 September - 4 October 1977, Plenary Meetings, Minutes, at para. 18, at p. 145. Resolution A22-28 (Attachment C), ICAO Doc. 9215, A22 RES, Resolutions Adopted by the Assembly and Index to Documents Assembly 22nd Session, Montreal, 13 September - 4 October 1977 at p. 91.
52. Gerald F. FitzGerald, "Lease, Charter and Interchange of Aircraft in International Operations - Article 83bis of the Chicago Convention on International Civil Aviation", Annals of Air and Space Law, Vol. VI (1981), at p. 50. See also Chapter IV.
53. Idem, at p. 58/59; see also Chapter II, para. 1 for further discussion.
54. ICAO Doc. 9311 A23 EX Vol. 1, Assembly 23rd Session, Montreal, September 16 - October 10, 1980, Executive Committee, Report, Agenda Item 13, para. 13:3 at p. 34.
55. Idem, para. 13:4 at p. 34; Resolution A23-2 (Attachment D), ICAO Doc 9316 A23 RES, Resolutions Adopted by the Assembly and Index to Documents, Assembly 23rd Session, Montreal, September 16 - October 10, 1980 at p. 36.
56. ICAO Doc. 9312 A23 TE (Vol. 1), Assembly 23rd Session, Montreal, September 16 - October 10, 1980, Technical Commission, Report at pp. 36, 38-39, Minutes at p. 53/54.
57. Resolution A23-3 (Attachment E), ICAO Doc. 9316 A23 RES, Resolutions Adopted by the Assembly and Index to Documents, Assembly 23rd Session, Montreal, September 16-October 10, 1980 at p. 37.

58. ICAO Doc. 9317 A23 P/1-13, Assembly 23rd Session, Montreal, September 16 - October 10, 1980, Plenary Meetings, Minutes, 12th Meeting, at p. 146. Resolution 23-13 (Attachment F), ICAO Doc. 9316, A23 RES, Resolutions Adopted by the Assembly and Index to Documents, Assembly 23rd Session, Montreal, September 16 - October 10, 1980 at p. 75.
59. ICAO Doc. 9414, A24/P1-15, Assembly 24th Session, Montreal, 20 September-7 October 1983, 1984, Plenary Meetings, Minutes, 13th Meeting, Resolution 24-2 (Attachment G) ICAO Doc. 9414 A24-RES; Resolutions Adopted by the Assembly and Index to Documents, Assembly 24th Session, Montreal, 20 September- 7 October 1983, at p. 21.
60. Supra, note 37 at 64.

CHAPTER II
PROBLEMS ARISING IN CONNECTION WITH LEASE,
CHARTER AND INTERCHANGE

1. **Chicago Convention on International Civil Aviation**

The Panel of Experts, mentioned previously, in their consideration of the Chicago Convention in 1976 singled out many Articles which could give rise to problems in connection with a transfer of functions and duties from a State of Registry to a State of the Operator. The following Articles were considered: Article 5 (Right of non-scheduled flight); Article 6 (Scheduled air services); Article 12 (Rules of the air); Article 15 (Airport and similar charges); Article 24 (Customs duty); Article 25 (Aircraft in distress); Article 26 (Investigation of aircraft accidents); Article 27 (Exemption from seizure of patent claims); Article 30 (Aircraft radio equipment); Article 31 (Certificates of airworthiness); Article 32 (Licences of personnel); Article 33 (Recognition of certificates and licenses); and Article 77 (Joint operating agencies).¹ Later, the Panel agreed that some Articles did not raise problems and therefore were not pursued. When the Chicago Convention was amended in 1980 by the adoption of Article 83bis, some

of the above-mentioned Articles which the Panel of Experts discussed (Articles 5, 6, 15, 24 26, and 27) were not referred to in the amendment. Each will however be discussed below.

Article 5 (Right of non-scheduled flight) and Article 6 (Scheduled air services): The Panel agreed that any action taken to resolve problems arising out of lease, charter and interchange of aircraft should not affect the prerogatives of a state concerning its decisions taken with respect to economic matters, in particular with traffic rights and obligations. As Articles 5 and 6 deal with traffic rights, they are not directly linked to the matter in review. For this reason they need not be given further consideration here.²

Article 15 (Airport and similar charges): Article 15, which deals with airport and similar charges, states that every airport open to public use shall be open "under uniform conditions to the aircraft of all contracting States". Nothing in that provision prevents the State of Registry (in which the airport is located) from discriminating against its own planes.³ A problem could be imagined when a plane of a state that discriminates against its own planes, is leased to another country. That plane is operated to an airport of the first state and thus being discriminated. It was agreed that this problem was indeed

more a theoretical one and should no longer be considered.⁴

Article 24 (Customs duty): Some countries actually construe Article 24 as not being applicable to leased, chartered or interchanged aircraft. Again, the Panel of Experts agreed that this problem of custom duties was more of theoretical character and refrained therefore from any further action in that respect.⁵

Article 25 (Aircraft in distress): This provision, which states that the State of Registry undertakes to provide such measures of assistance as may be necessitated by the circumstances does not provide any guarantee to the State of the Operator to be allowed to help one of its aircraft operated pursuant to a lease, charter or interchange agreement. It was held that this problem could be resolved in the best way by inserting standards within Annex 12 (Search and Rescue), together with a consequential amendment in Annex 9 (Facilitation).⁶

Article 26 (Investigation of aircraft accident): According to this Article, the State of Registry shall be given the opportunity to appoint observers to be present at an accident enquiry.⁷ It was suggested that the State of the Operator, using a plane registered in another state, should have the same rights as the State of Registry. Ultimately this issue was resolved without amending the

Convention. The inclusion of a standard in Annex 13 was sufficient.⁸

Article 33 (Recognition of certificates and licenses) and Article 27 (Exemption from seizure of patent claims): After review by the Panel of Experts, it was decided that these provisions did not raise problems that would require a solution by a separate convention, amendment of the Convention or inclusion in Annexes.⁹

Article 30 (Aircraft radio equipment): No problems seemed to arise according to the Panel. Any difficulties that might arise could be solved by the recognition by the State of Registry of the radio operator's licence issued by the State of Operator. The ITU Radio Regulation facilitates the recognition of any radio operator's licence, in view of wide acceptance of the Geneva Convention.¹⁰ This provision was considered again by the Legal Committee and eventually included in the amendment.¹¹

The other provisions discussed by the Panel of Experts, Articles 12, 31 and 32, were retained. It was believed that a solution either by multilateral Convention or an Amendment was required for these Articles.

Article 12 (Rules of the air): According to Article 12 each contracting state has the duty to ensure that "every aircraft carrying its nationality marks ...

shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft...." A problem arises when an operator flies a plane registered in another state. It is sometimes difficult or even impossible for the State of Registry to ensure that the duties stated in Article 12 are complied with,¹² but the State of Registry is not relieved from its responsibility under the Chicago Convention. A transfer of functions and duties by bilateral agreement, has no effect on third states. The Panel of Experts considered this problem as serious enough to be resolved by a convention or an amendment to the Chicago Convention.¹³

Article 31 (Certificates of airworthiness): While problems do not arise on the initial issuance of airworthiness certificates, difficulties, if any, appear at the time of the renewal of such certificates, particularly if these must be renewed at a time when the aircraft is operated by an operator of another state pursuant to a lease, charter or interchange arrangement. Other problems could arise with respect to the maintenance schedule, which has to be approved by the authorities of the State of Registry. The solution of an amendment was recommended also in this case.¹⁴

Article 32 (Licences of personnel): A satisfactory resolution of the problem of licencing the personnel operating an aircraft registered in another state could be pro-

vided by the validation of foreign licences by the State of Registry. Though this is not always possible, some delegations expressed the view that the State of Registry should be able to transfer some responsibilities in that respect to the State of the Operator, thus requiring a solution envisaged under Article 12 (i.e. amendment of the Chicago Convention or separate multilateral Convention).¹⁵

Article 77 (Joint operating agencies): The main issue with respect to Article 77 appears to be the designation of the State of the Operator. A possible solution would be to designate one of the member states of the Joint Operating Agency as the State of the Operator. The Panel of Experts agreed that a potential problem existed and that further study in that respect is required by the Legal Committee.¹⁶

2. Other Conventions

a) Rome Convention:¹⁷ This Convention is a private air law convention. It deals with damage caused to third parties on the ground by foreign aircraft in flight. A maximum limit of liability for aircraft of a foreign country is established. This maximum liability limit is not necessarily applicable to aircraft registered in the state

where the accident occurs, giving rise to a problem similar to the one below:¹⁸

"SABENA is operating a flight from Brussels to Paris with an aircraft belonging to Air France. While flying over a French city, the aircraft crashes into a Gas Works, which explodes and lays waste a whole district. Even after the Rome Convention has come into force SABENA will not be able to avail itself of its provisions since the Convention (Article 23 Rome Convention) applies to damage arising on the territory of one contracting State and caused by aircraft registered in the territory of another contracting State."¹⁹

Uncertainties in public international air law with respect to transfer of aircraft from the State of Registry to the State of the Operator have contributed to problems in private international air law. Due to ratifications of the Rome Convention by only 28 parties, a problem may be perceived but is not very urgent. An amendment to the Rome Convention was recommended by the Legal Committee.²⁰

b) Tokyo Convention:²¹ Under the Tokyo Convention, the State of Registry has to exercise jurisdiction over offences committed on board an aircraft in flight and obliges that state to take measures to establish its jurisdiction.²² In the case of lease, charter, and interchange of aircraft it is still the State of Registry that would have to exercise its jurisdiction. After agreeing that there was indeed a problem, the Panel referred the study of this convention to the Legal Committee.²³ Since

the Legal Committee could not agree on a final text of an amendment, the discussion on the matter was closed.²⁴

ENDNOTES - CHAPTER II

1. ICAO, Panel of Experts on Lease, Charter and Interchange, PE/CHA, Montreal, 11-19 October 1976, Report, para. 14:1, at p. 4.
2. Idem, para. 16, at p. 5.
3. Idem, para. 18, at p. 6.
4. Idem, para. 18, at p. 6.
5. Idem, para. 19, at p. 7.
6. Idem, para. 20, at p. 7.
7. ICAO Doc. 7300/6, Convention on International Civil Aviation, Article 26.
8. Supra, note 1, para. 21, at p. 7; for further discussion see Chapter V, Subchapter I, para. 3.
9. Supra, note 1, para. 26, at p. 8.
10. International Telecommunication Convention, Geneva, ITU (1959).
11. Supra, note 1, para. 22, at p. 7. For further discussion of Article 30 of the Chicago Convention see Chapter V, Subchapter II, para. 2.
12. Absent and out of control of State of Registry, Howie, van Dam, "Facilitating the Lease and Interchange of Civil Aircraft", ICAO Bulletin 2/89, at p. 9.
13. Supra, note 1, para. 17, at p. 5.
14. Supra, note 1, para. 23, at p. 8.
15. Idem
16. Idem (for further discussion see Chapter V, Subchapter IV, para. 1).

17. See note 35, Chapter I.
18. Supra, note 1, para. 28, at p. 9.
19. ICAO Doc. 7921, LC 143-2 cit., Legal Committee Session, Documents, 11th Session, Tokyo, 12-25 September, 1957, para. 24, at p. 19.
20. ICAO Doc. 9238, LC 180-1, Legal Committee Session, 23rd Session, Minutes, 22nd Meeting, Montreal, 23 February 1978, paras. 4, 11, 13 and 18, at pp. 120-123.
21. See note 37, Chapter I.
22. Article 13, Tokyo Convention.
23. Supra, note 1, para. 28, p. 10.
24. ICAO, Doc. 9238, LC 180-1, Legal Committee Session, 23rd Session, Minutes, 17th Meeting, Montreal, February 21, 1978, para. 17, at p. 92.

CHAPTER III

POSSIBLE SOLUTIONS TO THE PROBLEMS

In Chapter II some of the issues which emerged in connection with the transfer of certain duties and functions from the State of Registry to the State of the Operator were briefly discussed. Generally, it can be said that there are the following possible methods of dealing with this issue: Bilateral Agreements (or a series of them); Multilateral Agreements on a Regional Basis; Multilateral Agreements on a Global (General) Basis; Annex Machinery of Chicago Convention; and Amendment of the Chicago Convention.¹ These, their advantages and disadvantages, shall be analyzed in this chapter.

1. Bilateral Agreements

Parties in these agreements recognize the delegation of functions and responsibilities by either of them to a third state.² Such an agreement may fall under Article 41 of the Vienna Convention on the Law of Treaties,³ which prohibits such an agreement because it is prohibited under Article 82 of the Chicago Convention. Since probably not all states parties of the Convention of International

Civil Aviation would be involved in such an agreement Article 41 of the Vienna Convention on the Law of Treaties applies. So the Parties are prohibited to do so, but if they still conclude an agreement it will be not invalid, since it will not violate rules of a jus cogens character.⁴ Therefore this Treaty will be applicable between the two states and not cause any prejudice to third states. The State of Registry will therefore remain responsible under the Chicago Convention. With respect to such states, it seems obvious that such a solution would not help the aim of the Chicago Convention to have a unified set of rules applicable to the operation of aircraft.

2. Multilateral Agreement on a Regional Basis

The advantages of this type of agreement could be enjoyed by states with common technical, economical standards and related interests as there is less difficulty in reaching an agreement.⁵ However, leasing, charter and interchange arrangements are growing in importance and tend to involve states of different continents, cultures and level of development.

Today, more and more states of the Third World are involved in acquiring new planes to meet the "noise requirement"⁶ but do not have the financial capabilities to buy

new planes. It is submitted that limited multilateral instruments may tend to exclude such nations from the option of entering into such agreements.

3. General Multilateral Agreement

This constitutes probably the only real alternative to the amendment of the Chicago Convention. It would offer the possibility to include provisions relating to other Conventions (like the Rome Convention and Tokyo Convention);⁷ and the entry into force could require a smaller number of ratifications than would be required for an amendment of the Chicago Convention. However, the fundamental problem would remain unresolved: the transfer of certain functions and duties is a very substantive matter of the Chicago Convention and it seems important, for the sake of unity that this Convention is not circumvented by another convention. This substantive matter requires a solution within the Convention, in other words, the process of amending the Convention has to be observed.

As a matter of fact it may take longer for such an amendment to enter into force, but once it is in force there will be already over 90⁸ states that will be Parties to that amendment. For a multilateral Convention to reach the same number of ratifications, it may take at least the same

amount of time. The value of a convention being in force but having only a small number of states adhered to is somewhat limited, especially on such an important issue as this one. It has been the experience that conventions with few parties are not of much practical use.⁹

4. Amendment of the Chicago Convention

The Subcommittee on Resolution B of the Guadalajara Conference considered an amendment to the Chicago Convention but concluded that such was not required.¹⁰ Later, the Panel of Experts was unable to express a preference for either the amendment or the separate convention.¹¹

With time, the issue on lease, charter and interchange has become far more important than initially thought. It is a fact that 98 ratifications are required to bring the amendment into force. It is important to acknowledge that the fundamental principles, embodied in the Chicago Convention, are beneficial to international air law and therefore should not be disturbed.¹² One of these fundamental principles is the fact the State of Registry is responsible for the operation of its aircraft. An amendment to the Chicago Convention would make an exception to that rule, so as to render another state responsible for the aircraft.

Possibly a separate international convention on that specific subject matter would disturb the unity of the Convention. However, the best way to identify the state having responsibility (State of the Operator or State of Registry) for aspects of flight safety lies within the legal framework of the Convention, by an amendment.¹³

5. Solution through the Annex Machinery

The inclusion of the substance of the Note like the one in Annex 6 Chapter III¹⁴ in the appropriate Annexes was proposed so as to give it a normative character of a Standard. The problem with this solution is that under the procedure established by the Chicago Convention such a Standard would be circulated to the states, which would be free to file differences if they wished to do so.¹⁵ As well, a Standard does not require a state to recognize the substitution of the responsibility of the State of the Operator for that of the State of Registration.¹⁶ A further objection was that it is doubtful whether the delegation of function and the consequential adoption of national regulations in regard to enforcement of the law fall within the class of subjects contemplated by Article 37 (Adoption of international standards and procedures).¹⁷

The Note in Annex 6 only refers to delegation of functions but not to the transfer of responsibility. To find a solution via the Annexes, in fact altering an Article of the Convention, would be a purported amendment of the Convention itself, contrary to its Article 94. Again one can raise the point that since this is such a substantive matter a solution should be found within the Convention.¹⁸

6. Transfer of Registration

During the meetings of the Subcommittee on Resolution B of the Guadalajara Conference some states claimed that the whole problem could be avoided by transferring the registration of aircraft. This however is only possible in those cases where the entry of an aircraft on a register was not constitutive of property rights in the aircraft.¹⁹ International air navigation is founded on a concept that the registration of aircraft has a certain stability. This stability should not be disturbed without good reasons.²⁰ Further, many national legal systems do not permit registration of an aircraft in the national register unless it is substantially owned and effectively controlled by a citizen of that state.²¹

7. Potential Conflict Between a Multilateral Convention and the Chicago Convention

Canada prepared a working paper²² which deals in extenso with that problem. Its conclusions were that in preparing and subscribing to a multilateral convention inconsistent with the Chicago Convention, the states concerned will be doing no more than completing the Chicago Convention in respect of what is essentially a technical matter and are not affecting the substance. The new convention would not affect matters of a jus cogens character.²³ In addition, a state applying or concluding a multilateral convention which is incompatible with the Chicago Convention, is not relieved from its obligations and duties toward a third state.²⁴ The rules that govern the case of successive treaties incompatible with an earlier treaty will apply to protect State B.

Article 30 of the Vienna Convention²⁵ dealing with incompatibility of treaties will apply without prejudice to Article 41 of the Vienna Convention according to Article 30(5) of the Vienna Convention (Agreements to modify multilateral treaties between certain of the parties only.)

From these statements it appears that there would be conflict, which however would not invalidate the new

convention.²⁶ The aim of the Chicago Convention on International Civil Aviation is that this Convention is applied as widely and as uniformly as possible.²⁷ The mechanism for amending the said Convention²⁸ reflects that idea by requiring 2/3 majority of the member states to adhere by ratification to an amendment in order for it to come into force.²⁹

Article 82 of the Chicago Convention in fact prohibit the parties to enter into arrangements inconsistent with the Chicago Convention. A new Convention would not be rendered invalid, but as mentioned above, the states members to both Conventions would not be relieved from their responsibilities under the Chicago Convention with respect to third States.³⁰

Some Delegations considered that a new convention would only deal with matters which were not dealt with by the Chicago Convention, in other words, with matters that fell into a gap left by the Convention. A new Convention would therefore be supplementary and there could be no conflict between the two instruments.³¹

Again it has to be emphasized that the importance of that matter speaks in favour of an amendment of the Convention rather than a separate convention. The main responsibilities are covered by the Chicago Convention. The provisions of a separate convention most probably would

conflict with some of the Chicago Convention, regarding the transfer of certain duties and functions to the State of the Operator. A new convention would not be applicable to third states, Parties only to the Chicago Convention.

ENDNOTES - CHAPTER III

1. ICAO, Panel of Experts, Montreal, 11-19 October 1976, PE/CHA WD-1, pp. 5-8. (Report of Subcommittee on Resolution B of the Guadalajara Conference) March 1963.
2. Idem, at p. 7.
3. Vienna Convention on the Law of Treaties, A/CONF.39/27, 23 May 1969.
4. Article 53 Vienna Convention on the Law of Treaties.
5. Supra, note 1 at p. 7.
6. Chapter III requirements as mentioned in Annex 16, Vol. I to the Chicago Convention ICAO Doc. 7800/6.
7. See notes 35 and 37 of Chapter I.
8. 98 States = 2/3 of the Parties to the Chicago Convention in 1980, as required by Article 94(a) of the Convention.
9. Rome Convention 1952 (28 States). (On the other hand one should not overlook the possibility of having a convention with all interested states as Parties to it. Leased, chartered and interchanged aircraft could be used in traffic with States Parties to that convention and thus not at all affecting states not having ratified that convention!).
10. PE/CHA, WD-1, at p. 5.
11. It referred that matter to the Legal Committee as the more appropriate body to study these problems; PE/CHA Report, para. 31:3, at p. 11.
12. LC/SC-LCI Report, para. 7, at p. 3.
13. Idem
14. Annex 6, Part II, see also Chapter I, para. 4.

15. According to Article 90 of the Chicago Convention 2/3 of the Council can adopt a Standard. Annexes contain Standards and Recommended Practices (SARPS). Under Article 38 of the Convention, states are free to file differences from SARPS.
16. PE/CHA WD-1, para. 28, p. 8; Report of the Subcommittee on Resolution B of Guadalajara Conference.
17. Idem, para. 29, at p. 8.
18. Idem.
19. PE/CHA WD-1, para. 13, at p. 54.
20. Idem, para. 14, at p. 5.
21. Eg. Articles 52/53 of the Swiss Aviation Code "Bundesgesetz ueber Luftfahrt", Switzerland, Doc. 748.0; Section 501 of the U.S. Federal Aviation Act of 1958 (amended in 1977, however, to permit for aliens with permanent residence) (1)(A) and (2)(B).
22. LC/SC-LCI WD-12.
23. Idem, para. 14(a), at p. 12 and Art. 53 of the Vienna Convention on the Law of Treatise.
24. Idem, para. 14(b), at p. 12.
25. Supra, note 3.
26. Supra, note 23, para. 14(c), at p. 12.
27. LC/SC-LCI Report, para. 28 at p. 13.
28. Article 94 of the Chicago Convention.
29. LC/SC-LCI Report, para. 28, at p. 13.
30. Idem, para. 29, at p. 22.
31. Idem, para. 31, at p. 33.

CHAPTER IV

SOLUTION CHOSEN BY THE 23rd ASSEMBLY: THE AMENDMENT OF THE CHICAGO CONVENTION THROUGH ARTICLE 83bis

1. Reason for the Choice of an Amendment

Each of the solutions discussed above in Chapter III gives rise to certain difficulties and problems. An amendment of the Chicago Convention was eventually proposed by the Special Subcommittee on Lease, Charter and Interchange. The advantages of an amendment are that negotiations by a state of bilateral agreements with selected other states would give the opportunity to evaluate the standards, procedures and practices of regulating authorities of other States thereby contributing to better exchange of information and greater uniformity of safety standards. Article 83bis is flexible since all or only a part of the duties and functions can be transferred, more efficient spending of States resources in monitoring operation, logs and licences, the entire optionality of the Agreement.¹ The proposition of an amendment was not challenged by the Legal Committee when it elaborated the text of the amendment to be submitted to the Assembly. The only true alternative offer-

ing a viable solution was the conclusion of a separate convention, independent from the Chicago Convention.

It would, contrary to its aim,² lead to a disunification because there would simultaneously exist two instruments dealing in all probability with the same subject matter. It is further established that a separate Convention would not in itself be contrary to Article 82 of the Chicago Convention, and would create no prejudice whatsoever towards third states not Parties to that Convention.³

A solution through the Annex machinery would not help to clarify the issue of responsibility. Every State could file a difference to a Standard; under Article 38 of the Convention therefore, no single standard of application could be guaranteed. Furthermore, standards adopted under Article 37, 54(1) and 90 of the Chicago Convention can only implement the provisions of that Convention and must not be contrary to its principles. The Special Subcommittee of the Legal Committee expressed its preference for an amendment of the Chicago Convention. It was agreed that the Subcommittee would draft a specific proposal for amendment of the Chicago Convention. The principles in that draft could then also serve as a basis for a draft of a separate Convention, if the Legal Committee still believed that such a Convention should be prepared.⁴ The conclusion of the Report of the Subcommittee states:

"...the Subcommittee expressed its preference for this solution (Amendment of the Convention; added) and decided to recommend that the Legal Committee take as a basis of its work the draft amendment in Appendix F⁵ hereto it being considered that this subject was ripe for a study by the Legal Committee."⁶

2. Long Process of Coming Into Force

The Protocol relating to the Amendment of the Convention of the International Civil Aviation was adopted by the 23rd Session of the General Assembly in 1980. Today, almost a decade later, the Convention has still not been formally amended by Article 83bis, lacking the sufficient number of ratifications. Just a little more than the half of the required ratifications have been deposited.⁷ During the process of elaboration and development of Article 83bis, there were some delegations opposing such an amendment out of fear that a slow implementation process would prevent Article 83bis from entering into force. On the one hand this fear seems justified but on the other hand, a separate multilateral convention would probably not have had more Parties during the same time, although by now it would have been in force.⁸ This gives rise to the question:

Why are states so slow to ratify though the Assembly adopted the Protocol without opposition? No substantive reason

seems to exist.⁹ Some possible answers to that question may be:

- The subject of transfer of certain functions and duties from the State of Registry to the State of the Operator may be given a low priority in an agenda of a state.¹⁰ It is sometimes difficult to persuade governments to complete ratification procedures, which, depending on the constitutional structure of a country, could be more or less sophisticated.

- Depending on the state there may be more urgent problems competing for the Parliamentary priorities.

- Another reason could be that a particular state does not want to enter into any arrangement of lease, charter of interchange and is thus not interested in the subject.¹¹

- Other states perhaps are not well aware of the importance of the amendment, not having the skilled personnel to present the issues more favorably to the respective governmental agencies.

- Again, others probably fear that by ratifying a protocol obligations to act would follow immediately. This may lead them to think that necessary changes in the legislation have to be made at once.¹²

It is noteworthy to see that most countries with a lot of leasing business (and also a lot of charter and

interchange) have ratified the Article 83bis¹³. Because of the growing number of lease, charter and interchange arrangements, it is important that even nations that are not engaged in any such arrangement ratify that protocol. Even if they are not interested at the moment, they may well be confronted with such a problem of transfer in future. Sooner or later new aircraft have to be acquired to either meet new noise requirements of the western world airports¹⁴ or to have a more economic fleet. Prices of aircraft increase steadily and it may happen that an airline of a less developed country (not having ratified the protocol) has to enter into such an agreement. Other airlines may have to look for replacements in case of late delivery of new aircraft by the manufacturer as experienced lately.¹⁵

It is fair to say that sooner or later every state will be confronted with the problem of an aircraft operated by an operator of a nationality different than the aircraft itself. The ratification of Article 83bis not only contributes to the improvement of air safety because it clearly establishes what authority is responsible for the operation of aircraft, and clearly makes the Chicago Convention applicable. It will also tend to relieve the appropriate authorities from the complex work which would be involved by either de- and re-registration of aircraft in respective

registers or by the workload created by the organization of supervision of maintenance, etc.

When a state ratifies Article 83bis it is in no way obliged to enter into any practical arrangement leading to the delegation or acceptance of authority. State A which ratifies the Protocol amending the Convention is only obliged to recognize the transfer of certain functions and duties from the State of Registry to the State of the Operator if state A has been directly notified or if that arrangement has been registered and published by the Council of the ICAO. Domestic legislation need not be amended,¹⁶ such would be the situation in Switzerland. Every Treaty requiring substantial amendments of laws or imposing obligations onto Swiss citizens requires an approval by the Swiss people. Such Treaty has to be submitted in a 'obligatory' referendum. Article 83bis did not fall into such a category, since no concrete obligations are imposed onto Swiss citizen.¹⁷

By ratifying Article 83bis Switzerland would not necessarily permit the transfer of certain functions and duties or the acceptance of them. Switzerland solely is required to recognize the transfer of functions and duties between two states. For this purpose no amendment of Swiss law is required. Should Switzerland itself, however, be involved in such a transfer, specific provisions in the law

would be required, and the codes would have to be amended in that respect, thus calling for a referendum. It was enough from a constitutional point of view if the Parliament (both chambers) adopted the amendment, the so-called Referendum on State Treaties was not necessary.¹⁸

Article 83bis is only of an enabling character and not of an obligatory one.¹⁹ There is no such provision as a "non-discrimination" article (like eg. Article 15 of the Chicago Convention) applicable in such a case. For example, if a state enters into an agreement of transfer of certain functions and duties with a specific other state, it has no obligation whatsoever to enter into same arrangements with other states. Freedom for a state to choose with whom it wants to enter into an agreement remains entirely with that state.²⁰

3. Comparison to other Amendments

To date there have been only a few amendments to the Chicago Convention. Article 83bis is the first substantial (i.e. non procedural) amendment, followed years later by Article 3bis. Article 83bis is however even more substantial since it deals with one of the very bases of the international air law: the link between nationality (of the aircraft) and the responsibility for its operation.²¹

Article 3bis, done in 1984, deals with the interception of aircraft and recognizes the duty of states not to use weapons against civil aircraft in flight, Article 83bis is quite different. The subject matter which is dealt with in Article 3bis is far more delicate. There are very differing views and opinions on how to intercept aircraft. Contrary to Article 83bis, Article 3bis obliges states to do something, for example, new regulations for interception must be enacted to meet the requirements of Article 3bis.²² Therefore, Article 3bis is not simply of an enabling character. It is submitted that Article 3bis may even take longer to be ratified by sufficient number of states to enter into force. On the other hand however, it should be emphasized that paragraph (a) of Article 3bis is only declaratory of existing international law and thus is deemed to apply regardless of its ratification.

ENDNOTES - CHAPTER IV

1. IATA Discussion paper, advantages of ratifying Article 83bis of the Chicago Convention. "Lease, Charter and Interchange of Aircraft in International Operations".
2. ICAO LC/SC-LCI, WD-13, Comments of CSSR.
3. As discussed in Chapter III, para. 7.
4. ICAO LC/SC-LCI, Report para. 56.1(b) at p. 22.
5. Text of draft amendment, see Attachment H.
6. ICAO LC/SC-LCI Report, para. 56(a) at p. 22.
7. 52 ratifications out of 98 required, as of August 1, 1989, see note 6 in Chapter III.
8. See note 8, Chapter III.
9. IATA Memorandum 19/10/88, Discussion paper attached to Memorandum at p. 5.
10. Idem.
11. Idem.
12. According to Mr. D. Fiorita, former Representative of Canada at the Council of ICAO, in a discussion.
13. List of ratification, Attachment I, it is interesting to note the Ireland home of GPA is not among them.
14. See note 5, Chapter III.
15. R.G. O'Lone, "Delays Force Boeing to Revise Delivery Schedules", AWST, Jan. 1989, at p. 73.
16. Howie, van Dam, February 1989, "Facilitating the Lease and Interchange of Civil Aircraft", ICAO Bulletin 2/1989 at p. 9/10.
17. Constitution of Switzerland Art. 85, para. (5) and Article 89 para. (3) lit. (a).

18. Botschaft zur Aenderung des Uebereinkommens ueber die internationale Zivilluftfahrt, Switzerland, (Doc. 84.008), 15 February 1985.
19. Supra, note 9.
20. Supra, note 9.
21. "Facilitating Ratification of Article 83bis of the Chicago Convention". Memorandum produced in the International Working Group attached to a letter from Mr. Karl-Heinz Bockstiegel, dated the 19 September 1989 addressed to Mr. Henri Wassenbergh, Mme P. Simenos, and Mr. Ronald Katz.
22. Protocol relating to an amendment to the Convention of International Civil Aviation, Montreal 1984, Article 83bis paragraph (c).

CHAPTER V
DISCUSSION OF ARTICLE 83bis IN DETAILS

Subchapter I: General Remarks¹

1. Why Article 83bis?

The Subcommittee of the Legal Committee discussed in 1977 where in the Chicago Convention the new amendment should be inserted. After considering inserting the provision after Article 19 and 36, it was decided to insert the amendment after Article 83, in Part IV of the Convention.² While insertion after either of the Articles would have been possible, the chosen seems the best, particularly since the provisions in Part IV of the Chicago Convention (Final Provisions) deal with registration of arrangements, with the Council.

2. Title of Article 83bis

The title reads: "Transfer of certain functions and duties". There was a lengthy discussion in the Subcommittee of the Legal Committee as to whether the Amendment should have a title as do the other provisions or not. In

the original text of the Convention the Articles had no titles. Instead, the titles were presented as marginal notes.³ Some Delegations put forward that since Article 93bis had no title, this example should be followed for Article 83bis. It was stated that the presence of titles would lead to misinterpretation. Other delegations feared the possibility of misinterpretation because of the absence of titles.⁴ The Subcommittee eventually reached a consensus that Article 83bis should have a title:⁵ "Transfer of Certain Functions and Duties of the State of Registry".

With respect to the wording of the title, Canada suggested the deletion of 'the State of Registry' since aircraft internationally or jointly registered would not be covered.⁶ This proposal was eventually adopted by a majority of the members of the Legal Committee.⁷ Not so the proposal of Venezuela to delete 'certain'. Venezuela saw an inconsistency between title and text, because the provision refers to the transfer of the functions all or in part.⁸

The title, however, is intended as a general reference and has no legal value in itself.⁹ It seems, however, that for the sake of clarity the title proves to be helpful.

Subchapter II: Article 83bis, Paragraph a

1. Selection of Articles

The Panel of Experts on Lease, Charter and Interchange concluded in its report:

"In the light of the foregoing, it is for consideration whether a separate convention providing for a transfer of responsibility with regard to flight and manoeuvre of aircraft from the State of Registry to the State of the Operator is consistent with Article 12 of the Chicago Convention. It is the opinion of the Panel that the same problem may arise under Articles 31 and 32 of the Chicago Convention."¹⁰

The Special Subcommittee on Lease, Charter and Interchange emphasized on the Articles mentioned by the Panel of Experts,¹¹ but it did not rule out the consideration of any other articles.¹² It was considered that these were the only problems in relation with lease, charter, interchange or any similar arrangement.

As to Article 12 (Rules of the air), it was realized, as it was previously by the Panel of Experts, that under the actual regime of the Chicago Convention, it is still the State of Registry that is responsible for the operation of the aircraft. A bilateral agreement of transfer of functions and duties has no effect on third states.¹³

Problems arise under Article 31 (Certificates of airworthiness) when the time comes to revalidate certifi-

cates of airworthiness or to approve a maintenance schedule for an aircraft being operated by a foreign operator. The State of Registry remains responsible.¹⁴

Such problems have been and are presently encountered by Swissair, which has leased two wide-bodied aircraft from an American Leasing Company. These jets retained their US-Registration thus rendering the State of Registry (i.e. the United States) responsible. The enforcement of the US airworthiness requirements applicable in that case is guaranteed by an FAA-Team. Maintenance is supervised by other than Swissair personnel.¹⁵ It is easily imaginable that some problem of technical and also personnel character could arise in such a case.

The Subcommittee noted that such problems could even occur in arrangements involving transfer of aircraft with the crew: the State of Registry is not in the position to discharge its responsibility under Article 31 (Certificates of airworthiness).¹⁶ The validation of foreign licences by the State of Registry often enables it to resolve problems arising out of Article 32 (Licences of personnel). In practice this may not always be feasible, therefore a transfer of that responsibility to the State of the Operator would be advantageous.¹⁷ The Subcommittee added that, in cases of transfer of aircraft with the crew, a problem of adequate surveillance by the State of Registry

may arise, since that state may not be in the position to exercise effective control over the crew.¹⁸ In addition to the Articles mentioned by the Panel of Experts, Article 77 relating with joint operating agencies was also considered by the Subcommittee. This problem will be dealt with more thoroughly in Subchapter IV. Paragraph (c) of Article 83bis has been dedicated to that provision.

2. Problem of Article 30

The Panel of Experts considered that the problem of the licensing of the radio apparatus on board aircraft and its operation has been resolved by the recognition of the State of Registry of the radio operators licence issued by the State of the Operator.¹⁹ The ITU Radio Regulations state in Article 23:²⁰ "...the service of every aircraft radio station shall be performed by a radio operator holding a certificate issued or recognized by the Government to which the radio station is subject." This Directive of the Radio Regulations should facilitate the recognition of any radio operator's licence, in view of its world-wide acceptance.²¹

The Subcommittee did not refer to Article 30. This problem only surfaced again in the Legal Committee, where France made a formal proposal to insert in the list of

Articles a specific reference to Article 30(b). According to the French Delegation, Article 30(b) was drafted along the same line as Article 32 (Licences of personnel). Since functions and duties with respect to certificates of competency and licences could be transferred to the State of the Operator, the same should be adopted with respect to Article 30(b).²² The Delegation of the United Kingdom was concerned since Article 30 not only deals with the Chicago Convention but also with the Radio Regulations of the International Telecommunication Union.²³

The Director of the Legal Bureau explained that while Article 30(b) of the Chicago Convention referred solely to the issuance of the licence by the appropriate authorities of the state in which the aircraft is registered, the Geneva ITU Convention and Radio Regulations made reference to issuance as well as to recognition by the Government to which the station is subject.²⁴ If the State of the Operator could be regarded as the state to which the station is "subject", in accordance with the ITU Radio Regulations, a licence could be issued and validated by the State of the Operator. The State of Registry would then be relieved from its responsibilities. Therefore, there would be no contradiction in adding Article 30(b) to the list of Articles in the proposed amendment.²⁵

Kenya then made a proposal to refer to Article 30 in toto, in order to allow the possibility for the State of the Operator to issue certificates or licences for installation and operation in case of replacement during maintenance of the apparatus.²⁶

Concern was expressed about the fact that there could be a different legal interpretation of the phrase 'the state to which the station is subject' and whether the State of the Operator could under all circumstances be regarded as the state to which the station is subject.²⁷

Eventually the proposal of France and Kenya to insert Article 30 as a whole in to the list of Articles referred to in the proposed Article 83bis was adopted by consensus. It was further agreed that ICAO would consult the International Telecommunication Union on this matter to get all relevant information.²⁸

3. Problem of Article 26

The Panel of Experts felt that in cases of aircraft accident investigations, the State of the Operator should also be allowed to enjoy the same rights as the State of Registry, that is to participate in the investigation and to appoint observers. It was the opinion of the Panel that this could be done without amending Article 26, and without

referring to it in Article 83bis. Recommendation 5/1 made by the Aircraft Accident Investigation Divisional Meeting was to be included in Annex 13. This proved to be the best solution.²⁹ This Recommendation, included later as a Standard in Annex 13, permits the State of the Operator to appoint observers and to be present at the enquiry. The Special Subcommittee did not consider it necessary to undertake further steps.³⁰

In the discussions of the Legal Committee, the Delegates of Finland and Kenya expressed some concern, about the possible appointment of observers by the State of the Operator, if such a situation is mentioned only in Annex 13, this would weaken the position of the State of the Operator.³¹ According to France, to insert Article 26 into the list of provisions enumerated in Article 83bis would not be appropriate, since that Article 26 did not deal with functions and duties that are to be transferred to the State of the Operator.³² The Chairman even considered that this would be detrimental. He felt that if Finland and Kenya continued to have problems with Article 26, they should submit a proposal for the amendment of Article 26 itself.³³

Such a separate amendment was eventually submitted. In a vote, it was decided to transfer that proposal³⁴ to the Drafting Group.³⁵ The text prepared by the Drafting

Group was discussed and put to vote. There were two tie votes on that amendment to Article 26. The Chairman then applied Rule 43 of the Rules of Procedures and declared the proposal lost.³⁶ The Chairman recalled that there was an agreement, in principle, that Article 26 should be amended. There was however no consensus as to the text prepared by the Drafting Group. Even if that Group would submit another text, the Chairman believed, that the Committee could not reach a satisfactory conclusion.³⁷

4. Registration and Nationality

Registration and nationality are important with respect to Article 83bis. The term "nationality" describes a specific legal relationship between a person and a state. From this legal relationship specific rights and obligations are derived.³⁸ This concept applies to ships as well, but it is quite a new concept in international law with regard to aircraft. First established in the Paris Convention of 1919,³⁹ Article 17 of the Chicago Convention now states: "Aircraft have the nationality of the state in which they are registered." It is the registration (in a state's registry) that determines the nationality of an aircraft. Numerous responsibilities⁴⁰ are attached with respect to aircraft, to the State of Registry.⁴¹ An

aircraft cannot validly be registered in two different registers,⁴² hence it can not have more than one nationality. The registration within a country is subject to national laws and not governed by the Chicago Convention.⁴³ Aircraft engaged in international operations have to bear the nationality and registration marks.⁴⁴

Not even aircraft in a multinational airline can have more than one nationality. The aircraft are either "divided" and registered in the participating states or all in one State,⁴⁶ or there is a joint registration,⁴⁷ as is the case with Arab Air Cargo (Jordan - Iraq).⁴⁸

The State of Registry is responsible to third states for the compliance with rules of the air if its aircraft do not meet the obligations set in the Chicago Convention and its Annexes.

5. Contracting States

The term "contracting States" is not specified and can, therefore, have two interpretations. "contracting State" could on one hand be interpreted as meaning a state that ratified the Chicago Convention and has become a Party to it, or, on the other hand, "contracting State" could also refer specifically to the Protocol, amending the Chicago Convention by Article 83bis. In that case "contracting

State" means the state that has not only ratified the Chicago Convention, but also the amendment. It is submitted that it is only the second interpretation that should be applicable, since Article 94(a) states that an amendment comes only "into force in respect of States that have ratified ..." it.⁴⁹

6. Lease, Charter and Interchange

a) Lack of Definition

It will be noticed that the terms "lease", "charter" and "interchange" are not defined, nor is any reference made to another Article in that respect.

During the 23rd Session of the Legal Committee, some Delegations favoured a precise definition of these terms,⁵⁰ or, alternatively, the establishment, by the Council, of guidelines on how the states should interpret these terms.⁵¹

The majority of states, however, thought that it would be better not to define these practices for the following reasons. Firstly, it is doubtful whether a common definition acceptable to everybody could be found.⁵² Secondly, a definition is not essential. It might be inappropriate to arrive at a definition if the sole purpose

of an agreement concluded between states was the transfer of functions and duties.⁵³ Thirdly, there is no need to define these terms, since legislation on the subject appears to vary considerably from country to country and hence it would be difficult to find an acceptable definition, and for that reason might hamper a quick ratification.⁵⁴ Fourthly, a definition would "impose insurmountable burdens upon various institutions".⁵⁵ Fifthly, a definition could be very inopportune by introducing restrictions in form of a preconceived definition.⁵⁶ Finally, a definition could be counterproductive to the attempt to ensure the highest level of safety in those types of operations.⁵⁷

Another delegation wanted even to delete totally the reference to lease, charter and interchange as long as the basic idea of Article 83bis was maintained, it being an aircraft registered in one state and operated by an operator belonging to another state.⁵⁸

The Committee's task was to find a solution in public international law for an effective transfer of functions and duties from the State of Registry to the State of the Operator. The arrangements in Article 83bis refer to private law agreements between airlines themselves or between leasing companies and airlines. Therefore, a definition of these agreements did not come within the scope of the task of the Legal Committee.

b) Attempt at Definition

A main difficulty is the difference between civil law and common law. Initially the transactions of charter and interchange were not known in civil law, but only in common law. These practices were heavily influenced by maritime law.⁵⁹ Eventually, however, these institutions found their way into civil law through the way of "innominate contracts". In civil law countries, one is free to conclude any contract, even if it is not specifically provided for in the Civil Code. Some attempt at definition shall be presented in this thesis.

aa) Lease

In simplest terms, leasing is a commercial arrangement whereby an equipment owner conveys to the user the right to use the equipment for payment of specified rentals over an agreed period of time. After expiration of the lease, the equipment has to be returned to the equipment owner.⁶⁰

Leases are often used nowadays as a financial instrument providing numerous advantages.⁶¹ There are many kinds of leases, which will not all be explored. The principal difference in aviation is made between wet lease,

which is the lease of the aircraft with the crew, and dry lease which only involves the aircraft alone.⁶²

The periods of leasing can vary considerably from only a few days up to several years. Nowadays most often specialized leasing companies are involved.

bb) Charter

As stated in Blacks Law Dictionary, charter means: "To hire, rent or lease for a temporary use".⁶³ Charter is a term borrowed from maritime law which has been adapted to air law.⁶⁴

It should not be confounded with "charter" in "charter-flights", which tends to describe non-scheduled air-services, although the "charter" of an airplane may be the origin of such operation. It is submitted that charter arrangements often occur between airlines and do not involve leasing companies. A "charter" arrangement rarely lasts longer than a season. It is a good way to keep planes flying in off-peak periods of the year, and provides the most economic possible use of an aircraft.⁶⁵

cc) Interchange

There is little difference, if any, between the concept of "lease" and "interchange". Reference can be made, for this purpose, to interchangeability, which, according to the Legal Committee at its 11th Session, means

"...the ability of an airline operating internationally under a governmental agreement or authorization, to use other aircraft belonging to a foreign airline and registered in a foreign State, with or without the aircraft's crew."⁶⁶

More specifically, "interchange" is an aircraft being handed over by one operator to be operated for a period of time against rental payment.⁶⁷

Originally, it meant the loan of equipment by one US operator to another. In the lingua franca of ICAO today, it means an arrangement under which an aircraft registered in one state is put into the hands of and operated by an operator having another nationality.⁶⁸ It is submitted that, as shown in the example below, interchanges are not meant to be lasting arrangements.

e.g.: Air New Zealand flies the leg Auckland - San Francisco where British Airways will take over the same aircraft to fly it as British Airways flight from San Francisco to London.⁶⁹

Thus, maximum use is made of extremely expensive aircraft and they are operated economically.⁷⁰

It is submitted that there is little substantive difference between these three terms,⁷¹ which are private law terms, that have in this particular case of Article 83bis repercussions in public law. Even if there is no common definition, they cannot be ignored as to their effect on the Chicago Convention.

It is important to notice that all practices will, once Article 83bis is implemented, have the same effect in public law. In all three instances an aircraft registered in one state will (if no transfer of registration is undertaken) fly with an operator of a different nationality, thus no longer being under the direct supervision of the State of Registry.

7. "Any Similar Arrangement"

This wording of Article 83bis may accentuate the statement that there is no fundamental difference between the instances of lease, charter and interchange. "Any similar arrangement" refers to lease, charter and interchange as examples. By the addition of "any similar arrangement", it is clearly stated that lease, charter and interchange do not form an exhaustive list.⁷² Therefore, any other arrangement of a similar character can be made

aiming at the transfer of certain functions and duties from the State of Registry to the State of the Operator.

8. Place of Business - Place of Permanent Residence

The operator employing the aircraft of the State of Registry must be of another nationality in order for Art. 83bis to apply. The nationality of an operator is defined by its place of residence.

Article 83bis refers in the first instance to the principal place of business. The operator must have his principal place of business outside the State of Registry. For the definition of this principal place of residence, one can refer to Article 28 of the Warsaw Convention⁷³ and case law connected thereto. Article 28 of the Warsaw Convention refers in the US translation to "domicile" whereas the English speak of "ordinary residence". In a case before an American court, it was decided that the "domicile of a corporation is customarily regarded as the place where it was incorporated...".⁷⁴

In civil law, residence is designated by "statutes" (Articles of Association) as "siège social".⁷⁵ There is some difference in common law and civil law countries between "residence" and "domicile". However, the main

feature is the same: a corporation can only have one residence or domicile.⁷⁶

In order to define the principal place of business, one can again refer to Article 28 of the Warsaw Convention, but the facts of each case have to be appreciated and the various places of business have to be compared in order to find the one which is "principal". In common law there are guidelines for making this determination, such as the place where the executive and main administrative functions of the carrier are located.⁷⁷ The provision of the Warsaw Convention indicates that there can only be one place of business.⁷⁸

According to US courts, there tends to be only one place, the place of principal business which is the same as the place of permanent residence. This follows from the above-mentioned. There are, however, exceptions where an airline may have its principal place of business at another place than its permanent residence. This is often the case in civil law countries, where it is the "siège social" that decides on the place of permanent residence.⁷⁹

It has to be emphasized that the aircraft must not only be out of the jurisdiction of the State of Registry, according to Article 83bis, but also operated pursuant to a lease, charter or interchange arrangement with an operator of another state.

9. Aircraft

An aircraft is "any machine that can derive support in the atmosphere from the reactions of the air other than the reaction of the air against the earth's surface."⁸⁰ There is no specific limitation as to the types of aircraft involved, except the restrictions of the Chicago Convention in general.

Article 3(a) of that Convention states that it shall only be applicable to civil aircraft. Article 3(b) says that aircraft used in military, customs and police services are deemed to be State aircraft. Therefore, the Convention does not apply to them. If no longer used in the mentioned services, it would again be a civil aircraft, thus subject to the Convention.

10. Transfer of Functions and Duties

Duties and functions mentioned in Articles 12, 30, 31 and 32(a) can be transferred from one state to another. Such a transfer agreement remains entirely optional. An agreement can only contain the mentioned functions and duties,⁸¹ of which all or some can be transferred. The State of Registry shall be relieved from its duties in respect of what has been transferred. The State of the

Operator will be the new responsible state under the Chicago Convention.

In Article 94 of the Chicago Convention, there is one quite important restriction. Article 83bis applies only to the states that have ratified that amendment and only when it has come into force.⁸² States which are Parties of the Convention on International Civil Aviation but which have not ratified the Protocol relating to Article 83bis may still regard the State of Registry as the responsible state, and it will not be able to divest itself from its responsibilities under the Chicago Convention. It is submitted that in practice, once the amendment is in force, the inability of divesting the responsibility will apply only to a few aircraft since the most "important" States will probably have ratified that amendment.

11. State of Registry

The State of Registry is the state in which the aircraft is registered and therefore determines the nationality of the aircraft.⁸³

12. State of the Operator

In order to define the term "State of the Operator" one must first refer to the term "operator" itself. No attempt was made to define this term in the Panel of Experts or in the Special Subcommittee of the Legal Committee. This is not surprising since during the preparation of the Rome Convention,⁸⁴ a delegation put forward that there were no less than 52 definitions of the term "operator". It was held that the definition should therefore be left to courts.⁸⁵

"Operator" means the person for the time being having the management of the aircraft. Managing means not only the piloting of the aircraft. The operator is a person who designates commander, employees, crew, etc., and decides what work the aircraft should do.⁸⁶

In connection with Article 83bis, it is submitted that "operator" refers mainly to a business entity operating aircraft, which are most often airlines.

The State of the Operator would therefore be the place where the operating entity has its "siège social" or where it is incorporated according to civil or common law.⁸⁷ Since in both systems an operating entity can have only one place of permanent residence, there can also be only one State of the Operator.⁸⁸ This is the state

to which certain functions and duties are being transferred according to Article 83bis.

Subchapter III: Article 83bis, Paragraph (b)

1. Effect of the Transfer

As already discussed before, the transfer shall only have effect on states that have ratified the Protocol implementing Article 83bis and further only when the 98th ratification has been deposited. According to Article 83bis, para. (b), in order to have effect, the agreement (referring to the transfer of functions and duties) must be registered with the Council of the International Civil Aviation Organization, which shall then make that agreement public. Once it has been published, it will have an effect on all contracting States. The Council shall publish these agreements as soon as possible. Some uncertainty prevails as to the meaning of the wording "as soon as possible".

In the Legal Committee, states (Algeria, France, Canada and also Australia), were concerned that an arrangement, which is referred to in Article 83bis, para. (b), could expire before the machinery of registration and publication with ICAO would render that transfer of functions and duties effective.⁸⁹ Short term leases may expire before

the legal effects of the arrangement of delegation have been achieved.⁹⁰ To encounter the aforementioned problem, France, Algeria and Canada jointly submitted a proposal, which would allow the states not to wait until the publication of the agreement by ICAO but to notify third states directly.⁹¹ France stated:

"The registration of the agreement with ICAO and the publication by ICAO was a time-consuming process. There was no need to wait for the ICAO-Council to make such an agreement public but rather the agreement could either be registered with ICAO or directly communicated to the States concerned." (emphasis added)⁹²

ICAO would, in that context, not publish the content of the agreements but only notify that they have been registered.⁹³

The Delegate of Canada stated that even after direct notification, the obligation would still remain to register the agreement with the Council.⁹⁴

The Delegation of France made a further clarification stating that no proposed draft called for making available the whole text of the agreement. The French proposal also stated that the agreement would enter into force upon direct notification, but only after registration with the ICAO, and before publication, the date of effectiveness being the date of registration.⁹⁵ The Drafting Group was to prepare a new text based on the tripartite proposal of France, Canada and Algeria. The proposal elaborated by the

Drafting Group was not backed by all members of that group. The USSR submitted a new proposal⁹⁶ which was adopted by the Legal Committee to form paragraph (b), after some minor drafting changes.⁹⁷ According to Article 83bis, paragraph (b), agreements enter into force once they have been registered and been made public or once the existence and scope of the agreement have been directly communicated to the states.

The wording in Article 83bis may lead to some confusion, since one could interpret it to mean that there is an alternative between registration/publication and direct notification. The case, however, is that all Agreements have to be registered with the Council of the ICAO according to Article 83 of the Chicago Convention. Therefore, there is only a choice between waiting for the publication or notifying directly in order for the Arrangement to enter into force with respect to third parties.

2. Registration with the International Civil Aviation Organization

According to Article 83 any agreement shall be registered with the Council of the ICAO. If not inconsistent with the Chicago Convention, the agreement shall be published as soon as possible.

As seen above, direct notification of the agreement can shorten the time between registration and publication. The proceeding of the registration was discussed by the Director of the Legal Bureau: a certificate of Registration is issued once the authenticity of the agreements that were concluded is established, and they have been submitted in the appropriate languages and in the specified number of copies. The certificate contains pertinent information about those agreements. Monthly lists of all registered instruments are then published.⁹⁸

It is easy to imagine that this procedure may be a lengthy one, perhaps more than the overall length of such transfer arrangement. Agreements relating to transfer of functions would however be accorded the same treatment as mentioned above by the Director of the Legal Bureau. Any significant change would have budgetary as well as practical implications which could be best dealt with at an Assembly session.⁹⁹

Non-registration or the withholding of it would create unnecessary delays in aircraft operations, which could result in losses to the operator. To avoid such impediments, registration and publication should take place as expeditiously as possible.¹⁰⁰ Direct notification is a real alternative and therefore Article 83bis, paragraph (b) seems a good and viable solution to that problem.

3. Publication

"Publication" means that a publication would contain the pertinent information about the agreements and be published in the appropriate languages, that are the official languages of the ICAO.¹⁰¹ This information could then be published in monthly lists. According to the Director of the Legal Bureau, even semi-monthly lists are a possibility.¹⁰²

4. Private and Direct Notification

In order to shorten the time lapse between registration and publication, states can notify other states of the agreement on transfer of certain functions and duties. It will have effect for the notified states upon notification. For agreements with respect to which states have not been notified, effect will take place only upon official publication in the monthly or semi-monthly lists.

The private and direct notification has to contain pertinent information on the existence and the scope of the agreement.¹⁰³

Subchapter IV: Article 83bis, Paragraph (c) - Applicability
to Article 77 of the Chicago Convention

Paragraph (c) of Article 83bis states that paragraph (a) and (b) of the same Article shall also apply to joint operating organizations.

1. Preliminary Remarks on Article 77

Article 77 allows joint air transport organizations and international operating agencies to be established. They are subject to all the provisions of the Chicago Convention. The Council shall determine how the provisions relating to nationality shall apply.

According to the Director of the Legal Bureau, "determine" in Article 77 shall be interpreted to mean "decide".¹⁰⁴ Thus, the Council of the International Organization of Civil Aviation shall decide on that matter with binding force effect on all other States. The Council is further not only limited to Articles 17 through 21 of the Chicago Convention, which relate to nationality and registration, but may refer to all articles which refer to nationality or imply it.¹⁰⁵

For a long time, this was more a theoretical than a real problem, since Article 77 was never applied. With the

creation in 1984 of a joint operating organization between Iraq and Jordan (Arab Air Cargo), this problem became real. The Council had to decide in what manner the provisions of the Convention should apply in this situation. The Council decided that as of 1 January 1984, Arab Air Cargo shall have a separate and distinct registration mark, from the one of the participating states.¹⁰⁶ Aircraft shall be registered in a joint register, separate and distinct from the ones of Jordan and Iraq.¹⁰⁷ The registry shall be kept by Jordan on behalf of both states.¹⁰⁸ Responsibilities and obligations shall be assumed jointly and severally by both states.¹⁰⁹

A problem with respect to lease, charter or interchange arrangements of aircraft to and from a joint operating agency had never presented itself previously and may therefore seem more theoretical than probable though it may still happen in future.

A solution to such a problem may be found in the Tokyo Convention.¹¹⁰ For the purpose of that Convention, the states involved in joint operating agencies shall determine which of them is to be considered as the State of Registry.¹¹¹ This could also apply for determining which is the State of the Operator. While this is a possible solution, it has to be emphasized that, for the moment, no

amendment has been adopted to the Tokyo Convention. This was considered premature.¹¹²

2. Discussion in the Legal Committee

The Working Draft prepared by the Subcommittee of the Legal Committee did not contain any provision on joint or international registration.¹¹³ The proposal of the Arab Republic of Egypt would provide the possibility for an international operating agency to be a party to a transfer of functions and duties in the same circumstances and conditions and having the same effect as a normal transfer between two contracting states.¹¹⁴ The Delegate of Cuba preferred a solution like the one mentioned above, which would follow the example of the Tokyo Convention.¹¹⁵ The operating agency would in that case designate a State of the Operator.

Another delegation proposed that a more simple solution would be to state that the provision of Article 83bis apply to cases covered by Article 77.¹¹⁶ It was believed that it would be difficult in that session to consider all different cases of transfer of functions and duties from joint and international operating organizations to the contracting states which were not members of such organizations.¹¹⁷ There was also some concern expressed

by a delegation on the role of the Council in that respect. It was felt that it was up to the Council to decide (determine) in which way Article 83bis should apply in situations foreseen in Article 77.¹¹⁸ The Chairman interpreted the Polish proposal as being automatically applicable without prejudging the authority of the Council with regard of the problem of nationality. The need for further study by the Council was not precluded.¹¹⁹ The new paragraph was adopted with no negative votes.

A Few Remarks on a Provisional Application of Article 83bis

Article 25 of the Vienna Convention on the Law of Treaties¹²⁰ reads:

- 1) A treaty or a part of a treaty (emphasis added) is applied provisionally pending its entry into force:
 - a) the treaty itself so provides
 - b) the negotiating States have in some other manner so agreed
- 2) Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Paragraph 1(a) of this Article does not apply since neither the Chicago Convention nor Article 83bis mention a possibility of provisional application of the treaty. In the proceedings of the discussions and committees leading to

Article 83bis the negotiating states never agreed to insert a provision which would allow to apply Article 83bis provisionally.

Although it may take a long time to obtain the necessary ratification, the mechanism of Article 94(a) of the Chicago Convention should be observed. An attempt should be made to motivate states for faster ratification. This is being tried by the workshop which has been established by The Netherlands and the US.¹²¹

ENDNOTES - CHAPTER V

1. Text of Article 83bis (Attachment J).
2. Subcommittee of the Legal Committee, LC/SC-LCI; Report para. 54:1, at p. 18.
3. Idem, para. 54:2, at p. 18.
4. Idem.
5. Idem.
6. ICAO Doc. 9238, LC 180-1, Legal Committee (LC) Meetings, 23rd Session, Minutes, 20th meeting, para. 11 at p. 110, Canada.
7. Idem, para. 12, at p. 110.
8. Idem, para. 11, at p. 110, Venezuela.
9. Idem, para. 11, at p. 110, Canada.
10. PE/CHA, Report, cit., para 31:2, at p. 11.
11. Articles 12, 31, 32.
12. LC/SC-LCI, Report, para. 8, at p. 4.
13. Idem, para. 9, at p. 4.
14. Idem, para. 10, at p. 5.
15. Mr James T. Stewart Jr., from Zuckert, Rasenberg and Scoutt, Washington, D.C. in a discussion.
16. Supra, at note 12, para. 10:1, at p. 5.
17. Supra, at note 12, para. 11, at p. 5.
18. Supra, at note 12, para. 11:1 at p. 5.
19. PE/CHA, Report, para. 22, at p. 7.
20. Radio Regulations to International Telecommunication Convention, Geneva 1969.

21. Supra, at note 19.
22. LC, 3rd meeting, para. 25, at p. 18, France.
23. Idem, para. 28, at p. 19.
24. Idem, 4th meeting, para. 1, at p. 21, Director Legal Bureau.
25. Idem.
26. Idem, para. 3 at p. 21.
27. Idem, para. 7, at p. 22.
28. Idem, para. 8, at p. 22.
29. PE/CHA, Report, para. 21 at p. 7.
30. LC/SC-LCI, Report, para. 13:3 at p. 6.
31. LC, 4th meeting, para. 10 and 11, at p. 23, Finland, Kenya.
32. Idem, para. 14, at p. 23.
33. Idem, para. 16 at p. 24.
34. (Text of proposal in Attachment K) It is in fact a valid remark to include the State of the Operator in the accident inquiry. An amendment of the Convention certainly would have more power than a mere amendment of the Annex. It has to be emphasized that Article 26 does not deal with the transfer of functions and duties (see Chapter II, para. 1) and therefore should be dealt with separately from Article 83bis.
35. LC, 6th meeting, para. 28, at p. 37/38.
36. LC, 21st meeting, para. 21 and 23, at pp. 116/117.
37. Idem, para. 26, at p. 117.
38. Dr. Michael Milde, "Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or International Operating Agencies", Annals of Air and Space Law, Vol. 10, 1985, p. 140.

39. Idem, p. 141.
40. Responsibilities like in Articles 12, 30, 32(a) of Chicago Convention.
41. Supra, note 38.
42. Article 18 of the Chicago Convention on International Civil Aviation.
43. Article 19 of the Chicago Convention.
44. Article 20 of the Chicago Convention, eg. Swiss aircraft: HB-IGC, HB=Nationality mark; IGC=Registration mark.
45. Example SAS (Scandinavian Airlines): 2/7 of the fleet registered in Denmark, 2/7 in Norway and the remaining 3/7 in Sweden.
46. U. Klee, Airline Fleets International '89, at p. 10. Gulf Air Multinational airline of the following States: Bahrain, Oman, Qatar, United Arab Emirates, (Abu Dhabi). All aircraft are registered with Oman and carrying its nationality marks (A40).
47. More on joint registration in Subchapter IV, para. 1.
48. Supra, note 38 at p. 138.
49. See also Subchapter II, para. 10.
50. LC, 1st meeting, para. 13, at p. 5, Kenya.
51. Idem, para. 16 at p. 5.
52. Idem, para. 15, at p. 5.
53. LC, 2nd meeting, para. 1 at p. 7, Argentina.
54. Idem, para. 3, at p. 7, USSR, especially when states would not agree with that definition.
55. Idem, para. 5, at p. 7, Cuba.
56. Idem, para. 7, at p. 8, Netherlands.
57. Idem, para. 8 at p. 8, USA.

58. Idem, para. 14, at p. 9, Canada.
59. PE/CHA, Report, para. 15, at p. 5.
60. Dr. Donald Bunker, The Law of Aerospace Financing in Canada, McGill University, 1988, p. 23.
61. See introduction.
62. Arnold W.G. Kean, "Interchange", Journal of the Royal Aeronautical Society, Vol. 67, August 1963, at p. 514.
63. Blacks Law Dictionary, 5th edition.
64. See supra, note 59.
65. An airline from the northern hemisphere which charters aircraft from an airline of the southern hemisphere in winter and vice versa in summer time.
Same can also be achieved with interchange, which shows that there is no substantial difference between the two expressions.
66. ICAO Doc. 7921 - LC/143-2, Legal Committee, 11th Session, Tokyo, 12-25 September 1957, vol. II, Docs, p. 21.
67. See supra, note 62, at p. 514.
68. Arnold W.G. Kean, "Interchange of Aircraft", Essays in Air Law, 1982, at p. 111, interchanges last for short terms although seasonal interchanges are known, see pp. 114/115, para. 4, see also note 65.
69. Idem, p. 113.
70. Supra, note 62, at p. 514.
71. Interchange is also called barehull charter in the UK, or dry lease in the United States. There is no clear distinction between all these terms, supra note 62, at p. 514.
72. LC, 3rd Meeting, para. 3 at p. 13.

73. Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, 1929.
74. The People of the State of Illinois, ex rel. Compagnie Nationale Air France v. the Honorable Louis J. Giliberto et al., Illinois Supreme Court, 1979. 15 Avi. 17429 383. N.E. 2d 1977 (III S.C. 1978) Cert. den. 441 U.S. 932 (1979).
75. Georgette Miller, Liability in International Air Transportation, 1979, p. 301.
76. Idem.
77. Idem, at p. 302.
78. Idem.
- 79.
80. Annex 13, Chapter I, Definitions.
81. Howie/van Dam, "Facilitating the Lease and Interchange of Aircraft", ICAO Bulletin, February 1989 at p. 9.
82. 98 ratifications, see Chapter III, note 7.
83. Article 17, Chicago Convention.
84. See note 35, Chapter I.
85. Memorandum of the Department of Justice of Canada, Dr. Gerald F. Fitzgerald on ICAO Special Subcommittee on Lease, Charter and Interchange, March 17, 1977.
86. supra, note 62, at p. 516.
87. See Chapter V, Subchapter III, para. 8.
88. Idem.
89. LC, 9th meeting, para. 11 at p. 55, Australia.
90. Idem, para. 10 at p. 55, Denmark.
91. Idem, para. 9, at p. 54, France.
92. Idem.

93. Idem.
94. LC, 9th meeting, para. 19, at pp. 56/57, Canada.
95. LC, 10th meeting, para. 5 at p. 60, France.
96. LC, 19th meeting, para. 2, at p. 103, USSR.
97. Idem., para. 19, at p. 107.
98. Idem., para. 6 at pp. 104/105, Director of the Legal Bureau.
99. Idem.
100. LC, 19th meeting, para. 7 at p. 105, Bulgaria.
101. English, Russian, French, Spanish.
102. Supra, note 97.
103. See text Article 83bis, para. (b) (Attachment J).
104. Supra, at note 38, at p. 147.
105. Supra, at note 38 at p. 145, and LC/SC Report on Article 77, of 24 July 1965.
106. Supra, at note 38 at p. 144, and LC/SC on Article 77, Report of 24 July 1965.
107. Idem.
108. Idem.
109. Idem.
110. See note 37, Chapter I.
111. Tokyo Convention, Article 18.
112. See Chapter I, paras. 7 and 9.
113. LC, 5th meeting, para. 2 at p. 25, Chairman of the LC.
114. LC, 5th meeting, para. 3 at pp. 25/26, Canada.
115. Idem., para. 6 at p. 26, Cuba.

116. Idem, para. 8 at p. 27, Poland.
117. Idem, para. 13 at pp. 27/28.
118. LC, 7th meeting, paras. 3 and 7 at p. 39, Belgium and Senegal.
119. Idem, para. 19, at p. 43, Chairman of the LC.
120. See note 3, Chapter III.
121. Supra, note 81.

CHAPTER VI
SOME FINAL REMARKS

1. When will Article 83bis Enter Into Force

It is now almost a decade since Article 83bis has been adopted by the 23rd Session of the Assembly of the ICAO, with no negative votes.¹

Generally, the time elapsing between the adoption of an amendment by the Assembly and its entry into force was never short. Article 93bis which was adopted in 1947 by the Assembly of the ICAO² only entered into force 14 years later in 1961. It must be emphasized that the 2/3 majority of the Assembly was 18 in 1947. Since it took quite a long time for Article 93bis to enter into force, it is probable that the Amendment Article 83bis will take at least the same amount of time.

The 2/3 majority rule was first applied in 1947 at a time where there were only 27 States Parties to the Chicago Convention. Today there are more than 6 times as many. It is worth considering whether the 2/3 rule is now outdated. However, it is important to notice that thanks to this rule the Chicago Convention has maintained a certain unity. Once an amendment enters into force there will be

already a substantial number of states adhering to that amendment.

To date 52 states have ratified the Protocol for the Amendment of the Chicago Convention by Article 83bis. In order to get the 98 required ratifications it will still take some time, some say years.

2. Workshop

In order to promote quicker ratification a workshop has been established at the initiative of The Netherlands and the United States. Some states that have already ratified Article 83bis are members to that workshop.³ The participants in the workshop seek ways to approach states that have not yet ratified the amendment and to ask them to take ratification into consideration. The workshop would also provide assistance and guidance, in connection with ratification of Article 83bis, if required.⁴ Additional ways are being sought for a speedy ratification of Article 83bis, like regional meetings, symposia, conferences.⁵

3. Duty for ICAO Member States to Ratify Article 83bis

In the Chicago Convention there is no provision implementing a duty to ratify amendments of the Chicago Convention. There is a specific provision which is only applicable to the Standards and Recommended Practices.⁶ States undertake (commit) themselves to collaborate in securing the highest practicable degree of uniformity in regulations. This commitment to the highest practicable degree of uniformity does however not apply to amendments of the Convention.

Some sort of duty could eventually be seen as threat of exclusion of some states from ICAO Membership as stated in Article 94(b) of the Chicago Convention. According to this provision, a state which has not ratified an amendment within a specified period of time shall cease to be a Member to the Organization and a Party to the Convention, if the Assembly provides so in its resolution recommending the adoption. Article 94(b) was never invoked in the history of ICAO, nor was it here in this particular matter.

4. "Law of Gravity"

As established above, there is no duty of ratification. An agreement of transfer functions and duties which is then to be recognized by the other contracting States must according to Article 83bis, take place between two states which have both ratified the new amendment. State A, being a Party to the Protocol implementing Article 83bis, could therefore be not willing to enter into agreement of transfer of function and duties with state B which has not yet ratified. A lease charter and interchange arrangement could therefore also be endangered. And state B may feel itself compelled to ratify Article 83bis.

5. Problems Related to Article 83bis

a) Flag of Convenience

A flag of convenience is a phenomenon known in maritime transportation. Countries, like Liberia and Panama with low wages, low taxes and perhaps lax enforcement of safety requirements, tend to have many ships on their registries.⁷

It is quite unlikely that the same will happen in air transportation with the implementation of Article 83bis

Maritime and air transportation are quite different in several respects. Aircraft is airborne only a few hours at a time. There is no need for crew quarters. There are strong trade unions and there is a high professional status of pilots. As far as safety is concerned, there would be only very few (if any) operators, who would willingly endanger their investment (their aircraft) at unnecessary risk.⁸ Actually strict control is exercised by governments over the operation and interchange of aircraft.⁹ For these reasons there seems to be no danger that the use of a "flag of convenience" would be successful in international air transportation. The concept of "substantial ownership and effective control" over the aircraft may set another disincentive to "flag of convenience". Thus there is hardly any danger of misuse of Article 83bis.

b) National Legislation

The real usefulness and therefore success of lease charter and interchange arrangements depends not only on Article 83bis and its entering into force but also on the particular states and their national legislation. A state adhering to the Protocol is not forced to enter into lease, charter and interchange arrangements.

National legislation may forbid or severely restrict the use of foreign registered aircraft in their territory. It can also forbid aircraft registered in its registry to be transferred according to lease, charter or interchange arrangement, particularly, if it wishes to retain its responsibility for the aircraft. Article 83bis is only of an optional character. All, parts or none of the functions and duties mentioned in that Article 83bis may be transferred.¹⁰

Article 83bis relieves states from the tremendous burden of supervising aircraft which are operating with foreign operators outside the jurisdictions of the State of Registry and is therefore a way to promote such arrangements of lease, charter and interchange.

On the other hand, one should not overlook the possibility of a highly developed state with high safety and maintenance standards leasing its aircraft to a Third World state. The former state would probably not prefer to transfer its responsibility for the safety and maintenance of the aircraft. Since Article 83bis is of an optional character not all duties and functions need to be transferred to that Third World state. A ratification of Article 83bis can only bring advantages. It still leaves the door open for states, who feel that its airplanes would not properly be maintained in the other State, not to transfer functions and duties.

c) Unsolved Problems

As already discussed in Chapter III not all Articles which gave rise to problems found their way into the amendment, particularly those provisions which are considered only to present purely theoretical problems or were not directly related to the transfer of functions and duties. Hence there are some marginal more theoretical problems left out. These do not however affect the aim of promoting lease, charter and interchange arrangements and connected therewith transfer of certain function and duties.

ENDNOTES - CHAPTER VI

1. ICAO Doc. 9317 A23 P/1-13, Assembly 23rd Session, Montreal, September 16 - October 10, 1980, Plenary Meetings, Minutes, 12th Meeting, at p. 146.
2. ICAO Doc. 4224, A-1 P/1-47, Assembly 1st Session, Meetings, Minutes, 26th Meeting.
3. Howie, van Dam, ICAO Bulletin, February 1989, at p. 10. Member of the Workshop are the United States, The Netherlands, German Federal Republic.
4. Idem.
5. Idem
6. Article 37 of the Chicago Convention.
7. Kean, "Interchange", Air Law Essays, at p. 123, operating costs are for these reasons much lower.
8. Idem.
9. Idem.
10. A Canadian Note on Article 83bis of the Chicago Convention - Lease, Charter, and Interchange of Aircraft in International Operations.

CONCLUSION

The work on Article 83bis started over two decades ago and this amendment has been adopted by the Assembly of the International Civil Aviation Organization in 1980 without negative vote. This amendment is still not in force today. Its history and the slow pace of ratifications have been discussed in this paper.

Advantages are not contested and it is difficult to figure out disadvantages. Reasons speaking in favour of a fast ratification are that lease, charter and interchange would be promoted because of lower costs and less administrative workload for government authorities and airlines.¹ The negotiation of bilateral agreements leading to the transfer of functions and duties would lead to a better exchange of information and thus to a greater uniformity of safety standards.² Article 83bis would in this manner contribute to safety in civil aviation in general.

State resources would be more efficiently spent in monitoring the operations, logs and licences pertaining to aircraft whose operators are based within that state.³

Article 83bis is of an optional character and not all functions and duties need to be transferred. Contrac-

ting States are not obliged to transfer the functions and duties if they do not feel like doing it, they are however obliged to recognize the transfer between two other Contracting States if they have properly been notified (directly) or if the agreement has been correctly registered and published.⁴

A clear view on who is responsible for a leased, chartered or interchanged aircraft would again be established. As already stated it is difficult to distinguish disadvantages of Article 83bis. Since the amendment is not yet in force there is no experience in a large scale of transfer of functions and duties. Actually, disadvantages often emerge only when experienced in practice. Some states may, however, be reluctant to ratify since they may fear to loose the control of the aircraft registered in its registry.

This problem can, however, be circumvented even within Article 83bis since the state is not obliged to transfer the functions and duties. If then State of Registry feels that the aircraft would not properly be maintained they can refuse to enter into a bilateral agreement on transfer of functions and duties with that particular state. They would in this case only be bound to accept transfer of functions and duties between other states.⁵ The usefulness and the credibility of the Chicago Convention as legal backbone of the International Civil Aviation Organization

are dependent on the willingness and cooperation of all Member States to shoulder their responsibility in actually making those changes effective.⁶

An amendment would remain a dead letter without such an action and thus threatening the system itself. In international civil aviation a maximum co-operation of ICAO member states is necessary to act together to make civil aviation safer and more efficient, to the benefit of all individual users and mankind itself.⁷

Article 83bis constitutes the first truly substantive amendment to the Chicago Convention and is necessary to preserve the vitality of the Chicago Convention by reflecting the realities.⁸ Lease, charter and interchange agreements will become more and more frequent in future. It has been mentioned that it would go even so far that airlines would become mere operators and no longer own the aircraft. These arrangements of lease, charter and interchange are therefore going to become more important, independent of the fact whether Article 83bis will be ratified or not. The question is whether or not these arrangements are going to be facilitated by the possibility of transfer of functions and duties. Without Article 83bis, there is no effect with respect to third states should bilaterally such an agreement of transfer have been arranged. The State of Registry would remain international-

ly responsible for the operation of aircraft. The system of provisional application should however be kept as a possibility since it will become increasingly difficult to get sufficient number of ratifications (today over 100!). It is regrettable that the way of provisional application as stated in the Vienna Convention on the Law of Treaties has not been applied. Article 83bis could have already been applied and advantages and perhaps also disadvantages could have been more clearly identified. The Convention nowadays does not reflect the entire reality and it is important for a Convention to keep track with new evolutions in order not to become less and less important and thus having negative repercussions on civil aviation. Therefore, it is highly desirable that the amendment enter into force as soon as possible.

ENDNOTES - CONCLUSION

1. IATA Discussion paper, Advantages of Ratifying Art. 83bis of the Chicago Convention - Lease Charter and Interchange in International Operation, 19 February 1989. (Bilateral agreements will of course still be necessary to discuss the modalities of the transfer, duration, whether or not all functions should be transferred, additional requirements, etc.)
2. Idem.
3. Idem.
4. Idem.
5. John T. Stewart Jr. in a discussion.
6. Howie, van Dam, "Facilitating Lease and Interchange of Civil Aircraft", ICAO Bull. 2/89.
7. Idem.
8. Supra, note 1.
9. Supra, note 5.

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Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air

Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, ICAO Doc. 8364

Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, ICAO Doc. 7364

Vienna Convention on the Law of Treaties, UN Doc. A/CON.39/27 23 May 1969

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"Note on the definition and use of the expressions 'lease, charter and interchange' in the proposed Art. 83bis of the Chicago Convention", December 12, 1977

"A Canadian Note on Article 83bis of the Chicago Convention" Lease, charter and interchange of aircraft in international operations (presented by Canada)

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James C. Halstead & Julius Maldutis, "GPA Group Ltd.", Salomon Brothers, Stock Research, February 1989, New York

Resolution A18-16

Problems arising out of the lease, charter and interchange of aircraft in international operations

- WHEREAS it is in the general interest of international civil aviation that arrangements for lease, charter and interchange of aircraft, particularly aircraft without crew, be facilitated;
- WHEREAS the international provisions in force contain no absolute impediment to the implementation of such arrangements;
- WHEREAS, inter alia, Annex 6 to the Convention on International Civil Aviation does not prevent the State of Registry from delegating to another State the authority to exercise the functions incumbent upon it pursuant to that Annex;
- WHEREAS such delegation may facilitate the implementation of arrangements for lease, charter and interchange of aircraft, particularly aircraft without crew;
- WHEREAS such delegation may only be made without prejudice to the rights of third States;
- WHEREAS the Convention on International Civil Aviation was developed prior to the widespread application of international lease, charter and interchange of aircraft, particularly without crew;
- WHEREAS the Convention on International Civil Aviation places on a State of Registry responsibilities that it may be unable to fulfil adequately in instances where an aircraft registered in that State is leased, chartered or interchanged, in particular without crew, by an operator of another State;
- WHEREAS the Convention on International Civil Aviation may not adequately specify the rights and obligations of the State of an operator of the aircraft leased, chartered or interchanged, in particular without crew, and
- WHEREAS the safety and economics of international air transportation may be adversely affected by the lack of clearly defined responsibilities for aircraft leased, chartered or interchanged, in particular without crew, under the existing provisions of the Convention on International Civil Aviation.

A

LEASE, CHARTER AND INTERCHANGE OF AIRCRAFT - ANNEX 6
TO THE CONVENTION OF THE INTERNATIONAL CONVENTION ON
CIVIL AVIATION

THE ASSEMBLY URGES STATES:

- (1) that, where arrangements for the lease, charter and interchange of aircraft - particularly without crew - would be facilitated, the State of Registry of such an aircraft, to the extent considered necessary, delegate to the State of the operator its functions under Annex 6 to the Convention on International Civil Aviation; and
- (2) that in such cases, the State of the operator change if necessary, its national regulations to the extent required to empower it both to accept such delegation of functions and to oblige the operator to fulfil the obligations imposed by Annex 6.

B

LEASE, CHARTER AND INTERCHANGE OF AIRCRAFT - CONVENTION
ON INTERNATIONAL CIVIL AVIATION, ITS ANNEXES AND OTHER
CONVENTIONS

THE ASSEMBLY DIRECTS THE COUNCIL, in order to take into account the present practices relating to international lease, charter and interchange of aircraft, particularly without crew:

- (1) to examine the Annexes to the Convention on International Civil Aviation with a view to making recommendations for their amendment as soon as practicable;
- (2) to examine expeditiously the Convention on International Civil Aviation, through the appropriate bodies of the Organization or, where deemed necessary, through a committee of experts in the technical, legal and economic fields established for that purpose and submit a report on the subject at the next session of the Assembly at which a Technical Commission is established; and
- (3) to obtain and distribute to Contracting States information concerning national laws and regulations pertaining to the lease, charter and interchange of aircraft, taking into account the financial consequences of this directive.

ATTACHEMENT B

Resolution A21-22

Lease, Charter and Interchange of Aircraft in International Operations

RECALLING that the Assembly at its 18th Session adopted Resolution A18-16;

RECALLING FURTHER that this resolution recognized that it is in the general interest of international civil aviation that arrangements for lease, charter and interchange of aircraft, particularly without crew, be facilitated;

WHEREAS the Convention on International Civil Aviation places on a State of Registry responsibilities that it may be unable to fulfil adequately in instances where an aircraft is leased, chartered or interchanged, in particular without crew by an operator of another State;

WHEREAS the Convention on International Civil Aviation may not adequately specify the rights and obligations of the State of an operator of the aircraft leased, chartered or interchanged, in particular without crew;

WHEREAS the instances of lease, charter and interchange of aircraft have substantially risen in number, thus presenting serious problems;

WHEREAS the provisions in the Annexes to the Convention on International Civil Aviation relating to the delegation of authority from one State to another to exercise certain functions may only be made without prejudice to rights of these States; and

WHEREAS the basic problem of ultimate responsibility of the State of Registry in this matter remains unresolved;

THE ASSEMBLY:

- (1) COMMENDS the Council for the actions taken thus far in its efforts to resolve the problems arising from the lease, charter and interchange of aircraft;
- (2) DECLARES that, nevertheless, the matter of lease, charter and interchange of aircraft in international operations continued to present serious problems which need solution;
- (3) DIRECTS the Council to further explore, on an expedited basis, solutions to the still unresolved problems, including, if necessary, the possibility of appropriate amendment of the Chicago Convention and to report thereon to the next Session of the Assembly at which there is a Technical Commission;
- (4) DECLARES that this Resolution supersedes Part B of Resolution A18-16

Resolution A22-28

Lease, Charter and Interchange of Aircraft in International Operations

RECALLING that the Assembly at its 18th and 21st Sessions adopted Resolutions A18-16 and A21-22;

RECALLING further that these Resolutions recognized that it is in the general interest of international civil aviation that arrangements for lease, charter and interchange of aircraft, particularly aircraft without crew, be facilitated;

WHEREAS the Convention on International Civil Aviation places on a State of Registry responsibilities that it can fulfil when the aircraft is operated by an operator of that State, as is normally the case, but it may be unable to fulfil adequately in instances where an aircraft is registered in that State is leased, chartered or interchanged, particularly without crew, by an operator of another State;

WHEREAS the Convention on International Civil Aviation may not adequately specify the rights and obligations of the State of an operator of the aircraft leased, chartered or interchanged, in particular without crew;

WHEREAS the instances of lease, charter and interchange of aircraft have substantially risen in number, thus presenting serious problems;

WHEREAS the provisions in the Annexes to the Convention on International Civil Aviation relating to the delegation of authority from one State to another to exercise certain functions may only be invoked without prejudice to rights of third States;

WHEREAS the law of certain Contracting States is not further adapted to this situation; (and)

WHEREAS the basic problem of ultimate responsibility of the State of Registry in this matter remains unresolved;

THE ASSEMBLY :

1. COMMENDS the Council for the measures taken thus far in order to facilitate the lease, charter and interchange of aircraft, on the one hand by adopting various amendments to the Annexes to the Chicago Convention and on the other by commissioning the study of an appropriate agreed text by a Working Group and then by a special subcommittee of the Legal Committee.
2. DECLARES that the matter of lease, charter and interchange of aircraft continues to present various problems which need solution.
3. DIRECTS the Legal Committee to study the report of the special subcommittee for the purpose of preparing an appropriate agreed text, which could take the form of an amendment to the Chicago Convention.
4. INVITES all Contracting States the provisions of whose laws inhibit the lease, charter and interchange of aircraft to review in due time such provisions with a view to removing those inhibitions and extending their powers in order to better enable them to exercise the new functions and duties which could be placed upon them as State of the Operator.

Resolution A23-2

Amendment of the Chicago Convention Regarding Transfer of Certain Functions and Duties

THE ASSEMBLY OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION,

HAVING MET in its Twenty-Third Session at Montreal on 6 October 1980,

HAVING NOTED Resolutions A21-22 and A22-28 on lease, charter and interchange of aircraft in international operations,

HAVING NOTED the draft amendment to the Convention on International Civil Aviation prepared by the 23rd Session of the Legal Committee,

HAVING NOTED, that it is in the general desire of Contracting States to make a provision for the transfer of certain functions and duties from the State of Registry to the State of the operator of the aircraft in the case of lease, charter or interchange or any similar arrangement with respect to such aircraft,

HAVING CONSIDERED it necessary to amend, for the purpose aforesaid, the Convention on International Civil Aviation done at Chicago on the seventh day of December 1944,

1. APPROVES, in accordance with the provisions of Article 94 (a) of the Convention aforesaid, the following proposed amendment to the said Convention:

Insert after Article 83 the following new Article 83 bis:

"Article 83 bis

Transfer of certain functions and duties

(a) Notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31 and 32(a). The State of registry shall be relieved of responsibility in re-

spect of the functions and duties transferred.

(b) The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.

(c) The provisions of paragraph (a) and (b) above shall also be applicable to cases covered by Article 77."

2. SPECIFIES pursuant to the provisions of the said Article 94(a) of the said Convention, ninety-eight as the number of the Contracting States upon whose ratification the proposed amendment aforesaid shall come into force, and
3. RESOLVES that the Secretary General of the International Civil Aviation Organization draw up a Protocol, in the English, French, Russian and Spanish languages each of which shall be of equal authenticity embodying the proposed amendment above-mentioned and the matter hereinafter appearing:
 - a) The Protocol shall be signed by the President of the Assembly and its Secretary General.
 - b) The Protocol shall be open to ratification by any State which has ratified or adhered to the said Convention on International Civil Aviation.
 - c) The instruments of ratification shall be deposited with the International Civil Aviation Organization.
 - d) The Protocol shall come into force in respect of the States which have ratified it on the date on which the ninety-eight instrument of ratification is so deposited.
 - e) The Secretary General shall immediately notify all Contracting States of the date of deposit of each ratification of the Protocol.

- f) The Secretary General shall immediately notify all States parties to the said Convention of the date on which the Protocol comes into force.
- g) With respect to any Contracting State ratifying the Protocol after the date aforesaid, the Protocol shall come into force upon deposit of its instrument of ratification with the International Civil Aviation Organization.

ATTACHEMENT E

Resolution A23-3

Ratification of Protocol incorporating Article 83bis
into the Chicago Convention

THE ASSEMBLY

HAVING ADOPTED Resolution A23-2 amending the Chicago
Convention by the addition of new Article
83bis,

URGES all Contracting States to complete any neces-
sary changes in their national law and to
ratify the amendment as soon as possible.

Resolution A23-13

Lease, Charter and Interchange in International Operations

WHEREAS it is in the general interest of international civil aviation that arrangements for lease, charter and interchange of aircraft, particularly aircraft without crew, be facilitated;

WHEREAS the international provisions in force contain no absolute impediment to the implementation of such arrangements;

WHEREAS inter alia, Annex 6 to the Convention of International Civil Aviation does not prevent the State of Registry from delegating to another State the authority to exercise the functions incumbent upon it pursuant to that Annex;

WHEREAS such delegation may facilitate the implementation of arrangements for lease, charter and interchange of aircraft, particularly aircraft without crew;

WHEREAS such delegation may only be made without prejudice to the rights of third States;

WHEREAS the Convention on International Civil Aviation was developed prior to the widespread application of international lease, charter and interchange of aircraft, particularly aircraft without crew;

WHEREAS the Convention on International Civil Aviation places on a State of Registry responsibilities that it can fulfil when the aircraft is operated by an operator of that State, as is normally the case, but it may be unable to fulfil adequately in instances where an aircraft registered in that State is leased, chartered or interchanged, particularly without crew, by an operator of another State;

WHEREAS the Convention on International Civil Aviation may not adequately specify the rights and obligations of the State of an operator of the aircraft leased, chartered or interchanged, in particular without crew until such time as the amendment to the Convention (Article 83bis) enters into force;

WHEREAS the safety and economics of international air transportation may be adversely affected by the lack of clearly defined responsibilities for aircraft leased, chartered or interchanged, in particular without crew, under the existing provisions of the Convention on International Civil Aviation;

- WHEREAS the instances of lease, charter and interchange of aircraft have substantially risen in number, thus presenting serious problems;
- WHEREAS the provisions in the Annexes to the Convention on International Civil Aviation relating to the delegation of authority from one State to another to exercise certain functions may only be invoked without prejudice to the rights of third States;
- WHEREAS the law of certain Contracting States is not further adapted to this situation; and
- WHEREAS the basic problem of ultimate responsibility of the State of Registry in this matter remains unresolved until such time as the amendment to the Convention (Article 83bis) enters into force;

THE ASSEMBLY

1. COMMENDS the Council for the measures taken thus far in order to facilitate the lease, charter and interchange of aircraft, on the one hand by adopting various amendments to the Annexes to the Chicago Convention and on the other by commissioning the study of an appropriate agreed text by a working group and then by a special subcommittee of the Legal Committee;
2. DECLARES that the matter of lease, charter and interchange of aircraft continues to present various problems which need solution;
3. URGES that, where arrangements for lease, charter and interchange of aircraft - particularly without crew - be facilitated, the State of Registry of such an aircraft, to the extent considered necessary, delegate to the State of the Operator its functions under Annex 6 to the Convention on International Civil Aviation;
4. URGES that, in such cases, the State of Operator change, if necessary its national regulations to the extent required to empower it both to accept such delegation of functions and to oblige the operator to fulfil the obligations imposed by Annex 6;
5. INVITES all Contracting States, the provisions of whose laws inhibit the lease, charter and interchange of aircraft, to review in due time such provisions and extending their powers in order to better enable them to exercise the new functions and duties which could be placed upon them as State of the Operator; and
6. DECLARES that this resolution supersedes Resolutions A18-16, A21-22 and A22-28.

ATTACHEMENT G

Resolution A24-2

to implement Art. 83bis

THE ASSEMBLY,

HAVING ADOPTED, at its 23rd Session, Resolution 23-2 amending
the Convention on International Civil Aviation by the
addition of a new Article 83bis;

REAFFIRMING Resolution A23-3 adopted at its 23rd Session;

HAVING NOTED that, it is highly desirable that the afore said
amendment comes into force as soon as possible, for the
benefit of all ICAO Member States, so as to facilitate
lease, charter and interchange of aircraft;

URGES all Contracting States which have not yet done so to
ratify the amendment as soon as possible.

ATTACHEMENT H

TEXT APPROVED BY THE SUBCOMMITTEE OF THE LEGAL COMMITTEE

Article 83bis

Transfer of certain functions and duties from the State
of Registry

(a) Notwithstanding the provisions of Articles 12, 31 and 32(a) of this Convention, when an aircraft registered in a contracting State is operated pursuant to an agreement of lease, charter or interchange or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 31 and 32(a) of this Convention. The State of registry shall be relieved of responsibility in respect of its functions and duties transferred.

(b) The transfer shall not have effect in respect of other contracting States before the agreement between States in which it is embodied has been registered and made public pursuant to Article 83, or directly communicated to the other States or States concerned by a State party to the agreement.

STATES WHICH HAVE RATIFIED THE PROTOCOL RELATING TO AN
AMENDMENT TO THE CONVENTION ON INTERNATIONAL CIVIL AVIA-
TION-----
Article 83bis, signed at Montreal on 6 October 1980

Oman	11 March 1981	1
United Kingdom	16 March 1981	2
Republic of Korea	23 April 1981	3
Hungary	27 May 1981	4
Ethiopia	25 June 1981	5
Bulgaria	7 July 1981	6
Egypt	11 September 1981	7
Barbados	5 October 1981	8
Netherlands	5 November 1981	9
Uruguay	7 January 1982	10
United States	15 February 1982	11
Iraq	4 March 1982	12
Uganda	10 March 1982	13
Chile	28 June 1982	14
Panama	3 August 1982	15
France	27 August 1982	16
Kenya	13 October 1982	17
Israel	25 February 1983	18
Czechoslovakia	25 February 1983	19
Lebanon	14 April 1983	20
Austria	25 April 1983	21
Guatemala	26 April 1983	22
Spain	11 July 1983	23
Belgium	23 September 1983	24
Seychelles	23 September 1983	25
Germany (FRG)	19 October 1983	26
Denmark	22 December 1983	27
Mali	11 January 1984	28
Philippines	31 January 1984	29
Cuba	17 May 1984	30
Haiti	21 September 1984	31
Greece	25 September 1984	32
Switzerland	21 February 1985	33
Tunisia	29 April 1985	34
Canada	23 October 1985	35
Italy	29 November 1985	36
Luxembourg	1 October 1986	37

Morocco	29 January 1987	38
United Arab Emirates	18 February 1987	39
Togo	24 April 1987	40
Pakistan	27 May 1987	41
Sweden	13 July 1987	42
Indonesia	29 July 1987	43
Argentina	12 August 1987	45
USSR	3 February 1988	46
Niger	8 April 1988	47
Guyana	2 May 1988	48
Bangladesh	2 September 1988	49
Antigua/Barbuda	17 October 1988	50
Vanuatu	31 January 1989	51
Cyprus	5 July 1989	52

ATTACHEMENT J

TEXT ADOPTED BY THE 23rd SESSION OF THE ASSEMBLY OF THE
INTERNATIONAL CIVIL AVIATION ORGANIZATION ----- *

Article 83bis

Transfer of certain functions and duties

(a) Notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to lease, charter or interchange or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31 and 32(a). The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.

(b) The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and the scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.

(c) The provisions of paragraphs (a) and (b) above shall also be applicable to cases covered by Article 77.

* underlined the differences to the text approved by the Subcommittee of the Legal Committee

ATTACHEMENT K

AMENDMENT TO ARTICLE 26 OF THE CONVENTION ON INTERNATIONAL
CIVIL AVIATION

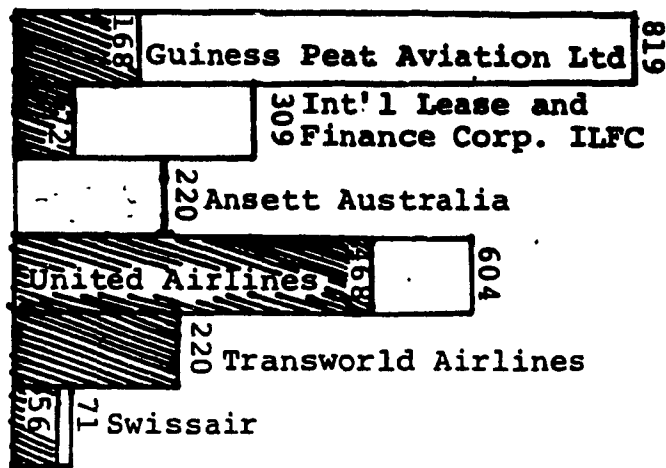
(Proposal by the Delegations of Finland and Kenya)

It is proposed that the last sentence of Article 26 should be amended to read as follows (amendments underlined):

"... The State in which the aircraft is registered, and in cases referred to in Article 83bis, the State of the operator shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to those States."

Attachement L

aircraft delivered and
aircraft ordered



Percentage of aircraft leased

