



LEGAL COMMITTEE – 35TH SESSION

(Montréal, 6 – 15 May 2013)

Agenda Item 3: Consideration of other items on the General Work Programme of the Legal Committee

SAFETY ASPECTS OF ECONOMIC LIBERALIZATION AND ARTICLE 83 *BIS*

(Presented by the Secretariat)

1. INTRODUCTION

1.1 During the 33rd Session of the Legal Committee in 2008, in accordance with a decision of the Council, LC/33-WP/4-6 was presented to the Committee for any study by a Sub-Committee on how to improve relevant ICAO provisions and guidance material in order to facilitate greater usage of Article 83 *bis* of the *Convention on International Civil Aviation* (Chicago, 1944). The Council had taken this decision in light of a Report on the Study on the Safety and Security Aspects of Economic Liberalization (C-WP/12480). The Committee concluded that no legal aspects pertaining to Article 83 *bis* and relating to the issues raised in the above-mentioned Study could be identified for further study by a Sub-Committee.

1.2 The Council, during the sixth meeting of its 184th Session on 23 June 2008, considered the Report on the 33rd Session of the Legal Committee. During the discussion, reference was made to issues which remained to be clarified to assist States in implementing Article 83 *bis*, more particularly relating to economic liberalization and to the establishment of unique identifiers for aircraft habitually involved in international civil aviation, in the context of the implementation of Article 21 of the Chicago Convention on the report of registrations. The Council accordingly agreed to request the Secretariat to further monitor and develop as necessary the issue of safety aspects of economic liberalization and Article 83 *bis* of the Chicago Convention, and to add this item to the General Work Programme. It was decided to include the subject “Safety aspects of economic liberalization and Article 83 *bis*” as a new item 6) in the revised General Work Programme of the Legal Committee.

1.3 The Assembly, during its 37th Session in 2010, considered a Secretariat report on the Work Programme of the Legal Committee, which noted specifically in respect of the aforementioned item 6) that the Legal Affairs and External Relations Bureau (LEB) had provided legal support to the Air Navigation Bureau (ANB) for the establishment of the necessary framework to implement Article 21 of the Chicago Convention regarding a database of aircraft and ownership, as well as for an international register of Air Operator Certificates (AOCs).

1.4 At the third meeting of its 197th Session on 2 November 2012, the Council considered C-WP/13886 on the General Work Programme of the Legal Committee. During the discussion, reference was made to the difficulties States encounter in implementing Article 83 *bis* and to the assistance which can be provided by ICAO to States in such cases. The view was further expressed that a number of outstanding issues required further consideration with respect to the implementation of Article 83 *bis*. The Council accordingly decided that the priority of the item “Safety aspects of economic liberalization and Article 83 *bis*” be raised from priority six to priority three.

2. DEVELOPMENTS

2.1 **Status and registrations** – As of 21 March 2013, 162 States were parties to the Protocol of amendment to the Chicago Convention relating to Article 83 *bis*. A total of 147 agreements pursuant thereto have been registered with ICAO, with registration still pending for about 80 agreements. Those 147 agreements involve in total 51 States. A continuously updated list of parties to Article 83 *bis* may be found on the ICAO website as part of the LEB Treaty Collection. The database of aeronautical agreements and arrangements (DAGMAR), also available via the LEB page on the ICAO website, features essential information on registered agreements.

2.2 **Assistance to States** – In order to provide assistance to Member States, detailed guidance material was issued by the Secretariat in 2003 through ICAO Circular 295 – *Guidance on the Implementation of Article 83 bis of the Convention on International Civil Aviation*. In line with such guidance, LEB further provides support and advice to ANB, mainly in the framework of the safety oversight audits with respect to the related audit protocol questions. LEB was also invited to make a presentation in a Seminar on Leasing and Article 83 *bis* organized by the European Aviation Safety Agency (EASA) in June 2010, which numerous European States attended.

2.3 **Safety Oversight Audits results** – Information collected from the ICAO Universal Safety Oversight Audit Programme (USAOP) shows that 68% of the States parties to Article 83 *bis* have not modified their primary aviation legislation, related operating regulations, and procedures to account for transfers of duties and responsibilities as envisaged by Article 83 *bis*. Moreover, audit team reviews of agreements signed under Article 83 *bis* have revealed that the majority of them actually did not provide for transfers of duties under Articles 12, 30, 31 and 32 a) of the Chicago Convention as per Article 83 *bis*, but rather specified issues relating to surveillance activities, which would in any case fall under the responsibility of the State of the Operator. As regards effective transfers of duties and responsibilities from the State of Registry to the State of the Operator under Article 83 *bis*, the agreements concluded to date have mainly addressed Article 32 a) (pilot licensing), while less than a handful addressed Article 31 (airworthiness certification).

2.4 **Level of implementation** – As considered by the Legal Committee during its 33rd Session, the Council had opined in 2005 that “the low number of registered Article 83 *bis* agreements was not due to the legal aspects of Article 83 *bis*; rather, it was attributable to the difficulties encountered by States in their bilateral negotiations”. Feedback received by LEB in this regard suggests that one particular difficulty lies in the level of authority required for the signature of such agreements. Although Circular 295, guideline 3.7, indicates that “the level of authority for signing transfer agreements should be equivalent to that required for administrative arrangements between aeronautical authorities”, the constitutional system of some States requires signature at ministerial or cabinet level, which is not always practicable, especially in respect of arrangements of shorter term.

2.5 **Short-term operations** – Further feedback also indicates that the formalities attached to the implementation of Article 83 *bis* may render it impractical in the context of (very) short-term leases, charters, or interchanges of aircraft. For instance, during the 6th ICAO Worldwide Air Transport Conference (ATConf/6; Montreal 18 to 22 March 2013), the Latin American Civil Aviation Commission (LACAC) presented a regional model for dual safety oversight as an alternative in view of the specific difficulties involved in applying transfer of responsibilities under Article 83 *bis* to short-term interchange of aircraft between distinct operators from different States.

2.6 **Safety oversight responsibilities** – As discussed in Council in 2008 (184/6), the implementation of Article 83 *bis* requires that States be aware at all times of who is responsible for safety oversight with respect to specific aircraft; so, whatever the level of economic liberalization, accountability for safety oversight must be clear. In this regard, Annex 6 – Operation of Aircraft, to the Chicago Convention has been amended so as to provide for the mandatory carriage of a certified true copy of the AOC on board aircraft, in line with guideline 3.12 in Circular 295. This requirement is intended to ensure proper identification of the State of the Operator upon inspection and has been applicable since 20 November 2008.

2.7 **Principal place of business** – Under Item 2.2 (Air carrier ownership and control), the ATConf/6 concluded there was broad support for encouraging States to continue to liberalize air carrier ownership and control through various existing measures, including via adoption of alternative criteria for designation of airlines based on “principal place of business and effective regulatory control”, as recommended by ICAO. It was emphasized that regardless of any change in regulatory arrangements, including liberalization of air carrier ownership and control rules, States must ensure that their safety oversight functions are carried out in compliance with ICAO Standards and Recommended Practices.

2.8 **Article 21 of the Chicago Convention** – The ICAO Aircraft Registration System (ARS) went on-line in November 2011, collecting information on the registration status, ownership, and operators for aircraft habitually involved in international civil aviation; 44 States are currently furnishing data to ICAO. The ICAO Air Operator Certificate (AOC) system, which collects information on AOCs, as well as related Operations Specifications, was implemented in January 2013 and rolled out for live testing by an initial sampling of 11 States. Following implementation of recommendations from these tests, ICAO is planning to open the system up to all ICAO Member States by the end of the third quarter of 2013. The ARS system will eventually function seamlessly with the AOC system, providing one stop access to aircraft safety information through one single ARS/AOC system.

3. CONCLUSIONS

3.1 States whose constitutional systems in principle require high-level authority for signing agreements under Article 83 *bis* should consider the possibility of signing umbrella agreements, which would provide for delegation of authority at lower level for concluding individual 83 *bis* arrangements with regard to specific aircraft. This could also be achieved through insertion of a dedicated umbrella clause into bilateral air services agreements.

3.2 Article 83 *bis* implementing agreements must be registered with ICAO and made public pursuant to Article 83 of the Convention. As noted in paragraph 2.1 above, the Secretariat is facing a backlog of registrations. Recently allocated resources should eliminate this backlog. Nevertheless, it is recalled that third states may be officially advised of any agreement by any State Party to such agreement by way of direct notification, as per paragraph b) of Article 83 *bis*.

3.3 With reference to Article 21 of the Convention, ICAO's progressive establishment of the ARS/AOC system should prove useful to accurately identifying the respective State of Registry and the State of the Operator for specific aircraft. In conjunction with the information available in DAGMAR, this should facilitate a proper determination of responsibilities for safety oversight, including when the aircraft concerned are the object of an agreement under Article 83 *bis*. The possible utility of an electronic interface between the ARS/AOC system and DAGMAR could be explored.

4. ACTION BY THE COMMITTEE

4.1 The Legal Committee is invited to consider this working paper and endorse the above conclusions.

— END —