



LEGAL COMMITTEE – 35TH SESSION

(Montréal, 6 – 15 May 2013)

Agenda Item 7: Report on work done at the Session

DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 35TH SESSION

The attached Appendix E relates to the draft Report of the Legal Committee.

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APPENDIX E

REPORT OF THE WORKING GROUP TO REVIEW LC/35 - WP/3-2 "SAFETY ASPECTS OF ECONOMIC LIBERALIZATION AND ARTICLE 83 *BIS*"

The Chairman of the 35th session of the Legal Committee requested this working group to review LC/35 - WP/3-2 "Safety Aspects of Economic Liberalization and Article 83 *bis*", presented by the ICAO Secretariat, and prepare a report whether there are any legal issues related to the negotiation of Article 83 *bis* agreements and their registration with the ICAO. In the alternative, this working group was requested to provide some recommendations to improve the quality of these Agreements.

An article 83 *bis* Agreement is a tool to transfer certain functions and duties normally incumbent on the State of Registry to the State of the Operator, in the case of lease, charter or interchange of an aircraft. Without these agreements, safety oversight would be costly and complicated as the State of Registry may have to follow the aircraft to foreign jurisdiction to ensure that they are in compliance with their safety regulations. Article 83 *bis* makes clear that in order to have an 83 *bis* Agreement to be in place, the State of Registration and the State of the Operator must agree to transfer all or part of the State of Registry's legal responsibilities under Articles 12, 30, 31 and 32 *a*) of the Convention, which generally relate to Licences of Personnel, Certificate of Airworthiness, Aircraft Radio Equipment, and Rules of the Air. These agreements are therefore useful when aircrafts are transferred on a long term basis.

At the outset, this working group is of the view that there are no legal issues per se with language of Article 83 *bis* or the draft agreement proposed by ICAO in its Circular 295; however, consequential legal issues may arise in the implementation of Article 83 *bis* due to a lack of understanding of some member States as to the applicability of Article 83 *bis* and the nature of leasing. ICAO Secretariat has also indicated in its Working Paper LC/35 - WP/3-2 that most of the Article 83 *bis* Agreements registered with ICAO are not valid Article 83 *bis* Agreements. They are mostly lease agreements whereby both States agree to carry out certain aspects of their respective function without transferring the safety oversight- which is not the real intent of an Article 83 *bis* Agreement. In fact, most of these agreements, according to the Secretariat, are standard lease agreements.

A related issue is States' registration of these agreements with ICAO as "Article 83 *bis* Agreements" when they do not actually involve a transfer of the State of Registry's legal responsibilities, as contemplated by Article 83 *bis*. This may have some unintended consequences, as third States who have ratified Article 83 *bis* may be lead to believe that such agreements involve a transfer of the State of Registry responsibilities, which they are obliged to recognize under Article 83 *bis*, paragraph *b*), when actually they do not. As for the States that have concluded these so-called 83 *bis* Agreements, the registration of an agreement pursuant to Article 83 *bis* that does not involve a transfer of State of Registry responsibilities under Articles 12, 30, 31 or 32 *a*) of the Convention may be evidence of a lack of understanding about the applicability of Article 83 *bis*, which is perpetuated when the agreement is entered into the ICAO registry. To exacerbate this issue, ICAO has clearly indicated that they do not have the legal

mandate authority, or resources to conduct substantive reviews of these agreements, nor any of hundreds of the various types agreements that States submit to the ICAO registry on a yearly basis. In fact, ICAO has indicated that because of the large volumes of agreements they receive, there is a backlog of agreements awaiting registration.

This Working Group has discussed these issues in detail and would like to make the following recommendations to the Chairman of the Legal Committee:

1. Various aircraft lease and/or interchange arrangements are useful tools for air carriers to use to meet fluctuating operational needs, allowing them to take advantage of market opportunities and increased demands despite a lack of internal fleet capacity during periods of peak demand. However, there seems to be a lack of understanding amongst States as to the applicability of Article 83 *bis* and its applicability to these types of transactions. Without doubt, this group is of the view that updated guidance on the applicability of Article 83 *bis* and the nature of 83 *bis* agreements should be available to Member States. As a first step, the Secretariat could review ICAO Circular 295 to determine whether changes are necessary to address some key questions, such as the voluntary nature of these agreements; when these various aircraft lease and/or interchange agreements implicate Article 83 *bis*; whether agreements for transfer of aircraft from one State to another State on a short term basis involve (or necessitate) a transfer of State of Registry responsibilities under Article 83 *bis*; the legal implications for each State of entering into an Article 83 *bis* Agreement, etc.
2. This group also recommends that a task force be formed with appropriate ICAO Secretariat personnel and representatives from Legal Committee with expertise in dealing with Article 83 *bis* Agreements to assist in revising ICAO Circular 295 and also to better educate Member States on the applicability of 83 *bis* Agreements.
3. There are two issues with registration: (1) Agreements that do not involve a transfer of State of Registry responsibilities being registered pursuant to Article 83 *bis*, and (2) the delay in registration. The first issue might be addressed by educating Member States as to the application of Article 83 *bis* and the purpose and effect of registering these agreements with ICAO. In this regard, the task force recommended in #2 could be of help. With respect to the delay, this group recommends that subject to availability of resources ICAO consider the option of developing a web based registry where Member States can input information and upload agreements themselves electronically rather than sending the agreement to ICAO to complete the registration process. Legal issues relating to the implementation of a web-based registry could be considered by the Task Force. Another possible option would be for States to notify other States directly and on a parallel basis as outlined in Article 83 *bis* (b).
4. Another recommendation of this Group is that when regional conferences are held, ICAO consider including Article 83 *bis* as an agenda item and promote the relevance of these agreements to Member States. This would result in a better understanding of these agreements amongst all Member States.

5. The working group was doubtful as to the benefit of having these agreements for short term leases due to the complexities involved in negotiating these agreements, since many States consider them as formal treaties, as well as the financial costs associated with their implementation. Therefore, this group recommends that ICAO should continue to encourage States to be flexible in negotiating these agreements so that they do not end up negotiating treaties each time an Article 83 *bis* Agreement has to be concluded. Although this would depend on the nature of each State's national laws and their Constitution, ICAO should promote awareness of arrangements that give States flexibility with respect to the approval level of Article 83 *bis* Agreements such as umbrella agreements and delegate further signing authority to State officials to negotiate future agreements with the same State given the nature of short term leases that are more common these days.

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