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**COMMENTS ON THE REVISED DRAFT REGULATIONS**

(Submitted by Sir Roy Goode)

1. This document contains comments on the revised draft Regulations (as set out in MACPC6 – Doc. 5) for the future International Registry to be established under the MAC Protocol submitted by Sir Roy Goode. Sir Goode was the Rapporteur at the MAC Protocol Diplomatic Conference in 2019 and is the author of the MAC Protocol Official Commentary.

## PROPOSED CHANGES TO DRAFT REGULATIONS FOR THE MAC REGISTRY, WITH COMMENTS

### General note

1. The drafting of regulations for an International Registry is an extremely complex matter requiring close attention to detail and the Regulations Working Group is to be congratulated on the high quality of its proposed text of the MAC Registry regulations. The comments that follow are in no way intended to detract from the Group's achievement, the Group itself having flagged the fact that the draft Regulations were Baseline Regulations and left open for further consideration some of the issues raised below. I have not sought to draft for the suggested changes pending decisions (if any) to be taken on them by the Preparatory Commission.

2. The drafting changes proposed below arise primarily from intensive work I undertook in collaboration with Howard Rosen, Chairman of the Railway Working Group, to revise the draft regulations for the Rail International Registry approved at a meeting of its Supervisory Authority which was established at a meeting in Bern on 8 March 2024. Not all the revisions made are appropriate for the MAC Registry regulations but they do incorporate a number of useful ideas which I suggest could be considered for inclusion in the MAC Registry regulations. I would draw attention in particular to:

- (1) identification of the object;
- (2) the rules on non-Convention filings (Rail Regulations Section 7.1);
- (3) the need for enhanced protection against the improper registration of a non-consensual right or interest("R-NCRI");
- (4) the introduction of a facility for filing a caution against registration (Sections 5.6.3 *et al*);
- (5) the insertion of a number of new definitions;
- (6) a provision for "Registrar discretion" to indicate that with stated exceptions the Registrar is not accountable for the exercise of his or her judgement in granting or refusing an application for registration.
- (7) the need to make a slight change to the regulations relating to the registration of assignments.

### Identification of the object

3. An interest in an object can be registered only if the description of the object contains its manufacturer's serial number and "such additional information as required to ensure uniqueness (Protocol, Article XVII). This vital element is missing from Section 5.1(c)(ii). Further, that provision refers to one other item of descriptive information "if so required by the Procedures." So Section 5.1(c)(ii) should be amended to read "such other item of descriptive information about the equipment specified in the Procedures as is necessary to ensure uniqueness."

### Non-Convention filings

4. It has long been the feature of the Cape Town registry system that interests are registered even though they fall outside the Convention. This may be through inadvertence but is more commonly done in the hope that such registration will constitute notice of the interest under national law. The Rail Registry regulations have provisions on non-Convention filings which could usefully be adopted and I have incorporated them into the draft MAC registry regulations.

### Unilateral registrations

5. In most cases a registration can be effected only with the electronic consent of the party against whom the registration is to be made. There are two cases, however, where no such consent

is involved: registration of an R-NCRI, for which provisions is made under Article 39 of the Convention, and registration of a pre-existing right or interest, provided by Article 60(1),(3) of the Convention as amended by Article XXVII of the MAC Protocol. The latter is unlikely to give rise to an abusive registration because the only effect of the registration is to preserve whatever priority the registrant may have under the applicable law. By contrast, In the rail registry regulations the rules on registration of an R-NCRI (for which provision is made by Article 39 of the Convention) have been tightened because of abuse of the system. In particular, registrations have been made where (a) no Contracting State has made a declaration under Article 39, (b) the registrant does not hold a registrable interest, (c) the interest sought to be registered falls outside the scope of the declaring State's declaration, or (d) the Convention does not apply to the interest because the debtor was not situated in a Contracting State at the time of the agreement.

### **Cautions**

6. The draft MAC registry regulations contain protective provisions similar to those of the rail registry regulations. However, the rail registry regulations also contain useful provisions for entry of a caution in the International Registry which has the effect of requiring the Registry to give notice to a person named as creditor or debtor that the Registrar has received an application for registration of an R-NCRI or a pre-existing right or interest. In the case of an R-NCRI the Registrar is required to affix to the notice a copy of any documentary evidence submitted in connection with the proposed registration. These provisions, provide a creditor who is potentially adversely affected to challenge the attempted registration, could usefully be adopted in the MAC registry regulations.

### **Additional definitions**

7. Certain definitions in the rail registry regulations could usefully be adopted in the MAC registry regulations:

	<i>Purpose</i>
"Caution"	Needed if there is provision for entry of a caution
"Lapse date"	A phrase used by currently undefined
"Non-Convention filing"	Needed if the effect of a Non-Convention filing is covered
"Person"	To avoid doubt, particularly for trusts
"Pre-existing right or interest"	Definition convenient to avoid recourse to the Convention
"Primary obligor"	Connected to the R-NCIR provisions
"Registrar discretion"	See below, paragraph 8.

### **Registrar discretion**

8. There is a range of matters on which the Registrar has to exercise his or her judgment. These are conveniently listed in the definition of "Registrar discretion" in Section 16.7 of the rail registry regulations. The general principle embodied in those regulations is that the exercise of Registrar discretion is to be treated as valid and conclusive with respect to all matters relating to the International Registry (Section 16.7.1) and that neither the Registrar nor the International Registry is to incur any liability in relation to the exercise of Registrar discretion (Section 16.7.2). There are, however, exceptions for cases where the Registrar has acted improperly. Under Section 16.7.3, while the exercise of Registrar discretion does not in general constitute an error or omission for which the Registrar would be liable under Article 28 of the Convention this immunity does not apply:

- (a) in the case of the Registrar's gross negligence or intentional misconduct;
- (b) where the Registrar has failed to consider one or more documents sent to the Registrar as provided in the Regulations or the Procedures; or
- (c) where the decision of the Registrar was manifestly based on legally irrelevant documents.

It is suggested that similar provisions could usefully be incorporated into the MAC registry regulations.

**Registration of an assignment of an unregistered interest**

9. The draft regulations rightly provide for registration of an assignment of an unregistered interest. However, it needs to be made clear that an assignment of an interest which is neither registered nor registrable may not be registered, the purpose being to make it clear that while an assignment of an unregistered interest is permissible as provided by Article 16 of the Convention such an interest must at least be capable of registration, so that an assignment of an interest which is neither registered nor registrable may not itself be registered. A typical case is where the interest relates to classes of equipment or provides for floating security such as a floating charge. Such an interest will not relate to an item of MAC equipment that is uniquely identifiable, a crucial requirement for registration. Again, if the interest is not registrable because it falls outside the Convention altogether then registration of an assignment of that interest would have no Convention effects.

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