

ASSEMBLY – 35th SESSION

Agenda Item: No.17, Enhancement of ICAO Standards

**Harmonizing States' Regulations
for
International Fractional Ownership Operations**

(Presented by the International Business Aviation Council)

Summary

This Working Paper describes current problems relating to the lack of harmonized policy or standards for international fractional ownership operations. It examines the applicable Articles of the Chicago Convention provisions and describes the problems inherent in differences in how States are interpreting these in the context of 'remuneration or hire'. The Working Paper invites the Assembly to recommend that the Council conduct a study with the objective of developing policy and guidance with respect to a methodology for determining the commercial or non-commercial nature of international aircraft operations.

References

Chicago Convention
IBAC Position Paper (found at
http://www.ibac.org/Library/ElectF/poli/position_paper_nov_18_2003.pdf
www.ibac.org)

1. Introduction

1.1 Fractional ownership operations have been amongst the fastest growing sectors of aviation over the past 15 years. Over 800 aircraft are now operating worldwide in various programmes designed for multiple owners to share aircraft in a pooled arrangement, operated by a programme manager. (Attachment A provides a description of fractional ownership programmes)

1.2 No internationally harmonized policy or standards exist for regulating fractional ownership operations. As a result different, and in some cases conflicting, rules are being established by some States, and other States are seeking interpretation of existing ICAO provisions with respect to 'commercial' or 'non-commercial' determinations. There are significant implications for international business aircraft operations, not only for fractional ownership operators (and, by extension, owners of fractional shares) but also for commercial operators in the face of different treatments depending upon how States classify fractional operations. In addition, regulators face the challenge of how to regulate aircraft from another State when they are operating to a different rules base compared to operators in their own State.

2. State Regulatory Issues

2.1 The regulatory issue pertains to whether the operation of aircraft in fractional ownership programmes should be considered 'commercial' or 'non-commercial'. Some States have determined that such operations are commercial and others that they are non-commercial. Most other States are awaiting guidance. Essentially all States agree that the determination is an 'economic' issue as safety of fractional operations is not at issue given the excellent safety record of fractional operations.

2.2 The United States regulates fractional ownership under FAR Part 91, Subpart K, a section of the non-commercial rules developed specifically to regulate fractional ownership programmes and operations. Subpart K imposes additional requirements on owners and operators such as the need for an operational control system. Conversely, some European States have determined that fractional operations are 'commercial', although this can often depend on the design of the specific programme. The European Civil Aviation Conference (ECAC) has established a task force in an attempt to develop a unified European position. Many other States around the world are taking a 'wait and see' approach or are believed to be awaiting ICAO guidance.

3. ICAO Convention and Annexes

3.1 There is significant room for interpretation in the Convention on International Civil Aviation (Chicago 1944), and its Annexes, as regards to whether fractional ownership operations should be considered 'commercial' or 'non-commercial'. Commercial operations are those "*involving the transport of passengers, cargo or mail for remuneration or hire*". Yet the Convention does not provide a definition or guidance on the meaning of "*for remuneration or hire*", "*for remuneration or reward*" or "*commercial air transport*".

3.2 The relevant articles in the Convention are Article 1 (Sovereignty), Article 5 (Right of non-scheduled flight), Article 7 (Cabotage), Article 11 (Applicability of air regulations), and Article 12 (Rules of the air). There is nothing in these Articles or elsewhere in ICAO policy to give guidance regarding the determination of commercial or non-commercial as applied to fractional ownership operations. (For details of the ICAO provisions refer to a copy of the Convention or to the IBAC Paper cited as a reference).

3.3 The problem lies in the varying interpretations of the meaning of "remuneration or hire". Since there is no guidance within ICAO policy on what constitutes "remuneration or hire", both States and individuals have made their own interpretations. Further complicating the issue is that fractional ownership programmes take many forms and States and individuals are making conclusions based on their knowledge of one of the fractional designs.

4. Implications for International Operations

4.1 Unequal treatment of business aircraft operations between States can result in trade advantages to one State over another and business advantage to one company over another, therefore impacting negatively on the efficiency and cost effectiveness of business aviation services.

4.2 The fiscal and economic implications of the differences are profound. Business aviation's 'raison d'être' is the safe, secure and efficient transportation of business passengers and goods rapidly between locations of business activity. The economic viability of businesses often depends on short notice transportation of personnel; without this flexibility the world's corporations face considerable economic penalty with potential for adverse impact on global productivity and national economies.

4.3 Aviation consists of a vast range of different air transportation designs and concepts. Unfortunately, they do not all fit neatly into the commonly recognized domains of either 'commercial' or 'non-commercial' operations. Given the very wide differences around the world on the interpretation of "remuneration or hire" as applied to fractional ownership operations, and the evolving differences in regulatory approaches, there is great potential for inequitable treatment of operators in international operations of business aircraft. Resolution of the problem can be achieved by development of policy and guidance by ICAO.

5. Action by the ICAO Assembly

5.1 The Assembly is invited to recommend that the Council conduct a study, the purpose being to produce a policy and criteria for making determinations regarding the commercial or non-commercial nature of international aircraft operations. The policy is to provide specific guidance with respect to the meaning of "remuneration or hire" as applied to fractional ownership operations.

**Attachment A
To
ICAO Assembly WP/xxx**

Description of Fractional Ownership Operations

1. Although shared aircraft ownership has existed since early days of aviation, the current concept of fractional ownership was not introduced until 1987. Since that time a number of programmes have been introduced, primarily in North America, Europe and South America.
2. Fractional ownership has not been officially defined within the international community, but is generally recognized to have the following characteristics:
 - ✓ a number of aircraft are in the programme;
 - ✓ a number of owners, each of whom owns one or more shares of at least one aircraft;
 - ✓ the generally recognized maximum number of owners per aircraft is 16 as per the definition of fractional ownership in US Part 91 (may be up to 1/32 ownership of a helicopter);
 - ✓ aircraft are pooled in a dry lease arrangement (an owner may be utilizing an aircraft other than the one for which he/she has a share);
 - ✓ a contracted management services company provides services including piloting and maintenance;
 - ✓ owners are considered to be operators and assume some of the liability; and
 - ✓ owners are required to purchase a share(s) of an aircraft and sign an agreement for management services and a dry-lease interchange agreement.
3. Although 'operational control' is a consideration in the management of a fractional ownership programme, it is not necessarily a defining characteristic.
4. Since early days of fractional ownership there has been debate regarding whether these operations should be deemed commercial or non-commercial. The distinction is important as fractional ownership operations are designed to transport persons on business travel for which flexibility is critical. The freedom allowed non-commercial flights under the Chicago Convention provides this flexibility and is one of the principal reasons why corporations own and operate aircraft.
5. Examples of how different rules apply to commercial and non-commercial operations are:
 - a) Economic: rules require commercial flights to have specific or general authority (permits) to operate in another State, whereas non-commercial operations do not need prior approval;
 - b) Operating: rules for corporate aircraft (non-commercial) offer more freedom than those for Air Transport (commercial) as they permit operations on short notice without advance approvals, thus accommodating the flexibility demands of businesses (efficiency); and
 - c) Customs: rules applicable to non-commercial operations normally permit carriage of passengers (within some limits) between locations within a foreign State, whereas similar freedoms are not permitted in Air Transport (cabotage) without advance approval.

6. A very significant factor in assessing whether fractional operations should be considered 'commercial' or 'non-commercial' is that there are a great number of different organizational and financing designs, ranging from a simple shared ownership arrangement to a very complex multi-national operation with a large variation in costing and payment plans. This has caused considerable misunderstanding, as opinions are being made based on one of the designs without the realization that many other variants exist. In other words, the concept of 'fractional ownership' is too complex to make a simple determination that they are collectively either 'commercial' or non-commercial'.