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## Memorandum

NAME	POSITION
TO Gary Prosser ; Jon Price	Secretary General of IALA ; Deputy Chair of IALA's Legal Advisory Panel
FROM Hector O. Farina	
DATE January 15, 2014	

### IALA TERMINATION AS NGO REGULATED BY 1901's FRENCH ASSOCIATIONS LAW

On January 10<sup>th</sup> you asked us to intervene as a Legal Counsel on two broad issues in the framework of the abovementioned matter: Amendment to IALA's Constitution and the steps required for termination.

In that respect, this memorandum is aimed at, firstly, presenting our comprehension of IALA's current general and specific objectives and the general scope of work expected from IALA's Legal Counsel (1.) and secondly, focus on the specific issues which are part of the requested scope of work (2.).

In the second part of this memorandum we will develop the main issues related to our legal assistance concerning the termination of IALA as an association regulated under French law, the transfer and reception of rights, interests, assets and liabilities of the Association in favor of the newly created IGO and the administrative formalities required in the framework of the termination proceedings.

Two appendix are included to the present memorandum: Appendix I contains a suggested roadmap for the Legal Counsel's assistance to achieve IALA's objectives and Appendix II contains a list of documents we expect to receive at your earliest convenience to allow us to assist you in the most appropriate manner during the next steps of the process.

#### 1. Our understanding of IALA's objectives and of our general scope of work

##### 1.1 IALA's objectives

The International Association of Marine Aids to Navigation and Lighthouse Authorities (IALA) is a non-governmental organization (NGO) that has been established in 1957 under French Law<sup>1</sup> with the aim of fostering *"the safe, economic and efficient movements of vessels, through improvement and harmonization of aids to navigation worldwide and other appropriate means."*

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<sup>1</sup> Law on Associations of 1901.

Decision has been taken to change the current status of IALA from that of an association governed by French Law to that of an inter-governmental organization (IGO), governed by an International Agreement.

By changing its status into that of an IGO, having Governments as National Members, IALA will be able:

- to adapt its legal status to its scope of intervention;
- to enhance its funding possibilities;
- and to ensure that its services reach the international maritime community.

Prior to the status' modification, IALA is seeking to amend its Constitution as NGO to dissolve itself and facilitate the transfer of its assets to the new IGO. That Constitution's amendment as the termination of IALA will be the framework of our legal assistance.

### **1.2 General scope of the Legal Counsel's work**

According to our comprehension, the following tasks are required from the Legal Counsel to achieve IALA's objectives:

- Legal advice and opinions on the amendment of the current Constitution, notably article 13 of the IALA's current Constitution;
- Legal advice on termination proceedings;
- Legal advice on the necessary measures for the transfer of IALA's rights, interests, assets and liabilities;
- Legal advice on identifying and overcoming any legal restrictions on the transfer of rights, interests, assets (tangible and intangible) and liabilities from the Association to the new IGO;
- Undertake the necessary measures to allow IALA to continue to operate efficiently in the period between the General Assembly and the entry into force of the International Agreement;
- Termination of IALA.

## **2. Specific issues related to our scope of work**

In light of the objectives presented above, we develop hereafter the main issues identified in your briefing note, which are: the amendments of IALA's current Constitution **(2.1)**, the transfer of IALA's rights, interests, assets and liabilities to the new IGO **(2.2)** and the termination of IALA as NGO **(2.3)**.

### **2.1 Amendments of IALA's Constitution**

In your briefing note you informed us that the following amendment of IALA's Constitution will be proposed in the next General Assembly:

*"In the event of IALA being constituted as an International Organization based on an International Agreement this Constitution will terminate without further action when the International Agreement enters into force. The ownership of all assets and liabilities will, at that date, be formally transferred free of charge and without reservation into the possession of the IALA constituted according to the International Agreement."*

The proposed amendment is aimed at allowing the Association, through its governing bodies, to:

- exercise the necessary powers to terminate the Association;

- and to transfer the rights, interests, assets, liabilities and other matters of the Association to the new IGO.

After a first analysis of IALA's current constitution (that we received only in English), it is to our comprehension, that the current article 13 of the Constitution is drafted in conformity with IALA's objectives regarding the termination and the transfer of assets, and that possibly the proposed amendment will not be necessary.

Indeed, concerning termination, article 13, in its part, related to termination of the Association refers to a decision of the General Assembly taken in the conditions foreseen by article 12 of the Constitution, which provides that to validate such a decision it needs to be made by *"two-thirds majority of National members attending a General Assembly"*.

In other words, the Constitution clearly provides the procedure allowing the General Assembly to take the decision of termination.

Concerning, the transfer of rights, interests, assets and liabilities, article 13 provides that the *"counsel is responsible for the winding up of IALA and distribution of assets to charitable or technical organisations connected with marine aids to navigation."*

From our point of view, this provision allows the Counsel to take all the necessary measures to transfer the assets (which include interests, rights and attached liabilities) to the new IGO. We understand that the latter shall be considered as a *"technical organisation connected with marine aids to navigation."*

We understand that a General Assembly will take place in La Coruña in May 2014. In such General Assembly, or in a following one, the decision of termination could be taken and the General Assembly could give mandate to the Counsel to take any appropriate measures to properly terminate the Association and transfer its assets to the new IGO (see point 2.3).

Nevertheless, if for any reason that we have not been informed with (i.e. the Counsel's will to avoid any potential ambiguity), IALA decides to proceed with the amendment, in our opinion, it would be highly recommended to redraft the entire article and not to just add a new paragraph, which could complicate the comprehension of the specific winding up objectives.

For the timing of the procedure, particular attention has to be made to the fact that the Constitution's amendment is subject to certain formalities in addition to the internal process, governed by the Constitution itself. In other words, the decision to terminate an Association has to be completed by administrative formalities in regard to the French Law of Associations.

Indeed, changes in Associations' Constitutions as well as termination itself have to be declared to the French Administration<sup>2</sup> within a period of three (3) months<sup>3</sup>. The declaration is mandatory and has to be done either through a specific **"form"**<sup>4</sup> or sent as free form letter to the French Administration.

The opposability to the third parties of the related changes in the Association's Constitution is subject to such declaration. Any default in such a declaration can lead to penal sanctions.

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<sup>2</sup> Changes in Associations' Constitutions has to be communicated to the 'greffe des Associations', 'Centre des finances publiques' (if taxation in France), Insee and Urssaf.

<sup>3</sup> Loi on Associations of 1901, article 5 paragraph 4.

<sup>4</sup> Formulaire Cerfa n°13972\*02.

The changes are opposable to third parties from the date of the declaration<sup>5</sup> and they have to be held in a **special register** which has to be presented to administrative and judicial authorities every time they request it<sup>6</sup>.

Finally, a non-binding publicity measure is possible, and in the present case advisable, in the JORF (Journal Officiel de la République Française) at the same time as the declaration.

It is to be noted that a law draft is currently discussed in French Parliament<sup>7</sup>. Its articles 41 and 42 may change the procedure concerning termination and modification of Constitution of Associations. In that regard, particular attention should be given to any changes on French legislation related to the Association that could possibly occur from now until the termination / transfer of assets step.

## 2.2 Transfer of rights, interests, assets and liabilities from the Association to the new IGO

### 2.2.1 *Transfer of rights, interests, assets and liabilities from the Association*

According to the briefing note, you have asked us to point out any legal restrictions on the transfer of rights, interests, assets and liabilities from IALA to the new IGO, and to provide you with the measures that can be taken to minimise their impact.

First of all, we have to mention that it is not necessary for the transfer of rights, interests, assets and liabilities from the Association to the new IGO to occur, only, during the winding up and termination process.

However, it is imperative that both entities exist at the moment of the transfer.

Indeed, the bullet point 12 of point 8.2.3 of the Constitution provides the Counsel “*may authorize the purchase, sale, renting or letting of property and the granting and obtaining of loans whether or not secured by mortgage, required for the running of the Association*”.

In the context of this article, it appears that letting of can be considered as the awarding of property. If that is the case, the Counsel has then sufficient powers to transfer, free of charges, the rights, interests, assets and liabilities from the Association to the new IGO prior to the termination, and even before any decision of termination under the sole condition that such transfer satisfies the objectives of the Association (article 8.2.3 bullet point 12: the Counsel “*may authorize the purchase, sale, renting or letting of property and the granting and obtaining of loans whether or not secured by mortgage required for the running of the Association*”).

Nevertheless, we have to read the French version of IALA’s Constitution to ensure that our understanding was correct.

From another perspective, according to IALA’s Constitution, the Counsel has the same power of transfer in the event of the termination of the Association. Indeed, article 13 provides that the Counsel is responsible for the “*distribution of assets to charitable or technical organisations connected with marine aids to navigation.*”

In other words, once the IGO has been created, IALA is presented with two options:

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<sup>5</sup> Loi on Associations of 1901, article 5 paragraph 5.

<sup>6</sup> Loi on Associations of 1901 article 5 paragraph 6.

<sup>7</sup> Draft Bill on social and united economy (*Projet de loi relatif à l'économie sociale et solidaire*) (ESSX1315311L).

- The transfer of the rights, interests, assets and liabilities during the lifespan of the Association, i.e. before the winding up of the Association; and
- The transfer of the rights, interests, assets and liabilities during the winding up of the Association.

That being said, it is necessary to confirm, after reviewing French version of the Association's Constitution, that the Constitution awards a governing body the necessary powers to exercise such a transfer during the lifespan of the Association.

Nonetheless, both cases will require a separate transfer of each right, interest, asset and liability. The reason being is that there is no legal basis for the global transfer of IALA's current estate to the new IGO. Generally, the global transfer of an estate is carried out in the framework of a corporate merger, acquisition, transformation etc. Such operations are regulated according to the status of the entity. By way of example, global transfer of estates between companies is regulated by the French Commercial Code. Similarly, aspects concerning mergers, acquisitions, split ups and transfer of assets between associations are regulated by several texts, including but not limited to the French Tax Code.

However, there are no legal provisions regulating the global transfer of estates from an Association to and IGO. That being said, an *ad-hoc* method for the transfer of IALA's rights, interests, assets and liabilities has to be carried out. This method will, evidently, have a contractual basis.

This will require a full inventory of IALA's rights, interests, assets and liabilities, since their nature shall affect the formalities and conditions of their transferability.

In that perspective, several legal issues arise depending, not only on the nature of the element being transferred (tangible or intangible, fixed or movable) but also on the contractual basis that link IALA with third parties. The consequence is that that a legal and contractual due diligence has to be carried out at the Association. The legal counsel shall review, in the said due diligence, all documents and contracts related to IALA to determine all its rights, interests, assets and liabilities to point out and resolve all obstacles or conditions that may face the completion of the transfer.

By way of example, the headquarter building is either owned by or leased to IALA. In the case of a leasing, the lease contract must be reviewed to verify that there is no provision prohibiting the transfer of the contract to a third party, in the present case the new IGO.

Similarly, it is common that contracts serving as basis liabilities include such provisions prohibiting the transfer of these liabilities to a third party. Other contracts may condition their transfer. The results of the due diligence shall highlight all these obstacles and allow the legal counsel to point out the necessary measures, if any, that need to be taken to overcome such obstacles.

The legal due diligence will determine all IALA's intangible rights, such as logos, registered trademarks or other assets. Such assets may also include shares of companies or participations in other associations. Often, the transfer of such shares or participations is subject to the agreement of shareholders consents, depending on the bylaws of the company or the association. These bylaws will therefore need to be reviewed and analysed.

In any case, a legal and contractual due diligence of the Association is necessary to guarantee the success of the transfer of IALA's rights, interests, assets and liabilities.

### 2.2.2 *Specific issues related to the transfer of employment contracts*

The transfer of the current employment contracts, if any, raises several issues.

French labor law imposes a certain number of obligations on the employer, some of which are peculiar to the termination of the entity in which the employee works (current positions, pensions, wages, paid holidays etc.).

The most delicate of these obligations concern the protection of employees in the event of the termination of the Association. The employer could be responsible for offering these employees equivalent posts.

In the case of the new IGO, the posts and their attached conditions shall be governed by the International Agreement and, to some, extended by the Headquarters Agreement.

We understand that these specific issues are related to the organization of the new IGO which is out of the scope of our mission.

We would therefore like to inform you that we rest at your entire disposal for legal assistance concerning these specific issues. Nonetheless, to give you're the most satisfying advice we would need to analyze the documentation related to the IGO's International Agreement and the Headquarters Agreement (final version, or even a draft).

### *2.2.3 Reception of rights, interests, assets and liabilities by the new IGO*

Firstly, we would like to point out, according to the briefing note, the reception of the rights, interests, assets and liabilities is not included in our scope of work.

However, to guarantee the success of the transfer operation, we have to clarify the necessity of ensuring that the International Agreement that shall govern the new IGO contains the necessary provisions allowing the latter to receive rights, interests, assets and liabilities from the Association

Generally, and unless prescribed otherwise by the International Agreement, all sort of contributions can be received by an IGO, in any possible form. Therefore, since the transfer shall be free of charge, there appears to be no obstacles for the new IGO to receive such a contribution from the Association.

This is currently being practiced by several IGO's including, but not limited to, the United Nations, which has created several funds to receive donations, notably the United Nations Foundation. This is also the case of IALA according to article 11 of its Constitution.

It is therefore highly recommended to proceed to a thorough and precise revision of the International Agreement to ensure the well-being of the reception of the assets by the IGO.

## **2.3 Termination of IALA**

According to article 13 of IALA's constitution the procedure for the termination of the Association is the same at that for changing the constitution. In that perspective, a General Assembly must be held and a decision to terminate the Association must be taken by a two-thirds majority of National Members attending this General Assembly.

To avoid the complicated and time-consuming procedure of changing the Constitution, previously described in this memorandum (see point **2.1**), we recommend that during the same General Assembly, a decision is to be taken designating the new IGO as the sole beneficiary of the assets (including rights, interests and attached liabilities) that shall be distributed during the winding up of the Association. This decision is in perfect conformity with article 13 of IALA's constitution that provides that the assets are to be distributed to "*technical organizations connected with marine aids to navigation.*"

Once these internal steps have been made, it will be necessary to undergo certain French Administrative proceedings. These proceeding are identical to the proceeding necessary to the changing of the Constitution, previously described in point 2.1 of this memorandum.

## **.Appendix I: Roadmap for the accomplishment of IALA's objectives**

Below is a roadmap of steps and tasks that shall be made, in chronological order, to guarantee the success and completion of all of IALA's objectives:

- 1- IALA shall receive the present memorandum
- 2- Meeting in Paris with Mr. Proser, IALA's Secretary General and Mr. Price, the Deputy Chair IALA's Legal Advisory Panel
- 3- Reception, by the Legal Counsel, of the documents listed in Appendix II
- 4- Start of a legal and contractual Due Diligence at IALA headquarters
- 5- Report on the results of the Due Diligence
- 6- Preparation of drafts for all necessary contractual documents for the transfer of IALA's rights, interests, assets and liabilities to the new IGO
- 7- Creation of the new IGO
- 8- General Assembly deciding on the termination of IALA
- 9- Transfer of rights, interests, assets and liabilities from IALA to the new IGO
- 10- Termination of IALA as NGO



## **Appendix II: Necessary documents for our scope of work**

For the carrying out of the abovementioned tasks, the Legal Counsel requires the list of mentioned below:

- A copy of IALA's Constitution in French
- A copy of the minutes :
  - Related to General Assembly meetings
  - Related to the Counsel's meetings
  - Related to Constitution amendments
  - Related to current proceedings to terminate IALA as an NGO and the creation of a new IGO
- A copy of the current version of the overall roadmap for the project referred to in the briefing note;
- Draft of the International Agreement (and a separate list of States and public / private members of the future IGO);
- Draft of the Headquarters Agreement, if available;
- All contractual documents to which IALA is a party (contracts of current employees, interests and rights in other associations or companies, etc.) as part of the due diligence process;
- List of IALA's current employees, volunteers or any other workers;
- list of employees, volunteers or any other workers including international civil servants that shall be engaged in the new IGO;
- All official documents (ownership titles or other) related to the assets possessed by IALA (tangible and intangible assets : properties, movable and immovable assets);
- Last audited account and financial statements of IALA (balance sheet and income statement).