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## THE AIRCRAFT MORTGAGES CONVENTION: The United Kingdom Moves Toward Ratification

THOMAS CONLON\*

The growth of the international air transport industry, combined with the accelerating expense of the new supersonic and wide-bodied jets,<sup>1</sup> has revived interest in the international treaty on the recognition of security interest (e.g., mortgages) in aircraft.<sup>2</sup> Noteworthy among nations showing increased interest in the international mortgage convention has been the United Kingdom. The United Kingdom, by the enactment of the Civil Aviation Act of 1968 and the issuance of the United Kingdom Mortgaging of Aircraft Order of 1972, has laid the groundwork for ratification of the convention on the "International Recognition of Rights in Aircraft," the so-called Geneva Convention of 1948.

The need for an international treaty to protect a creditor's security interest in aircraft had been discussed even before the emergence of the commercial aviation industry. There was a general consensus among manufacturers and airlines that large sums of money would have to be borrowed in order for the industry to develop and expand. Banks and financial institutions appeared reluctant to invest large sums of money to finance the purchase of aircraft secured by a chattel mortgage or other security interest in the aircraft until they had received assurances that their interest in the aircraft was secure, particularly when the aircraft were

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<sup>1</sup> A Boeing 707 currently costs about \$15,000,000, a 747SR costs around \$47,000,000. The Concorde is stated to have a production cost of £51,000,000 (pounds) per aircraft while the current sales price is around £22,000,000. *Flight International*, Oct. 1, 1977, at 935.

<sup>2</sup> Other factors adding to the appeal of the international mortgages convention are increases in the leasing of the aircraft as well as the desire of lenders for additional security.

out of the jurisdiction of the flag state. What good is it, bankers rightfully asked, to have a charge on an aircraft if that charge is not recognized by the courts in foreign states where the aircraft may land?

With the knowledge that financing would be crucial for the developments of the post-war industry, the manufacturers and airlines, prior to the end of World War II, agreed to work for an international agreement on the recognition of rights in aircraft. As early as 1925, the International Chamber of Commerce had formed a special committee of air experts—CITEJA—who by 1931 had produced a draft convention on "mortgages." Though these drafts were not ratified, CITEJA's early efforts would bear fruit later. Soon after World War II, the newly formed International Civil Aviation Organization (ICAO) Legal Committee, with reference to the CITEJA draft convention, helped draft the Geneva Convention of 1948 on "international recognition of rights in aircraft."<sup>3</sup>

A quarter of a century after it came into force in September, 1953, the United Kingdom, which played a major role in drafting the Geneva Convention, appears ready to join the 38 ICAO members who have ratified the Convention.<sup>4</sup> If and when the United Kingdom does ratify it, a vital step will have been taken towards harmonizing aircraft mortgages on an international level.

In the United Kingdom, the initial steps toward ratification were taken with the enactment of the Civil Aviation Act of 1968, Section 17, which provides that: "Her Majesty may by Order in Council make such provision as appears to Her to be necessary or expedient for giving effect to the International Recognition of the rights in Aircraft."<sup>5</sup>

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<sup>3</sup> Convention on the International Recognition of Rights in Aircraft, *opened for signature* June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847, (hereinafter cited as *Convention on IRRA*).

<sup>4</sup> Since 1970 six countries have acceded to the Convention, bringing the number of Contracting States to 38. As of March 1, 1977, the following countries are members of the Convention: Argentina, Brazil, Chile, France, Greece, Iceland, Italy, Mexico, Netherlands, Switzerland, U.S.A., Denmark, Norway, Sweden, Cuba, Pakistan, Laos, Ecuador, El Salvador, Federal Republic of Germany, Haiti, Mali, Mauritania, Niger, Algeria, Ivory Coast, Tunisia, Thailand, Lebanon, Cameroon, Egypt, Paraguay, Gabon, Rwanda, Chad, Luxembourg, Libyan Arab Republic and the Central African Republic, *Shawcross and Beaumont on Air Law*, 4th Ed., London 1977.

<sup>5</sup> Civil Aviation Act, 1968, Section 17.

An Order in Council under this section may make provision:

for the recognition in the United Kingdom of rights of the kind specified in the Convention in or over the aircraft registered in other states party to the Convention, being rights registered or recorded in those states in accordance with the Convention and recognized as valid by the law of the state party to the Convention in which the aircraft in question was registered when the rights were constituted.<sup>6</sup>

Further, Section 16 provides that the Order extend to any store of spare parts for the aircraft.

The Aircraft Mortgages Order of 1972 provides, *inter alia*, for the registration of mortgages at the Civil Aviation Authority,<sup>7</sup> said mortgages to have priority status over any subsequent mortgage filed against the aircraft<sup>8</sup> and any store of spare parts for the aircraft.<sup>9</sup> Potential problems related to existing English law are dealt with in Article 16(2) which states that conflicting provisions of the Bills of Sales Acts shall not apply and the sections of the Companies Act shall be read as if applying to aircraft. With these obstacles overcome, the groundwork necessary for the ratification of the Geneva Convention has been done and formal acceptance would be forthcoming in the immediate future. The question is, when?

#### THE GENEVA CONVENTION OF 1948

##### 1. *Towards an International Mortgage*

The subject of mortgages and other forms of security interests is a complex and diverse area of the law. The Geneva Convention is an attempt at establishing an internationally recognized priority charge on a chattel which is by nature international—the aircraft. The basic objectives of the Convention are to:

- (1) protect secured creditors who have lent money on the security of the aircraft;
- (2) protect third parties dealing in or with aircraft against hidden security interests (i.e. charges);

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<sup>6</sup> *Id.*

<sup>7</sup> Stat. Inst. 1972, No. 1268, Article 4(1).

<sup>8</sup> *Id.* at Article 14(2).

<sup>9</sup> *Id.* at Article 3.

- (3) define and protect the "privileged" or priority claims against the aircraft; and
- (4) facilitate the transfer of aircraft from one nationality to another.<sup>10</sup>

It was hoped that harmonizing the law related to rights in aircraft on an international level would benefit the developing civil aviation transport industry, give the financial institutions the greater security they required, and facilitate the export of aircraft.

Obviously, the Geneva Convention is an undertaking among member states to the Convention and has little effect when the aircraft is present in a country which is not a party to the treaty, unless that particular non-member state has incorporated the principles of the Geneva Convention into its national law.

## 2. *The Rights Protected*

Article 1 enumerates the rights which member states undertake to recognize. This was done because the framers were unable to agree on a general term or form of definition which would be acceptable on a general basis. As an alternative, they agreed to set out the specific rights to be recognized, subject to the conditions that said rights (1) are properly constituted according to the laws of the state of nationality of the aircraft at the time of their constitution, and (2) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.<sup>11</sup>

The rights to be recognized are:

- (a) rights of property in aircraft;
- (b) rights to acquire aircraft by purchase coupled with possession of the aircraft;
- (c) rights to possession of aircraft under leases of six months or more;
- (d) mortgages, hypothèques and similar rights in aircraft which are contractually created as security for payment of an indebtedness.<sup>12</sup>

In addition, a Contracting State is free to recognize any rights

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<sup>10</sup> Wilberforce, *The International Recognition of Rights in Aircraft*, 1948 I.L.Q. 421.

<sup>11</sup> Convention on IRRA, Article 1(d)(i), *supra* note 3.

<sup>12</sup> *Id.* at Article 1(1).

in aircraft under the law of any Contracting State<sup>13</sup> so long as Contracting States do not admit or recognize any right as taking priority over the rights enumerated in paragraph 1 of Article 1. The "other rights," though they may be recognized by a Contracting State, are subordinate to the enumerated rights.

The protection extended by the Convention applies to the right of ownership, conditional sale, long-term leases, equipment trust arrangements, pledges and mortgages, hypothèques, and similar rights in aircraft. For a right to be recognized under the convention, it must be "contractually created as security for the payment of an indebtedness."<sup>14</sup> The scope of the Convention is thus limited to security arrangements resulting from agreement between the parties and does not include those security interests which might arise by judicial decision or operation of the law, for example, the interest a wife might have in an aircraft belonging to her husband, something analogous to a dower interest, or instances in which a judgment might be considered an encumbrance on the aircraft.<sup>15</sup> Further, the Convention is not limited to a specific kind of indebtedness and is sufficiently broad to cover future advances, "if they have been made at the time the right is questioned."<sup>16</sup> On this point, one commentator has stated:

The broad language indicates that as long as there is an 'indebtedness' of whatever origin, it does not matter whether or not it is connected with the specific aircraft, for example, as purchase price, costs of repair or damages. Consequently, the term 'indebtedness' will include any kind of causa from a simple debt to a fleet mortgage.<sup>17</sup>

### 3. *Who is Protected*

As noted, the object of the Convention is to protect secured rights of property and possession in an aircraft in "foreign" Contracting States after such secured rights have been validly acquired by third parties in accordance with the law of the state in which

<sup>13</sup> *Id.* at Article 1(2).

<sup>14</sup> *Id.* at Article 1(d).

<sup>15</sup> See annotated text of the Convention by the Legal Subcommittee of the Air Coordinating Committee, 16 J. AIR L. & COM. 69, 71 n.11 (1949).

<sup>16</sup> *Id.* at 71, n.14.

<sup>17</sup> Bayitch, *Aircraft Mortgage, A Study of Comparative Law of the Western Hemisphere*, 13 U. MIAMI L. REV. 424, 433 (1958).

such aircraft is registered as to nationality (flag state). The nationality of the third parties (such as the lending banker) holding security interests does not affect the applicability of the Convention. Thus, even if the third party is not a national of the flag state of the aircraft, or even a national of a country which is a Contracting State, he is entitled to the privileges of the Convention.<sup>18</sup> For example, a resident of a non-Convention country, e.g., England, who has a security interest in an aircraft registered in a Convention country, e.g., France, must comply with the French rules regarding the recordation of his charge and must enter a valid charge according to the nationality of the aircraft in order to obtain the privilege of a Convention-wide security interest in the aircraft.

#### 4. Recording

There is no mandatory requirement that a Contracting State maintain a record. To qualify as a security interest, however, it must be "regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality."<sup>19</sup> Thus, the provision of such record is essential to effect recognition. In brief, an interest that is not recorded cannot qualify for international recognition.

Nor does the Convention attempt to make the recording procedure uniform throughout all countries who have adopted the treaty. The 1931 CITEJA draft had proposed the maintenance of a standard record and uniform system of recordation, but this idea was dropped and it was agreed that each State should be free to adopt its own system.

Specifically, Article 2(1) provides: "All recordings relating to a given aircraft must appear in the same record."<sup>20</sup> The object of this provision is to require a state to keep all rights with respect to a given aircraft entered in the same record. There is no definition of "record," and it can refer merely to a file or folder as is used by the Federal Aviation Association in the United States, the intent presumably is that a creditor or potential creditor who intends to rely on the aircraft for security need only go to one central

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<sup>18</sup> *Id.* at 432.

<sup>19</sup> Convention on IRRA, Article 1(d)(ii), *supra* note 3.

<sup>20</sup> *Id.* at Article 2(1).

record to discover the encumbrances already filed against the chattel.

### 5. *The Record*

Not only is the record public and kept in a central file, but any person is entitled to receive certified copies or extracts of the particulars recorded,<sup>21</sup> and those copies or extracts which constitute prima facie evidence of the contents of the record.<sup>22</sup> The "extracts" provision was incorporated because some states, such as the United States, follow the practice of recording the mortgage instrument itself on the register, and a certified copy of such a record might prove time-consuming and costly. In contrast, some states require only that certain particulars be filed in the record, and in such cases a certified copy would be supplied.

The question was raised in the drafting stage, what if the extract or certified copy of the record produced is inaccurate and the individual suffers damage as a result of reliance on the inaccurate extract or copy? Can an error by the registrar cause the registered mortgage to lose its priority and, if not, what recourse is available to the individual who has suffered damage because he relied on the faulty record? It would appear that the framers of the Geneva Convention, after discussing this point at length, altered the early draft convention, which stated that certified copies or extracts would constitute "evidence," to read that they "shall constitute *prima facie* evidence of the contents of the record."<sup>23</sup> Presumably this was done to allow copies or extracts to be impeached by proof that they were not true copies. Thus, the priority of a recorded mortgage is not affected by the inaccurate extract or certificate. The individual damaged by an inaccurate record will have to bring his claim for compensation under the national law.

The time of recordation of a document is to be governed by the law of the flag state. Article 3(3) of the Convention attempts to cover the various systems of recording. It states that Contracting States must provide that the filing of the document for recording shall have the same effect as recording. Thus, where the law of the Contracting State regards the receipt of a document for re-

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<sup>21</sup> *Id.* at Article 3(2).

<sup>22</sup> *Id.*

<sup>23</sup> See Minutes, 1st Session Legal Committee, ICAO Doc. 4635 at 43.

cordation as tantamount to recording, other Contracting States are to regard it as having been duly recorded from the time of such receipt. Further, the Convention provides that the registrar or authority shall be allowed to charge a reasonable fee for the recordation services such as recording fees, as well as charges for furnishing extracts and certified copies.<sup>24</sup>

In theory, an individual considering lending money against the security of an aircraft should be able to go to the state's central register and obtain a file or folder which is prima facie evidence of the existing security interests in the aircraft.<sup>25</sup> If a state for administrative reasons wishes to maintain more than one register, each record should contain all recordings relative to a given aircraft. Finally, the effect of a recording, under the Convention, is determined according to the law of the Contracting State where it is recorded (which is the flag state of the aircraft). Thus, with regard to recordings by third parties, it is the law of the flag state rather than the *lex rei sitae*.

## 6. Spare Parts

Since one of the purposes of the Convention is to provide security for creditors to facilitate the financing of the air transport industry, the inclusion of a provision on spare parts would, it was hoped, increase the value of the chattel being offered as security and hopefully increase the amount of money able to be borrowed on the chattel. The United States strongly supported the inclusion of this article because spare parts, it pointed out, often represent as much as twenty-five percent of the purchase price of the aircraft.

Article 10 sets out the major provisions of the Convention regarding spare parts. The framers of the Convention decided that it should be left to the individual Contracting States to determine whether spare parts were to be included within the scope of the Convention. Thus, if the law of the Contracting State so provides, spare parts can be included as chattel secured under the treaty.

It should be noted that not all spare parts are eligible for in-

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<sup>24</sup> Convention on IRRA, Article 3(3), *supra* note 3.

<sup>25</sup> Under the current U.K. law the Civil Aviation Authority has the duty to indemnify anyone who suffers a loss due to error or inaccuracy in the register. See Aircraft Mortgage Order, 1972, Article 18.

clusion within the scope of the Convention, only those spare parts 1) held in conformity with the Convention, 2) stored at a specified place or places, and 3) concerning which the appropriate public notice, specifying the description of the right, the name and address of the "right" holder and where the right is recorded is given and exhibited at the place where the spare parts are located.<sup>26</sup> The purpose of the public notification is to give due notice to third parties that such spare parts are encumbered.

Further, spare parts under Article 10 does not refer to spare parts in general but merely those covered by an Article 1 right, that is, a mortgage, etc., in connection with a financing transaction.<sup>27</sup> Whether the creditor can take a Convention-wide right over spare parts is, in the final analysis, determined by the local law of the flag state of the aircraft.

The central record of encumbrances maintained by the Contracting State should include a statement indicating the character and approximate number of such spare parts. Those spare parts, however, can be replaced without affecting the right of the creditor. Spare parts has been defined in the treaty as "parts of aircraft, engines, propellers, radio apparatus, instruments, appliances, furnishings, parts of any of the foregoing, and generally any other articles of whatever description maintained for installation in aircraft in substitution for parts or articles removed."<sup>28</sup>

Some may ask about the status of a part of the aircraft, for example, the engine, which has been removed for repair. Is it still part of the aircraft or is it a spare part? The framers of the Convention attempted to cover this point in Article 10(4) and Article 16. The former article includes as spare parts those "in substitution for parts or articles removed." Article 16 sets out the definition of an aircraft to include "airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein *or temporarily separated therefrom*."<sup>29</sup> Besides being a broad definition of aircraft (to include all other articles intended for use in the aircraft), Article 16 states

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<sup>26</sup> Convention on IRRA, Article 10(1), *supra* note 3.

<sup>27</sup> Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722 at 93-94.

<sup>28</sup> Convention on IRRA, Article 10(4), *supra* note 3.

<sup>29</sup> *Id.* at Article 16 (emphasis added).

that parts temporarily removed are still considered for purposes of the Convention to be part of the aircraft.

A novel aspect of the Convention relates to unsecured creditors. Article 10(3) provides that unsecured creditors in certain cases may be able to assert a claim on one-third the sales proceeds from the sale of spare parts, said rule to be applied at the discretion of the judicial authorities.<sup>30</sup> Incorporated to encourage local businessmen to extend credit to airlines doing business in their community, this is an exception to Article 7(4) which provides for the full reimbursement of priority claims prior to secondary claims.

Under this Article, if a bid in excess of two-thirds of the value of the encumbered spare parts is received, the parts may be sold at a judicial sale if the executing creditor is unsecured. Further, the authorities may, in order to provide for the claim of the unsecured creditor, limit the amount payable to secured creditors to two-thirds the sale proceeds. In other words, the unsecured creditor may be able to enforce his claim to the extent of up to one-third the sales proceeds.

In short, spare parts are within the scope of the Convention if (1) the law of the Contracting State provides for their inclusion, (2) they are encumbered in connection with the financing of an aircraft, (3) they are stored in a specific designated place(s), (4) appropriate public notice is given, and (5) the central records reflect the inclusion of spare parts under the charge. There is no need to designate each part or its location; the obligation is merely to list the location of the store of spare parts and the aggregate number of parts stored.

## 7. *Judicial Sale*

### *A. The Procedure*

The Geneva Convention establishes only one method of enforcement of a right in an aircraft—the forced judicial sale. Article 7 provides that the proceedings of a sale of an aircraft in execution shall be determined by the law of the Contracting State where the sale takes place. Further, the Convention requires certain basic standards to be observed: (1) the date and place of the sale shall be fixed at least six weeks in advance,<sup>31</sup> (2) the executing creditor

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<sup>30</sup> *Id.* at Article 10(3).

<sup>31</sup> *Id.* at Article 7(2)(a).

must produce an extract of the recordings concerning the aircraft, (3) the executing creditor must give public notice of the sale at the place where the aircraft is registered as to nationality (the flag state) in accordance with the applicable law of the flag state, (4) said notice shall be at least one month prior to the fixed date, and (5) notice shall also be given by registered mail to the recorded owner and holders of recorded rights in the aircraft.<sup>33</sup>

The consequences for failure to observe the procedural requirements shall be provided by the law of the Contracting State where the sale takes place. Any forced judicial sale that takes place in contravention of the stated Convention requirements,<sup>33</sup> however, may be annulled if demand is made within six months from the date of the sale by any person suffering damages as a result of such contravention.

Consistent with the rest of the Convention the treaty does not attempt to establish a uniform Convention-wide procedure regarding the forced judicial sale; rather, it establishes certain minimum standards, the contravention of which may result in the annulment of the sale. Presumably, the decision as to annulment will be at the discretion of the judge even if the person making the demand has done so within six months of the sale.

### B. *The Sale*

Not only must a creditor seeking to set aside a judicial sale of an aircraft for non-compliance do so within the stated six-month period, he must also show actual damages and prove that said damage was the direct result of the failure of the attaching creditor to comply with the minimum requirements set out in Article 7 of the Convention.<sup>34</sup>

A minimum bid price is set out under the provisions of Article 7(4): "No sale in execution can be effected unless all rights having priority over the claim of the executing creditor in accordance with this Convention which are established before the competent authority, are covered by the proceeds of sale or assumed by the purchaser."<sup>35</sup> Effectively, a junior creditor would not be able to

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<sup>33</sup> *Id.* at Article 7(2)(b).

<sup>34</sup> *Id.* at Article 7(3).

<sup>34</sup> See note 15 *supra* at 83, n.78.

<sup>35</sup> Convention on IRRRA, Article 7(4), *supra* note 3.

effectuate a successful forced judicial sale unless the proceeds of the sale would be sufficient to pay off all senior liens and rights, unless, by agreement between the parties, the purchaser guarantees the satisfaction of the prior rights or the sale is made subject to such prior liens and rights. Presumably, the term "rights" referred to here includes not only the Article 1 enumerated rights but also any special rights existing (recorded and unrecorded) pursuant to Article 4, which will be discussed in greater detail below. In cases where a fleet mortgage exists, that is, where each aircraft in the fleet constitutes security for the entire debt, to comply with the minimum bid requirement a sale price equal to the full extent of the debt would be required.<sup>38</sup>

### 8. *Priority Rights*

After the judicial sale is confirmed, the next step is to disburse the proceeds of the forced judicial sale. The priority, or ranking, of claims under the Convention is first, the privileged claims, such as costs of the judicial sale, the Article 7 costs, compensation for salvage under Article 4, and extraordinary expenses indispensable for the preservation of the aircraft. These claims, if allowed under local law, are privileged claims and are the only claims, save for the possible Article 7(5)(b) surface damage claims discussed below, which may take precedence over the recorded Article 1(2) enumerated rights. The enumerated (Article 1) rights which have been properly recorded are ranked second and all other rights are ranked below these.

### 9. *Surface Damage*

Another innovation of the Convention is Article 7(5), which can limit claims of those claiming under Article 1 to eighty percent of the sales price, with the remaining twenty percent made available where injury or damage is caused to persons or property on the surface of the Contracting State where the execution sale takes place. In effect, this provides compensation for another class of unsecured creditor. This exception to the secured creditors' rights does not apply, however, where adequate and effective insurance or cover exists to protect the injured or damaged third party. Further, the Contracting State apparently has the burden of enacting

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<sup>38</sup> See note 15 *supra* at 83, n.78.

legislation to allow setting aside twenty percent of the proceeds for the benefit of local creditors who suffer injury or damage. Whether this provision would apply to sonic boom damage is at least questionable, it being difficult to show that the drafters intended to include it under Article 7(5).

Another priority claim over the preference rights of Article 4 and enumerated rights of Article 1 is the claim for expenses incurred in a forced sale. Those costs incurred in the common interest of the creditors are to be paid first, ahead of both the Article 4 and Article 1 claims.<sup>37</sup>

#### 10. *Clear Title*

The effect of a "proper forced sale" pursuant to the standards set out in Article 7 is that the aircraft sold shall be transferred free from all rights which have not been assumed by the purchaser.<sup>38</sup> The rights referred to include the enumerated rights of Article 1 and the priority rights under Article 4, as well as all encumbrances or other liens, again, unless they have been assumed by the buyer.

#### 11. *Transfer of Aircraft*

Article 9 provides that, except in the case of a forced sale in conformity with Article 7, the aircraft cannot be transferred from its current nationality register to the nationality register of another Contracting State, unless all holders of recorded rights have been satisfied or consent to the transfer. The obvious weakness of this provision is that it does not seem to prevent or restrict the transfer of an aircraft from its current nationality register to another non-contracting party nationality register. The United States delegation had originally proposed that the prohibition not only extend to transfers between Contracting States but also to transfers from a Contracting State to a non-contracting state as well. The United States proposal was strongly urged but was defeated.<sup>39</sup> Another possible problem with Article 9 is that it refers merely to holders of "recorded rights," and presumably this term does not include holders of Article 4 "priority rights." If this is so, the priority right

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<sup>37</sup> Convention on IRRA, Article 7(6), *supra* note 3.

<sup>38</sup> *Id.* at Article 8.

<sup>39</sup> Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722 at 218.

holder apparently need not be satisfied prior to transfer, nor would the transferor be required to obtain the consent of the non-recorded right holders.

## 12. *Privileged Claims*

The United States' delegation throughout the development of this Convention was opposed to the inclusion of a provision for privileged claims to take priority over recorded mortgages or other security interests—the Article 1 rights. As the concept of privileged claims is widespread throughout Europe, however, the draftees of the Convention eventually agreed to include claims of this nature on a limited basis. Article 4 states that where claims for (1) salvage or (2) extraordinary expenses necessary for preservation of the aircraft give rise to a right conferring a charge under the law of the Contracting State where the salvage or preservation were terminated, such claims shall take priority over all other rights in the aircraft.<sup>40</sup>

The provisions of Article 4 of the Geneva Convention do not create a priority right for a claim for salvage or preservation, but merely recognize such right if it exists under the law of the Contracting State where the salvage or preservation terminated. If termination of a salvage occurs when the salvor relinquishes custody of the aircraft, then a prudent salvor, where possible, would seek to terminate the salvage in a Contracting State where the law recognizes his priority right for salvage.

With regard to preservation expenses, Article 4 refers not to ordinary, recurring expenses, but rather to “extraordinary” expenses indispensable for preserving the aircraft. Preservation apparently refers to expenses incurred to protect the very existence of the aircraft rather than expenses for repair of mere wear and tear.

If the law of the Contracting State provides for these priority rights, then under the Convention they will be recognized. Satisfaction of Clause 4 claims will be in the inverse order of the dates of the incidents in connection with which they have arisen.

Do priority charges have to be recorded? As far as strict recordation is concerned, the answer is “no,” but Article 4 requires that salvage and preservation charges be “noted” on the record within three months from the date of the termination of the sal-

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<sup>40</sup> Convention on IRRA, Article 4, *supra* note 3.

vage or preservation operations. The Convention fails to define the term "noting," but presumably it is less than recording. Regardless of definition, the central records should contain a note or notation of the Article 4 claim within the three-month period following termination of the salvage or preservation, or the right will not be recognized. Finally, Article 4(5) states that the Article shall apply notwithstanding the provisions of Article 1(2), thus presumably establishing that the Article 4 claims take precedence over the enumerated rights as set out in Article 1(2).

### 13. "Aircraft"

Article 16 provides a definition of aircraft which includes the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft, whether installed in the aircraft or temporarily separated from it. Thus, the definition of aircraft includes not merely the airframe but items attached to the airframe.<sup>41</sup>

### 14. Territory of Contracting State

In cases where the Contracting State is responsible for the foreign relations of a territory and that territory maintains a separate mortgages register, Article 17 provides that reference to the law of the Contracting State is to be construed as reference to the law of the territory.<sup>42</sup>

### 15. Ratification

Finally, the Geneva Convention is to come into force when two of the signatory states have deposited instruments of ratification.<sup>43</sup> It came into effect ninety days after the deposit of the second ratification on October 1, 1953, with the Convention being ratified by the United States and Pakistan.

## CONCLUSION

The escalation in the cost of the modern aircraft, the continued growth of international civil aviation, the constant need to raise funds by the airlines, and the requirement of the bankers for addi-

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<sup>41</sup> *Id.* at Article 16.

<sup>42</sup> *Id.* at Article 17.

<sup>43</sup> *Id.* at Article 20.

tional security have again focused attention on the Geneva Convention of 1948 on the international recognition of rights in aircraft. The recent gestures toward ratification by a major civil aviation nation, the United Kingdom, will undoubtedly cause a number of other states to have another look at this relatively simple multilateral treaty which attempts to bring a degree of order on an international basis to a diverse and complicated area of the law.

The drafters of the Convention, in creating the framework for an international legal regime over aircraft mortgages, chose not to attempt to unify world law on the subject, but rather to enact a recognition treaty under which individual states were free to maintain or create their own legal concepts and laws regarding charges on aircraft. Also, they attempted to devise a means for securing the recognition of the charges in other states—the conflict of laws problem.

Under the Geneva Convention, a court sitting in a Contracting State other than the flag state of the aircraft cannot apply its own conflict of laws rules, but instead must look to the country where the aircraft was registered at the time the right was created. Thus the validity of the contract is in effect judged, not according to the *lex loci contractus* or on the intention of the parties, but according to the law of the state whose nationality the aircraft possesses. Recognition, under the Convention, is conditional upon recording.

It creates uniform conflict of laws rules based on nationality of the aircraft. It provides for the recognition of and protection of validly created rights in foreign aircraft and equipment of a Contracting State, and it subordinates a great number of local privileged claims, including claims for taxes, wages, and judicial expenses.

After the judicial sale has been confirmed, the priority of creditors under the Convention is (1) privileged claimants, (2) recognized secured claimants, and (3) claimants with interests not recognized internationally. Twenty percent of the judicial sales price, however, can be set aside for the benefit of local creditors who have suffered injury or damage on the surface of the Contracting State where the judicial sale takes place.

Further, minimum standards are established regarding the

forced judicial sale covering notice, time, publication, and minimum bid price acceptable. The Convention presupposes the creation of a central register for creditors. This has had a significant reforming influence on how Contracting States record the interests of foreign creditors.

To look at the matter another way, in the absence of the Geneva Convention, a creditor holding a security interest in an aircraft is exposed to the wide divergence in law, procedure, and practice of foreign courts. A creditor could bring an action in a foreign court, but he would be basing his action largely on the hope that the foreign court, as a matter of comity, would recognize his duly created security interest in the aircraft. In the final analysis, the law of the *lex situs* would probably be employed by the court to determine the recognition of a foreign security interest in a movable chattel.

There has not been any serious criticism of the Convention as such, and it has been suggested that the lack of ratifications may be solely due to the hesitation of many governments to surrender property rights in the field of private law to a multi-lateral agreement.<sup>44</sup> One commentator stated his belief that it is still the general consensus that the Convention has provided a useful and practical solution to the problem of aircraft financing,<sup>45</sup> and that the financing of aircraft during the 1950's and 1960's was not the acute problem the drafters of the Convention had expected.<sup>46</sup>

Since 1948, the Convention has been ratified or acceded to by thirty-eight nations, including the United States, Brazil, France, Netherlands, Switzerland and West Germany. Conspicuous among nations not having ratified the Convention are Australia, Canada and the United Kingdom. Ratification by the latter would be a major step toward widening the geographical scope of the Convention and thus effectively increasing its efficiency.

The Geneva Convention has been evaluated as a solid legal

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<sup>44</sup> Johnston, *Legal Aspects of Aircraft Finance*, 29 J. AIR L. & COM. 299, 308 (1963) (hereinafter cited as Johnston); but see Doskow, *Transitory Chattels and Stationary Law: A Proposal to Facilitate Secured Financing of Aircraft Employed in International Flight*, 26 J. AIR L. & COM. 36, 52 (1959) calling for adoption of bilateral agreements as a superior approach to international secured aircraft financing.

<sup>45</sup> See Johnston, *supra* note 44 at 310.

<sup>46</sup> See Johnston, *supra* note 44, at 326.

achievement in the field of international aviation law, with the possible drawback that it may have been before its time when it was introduced in 1948.<sup>47</sup> The present revival of interest in the private financing and leasing of aircraft and consequently in the Geneva Convention seems to be proving commentators correct on both points.

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<sup>47</sup> ICAO Working Paper, A.12-WP/36, LE/5, 12/3/59.

**Comments  
and  
Case Note**



The *Journal of Air Law and Commerce* is acutely aware of the current controversy involving the regulation of airport noise. Especially in light of the ongoing dispute over the granting of landing rights to the Concorde SST and the promulgation of the FAR Part 36 requirements, the Board of Editors felt that a concentrated study of the field of airport noise regulation was in order. The article by Robert B. Donin, "British Airways v. Port Authority: Its Effect On Airport Noise Regulation," discusses the decisions of the Southern District of New York and the Second Circuit Court of Appeals and explains, in part, the impact that these decisions will have on noise regulation, both domestic and international. The companion student work carefully analyzes the decisions, emphasizing other recent court decisions in which the constitutional questions of preemption of local regulations and conflicting federal and local laws have arisen. A second student work surveys the types of court actions and legislative regulations which have been used in attempts to alleviate the problems caused by increased airport traffic and noise. Finally, two student authors detail FAR Part 36 and the legislative proposals which have been presented in response. The authors have analyzed the various proposals in light of the economic situation and prospects of the airline industry and have come to very different conclusions with respect to which proposal best serves the industry and the public. By focusing a major portion of this issue on airport noise regulation, the *Journal* hopes to give those students of air law who are unfamiliar with the area a chance to acquaint themselves with some of the issues involved, as well as to serve as an additional resource for those who are committed to resolving those questions.

The Board of Editors, 1977-78.

