Obtaining Title and Financing Transport Category Aircraft - National and International Implications

John T. Stewart Jr.
OBTAINING TITLE AND FINANCING TRANSPORT CATEGORY AIRCRAFT — NATIONAL AND INTERNATIONAL IMPLICATIONS

JOHN T. STEWART, JR.*

What manner of thing is an aircraft in the eye of the law?
What manner of thing is title to an aircraft in the eye of the law?
What manner of thing is an owner of an aircraft in the eye of the law?
What manner of thing is a U.S. citizen in the eye of the law?

INTRODUCTION

THE AIRPLANE is the sine qua non of aviation. It is the purpose for which the air transport industry exists. It is the method by which goods and people are transported both nationally and internationally in ever increasing

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numbers. Airplanes, the vehicles which provide this mode of transportation for air carriers, are large and are characterized as transport category aircraft. They are very expensive and billions of dollars a year are expended in purchasing such aircraft or purchasing their use. In recent years, the United States federal government has promulgated a number of changes in the statutory and regulatory framework governing the ownership and administrative requirements necessary for the operation of these aircraft, both domestically and internationally. These changes have affected the methods of aircraft financing and the availability of transport category aircraft to domestic and foreign air carriers. U.S. carriers, when replacing or modernizing their fleets, can now focus on a variety of financing options including various forms of

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2 According to the Federal Aviation Administration, a transport category aircraft generally weighs more than 12,500 pounds and is designed to transport people and goods. See generally 14 C.F.R. § 25 (1984) (specific airworthiness standards).

3 The cost of a transport category aircraft ranges to $60,000,000 or more. See infra note 11.

4 According to statistics provided by the Air Transport Association, U.S. scheduled airlines spent $4.6 billion on air transport aircraft and related equipment in 1983. 1984 ANNUAL REPORT, supra note 1.

5 For general discussion, see Stewart, Lease, Charter and Interchange of Aircraft: A Government Perspective, 14 AKRON L. REV. 187 (1980) (hereinafter cited as Stewart, Lease, Charter and Interchange); McMeen & Sarchio, Administration of United States Registration of Foreign-owned Aircraft, 46 J. AIR L. & COM. 1 (1980). For example, 49 U.S.C. § 1401(b) has been amended to enable a U.S. corporation (other than a "U.S. citizen" corporation) to register aircraft in the United States, provided such aircraft are "based and primarily used in the United States. . . ." 49 U.S.C. § 1401(b) (1981). This requirement of primary use in the United States has been implemented by section 47.9 of the Federal Aviation Regulations, which requires at least 60 percent of the total aircraft flight hours to be within the United States. 14 C.F.R. § 47.9 (1984). Section 1508(b) of the Federal Aviation Act has been amended to permit the use of foreign-registered aircraft on a dry lease to U.S. air carriers. 49 U.S.C. § 1508(b) (1981). This provision of law has been implemented by FAA regulations. 14 C.F.R. §§ 121.153(c), 135.25(d) (1984). These regulations permit the operation of foreign-registered aircraft of a country which is a member of the Civil Aviation Organization if it is of U.S. approved type design and meets the U.S. airworthiness standards contained in 14 C.F.R. §§ 1-199 (1984).
leasing arrangements. Foreign air carriers now have the possibility of further enhancing fleet utilization by "dry" leasing\(^6\) aircraft to U.S. carriers for use within the United States.

The key elements that must be focused on in the purchase and use of aircraft in the United States are common to both large transport category aircraft and general aviation aircraft. These are the elements of ownership and citizenship.\(^7\) While "title"\(^8\) to the aircraft is important, its meaningfulness with respect to the aircraft has become blurred. "Aircraft ownership" as a term of art is undefined by a statute but is of increasing importance to air carriers in choosing methods to finance or utilize aircraft. The term "citizen of the United States" is, however, explicitly defined in the Federal Aviation Act.\(^9\)

In the arena of aircraft registration and use there have been recent changes in the law designed to enhance the registrability and use of aircraft in a deregulated aviation environment.\(^10\) The term "dry leasing" refers to a civil aircraft which is leased without a crew. See 14 C.F.R. § 135.25(d)(1984).

\(^6\) The term "dry leasing" refers to a civil aircraft which is leased without a crew. See 14 C.F.R. § 135.25(d)(1984).


\(^8\) In this article, the term "title" refers generally to evidence of the right to possession of property. See generally BLACK'S LAW DICTIONARY 1331 (5th ed. 1979).


\(^11\) The Senate Report pointed out that:

If we are to achieve our objective of competitive air service with the lowest fares and rates which can be economically provided, it is important that arbitrary and unnecessary restrictions on the utilization of aircraft (i.e., solely from the fortuitous circumstances of the country of registration) be avoided. Moreover, with the extremely high cost of modern aircraft ($50-60 million for a B-747 with spare parts) maximum efficiency of operations may well be dependent upon a relatively free exchange of aircraft between U.S. and foreign carriers. Modern (but very expensive) wide bodied aircraft permit efficiencies unobtainable with older narrow bodied aircraft, but only if the aircraft are fully utilized. Therefore, removal of artificial barriers to U.S. carrier leases of foreign aircraft, with or without crews, can contribute significantly to more efficient, lower cost operations. The reduction of such barriers may be particularly important in facilitating the entry, or potential entry, of small U.S. air carriers in domes-
It is necessary to understand the concepts of ownership and citizenship as they have been reflected in the federal law of the United States, to appreciate, in part, the decision-making process involved in the financing and use of aircraft in today's environment.

In the United States, it is unlawful to operate an aircraft eligible for registration, be it transport category or otherwise, unless that aircraft is registered in accordance with the United States statute governing registration — the Federal Aviation Act (the Act).\(^{12}\) To qualify for registration, most applicants\(^{13}\) must focus on being an owner of the aircraft and a "citizen of the United States" as that term has been defined in the Act.\(^{14}\) From a substantive point of view, the provisions for registering aircraft may at first glance have little to do with the financing of aircraft. The method chosen, however, to qualify for the requirements making one eligible for aircraft registration — that is, citizenship and ownership — has had a great influence on the methods that are utilized to finance aircraft.

The health of an air carrier, from a financial point of view, is very often dictated by the debt service and capitalization required for its aircraft fleet. The operation of an

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\(13\) The Act also permits aircraft to be registered by lawfully admitted permanent resident aliens and, as discussed infra, by corporations lawfully organized in the U.S. if the aircraft is based in and primarily used in the U.S. 49 U.S.C. § 1401(b)(1)(A)(i)(ii)(1981).


"Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the President and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

*Id.*
airline today is determined as much by the tax law and the aircraft purchasing or rental market as it is by the routes, tariffs and general merchandising techniques employed by airlines. The decision with respect to fleet structure is permeated by decisions of whether to obtain an aircraft through bank or other financing leveraged lease arrangements, net lease arrangements, or variations and combinations of these methods. An additional ingredient of this decision making mix is the recently acquired ability of U.S. carriers to use, on a dry lease basis, non-U.S. registered aircraft. The paths chosen often dictate or are dictated by the financial health of a particular airline.

Airlines are not the only parties interested in the financing involved in equipment. Institutional investors, aircraft brokers and others whose profit motivation is paramount look to equipment investments as a means of effective use of money resources. The tax advantages, such as the investment tax credit and certain forms of depreciation have advantages for institutional investors as well as for the airlines. The investors obtain the profit from investing in the equipment and the airlines obtain the use of the equipment.

During the last several years a number of forms of air-

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16 See generally Eyer, The Sale, Leasing And Financing Of Aircraft, 45 J. AIR L. & COM. 217 (1979); see also Amendments to the Civil Aeronautics Act, 1948 Hearings Before the Senate Subcomm. of the Senate Comm. on Interstate and Foreign Commerce 80th Cong., 2nd Sess. 8566 (1948) (statement of Roger F. Murray, Vice President, Bankers Trust Co., N.Y.):

Each airline presents a different problem, depending upon the state of its development, the routes which it serves, the financial resources at its disposal, and the obligations which it has already incurred. These circumstances of the individual air line will determine whether long-term capital, an equipment trust, a chattel mortgage, or a conditional sale contract will be the most appropriate means of financing flight equipment.

Id.

Craft financing have evolved which are linked to the particular needs of a carrier and the atmosphere of the financial market at that given point in time. Some airlines may be able to purchase large aircraft by going to the bank, borrowing money, putting the aircraft up for collateral and paying the principal and interest. Others may find that satisfactory credit terms may not be available and that it may be more advantageous for them to seek alternative methods for obtaining aircraft use. One device which has gained in popularity has been the so-called "leasing device." Leases vary both in nature and intent and include anything from a very short term use of an airplane to a method of financing a larger transport category aircraft. There are net leases, true leases, peppercorn leases, security leases, finance leases, leverage leases, lease-backs, and so-on.

But what does this all have to do with title to the aircraft and the implications for both national and international aircraft usage? Perhaps we would start at the very beginning and ask ourselves the question that was asked by one of the commentators on aviation law: "what manner of thing is an aircraft in the eyes of the law?" Professor McNair in his treatise on air law pointed out, among other things, that the question is of importance since aircraft fly

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20 Stewart, supra note 18 at 58-60.
23 Generally used to refer to a lease for a nominal rental. See BLACK'S LAW DICTIONARY 1291 (4th ed. 1968).
across international boundaries. Comparing the aircraft to a ship and indicating that it had a legal personality of its own, he also noted that an aircraft was movable property. In the United Kingdom aircraft are included in the category of "goods" under the British Sale of Goods Act. The Uniform Commercial Code reflects similar treatment in the United States. The nature of aircraft and its need for a national identity has been the subject of discussion by lawyers of all nations almost since the inception of commercial aviation.

NATIONAL IDENTITY

The concept of aircraft registration finds its origin in concepts of aircraft nationality. A national identity for aircraft was a necessary accommodation to flight in the air space over which governments exercise sovereignty. Indeed, even before the invention of the airplane, the issue of nationality was being discussed in the context of balloon flights. It is reported that one commentator proposed that the nationality of the balloon depended on the nationality of the owner and further that the owner, commandant and three quarters of the crew of the balloon must be citizens of the same state. One is struck by the

29 Id.
30 Id.
32 "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. U.C.C. § 2-105(1)(1972).
33 See generally Kingsley, Nationality of Aircraft, 3 J. Air L. 50 (1932).
34 See infra note 35.
35 Discussing the nationality of the balloon:
   In 1900 and 1902, before the invention of the airplane, Fauchille, when advocating freedom of the air, discussed balloons only. He proposed that the nationality of a balloon depend, as in the case of a ship, on the nationality status of the owner, and that the owner, commandant and three-fourths of the crew of the balloon be citizens of the same state. He considered that it was not so much the balloon itself as the crew chosen by the owner which could cause international complications. Fauchille probably arrived at these conclusions from the fact that France confers French nationality only upon
similarity between this concept and the present definition of corporate citizenship contained in the Federal Aviation Act, wherein the president, two-thirds of the board of directors and 75 percent of the voting interests must be in the hands of United States citizens.\textsuperscript{36}

The international community has been in agreement since it first grappled with the issue in the form of an international accord\textsuperscript{37} that vehicles engaged in manned flight should possess national identity.\textsuperscript{38} This concept was reflected in the International Convention of Air Navigation of 1919,\textsuperscript{39} the Pan American Convention on Commercial Aviation of 1929\textsuperscript{40} and is presently reflected in Article 17 of the Convention on International Civil Aviation (more commonly referred to as the Chicago Convention).\textsuperscript{41}

The Chicago Convention requires that an aircraft have

\begin{itemize}
  \item Lambie, Universality versus Nationality of Aircraft, 5 J. AIR L. 1, 6 n.9 (1934).
  \item See, Lambie, Universality versus Nationality of Aircraft, 5 J. AIR L. 1, 246 (1934).
  \item Id.
  \item Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173. “Aircraft possess the nationality of the State on the register of which they are entered in accordance with the provisions of Section I(c) of Annex A.” Id. art. 6.
  \item According to the Pan American Convention on Aviation:
    Aircraft shall have the nationality of the state in which they are registered and can not be validly registered in more than one state.
    The registration entry and the certificate of registration shall contain a description of the aircraft and state, the number or other mark of identification given by the constructor of the machine, the registry marks and nationality, the name of the airdrome or airport usually used by the aircraft, and the full name, nationality and domicile of the owner, as well as the date of registration.
\end{itemize}
the nationality of the state in which it registered,\textsuperscript{42} that no aircraft can be validly registered in more than one state\textsuperscript{43} and that registration of the aircraft shall be in accordance with the laws of the state in which it is registered.\textsuperscript{44} The Convention also calls for a display of an appropriate nationality and registration mark for every aircraft in international air navigation.\textsuperscript{45} The international standards for such nationality and registration marks are presently contained in Annex 7 to the Chicago Convention.\textsuperscript{46}

Much of the legal rationale associated with establishing the principles of nationality of aircraft is linked to the concepts of the relationship of a state to its citizens.\textsuperscript{47} Generally speaking, citizenship bestows upon the individual the right to be protected by the state of which he or she is a citizen. Conversely, the states have certain obligations in connection with their citizens. In aviation, states have certain obligations with respect to aircraft bearing their nationality.\textsuperscript{48} Conversely, aircraft of those nationalities, by virtue of being registered in a particular state, are granted certain rights.\textsuperscript{49} In aviation, these rights and duties are spelled out in a series of international multilateral and bilateral conventions concerning such things as safety obligations,\textsuperscript{50} criminal jurisdiction,\textsuperscript{51} and rights of transit and

\textsuperscript{42} Id. art. 17 states that "[a]ircraft have the nationality of the State in which they are registered."

\textsuperscript{43} Id. art. 18 states that "[a]n aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another."

\textsuperscript{44} Id. art. 19 states that "[t]he registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations."

\textsuperscript{45} Id. art. 20 states that "[e]very aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."


\textsuperscript{47} See Lambie, Universality versus Nationality of Aircraft, 5 J. AIR L. 1 (1934).

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} See Chicago Convention, supra note 41.

commerce. The common denominator in international aviation for determining all these relationships has been the registration of the aircraft.

In short, the purpose of registration is to link a legal personality to the aircraft so that the responsibilities and benefits of government, both to the individual and to the property, may be established.

CITIZENSHIP

In the United States there are generally three criteria which must be met in the process of qualifying for registration. The aircraft must be owned by a person who is a citizen. The elements of "person" and "citizen of the United States" are defined by the Federal Aviation Act. A person is defined as "any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic and includes any trustee, receiver, assignee, or other similar representative thereof. . . ." A "citizen of the United States" is defined as:

(a) an individual who is a citizen of the United States or one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the President and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75

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53 All multilateral aviation conventions place responsibilities for aircraft with the "State of registry." Similarly, rights granted are to aircraft of the "State of registry."

54 See supra note 10. As noted earlier, the Act does provide for lawfully admitted resident aliens to register aircraft.

per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.\textsuperscript{56}

In addition to the definition of citizen contained in this provision of the Act, Congress created a special category of U.S. corporation for purposes of registration. By enacting this provision Congress recognized the growing number of U.S. domestic corporations which are subsidiaries of foreign-owned corporations or whose ownership is such that the voting interest requirements or management requirements of the statutory definition of citizenship cannot be met. The provision defines such a corporation as one, other than a corporation which is a citizen of the United States as that term is defined in the Act, which is lawfully organized and is doing business under the laws of the United States or any state thereof, provided the aircraft registered in the United States is based in and primarily used in the United States.\textsuperscript{57}

It is clear that Congress intends that the linkage of nationality to aircraft have as its mortar the concept of United States citizenship in one form or another. In arranging for the use of aircraft by purchase or lease or otherwise, it is important to focus upon this statutory requirement. This element must constantly be in the minds of those responsible for advising carriers about obtaining the use of particular aircraft. The issue must be examined by considering the nature of the legal entity which in fact owns the aircraft being operated by the air carrier in the United States. The concern is not always resolved by determining who holds title to the aircraft.\textsuperscript{58} Should the ownership nature of the aircraft change in such a way as to disqualify the owner as "a citizen of the United States" as that term is defined in the Act,\textsuperscript{59} the aircraft would become ineligible to be operated in the United States.

\textsuperscript{56} Id. § 1301(16).
\textsuperscript{57} Id. § 1401(b)(A)(ii).
\textsuperscript{58} See Stewart, \textit{Aircraft Leasing}, supra note 18 at 69-72.
The expense of transport category aircraft and a need to meet that funding requirement have stimulated the emergence in the last several years of a number of devices, some of which might be categorized as in the nature of legal fictions, which have been referred to by commentators as the "triumph of form over substance." These devices nonetheless will permit owners of aircraft to meet the citizenship requirements, while at the same time permitting them to take advantage of sources of funds which are not entirely from U.S. citizen lenders. Such concepts as voting trusts, financial leases and leveraged leases have been utilized to facilitate the purchase of aircraft while at the same time accommodating the statutory restrictions imposed with respect to citizenship. In this regard, it is interesting that a number of foreign carriers

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60 The most notable example in this author's view is the federal income tax treatment. For FAA views, see supra note 27; see also McFadden & Smith, Tax Act Leases On FAA Loan Aircraft, AIR FINANCE J., Jan. 1982, at 3.


62 See supra note 25.

63 The following comment from an FAA position paper entitled "Use of Voting Trusts for Purposes of Establishing Citizenship Status Under Sec. 101(16) of the Federal Aviation Act To Facilitate Corporate Registration Of Civil Aircraft Of The United States" illustrates the nature of the accommodation being made:

A recurring situation is one involving a corporate applicant (for a Certificate of Aircraft Registration) that does not wish to have to restrict the operation of the aircraft as required by Section 47.9 [ed. note: regulation defining term "based in and primarily used"] and meets all the requirements of section 101(16) of the Act, except that 75 percent of its voting interest is not owned or controlled by other citizens of the United States. To remedy this obstacle to registration eligibility, proposals are sometimes being made to place "control" of foreign-owned stock in a voting trust, utilizing trustees who are citizens of the United States.

The statutory criteria of control of 75 percent of the "voting interest" is elusive. It is not defined in Title V or VI of the Act. The term does appear in Title IV ("Air Carrier Economic Regulation") where, for those purposes only, Section 413 indicates that "it is immaterial whether such control is direct or indirect." Nor has the Civil Aeronautics Board, which administers Title IV, defined "control" in its regulations, although the term is used (see, e.g., 14 C.F.R. § 287.1(e)). In Ronson Corporation, CAB Dockets 25583 and 25603, an Administrative Law Judge of the Board in 1974 held that a voting trust was not effective for purposes of the citizenship requirement for air carriers in the absence of an overriding public interest factor. Nevertheless, the FAA for several years has approved the use of
have utilized the leverage lease device to obtain U.S. manufactured aircraft.\textsuperscript{64} The aircraft ownership in these situations has remained with U.S. citizens, thus imposing on the foreign operator the obligation to maintain the aircraft in accordance with U.S. safety standards since the aircraft remains on the U.S. registry.\textsuperscript{65}

In addition, institutions other than air carriers which own aircraft must constantly be alert in order to preserve the continuing registration eligibility for the equipment subject to their investment by monitoring the nature of the foreign capital that is invested in the institution. In order to avoid the loss of citizenship eligibility on the aircraft subject to their investment, institutional investors must be careful that any foreign infusion of capital is accomplished in such a manner as not to reduce the statutory requirement of 75 percent ownership of voting interest by that particular organization through foreign acquisitions of stock.

Thus the mortar which binds the nationality of aircraft in the United States is the requirement under the Act for citizenship as an eligibility criterion for aircraft registration.\textsuperscript{66} It is worth noting at this juncture that there is one anachronism which continues to exist in the statutory definition of citizenship with respect to the eligibility requirement in the Act for aircraft registration. This antiquity of law is found in the definition of partnerships. While partnerships are eligible to register aircraft under the Act, the law requires that each citizen member of the partnership be an individual, thus eliminating from eligibility corporate partnerships.\textsuperscript{67} It is a subject which needs a legisla-

\textsuperscript{64} Examples of carriers utilizing the leveraged lease are KLM and CAAC (People's Republic of China).

\textsuperscript{65} See Stewart, Lease, Charter and Interchange, supra note 5.


\textsuperscript{67} Id. § 1301(16)(b) (1981); see also 14 C.F.R. § 47.2(2) (1984) (U.S. citizen means: "A partnership of which each member is such an individual").
tive cure and which should be accomplished as soon as possible. There appears to be a consensus in the aviation community for such a legislative change.

Indeed the time may have come to take a fresh look at the requirements of citizenship generally as they relate to the eligibility for registration and thus the nationality of U.S. registered aircraft. At least one organization, the Committee On Aeronautics of The New York City Bar Association, has suggested that the citizenship and corporate partner restrictions are no longer necessary or appropriate in light of today's atmosphere involving aircraft utilization and international corporate ownership and finance as well as partnership law and practice. The New York City Bar Association has recommended, among other things, the elimination of the citizenship requirement as necessary for the eligibility of registration of aircraft in the United States. Instead, they suggest that a non-U.S. citizen registrant submit himself to the U.S. jurisdiction to permit its statutory obligations to insure the safety of civil aviation in this country.

The world community, through provisions in a series of multi-national agreements, has already recognized the fact that citizenship is not the sole requirement or bond which relates to national obligations. In the Hague Convention on hijacking, the Montreal Convention on sabotage and, indeed, by a pending amendment to the Chicago Convention recognition has been taken of the

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68 Two Problems in U.S. Aircraft Registration, Comm. on Aeronautics of the New York City Bar Ass'n (1982).
69 Id.
70 Id.
72 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 41(c), ICAO Doc. No. 8966 (1971).
73 The pending amendment (ratified by the U.S.) is art. 83 b which states: (a) Notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has not such place of business,
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fact that obligations and rights should not rest solely with
the aircraft's state of registry but should also attach to the
civil aircraft operator's state.

I submit that an appropriate forum composed of gov-
ernment and private sector interests should undertake a
review of the present statutory requirements for eligibility
for registration of aircraft in the United States. The re-
view of requirements should bear in mind today's aviation
atmosphere — financial, operational, and international —
with a view toward determining whether they adequately
meet the needs of today's civil aviation as well as the pub-
ic interest and, if necessary, to recommend appropriate
legislative changes which might be considered by the
Congress. For instance, the percentage of voting interest
necessary as a corporate citizen was 51 percent in the mid
1930's. Should we return to this criterion? Are there
other approaches which will enhance the commercial
growth of aviation and at the same time, protect the pub-
ic interest? At the least, the validity of the registration
eligibility requirements should be examined. If the col-
lective judgment is that they are still valid, so be it. But let
us at least review the bidding.

his permanent residence in another contracting State, the State of
registry may, by agreement with such other State, transfer to it all or
part of its functions and duties as State of registry in respect of that
aircraft under Articles 12, 30, 31 and 32(a). The State of registry
shall be relieved of responsibility in respect of the functions and du-
ties transferred.

(b) The transfer shall not have effect in respect of other contracting
States before either the agreement between States in which it is em-
-bodied has been registered with the Council and made public pursu-
ant to Article 83 or the existence and scope of the agreement have
been directly communicated to the authorities of the other con-
tracting State or States concerned by a State party to the agreement.

(c) The provisions of paragraphs (a) and (b) above shall also be ap-
licable to cases covered by Article 77.

For discussion of art. 83 b see supra note 5; see also, ICAO Doc No. A-WP/93 P/41
26/9/80; art. 12 concerns Rules of the Air; Art. 30 concerns Aircraft Radio Equipment;
art. 31 concerns Certificates of Airworthiness, and art. 32(a) concerns Personnel Licenses.

973, 1005 (1938), changed the Air Commerce Act of 1926 requirement of only 51
percent (44 Stat. 568 (1926)).
As pointed out earlier, the Federal Aviation Act does not define "owner." It is left to the Administrator of the Federal Aviation Administration to define that term. He has done so by regulation to include a buyer in possession, a bailee, a lessee of an aircraft with a contract of conditional sale, and the assignee of such persons, as well as more recently the finance lessee of an aircraft.

For decades the issue of ownership and its relationship to aircraft has been of some concern. An early commentator opined:

[A] person conferring nationality upon an aircraft must stand in a certain relation to the aircraft, and the problem is essentially one of determining the legal relations connecting the person and the aircraft.

As to these relations, they must: (a) be governed by private law; (b) be recognized by the laws of all countries; (c) be susceptible of simple and clear definition; (d) be of a certain duration; (e) be such as to ensure the closest legal and economic ties between the person and the aircraft.

The principle of ownership, the legal relation accepted at present by the laws of most countries fulfills the requirements of (a) to (d). But it does not possess the characteristic (e); and this leads me to believe that a mistake was made in choosing the personal nationality of the owner to apply it to the aircraft.

The legal notion of ownership is relatively clear. But from an economic point of view ownership is not at all well defined. Sales subject to the retention of ownership until payment is complete, the "trustee" of English law and the various corresponding legal provisions in continental law, ownership at the place of the security and chattel mortgages, under German law, and long leases of movable objects, all such devices familiar to modern lawyers have gone far to separate the "owner" from his "possession." They clearly show that ownership does not present the

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75 14 C.F.R. § 47.5(d) (1984).
76 Id.
character of "ensuring the closest economic tie between the person and the aircraft."77

The FAA, in commenting on the concept of ownership, declared that the interest of the FAA in ascertaining the owner of an aircraft is limited and particularized. Section 501(f) of the Act78 provides that:

Certificate [of registration] shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership of aircraft by a particular person is, or may be, in issue.79

As stated in the Federal Register:

This section implies that the FAA's determination of the "owner" may not necessarily coincide with a determination of ownership in another forum, for other purposes. As explained in 1938 by Fred D. Fagg, Director of Air Commerce, Department of Commerce, "... we are interested only from the standpoint of nationality of the owner rather than whether he actually possesses legal title."80

If the cement of citizenship is national identity, then the sand of such cement is ownership. The issue of ownership is important not only in the area of aircraft registration, but also with respect to the whole body of law surrounding the relationship between buyer and seller, debtor and creditor, and security interests in aircraft. It has been said that when modern day aircraft transactions are closed, participants may well look at each other and say "someone in this room owns an airplane."81

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79 Id.


81 Intelligence Briefs, 10 AIR FINANCE J. 3 (1981).
purchase of large transport category jet aircraft in today's financial environment is one which is walled with masses of paper and guarded by a phalanx of attorneys of all forms of specialty, accountants, aviation consultants, and in some cases, government representatives from the legal bastions of tax and aviation. Gone, at least for the time being, are the days when most air carrier management could go to the bank, obtain a loan, give a chattel mortgage on the aircraft and proceed about its business. Even the term "chattel mortgage" has disappeared from the world of secured interest under the Uniform Commercial Code. The titleholder of the aircraft, that is the person who holds the paper title on the aircraft, may indeed not be construed as being the owner of the aircraft for certain provisions of the Act. Rather, with the increased usage of such funding devices as conditional sales, leases with options to purchase, leverage leases and finance leases, the owner of the aircraft is the one, as the Federal Aviation Administration (FAA) points out in its opinion on finance leases, who holds the indicia of ownership rather than the paper title to the vehicle.

In a financial market where the capital necessary to purchase large transport category aircraft runs into millions of dollars, the role of the lender and the protection of his interests very often loom as large as the role of the purchaser and the role of the seller. All three parties are interested in where the incident of ownership finally comes to rest because, among other considerations, if the owner is a citizen it is possible to register the aircraft with the FAA. Lenders and sellers are then in a position to take advantage of the recordation provisions of the Federal Aviation Act and are thereby afforded protection for their investment in the form of a federally recorded secur-

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82 See U.C.C. art.9 (1972); the current article 9 uses the phrase "security interest" which replaced the pre-code device and term "chattel mortgage."
84 See Lambie, supra note 47, at 87.
ity interest. The need to protect the financiers of aircraft purchasers is a truism if air commerce is to continue to flourish. Money will not be loaned unless there can be some assurance that a means exists to protect the secured interest of the lender. This protection is all the more necessary considering the highly mobile nature of the goods with which we are dealing — the airplane.

Recognition of these factors led Congress in 1938 to attempt to establish a central clearing house within the federal government where one could ascertain what claims might exist against the aircraft he intended to purchase and conversely, where persons having a secured interest in aircraft would put the world on notice of the security interest. That clearing house is the FAA Aircraft Registry, now permanently located in Oklahoma City, Oklahoma.

Title V of the Federal Aviation Act provides for recordation of rights in aircraft, certain engines, propellers and spare parts. With respect to aircraft, the Act provides that the FAA must record any conveyance or instrument which affects title to or an interest in U.S. registered aircraft. A conveyance is defined very broadly as a bill of sale, a contract of conditional sale, a mortgage, an assignment of a mortgage, or another instrument affected to or an interest in property.

The Act also addresses the recordation of leases and other security instruments with respect to engines capable of generating 750 or the equivalent horsepower and specifically identified aircraft propeller capable of absorbing 750 horsepower, as well as certain other pooled engines.

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85 49 U.S.C. § 1403(a) (1981). A security interest may only be recorded under the Federal Aviation Act if it is a conveyance which affects title to or an interest in, a civil aircraft of the United States. Id.
87 The FAA Aircraft Registry is located at the Mike Monroney Aeronautical Center, Box 25082, Oklahoma City, Oklahoma 73125.
and spare parts. In this latter case the provision is applicable only to engines, propellers, appliances, and spare parts maintained by or on behalf of air carriers certificated by the Civil Aeronautics Board. The benefits of recording with respect to such engines does not extend to intrastate air carriers. Additionally, security interest holders may record against engines, propellers and spare parts which are physically located at a situs referred to in the recorded instrument. In this situation, caution should be exercised to amend the instrument if the spare parts are relocated.

Since a conveyance is broadly defined in the Act, it is recommended that if it can reasonably be said to affect an interest in aircraft it should be filed for recordation. Documents reflecting the release of liens are also recordable and indeed the federal regulations require their filing. There are certain areas which still cause difficulty, however, to interested lenders seeking information on claims against aircraft being purchased. Federal tax liens are not recorded and certain nonconsensual liens, such as certain materialmen's or artisans' liens, are not recorded.

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93 Id.
95 14 C.F.R. § 49.51(a) (1981).
97 14 C.F.R. § 49.17(e)(5) (1984). This regulation states:
Immediately after a debt secured by a chattel mortgage has been satisfied or any of the mortgaged aircraft have been released from the chattel mortgage, the holder shall execute a release on AC Form 8050-41 provided to him by the FAA when he recorded the conveyance made to him, or its equivalent, and shall send it to the FAA Aircraft Registry for recording. If the debt is secured by more than one aircraft and all of the collateral is released, the collateral need not be described in detail in the release document. However, the description of the mortgage must include its date, the names of the parties, the date of FAA recording, and the recorded document number.

Id.
98 Id. § 49.17(a). The FAA, as a matter of policy, will only record certain mechanics liens. See 46 Fed. Reg. 61,528 (1981), which states:
However, we are of the opinion that the right to assert such claims of
What is the effect of recordation under the federal system? Unless recorded with the FAA, the conveyance is not valid against any person other than the person who made the conveyance, to whom the conveyance was given, or who has actual notice thereof. Recordation is effective from the date of filing.

Security interest holders, however, cannot stop here. The Federal Aviation Act does not determine the validity of the instrument filed, nor does it determine the priorities which might be accorded to claims evidenced by such lien by recording them with the Registry must be governed by State legislation in order to assure uniformity and nondiscriminatory standards. We also recognize that this involves a change in the Registry procedures. The Registry has previously accepted such liens, but has experienced some difficulty with liens which have not been released, claimants who can no longer be found, and some liens which are alleged to be spurious, but have nevertheless found their way into the recorded documents against certain aircraft. At the present time, the Registry is named a party in two suits to clear the title to aircraft encumbered by mechanics' liens, asking for either a purge of the records, or clear title in the record owner of the aircraft. Of course, we will abide by the judgment of the court in each case.

Our survey of the statutes of the laws of States, and three other jurisdictions for which the Registry provides aircraft recording and registration services under the Federal Aviation Act, shows 16 States or territories which have recording or notice provisions for personal property liens:

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<tr>
<th>Alaska</th>
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<tr>
<td>Arkansas</td>
<td>Oklahoma</td>
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<td>Georgia</td>
<td>Oregon</td>
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<td>Illinois</td>
<td>South Carolina</td>
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<td>Indiana</td>
<td>South Dakota</td>
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<td>Kansas</td>
<td>Virgin Islands</td>
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<td>Kentucky</td>
<td>Washington</td>
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<td>Maine</td>
<td>Wyoming</td>
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The common elements of the notice statute is the presence or absence of the following requirements:
- The time within which the claim must be recorded;
- Whether the claim must be signed by the claimant, or may be signed by his agent or attorney;
- Whether the claim must be verified;
- Where the claim is to be filed. [Of course, for aircraft, there is Federal preemption of place of filing — The FAA Aircraft Registry at Oklahoma City].

100 Id. § 1403(d).
filings and instruments. Here we must turn to state law and examine the state Uniform Commercial Code provisions. Federal law provides some assistance in bringing uniformity into commercial practice. Recently the Supreme Court has put to rest any question of the federal filing requirements being preemptive of any state notice requirements. It also appears to have reaffirmed that state law must be examined with respect to the priority of claims issue. The Act is some assistance in the choice of law decision faced by lenders, purchasers and sellers since it does create a federal choice of law rule which indicates that the state in which the instrument is delivered is the state whose law will determine the validity of such instrument. All of this having been said, however, there continues to be some cause for nervousness. For as the Supreme Court in Philko pointed out in a footnote, the federal system, while designed to afford some sense of

101 *Id.* § 1406. This section states:
The validity of any instrument that recording on which is provided for by section 1403 of this title shall be governed by the laws of the state, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

102 *Id.* The priority of security interests under state law is governed by article 9 of the Uniform Commercial Code. See infra note 104.


104 *Philko,* 103 S.Ct. at 2480. The opinion states:
Although state law determines priorities, all interests must be federally recorded before they obtain whatever priority to which they are entitled under state law. As one commentator has explained, "The only situation in which priority appears to be determined by operation of the [federal] statute is where the security holder has failed to record his interest. Such failure invalidates the conveyance as to innocent third persons. But recordation itself merely validates; it does not grant priority."

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consolation in the market place, is not without certain mechanical flaws. According to the Court:

Although the recording system ideally should allow any transferee who has checked the FAA records to acquire his interest with the certain knowledge that the transferor's title is clear, we recognize that the present system does not allow for such certainty, because there is a substantial lag from the time at which an instrument is mailed to the FAA to the time at which the FAA actually records the instrument. Thus, if the owner of an airplane grants a lien on it to Doe on one day and attempts to sell it to Roe on the following day, Roe might erroneously assume, based on a search of the FAA records, that his vendor has clear title to the plane, even if Doe had promptly mailed the documents evidencing his lien to the FAA for recordation.\(^{106}\)

Recognizing the mobile nature of aircraft, the international community has attempted to address the concerns of the financial community whose investment in aircraft is at stake as it transits to various national jurisdictions. As early as 1931, the international community had drafted two conventions, one dealing with secured interests in aircraft\(^{107}\) and the other focusing on recordation matters.\(^{108}\) However, it remained for the Civil Aviation Convention in Chicago in 1946, to focus the international community on this subject in a meaningful manner.\(^{109}\) At that Convention a resolution was adopted calling for an international private air law dealing with the title to aircraft.\(^{110}\) The so-called Mortgage Convention was the result of the endeavor.\(^{111}\) Unfortunately, the Mortgage Convention has received limited acceptance in the international community; and while the United States is a party thereto, a

\(^{106}\) Philko, 103 S. Ct. at 2479, n.5.


\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) Id.

The number of leading aviation states are not.\textsuperscript{112}

The Mortgage Convention is designed to protect rights in an aircraft which have been created in one signatory State when the aircraft moves to another signatory State.\textsuperscript{113} It covers security interests such as mortgages and similar contractual rights in aircraft.\textsuperscript{114} The U.S. viewed the Convention as a stimulus to overseas sales by U.S. manufacturers.\textsuperscript{115} The obligation undertaken by parties thereto is to recognize and protect the rights of foreign holders of security interests. The most significant benefit of the Convention was probably the participants' undertaking the obligation not to register aircraft previously registered in another contracting State unless all holders of recorded interests have been satisfied or consent to transfer of registration.\textsuperscript{116}

The Mortgage Convention applies to security interests that are contractually created; thus statutory, judicial and common law liens are not covered.\textsuperscript{117} The Convention

\textsuperscript{112} Notably, the United Kingdom.

\textsuperscript{113} See generally Calkins, Creation and International Recognition of Title and Security Rights In Aircraft, 15 J. AIR L. & COM. 156 (1948).

\textsuperscript{114} See Convention note 111, at art. 1.

\textsuperscript{115} In submitting the Convention to the United States Senate for advice and consent to ratification, the report of the Acting Secretary of State Robert Covett contained the following observation:

The need in the interest of the future expansion of international civil aviation that rights in aircraft be recognized internationally has been realized for some time. The development of civil aviation requires that adequate finances be forthcoming for aircraft manufacturers. Although aircraft may represent an attractive form of security for loans needed for their purchase, their mobility allows them to evade seizure should the debtor default. By crossing a frontier, aircraft can avoid legal action by creditor unless the surety held by him is internationally recognized.

U.S. Senate, Executive E, 81st Cong., 1st Sess. at p. 4.

\textsuperscript{116} For a general discussion of the Convention, see Calkins, supra note 113; U.S. Air Coordinating Committee Doc. ACC 88.12. This obligation has been incorporated into FAA regulations at 14 C.F.R. § 47.47 (1984).

\textsuperscript{117} Article 1(2) of the Convention also provides that "[n]othing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not admit or recognize any rights as taking priority over the rights mentioned in Paragraph (1) of this Article." As a matter of policy the FAA recognizes, and therefore declines to deregister export aircraft encumbered by, tax liens and restrictive court orders.
defines an aircraft as including the airframe, engines, propellers, radio apparatus and other articles intended for use in the aircraft whether or not temporarily separated from it.\textsuperscript{118} The Convention does not provide for the recognition of security rights in specifically identified engines, except as components for an aircraft or as part of a store of spare parts.\textsuperscript{119} Spare parts are used only if they are maintained for installation on an aircraft, stored in specified places and provided certain "notice" requirements are met.\textsuperscript{120}

There are a number of provisions dealing with judicial executions and sales of aircraft in a contracting State other than the State of registry, the most important of which is the requirement of one month’s public notice and notification of recorded lien holders.\textsuperscript{121} The Convention does have a provision granting priority to claims for salvage and extraordinary expenses indispensable for the preservation of the aircraft.\textsuperscript{122}

With respect to advising lenders and others engaged in aircraft sale or lease transactions, one final observation may be worth noting. Parties to such transactions should be mindful of the provisions of current U.S. bankruptcy law,\textsuperscript{123} and specifically of the recent changes in the Bankruptcy Code. New section 1110 of the Bankruptcy Code has been modified to give the trustee\textsuperscript{124} in a reorganiza-

\begin{footnotesize}
\textsuperscript{118} Convention on the International Recognition of Rights in Aircraft, supra note 111, art. XIV.
\textsuperscript{119} Id. art. VIII.
\textsuperscript{120} Id. art. VIII(4).
\textsuperscript{121} Id. art. V.
\textsuperscript{122} Id. art. III.
\textsuperscript{124} Concerning the debtor-in-possession, 11 U.S.C. § 1107 (1979) states:
(a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in section 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.
(b) Notwithstanding section 327(a) of this title, a person is not qualified for employment under section 327 of this title by a debtor in
\end{footnotesize}
tion case an opportunity to continue in possession of the equipment by curing defaults and by making the required lease and purchase payments. This removes the absolute veto power over a reorganization that lessors and conditional vendors might have exercised under previous law while still entitling them to the protection of their investment. It should also be noted that parties to a lease or conditional sale agreement may no longer provide for exclusion of the bankruptcy laws by the terms of the lease or

possessions solely because of such person's employment by or representation of the debtor before the commencement of the case.


(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301), or vessels of the United States, as defined in subsection B(4) of the Ship Mortgage Act, 1920 (46 U.S.C. 911(4)), that are subject to as purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, as the case may be, to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless —

(1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be —

(A) that occurred before such date is cured before the expiration of such 60-day period; and

(B) that occurs after such date is cured before the later of —

(i) 30 days after the date of such default; and

(ii) the expiration of such 60-day period.

(b) the trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.

Id.
CONCLUSION

The foregoing discussion represents an overview of some of the important elements relating to title to transport category aircraft as they affect the decisions of lenders, purchasers and sellers of large transport category aircraft. It has been necessarily brief and perhaps oversimplistic. The federal statute which addresses the issues of citizenship and ownership as they relate to the registration of aircraft and the recordability of instruments affecting title to aircraft has been on the books for a good number of years. It has been the subject of partial amendment, of commentary by learned practitioners and of legal interpretation through regulation and otherwise by the FAA. Aviation has moved into the jet age. Aircraft financing has moved into the age of mega-dollars and multi-national transactions. The world of security interests has seen the adoption by almost all states in the United States of the Uniform Commercial Code. The Federal Aviation Act itself has been amended to accommodate the changing environment of deregulation. The international community has amended the international undertakings to recognize the viable use of aircraft by permitting the delegation of authority from countries of registry to countries of the operator.

Computer science is available to facilitate the rapid transference of information. I suggest that it is time for a new look at the law and practice, particularly the provisions of the Federal Aviation Act, as they relate to aircraft registration and recordation of security interests with the view toward bringing the present statute into the modern era. It is perhaps the kind of undertaking which would be appropriate for a committee of government and private

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126 Id.
127 Louisiana is the noted exception.
128 See supra notes 9-10.
129 See supra notes 72-74.
sector representatives. This is the kind of undertaking that calls for an oversight hearing. Regulatory changes, some merely of a technical nature, while others more substantive should be initiated to bring the federal regulations into conformity with modern practice. The FAA is already studying possible improvements in its activity in this area. These should be encouraged and should include consideration of the use of today's computerized environment to accommodate more rapidly the public need and publication in the Federal Reporter, or other vehicle of FAA guidance and counsel, opinions relating to specific transactions. International initiatives in the form of encouraging an international central clearing house for liens on aircraft and aircraft engines should also be stimulated and encouraged. I am not suggesting we tinker with a machine that is working well enough, but rather look to see whether it is the most efficient kind of machine for today's environment.