Creation and International Recognition of Title and Security Rights in Aircraft

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CREATION AND INTERNATIONAL RECOGNITION OF TITLE AND SECURITY RIGHTS IN AIRCRAFT

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THE principal purpose of this Article is to discuss in detail the draft of the proposed convention on the International Recognition of Rights in Aircraft, which is on the agenda of the Second Assembly of ICAO for finalization and opening for signature.¹ This draft was prepared by the ICAO Legal Committee at its first meeting, held in Brussels in September, 1947. In order to discuss the Convention intelligently, however, it will first be necessary to examine the existing law on the subject so as to understand the objectives which the draft seeks to achieve, the compromises which it attempts to reach, and the possible questions of law it leaves unsolved.

A hypothetical case which presents the problems with which we are concerned is the following: Airline X, incorporated under the laws of Delaware, desires to purchase a fleet of ten new aircraft, manufactured in California, in order to conduct its operations from the United States to England, France, Italy, and beyond. A New York bank is consulted, and agrees to furnish the necessary funds, provided that it can be given a valid purchase-money security on each of the new aircraft, together with a secured interest equal to twenty-five per cent of the total purchase price of the new fleet on its existing fleet of six unencumbered aircraft as additional security.

The Bank further insists, with respect to the "new" fleet, that every airplane is to constitute joint security for the entire loan, and that every airplane in the "old" fleet is to constitute joint security for the additional twenty-five per cent, until the last of the new airplanes is paid for. Assume, further, that it is decided to employ a mortgage as the security device in both cases.

If we assume that at the time of the "closing" of the transaction,

¹ For complete text, see 14 Journal of Air Law and Commerce 500 (1947).
none of the "new" fleet has been delivered to the airline, and that two of the "old" fleet are in France, one in England, one in New York and two over the high seas between Ireland and the United States bound in opposite directions, we have a situation which has limitless possibilities for confusion. First of all, what will be the situation with regard to an aircraft of the "new" fleet abroad after it has been turned over to the airline? Would the lien of the mortgage be valid as against an attaching creditor in England, where chattel mortgages as such are not recognized for domestic purposes? To what extent would it be recognized in France, where mortgages though permitted, can cover only single units? What would be the subsequent status in the United States of the aircraft of the "old" fleet which at the time the mortgage was made were in France, England, and over the high seas?

At the outset, it must be observed that no answer can be given to these questions with absolute assurance of being correct. There are still too many theories of conflicts of law which have been applied by the courts of the world to permit complete certainty of solution.

Basically two problems are presented: the first involves the creation of the mortgage, the second, relates to its recognition and enforcement. Whether a right of any kind has been created will depend not only on the terms of the agreement between the parties, but on the provisions of the law which must be applied to such creation. This is primarily a matter of determining, under the specific facts of each case, what law is to be applied and whether the transaction is valid under such law. The question is distinctly a factual and legal one. The recognition and enforcement abroad of a right validly created elsewhere, however, is one which will be resolved primarily as a matter of public policy of the State in which the determination is to be made. These problems therefore will be treated separately.

**Law Governing Creation of Interest in Tangible Moveables**

There appear to be at least three rules as to what law governs the creation or transfer of interests in tangible moveables. Some older cases have adopted the rule that the domicile of the owner is the jurisdiction whose law should control, apparently on the theory of *mobilia sequuntur personam*. Mr. Beale in his treatise on the Conflict of Laws disposes of this doctrine as applied to the creation of rights in chattels as follows:

> "If the maxim is thought of with relation to tangibles, to which it has often been applied, it is almost grotesque. The picture of a "

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horse or a library of books following the owner about from place to place is not one which has legal connotations."

While we can fully agree with Professor Beale as to the grotesque character of the doctrine, as applied to horses and libraries, whose exact geographical status at any given time can be determined subsequently, there is definite appeal to the doctrine insofar as aircraft are concerned. If it were to be followed, greater certainty would undoubtedly result, since there would be no necessity for fixing the geographical location of 300 mile-an-hour aircraft at a precise moment of time. The possibility of its readoption is therefore not beyond question. Moreover, irrespective of theoretical niceties, few financial institutions will want to lend large sums of money where there is any substantial chance that the doctrine might be followed so as to apply the law of a jurisdiction under which the interest it seeks to protect is not recognized. Consequently, prudence would dictate, in the creation of any secured lien interest, that the law of the domicile of the airline be checked to determine whether such interests can lawfully be created.

The second principle of conflicts of laws which is sometimes used by the courts to determine the law which governs transactions in tangibles is that the law of the place where the contract is entered into and is to be performed shall apply.8 The Restatement, Conflict of Laws is opposed to this rule, both with respect to the rights of the parties inter se and with respect to rights of third persons.9 However, in Jewett v. Keystone Driller,10 the Massachusetts court decided that a dispute between the parties to a conditional sale was to be decided in accordance with the law of the jurisdiction where the contract was made, ignoring the law of the jurisdiction where the chattel was located. From its opinion, the court did not stress the fact that the dispute was between the parties rather than one involving the rights of third parties. However, this distinction was specifically made in Grieme v. Robkes,11 as follows:

"... We think it true that a mortgage executed in one state upon property in another will not be held in force in the latter state as against attaching creditors, and others not parties to the mortgage, without notice, but we believe as between the parties themselves such mortgage is valid."

By far the great majority of cases appear to apply the rule that the creation and transfer of a right in a tangible chattel is governed by the law of the situs of the chattel at the time of the creation or transfer of the right.12 In this connection, it has been stated that,

"... It is important to note that the term situs as used in this chapter refers simply to the actual physical location of the property at

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9 RESTATEMENT, CONFLICT OF LAWS, §265 comment (1934).
10 Supra, note 6.
11 45 S. D. 480, 188 N. W. 745 (1922).
the time the transaction whose effect is to be determined occurred. It is not used, as is sometimes the case, to indicate as a legal conclusion the place whose law is to govern the effect of a particular transaction which may or may not be the place where the chattel is at the time."  

Since the reason for the rule is that it "has the merit of adopting the law of the jurisdiction which has the actual control of the goods and the merit of certainty," there is no doubt that Mr. Goodrich is logically correct.

We, therefore, are confronted with a rule of conflicts of law, which is followed by the majority of American states, by England, France, and Germany, and which would require us to pinpoint in space as of the instant the mortgage is signed, 300-mile per hour aircraft in order to determine by what law the mortgage shall be governed. It is submitted that such an application of the situs rule is just as grotesque as the application of the domiciliary rule to Professor Beale’s ambulatory library and that far from having the merit of certainty, it will give rise to almost insoluble difficulties. Moreover, the doctrine leaves us completely in the dark with respect to the two aircraft over the North Atlantic given in the example. Is the mortgage with respect to such airplanes to be determined, as liens with respect to vessels, by the law of the flag? If so, we are in a particularly precarious spot, since there is no national mortgage law as such applicable to aircraft in the United States, but only the laws of the various states—and which one of those should we apply? Again, would the law of the flag cease to apply the instant the airplane arrived over the territorial waters of another nation? Any other solution would appear incompatible with national sovereignty in overlying airspace, so carefully preserved by the Chicago Convention. Even though the law of the flag would have little utility, it would obviously be impossible to apply the law of the situs to these two aircraft.

Domestically, the matter is further complicated by two recent decisions of the United States Supreme Court—United States v. Causby—United States v. State of California. The effect of these two decisions may well be to place aircraft flying above the minimum altitudes over states of the United States within the exclusive jurisdiction of the Federal Government. The logical extension of the Causby case would give aircraft cruising at normal flight altitudes a federal situs for conflicts purposes.

With these difficulties in mind, it is not easy to conceive of a court

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13 Goodrich, Conflict of Laws, §150, note (2nd ed. 1938).
15 Dicey, Conflict of Laws, 608 (5th ed. 1932).
17 Ibid.
18 The Velox, 21 F. 479 (1884); The Angela Maria, 35 F. 430 (1888).
19a 328 U. S. 256 (1946).
19c See Cooper, cit. note 19 supra.
pushing the *situs* rule to its logical conclusion. The Restatement recognizes the potential difficulty in a far less cogent form, but refuses to express any opinion as to what law will govern a transaction whereby several moveables, in different jurisdictions, are transferred or encumbered by a single act.

Possibly, a court if confronted with this situation would apply the rule, but would determine that something more lasting than transitory location be used to determine *situs*—and would apply the law of the place where the aircraft was usually based. This, in effect, would be only a variation of the domiciliary rule, but if the place of basing and the domicile of the owner were in different jurisdictions, such a rule would have neither the doctrinal comfort of *mobilia sequuntur personam* nor the logical justification of *lex rei situs*. Another facet to the problem which must be borne in mind is the fact that the *situs* rule only becomes inappropriate while the aircraft is in the air. Certainly, if an aircraft is attached abroad, or is locally subjected to a lien or other encumbrance in foreign territory, it is obvious that it should be subject to the complete dominion of that jurisdiction. The aircraft loses in such circumstances its exclusive and different character from other chattels.

From considering the various doctrines of conflicts of law applicable to transactions covering fleets of aircraft, one is impressed by the inappropriateness of each of them to meet current commercial needs in a logical manner. The domicile of the airline—i.e., its state of incorporation, may never see any of the aircraft its laws are supposed to affect; the same may be said of the place where the contract is made; and as for the *lex rei situs*, this doctrine, when applied to aircraft actually in flight, presents untold problems of fact finding.

Fortunately, to be forewarned is to be forearmed, since it is probable that the transaction can be so arranged as to take account of the varying possibilities. In the case of mortgages covering after-acquired aircraft, it is necessary to provide in the indenture for the delivery of each aircraft in a State where after-acquired property clauses are legal and in accord with the formalities of that state. It also would be desirable to have all aircraft in the existing fleet, or such of them as are to be subjected to lien, brought into one jurisdiction at the time the transaction is closed, preferably the state where the contract is made and to be performed, which, if possible, should be the state of the airline's incorporation. Although it would not be difficult to close the usual transaction in the state of incorporation, the problem of herding all the airline's airplanes into the jurisdiction at that time might well prove so costly as to be impracticable. However, there is no reason why the indenture should not be worded to provide that each aircraft should be bound under the mortgage separately only after

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20 Restatement, Conflict of Laws, §256 caveat (1934).


22 See Beale, op. cit. supra, note 5, §265.2; Restatement, Conflict of Laws, §265b (1934).
it has returned from flight and has become immobilized in the chosen jurisdiction.

The importance of taking these varying conflicts theories into account at the time of the transaction cannot be overemphasized. The proposed Convention on the International Recognition of Rights in Aircraft will impose on the various Contracting States obligations to recognize rights in aircraft "which have been created in conformity with the law of the country whose nationality the aircraft possesses." Cases will undoubtedly arise in the future where a foreign court will be confronted with the problem of enforcing, as against the citizens of that country, a mortgage held by an American citizen on an American aircraft. In such cases, the court may be quick to seize on the conflicting rules in our several states, and any doubt that a lien has been validly created on the aircraft may be expected to be pressed to the utmost by attorneys representing local creditors.

RECOGNITION OF RIGHTS VALIDLY CREATED

Assuming that the problem presented by the foregoing discussion has been successfully resolved, and a lien created on an aircraft which will be recognized as valid under each of the doctrines of conflicts of laws discussed, there remains the much more serious problem as to the extent to which such a lien will be recognized and enforced in other countries. At the present time, in the absence of an international treaty on the subject, this is almost impossible to predict. Generally speaking, the rule most usually applied appears to be that a foreign right in a foreign chattel will be recognized and enforced only to the extent that such a right is not contrary to the public policy of the forum.

The foregoing statement of the rule, however, does not in fact offer a very sound basis for prediction if the varying laws of the states of the United States are to be taken as a guide. In many of the states security interests in chattels brought in from other states must be recorded in the second state. 23 In Pennsylvania, and for a long time in Louisiana, chattel mortgages were not recognized, and valid mortgages created on chattels in other jurisdictions were not enforced when the chattel was brought into those states. 24 Although the validity of a chattel mortgage in a second state should not, in theory at least, depend on whether the mortgagee has consented to the removal of the chattel, the rule in at least six states appears to be that if the removal is with the consent of the mortgagee, refileing in the new state is necessary. 25

Moreover, it is almost universally true that a prior lien may be placed on a chattel in a foreign state which could have the effect of making the mortgage valueless. 26 Restrictions which diminish the

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24 BEALE, op. cit. supra, note 5, §266.3.
25 See note, 67 A. L. R. 695, 714 (1928), and cases there cited.
26 RESTATEMENT, CONFLICT OF LAWS, §268(d) (1934).
effectiveness of rights created in foreign jurisdictions may be either judge-made or statute-made, but in any event the secured creditor may find the value of the security diminished by reason of the removal of the chattel from the state where the lien was made.

With the possibility of many different and unpredictable treatments of secured interests in aircraft by foreign countries, it is obvious that an international convention which will bring certainty to the field is indispensable before credit arrangements can receive widespread adoption in international air transportation. To be of any practical use, such a convention must accord recognition and substantial protection to validly created rights in foreign aircraft. It must include an undertaking on the part of each country to limit the amount of local prior liens which it will permit to be placed ahead of a pre-existing mortgage on a foreign aircraft. Because such recognition and protection must be uniform throughout all Contracting States, the differing national philosophies as to the relative status of the secured creditor with respect to the general creditors must be carefully weighed and a solution found which will be satisfactory to all.

**Historical Developments of the Draft Convention**

From the beginning of international air transport activities, men connected with aviation have realized the problems involved in connection with rights in aircraft which fly abroad. In 1926 CITEJA was created as a result of the International Conference on Air Law held in Paris in the Autumn of 1925 and was specifically charged by that Conference with drawing up draft conventions on aeronautical registers, aircraft ownership, rights in rem, and mortgages. In 1931 the CITEJA produced two draft conventions, one relating to an aeronautical property record and the other to mortgages and other secured interests. These draft conventions are what might be called the grandparents of the present Brussels draft. In the early CITEJA draft on the Aircraft Property Record, the draftsmen attempted to establish what might be termed the "Torrens" system of the air. This system, however, was confined to proprietary interests in aircraft. Possibly for the reason that certain states might be unwilling to accept mortgages on airplanes\(^{27}\), the draft convention relating to the recognition and protection of such rights was embodied in a separate document.

Apparently, the time was not ripe in international flying for either of these conventions to have widespread, enthusiastic support.\(^{28}\) Both of them lay dormant until the Chicago Conference in 1944, at which time, and at the suggestion of the American delegation, a resolution

\(^{27}\) See note 3, *supra*.

\(^{28}\) The English delegate to CITEJA, Sir Alfred Dennis, stated that the British Delegation was not interested in the mortgage convention and abstained from voting thereon—Compte Rendu, 6th Sess., 50, 134.
was adopted recommending that the various governments represented at the conference give consideration to the early calling of an international conference on private international air law for the purpose of adopting a convention dealing with the transfer of title to aircraft, and that such private air law conference include in the bases of discussions, the existing draft conventions relating to mortgages, other real securities and the aerial privileges.

Pursuant to this resolution, the matter was considered by the CITEJA in Paris in January of 1946. It was again considered by the Interim Assembly of the PICAO, held in Montreal in May, 1946. The results of the discussion at this latter meeting produced a unified draft combining the principles of both the early CITEJA drafts. Several questions of substance were left unresolved at that time, however, and the various Contracting States were therefore asked for their views as to the proper solution. The same questions were also considered by the CITEJA in its Cairo meeting held in November, 1946.

Real progress toward achieving unanimity was reached in a meeting of an Ad Hoc Committee held in Paris in February of 1947 to consider the replies from the several countries to the PICAO questionnaire and to work on a new draft convention. Represented at this meeting were delegates of the United States, the United Kingdom, France, and Belgium. This draft was circulated by the ICAO to all member States and formed the basis for consideration by the Fourth Commission of the First Assembly of ICAO in May, 1947.30

The meetings of the Fourth Commission of the First Assembly of ICAO were somewhat handicapped in the discussion of the Convention by the necessity for dealing with more immediate problems confronting the Assembly. Because of the limited time available, a searching analysis of the real problem was not made, and a great deal of energy was spent in considering the different types of security interests, particularly the American "equipment trust". It is submitted that the mechanics whereby a secured interest is created have relatively little bearing on the fundamental problem — ie: to what extent will the countries allow such interests in foreign aircraft to be protected. Nevertheless, the Montreal drafting committee recommended a provision which would have permitted Contracting States to "reserve out" on the undertaking to recognize certain elements of the equipment trust.31

Despite the numerous considerations and reconsiderations, all questions of substance were by no means settled in Montreal and the question was fully reconsidered, debated and argued at length at the Brussels Meeting of the Legal Committee of ICAO in September

29 Final Act International Civil Aviation Conference, Chicago, 1944, Part V.
30 See 14 JOURNAL OF AIR LAW AND COMMERCE 382 (1947).
31 Report of Drafting Committee, ICAO Doc. 4362.
It is difficult to state with any degree of accuracy which hurdle was the most difficult to overcome. Broadly stated, the jurists of the respective countries were distrustful, to say the least, of the various security devices and interests which other countries offered their own investors. That agreement was finally reached on a draft that should be acceptable to most nations is a tribute to the patience and ingenuity of the men attending that meeting.

LIMITATIONS ON SCOPE OF CONVENTION

Perhaps it would be wise to say a few words about what the Convention does not purport to cover before going into a detailed discussion of its various provisions. In the first place, the Convention does not purport to state by what law the creation of interests in aircraft or their transfer will be governed. No attempt is made to resolve the difficulty in choosing between the conflicting doctrines set forth in the first part of this article. The absence of such coverage, however, is not clearly seen from a reading of the draft. In Article I, after the recitation of rights which the States undertake to recognize, there is a proviso which reads, "provided that such rights have been constituted and are recorded in a public record, in conformity with the law of the Contracting State whose nationality the aircraft possesses." It will be noted that the phrase "in conformity with the law" does not specify the municipal law of such Contracting State but merely requires the rights to have been constituted in conformity with the law of such state. The discussions at Brussels make it amply clear that what is intended is the entire law of a Contracting State, including its law on conflict of laws.33

Consequently, it will be necessary for a court which is seized with a problem in the future to consider under what law a given transaction was consummated, applying to its decision the law of conflict of laws of the Contracting State whose nationality the aircraft bears.

Secondly, the proposed Convention does not purport to protect international credit as such in all aircraft, but is limited to protecting credit in aircraft while abroad. The proposal was made several times during consideration of the Convention, both at Montreal and at Brussels, that the interests of foreign creditors in domestic aircraft be extended the same protection as that extended to creditors' interests in foreign aircraft. This proposal was finally withdrawn when it became apparent to its proponent that it would be rejected.34

The third thing that the proposed Convention does not purport to do is to establish a "treaty mortgage". The Contracting States are left almost completely free to utilize whatever form of security

32 For Report and Commentary of the Legal Committee of ICAO on the Draft Convention, see 14 JOURNAL OF AIR LAW AND COMMERCE 505 (1947).
33 Minutes, Brussels Meeting, Legal Committee, ICAO Doc. 4611, p. 4. See also, Comments received from Government of Norway, ICAO Doc. 5088.
34 Minutes, Legal Committee, Brussels, L. C. Working Draft 23 (Sept. 18, 1947).
device may appeal to them. The scope of the Convention is limited to the recognition, enforcement, and protection of valid secured interests in foreign aircraft.

The fourth field which the proposed Convention does not purport to cover are interests created not by agreement of the parties but through operation of law. It was decided at the Brussels Meeting that any attempt to safeguard judicially created interests would be unwise and unnecessary and that the same result could be obtained through a recording of a transfer required to be made by domestic law.

A fifth realm in which the Brussels Legal Committee did not desire to venture was a mandatory requirement on Contracting States to maintain a record or system for recording. Under the earlier drafts, mandatory provisions had been made for the maintenance of a recording system uniform in all Contracting States. It was considered by the representatives attending the Brussels Meeting that the proposal was not in keeping with the present philosophy of the Convention and that it was not desirable to enter into the realm of the internal affairs of the various Contracting States to such an extent. Consequently, the Convention is now phrased as to permit a State to maintain a recording system. If such a system is maintained and rights are recorded of record, they will be recognized and enforced in foreign countries. But there is no requirement that such a register or record be maintained.

A sixth and extremely important phase of international judicial relations which the Convention does not cover relates to execution proceedings and the necessity for filing notice of such proceedings in the record of the Contracting State whose nationality the aircraft bears. Preceding drafts all included a provision as to the recording of foreign executions on aircraft and made provisions that a purchaser from the owner, buying the aircraft after the recording of the attachment or execution, would not prevail as against the executing creditor or the vendee at the judicial sale. This provision was omitted by a no means unanimous vote of the Committee, but it is considered that its omission is not vital.

The point was made at Brussels that a foreign judicial sale could be defeated by the fraudulent transfer of the aircraft by the owner to some innocent third party, who records. The purchaser not having actual or constructive notice of the attachment would be entitled to prevail as against the attaching creditor by the municipal law of most countries. Therefore—so the argument goes—the foreign court would have to recognize the paramount title of the new owner and dismiss the attachment against the aircraft by reason of the undertaking in Article I of the Convention. However, it is believed that this argument ignores the primary doctrine of conflicts of law discussed earlier in this article—i.e.: that the creation or transfer of an interest in a moveable is governed by the law of the place where the chattel is when the transaction takes place. The chattel presumably remains
in the foreign jurisdiction in the custody of the court.

Consequently, when the court looks to the state of registry to determine whether the fraudulent transfer is valid by the law of the flag, it will consider that country's law on conflicts of law, which, in most cases, would apply the law of the place where the chattel was at the time of purported transfer. Thus, by a somewhat round-about way the court of the forum would end up by applying its own law. This would undoubtedly be true even where the state of registry has no national law on conflict of law, as is the case of the United States. It is scarcely conceivable that a court holding a chattel in its custody would permit a fraud to be perpetrated on it by reason of diverse rulings of subjurisdictions of the country where the aircraft is registered.

DISCUSSION OF THE CONVENTION, ARTICLE BY ARTICLE

Article I—Rights Recognized by Contracting States

Article I contains the basic undertakings in the Convention. In it each Contracting State undertakes to recognize four classes of rights. These classes of rights are so described as to break down into their various constituent elements every known interest regarded as a recordable interest in American law. When finally so broken down the bugaboo of the equipment trust which confronted the foreign lawyers soon vanished. It will be noted that the undertaking of each State is to recognize the rights set forth. Paragraph (1) of the Article contains no undertaking to enforce such rights. At first glance, this might appear to be an oversight, but it is submitted that the present text is more desirable the way it is than it would be if it included a specific undertaking to enforce such rights.

Under paragraph (2) of the Article the effect of the recording of such rights with regard to third parties is to be determined according to the law of the Contracting State where they are recorded. Consequently, there is a definite undertaking to enforce the rights as against third parties, if the domestic law of the aircraft called for such enforcement. On the other hand, there is no undertaking to enforce the rights as between the parties to an agreement, and conse-


36 Article I—Each Contracting State undertakes to recognize
   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, hypotheces, and similar rights in aircraft which are contractually created as security for the payment of an indebtedness,

provided that such rights have been constituted and are recorded in a public record, in conformity with the law of the Contracting State whose nationality the aircraft possesses.

(2) Except as otherwise provided in this Convention, the effects of the recording of such rights with regard to third parties shall be determined according to the law of the Contracting State where they are recorded.
quently the vexacious question of whether specific performance or money damages is to be decreed is avoided.

The list of rights which are to be protected are self-explanatory and needs no discussion here. The reason that rights to possession under leases of six months or more were included [subparagraph (c)] was to protect the interest of an airline to retain possession of the aircraft during the term of its lease under an equipment trust indenture. Subparagraph (d), of course, relates to the airline's option to acquire the title to the aircraft upon performance of all conditions.

The voluntary nature of the keeping of the record has already been discussed as has the phrase "in conformity with the law" of the Contracting State. However, it is believed desirable to reiterate at this point that the words "in conformity with the law" relate not only to the municipal law of the Contracting State in question but to its law on conflicts of law. Consequently, it would be perfectly possible to have a transfer of an aircraft, made while the aircraft is outside the jurisdiction of its state of registry, effected in accordance with the law of the foreign state. And if the State in which the aircraft is located at the time of the attempted creation of the interest does not recognize such interests, then apparently no valid right will have been created under the Convention, even though the home State does recognize such right in its own municipal law. On the other hand, it would appear that if a right is created in an aircraft in a foreign jurisdiction of a type not recognized by the jurisdiction of the aircraft's registration, a valid right will nevertheless be created if the right is permitted to be recorded in the latter Contracting State. Thus, an aircraft which is to be sold to a citizen of a foreign country could be mortgaged or otherwise encumbered in the country of its manufacture, even though it is initially registered in a foreign jurisdiction, provided that the foreign country (a) is a party to the Convention, (b) maintains a record, (c) permits the encumbrance to be recorded, and (d) follows the lex rei situs doctrine of conflicts of law. This point is presented more as a matter of intellectual interest than as a matter of practical concern, for it is not believed that many financial institutions would want to rely upon a lien obtained through such devious channels.

Paragraph (2) of Article I lays down the mandatory rule that the effect of recording of any of the enumerated rights with regard to third parties shall be determined according to the law of the Contracting State where they are recorded. Nothing is said, however, as to the effect of recording or lack thereof as between the parties. Omission of such provision was made advisedly. Primarily, this omission was due to the fact that there is no widespread necessity for the protection of such rights and their enforcement between the parties internationally. Secondly, since there is no mandatory provision to record in the Convention, and since in many states, including the United States, an unrecorded transfer or right is valid as between
the parties, an undertaking to recognize recorded rights as between the parties, would leave in doubt what treatment should be accorded to unrecorded rights, as between the parties. In view of the fact that making the Convention applicable as between the parties to a given transaction might have far-reaching and unforeseen effects, it was decided that limiting the Convention to third parties was the far sounder approach.

**Article II — Recording and Record Procedures**

The provisions of this Article⁷ are self-explanatory. Paragraph (4) of the Article was designed to cover cases such as the recording system in the United States where a document is deemed recorded when it is received for filing. This procedure departs from the practices in other countries where record books are maintained and separate pages for each aircraft are contained in the book. Paragraph (5) of the Article originally related only to reasonable fees for recording. However, it was deemed desirable to expand this to cover all types of services performed by the authority maintaining the records.

**Article III — Privileged Claims**

Article III⁸ represents one of the places in which the most delicate balancing of interests was necessary in order to arrive at a satisfactory compromise. Certain delegations, such as that of the United States,

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³⁷ Article II—(1) All recordings relating to a given aircraft must appear in the record of the State whose nationality the aircraft possesses.
(2) The address of the authority responsible for maintaining the record must be shown on the certificate of registration as to nationality.
(3) Any person shall be entitled to receive from the authority maintaining the record duly certified copies or extracts of the particulars recorded. Such copies or extract shall constitute prima facie evidence of the contents of the record.
(4) The national law may provide that the filing of any document for recording shall have the same effect as a recording. In that case, adequate provision shall be made to ensure that such documents are open to the public.
(5) Reasonable charges may be made for services performed by the authority maintaining the record.

³⁸ Article III—(1) The claims set forth below give rise to charges which, without recording, follow the aircraft and take priority over all other claims:
   a) compensation due for salvage of the aircraft,
   b) extraordinary expenses indispensable for the preservation of the aircraft.
(2) The claims enumerated in paragraph (1) above shall be satisfied in the inverse order of the dates of the incidents in connection with which they are incurred.
(3) The priority accorded to these claims by paragraph (1) above shall be extinguished unless judicial action thereon is commenced within three months from the date of their arising. The law of the forum shall determine the contingencies upon which this period may be interrupted or suspended.
(4) If a charge arising from any such claim has been recorded, it shall, on the extinction of the priority accorded by paragraph (1), take priority as a right mentioned in Article I.
(5) Any of the claims mentioned in this Article may be entered at any time on the record so as to give notice thereof to all concerned.
(6) In the case of any incident occurred within the territory of a Contracting State to an aircraft there registered the question whether any of the claims mentioned in paragraph (1) is entitled to the priority or charge there mentioned shall be determined by the national law.
(7) Except as provided in this Article, no charge taking priority over the rights mentioned in Article I shall be admitted or recognized by Contracting States.
desired to hold the so-called preferred or priority claims to an absolute minimum. Other countries desired to afford priority status to claims for airport and navigation fees, claims for damages to airport structures, and a host of other claims which they believed should take priority over any secured interest.\footnote{Comments received from the Government of India (re 1947 Montreal draft) ICAO Doc. 4548.}

As a matter of principle, it was finally resolved that only such charges as would inure to the benefit of the mortgage or secured interest holder as well as to the owner of the aircraft should be allowed. Consequently, priority claims have been limited as set forth in paragraph (1) of this Article to compensation due for salvage of the aircraft and to extraordinary expenses indispensable for the preservation of the aircraft. This second category of claims is possibly not as free from ambiguity as it might be. What kind of expenses represent extraordinary expenses? Despite this ambiguity it was decided at Brussels that there was ample safeguard in the word “indispensable.” If the expenses themselves were not indispensable for the preservation of the aircraft, the expenses must be disallowed. Consequently, it is very doubtful that large expenses will be incurred with respect to a particular aircraft. The Maritime rule was adopted that priority charges shall be satisfied in the inverse order of the dates of the instances in connection with which the claims were incurred.

The priorities are also very short-lived. Such priority is lost unless judicial action on the claims has been commenced within three months from the date of their arising. However, this three-month period may, according to the law of the forum, be either “interrupted” or “suspended” upon the happening of certain contingencies.

The use of the words “interrupted or suspended” in Article III, paragraph (3) gave rise to an interesting and rather extended debate as to their meaning. The results of the debate indicate that when the three-month period is “interrupted” upon the happening of a contingency, it will start in again \textit{in toto} when the contingency ceases and the claimant will have a full 90 days in which to commence his action. The word “suspended,” on the other hand, means that only 90 days in all are available to the claimant whether they run consecutively or are separated by one or more contingencies.\footnote{Minutes, Brussels meeting, LC Working Draft 20, pp. 7 & 8.}

Paragraph (4) of Article III is a highly novel provision permitting the recording of a priority claim as a right recognizable under Article I. Consequently, if any one of the priority charges is recorded by the holder thereof, either before the 90-day period has expired or subsequently thereto, it will be treated as though it were a right specifically mentioned in Article I. Such a right under the United States’ system of recording would take effect as of the date of recording if subsequent to the expiration of the 90-day period, and if prior
Paragraph (5) of Article III is designed not only to implement paragraph (4) but also to direct the State to permit the recording of these rights at any time. The advantages of this are said to be that subsequent purchasers of aircraft may be given notice of priority claims by looking at the record. It should be noted, however, that this provision would have no effect in a country where no recording system is maintained.

Paragraph (6) of Article III is part of the solution to one of the knottiest problems presented by the Convention. That problem deals with the proper sphere of its applicability. In general, this subject is treated in Article IX of the Convention. However, that Article makes the Convention applicable "to aircraft registered as to nationality in a Contracting State, provided that a Contracting State shall not be obliged to apply [the] Convention (except Articles III and VII) within its own territory to aircraft there registered." The requirement in Article IX, as to the application of Article III to domestic aircraft, was designed to assure that salvors and those performing "indispensable" services for an aircraft while on foreign soil would not be deprived of their priority upon the return of the aircraft to domestic territory. To accomplish this end, it was necessary to make the provisions of Article III applicable so far as they relate to priority claims arising outside domestic territory, even after the aircraft has returned home. An unfettered application of Article III to domestic aircraft, however, would require each Contracting State to make the priority claims applicable to its own aircraft arising on domestic soil. It was fully recognized by all the lawyers gathered at the Brussels conference that it was highly undesirable to force States to adopt rules relating to their own aircraft while on their own territory. That is a matter primarily for domestic concern and is not properly the subject for an international convention. Thus, there was inserted in Article III a saving clause which permits the Contracting State to make inapplicable the priority provisions of Article III to domestic aircraft on domestic territory. However, it is not necessary that this be done, and if the Contracting State desires that such types of claims be granted priority it may do so under this rule.

Paragraph (7) of Article III is one of the most important keystones of the Convention. By this paragraph Contracting States are prohibited from admitting or recognizing any charge taking priority over the rights mentioned in Article I. Consequently, no tax claim of a foreign State can be placed ahead of a mortgage on a visiting aircraft going into that State. Nor will the claims of provisioners, suppliers, or other lienors be admitted. The effect of this provision, therefore, is to guarantee the rank of security in accordance with the priority given it under domestic law of the aircraft's registry.

The placement of paragraph (7) however, is unfortunate. Until
the last day of the Brussels conference this provision was contained in Article IV, which at that time was entirely different from the present Article IV. In order to reduce the number of Articles, as well as to eliminate a troublesome cross-reference, the suggestion was made that this provision be moved up into Article III. This was agreed to unanimously and without discussion by the delegates. However, it was not recognized at the time what hidden effect such a change in placement would have. By putting the provision in Article III, it becomes mandatory on all States to apply it to domestic aircraft while on domestic territory. This would have the unfortunate effect of preventing a State from imposing tax liens on a domestic aircraft ahead of preexisting mortgages. The majority, if not most of the States concerned, would be violently opposed to such a restriction, and it would probably be violative of constitutional provisions of several Latin American countries. Therefore, the United States has recommended in its comments to ICAO on the Convention that the provision be moved from Article III and included as a paragraph (3) of Article I.

This change accomplished, foreign Contracting States will be prohibited from placing their own liens ahead of mortgages on visiting aircraft, while the home State of such aircraft may place such liens and charges ahead of domestic mortgages. Of course, such tax claims would not be enforced abroad, since they do not belong to the rights enumerated in Article I.

Article IV — Interest and Ancillary Charges

Article IV is self-explanatory and need not be discussed at length here. The legislative history of the Convention makes it clear that attorneys fees and other ancillary charges which are reserved in a trust indenture may be covered by the lien of the charge or mortgage.

Article V — Judicial Sales

This Article presents possibly the most interesting compromises
reached in the Brussels meetings. The first three paragraphs are fairly self-explanatory, and it is not necessary to discuss them in detail. It should be noted, however, in passing that the provision for judicial sales follows out the general rule of conflicts of law that the procedure to be followed on execution sales is that of the forum and not of the place where the aircraft was encumbered or the domicile of the owner. It should also be noted that the first three paragraphs have been drawn so as to place no responsibility of notifying the interested parties on the authority responsible for maintaining the record in which the rights are recorded.

Paragraph (4) of Article V relates to the establishment of a minimum bid when the aircraft is to be sold at judicial sale. In effect, it provides that no aircraft may be sold under such circumstances unless the proceeds of the sale are equal to or better than the total amount of prior secured liens. In the case of mortgages or other security interests where several aircraft form the security, as under the fleet mortgage doctrine, the minimum bid required would be the total debt outstanding. This, of course, could well exceed the actual value of the aircraft on sale, and except in the event of some abnormal circumstances would prevent it.

This provision is in effect a practical compromise of the doctrine of "la purge." Under continental law, upon sale of a secured chattel, a clear title will be vested in the purchaser at the sale, free and clear of all preexisting liens. This doctrine was strongly opposed by financing institutions because of the possibility that a lien held by them would be wiped out upon a foreign judicial sale and the proceeds would not be sufficient to pay the outstanding debt. The American position in this regard was in conformity with the desires of the financial interests, and at Brussels it was advocated that no prior lien should be purged at a judicial sale, but should carry over and remain as a prior secured interest ahead of that of the purchaser at the sale.

In assessing the results of this compromise against the background of the continental position on the one hand and the American position on the other, it is believed that substantial satisfaction is given to both doctrines. In theory, the judicial sale has the effect of trans-

(5) The national law of a Contracting State may provide that the rights referred to in Article I, if held as security for an indebtedness, shall not be set up, to an extent greater than 80%, of the sale price of the aircraft taken in execution, as against persons who have sustained injury or damage on the surface caused by such aircraft, or by any other aircraft encumbered with similar rights held by the same persons, except in the case where the injury or damage in question is adequately and effectively insured by a State or with an insurance undertaking in any State. In the absence of other limit established by the law of the Contracting State where the execution sale takes place, insurance in the equivalent to the amount of the purchase price when new of the aircraft sold on execution shall be considered adequate for the damages caused.

(6) Costs legally chargeable under the law of the Contracting State where the sale takes place which are incurred in the common interest of creditors in the course of execution proceedings leading to sale, shall be paid out of the proceeds of sale, before any claims, including those given preference by Article III.

44 RESTATEMENT, CONFLICT OF LAWS, §585 (1934).
ferring the entire property in the aircraft to the new purchaser. In
practice, however, such a sale cannot be held unless all charges and
prior encumbrances have been covered. The sale, when it can be
held, wipes out all prior charges and transfers the claim of such
secured creditors to the purchase money. On the other hand, the
secured creditor is given reasonable protection against "strike suits."

This provision seems to have received the support of all govern-
ments who have commented on the Brussels draft to date—at least,
tacit support—since it has not been mentioned in any of the govern-
ment comments.

Perhaps the most interesting and novel provision in the Con-
vention appears in paragraph (5) of Article V. In many ways it
represents the heart of the Convention insofar as financing large
fleets of aircraft is concerned. To the proponents of "security of
possessions" a lien covering several aircraft jointly would naturally
cumber each airplane with the total amount of outstanding
indebtedness, provided, of course, that more than 100 per cent repay-
ment of the claim could not be had. Thus, so long as a substantial
portion of the debt remains outstanding and exceeds the value of all
airplanes of the fleet individually, each such airplane would be
almost immune from individual attachment, seizure, and sale. On
the other hand, to the proponents of the theory of security of trans-
actions, the fleet mortgage principle was undesirable because it
effectively prevented the sale or attachment of an aircraft which
was encumbered with a fleet mortgage.

At the Brussels meeting much consideration was given this point.
It was brought out that a state into which a foreign aircraft is operated
has a very definite interest in the protection of its citizens from the
negligence of the airline operator. This protection would be obtained
in part at least by insuring that all assets of the airline would be
effectively subject to attachment and execution at the suit of such
an injured citizen, and it was felt highly undesirable to limit in any
way his right of action against the airline and the airline's airplanes.
Prior liens, surpassing the value of any aircraft of the fleet, in the
hands of third parties, would deprive the injured citizen of any means
of reaching the most substantial item of property belonging to the
airline. This was deemed distinctly contrary to the public interest
by many of the delegates present.

With respect to contract and other "voluntary" creditors, no strong
equities were present. Whereas there is great justice in providing
some measure of protection for those who are injured through the
negligent operation of a foreign airplane, there seems to be no equita-
ble reason why tradesmen and other people relying on the general
credit of the airline should be given protection to the extent of injur-
ing the security value of the financial institution which made the
operation possible. In the case of the ordinary commercial dealer,
he has ample opportunity to check the credit standing of the airline
with whom he deals, and it is not necessary for him to rely, nor does he in fact rely, on the aircraft flown by the company for security.

Paragraph (5) of Article V, therefore, provides, in effect, that the "fleet mortgage" doctrine shall not be valid beyond 80 per cent of the value of the airplane attached as against a person who has been injured by such aircraft or by another aircraft in the fleet, unless adequate and effective third party insurance is carried by the airline equivalent to the amount of the purchase price of the aircraft when new. In such cases, of course, the injured party would have available to satisfy his claim an insurance fund much larger than the 20 per cent equity in the airplane. No such provision has been made for the ordinary commercial general creditor, since he will have the opportunity to check the credit standing of the airline before doing business with them on a credit basis.

The provision has been so drawn as to apply only where a fleet mortgage or at least a "fleet" relationship exists between the security holder and the owner of the aircraft. In this way, a prospective secured creditor need only concern himself with the fleet on which he gives credit, and need not worry as to whether there is insurance coverage on other aircraft belonging to his borrower. In the comments which have been received to date from the various governments, only Sweden has seen fit to express an opinion, which was favorable.45

The remaining provision in Article V—paragraph (6)—relates to court costs and makes them a first item chargeable against the proceeds of the sale on execution.

Article VI—Purge of Prior Claims on Judicial Sale

Turning to Article VI46 of the Convention, it will be noted that the doctrine of the "purge" has been retained. This is merely part of the compromise discussed above under Article V (4) and represents the view favored by the continental lawyers. Moreover, it is not entirely unknown in American law, since the bankruptcy court may order the sale of a bankrupt's assets free and clear of prior liens.47 In one respect, however, a novelty is imported into the picture. Under the doctrines of American law, at least, holders of security interests in the form of Pennsylvania leasing agreements, conditional sales, or equipment trusts, do not lose their secured rights upon an adjudication in bankruptcy of the borrower of the money. The security holder, because he holds title to the chattel, will be able to repossess the

45 The International Chamber of Commerce Subcommittee has recommended the insertion of a provision which would limit recovery on a fleet mortgage to two-thirds of two-thirds the value of the aircraft sold—which if adopted would utterly destroy the value of the fleet mortgage.

46 Article VI—Sale in execution of an aircraft in conformity with the provisions of Article V shall effect the transfer of the property in such aircraft free from all charges which are not assumed by the purchaser.

chattel in accordance with the usual commercial law prevailing in his state.\textsuperscript{48} Furthermore, it is a general rule that the property belonging to one person cannot be sold in execution for the debt of another. The approach which the Brussels Committee took in drafting both Articles V and VI was to treat all security interests as such, rather than to segregate them into separate blocks of lien and ownership interests. Consequently, under Article V (5), discussed above, neither rights of property held as security, mortgages, leasehold interests, nor irrevocable options to purchase may be set up against certain negligence claimants to a greater extent than 80 per cent of the value of the aircraft unless adequate insurance is carried. It is probable that Article VI will be construed in the same way and that where an aircraft, which is subject to an equipment trust and consequently owned by a bank, is seized, in execution of a debt owed by the airline, it would be subject to sale free of the bank's interest. In other words, the effects of Article VI cannot be avoided by the choice of a title instead of a lien-type security.

\textit{Article VII — Transfer of Aircraft from One Nationality to Another}

In Article VII,\textsuperscript{49} transfer of registration from the nationality register of one country to that of another creates a great many problems as to how security interests recorded in the country of transfer are to be handled. Under the preceding drafts, elaborate machinery was set forth as to the maintenance of a record and the procedure to be followed when the aircraft is transferred from one nationality register to another. At Montreal, during the meetings of the Fourth Commission in May of 1947, the British delegate suggested that the elaborate provisions theretofore contained in the various drafts be eliminated. In their stead, he suggested a simple article, much along the lines of present Article VII. This would impose the obligation on the authorities of the state from which the aircraft is to be transferred to see to it that the consent of all holders of recorded rights had been obtained or their claims satisfied before the aircraft could be deregistered. Since under Article 18 of the International Convention on Civil Aviation signed at Chicago in December of 1944, an aircraft cannot be validly registered in more than one state, the prohibition set forth in Article VII would effectively prevent registration in a new country until the recorded rights have been satisfied or consent obtained from the holders. The method proposed offers several advantages from the administrative point of view, since the administrative authorities can insist that the prospective transferee furnish complete proofs that the required conditions for transfer have been met. Once this has been done, the aircraft may be deregistered from the nationality register of the transferring country and will be free to be registered on the nationality register of another country.

\textsuperscript{48} \textit{In re Lakes Laundry, Inc.}, 79 F(2d) 326 (C.C.A. 2nd, 1935).
\textsuperscript{49} \textit{Article VII—No transfer of an aircraft from the nationality register or the record of a Contracting State to that of another State shall be made, unless all holders of recorded rights have been satisfied or consent to the transfer.}
state. To what extent this proposal may require revision of the Civil Aeronautics Act to take care of ownership of a U.S. registered aircraft by a non-citizen is outside the scope of this article.

The suggestion has been made that the approach of the Legal Committee in the Brussels draft be reversed. That is, instead of placing responsibility on the administrative authorities at the time of deregistration, such responsibility would be placed on them before permitting the aircraft to be registered. It is believed that this approach would have several unfortunate effects. The procedures necessary to determine that all claims have either been satisfied or that the holders thereof have consented to the transfer would be administratively impossible for aeronautical authorities located in a different country frequently thousands of miles away from where the claims arose. Moreover, it would mean that where an aircraft is to be transferred from the nationality register of a Contracting State to the nationality register of a non-Contracting State valid liens in the Contracting State would not necessarily be protected. On the other hand, the proposal would afford protection to liens created in a non-Contracting State upon transfer to the record of a Contracting State, thereby securing to lien holders of such non-Contracting State a certain measure of protection to which they are not entitled until their country has ratified the Convention. For these reasons, it is believed that this suggestion is not a practical one.

Article VIII—Spare Parts

Article VIII is the solution of a problem which is quite different from the other Articles. Comments submitted by International Chamber of Commerce, ICAO Doc. 5054.

51 Article VIII—(1) If, in conformity with the law of a Contracting State where an aircraft is registered, a recorded right of the nature specified in Article I, and held as security for the payment of an indebtedness, extends to spare parts stored in a specified place or places, such right shall be recognized by all Contracting States, as long as the spare parts remain in the place or places specified, provided that an appropriate public notice, specifying the description of the right, the name and address of the holder of this right and the record in which such right is recorded, is exhibited at such place where such spare parts are located, so as to give due notification to third parties that such spare parts are encumbered.

(2) A statement indicating the character and the approximate number of such spare parts shall be annexed or included to the recorded document. Such parts may be replaced by similar parts without affecting the right of the creditor.

(3) The provisions of Article V (1) and (4) and of Article VI shall apply to a judicial sale of spare parts. However, in fixing the minimum bid at which the sale can take place, account shall be taken of charges having priority over the claim of the executing creditor only to the extent of two-thirds of the value of the spare parts as determined by experts appointed by the authority responsible for the sale. Further, in the distribution of the proceeds of sale, the competent authority may, in order to provide for the claim of the executing creditor, limit the amount payable to holders of such priority charges to two-thirds of the amount of such proceeds of sale after payment of costs referred to in Article V (6).

(4) For the purpose of this Article the term “spare parts” means 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.
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from the one we have been considering heretofore. The earlier Articles of the Convention deal with the recognition in Contracting States of rights validly created in foreign aircraft of other Contracting States. In Article VIII the undertaking is to protect rights in spare parts which are to be stored and maintained by foreign airlines within domestic territory.

In the case of an airplane, the question is merely one of recognizing a foreign-held right in a chattel which is only temporarily within the jurisdiction. On the other hand, a stock-pile of spare parts owned by the foreign airline may remain in the jurisdiction over extended periods of time.

In view of this difference and the fact that the spare parts will in reality receive their entire protection from the local law of the country in which they are stored, many of the delegates, were reluctant to agree to treating them differently from other chattels permanently located in the domestic territory. However, there are in fact certain characteristics which distinguish such spare parts from other chattels which belong to domestic citizens. Under Article 24 (b) of the Chicago Convention, spare parts are to be admitted free of customs duty by the Contracting States, although provision is made for keeping such spare parts under customs control and supervision if so desired by the state in whose territory they are located. Moreover, where spare parts are patented articles, they will also receive the limited protection of Article 27 of the Chicago Convention, which limits the attachment of such spare parts in connection with patent suits and other patent claims.

The necessity for some protection of spare parts located abroad is almost vital if adequate financing is to be obtained. Frequently, the cost of spare parts will amount to more than 25% of the total financial needs of the carrier. From the standpoint of efficiency of operation a large proportion must be kept in stockpiles abroad, available for ready use at different points along the international line. If such spare parts must be kept at home because of inability to give effective liens on them abroad, air transportation will be slowed down and may be rendered less safe. Moreover, irrespective of efficiency of operations, a certain minimum quantity of spares must be maintained along the route, and in some cases failure to obtain financing for such spares has resulted in the falling through of an entire financing arrangement for a new fleet. Consequently, all the delegates felt that there was a substantial need for some kind of spare parts protection. Article VIII is the solution which they developed. By paragraph (1) the Contracting States undertake to recognize secured rights in spare parts, provided that a local notice is posted at the place where they are kept advising persons dealing with the airline that the spare parts are subject to lien. In certain respects it is similar to the "warehousing" principle frequently employed in this country.

In addition to the local notices which must be posted at all places
where spare parts are kept, a statement indicating the character and approximate number of such spare parts must be annexed to (or included in) the recorded document in the record of the state whose nationality the aircraft bears. Such statement is not intended to indicate that a detailed inventory of the spare parts must be furnished but merely their general description and approximate number.

Obviously, the provision would be of little value unless a "floating charge" on the spare parts were permitted. This is expressly allowed by paragraph (2) of the Article, which states that the parts may be replaced by similar parts without affecting the right of the creditor. In this manner, the airline may freely interchange spare parts located at different depots without in any way impairing the lien of the secured creditor.

The American delegation argued that there should be no apportionment of the lien of the mortgage with respect to the spare parts, but that if the mortgage indenture so provided the entire amount of the mortgage debt should be jointly secured by all spare parts located in the several depots. The argument was made that the spare parts themselves could in no way injure local inhabitants, and that negligence claims could not arise from the storage of such parts in domestic territory. This argument was rejected, and an apportionment provision inserted which provides for the appraisal of the spare parts by experts appointed by the court, and permits the minimum bid at which they may be sold at two-thirds of such appraisal. Thereafter, the secured creditor may be limited to two-thirds of the proceeds of the sale. Although this provision does not offer the complete security which might be desirable from the point of view of financial interests, it is believed that adequate protection is afforded, and a secured creditor enabled to lend substantial amounts against spare parts located abroad.

The term spare parts has been broadly defined so as to include articles of every nature and description which are maintained abroad for installation in aircraft in substitution of articles removed. Obviously, the definition would not include tools, machinery, or other objects used on the ground and not intended for installation in an aircraft.

Since Article XIII injects into our law a wholly new principle, it is believed that new legislation will have to be enacted both for the purpose of fulfilling our obligations under the Convention with respect to spare parts of foreign airlines located in United States territory and for the purpose of obtaining protection for U.S. owned spare parts located abroad. The latter objective can be met, it is submitted merely by a declaration of policy that the procedure detailed by paragraph (1) is in conformity with the United States law, and that rights in U.S. registered aircraft may be extended to cover spare parts located abroad.
Article IX—Applicability of Convention

This article\(^5\) has been discussed to a large extent in connection with the discussion of Article III (6). The intent of the two articles in combination is to provide that the Convention shall be observed and shall apply to all foreign aircraft registered in Contracting States when on the domestic territory of any given Contracting State, and to domestic aircraft to the extent of Article VII (the transfer of one aircraft from one registry to another) and Article III with respect to priority claims which are incurred by the aircraft while abroad. As pointed out in the discussion under Article III the Contracting State may provide in its own law that priority claims arising domestically shall also apply to such aircraft and be regarded as priority claims when the aircraft travels abroad. Some criticism has been received on the drafting of this particular Article, and it may well be that it can be rephrased in a happier manner. No one, however, has suggested a change in substance of the Article, and so long as this is true probably a better solution can be reached when the draft is finalized at the Second Assembly at Geneva.

Article X—Laws Relating to Immigration, Smuggling, etc.

This Article\(^5\) would undoubtedly represent the law of all Contracting States in any event. However, in order to make it amply clear that the Convention would not over-ride true police regulations of the Contracting States, the Article has been inserted. Article XI\(^5\) deals with military and police aircraft and needs no comment.

Article XIV—Definitions

It will be noted from this definition\(^5\) that the engines, propellers, radio apparatus and other articles intended for use in the aircraft even though temporarily separated therefrom are included in the term “aircraft.” This should not, however, conflict with the definition of spare parts in Article 8. It is interesting to note that this definition may be at variance with the definition of aircraft in the Civil Aeronautics Act, which is open to the construction of applying only to the airframe and not including engines, propellers, or other accessories used in airplanes. Depending on the type of mortgage or secured interests in these various articles, this provision may have the effect of changing lien rights when the airplane goes abroad. For

\(^5\) Article IX—This Convention applies to aircraft registered as to nationality in a Contracting State, provided that a Contracting State shall not be obliged to apply this Convention (except Articles III and VII) within its own territory to aircraft there registered.

\(^5\) Article X—Nothing in this Convention shall prejudice the right of any Contracting State to enforce against an aircraft its national laws relating to immigration, smuggling or air navigation.

\(^5\) Article XI—This Convention shall not apply to aircraft used in military, customs or police services.

\(^5\) Article XIV—For the purposes of this Convention the terms “aircraft” shall include the air frame, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.
example, if a secured creditor has a chattel mortgage on an engine which is attached to an aircraft which in turn is mortgaged to another party, the chattel mortgage of the engine would be merged in the superior lien of the aircraft chattel mortgagee when the aircraft goes abroad.

Formal Articles

The remaining articles in the Convention are for the main part formal articles which are of no particular pertinency to this discussion. However, it is interesting to note that the Convention will come into effect as soon as any two signatories have ratified it.

Conclusion

It is believed that the Convention, when ratified, and in force among a substantial number of countries, will go a long way toward clarifying the situation with respect to the international recognition of rights in aircraft, and will afford a substantial measure of protection to secured creditors of aircraft traveling abroad. It should be recognized, of course, that the Convention does not guarantee complete security to such creditors. However, as a compromise of conflicting points of view, policies, and internal laws, it is believed that this draft is the most satisfactory that can possibly be obtained. There are certain parts of the Convention which undoubtedly are not too clear and some aspects of the problem have not been covered. But no matter how much time is spent on an international problem as complicated as this one, it would be impossible to arrive at a perfect solution, satisfactory to everybody. Therefore, it is believed that the points of uncertainty should be left to the courts and subsequent amendment to the Convention if that is shown to be necessary. Despite its weak spots, the Convention should provide a wide measure of protection, particularly where adequate attention is paid to the conflicts problems when the financing arrangements are being formulated.