I. INTRODUCTION

The Fifth Session of the ICAO Council, held in Montreal September 7, 1948, through December 10, 1948, saw the reconstitution of the Air Transport Committee in accordance with the Second Assembly's resolution and the circulation of a request to Contracting States that they submit their nominations for the Air Navigation Commission by January 10, 1949. Lengthy debate in this session prior to its adoption of the Operating Practices (OPS) Annex to the Convention on International Civil Aviation emphasized the need for carrying out other recommendations of the Second Assembly.

II. ORGANIZATION AND PROCEDURE

On October 12, 1948, the Council adopted a resolution whereby the Air Transport Committee was reconstituted as a committee of twelve representatives of Council Member States as follows: Argentina, Australia, Belgium, Canada, China, France, Iraq, Mexico, The Netherlands, Sweden, the United Kingdom, and the United States. Dr. Paul T. David, of the United States, was elected chairman of the new committee, which with its membership confined to Council Member States should be a real subsidiary working group of the Council.

On the same date the Secretary General of ICAO sent a letter to all Contracting States drawing their attention to the Council's resolution of October 5 requesting each to nominate one candidate for a twelve-member Air Navigation Commission of technically qualified representatives of Council Member States. In connection with the establishment of the Air Navigation Commission, the Council drew up terms of reference for the new body. The terms of reference give the Commission the duty of advising

"the Council on methods for ensuring that the responsibility of the Council remains undivided and that duplication is avoided in the consecutive steps on air navigation matters."1

Members of the Council elected during this session to its working committee on Joint Support were Argentina, Australia, Canada, France, India, The Netherlands, Portugal, the United Kingdom, and the United States. Sir Frederick Tymms, Council Representative for the United Kingdom, was elected chairman. Elected to the Council's Finance Committee were Canada, China, France, Ireland, Mexico, the United Kingdom, the United States, and Sweden with Mr. C. S. Booth as chairman.

The Council, by authority granted in Second Assembly Resolution A2-10, abolished the Committee on the Convention on International Civil Aviation and approved the following steps for handling amendments to the Convention:

1) Referral by Council of proposed amendment to one of its committees;

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1 Divisional Assistant, Aviation Division, Department of State.
2 Council, Fifth Session, Minutes of the Tenth Meeting, ICAO Doc. 6226, C/704, 28/10/48. The terms of reference, among other things, specify that “each member of the Commission and each alternate shall be paid by and shall serve under the responsibility of the state which nominated him.”
2) Preparation of draft amendment by the committee in consultation with the Legal Bureau; 3) Optional referral by Council of draft amendment to working group of its own or to the Legal Committee; 4) Submission of the proposed amendment to the Assembly.

It also established the following schedule for the presentation of amendments to the 1950 Assembly:

November 1948—Contracting States to be advised to submit by February 28, 1949, their initial proposals for amendments which they consider essential; January - September 1949—Proposed amendments to be considered by appropriate bodies of the Organization on the basis of documentation prepared by the Secretariat; Prior to April 1949—Council to consider desirability of amending Article 94, the Convention's article on amendment procedure; September 1949—Council to consider all other proposed amendments; January 1950—Proposed amendments to be considered by Contracting States.

The Council also decided that an individual could be an accredited representative of more than one State at regional, divisional or similar special meetings but that he could vote only on behalf of the State which he primarily represented.

III. AIR NAVIGATION MATTERS

The Fifth Session of the Council saw the adoption of Annex 6 to the Convention on International Civil Aviation, covering International Standards and Recommended Practices for Operation of Scheduled Air Services. The Air Navigation Committee had devoted sixty meetings and the Council ten meetings to the review of this Annex, which had originated in the Operating Practices Division in March 1947.

On December 10, 1948, when the Annex was adopted, the United States Representative on the Council made a speech in which he suggested that certain changes be made in the working methods of the Organization, so that the technical standards set by it might be kept abreast of aviation's progress. The Acting Council President concurred in the need for the Council's giving a high priority on its agenda to this matter.

In addition, the Air Navigation Committee in the fall of 1948 completed most of its work on a draft annex on airworthiness and began work on a draft annex on radio aids to air navigation, based on the Final Report of the Special Radio Technical (COT) Division. The Committee and the Council approved the final reports of the North Pacific, North Atlantic, and European-Mediterranean Regional Air Navigation Meetings, the special meeting held in London in September 1948 on aerodrome lighting in the European-Mediterranean and North Atlantic Regions, the third session of the Rules of the Air and Air Traffic Control (RAC) Division, and the COT Division as well as an amendment to Annex 4 (Aeronautical Charts) of the Convention, which is now in effect. As a result, certain new ICAO Procedures for Air Navigation Services have been or will be implemented and new International Standards and Recommended Practices will eventually come into force.

During its fifth session, a Council resolution approved the United States and Canadian interpretation of Annex 2 (Rules of the Air) with regard to the use of instrument flight rules. Need for this interpretation had arisen in connection with the Council's action in adopting the Annex.

The Organization, in accordance with the request of the International Telecommunications Union Aeronautical Frequency Conference (June-September 1948), began work on the establishment of worldwide frequency requirements in the Aeronautical Mobile Band. Regional aeronautical frequency requirements were put on the agenda of the South-East Asia
Regional Air Navigation Meeting, held in New Delhi November 23-December 14, 1948. They were also the subject of a special European-Mediterranean frequency meeting being held concurrently with the ICAO Communications Division Meeting, which convened in Montreal on January 11, 1949, to consider the ITU's draft frequency allotment plan for the air routes of all fifty-one ICAO Member States among other problems. A joint ICAO-ITU meeting on allotment of frequencies in the Western Hemisphere will be held in the United States in March 1949 conjointly with the Fourth Inter-American Radio Conference.

The South-East Asia Regional Air Navigation Meeting, in addition to handling frequency problems already mentioned, examined existing air navigation facilities in the region and made recommendations for their improvement and drawing up of special regional operating procedures. Several such meetings were scheduled for the early part of 1949.

IV. AIR TRANSPORT MATTERS

On November 1 the last meeting was held of the old Air Transport Committee, membership on which had been open to all ICAO Member States, and on November 3 the new Committee of the Council began work.

With the exception of registration of agreements with the Organization, the Final Report of the Second Session of the Facilitation (FAL) Division occupied both the old and new Committees during most of the fall. Much time was devoted to the redrafting of the proposed FAL Annex to the Convention. The draft Annex submitted to the Committee by the FAL Division was reviewed and changes were made so as to clarify and simplify these Standards and Recommended Practices, which the Committee voted to define as follows for FAL purposes:

"Standard—Any specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspect of international air navigation which has been adopted by the Council pursuant to Article 54(1) of the Convention, and in respect of which noncompliance must be notified by States to the Council in accordance with Article 38.

"Recommended Practice—Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54(1) of the Convention, and to which Contracting States will endeavor to conform in accordance with the Convention."  

Although necessary to make substantial changes to bring the draft Annex in line with the new definitions, very few changes were made in the substantive meaning of the Division's draft. Since the Committee did not complete its work on the Annex before it adjourned on December 9, the Annex is its first item of business for 1949. It has been estimated that the Committee's work on the Annex will probably be completed by February 1949 and that the Council may adopt it in March.

Other items on the Committee's agenda are the completion of action on the Statistics Division Report, including the drafting of Council resolutions on airport statistical reporting and accident analysis and statistics; consideration of the Secretariat's draft study on air navigation facility user charges and draft request to Member States for their views on this subject; relationship of the Organization with IATA, particularly on air mail mat-
ters; and consideration of replies from Member States on scheduled and non-scheduled international air services and on applicability of their laws and regulations to the various categories of international air transport services, as required by the Second Assembly's Resolutions A2-17, A2-18 and A2-19.

Another economic study to be undertaken by the Committee is that on burdensome insurance requirements, based on views of Member States submitted on or before December 3, 1948 in accordance with Second Assembly Resolution A2-20. Consideration will also be given at the next session to a working paper on administrative problems connected with the nationality of aircraft flying under international operating agencies. The Committee will also have to devote some time to the consideration of draft rules on registration of agreements to be prepared, on the basis of drafts submitted by the United States and the Secretary General.

If the Air Transport Committee is able to carry out this heavy work program during its next session, substantial progress may be made at an early date by the Organization in the preparations for the work of the Economic Commission of the 1950 Assembly.

V. LEGAL MATTERS

On October 26, 1948, the Council agreed to carry out the recommendations of the Third Session of the Legal Committee with regard to circulation of three questionnaires to ICAO Member States. One deals with the limits of liability concerning passengers, cargo, and baggage in the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air and the desirability of changing them. The second questionnaire concerns possible revision of the Rome Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, the supplementary Brussels Protocol, and the draft Convention concerning aerial collisions prepared by CITEJA. The third is on the subject of the Brussels Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea and the draft Convention for the unification of certain rules relating to assistance and salvage of aircraft by aircraft on land, the desirability of revising them, and the possibility of a single convention to deal with assistance to both ships and aircraft in distress.

Early in January 1949 Denmark, Norway, and Sweden signed the Convention on the International Recognition of Rights in Aircraft, making the total number of States which have signed the Convention (since its opening for signature at the Second ICAO Assembly) twenty-three. The United States is one of the signatory States, and advice and consent of the United States Senate to ratification of the Convention have been requested by the President.

VI. GENERAL

Consents to assessment for the Joint Support of air navigation services in Iceland were received from the United States, the United Kingdom, The Netherlands, Canada, Denmark, and Sweden, representing more than 80% of the total assessment, the percentage necessary to make them effective as provided in the Final Act of the Conference on Air Navigation Services in Iceland.5

On December 23, 1948 the Secretary General of ICAO, in accordance with a decision of the Joint Support Committee, sent a letter to the ten States,

parties to the North Atlantic Ocean Weather Ship Station Agreement, requesting their views on the holding of a meeting to consider revision and renewal of the Agreement, and certain technical problems. The Agreement, which expires June 30, 1950, calls for the convening of such a meeting by April 1, 1949.

The ICAO Council during its fifth session delegated to its President authority to prepare for the holding of a meeting of States interested in the Joint Support of Greek airports.

The United Nations on November 18, 1948 approved Finland’s membership in ICAO, but that country will not actually become a member until deposit by the Finnish Government of its instrument of adherence to the Chicago Convention.

The Second ICAO Trainee Program is scheduled to begin January 17, 1949 when nominees of six contracting States—Haiti, China, Bolivia, Dominican Republic, India, and Pakistan—will be given a six-month training course in Montreal on all phases of the work of the Organization—technical, economic, and administrative. The training of the first group of six aviation specialists from various countries, completed in June 1948, has given the Organization some experience as a basis for improving the curriculum of the new group.

JOAN H. STACY

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

Intensive study is being given to the possibility of a new structure of passenger fares and cargo rates for international services of IATA members as the result of the second meeting of the joint and composite Traffic Conferences of the Association at Bermuda during November.

After a lengthy discussion, representatives of IATA member airlines from all parts of the world agreed in principle on the desirability of introducing tourist-class service at lower fares and assigned the subject, among others, to a special high-level committee of airline traffic executives for study at Brussels late in January. Pan American World Airways, impressed by the success of its tourist fare between New York and San Juan, Porto Rico, was the moving force in this project.

The proposals before the traffic group include, in addition to tourist class fares, special off-season rates, excursion fares and other means whereby the cost of international air transport to the traveller can be lowered and the service made available to a larger market.

In making its studies, the group will take into consideration such problems as cost of operation and uniform criteria by which tourist-class service can be differentiated from the present standard. The report of the group will be considered by a special session of the composite Conferences in Europe during May. If it is accepted, the new structure of rates and fares could be put into effect during the Fall season of 1949.

In the meanwhile, the Conference meetings at Bermuda voted unanimously to hold the line on present passenger fares and cargo rates throughout next Summer, except for small increases between Europe and South America and minor adjustments elsewhere. Although costs of equipment, fuel, materials and services were found to be generally rising, the airlines hoped that an increasing volume of traffic would enable them to maintain the existing IATA Conference rate structure through the Summer.

ARTICLE I

(1) The Contracting States undertake to recognize:

1. Although the term “Contracting State” is not defined in the Convention, it is obvious that it includes only those countries with respect to which the Convention has come into force and who have not denounced it.

(a) rights of property in aircraft;

2. The word “right” has been used consistently throughout the Convention. See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722 p. 231.

3. This clause was inserted primarily to cover outright ownership of the aircraft where legal and beneficial ownership are combined. Minutes, First Session, Legal Committee, ICAO Doc. 4635, pp. 36, 37. There is a possibility, however, that the phrase is broad enough to cover a conditional right of property, such as the conditional sale. On this point there appears to be a split of authority in the United States, since some jurisdictions hold that the interest of the conditional vendee is not a property right, whereas others hold that it is. Insofar as aircraft are concerned, the Civil Aeronautics Board has held that the vendee pursuant to a contract of conditional sale was the “owner” of the aircraft for purposes of registration as to nationality. O’Connor-Registration of Aircraft, 1 CAA 5 (1939).

Irrespective of whether or not a conditional sale is covered under this clause (a), there is no doubt that it is covered under clause (b), and the legislative history of the Convention indicates that the Civil Code lawyers intended clause (b) to cover this type of transaction. Minutes Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, p. 176. Report and Commentary ICAO Doc. 4635, p. 253.

Apart from the conditional sale, the secured creditors interest in other security devices where title is retained will definitely be protected under this clause. Minutes, 1st Session, Legal Committee, ICAO Doc. 4635, p. 37.

(b) rights to acquire aircraft by purchase coupled with possession of the aircraft;

4. See note 3. The purpose of this clause, apart from its application to conditional sales, was to protect the option right of a purchaser under a hire-purchase agreement or equipment trust to have the property in the aircraft transferred to him in accordance with the terms of his agreement.

5. The recognition accorded this right is not an absolute one however. The buyer must be in possession of the aircraft in order to bring the terms of the Convention into play. Thus if the purchaser under a hire purchase agreement or equipment trust were to lease his equipment to a third party, he would no longer have the possession of the aircraft, and his right to acquire the property in the aircraft might not be recognized in a foreign jurisdiction. This is not considered to be a vital objection, however, since it was the only basis on which certain important countries would consent to the inclusion of this clause at all.

* The text of the Convention was originally published in the Summer 1948 issue, 15 J. Air L. & C. 348, and the annotations are here offered for the information of counsel who wish to study the legal and technical implications of the text.
ARTICLE I (Cont.)

(c) rights to possession\(^6\) of aircraft under leases\(^7\) of six months\(^8\) or more;

\(^6\) It will be noted here that unlike clause (b) the right to possession is recognized. Hence where there is a sublease, the sub-lessor will be protected as against the original lessor.

\(^7\) The primary purpose of this clause is to safeguard the right of a purchaser of an aircraft under an equipment trust or hire-purchase agreement to the continued possession of the aircraft pursuant to his contract, as against an attaching creditor of the security title holder.

\(^8\) The six month period was chosen as one which would cover all \(\textit{bona fide}\) financing transactions, and at the same time not require courts to consider as rights against the aircraft many small claims for short-term leases, where the objective was not to financing the purchase of the aircraft. Although primarily intended to promote the financing of aircraft, this clause is certainly broad enough to cover long-term leases as such.

(d) mortgages,\(^9\) hypothèques\(^10\) and similar rights\(^11\) in aircraft which are contractually\(^12\) created as security\(^13\) for payment of an indebtedness;\(^14\)

\(^9\) This language was intended to cover all types of mortgages, both of the title type and the lien type. (In this note and in many subsequent annotations statements are made that it was “intended” to accomplish a stated purpose. When such statements are not supported by citations to the Minutes, they are based on the recollection of Mr. G. N. Calkins, Jr., United States representative in the drafting committee at both Brussels and Geneva.)

\(^10\) Because the concept of the French mortgage differs somewhat from the common law concept, particularly the title mortgage, it was decided to use the French name to indicate the definite intention to cover the field of mortgages.

\(^11\) “Similar rights” was employed as a catch-all to take care of any other possibility for financing aircraft which is in the nature of a mortgage. It was not, however, the intent to cover either hire-purchase agreements, conditional sales, or equipment trusts under this heading.

\(^12\) It was the intent here to limit the type of mortgage accorded recognition to those which have been created by agreement, and to eliminate those which might arise by operation of law (such as the interest a wife might have in an aircraft belonging to her husband, somewhat analogous to a dower interest—as well as the case where a judgment might be considered as encumbering the aircraft). \textit{See Minutes, First Session Legal Committee, ICAO Doc. 4635, pp. 35 et seq.}

\(^13\) This further limits the clause to cases where there is a \(\textit{bona fide}\) security or financing transaction. It of course would not include partnership rights, or rights of a purely equitable nature, as for example, the rights of a \textit{cestui que trust} under a trust agreement or the right of the holder of an equipment trust certificate.

\(^14\) The word “indebtedness” was employed to indicate an obligation which can be translated into money at the time the right is questioned. The word “debt” was rejected in drafting committee for fear of its connotation in early English common law. It accordingly is sufficiently broad to cover future advances, if they have been made at the time the right is questioned. \textit{See Comments received by the Government of India, July 24, 1947, ICAO Doc. 4548. Comment of Government of Sweden, ICAO Doc. A2-LE/31, p. 292.}
ARTICLE I (Cont.)

provided that such rights

(i) have been constituted\(^{15}\) in accordance\(^{16}\) with the law\(^{17}\) of the Contracting State in which the aircraft was registered as to nationality\(^{18}\) at the time of their constitution,\(^{19}\) and

\(^{15}\) Created or brought into being.

\(^{16}\) The words "in accordance with" were originally inserted in the Brussels draft convention, ICAO Doc. 4627, for the express purpose of permitting the inclusion of a country's law of conflict of law as well as its municipal law. See *Minutes, First Session, Legal Committee, ICAO Doc. 4635*, p. 41. Thus a right in an aircraft in State X would be safeguarded by the Convention even if the right had been constituted in State Y, in conformity with the law of the latter country—so long as State X's law of conflict of laws would apply the law of State Y.

It is extremely doubtful this result was intended when the matter was again discussed at Geneva. The Legal Commission definitely voted in favor testing the validity of a right pursuant to the law of the country in which the aircraft was at the time registered as to nationality, and this vote was regarded as rejecting a counter proposal that the right be tested by the law of the place where the rights were constituted. See *Legal Commission Minutes, 2nd Assembly, ICAO Doc. 5722*, pp. 33, 34. On page 35 of the same document a proposition that the phrase "law of the Contracting State" should include that state's rules on conflicts of law was defeated by a vote of 9 to 8. The Brussels' phraseology was however retained by the drafting committee, and when the subject was discussed at the second reading of the text, the Commission did not insist on having the word "internal" placed in the text. *Legal Commission Minutes, 2nd Assembly, ICAO Doc. 5722*, pp. 174, 175.

Despite the somewhat doubtful history of the development of this provision, the representatives to the Legal Sub-Committee of the Air Coordinating Committee are of the unanimous opinion that the "law of the Contracting State" includes that country's rules on conflicts of law.

\(^{17}\) A parallel difficulty for the United States is presented by the phrase "law of a Contracting State". It was definitely intended that this phrase would cover the law of sub-jurisdictions.

\(^{18}\) This is the registration as to nationality contemplated by Articles 17-21 of the Convention on Civil Aviation signed at Chicago, December 7, 1944.

\(^{19}\) Irrespective of whether the "law of the Contracting State" includes its law on conflicts of law, it is evident that the provision of this paragraph precludes a court sitting in a country other than that of the aircraft's registration from applying its own rules of conflicts of laws. In any case such a court is required to look to the country where the aircraft was registered at the time the right was created.

(ii) are regularly\(^{20}\) recorded\(^{21}\) in a public record\(^{22}\) of the Contracting State in which the aircraft\(^{23}\) is registered as to nationality.

\(^{20}\) This refers to compliance with recording formalities. See *Draft Minutes, Legal Commission, 2nd Assembly, Assembly Doc. A2-LE/4 p. 3 et seq*.

\(^{21}\) In drafts of this convention prior to the draft produced by the Fourth Commission of the First ICAO Assembly, there had been a mandatory requirement for the Contracting State to maintain a record. It was decided at Montreal to abandon all idea of making the recording procedures uniform throughout all countries parties to the Convention. Instead, the only sanction to maintain a record, if it can be called such is the fact that rights in
ARTICLE I (Cont.)
aircraft will be required to be recognized by other Contracting States only when they have been recorded.

22 The Convention is not designed to foreclose a Contracting State from maintaining as many “records” or registers as it may desire. However, it should be noted that by Article II (1) all the rights relating to a given aircraft must appear on the same record, and consequently it is not open to a Contracting State to permit recording of one right in one record and a second right in another record. From the point of view of the United States, there is no compulsion to record in the Federal record other than the strong sanction of making such rights invalid as against third persons without notice if not recorded. It should also be noted that the record or records maintained by the Contracting States must be public records. Although there was no discussion in either the Legal Committee or the Legal Commission of the Second Assembly as to what the word “public” meant, the intention of the draftsmen of the Convention was that the record should be one open to the public. This interpretation is borne out by the language of Article III (3).

23 It will be noted that the requirement as to regularity of records is in the present tense. It was drafted in this manner to insure that the test of regularity of a given recording is measured by the law of the country where the aircraft is registered as to nationality at the time the recording is questioned. As an example, if an aircraft of U.S. registry is encumbered with a mortgage recorded in the United States pursuant to our formalities and then the aircraft is subsequently transferred to the French registry together with the mortgage, the question of whether or not the recording in France is regular is to be determined under French law, not United States law.

The regularity of successive recordings in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to nationality at the time of each recording.

24 The purpose of this paragraph is to insure that, in a case where a given aircraft is transferred from one nationality to one or more successive nationalities, the question as to the regularity of a recording in a country of prior registration should be governed in accordance with the law of that country. See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, p. 34.

(2) Nothing 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 right as taking priority over the rights mentioned in paragraph (1) of this Article.

25 This provision was inserted in the Convention at the request of the English delegation in order to make it amply clear that Contracting States could recognize rights in aircraft established under the laws of other Contracting States but which would not qualify in accordance with Article I (1). This would permit a Contracting State to recognize an unrecorded mortgage. See Minutes, Legal Commission 2nd Assembly, ICAO Doc. 5722, p. 177.

26 The word “recognize” has been used consistently in the Convention to denominate the action of a State with respect to a right created in a foreign country. The purpose of this clause is to prevent the displacement of any such recognized rights coming under Article I by other rights. With regard to foreign created rights, the word “recognize” would be sufficient. How-
ARTICLE I (Cont.)

ever, it can scarcely be said that a country "recognizes" a right created in its own territory pursuant to its own law. For this reason, the word "admit" was included in the prohibition so as to prevent a State from either placing a foreign right ahead of an Article I (1) type right or admitting a right created in its own territory ahead of Article I (1) rights.

27 The word "priority" here must be held to mean priority over those rights mentioned in Article I which are held as security for a debt. Cf. French text, which uses the word "grevant" (encumbering). Consequently, this provision permits a Contracting State to recognize an unrecorded mortgage or lien as against the owner of an aircraft even where his ownership is recorded.

ARTICLE II

(1) All recordings relating to a given aircraft must appear in the same record.28

28 One of the conditions upon the recognition of a right mentioned in Article I (1) is that the right be recorded in a public record of the Contracting State in which the aircraft is registered as to nationality. The provision set forth in Article II (1) is an amplification of that condition in that it requires all rights with respect to a given aircraft to be entered in the same record. This contemplates the possibility that a State may desire to maintain several records for administrative or other reasons. In such a case this provision would require that all recordings relative to a given aircraft appear on the same record. See Minutes, Legal Commission, 2nd ICAO Assembly, Assembly Doc. 5722, pp. 180, 181.

(2) Except as otherwise provided in this Convention, the effects29 of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

29 This provision adopts the law of the Contracting State in which the aircraft is registered as to nationality so far as the effects of recording are concerned with regard to third parties.

(3) A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law.30

30 One of the principal questions discussed in the Legal Commission of the 2nd Assembly in Geneva in June of 1948 was whether or not a Contracting State under the Convention would be obliged to recognize for the purpose of recording a pre-existing right encumbering an aircraft formerly registered in another State. That is to say, that if an aircraft of United States manufacture is encumbered with a mortgage under United States law and the aircraft then is transferred to Brazilian registry, would the Brazilian Government be required to record the right formerly carried on the United States register. Such a requirement might mean in certain cases that one country would be forced to accept, recognize, and enforce a right which its domestic law did not permit to be created in its territory. The Brussels draft of the Convention was not clear on this point, and after considerable debate it was decided over the objection of the United States to include this provision. By the use of the word "prohibit" it was intended to permit the State concerned to prevent the recording of such a right even though there is no express provision in that country's statutory law prohibiting recordation of such a right. See Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, pp. 182, 183, 230, 231.

In the opinion of the representatives to the Legal Sub-Committee of the Air Coordinating Committee there exists no prohibition in the United States
ARTICLE II (Cont.)

against the recording with the Civil Aeronautics Administration of a right created under the law of any country.

ARTICLE III

(1) The address of the authority\(^{31}\) responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.\(^{32}\)

\(^{31}\)By the use of the word "authority" it was intended to cover every possibility through which a record might be maintained. It obviously includes an administrative authority such as the Civil Aeronautics Administration, and is broad enough to include a court where a record is kept by a court, as is the case in Germany. See Richter Report submitted to the CITEJA on Preliminary Draft Convention relating to aircraft mortgages (Oct. 1931).

\(^{32}\)It is important to bear in mind the difference between registration as to nationality in this Convention and a recording. In certain countries they can both be effected in the same record. However, the concepts are entirely different, the registration as to nationality being required by the Chicago Convention, whereas recording of rights in aircraft is an entirely permissive matter insofar as this Convention or the Chicago Convention are concerned. Since every aircraft must carry a certificate of registration as to nationality, it was deemed advisable to require the address of the authority responsible for maintaining the record of rights to be carried on this particular certificate. In this way, when a country maintains more than one record, the particular record, on which the rights are carried must be shown.

The provisions of this Article III (1) are regarded as constituting a direction to the Administrator of Civil Aeronautics to carry them out.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts\(^{33}\) of the particulars recorded. Such copies or extracts shall constitute prima facie\(^{34}\) evidence of the contents of the record.

\(^{33}\)This provision indicates another attribute of the public character of the record. The right to obtain copies or extracts from public records is one which is well recognized in all commercial countries, and consequently, there is nothing novel in this provision. The word "extracts" was included to permit the furnishing of copies of less than an entire document. In the case of the United States where mortgage indentures frequently exceed a hundred pages, this provision is highly desirable.

\(^{34}\)Prior to the draft of the Convention produced at Brussels by the Legal Committee at its First Session, the drafts of the Convention had stated flatly that the copies or extracts should constitute evidence of the contents of the record. The words "prima facie" were inserted to indicate that any such copy or extract could be impeached by proof that they were not true copies in fact of what they were reported to be. See Minutes, 1st Session Legal Committee, ICAO Doc. 4635, p. 43, 46.

(3) If the law of a Contracting State provides that the filing of a document for recording shall have the same effect as the recording,\(^{35}\) it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.\(^{36}\)

\(^{35}\)The terms "record," "recording," and "recordation" are used in the Civil Aeronautics Act somewhat loosely when measured by European standards. The actual practice is to receive a document which is admitted for
ARTICLE III (Cont.)
recordation and to place it in a file bearing the number of the aircraft's certificate of registration. All papers concerning that aircraft are filed in this same folder, and may be inspected by the public. In the concept of many European countries, where all the rights in a given aircraft are listed on a page of a large loose-leaf book, such a system is not a true recording system. In Europe the instruments themselves may not be set forth in full in the book, but a mere description of the right which they create is listed on the appropriate page. For this reason Article III (3) was inserted in the Convention to make sure that both systems contemplated were covered by the Convention. It will be noted that the law of the Contracting State must provide that the filing of the document for recording shall have the same effect as recording. A second reason for the insertion of this provision is to make sure that where the law of a Contracting State regards the receipt of a document for recordation as tantamount to recordation itself, even though the document has not officially been copied or otherwise entered on the record, other Contracting States will regard it as having been duly recorded from the time of such receipt.

80 This provision merely insures that the document filed for recording will be open to public inspection. This is regarded as a direction to the Administrator to implement this provision.

(4) Reasonable charges may be made for services performed by the authority maintaining the record.

37 There was considerable debate in the First Session of the Legal Committee at Brussels as to the inclusion of this provision. It was finally decided to include it in order to counteract any implication that Article III (2) required the authority to furnish copies or extracts free. The word "reasonable" was included as a limitation on the charge which may be made. Minutes of 1st Session Legal Committee, ICAO Doc. 4635, p. 43, et seq.

38 The word "services" was designed to include not only the furnishing of copies of extracts but also to cover fees for recording any rights under the Convention. Minutes of 1st Session, Legal Committee, ICAO Doc. 4635, p. 47.

ARTICLE IV

(1) In the event that any claims in respect of:
(a) compensation due for salvage of the aircraft, or

89 This Article represents treatment accorded so-called "privileged" claims, or those claims which have priority over any recorded mortgage or other security interest. The United States delegations throughout the development of this Convention have been opposed to the inclusion of any provision relating to privileged claims. However, the idea of privileged claims is a traditional one in the minds of Continental lawyers, and for this reason it was necessary to include a provision of this nature. The types of claims permitted, however, are very restricted.

40 The word "claims" was used to indicate a money demand of any type.

41 Despite the use of the word "due" in this connection, it is apparent from the context of the Article that the amount owing is not required to be liquidated at this juncture. In short, the compensation referred to may be in an undetermined amount.

42 As used in this text it is apparent from the legislative history of the Convention that salvage includes not only the possibility of salvaging aircraft at sea but also the salvage of aircraft on land. Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, pp. 132-136. It was the understanding of the Legal Commission at Geneva at the Second Assembly that
ARTICLE IV (Cont.)
salvage will arise only where the aircraft is in distress from which it could not save itself through its own efforts, and that through the aid given by the salvor, the aircraft is rescued. Minutes, Legal Commission, Second Assembly ICAO, ICAO Doc. 5722, p. 136.

(b) extraordinary⁴³ expenses indispensable for the preservation⁴⁴ of the aircraft
give rise, under the law⁴⁵ of the Contracting⁴⁶ State where the operations of salvage or preservation were terminated, to a right conferring a charge⁴⁷ against the aircraft, such right shall be recognized by Contracting States and shall take priority over all⁴⁸ other rights in the aircraft.

⁴³ The word “extraordinary” was inserted to indicate that ordinary, routine expenditures were not intended to be covered by this clause. Only those expenses which are out of the ordinary and are not recurring are intended to be covered in this paragraph. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 56.

⁴⁴ The word “preservation” was used to indicate that the expenses must be necessary for the maintenance of the aircraft in the condition in which it was prior to the time the expenses were incurred. It does not include any expenses which add to or increase the value of the aircraft, and therefore would not include repairs. See Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, p. 186, 187, 188.

⁴⁵ It will be noted that the Convention does not create a right of salvage or reimbursement for extraordinary expenses, but merely affords such rights, created apart from the Convention, appropriate recognition.

⁴⁶ It was intended here to give a situs to the operations of salvage and for extraordinary expenditures so that it could be easily determined whether or not the salvor or person incurring the expenditures was entitled to a priority. For the purpose of this phrase, salvage operations should be considered as terminating when the aircraft is brought to a port of refuge. More difficulty would be encountered possibly in the case of salvage of aircraft on land where the aircraft is transported from one country to another by the salvor. Presumably so long as an aircraft is in the custody of the salvor, the operations of the salvage will not terminate.

⁴⁷ In order to avoid confusion throughout the Convention the word “right” has been used to indicate any right in aircraft. Prior to the Geneva draft, however, the word “charge” had been used to indicate a lien or encumbrance on the aircraft as differentiated from a right of ownership. In order to avoid giving rise to a construction that something different from a right was intended by “charge”, the phrase “right conferring a charge” was used.

⁴⁸ This obviously includes rights mentioned in Article I.

(2) The⁴⁹ rights enumerated in paragraph (1) shall be satisfied in the inverse order of the dates of the incidents in connection with which they have arisen.

⁴⁹ The rule set forth herein is an adaptation from the maritime rule relating to the settlement of privileged claims. See Report and Commentary on Brussels Draft Convention, ICAO Doc. 4635, p. 254.

(3) Any of the said rights may, within three months from the date⁵⁰ of the termination of the salvage or preservation operations, be noted on the record.⁵¹

⁵⁰ By the use of the word “noted” the draftsmen intended a difference between a recording under Article I and a notation of a priority right under
ARTICLE IV (Cont.)

Article IV. Notation is not, properly speaking, recordation. One of the reasons for this differentiation is that the amount and the validity of a claim for extraordinary expenses or for salvage may not be determined at the time a claim is noted on the record. In most countries an invalid right may not be recorded.

In the original reading at the Second Session of the Legal Commission there was a comment by Brigadier Wilberforce that the word “recorded” was actually intended in this subparagraph. See Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, p. 164. However in the final draft of the Convention the word “recorded” was changed to “noted” in the English version and “inscrit” to “mention” in the French version. The change was apparently accomplished in the drafting committee since there is no indication in the minutes of a reversal on this point. See, however, Statement of Swedish Delegate A2-LE/13, p. 9.

This provision is regarded as constituting a specific direction to the Administrator of Civil Aeronautics to place any claim of such rights in the appropriate aircraft file maintained by him and to take such other action as may be necessary to implement this provision.

(4) The said rights shall not be recognized in other Contracting States after expiration of the three months mentioned in paragraph (3) unless, within this period,

(a) the right has been noted on the record in conformity with paragraph (3), and

It will be noted that the phrase “admitted or” has not been included in this paragraph. The omission was intentional. The effect of it is to permit the priority claim to subsist in the Contracting State where it arose even though it has not been noted on the record of the State of the aircraft’s registry. The result was based on the theory that the Convention did not establish the charge against the aircraft, but merely gave recognition to a charge created pursuant to the law of a sovereign State. In consequence of the foregoing, an unrecorded charge may exist for years against the aircraft, but it cannot displace any recorded right (other than ownership) no matter when that right is recorded. See Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, p. 145 et seq. See Note 58.

(b) the amount has been agreed upon or judicial action on the right has been commenced. As far as judicial action is concerned, the law of the forum shall determine the contingencies upon which the three months period may be interrupted or suspended.

This provides for a settlement of the amount of claim through agreement of the parties.

It is to be noted that the judicial action contemplated in (b) is judicial action with respect to the right and not judicial action necessarily on a personal claim against the aircraft owner. Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722 p. 189.

As used by the Legal Committee at Brussels where this language was introduced, the word “interrupted” indicates a break in the running of the three months’ period after which the three-month period will be started all over again. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635 p. 59.

The word “suspended”, on the other hand, was used to indicate the possibility that the period would not start de novo but only the unexpired portion would continue to run. See Minutes of First Session, Legal Committee, ICAO Doc. 4635, p. 59.
ARTICLE IV (Cont.)

This Article shall apply notwithstanding the provisions of Article I, paragraph (2).58

This provision was inserted in the Convention out of an abundance of caution in order to make it amply clear that the provisions of Article IV relating to privileged claims overrode the general provisions of Article I (2).58

Article IV, although it deals with a relatively minor aspect of the Convention, possibly received more discussion in the Legal Commission at Geneva than any other provision. Despite all these deliberations, the Article remains ambiguous in certain respects. The principal factor giving rise to this ambiguity is that it departs from the general philosophy of the Convention, as set forth in Article I (2), which is to protect recorded rights, and creates a priority in certain privileged claims as set forth in Article IV (1), in derogation of the interests of the holders of recorded rights. Article IV contravenes the general philosophy of the Convention and specifically the provisions of Article I (2) in three ways:

(a) It grants privileged claims a top priority;
(b) It requires other States to recognize such claims as having top priority even during the three-month period when they may not be recorded;
(c) It prohibits other Contracting States from recognizing such claims if the provisions of Article IV (4) have not been complied with.

The ambiguity relates to the effect such a claim will have in the country where it arose if it has not been recorded in the State of the aircraft's registry.

The English text is clear that the prohibition against recognition of unrecorded privileged claims after the three-month period has expired applies only to other Contracting States. The French and Spanish texts are not so clear on this point, but the legislative history indicates that the English text more properly reflects the intent of the Legal Commission. Consequently, the State where the claim arose would be at liberty to admit the claim as an encumbrance against the ownership interest in the aircraft. Would it also be able to place such a claim ahead of recorded security rights?

Since the prohibition of Article IV (4), contravenes only that part of Article I (2) which permits a State to recognize unrecorded claims, it does not affect that part of Article I (2) providing that States shall not admit or recognize unrecorded rights as having priority over recorded rights. Unless, therefore, some other provision of the Article permits the Contracting States where the claim arose to prefer it to recorded rights, the general prohibition of Article I (2) will prevail.

The only provision in Article IV which might have the foregoing effect is the last clause in Article IV (1) “and shall take priority over all other rights in the aircraft”. It is clear that this creates a treaty priority and is not merely a recognition of priority established under local law. (ICAO Doc. 5722, pp. 185, 186.) However, there is nothing in the Article which explicitly makes this priority thus established by the Convention terminate if the conditions of Article IV (4) have not been complied with.

It is the opinion of the members of the Legal Sub-Committee of the Air Coordinating Committee that such a termination must be implied. This opinion is based on (1) the fact that a proposal to make the clause conditional on compliance with Article IV (4) was withdrawn because it was only a drafting change (ICAO Doc. 5722, p. 129); (2) the fact that an Indian proposal which would have left the entire matter of the establishment of liens and their priority over these privileged claims to national law was objected to by Mr. Justice Alten (Norway), the chief proponent of this text,
ARTICLE IV (Cont.)
as insufficient—"There was also another question. How long should these charges exist as (un) recorded charges? It was also necessary to have recording effected within a certain period." (ICAO Doc. 5722, p. 122.) It is also clear from an earlier proposal of Mr. Justice Alten (Norway) that he intended the priority to cease altogether if the claim were not recorded (ICAO Doc. 5722, p. 317).

These reasons are buttressed by the complete absurdity a failure to read such a condition into the Article would bring about. The priority being a treaty priority, it would apply in all countries including the country of origin of the claim, even though the latter State granted only a deferred rank to the claim (ICAO Doc. 5722, p. 185). This result is desirable for the sake of uniformity so long as the claim is to be recognized internationally, but when international recognition is cut off there would be no reason for requiring the country where the claim arose to subvert its own laws to accomplish a result prohibited to the other Contracting States and in derogation of the basic principles of the Convention. Accordingly, it is the opinion of the members of the Legal Sub-Committee of the Air Coordinating Committee that the top priority granted these claims by the Convention will cease to exist in all countries if the conditions of Article IV (4) are not met.

This opinion leads to the following specific conclusions:

(a) That an Article IV type claim, if the conditions of Article IV (4) are met, will enjoy top priority over recorded rights in all Contracting Countries.

(b) That such a claim, if the conditions of Article IV (4) have not been met, is not to be recognized for any purpose as a lien against the aircraft in Contracting countries other than the country in which it arose.

(c) That such a claim, if the conditions of Article IV (4) have not been met, may be recognized in the country of origin of the claim as a lien against the aircraft only to the extent it does not displace other encumbrances against the aircraft.

ARTICLE V

The priority of a right mentioned in Article I, paragraph (1) (d), extends to all sums thereby secured. However, the amount of interest included shall not exceed that accrued during the three years prior to the execution proceedings together with that accrued during the execution proceedings.

50 It will be noted that this provision relates only to mortgages, hypotheces, and other similar rights.

60 By this language, it was intended that all costs and expenses which under the mortgage indenture are made part of the mortgage debt, would be covered by this provision. See Report and Commentary on the Brussels Draft Convention, ICAO Doc. 4634, ICAO Doc. 4635, p. 249, 255.

61 By the use of the phrase "thereby secured" it was the intention of the draftsmen to include future advances.

62 In prior drafts the phrase "prior to the execution proceedings" read "prior to the commencement of the execution proceedings". It is believed that the words "the commencement of" were inadvertently omitted and that the phrase as it now reads should be construed in that manner. This construction will enable the courts to fix with exactness the date prior to which accrued interest will not be allowed.
ARTICLE VI

In case of attachment or sale of an aircraft in execution, or of any right therein, the Contracting States shall not be obliged to recognize, as against the attaching or executing creditor or against the purchaser, any right mentioned in Article I, paragraph (1), or the transfer of any such right, if constituted or effected with knowledge of the sale or execution proceedings by the person against whom the proceedings are directed.

In general, the Convention deals only with the recognition and protection of rights in aircraft. It makes no attempt to deal with rights in those rights—i.e., such as a mortgage of a leasehold interest, the assignment of a mortgage or lease, or the transfer of an option. However, in this case it was deemed desirable to protect the rights of an attaching creditor who might levy on a mortgage, or of some other right in the aircraft, held by a creditor of the aircraft owner.

The purpose of this provision was to guard against the case where an aircraft belonging to a debtor is attached abroad, and the owner thereupon transfers the airplane, possibly fraudulently, to another person. In such a case, without this provision, it might be considered that the foreign court would be required to recognize the transfer and since the aircraft no longer would belong to the defendant in attachment proceedings, would be required to dismiss the attachment.

"Purchaser" means purchaser at any judicial sale or sale in execution.

Because, for the purpose of this provision, the scope of the Convention is widened to include rights on rights, it was necessary to make provision for a case of transfer of any such rights. In the ordinary course of events a direct right in an aircraft either exists or not, and there is no necessity to make a determination for the purpose of recognition of the right as to who the owner of the right is.

It will be observed that this Article is not effective unless the transaction has been constituted or effected by the person against whom the attachment proceedings are directed.

ARTICLE VII

(1) The proceedings of a sale of an aircraft in execution shall be determined by the law of the Contracting State where the sale takes place.

This word is sufficiently broad to include any type of execution sale conducted under, pursuant to, or by judicial authority. It is not construed as being broad enough to include a private sale under a power of sale and a trust deed. See Draft Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, p. 202.

(2) The following provisions shall however be observed:

(a) The date and place of the sale shall be fixed at least six weeks in advance.

This provision is regarded as self-executing and therefore will automatically override inconsistent State and Federal law when the Convention comes into effect for the United States.

(b) The executing creditor shall supply to the Court or other competent authority a certified extract of the recordings concerning the aircraft. He shall give public notice of the sale at the place where the aircraft is registered as to nationality, in accordance with the law there applicable, at least one month before the day fixed, and shall concurrently notify by
ARTICLE VII (Cont.)

registered letter, if possible by air mail, the recorded owner and the holders of recorded rights in the aircraft and of rights noted on the record under Article IV, paragraph (3), according to their addresses as shown on the record.

As used in this connection the word “competent authority” is construed to mean the officer conducting the sale.

It will be noted that there is no requirement that certified copies of the recordings be furnished to the competent authority or the court. The extent of the “extract” of the recordings would appear to be within the discretion of the executing creditor unless the extracts were so incomplete as to make the certification meaningless. Although this represents a field of ambiguity in the Convention, it is not regarded as serious, since the secured creditor is given notice by registered mail and may appear and prove his claim before the competent authority.

When this provision was being discussed in the Legal Commission in Geneva, the attention of most of the delegates was directed to notice by publication rather than notice by posting. However, if the law of the place where the aircraft is registered as to nationality provides that public notice may be given by posting on a bulletin board, that should be sufficient. In this connection it may be advisable to consider legislation detailing the manner in which a notice under this Convention should be published.

This requirement would be fulfilled, it is believed, by mailing a registered letter at the same time the notice is published.

This provision was inserted at the request of the Australian Delegate, who stated that the ordinary mail took up to three weeks to reach Australia by surface from most other places. The phrase does introduce an element of doubt into the procedure since there will always be a question as to whether or not it was possible to send a registered letter by air mail to the recorded owner and the holders of the recorded rights in aircraft. In order to be on the safe side, it would seem advisable to mail two letters to each person, one by ordinary registered mail and the other by registered air mail.

It should be noted that both holders of rights in aircraft under Article I and those holders of priority rights which have been noted on the record under Article IV (3) must be notified by registered mail. There is, however, no obligation to notify those salvors or other persons entitled to priority rights under Article IV who have not noted their rights on the record. This fact in conjunction with Article VIII, which effects a “purge” of all rights in the aircraft, may operate to deprive a salver of his right. However, it is believed that the provision is not too onerous since the salver may protect himself by noting his claim on the record immediately after the salvage incident.

(3) The consequences of failure to observe the requirements of paragraph (2) shall be as provided by the law of the Contracting State where the sale takes place. However, any sale taking place in contravention of the requirements of that paragraph may be annulled upon demand made within six months from the date of the sale by any person suffering damage as the result of such contravention.

The effectiveness of this provision is somewhat diminished by the second sentence of the paragraph. It is evident that whatever are the consequences provided by the law of a Contracting State where the sale takes place, the sale may nevertheless be annulled. In the development of this provision the main dispute in the Legal Commission of the Second Assembly concerned the question as to whether a person suffering damage as a result of
non-compliance with provisions of Article VII (2) would be entitled to have the sale avoided, irrespective of whether the national law of the Contracting State concerned provided a sanction for such non-compliance. In most countries, undoubtedly, such a sale would be set aside in the case of non-compliance with the formalities. However, certain countries could provide that a fine be paid to the State, or that the person suffering damage would be entitled to obtain money damages, or be reimbursed by the State. When the matter was first discussed in the Legal Commission at Geneva, a proposal that only in the case where the national law contained no such sanction would the right to avoid the sale be appropriate. A counter-proposal was made by the Portuguese delegation that even if the law of a Contracting State provided for a sanction, annulment of the sale could always be requested where a prejudice had been caused. In presenting the matter to be voted on the Chairman stated that a vote for the first proposal would be considered a vote against the second. The first proposal was adopted by a vote of 18 for and 2 against.

As a result of this vote the Drafting Committee submitted a text reading as follows:

“3. The consequences of failure to observe the requirements of paragraph (2) shall be as provided by the law of the Contracting State where the sale takes place.

If the law of the Contracting State where the sale takes place contains no sanction for non-compliance with paragraph (2), any sale taking place in contravention of the regulation laid down in that paragraph may be annulled upon demand made within six months from the date of the sale by any person suffering damage as the result of such non-compliance.”

When this draft was presented to the Legal Commission on the second reading of the text, Mr. Justice Alten, the Chairman of the Drafting Committee, moved that the first part of the second paragraph be eliminated down to the words beginning with “any sale taking place.” The motion was objected to by the Indian delegate on the ground that it affected a question of substance. The Chairman then put the question to a vote stating that the meeting would be implicitly taking a decision on the question of whether it was a question of procedure or of substance. If the question were one of substance, it would then require a further two-thirds vote to reopen the debate. The Commission thereupon decided to consider the proposal of Mr. Justice Alten which was thereafter adopted by vote. Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, p. 200, 201.

76 This language indicates that the judge would have a certain amount of discretion as to whether the sale should be avoided, even though the person making the demand has done so within six months and has suffered damages as a result of the non-compliance with the sale provisions of Article VII (3). However, it is believed that the legislative history in the Legal Commission at the Second Assembly indicates that the application may be made and the sale avoided as a matter of right, if the person suffers damage as a result of the contravention.

77 It is believed that when the sale is annulled, it would have the effect of making the transaction void ab initio with the probable result the aircraft could be recovered even from a bona fide transferee of the purchaser at the judicial sale.

78 It should be noted that not only must the plaintiff in a suit to set aside a judicial sale pursuant to the provisions of this paragraph show actual damage, but he must show that such damage was the direct and proximate result of the failure of the attaching creditor to carry out the provisions of Article VII (2).
ARTICLE VII (Cont.)

(4) No sale in execution can be effected unless all rights having priority over the claim of the executing creditor in accordance with this Convention which are established before the competent authority, are covered by the proceeds of sale or assumed by the purchaser.

This provision is the so-called "minimum bid" provision. The purpose of the Article is to prevent a sale at the behest of a junior lienor unless the proceeds of the sale would be sufficient to pay off all senior liens and rights or unless the sale is made subject to such prior liens and rights. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 112.

This would obviously include not only prior rights of the type set forth in Article I but also all rights under Article IV including those not recorded.

The word "claim" was used here to cover not only a right of the nature dealt with in the Convention but also an unsecured debt of any nature for which the aircraft has been attached.

Under Article 7 (2) (b) the executing creditor is obliged to supply to the Court or other competent authority a certified extract of the recordings concerning the aircraft. Whether such a filing will constitute a sufficient establishment of the claim for the purpose of this paragraph is open to question.

All amounts secured by the mortgage or other interest in the aircraft must be covered by the proceeds of sale. In the case of a fleet mortgage where each aircraft in the fleet constitutes security for the entire debt, a sale price to the full extent of the debt would be required.

(5) When injury or damage is caused to persons or property on the surface of the Contracting State where the execution sale takes place, by any aircraft subject to any right referred to in Article I held as security for an indebtedness, unless adequate and effective insurance by a State or an insurance undertaking in any State has been provided by or on behalf of the operator to cover such injury or damage, the national law of such Contracting State may provide in case of the seizure of such aircraft or any other aircraft owned by the same person and encumbered with any similar right held by the same creditor.

This paragraph represents the biggest compromise of the Convention between the viewpoint of the United States on the one hand, and the foreign countries on the other. In effect, it provides for a conditional recognition of the fleet mortgage to the full extent of the mortgage debt. The condition under which the fleet mortgage will not be recognized except in a prorated amount is when suit is brought by a person who has been physically injured or where property has been damaged by the flight operations of the debtor airline, and who thus becomes an involuntary creditor of the airline. Even then, however, the condition will not operate unless no adequate insurance covering the risk to third persons on the surface is carried.

Injury includes death.

Would not include the operator of or passengers in another airplane in flight. Presumably, however, would cover damage to other aircraft and its passengers in its process of taking off.

This provision was developed at Brussels during the First Session of the Legal Committee. It was the intention of the draftsmen there to cover all security devices, including the retention of title as a security device. This would envisage the attachment of an aircraft operated by the borrower under an equipment trust or hire purchase agreement with the security title
ARTICLE VII (Cont.)

in the lender. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 105, et seq.

88 The purpose of this provision is to permit a State to guarantee the possible tort claim against airlines operated by the State, without the necessity for taking out insurance. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 168. Other self insurance for risks to third persons, however, would not appear to be contemplated by the Convention.

89 The phrase “by or on behalf of the operator” is not designed to preclude the taking out of insurance by the secured creditor in case he so desires to cover the particular risks. It was, however, designed to indicate that insurance taken out by property owners on their own houses and other property was not to be considered sufficient to meet this proviso. See Minutes, Legal Committee, 2nd ICAO Assembly, ICAO Doc. 5722, p. 207.

90 There must be a “fleet” relationship between the operator of the aircraft and the secured creditor. This means not only the usual type of “fleet mortgage”, but it would also cover a situation where several aircraft are purchased from the same source at different times under similar but separate financing agreements.

(a) that the provisions of paragraph (4) above shall have no effect91 with regard to the person suffering such injury or damage or his representative if he is an executing creditor;

91 In the event that insurance is not carried, it will be noted that no minimum bid requirement will be effective on the sale of a fleet mortgage aircraft.

(b) that any right referred to in Article I held as security for an indebtedness encumbering the aircraft may not be set up against any person suffering such injury or damage or his representative in excess of an amount equal to 80%92 of the sale price.93

92 The figure of 80 per cent was chosen at the First Session of the Legal Committee in Brussels for the reason that in general the prorated share which each aircraft bears in a fleet of the mortgage debt rarely exceeds 80 per cent of the value of the aircraft. Thus the holder of the mortgage would be substantially protected, even though the additional protection accorded by the joint nature of the liability would not accrue to his benefit. On the other hand, it does permit a certain equity to be attached by the injured person. See Minutes Legal Committee, 1st Session ICAO Doc. 4635 pp. 97, 167, et seq.

93 Since the mortgage may be set up to the extent of 80 per cent of the sale price, it is apparent that any claims of priority creditors under Article IV and for costs of the suit must be paid out of the remaining 20 per cent.

In the absence of other94 limit established by the law of the Contracting State where the execution sale takes place, the insurance shall be considered adequate95 within the meaning of the present paragraph if the amount of the insurance corresponds96 to the value97 when new of the aircraft seized98 in execution.

94 This provision permits Contracting States to establish other limits, either higher or lower for insurance for third party liability on the surface. Consequently, it does not prejudice a country in any way in its consideration of limitations of liability for such type of damage. Presumably a limit imposed for the purpose of this provision would be the same or consistent with limitations of liability generally for aircraft damage to the surface, although such is not required by the Convention.
ARTICLE VII (Cont.)

95 This provision goes only to the adequacy of the insurance and not to its effectiveness.
96 This word permits the insurance to be made payable in any type currency so long as it is the equivalent of the aircraft when new.
97 It was the intention of the draftsmen at Brussels in inserting this clause to bring the greatest certainty possible to the transaction so that lenders could determine in advance exactly what amount of insurance must be maintained. Since it is customary at the present time for airlines to carry insurance far in excess of the value of individual aircraft when new, it is not believed that this requirement should cause any trouble.
98 It will be noted that the amount of the insurance must correspond to the value when new to the particular aircraft which has been attached and not the aircraft causing the damage (unless that aircraft is the one that is attached). In a fleet mortgage it is obviously not necessary that the insurance correspond to the value of the fleet.

(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 IV.

99 Since by Article VIII all secured interests in the aircraft are purged through the judicial sale, the sale must be legally held to be in the common interest of all secured creditors and of the attaching creditor if he is not a secured creditor. This will be true even if one or more of the secured creditors have attempted to contest the sale. However, it will be noted that only those costs which are in the common interest of all leading to the sale are permitted to come ahead here.
100 If no sale takes place, obviously there will be no costs allowed against the aircraft.
101 It was suggested during the course of the development of this Convention that the costs should be payable by the purchaser in addition to the price. However, this idea was rejected because it would be impossible to ascertain the exact amount that the purchaser would have to pay at the time his bid was made.

ARTICLE VIII

Sale of an aircraft in execution in conformity with the provisions of Article VII shall effect the transfer of the property in such aircraft free from all rights which are not assumed by the purchaser.

102 This provision incorporates the doctrine of the civil law known as the "purge." As will be seen it provides that judicial sale shall have the effect of transferring the ownership in the aircraft free and clear of all encumbrances or other liens, unless assumed by the purchaser. These, of course, would include the priority rights under Article IV as well as rights under Article I. It does not, however, extinguish the claim in personam against the debtor. See Minutes Legal Committee, 1st Session, ICAO Doc. 4635, p. 110, et seq.

ARTICLE IX

Except in the case of a sale in execution in conformity with the provisions of Article VII, no transfer of an aircraft from the nationality register or the record of a Contracting State to that of another Contracting State shall be made, unless all holders of recorded rights have been satisfied or consent to the transfer.
ARTICLE IX (Cont.)

103 This Article stems from a suggestion made by Brigadier Wilberforce of the United Kingdom during the consideration of this matter in Commission IV at the First Assembly of ICAO held in 1947. The language was adopted for the main part on the floor at the First Session of the Legal Committee held in September of 1947. The primary concept of the Article is to prevent the transfer of registration as to nationality from one Contracting State to another without securing the consent of all recorded creditors. If their claims have been satisfied, that fact may be shown and the transfer permitted.

104 During the Legal Commission meetings at Geneva, the United States Delegation strongly urged that this prohibition extend not only to transfers to other Contracting States but transfers to non-contracting States as well. This was defeated. Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, p. 218. As a result it may be possible to circumvent this provision by a transfer to a non-contracting State free of lien and thereafter a transfer from the non-contracting State to the desired Contracting State.

105 It will be noted that the only obligation is to holders of recorded rights. Since the holder of a priority right under Article IV does not have a recorded right, it would appear that he would neither have to be satisfied nor consent to the transfer.

106 “Satisfied” would include not only payment but a quit-claim or general release.

ARTICLE X

(1) If a recorded right in an aircraft of the nature specified in Article I, and held as security for the payment of an indebtedness, extends in conformity with the law of the Contracting State where the aircraft is registered 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 the place where the spare parts are located, so as to give due notification to third parties that such spare parts are encumbered.

107 This Article provides for a limited coverage of spare parts in connection with a financing transaction. It will be noted at the outset that the provision does not apply to spare parts in general but only those which are covered by a mortgage or other encumbrance in connection with the financing of an aircraft. Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, pp. 93-94.

108 Accordingly, it is the recorded right in the aircraft which must extend to cover spare parts.

109 It was the intention of the draftsmen of the Convention by the use of the words “in conformity with” to permit local law to control as to coverage of spare parts. See ICAO Doc. 4601, p. 6—LC/37—3/9/47.

110 See Definition set forth in Article X (4). This would not include an engine or other part of an aircraft which is temporarily removed from the airplane for the purpose of repairs or for other reasons. Such an engine or part would be considered a part of the airplane under definition of aircraft in Article XVI.

112 Specified in the mortgage indenture.

112 The French and Spanish texts of the Convention read “upon condition that” instead of “as long as” in this particular place. However, the legisla-
ARTICLE X (Cont.)

tive history would indicate that the intention was the same as the English. See Minutes, Legal Commission, 2nd ICAO Assembly, ICAO Doc. 5722, p. 220, et seq.

113 The word “due” is really redundant in view of the fact that the word “appropriate” has been inserted above. However, during the drafting and formulation of this provision the “due” was inserted at the insistence of the French Delegation in Montreal in 1947. Subsequently, in Brussels at the First Session of the Legal Committee, the word “appropriate” was included at the request of the Canadian delegate. See Minutes Legal Committee, 1st Session, ICAO Doc. 4635, p. 169.

114 Since the right must be described in the public notice, it would appear that nothing further need be stated in the notice to indicate that the spare parts are encumbered.

(2) A statement indicating the character and the approximate number\(^\text{110}\) of such spare parts shall be annexed to or included in the recorded document. Such parts may be replaced by similar parts without affecting the right of the creditor.\(^\text{116}\)

115 Since the spare part coverage is of a relatively limited nature, and was intended to cover only those spare parts procured on the original financing of an aircraft (or their replacements), it will be possible to indicate the character and the approximate number of such parts. The United States Delegation opposed the inclusion of this provision throughout, but the other delegates insisted on its retention for the purpose of indicating the type of spare parts designed to be covered. This, however, is not a requirement that the character and approximate number of the spare parts be detailed as to each place, but only as to the aggregate number of spare parts and their character contained in the financing. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 119, et seq.

116 This last sentence permits the interchange of the parts and their replacement by other parts. Again, this relates to the parts in the aggregate and not the parts at any specific place.

(3) The provisions of Article VII, paragraphs (1) and (4), and of Article VIII shall apply to a sale of spare parts in execution. However, where the executing creditor is an unsecured\(^\text{117}\) creditor, paragraph 4 of Article VII in its application to such a sale shall be construed so as to permit the sale to take place if a bid is received in an amount not less than 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,\(^\text{118}\) limit the amount payable to holders of prior rights to two-thirds of such proceeds of sale after payment of the costs referred to in Article VII, paragraph (6).

117 The limitation that the executing creditor must be an unsecured creditor was inserted to prevent a junior lienor from taking advantage of this provision in order to obtain some payment out of the mortgaged parts at the expense of a senior lienor. The entire clause was intended only for the benefit of the local unsecured creditors who might do business with the airline or might be insured by it. Minutes, Legal Commission, 2nd Assembly, ICAO Doc. 5722, p. 95.

118 It is believed that “executing creditor” as used herein would include a trustee in bankruptcy. It is doubtful, however, whether the secured creditor could file his claim as a general creditor to participate in the one-third reserved for the executing creditors.
ARTICLE X (Cont.)

(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.\(^{119}\)

\(^{119}\) As indicated above the term “spare parts” would not include any part of an aircraft which is temporarily removed from the aircraft for purposes of repairs where that part is to be replaced on the airplane immediately.

ARTICLE XI

(1) The provisions of this Convention shall in each Contracting State apply to all\(^{120}\) aircraft registered as to nationality in another Contracting State.

\(^{120}\) Despite the all-inclusive nature of this sentence, it must obviously be read in connection with Article XIII. It should also be noted that in this Article the French and Spanish texts are stated in a negative manner whereas the English text is in the positive. It was the opinion of the Committee that this diversity in language in no way affected substance.

(2) Each Contracting State shall also apply to aircraft there registered as to nationality:

(a) The provisions of Articles II,\(^{121}\) III,\(^{122}\) IX,\(^{123}\) and

\(^{121}\) Recordings must appear in same record.

\(^{122}\) Listing of address of authority on certificate of registration as to nationality, furnishing of copies, manner in which recording system must be maintained and opportunities for making reasonable charges.

\(^{123}\) Provision prohibiting transfer from nationality register unless creditors consent or are satisfied.

(b) The provisions of Article IV, unless the salvage or preservation operations have been terminated within its own territory.\(^{124}\)

\(^{124}\) This exception is not to be regarded as prohibitory. If the Contracting State desires to have salvage and preservation operations enjoy a priority status domestically, it is possible for that State so to provide notwithstanding this provision. Its purpose was only to exempt the State from a mandatory requirement that Article IV should be applied to its own aircraft involving salvage or preservation operations occurring within its own territory. See Minutes Legal Committee, 1st Session, ICAO Doc. 4635, p. 170.

ARTICLE XII

Nothing in this Convention shall prejudice the right of a Contracting State to enforce against an aircraft its national laws relating to immigration,\(^{125}\) customs\(^{126}\) or air navigation.\(^{127}\)

\(^{125}\) This Article was inserted to make it amply clear that nothing in the Convention was intended to deprive the State of its police power in the enforcement of its immigration, customs or air navigation laws. See ICAO Doc. 5722, pp. 154, 155

\(^{126}\) At Geneva the word “customs” was substituted for the word “smuggling,” which appeared in Brussels draft of the Convention. This change probably expanded the term to include violation of formal requirements as well. See ICAO Doc. 5722, pp. 136, 154, 155.

\(^{127}\) This preserves the right of a State to impose a first lien on an aircraft for violation of its air traffic rules and other air navigation laws.
ARTICLE XIII

This Convention shall not apply to aircraft used in military, customs or police services.\textsuperscript{128}

\textsuperscript{128} See footnote \textsuperscript{120}.

ARTICLE XIV

For the purpose of this Convention, the competent judicial and administrative authorities of the Contracting States may, subject to any contrary provision in their national law, correspond directly with each other.\textsuperscript{129}

\textsuperscript{129} This Article is of questionable utility in view of the restriction which subjects it to contrary national laws.

ARTICLE XV

The Contracting States shall take such measures as are necessary for the fulfilment of the provisions of this Convention\textsuperscript{130} and shall forthwith inform the Secretary General of the International Civil Aviation Organization of these measures.\textsuperscript{131}

\textsuperscript{130} Under the laws of most countries, treaties are not self-executing instruments. As a result it was believed necessary to put in a provision requiring such States to place implementing provisions in their substantive law. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 140, \textit{et seq}. Furthermore, even in countries with systems such as those of the United States, where self-executory treaties become the supreme law of the land, certain parts of the treaty which are non self-executing must be implemented.

\textsuperscript{131} In the development of this provision, there was once a requirement that the Secretary-General would advise all the Contracting States under this Convention. This was regarded, however, as being a limitation clause, since the Secretary-General in due course under the Chicago Convention would notify all Contracting States under that Convention. See Minutes, Legal Committee, 1st Session, ICAO Doc. 4635, p. 140.

ARTICLE XVI

For the purposes of this Convention the term “aircraft” shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.\textsuperscript{132}

\textsuperscript{132} Attention has already been drawn to the difference between the definition of spare parts and this definition of aircraft. It should also be noted in this connection that the definition contained in the Convention goes beyond the definition contained in the Civil Aeronautics Act. For international purposes the aircraft includes everything attached to the airframe and not merely the airframe itself.

ARTICLE XVII

If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible,\textsuperscript{133} references in this Convention to the law of the Contracting State shall be construed as references to the law of that territory.

\textsuperscript{133} It should be noted that this clause relates only to cases where separate registers for the purpose of nationality are maintained and not where separate records are maintained.
ARTICLE XVIII

This Convention shall remain open for signature until it comes into force in accordance with the provisions of Article XX. As of December 1, 1948, the following countries had signed the Convention: Argentina, Belgium, Brazil, China, Colombia, France, Iceland, Italy, Mexico, Netherlands, Peru, Portugal, United Kingdom, United States, Venezuela, Dominican Republic, Switzerland, Greece, Chile, Denmark, Norway, and Sweden.

ARTICLE XIX

(1) This Convention shall be subject to ratification by the signatory States.

(2) The instruments of ratification shall be deposited in the archives of the International Civil Aviation Organization, which shall give notice of the date of deposit to each of the signatory and adhering States.

While making an international organization the depository of the Convention is a departure from traditional practice, it is believed that this is desirable in this case.

ARTICLE XX

(1) As soon as two of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the second instrument of ratification. It shall come into force, for each State which deposits its instrument of ratification after that date, on the ninetieth day after the deposit of its instrument of ratification.

Although it is not usual to have a multilateral convention enter into effect when only two of the signatory States have ratified, it appeared desirable in this instance to bring it into force immediately with respect to two States, since the obligations under the Convention may be amply fulfilled by two States with respect to each other.

(2) The International Civil Aviation Organization shall give notice to each signatory State of the date on which this Convention comes into force.

(3) As soon as this Convention comes into force, it shall be registered with the United Nations by the Secretary General of the International Civil Aviation Organization.

This is required by Article 102 of the United Nations Charter.

ARTICLE XXI

(1) This Convention shall, after it has come into force, be open for adherence by non-signatory States.

(2) Adherence shall be effected by the deposit of an instrument of adherence in the archives of the International Civil Aviation Organization, which shall give notice of the date of the deposit to each signatory and adhering State.

(3) Adherence shall take effect as from the ninetieth day after the date of the deposit of the instrument of adherence in the archives of the International Civil Aviation Organization.
ARTICLE XXII

(1) Any Contracting State may denounce this Convention by notification of denunciation to the International Civil Aviation Organization, which shall give notice of the date of receipt of such notification to each signatory and adhering State.

(2) Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

ARTICLE XXIII

(1) Any State may at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Convention does not apply to any one or more of the territories for the foreign relations of which such State is responsible. The expression "territories for the foreign relations of which such State is responsible" has been developed to express in a few words the extent of territorial application that had been included in the ever-expanding wording previously used in the provisions relating to territorial application. Previously, expressions such as "colonies, protectorates, mandated territories or any territory subject to its sovereignty or authority, or any territory under its suzerainty or trusteeship" or "colonies, protectorates, territories in respect of which it exercises a mandate or trusteeship, territories under its suzerainty, and other non-metropolitan territories subject to its sovereignty or authority", were used. Such provisions had become cumbersome and with the addition of new terms were increasingly cumbersome. Phraseology similar in substance to that used in Article XXIII is contained in a number of recent international agreements.

188 This provision permits a Contracting State to exempt the application of the Convention to its territories if it should so desire.

(2) The International Civil Aviation Organization shall give notice of any such declaration to each signatory and adhering State.

(3) With the exception of territories in respect of which a declaration has been made in accordance with paragraph (1) of this Article, this Convention shall apply to all territories for the foreign relations of which a Contracting State is responsible. This provision should be read in conjunction with Article XXIII (1).

140 This provision should be read in conjunction with Article XXIII (1).

(4) Any State may adhere to this Convention separately on behalf of all or any of the territories regarding which it has made a declaration in accordance with paragraph (1) of this Article and the provisions of paragraphs (2) and (3) of Article XXI shall apply to such adherence.

(5) Any Contracting State may denounce this Convention, in accordance with the provisions of Article XXII, separately for all or any of the territories for the foreign relations of which such State is responsible.