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AIRCRAFT MORTGAGE A STUDY IN COMPARATIVE AVIATION LAW OF THE WESTERN HEMISPHERE

S. A. BAYITCH

VIII. INTERNATIONAL PROBLEMS

The familiar difficulties arising from differences between the laws of various jurisdictions may be avoided somewhat by the adoption of one or another of several alternatives. One is that of using the conflict rules enacted independently in each country as part of its municipal law. A more satisfactory way is that of unifying the conflict rules through international agreements even though diversity of substantive law remains to prevent complete uniformity of results. The final and most satisfactory method, of course, is that of treaties establishing both uniform conflict and substantive law.

These three methods operate in various combinations and degrees to deal with security interests in aircraft arising out of situations based on different legal systems.²⁸⁶

MUNICIPAL CONFLICT LAW

The earliest attempt to cope with choice-of-law problems as a distinct juridical proposition, the statist doctrine, introduced a tripartite classification of substantive law and assigned each one contact. Personal property took the classification of *statutum personale* and was therefore governed by the law of the domicile of its owner.²⁸⁷ The rule in its original simplicity has now vanished, except as preserved in the statute books of some states, California,²⁸⁸ Idaho,²⁸⁹ Montana²⁹⁰ and North

286. ENNIS, *DERECHO INTERNACIONAL PRIVADO* 453 (1953); 2 MIAJA DE LA MUELA, *DERECHO INTERNACIONAL PRIVADO* 369 (1955); 3 RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY* 122 (1958); SCERNI, *IL DIRITTO INTERNAZIONALE PRIVATO MARITTIMO ED AERONAUTICO* 355 (1936); VERPLAETSE, *DERECHO INTERNACIONAL PRIVADO* 617 (1954); Visscher, *Les Conflits de Lois en Matière de Droit Aérien*, 48 *RECUEIL DES COURS* (Hague) 285 (1934); also ROMANG, *ZUSTANDIGKEIT UND VOLLSTRECKBARKEIT IM INTERNATIONALEN UND SCHWEIZERISCHEN LUFTPRIVATRECHT* (1958), and Verplaetse, *Sources of Private International Air Law*, 7 *INT'L & COMP.L.Q.* 405 (1958).

287. LALIVE, *THE TRANSFER OF CHATTELS IN THE CONFLICT OF LAWS, A COMPARATIVE STUDY* 34 (1955); ZAPHIRIOU, *THE TRANSFER OF CHATTELS IN PRIVATE INTERNATIONAL LAW, A COMPARATIVE STUDY* 17 (1956); Rossi Masella, *Regimen Internacional de los Bienes*, in *ESTUDIOS JURIDICOS EN MEMORIA DE J. IRURETA GOYENA* 569, 585 (1955).

288. *CIVIL CODE* § 946 (1872).

289. *REV. STAT.* § 55—401 (1947).

290. *REV. STAT.* § 67—1101 (1947).

Dakota.²⁹¹ In Latin America only Argentina²⁹² and Brazil²⁹³ provide for it in their civil codes albeit in a modified form.

Notwithstanding the firming up in some countries²⁹⁴ of the *statutum personale* as a result of nationality concept replacing that of domicile, Latin American²⁹⁵ countries and most jurisdictions in the United States²⁹⁶ and Canada²⁹⁷ embraced another doctrine, that of the *lex situs*. Latin American codes express this in two different ways. One group applies the *lex situs* without distinction to movables and immovables, and the other expressly subjects movables to the *lex situs*. Bolivia,²⁹⁸ Chile,²⁹⁹ Colombia,³⁰⁰ Ecuador,³⁰¹ El Salvador,³⁰² Guatemala,³⁰³ Nicaragua,³⁰⁴ Panama,³⁰⁵ and

291. REV. CODE § 470701 (1948).

292. The CIVIL CODE, art. 11 (1869) providing that "Movables permanently situated and not intended to be removed are subject to the *lex situs*; movables carried by the owner as well as things whose sale or removal to another place are intended are subject to the law of the domicile of the owner." 2 ROMERO DEL PRADO, MANUAL DE DERECHO INTERNACIONAL PRIVADO 254 (1944); ENNIS, DERECHO INTERNACIONAL PRIVADO 303 (1953).

293. Art. 8 (1) Lei de introducao ao Codigo Civil Brasileiro (1942) follows generally the *lex situs*; in regard to chattels carried by the owner or to be removed to another place, the law of the owner's domicile controls, like in Argentina (*supra* note 292). There is a special provision on pledges to the effect that the law of the domicile of the person in whose possession the pledge is, controls; this rule was later adopted by the Bustamante Code, art. 111 (*infra* note 340). TENORIO, DIREITO INTERNACIONAL PRIVADO (1949), also his LEI DE INTRODUCAO . . . 319, 323 (1942).

294. Particularly in Italy (CIVIL CODE, art. 7, 1868, now replaced by the *lex situs*, art. 22, prel. disp., CIVIL CODE, 1942), and Spain (CIVIL CODE, art. 10, 1889). Trias de Bes, *Conception du Droit International Privé d'après la Doctrine et la Pratique en Espagne*, 31 RECUEIL DES COURS (Hague) 627, 647 (1930). The latter provision still lingers on in the CIVIL CODE of Puerto Rico, art. 10 (1889).

295. Obregon, *Conflict of Laws in Latin American Countries*, 27 YALE L.J. 1030, 1034 (1930); Valladao, *Le Droit International Privé des États Américains*, 81 RECUEIL DES COURS (Hague) 5 (1952).

296. Green v. Van Buskirk, 72 U.S. (5 Wall.) 307 (1866), 74 U.S. (7 Wall.) 139 (1868). Carnahan, *Tangible Property and the Conflict of Laws*, 2 U. CHIL. REV. 347 (1935); FALCONBRIDGE, *ESSAYS ON THE CONFLICT OF LAWS* 471 (2d ed. 1954); Stumberg, *Chattel Security Transactions and the Conflict of Laws*, 27 IOWA L. REV. 528 (1942). Doskow, *Transitory Chattels and Stationary Law: a Proposal to Facilitate Secured Financing of Aircraft Employed in International Flight*, 26 J. AIR L. & COM. 36 (1959). Cf. RESTATEMENT, CONFLICT OF LAWS, § 255 — 258, 265 (1934). Conflict rules also appear in Sec. 9 — 103 of the UNIFORM COMMERCIAL CODE (1957).

297. Except in Quebec (art. 6 of the CIVIL CODE, 1866). LAFLEUR, *THE CONFLICT OF LAWS IN THE PROVINCE OF QUEBEC* 123 (1898).

298. CIVIL CODE art. 3 (1830). SALINAS, MANUAL DE DERECHO INTERNACIONAL PRIVADO 191 (1948); URQUIDI, LECCIONES SINTETICAS DE DERECHO INTERNACIONAL PRIVADO 254 (1944).

299. CIVIL CODE art. 16 (1855). DUNCKER BIGGS, DERECHO INTERNACIONAL PRIVADO (1950). On vested rights, art. 438 of the CIVIL CODE.

300. CIVIL CODE art. 20 and 262 (1873). COCK ARANCO, *TRATADO DE DERECHO INTERNACIONAL PRIVADO* 262 (1952).

301. CIVIL CODE art. 15 (1950). SALAZAR FLOR, DERECHO CIVIL INTERNACIONAL 407 (1955); 1 PAREDES, *TEORIA GENERAL DEL DERECHO CIVIL INTERNACIONAL* 329 (1931).

302. CIVIL CODE art. 16 (1926).

303. Ley constitutiva del poder judicial, decreto no. 1862, art. XXI (1936); aircraft are considered to be movables, art. 377 of the CIVIL CODE (1933). MATOS, *CURSO DE DERECHO INTERNACIONAL PRIVADO* 408, 433 (1941); MUNOZ MEANY, DERECHO INTERNACIONAL PRIVADO 165 (1953); Villagran Kramer, *Sintesis del Derecho Internacional Positivo de Guatemala*, (29) UNIVERSIDAD DE SAN CARLOS 7, 38 (1954).

304. CIVIL CODE art. VI, 16 — 19 (1904).

305. CIVIL CODE, art. 6 (1916).

Peru³⁰⁶ form the first group while the second consists of Costa Rica,³⁰⁷ Mexico,³⁰⁸ Uruguay³⁰⁹ and Venezuela.³¹⁰ In all these jurisdictions the *lex loci* will control with regard to security interests in chattels, including aircraft, except where the rule of the *lex situs* has been changed by special enactments regarding aviation.

This solution, practical as it may be for chattels generally, was no longer satisfactory when modern developments, technical as well as commercial, brought about rapid and massive movements of important kinds of chattels. Not only did difficulties develop with ordinary goods *in transitu* but the *lex situs* rule became utterly unrealistic when the attempt was made to apply it to chattels which by their very function must be continually on the move. For vessels and aircraft a new solution had to be found. It was found in emancipating them from any kind of derivative contact and replacing such with an independent contact of a quasi-personal nature, nationality.³¹¹

The use of nationality as the controlling law-selecting device for security interests in aircraft was achieved in two ways. First, by the adoption of a unilateral conflict rule declaring aviation acts in force in these countries to apply to domestic aircraft. Second, in some countries, by a complete conflict rule subjecting both domestic and foreign aircraft to a uniform conflict rules based on nationality. This rule declares the national law of the aircraft to control "interests in rem and privileges of private origin," as is the case in Brazil.³¹² In Uruguay³¹³ it underwent two modifications. The first removed the private origin limitation on privileges by making statutory liens amenable to the *lex nationalis* of the aircraft as well; and the second exempted from *lex nationalis* "expenses necessary for the last flight which are governed by the law of the place where they have been incurred," i.e. *lex loci actus*.

306. CIVIL CODE, prel. tit. art. VI (1936).

307. CIVIL CODE art. 5 (1887); ORTIZ MARTIN, DERECHO INTERNACIONAL PRIVADO (1947).

308. Constitution art. 121 (II) (1917); CIVIL CODE for the federal district, etc. art. 14 (1928). ARCE, DERECHO INTERNACIONAL PRIVADO 180 (1955). The same rule prevails in the civil codes of the states: Campeche (art. 14, 1942), Chihuahua (art. 14, 1941), Coahuila (art. 14, 1941), Colima (art. 14, 1953), Durango (art. 14, 1947), Hidalgo (art. 14, 1940), Jalisco (art. 12, 1936), Mexico (art. 14, 1936), Nayarit (art. 14, 1938), Nuevo Leon (art. 14, 1935), Oaxaca (art. 12, 1943), Senora (art. 15, 1949), Tabasco (art. 14, 1950), Tamaulipas (art. 9, 1940), Veracruz (art. 7, 1932), and Yucatan (art. 7, 1941).

309. CIVIL CODE art. 5 (1868 as amended 1914).

310. CIVIL CODE art. 10 (1942). TEBRES POBEDA, APUNTES DE DERECHO INTERNACIONAL PRIVADO 116 (1957).

311. Cooper, *National Status of Aircraft*, 17 J.AIR L. & COM. 292 (1950); also *Etude sur le Statut Juridique des Aéronefs*, 4 REVUE FRANCAISE DE DROIT AERIEN, 125, 205 (1950); HONIG, *THE LEGAL STATUS OF AIRCRAFT* 34 (1956); Gazdik, *Nationality of Aircraft and Nationality of Airlines as Means of Control in International Air Transportation*, 25 J.AIR L. & COM. 1 (1958).

312. CODIGO BRASILEIRO DO AR art. 7 (Brazil 1938).

313. CODIGO DE LEGISLACION AERONAUTICA art. 8 (Uruguay 1942).

The Argentine aviation code³¹⁴ contains a special conflict rule dealing with acts and contracts executed abroad relating to interests in aircraft, among others "encumbrances and injunctions (*inderdiciones*) in aircraft or decreed against them." Such acts take effect in Argentina only if they are executed in the form of public acts or before an Argentine consul who will record the document and forward it to the competent authority.³¹⁵ A recent decree-law concerns itself with the transfer from abroad of aircraft including security interests.³¹⁶ But the real meaning of the enactment is difficult to assess with certainty.

Without adopting a specific conflict rule Mexico provides ³¹⁷ that "acts executed, contracts entered into and judicial decisions rendered in a foreign country will be inscribed in the Mexican Aeronautical Register provided they meet requirements set up by article 3005 of the Civil Code for the Federal District and Territories" and are submitted, if necessary, in an authorized Spanish translation. By contrast, for interstate situations the same Regulations contain a conflict rule:

The acts executed or contracts entered into in another federal entity will be inscribed only if they meet both the formal requirements as set up by the law of the place of making as well as qualify for inscription under the provisions of the Civil Code for the Federal District and Territories, the Law of General Means of Communication and these Regulations.

TREATY LAW

Two groups of treaties deal with matters relevant to security interests in aircraft. The first adopting the method of uniform conflict rules

314. CODIGO AERONAUTICO DE LA NACION art. 50 and 38(2) (Argentina 1954).

315. A similar provision in the Uruguayan Aviation Act (art. 99) applies only to acquisition of aircraft.

316. Decree-law no. 12, 627 of Oct. 11, 1957 (BOL. OF. Oct. 23, 1957) concerning registration and inscription of aircraft with encumbrances constituted abroad:

Art. 1. For a period of three years from the date of publication of this decree-law any aircraft acquired by a contract of purchase and sale on credit or by other contracts entered into abroad by which the vendor has retained title to the aircraft for security until complete payment of the agreed upon purchase price, may be registered and inscribed in the name of the purchaser and subject to the restrictions arising from the contract of purchase, provided the purchaser meets the requirements established by ch. IV of title IV of the Aeronautic Code (law 14, 307) for the ownership of an Argentine aircraft. The registration of the aircraft in the name of the acquirer as well as the inscription of encumbrances or restrictions arising from the contract of acquisition will be registered simultaneously. Once the encumbrances or restrictions have been cancelled and the transfer perfected in his favor, the acquirer shall apply for a definite inscription or registration.

Art. 2. The Ministry of Aviation will propose measures to be taken before the expiration of the period established in art. 1.

(Art. 3 and 4 contain provisions concerning approval and publication).

It seems that certain of these provisions have been superseded by the subsequent ratification of the Geneva Convention by Argentina.

317. Art. 23 and 24 of the *Reglamento del registro aeronautico Mexicano* (1951); see note 59 *supra*.

includes the Convention on International Civil Law³¹⁸, the Convention on International Commercial Law³¹⁹ and the Convention on International Commercial Navigation.³²⁰ This same group also includes the Convention on Private International Law (Bustamante Code).³²¹ The second goes directly into the field of securities in aircraft introducing uniform substantive law as well; at the present time it is represented by the Convention on International Recognition of Rights in Aircraft.³²²

THE MONTEVIDEO CONVENTIONS. The Convention on International Civil Law of 1889 contains, of course, no special provisions regarding aircraft and security interests in them but only conflict rules applicable to chattels generally. In this regard the *lex loci* prevails.³²³ Added are provisions dealing with the recognition of foreign created interests; a change in the location of chattels involved "does not affect rights acquired in accordance with the law of the place where they were at the time of such acquisition."³²⁴ The question as to whether or not such recognition in cases of *hipoteca* or nondispossessory *prenda* may be prevented by the lack of a parallel institution in the jurisdiction to which the chattel has been removed, is answered by the rule that "interested parties must comply with the substantive or formal requirements (*requisitos de fondo o de forma*) imposed by the law of the new location, in order to acquire or preserve the rights mentioned."³²⁵ The same position is taken by the provision that interests acquired by third parties in accordance with the law of the new location of the chattel but before compliance by holders of prior interests with the "requirements stated," *i.e.*, domestication of foreign created rights in accordance with the law of the new location, prevail "over those of the first acquirer," meaning over interests constituted under the law of the chattel's prior location.³²⁶

In 1940 amendments were added to both of the 1889 Conventions. The newly named Convention on International Land Commerce Law adopted new provisions on commercial *prenda*³²⁷ which may be applied to aircraft in such jurisdictions that consider dealings with them a matter of commercial law. The *lex loci* still prevails³²⁸ though a differentia-

318. Montevideo, 1889. RESTELLI, ACTAS Y TRATADOS DEL CONGRESO SUD-AMERICANO DE DERECHO INTERNACIONAL PRIVADO (MONTEVIDEO 1888-1889) (1928); also LOS TRATADOS DE MONTEVIDEO DE 1889 Y SU INTERPRETACION JUDICIAL (1940). The conventions as amended in 1940 are translated in 37 AM.J.INT'L L. (supp. 1943). Conventions listed here have been ratified by Argentina, Uruguay, Peru, Paraguay, Bolivia and Colombia. For a comprehensive survey, see ALFONSIN, TEORIA DEL DERECHO PRIVADO INTERNACIONAL 78 (1955).

319. Montevideo 1889; translation in 37 AM.J.INT'L L. 132 (Supp. 1943).

320. Montevideo 1889; translation in 37 AM.J.INT'L L. 109 (Supp. 1943).

321. Habana 1928. See note 340 *infra*.

322. See note 346 *infra*.

323. Art. 24.

324. Art. 30.

325. Art. 30, para. (2).

326. Art. 31.

327. Art. 19-22.

328. Art. 20.

tion has been introduced between the underlying agreement and its in rem effect. The formalities and requirements are governed by the *lex loci*, the "quality of the document" by the law "governing the contract,"³²⁹ which is apparently the *lex causae* as determined by local conflict law. In regard to the in rem effect, the *lex situs* continues to prevail: "The rights and duties of the contracting parties in regard to the chattel given in *prenda* with or without dispossession are governed by the law of its location at the time when *prenda* was constituted."³³⁰ Foreign created interests in the chattel are dealt with in the same way as they were in the 1889 Convention on International Civil Law,³³¹ the Convention on International Land Commerce Law³³² using the following language:

A change in the location of the chattel given as *prenda* does not affect interests acquired in accordance with the law of the State where *prenda* was constituted; however, for the preservation (*conservación*) of these rights the requirements as to form and substance imposed by the State of the new location must be met.

Evidently, the requirement of domestication of foreign created interests has not been completely abandoned, but rather the question has been shifted from one of recognition to one of preservation. Whether the latter term signifies a declaratory or constitutive requirement remains doubtful; but whatever its meaning, that will have to be determined according to local law, *i.e.*, that law of the place where the chattel is to be found at the time such determination is sought. Compared with the Convention on International Civil Law of 1889, the position of third persons with interests in chattels removed from the original location where it has been encumbered, has changed in two aspects. First, recognition of a newly created interest is available only to bona fide acquirers of interests in accordance with the law of the chattel's new location; and the second, such acquirer is given no priority since the question of his rank is to be decided "by the law of the State of the new location" of the chattel.³³³

The 1940 Convention on International Maritime Commerce Law included aviation.³³⁴ Its general rule is³³⁵ that the law of the aircraft's nationality applies to all matters related to the "acquisition and transfer of property, privileges and other interests in rem as well as of publication which guarantees its effect in regard to third parties interested."³³⁶ As to foreign created *hipotecas*, the Convention abandoned the require-

329. Art. 19, para. (1).

330. Art. 20.

331. Art. 30.

332. Art. 21.

333. Art. 22.

334. Art. 43.

335. Art. 1-4.

336. Art. 2.

ment of domestication by simply stating³³⁷ that "*Hipotecas* or any other interests in rem in vessels [aircraft] having the nationality of one of the States and properly constituted and registered in accordance with its laws shall be valid and take effect in other States." As a consequence, rules dealing with the change of nationality had to replace those regulating the change of the location of the chattel. In this respect the Convention³³⁸ adopted the position that such a change does not affect the privileges and interests in rem once properly established, the effect of such interests to be regulated by "the law of the flag [nationality] at the moment when the change of nationality occurred."

It may be added that the "right to attach and judicially sell a vessel [aircraft] is determined by the law of its location,"³³⁹ a rule which for all practical purposes coincides with the *lex fori executionis*.

THE BUSTAMANTE CODE. The Bustamante Code of 1928³⁴⁰ includes among provisions dealing with international commercial law a title on maritime and air commerce. Rules applicable to maritime matters "are also applicable to aircraft."³⁴¹ The decisive contact of nationality applies to foreign created interests in aircraft as can be seen by the following provision:³⁴² "Privileges and real guarantees constituted in accordance with the law of the flag [nationality] have extraterritorial effect even in those countries where the laws do not recognize nor regulate such hypothecation." Thus the Code adopted the principle of unconditional recognition of foreign interests dispensing with any kind of domestication, a principle expressed in general rules of the Code.

The rights acquired in accordance with the rules of this Code shall have full extraterritorial force in the contracting States, except when any of their effects or consequences is in conflict with a rule of international public order.³⁴³

337. Art. 31.

338. Art. 3.

339. Art. 4.

340. Habana, 1928. Text in 1 SCOTT, *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, 1889-1928*, 325 (1931), and 4 HUDSON, *INTERNATIONAL LEGISLATION* 2283 (1931). 2 SANCHEZ DE BUSTAMANTE, *DERECHO INTERNACIONAL PRIVADO* 348, 353 (1934).

The convention was ratified by Cuba, Guatemala, Honduras, Panama and Peru; with reservations by Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Haiti, Nicaragua and Venezuela. On the question of reservations, see MUCI ABRAHAM, *LOS CONFLICTOS DE LEYES Y CODIFICACION COLECTIVA EN AMERICA* 34 (1955).

The Convention on Commercial Aviation (Habana 1928), text in 1 SCOTT, *supra* at 385, contains no provision relevant here. The same goes for the Spanish-American Convention on Aerial Navigation (Madrid 1926); text in 3 HUDSON, *INTERNATIONAL LEGISLATION* 2019 (1931).

341. Art. 282. Property generally is controlled by the *lex situs* (art. 105), with additional provision concerning chattels in art. 106; however, in art. 110 and 111 (*brenda*) the domicile appears as a subsidiary contact. In regard to aircraft, these rules are replaced by art. 274-284.

342. Art. 278.

343. Art. 8.

The law of nationality of the aircraft controls "the rights of creditors after the sale . . . and their extinguishment."³⁴⁴ On the contrary the "power of judicial attachment and sale . . . shall be subject to the law of the place where it [aircraft] is located."³⁴⁵

The real impact of these treaties on domestic law depends upon a variety of factors. In the first place ratification, reservations and transformation of treaties into the law of the land under different constitutional systems must first be considered. Secondly, the conventions just discussed, even though creating uniform law, are still only treaty law and as such apply only to nationals of the contracting parties. Another factor to be taken into account is the condition of domestic law which together with traditional judicial practice and the political climate may engraft on the text of the treaties results quite different from those called for by the literal language of such texts.

THE GENEVA CONVENTION.³⁴⁶ In its own words this Convention applies "in each Contracting State . . . to all aircraft registered as to

344. Art. 277.

345. Art. 276.

346. Geneva, 1948, 4 (2) U.S.T. & O.I.A. 1831 (1953); T.I.A.S. 3847 (see note 79 *supra*).

BAYTICH, CONFLICT LAW IN UNITED STATES TREATIES 71 (1955), also 9 MIAMI L.Q. 125, 127 (1955); Fixel, *International Recognition of Rights in Aircraft*, 31 (8) MICH. S. BAR J. 7 (1952); Giannini, *Sulla Convenzione di Ginevra (1948) Relativa al Riconoscimento dei Diritti sugli Aeromobili*, 16 REVISTA DEL DIRITTO DELLA NAVIGAZIONE 35 (1950); HOFSTETTER, L'HYPOTHEQUE AERIENNE 219 (1950); HONIG, THE LEGAL STATUS OF AIRCRAFT 78 (1956); MONACO, *Il Riconoscimento Internazionale dei Diritti sugli Aeromobili secondo la Convenzione di Ginevra 19 Giugno 1948*, 15 REVISTA DEL DIRITTO DELLA NAVIGAZIONE 49 (1949); Wilberforce, *The International Recognition of Rights in Aircraft*, 2 INT'L L.Q. 421 (1948).

For background, Calkins, *Legal Committee of the International Civil Aviation Organization*, 18 DEP'T STATE BULL. 506, 523 (1948); also *Creation and International Recognition of Title and Security Rights in Aircraft*, 15 J. AIR L. & COM. 156 (1948); Garnault, *Le Projet de Convention de l'O.A.C.I. Concernant la Reconnaissance Internationale des Droits sur Aeronefs*, 2 REVUE FRANCAISE DE DROIT AERIEN 1 (1948); Lachford, *Pending Projects of the International Technical Committee of Aerial Legal Experts*, 40 AM.J. INT'L L. 280 (1946); also *Private International Air Law*, 12 DEP'T STATE BULL. 11 (1945); Moore, *Some Principal Aspects of the ICAO Mortgage Convention*, 14 J. AIR L. & COM. 531 (1947); Warner, *PICAO and the Development of Air Law*, 14 J. AIR L. & COM. 1 (1947).

A useful comment is available in *Annotated Text of the Convention on International Recognition of Rights in Aircraft* (prepared by the Legal Subcommittee of the Air Coordinating Committee), 16 J. AIR L. & COM. 70 (1949).

Documentation is published by the ICAO; the most important: Legal Committee (Bruxelles, 1947), Doc. 4653, and Legal Commission (Geneva, 1948), Doc. 5722, also *Report and Commentary of the Legal Committee of ICAO on the Draft Convention Concerning the International Recognition of Rights in Aircraft*, 14 J. AIR L. & COM. 505 (1947).

The Convention is ratified within the Western Hemisphere by Mexico (ratif. April 5, 1950, effective Oct. 1, 1953), Brazil (July 3, 1953, Oct. 1, 1953), Chile (Dec. 19, 1955, March 18, 1956), Argentina (Jan. 31, 1958, May 1, 1958), Ecuador (adherence July 14, 1958, Oct. 12, 1958), El Salvador (adherence August 14, 1958, Nov. 12, 1958), and United States (Sept. 1949, Sept. 17, 1953). Mexico deposited its ratification with reservations concerning "priorities granted by Mexican law to fiscal claims and claims arising out of work contracts over any other claim." On July 1, 1950 the United States declared itself to be unable to accept this reservation and unwilling to regard the Convention in force between the United States and Mexico, 1951 U.S. Av. 130, and 1952 U.S. & Can. Av. 433. Chile reserved the right to recognize priority in accordance

nationality in another Contracting State."³⁴⁷ This provision contains both a positive and a negative rule. The former is a fundamental one and limits the coverage of the Convention to situations when an aircraft registered in one contracting country enters the territory of another.³⁴⁸ It may be said that the Convention presupposes a diversity of nationality: between that of the aircraft itself and that of its location. Under the negative referred to above the Convention does not apply to domestic aircraft, except in a few specified situations. One is where a change of a domestic aircraft's nationality is contemplated. Such a change cannot take effect unless "all holders of recorded rights have been satisfied or consent to the transfer,"³⁴⁹ or where the transfer occurs in consequence of a judicial sale in conformity with the Convention.³⁵⁰ Another situation relates to privileged claims for salvage or preservation, except where "these operations have been terminated within its (*i.e.*, the aircraft's nationality) own territory."³⁵¹ It may be added, however, that such favorable treatment is not available to foreign holders of security interests. The Convention does not impose a duty to recognize their security interests in the domestic aircraft. In this respect the control of local law remains unimpaired.

It is apparent that the coverage is based on objective criteria, *i.e.*, nationality of the aircraft and its location abroad. As a consequence, the nationality of the parties involved (for example, that of the holder of a security interest) does not affect the applicability of the Convention. This means that the Convention may apply even as to nationals of non-contracting countries. It is true that in most cases the owner-debtor will be a national of a contracting country since the nationality of aircraft is tied in with the nationality of its owner, individual or corporate. However, holders of security interests may profit from the privileges extended under the Convention even if they are not nationals of the country of registration or of the country where the aircraft is located at the critical time.

Security interests. The Convention is designed to guarantee international recognition of enumerated types of interests in aircraft. It applies to the right of ownership, conditional sale, long term leases and equip-

with its national law, "fiscal claims for taxes, charges and other fees due by the owner or holder of the aircraft and arising out of the service of the aircraft, and the claims for salaries and wages of the crew during the period prescribed by national law" 1952 U.S. & Can. Av. 433. The United States refused to accept this reservation.

The Convention also is ratified by Pakistan, Norway, Sweden and Laos.

For later developments Wilberforce, *Report on Recognition of Rights in Aircraft*, in INTERNATIONAL LAW ASSOCIATION, REPORT ON THE 44TH CONFERENCE (Copenhagen 1950) 233 (1952); Doskow, *Transitory Chattels and Stationary Law: a Proposal to Facilitate Secured Financing of Aircraft Employed in International Flight*, 26 J. AIR L. & COM. 36, 45 (1959).

347. Art. XI (1).

348. Language borrowed from art. 27 of the Chicago Convention on International Civil Aviation (1944), T.I.A.S. 1591.

349. Art. IX.

350. Art. VIII.

351. Art. XI, para. (2)(b).

ment trust arrangements as well as to "mortgages, hypothèques and similar rights in aircraft."³⁵² It follows that both the pledge and the title type of security interests in aircraft qualify for recognition, including the *prenda sin desposesión*.³⁵³

The Convention applies to these types of security arrangements subject to two conditions: one related to the nature of the indebtedness for which the security is constituted, and the other to the type of chattel used as security.

With regard to the indebtedness secured, the Convention is restrictive in one sense and liberal in another. To qualify for international recognition the underlying security arrangement must be "contractually created,"³⁵⁴ i.e. originate from an agreement between the parties and not by operation of law or judicial decision. It therefore excludes statutory, common law or judicial liens. On the other hand, the Convention is liberal in that it grants recognition to security interests established "for payment of an indebtedness."³⁵⁵ The broad language indicates that as long as there is an indebtedness of whatever origin, it does not matter whether or not it is connected with the specific aircraft, for example, as purchase price, costs of repair or damages. Consequently, the term indebtedness will include any kind of *causa* from a simple debt to a fleet mortgage.³⁵⁶

Local laws uniformly require disclosure in a formal instrument of the amount of indebtedness.³⁵⁷ Some items, like costs or insurance, may not, however, be expressed in figures. These items are, nevertheless, included in the secured indebtedness as the Convention provides³⁵⁸ that "the priority of a right mentioned in article I, paragraph (1) (d) extends to all sums thereby secured." As to interest on this debt, the Convention grants equal rank with the principal to that "accrued during the three years prior to the execution proceedings together with that accrued during the execution proceedings."³⁵⁹

To qualify for international recognition such security interests must be substantively valid and properly recorded. The interests must be "constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution."³⁶⁰ This provision applies solely to the agreement creating the

352. Art. I, para. (1) (d).

353. See note 27 *supra*.

354. Art. I, para. (1) (d), repeated in art. VII, para. (5) (b) and art. X, para. (1).

355. *Ibid.* Here, indebtedness is translated with *dette* and *deuda*, but in art. VII and X (1) with *créance* and *crédito*.

356. From the text of the Convention it seems that the indebtedness may arise from other than contractual sources, *contra* Monaco, *loc. cit.* note 346 *supra*, at 53, not distinguishing between the security agreement and the *causa* of the debt to be secured.

357. See note 118 *supra*. GONZALES, *TEORIA GENERAL DEL INSTRUMENTO PUBLICO, INTRODUCCION AL DERECHO NOTARIAL ARGENTINO Y COMPARADO* (1953).

358. Art. V.

359. Art. V.

360. Art. I, para. (1) (i).

security, and not to the agreement or any other ground from which the indebtedness to be secured arose. Even in this restricted sense the question immediately arises as to whether the reference to the law of the country of the aircraft's nationality is intended to indicate the substantive or choice-of-law rules in force therein. Preparatory materials are not clear on this point.³⁶¹ The solution, if any, must be sought in the general rules for the interpretation of treaties. The prevailing principle would appear to be that the law of a country is understood to mean a reference to its substantive law. The main argument is that otherwise such provision would be a mere statement of the *status quo* and, consequently, meaningless.

The security interest must also be "regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality."³⁶² An interest not recorded cannot qualify for international recognition regardless of whether the lack of recording is due to the fact that the jurisdiction of the aircraft's nationality has no registers for such purposes, or declines to record the interest, or the interest in question need not to be recorded at all.³⁶³

The security. The Convention accepts only two objects as security: aircraft and spare parts. It expressly provides that it applies to security interests "in aircraft" without defining what an aircraft is; each jurisdiction must supply its own definition. Government owned aircraft are within the terms of the Convention unless they be used for "military, customs and police service."³⁶⁴ In lieu of definition of aircraft, the Convention supplies a list of its components. It contains the following items: "the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom."³⁶⁵

The Convention fails to answer the question whether or not it is applicable to security interests in the component parts of an operational aircraft, for example, in the engines, radar or propellers. From the overall purpose of the Convention it might be deduced that such partial security interests are outside of its scope except spare parts which are specifically dealt with.

361. Doc. 5722, at 12, 15, 22, 28 and 35 (1948).

362. Art. I, para. (1) (ii).

363. For example, under Florida law (FLA. STAT. § 698.01) dispossessory chattel mortgages need not be recorded; assuming that another recorded mortgagee knew of its existence (art. 503(c), Federal Aviation Act), such unrecorded security interest would be effective. However, it would not qualify for international recognition in case the mortgagee took the aircraft abroad.

364. Art. XIII; in regard to other aircraft the question of sovereign immunity may arise. Note, *Sovereign Immunity of Foreign Government-Owned Airlines*, 18 J. AIR L. & COM. 455 (1951). Cf. Bayitch, *Aliens in Florida*, 12 U. MIAMI L.REV. 129, 143 n. 100 (1958).

365. Art. XVI. Fortunately, the attempt to insert provisions concerning aircraft under construction (see note 133 *supra*), was rejected (Doc. 4635, at 41 and 255).

The Convention does supply its own definition³⁶⁶ of spare parts; they are "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." As already indicated, spare parts may be used as independent security in some jurisdictions³⁶⁷ while in others they are only affected by security interests in aircraft to which they appertain. In this respect the Convention took a clear cut position. It denied recognition to independent security interests in spare parts. Security interests in spare parts go along with the interests constituted in the aircraft to which they belong. The question as to the extent of spare parts thus affected is determined by the national law of the aircraft. The Convention provides³⁶⁸ that "If a recorded right in an aircraft . . . extends, in conformity with the law of the Contracting State where the aircraft is registered, to spare parts . . . such right shall be recognized. . . ." It would follow that an extension by contract of security interests to chattels which are spare parts according to the national law of the aircraft, but which are not under the definition established by the Convention, would not be internationally recognized.

Nevertheless, this reliance by the Convention on the national law of the aircraft is incomplete since additional requirements are imposed by the Convention.³⁶⁹ They are: spare parts must be "stored in a specified place or places," international recognition due only "as long as the spare parts remain in the place or places so specified;" an "appropriate notice specifying the description of the right, the name and address of the holder of this right and the record in which the right is recorded, is exhibited at the place where the spare parts are located so as to give due notice to third parties that such spare parts are encumbered." Lastly "a statement indicating the character and the approximate number of such spare parts shall be annexed to or included in the recorded instrument," with the proviso that "such parts may be replaced by similar parts without affecting the right of the creditor."

Several points emerge from this provision. It is evident that these requirements surpass by far those adopted in the several jurisdictions, even those of the most advanced type. The Convention, of course, was not designed to affect domestic aircraft and interests in them nor in their spare parts. Only if it is desired that spare parts are to become part of the security together with the aircraft, and international recognition of such an arrangement is also intended, must these additional prerequisites be followed.

366. Art. X, para. (4).

367 See note 149 *supra*.

368. Art. X, para. (1). The rule appears to be unworkable since it springs from the rather naive proposition that each individual aircraft has spare parts all of its own.

369. Art. X, para. (2).

Recognition. The focal point of the Convention is the promise on the part of the contracting countries to recognize certain interests in foreign aircraft. Therefore the question of what recognition means is a fundamental one. The start of this inquiry must be taken from the language of the Convention itself. It states, "The Contracting States undertake to recognize (a) rights . . . (d) mortgages, hypothèques and similar rights in aircraft,"³⁷⁰ in pursuance of the statement of policy expressed in the Preamble to be "highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognized internationally."

Before turning to the interpretation of the term recognition it must be made clear that the undertaking on the part of the contracting countries to recognize such interests is but a shorthand expression to cover a more complex situation. In a treaty of this kind concerned with interests constituted between private individuals, countries do not promise to recognize privately created interests as directly affecting them in their sovereign capacity. The undertaking carries with it only the promise that their respective agencies, judicial and administrative, will recognize interests qualifying under the Convention but always in accordance with their own substantive, jurisdictional and procedural rules, except where specifically superseded by the Convention. If this is so, then what is the effect of such an undertaking?

The solution to this question lies perhaps in defining the effect of recognition. Recognition is a term of art.³⁷¹ Its meaning is best understood in a situation where no treaty obligation to recognize exists. In that situation all foreign-created interests, contractual, or tortious, or security, are recognized at the discretion of the *lex fori*. A denial of recognition for any reason is not a breach of international law because recognition of foreign-created interests is completely a matter of domestic law and the sovereignty of that law is in no way limited by foreign or international law. Foreign-created interests may, however, be recognized by the *lex fori*,³⁷² but as recognized carry only the sanctions contained therein. On

370. Art. I, para. (1).

371. Arminjon, *La Notion des Droits Acquis en Droit International Privé*, 44 *RECUEIL DES COURS* (Hague) 66 (1933); DICEY, *CONFLICT OF LAWS* 9 (7th ed. 1958); FALCONBRIDGE, *ESSAYS ON THE CONFLICT OF LAWS* 10 (2nd ed. 1954); also LALIVE, *op. cit.* note 287 *supra*, at 146; recently WICHSER, *DER BEGRIFF DER WOHLERWORBENEN RECHTE* (1955).

It seems that the Convention for the Unification of Certain Rules Relating to Maritime Mortgages and Liens [Brussels, 1926, text in 3 HUDSON, *INTERNATIONAL LEGISLATION* 1845, (1931)] adopted a more fortunate language: "Mortgages . . . upon vessels duly effected in accordance with the law of the contracting State to which the vessel belongs, and registered in a public register . . . shall be regarded as valid and respected in all other contracting States"-(art 1).

Monaco, *loc. cit.* note 346 *supra*, at 52, understands the provision only as "determinazione nella legge regolatrice della validità sostanziale e formale dei singoli diritti." Giannini (*loc. cit.* note 346 *supra*, at 39) reads the term recognition in the sense of art. I of the Brussels Convention.

372. *E.g.*, under the Montevideo conventions or the Bustamante Code.

the contrary, recognition of foreign-created interests provided for in a treaty becomes part of the law of the land which looses every vestige of uncontrolled discretion contained in the notion of comity or its doctrinal equivalents. Moreover, the recognition of these interests by treaty is also a part of the country's international obligations enforceable in accordance with general principles of international law.

Since the purpose of the Convention is "that rights in aircraft be recognized internationally," recognition must mean something definite. There can be no doubt that recognition of an interest means the recognition of its existence. This, in turn, means that the existence of an interest in aircraft is established in the area where such interest exists, namely between the parties to the respective arrangement, for example, between the mortgagor and the mortgagee. It is true, the method of establishing the existence of an interest is not fixed by the Convention. From another provision of the Convention it may be concluded that interests will be "established before the competent authorities,"³⁷³ meaning before authorities competent for such determination in accordance with the rules governing such proceedings. It must also be made clear that recognition of the existence of an interest is not identical with enforcement of such interest. In this respect local law will determine the ways and means available except as modified by the Convention. Once the interest has been proven to exist, it will be difficult to deny its enforcement provided it is sought in accordance with the applicable rules of the *lex fori*. Therefore, it may be said that merely because the consequence of breach and the remedies for reparation thereof are furnished by the local law, this in no way detracts from the fundamental benefit of international recognition of the very existence of the interest itself.

Some doubts have been expressed³⁷⁴ as to the range of recognition imposed by the Convention. Does the recognition take effect between the parties to the underlying agreement or is such recognition effective only in relation to third parties? In order to do justice to this question, a determination of the meaning of third parties must be made. In a general way it may be said that a third party is one not directly participating in the transaction involved. Like any legal relationship originally bilateral in nature, it may involve during its life many parties other than those who created it. This general notion must be adapted to the fundamental structure of the Convention. Starting with primary parties, e.g., parties to a recognized security arrangement, third parties will be persons not directly involved in the arrangement. Since there may be more than

373. Art. VII, para. (4).

374. Calkins, *loc. cit.* note 346 *supra*, at 166 and 167; accord Monaco, *loc. cit.* note 346, at 56, with the simple allegation "che soltanto gli effetti nei confronti dei terzi debbano essere considerati e del tutto ovvio, non sorgenti il problema nei rapporti diretti fra parti, le quali devono al riguardo far capo non alla misura di pubblicita, ma al titolo che serve di fundamento dell'iscrizione." but see HOFSTETTER, *op. cit.* note 346 *supra*, at 234.

one arrangement of this type in force in regard to an aircraft, the question arises whether such other pairs of parties become third parties. Certainly not. First of all, the Convention is unmistakably clear in the terms imposing recognition of all interests properly qualified. Insofar as the Convention is concerned, such interests are *inter sese* of equal dignity, and none may be relegated to the subordinate position of third parties. It follows that holders of recognized interests can not be third parties. Thus only claimants, having no such recognized interests, remain.

For this class of claimants the Convention has provided specific rules. First of all, their interests may be recognized within the provision of article I, paragraph (2) of the Convention. Second, there is an additional provision where such claimants are expressly referred to as third parties,³⁷⁵ namely in article II, paragraph (2):

Except as otherwise provided in this Convention, the effects 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.

The rule cannot apply to holders of recognized interests, not even *inter sese*, since these interests must be recognized *inter sese* and in relation to third parties and, consequently, the "effect" of such interests cannot be in doubt. In relation to outsiders, to third parties, the provision considers not the effect of recognition, but only the effect of one of the prerequisites for recognition, namely that of recording. The effect of recording in accordance with article I, paragraph (1) (ii) of the Convention as against third parties is then determined not by a specific rule of the Convention but by the "law of the Contracting State where it [the interest] is recorded." Under the latter law, the effect may be mere notice-giving or may be substantive.

Compared with the Montevideo conventions it is clear that the Geneva Convention requires no domestication of foreign-created interests. This is quite understandable since the nationality of the aircraft remains unchanged when the aircraft enters a foreign jurisdiction and by so doing triggers the Convention into operation. Further, under the Geneva Convention, interests in aircraft will be recognized regardless of whether or not the specific type of security interest is available under local law. It is true that a contracting country "may prohibit the recording of any rights which cannot validly be constituted according to its national law."³⁷⁶ Yet no country may deny recognition to a foreign-created interest on this ground.

Two questions arise at this point. The first involves the right of a contracting country to recognize interests other than those recognized

375. The term "third parties" appears also in art. X, para. (1).

376. Art. II, para. (3).

under the Convention; the second deals with the right of such countries to deny recognition to interests otherwise meeting requirements of the Convention.

The first question is answered by article I, paragraph (2) of the Convention:

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.

A thoughtful reading of this text indicates that the first part of the sentence may be inaccurate. In comparison with the French and Spanish versions it deviates in two important ways from the apparently intended meaning. First, the English text uses the words "recognition of any rights" while the other two versions contain the logical "*validité d'autres droits*" and "*otros derechos*". Second, the English text justifies such exceptional recognition by referring to the "law of any Contracting State," a language which does not convey what the French and Spanish versions do, namely "*par application de leur loi nationale*" and "*por la aplicacion de su ley nacional*."

Having thus established the proper text, its meaning is apparent. The Convention does not prohibit in principle the recognition of interests other than those within its purview. Such recognition may be extended beyond these limits provided two requirements are met. The first is self-evident, namely that the recognition is justified under the law of the contracting country granting such recognition; and the other, that such recognition does not interfere with priorities of interests recognized by the Convention.

The question remains concerning the denial of recognition. The answer is given in article V of the Convention:

In case of attachment or sale of an aircraft in execution, or of any right therein, the Contracting State 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 affected with knowledge of the sale or execution proceedings by the person against whom the proceedings are directed.

A rapid enumeration of the main features characterizing such a situation will suffice to show the scope of the rule. In order to permit the denial of an interest otherwise qualifying for international recognition, there must be, first, pending proceedings for attachment or forced sale of the aircraft or of any interest therein; second, the interest to be denied recognition must have been constituted or transferred after the commencement of such proceedings; third, the recognition of the creation

or transfer of such an interest being one of the kind covered by the Convention, would be detrimental to the executing creditor or to the purchaser; and lastly, the interest was constituted or transferred with knowledge on the part of the "person against whom the proceedings are directed" of the enforcement proceedings. In these situations denial of recognition will take effect only between the attaching or executing creditor and the person "against whom the proceedings are directed" as well as the acquirer or transferee of such interest on the other, as the case may be.

The rule contained in the Convention having thus been defined, another question must now be raised, that of the impact of this rule on the domestic law. The provision appears to be self-executing and not only optional allowing contracting countries to enact legislation to give it effect. Consequences are far-reaching indeed. Generally, national legislations have some kind of fraudulent conveyancing statutes, variants of the *actio Pauliana* or the Statute of Elizabeth. Where this is the case, voidability under such statutes will be severely curtailed since the only ground to deny recognition available under the Convention is the one just discussed, namely the factual knowledge of pending enforcement proceedings. This would mean that recognition of interests cannot be withheld on a ground provided in the typical statute, such as the intent to defraud. It is true that the holder of a security interest in aircraft need not prove such intent and that it will suffice to prove the actual knowledge of pending enforcement proceedings. However, the creditor cannot succeed against the Convention by proving fraudulent intent. Consequently, holders of security interests have had their grounds to void fraudulent acts within³⁷⁷ or without bankruptcy reduced to one, that of the factual knowledge of enforcement proceedings.

Privileged claims. In order to strengthen the position of internationally recognized security interests in aircraft, the number of claims privileged under local laws had to be severely curtailed. The only claims to survive this drastic reduction are the following which are listed according to rank:

(i) Costs "legally chargeable under the law of the Contracting State where the sale takes place";³⁷⁸ they "shall be paid from the proceeds of the sale before any claims, including those given preference by Article IV." In order to qualify costs must not only be due under the *lex fori executionis*, but also "incurred in the common interest of creditors in the course of execution," a provision introducing the rather vague notion of common interest. It is interesting to note that costs which include judicial costs as well as attorney's fees, will be privileged regardless of the fact that they may not be privileged, but only assessable under the *lex fori executionis*.

377. Cf. 11 U.S.C. § 107 (1952).

378. Art. VII, para. (6); there may be some doubt as to the exactness of the English version which uses "chargeable" (presupposing a lien) as compared with the French and Spanish "exigibles"; see also note 379 *infra*.

(ii) "Compensation for salvage and extraordinary expenses indispensable for the preservation of the aircraft"³⁷⁹ constitute the other group of privileged claims. Compared with the costs, requirements here are more strict. They must not only be privileged under the law of the jurisdiction "where the operations of salvage or conservation were terminated," but also, under the same law, constitute a lien against the aircraft.³⁸⁰ On the contrary, their specific rank under the same law does not count. The Convention provides that these claims "shall take priority over all other rights in the aircraft." This is simply not so. Costs take priority according to paragraph (6) of article VI; in addition, claims for salvage and preservation do not take priority over "all other rights," like ownership. As to the rank *inter sese*, the Convention provides that claims for salvage and preservation will be "satisfied in the inverse order of dates of the incidents with which they have arisen;"³⁸¹ and they will retain their privileged status, contrary to the general principle of recording necessary for the recognition of interests under the Convention, for three months since the termination of the salvage or preservation; after the expiration of this period contracting countries³⁸² will not recognize such claims unless "(a) the right has been noted on the record . . . and (b) the amount has been agreed upon or judicial action on the right has been commenced."

Projected against comparative materials,³⁸³ it appears that a great number of claims privileged under local law will be, if not wiped out, then relegated to a rank where they cannot interfere with security or other interests recognized under the Convention. In most jurisdictions judicial expenses appear in a privileged position and, consequently, will easily meet requirements set up by the Convention. The same is true for salvage claims, but less so for claims arising from preservation. Hardest hit are taxes and similar governmental claims though, in fact, the result will be less noticeable in view of the fact that no country wants to be a tax collector for the other; but the Convention may cut off privileged tax claims locally imposed upon foreign aircraft. Eliminated as privileged claims altogether are claims arising out of employment contracts.³⁸⁴ Such claims, it is true, originate from a contractual relationship, but the security lien in the aircraft is, in most cases, of statutory origin. Nevertheless, it may be expected that in some

379. Art. IV, para. (1). The English version uses "right conferring a charge against the aircraft" while the French text spells out clearly two features, "a la condition d'être privilégiés et assortis d'un droit de suite." Privilege is not granted when spare parts are sold, see note 400 *infra*.

380. MACHIN SANCHEZ, ASISTENCIA Y SALVAMIENTO EN EL DERECHO AERONAUTICO INTERNACIONAL (1949); KENNEDY, CIVIL SALVAGE 376 (4th ed. 1958). See also note 227 *supra*.

381. Art. IV, para. (2).

382. The English text reads that these claims "shall not be recognized in other Contracting Countries" while the French has the correct version "Les Etats contractants" and the Spanish "Los Estados contratantes." (Emphasis added.)

383. See part V of text *supra*.

384. See note 247 *supra*.

jurisdictions wages could prevail against the Convention because of a higher than treaty source in the local constitutional law itself.³⁸⁵

Rank of recognized interests. The Convention only imposes a generally worded obligation to recognize some nonprivileged interests in aircraft. There is nothing said in the Convention as to the rank *inter sese* of such interests. Nevertheless, it seems to be reasonable to assume that foreign-created interests will be recognized as they rank *inter sese* under the national law of the aircraft.

The transfer of an aircraft from one register to another may affect security interests constituted and registered according to the law of the former nationality. Being made aware of this danger, the drafters had two alternatives. One, they could adopt the principle of the running-with-the-aircraft, or they could establish precautionary safeguards available to holders of security interests to prevent the transfer altogether. The second alternative was adopted. An aircraft may be transferred from one register to another and, consequently change nationality, only if "all holders of recorded rights have been satisfied or consent to the transfer."³⁸⁶ This gives holders of security interests sufficient leverage, particularly where the transfer is contemplated to a jurisdiction with no provisions for the registration of interests already constituted, and the Convention does not compel such a country to record "any rights which cannot validly be constituted according to its national law."³⁸⁷ An exception is established for judicial sales; there title will pass "free from any rights," except encumbrances "assumed by the purchaser."³⁸⁸

Enforcement. The Convention contains only one method of enforcement, the forced sale. In accordance with the generally accepted conflict rule, this is governed by the *lex fori executionis*.³⁸⁹ The Convention has in addition, introduced important uniform procedural rules, some self-executing, others optional, resulting in far-reaching changes in the otherwise applicable local law.

Preliminary to a forced sale local laws generally demand that fair notice be given to interested parties. The Convention has set up minimum standards of its own regarding such notice and has supplied them with rather stringent sanctions. Making the prosecuting creditor responsible for

385. See note 250 *supra*. Both tax claims and claims for wages appear as the principal ground for reservations, see note 346 *supra*.

386. Art. IX.

387. Art. II, para. (3).

388. Art. VIII.

389. Art. VII, para. (1). In the United States enforcement procedure is a matter of state law; as an example of the impact of the Convention on municipal law, Florida law will be referred to. It may be added that, in this respect, state law applies also in federal courts, Fed. R. Civ. P. 69 (a).

A mortgage, movable or immovable, shall be foreclosed by a complaint in chancery, FLA. STAT. § 702.01 (1957); McCormick, *The New Mortgage Foreclosure Procedure*, 27 FLA. BAR J. 422 (1953); also WHITNEY, *THE LAW OF MODERN COMMERCIAL PRACTICES* 920 (1958).

giving notice of the sale, he "shall give public notice of the sale at the place where the aircraft is registered as to nationality, at least one month before the day fixed"³⁹⁰ for sale, adding that "the date and place of the sale shall be fixed at least six weeks in advance,"³⁹¹ apparently by the authority conducting the enforcement proceedings. The creditor also must "notify by registered letter, if possible by airmail, the recorded owner and the holders of recorded rights in the aircraft"³⁹² as well as holders of claims noted in connection with salvage or preservation, all to "their addresses as shown on the record," a certified extract of which has to be supplied by the prosecuting creditor to the "Court or other competent authority" in charge of the proceedings.

Sanctions for noncompliance with these standards are twofold. A forced sale performed in violation of these notice requirements, "may be annulled upon the demand made within six months from the date of the sale by any person suffering damage as the result of such contravention."³⁹³ This sanction seems to be too far reaching considering the fact that a motion to set aside a judicial sale may be made by claimants who do not even need to be notified. In addition, the Convention incorporates sanctions established by the *lex fori executionis* by providing that "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."³⁹⁴ This provision can only operate in a jurisdiction where the requirements under local law match those established by the Convention and contain some kind of sanction for their violation though perhaps less stringent.

The forced sale is normally conducted according to the *lex fori executionis*. An important innovation introduced by the Convention is, at least for common law jurisdictions, the provision³⁹⁵ that:

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

390. Art. VII, para. (2). Florida law requires a notice seven days prior to sale "in a newspaper circulated in the county where the sale is to be held," FLA. STAT. § 702.02 (2) (1957). The Convention has imposed additional notice requirements.

391. Art. VII, para. (2) (b). In Florida after the final decree of foreclosure, the clerk fixes the day for the sale, FLA. STAT. § 702.02 (2) (1957) no less than ten days and no more than thirty days after the date of the final decree. This rule has been superseded by the Convention where the latter controls.

392. Where the Convention controls this represents an additional notice requirement.

393. Art. VII, para. (3). Under Florida law an objection to the sale may be filed within ten days after the filing by the clerk of the certificate of sale, FLA. STAT. § 702.02 (3) (1957). Where the Convention applies, its self-executing provision will prevail.

394. Art. VII, para. (3). Florida provides for setting aside a foreclosure decree before sale, FLA. STAT. § 702.07 (1957).

395. Art. VII, para. (4).

This provision exemplifies one of the elaborate mechanisms of civil law origin designed to prevent forced sales detrimental to both the debtor and favorably ranking creditors. In this respect two methods have been developed: one establishing the requirement of a statutory minimum bid based on the value of the chattel, and the other,³⁹⁶ empowering the authority in charge to deny confirmation to a bid which does not cover at least the claims ranking ahead of the prosecuting creditor. The Convention adopted the second alternative in the form of a self-executing rule,³⁹⁷ thus eliminating the nuisance value of claims with no fair chance of being paid.

Once the judicial sale is confirmed,³⁹⁸ the authority will order the disbursement of the proceeds to claimants in accordance with their priority. First are claims privileged under the Convention, i.e. costs, salvage and preservation. Then come security and other interests in the nature of encumbrances recognized under the Convention and evidenced by the "certified extract of the recording concerning the aircraft."³⁹⁹ In case an interest otherwise qualified for international recognition should properly be opposed, such incident will be decided by the competent authority under the *lex fori*. Lastly, claimants with interests not recognized internationally will have an opportunity to partake of the proceeds remaining, if any.

The proceeds available to holders of internationally recognized interests may be reduced by 20% in the event that they compete with a privileged class of local creditors. In this respect the Convention has an optional provision permitting contracting countries to enact legislation to this effect and to set aside 20% of the proceeds for the benefit of local creditors who suffered "injury or damages to person or property on the surface of the Contracting State where the execution takes place."⁴⁰⁰ The quota of 20%

396. To this method the Convention turns when dealing with forced sale of spare parts, note 400 *infra*.

397. In Florida there is a statutory presumption in favor of the amount bid at the sale, FLA. STAT. § 702.02 (5) (1957), "unless objection thereto shall be filed in the cause within ten days after the filing of the clerk's certificate of sale." Such objections will be considered by the court; however, the filing of such objections "to the value of the mortgaged property shall in no way affect or cloud the title . . ."

398. Under Florida law a sale must be confirmed by the court, FLA. STAT. § 702.02 (3) and (4) (1957). On common law doctrines, FREEMAN, A TREATISE ON THE LAW OF EXECUTION IN CIVIL CASES (1888), and THE LAW OF VOID JUDICIAL SALES (1902).

399. Art. VII, para. (1) (b), also art. III, para. (2).

400. Art. VII, para. (5). This rule applies only in regard to aircraft. For spare parts the Convention introduced a different rule (art. X, para. 3). After confirming that provisions of art. VII, para. (1) and (4) as well as art. VIII apply to forced sales of spare parts, the Convention disregarded its own fundamental position that spare parts are not independent security; instead it introduced an unnecessary and complicated scheme [art. X, para. (3)] by providing that in case spare parts are sold, the provision of art. VII, para. (4), concerning the minimum bid, will not apply ("in its application to such sale be construed so as to permit . . ."). The acceptable bid here is not determined by the amount of interests with priority over the claim of the executing creditor, but it is fixed as "two thirds of the value of the spare parts as determined by experts appointed by the authority responsible for the sale." Further, the proceeds from such sale will be disbursed so that "the holders of prior rights" (whatever this means) will be paid from only two thirds of the proceeds (which may be two thirds of two thirds of the estimated value of the spare parts). This special regime was

applies as well to "any other aircraft owned by the same person and encumbered with any similar right held by the same creditor." This provision exempts local creditors from the possibility that a fleet-mortgage would make encumbered aircraft judgment proof; but it does not apply where an "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,"⁴⁰¹ the Convention apparently assumes that such insurance will be substituted by operation of law.⁴⁰²

CONCLUSION

It is not surprising to find differences in the law protecting security interests in chattels where for thousands of years the underlying rules developed purely as a matter of local concern. Yet it is comforting to see that these differences are far more the result of forces of tradition and inertia than a response to any real life demand. In many countries various forms coexist indicating an ability to adjust. Title versus lien as well as the dispossessory and nondispossessory are far less important than appearance would indicate. Pressures of those supplying financing, especially those acting in international trade, have forced even jurisdictions the most encrusted with tradition, into making their laws of security arrangements amenable to every day needs.

The progress achieved in this area of the law of aviation has been remarkable. Most of the countries under discussion have overcome the primitive attitude of the unavoidable dispossession of the debtor and replaced it with the civilized method of recording an instrument. Other modern devices of credit financing like conditional sales coupled with retained title and long term leases have been freely adopted and, in many countries through special aviation legislation, imbedded as a permanent feature of the law. A streamlining of the various types of security arrangements is already under way. Consolidation of questions unsettled in the common law jurisdictions and simplification of the overwritten statutory efforts in

introduced upon the surprising argument that the "position of spare parts is different from that of the aircraft" and that involuntary creditors who would suffer damage from spare parts" should be considered (Doc. 4663, 123). It is available only where the "executing creditor is an unsecured creditor"; then the "competent authority may . . . limit the amount payable to holders of prior rights to two-thirds", apparently a self-executing treaty provision. Thus one more variation was introduced. While the rule in favor of local creditors injured by the aircraft (art. VII, para. 5) is only optional and as such requires special legislation in practically all countries, the analogous situation involving spare parts and an unsecured executing creditor for any claim is self-executing, granting the proper authority discretion to allow payment of costs (art. VII, para. 6), but not of other privileged claims in the sense of Art. IV, para. (1) and then set aside one third of this amount for the benefit of any such unsecured creditor. Consequently, privileged claims for salvage and preservation, if any, will be first covered from the remaining two thirds of the proceeds for the spare parts and what remains will be available to holders of recognized interests.

401. Art. VII, para. (5).

402. See part IV (iv) *supra*.

some of the civil law countries promise to provide reliable and realistic patterns for credit arrangements secured by aircraft.

The interamerican conventions never have had an opportunity to prove their effectiveness in matters of aviation. The elaborate Geneva Convention is without any doubt an important attempt toward the creation of a basic set of uniform substantive and procedural law in this field. The Convention gives us a warning as well. From the small number of ratifications it can be seen that too much was attempted too soon. In legislating for the whole world, the Convention allowed itself to be dominated by the specific legal traditions of a few countries, some of them more ambitious than factually interested. Thus it happened that instead of being the first step in the right direction, it attempted to say in one try the final word. Instead of supplying a few principles to a large number of countries, it beclouded a sound basis with speculative niceties. In many places the result was a compromise between legalistic wits rather than a design to serve practical needs.

Future action is clear. There is a need for a thorough revision of the Geneva Convention. This must be based on sound comparative legal documentation, on experience already had thereunder and on suggestions from writers and learned societies in the field. The other great need is for introduction of provisions on recognition of security interests in aircraft into bilateral treaties of friendship and commerce or into treaties of aviation, a method equally or even more promising because the participating countries will be cognizant of and responsive to the real needs of the industry, both transporters and financiers, in legal as well as economic terms.