REAL RIGHTS IN AIRCRAFT AND VESSELS

A Brief Comparative Survey of National Legislations and International Conventions from the Point of View of Conflicts

A THESIS

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INTRODUCTION

The purpose attempted in this paper is to stress some analogies and differences in the approach to the problem of real rights in vessels and aircraft at both the national and international levels.

This problem is perhaps the most complex one ever embodied in the form of an international convention. This is due to the fact that individual legal systems regard real rights in movables as one of the most exclusive domains of their legislative and jurisdictional power.

On the other hand, vessels and aircraft are the two most important means of international transport and commerce. Performance of this role may often occasion cases of conflict of laws. As legal systems differ widely in the degree of their social and cultural evolution, the type of solutions offered may be detrimental to the lawful holders of rights in these movables.

Both the Brussels Convention on Liens and Mortgages signed in 1926, and the Geneva Convention on Rights in Aircraft of 1948, provide a new type of solution of conflict of laws in their respective spheres of application.

In the case of vessels, the Brussels Convention advances 'the law of the flag' instead of the hitherto prevailing 'lex fori' or 'lex rei sitae'. In the case of aircraft, the Geneva Convention provides for the rule of 'the law of registry', which is the nearest equivalent of 'the law of the flag'.

Both offer the best possible solution which, up to the present time, can be obtained.

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C H A P T E R I

MUTUAL RELATIONSHIP OF LEGAL SYSTEMS IN COMPARATIVE LAW

S E C T I O N I

A General Notion of Conflicts

1. Broad Meaning of a Legal System.

Continental writers, more than any others, are inclined to try to establish the limitations of legal phenomena. If such limitations are preceded by a thorough analysis, their advantage is that they give in a short statement the complete picture of a given event.

P. Arminjon, a prominent Swiss law professor, very accurately defines a legal system as a grouping of persons united by a legal rule, often also by a jurisdictional and administrative rule, which governs the basic principles of their social life.[1] As examples of various legal systems the author cites: metropolitan France, England, Scotland, the community of Algeria, Moslems of the Malekite rite, etc.[2] In short, it may be stated that there are more legal systems than states.

For a better emphasis of this accurate observation it might be remembered that in such federated states as the United States and Canada, under the supreme law of the Constitution there are favourable conditions for the growth of several legal systems purporting to private law matters.

Different cultures, traditions, and habits, the origins of which can be attributed to peaceful and non-peaceful historical influences, are the basis for the phenomenon of the variety of legal systems.

Intercourse among peoples, which nowadays is incomparably more active than some fifty years ago, has been always the main factor in bringing face to face these various legal systems which represent various

social cultures. As a result of this contact, a new problem arises: namely, how to reconcile the conflicting rules, although dealing with only one subject matter. This is the origin of a new branch of law which is preoccupied with providing solutions to the various conflicting laws. This branch of law is called "the law of conflict of laws", or "private international law", the latter name being used in the civil law countries.

2. General Scope of the Modern Conflict Rules.

The rules of the "law of conflicts" are very seldom embodied in a volume of written provisions. Codifications are scarce.[3] Having an unwritten form, as is usually the case, the question arises 'Where do they originate? Where does their binding force come from?' They originate in court decisions and various domestic statutes.[4] Consequently, the binding force of such a law resides within the scope of domestic law. Niboyet is very correct when he says that private international law is neither private nor international.[5] This is true because the rules of the "law of conflict" comprise also the domain of public domestic law in the sense that such matters governing penal or revenue laws shall undoubtedly be governed by domestic laws.[6] French legal doctrine is of the same opinion in specifying that political, penal, and procedural laws, and real statutes as well, are a domain reserved to the French domestic laws.[7] Consequently all the remaining matters, i.e. those which are outside the penal, political, or procedural laws, or real statutes, constitute the domain in which conflicts may occur.

An absolute prerequisite for their occurrence is that two legal rules belonging to two different legal systems have to apply in connection with a case which originates under the rule of one legal system and is brought before the courts of another one to get a judicial decision.

A foreign rule is supposed to be applied if, according to the opinion of the 'lex fori', the subject-matter is classified as appertaining to the group of matters in which the foreign rule is applicable. Criteria according to which the classification of a given subject-matter is proceeded with, appertain to the 'lex fori' considerations, when the subject-matter itself may have taken shape under considerations of a different forum.

Strictly according to the rules of classifications, it is almost impossible to avoid mistreatment of the principle of justice itself. E. Rabel points out a non-theoretical example of such mistreatment in the U.S. judicial practice, where "foreign statutes of frauds are deemed to prescribe formalities as defined by the rule of conflicts relating to formalities, though such statutes may be otherwise interpreted in various jurisdictions for various purposes".[8]

In French law, for instance, the rules concerning frauds are considered as substantive rules for the purposes of domestic and conflict application.[9] However, the criterion of the classification, otherwise called 'attachement', in the above-mentioned case, lies with the U.S. domestic rule, from which the U.S. "conflict of law" rule gets its binding force and its authority.

When the hitherto mentioned requirements have been met in accordance with the rule of conflict of 'lex fori', it seems that there should be no more obstacles for application of foreign substantive law. It follows that the foreign rule has met successfully the test of equality as to the social and cultural standard represented in an analogous provision of the domestic rule.[10] Besides the conclusion that the foreign rule is of equal rank, it is supposed also that the court of forum has also found that its application will not encounter any major difficulties on the part of judicial technique and organization. Niboyet holds that the foreign rule must meet the test of technical expediency.[11]

Still, the process of testing shall not be considered as complete until the last step is taken; viz., the compatibility of the foreign rule with the requirements of the public policy principle must be established.

3. The Rule of Public Policy.

There is a rule of public policy for the purposes of purely domestic jurisdiction; i.e., what is forbidden by law, and another rule of public policy for the purposes of the law of conflict of laws; i.e., a foreign rule, although competent, cannot be accepted by the jurisdiction of the forum, because it is considered able to produce "social uneasiness".[12] What are then the criteria or conditions which determine the application of this dangerous principle of public policy? These criteria are of very vague character, because such characteristics as social or cultural compatibility are very difficult to be precisely appreciated and classified.

Generally speaking, the rule of public policy changes from time to time and from place to place.[13] Human society, at the level of state organization, continuously passes through the evolution of social and economic ideas. This evolution finds its reflection in the body of legal rules of a given state. Within this body of rules the above ideas are crystallized for a certain period of time. The duration of this period may also vary from place to place. The sense of self-preservation which characterizes all human society at the level of statehood obviously demands that the state defend its own legal system against a foreign legal rule which might hurt its own legal system.

The point of departure for analysis of a public policy principle should be the following: it is clear that in virtue of the 'rule of conflict' of the country of the forum, the foreign legal rule prevails, competent, ready to be applied, but rejected. Reasons for the rejection of an apparently binding foreign rule belong to the considerations of the forum which rejects. It should be presumed that the foreign rule, in spite of its formal (i.e. technical) compatibility, does not harmonize with the moral, social, or economic ideas contained in the legal system of the forum.

Thus, a French court will reject a foreign pledge not accompanied by the dispossession of the pledgor as contrary to the French legal system expressed in the French civil code.[14] Consequently, the same should be deduced with respect to foreign chattel mortgages or any other real charges, when they do not correspond with French legal ideas contained in the real statutes.

Such practice is common to all legal communities. G.C. Cheshire has assembled four principal precepts outlining the application of the English public policy principle. These are: 1) "where the fundamental concepts of English justice are disregarded; 2) where English concepts of morality are infringed; 3) where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers; 4) where a foreign law or statute offends English concepts of human liberty and freedom of action".[15]

The principle of public policy can be flexible or inflexible. This depends on its interpretation. Practically all courts have a very wide margin in their interpretation of it. A narrow, "provincial" interpretation of this principle inevitably leads to the substitution of the public policy principle, which is supposed to have an international meaning, by the rule of public policy as conceived by the municipal law for exclusively domestic purposes, when no application of foreign law is needed.[16] When narrowly applied, it might be a weapon which will hamper not only the progress of legal concepts, but also, at the same rate, the progress of civilization as a whole. E. Rabel very rightly remarks that "to inject national policies directly into 'conflict' law will destroy it".[17] Niboyet's opinion that "public policy is a remedy thanks to which a normally competent foreign rule will not be admitted when there is judicial incompatibility between two legislations" can be interpreted in a flexible and also in an inflexible way.[18] It is a very general frame which should be filled out with the contents established by the trial judge. It is up to him to declare what, in a given case, constitutes a

"legislative imcompatibility" as a requirement of the application of the principle of public policy.

As things are now, the usual feature is to give a "homeward trend" interpretation to the rules of conflict of laws.[19] A more appropriate interpretation which imposes itself is a generous "international" interpretation of this elastic principle.[20] E. Rabel suggests that this new way of interpretation should embrace all internal laws. It should give maximum protection to private rights, and consequently should lead to the international unification of the rules of conflict law.[21] This is a very far-reaching suggestion. When materialized it could serve in the best way the purposes of human society, but, at the same time, because of its revolutionary character, it may arouse a strong opposition to the idea itself on the part of the individual legal systems. The realization of this idea would require a total change of the present attitude. Therefore, it is very doubtful, if, at this time, these individual systems are prepared to countenance such a radical reform.

A more reasonable, and hence a more appropriate, advisable tactic to be applied in this respect is a way of gradual change of attitude by means of international conventions which, while dealing with their subject-matters, unify also the conflict rules occasioned by them.

4. Interpretation of Foreign Law.

It is presumed that a judge of a given country is competent to administer justice only under his domestic law. The law of a foreign country is normally not required as a component of his legal knowledge. Unwritten

habits, volumes of written statutes, cases and practices, not to mention the legal literature, accumulated nowadays in such a quantity that, practically speaking, it is impossible to require a judge to learn the law of a foreign country in addition to his own law.

However, the rule of the law of conflicts facilitates this apparently superhuman task which a judge of a forum faces. This rule reads that the judge shall apply foreign law when the subject-matter coming under the foreign competent rule has its near equivalent in the statutory provisions, or in the law of cases of the country of the forum. This is one of the requirements for applying a foreign rule.[22] From this point of view, referring to the judicial technique, a foreign legal provision that is competent and, as such, admitted in a given case, cannot be wholly unknown to the judge of the forum. The premises are known because of the similarity with the domestic rule. The rest of its contents can be acquired ex officio, or satisfactorily presented by a party to the case.

A further condition to be fulfilled should be a proper interpretation of the rule. The optimum would be that the rule be interpreted by the judge of the forum as well and correctly as it would be in the home country. Probably the best result would be achieved in a country where the knowledge of comparative law is on the highest level. According to E. Rabel such an aim should be contained in any future program of legal learning in the individual legal systems.[23]

As universal practice shows, it seems to be quite a common thing

that the courts are reluctant to sanction the interpretation of foreign rules.[24] In the U.S. Courts, for example, the burden of proving foreign law rests wholly with the party who claims its protection. The requirements of the standard of this proof are very high, so that in practice, it turns out to be very costly. If the financial situation of the party claiming it is not such as to allow him to bear this cost, the court may apply its own law, where the foreign law, though pertinent, has not been proven.[25]

In France, for instance, where interpretation of the foreign law is involved, cases cannot be pleaded before the highest court (Cour de Cassation).[26] The highest they reach is the court of appeal. This practice, however, is not without significance. The Supreme Court of France in its "arrêts" interprets French law at the highest judicial level. Although this interpretation binds only the Court itself, nevertheless the influences of these "arrêts" at the lower levels cannot be minimized.[27] If the Cour de Cassation issues a similar "arrêt" in a case where a foreign law is involved, it can be regarded, at least, as a lack of courtesy, notwithstanding the fact that the "arrêts" have not such a force of binding precedent for future cases as judgments of the House of Lords in England.

In conclusion, it may be said that besides the cases where, owing to a regard for public policy, related above, the foreign law, although competent in principle, cannot be applied; in the remaining cases, its application is hampered in several directions: 1) lack of knowledge of comparative law; 2) linguistic difficulties in understanding it, and

3) too high a financial burden for the litigating party to prove satisfactorily the foreign law claimed.

All these difficulties constitute, in the present circumstances, the dominant feature of the applied rules of conflict of laws. The impact of domestic statutes on the application of the rules of conflict is beyond any doubt. In practice, this impact expresses itself in references to the domestic statutes. With a great deal of accuracy A. Nussbaum gives to this impact the adjective "homeward trend".[28]

To bring remedy to this situation would require a considerable effort on the part of the major countries. Of course, the most far-reaching result would be achieved if the existing municipal laws in various countries were to achieve the same character. Then, the rules of conflicts would be identical everywhere, because their only source would then lie within the body of municipal laws.[29] However, it would be very unrealistic to nourish hopes that such a wish would have any chance of materializing in the near future. The undisputed truth seems to be that today's world of legal systems and notions is more divided than a hundred years ago when Savigny's recipe for private international law was its universalism.[30]

As mentioned in the foregoing paragraph, it would not be advisable, for many reasons, to push too far the idea of uniformity of the municipal rules. This may hurt unnecessarily the still very young national pride of some legal systems. It seems more reasonable to abandon, for the time being, Savigny's idea of universalism of conflict rules, or the uniform-

ity of municipal laws suggested by E. Rabel. Such an effort would be beyond the present international possibilities. Attempts should be directed rather towards:

1) an elaboration of reliable conflict rules accompanying each international convention dealing with private law matters;
2) individual legal systems should tend to the end that each, promulgated statute would be accompanied by an appropriate conflicts rule.[31]

For the purpose of this paper, it is the first proposition which will be examined in the subsequent chapters.

5. Real Rights (Droits Réels).

The concept of real rights has its origin in Roman law. As the name itself indicates, its contents refer to rights in things. Things are generally divided into movables and immovables. It may be noted, however, that there is an intermediate class of things; namely, immobilised or individualised movables.[32] To this category belong, above all, vessels. To this class of movables also tends to enter another important res; namely, aircraft.

Generally speaking, the domain of real rights is of the utmost importance within the legal system of a country. It reflects "the state of society in which any given nation may find itself".[33]

From the point of view of conflicts rules, the same reason also plays a very important role. According to Niboyet, for instance, real

statutes belong to this exclusive domain where the only admitted competency is that of French statutory rule.[34] It is said that this competency is original, i.e. of primitive origin, which does not result either from the application of the exception of the public policy principle, or from the application of the rule of 'renvoi'.[35]

It means that no real right can be created in a movable belonging to a foreign national, which, at a given moment, is located within French territory, which does not strictly correspond to the stipulation of the French real statute. A very similar provision is contained also in a respective stipulation of the Restatement of Law: "capacity to make a valid conveyance of an interest in a chattel is determined by the law of the state where the chattel is at the time of the conveyance".[36]

It may be recalled in this connection that on the borderline of this subject-matter is the problem of 'vested rights' in things. A general opinion favours the recognition of such rights. The Restatement, for instance, recommends that "when a chattel is brought into another state, the new state is presumed to recognize the right acquired in the former state of status".[37] French and Swiss doctrines share a similar view in respect to this subject-matter. The only difference between them consists of the fact that in France, for example, a pledge without the dispossession acquired in a foreign country will not be granted recognition by virtue of the application of the principle of public policy, whereas in Switzerland, it will be valid only between the parties.[38]

Another very important and characteristic feature of legal rules relating to movables ("chattels"), is the most universally accepted axiom

that the essential proof of ownership in movables is possession. "Possession vaut titre" as it is translated in the French doctrine. "Possession is nine points of the law"-say the English. Uncomfortable consequences of this axiom may appear in their magnitude when applied to such an important chattel as an aircraft or vessel. This may not occur, nowadays, to vessels, which in individual legal systems for many decades have enjoyed the exceptional status of so-called immobilization and, connected with it, recognition of title. However, this may not be the case with regard to the recognition of title to aircraft engaged in international flights.

S E C T I O N II

Main Groups of Maritime Legislations

1. Historic Background.

Since the dawn of human history, vessels have played an undisputed role in promoting not only the economic prosperity of nations engaged in mutual commercial intercourse, but have helped also in the spreading of cultural, social, and political ideas from one maritime nation to another.

More or less frequent visits of vessels to neighbouring ports have given birth to the various maritime customs and usages. The first written historical trace of such customs goes back to Ancient Times. Its cradle was the Island of Rhodes in the Mediterranean.

A more pronounced period of history to which their more complete formation may be attributed falls into the Middle Ages. The most famous medieval collections of these usages are known as Consolato del Mare, from Barcelona, and Rôles d'Oleron, in the French Kingdom. Maritime customs and usages assembled in both of them do not differ essentially from one another. Their application was not at all restricted to the national area in which they originated. It was not unusual for the French judges in Marseilles or the Spanish in Barcelona to apply the stipulation from the Consolato del Mare.[39] The same may be said also of the Rôles d'Oleron. No territorial limits were imposed by the law of that time. In addition, their provisions were frequently cited in the decisions of the courts in England, Scotland, Prussia, and Scandinavia.[40]

The uniformity of maritime law which prevailed in the Middle Ages

for the first time was disturbed by the statutory activity of the Hanseatic League. This powerful commercial maritime community, known as 'Hansa', as early as the XIVth century started to promulgate its own statutes which replaced the uniform maritime customs. A specially created Hanseatic judicial organization applied nothing but its own rules.

The example of Hansa was later followed by some of the European monarchs, who had promulgated the so-called 'Ordonnances' in order to settle the whole set of maritime matters. The most remarkable ones were those enacted in France under Louis XIV, known as 'Ordonnance Colbert 1681', and in Spain under Charles V and Philippe II.

In spite of this statutory intervention, it may be assumed, however, that the maritime law of the Seventeenth and Eighteenth centuries still preserved a considerable uniformity.[41] For statutes did not yet differ from the substantial concept as contained in the Medieval maritime customs. Therefore, the period prior to 1789 is very rightfully referred to in the United States doctrine as a period of "general maritime law".[42]

The final blow to the unity of maritime customs took place during the Nineteenth and Twentieth centuries. It arose on the part of the individual national legislations, Above all, its effects are noticeable in the continental Europe where maritime matters have been included in the body of rules of the commercial codes. Consequently, as in France for instance, separate judicial authorities known as Admiralty Courts were abolished, and since 1789, maritime matters have been submitted to the

jurisdiction of civil tribunals.[43]

In the common law countries where Admiralty jurisdiction survived, the same period is also marked by intensified legislative activity. In these legislative enactments the basic differing characteristics of the main maritime systems also with regard to real rights received their final shape.

2. Continental Maritime Systems.

A. French Law.

As has been mentioned above, the French Revolution abolished the admiralty courts, thus putting an end to a distinct judicial maritime administration. In 1808, the Code of Commerce came into force and the whole field of private maritime law has been included in it. Articles 190-196 contain substantial provisions concerning the most important kind of real rights in vessels; namely liens. Article 191 settles their number at eleven, and stipulates their ranking which has to follow their order of enumeration. A most striking feature of the French maritime liens is their entirely contractual character.[44] G. Ripert is of the opinion that the justification for such a character of the French maritime liens may be sought in the alleged intention of the legislator in 1808 to create favourable conditions to obtain credit on vessels.[45] Inconveniences resulting out of the fact of the existence of this great number of liens was considerably alleviated by the provision contained in Article 194 which requires an effectuation of special formalities of proof how the liens came into the effect.

What concerns the rule of conflicts which the French commercial tribunals apply to maritime liens on foreign ships is the rule of 'lex fori'. It means that foreign maritime liens will be enforced only when they correspond to the kind of charges provided by the Code and to the unchangeable order of enumeration which has also been provided there.[46]

Another type of real rights which may be established on vessels (namely, maritime mortgages), has been known to the French legislation since 1874. By that time, a law had been passed enabling the shipowners to establish real securities on vessels as guaranties for credit contracted by them. This law was amended in 1885. According to this law the ranking of maritime mortgages follows immediately after the privileged claims enumerated in Article 191.

The basic principles of French maritime law have been adopted by the whole group of Latin countries (Italy, Belgium, Spain, Portugal, Rumania, South American countries), and also by the Netherlands, Egypt, Turkey, and Japan.[47] Thus, the area within which the French maritime system prevails is of quite great extent. This should be borne in mind as an essential factor which might be of considerable help during the examination of attempts tending to the unification of real rights in vessels.

B. German Law.

Legal provisions regarding private maritime matters were assembled in Germany as well as in France in the Code of Commerce enacted in 1897. With respect to maritime liens, both French and German Codes apply the method of enumeration. Many of the provisions in both codifications are

identical. Notwithstanding this apparent similarity, the German private maritime law presents by itself a separate group. For instance, liens for collision or general average do not have their equivalent in the French Commercial Code. It rather recalls a certain analogy with the corresponding situation in the British Admiralty. However, this is not the only difference between the two codifications. A substantial contrast between them consists in a distinct concept of the privileged creditor. According to German law, the guaranty to which a creditor is entitled is limited to the res only (fortune de mer); whereas in France, this guaranty can be extended to the personal liability of the shipowner or the ship operator respectively.[48]

The German legislation provides for the application of the rule of 'lex fori' as a proposal to solve conflicts where priority of liens is involved. In matters relating to the creative basis, i.e. causes giving rise to maritime liens on foreign ships, it is the rule of 'rei sitae' which is given preference.[49]

Ship mortgages have been known to German law since the second half of the Nineteenth century. Prussia was the first to introduce them in 1861, and its example was followed by Hamburg and Bremen in 1885 and 1887 respectively. The civil Code of 1896 unified these particular laws and the provisions concerning ship mortgages are contained in Articles 1259-1270. The ranking accorded to ship mortgages in this codification has been placed immediately after the liens enumerated in article 776 of the Code of Commerce.

The peculiarities of the German maritime system could be found in

the legislation of pre-Soviet Russia. At present, the maritime legislation of the Scandinavian countries has adopted this system.

3. Admiralty Systems.

There are two substantial branches of the admiralty system; namely, English and American. The principles of the English Admiralty are also common to the British Colonies and Dominions. For instance, the Canadian Admiralty Act of 1934 has integrally incorporated the British Consolidated Act of 1925.[50]

The American Admiralty, in spite of its long, common tradition with the English Admiralty practice, as well as with the general historic foundations of European maritime law, now represents a distinct system of law.[51] Therefore, it appears necessary to analyze these two major Admiralty systems separately.

A. English Admiralty.

In contrast to the continental maritime systems, the English Admiralty admits a relatively small number of maritime liens. There are five basic causes which give rise to them.[52] The ranking of maritime liens is established in inverse order to the dates on which they arise. Consequently, their ranking does not depend either upon the order of enumeration (as it is in France) or on the value of the charge as is the case in the German codification.

Besides maritime liens, the English Admiralty still recognizes possessory liens, and, as athird group, statutory liens. Possessory liens, which are based on possession, are also called common law liens.

Statutory liens have arisen as a consequence of the enlargement of admiralty jurisdiction in various statutes, chiefly in the Admiralty Court Acts of 1840, 1861, 1894, the provisions of which were finally incorporated into the British Consolidated Act of 1925.[53]

The order of ranking within these three groups of liens is the following: 1) maritime liens stricto sensu; 2) possessory liens, and 3) statutory liens, before which have been put ship mortgages.

The enforcement of liens before the Admiralty is executed in a procedure in rem. In the case of enforcement of maritime liens it is considered that the right in rem is inherent, and exists independently of statute; whereas, in case of statutory liens, the Admiralty jurisdiction can be exercised only if, at the time of the institution of the cause, the ship, or the proceeds thereof were under the arrest of the court.[53]

Similarly to the other systems, the English Admiralty applies the 'lex fori' as the rule of conflicts with regard to maritime liens on foreign ships. It extends to both their ranking and priority.[54]

As has been mentioned above, ship mortgages take precedence over statutory liens. They were instituted by the Admiralty Court Act of 1840. Before this enactment, the Admiralty had no jurisdiction over maritime mortgages. The scope of this law, however, embraces only mortgages on English ships.

B. <u>American Admiralty.</u>

The United States maritime law represents a distinct group within the admiralty system. The number of maritime liens is comparatively much

greater than in England. As a general rule, (as in England), they are all equal and attach to maritime property in inverse order to the time or their arising. "However, certain classes of liens (such as seamen's wages and salvage) are accorded priority over others regarded as of lesser dignity, so that the ranking depends somewhat upon custom."[55]

Another difference between the approach of the English and American Admiralties to maritime liens consists of the fact that in England, where procedural theory prevails, the guilt of the res itself is not sufficient to cause the arrest of the ship when the enforcement of a maritime lien is involved. There must also be proved the personal liability of the shipowner.[56]

In the United States, meanwhile, with its dominant theory of personification, maritime liens are regarded as a kind of right of property and a vessel as a guilty thing.[57]

Perhaps the most characteristic feature of the American maritime system with regard to liens is the power of the U.S. Admiralty courts to increase or decrease the kinds of claims which are regarded as giving rise to a maritime lien enforceable in rem.[58] Henceforth, it implies that Statutes (in this case the Merchant Marine Act 1920) are not the only legal basis giving rise to maritime liens. In this respect, the American Admiralty practice differs strikingly from the continental systems where the legal basis is vested only in the respective codifications.

What concerns the rule of conflicts the American Admiralty applies to maritime liens on foreign ships is basically the rule of the 'lex rei sitae'.[59] However, there are exceptions to this rule; namely, in cases

of collision on the high seas involving vessels of different nationalities "the general maritime law as understood and administered in that country" is applied.[60] Further, the rank and priority of the maritime liens on a foreign vessel, unless exclusively involving liens arising by virtue of the law of the foreign country, or the several foreign countries containing identical provisions on the subject, the rule of conflicts is the law of the United States.[61]

By virtue of the Ship Mortgage Act of 1920 (Section 30, subsection r) ship mortgages have been accorded a very favorable legal position; namely, they have been granted status of 'preferred ship mortgage', which means that they have "priority over liens arising subsequent in time to its recording and endorsement, except as to liens for wages, salvage, general average, and torts claims..."[62] The scope of application of the Ship Mortgage Act of 1920, until June 29, 1954 was restricted to United States vessels only.

4. The Idea of Unification of Maritime Law in Respect to Real Rights.

A. Causes Leading to It.

The variety of maritime legal systems with substantially differentiated provisions concerning, above all, the ranking and priority of maritime liens and the foreclosure of maritime mortgages as well, is the basic reason of conflicts in the matter of these two most important real rights in a vessel.

The hitherto practised solution of the 'lex fori' is the proof how much the individual legal systems insist upon their legal individuality.

It proves also the validity of the thesis that real statutes belong to this domain of legal matters where the only competency is that of the forum.

Meanwhile, such a situation could not but hamper international maritime intercourse. Its disadvantages have been felt, for a long time, by shipowners, insurers, and bankers; briefly, by all persons engaged or interested in this intercourse. It is obvious that the repercussions of the situation may affect many aspects of national and international life. It cannot be solved otherwise than by means of an international convention.[63]

B. Comité Maritime International the Main Promoter of this Idea.[64]

The last decades of the Nineteenth Century inaugurated an extremely significant and historically important era of impressive activity and achievements in the field of international maritime legislation. Two legal bodies of international repute and competency contributed highly to these achievements. They are: International Law Association and Comité Maritime International. Both were founded in Belgium, the first one in Brussels in 1873, and the second one in Antwerp in 1897.[65]

The International Law Association in its endeavours followed an interesting method of work. In each subject-matter under discussion, an agreement of all the interested parties was sought. The leading idea was to create uniform maritime rules which would be adopted from within the national legislations. In that way were elaborated and subsequently adopted the York and Antwerp Rules (1890), revised in Stockholm in 1924; the Hague Rules (1922); London (1893); Vienna (1924); and the Warsaw

Rules (1926).[66]

The idea of preparing an international convention relating to the question of real rights in vessels became one of the most important tasks of the Comité Maritime International (C.M.I.). Its founders (and at the same time great scholars), Louis Franck and Ch. Lejeune, conceived it as a permanent body with national branches in all maritime countries. Each topic was to be submitted to national associations for discussion. National opinions in their turn were discussed at the plenum of the C.M.I. After that, they were to be discussed and examined within the commissions entrusted with the individual subject-matters. In the final phase, discussions were held at the Conferences and then recommendations were made as to the proposed solutions to the topics on the agenda.

The topic of unification of real rights in vessels was, for the first time, deliberated at the Conference held in Hamburg (1902).[67] The discussions started there were resumed later in Amsterdam (1904), and subsequently continued in Venice in 1907. The recommendations of these three Conferences can be summarized as follows:

1) adoption of a uniform set of rules with regard to maritime liens.
2) adoption of the law of the flag in respect to maritime mortgages.

Furthermore, the Venice Conference prepared also a draft convention for submission to a diplomatic Conference to be held at a later date. This Conference also met in Brussels in 1909. Representatives from

twenty-six states took part in it. The U.K. and the U.S. were also represented. Unfortunately, this imposing assembly did not adopt the Venice draft recommending a relatively small number of liens. This Conference reconvened in 1910, and again in 1913, for the last time before the outbreak of World War I.

The first meeting of the C.M.I., held after World War I, took place in Antwerp in 1921. A lien for disbursements was raised there and the problem of registration of liens was advanced. In turn, a Diplomatic Conference was called in Brussels in 1922 which passed by a majority vote the first convention on liens and mortgages. However, it was amended again in 1923, and signed as a final draft in 1924. This amendment removed liens for necessaries and disbursements from the first to the second class rank. The 1924 draft was received with much criticism in the U.S. and the U.K.[68]

Soon afterwards, it became evident that such a draft convention would not obtain widespread ratification. Therefore, a new Conference was called at Genoa in 1925 with the intention of elaborating a universally acceptable amendment.

In 1926 a new draft convention was presented to the Brussels Diplomatic Conference. In substance, this draft recalls the one submitted in 1922, where liens for necessaries and supplies were granted first class rank.

The United States did not take part in the 1926 Brussels Conference. It made known its negative attitude to it at Genoa in 1925. It claimed that constitutional obstacles impeded its eventual ratification.[69] The U.K. Delegation withdrew its approval to the 1926 draft on the basis that

it did not correspond with the British principle "to limit the number of liens in order to improve the status of the mortgage".[70]

The Brussels Convention on Liens and Mortgages of 1926, led by the Comité Maritime International, thus came into being after a quarter-of-a-century of laborious efforts.

In the following chapters, an attempt will be made to stress the kind of legal solutions this Convention proposes in the matter of real rights in vessels.

S E C T I O N III

Types of Rights in Aircraft in the Major Legal Systems.

1. France.

A pledge is a most frequently applied real right in connection with a movable. An aircraft suited to the purpose it has to serve, for practical reasons cannot be subjected to this form of real right in which dispossession is an indispensable corollary.[71]

There is another form of real right in movables which does not require dispossession. This is the law of the so-called "nantissement des fonds de commerce" which was introduced in 1898 and subsequently amended in 1909. It enables the whole commercial entreprise to acquire credit without being dispossessed of the assets constituting the entreprise. A close analogy may be drawn between the "nantissement des fonds de commerce" and the British floating charge. In spite of the apparent practicability of the law of nantissement, it has not yet been applied to aircraft. French authors do not mention any case of such an application.[72] Others draw from this fact the conclusion that there is little probability that the law on "nantissement des fonds de commerce"will ever be applied to aircraft.[73]

In 1917 the law of hypothecs on river vessels was introduced. Its provisions have been adapted to the law on air mortgages which was enacted in 1924.[74] This law provides that the deed of mortgage, in order to be valid towards third parties, must be registered. The act of the deed must not be authentic, i.e. performed by a notary, but the so-called form under private seal is sufficient to give formal validity to it. The air

mortgage established by this Law is simple in the sense that it can be only a conventional mortgage between the parties. "Hypothèque legale" and that of 'a married woman' were avoided in both the 1917 and the 1924 Laws.[75]

Thus the Law of 1924 creating legal premises for the establishing of real charges in aircraft constitutes a remarkable exception from the hitherto prevailing general rule that movables are not mortgageable.[76] However, the provisions of the Law of 1924 have not yet been applied in practice.[77]

As to the other group of real rights, namely privileges, an aircraft, like other movables, remains under the rule of the Civil Code provisions relating to general privileges. Moreover, these unregistered common law privileges on movables take precedence over the aerial mortgage.[78]

2. Great Britain.

Being a chattel within the rule of English common law, an aircraft is not susceptible to be mortgaged as a ship can be. As a chattel, it can be pledged, but "this is, however, not a method likely to appeal to the owner of an aircraft and desirous of raising money on it".[79] The only devices to raise money on aircraft provided in England are: 1) bill of sale or 2) floating charge or debenture.[80]

Bills of Sales were introduced by the Act of 1882. This Act requires written form of the act and stipulates that it should be witnessed and registered, and should specify the amount lent and the inven-

tory of charged goods as well. Sanction for noncompliance with these formal requirements nullifies this act. Written form and registration are used instead of dispossession when a chattel is pledged.

A floating charge which is usually put on the whole assets of a company is a typical method of lending money to big corporate entreprises by means of the issuance of debenture bonds. It confers a privileged right of priority which is especially advantageous in case of bankruptcy when the creditors from this act have to be satisfied before the others. In virtue of the Companies Act of 1948, a floating charge act should be registered within 21 days with the Registrar of Companies.

The floating charge has been very favorably commented on by some European writers as a very practicable and suitable way of establishing credit for commercial airlines.[81]

3. United States of America.

The Civil Aeronautics Act of 1938, Section 503, stipulates the kind of real charges to which an aircraft may be subjected. They are the following: 1) mortgages, 2) leases, 3) conditional sale, and 4) equipment trust. All these rights must be registered in order to acquire validity towards third parties.

The chattel mortgage is of great practical value.[82] It confers a lien upon the mortgagee. There is no special form prescribed for the act of chattel mortgage. If, in practice, a form is applied, it may serve only the purpose of an eventual proof. The value of this real right is strictly national. Hence, when an aircraft crosses a national border on entering a state in which chattel mortgage is unknown, as in England, or

is based on entirely distinct concepts as in France, this privileged situation of the chattel mortgagee would lose all its original value.

Leases, the second form of real charges, is very similar to conditional sale.[83] It provides that the lessee, after having paid a certain amount of money in rentals, is entitled to become the proprietor if he agrees to pay an additional sum. A pure form of lease usually stipulates that after a certain period of time the chattel should return to the lessor. A lease which does not contain such a stipulation is presumed to express the intention of the parties by becoming a conditional sale contract.

Conditional sale is not subjected to any special requirement as to the form in which it must be written. It has only to be registered in order to acquire the status of a privileged claim towards third parties. When the purchaser defaults in his payment, the privileged vendor is entitled either to take back the chattel, or to sue the purchaser for additional payments. Legal provisions concerning conditional sale vary from state to state. In the State of Pennsylvania, for instance, the validity of this privileged claim is not recognized as extending towards third parties.[84]

Equipment trust is a form of obtaining credit largely used by railway companies. It is also very suitable for airlines.[85] In an equipment trust deal, four parties are involved: the vendor of the equipment, the trustee, and the beneficiaries of the trust. The trustee issues certificates to the beneficiaries, pays the sale price to the vendor, and acquires title to the property. He performs also an agreement of the

lease with the purchaser, in which the latter obliges himself to pay back the borrowed money, and the former, to transfer the title to the chattel upon the completion of the payment. In the case of nonpayment of the agreed rentals, the trustee has the right to claim possession of the chattel and to sell it in order to pay back money to the beneficiaries of the trust.

4. Canada.

Before entering into any enquiry concerning which specific types of real rights are admitted under the rule of Canadian law, it should be borne in mind that Canada is a federal state. The British North America Act, the supreme law of this land, has granted to the Provinces the power to legislate over private rights.[86] Therefore, at present, the subject of real rights in aircraft has to be examined separately in individual provincial legislations. For the purposes of obtaining a general picture, this task may be simplified by the fact that the legal systems of the Provinces are, as a rule, common law systems, with the exception of the civil law system in Quebec. The following real rights may be accounted as purporting also to aircraft: 1) chattel mortgage, 2) conditional sale or hire-purchase agreement, 3) lien note, and 4) equipment trust.

In the common law Provinces, an aircraft may be subjected to chattel mortgage as provided under the various provincial statutes.[87] The Quebec Civil Code, however, (as the French Code does also), considers movable property not mortgageable.[88] The purpose of instituting chattel mortgages was to enable creditors to obtain security for money lent for the purchase of household furniture, agricultural equipment, and machin-

ery generally, or to secure repayment of a past debt. Chattel mortgage Acts usually provide that the mortgage must be registered in a County Court and it is effective only in the County Court District where the mortgaged property is located. A mortgaged chattel, therefore, cannot be seized outside the jurisdiction of the applicable County Court. Because of the mobile character of aircraft, this type of legal device does not commend itself to be applied as security.

A conditional sale or hire-purchase agreement provides that ownership in goods does not pass until the purchase price has been paid. This device is often used to secure payment of the purchase price of aircraft. It is also recognized under the laws of Quebec.[89]

The lien note is the third method of financing the purchase of chattels.[90] This is something like a hire-purchase agreement. It can be put into effect only at the time of sale. To be valid, it must be accompanied by a transfer of possession but not of the ownership of the chattel. The requirement of their registration is not obligatory in every Province. This form of security is extensively used in the sale of automobiles.

The equipment trust is the fourth method of financing the purchase of chattels. The Federal Government enacted this method of financing for railways in sections 137 to 146 of the Railway Act, which provides for the registration of mortgages, etc.[91] Oil companies, tank-car companies, and tank-line companies, as well as other organizations which require large amounts of capital to be invested in movable and salable equipment, may make use of equipment trust obligations to finance the purchase of

equipment.

The above-mentioned securities in chattels exist under provincial laws except for the equipment trust provided in the Railway Act. This Act requires that securities, according to provincial law, have to be registered within the County Courts; and in the case of equipment trusts for railways, the instrument of such security has to be "deposited in the Office of the Secretary of State of Canada, and notice of such deposit shall forthwith be given in the Canada Gazette".[92]

5. International Convention the Only Solution to the Conflicting Concepts of Real Rights in Aircraft.

A. Causes of these conflicts.

The preceding short survey of the four legal systems, representing at the same time countries with major airlines, indicates that substantial differences exist among these systems as to the legal concepts with regard to real rights in aircraft. First, these differences pertain to the kinds of real rights to which an aircraft may be subjected. Second, they may relate to the legal measures which are provided in these systems to enforce these rights. Both kinds of rights and legal means provided for their execution correspond strictly to the degree of evolution of a given legal system. With few exceptions (as for instance, in France, where the law of 1924 created a legal basis for the institution of air mortgages, or in the U.S., since the enactment of the Civil Aeronautics Act of 1938, which also provides for a distinct type of securities in aircraft), the remaining legal systems regard the matter of real rights in aircraft as belonging to the scope of their common (civil) law rules.

As a general rule, it may be said that an aircraft, for the time being, is deemed to be movable "in transitu".[93] Such an aircraft, when passing through different countries with distinct legal systems in the matter of real rights, is subjected to the rules of these different countries. Since positive law changes from state to state, and in the case of a federal state, changes within the national boundary, such a situation would give rise to countless cases of conflicts of laws. In such a situation, an international juxtaposition of real rights would take place and the rights of creditors or lawful owners of aircraft would be jeopardized by the application of public policy principle, or by local privileges of common or civil laws.[94]

In the case of vessels, the matter of real rights has been incorporated into statutes which were promulgated in both civil and common law countries, in the course of the Nineteenth and Twentieth centuries. These enactments accentuated, to a great extent, the divergencies already existing in the legal provisions of the maritime systems. Notwithstanding this fact, the old tradition in the case of vessels still may offer some similarities and common characteristics of approach when the matter is examined at the international level. This, however, cannot be the case with the subject of real rights in aircraft. Air transportation is only fifty years old and therefore cannot have centuries-old tradition behind it. Besides, private law matters concerning aircraft were subjected to the bodies of national legislations even before any customary rule could have been created.[95]

The problem of real rights in aircraft, at present, is a purely

domestic question of individual legal systems. Only through the medium of an international convention removing the application of the principle of public policy can this problem become a component of international private air law.

B. International Legal Bodies in Charge of Drafting Such Convention.

CITEJA (Comité International Technique d'Experts Juridiques Aériens) was the first international legal organization entrusted with the task of elaborating an international convention on real rights in aircraft. Created in 1926 during the first international conference of international private air law, held in Paris, it was conceived as an official body composed of lawyers designated by individual member-states to CITEJA.[96] Each state could designate as many delegates as it pleased, but was granted only one vote in sessions of the Committee. The Committee was divided into four commissions charged with the study of individual subject-matters.

The commissions prepared preliminary drafts which, in turn, were submitted to the whole Committee for approval. After that, such drafts had to be presented to a diplomatic conference for the final touches and for a vote of acceptance. After this stage, the remaining procedure was ratification according to the constitutional provisions of individual states.

In this manner, CITEJA worked out the following draft conventions: the Warsaw Convention on the liability of an air carrier (1929), Rome Convention on damages caused on the surface; and still another on "saisie

conservatoire" (1933); and the Brussels draft conventions on salvage and collision (1933).

Study on the preliminary draft convention concerning real rights in aircraft was commenced immediately. As early as 1927, the commission charged with this subject had prepared a report on it. In 1931, during the plenary session of CITEJA, the above commission presented two preliminary drafts: one relating to aeronautical property and register, and the other one relating to mortgages and privileges in aircraft. These drafts received the approval of the Committee. The third step, namely, acceptance by a diplomatic conference, was still needed. This, however, did not take place before the outbreak of World War II. Obviously, the criticism aroused by these two drafts was the main reason for the delay of this conference.[97]

After the war, the first session of CITEJA was held in Paris in January 1946. In July of the same year, sessions of the commissions took place also in Paris. These sessions were continued in November in Cairo. The two preliminary drafts of 1931 were then discussed and examined in connection with the new legal conditions created by the Chicago Convention 1944, which set up the post-war status of international civil aviation. During the Cairo session, an important question had to be decided: whether it would be possible for CITEJA to continue its work along with the recently provided Legal Committee of PICAO (later ICAO). Moreover, the Legal Committee, according to the resolution taken by the Assembly of PICAO in Montreal, May 1946, was called upon to deal with both public and private air law matters as well. It appeared that the simultaneous

existence of both the Legal Committee and CITEJA would become impossible. Consequently, the Cairo meeting passed a vote that CITEJA should be dissolved and its archives handed over to the Legal Committee of ICAO.

From that time on, the question of the elaboration of international convention on real rights in aircraft became the ambitious duty of the Legal Committee within ICAO. The ICAO Assembly held in Montreal in May 1947 was presented with the so-called Parisian draft convention, worded in February 1947 by a committee composed of English, American, French, and Belgian lawyers. The fourth Commission of the Assembly held in Montreal formulated a new text and submitted it to the Legal Committee which met in Brussels in September 1947. Out of that meeting came the so-called Brussels draft which served as basis of discussion in Geneva in June 1948, when the final draft convention on real rights in aircraft was voted upon and subsequently signed.[98]

A more detailed discussion of these three stages, namely, CITEJA, Brussels, and Geneva, will be presented in Chapter III.

C H A P T E R II

VESSELS AS SUBJECTS OF RIGHTS IN NATIONAL AND INTERNATIONAL LAW

S E C T I O N I

Title

1. Registration of Vessels

From a historical point of view, registration of merchant vessels as a necessary legal formality was first introduced into English law in 1660, and into French law in 1681.[99] These enactments were conceived primarily as a defense for home-built ships. Requirements of registration, at that time, were imposed exclusively on foreign-built vessels when they were put under the ownership of nationals.

In the ensuing centuries, the practice of registration of merchant vessels was extended to both foreign and home-built vessels as well. Commenting on later statutes, Ch. Abbott remarks that "the great, and, perhaps, the only original object of these statutes was to advance the public policy of the State by the notoriety of property obtained through the medium of a public register, a measure adopted with numerous improvements, from the wisdom of former times".[100]

It was until the Nineteenth Century that registration statutes were enacted in most maritime states, and the registration of merchant vessels became a general rule of private maritime law.[101] Moreover, the scope of real rights susceptible to registration, over a period of time, has been enlarged considerably. Besides the right of ownership, ship mortgages also are now registered to enable them to acquire the privileged status provided for them in various national legislations.

A brief survey of the respective provisions in the four groups of maritime legislations should enable us to appreciate properly the legal

extent of the act of registration of a vessel as creating a clear and complete title of property at the national and international level as well.

A. France.

The register of vessels in France is kept by the Administration of Customs which maintains offices in the major ports.[102] Certificates of original ownership, which are called 'actes de francisation', contain all the data pertinent to a vessel: its name, tonnage, place of construction, and the name of the owner.[103] In the case of transfer of ownership, the name of the new shipowner is shown on the same certificate through a formality called 'acte de mutation en douane' executed before the same office. The certificate of registration in both cases (i.e. 'francisation' and 'mutation en douane') produces equal legal effects; namely, a) it establishes the identity of the vessel; b) is the proof of its nationality; and c) it is an unquestionable evidence of the rightful title of property in the vessel.[104]

B. Germany.

The registration of vessels in this country was introduced by the Law of 1899. In virtue of it, special courts, the so-called 'Amtsgerichte', were designated to keep the register. This register is public in the sense that the data contained in the inscriptions can be disclosed to anyone desirous of knowing them. All transactions concerning a vessel are inscribed therein, including real charges.[105] The certificate of registration possesses, as in France, the quality of absolute proof with regard to the title of maritime property and to the existence and extent

of other real rights as well.

C. England.

The law at present in force in respect to registration of British ships is the Merchant Shipping Act 1894. It requires that vessels be registered, and a certificate that this has been done is essential to their recognition as British ships.[106]

As elsewhere, registration in England serves the following purposes: a) it establishes a clear and complete title of property in British ships; b) it enables qualified persons, by entry in the register, to proceed with a rapid and convenient method of transfer of property in vessels.

It may be noticed, however, that in comparison with the Continental maritime systems, where the contents of the certificate of registration are considered as an absolute proof of ownership, "registration in England is merely 'prima facie' evidence of ownership, which may be rebutted by proof that the true ownership is elsewhere".[107]

D. United States.

Similar provisions are in force in the United States. The Merchant Marine Act of 1920, Section 30, which, at present, governs the problem of registration of vessels, requires that the registration be effected in cases of the institution of original ownership, the transfer, or the establishment of a maritime mortgage. No such transmissions can be considered legally binding without a registration duly performed.[108]

2. Uniformity of National Rules Relating to Registration and the Question of Conflict of Laws.

A short survey of legislations in the major maritime systems shows that,

at present, registration of merchant vessels is the general rule of private maritime law of most maritime States. These systems may vary as to the provisions determining the conditions under which ownership in vessels is to be accorded. Some of them (for instance, England, the United States, and Germany), traditionally enforce their restrictive provisions that the ownership of vessels must belong only to the nationals of the respective countries.[109] France is more liberal in this respect, as the Law of 11 June 1845 stipulates that at least half of the property of the ship should belong to French nationals.

Yet these conditions (and underlying them, political considerations) are entirely matters of domestic concern, and as such cannot pertain to international law.[110]

Since internal policy considerations are foreign to international law, such law must be concerned exclusively with the legal consequences which are created by the universally-applied practice of registration of merchant vessels. These consequences are as follows:

1) certificate of registration which is carried by a vessel engaged in international transport is the only evidence of a complete and clear title of property in a vessel;
2) the law of the country which issued such a certificate appears to be the only applicable law in matters regarding its legal extent and the validity of real transmissions operated.

In this connection, it may be noted that the Brussels Convention

on Liens and Mortgages, of 1926 when stipulating in Article I about the registration of ship mortgages, indirectly implies these consequences.

This characteristic legislative omission does not seem to be an incidental one. It appears to be rather in perfect harmony with the prevailing rule of international law "that ownership is a right which 'propria virtute' obtains recognition in international law, and no conventional agreement is necessary to reinforce it."[111]

S E C T I O N II

Liens

1. General Meaning.

From time immemorial, merchant vessels have been engaged in international commerce. The performance of their duties very often required that a loan had to be contracted, supplies or other services bought, in order that the vessels might be able to continue their trips. Such contracts made by a ship, or services rendered to it, soon attracted the attention of Roman legislators. They enacted laws according to which "every man who had repaired, or fitted out the ship, or lent money to be employed in those services, had a privilege or right in payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract, or agreement, subjecting the ship to such a claim".[112]

At present, countries which have adopted Roman Civil Law as the basis of their jurisprudence, have given an identical legal meaning to the above-cited maritime rights or privileges.[113]

These maritime privileges, or 'liens' as they are known in the Admiralty, appear to be of utmost importance to the purpose of maritime trade and commerce, and have been so since the earliest period of history. The so-called maritime causes which gave rise to them in the course of centuries were subjected to changes. Especially, in the Nineteenth and Twentieth centuries, because of the revolution in the techniques of navigation, a considerable evolution in these causes took place and was sub-

sequently reflected in the respective legislative acts.

As a general rule, it may be said that present-day maritime liens are recognized on a contractual or quasi-contractual basis, and "the ship by the general maritime law may be held responsible for the torts and misconduct".[114]

2. Kinds of Maritime Liens in the Major Legal Systems.

A. France.

By Article 191 of the Code of Commerce (before the amendment of 1949) the following causes give rise to maritime privileges which rank according to the order of enumeration:[115]

1) judicial cost of sale;
2) pilotage, tonnage, towage, mooring;
3) wages for keeping and watching;
4) hire of warehouse for storing a ship's appurtenances;
5) repairing since a ship's last voyage;
6) wages of captain and crew;
7) advancement for necessities;
8) sums due to the vendor;
9) bottomry used for repairing the vessel and victualing;
10) insurance premium for last voyage;
11) indemnity for non-delivery of the goods.

A brief examination of this compulsory enumerative listing of maritime privileges indicates that the privileges are predominantly contractual or quasi contractual liens. In contrast to other maritime systems, the absence of delictual and quasi-delictual causes, such as collision and salvage, is striking. Until the passing of the amendment of 1949, a claim for salvage, for instance, had to be sought in accordance with article 2102(3) of the Civil Code. Hence, the claimant was granted only a civil law privilege, the ranking of which was uncertain.[116] Still worse

was the situation of a claim arising out of collision. Its purely delictual character did not fit with the contractual concept of French maritime liens.[117] After the implementation of the Brussels Convention in 1949, the French courts have the legal basis to recognize 'collision' and 'salvage' as maritime liens towards vessels of all foreign countries.

A strongly characteristic feature of French maritime liens enumerated in Article 191 is the liens rank according to the order prescribed in that law. It follows therefore that they are divided into privileges of higher and lesser dignity according to the precedence which a given maritime cause has been granted in this enumerative order.Liens of more recent date take precedence over those which occurred earlier, and claims which attach to the same event are deemed to have occurred at the same time.[118]

As to the extent of a maritime lien under the rule of the French Code of Commerce, it comprises the vessel, its freight, and the accessories of both, whereas the other privileged claims attach to all the goods of the debtor including ships or vessels. It may be noted, however, that they also involve the personal liability of the shipowner, since he is responsible in civil law for the acts of the captain and the crew.

It is held that the most characteristic feature of maritime liens is the fact that they may attach maritime property unconditionally.[119] In French legal terminology, this character is called 'droit de suite'. Article 190 recognized this character of 'droit de suite' with regard to maritime liens, but it stipulated, at the same time, that this unconditional character is lost when the vessel makes a new sea voyage regis-

tered in the name of a new owner. Equally, the extinction of this 'droit de suite' occurs when a vessel is sold and certain formalities provided by law (19.2,1939) accompany this sale. The above-mentioned law provides that the "droit de suite" of the privileged creditors shall be deemed extinguished after two months have elapsed from the date of sale duly registered and published in the "Bulletin Officiel des Ventes et Cessions de Fonds de Commerce". Besides, article 196 provides for two additional causes of extinction of maritime liens. They occur in the following cases. 1) judicial sale, and 2) confiscation.

B. Germany.

Article 754 of the German Code of Commerce stipulates the following causes as giving rise to maritime liens:

1) Preservation charges at the last port;
2) All public dues and charges on a ship;
3) Wages of the master and crew;
4) Pilotage, salvage;
5) General average;
6) Bottomry and credit arrangements;
7) Non-delivery or damage to goods;
8) Other transactions of the master in the scope of his authority;
9) Faults of the master and crew;
10) Compensation of seamen.

Those are the privileged claims which may be made on ship and freight. In addition to these, the German Code of Commerce admits maritime liens which may also be instituted on cargo. These are: 1) claims for freight; 2) for bottomry; 3) general average; and 4) salvage (Art. 760). Article 776 provides that maritime liens on ship and freight have priority over all other liens. What concerns their ranking inter se is as follows: the expenses of watching and keeping the ship at its last

port, where the ship is going to be sold upon a writ of execution, these expenses rank first in all cases.[120]

Next to this lien follow:

1) All public dues and charges;
2) Claims of the crew (wages);
3) Pilotage, salvage, general average, bottomry, and other credit arrangements;
4) Damage of goods;
5) Other transactions; (Art.754).

As has been mentioned above, there is a considerable difference between maritime liens in both the French and the German systems. Above all, it should be noted that in the German system, delictual causes such as salvage have been admitted as giving rise to maritime liens. Another important distinction consists of the fact that in Germany there may be separate liens on a vessel and its cargo on the one hand, and liens on the cargo on the other hand. Moreover, in German law, the extent of the maritime lien is strictly limited to the so-called 'fortune de mer', which, in practice, amounts to the fact that a privileged creditor cannot pursue his claim beyond this limit, i.e., he cannot invoke the personal liability of the shipowner.[121] The concept of 'fortune de mer' is also a determining factor in the matter of establishing the ranking of maritime liens. Thus, liens are ranked after each sea voyage when it becomes necessary to make an account of the 'fortune de mer'. Consequently, charges which occurred during the most recent voyage take precedence over those which occurred earlier.[122]

In a way similar to the provision contained in the French Code of Commerce, the German Code stipulates that maritime liens on a ship may

be enforced against all third parties who have possession of the vessel.[123] Hence, the unconditional character of a maritime lien is fully preserved in the stipulation of this provision. The extinction of this unconditional character (the French 'droit de suite') may take place under circumstances provided by law. They occur in the following cases: 1) when a voluntary sale takes place and a duly performed notice reaches the creditors; 2) when a public sale is executed at home; 3) when the same occurs abroad; 4) when the sale is executed by the master within the scope of his authority which is subsequently confirmed by the Court; 5) when it is ordered by a government; and 6) when it is sold as a 'good prize'.[124]

C. England.

For many centuries the English common law courts competed with the admiralty as to the jurisdiction over maritime matters.[125] A most effective piece of legislature which took place in the course of the Nineteenth and Twentieth centuries crystallized the extent of the Admiralty jurisdiction and provided for a clear distinction of the kinds of real rights to which an English vessel might be subjected. The most important among these statutes then enacted arethe following: the Admiralty Courts Acts of 1840, 1861, 1894, and the British Consolidated Act of 1925. By virtue of these statutes, maritime liens arise from such particular maritime causes as:

1) bottomry and respondentia
2) collision, damage;
3) salvage;
4) seamen's wages;
5) master's wages and disbursements.[126]

These causes constitute a legal basis for the most genuine maritime liens.Moreover, it may be also emphasized that in the case of the above-mentioned maritime liens, the right 'in rem' by means of which they are enforced belongs to the inherent jurisdiction of the Admiralty Court and may exist independently of statute.[127]

Causes which determine maritime liens are composed, unlike the French law, of contractual and delictual causes as well. Collision is a typical example of a tortual lien. Accordingly, this classification into contractual and delictual liens has well established the order of ranking so that liens 'ex delictu' go before liens 'ex contractu'. Within this division, however, liens are supposed to be equal and coordinate. An exception has been made only in respect to liens for salvage. Because of the weight and importance of this type of lien, it usually renders, to the 'res' it was accorded, precedence over all other liens 'ex contractu'.[128] Therefore, it may be said, the lien for salvage enjoys a very privileged status among English maritime liens. This privileged position becomes obvious during procedures before the Admiralty when enforcement of claims for salvage services resemble rather the American procedure 'in rem' than the English one.[129] Apart from this, the general rule is that liens 'ex contractu' rank in the inverse order of their attachment to the 'res'.[130]

The legal extent of a maritime lien, as a general rule, comprises the ship, its accessories, its freight, and its cargo. However, its limits may vary according to the type of maritime lien. In the case of bottomry, for example, such a lien may extend to the vessel and its

freight, or to the vessel, its freight, and its cargo respectively. When the lien is established on the cargo alone, it is called 'respondentia'. In this case the shipowner is allowed to seize the cargo, only in order to compel the cosignee to remit to the court the amount of the freight.[131] In the case of salvage, the lien embraces the ship, its freight, and its cargo. Furthermore, a salvor by virtue of the Admiralty Court Act of 1861 is provided with a possessory lien with regard to a salvaged vessel.[132] Liens for seamen's wages cover the whole ship, with no part being any more important than another. It extends to the freight, even to that payable to subcharterers, and where the proceeds from the sale of the ship are insufficient, the freight must be paid to the court. However, where there is no lien on the ship for wages, there is none on the freight, for the lien on the freight is dependent upon the lien on the ship.[133] The lien for a master's disbursements and wages in this respect has been made equal to that of the seamen by virtue of the Shipping Act of 1894.[134]

Causes of extinction of maritime liens are quite numerous. G. Price counts eleven of them.[135] They may be grouped, however, into three main classes: 1) Causes of extinction by virtue of the law, as for example, limitation by statute; negligence to follow the delay imposed by statute; sale by the Court; non-receipt of the claim against the vessel for the unpaid wages of seamen if, upon agreement, these wages remained in deposit with the managing owner; and retention of the ship by salvor.

2) Causes of extinction by virtue of an agreement stipulated or presumed. In this class are comprised: payment and acceptance; acceptance

of bail; agreement to postpone payment of bond (bottomry); taking of a security instead of payment in cash.

3) Causes of extinction by virtue of vis major, such as: capture of the vessel; its loss or destruction.

D. United States.

The list of maritime liens which may be enforced before the United States Admiralty was established by the Maritime Liens Act of 1910 and the Merchant Shipping Act of 1920. The following causes have been stated in them as giving rise to maritime liens:

1) bottomry and respondentia;
2) repairs, supplies, and necessaries;
3) tort liens and collisions;
4) seamen's wages;
5) master's disbursements;
6) salvage;
7) towage, pilotage, wharfage, and stevedore services;
8) breach of contract;

Both contractual and delictual causes as well are comprised in the above-quoted list as giving rise to maritime liens. They are, however, more numerous in the United States than in England. Compared with the English list, there have been added liens for necessaries, general average, pilotage, towage, wharfage, and breach of contract of affreightment.

In the ranking of liens, the general rule is that they are ranked by the voyage in inverse order to their attachment, so that the latest lien in point of time outranks prior liens. Meanwhile, certain classes of liens (such as seamen's wages and salvage) are accorded priority over others. Therefore, it may be assumed "that the ranking depends somewhat

upon custom, and liens are divided into classes of greater and lesser dignity".[136]

Prior to the Maritime Liens Act of 1910, liens for necessaries and supplies furnished in the homeport were not recognized. In virtue of the latter statute, any person who furnishes repairs, supplies, towage, has a maritime lien, which may be enforced by suit 'in rem'. This Act does not make any distinction between foreign and domestic vessels in the matter of liens for necessities.[137]

As in other maritime systems, a maritime lien comprises the ship, its freight, and its cargo.

Extinction of maritime liens, according to the general law of the United States, occurs under the following circumstances: payment, express agreement, sale by court, sale out-of-court in bona fide, delay in enforcement, giving credit, taking collateral security, release of the vessel on the deposit of a bond, forfeiture, proceedings 'in personam', bankruptcy and insolvency, destruction of the vessel.[138]

3. Conflicts.

A brief survey of the legal provisions relating to maritime liens which are in force in the major maritime systems may easily suggest that the variety of these provisions is the principal source of legal difficulties to which a creditor of real rights in the vessel may be subjected at the international level. Above all, these difficulties arise when liens are called for execution in a foreign country. Then conflicts "may relate not only to the existence or recognition of maritime liens, but also to such questions as their extent, priority, and mode of extinction".[139]

The appropriate national statutes or codifications contain explicit or implicit rules of the conflicts of laws with regard to the matter of ranking, extent, and extinction of maritime liens on a foreign vessel. Up to the present, the most frequently applied solutions in this respect have been either the rule of the 'lex fori', or the rule of the 'lex rei sitae'.

The rule of the 'lex fori', when applied as a key for the solving of matters of conflicts, is only an original application of domestic law denying the acceptance of the foreign law.

This rule (lex fori) is always followed by the English Admiralty, whenever "the priority of claims against a ship is regarded as a matter of remedy procedure; hence competing claims will rank according to English law".[140]

This rule has also been applied by French tribunals to solve the problem on foreign ships.[141]

The fact that this rule is favored suggests that national courts are reluctant to administer foreign law because it is difficult to understand. Such may be the only practical justification of this procedure. Its disadvantages, however, outweigh the aforesaid merits. An example will easily illustrate this aspect of the problem. A French vessel, for instance, may be involved in a collision with an English ship. If the suit for damages resulting from this collision is brought before the English Admiralty Court, the lien will be enforced notwithstanding the fact that the French law (before the amendment of 1949) did not recognize collision as a cause giving rise to a maritime lien. In an inverse

case, i.e., a French vessel in fault and the suit brought before the French civil tribunal, there would be no legal basis for a French judge to admit the existence of the maritime lien for collision damages, as this cause was unknown to the old Article 191. A similar situation could be created if, for instance, an English vessel contracted for necessaries in any U.S. port. Such a transaction, according to U.S. maritime law gives rise to maritime lien.[142] It does not, however, in the English law, nor in German or French legislations.[143] Consequently, a transaction for necessaries contracted in the U.S. would be recognized only as a maritime lien in the U.S. but would not be admitted as such in England, or in other maritime systems.

To summarize, it may be said that the rule of 'lex fori', when applied to maritime liens existing on foreign ships, does not appear to be an adequate solution in meeting the needs and requirements of modern international maritime intercourse. This rule appears to guarantee only the interests of one party represented at the maritime trial; namely, the party of the forum. The other party, namely the creditor of real rights in a vessel, is not so well secured that his rightful interests, although originating in other situs, will be properly protected.

Another method of solving opposed real rights in a foreign vessel is the rule of 'lex rei sitae';"the law of the place where the facts giving rise to the alleged lien occurred".[144]

This rule is applied to some extent in Germany when the matter of causes giving rise to maritime liens on a foreign ship is involved.[145] With regard to ranking and priority, however, it is the rule of 'lex fori'

which is applied.

A standard similar to that of Germany embraces American Admiralty practice. When a vessel is seized and sold in an American court of admiralty, the existence of a lien is determined by the 'lex rei sitae'.[146] However, the priority of liens, when foreign lienors are involved, seems to be doubtful. The matter is treated as purely procedural. There are some cases which indicate that the priority of liens is a substantive matter and that the foreign law should be followed.[147]

There should be no doubt that the 'lex rei sitae' is more advantageous than the 'lex fori' as a key to solve international conflicts concerning real rights in vessels. Paraphrasing E. Rabel in the field of maritime law it would seem that this rule is the best existing method of serving the principle of "international justice".[148] This principle requires that each legal act be treated in accordance with the law under the rule of which it has been created. Notwithstanding this theoretical superiority, this method is also susceptible to the creating of numerous inconveniences. Especially may they occur when "a number of liens are created on a vessel which has visited several countries".[149] No judge in the world would be able to apply several foreign laws at the same time. Hence, the theoretical merits of the rule 'lex rei sitae' seem to be far outnumbered by practical inconveniences which may be created when it is applied in practice.

The foregoing short survey of the major legislations indicates that the overwhelmingly applied practice of solving conflicts with regard to maritime liens on foreign ships refers to the rule of 'lex fori'. Even

in the systems where the 'lex rei sitae' prevails formally (Germany, United States), the 'lex fori' is not totally excluded from their courts.

It was the noble aim of the Comité Maritime International during its twenty-year-long endeavours to find another solution which would stimulate international maritime intercourse. The result of these endeavours is contained in the Brussels Convention on Liens and Mortgages, 1926.

4. Solution Suggested by the Brussels Convention, 1926.

Article 2 of the Brussels Convention establishes five maritime liens which are to be given priority over mortgages, hypothecations, and other similar charges. By virtue of this article, the following causes give rise to maritime liens: 1) all public dues and charges; pilotage and conservatory charges; 2) seamen's and master's wages; 3) salvage and general average; 4) collision damage; 5) captain's disbursements within the scope of his authority for supplies and necessaries.

The order of ranking of these liens has been conceived as an unalterable one. The stipulation from article 3, para. 1, requires that Contracting States shall not be allowed to change the order of ranking established in Article 2. As a supplementary provision there, it had been stated that individual states may provide in their national legislations for other causes of liens, but these other liens can only follow the privileges of the first rank and mortgages. Hence, articles 2 and 3 are of paramount importance as far as the number and ranking of maritime liens are concerned. The character of this provision may be said to be that of a law-making rule in the sense that it intends to make uniform

the hitherto prevailing provisions in different maritime systems in respect to ranking of maritime liens.

Of course, acceptance of this rule of uniformity within the maritime community of states would render the problem of conflicts immaterial, and the respective rules concerning the causes and ranking of maritime liens would become rules of domestic law, which would then be identical in all states ratifying the Convention.

Another aspect of the maritime lien which is susceptible to conflicts at the international level is the extent to which a maritime lien may attach to a vessel. The Convention explicitly stipulates that the maritime lien which attaches to a vessel includes also the freight "for the voyage during which the secured claim arises and to the accessories of the vessel and freight accrued since the commencement of the voyage".[150] Furthermore, each lien, without exception, is entitled to that extension. Article 4 contains a very exhaustive interpretation of the term accessories. It is worth mentioning that "payments made, or due to the owner on policies of insurance, subvention, or subsidies" are deemed not to be accessories. Equally, in the matter of the extent to which a lien may attach, the provision of the Convention, when adopted, will supersede some contrary provisions in this respect in such major maritime systems as Germany or England.[151]

The third aspect of maritime liens, which is of primary importance as far as conflicts are concerned, is the matter of the extinction of maritime liens. In this matter, individual national legislations vary to a great extent.[152] The Convention provides for two kinds of reasons which

give grounds for the extinction of maritime liens. These are: 1) national, 2) international, i.e. those provided in the Convention.[153]

A period of one year was set for all liens except those for necessities, for which a period of six months was provided, after which they lose their validity.[154] The one-year period (or six months in the case of necessaries) commences either from the date of the occurrence of the cause, or from the date on which the claim becomes enforceable.[155]

In providing for twofold causes of extinction of maritime liens, the Brussels Convention thus left the way open to national causes as possible sources of conflicts at the international level. Yet, in this connection, it is interesting to note that Article 9, para. 4, imposes on national legislations an obligation not to permit the extinction of any lien as a result of sale, "unless such sale is accompanied by such publicity as may be prescribed by the national law".

Summarizing the substantial provisions of the Brussels Convention with regard to maritime liens, one may conclude that, in the matter of causes giving rise to liens, their ranking, the extent to which they attach to the vessel, and even partially in the matter of causes of extinction, these provisions are of a uniform character. Contracting Parties to the Convention are bound to implement these stipulations in their national legislations. In such a situation (i.e. these stipulations having been implemented in the individual maritime legal systems), the cases in which there were conflict of laws would become quite rare.

In the remaining provisions relating to the general legal status of maritime liens, the stipulation which is contained in Article 8 and

which states that liens follow the vessel into whatever hands it may pass is of great importance. Furthermore, to emphasize the general character of maritime liens, Article 11 adds that such liens are "subject to no formality and to no special condition of proof".

The character of these two rules if in perfect agreement with the actually prevailing situation in this matter in the majority of maritime systems.[156]

S E C T I O N III

Ship Mortgages

1. Ship Mortgage: Modern Medium of Maritime Credit.

A lien for bottomry may be regarded as the oldest form of maritime credit. We are told that this form of maritime credit was already known to the shipowners of ancient India and Greece.[157] The Medieval ship operators also used it very extensively. At present, the lien for bottomry still appears at the top of list of maritime liens in the majority of maritime legislations, notwithstanding the fact that its significance in the past cannot be compared with that of today.[158]

The bottomry loan usually was contracted for by the shipowner before the departure of his ship, on the condition that the money lent would be applied to the necessities of the ship. Furthermore, the loan had to be repaid on the completion of the sea-voyage. On the whole, it may be said that the lien for bottomry is "in the nature of a mortgage, but no property passes as by mortgage and no possession is given as by a pledge".[159]

Ship mortgage statutes, which were enacted in all the major maritime systems during the Nineteenth and Twentieth centuries, resulted in the fact that liens for bottomry lost their prior value as means of maritime credit. Obviously, technical progress in sea-navigation, which coincided with the ship mortgage enactments, contributed greatly to the fact that the role of bottomry loans was replaced by ship mortgage contracts. Thanks to this technical progress, sea-going vessels became incomparably larger and, as a result, the safety factor was increased; at the same

time, the cost of their construction also grew greater. Consequently, these new conditions required a new form of credit which could fully meet the new exigencies of maritime intercourse. Ship mortgages meet these new conditions. In contrast with the short-term credit obtainable by means of a lien for bottomry, a ship mortgage contract may provide a ship owner with a larger amount of money, lent on easier terms, and for a longer period of time.

2. Legal Status of Ship Mortgage in the Major Maritime Systems.

A. France.

The law of ship mortgages was introduced in France in the last quarter of the Nineteenth century.[160] Since that time, sea-going vessels with a capacity of not less than twenty tons can be subjected to this new type of maritime credit.

According to the law of 1874, the ranking of ship mortgages with regard to maritime liens was set to follow immediately the liens enumerated in Article 191 of the Code of Commerce. As Article 191 (before its amendment in 1949) did contain eleven privileged maritime claims, the value of ship mortgages, regarded from the point of view of security, could not but appear very unattractive to many prospective investors.

This relationship toward liens, and consequently the value of ship mortgages as a form of security, was considerably improved after the amendment of 1949.[161] By virtue of this law, the number of maritime liens has been reduced from eleven to six, and ship mortgages can be preceded only by them.

Another aspect, however, may be regarded as of still more direct interest to international private maritime law. This is the question of enforcement of foreign ship mortgages before French tribunals. Until recently, it may be noted, French courts were reluctant to admit the validity of foreign ship mortgages within French territory. It is believed that these tribunals did adopt the practice of rejecting any such requests for the recognition of foreign mortgages if the process of publicity in the case of foreign mortgages did not conform with the requirements of French law.[162] In other words, it may be seen that such a justification amounts to the application of the principle of public policy with regard to the foreclosure of foreign ship mortgages.

B. Germany.

A similar legal situation is enjoyed by ship mortgages in Germany. Ship mortgage legislation was enacted during almost the same period as French mortgages.[163] It may also be said that in the respect of both ranking and enforcement, the two legislations reflect the same kind of basic legal thinking. In the matter of the ranking, ship mortgages in German law are preceded by maritime liens on ship and freight, as enumerated in Article 776 of the Code of Commerce. Concerning the problem of the enforcement of foreign ship mortgages, there is no evidence in the available German material that these are accorded recognition and validity.

C. England.

An English ship mortgagee ranks after persons having either maritime or possessory liens, but before persons with only a right'in rem'. Because, in English law, the number of maritime liens is incomparably smaller than

in any other maritime system, the legal status of an English ship mortgage is more advantageous than it is in France or Germany. However, the problem of the enforcement of foreign mortgages does not differ substantially from the situation in previous systems. The Admiralty Courts Acts of 1840 and 1894 do not contain a clear statement in this matter. Then, an answer to this important question should be sought rather in the Admiralty cases.

Yet the Colorado, a relatively recent decision in this matter, cannot provide us with a clear answer.[164] In that case, a French ship was arrested in a proceeding 'in rem' in England in 1922, and sold. The proceeds from thissale were claimed by repairers claiming as necessaries men for repairs done to the ship and a Belgian bank under a French hypotheque. According to French law, a claimant for necessaries ranks before a mortgagee. The English Courts, however, applied the 'lex fori' to the priorities and declared the claim of the mortgagee (whose mortgage was made in France) preferred.

Meanwhile, the proceeds from the sale were distributed in such a way that the claims of the mortgagee were entirely disregarded. It is very probable that this fact originated two different interpretations of the Colorado decision. One of them held that "there is no reason to doubt that under the doctrine of Colorado a foreign mortgage could obtain original admiralty jurisdiction in rem".[165] The other opinion, and at the same time an official view of the Comité Maritime International, maintained that the enforcement of foreign ship mortgages in England was uncertain and unsatisfactory.[166]

D. United States.

Perhaps the best legal situation in all maritime systems is provided for ship mortgages under United States law. The Ship Mortgage Act of 1920 accorded to them the status of 'preferred ship mortgages'. However, the applicability of this Law was limited to national registered mortgages only. For this reason, the Act has been much criticized, as it has failed to provide protection for investors in foreign ship mortgages.[167] The case of Secundus which came before the Federal district court in 1927, occasioned a test for the applicability of this Act in respect to the enforcement of foreign ship mortgages.[168] In this case, a mortgage held by the French Government on a French vessel was involved. The French claim was rejected, and thus a precedent established that the Ship Mortgage Act of 1920 does not provide for foreclosure of foreign ship mortgages.

An important change occurred in 1954, when the Public Law 447 extended the Preferred Ship Mortgage foreclosure law of 1920, Subsection K, to ships of foreign registry. This law is effective immediately and applies to existing mortgages, as well as to those bearing date after June 29, 1954.[169] There is, however, one substantial difference between the enforcement of a U.S. ship mortgage and a foreign one. In the case of a foreign vessel, the "preferred mortgage lien" shall be subordinate to maritime liens for repairs, supplies, towage, or other necessaries performed or supplied in the United States, as well as to liens having priority over domestic ship mortgages. In the case of a mortgage on a United States vessel, its ranking may be considered much better, as it is preceded by a smaller number of liens.

Notwithstanding the distinction between domestic and foreign ship mortgages, the provisions of the Law of 1954 must be considered very advantageous, for it provides for legal measures enabling the extension of the Admiralty process to any mortgage of a foreign vessel. In this manner, it may contribute greatly to the international solution of the complex problem of recognition and enforcement of international ship mortgages.

3. Conflicts-Proposed Solution in the Convention 1926.

This short survey of provisions relating to ship mortgages, their ranking, and enforcement, leads us to the following conclusions:

1) At present, ship mortgage statutes are in force in all major maritime systems;
2) The ranking of ship mortgages in relation to maritime liens varies according to each legislation;
3) In the absence of an explicit stipulation in domestic statutes, individual national jurisdictions are reluctant to enforce foreign ship mortgages.

The Comité Maritime International (C.M.I.) at its earliest meeting attempted to find a satisfactory solution to the problem of ranking and enforcement of maritime mortgages. At the Conference held in Amsterdam (1904), a resolution was passed which recommended: a) restriction of the number of maritime liens to such an extent that the possibility of obtaining maritime credit in the form of a mortgage would not be impaired, and b) the granting of an international status of validity to national ship mortgages.[170] In the first draft convention presented to the Liver-

pool Conference in 1905, ship mortgages were accorded international recognition, and the rule of 'the law of the flag' was adopted as the law governing their international validity from the time of establishment to the time of their expiration.[171] Moreover, at the subsequent conferences of the C.M.I., this new status of maritime mortgage was never contested. This aspect might justly be considered as evidence that the international maritime community, at that time, had become mature enough to accept the 'rule of the law of the flag' as a way of solving conflicts over international ship mortgages.

This principle of 'the law of the flag' was incorporated, in its entirety, in the Brussels Convention 1926. By virtue of Article I of this Convention, a foreign ship mortgage acquires a legal effect towards all Contracting States, under the condition that the mortgage has been duly effected and "registered in a public register either at the port of vessel's registry or at the central office.." Hence, effectuation and registration in accordance with the law of the registry of the ship are the only obligations imposed upon the Contracting States, which, when fulfilled, render a mortgage valid in all Contracting States.

As far as the ranking of ship mortgages is concerned, the Convention provides that such ranking shall follow immediately after the five 'international' liens enumerated in article 2.

The text of the Convention does not provide for a uniform type of ship mortgage. In this respect, the character of the provision contained in Article I differs substantially from the provision in Article II relating to maritime liens. In the first case, it is the principle of rec-

ognition that prevails, and in the other, the principle of uniformity. Therefore, we may conclude that the provisions of the Brussels Convention, concerning the enforcement of foreign mortgages, do not present so great a difficulty as those concerning maritime liens. The only troublesome question with which individual maritime systems may be faced is that of priority of the mortgage lien when it is competing with other liens.

However, assertions of the principle of recognition of the validity of foreign ship mortgages, to which the law of the flag is applied as a rule of conflicts, may be considered as the paramount achievement of the Comité Maritime International.

C H A P T E R III

INTERNATIONAL DRAFT CONVENTIONS ON REAL RIGHTS IN AIRCRAFT

S E C T I O N I

Efforts of Citeja

1. Draft Convention on the Ownership of Aircraft and the Aeronautic Register.

As early as 1927, a study group under the chairmanship of a German, Professor Richter, prepared a report on the subject of real rights in aircraft. In 1931, at the plenary session of CITEJA held in Paris, two separate draft conventions were submitted for final discussion: 1) Draft Convention on the Ownership of Aircraft and the Aeronautic Register, and 2) Draft Convention on Mortgages, Other Real Securities, and Aerial Privileges. Both drafts, undoubtedly, constitute an entity, a complete set of rules intended to regulate the subject of real rights in aircraft. However, the draft on ownership should be discussed first, because it contains the type of stipulations that may be considered as introductory to the provisions which are contained in the second draft. Article I, para. I of this draft contains a basic stipulation which provides that: "The High Contracting Parties undertake to establish in their national laws that every aircraft registered according to the said laws shall be inscribed on a register for the publicity of rights by the competent authority of the said State".

Paragraph 2 of the same article, in addition, provides the type of register which Contracting States are supposed to introduce into their jurisdictions: "The said register may be the one in which the aircraft is registered on a distinct register. In the latter case agreement shall be established between the two registers".

A supplementary provision which determines further qualifications of the contemplated register is contained in Article 5 Para. 2 of this article stipulates that this register "must be public, and any person may demand certified true copies". Following the provision of Article 7, the register "must contain all data relative to the aircraft and especially, the number of the certificate of registration, the date of registration, the mark of nationality of registration, the type of craft, a brief description of the craft, the date and place of construction, serial number of construction, kind and power of the motors, name and domicile of the owner, name of the insured, and the other data prescribed in Article 9".

It is clear that the provisions cited above are intended to lay down a type of detailed stipulation concerning the data which are supposed to be inscribed in an aeronautic register of private rights.

Now the question should be asked, -What kind of legal effects, between the parties and toward third parties, are those stipulations intended to produce? A very clear answer to this question is given in Article 9.

1) All transfers of property 'inter vivos', assignments, sessions of real rights, and renunciations of the said rights, are valid with regard to third parties only through their inscription on the register and produce no effect until the date of said inscription.

2) Against the one who has acquired in good faith the ownership or a real right from the person inscribed on the register as holder of said rights no objection can be made on the grounds of the lack of right of

the person from whom his right is derived.

3) The Contracting States shall take the measures necessary in order to effect the inscriptions in case of transfer due to decease.

Consequently, the legal effects which the register of real rights is intended to produce between the parties and toward third parties are of very great extent, for any change in the ownership of the aircraft, or any transaction (transfers, assignments, cessions, renunciations) concerning real rights, acquires legal validity only if inscribed in this register and from the date of the said inscription. Besides, nobody can object to the regularity of the transaction if it is performed in such a manner that the good faith of the acquirer of the said real rights cannot be questioned.

Briefly, the register in question is presumed to create an absolute proof of title in aircraft, or of real rights therein, which cannot be opposed by third parties unless bad faith on the part of the purchaser is proven.

2, Draft Convention on Mortgages, Other Real Securities, and Aerial Privileges.

As the title of this draft indicates, two types of real rights are included in this project of the Convention; namely, liens and mortgages in aircraft.

A. Liens.

Article 7 provides for three kinds of liens:

1) "The airport fees or fees for any other public aerial navigation service arising out of the last voyage;

2) "Compensation due because of salvage or assistance;

3) "Expenses paid in case of repairs effected by the Commander by virtue of his legal powers, or upon his order in the course of a voyage for real needs, or conservation of the aircraft".

Paragraph 2 of the same article expressly stipulates that the ranking of these three liens with respect to one another "shall be determined in the above order", i.e., in the enumerative order already determined. In addition, it is stated that liens arising out of salvage and repairs, within their class, shall be paid preferably in the inverse order of the dates when they originated. Yet, in the case of a lien for airport and other fees, this rule cannot be applied.

Consequently, the lien attaches aerial property with its accessories, but "the right of preference does not include the insurance indemnity".[172] Furthermore it is stipulated that the right of preference "expires after a period of three months from the day when the operations which give rise to the privileged claim are completed. Considerations of interruption in the above period shall be determined by the law of the court taking cognizance".[173]

B. Mortgages.

Article I of this draft provides a very clear interpretation of the meaning of aerial mortgage. This meaning covers "a real security, whatever may be its name and origin, which is inscribed on the register for the publicity of rights, and which assigns the aircraft to the payment of the debt the amount of which is likewise inscribed thereon". The condition on which the acquisition of legal effects by an aerial mort-

gage depends is that it should be "regularly constituted and not extinguished, according to the law of the Contracting State on whose register the aircraft is inscribed".[174]

It follows from this provision that the domestic law of the Contracting State is the law which determines the regularity of the constitution of the aerial mortgage and the causes of its extinction. Its registration in the national aeronautic register, for which detailed stipulations were provided in the former draft convention, is necessary only in order that this mortgage may acquire an international status of validity. It may be noted in that connection that within such a broad meaning as that given to the term 'aerial ~~areial~~ mortgage', various peculiar national forms of real securities might be comprised.

As to the extent to which an aerial mortgage is supposed to attach to aircraft, Article 4 stipulates that it "shall include the insurance indemnity due in case of loss or damage to the aircraft", but "it shall not extend to the freight".

As far as the ranking of the mortgage is concerned, it may be noted however, that by virtue of Article 7, this charge is preceded by the three aerial privileges. The ranking of mortgages 'inter se', according to the stipulation of Article 5, "shall be determined by the inscription on the register".

In the problem of the ranking of aerial mortgages as contemplated in this CITEJA draft, it is worthwhile noting that Article 6 stipulates that it "shall take precedence over all claims, even those of the Fisc, which are not privileged by virtue of Article 7". Eventually, protocol

enabled the Signatory States to make reservations as to the intended establishment of a Fisc lien in their national legislations.[175]

3. Précis.

We may consider the attempts of the two CITEJA drafts from two angles:
1) We should take into consideration the extent to which the rules of the comparative law prevailing at that time were familiar with the matter of the aeronautic register and the problem of real rights in aircraft.
2) What legal character, from the point of view of conflicts, may be attributed to the rules suggested in these two drafts.

When, in 1931, these two drafts were presented to the plenary session of CITEJA for discussion, an aeronautic register for the purposes of publicity of real rights in aircraft was not in force in any legal system except that of France. In that country, the law of 1924 introduced the so-called 'registre d'immatriculation'. By virtue of Article 11 of this law, the act of registration of aircraft in this register creates an absolute proof of title to aerial property - "l'inscription vaut titre". Furthermore, Article 12 stipulates that any change in the title must be inscribed in the register in order that it may produce legal effects with regard to third parties. In the same manner, aerial mortgages (for which the law of 1924 provides), in order to acquire binding validity towards third parties, must be inscribed in the same register.[176] Consequently, a mortgage which is unregistered produces legal effects only between the two parties. Moreover, through registration, an aerial mortgage avails itself of the so-called 'droit de suite', which follows this real charge unconditionally. However, this right may be preceded by privileged cred-

itors for the special charges provided in the Civil Code.[177]

Henceforth, a certain analogy may be traced between the French law of 1924 and the CITEJA draft convention on the ownership of aircraft and the aeronautic register. The respective stipulations in both documents provide that the aeronautic register is presumed to create an unquestionable proof of title to property in aircraft.[178]

The intention of the second CITEJA draft regarding aerial mortgages, other securities and aerial privileges, is to render internationally valid an aerial mortgage which has been "regularly constituted and not extinguished".[179] However, this international validity can be acquired solely in cases where the mortgage is inscribed in the aeronautic register. Therefore, the establishment of an aeronautic register according to the laws of the Contracting States is a prerequisite of the second draft relating to mortgages and privileges.

In both stipulations concerning the establishment of an aeronautic register, and in those relating to the establishment of a valid aerial mortgage, the CITEJA drafts refer to the domestic laws of the Contracting States, i.e., to the law of registry of aircraft as to the law which governs the regularity of registration and the validity of the mortgage. Hence, the law of registry, which, in this case, may be considered equivalent to the 'law of the flag' in maritime law, was conceived in both CITEJA drafts as the rule of conflicts in respect to the registration and institution of a valid mortgage. However, the effects, which such national mortgages shall produce, are determined by the Convention.[180]

As far as the matter of aerial privileges is concerned, the rule of conflicts is not the law of Contracting States, but the stipulation

in Article 7 (mortgage draft) which provides for a unified international rule of a law-making character, determining the kind of privileges and their extinction.

These two drafts were carefully discussed by juridicial experts and studied also by the governments to which they were sent for appraisal after the Conference in 1931. However, no diplomatic conference was convened to give final consideration and the necessary approval before ratification to these drafts.

Obviously the criticisms which this subject-matter aroused were of such a nature that they impeded any further progress in this complicated matter of international importance. An especially strong attack on both drafts came from the German air law experts. The provisions concerning the establishment of an aeronautic register were especially singled out for attack.[181] These law experts did not favour the idea of the so-called immobilization of aircraft to what would amount, in practice, to the application of the draft convention on the aeronautic register.

The German delegation equally disliked the idea of a registered aerial mortgage, pointing out the fact that the object of contemplated security was still too mobile, and consequently not secure enough to be susceptible to aerial mortgages.[182]

It may be also added that international bodies of such repute and competency as the International Chamber of Commerce and IATA shared the opinion expressed by the German delegates.[183]

S E C T I O N II

Efforts of the Legal Committee of ICAO (Brussels Draft 1947)

1. Introductory Paragraph.

Before we enter upon this subject-matter, we shall attempt to point out some historical data which may be of some importance when we examine the Brussels draft.

The outbreak of World War II interrupted the efforts of CITEJA for several years. These efforts were resumed in 1946 at the sessions held in Paris and Cairo respectively. As we already know, CITEJA was officially dissolved at the Cairo meeting, and its archives were then handed over to the Legal Committee of ICAO.

In order to make the historical picture still more complete, another factor of importance may be mentioned. This was the promulgation in 1938 by the United States of the Civil Aeronautics Act, which provided for several types of real charges to be established on aircraft.[184] Thus, before World War II, another major legal system, that of the United States, enacted a law which provided for an aeronautic register and a distinct group of real rights in aircraft. Henceforth, the French law of 1924 ceased to be the only enactment covering this subject-matter within the body of rules of comparative law.

The attention of any examiner may be drawn by the change in the form. Instead of having two drafts as CITEJA had contemplated, the ICAO Legal Committee combined two drafts into one and also changed the title to: "The Convention on International Recognition of Rights in Aircraft".

This Brussels draft is the fruit of an extended meeting of the

Legal Committee of ICAO held in Brussels in September 1947, attended by 59 legal experts and observers from 29 nations and 7 international organizations. Building on the previous studies of the CITEJA and of the PICAO, the Brussels meeting produced a text which may be rightly characterized a model of skilful compromise and harmonizing of different ideas.[185]

2. "Rights Reciprocally Recognized".[186]

As stated above (Ch. III, Sec. I), the CITEJA draft concerning mortgages and privileges devised a type of rules for use in all states provided that a uniform effect were attributable to them in all jurisdictions. Article 2 of that draft explicitly stipulated:

> "Aerial mortgages regularly constituted and not extinguished, according to the law of Contracting State on whose register the aircraft is inscribed, shall produce the effects determined by the present Convention".

Uniformity is no longer the principle adopted by the authors of the Brussels draft. Reciprocity is the new dominating feature of the new draft convention on real rights in aircraft. Article I, para. I of this draft emphasizes this character of reciprocity when enumerating rights which should be recognized among the Contracting States:

> "(1) "Each Contracting State undertakes to recognize
>
> a) rights of property in aircraft,
>
> b) rights to acquire aircraft by purchase, coupled with possession of the aircraft,
>
> c) rights to possession of aircraft under leases of six months or more,

d) mortgages, hypotheques, and similar rights in aircraft which are contractually created as security for the payment of an indebtedness".

Further, the same article states two conditions upon the fulfilment of which the reciprocal recognition of these rights is to be granted:

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

It may be noted that the same conditions also were stipulated in the CITEJA draft. However, a substantial difference between both stipulations consists of the fact that the effect of the registration of rights in the Brussels draft is less extensive than that in the CITEJA draft. In the latter draft, the legal effects of the inscription into the register were conceived as creating an absolute proof of the existence of real rights toward third parties; whereas, the former one states that "the effects of the recording of such rights shall be determined according to the law of the Contracting State where they are recorded".[187]

Article I of the Brussels draft, when considered from the point of view of the legislative technique, seems to be a combination of the first articles in both of the CITEJA drafts. Above all, it is apparent in the case of the right of property. In the latter draft, this right was treated separately, as it had already appeared in the draft concerning ownership and register. In the Brussels draft, it has been included in the

general list of real rights and, consequently, enumerated in Article I, para. I.

From the point of view of merit, however, the Brussels draft seems to be more adequate in meeting the needs of the international legal community. There is no limit placed upon the nature or type of charges to which recognition may be given. Besides the right of property, three other classes of real rights have been admitted. The first two categories,/namely, (b)"Rights to acquire aircraft by purchase coupled with possession of the aircraft", and (c) "Rights to possession of aircraft under leases of six months or more"/, were included to cover the financial devices used and known in the U.S.A. as the "equipment trust" and the "conditional sale agreement".[188] Insertion of these two types of real rights into the Brussels, and subsequently into the Geneva draft, is an apparent acknowledgment of their usefulness when transactions in aircraft are involved.

The last type of real right contemplated by the Brussels draft is: "Mortgages, hypotheques, and other similar rights in aircraft which are contractually created as security for the payment of an indebtedness".[189] This formulation, meanwhile, approaches most closely the hitherto prevailing notions concerning the meaning of real rights. It is almost identical with the wording used in the CITEJA draft that: "by aerial mortgage is understood a real security, whatever may be its name and origin".[190]

3. Claims Having Priority.[191]

There are two causes, which, by virtue of Article 3, are considered as giving rise to aerial liens: a) "Compensation due for salvage of the air-

craft", and b) "Extraordinary expenses indispensable for the preservation of the aircraft".

In a way comparable to that of customary maritime practice, these aerial liens are not required to be recorded, but "without recording, follow the aircraft and take priority over all other claims".[192] Also in a way similar to the ranking of maritime liens, it is provided that these two claims "shall be satisfied in the inverse order of the dates of the incidents in connection with which they are incurred".[193]

The stipulation of Article 3, para. 3, which concerns the duration of these liens, provides, that they "shall be extinguished unless judicial action thereon is commenced within three months from the date of their arising". The period of expiry set up in this provision for aerial liens is considerable shorter than that which was envisaged in the Brussels maritime Convention of 1926, where a one-year limit was set up for the majority of maritime liens.

Registration or recordation (the term used in the Brussels draft) if effected within the three-months limit, establishes the fact that liens, upon the extinction of their privileged priority, may enter the class of rights mentioned in Article 1.[194] Moreover, recordation is deemed desirable, although not compulsory, as 'a notice to the world' of the existence of encumbrances on a given aircraft.[195]

Salvage and expenses for preservation are the only charges for which the Brussels draft provides a status of liens. Except for these two kinds, no other claims can be admitted or recognized by the Contracting States.[196]

4. Legal Extent of Rights in Aircraft.-Spare Parts.

After long deliberation, it was decided in Brussels that a real right may be extended on aircraft spare parts.[197] In the majority of legal systems it is an unusual form of pledge where accessories can become objects of a separate right.[198] Only in the United States is this type of pledge permitted. The Civil Aeronautics Act of 1938 stipulates that, for security purposes, an instrument of security may be executed, "which instrument need only describe generally by types..., and spare parts covered thereby and designate the location or locations thereof".[199]

According to Article 8, the conditions for recognition of real charges in spare parts are the following: 1) the law enabling the registration of such a right has to be in force in the country of registry of aircraft; 2) spare parts must be stored in a specified place or places; 3) public notice must be exhibited specifying items, type of right established, name and address of its holder, and where it is registered.

It may be noted, meanwhile, that the enumeration of items constituting 'spare parts', such as stipulated in Article 8, para. 4, is not very different from that provided in Article 14 for the aircraft itself. This may lead to some contradiction in the case of an interpretation involving the question which items should be understood as covered by the general right in aircraft on the one hand, and which are the 'spare parts' and the separate right on them on the other.

In summarizing, we may point out that the idea of a distinct real right in 'spare parts' as formulated in Article 8 of the Brussels draft

is a characteristic innovation in comparison with the CITEJA draft. Nevertheless, this idea, taken by itself, seems to be a logical answer to the economic needs which air transport is facing at the present time. An example may help to illustrate this factor: Before World War II, the cost of few aircraft was more than $50,000 or $60,000. This was the value of a DC-3 or a Dakota transport. The purchase of such a plane was not a great financial problem. Since the war, however, we see numerous large transport planes, the cost of which ranges from $700,000 to $1,000,000 and more. The 'spare parts' needed cost from 20% to 50% of the value of the aircraft.[200]

Hence, the problem of the financing of 'spare parts' of such value is urgent and of extreme economic importance. Simultaneously, this problem has become in Brussels a matter of international legal importance.

S E C T I O N III

Efforts of the Second Assembly of ICAO, June 19-25, 1948.

(Convention on International Recognition of Rights in Aircraft)

1. Introductory Paragraph.

The draft Convention on the International Recognition of Rights in Aircraft was finalized by the Legal Committee of ICAO during the meeting held in Brussels in September 1947. Soon afterwards, reports on this draft were circulated to all Contracting States and International Organizations such as: IATA, International Chamber of Commerce, International Law Association, and International Union of Aviation Insurers. The comments, which the States and Organizations were asked to forward, were received by the Legal Committee by the end of that year, and were again circulated to the same bodies.

Thanks to the splendid procedure of circulating comments, a valuable documentation was collected, and placed at the disposal of the Legal Commission of the Second Assembly.

The Second Assembly was a Diplomatic Conference, at which thirty-one Contracting States, three non-Contracting States and four International Organizations were represented. It convened not to draft a new text, but to introduce some amendments to the one already prepared, (if such were suggested by the aforesaid comments, agreed to by the Assembly in the majority vote), and as a final result, to give to the world the adopted Convention.

However, the framework which was set up in Brussels through amendments passed at Geneva received some substantial minor changes. Where no

substantial change was made, the Brussels text gained in clarity either through the new wording of the old stipulation, or by adding new supplementary ones.

2. Rights Reciprocally Recognized.

At the Geneva Conference, no one contested the four main types of real rights in aircraft on which agreement had been reached in Brussels. Therefore, these rights were inserted into the final text in the same order of enumeration as that which the Brussels draft had provided for them (rights of property, hire-purchase agreement, equipment trust, and mortgages). The two basic conditions of recognition (constitution of rights in accordance with the law of registry of aircraft, and registration of these rights) were not questioned either.

However, at the first meeting of the Second Assembly, a question was raised that the wording (such as used in Article I (1) in the Brussels text, concerning the law which is supposed to govern the constitution and recordation of rights) was confusing and therefore required clarification.[201] The respective provision read: "Each Contracting State undertakes to recognize"... (four rights enumerated)... "provided that such rights have been constituted and recorded in a public record, in conformity with the law of the Contracting State whose nationality the aircraft possesses". The interpretation which was agreed to in Brussels held that the Contracting States were obliged to recognize as rights those which were established on an aircraft as soon as it was ascertained that they arose from a particular national law.[202] Several Governments, in their replies to the circulars of the Legal Committee of ICAO, presen-

ted objections to this kind of interpretation.[203] To find a solution to this matter of substance, the following proposal was submitted at the fourth meeting of the Legal Commission of the Second Assembly: "What law should be taken into consideration to determine the regularity of the constitution and the recording of rights?"[204]

The vote which was subsequently taken established the fact that the regularity of the constitution of rights should be determined by the law of the registry of the aircraft at the time of the constitution of such rights. With respect to the second part of the proposal, the same vote decided that the law of the State in which the aircraft was registered at the time of recording, should be the law governing the regularity of recordation.[205] The result of these two votes were embodied in the Geneva text in Article I, para. I, subparagraphs (1) and (2) respectively.

Henceforth, only one interpretation would be admissible in this matter of importance; namely; 1) That with respect to the validity of the constitution of rights in aircraft, it is the law of the registry of aircraft as to nationality, even if the aircraft is transferred to another registry (under the conditions provided in this Convention), that is the competent law-hence, the law which governs a given real right throughout its whole legal existence. 2) That with respect to the validity of recordation of the rights in aircraft, the law of the actual registry as to nationality is the law which governs the validity of recordation.[206]

It is obvious that these two important rules of conflicts may

become fully applicable only in cases of transfer of aircraft to another nationality.

Yet the principle of integrity which seems to have been achieved in the two votes mentioned above was substantially changed in the subsequent course of the debates. The Delegations from Argentina, Brazil, and Portugal presented a proposal which, in substance, read as follows:

"Each Contracting State may, however, in the case where an aircraft acquires its nationality, refuse to record rights previously constituted which may be not admissible by its own law".[207] In consequence of the vote taken, this new concept was incorporated into the final text of Geneva, and was worded as follows:

"A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law".[208]

Considered from the point of view of integrity, the adoption of the above-mentioned proposal, which enables individual Contracting States to refuse admission to their national records of rights created under the law of previous (original in the sense of Article I (1) (i)) registry, constitutes undeniably a retrograde step.[209] On the other hand, since its adoption is limited only to cases of transfer, it has no influence upon the substantial concept of the Convention where recognition of rights is involved.[210] Evidently, acceptance of this amendment may be considered as an expression of 'sui generis' self-defense demonstrated by individual States in order to preserve the integrity of their legal systems.

3. Claims Having Priority (Liens).

Another substantial change to which the Brussels draft was subjected at Geneva related to the subject of 'claims having priority'; in other words, to aerial liens.

According to Article 3 (1) Brussels draft, two causes were stipulated as giving rise to aerial liens; namely, salvage assistance, and extraordinary expenses indispensable for the preservation of the aircraft.

At Geneva, it may be noted, it was not the question of these two causes which was subjected for amendment, but the construction of the introductory sentence in the above-mentioned Article 3 (1). This was: "The claims set forth below give rise to charges which, without recording, follow the aircraft and take priority over all other claims". It is this construction which was questioned. One substantial objection raised against it was that the wording used "was capable of giving an interpretation that salvage and extraordinary expenses would have changed into a charge against aircraft", even if such claims in national laws had not yet been turned into charges of the kind contemplated in Article 3 (1).[211] Consequently, it was pointed out that this would be contrary to the intention of the Convention which does not contemplate creating rights, "but it was the intention of the Convention to recognize rights which existed as a matter of law, or by act of the parties".[212] In the subsequent voting, the contentious subject-matter received a new wording which reads as follows:

"In the event that any claim in respect of: a) compensation due for

salvage of the aircraft, or b) extraordinary expenses indispensable for the preservation of the aircraft give rise, under the law of the Contracting State where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognized by Contracting States and shall take priority over all other rights in the aircraft".[213]

As for salvage, it had been agreed that it should include salvage both at sea and on land as well.[214]

There was no disagreement about the remaining stipulations in the Brussels draft concerning "claims having priority". So, in the final Geneva draft the same requirements appeared as were provided in the Brussels draft with regard to the three-month expiry term for claims.[215] Likewise, requirements were repeated with respect to recordation exercised for the purpose of preserving the character of a recorded right if the three-month expiry term elapsed, and with respect to recordation for purposes of serving as "a notice to the world".

Briefly, what was achieved at Geneva can be summarized as follows:

1) Claims for salvage and preservation shall acquire status of privileged priority before the four types of priority rights, if the law of the Contracting State in which the services were terminated admits such claims as privileged.

2) The rule of conflicts which was adopted in these cases is not the law of registry as to nationality, but the law of the Contracting State in which services of salvage and preservation were terminated.

4. Fiscal Claims.

In connection with the discussion about priority claims, if the law of a Contracting State so provides, another kind of claim is proposed to be added to the article treating with such priority claims. The Delegations of Brazil, Italy, Peru, and Portugal presented a joint proposal,[217] ... according to which a State of the forum "may accord to claims for taxes, due to that State by reason of operation of the aircraft belonging to the enterprise concerned, a priority which takes priority over all other claims in the execution proceedings". Further, the proposal specifies that the taxes for the last two years shall constitute a legitimate basis for creation of priority claims. Regarding the limit to be placed on the extent of such a claim, it was stated that the claim "shall not absorb more than 20% of the price obtained in the sale of an aircraft by judicial authority".[218]

If the forum of execution proceedings is not the State which raises the treasury claim, the Latin bloc proposal suggested that the claim "shall not be taken into account in the execution proceedings unless they have been recorded in accordance with Articles I and II (Brussels draft; in Geneva the respective provisions were distributed in Articles I, II and III). In that case, those claims shall receive the priority due to them by reason of their recording in a public record, in accordance with the provisions of Article I. This proposal fired one of the most legally animated discussions that had ever happened at this conference.

The subject obviously touched upon one of the fundamental principles of international private law (conflicts law). The proposal was

endorsed during the discussion by several Delegates of other Latin-American countries.[219] The Delegates of Argentina[220] and of Ireland[221] presented amendments aimed at the institution of Treasury claims without restrictions, such as two-year taxes which shall constitute the claim and a 20% limit of the sale price deductible to fulfil the claim. It is established practice in sovereign courts, irrespective of legal systems, not to enforce foreign revenue laws.[222]

Revenue laws (or fiscal legislation) belong to the public domain of national laws and, as such, are incapable of being dealth with in a private law convention. Against this proposal, an argument was raised that the matter had been properly settled at the Chicago Convention (Art. 5) dealing with non-scheduled operations and in bilateral agreements, which in virtue of Art. 6 of this Convention have to be concluded, and in which payment of taxes is usually provided for.[223] Besides these legal considerations, emphasis was placed on the economic aspect of the purpose of the debated convention,[224] and the detrimental consequences on the chances of getting credit in cases where the proposal is accepted. The supporters of the institution of fiscal claims maintained that "if the State of the executing tribunal did not wish to apply the foreign fiscal laws, it could agree to accept the recording and not apply the foreign laws",[225] for which there was a stipulation in the third paragraph of the joint Latin bloc proposal.[226]

Recordings, according to this reasoning, were conceived as a means by which public law claims could be transformed into private law claims and thus could become executable in a foreign court. It is rather doubt-

ful whether a simple recording is able to change the public character of a claim into a private law charge. Even the argument of Prof. Cunha that "several States, as regards affairs of property, etc., brought suits and were considered as private persons "indirectly indicates this necessary condition of private activity on the part of a State which permits the State to appear before a civil court as a private party.[227]

When the joint proposal of Brazil, Portugal, Italy, and Peru was put to the test of a vote, the result showed the majority of delegates did not agree with the conception of the transformation of claims emanating from a sovereign prerogative of a State, embodied in its public law rules; it proved that the basic principle of the rules of conflict is opposed to such a transformation.[228]

On the basis of the Latin bloc's proposal lies their own reason which should not be underestimated. This reason has been clearly stated in the following words of Prof. Cunha. "It was not a Brazilian or Portuguese proposal to have the fiscal privileges. It was a principle of internal law and of fundamental internal policy. It was a question of prestige, aside from economic aspects for a State to have the fiscal privilege".[229]

To support the exactness of this statement with facts, the Italian Delegate declared that in his country "a new code of navigation had entered into force in 1942, according to which there was specifically reserved a special privilege for taxes relating to the practice of aerial navigation".[230]

Delegates of Mexico, Cuba, and Venezuela[231] made reference to the

formal provisions in their respective legislations which necessitated the inclusion of fiscal claims. On the List of Signatories to the Convention [232], Argentina placed beside her signature a reservation granting to her own fiscal claims a status of priority; Chile did the same, adding to the claims of the Treasury wage claims and supply liens.[233]

These reservations were repeated in the ratification documents deposited later by the governments of Mexico and Chile.

The U.S. State Department immediately declared that these reservations were not acceptable. Whatever concerns the international legal validity of ratifications with attached reservations will be treated with in the next chapter.[234]

In connection with this problem, it is worthwhile remembering that both the CITEJA Draft on Mortgages and Liens of 1931, and the Brussels Convention on Maritime Mortgages and Liens of 1926, do not contain in their principal texts a lien for Treasury claims. However, a protocol was attached to the Brussels Convention of 1926 to the effect that each Contracting State would have the right "to establish among the claims mentioned in paragraph (1) of Article 2 a definite order of priority, with a view to safeguarding the interests of the Treasury".[235]

The CITEJA Draft, which was never signed by a diplomatic conference, had a clause providing that at the signing of the Convention "it shall appertain to the Governments to safeguard the eventual interest of the Treasury, whether by increasing, at the conference, the list of Article 7 (enumerating liens), or by including into the protocol the right to accord priority to certain fiscal charges."[236]

5. Précis.

The Legal Commission of the Second Assembly of ICAO completed its work on June 18, 1948, at which time it presented the final draft to the Second Assembly for approval. In the subsequent vote, in which thirty-two delegations participated, the Draft Convention on the International Recognition of Rights in Aircraft was unanimously approved. Thus, for the first time in history, a convention on real rights in aircraft came into legal being. Seventeen years elapsed between that historic date of June 18, 1948, and the plenary session of CITEJA in 1931 when the idea of real rights in aircraft was, for the first time, presented in draft form, but not approved by a diplomatic conference. Within this period of time, the basic approach towards the problem of real rights in aircraft passed through a considerable evolution. Below, we shall attempt to stress along broad lines the substantial features of this evolution with regard to three distinct types of real rights: title, liens, mortgages and other securities. For this purpose, it will be assumed that the principle advanced at Brussels, and subsequently adopted at Geneva, represents an identical approach, notwithstanding minor changes of substance as related above.[237]

A. Title.

Unlike the CITEJA Draft Convention on the Ownership of Aircraft and the Aeronautic Register, the Geneva Convention does not contain enough exhaustive and explicit stipulations which can create presumption of absolute validity of the title in aircraft. The respective provisions in the CITEJA draft convention states that: "Against the one who has acquired in good

faith the ownership or a real right from the person inscribed on the register as holder of said right, no objection can be made on the grounds of the lack of right of the person from whom his right is derived".[238]

In the Geneva text, meanwhile, the right of ownership had been placed on an equal level with other real rights and securities as enumerated in Article I. Consequently, all subsequent stipulations in that article concerning the validity of the constitution of real rights must refer to the right of property as well.

Hence, the owner of an aircraft, in the case of an enforcement procedure at home or abroad, or even in the case of a transfer, was under the duty of showing that his right of property had "been 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".[239]

In summary, it may be said that the respective provisions of the CITEJA draft convention regarding the ownership of the aircraft are of superior rank as they make the recorded title unimpeachable.

B. Claims Having Priority-Liens.

The legal criterion which was the basis of procedure in both the CITEJA and Geneva drafts is diametrically different. In the former case, the basis is the principle of unification, for Article 7 (CITEJA mortgage draft) expressly stipulates: "The following shall be paid with preference over aerial mortgage claims: a) Aircraft fees...; b) Compensation ....; c) Expenses paid in case of repairs..." In the latter case there is no obligation imposed upon the Contracting States to give effect to provisions which do not correspond with their domestic laws. Consequently, Article

4 (1) of the Geneva text provides for the recognition of two types of privileged claims if "the law of the Contracting State where the operations of salvage or preservation were terminated" gives rise to such claims.

Briefly, the Geneva provision concerning aerial privileges does not attempt to interfere with the domestic laws of the Contracting States. It adopted in that respect the principle of recognition, which, therefore, appears to be a superior method of approaching this subject-matter at the international level.

C. Mortgages and Other Securities.

The authors of the Brussels draft and of the final Geneva text adopted a broader platform for the choice of real securities which may be established on an aircraft. There are three main groups enumerated in Article I of the Geneva text.

The CITEJA draft on aerial mortgages had provided only one type of security, namely an aerial mortgage, "whatever may be its name and origin".[240] In providing for a larger choice of forms of real securities, the Geneva text seems to be more practical and up-to-date as far as the possible forms for financing larger fleets of aircraft in various countries are concerned.

There is still another substantial difference between these two approaches toward security in aircraft. This difference purports to the kind of legal effects that each of the documents (CITEJA and Geneva) intends to attribute to the notion of real security. According to the CITEJA draft, "aerial mortgages regularly constituted and not exting-

uished, according to the law of the Contracting State on whose register the aircraft is inscribed, shall produce the effects determined by the present Convention".[241] It clearly follows from this stipulation that the authors of this draft were desirous of attributing uniform effect to aerial mortgages. In contrast, the Geneva text laid down another principle; namely, the principle of recognition of legal effects of established real securities to the extent provided for them by the law of the country of their constitution.[242]

In conclusion, it may be stated that CITEJA followed the principle of unification providing for ownership and aerial privileges, and of uniformity as far as mortgages were concerned.

The Legal Committee of ICAO and the Second Assembly adopted an opposite principle; namely, that of recognition of real rights created and having effect according to the law of registry. This appears to be a more adequate solution to the problem of the conflicting legal systems so far as real rights in aircraft are concerned.[243]

C H A P T E R IV

BRUSSELS CONVENTION 1926, AND GENEVA CONVENTION 1948

S E C T I O N I

Approach to Real Rights -Adopted as Solution to Conflicts

1. Introductory Paragraph.

The fact that both documents (the Brussels Convention on Liens and Mortgages of 1926, and the Geneva Convention on International Recognition of Rights in Aircraft signed in 1948) deal with the same subject-matter makes possible an attempt to stress either the analogies or the differences between them. Generally, this common subject-matter may be looked upon as referring to real rights in vessels and aircraft.

These two means of transportation have many features in common. By nature they are movables. As such they can be moved from one place to another, from country to country, from one system of law to another. Basically, being movables, they should depend upon the law of whatever place in which they are situated, for such is the unquestionable rule of conflicts as stated by Story that "a nation whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there".[244]

However, age-old tradition with respect to vessels, and fifty years of international customs regarding aircraft, show that both vessels and aircraft are not ordinary chattels, but 'sui generis' chattels. This exceptional status of these means of transportation within the general class of movables is due to their quality of nationality. In the case of vessels, this quality is displayed by means of a flag. Besides, a vessel, in addition to its flag, "must carry papers which provide a more efficient means of testing a ship's nationality".[245]

For similar purposes Article 20 of the Chicago Convention requires a display of signs in the case of aircraft.[246] As a general rule, it may be stated that in both cases "the possession of a nationality is the basis for the intervention and protection by a state".[247] This is a quality which distinguishes vessels and aircraft from other movables. These chattels are the only ones to which public international law has accorded the attribute of quasi-personality.[248]

Yet this analogy taken from international public law cannot be extended to the private law rules. In this field, vessels may be said to be the only movables which also possess the characteristics of quasi-personality, or may be regarded as quasi-subjects in private law.[249] The criterion which enables us to test such capacity, the quality of private responsibility, is that the vessel may be held responsible for such maritime occurrences as collision or salvage, in which the fault of the shipowner does not have to be established. It is worth noting that all maritime systems, except the French one before the passing of the law of 1949, are familiar with these two causes of maritime liens, which, at the same time, provide a test of private quasi-personality of vessels.[250]

As to aircraft, their legal status in the majority of legal systems related above (Ch. I, Sec. III) is not distinct from the one that other chattels enjoy. Claims against them may arise, they may be sued, and claims may be enforced not in a special procedure, but under circumstances and in accordance with the rules provided for in the common (or civil law).

Meanwhile, another aspect common to these two types of international

transportation, should not be omitted. This is the problem of financing, the so-called credit. It is not legal in the first instance, but it becomes legal at a later stage. As has been stated before, requirements of modern shipbuilding in the Nineteenth Century were the main stimulus to the national maritime systems for the enactment of ship mortgage statutes.[251] Still greater requirements, insofar as finances are concerned, are at present facing air transport companies. It is to be hoped that the eventual solution to these financial needs may be legislative enactments covering securities in aircraft.

It should be borne in mind that both means of transportation (ship and plane) are international in the full sense. Hence, eventual securities raised on them require not only the protection of national laws, but also, to some extent, protection from foreign legislative systems. Having in mind that the diversity of national legal systems steadily continues toward "proliferation", protection of the interests of creditors, if not arranged by means of an international agreement, would be seriously jeopardized.[252]

In the following discussion, an attempt will be made to stress achievements in the matter of real rights in vessels and aircraft as they could be obtained in Brussels and Geneva.

2. Title.

A. Brussels Convention.

As already indicated (Ch. II, Sec. I), this Convention does not contain any stipulation relating to right of property in a vessel, nor any require-

ment concerning registration of title to this property. Only indirectly could it be deduced that the Convention recognizes as a matter of fact the present rules concerning registration of ships as to their title. Such a deduction may follow from the provision contained in Article I, which imposes upon the Contracting States a duty to provide for "duly registered mortgages". Such a deduction becomes apparent, since the register of ships as to the title of property in them, serves simultaneously as a register for ship mortgages. Hence, the most apparent explanation of this omission in providing a direct stipulation for the title in maritime property is the fact that the registration of ships as an evidence establishing an unquestionable title has been well rooted for long time in all maritime systems. It has become a well established custom within international maritime communities that vessels (those exceptional movables), by virtue of national statutes, are everywhere subjected to the obligation of registration for private law matters, which means that titles to maritime property are recognized everywhere as impeachable.

B. Geneva Convention.

Authors of the Geneva Convention offer another opinion in what concerns the matter of right of property in aircraft. This right has been stipulated in Article I, and ranks there as a principal real right. R.O. Wilberforce, an eminent private air-law expert, considers this inclusion "anomalous", since the right of property is sufficiently safeguarded in international law.[253] In the opinion of that author, some usefulness for this inclusion cannot be denied, since this may appear a very useful

stipulation in the case of transfer of aircraft to another registry.[254] Moreover, it may be equally useful in the case of sales in execution. For the latter type, the respective Article 7, para. 4, provides that a sale in execution cannot "be effected unless all rights having priority of the claim of the executing creditor are covered by the proceeds of sale or assumed by the purchaser".

Regarded then from the point of view of these additional safeguards which the right of property was accorded in the Geneva Convention, we believe that in this respect the construction of the Geneva Convention is superior to that evidenced in the Brussels Convention.[255]

The problem of the formal evidence of right of property was equally provided for in the Geneva text. This right must be recorded in a public record, and only then acquires the quality of priority and may be granted recognition by other Contracting States. However, the recordation of the right of property in aircraft does not create an absolute proof of the title to property on behalf of the owner, as is the case in the national maritime registers. The covering stipulation in this matter states:

"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".[256]

Some deficiencies of this construction and the desirability of replacing it by one which would produce 'absolute effects toward third parties' have been stated in the previous Chapter.[257]

3. Liens.

A. Brussels Convention.

The problem of maritime liens (their number, ranking, and extinction) was the most complex task the Comité Maritime International had to countenance in its efforts to elaborate a convention acceptable to possibly all maritime systems. The Brussels Convention which was the fruit of these efforts offered unification of maritime liens as a 'pattern' solution to this complex problem.

It was provided in Article 2 that the number of liens should be five, and their ranking should conform with the order of their enumeration. These liens are sometimes called 'international' liens,[258] which is what distinguishes them from the category of 'national' liens, also contemplated by the Convention. However, the ranking of this latter class is preceded by 'international' liens and registered mortgages.

The adoption of the principle of 'unification', as far as maritime liens are concerned, differs strikingly from the principle of recognition which prevails with regard to maritime mortgages. It is believed that Delegates to the Brussels Conference were motivated principally by the idea of improving the situation of ship mortgages with regard to liens, and therefore "aimed at a standard list of liens and priorities among nations, to the end that interests in vessels might be predictable and the ship mortgage an effective form of security".[259]

B. Geneva Convention.

As has already been stated (Ch. III, Sec. III), Article 4 of the Geneva Convention provides for the recognition of two liens in aircraft (salvage

and indispensable repairs) on the condition that these claims be considered as privileged by the law of the Contracting State in which the operations giving rise to them are terminated. It may be recalled in this connection that this formulation of the problem of liens in aircraft is the result of long discussions held at meetings of the Second Assembly. Opinion prevailing at that time concerning the validity and recognition of these two liens can be summarized as follows: "For example, no nation has as yet adhered to the Brussels Convention on Salvage of Aircraft by Aircraft at Sea, and it cannot be stated positively that the law of all jurisdictions would recognize salvage rights in aircraft. Similarly in the case of extraordinary expenses indispensable for the preservation of the aircraft..."[260] Moreover, to this should be added that the Brussels Convention on Salvage of Aircraft by Aircraft of 1938 omits any claim for liens against the aircraft.[261] In the same manner, the draft Convention "for the Unification of Certain Rules Relating to Aerial Collisions" now pending before the Legal Committee of ICAO provides for the payment of an indemnity by the operator of an aircraft responsible in the case of collision between aircraft.[262] This draft convention agrees with the Convention on the Salvage of the aircraft in that it does not contemplate the creation of a lien against aircraft for services rendered. These two facts certainly may be held for adequate evidence that no such liens now exist in international private air law.[263]

The foregoing assertion of the lack of evidence of the existence of liens which could attach aerial property in the same way as they do

maritime property is of extreme importance. First, it is the most pronounced characteristic which distinguishes the two movables: vessel and aircraft. Second, it greatly improves the security value of other real rights which may be established on aircraft.

4. Mortgages and Other Securities.

A. Brussels Convention.

As stated above (Ch.II, Sec. III), Article I of the Brussels Convention stipulates the recognition of ship mortgages established on ships belonging to other Contracting States. The only condition under which such recognition could be granted is that hypothecation or other similar security in a vessel be duly effected and registered "in a public register either at the port of vessel's registry or at the central office".[264] Consequently, ship mortgages of the Contracting States shall be granted recognition, hence enforcement (in case the mortgagor is in default in payment of his obligation) before the courts of the other Contracting State, if the mortgagee satisfactorily proves that his claim is based on a deed of mortgage which was performed and registered according to the law of the country of registry of the ship.

The adoption of the principle of recognition with respect to maritime mortgages (and consequently the acceptance of the 'law of the flag' as the rule of conflicts with regard to these mortgages) is an advantageous feature of that Convention. It may be noted, however, that this principle of recognition and the rule of the 'law of the flag' as conceived in this Convention are closely connected with the other principle,

i.e., of 'unification' concerning maritime liens. Article 3 of the Convention expressly stipulates that the ranking of ship mortgages has to be preceded by five 'international liens' enumerated in Article 2,[265] irrespective of the date at which these liens may attach the vessel.

It appears that through the connection of the mortgage stipulation provided in Article 3, the principle of the recognition so solemnly proclaimed in Article I was considerably weakened.

B. Geneva Convention.

In comparing the stipulations of the Geneva Convention, covering mortgages and other similar securities, with those contained in the Brussels Convention, attention has to be drawn to the fact that the Geneva Convention provides for a greater number of forms of real securities. Article I of the Geneva Convention, besides the standard form of real security (mortgages, hypothecs and similar rights), which is the only form used in the Brussels Convention, envisages also such other types as:

1) "rights to acquire aircraft by purchase, coupled with possession of the aircraft"; (Art. I (1) (b), and
2) "rights to possession of aircraft under leases of six months or more"; (Art. I (1) (c).

These two additional types of real rights as they are at present in the U.S.A. may, in the future, serve as two useful forms of security in aircraft in other countries as well.

Other stipulations concerning the validity and conditions of recognition are, at first sight, similar. In both cases, the creation of real rights has to be proceeded with according to the law of the country of

registry. However, a more elaborate character may be attributed to the stipulation contained in this respect to the Geneva Convention. As related above, (Ch. III, Sec.III), the Geneva text made a distinction between the law of constitution of the right and the law of the recordation.[266] It was understood in Geneva that the law of the real right would not change throughout the whole legal existence of the charge;[267] whereas the law of the recordation may change as often as the aircraft is transferred. In view of this distinction, it becomes clear that in the case of the transfer of aircraft to another nationality, real rights contemplated in the Geneva Convention continue to be effective according to the law of substance of the country of their original constitution. There should be no doubt that such a provision cannot but provide for the maximum legal security as far as prospective investors in aircraft are concerned. Furthermore, this aspect of security was emphasized by the inclusion of the provision concerning the transfer of aircraft to another nationality. This provision states that "unless all holders of recorded rights have been satisfied or consent to the transfer", the said transfer cannot be put into effect.[268]

The Brussels Convention, meanwhile, does not contain any such provision, either of the kind of distinction between the 'law of the constitution' and the 'law of recordation' related above, or any stipulation referring to the protection of ship mortgages in the case of the transfer of the vessel to a foreign registry.

Therefore, it appears that the Geneva Convention is construed on a broader basis than that adopted in the Brussels Convention. This

superiority may be said to purport to the following aspects:

1) The Geneva Convention envisages greater choice of forms of real securities:
2) Provides more effective safeguards for holders of securities in the case of the transfer of aircraft to another nationality;
3) Because of the absence of 'international' liens in aircraft, the value of eventual securities in aircraft is therefore considerably increased.

S E C T I O N II

Ratifications

1. Brussels Convention.

According to the data which were made available at the Conference of the Comité Maritime International, held in Amsterdam in 1949, the following countries ratified the Brussels Convention on Liens and Mortgages signed in 1926:[269]

1) Belgium (1930)
2) Denmark "
3) Spain "
4) Esthonia "
5) Hungary "
6) Brazil (1931)
7) Portugal "
8) Monaco "
9) Norway (1933)
10) Finland (1934)
11) France (1935)
12) Poland (1936)
13) Romania (1937)
14) Sweden (1938)

To this number of ratifications should also be added countries which adopted the Convention approved by the Brussels Conference in 1924.[270] The substantial principle of that Convention is the same as that adopted in 1926, with this exception: that liens for necessaries

and disbursements were accorded the second class of ranking. This Convention was accepted by:

15) The Netherlands

16) Greece

17) Morocco

In addition, two countries not adhering to the Convention adopted its principles in their maritime legislations.[271] These were:

18) Italy

19) Lebanon

2. Geneva Convention.

The list of signatories to this Convention, as of November 15, 1948, comprised twenty States.[272]

Two States out of this number placed reservations beside their signatures. These were: Argentina, which presented a reservation claiming priority for its fiscal taxes; and Chile, on the same basis of fiscal claims, and additionally for claims arising out of other charges connected with the service of aircraft, and "the claims for salaries and wages of the crew during the period prescribed by the national law".[273]

The list of ratifications, meanwhile, is much smaller than that of the signatories. The first signatory state to ratify the Convention without any reservations was the United States of America. The Congress approved the Convention on August 30, 1950. Next followed the ratification deposited by Mexico, April 5, 1950. However, the Mexican ratification was accompanied by a reservation claiming "the priorities granted by Mexican laws to fiscal claims and claims arising out of work contracts

over any other claims".[274]

Pursuant to Article XX, the Convention should have entered into force between the United States of America and Mexico July 4, 1950. It did not because of the objection made by the United States stating that the United States could not regard Mexico as a party to the Convention.[275]

Subsequent ratifications of the Convention came from the Governments of Chile on November 20, 1951, accompanied by the same kind of reservation which was deposited at the signing. On March 19, 1952, the Secretary General of ICAO communicated the Chilean reservation to each signatory State "with the request that it express, if it deemed appropriate, its attitude towards the reservation, not later than July 1, 1952".[276]

The Government of the United States of America, even before the request was dispatched, notified ICAO of its objection to the Chilean reservation and its ipso facto decision not to "regard this Convention as having entered into force between the United States of America and Chile on the ninetieth day after deposit of the Instrument of Ratification by the Government of Chile".

Commenting on the reason for this objection, the Representative of the United States of America to ICAO pointed out that the reservation attached by Chile to its ratification was in the nature of an amendment which would, "to a considerable degree, vitiate the protection offered by the Convention to persons having property rights in aircraft".[277]

The Convention was ratified, without reservation by the Government of Brazil (July 3, 1953), and Pakistan (June 19, 1953). Pursuant to Article XX of the Convention, these ratifications took effect on the nine-

tieth day after their deposit (October 1, and September 17, 1953, respectively).[278]

The last ratification was deposited by Norway on March 5, 1954, and the Convention entered into force for that State June 4, 1954.[279]

It may be noted that these last three ratifications: Brazil, Pakistan, and Norway did not contain any objection to the Mexican and Chilean reservations.

S E C T I O N III

Reservations to the Geneva Convention

1. General Reasons for a New International Approach to Reservations.

The steadily growing activity in international intercourse and the variety of mutual relations among States (connected with it) are the main causes for the continually growing number of international treaties and conventions in which these relations are expressed.

Through the creation of the League of Nations in the Treaty of Versailles of 1919, the role and principles of which are being continued after World War II by the United Nations Organization, the treaty-making power of individual states has derived a new stimulus from these international organizations. Under such auspices, many multilateral conventions have been concluded. Both Article 18 of the Covenant and Article 102 of the Charter of the United States provide for the registration of every treaty or international agreement.

The fact that up to July of 1944 a total of 4822 'treaties or international engagements' was registered under this article, and that 204 volumes containing treaties and agreements thus registered were published, indicates the scope and importance of its provisions.[280]

Volumes of the United Nations 'Treaty Series' are also systematically growing. In both cases, it is 'prima facie' evidence of the intensity of the mutual legal relations between states.

Simultaneously with the growth of the number of the multilateral treaties has grown the number of reservations which the individual States,

for their own reasons, have attached to the ratified, or adhered-to conventions. Application of old rules regarding the interpretation of reservations to this new situation - namely, that they must be unanimously accepted or tacitly consented to by the remaining states - would, in the final analysis, discourage not only the ratifications but the signing of multilateral treaties.[281]

2. Advisory Opinion of the International Court of Justice 1951.

The problem of reservations became a very acute one when multiple reservations were presented to the Convention (adopted in 1948) on the Prevention and Punishment of the Crime of Genocide.[282] In order to solve this problem, the general Assembly of the United Nations in November 1950 adopted a resolution requesting the International Court of Justice to render an advisory opinion on the matter of the principle to be applied to these reservations. The basic subject-matter contained in this resolution was formulated as follows:

1) "Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention, but not by others?
2) If the answer to question (1) is in the affirmative, what is the effect of the reservation as between the reserving State and (a) the parties which object to the reservation and (b) those which accept it?"[283]

According to traditional concepts, there would be no place for

question (1) because "a State may sign, through its plenipotentiaries, with the consent of other signatories, the text of the treaty with certain reservations".[284]

However, the International Court of Justice, in its decision of May 28, 1951, voted in the affirmative; namely, that the reserving State whose reservation has not been objected to by all the partied to the Convention, can be considered a party to the Convention "if the reservation is compatible with the object and purpose of the Convention".[285]

The considerations which led the majority of the international judges to the decision reversing the old traditional concept of the validity of reservations, and the legal status of a reserving State, are of great importance. It established therein that there is no rule of international law with regard to "the absolute integrity of a convention", and that "the considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one that such a rule exists".[286]

A new factor has been adduced to replace the old concept; namely, the criterion of "compatibility of a reservation with the object and purpose of the convention" which shall be used to help find a basis in making a reservation, or the making of an objection to it as well.[287]

The answer to question (2) stresses the importance of this new principle of 'compatibility'. This answer states "that if a party to the convention objects to a reservation which it considers incompatible with the object and purpose of the Convention, it can, in fact, consider that the reserving State is not a party to the Convention". Further, the same

answer points out "that if a party accepts the reservations as being compatible with the object and purpose of the Convention, it can, in fact, consider that the reserving State is a party to the Convention."[288]

Although this opinion was rendered in connection with the interpretation of reservations to the Convention on Genocide, the findings which the voting majority of judges used as 'ratio decidendi' in delivering this opinion cannot be underestimated. They refer to the new situation in which multilateral conventions are the most typical form of international agreements. These agreements usually came into being as a result of long discussions in which the decisive procedure to establish the final contents of the convention was the vote expressed by the majority. Therefore, "the majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain states to make reservations".[289]

It may be noted that the numerous reservations in recent years to multilateral conventions give proof of this phenomenon. Furthermore, it was underlined that, because of this new process in concluding multilateral conventions, "none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose or 'raison d'être' of the convention".[290]

This Advisory Opinion, when applied in practice, would create a situation in which "the treaty enters into force only between the State making the reservation and the States consenting to it".[291] Hence, following this new precept, it is possible that within the membership to a convention there might be states considered by some as members, and by

others as non-members. For many reasons, such a situation seems to be less disadvantageous in the case of private law conventions.[292] Since they are more appropriate to such groupings of States which very often may be dictated either by reasons of mutual economic interests, or regional legal similarities. In other words, these mutual economic interests, or regional legal similarities should ascertain the application and appraisal of the principle of 'compatibility' either of reservations or objections to them.

3. Legal Status of the Reserving and Objecting States to the Geneva Convention.

The Geneva Convention on the Recognition of Rights in Aircraft (1948) was not provided with any article relating to the prohibition of making reservations, nor with any article allowing them. The Convention is silent about the reservations and their eventual legal effect. It is an example of a convention which was worded according to the old traditional concept and technical schema. This is a Convention which was concluded before the Advisory Opinion of 1951, and consequently occurred before the passing of Resolution 598 (VI) of the United Nations Assembly, establishing types of clauses to be inserted in future multilateral conventions.[293]

At the same time, the Geneva Convention, being a multilateral convention with the purpose of introducing at the international level a new behaviour in respect to private rights in aircraft, is especially susceptible to being applied with new rules respecting the interpretation of reservations; namely, those established by the Advisory Opinion.

The practice hitherto adopted by the Secretary General of the Inter-

national Civil Aviation Organization with regard to the Mexican and Chilean reservations, (which were communicated to each signatory and contracting state with the request to express "its attitude towards the reservation"), proves, somehow, that the modern approach to reservations was adopted. This indicates also that the criterion proposed in the considerations of the International Court of Justice was followed by ICAO, and possibly concluded as permitting the admissibility of reservations. The above-mentioned criterion exhaustively states the aspects to be considered: "the character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect".[294]

It would appear that in the light of this modern trend regarding reservations the objection of the United States of America to the Mexican and Chilean reservations is completely consistent with the answer of the Advisory Opinion to question (2a) which states:

> "That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the convention, it can in fact consider that the reserving state is not a party to the convention".

In view of the same opinion, the absence of objections to the above-mentioned reservations on the part of the three remaining parties to the Convention implies the conclusion that these parties accepted the reservations "as being compatible with the object and purpose of the Conven-

tion", and hence "in fact consider that the reserving state is a party to the Convention".[295]

Thus, Mexico and Chile, whose reservations were objected to only by the United States of America, are not parties to the Convention towards the United States of America which held their reservations 'incompatible' with the object and purpose of the Convention, but have to be regarded as parties towards Brazil, Pakistan, and Norway, which, by not raising objections to these reservations, 'ipso facto' recognized them as 'compatible' with the object and purpose of the Convention.

In this manner, the impact of the Advisory Opinion may be of far-reaching extent upon the problem of the applicability of the Geneva Convention on the International Recognition of Rights in Aircraft.

Thanks to this Opinion, a solution may be found to the problem of fiscal claims which were raised in Geneva by the Latin group of delegates.[296] These Latin countries which consider such claims as an insurmountable matter of their constitutional prestige may be considered members to the Convention by those states which do not object to their claims. In this way may be obtained the universality of the acceptance of principles proclaimed by this Convention; i.e., concepts of the recognition of real rights and securities in aircraft, entrusted to this Convention, may be accepted by a larger number of states.

C H A P T E R V

GENERAL CONCLUSIONS

1. Brussels Convention.

Altogether, there are nineteen countries which have adopted the Brussels principle of solving international maritime conflicts with regard to liens and ship mortgages. European countries, above all, are included in this number. Germany, England, and the United States, all three representing the three major maritime systems, are missing on this list of ratifications. Considered from this point of view, the success of the Convention appears very moderate.

It seems that the main reason for this moderate success of the Convention rests in the unified character of the provisions concerning maritime liens. Evidently the system of enumeration of a fixed number of maritime liens does not appeal to many maritime systems with different practices and different traditions in that respect. In England, for instance, the number of maritime liens is much smaller than that which is proposed by the Convention. Therefore, the British Delegation to the Brussels Conference in 1926, in announcing its withdrawal from any further participation in the work of the Conference, openly stated that the number of maritime liens as proposed in the draft was too great in comparison with the English rule.[297]

Besides, the method of creating maritime liens in England and the United States of America is quite distinct from that which is contemplated by the Convention. Maritime liens in England are created by court decisions. In the United States also, "admiralty courts may increase or decrease the kinds of claims which are regarded as giving rise to a maritime lien enforceable in rem".[298]

The standard system of enumerated liens such as offered by the Convention, in order to be workable, would have to be integrated into the legislative systems of the ratifying state. This would call for unusual legislative reform and, perhaps, for drastic changes in the jurisdictional practice.

Hence, it appears that the problem of maritime liens is of such legal nature "that /these liens/ do not lend themselves to regulation by an international convention".[299] Consequently, it follows that "their creation and priorities will in all likelihood, remain a matter of national law".[330]

In respect to maritime mortgages, the Convention proposed a simple mode of solving conflicts; namely, the adoption of 'the law of the flag' as the law which should govern the existence of the mortgage from its creation until its expiration or enforcement. This simple rule, however, could not stand by itself, but was combined with the provision concerning liens. The ranking of the maritime mortgage in the Convention must follow the five 'international' liens. It is a less favorable situation than that which has been provided in the case of mortgages in the English admiralty, or the United States Ship Mortgage Act of 1920. With respect to the latter case, it is believed that the more favorable status of preferred ship mortgages in the United States may have greatly contributed to the adoption of a negative attitude towards the Convention.[301]

To summarize it may be stated that:

1) The lack of widespread ratifications or adherences to the Brussels Convention is due to its unified provisions concern-

ing maritime liens.

2) The present maritime status (i.e., division into main maritime systems) remains unchanged after the adoption of the Convention.

3) The work of the Comité Maritime International and of the Brussels Conferences solidified and synthesized the problem of rights in vessels and the conflicts connected with them.

2. Geneva Convention.

The approach towards rights in vessels, such as was adopted by the Brussels Convention, is quite different from that which is used in the Geneva Convention. If the former could be called a convention of unification because of the character of rules concerning maritime liens, then the latter must be considered as a classic example of a convention of recognition.

The method of recognition, according to the opinion of G. Ripert, is the most simple one, because it does respect the diversity of national laws and still provides for means to solve the conflicts.

Above all, this method seems to be particularly suitable in the case of conventions on real rights in aircraft. In the majority of cases, individual legislative systems consider aircraft as ordinary movables not susceptible to being charged with distinct real rights (England, Canada), and where such capacity has been provided for, (France for instance), these rights may be preceded by civil law privileges on movables.[303]

As the present national concepts are substantially different on the subject of real rights in aircraft, it would be impossible to predict the rule most usually applied by individual legal systems in the absence of

an international treaty. Above all, it seems that the principle of 'public policy' would be, in the last instance, the criterion by which foreign rights in a foreign chattel would be recognized and enforced.[304]

Therefore it appears that the most essential purpose of this Convention is to waive the application of the principle of 'public policy'; otherwise, "the Convention would not be efficacious".[305]

Notwithstanding the fact that this Convention proclaims a simple method of solving conflicts (i.e., 'the law of the registry'), it is still complex and no one knows how it may work out in practice. The slow ratifications are an apparent sign of its complexity. Even after ratifications are deposited, this Convention seems to impose upon States obligations such as:

1) The passing of appropriate internal legislations concerning Public Records. This obligation, although not compulsory in the stipulation of the Convention, appears indispensable if the rights in aircraft provided for in Article I (1) have to be granted mutual international recognition.
2) Equally indispensable seems to be the promulgation of an appropriate domestic law determining the choice of real rights a ratifying state wishes to establish on its national aircraft. In such an enactment, it should be specified what type of rights enumerated in Article I (1) a given state intends to make as its priority rights in aircraft.
3) The passing of appropriate legislation concerning the enforcement of foreign types of rights in aircraft. A ratify-

ing state may be called upon in the future to enforce such foreign rights before its national courts.

The enactment of the third category of legislations appears to have a particular importance. This should facilitate, for instance, an eventual execution of 'equipment trust', a device provided for in Article I of the Geneva Convention. The inclusion of this form among the rights of priority was rather strongly criticised as being one which may give rise to many difficulties when it is put before the executive authorities of the Contracting State in which the legal system is unfamiliar with it. This criticism came from the delegates of the countries with civil law systems where the rights in property are based on completely different principles.[306] Specifically trusts are a form of rights in property which are substantially unknown to these systems.[307]

A N N E X I

BRUSSELS CONVENTION ON LIENS AND MORTGAGES 1926

Brussels International Maritime Conference, 1926.

International Convention for the Unification of Certain Rules of Law Relating to Maritime Mortgages and Liens.

Article I.

Mortgages, hypothecations and other similar charges upon vessels, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel's registry or at a central office, shall be recognised and treated as valid in all the other Contracting States.

Article 2.

Maritime liens shall attach to a vessel, to the freight for the voyage during which the secured claim arises, and to the accessories of the vessel and freight accrued since the commencement of the voyage, in respect of the following:-

(1) Law costs and fees due to the State and other expenses incurred in the common interest of the creditors in order to preserve the vessel, or to procure her sale and the distribution of the proceeds of sale; tonnage dues, light, dock and harbour dues, and other public rates and charges of the same character; charges for pilotage, and charges for watching and preserving the vessel from the time of her entry into the last port (a);
(2) Claims under the contract of service of the master, crew, or other persons serving on board the vessel;
(3) Remuneration for salvage, and the contribution of the vessel in general average;

(a) The protocol contains a declaration to the effect that "The High Contracting Parties reserve the right for each State by legislation or otherwise (1) to establish among the claims mentioned in paragraph (1) of Article 2 a definite order of priority, with a view to safeguarding the interests of the Treasury; (2) to give to the authorities administering harbours, docks, lighthouses and navigable waterways, which have caused to be removed any wreck or other obstruction to navigation, or who are creditors in respect of dock or harbour dues, or for damage caused by the fault of a vessel, the right, in case of non-payment, to detain the ship, wreck or other property, to sell the same, and to indemnify themselves out of the proceeds in priority to other creditors; and (3) to make provision as to the order of priority of claims for damage done to harbours, docks, piers, and similar works otherwise than in accordance with Articles 5 and 6".

(4) Claims due for collision or other accidents of navigation, and for damage caused to works in or about harbours, docks, and navigable waterways; for personal injury to passengers or crew and for loss of or damage to cargo or passengers' baggage;

(5) Claims resulting from contracts entered into or transactions carried out by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or transactions are necessary for the preservation of the vessel or the continuation of her voyage, whether the master is or is not at the same time owner of the vessel, and whether the claim is his own or that of ship suppliers, repairers, lenders or other contractual creditors (b).

Article 3.

The mortgages, hypothecations and other charges on vessels referred to in Article I shall rank immediately after the liens mentioned in the preceding Article.

National laws may grant a lien in respect of claims other than those specified in the preceding Article; but no modification may be made in the priority conferred on mortgages, hypothecations or other charges, nor in that of the liens which take precedence thereof.

Article 4.

The accessories of the vessel and freight, mentioned in Article 2, mean:-

(1) Compensation due to the owner for material damage sustained by the vessel and not repaired, or for loss of freight;

(2) General average contributions due to the owner, in respect of material damage sustained by the vessel and not repaired, or in respect of loss of freight;

(3) Remuneration due to the owner for salvage services rendered at any time before the end of the voyage, excluding any sums allotted or apportioned to the master or other persons in the service of the vessel.

Freight shall be deemed to include passage money. In cases where liability is limited pursuant to the provisions of the Convention on the Limitation of Shipowners' Liability the fixed sum of 10 per cent. on the value of the vessel at the beginning of the voyage provided for by Article 4

(b) The protocol contains a declaration to the effect that "This Convention does not affect the provisions of any national law giving a lien to public insurance associations in respect of claims arising out of the insurance of the personnel of vessels".

of that Convention shall be substituted for freight for the purpose of this Convention.

Payments made or due to the owner on policies of insurance, as well as bounties, subventions, and other national subsidies, are not included as accessories of the vessel or of the freight.

Notwithstanding anything in the opening words of Article 2, the lien in favour of persons in the service of the vessel shall extend to the total amount of freight due for all voyages made during the subsistence of the same contract of service.

Article 5.

Liens attaching on the same voyage shall rank in the order in which they are set out in Article 2. Claims included under any one heading shall share equally and 'pro rata' in the event of the fund available being insufficient to pay the claims in full.

The claims mentioned under Nos. 3 and 5 in that Article shall rank, however, for payment inversely to the order of time in which they arose.

Claims arising from one and the same occurrence are deemed to have originated at the same time.

Article 6.

Claims secured by a lien and attaching to the last voyage shall have priority over those attaching to previous voyages: provided that claims under one and the same contract of service extending over several voyages shall all rank with claims attaching to the last voyage.

Article 7.

As regards the distribution of the sum resulting from the sale of the property subject to lien, the creditors whose claims are secured by a lien shall have the right to prove for their claims in full, without any deduction on account of the rules relating to limitation of liability; provided, however, that the dividend receivable by them shall not exceed the sum due having regard to the said rules.

Article 8.

Claims secured by a lien shall follow the vessel into whatever hands she may pass.

Article 9.

Maritime liens shall cease to exist, apart from any provision of national laws for their extinction upon other grounds, at the expiration of one year: provided that the lien referred to in Article 2 (5) for necessaries supplied to the vessel shall cease at the expiration of six months.

The period runs for the lien for salvage from the date of the termination of the services; for the liens for collision accidents of navigation and personal injuries from the date when the damage was caused; for the lien for loss of or damage to cargo or passengers' baggage from the date of delivery or when delivery ought to have been made; for the lien for necessaries and repairs from the date when the obligation attached. In all other cases the period runs from the date when the claim becomes enforceable.

The fact that any of the persons specified in Article 2 (2) has a right to any payments in advance or on account does not render his claim enforceable for the purposes of this Article.

It shall not be permissible by a national law to make the sale of the vessel a ground for extinction of any lien upon her unless the sale is accompanied by such publicity as may be prescribed by the national law, including notice to the authority charged with keeping registers referred to in Article I of this Convention of such length and in such form as may be so prescribed.

The grounds upon which the above periods may be interrupted shall be determined by the law of the Court where the case is tried.

The High Contracting Parties reserve to themselves the right to provide by legislation in their respective countries that the said periods shall be extended, in cases where it has not been possible to arrest the vessel to which a lien attaches in the territorial waters of the State in which the claimant has his domicil or principal place of business, provided that the extended period shall not exceed three years from the time when the obligation attached.

Article 10.

A lien on freight may be enforced so long as the freight is still due or the sum paid for freight is still in the hands of the master or the agent of the owner. The same principle applies to a lien on accessories.

Article 11.

Subject to the provisions of this Convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.

This provision does not affect the right of any State to make provision by national legislation requiring the master of a vessel to fulfil special formalities in the case of certain loans raised on the security of the vessel, or in the case of the sale of her cargo.

Article 12.

National laws must prescribe the nature and the form of documents to be carried on board the vessel on which entry must be made of the

mortgages, hypothecations, and other charges referred to in Article I, so, however, that the mortgagee requiring such entry in the said form be not held responsible for any omission, mistake, or delay in inscribing the same on the said documents.

Article 13.

The foregoing provisions of this Convention also apply to vessels in the possession of a time charterer or other person operating, but not being the owner of the vessel, except in cases where the owner has been dispossessed by an illegal act, or where the claimant is not a 'bona fide' claimant.

Article 14.

The provisions of this Convention shall be applied in each Contracting State in cases in which the vessel to which the claim relates belongs to a Contracting State, as well as in any other cases provided for by the national laws.

Nevertheless, the principle formulated in the preceding paragraph does not affect the right of the Contracting States not to apply the provisions of this Convention in favour of the subjects or citizens of a non-Contracting State.

Article 15.

This Convention does not apply to vessels of war, nor to Government vessels appropriated exclusively to the public service.

Article 16.

Nothing in the foregoing provisions shall be deemed to affect in any way the competence of tribunals, modes of procedure or methods of execution authorised by the national laws.

Article 17.

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a 'procès-verbal' signed by the representatives of the Powers which take part therein, and by the Belgian Minister for Foreign Affairs.

The subsequent deposit of ratifications shall be made by means of a written notification, addressed to the Belgian Government, and accom-

panied by the instrument of ratification.

A duly certified copy of the 'procès-verbal' relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government, through the diplomatic channel, to the Powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

Article 18.

Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the Convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Article 19.

The High Contracting Parties may at the time of signature, ratification, or accession, declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominion, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

Article 20.

The present Convention shall take effect, in the case of the States which have taken part in the first deposit of ratifications, one year after the date of the 'procès-verbal' recording such deposit. As respects the States which ratify subsequently or which accede, and also in cases in which the Convention is subsequently put into effect in accordance with Article 19, it shall take effect six months after the notifications specified in paragraph 2 of Article 17 and paragraph 2 of Article 18 have been received by the Belgian Government.

Article 21.

In the event of one of the Contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States, informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

Article 22.

Any one of the Contracting States shall have the right to call for a fresh Conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention one year in advance to the other States through the Belgian Government, which would make arrangements for convening the Conference.

A N N E X II

DRAFT CONVENTION ON THE OWNERSHIP OF AIRCRAFT AND THE AERONAUTIC REGISTER, ADOPTED BY CITEJA IN 1921.

Draft Convention on the Ownership of Aircraft and the Aeronautic Register

Adopted by CITEJA in 1931

Article 1

(1) The High Contracting Parties undertake to establish in their national laws that every aricraft registered according to the said laws shall be inscribed on a register for the publicity of rights, having in view the inscription of the ownership and the real rights by the competent authority of the said State.

(2) The said register may be the one in which the aircraft is registered on a distinct register. In the latter case agreement shall be established between the two registers.

Article 2

(1) An aircraft inscribed on the register of one of the High Contracting Parties cannot be inscribed on the register of another High Contracting Party unless the owner proves that he has effected the cancellation of the original inscription.

(2) In case the aircraft is encumbered with real charges on the register the inscription on the new register shall be subject to the proof that the creditors have been paid or have agreed to the transfer of the inscription. In the latter case the real charges shall be inscribed on the new register solely upon the evidence of the inscriptions existing on the preceding register.

(3) In order to effect the transfer of the inscription from the register of one of the High Contracting Parties to that of another one:

1. An application for inscription must be addressed to the Bureau of the State in which the aircraft is to be inscribed:
2. An application for cancellation with a view to transfer of the inscription to the register of another State must be addressed to the Bureau of the State in which the aircraft is inscribed. The application shall indicate the Bureau to which the inscription is to be transferred and must be accompanied, if the case applies, by the written consent in duplicate, duly legalized, of the creditors, or by the proof that the said creditors have been paid.

(4) The application for cancellation ipso facto shall render the mortgage claims payable.

(5) A note of the application for transfer shall be made on the

register of the first State, and no inscription can be made thenceforth on the same register. However, if the Bureau of the first State receives under the conditions contemplated in article ..... /1 an application relative to a forced execution after a note has been made of the application for transfer, the provisions of the said article shall be applied; a certified true copy of this application shall be transmitted immediately by the Bureau of the first State to that of the second State which also shall conform to article ...../1

(6) In case the Bureau of the first State does not oppose the cancellation on its register, it shall, by means of form A of the Annex, inform the Bureau of the State in which inscription is applied for, and shall transmit to it the application contemplated in section 1 of paragraph 3, and at the same time a certified true extract from the register certifying that there is no objection to the cancellation of the original inscription.

(7) The Bureau in which the new inscription is applied for shall proceed, if proper, according to formula B of the Annex, to the inscription of the aircraft and shall send without delay to the Bureau of the first State a certification of the inscription on its register. Upon receiving this certification the inscription of the aircraft shall be cancelled on the register of the Bureau of the first State.

Article 3

Each of the Contracting States may inscribe on its registers, provisionally, aircraft under construction or not yet registered.

Article 4

The following are considered as forming an integral part of the aircraft; the motors, tools and, in general everything intended for the permanent use of the aircraft, indicated in the inventory, even if they are temporarily separated, with reservation of the rights of third parties who are purchasers in good faith.

Article 5

(1) The register contemplated in Article I shall be kept by the authorities determined by the national laws, and according to the rules provided in the same laws, in so far as they are not contrary to the

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/1 Article 8 of the Draft Convention on mortgages, other real securities and aerial privileges is referred to. The number of this article has been left blank in view of the possible amalgamation of the two drafts by the International Conference on Private Aerial Law. (Footnote in the draft.)

provisions of the present Convention.

(2) The register must be public, and any person may demand certified true copies.

(3) The seat of the Bureau charged with keeping the register must be indicated on the certificate of registration.

(4) The Bureaus charged with keeping the register are authorized to correspond directly in order to assure the execution of the provisions of article 2.

Article 6

The obligation to have the aircraft registered shall devolve upon the owner who must furnish all information which is necessary to effect the inscription in the terms of the following article.

Article 7

(1) The register provided in article 1 must contain all data relative to the aircraft and, especially, the number of the certificate or registration, the date of registration, the mark of nationality and registration, the type of craft, a brief description of the craft, the date and place of construction, serial number of construction, kind and power of the motors, name and domicile of the owner, name of the insured, and the other data prescribed in article 9.

(2) For aircraft under construction the register shall contain the data which can actually be furnished; said data to be completed after the construction is finished

Article 8

(1) If changes take place in the facts mentioned on the register, or if the aircraft perishes, is demolished or becomes permanently unfit for air navigation, the Bureau of inscription must be requested to make the necessary changes.

(2) The application must be signed by the owner and accompanied with the necessary documents of proof.

Article 9

(1) All transfers of property inter vivos, assignments, cessions of real rights and renunciations of the said rights are valid with regard to third parties only through their inscription on the register and produce no effect until the date of said inscription.

(2) Against the one who has acquired in good faith the ownership or a real right from the person inscribed on the register as holder of said right no objection can be made on the grounds of the lack of right of the person from whom his right is derived.

(3) The Contracting States shall take the measures necessary in order to effect the inscriptions in case of transfer due to decease.

Article 10

The inscription made on the register by virtue of articles 1, 8 and 9 must be reproduced on the certificate of registration.

FINAL PROVISIONS

Article 11

This Convention shall apply only to aircraft assigned to international navigation.

Article 12

The High Contracting Parties whose legislation may not be sufficient to assure the execution of the provisions of this Convention shall take the measures and enact the sanctions necessary for this purpose.

A N N E X III

DRAFT CONVENTION ON MORTGAGES, OTHER REAL SECURITIES, AND AERIAL PRIVILEGES, ADOPTED BY CITEJA IN 1931

Draft Convention on Mortgages, Other Real Securities, and Aerial Privileges

Adopted by CITEJA in 1931

CHAPTER I. - On Mortgages and Other Real Securities

Article First

In the meaning of the present Convention, by aerial mortgage is understood a real security, whatever may be its name and origin, which is inscribed on the register for the publicity of rights and which assigns the aircraft to the payment of a debt the amount of which is likewise inscribed thereon.

Article 2

Aerial mortgages regularly constituted and not extinguished, according to the law of the Contracting State on whose register the aircraft is inscribed, shall produce the effects determined by the present Convention.

Article 3

The aerial mortgage shall guarantee, equally with the principal sum, the current interests and the interest in arrears for one year, at the rate recorded on the register, as well as the costs of procedure, in so far as they are not privileged by paragraph 1 of Article 11.

Article 4

(1) The aerial mortgage shall include the insurance indemnity due in case of loss or damage to the aircraft.

(2) It shall not extend to the freight.

Article 5

The rank of aerial mortgages with respect to each other shall be determined by the inscription on the register.

Article 6

With reservation of the provisions of paragraph 4 of Article 8, and paragraph 5 of Article 13, the aerial mortgage shall take precedence over all claims, even those of the Fisc, which are not privileged by virtue of Article 7.

CHAPTER II. - Privileges

Article 7 /1

(1) The following shall be paid with preference over aerial mortgage claims:

a) The airport fees or fees of any other public aerial navigation service arising out of the last voyage; /2

b) Compensation due because of salvage or assistance;

c) Expenses paid in case of repairs affected by the commander by virtue of his legal powers or upon his order in the course of a voyage for real needs of conservation of the aircraft.

(2) The rank of said claims with respect to each other shall be determined in the above order. Claims connected with one and the same voyage shall be privileged in the order in which they are arranged in paragraph 1. The claims contemplated under letters b) and c) within each of the said categories shall be paid preferably in the inverse order of the dates when they originated.

(3) The right of preference does not include the insurance indemnity.

(4) This right expires after a period of three months from the day when the operations which give rise to the privileged claim are completed. Considerations of interruption in the above period shall be determined by the law of the court taking cognizance.

/1 It will be for the Governments to safeguard where necessary the interests of the Treasury, either by enlarging, at the Conference, the list in Article 7, or by making reservation, in the final protocol (Protocole de Cloture), of the right to privilege certain fiscal claims. (Footnote in the draft.)

/2 The final protocol shall contain a reservation whereby each State is left free to establish among these claims a fixed order, inspired by regard for the interests of the Treasury. (Footnote in the draft).

CHAPTER III. - Forced Execution

Article 8

(1) When an aircraft is attached in order to be sold, or when proceedings of forced execution are begun without preliminary attachment, the competent authorities must apply to the Bureau charged with keeping the register for the publicity of rights to have a record thereof made on the register.

(2) The application shall be made out according to the attached form (See Annex A). It may be delivered to the Consul of the country where the register for the publicity of rights is kept, for transmission by telegram to the said Bureau upon payment of the charges.

(3) The Bureau charged with keeping the register for the publicity of rights must take the measures necessary in order that, upon receipt of the application, any person coming to consult the inscriptions on the register relative to the attached aircraft may have knowledge thereof, that record thereof may be made on the said register, that the owner and the creditors inscribed may be informed thereof and that a certified true copy of the record, as well as the list of the addresses of the owner and the creditors inscribed, furnished by them, may be sent to the competent authorities indicated in the application.

(4) No alienation can be alleged against the attaching or intervening creditor or the beneficiary of the adjudication, if effected after the receipt of the application by the Bureau charged with keeping the register for the publicity of rights or if, at the time of the alienation, the purchaser had knowledge or should reasonably have had knowledge of the opening of the proceedings or of the attachment. The same rule shall apply to the constitution of mortgages and other real rights.

Article 9

(1) Sale by authority of justice has for effect the transfer of the property and the settlement of the charges under the conditions determined by the law of the place of the execution.

(2) This law must prescribe that the owner and the creditors inscribed shall be notified, at least one month in advance, of the date on or before which they may, in the conditions determined by this law, present their rights, and that, at least one month in advance, the date of the sale shall be communicated to the owner and to the said creditors and published in the place where the register for the publicity of rights is kept.

Article 10

Failure to observe the formalities prescribed in Article 9 will have for effect, according to the law of the place of the execution, either nullity of the sale, or the invalidity of the sale as against interested third parties, or compensation by the State for the damage caused. The obligation to pay compensation cannot be made conditional upon reciprocity.

Article 11

(1) There shall be deducted from the amount of the adjudication, before distribution thereof, only the court costs incurred in the common interest of the creditors in order to arrive at the sale and distribution of the price, including the expenses of custody, but excepting the expenses incurred with a view to obtaining an executionary title.

(2) The surplus of the price of adjudication shall be distributed to the creditors and to the owner, in accordance with the rules of procedure of the law of the place of the execution, taking into account the rank which belongs to the creditors in the terms of the present Convention.

Article 12

(1) The competent authorities of the country where the register for the publicity of rights is kept must proceed to release the mortgages extinguished under the conditions prescribed in Article 9 upon the presentation of an authentic certified copy of the act of adjudication, and after the competent authorities, according to the law of the court of inscription, shall have verified that the certified copy is authentic, that the authorities which performed the adjudication were competent, and that the conditions of publicity contemplated in Article 9 have been observed.

(2) The competent authorities of the country in which the register for the publicity of rights is kept shall notify the owner and the inscribed creditors of the release effected.

(3) The copy of the act of adjudication, verified in conformity with paragraph 1, shall constitute proof, with respect to the Bureau charged with keeping the register for the publicity of rights, of the transfer of ownership.

CHAPTER IV. - Precautionary Attachment

Article 13

(1) Proceedings of precautionary attachment shall be governed by the law of the place of the attachment. However, the following provisions must be observed:

(2) The competent authorities or the attaching creditor may apply to the Bureau charged with keeping the register for the publicity of rights to have a record of the attachment made on the register.

(3) The application shall be drawn up according to the attached form (See Annex B); it may be sent to the Consul of the country in which the register for the publicity of rights is kept for transmission by telegraph to the said Bureau upon payment of the charges.

(4) The Bureau charged with keeping the register for the publicity of rights shall proceed according to the provisions of paragraph 3 of Article 8.

(5) No alienation can be alleged against the attaching creditor, if effected after the receipt of the application by the said Bureau or if, at the time of the alienation, the purchaser had knowledge or could reasonably have had knowledge of the attachment. The same rule shall apply to the constitution of mortgages or other real rights.

(6) The authorities charged with keeping the register must cancel the record of the precautionary attachment as soon as the act or the decision according the release of the attachment is sent to them.

CHAPTER V. - Final Provisions

Article 14

With a view to the application of the present Convention, the competent judicial and administrative authorities of the High Contracting Parties are authorized to correspond directly with each other.

Article 15

The provisions of the present Convention shall apply only when an aircraft registered by one of the High Contracting Parties is on the territory of another High Contracting Party.

A N N E X IV

DRAFT CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT, APPROVED SEPT. 25th, 1947, AT BRUSSELS

Draft Convention on the International Recognition of Rights in Aircraft

(Text Approved by the Legal Committee at its meeting of September 25th, 1947, at Brussels)

ARTICLE I

Rights Reciprocally Recognized

(1) Each Contracting State undertakes to recognize:

a) rights of property in aircraft,

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

c) rights to possession of aircraft under leases of six months or more,

d) mortgages, hypotheques, and similar rights in aircraft which are contractually created as security for the payment of an indebtedness,

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

(2) Except as otherwise provided in this Convention, the effects of the recording of such rights with regard to third parties shall be determined according to the law of the Contracting State where they are recorded.

ARTICLE II

Public Records

(1) All recordings relating to a given aircraft must appear in the record of the State whose nationality the aircraft possesses.

(2) The address of the authority responsible for maintaining the record must be shown on the certificate of registration as to nationality.

(3) Any person shall be entitled to receive from the authority maintaining the record duly certified copies or extracts of the particulars recorded. Such copies or extracts shall constitute prima facie evidence of the contents of the record.

(4) The national law may provide that the filing of any document

for recording shall have the same effect as a recording. In that case, adequate provision shall be made to ensure that such documents are open to the public.

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

ARTICLE III

Claims Having Priority

(1) The claims set forth below give rise to charges which, without recording, follow the aircraft and take priority over all other claims:

a) compensation due for salvage of the aircraft,

b) extraordinary expenses indispensable for the preservation of the aircraft.

(2) The claims enumerated in paragraph (1) above shall be satisfied in the inverse order of the dates of the incidents in connection with which they are incurred.

(3) The priority accorded to these claims by paragraph (1) above shall be extinguished unless judicial action thereon is commenced within three months from the date of their arising. The law of the forum shall determine the contingencies upon which this period may be interrupted or suspended.

(4) If a charge arising from any such claim has been recorded, it shall, on the extinction of the priority accorded by paragraph (1), take priority as a right mentioned in Article I.

(5) Any of the claims mentioned in this Article may be entered at any time on the record so as to give notice thereof to all concerned.

(6) In the case of any incident occurring within the territory of a Contracting State to an aircraft there registered, the question whether any of the claims mentioned in paragraph (1) is entitled to the priority or charge there mentioned shall be determinated by the national law.

(7) Except as provided in this Article, no charge taking priority over the rights mentioned in Article I shall be admitted or recognized by Contracting States.

ARTICLE IV

Priority of Principal and Three Years' Interest

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

ARTICLE V

Sale in Execution - Notice

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

(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,

b) the executing creditor shall supply a duly certified extract of the recordings concerning the aircraft, shall give public notice of the sale at the place where the aircraft is registered at least one month before the day fixed, and shall concurrently notify, by registered letter, the recorded owner and the holders of rights in the aircraft recorded or entered on the record whose addresses are known.

(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.

(4) No sale can be effected unless all charges 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 the sale or assumed by the purchaser.

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

State. In the absence of other limit established by the law of the Contracting State where the execution sale takes place, insurance in the equivalent to the amount of the purchase price when new of the aircraft sold on execution shall be considered adequate for the damages caused.

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

ARTICLE VI

Sale in Execution - Effect

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

ARTICLE VII

Transfer of Nationality

No transfer of an aircraft from the nationality register or the record of a Contracting State to that of another State shall be made, unless all holders of recorded rights have been satisfied or consent to the transfer.

ARTICLE VIII

Spare Parts

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

(2) A statement indicating the character and the approximate

number of such spare parts shall be annexed to or included in the recorded document. Such parts may be replaced by similar parts without affecting the right of the creditor.

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

ARTICLE IX

Scope of Convention

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

ARTICLE X

Immigration, Smuggling, Air Navigation Laws

Nothing in this Convention shall prejudice the right of any Contracting State to enforce against an aircraft its national laws relating to immigration, smuggling or air navigation.

ARTICLE XI

Military, Customs, Police Service

This Convention shall not apply to aircraft used in military, customs or police services.

ARTICLE XII

Direct Administrative Communications

For the purpose of this Convention the competent judicial and

administrative authorities of the Contracting States may correspond directly with each other.

ARTICLE XIII

Amendment of National Laws

Contracting States whose national laws may not be sufficient to ensure the fulfilment of the provisions of this Convention, shall take such measures as are necessary for this purpose. Upon these measures becoming effective, such States undertake to notify them to the Secretary General of the International Civil Aviation Organization.

ARTICLE XIV

Aircraft - Definition

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.

ARTICLE XV

Signatures

This Convention shall remain open for signature until it comes into force in accordance with the provisions of Article XVII.

ARTICLE XVI

Ratification

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

ARTICLE XVII

Effective Dates

(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.

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

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

ARTICLE XVIII

Adherence

(1) This Convention shall, after it has come into force, be opened 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 XIX

Denunciation

(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 XX

Territorial Declarations

(1) Any State may, at the time of signature or of the deposit of its instrument of ratification or adherence, declare that the acceptance which it gives to this Convention does not apply to all or any of its overseas territories. The "overseas territories" of a State shall mean its 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.

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

(3) Any State may subsequently adhere, in accordance with the provisions of Article XVIII, on behalf of all or any of its overseas territories, regarding which it has made a declaration as aforesaid.

(4) Any State may denounce this Convention, in accordance with the provisions of Article XIX for all or any of its overseas territories.

ARTICLE XXI

Overseas Territories

(1) Upon deposit of its instrument of ratification or adherence, or by notification to the International Civil Aviation Organization at any time thereafter, any State may declare that any overseas territory is to be regarded as a separate Contracting State for the purposes of this Convention.

(2) The International Civil Aviation Organization shall give notice of any declaration made as aforesaid and of the date of receipt thereof to each signatory and adhering State and such declaration shall take effect as from the ninetieth day after its receipt by the International Civil Aviation Organization.

(3) Any declaration made in pursuance of paragraph (1) of this Article may be rescinded by a notification of rescission to the International Civil Aviation Organization, which shall give notice of the date of receipt of such notification to each signatory and adhering State. Rescission shall take effect as from the ninetieth day after the notification thereof to the International Civil Aviation Organization.

In Witness Whereof the undersigned Plenipotentiaries, having been duly authorized, have signed this present Convention.

Done this .....day of ....., 19.....
at .....[x]
in the English, French and Spanish languages, each text being of equal authenticity.

This Convention shall remain deposited in the archives of the International Civil Aviation Organization and one certified copy thereof shall be transmitted by the Secretary General of the International Civil Aviation Organization to the Government of each State which has signed, ratified or adhered thereto.

[x] The foregoing text is at this date (October, 1947) merely a draft proposal.

FOOTNOTES

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9) Niboyet, P.,op.cit.1946 ed.,p.535.

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307) Niboyet,J.P.,op.cit.,2nd ed.,p.571.

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