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John T. Stewart Jr.

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Stewart: Lease, Charter and Interchange of Aircraft

LEASE, CHARTER AND INTERCHANGE OF AIRCRAFT: A GOVERNMENTAL PERSPECTIVE

JOHN T. STEWART, JR.*

INTRODUCTION

PASSENGERS aboard aircraft arriving or departing at international airports, such as Heathrow, London; Charles de Gaulle, Paris; John F. Kennedy, New York; or Dulles, Washington, D.C. may notice as their aircraft is taxiing for takeoff or to a gate for disembarkation that a number of aircraft of different national airlines bear the prefix "N" in their identification markings. This prefix is the international identification mark of aircraft of United States registry.¹ During 1979 and early 1980 passengers arriving or departing at either Heathrow or Charles de Gaulle may have seen the Concorde bearing the international identification markings of the United Kingdom or France. A few hours later, however, that same aircraft might have been observed at Dulles where ground personnel were in the process of changing its British or French international identification mark and replacing it with the United States "N." On other occasions, at other international airports, a similar phenomenon might be evident: an aircraft of an air carrier of one nationality bearing the national registration marks of a country other than the nationality of that particular carrier. Because of a recent change in law, United States passengers may soon be flying between two cities in the United States on an aircraft operated by a United States carrier but bearing the registration mark of a foreign country. What is being observed is, in part, the international world of "lease, charter and interchange" of aircraft.

The international aviation community has, for some time, been occupied with this phenomenon and the responsibilities of governments in connection with the aircraft involved. For purposes of this article, and as it is generally agreed by the international aviation community, the phrase "lease, charter and interchange" is used to describe the lease of an aircraft, or an aircraft and crew, which is registered in one State for operation by an

*Assistant Chief Counsel, International Affairs and Legal Policy, Chief Counsel's Office, Federal Aviation Administration, United States Department of Transportation; A.B. Yale (1949); LL.B. Columbia (1955); Chairman, U.S. Delegation to Special ICAO Legal Subcommittee on Lease, Charter and Interchange of Aircraft (1977); Legal Adviser to U.S. Panel Member to ICAO Panel of Experts on Lease, Charter and Interchange of Aircraft in International Operations (1976); Member, U.S. Delegation to ICAO Legal Committee (1978); Member, U.S. Delegation 23rd Session of ICAO Assembly (U.S. spokesman in Legal Commission) (1980).

The views expressed in this article are those of the author and do not necessarily reflect those of the U.S. government or any agency thereof.

¹ See Convention on International Civil Aviation, Dec. 7, 1944, art. 37, 61 Stat. 1180, T.I.A.S. No. 1591; Annex 7 to the Convention on International Civil Aviation; Nationality and Registration Marks, 14 C.F.R. § 45.21 (1980).

operator whose nationality is of another State² These arrangements are common in international aviation operations and have been increasing in volume and frequency for several years.³ The involvement of governments in such arrangements is mandated by both their membership in the family of nations and their involvement as parties to a number of international conventions which form the tapestry of international civil aviation—the principal one being the International Civil Aviation Convention,⁴ commonly referred to as the Chicago Convention. In addition, responsibilities in one form or another devolve on States as a result of their being parties to the Hague Convention on hijacking,⁵ the Montreal Convention on sabotage and other unlawful acts against aircraft,⁶ the Tokyo Convention relative to offenses and certain other acts occurring on aircraft,⁷ and the Rome Convention concerning the liability to persons and property on the ground resulting from aviation accidents.⁸

While equipment interchange arrangements are generally matters for negotiations between aircraft owners and those desiring to use such aircraft,⁹ the obligations which fall upon States, as parties to the various Conventions, depend upon which State the particular aircraft is registered in or by which State's nationals the aircraft is being operated. The difficulties associated with the responsibilities of States in aircraft interchanges have been studied for many years in many forums. The European Civil Aviation Conference, generally referred to as "ECAC", had been considering the problem almost from its inception in the 1950's.¹⁰ The Legal Committee

² For a discussion of the definitional question, see Vol. 1, Minutes, Legal Committee 23d Session, ICAO Doc. 9238-LC/180-1, pp. 3-9.

³ As an indication of the magnitude of international leasing activity, over one-third (57) of the member States of the International Civil Aviation Organization (ICAO) have responsibilities as either lessor or lessee States of aircraft registry. See McDonnell Douglas Corporation, World Commercial Aircraft Inventory (1980); Boeing Company, Jet Airplane Fleets of the World (1979).

⁴ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

⁵ Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, 22 U.S.T. 1641, T.I.A.S. No. 7192.

⁶ Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Jan. 26, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570.

⁷ Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Dec. 4, 1969, 20 U.S.T. 2941, T.I.A.S. No. 6768.

⁸ The United States is not a party to the Rome Convention. The original text of the Rome Convention may be found in ICAO Doc. 7364 (consolidated amended version attached to ICAO LM 1/8.4-80/4).

⁹ For a general discussion, see Gretta & Lynagh, *Aircraft Leasing—Panacea or Problem*, 5 TRANSP. L.J. 9 (1973); Burke, *Bank Counsel's Guide to Equipment Leasing Transactions: Nontax Aspects*, 94 BANKING L.J. 580 (1977); Eyer, *The Sale, Leasing and Financing of Aircraft*, 45 AIR L. & COM. J. 217 (1979).

¹⁰ Report, Vol. 1, European Civil Aviation Conference, 2d Session (Madrid, 24 April-11 May 1957), ICAO Doc. 7789, ECAC(2)-1, pp. 27-33.

of the International Civil Aviation Organization, "ICAO", had studied the problem intermittently for almost thirty years.¹¹

The problems concerning the responsibility of the State of registry with respect to its aircraft which are operated by an operator whose nationality is of another State are primarily jurisdictional in nature. In dealing with them international focus has been upon safety, criminal jurisdiction, property rights in aircraft, and to some extent the responsibilities for damages resulting from the operation of the aircraft which cloak both the State of registry and the State of the operator. What follows outlines briefly the various approaches used by the international legal community to resolve the problems associated with aircraft leases and will be limited to those issues which are peculiarly associated with governmental responsibilities. Finally, because of some dramatic changes in the law in this area, recent United States developments affecting the use of leased aircraft will also be discussed.

NATURE OF GOVERNMENT INVOLVEMENT GENERALLY

There are a number of reasons that compel persons, corporations, and air carriers to lease aircraft. First, leasing arrangements may be a most economical way for airlines to obtain the use of aircraft. This is particularly true where the financial arrangement will permit tax benefits to institutional lenders.¹² Second, leasing is attractive since it can maximize aircraft utilization. In addition, replacement of aircraft in accident situations or while awaiting delivery of other aircraft purchased are reasons which encourage leasing. The arrangements between private parties are varied and forms of lease arrangements are many.¹³ In the governmental area, however, the lessor and lessee must consider the effect of national law and regulations on the aircraft involved. For instance, in the United States, the following provisions of the Federal Aviation Act of 1958, as amended, must be considered in the leasing of an aircraft: registration of aircraft;¹⁴ filing of agreements;¹⁵ recordation of aircraft ownership;¹⁶ limitation of security on owner's liability;¹⁷ airworthiness certificates;¹⁸ air carrier operating certificates;¹⁹ maintenance of equipment;²⁰ and, aviation insurance.²¹ In addition to statutory provisions, in the United States there are a number of

¹¹ Minutes, ICAO Doc. 7057-C/817, p. 203, para. 4.

¹² See, e.g., Stiles & Walker, *Leveraged Lease Financing of Capital Equipment*, 28 Bus. L. 161-78 (1972-73); Schmidt & Larson, *Leveraged Lease Arrangements: Tax Factors that Contribute to their Attractiveness*, 41 J. TAX. 210-22 (1974).

¹³ See, *supra* note 9 for reference to a general discussion in this area.

¹⁴ 49 U.S.C. § 1401 (1976).

¹⁵ *Id.* at § 1403(c).

¹⁶ *Id.* at § 1403.

¹⁷ *Id.* at § 1404.

¹⁸ *Id.* at § 1423(c).

¹⁹ *Id.* at § 1424.

²⁰ *Id.* at § 1425.

²¹ *Id.* at § 1531.

administrative regulations which also become operative depending upon the registration of the aircraft.²² All of these statutory and regulatory provisions impose responsibilities on the United States Government with respect to the aircraft, its owner and its operator. For aircraft operated internationally, lessors and lessees should be aware of multilateral or bilateral governmental rights and obligations with respect to aircraft of U.S. registry²³ which can determine, among other things, the registerability of aircraft,²⁴ the responsibility of governmental safety surveillance,²⁵ and the jurisdiction for criminal prosecution for certain crimes committed aboard an aircraft.²⁶ The extent of international involvement in this area can be seen in the following selected Articles of the Convention on International Civil Aviation:

Article 12 - (Rules of the Air) imposes on contracting States responsibility for: (a) insuring that every aircraft flying over or maneuvering within its territory shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force; and (b) insuring that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force.²⁷

Articles 17, 18, 19, and 20 (Nationality of Aircraft) provide that: (a) aircraft have the nationality of the State in which they are registered; (b) an aircraft cannot be registered in more than one State, but its registration may be changed from one State to another; (c) national laws govern registration; and (d) every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.²⁸

Article 30 - (Aircraft Radio Equipment) provides that aircraft radios be licensed by the State of registry if they are to be carried in

²² See, e.g., 14 C.F.R. § 47 (1980) (aircraft registration); § 49 (recording of aircraft titles and security documents); § 121 (certification and operations; domestic, flag, and supplemental air carriers and commercial operators of large aircraft); § 129 (operations of foreign air carriers); § 91 (general operating rules); §§ 61, 63, 65, 67 (airman certification); §§ 23, 25 (airworthiness standards); § 36 (noise standards); § 43 (maintenance); § 218 (lease by foreign air carrier or other foreign person of aircraft with crew); § 375 (navigation of foreign civil aircraft within the United States); see also U.S. Dep't of Transportation (FAA), Truth in Leasing Advisory Circular, AC No. 91-57A (1978).

²³ For examples of multilateral rights and obligations, see generally, *supra* notes 4, 5, 6 & 7. Obligations and rights are also set forth in bilateral air transport agreements such as Agreement Relating to Air Transport Services, April 16, 1956, United States-Germany, 7 U.S.T. 527, T.I.A.S. No. 3536.

²⁴ Convention on the International Recognition of Rights in Aircraft, Sept. 17, 1953, 4 U.S.T. 1830, T.I.A.S. No. 2847.

²⁵ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, articles 31, 32, 38 & 39.

²⁶ Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 5; Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *supra* note 6; Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, *supra* note 7.

²⁷ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, art. 12.

over the territory of other contracting States; that the use of radio apparatus be in accordance with the regulations of the State flown over and, finally, that radios be used only by members of the flight crew licensed for that purpose by the State of registry.²⁹

Article 31 - (Certificates of Airworthiness) requires that every aircraft engaged in international navigation be provided with a certificate of airworthiness issued or rendered valid by the State of registry.³⁰

Article 32 - (Licenses of Personnel) imposes the obligation that the pilot and crew of aircraft engaged in international navigation be provided with certificates of competency issued or rendered valid by the State of registry. Additionally, provision is made for States to refuse to recognize, for the purpose of flight above their territory, certificates of competency and licenses granted to any of its nationals by another contracting State.³¹

Article 33 - (Recognition of Certificates and Licenses) provides that certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards established under the Convention.³²

Article 39 - (Endorsement of Certificates and Licenses) requires that certificates and licenses shall have endorsed on them details in which the aircraft and/or personnel have not fully satisfied all conditions.³³

Article 40 - (Validity of Endorsed Certificates and Licenses) states that no aircraft or personnel having certificates or licenses so endorsed as indicated in Article 39 shall participate in international navigation except with the permission of the State or States whose territory is entered. The registration or use of any such aircraft, or of any designated aircraft part, in any State other than that in which it was originally certified shall be at the discretion of the State into which the aircraft or part is imported.³⁴

Article 25 - (Aircraft in Distress) requires that States undertake to help aircraft in distress in their territory and to permit, subject to their control, the owners of the aircraft or authorities of the States of registry to provide help.³⁵

²⁹ *Id.* at 1189, art. 30.

³⁰ *Id.* art. 31.

³¹ *Id.* art. 32.

³² *Id.* art. 33.

³³ *Id.* at 1191, art. 39.

³⁴ *Id.* at 1192, art. 40.

Article 26 - (Investigation of Accidents) provides that States where fatal accidents occur are responsible for investigating them, but allows the State of registry to be given the opportunity to appoint observers to be present at the inquiry.⁸⁶

The following "Note," found at the beginning of Chapter 3 of Annex 6 of the Chicago Convention, may help to summarize the nature of the international problem:

The Convention specifies in a number of respects the fundamental responsibility of a Contracting State for aircraft of its nationality. The responsibility of a State of Registry is further expanded in this Annex. *Methods of discharging such responsibility may vary among States but no particular method can in any way relieve the State of Registry of its responsibilities. . . .* Subject to this basic responsibility, nothing in this Annex prevents:

- (a) in the case of an aeroplane being chartered and operated by an operator having the nationality of a Contracting State other than the State of Registry, the latter State delegating to the former State, in whole or in part, the exercise of the functions imposed by this Annex; . . .⁸⁷

It is evident from the foregoing that the scheme developed by the Chicago Convention places with the State of registry almost total responsibility for its aircraft. The inability to effectively meet these obligations has stimulated the pursuit of an effective resolution of the practical problems related to State responsibility for leased aircraft.⁸⁸ In addition, the need to provide a satisfactory jurisdictional base of the broadest nature to combat hijacking and other crimes against aircraft has served as a further impetus to recognizing the legitimate roles of lessors and lessees of aircraft involved in international operations.

INTERNATIONAL SOLUTIONS

A. *Private Air Law Conventions*

A series of multilateral conventions, generally referred to as the Private Air Law Conventions, have been designed to affect the rights of private individuals rather than creating rights and obligations in governments. These conventions will be discussed below.

As a matter of historical perspective, some of the earliest, as well as more recent, actions taken by the world aviation community relating to leased aircraft have been those connected with deliberations attending the international aviation conventions concerning private rights in aircraft and liability for damages.

⁸⁶ *Id.* at 1187, art. 26.

⁸⁷ *Supra* note 11.

⁸⁸ *See* Comment of United Kingdom Delegate Mr. Kean, ICAO Doc. 8301-LC/149-1, p. 251.

The issue concerning leased aircraft emerged in 1948 in the context of the Convention on the International Recognition of Rights in Aircraft.³⁹ The principal advantages flowing to the United States from this Convention can be found in the following statement from the Report of a Senate Committee on Foreign Relations, which recommended that the Senate advise and consent to the ratification of the Convention:

The chief advantage of the convention for us is the assistance it will give civil aviation in the United States by facilitating and making more secure the financing of the aircraft industry. It will also assist the bankers in this respect. On six points particularly the advantages are apparent.

- (1) Security is promised American bankers in the financing of aircraft by recognizing the prior rights in the aircraft if properly recorded. Security is also assured where aircraft or their parts are used as pledges for the payment of indebtedness.
- (2) Liens recorded in the United States on aircraft will take precedence over all unrecorded liens, and a prior claim as against recorded rights can only be established against the aircraft for salvage and for repairs.
- (3) Foreign governments have conditionally accepted the American security device known as the fleet mortgage, under which all the aircraft in a fleet are liable jointly and severally for claims against the operator. Said Mr. Russell B. Adams, member of the Civil Aeronautics Board, before the subcommittee: "the importance of the fleet mortgage principle to the financing of international air lines cannot be overemphasized."
- (4) Sales in execution under article VII provide a means whereby the lender will "be repaid his loan even though he may lose his security."
- (5) Security is provided the banker who lends money on spare parts to be located in a foreign country.
- (6) The machinery for recording is simple and fits into the present functions and activities of the Civil Aeronautics Administration.⁴⁰

Article I of the Convention requires contracting States to recognize "rights to possession of aircraft under leases of six months or more," provided that such rights "have been constituted in accordance with the law

³⁹ Convention on the International Recognition of Rights in Aircraft, *supra* note 24. This Convention had, however, been lurking in the background since 1931 when the Comité International Technique d'Experts Juridiques Aériens, an international organization of private air-law experts, drafted two air conventions. One dealt with mortgages and securities on airplanes. The other was concerned with the ownership and registration of aircraft. Neither convention convened but, under United States leadership, the concepts embodied in the Conventions were subsequently revived.

⁴⁰ SENATE COMM. ON FOREIGN AFFAIRS, 81st Cong., 1st Sess., EXEC. RPT. NO. 9-CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT 3-4 (1949).

of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality."⁴¹ This provision has been explained as follows:

It will be noted here that . . . the *right to possession* is recognized. Hence where there is a sublease, the sub-lessor will be protected as against the original lessor.

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

The six month period was chosen as one which would cover all bona fide financing transactions, and at the same time not require courts to consider as rights against the aircraft many small claims for short-term leases, where the objective was not to finance the purchase of the aircraft. Although primarily intended to promote the financing of aircraft, this clause is certainly broad enough to cover long-term leases as such.⁴²

From the foregoing it is evident that, almost from the inception of commercial aviation, the concern of the government has been focused on the issue of leasings within the context of private sector financing.

In 1961, at Guadalajara, Mexico, delegates from a number of nations attended a diplomatic conference on private international air law to consider The Convention for the Unification of Certain Rules relating to International Carriage by Air performed by Persons other than the Contracting Carrier.⁴³ This Convention, commonly referred to as the Guadalajara Convention, deals with aspects of the charter and hire of aircraft as they relate to the liability provisions of the Warsaw Convention.⁴⁴ The Guadalajara Conference adopted Resolution B which urged ICAO to study "the legal problems affecting the regulation and enforcement of air safety which have been experienced by certain States when an aircraft registered in one State is operated by an operator belonging to another State."⁴⁵ In 1962, the 14th Session of the ICAO Legal Committee established a Subcommittee on Resolution B of the Guadalajara Conference.⁴⁶ This

⁴¹ ICAO Doc. 7057-C/817, *supra* note 11.

⁴² Legal Subcommittee of U.S. Air Coordinating Committee, (Jan. 3, 1949), Doc. ACC 88.11, p. 4.

⁴³ ICAO Doc. 7364, *supra* note 8.

⁴⁴ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. For a discussion of this convention and amendments proposed thereto, see generally *Aviation Protocols: Hearings Before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. (1977).

⁴⁵ Documents, Vol. 11, International Conference on Private Air Law (Guadalajara, Aug.-Sept. 1961), ICAO Doc. 8301-LC/149-2, p. 17; (for an historical background of the problem, see p. 35).

same Subcommittee was charged by the Legal Committee with studying similar problems related to the Tokyo Convention.⁴⁷

The Subcommittee on Resolution B of the Guadalajara Conference met in early 1963 and produced two reports. The report dealing with the legal problems affecting the regulation and enforcement of air safety in charter or lease situations contained a number of possible solutions, viz.: (1) amendment of the Convention on International Civil Aviation; (2) delegation of functions of the State of registration to the State of the operator; and, (3) inclusion of a standard in Annex 13 to the Chicago Convention providing for representation of the State of the operator at Accident inquiries.⁴⁸

The September 1964, 15th Session of the ICAO Legal Committee considered, *inter alia*, the report referred to in the paragraph above. The 15th Session of the Legal Committee took the following actions with respect to the report of the Subcommittee on Resolution B of the Guadalajara Conference:

- (a) Agreed that the European Civil Aviation Conference could also study the problem;
- (b) Decided that the best way of solving the problems in question would be the delegation of functions of the State of Registry to the State of the Operator of the aircraft concerned;
- (c) Decided that the Subcommittee should be continued in existence and that it should prepare model bilateral agreements to provide for such delegation; and
- (d) Decided that a questionnaire should be sent to the States concerned with these problems in order to obtain factual information for the use of the Subcommittee.⁴⁹

Subsequently, the 15th Session of the ICAO Assembly in June, 1965, considered the priorities to be assigned to the work program of the Legal Committee. Although the work regarding lease, charter, and interchange was not assigned a high priority, the Assembly did recommend that the Chairman of the Legal Committee appoint a Rapporteur to study the subject and to maintain communication with other organizations working on the question.⁵⁰ In view of the priority accorded to other subjects, the Legal Subcommittee on Resolution B of the Guadalajara Conference was not reconvened.

In September 1978, the Diplomatic Conference on Air Law was held in Montreal, Canada for the purpose of considering amendments to the

⁴⁷ *Id.*

⁴⁸ ICAO Doc. 8582-LC/153-1, pp. 123-25.

⁴⁹ ICAO Doc. 8582-LC/153-1.

⁵⁰ Report and Minutes of the Legal Commission, 15th Session (Montreal, 22 June-16 July 1965) ICAO Doc. 8517-A. 15-LE-10.

Convention on Damages Caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on October 7, 1972⁵¹ (the Rome Convention). This latter Convention establishes guidelines for liability which include limits on liability caused by foreign aircraft to persons and property on the ground. As a result of recommendations from the ICAO Legal Committee, one of the amendments permitted the Convention to be applied to damages caused either by an aircraft operated by a contracting State in which it was registered or by the State of the operator of a leased aircraft. The proposed limit is contained in a new Article 23(1) of the Convention which reads as follows:

This Convention applies to damage contemplated in Article 1 caused in the territory of a Contracting State by an aircraft registered in another Contracting State or by an aircraft, whatever its registration may be, the operator of which has his principal place of business or, if he has no such place of business, his permanent residence in another Contracting State.⁵²

The ICAO Legal Committee which recommended the proposed amendment to the Rome Convention also considered possible amendments to the Chicago Convention relating to governmental responsibility for leased aircraft and had drafted the proposed amendment to the Chicago Convention, which will be discussed *infra*.⁵³ Although the Rome Convention is a "private air law" convention, the concern with respect to governmental responsibility for leased aircraft is reflected in the following comments from the Summary Report on the work of that Legal Committee:

Several delegations stated that there was no interconnection between any suggested amendment of the Rome Convention and the proposed amendment of the Chicago Convention in Article 83 *bis*; the Rome Convention deals with private law liability of the operator for damage caused by aircraft on the surface and this matter is totally unrelated to the transfer of functions and duties from the State of registry to the State of the operator; such transfer concerns only matters of public law and relating to the regulation and enforcement of air safety under the provisions of the Chicago Convention. However, some delegations believed that there was a link between the proposed Article 83 *bis* of the Chicago Convention and the Rome Convention; as an example, they stated that a damage on the surface may be due to lack of airworthiness of an aircraft, for which the State of registry might be responsible if the functions and duties with respect to airworthiness were not transferred to the State of the operator⁵⁴

⁵¹ ICAO Doc. 7364, *supra* note 8.

⁵² *Id.*

⁵³ ICAO Doc. 9238-LC/180-1.

⁵⁴ ICAO Doc. 9238-LC/180-2, p. 34.

B. *Criminal Jurisdiction*

In dealing with the problem of leased aircraft and its relationship to criminal jurisdiction, two areas have been addressed. In the first instance the problem of the responsibility of the State of registry of the leased aircraft was examined in connection with the development of the Tokyo Convention which dealt with jurisdictional aspects of crimes committed aboard aircraft.⁵⁵ The issue was also looked at in connection with the international establishment of the crimes of hijacking, sabotage, and other acts of violence committed against aircraft. The resolutions, however, have been different.

With respect to the Convention on Offenses and Certain Other Acts Occurring on Board Aircraft (Tokyo Convention),⁵⁶ one of the matters considered by the 14th Session of the ICAO Legal Committee, in 1962, was whether to include the following provision in the draft convention on leased aircraft: "An aircraft chartered on a barehull basis to an operator who is a national of a State other than the State of registration shall be treated for the purpose of this Convention as if throughout the period of the charter it was registered in that other State."⁵⁷ The Legal Committee decided against including such a provision in the Tokyo Convention draft on the basis that the matter needed further study.⁵⁸ The Committee decided that such study should be carried out by the Subcommittee on Resolution B of the Guadalajara Conference since the two subjects were related.⁵⁹

The report of this latter Subcommittee regarding the use of aircraft chartered on a barehull basis was submitted to the International Conference on Air Law which convened in Tokyo in the summer of 1963.⁶⁰ The subcommittee report, however, did not reach an agreement on how to handle this question. Instead, without endorsement, it set forth two possible solutions. The first was that no special provision on the subject was necessary.⁶¹ Another view considered by the Subcommittee was that the Tokyo Convention might have a provision indicating that a State operating under the lease of an aircraft registered in another State might apply its laws to events occurring on that aircraft if it so chose, but that the exercise of such jurisdiction should fall entirely outside the scope of the Tokyo Convention.⁶² The subject was discussed at length in the Conference both separately and in association with the problem of aircraft being operated by an airline formed as a consortium of several States. Ultimately, the Con-

⁵⁵ Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, *supra* note 7.

⁵⁶ *Id.*

⁵⁷ ICAO Doc. 8302 LC/150-2, p. 101.

⁵⁸ See, *supra* note 46, at 179.

⁵⁹ *Supra* note 46.

⁶⁰ ICAO Doc. 8565 LC/152-1, p. 128.

⁶¹ ICAO Doc. 8565 LC/152-2, p. 113.

ference decided by a vote of 19 to 14 not to include a provision on leased aircraft in the Convention, presumably because States remained free in any event to apply their laws to such aircraft.⁶³

As a result of the work of a Special Legal Subcommittee⁶⁴ on the problems of lease, charter and interchange, the ICAO Legal Committee again considered the issue of leased aircraft in connection with the Tokyo Convention in February, 1978. It decided that, rather than amend the Tokyo Convention to give certain rights to the State of the operator, it would, instead, circulate a questionnaire to gather States' opinions on whether an amendment to the Tokyo Convention was necessary.⁶⁵ The 24th Session of the ICAO Legal Committee, held in May of 1979, relegated a low priority to the consideration of this matter.⁶⁶ Nevertheless, by the end of spring forty-four States had replied to the questionnaire. Forty States maintained that they had experienced no practical difficulties with the Tokyo Convention regarding offenses and other acts committed on board an aircraft leased without crew to a lessee who has in a contracting State either his principal place of business or, if he has no such place of business, his permanent residence.⁶⁷

The subject of leased aircraft also arose in connection with the development of a multilateral treaty on aircraft hijacking, the Convention for the Suppression of Unlawful Seizure of Aircraft,⁶⁸ opened for signature at The Hague, Netherlands, on December 16, 1970. That Convention lists three categories of States which are required to establish their jurisdiction in the event of an unlawful seizure of an aircraft, viz.: (1) the State of Registry of the Aircraft in which the offense is committed; (2) the State of landing of the aircraft where the offense occurred; and, (3) the State of the Operator in cases "when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State."⁶⁹

The following year, at Montreal, the subject again arose with the development of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.⁷⁰ This Convention dealt with sabotage and other unlawful acts against aircraft. The Convention followed the prece-

⁶³ *Supra* note 60, at 121-33, 138-39.

⁶⁴ For the text of report, see ICAO Doc. 9238 LC/180-2, pp. 63-80.

⁶⁵ See generally ICAO Doc. 9238 LC/180-1, pp. 84-101.

⁶⁶ See generally ICAO Doc. A23-WP/23, LE/1, p. 9.

⁶⁷ ICAO Doc. C-WP/6904.

⁶⁸ Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 5.

⁶⁹ *Id.* at art. 4.

⁷⁰ Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *supra* note

dent of the Hague Convention in requiring the establishing of jurisdiction by Contracting States in the same three categories mentioned above.

A desire to establish the broadest possible jurisdictional base as a deterrent to aircraft hijacking and sabotage explains the difference in treatment between the Tokyo Convention regime and those of the Hijacking and Sabotage Conventions.

C. Safety

One of the most troublesome areas of concern with respect to international obligations relating to leased aircraft has been that of safety responsibility. As already noted, the Chicago Convention places this responsibility on the State of registry of the aircraft. It was long recognized that in the commercial world of aviation equipment interchanges were attractive in certain situations and were in fact being dealt with bilaterally.⁷¹ However, a remaining vexatious problem has been how to provide for recognition of these bilateral delegations of responsibilities by States who are parties to the Chicago Convention but not parties to the bilateral understanding between the State of registry and the State of the operator.

Problems of safety which arise out of the leasing of aircraft in international operations had not been envisioned in 1944 at the time of the development of the Convention on International Civil Aviation. The basic difficulty is that the Chicago Convention places the fundamental responsibility on a contracting State for aircraft of its nationality. As indicated previously, however, this is a responsibility which cannot be carried out in all leasing situations.⁷²

The paragraphs which follow present an analysis of pertinent provisions of the Convention on International Civil Aviation as it relates to leasing problems.

Article 12⁷³ requires each State to "adopt measures to insure that . . . every aircraft carrying its nationality *wherever such aircraft may be*, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force" (emphasis added). In the case of foreign operators, this Article places an impossible burden on the State of registry, *i.e.*, to regulate the behavior of persons over whom it may have no actual control. Consequently, the State of registry must rely on the State of the operator to insure compliance; however, under the Convention, the State of registry cannot divest itself of the responsibility generated by this Article.

⁷¹ See, e.g., KSSU Corporation Manual, Feb. 9, 1973, an Agreement between the Civil Aviation Authorities of Denmark, France, the Netherlands, Norway, Sweden and Switzerland on Governmental Supervision of airworthiness, operation and maintenance of the aeroplanes involved under technical cooperation agreements between KLM, SAS, Swissair, and UTA.

⁷² See *supra* note 57.

⁷³ *Supra* note 29.

This results in making the State of registry responsible for actions of a crew which it may be powerless to control.

Article 31⁷⁴ provides that every aircraft engaged in international air navigation must be provided with a certificate of airworthiness issued or rendered valid by the State of registry. A significant difficulty arises for the State of registry when it tries to monitor the continuing airworthiness of the aircraft and assure that the operator complies with the maintenance, preventive maintenance and alteration provisions. The common result is that the State of registry must rely on the State of the operator to insure that this responsibility is discharged.

Article 32⁷⁵ stipulates that the pilot and crew of aircraft engaged in international navigation must be provided with certificates of competency issued or rendered valid by the State of registry. As with certificates of airworthiness, the State of registry is unable to avoid the final responsibility assigned to the authority issuing licenses of competency. As a result of this situation, a foreign operator is put in the position of having to apply to the State of Registry for airmen certificates.⁷⁶ The operator's crew then finds it necessary to comply with a foreign country's civil aviation regulations, often giving rise to the need for numerous clarifications and interpretations.

In 1971, the ICAO, by Resolution A18-16, directed the ICAO Council to examine the Annexes to the Chicago Convention for the purpose of recommending amendments to accommodate existing interchange process.⁷⁷ The Council approved the following note for inclusion in Annexes 1 (Personnel Licensing), 2 (Rules of the Air), 3 (Meteorology), 5 (Units of Measurement), 6 (Operation of Aircraft), 7 (Aircraft Nationality and Registration Marks), 8 (Airworthiness of Aircraft), 10 (Aeronautical Telecommunications), 12 (Search and Rescue), 13 (Aircraft Accident Inquiry), and 16 (Aircraft Noise) as and when further amendments to those Annexes were next adopted or approved:

Although the Convention on International Civil Aviation allocates to the State of Registry certain functions which that State is entitled to discharge, or obliged to discharge, as the case may be, the Assembly recognized, in Resolution A 18-16, that the State of Registry may be unable to fulfill its responsibilities adequately in instances where air-

⁷⁴ *Supra* note 30.

⁷⁵ *Supra* note 31.

⁷⁶ *See, e.g.*, 14 C.F.R. § 61.77 (1980) (special purpose pilot certificate: operation of U.S.-registered civil aeroplanes leased by a person not a U.S. citizen).

⁷⁷ ICAO Doc. 9275, p. II-32; also, of particular significance are subsequent assembly resolutions A21-22 and A-22-28, pp. II-33-35. Resolution A-22-28 calls upon States whose laws inhibit lease, charter and interchange to review their statutes with a view toward removing such obstructions. The United States has taken action to remove impediments to the use of foreign registered aircraft by U.S. air carriers.

craft are leased, chartered, or interchanged—in particular without crew—by an operator of another State and that the Convention may not adequately specify the rights and obligations of the State of an operator in such instances. Accordingly, the Council, without prejudice to the question of whether the Convention may require amendment with respect to the allocation of functions to States, urged that if in the above-mentioned instances the State of Registry finds itself unable to discharge adequately the functions allocated to it by the Convention, it may delegate to the State of the operator, subject to acceptance by the latter State, those functions of the State of Registry that can more adequately be discharged by the State of the operator. It is understood that the foregoing action will only be a matter of practical convenience and will not affect either the provisions of the Chicago Convention prescribing the duties of the State of registry or any third State.⁷⁸

At its 87th Session on April 7, 1976, the ICAO Council, pursuant to Resolution A21-22, agreed to establish a Panel of Experts on Lease, Charter and Interchange of Aircraft in International Operations.⁷⁹ The Panel, composed of technical and legal experts, met in Montreal from October 11-15, 1976, in nine open sessions. Pursuant to its terms of reference, the Panel prepared a list of problems arising out of the lease, charter and interchange of aircraft in international operations, and studied alternative solutions to these problems.⁸⁰

In the report which it submitted to the Council on November 11, 1976, the Panel recommended that the Council request the appropriate bodies to study the specific amendments which could be made to Annexes 9,⁸¹ 12,⁸² and 13⁸³ in order to cover the situation of an aircraft operated by a foreign operator not presently provided for in Articles 25⁸⁴ and 26⁸⁵ of the Chicago Convention, and to refer to the Legal Committee the study of the problems raised by Articles 12, 31 and 32, when an aircraft registered in one State is operated by an operator belonging to another State.⁸⁶

After considering the Report of the Panel at its 89th Session, on November 25, 1976, the ICAO council decided to convene in Montreal from March 23 to April 7, 1977, a meeting of a Special Subcommittee of the Legal Committee. Under its terms of reference, the Subcommittee was expected to study the problems raised by Articles 12, 31, and 32 of the

⁷⁸ ICAO Doc. C-WP/5699; ICAO Doc. AN-WP/4094.

⁷⁹ ICAO Doc. C-MIN 87/13, p. 111.

⁸⁰ ICAO Doc. PE/CHA (Report, Oct. 15, 1976).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

Chicago Convention when an aircraft registered in one State is operated by an operator belonging to another State.⁸⁷

The Special Legal Subcommittee issued its report on May 4, 1977, and recommended that the Chicago Convention be amended so that agreements between or among States to transfer all or part of the responsibilities under Articles 12, 31, and 32 of the Convention from the State of registry to the State of the operator in international lease, charter and interchange operations be recognized by all Contracting States to the Convention. The report further concluded that the matter was ripe for study by the Legal Committee and that no further meeting of the Subcommittee was necessary.⁸⁸

As part of its report, the Subcommittee prepared a Draft Amendment to the Chicago Convention, for submission to the Legal Committee, which read:

Article 83 bis

Transfer of certain functions and duties of the State of Registry

(a) Notwithstanding the provisions of Article 12, 31, and 32(a) of this Convention, when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter and interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 31, and 32(a) of this Convention. The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.⁸⁹

(b) * * *

The ICAO Legal Committee, meeting in 1978, approved the following text for amendment to the Chicago Convention:

Article 83 bis

Transfer of certain functions and duties

(a) Notwithstanding the provisions of Articles 12, 30, 31 and 32(a), when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect

⁸⁷ See generally ICAO Doc. 9238-LC/180-2, p. 64.

⁸⁸ *Id.* at 63.95.

⁸⁹ *Id.* at 94.

of that aircraft under Articles 12, 30, 31 and 32(a). The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.

- (b) The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.
- (c) The provisions of paragraphs (a) and (b) above shall also be applicable to cases covered by Article 77.⁹⁰

It should be noted that this text makes reference to Article 30 of the Chicago Convention. A question arose concerning whether such reference would cause confusion because of the requirements of the International Telecommunications Convention in Geneva in 1959.⁹¹ The Legal Committee of ICAO requested that the ICAO Council inquire as to any potential area of conflict between the proposed Article 83 *bis* and the Inter-telecommunications Union Geneva Radio Communications (ITU).⁹² After consultation with the ITU, the Administrative Council of ITU concluded that there would be a conflict.⁹³ This conflict was eliminated, however, with the adoption of a new regulation by the World Administrative Radio Conference, held in Geneva in November of 1979, concerning the issuance of license in the case of hire, lease or interchange of aircraft. This regulation provides that:

In the case of hire, lease or interchange of aircraft, the administration having authority over the aircraft operator receiving an aircraft under such an arrangement may, by agreement with the administration of the country in which the aircraft is registered, issue a license in conformity with that specified in No. 2025 as a temporary substitute for the original license.⁹⁴

The text of the amendment to the Chicago Convention was unanimously approved by the ICAO Assembly at its meeting in September 1980, and will be open for adherence by member States of ICAO.⁹⁵ When ratified by the requisite number of member States to the Chicago Convention it will become effective.⁹⁶

⁹⁰ *Id.* at 53.

⁹¹ ICAO Doc. A23-WP/16 EX/4.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ ICAO Doc. A23-WP/93 P/41.

RECENT DEVELOPMENTS IN THE UNITED STATES

There have been interesting developments in the United States within the last two years concerning the registration of aircraft and the use by United States air carriers of leased aircraft of foreign registry.

A. *Background*

The requirements relating to registration of aircraft in the United States date back to the provisions of the Air Commerce Act of 1926 and appear to have been based in large part on existing laws relating to water transportation.⁹⁷ Under maritime law, ownership by citizens or corporations organized under the laws of the United States was a prerequisite for the registration of American vessels.⁹⁸ An additional influence on the early United States law of registration is to be found in the International Air Navigation Convention of October 13, 1919.⁹⁹ By the terms of the Convention, nationality of an aircraft was to be determined by the ownership and registration. Registration in turn was restricted to nationals of the State.¹⁰⁰ The Air Commerce Act authorized foreign owned aircraft to navigate within the United States, provided that American aircraft were granted reciprocal privileges. Such aircraft, however, were unauthorized to engage in inter or intrastate commerce.¹⁰¹ In 1934, Section 3(a) of the Air Commerce Act was amended to permit limited registration of aircraft owned by aliens.¹⁰² The Civil Aeronautics Act of 1938, however, repealed Section 3 of the Air Commerce Act and required the ownership by a citizen of the United States and the absence of registration under the laws of a foreign country as qualifiers for obtaining United States registration of civil aircraft.¹⁰³ Section 501(f) of the Civil Aeronautics Act also addressed the issue of the "effect of registration." It stated that a United States certificate of registration shall be conclusive evidence of nationality for international purposes but not for any proceedings under the laws of the United States, nor would registration evidence ownership of aircraft in any proceeding in which the ownership may be an issue.¹⁰⁴ The Federal Aviation Act of 1958, nevertheless, reenacted the registration provisions of the Civil Aero-

⁹⁷ See H.R. REP. No. 572, 69th Cong., 1st Sess. (1926) (found in 1929 U.S. AV. R. 142-147 (1929)).

⁹⁸ 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 625 (1942) (citing REV. STAT. § 4132; 46 U.S.C. 11 (1958)).

⁹⁹ See 1929 U.S. AV. R. 142-43 (1929); 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 863 (1942); RHYNE, CIVIL AERONAUTICS ACT ANNOTATED 111 n.381.

¹⁰⁰ See C. FENWICK, INTERNATIONAL LAW 409 (3rd ed. 1948).

¹⁰¹ 49 U.S.C. §§ 176, 177 (1926) (repealed 1938).

¹⁰² S. REP. No. 1142, 73d Cong., 2d Sess. (1934).

¹⁰³ Section 1107(k) of the Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973, repealed § 3(a) of the Air Commerce Act of 1926, Pub. L. No. 254, 44 Stat. 568. In addition, § 5011(b) of the Civil Aeronautics Act of 1938, 52 Stat. 1005, made ownership by a United States citizen and absence of registration under the laws of any foreign country qualification requirements for United States registration.

¹⁰⁴ Civil Aeronautics Act of 1938, Pub. L. No. 706, § 501(f), 52 Stat. 973.

navitics Act of 1938, restricting United States registration to aircraft owned by citizens of the United States as that term is defined in the Act. The pertinent provisions of the Federal Aviation Act are as follows:

- (a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1108 of this Act) to operate or navigate within the United States any aircraft not eligible for registration: *Provided*, That aircraft of the national-defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Secretary of Transportation. The Secretary of Transportation may, by regulation, permit the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Secretary of Transportation may prescribe.
- (b) An aircraft shall be eligible for registration if, but only if — (1) It is owned by a citizen of the United States and it is not registered under the laws of any foreign country; or (2) It is an aircraft of the Federal Government, or of a State, Territory, or possession of the United States, or the District of Columbia, or of a political subdivision thereof.¹⁰⁵

It should be noted that in Section 501(a) a parenthetical exception was made to Section 1108 of the Act. That section prohibits the use of foreign registered aircraft for purposes of receiving at any point within the United States persons, property or mail for compensation or hire and destined for another point within the United States.¹⁰⁶ This provision is commonly referred to as the “cabotage” provision. It finds its origin in Section 6 of the Air Commerce Act of 1926, which reads as follows:

Sec. 6. Foreign Aircraft - (a) The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone. Aircraft a part of the armed forces of any foreign nations shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

(b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided; and if so authorized, such aircraft and airmen serving in connection therewith, shall be subject to the requirements of section 3, unless exempt under subdivision (c) of this section.

¹⁰⁵ 72 Stat. 771 § 501 (1958).

(c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Secretary of Commerce may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States, and may by regulation exempt such aircraft, and/or airmen serving in connection therewith, from the requirements of section 3, other than the air traffic rules; but no foreign aircraft shall engage in interstate or intrastate air commerce.¹⁰⁷

While these provisions prohibited the use of foreign registered aircraft for purposes of transporting for compensation or hire persons or property between points within the United States, they did not by their terms prohibit the use of such aircraft in overseas or foreign transportation. Thus, the statute by its terms did not prohibit the use of foreign registered aircraft in transporting persons or property for hire from a point in the United States destined for a point outside the United States. The Federal Aviation Regulations, however, prohibited United States carriers from using foreign registered aircraft for such purposes.¹⁰⁸

B. *Shift in United States Law and Practice*

As the decade of the seventies drew to a close some dramatic changes began to take place in United States law and practices concerning United

¹⁰⁷ *Supra* note 101.

¹⁰⁸ In a memorandum, dated Dec. 31, 1959, to the Chief of the Federal Aviation Agency's Office of International Coordination, the General Counsel of the FAA stated the agency position as follows:

[S]ection 1108(b) of the Federal Aviation Act of 1958 . . . forbids the use of foreign registered aircraft for the purpose of carrying between points in the U.S. persons, property or mail for compensation or hire. This provision of law would effectively prevent any U.S. air carrier operating domestically from using such aircraft under its certificate.

The foregoing does not affect U.S. air carriers operating internationally which do not carry for hire between points within the U.S. These carriers, however, are affected by other laws and regulations. Section 41.20 of the Civil Air Regulations governing U.S. air carriers operating internationally requires that any aircraft operated under the terms of any such certificate meet the applicable airworthiness requirements of the Civil Air Regulations. This, of course, requires that such aircraft possess airworthiness certificates issued by the U.S. As a general rule, U.S. airworthiness certificates are issued only to aircraft of U.S. registry. Section 603(c) of the Act provides that the registered owner of any aircraft may file for an airworthiness certificate and section 1.60 of the Civil Air Regulations limits such registered owners to U.S. citizens. In this respect the Federal Aviation Act of 1958 and the former law, the Civil Aeronautics Act of 1938, are identical. Consequently, this provision of law (section 603(c)) has long been interpreted as providing that only a U.S. citizen who is the registered owner under the Act of an aircraft may apply for an airworthiness certificate. Therefore, a U.S. air carrier operating internationally, in order to comply with section 41.20 of the Civil Air Regulations and obtain an airworthiness certificate for aircraft used in its certificated operations, must use only U.S. registered aircraft.

In view of the foregoing, we conclude . . . that a U.S. air carrier (either domestic or international) may not operate under the terms of its certificate a foreign registered aircraft. In this connection, it would make no difference whether the lease was a long-term lease or a short-term lease, or whether the lease arrangement was with crew or without crew.

States registered aircraft and the use of foreign registered aircraft by United States air carriers. The first of these changes occurred in 1977 and involved an amendment to Section 501 of the Federal Aviation Act of 1958. It was primarily designed to expand the aircraft registration eligibility criteria to include aliens admitted for permanent residence in the United States and corporations which were controlled by persons not meeting the Federal Aviation Act citizenship test. In the latter instance, the aircraft must be "based and primarily used" in the United States. Thus, the present Act now reads as follows:

An aircraft shall be eligible for registration if, but only if —

(1)(A) it is —

(i) owned by a citizen of the United States or by an individual of a foreign country who has lawfully been admitted for permanent residence in the United States;

or

(ii) owned by a corporation (other than a corporation which is a citizen of the United States) lawfully organized and doing business under the laws of the United States or any State thereof so long as such aircraft is based and primarily used in the United States; and

(2)(B) it is not registered under the laws of any foreign country; or it is on aircraft of the Federal Government, or of a State, territory, or possession of the United States or the District of Columbia or a political subdivision thereof.

For purposes of this subsection, the Secretary of Transportation shall, by regulation, define the term "based and primarily used" in the United States.¹⁰⁹

Regulations promulgated pursuant to statutory authorization have defined "based and primarily used" to require that the flight time of the aircraft be 60 percent in the United States for it to remain eligible for American registration.¹¹⁰

This statutory change has resulted in the registration of the French and British Concorde aircraft in the United States, thus permitting Braniff International Airways to operate under United States registry between Dallas/Fort Worth and Washington, D.C. A special policy statement, published in December 1978 by the Administrator of the Federal Aviation

¹⁰⁹ 49 U.S.C. § 1401(b) (1958), as amended by Act of Nov. 9, 1977, Pub. L. No. 95-163, § 14, and by Act of March 8, 1978, Pub. L. No. 95-241.

¹¹⁰ 14 C.F.R. § 47.9 (1980). This section of the Federal Aviation Regulations was also amended at that time to recognize existing agency practice in permitting registration under certain types of trust arrangements.

Administration, explains the background and program relevant to the Concorde interchange in the following manner:

Braniff International Airways (Braniff) is a United States flag air carrier which has been issued economic authority and given route approval for operations between Dulles and Dallas by the Civil Aeronautics Board (Board). Braniff is eligible to operate any aircraft on this route, if it is registered as a civil aircraft of the United States and it meets various other regulatory requirements. Braniff has proposed that it operate a foreign-owned Concorde on this route under an arrangement with British Airways Board (British Airways) and Campagnis National Air France (Air France). The Board has issued route authority to Braniff, and Braniff has opted to use the Concorde on a daily interchange basis. For Braniff's decision to be implemented, certain actions must be taken by the FAA.

The FAA has heretofore never been confronted with the administrative problems involving registration associated with an operation where the registration of the aircraft must change on a flight by flight basis. There have been however lease arrangements involving a change of registration every few months (*e.g.*, an Eastern Air Lines/Air Canada cross-lease arrangement was approved by the FAA in December, 1972, by Agency Order 8000.27). With the recent passage of the amendment to section 501 of the Act, it has become possible to effectuate a flight by flight interchange arrangement between a U.S. air carrier and a foreign air carrier where the aircraft is owned by a foreign interest incorporated in the United States. Significantly, there was and is no problem of registration confronting a proposed interchange where the aircraft is owned by a U.S. air carrier rather than the foreign air carrier.

The Braniff proposal presents the FAA with a situation where: (a) Braniff will have economic authority issued by the Board to operate under the interchange agreement (certain questions about the interchange are still pending before the Board), (b) there is no safety question due to the extensive cooperation between U.S., French and British authorities on the certification and maintenance program of the aircraft, (c) the aircraft will be U.S. certificated and maintained in accordance with the requirements of the Federal Aviation Regulations (FARs), (d) the environmental considerations have been extensively considered and resolved (Amendment 91-153, "Noise and Sonic Boom Requirements," as published in the Federal Register (43 FR 28406, June 29, 1978)) and, (e) but for the fact that the aircraft are owned by British Airways and Air France rather than Braniff and, the standard registration procedures cannot accommodate the time constraints the interchange agreement imposes on the transfer of the aircraft to Braniff's operations, these operations could go forward without the new registration mechanism. It should also be noted that through the International Civil Aviation Organization (ICAO), the U.S. has sup-

ported an amendment to the Chicago Convention to facilitate the lease, charter and interchange of aircraft, without a change of registry.

THE PROGRAM —

Braniff's proposal is that British Airways and Air France operate a Concorde (under foreign registry) to Dulles Airport. After arrival at Dulles, the Concorde will be operated at subsonic speed by Braniff over its Dulles/Dallas route. Braniff will return the Concorde at subsonic speed from Dallas to Dulles at which time it will be operated across the Atlantic by the foreign air carrier.

This proposal permits the direct Concorde ticketing of passengers from Europe, through Dulles to Texas, although the sequenced flight will be separately operated by air carriers of two different nations.

In connection with this arrangement, the FAA has been contacted by representatives of Braniff, the two foreign air carriers, and the Civil Aviation Authorities of the United Kingdom and of the Republic of France. As a result of these discussions, procedures were proposed to conform this arrangement with the Act and the FARs to allow implementation of the Board's order.

OWNERSHIP —

* * * * *

In order to meet this requirement, it has been proposed that the 'owner' — as to the British Airway's Concorde — will be a subsidiary of that air carrier, incorporated in the United States (corporation). United States registration is thus permissible under section 501(b) of the Act since the corporation — although it be foreign controlled — will be organized and doing business under the laws of a State, and the Concorde, while registered in the United States, will be based and used exclusively within the United States. A comparable pattern will be adopted for the French Concorde. This application of "based and primarily used in" will be set forth in a Special Federal Aviation Regulation which will be issued shortly.

The qualifying ownership interests in the Concorde by the corporation will be created by a document in the nature of a lease or bailment, from the foreign air carrier to the corporation. This document will contain terms consistent with section 101(16) of the Act (49 U.S.C. 1301) whereby the corporation becomes, or has the option of becoming, the complete owner of the Concorde (in accordance with section 501(c) of the Act) at the termination of the agreement.¹¹¹

As the decade closed the Federal Aviation Administration, through the drafting of exemptions from its regulations, permitted the use of United

¹¹¹ 43 Fed. Reg. 57367-8 (1978). Additionally, a Special Federal Aviation Regulation was promulgated as an interpretative rule establishing the principle that the statutory standard of "based in and primarily used" in the United States applies only during the time the aircraft is registered in the United States. 44 Fed. Reg. 38-9 (1979).

States air carriers of foreign registered aircraft in international operations only.¹¹²

The passage of the International Air Transportation Act of 1979¹¹³ addresses the remaining area of government concern in the area of leased aircraft problems. This Act not only includes goals for international aviation policy¹¹⁴ but also amends Section 1108 of the Federal Aviation Act to permit the lease of foreign registered aircraft (without crew) to United States air carriers for domestic use in the United States.¹¹⁵ That Act also permits, under certain emergency circumstances, the use of a foreign aircraft carrier to transport persons and property between two points within the United States.¹¹⁶ These dramatic changes in United States law were explained in a report by the Senate Committee on Commerce, Science and Transportation:

Under Section 1108(b) of the Act (which generally requires Board approval for navigation of foreign aircraft in U.S. airspace) the Board is precluded from granting authority for foreign aircraft to "... take on at any point within the United States persons, property or mail carried for compensation or hire and destined for another point in the United States." The section currently precludes a U.S. air carrier from operating foreign registered aircraft in interstate and overseas air transportation (*i.e.*, between two points in the United States), even where the only foreign involvement is the lease of the bare hull of the aircraft (*i.e.*, without crew).

Section 402(a) of the Act also provides a limitation upon the lease of foreign aircraft with crews by U.S. air carriers for domestic air transportation operations. The section authorizes the Board to grant a foreign air carrier permit only for "foreign air transportation." Under traditional concepts (*see* Part 218 of the Board's Regulations, 14 C.F.R. 218) a lease of an aircraft with crew—even where the service is performed on behalf of another direct air carrier which alone holds itself out as conducting the operation, and which exercises control over most phases of the operation—is considered to be a charter of the aircraft by the foreign air carrier to the U.S. air carrier. The operation would, therefore, constitute a charter by the foreign air carrier in interstate or overseas air transportation (*i.e.*, between two points in

¹¹² *See* Flying Tiger Line, Inc., Exemption No. 2511 from § 121.153 of the Federal Aviation Regulations, Feb. 15, 1978, Regulatory Docket No. 17666. Exemptions have also been granted to Trans International Airlines, Inc., Dec. 20, 1978, Regulatory Docket No. 18596 and National Airlines, March 28, 1979, Regulatory Docket No. 18872. These exemptions have been issued with a number of conditions and limitations. For example, the aircraft in question must meet airworthiness standards required for the issuance of a United States airworthiness certificate even though under the Chicago Convention the aircraft are required to have a current airworthiness certificate from its country of registry.

¹¹³ International Air Transportation Competition Act, 49 U.S.C.A. § 1301 (1980 Supp.).

¹¹⁴ *Id.* at § 17.

¹¹⁵ *Id.* at § 20.

¹¹⁶ *Id.* at § 13.

the United States), and hence would be precluded by the limitation of the current provisions of section 402(a) to authorizations for "foreign air transportation."

If we are to achieve our objective of competitive air service with the lowest fares and rates which can be economically provided, it is important that arbitrary and unnecessary restrictions on the utilization of aircraft (*i.e.*, solely from the fortuitous circumstances of the country of registration) be avoided. Moreover, with the extremely high cost of modern aircraft (\$50-\$60 million for a B-747) maximum efficiency of operations may well be dependent upon a relatively free exchange of aircraft between U.S. and foreign carriers. Modern (but very expensive) wide bodied aircraft permit efficiencies unobtainable with older narrow bodied aircraft, but only if the aircraft are fully utilized. Therefore, removal of artificial barriers to U.S. carrier leases of foreign aircraft, with or without crews, can contribute significantly to more efficient, lower cost operations. The reduction of such barriers may be particularly important in facilitating the entry, or potential entry, of small U.S. air carriers in domestic markets utilizing equipment which can compete effectively with their more powerful and well-financed competitors.

The addition of the new paragraph provided for in section 13 of S.1300 would permit the Board, to the extent it finds that such action is required in the public interest, to exempt a foreign air carrier from the requirements or limitations of the Act, including sections 1108(b) and 402(a), to the extent necessary to authorize a foreign air carrier to lease or charter aircraft, with or without crew, to a U.S. direct air carrier for the performance of services by or on its behalf in interstate and overseas air transportation, as well as in foreign air transportation, pursuant to an agreement approved by the Board under section 412 of the Act.

The Committee certainly does not intend the wet lease amendment to provide a means for "shell" or paper companies to operate foreign aircraft. The authority provided is by exemption, thus allowing the Civil Aeronautics Board (CAB) to control any possibility of abuse by shell or paper companies, and it would also allow the Board to prevent foreign airlines from obtaining behind-the-gateway operations, or indirect access to U.S. domestic traffic, which they might or might not have been able to gain through government-to-government negotiations.

The Section 13 amendment also provides that the leased aircraft would be "subject to such safety regulations as may be prescribed by the Secretary for such operations." This would permit the Secretary of Transportation to apply standards of safety applicable to U.S. registered aircraft to any foreign registered aircraft operated in U.S. domestic air transportation by or on behalf of a U.S. air carrier. Under the Convention on International Civil Aviation (the Chicago Con-

vention, 61 Stat. 1180) foreign registered aircraft are required to meet minimum safety standards set forth in Annexes to that Convention. In certain respects the safety standards applied to U.S. registered aircraft under the regulations of the Federal Aviation Administration may be higher than the minimum standards prescribed by the Convention on International Civil Aviation. The Secretary of Transportation may conclude that a foreign registered aircraft operated on behalf of a U.S. air carrier in domestic air transportation should comply with the higher standards applied to U.S. registered aircraft. On the other hand, foreign aircraft of various countries may be subject to different but equally stringent safety standards. With respect to aircraft registered in the latter countries, the Secretary may conclude that the foreign registered aircraft could be safely operated under the safety standards of their country of registration.

The Board is also given additional exemption authority to authorize foreign air carriers to carry traffic between two points in the United States in other unusual circumstances. Recently we have encountered severe disruptions of the domestic and international air transportation system by reason of the grounding of the DC-10 aircraft and the United Airlines strike. When such emergencies occur, thousands of passengers may be stranded, sometimes for days, and an even greater number have their vacation or business plans disrupted because of the inability to find seat capacity on U.S. aircraft. Similarly, perishable cargo may stack up and businesses may be severely disrupted because of the absence of air freight capacity in such emergencies. Even the mail may be disrupted. It just makes no sense for passengers to be stranded and businesses disrupted while foreign aircraft are flying half empty between U.S. points, but are unable to carry the traffic because of the absence of an authorization for local transportation. Similarly, particularly in the case of overseas air transportation, foreign aircraft overflying a U.S. point (*i.e.*, Qantas regularly directly overflies Pago Pago, American Samoa) would be more than willing to make an unscheduled stop to accommodate stranded passengers or backlogged cargo emergencies.

In no case would we expect or intend that the narrow authority now being given to the Board would be used in markets where demand occasionally may exceed supply in the course of routine operations; for example, full airplanes at the peak season are not, in normal conditions, considered as grounds for declaring an emergency. Nor do we intend that normal market factors affecting supply are grounds for such an emergency. The Board has broad powers under the law to authorize additional services needed in such cases.¹¹⁷

Regulations have been promulgated implementing authority to use foreign registered aircraft domestically in the United States. Generally,

¹¹⁷ S. REP. No. 329, 96th Cong., 1st Sess., reprinted in [1980] U.S. CODE CONG., & AD. NEWS 356-71.

these require that aircraft meet the same safety standards required of domestic United States air carriers.¹¹⁸

CONCLUSION

The foregoing discussion illustrates the capacity of the international community to recognize and deal with problems affecting international civil aviation. Sometimes it has moved with remarkable speed and at other times with deliberate caution, but the ability of the international aviation community to deal with this problem across a broad range of legal considerations demonstrates that international cooperation in civil aviation continues to be a viable and moving force in the relationships among nations.

At home, the United States has moved firmly and dramatically to meet the challenges of the jet age in facilitating maximum use of jet aircraft by broadening United States registration eligibility requirements and authorizing leasing arrangements involving non-United States registered aircraft. As we move into the decade of the eighties a base has been built for the development of a new and more meaningful domestic and international network for government involvement in aircraft leasing. It promises to continue and promote the use of aircraft across national lines. Accordingly, the next few years will undoubtedly see a further evaluation of provisions of the Federal Aviation Act relating to aircraft ownership and recordation requirements¹¹⁹ and the development of international bilateral or multilateral arrangements which realistically obligate a State whose national is operating the aircraft to accept responsibility for the safety and operation of that aircraft.

¹¹⁸ See 14 C.F.R. §§ 121, 127 and 135. 45 Fed. Reg. 68647-50 (1980).

¹¹⁹ For the history of one area of concern, see Notice of Proposed Rule Making: Recordation of Conveyances Affecting Title to, or an Interest in, Aircraft, 45 Fed. Reg. 34286-9 (1980).

