Aircraft Nationality and Registration: Impacts on the Global Air Transport Industry in the 21st Century

by

Jeremy Wai-Kin Wong

Institute of Air and Space Law

Faculty of Law – McGill University, Montreal

A thesis submitted to McGill University in partial fulfillment of the requirements for the degree of Master of Laws (LL.M in Air and Space Law)

Table of Contents

ABSTRACT

The rules found in the *Convention on International Civil Aviation (the Chicago Convention)* with respect to registration of aircraft have remained unchanged since its inception in 1944 despite rapid advancement of aviation technologies and a drastically different industry landscape since then. Although the Chicago Convention is a very pliable convention that has evolved and stood the test of time, the registration provisions found within it may have resulted in a disconnected registry system that perhaps has negative implications on both the public and private sphere as it pertains to air transport. This discord can potentially be seen, among other examples, from the seemingly misaligned registration requirements and registry practices across States, the failure of States to adhere to rules in the Chicago Convention (i.e., Article 21) that promote transparency of ownership and practical difficulties in achieving deregistration of aircraft. This thesis proposes to examine and question the current state of the law in its application to registration of aircraft, work done to date to rectify the impacts of this discordance in registration practices and the impacts of the current registration regime on contemporary air transport in the hopes of determining whether a harmonized system of aircraft registration is feasible or indeed necessary.

RESUMÉ

Les règles établies par la *Convention relative à l'aviation civile internationale* (la Convention de Chicago) applicables à l'immatriculation d'aéronefs n'ont pas été modifiées depuis leur entrée en vigueur en 1944, et ce, malgré l'évolution rapide des technologies aéronautiques et la transformation radicale de l'industrie du transport aérien. Bien que la Convention de Chicago soit une convention flexible, qui a évolué et qui a résisté à l'épreuve du temps, ses dispositions en matière d'immatriculation ont conduit à un système d'immatriculation ne reflétant pas la réalité, entraînant des conséquences potentiellement sérieuses pour le transport aérien, autant dans le secteur public que dans le secteur privé. Cette disparité peut être constatée, entre autres, dans les exigences et les pratiques d'immatriculation d'aéronefs sensiblement différentes d'un État à l'autre, et dans l'incapacité de certains États de se conformer aux règles de la Convention de Chicago (à savoir son article 21) qui ont pour objet de favoriser la transparence en matière de propriété, bien qu'elles puissent conduire à certaines difficultés pratiques en matière de radiation d'immatriculation d'aéronefs. Cette thèse a pour but d'analyser l'état actuel de l'application du droit aérien international public à l'immatriculation d'aéronefs, les mesures adoptées à ce jour afin de rectifier cette disparité dans les pratiques d'immatriculation d'aéronefs, ainsi que les effets du régime actuel d'immatriculation sur le transport aérien contemporain, et ce, afin de déterminer si un système uniforme d'immatriculation d'aéronefs est réalisable ou même nécessaire.

ACKNOWLEDGEMENTS

This thesis is dedicated to my husband Richard who consistently encourages me to pursue my dreams. Thank you for your support throughout this process of self-discovery and growth. I am also incredibly thankful to my colleagues in the Institute who are now life-long friends, especially to Alex and Floriana, for their feedback and offers to be sounding boards as we all completed this program together. Finally, I would like to thank my supervisor Professor Donal Hanley for his practical advice and guidance.

Introduction

The global air transport industry is an essential pillar of mobility that provides countless benefits to society. Aviation in particular connects people, expands economies, creates jobs, and spurs innovation. The Industry High Level Group, which is made up of four industry organizations including the International Air Transport Association (IATA), estimated that in 2019, the air transport industry supported 65.5 million jobs globally (either directly or indirectly) and generated $2.7 trillion USD in revenue worldwide.[1] The drafters of the *Convention on International Civil Aviation* (Chicago Convention)[2] undoubtedly would not have been able to predict the current volume of passengers carried, the global alliances among airlines, the advent of ultra low cost carriers and the industry's reliance on leased aircraft.

Even amongst this exponential expansion and the ever-growing reliance on aviation predicted to reach 200,000 flights per day by 2030,[3] present day regulatory practices with respect to the registration of aircraft have essentially remained unchanged since the inception of the *Convention for the Regulation of Aerial Navigation* (Paris Convention 1919).[4] Every aircraft involved in civil aviation must be registered pursuant to the Chicago Convention and bear the registration mark of the State of registry.[5] Upon recordation of the aircraft on the contracting State's registry, the aircraft obtains the

[1] "Aviation Benefits Report 2019," (2019), online: *ICAO* <https://www.icao.int/sustainability/Documents/AVIATION-BENEFITS-2019-web.pdf> at 7. The members of the Industry High Level group are Airports Council International, the Civil Air Navigation Services Organisation, the International Air Transport Association, and the International Coordinating Council of Aerospace Industries Associations.
[2] *Convention on International Civil Aviation,* 7 December 1955, 15 UNTS 295 (entered into force 4 April 1957).
[3] "Future of Aviation," online: *ICAO* <https://www.icao.int/Meetings/FutureOfAviation/Pages/default.aspx>.
[4] *Convention for the Regulation of Aerial Navigation*, 13 October 1919, UKTO (11 July 1922).
[5] *Supra* note 2 at Art 20.

nationality of the State of Registry.[6] In turn, the State of Registry becomes responsible for ensuring that the aircraft is compliant with minimum, internationally recognized safety requirements that are promulgated by the International Civil Aviation Organization (ICAO) and that it adheres to rules of the air found in the Chicago Convention.[7] The content of the Chicago Convention – and in particular Article 19 of the Chicago Convention[8] – can be seen as recognizing the sovereignty of States by providing them with the discretion to decide their registration practices and the basis upon which registration can be made. As will be seen in subsequent chapters, the discretion provided with respect to registration was perhaps implemented to maximize the number of participants to the Chicago Convention and was also arguably based on the Paris Convention 1919 as portions of the precursor document were transposed verbatim into the Chicago Convention. However, as the global air transport industry has drastically evolved since the post World War I era that encouraged the drafting of the Paris Convention 1919, the discretionary approach to aircraft registration found in Article 19 of the Chicago Convention may have resulted in multiple legal and practical issues when applied in light of modern-day realities of air transport. One such issue that will overlap the discussion is the inconsistency in practice of registering aircraft in various States. Some states for example, only register the owner and not the operator, others only register the operator and not the owner. The lack of a harmonized system, or to a degree a certain degree of alignment, with respect

[6] *Ibid.*
[7] *Ibid* at Art 37.
[8] *Supra* note 2., Article 19 of the Chicago Convention stipulates that "… registration or transfer of registration of aircraft in any contract State shall be made in accordance with its laws and regulations", which provides each contracting State with the discretion to determine their own requirements for registration. It could also be argued that the drafts of the Chicago Convention (as discussed below) were more concerned with maximizing the number of States that were willing to be party to the Chicago Convention by providing them with the discretion to determine their own registry practices.

to aircraft registration results in an even larger issue when considering the prevalence of use of aircraft operating leases that have dominated the market over the past 40 years. The result that arises is that owners are not necessarily operators and vice versa.

The lack of consistency in registry practices and key definitions such as that of an "owner" for the purposes of Article 21 of the Chicago Convention raises serious questions about the fulfilment of obligations under international treaties. Does the existing inconsistency in registration practices have an impact on deregistration of aircraft which is essential to aircraft financing and leasing? What impact is there on the effectiveness of Article 21 of the Chicago Convention and the compliance of contracting States?

Hanley in the chapter of his book titled "The Aircraft Operating Lease" has pointed out that State discretion has resulted in different types of registries.[9] The four major types of registries are the owner-only, operator-only, owner or operator and finally, the owner and operator. The differing registry practices further raise issues as argued by Abeyratne in "Aeronomics and Law: Fixing Anomalies" by the commercial realities of 21st century air transport, such as code-sharing, interlining and by the prevalence of aircraft operating leases.[10] Where the owner and operator of the aircraft is not necessarily the same person and the definition of "owner" is not ubiquitous, issues such as safety oversight and the fulfillment of international obligations may come into question.[11] For example, under an "owner-only" registry, what responsibilities does the State of Registry have for the airworthiness of an aircraft if it is being operated in another State? As can be seen, the

[9] Donal Hanley, *Aircraft operating leasing: a legal and practical analysis in the context of public and private international air law*, 2nd ed Alphen aan den Rijn: Kluwer Law International B.V, 2017) at 83.
[10] Ruwantissa Abeyratne, *Aeronomics and Law: Fixing Anomalies* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012) at 40.
[11] *Supra* note 9 at 83.

discussion in the literature regarding aircraft registration typically revolves around the effects it has on safety and the potential for flags of convenience. However, even that conversation is little discussed and is heated. Some commentators such as Yang and Bardell argue that owner-only registries and the transfer of responsibilities through article 83*bis* of the Chicago Convention are a robust way to ensure safety of aircraft.[12] On one hand the arguments of Yang and Bardell are on the surface correct but on the other hand the arguments only hold true if it can be assumed that Article *83bis* agreements are properly engaged and compliance is high.[13] Abeyratne is arguably correct given that good laws are only as effective as the level of compliance by its users. As we will see below, compliance with the Chicago Convention with respect to certain requirements, such as Article 21, is concerningly low. [14] It is not disputed that safety should remain the focus of aviation regulators and the primary evaluative criteria for the effectiveness of registration practices. However, the literature unfortunately is lacking when it comes to research into registration in general and other implications of Article 19 of the Chicago Convention on air transport. For example, how do States adhere to their obligations under Article 21 of the Chicago Convention where the definition of "owner" is non-existent in the Chicago Convention? What is the impact on risk analysis and repossession risk of aircraft objects when registry practices among the numerous contracting states to the Chicago Convention are so varied? The issues noted above and the potential registration

[12] Yalan Yang and Nicholas S Bardell, *A review of airworthiness assurance within international dry operating leases* (Australian Transport Research Forum 2017 Proceedings, 2017) at 9. *See* Chapter III, sub-chapter B for a discussion of Article 83*bis* and the issues that it was designed to mitigate.

[13] *Supra* note 10 at 39.

[14] *Supra note 2,* Article 21 requires that each contracting State furnish reports to the ICAO as prescribed by regulation or upon request, that provide information concerning the "ownership and control" of aircraft registered in that State. The Issue that arises is that there is no ubiquitous definition of "ownership" among the various contracting States.

problems that arise with the advent of new technologies, such as unmanned aviation vehicles, clearly indicates that more needs to be done to analyze the possibility of an international registration system that harmonizes registry practices (or again, creates a degree of alignment while preserving the sovereignty of each State to determine their own practices). Steps have already been taken by various industry groups including ICAO to establish international registries, such as the *Registry of Mobile Equipment*[15] and the *Global Aircraft Trading System*,[16] but there is no existing tool to date that is compulsory that must be used by all contracting states to the Chicago Convention.

This thesis will examine and question whether the registration practices developed over a century ago require a degree of alignment in light of the commercial realities of modern air transport. Transparency, consistency and completeness of information contained in registries around the world is essential to solving the issues that will be discussed in detail below. For example, these concepts will be essential in ensuring the safety of aircraft through clear delegation of responsibilities for aircraft among States and will help to resolve the issues involving de-registration that can arise during the lifetime of an aircraft. ICAO has been working on the establishment of an Aircraft Registration Network ("ARN")[17] that will act as a repository for aircraft registry information but adjustments in its implementation should be considered. Of course, it must still be seen whether more "stringent" steps will be accepted by States and more importantly, feasible.

---

[15] *Convention on International Interests in Mobile Equipment*, 16 November 2001, 2307 UNTS 285 (entered into force 01 March 2006).

[16] "Global Aircraft Trading System (GATS)," online: *Global Aircraft Trading System (GATS)* <https://e-gats.aero/about-gats.>. *See* Chapter II, sub-chapter C for a discussion of the Global Aircraft Trading System.

[17] "South Korea extends support for ICAO Aircraft Registration Network," online: *ICAO* <https://www.icao.int/Newsroom/Pages/South-Korea-extends-support-for-ICAO-Aircraft-Registration-Network.aspx>.

Arguably, as operating leases become even more prevalent, new forms of aircraft are developed and the world becomes even more digital, aircraft registries around the world may have to be at the very least, connected via an international registry to allow for instantaneous changes and updates of registration.

Chapter I will discuss the concept of aircraft nationality and registration, including the historical development of registration practices in aviation and the lack of a uniform definition of "owner". Chapter II will examine aircraft operating leases, discuss the "owner-operator" divide that exists and provide a comparative analysis of State practice with respect to aircraft registration. Chapter III will analyze the issues that arise due to the fragmented registration system and the "owner-operator" divide when applied to modern day treaties and practices. In particular, Chapter III will discuss Article 21 of the Chicago Convention and deregistration of aircraft and the difficulties currently faced despite the complex international regime established to minimize deregistration risk. Chapter IV will summarize the overall discussion and outline potential solutions towards a harmonized system, including an analysis of the feasibility of mandatory enrolment in an international registration system.

CHAPTER I: AIRCRAFT NATIONALITY AND REGISTRATION

A. DEVELOPMENT OF AIRCRAFT NATIONALITY AND REGISTRATION

I. Nationality and Registration as Customary International Law

"Nationality" conferred upon an inanimate and movable object is a millennia old concept. In fact, the notion of nationality can be found embedded in treaties that governed the navigation of waters and military engagement between waring ancient civilizations,

such as the Roman and Cathaginian Empire dating back to 500 BC.[18] Several centuries later, the same concept of nationality was applied by England to prevent ships without English nationality from trading with their overseas colonies.[19] Registration was eventually conceived through the English *Navigation Act 1660* and restrictions were implemented to prevent foreign owned ships from being registered on the English registry unless it could be proven that the owner of the ship possessed English nationality.[20] Nationality can therefore be seen as a tool for the regulation of trade, the establishment of responsibilities for a particular State and the basis for the "… peaceful utilization of the high seas".[21] It is therefore unsurprising that the concept of nationality was borrowed from maritime law when it came time to regulate the use of aircraft.

The successful international codification of rules pertaining to civil aviation, including that of nationality, started with the Paris Convention 1919, which will be discussed in the next section. However, the first aircraft were actually flown in 1783 which were in the form of hot air balloons.[22] Similar but arguably more "advanced" balloons were eventually used for military purposes, such as the civil war in the United States between 1861 and 1865 where balloons were utilized for reconnaissance. It is important however, to note that none of these early aircraft ever crossed international boundaries and accordingly, the

[18] John C cooper, *A Study on the Legal Status of Aircraft*, (Princeton: Institute for Advanced Study, 1949) at 4.
[19] John N K Mansell, *Flag state responsibility: historical development and contemporary issues* (Berlin: Springer, 2009) at 26.
[20] *Ibid*.
[21] S*upra* note 18 at 4.
[22] Michael Milde, *International air law and ICAO*, third edition ed, Essential air and space law v. 18 (Hague, The Netherlands: Eleven International Publishing, 2016) at 6.

concept of nationality was never contemplated as there was no impetus for the discussion until cross-border flight occurred.[23]

The beginning of the 20th century was marked with considerable advancement in the arena of aircraft and included the first successful flight of an airplane in 1903,[24] the navigation of balloons from Germany into France in 1908[25] and the first successful international flight between France and England in 1909.[26] The spike in international movement of aircraft spurred the necessity for an international regime and the holding of the 1910 Paris International Air Navigation Conference (Paris 1910 Conference). Although the Paris 1910 conference did not result in an international treaty being signed, it did create a draft convention (Draft Convention)[27] and set out the basis of the conversation for many important concepts eventually incorporated into the Paris Convention 1919 and subsequently into the Chicago Convention. These concepts included but were not limited to the distinction between civil and state aircraft (what was defined as "public" and "private" aircraft), whether sovereignty extended into air space and importantly for our purposes, whether aircraft possess nationality similar to that of sea faring vessels.[28]

---

[23] *"Civil War Ballooning," online: National Air and Space Museum* <https://airandspace.si.edu/learn/highlighted-topics-/flight/civil-war-ballooning>.
[24] "The Wright Brothers | The First Successful Airplane," online: National Air and Space Museum <https://airandspace.si.edu/exhibitions/wright-brothers/online/fly/1903/>.
[25] Milde, *supra* note 22 at 7.
[26] *Ibid*.
[27] *International Convention in regard to Aerial Navigation drafted by the Conference held at Paris in 1910, presented as Appendix A to the Report of Special Committee No. 1 of the Civil Aerial Transport Committee* (H.M. Stationery Office).
[28] *Supra* note 18 at 26.

Chapter I of the Draft Convention, although again not signed and ratified, set out the requirements for nationality of aircraft.[29] Article 2 stated that the Draft Convention only applied to aircraft that possessed the nationality of a contracting State. Article 3 based the nationality of an aircraft on the nationality of the owner, the owners' domicile within the contracting State or both (i.e., the individual State had the choice of requiring that the owner must be a national of the contracting State *and* resident of the country). Article 6 required that once nationality was conferred upon an aircraft, it must be recorded on a register containing ownership information and nationality marks as set out in the relevant annex of the Draft Convention. What is unclear however, is whether pursuant to the Draft Convention, nationality could be changed with the purchase and sale of the subject aircraft as it is not expressly stated. Another interesting aspect is that Article 7 of the Draft Convention stipulated the type of information to be recorded which would arguably, have made the various registries of differing states more uniform in the data collected.

The Draft Convention failed to receive the necessary signatures, but it is undoubted that in practice the participating States accepted the nationality principles laid down in the Draft Convention. For example, the French in 1911 issued a decree that all aircraft flown into or out of France would have to carry a permit that would only be issued if the nationality requirements as set out in the Draft Convention were fulfilled (e.g. nationality or domicile of the owner in France, nationality marks to be visible on the aircraft).[30] The decree issued also recognized the categories of public aircraft (i.e. military and state aircraft) and private aircraft (i.e. civil aircraft) and importantly, the distinction of

[29] *Supra* note 27.
[30] S*upra* note 18 at 31.

the applicability of the registration rules, specifically that they did not apply to public aircraft.[31] The United Kingdom, in line with France, eventually promulgated domestic legislation in the form of the *Aerial Navigation Act* in 1913 which prohibited foreign aircraft from entering the sovereign jurisdiction of the United Kingdom except with prior authorization.[32] States were therefore, evidently protecting their air space from intrusion from foreign aircraft. The acknowledgement of the term "foreign" aircraft was in and of itself a further indication that States had accepted the concept of nationality of aircraft. No where is this clearer than from the events of World War I where both "…belligerents and the neutral States vigorously protected the air space above their territory and the general perception of aviation become closely linked to national security"[33] and therefore, even prior to the entering of any codified international convention with respect to aerial navigation, the aforementioned principles could be seen as meeting the criteria for customary international law.

II. Nationality of Aircraft and the Paris Convention 1919

World War I erupted just four years after the Paris 1910 Conference where, as mentioned above, States protected their air space and solidified the concept of nationality of aircraft by indiscriminately (and as a matter of necessity) treated allied aircraft differently from belligerent aircraft. Nationality, a concept that was typically attached to an individual, was now conferred to aircraft, along with rights flowing from the registering State and corresponding duties imposed on that same registering State.

[31] *Ibid*.
[32] *Ibid* at 32.
[33] S*upra* note 22 at 10.

The “War to end all Wars” marked an incredibly turbulent and violent time in human history but it was also marked by exponential advancement of aviation technology. Planes during the war, although still incredibly primitive by modern day standards with their open cockpits, lack of navigational aids and other instruments, were used for the purposes of reconnaissance, direct attack and defence of air space.[34] It is estimated that over 200,000 aircraft in differing designs and levels of sophistication were manufactured during the war.[35] Military planes were evidently not suited for commercial air transport but the manufacturing capabilities and expertise of different states, including those of the British and French, laid the foundation for a booming air transport industry. With the nascent air transport industry in mind and a desire by the previous allied forces to limit the commercial aviation capabilities of now defeated Germany (and accordingly their rearmament capabilities), a Peace Conference was convened in Paris in 1919 among 19 nations to codify the customary international law in relation to rules of the air and to confirm the principles that would serve as the basis for uniform national regulations.[36]

The Paris Convention 1919 therefore represented the formal incorporation of “… the principle of nationality [that] was accepted by State legislation and decrees” which formed the basis for “… doctrinal discussions prior to World War I and confirmed by the conduct of States during the war itself”.[37] The nationality and registration provisions within the initial version of the Paris Convention 1919 were found in the following Articles:

---

[34] “Viewpoint: How WW1 changed aviation forever,” *BBC News* (19 October 2014), online: *BBC* <https://www.bbc.com/news/magazine-29612707>.
[35] *Ibid*.
[36] Albert Roper, “The Organization and Program of the International Commission for Air Navigation (C.I.N.A.)” (1932) 3 J Air L & Com 167.
[37] S*upra* note 18 at 38.

(i) **Article 1**: The recognition that "… every Power has complete and exclusive sovereignty over the air space above its territory", conclusively codifying the existing customary international law as discussed above in Part II with respect to air space and putting an end to the doctrinal and academic discussion on the topic.

(ii) **Article 6**: Set out that the aircraft possessed the nationality of the state of registry and interestingly, Article 6 made reference to Annex A of the Paris Convention 1919, which at chapter I, subparagraph (c), required Contracting States to include information pertaining to the identification mark given to the aircraft by the maker, the nationality and registration marks as assigned by preceding sections of Annex A, the usual station of the aircraft, *the full name*, *nationality and residence of the owner* and the date of registration.

(iii) **Article 7** (Before Amendment)[38]: Created a restriction and set out that aircraft could not be registered on a State's registry unless the owner possesses nationality of that State or if the owner is not a person and is a corporation, the president or the corporation and 2/3 of the directors must possess nationality of the registering State (and any other laws to which the registering State requires).

(iv) **Article 8**: Clarified that aircraft cannot be registered in more than one State and therefore, cannot have more than one nationality.

[38] The Paris Convention 1919 was eventually amended in 1929.

(v) **Article 9**: Information with respect to registration will be transferred to the International Commission for Air Navigation (the precursor to the International Civil Aviation Organization).

(vi) **Article 10**: Required registration and owner information to be marked on the fuselage.

(vii) **Article 25**: Recognized that nationality is superimposed onto to an aircraft and the State of registration maintains responsibility for the aircraft wherever it may be flying.

When comparing the nationality provisions of the Draft Convention and the Paris Convention 1919, there is no doubt that inspiration was drawn from the former and transplanted into the latter (e.g., the restriction to each aircraft possessing only a single nationality,[39] the requirement that each registry entry must include prescribed information, such as the name, nationality and domicile of the owner[40]). The requirements for registration were however, stricter such that the culmination of Articles 6 and 7 of the Paris Convention 1919 required that nationality would be derived from the registering State, but that registration was only permitted if the owner of the aircraft was a "national" of the registering State or in the case of a corporation, fulfilling nationality requirements including a majority of the directors having the nationality of the registering State. The requirements for registration in the Paris Convention 1919 were clearly more stringent than the 1910 counterpart, the latter extending discretion to the registering State to determine whether registration would be based on the nationality of the owner, the

[39] *Supra* note 27 at Art 4.
[40] *Ibid at* Art 7.

domicile of the owner or both.[41] With one of the primary purposes of the Peace Conference being the disarmament of Germany and the conference consisting of only ex-allied States and neutrals, arguably, removing the "domicile" of the owner in the Contracting State and restricting registration to only owners that are nationals had a twofold purpose. The first, being an attempt to limit the use of "flags of convenience" that plagued maritime law and raised questions of safety.[42] The second, being to limit the ability of post-war Germany to expand its aviation capabilities in other States.[43]

The Paris Convention 1919 was eventually amended. The first amendment involved the concern of neutral States and Article 5, which prevented any contracting State from permitting aircraft with nationality of a non-contracting State from flight above its territory. In essence, this meant that neutral States that had already signed early forms of bilateral agreements with Germany or aspired to enter arrangements, had to decide between being a contracting State to the Paris Convention 1919 or to maintaining a relationship with Germany. Eventually, Article 5 was amended to provide contracting States with the option of concluding special conventions with non-contracting States which came into force by an amendment signed in 1922.[44] After this amendment, the Paris Convention 1919 operated and was applied by both contracting and non-contracting States and was entrenched through domestic legislation.

All appeared stable until 1929 when Dr. Wegerdt, a minister of the German government released an article titled "Germany and the Paris Convention relating to air

[41] *Ibid* at Art 3.
[42] S*upra* note 22 at 80.
[43] *Ibid*.
[44] S*upra* note 18 at 38.

navigation dated 13th October 1919".[45] Dr. Wegerdt, in his article set out criticisms of the convention that had been in operation for approximately seven years and reasons for why Germany had abstained from becoming a contracting State. This article was the impetus for the International Commission for Air Navigation (ICNA), which had been waiting for an opportunity to revaluate the Paris Convention 1919 to "… facilitate the adhesion of all the States to the Air Convention of 13th October 1919 by making such amendments of the text now in force as may be warranted by the progress realized in the domain of air navigation and by the necessity of universal co-operation to ensure the unity of aerial law".[46] It appears that the ICNA had the foresight to predict that aviation was advancing at a rapid pace and that a homogenous system of regulation was necessary. This was especially true when considering potential cross Atlantic traffic.

The first successful non-stop flight from Europe to North America was achieved on 13 April 1928 and the possibility of air traffic crossing the Atlantic was now a reality and raised concerns regarding the control of future air traffic.[47] There is no doubt as seen in a letter from the Secretary of State of the United States at the time to President Hoover, that the United States wanted to be party to the Paris Convention 1919, in which it was noted that,

> "The proposed extraordinary session of the International Commission for Air Navigation which this Government is invited to attend will, it appears probable, consider the Convention of 1919, as amended, in its entirety. The result may be the adoption of such amendments as to constitute a thorough-going revision. The opportunity is presented, accordingly, to modify such provisions of the Convention as may have been in conflict with other conventions dealing with air navigation or with national laws and regulations on the subject. The possibility of

[45] Joseph V. Fuller and Tyler Dennet, *Papers relating to the foreign relations of the United States*, Vol 1 (Washington: United States Government Printing Office, 1943) *at 489* .
[46] *Ibid*.
[47] "First nonstop flight from Europe to North America," online: *HISTORY* <https://www.history.com/this-day-in-history/first-nonstop-transatlantic-flight-europe-to-north-america>.

> reconciling these conflicts and of laying a firmer foundation for a code of air law that may commend itself for universal adoption is of practical interest to the United States. It appears that the Conference will be attended by representatives of all the nations party to the International Air Navigation Convention of 1919, as well as by Germany and other nations which have not as yet adhered to that Convention, and, accordingly, in view of the rapidly increasing development of aviation activities in general and of American aviation interests in particular, I am of the opinion that it would be appropriate and advantageous for the United States to participate in this Conference".[48]

After an article-by-article examination of the Paris Convention 1919, amendments were made to eight of the Articles as affected by a protocol signed on June 15, 1929. However, only one amendment to Article 7, directly impacted nationality and registration as indicated below.

Article 7 (Amended)

> The registration of aircraft referred to in the last preceding Article shall be made in accordance with the laws and special provisions of each contracting State.

Article 7 (Before Amendment):

> No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.
>
> No incorporated company can be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, unless the President or chairman of the Company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State.

The debate that surrounded Article 7, was the German suggestion that nationality of aircraft should be based solely on the domicile of the owner, rather than on the nationality of the owner, "…irrespective of whether the owner is an individual or a company".[49] The

[48] *Supra* note 45 at 490.
[49] *Supra* note 45 at 494.

Germans were concerned that foreign owners of aircraft would not be able to register aircraft in the state in which they established a residence. The United States however, had other overarching concerns. Even prior to the conference and in a letter from the Secretary General to a US delegate of the conference, the US noted that a change to nationality being tied to domicile would be a difficult task given that requirements for registration have already been promulgated into the domestic legislation of many States, including that of the United States. For example, "… section 3 of the Air Commerce Act of 1926 provides that no aircraft shall be eligible for registration unless it is a civil aircraft owned by a citizen of the United States and not registered under the law of any foreign country…".[50] In a push towards ease of application over unanimity of registration protocols, the suggestion to confer absolute discretion upon each individual State to determine their respective registration requirements was put forward (as opposed to stipulating nationality or domicile of the owner in the convention) and was ultimately accepted by the conference. Further, as the *Inter-American Air Convention* and the *Pan American Convention*, both provided that registration of an aircraft would be determined by the rules as decided by each contracting State, an amendment of this nature could have the potential of increasing the likelihood that nations in the western hemisphere that were already party to the above-mentioned conventions to sign up to the Paris Convention 1919.[51] On one hand it is understandable that harmonization and the greatest degree of co-operation among States was necessary in a post war world but on the other hand, this concession on the parts of the various delegates would have far reaching

[50] *Ibid*.
[51] *Supra* note 45 at 500.

consequences on the international registration system and on the air transport industry as a whole.

III. Aircraft Nationality, Registration, and the Chicago Convention

The Chicago Conference was convened on November 1, 1944, and consisted of the delegates of 51 nations. The premise of the Conference was to establish a framework for international civil aviation and the determination of "… international air routes and services for operation in and to areas now freed from the danger of military interruption…" as the defeat of Germany, and the end of World War II, was approaching.[52] Unlike the end of World War I, aviation at this point in history had advanced to a level where inter-continental flights were normal course and essentially every country had airports, trained pilots and the technical knowledge to build and organize airlines.[53] The delegates expressed their understanding that aviation was essential to the redevelopment of the past-war world and the establishment of prosperity in peacetime. With the aforementioned backdrop, the Conference concentrated on the establishment of an international organization (and the organization's associated powers), the development of policies to avoid anti-competitive behavior and the creation of commercial rights of entry (i.e., the "freedoms of the air").[54] The concepts of nationality and registration were already well established from the Paris Convention 1919 and unsurprisingly, the provisions were transposed into the Chicago Convention with little debate and only minor adjustments to language. As seen from the minutes of the Proceedings of the

[52] *Proceedings of the International Civil Aviation Conference* (Washington: United States Government Printing Office, 1948) at 11.
[53] *Ibid* at 42.
[54] *Supra* note 52 at 603.

Conference, the United States draft (which is reproduced below) was used as the basis of discussion for the subcommittee 2 of committee I which was assigned to work on air navigation principles.[55]

Article 19 (United States Draft)

(a) Aircraft have the nationality of the State in which they are registered.

(b) An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

(c) The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

(d) Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.

(e) Each contracting State undertakes to supply to any other contracting State or to the international air organization on demand information concerning the registration and ownership of any particular aircraft in that State. In addition, each contracting State shall furnish reports to the international air organization under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the international air organization shall be made availably by it to the other contracting States.

Subparagraphs (a) to (d) were eventually renumbered to become separate Articles of the Chicago Convention. Subparagraph (e) became what is now, Article 21 of the Chicago Convention but was amended in the final act to include the words “on request” after “by it” in the second to last sentence to remove the obligation to furnish the information unless requested.[56] As discussed above, the nationality and registration provisions essentially remained unchanged from the Paris Convention 1919. The clear lack of discussion throughout the proceedings concerning nationality and registration could possibly have

[55] *Ibid*.
[56] *Ibid* at 686.

been due to the Conference's concentration on commercial and economic aspects of air navigation. An equally feasible explanation for the lack of discussion was that nationality was now an engrained, customary international law and its comparison to sea faring vessels was well established. Registration was therefore simply a means of recognizing nationality, not a means of creating nationality. In any event, Articles 17-21 of the Chicago Convention[57] reaffirmed the codification of nationality of aircraft, the singular nationality of each aircraft, the necessity to display registration marks and the need to provide information with respect to ownership and control of aircraft when prompted by either another contracting State or by ICAO.

B. AIRCRAFT NATIONALITY, REGISTRATION AND THE "GENUINE LINK"

The above outline and analysis of the historical development of nationality and requirements for registration raises the issue of whether there must be some link between the registering State and the aircraft in question. On a cursory reading of Article 17 of the Chicago Convention, the answer to this question is no. An aircraft will simply obtain the nationality of the State in which it is registered and as made abundantly clear by Article 19 of the Chicago Convention, the requirements of registration will be determined by the domestic laws and policies of each respective State.

Cooper drawing from maritime law argues that registration denotes two particular functions.[58] The first being that of the State as guarantor of the aircraft (e.g., ensuring airworthiness of the aircraft, issuance of certificates, guaranteeing that the aircraft will

[57] *Supra* note 2, Article 17 stipulates that aircraft will have the nationality of the State in which they are registered, Article 18 prohibits an aircraft from being registered in more than one State, Article 20 stipulates that aircraft much bear their nationality and registration marks.
[58] *Supra* note 18 at 3.

follow the rules of the air as determined via international law and domestic laws of each State, application of sanctions in the event of disobedience). The second function of the State is to act as protector of the aircraft from any abuses that might arise from the aircraft of other States.[59]

As a State is permitted to determine their own registration practices, no obligation arises on the State of Registry to require any level or threshold to establish some form of genuine link between the aircraft and the State of registry from which the guarantor and protector role flow. What must be addressed first however, is that some commentators argue that substantial ownership and control clauses within international conventions such as the *International Air Transport Services Agreement (IASTA)*[60] and bi-lateral air transport agreements among nations provides a level of protection against flags of convenience.[61] This argument is however, flawed. The substantial ownership and control requirements within conventions such as IASTA and found in bi-lateral agreements refers only to nationality requirements for *airlines* themselves, not aircraft.[62] Therefore, as Hanley correctly notes "… once the airline meets the ownership requirements thereunder, it does not matter whether the airline possesses the aircraft pursuant to ownership or pursuant to a lease".[63] Airline nationality and aircraft nationality although linked to an extent must be distinguished. The former relates to the economic regulation of air transit

[59] *Ibid*.
[60] *International Air Services Transit Agreement,* 7 December 1944, 84 UNTS 389 (entered into force 30 January 1945).
[61] Phillip Snodgrass, "Aviation Flags of Convenience: Ireland and the Case of Norwegian Airlines International" (2015) 14 Issues in Aviation Law and Policy 245 at 258.
[62] Supra note 60 at s 5.
[63] *Supra* note 9 at 84.

whereas the latter is inextricably linked to the State being a guarantor and protector.[64] An airline is in many cases obligated to meet nationality requirements for the purposes of being designated under international agreements but thereafter these airlines may, subject to any other domestic restrictions, obtain and use aircraft possessing the nationality of a State that is different from the nationality of the airline.

I. Maritime Law

Returning to the question of whether a genuine link requirement is necessary despite Article 19 of the Chicago Convention, commentators routinely refer to maritime law for jurisprudence. As seen in chapter I, subchapter A., many concepts of maritime law, were transposed into the air law regime with respect to registration. This can be seen in the codification of the registration requirement in the *1958 Convention on the High Seas*[65] whereby at Article 5(1) it states that:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Three conclusions can be derived from Article 5(1) above, with respect to registration of sea faring vessels. The first is that registration requirements are to be determined by each individual State with reference to their respective domestic laws. Secondly, vessels will have the nationality of their state of registry. The final aspect is that a "genuine link"

[64] Jiefang Huang, *Aviation safety through the rule of law: ICAO's mechanisms and practices*, Aviation law and policy series 5(Austin [Tex.] : Alphen aan den Rijn, The Netherlands : Frederick, MD: Wolters Kluwer Law & Business ; Kluwer Law International ; Sold and distributed in North, Central and South America by Aspen Publishers, 2009)at 27.
[65] *Convention on the High Seas,* 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

requirement must be established to show that a State of registry is capable of acting in its capacity as protector and guarantor. As can be seen, the first two criteria are identical to Articles 17 and 19 respectively of the Chicago Convention. *It is the final criteria of a genuine link that is not mentioned at all in the Chicago Convention*. On an ordinary reading of the genuine link criteria, Article 5(1) notes that "… in particular…" the State must be able to effectively exercise jurisdiction and control over the vessel in "… administrative, technical and social matters". Therefore, the genuine link criteria does not necessarily include a nationality and/or domicile requirement of the owner in relation to the State of registry – although this is not excluded either – as the import of the link is in essence the efficacy of the State in its ability to fulfill its function as protector and guarantor of the vessel.

Huang agrees with the argument that a genuine link only refers to the robustness and effectiveness of the oversight provided via the State of registry.[66] The MV Saiga (No.2) case of the International Tribunal for the Law of the Sea is often cited as authority for the genuine link argument.[67] The Saiga was an oil tanker that was supplying oil to fishing vessels off the coast of Guinea which was eventually boarded and detained by Guinean patrol. After the initial proceedings, Guinea refused to release the boat and initiated criminal proceedings against the master of the boat and against St. Vincent. Interestingly, the Saiga was,

> "… owned by a Cyprus company, managed by a Scottish company, and chartered to a Swiss company. Another Swiss company owned the cargo of gas oil. On board were a Ukrainian master and crew, and three Senegalese workers (painters). Previously registered in Malta,

[66] S*upra* note 64 at 26.
[67] *The M/V "Saiga" (No2) Case (Saint Vincent and the Granadines v Guinea)* [*The M/V "Saiga" (No2) Case (Saint Vincent and the Granadines v Guinea)*].

> the Saiga was provisionally registered in St. Vincent on March 12, 1997. The provisional registration certificate stated that it expired after six months. St. Vincent issued a permanent registration certificate on November 28, 1997".[68]

St. Vincent brought a claim contesting the detention and the criminal proceedings and Guinea raised a jurisdictional challenge to St. Vincent's claim and argued that they had no standing to bring the claim and in particular that there was a lack of a genuine link between St. Vincent and the Saiga.[69] In the tribunal's deliberations St. Vincent submitted that several facts establish a genuine link.[70] These included but are not limited to:

1) the fact that the owners of the Saiga maintain a company that is established in St. Vincent;

2) the Saiga was subject to "… the supervision of the Vincentian authorities to secure compliance with…" numerous international conventions;

3) the Saiga is subject to regular supervision by the Vincentian authorities with regard to the sea worthiness of the vessel; and

4) St. Vincent had made rigorous attempts to secure the protection of the Saiga.

The tribunal eventually concluded at paragraph 83 of the decision that:

> "… the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

II. Air law

The *Saiga* case clarified that the genuine link requirement contained within the 1958 *Convention on the High Seas,* which was eventually imported to Article 91 of the *United*

[68] Bernard Oxman and Vincent Bantz, "The M/V 'Saiga' (No.2) (Saint Vincent and the Granadines v. Guinea), Judgment (ITLOS Case No.2)" (2000) 94 The American Journal of International Law 140 at 140.
[69] *The M/V "Saiga" (No2) Case (Saint Vincent and the Granadines v Guinea)*, *supra* note 67 at para 77.
[70] *Ibid* at para 78.

Nations Convention on the Law of the Sea,[71] is not a nationality requirement per se but should inform a State as to whether registration should occur (i.e., are they capable of fulfilling their obligations). It is also evident from the assessment of the information provided by St. Vincent that fulfilment of this criteria will be based on the facts of each particular case and that the nationality and/or domicile of the owner may simply be evidence to the establishment of the link but is not conclusive proof of its existence.

In contrast, the Chicago Convention is silent on a genuine link requirement and importantly, any form of genuine link in the form of nationality of the owner was removed when the Paris Convention 1919 was amended. This may be due to the fact that flags of convenience are not prevalent in air law as compared to maritime law. It is also likely that the issue of flags of convenience at the time of the drafting of the Chicago Convention was not highly contemplated, if at all, because aircraft leasing whereby States of registry differ from States of operation was not common (as will be discussed in subsequent chapters) and the premise of the Chicago Conference was again, to discuss the economics of air transport. In any event, despite there being no express provision, a genuine link requirement is possibly superimposed onto Article 19 and may be inferred from the rights and duties that flow from registration. A link or a "social fact of attachment"[72] may be inferred from the functioning of the reciprocal rights found in the Chicago Convention. Huang argues that airworthiness certificates are a prime example of the genuine link requirement at work in that owners of aircraft are required to follow the airworthiness requirements as set out by the state of registry (and the minimum

[71] *United Nations Convention on the Law of the Sea,* 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).
[72] *Nottebohm (Liechtenstein v Guatemala)*, Reports of Judgements, Advisory Opinions and Orders III at para 23.

requirements as set out by ICAO) and once satisfied, the owner can rest assured that the airworthiness certificate will be recognized by other member States by virtue of Article 33 of the Chicago Convention.[73]

Although the need for a genuine link is not always conceded by commentators,[74] it is this author's opinion that as the use of aviation technologies become more automated, advanced, and prevalent in everyday use, a genuine link may be required in order to ensure that effective oversight of any given aircraft is maintained. In particular, this would be applicable in cases where Article 83*bis* agreements are not in effect or perhaps not applicable. This is not to say that all flags of convenience and the users of these registries are to be viewed negatively. As Abeyratne argues, there are generally two categories of aircraft that may be classified as utilizing a flag of convenience.[75] The first being those who utilize a flag of convenience for "fiscal purposes". There is no elaboration on what "fiscal" may refer to, but the dictionary definition defines fiscal as "… relating to financial matters".[76] This first class may therefore refer to those aircraft that are registered to ensure that financial interests are protected, such as a lessor choosing a lessor friendly jurisdiction (e.g. Ireland), whereby deregistration of planes in the event of lessee default will be easy to obtain or where the proposed state of registry has a robust aviation regulatory system. A robust regulatory system translates into less risk to be borne by the lessor. The second category of users of flags of convenience are those aircraft that choose a particular State that has "… no or minimal economic or technical oversight".[77] It

[73] *Supra* note 64 at 24.
[74] see Hanley, *supra* note 9 at 83.
[75] S*upra* note 10 at 38.
[76] "Definition of FISCAL," online: <https://www.merriam-webster.com/dictionary/fiscal>.
[77] S*upra* note 10 at 38.

is the second category of flags of convenience that pose an issue and whereby a genuine link requirement should be considered to ensure appropriate oversight.

It is suggested by some that flags of convenience may not pose a substantial problem given the universal safety oversight program (USOAP) of the ICAO.[78] There are however, three issues with this argument. First, this view assumes that USOAP will in all practical aspects be effective in capturing any deficiency that may be present. Secondly, the reliance on USOAP does not take into consideration other oversight responsibilities that may be encompassed within the role of guarantor and protector that are not categories of audit. For example, a recent report by the US Government Accountability Office (GAO) found that the use of opaque ownership structures within the US registry increased the risk that these structures could be used for the purposes of money laundering and terrorist financing.[79] Finally, reliance on USOAP in detecting deficiencies suggests that a reactive system as opposed to a proactive system is preferrable. A genuine link could arguably mitigate the risk of the above in a proactive manner and could become an auditable criteria.

C. Summary and Analysis

As can be seen from the above, nationality and registration, at least with respect to aviation, has been developed over a century and has followed the advancement of the technology through two world wars. The codification of the registration requirements has

[78] "Frequently Asked Questions about USOAP," online: *ICAO:* <https://www.icao.int/safety/CMAForum/Pages/FAQ.aspx>.
[79] Edward Gross, Erich Dylus, and Rauch Jonathan, "Under Scrutiny: The New GAO Recommendations for FAA Aircraft Registration," online: *Vedder Price* <https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2020/06/asl_v033n02_grossdylusrauch.pdf>.

evolved from a restrictive approach that set out that registration was only eligible to aircraft owned by nationals of the registering State as seen in the post world war I era to registration being dependent on the rules and regulations as promulgated by each registering State.[80] The implementation of the latter discretion that is encompassed in the present day Article 19 of the Chicago Convention that allows each contracting State to determine their registration practices was done to accommodate the existing domestic legislation in each respective State and to make the signing and eventual ratification of the international civil aviation legislation more enticing as existing State legislation did not have to be amended.[81] An almost paradoxical effect, however, arose as a result of this discretion afforded to the contracting States. What was supposed to be an international treaty to harmonize rules, has resulted in differing definitions of what constitutes an "owner" and what is applicable when assessing "control" pursuant to those terms as encompassed within Article 21 of the Chicago Convention.[82] As an example, is the owner the individual with legal title to the aircraft or the person who holds beneficial interest? Should the operator be registered as the "owner" of the aircraft if for all intents and purposes the operator has control of the aircraft? Is a "holder" of an aircraft the same as an owner? To determine the extent of the issue, the Secretary General of the ICAO conducted a survey to determine the extent of the differences in definition and uncovered that "… many States face difficulties due to the fact that the contents of the aircraft register are not the same in every ICAO Member State…" and that "… the definition of 'control'

[80] *Supra* note 2 at Art 19.
[81] *Supra* note 52.
[82] Ruwantissa Abeyratne, "Article 21 Report of Registrations" dans Ruwantissa Abeyratne, dir, *Convention on International Civil Aviation: A Commentary* (Cham: Springer International Publishing, 2014) 259 at 21.

differs from the definition of 'ownership' in most States.[83] Discussed in subsequent chapters, the lack of a clear definition is a pervasive issue and not only exacerbates the ability of States to comply with Article 21 of the Chicago Convention but impacts the overall functioning of aircraft financing and increases potential risks to aircraft safety.

The world today is evidently different from the tumultuous days in which the Chicago Convention and when its previous iterations were drafted. It is therefore arguable, given the above conclusions, that States may now be more willing than at any other point in history, to consider amending their registration practices if benefits, as will be discussed below in Chapter III, can be derived from engaging in the alignment of the system of registration. These moves towards alignment may include the requirement to evidence some form of genuine link between aircraft and registry unless oversight is effectively delegated, such as through Article 83*bis*,[84] which will be discussed below. Changes to current registry practices in place, such as the conversion to a digital format, as will be discussed in Chapter IV, may not be viewed as "cumbersome" and amendments to domestic legislation may be a welcomed modernization of the existing domestic registration process by all users of the system. The implementation of an international registry of aircraft may also be welcomed as this has already been the case with the international registration of interest in mobile equipment.

[83] ICAO LC/37-WP/2-4, L*egal Committee—37th Session, Implementation of Article 21 of the Chicago Convention* (2018) at 2.

[84] Supra note 2, Article 83*bis* allows for the transfer of certain oversight responsibilities from the State of Registry to the State of Operator with the purpose of placing the responsibilities on the State that has the closest nexus to the aircraft (discussed further in Chapter III).

CHAPTER II: AIRCRAFT REGISTRATION AMONG STATES

The previous chapter examined the historical development of nationality and registration. In particular, it analyzed the underlying reasons for the discretionary approach that was adopted in Article 19 of the Chicago Convention. This chapter will analyze the impact that Article 19 (and the broader registration practices) has on aircraft operating leases and the disconnect that arises as a result of the misalignment of registry practices. Subsequently, the chapter will discuss the differing registry practices that have developed as result of the discretion conferred upon states under Article 19 of the Chicago Convention.

A. AIRCRAFT LEASING

I. An Overview

The aircraft lease represents an innovative and adaptable tool used for the financing of highly mobile and expensive assets. So innovative and adaptable in fact that arguably, without aircraft leasing being so prevalent in the global air transport industry having a market share of about 50% of all aircraft (which will grow to 60% in the next five years), a recovery from the recent recession due to the Covid-19 pandemic would not have occurred.[85] In essence, the leasing industry allowed airlines to: (1) restructure their finances to increase liquidity through sale and leaseback transactions (e.g. Air Canada, in October of 2020 during the height of the COVID-19 pandemic raised nearly $500 million (CDN) through the sale and leaseback of nine Boeing 737 Max 8 aircraft and those funds

[85] Victoria Tozer-Pennington, *The Aviation Industry Leaders Report 2022: Recovery through Resilience* (KPMG, 2022)at 22.

were used to continue general operations and to fund mitigative measures in response to the Covid-19 pandemic);[86] and (2) renegotiate existing leases for deferred payments and extended amortizations so as to increase cash flow.[87] Leasing over the past 40 years has therefore proliferated and has provided the flexibility that airlines needed, both existing and emerging, to enter the market without requiring excessive amounts of capital for the purchase of their own planes. Peter Barrett, the current CEO of SMBC Aviation Capital, in making a comparison between airline business and the hotel industry noted that:

> "…[there] are parallels with the hotel industry. Most hotel operators don't own the assets, they're focused on service delivery and execution of that operating product. COVID-19 has accelerated a ***long-term sector trend that aircraft ownership and aircraft operation will be seen as separate things***". [emphasis added][88]

The divide between the ownership of aircraft and the operation of the said aircraft is the disconnect to which the global registration system has not yet adapted. The issue that must be addressed first, is what constitutes a "lease" for all intents and purposes.

II. The "Lease" – Finance vs Operating

A lease is an almost elusive term as can be seen from differing definitions. A lease, as defined by Bunker, is the "… commercial arrangement whereby an equipment owner (lessor) conveys to the user (lessee) the right to use equipment in exchange for specified rental payments over an agreed period of time (term)".[89] Black's law dictionary, although dealing with real property, defines a lease as "… A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for

[86] "Air Canada Completes Aircraft Sale and Leaseback Transactions," online: *News Release Archive* <https://aircanada.mediaroom.com/2020-10-08-Air-Canada-Completes-Aircraft-Sale-and-Leaseback-Transactions>.
[87] S*upra* note 85 at 21.
[88] *Ibid* at 22.
[89] Donald Bunker, "Aircraft Financing in the Future" 27 Annals Air & Space L 139 at 147.

consideration, usually, rent, the lease term can be for life, for a fixed period, of for a period terminable at will".[90] The Cape Town Convention defines a "leasing agreement" as "… an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment."[91] Although there are nuances to the definitions, certain recurring aspects present themselves.

(i) A lease is an agreement between two or more parties.

(ii) A lease will include a person or entity (the lessor) with the legal right to enter into a contract with the object, in this case the aircraft or other mobile equipment, as the material subject matter of the agreement. Hanley points out that the lessor is not necessarily the owner of the aircraft and may perhaps hold title pursuant to a head lease.[92] It is also feasible that the lessor may be a special purpose vehicle or an owner trust for all intents and purposes.

(iii) A lease will include a person or entity (the lessee) that is given the right to use and control the aircraft.

(iv) In exchange for the right to use and control the aircraft, the lessee agrees to provide consideration in the form of rent or other type of payment. Although the Cape Town Convention does not specify, a lease will likely be for a fixed period of time.

There are also generally two forms of leases that exist, both having the underlying characteristics noted above. The first is a finance lease, whereby the lessor and lessee enter an agreement for the lessee to obtain the right to use and control the aircraft but included in this agreement is the ultimate intention to transfer the ownership right (i.e. title) of the aircraft to the lessee.[93] The transfer or purchase of the aircraft by the lessee is

[90] Bryan Garner, *Black's Law Dictionary*, 11th ed (2019).
[91] *Supra* note 15.
[92] S*upra* note 9 at 18.
[93] S*upra* note 89 at 148.

typically accomplished through the amortization of the cost of the aircraft plus interest over the term of the agreement or may include an option to purchase the aircraft at the end of the term of the remaining residual value.[94] Operating leases on the other hand essentially entail only the use and control of the aircraft for a period of time that is substantially less than the useful lifetime of the aircraft and at the end of the negotiated term, the aircraft will be returned to the lessor. As the operating lease is premised on the ability of the lessor to lease the vehicle again after it has been returned at the end of the term and is therefore concerned with the condition of the aircraft, the lessor continues to bear the risks of ownership but also the rewards of ownership such as the ability to take advantage of the capital depreciation of the asset to mitigate tax exposure.[95] In a finance lease, given that it is not anticipated that the aircraft will return to the lessor, the lessee in actuality assumes all risks of ownership and in turn, is permitted to take advantage of the capital depreciation but will be required to report the "lease" on the balance statement of the lessee and is reported as a liability.[96] An airline as a lessee in an operating lease is on the contrary not required to report the lease as a liability and is then able to acquire an aircraft to service its clients without substantially impacting the debt-to-equity ratio that is used as one of the health indicators of a corporation to both lenders and shareholders.[97]

B. THE OWNER-OPERATOR DIVIDE AND IMPACT ON REGISTRATION

The use of operating leases has grown in prevalence due to the various advantages that this form of financing provides (both from a corporate/commercial and accounting

[94] *Ibid*.
[95] S*upra* note 9 at 15.
[96] *Ibid*.
[97] *Ibid*.

perspective). However, the result of this prevalence is sometimes confusion in pinpointing the "owner" of the aircraft versus the operator as there are differing definitions for these concepts found within the domestic registration processes of each State. As discussed in Chapter I, each State is entitled pursuant to the Chicago Convention to determine their own requirements for registration and the lack of a ubiquitous definition has subsequent knock-on effects that will be discussed in Chapter III. ICAO in the 39th Assembly meeting summarized the issue from the context of Article 21 of the Chicago Convention:

> "Some States fail to attest to the ownership of aircrafts, as specified in Article 21 of the Chicago Convention. Some States attest to a "Holder", or an "operator" but not an "Owner". Other States more intriguingly attest to an "Owner" which is not the owner. Others simply do not attest to either an "Owner" or a "Holder". Lastly, some States fail to reply to requests for information sent to them. In many countries, aircraft registers do not cover aircraft ownership which is handled by other administrative services. However, this should not prevent a State from taking measures to be able to respond to requests for information about ownership."[98]

Before addressing the specific issues that are derived from the lack of a uniform definition of ownership, it will be useful to explore some registry practices.

C. AIRCRAFT REGISTRIES AROUND THE WORLD

I. Operator-Only Registry

States that have an operator-only registry will register aircraft based on the actual operator of the aircraft and will generally not be concerned with the entity that owns the legal title. Canada is an example of an operator only registry. Under the *Canadian Aviation Regulations* ("CARs), all aircraft must have a Canadian certificate of registration issued by Transport Canada and recorded in the Canadian Civil Aircraft Register (CCAR) in order to validly operate.[99] However, in order to obtain the certificate of registration, the

[98] *ICAO A39-WP/159, Assembly—39th Session,* Technical Commission and Legal Commission (2016) at para 2.5.
[99] *Canadian Aviation Regulations at* s 202.13(ii).

individual or entity must be the *Canadian* "owner" of the aircraft by virtue of citizenship or if a corporation, by proof that it was incorporated either federally or under provincial legislation.[100] Although the CARs refer to the "owner" of an aircraft, the drafters make clear in the definitions of the regulations that an "owner" is "… in respect of an aircraft or remotely piloted aircraft system, means the person who has ***legal custody and control of the aircraft or system***" [emphasis added].[101] "Legal custody and control" is satisfied when it can be shown that an "owner" has "complete responsibility for the operation and maintenance of the aircraft".[102] In the context of an operating lease, the lessee would have possessory rights negotiated as part of the lease agreement, but the lease agreement must also vest the responsibility of maintenance on the operator of the aircraft as well in order to be validly registered in Canada. If the legal custody and control of the aircraft is ever transferred, the CARs stipulate that the certificate of registration is revoked.[103] Further, lease agreements are not filed with the CARs and lessors must take the appropriate steps to perfect their interest by filing in either the appropriate provincial registries dealing with secured interests or if applicable, the international registry pursuant to the Cape Town Convention, or in both which is common practice.[104]

Operator-only registries are evidently unconcerned with beneficial interest of the aircraft and with the security interests that may be attached. This concentration on the actual operation of the aircraft does raise certain concerns regarding the ease of

[100] *Ibid at* s 202.15.
[101] *Ibid at* s 100.01.
[102] *Ibid at s* 202.35(3).
[103] *Ibid at s* 202.35(1).
[104] Pierre Denis and Etienne Brassard, "Aviation Finance in Canda: Overview," online: <https://uk.practicallaw.thomsonreuters.com/9-628-1725?navId=0D7B692E59B3A740B1CD0867EF3E6397&comp=pluk&transitionType=Default&contextData=%28sc.Default%29>.

deregistering an aircraft in the event of default, especially in cases where the country in question may not be party to the Cape Town Convention (discussed in detail in subsequent chapters). Although, as we have recently seen in the case of Russia, an international convention is only as effective as the level of compliance taken by the member States.[105] Where a country maintains an operator-only registry such as Canada, deregistration will either occur pursuant to a filed irrevocable deregistration and export request authorisation (IDERA) pursuant to the Cape Town Convention (which will be further discussed in Chapter III) or Transport Canada will take instructions for deregistration from the registered owner as it is defined in the CARs (i.e. the lessee).

II. Owner-Only Registry

Owner-only registries are typically unconcerned with the operator of the aircraft and will look at only the owner for all intents and purposes. The United States maintains an owner-only registry that is governed by Title 49 of the *United States Code*[106] and the corresponding *Consolidated Federal Regulations* ("CFR"). In the United States, registration of an aircraft must only be in the legal name of its owner. The definition of the term "owner" however, is elusive and is highly convoluted when examined in conjunction with the person or entity that is capable of being a valid applicant.

An "owner" is defined in section 47.6 of title 14 of the CFR and notes that an owner "… includes a buyer in possession, a bailee, or a lessee of an aircraft under a contract of

[105] "Russian law creates new hurdle for foreign plane lessors," (14 March 2022), online: *Reuters* <https://www.reuters.com/world/putin-signs-law-registering-leased-planes-airlines-property-tass-2022-03-14/>. On March 14, 2022 Russia enacted new laws that permit the re-registration of leased aircraft on the Russian aircraft register despite the lack of de-registration pursuant to Article 18 of the Chicago Convention. This step was taken to allow aircraft in Russian airspace to continue to fly as the certificates of airworthiness of the leased aircraft were revoked by their respect States of registry.

[106] *Title 49*, USC, s 44102(a)(1) 49.

conditional sale, and the assignee of that person". An owner must also meet the applicant requirements whereby they must be a *citizen* of the US, a "resident alien" with permanent residence in the country or a corporation that does not meet the citizenship requirements but is incorporated under the laws of the US and performing business based in the US.[107] Citizens are further defined as individuals who are citizens of the US, partnerships where all the partners are citizens of the US and corporations that are incorporated under the laws of the United States (or any of the states, territories or possessions of the United States) where at least 2/3 of the board of directors are US citizens and 75% of the voting shares are owned or controlled by US citizens.[108]

It is interesting to note that "owner", although not specifically mentioned but can be inferred from the CFR, does not necessarily have to be both legal and beneficial holder of title. Section 47.7 of Title 14 of the CFR notes that trustees are capable of being applicants as long as they are citizens or resident aliens of the US. Further, from guidance materials it is clear that the trust must be domiciled in the United States and governed by domestic legislation.[109] The circumstances above give rise to the establishment of non-citizen trusts where the beneficial holder of the interest in the aircraft does not satisfy the nationality requirements pursuant to the CFR but places the aircraft in trust and transfers legal title to a US citizen or resident alien. The converse is also true whereby the beneficial owner is recorded on the register and not the legal owner. For example, the definition of

[107] *Title 14 at* s 47.7.
[108] *Ibid at* s 47.2.
[109] "Aircraft Registration and Recordation Process," (June 2018), online: *US Department of Transportation Federal Aviation Administration* <https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/media/Aircraft%20Registration%20and%20Recordation%20Processes.pdf>at 58.

owner includes a "…lessee of an aircraft under a contract of conditional sale".[110] This means that a lessee in a capital or finance lease who holds the beneficial interest due to the transfer of the risks and rights of ownership, can be registered as the "owner" even though the lessor may retain legal title until the payment has been satisfied and the agreement is terminated at the end of the term.[111]

In 2020, the United States Government Accountability Office ("GAO") conducted a study to examine any weakness in the US system of registration.[112] It uncovered several issues, including: (1) a lack of verification of information provided by applicants and (2) the use of opaque ownership structures to conceal true ownership.[113]

With respect to the first item above, the study found that there was a lack of controls in place to independently verify information that is provided by applicants and instead, the FAA reviewed applicant information with the sole purpose of assessing completeness and compliance with the existing regulations.[114] In fact, the lack of verification and inherent reliance on self-certification by applicants lead to a 2017 case where a corporate applicant named two individuals as holders of shares of the corporation.[115] In actuality the named shareholders were victims of identity theft. The aircraft was subsequently registered based on the self-certification of information whereby the applicant affirms the accuracy and validity of the information provided. It was found that the aircraft remained registered for an entire year before the fraudulent transaction was uncovered. Other case studies

[110] *Supra* note 107 at s 47.6.
[111] S*upra* note 9 at 85.
[112] U S Government Accountability Office, "Aviation: FAA Needs to Better Prevent, Detect, and Respond to Fraud and Abuse Risks in Aircraft Registration," online: <https://www.gao.gov/products/gao-20-164>.
[113] *Ibid*.
[114] *Ibid* at 19.
[115] *Ibid* at 22.

examined by the GAO found that a foreign drug cartel had fabricated a purchase transaction through an associated US corporation and registration was completed, but the plane was seized before the final payment was made.[116]

In terms of the opaque ownership structures, the GAO found that there is a general lack of transparency with respect to true beneficial ownership of aircraft. Four of these opaque structures were identified: (1) limited-liability corporations; (2) shell companies; (3) noncitizen trusts and (4) US citizen corporations using voting trusts.[117] The problem of transparency is further exacerbated by the fact that the establishment of the above-named structures is generally done through intermediaries who have no obligation to verify beneficial ownership information, with the exception of banks that must verify ownership information pursuant to anti-money laundering legislation. Even where banks are involved however, the GAO found that in 2010 a foreign owner of an aircraft used a bank that provided owner trustee services to register a plane in the US through a non-citizen trust.[118] It was established that the trustor was a company formed in the British Virgin Islands and the address of the trustor was a post office box located in Switzerland. No further information regarding directors of the corporation could be identified due to illegible signatures and lack of printed names on the documents.

As can be seen from the above discussion of the US registration process, the system can be abused due to a lack of data verification and the permissive use of convoluted ownership structures. Some commentators argue that the percentage of abuse relative to the actual number of legitimate registrations is low and therefore changes that add cost

[116] *Ibid* at 25.
[117] *Ibid* at 29.
[118] *Ibid* at 30.

to the registration process must be approached cautiously.[119] Others are of the view however, that despite the relatively low numbers, the safety and security risks of occluded ownership are high, and it may be time to eliminate nationality requirements that facilitate the use of trusts in favour of direct foreign ownership.[120] Direct foreign ownership would arguably not change the composition of the aircraft already using US airspace but would add transparency with respect to the beneficial owners of the aircraft and provide firsthand information regarding safety oversight activities (e.g. maintenance records, safety related issues).[121]

III. Owner or Operator Registration

Owner or operator registries provide more flexibility when it comes to the registration of aircraft. Ireland is an example of such a registry which is governed by statute through the *Irish Aviation Authority (Nationality and Registration of Aircraft) Order, 2015* (the "2015 Order").[122] Under the 2015 Order, nationality rules are imposed and aircraft can only be registered if it is "wholly owned" by (1) a citizen of Ireland or a citizen of an EU member State with a residence or business in that State, or (2) a company incorporated in Ireland with a principle place of business in Ireland or another EU member state and at least 2/3 of the directors are citizens of Ireland or other EU member states.[123] At first glance the rules seem similar to that of the United States discussed in the above sub-chapter II, requiring the implementation of non-citizen trusts and other vehicles to facilitate

[119] S*upra* note 79.
[120] Thomas Robert Wangard, "Solve the Problems with Non-Citizen Trusts: Do Away with Citizenship Requirements for Aircraft Registration in the United States" (2012–2013) 12:3 Issues Aviation L & Pol'y 539, online: <https://heinonline.org/HOL/P?h=hein.journals/isavialp12&i=556>.
[121] *Ibid* at 571.
[122] SI 107 of 2015.
[123] *Ibid* at s 7.

registration. On a close analysis though, the 2015 Order provides several exceptions to the nationality rules. First, article 7(4) stipulates that an aircraft that does not comply with the nationality rules in article 7(1) can still be registered if it is an aircraft that is "… chartered by demise, leased or on hire to, or in course of being acquired under a lease-purchase or a hire-purchase agreement by, a citizen or company may still be registered but subject to conditions that the civil aviation authority may impose…". This aforementioned section thereby allows operators who satisfy the nationality requirements to register aircraft pursuant to leases and other rental/financing vehicles even if the actual owner of the aircraft does not meet these requirements. Secondly, at article 7(5) the 2015 Order goes further to stipulate that,

> (5) If:
>
> (a) a person **who is not** a citizen of Ireland or of a member state of the European Communities and who resides or has a place of business in the State, or
>
> (b) a company **which is not** a company such as is referred to in paragraph (1) of this Article and which has a place of business in the State,
>
> is entitled as owner to a **legal or beneficial interest** in an aircraft or a share therein, the aircraft, if it may otherwise be properly registered in the State, may be so registered, but such registration **may be made subject** to a condition that the aircraft, while it is registered in pursuance of this paragraph, shall not be used as a commercial transport or aerial work aircraft and to any other conditions which the Authority may deem fit to impose [emphasis added].

Article 7(5) in essence gives the civil aviation authority the discretion to register aircraft regardless of the nationality of the owner and more importantly, regardless of the type of ownership the entity possesses. The mention of legal or beneficial interest facilitates the use of trusts, either registered by a trustee holding legal title or a beneficiary holding beneficial interest so long as the aircraft would have been eligible for registration had the nationality requirement been fulfilled. Registration pursuant to this section of the 2015 Order is, however, subject to the potential restriction at the discretion of the civil

aviation authority that the aircraft is prohibited from being used for "… commercial transport or aerial work", thereby precluding airlines and all other forms of operations that carry goods or passengers for profit. In practice however, trusts are established through professional trustees, such as financial institutions that have ties with Ireland, especially given the new transparency rules that were established by the European Commission in 2019 that require fiduciaries to collect information regarding beneficial ownership.

Ireland serves as the aircraft leasing capital of the world, holding a 65% share of the market and acting as the corporate headquarters for 14 out of 15 of the world's largest lessors.[124] In the past several years, there has been a recent surge in the use of trusts in Ireland due in part to the increased settlement of owner trusts driven by the need to facilitate efficiency in the aircraft leasing industry.[125] One of the major issues faced by the leasing industry is the excessive cost of re-drafting and transferring leases to a new lessor, known as a novation, when an aircraft is transferred (i.e. the rights and obligations under a lease settled between an existing lessee and lessor had to be transferred to the new owner, assuming the new owner is the lessor).[126] With an owner trust, the legal title to the aircraft will be held by a trustee, likely a professional trustee, and beneficial interest will be retained by the owner. The parties to the lease will be the lessee (e.g. an airline) and the professional trustee as the lessor. In the event the underlying aircraft is sold, only the beneficial interest will be the subject of the transfer while the legal interest will remain

[124] Joanna Bailey, "Ireland Has Over 17,000 Aircraft Orders—But Not For Traditional Airlines," (24 January 2019), online: *Simple Flying* <https://simpleflying.com/ireland-aircraft-leasing/>.
[125] "Aviation Update: Beneficial Ownership Register of Trusts - Application to Aircraft Leasing and Structured Finance Transactions," (20 March 2019), online: *Mason Hayes & Curran* < *https://www.mhc.ie/latest/insights/aviation-update-beneficial-ownership-register-of-trusts-application-to-aircraft-leasing-and-structured-finance-transactions*>.
[126] "Aviation Finance & Leasing: Global Overview," (5 April 2022), online: *Clyde & Co* <https://www.lexology.com/library/detail.aspx?g=5567c19a-b0f9-4d00-ab15-6e1a59ec350b>.

vested in the trustee. The lessee and lessor pursuant to the lease contract will remain the same subject to the parties of the contract being of sufficient generality that no change in language is necessary.[127]

Owner trusts are evidently effective in facilitating the ease of aircraft transfers, so much so in fact that the new Global Aircraft Trading System ("GATS") is premised on the establishment of GATS approved trusts that must initially be conceived in Ireland, Singapore or the United States, which are then registered in the GATS online platform.[128] Aircraft can then be readily traded by the transfer of beneficial ownership while legal title is retained by a trustee and the global online platform can be used to increase transparency for all parties.[129] The use of templates, such as transfer clauses, may also facilitate a common denominator for understanding the terms of large transactions and increased use of the GATS trust may assist in unifying a common understanding of trusts and thus "ownership" in general.

IV. Owner and Operator Registry

Owner and operator registries are arguably the least flexible model of registration system. Japan is an example of this type of registry. Under the *Civil Aeronautics Act*,[130] registration of aircraft and authority to operate within Japanese air space is regulated by the Ministry of Land, Infrastructure, Transport and Tourism ("MLIT"). The *Civil Aeronautics Act* stipulates that:

[127] *Supra* note 125.
[128] *Supra* note 126. *See* Article by Clyde & Co for a brief description of the operation of the Global Aircraft Trading System.
[129] *Supra* note 16.
[130] Act No 231 of 1952.

Article 4(1)

Any aircraft owned by any person who calls under any of the following items may not be eligible for registration.

(i) any person who does not have Japanese nationality
(ii) any foreign state or public entity or its equivalent in any foreign state
(iii) any juridical person or body established in accordance with the laws and regulations of any foreign state
(iv) any juridical person of which the representative is any one of those listed in the preceding three items or of which one-third or more of the officers are those persons or one-third or more of voting rights are held by those persons

Article 4(2)

Any aircraft which has foreign nationality may not be eligible for registration

Although the permissive word “may” is used in the English version of the legislation provided by the MLIT, the original Japanese version translates closer to “cannot be registered” and represents a complete prohibition on registration where any of the four subparagraphs in Article 4(1) are present. The application of articles 4(1) and 4(2) requires that owners of aircraft, both corporate entities and individuals, “must” be nationals of Japan pursuant to the above provisions. As is the same in all jurisdictions, operators of aircraft must also obtain a license to provide air transport services and Article 101(1)(v)(a) makes it clear that applicants cannot be anyone that falls under Article 4(1) of the *Civil Aeronautics Act* as noted above. When reading both provisions together, the pith and substance of Japanese law prohibits the registration of aircraft owned by those who do not have Japanese nationality and by airlines that do not possess Japanese nationality. An exception can be made by the MLIT pursuant to Article 129(1) to allow foreign operators to provide services, but the issue of national ownership of the aircraft itself still applies with no exception.

As a result of the above nationality prohibitions on both operators and owners, foreign leasing companies have looked to special purpose companies as a means of entry into the Japanese market. The general set-up of a special purpose company involves:[131]

(i) A lessor will purchase an aircraft from a manufacturer but will divide the ownership such that the beneficial interest is vested in a subsidiary of the parent leasing company and the legal interest will vest in a trustee.

(ii) A special purpose corporation will subsequently be set up by an existing Japanese company.

(iii) The trustee will then sell the legal title to the Japanese special purpose corporation which will then lease the aircraft to an airline. The aircraft will be leased either to a Japanese airline or to a foreign airline that has obtained authorization from the MLIT.

(iv) An agreement will be entered between the trustee and the special purpose corporation for the aircraft to be sold back to the trustee at a later date and for a nominal fee which acts as de factor security for the return of the aircraft.

(v) For all intents and purposes, the special purpose corporation is the "owner" for Japanese registration.

The conundrum that arises with the Japanese registration system and the use of special purpose corporations is that there are multiple "owners" depending on the user's interpretation. For example, in the scenario described above, is the owner the special purpose corporation itself? Is the owner more appropriately the subsidiary that

[131] *Supra* note 9 at 88.

holds the beneficial interest or is the owner the trustee that initially held the legal interest in the aircraft prior to selling it to the special purpose corporation?[132]

D. Summary and Analysis

Article 19 of the Chicago Convention and the discretion provided to each contracting State to self-determine registration requirements for aircraft on their registry has evidently resulted in a complex registration ecosystem that falls on a spectrum from restrictive to permissive. The differing levels of compliance with regulatory hurdles and the rapid expansion of leasing has created the need for ingenuity when devising legal structures to place aircraft on a desired registry (e.g., as discussed above, non-citizen trusts in the United States and the use of special purpose companies in Japan). But as can be seen from the US GAO audit discussed at subsection II above, although the majority of registrations using these legal structures have legitimate and valid purposes, a proportion of these registrations were associated with criminal activities, including the laundering of money and identity theft. Even where the registrations pursuant to these legal structures were legitimate, the lack of transparency as to the actual owner of the aircraft resulted in issues with regulatory oversight as pertinent information relating to the aircraft was not readily available when requested from bare title holders. Issues associated with transparency will hopefully decrease as States recognize the importance of monitoring ownership. This recognition has become more apparent through legislation such as EU Directive 2015/849 and Directive 2018/843 that requires each EU member State to create a central register in which beneficial ownership information is set out and is made publicly

[132] *Ibid* at 87.

available with the primary intention of combating money laundering and terrorist financing. A secondary effect will arguably bolster the ability of regulatory bodies to conduct oversight of aircraft by clearly providing information as to the person or entity that has responsibility for any particular aircraft. The effectiveness of the EU Directive is however, premised on the underlying legal system of the Member State and its recognition of trusts.

The other pervasive issue that arises from the differing registration systems is the multitude of "owners" that may exist depending on the user of the information. Again, Canada registers the "owner" of an aircraft but upon inspection of the relevant legislation, the owner is actually the operator who has care and custody of the aircraft. In the US, the owner may actually be a legal entity holding only bare title and in Japan, this owner may be a subsidiary corporation holding beneficial title, a professional trust company with legal title or a Japanese corporation.

CHAPTER III: IMPACTS OF REGISTRATION ON THE OPERATION OF AIR TRANSPORT

The preceding chapters examined the evolution of aircraft nationality, the contemporary reliance on aircraft leasing and the differing aircraft registration practices around the world in an attempt to illustrate the disconnect between the purpose of the Chicago Convention (i.e. the harmonization of a global air transport industry while enhancing safety) and the current realities of air transport. This chapter will further explore the practical issues that arise from the "owner-operator" divide by examining its application in the context of two contemporary issues: (1) Article 21 of the Chicago Convention (and an analysis of safety) and (2) Aircraft leasing and the impact of current

registration practices on deregistration and the effectiveness of the Cape Town Convention with a relevant case study.

A. ARTICLE 21 CHICAGO CONVENTION

Article 21 of the Chicago Convention states the following:

> "Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, ***information concerning the registration and ownership of any particular aircraft registered in that State***. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ***ownership and control of aircraft registered in that State and habitually engaged in international air navigation***. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States" (emphasis added)

Article 21 therefore obligates member States to furnish information concerning the "ownership" of aircraft ("Ownership Information") that are engaged in international air navigation when a demand is made of the member State to provide this information or where ICAO promulgates regulations at their discretion with respect to the provision of Ownership Information. The scope and application of Article 21 is however, elusive. Many questions arise on a cursory reading of this article of the Chicago Convention that is subsumed into the part regulating Air Navigation and placed under the chapter dealing with aircraft nationality. What form of "ownership" is contemplated within this Article? Does control refer to control in fact (i.e., physical control of the aircraft) or control at law (i.e., the direct or indirect ability to control the aircraft through contract or other legal means)? No where in the Chicago Convention are these concepts defined or clarified. Unfortunately, the minutes to the Chicago Conference provide little interpretative guidance and as discussed in Chapter I, this is likely due to the fact that the Conference was convened with an overarching goal to determine the economic and traffic rights

associated with air transport post World War II. Aircraft nationality was deemed to be sufficiently discussed through past conventions, as seen through the evolution of the principles associated with nationality and registration, and sufficiently established through practice of States. The determination of the meaning of these various elusive concepts may, however, be derived from an interpretation of the purpose of Article 21 as extrapolated from the history of the Chicago Convention and through analysis of the Chicago Convention as a whole.

I. Purpose of Article 21 and the Impact of Misaligned Registry Practices

Article 21, similarly to many of the other provisions of the Chicago Convention, was derived from the Paris Convention 1919. Article 9 of the Paris Convention 1919 provided that:

> "The contracting States shall exchange every month among themselves and transmit to the International Commission for Air Navigation referred to in Article 34 copies of registrations and of cancellations of registration which shall have been entered on their official registers during the preceding month"[133]

The pre-cursor to Article 21 was evidently more stringent, requiring the transmission of "registrations" *and* "cancellations" on a monthly, ongoing basis and among all contracting States and the International Commission for Air Navigation (as opposed to on an as needed basis and by request as required by the Chicago Convention). Given the backdrop of the end of World War I at the drafting of the Paris Convention 1919 and the end of World War II at the drafting of the Chicago Convention, it can be safely presumed that the requirement to collect and transmit registration information was first and foremost a security tactic and was designed to monitor and ensure that belligerent States were not

[133] *Supra* note 4.

engaged directly with air transport. In fact, a memorandum of conversation drafted by the Assistant Secretary of State of the United States recording the minutes of a discussion among President Roosevelt and high-level ministers that took place prior to the Chicago Conference noted that "… Germany, Italy and Japan were not to be permitted to have any aviation industry or any aviation lines, international or external" and that all "… external traffic would be handled by the lines of the other countries".[134] Roosevelt went on to say that he did not want Germany, Italy and Japan to be able to "… fly anything larger than one of these toy planes that you wind up with an elastic".[135] These sentiments were evidently reflected into Article 21 especially due to the fact that the American version of the draft treaty was used as the basis of deliberation by the subcommittee of the Chicago Conference that reviewed the provisions with respect to aircraft nationality and registration. Therefore, one of the main purposes of Article 21 that can be extrapolated from the historical context is that it was meant to monitor ownership information but in particular it was originally designed to police and deter the participation of these aforementioned "belligerent" States from having ownership of aircraft registered in any of the contracting States from which traffic rights pursuant to the *International Air Services Transit Agreement*[136] were extended. Article 21 was however, adjusted from Article 9 of the Paris Convention 1919 to make adherence less onerous (i.e., from mandatory monthly transmission of Ownership Information to "on demand") but the potential of a request from ICAO or another member State requires States to keep track of this pertinent Ownership Information at all times.

[134] *Supra* note 52 at 268.
[135] *Ibid*.
[136] *Supra* note 60.

The threat of war eventually subsided, and Germany became a contracting party to the Chicago Convention a mere nine years after the Chicago Convention was entered into force on April 4, 1947.[137] The air transport industry post Word War II rapidly expanded as evidenced by the exchange of traffic rights via bi-lateral transit agreements and eventually partially liberalized through the "open-skies" policy adopted by the United States. It was further changed through the formation of the European Union with its lack of restrictions for air transport of EU member States both in terms of traffic and economic rights.[138] Although there is a proportion of academics that argue that the Chicago Convention is outdated, ambiguous and does not fit the needs of contemporary air transport, other academics such as Havel and Sanchez contend that the ambiguity within the existing Convention provides for "… structural pliability" that in essence allows the Convention to evolve and adapt as necessary. [139] This pliability can also be seen in Article 21 of the Chicago Convention as what was likely originally implemented as a security measure to restrict market access (and also likely to an extent a retaliatory measure) has evolved into a mechanism that promotes the effective registration of aircraft. The Legal Committee of ICAO in their 37th session noted that "… the principal purpose of article 21 of the Convention… is to facilitate the exchange between contracting States of relevant information concerning the registration, ownership and control of aircraft".[140] This exchange of information, or at least the requirement to retain registration, ownership and

[137] "UNTC," online: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280163d69&clang=_en>.
[138] Brian F Havel and Gabriel S Sanchez, "Do We Need a New Chicago Convention?" (2011) 11 Issues Aviation L & Pol'y at 8.
[139] *Ibid* at 20.
[140] *Supra* note 83.

control information (collectively referred to as “Registration Information”) is primarily used to facilitate the efficient and effective transfer of aircraft.

II. Registration, De-Registration of Aircraft and Cross-Border Transferability

The transfer of aircraft and in particular, cross border transfers of aircraft, is a relatively new development in the aviation industry. Aircraft were once purchased directly by operators that would essentially use the aircraft for the full useful lifetime of the aircraft.[141] Direct ownership, as discussed above in chapter II, subchapter A., has become far less common due to the commercial benefits provided through leasing as opposed to outright purchasing. The reliance on leasing has created a situation where the transfer of aircraft may involve a change in operator but not necessarily a change in the actual owner.

A de-registration and subsequent registration of an aircraft with respect to a lease is theoretically simple. For example, if an aircraft is currently registered in State A and is to be re-registered in State B, the general practice is for State A to send the ownership information of the aircraft to State B so that State B does not have to independently verify the ownership of the aircraft for registration purposes.[142] Where ownership information is available, recorded and perhaps made available through the obligations under Article 21, the transfer is relatively straightforward. However, as discussed in chapter II, subchapter C., Article 19 of the Chicago Convention permits each State to determine their own registry practices and the “ownership information” transferred may not be necessarily useful as it does not correspond with the receiving countries notion of ownership. Lack of ownership information or more precisely, lack of useful ownership information ultimately

[141] *ICAO A39-WP/237, Assembly - Facilitation of the Cross-border Transferability Process* at 2.
[142] *ICAO A 39-WP/159, Assembly - Implementation of Article 21 of the Chicago Convention* at 2.

results in delays that can cause severe financial consequences to the acquisitioning operator. There are also fears, as noted by the Technical Commission in a working paper presented at the 39th Assembly session, that despite "… high implementation of International Standards and Recommended Practices (SARPS) related to XBT [cross border transfer], there are significant differences in the associated process which have contributed to the inefficient use of resources, possibility distracting State resources away from safety-related activities".[143] Furthermore, country-to-country variations in regulations, requirements and practices lead to duplications and inefficiencies for all aviation participants, which increase the likelihood of errors".[144] The importance of Article 21 has therefore been emphasized over the past several years as it was placed on the Work Programme of the ICAO and several initiatives have been implemented to increase adherence, including but not limited to the creation of a model certificate of de-registration and the establishment of the Aircraft Registration Network, which will be discussed below.

III. Article 21 and the ICAO Task Force

The "implementation of Article 21" has been on the Work Programme of the ICAO Legal Committee since 2016 when the issue of a lack of compliance with Article 21 was raised in a working paper presented to the ICAO Assembly by France.[145] The realization that there has been difficulty in securing compliance with Article 21 however, arose well before the implementation of Article 21 was added to the Work Programme of the Legal Committee. In fact, ICAO established the Aircraft Registry System (ARS) in 2010 which

[143] *Supra* note 141 at 2.
[144] *Ibid*.
[145] *Supra* note 142.

was designed to assist member States in complying with their Article 21 obligations by providing an electronic platform through which States could input or upload Ownership Information.[146] The *Rules for the Provision of Pertinent Data Concerning Aircraft Registered in a State Pursuant to Article 21 of the Convention on International Civil Aviation*[147] were also drafted and issued to member States through State Letter.[148] Despite the work put into developing the ARS and the associated Rules, it was determined that member States did not comply with Article 21 and Ownership Information that was uploaded to the ARS by some States was incomplete and wholly unreliable.[149] As a result of these deficiencies and the realization that Article 21 plays a critical role in cross-border transfers of aircraft, a Task Force was formed to determine the reasons for non-compliance and to find solutions to the pervasive issues.

(a) Task Force – First Meeting

The first meeting of the Task Force consisted of representatives from 13 member States.[150] Representatives began by summarizing the registry practices of their respective nations and several conclusions were drawn which reflect the above discussion.

(1) The definition of "owner" falls on a spectrum. On one extreme end, an owner consists of the entity that has custody and control of an aircraft. The other end of the spectrum are those registries that are "title registries" and record the entity that has the legal and/or beneficial title to the aircraft. The final category will record both

[146] *ICAO, Task Force on the Implementation of Article 21 of the Chicago Convention Report—Part I, A21TF* at 2–2.
[147] *ICAO Council, State Letter AN 11/47—10/67 dated 24 September 2010*.
[148] *Supra* note 126 at 2–3.
[149] *ICAO Assembly, Report of the Legal Commission on the General Section and Agenda Items 44, 45, 46 and 47, A39-WP/507*at 47–1.
[150] *Supra* note 146 at A1-1. These countries consisted of Brazil, Canada, Colombia, Egypt, Finland, France, Indonesia, Ireland, Russian Federation.

custody and control over an aircraft and the title holder. To further complicate matters, it was determined that some member States operate two separate registry systems (i.e., one that records title and the other that records care and custody);

(2) Differences in registration practices, in particular the definition of "ownership" may result in delays because the transfer of ownership information is not recognized or understood between the transferor and transferee. This difficulty arose in particular where an aircraft was being transferred from a "custody and control" state to a "legal and/or beneficial ownership" state;

(3) Several States concluded that ownership information is independently verified in their respective registries and therefore, obtaining information from the transferring State was not a material step in the transfer process;

(4) All members of the Task Force agreed that there will be no "… amendment to Article 21 in an attempt to define 'ownership' to conform to any of the prevailing systems".[151] This conclusion is in keeping with the deliberation in the Assembly whereby the delegation agreed that there would only be a clarification of the concepts pertaining to Article 21 and not an amendment to the Chicago Convention that would take away the discretion to manage each State's registration procedures.[152]

(5) Previous attempts to improve compliance with Article 21 through the Aircraft Registration System (ARS) failed because the ARS did not take the varying definitions of ownership into account. States had difficulty transposing data from their registries into the ARS or worse yet, did not record the information that was

[151] *Ibid* at 2–2.
[152] *Supra* note 149 at 47–2.

requested as their registry practices do not require the recordation of that particular information (e.g. care and custody registries may not record legal/beneficial ownership of an aircraft). Any future electronic platform must take the differing registry practices into account to facilitate transparency among the various States.

(6) Finally, the Task Force discussed the potential of a Model Certificate of De-Registration that would provide clarity on the definition of "ownership" used by the transferring State but would also serve as confirmation of de-registration.

The Task Force tabled a final determination regarding the Model Certificate of De-Registration and the proposed new Aircraft Registration Network (ARN) until additional research was conducted via the Secretariat.

(b) Task Force – Second Meeting

The second Task Force meeting took place approximately six months after the first meeting and involved a more rigorous analysis of the Model Certificate of De-registration and the ARN.

(i) Model Certificate of De-Registration

The formal proposal for the Model Certificate of De-Registration was put forward by France in a working paper presented at the initiation of the second meeting of the Task Force.[153] It was proposed that the Model Certificate of De-Registration could essentially be used as an interpretive tool that eliminates ambiguities that delay registration of aircraft. The Model Certificate would include fields requesting "standard" information "…

[153] Supra note 146 at 2–1.

thus making it easier and quicker for States to determine whether such information on ownership and control communicated to them by other States corresponds to the information they require under their respective domestic legal frameworks for purposes of aircraft registration".[154] As the Model Certificate was debated further, members of the Task Force raised concerns regarding the content and proposed operation of the document. Firstly, some members noted that the Model Certificate was overly complicated and was quite possibly redundant given that many States will issue an Export Certificate of Airworthiness that contains the same information.[155] Other States also argued that the Model Certificate would imply an onus on the transferring State to provide de-registration information when it should be the importing State that bears the responsibility of obtaining de-registration information.[156] Some members of the Task Force also raised the concern that requiring certain information such as "legal owner" would be inappropriate as certain States simply do not register this form of information.[157] Finally, members noted that it may be useful to include a section in the Model Certificate that indicates the type of registry (i.e. definition of ownership) operated by the de-registering State to provide context for interpretation to the registering State.[158] France responded to the above concerns by confirming that the various fields of the Model Certificate were not meant to be mandatory in nature and if information was not available, the field should be left blank. The logic was that a blank field would also be a good indicator of the system of registration in place within the de-registering State.[159] It was also the opinion of France

[154] *Ibid*.
[155] *Ibid* at 2–2.
[156] *Ibid*.
[157] *Ibid* at 2–3.
[158] *Ibid*.
[159] *Ibid*.

that a field to indicate the type of ownership used by the State of de-registration was logistically unworkable as the officials that normally process the certificates would not have the technical knowledge to deal with that type of information effectively.[160]. The Model Certificate was endorsed by the Task Force with the condition that the concerns raised during the meeting would be considered as the certificate is further developed

(ii) Current State of the Model Certificate of De-Registration

The Model Certificate of De-Registration was eventually fine-tuned through deliberations by the Cross Border Transferability Task Force and the Air Navigation Commission and a proposed amendment to Annex 7 was introduced. The draft amendments were sent out to member States by ICAO for comment via state letter dated 24 August 2020.[161] A couple aspects of the proposed amendments to Annex 7 are of note:

(1) The use of the proposed model certificate of de-registration is conditional on the existing processes of de-registration within a State. This means that a State does not have to issue a certificate of de-registration but if it does choose to do so, it must be in the "model" form.[162] Exporting States may therefore continue to issue notice to civil aviation authorities of an importing State with confirmation that an aircraft has been de-registered but with no further clarification of the underlying definition of "ownership";

(2) The proposed model Certificate of De-Registration, despite the opposition by France during discussions of the Article 21 Task Force, includes a section that

[160] *Ibid*.
[161] ICAO AN 3/1.2-20/76, P*roposals for Amendment to Annexes 7 and 8, regarding registration, deregistration and transfer of registration of aircraft*.
[162] *Ibid* at B-3.

requests the State to indicate the “Basis of registration” and includes checkboxes for three options: “Ownership of aircraft”; “Operator of aircraft” and “other (explain)”.[163] It can be assumed that the third option of “other” would encompass those States such as Switzerland that possess two separate registries, one that deals exclusively with Chicago Convention registrations and the other with Geneva Convention 1948 registrations.[164]

The Amendment 7 to Annex 7 was eventually approved by Council on March 7, 2022, during the 225th session with an effective date of 18 July 2022 and an applicability date of 2 November 2023.[165] However, given the conditional nature of the Model Certificate, its effectiveness remains to be seen. It is evident that ICAO has decided to continue with the permissive nature of the Chicago Convention in keeping with the discretion given to States via Article 19 to determine their own registry practices. The issue that arises however, is that where domestic rules are not amended to utilize the Model Certificate as part of the de-registration process, the Model Certificate may not be used, and the same issues of transparency and delayed transfers may continue to occur.

(iii) Aircraft Registration Network

The Model Certificate of De-Registration was designed as a “short-term” solution to the problems involving consistency in procedure, transparency of registration practices and delay in the cross-border transfers. Ultimately, the overarching goal was to design a new Aircraft Registration Network (ARN) that would replace the ARS and its many

[163] *Ibid* at B-7.
[164] *Supra* note 146 at 2–2.
[165] *ICAO Council, 225th Session, 7 March 2022, C-DEC 225/8* at 3.

inefficiencies. Even more importantly, the main purpose of the ARN is to increase compliance to obligations under Article 21 of the Chicago Convention. In light of the above goals, the Article 21 Task Force approved the Secretariat's request for the establishment of an Aircraft Registration Network Sub-Group (ARNSG) that was composed of an inter-disciplinary group of professionals to ensure that the usefulness of the new ARN was optimized by considering the various registration practices of the member States and integrating these differences into the development of the new system.[166]

It is therefore not surprising that the first meeting of the ARNSG examined the registration practices of the various States and in particular, the level of electronic integration in the registration process (e.g. the level of manual input of information into a database, the scanning of paper documents, applications via hardcopy forms).[167] As the ARN is a "modern" registry system intended to integrate information regarding the registration of aircraft, the ARNSG took the opportunity to determine whether the incorporation of unmanned aircraft registration could also be a priority. Accordingly, members of the ARNSG were asked to share registry practices for the recordation of unmanned aircraft registration.[168] The second meeting of the ARNSG homed in on more specific issues. The first issue discussed the process of registering visiting drone operators and the information that had to be collected from the operator (e.g. hotel accommodation, cell phone number).[169] Some States noted that visiting drone operators were expected to use the home State's registration system, leading to accessibility issues

[166] *ICAO A21TF/2, Task Force on the Implementation of Article 21 of the Chicago Convention, Second Meeting* at 2–4.
[167] *Supra* note 146.
[168] *ICAO LC/37-WP/2-4, Legal Committee, Implementation of Article 21 of the Chicago Convention*.
[169] *Ibid* at A-2.

including that of language barriers. The second pervasive issue discussed at the meeting was a reiteration of the owner-operator divide and the differing definitions of "ownership" in an attempt to clarify the use of this information[170]. It was concluded that "… the ARNSG is continuing to seek clarification from States on these information uses, and the optimum set of information that would be beneficial to States in managing their aircraft registry and subsequent safety oversight responsibilities".[171] Finally, the ARNSG discussed the issue of accuracy and consistency of information while data was captured by the ARN (e.g. open text field whereby States could input info such as aircraft type may result in multiple types of entries for the same information) and raised the suggestion that selection boxes with pre-populated information would assist in maintaining consistency[172]. Only where a pre-populated selection is not available can an applicant input information in an open text field which would subsequently be verified by the ARN prior to the information being added to the overall data set.

With the information above, an ARN prototype has been launched that allows States with existing electronic systems to connect to the ARN.[173] This connection results in the automatic transfer of aircraft registration data from the State registry to the ARN to fulfil Article 21 obligations and to add overall information to the international master dataset that can be used for other inter state operations (e.g. cross border transfer of aircraft, temporary permits for foreign operators of drones).[174] States that do not yet have an

[170] *Ibid*.
[171] *Ibid*.
[172] *Ibid*.
[173] ICAO TV, *"Aircraft Registration Network"* 2019, online (video) < https://www.icao.tv/videos/aircraft-registration-network-arn>.
[174] *Ibid* at 00h:02m:36s.

electronic system are invited to use the ARN to create a customisable system that manages day-to-day registration tasks which would eliminate the inefficiencies of a paper-based process and assist in fulfilling Article 21 obligations.[175] Further, the prototype has integrated the registration of unmanned aircraft into the ARN which adds to the overall goal of unmanned aircraft system traffic management to better regulate the sharing of space between unmanned aircraft and traditional aircraft. The integration of UAS into the ARN allows for the tracking of drones, the provision of contact details of the operator and enhances ability for enforcement. One further function of the ARN with respect to UAS involves the ability to track delegated unmanned aircraft operator functionality. For example, where an owner of a drone is not the operator of the drone, ARN-connected States can transfer the responsibility for operations between the owner and the varying operators.[176] The State will therefore be able to maintain oversight of the operator while ensuring that the owner is not liable for infractions by the operator. The ARN is also slated to allow for the application of foreign permits among ARN connected States. For example, an operator of a drone can apply directly through the ARN for a temporary permit to operate a drone in a foreign State. If an infraction occurs, the foreign State will be able to identify the drone through the international master dataset and proceed with enforcement.[177]

The need for the ARN is undisputed. As the air transport sector continues to evolve and move further away from the conditions present at the drafting of the Chicago Convention, new advances in registration practices are necessary to streamline current

[175] *Ibid* at 00h:08m:11s.
[176] *Ibid* at 00h:19m:30s.
[177] *Ibid* at 00h:20m:30s.

processes and to include the registration of new technologies. The consensus of this view can be seen from the involvement of the Republic of Korea and the memorandum of understanding signed with ICAO for the provision of technical expertise in the development of the ARN.[178] China, being a leader in the use and development of digital technologies, has also been a proponent of change and has shown their support for the ARN.[179] Despite support by member States, it still must be noted that the ARN is a voluntary system and is again only as useful as the information provided and the number of States that participate.

IV. SUMMARY

The misalignment of registry practices and the discretion afforded to States pursuant to Article 19 has led to the non-compliance of States with Article 21. The lack of compliance was recognized as an inherent issue and resulted in the implementation of Article 21 being placed on the work agenda of the Legal Committee since 2016 and has culminated in the implementation of a model certificate of de-registration as found in the 7th amendment to Annex 7 and the creation of the ARN. Despite the significant work conducted by various stakeholders, questions remain as to the future effectiveness of the model certificate of de-registration and the ARN. Will States that already have existing electronic systems opt to use the ARN for their day-to-day registration needs? With the increasing concerns regarding cyber security, will States want to integrate their systems with that of a foreign State? If a State does not issue a certificate of de-registration as part

[178] *Supra* note 17.
[179] "Aircraft Registry Network (ARN) & Wrap Up and Next Steps," online: ICAO TV <://www.icao.tv/videos/droneenable2-aircraft-registry-network-arn-wrap-up-and-next-steps>.

of their de-registration process, which is within their sovereign right to do so, is the model certificate of de-registration rendered moot? Given the “voluntary” nature of these tools, it is unclear whether States will be willing to integrate these initiatives into their existing systems when considering the above potential issues. What is clear however, is that there is an increased awareness of the pitfalls associated with the current registration regime, the importance of meeting obligations under Article 21 and the need for a modernized system that accounts for the contemporary air transport industry. This awareness of the importance of Article 21 can be seen in the reluctance by certain members that attended the 38th session of the Legal Committee to remove the Implementation of Article 21 from the work agenda. On one hand, this reluctance was likely due to the fact that there are still many unanswered questions with respect to the operation of the ARN. On the other hand, recent events such as Russia’s misappropriation of foreign aircraft through the forced re-registration of these leased aircraft in violation of Article 18 of the Chicago Convention (and other international Conventions such as the Cape Town Convention) makes it apparent that the progress made to date regarding registration is more than just a concern with Article 21. It is a step towards the imagining of a new system of registration that emphasizes the globalized world in which we live and the changing commercial realities of the air transport system that currently exist. The differences in registry practices, especially the definition of “ownership” perhaps will be diminished in the future as globalization continues to expand or at the very least, registries will have a better understanding of the nuances among registries and adjust their procedures accordingly.

The recent events in Russia (which will be discussed in detail below in Chapter III via case study) whereby aircraft registered in Ireland were misappropriated through violations

of the various international conventions, highlight the struggle faced by lessors and the "worst case scenario" whereby high value assets are ultimately lost due to uncooperative contracting States. A lessor or creditor's ability to de-register and export an aircraft are vital factors to consider when evaluating the overall risk to be taken. The risk factors will also change depending on the State seeking the asset and the type of registry system operated by the State. Innovative legal work has been conducted in this area to enhance protections for creditors and to lessen expense and time wasted for those requiring mobile assets.

B. MOBILE ASSETS, DE-REGISTRATION AND EXPORT

I. Overview

Another issue that arises from the misalignment of registry practices is the ease in which aircraft can be deregistered. Aircraft and engines are essential components of airlines and as costs have increased, coupled with smaller profit margins, airlines have looked at other options of securing aircraft for the provision of services. Currently, approximately 50% of all aircraft are subject to an operating lease as discussed above at Chapter II. Understandably, given the high value of the assets that form the subject-matter of aircraft financing transactions, creditors want to be ensured that if default occurs as set out in the agreement between the parties, the aircraft can be repossessed and placed back into revenue generating status as soon as possible. Hanley summarizes the concern where he notes:

> "… A lessor's main concern on a default will be to obtain repossession of the aircraft and its documents, to deregister the aircraft from the aircraft register on which the lessee placed it,

and to export it from the lessee's country as soon as possible, ideally before any declaration of bankruptcy in respect of the lessee".[180]

Aircraft and their engines are highly mobile and therefore, are starkly different from other assets that are securitized such as real property. In terms of real property, creditors may be able to obtain a court order for repossession of real property where a mortgagee defaults on the terms of the loan and swiftly take action to secure the asset as the asset in question can be easily located. Aircraft on the other hand are inherently mobile and therefore, even where a creditor is able to successfully navigate the national laws that govern the security interest in an asset and a creditor obtains authorization – such as a court order – to repossesses an aircraft, the aircraft may be situated in a jurisdiction in which courts refuse to recognize the order or refuses to de-register the aircraft.[181] This was a characteristic concern faced by creditors and as Sir Roy Goode emphasized, security interests prior to the coming into force of the Cape Town Convention for mobile assets were governed mainly through national law and thus created an imperfect system as "… the law of nationality registration may be hostile to possessory security and may not recognize various kinds of security interests accepted elsewhere…".[182] The other issue that arises that is unique to aircraft is the fact that aircraft, pursuant to the Chicago Convention, are required to be registered for lawful operation as opposed to engines and other mobile equipment.[183] It is possible then that a creditor may successfully obtain

[180] *Supra* note 9 at 141.
[181] Dean N Gerber and David R Walton, "De-registration and Export Remedies under the Cape Town Convention" (2014) 3:1 Cape Town Convention Journal 49, online: <http://www.tandfonline.com/doi/full/10.5235/20497611481422248 5>at 51.
[182] Roy Goode, "International Interests in Mobile Equipment: A Transnational Juridical Concept" (2003) 15:(i) Bond Law Review at 9.
[183] *Supra* note 2 at s 18.

possession of the aircraft in question but if they are unable to swiftly secure the de-registration and subsequent export of the aircraft then significant financial loss may arise (e.g. where the aircraft is not put back into revenue generating service and/or is not appropriately maintained and deteriorates).[184] The ease in which repossession, de-registration and export can be accomplished will dictate the risk assessment. Higher risk generally results in greater compensation such as increased interest rates or amount of the periodic payment to offset said risk.[185]

The risk borne by creditors is further exacerbated depending on the type of registry that is operated by the state of registry. Where an aircraft is registered in an owner-only registry, the owner will be recorded and subject to any charge that has priority, will maintain their ability to de-register an aircraft upon repossession and expeditiously arrange to place the aircraft back into service. However, where an aircraft is registered in an operator-only registry, the owner of the aircraft (i.e., the creditor) will have no de facto jurisdiction to request de-registration of the aircraft as the civil aviation authority, or whichever government body responsible for registration of aircraft, will likely not take instructions for de-registration without the consent of the operator that is registered.[186]

II. Pre-Cape Town Convention Tools to Secure De-Registration

Prior to the coming into force of the Cape Town Convention, which will be subsequently discussed below, creditors had to devise methods to increase the odds of securing their assets (i.e., repossession, de-registration and export where necessary) in

[184] S*upra* note 181 at 49.
[185] *Ibid*.
[186] S*upra* note 9 at 148. *See* below discussion regarding remedies under the CTC, in particular the operation of the IDERA where an international interest exists pursuant to the CTC.

the event of default. These tools are still relevant today as some countries are not signatories to the Cape Town Convention.

(a) Irrevocable Power of Attorney

One such method was the use of the irrevocable power of attorney ("IPOA"). An IPOA was a "standard" tool used in financing transactions whereby as part of the overall agreement, the operator would grant an IPOA to the creditor. This was especially the case where registration was to take place in an operator only registry. The IPOA would in theory provide the creditor or their authorized agent with the ability to de-register an aircraft if an event of default as defined by the agreement materialized. [187] The efficacy of the IPOA, as generally agreed upon in the literature, was limited as the recognition and application of the IPOA was inconsistent and dependent on national laws.[188] First, some courts were reluctant to grant de-registration of an aircraft pursuant to an IPOA without an accompanying court order.[189] The need to obtain an additional court order undoubtedly adds time and cost to the process of de-registration. Secondly, in some jurisdictions a power of attorney must be revocable regardless of the agreement among the parties and thus an operator may have simply "revoked" the IPOA rendering it useless.[190] The general reluctance by courts in all jurisdictions to recognize the effectiveness of IPOAs is likely grounded in the risk of liability that may arise in the event that an asset is mistakenly released to an unauthorized user.

[187] *Supra* note 181 at 50.
[188] *Ibid*.
[189] *Ibid*.
[190] *Ibid*.

(i) Case Study: King Fisher

An example of the ineffectiveness of the IPOA can be seen in the now exemplary case of *DVB Aviation Finance Asia PTE Ltd. V. Directorate General of Civil Aviation* which involved numerous aircraft leased to Kingfisher Airlines (a now defunct airline).[191] DVB, a lessor had leased two A320-232 aircraft to Kingfisher Airlines, an airline with its main operations in India.[192] Unfortunately, as a result of financial distress, Kingfisher breached the terms of the lease agreement and defaulted on loan payments and accordingly DVB sought to repossess and de-register the aircraft. *Re-possession* of the aircraft had been relatively simple given that the aircraft were located in Istanbul, Turkey and outside the jurisdiction of India. The difficultly instead arose when DVB attempted to de-register the aircraft from the Indian registry in order to register the aircraft in a new jurisdiction pursuant to a new lease.[193] DVB as part of the lease agreement had negotiated the granting of an IPOA to give them authority to de-register the aircraft in the event of default. When the IPOA was served upon the Indian Directorate General of Civil Aviation ('DGCA'), the DGCA refused to de-register the planes and argued that Kingfisher had acquired an equitable interest in the aircraft as Kingfisher had an option to purchase the aircraft at the end of the lease term.[194] DVB was subsequently instructed that they had to obtain a no-objection certificate from Kingfisher in order to secure de-registration from the DGCA despite the existence of an IPOA.[195] DVB eventually succeeded in securing de-

[191] WP (C) 7661/2012 and CM No.4208/2013 (8 April2013).
[192] *Supra* note 181 at 50.
[193] *Ibid*.
[194] *Aircraft Repossession in India—Turbulence Ahead, Buckle Up!*, SSRN Scholarly Paper, by Nithya Narayanan, papers.ssrn.com, SSRN Scholarly Paper ID 2353197(Rochester, NY, 2013) at 3.
[195] *Ibid*.

registration of the aircraft through further court proceedings commenced against both Kingfisher and the DGCA where the Indian High Court ordered the de-registration of the aircraft pursuant to the valid IPOA that was held by DVB.[196] The delay in the de-registration and export of the aircraft resulted in physical damage to the aircraft due to neglect and DVB undoubtedly lost potential revenue.

(b) Article 83*bis*

Another tool that has served to assist in securing de-registration has been Article 83*bis* of the Chicago Convention. Although the rationale for the addition of 83*bis* to the Chicago Convention revolved around the promotion of aviation safety, it is clear that the implementation of Article 83*bis* has advanced the ease in which aircraft can be de-registered given the commercial realities of contemporary air transport.

(i) Overview of Article 83*bis*

It is evident that as aircraft financing leasing and interchange transactionsexponentially increased in usage, a real concern regarding safety oversight of aircraft arose. How does a State of Registry effectively monitor an aircraft that is being used on the other side of the world? How does a State of Registry ensure that maintenance is being carried out to the appropriate international standard upon which the aircraft's certificate of airworthiness is to be issued?[197] In essence a State of Registry "… must ensure that every aircraft listed on its register complies with the laws and regulations

[196] *Ibid*.
[197] *Doc 10059, Manual on the Implementation of Article 83bis of the Convention on International Civil Aviation, First Edition, 2017* (International Civil Aviation Organization)s 2.2.1.

that apply to the flight of aircraft, regardless of where an aircraft may be operated".[198] ICAO was well aware of this issue and having a primary mandate to ensure the safety of aviation, devised an amendment to the Chicago Convention via Article 83*bis* which allows for the transfer of functions typically carried out by the State of Registry to the State of Operator.[199] These "typical" functions are found under Article 12 (Rules of the Air), Article 30 (Aircraft Radio Equipment), Article 31 (Certificates of Airworthiness) and Article 32a (Licenses of Personnel) of the Chicago Convention. However, the Ratification of Article 83*bis* does not in and of itself transfer the functions in any of Articles 12, 30, 31 and 32(a). The State of Registry and State of Operator must enter into an agreement to expressly specify the functions that will be transferred.[200] Private parties therefore have no authority to transfer functions despite the fact that most Article 83*bis* agreements will stipulate the particular aircraft to which it applies and does not constitute a blanket transfer that is ubiquitous among aircraft within the State of Operator. Once an agreement has been made between the States, it then must be formalized through registration with the ICAO

[198] *Ibid*s 2.1.1.

[199] *Supra*, note 2, Article 83*bis* stipulates:

> a. Notwithstanding the provisions of Articles 12, 30, 3 1 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 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.

.

[200] *Ibid at* s 83*bis*.

Council and subsequent notification to other contracting States.[201] Third-party States that are not privy to the transfer agreement, subject to the contracting parties complying with the formalities, must recognize the State of Operator as the State responsible for whichever noted functions that are registered and the State of Registry is subsequently relieved of their responsibility to provide oversight of those transferred functions.

(ii) Safety and Article 83*bis*

Upon an analysis of Article 83*bis* agreements, it becomes abundantly clear that the types of responsibilities transferred under an Article 83*bis* agreement will be dependent on the political relationship between the State of Registry and the State of Operator and also on the similarities in the robustness of oversight standards.[202] For example, the delegation agreement between the Irish Aviation Authority and the Ministry of Transport State Authority of Russian Federation dated 26 March 2002, notes that Ireland will retain responsibility under Annex 8 (i.e. airworthiness of aircraft)[203] while the actual maintenance of aircraft will be completed by Russia.[204] The Article 83*bis* agreement between Ireland and Russia therefore stipulates that Ireland as the State of Registry maintains the ability to issue the continuing airworthiness certificate for the noted aircraft, thereby fulfilling obligations under Article 31 of the Chicago Convention. Russia in turn must maintain the aircraft in accordance with standards set by the State of Registry and is obligated to generate reports with respect to maintenance upon request. In contrast, where States

[201] *Supra* note 197 at s 2.4.1.
[202] *Supra* note 12 at 6.
[203] *Supra* note 2, The Chicago Convention includes multiple annexes, including Annex 8 which sets out minimum standards upon which States can recognize Certificates of Airworthiness.
[204] "Delegation Agreement Between Irish Aviation Authority and Ministry of Transport State Authority of Civil Aviation of Russian Federation on the implementation of Article 83*bis* of the Chicago Convention," (26 March 2002), online: <https://cfapps.icao.int/dagmar/Full_Text/2002/4576-E.pdf>.

are more politically cohesive, such as those where standards of airworthiness are more similar, full transfer of responsibility may be seen. For example, Ireland's Article 83*bis* agreements with other European Union states will generally include full transfer of powers with little to no retention of transferable responsibilities.[205] Statistics from ICAO's Universal Safety Oversight Audit Programme, which monitors among other aspects a Contracting States compliance with ICAO minimum safety standards and overall effectiveness of a States ability to provide safety oversight, shows that there are still differences among States when it comes to the implementation of a general safety system and culture (i.e. the "effective implementation rate").[206] For example, using the interactive viewer[207] on the ICAO website and with Ireland as a basis, it can be seen from Figure 1 below, that EU States tend to have relatively similar effective implementation rates when compared to the global average. Most importantly they are all above the global average when it comes to effective implementation.[208]

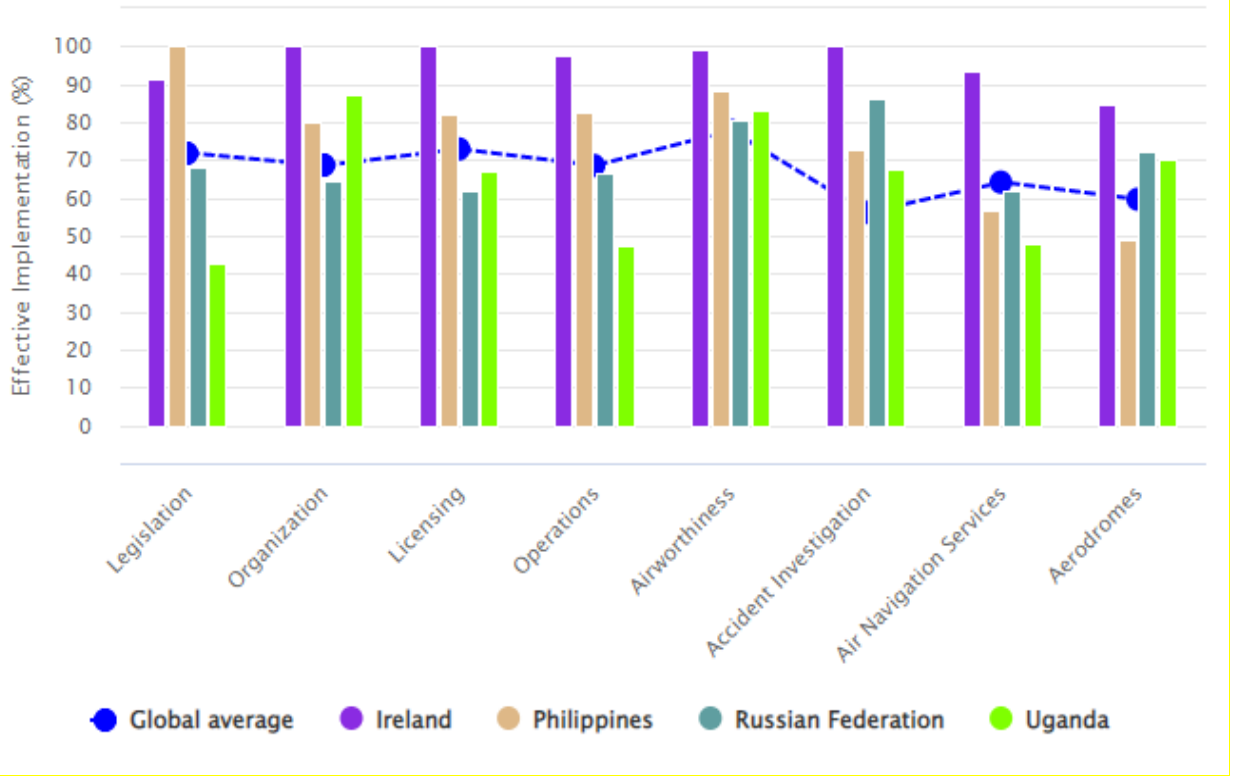
[205] S*upra* note 12 at 5.
[206] *Supra* note 78.
[207] "Safety Audit Results: USOAP interactive viewer," online: <https://www.icao.int/safety/pages/usoap-results.aspx>.
[208] *Supra* note 78. It must be noted that an effective implementation rate does not necessarily mean that aircraft flown in those States are not safe per se. However, it does indicate that a civil aviation authority in that particular State with a low effective implementation rate may not have the ability (or possibly desire) to ensure that both domestic and international standards are maintained.

Figure 1: Comparison of EU Member States effective implementation rates vs global

On the other hand, again using Ireland as a basis of comparison, countries outside of the EU may have a broader spectrum in terms of compliance with ICAO standards. As seen here from the Figure 2 below[209], the Philippines and Russia are below the global average in areas such as operations and licensing, two key areas in which a lessor may want to ensure has a high compliance rate before entering into a commercial agreement for an aircraft.

[209] *Supra* note 207.

Figure 2: Comparison of Ireland (EU Member State) against the effective implementation rates seen in other countries



Article 83*bis* agreements are therefore an effective tool to mitigate risk associated with fragmented safety oversight (i.e., control in one state and registration in another) seen in aircraft leasing and financing transactions. This is made possible by the voluntary and flexible terms of Article 83*bis* that allow the State of Registry to choose the responsibilities that it wishes to transfer based on factors such as whether overall effective implementation is sufficient and whether underlying safety regulations in the State of Operator are similar enough to that of the State of Registry so that a lessor or financier can feel rest assured that their aircraft will be maintained properly. This will especially be the case in operating leases where the lessor retains the risks if ownership. Although article 83*bis* agreements may seem to be a complete solution to problems of safety when

it comes to the fragmentation of safety oversight, there are two additional considerations that may impede the effectiveness of Article 83*bis* agreements. Firstly, these agreements are only effective if they are properly implemented. ICAO upon review of Article 83*bis* agreements filed in their depository, found that a number of agreements attempted to transfer responsibility for oversight areas that were not permitted.[210] This is a concerning discovery as certain States may have believed responsibilities were transferred when in fact, the transfer was ineffective. Secondly, some States which have ratified Article 83*bis* protocol, have not effectively transposed the rules into their domestic legislation to give effect to the protocol.[211] Finally, Article 83*bis* agreements will not apply to aircraft registered in operator only registries as the aircraft will be registered and operated by the same State. In these situations where a lessor may have an aircraft in an operator only jurisdiction, the parties are free to contract on how safety oversight will be maintained (e.g., standards to be applied, the provision of reports).[212]

Therefore, issues with respect to safety do arise when considering registration in one state and operation in another. However, tools such as Article 83*bis* agreements are effective means of ensuring clear delineation of responsibilities over safety oversight. Where these agreements are not applicable, such as where the subject State has not yet ratified the protocol or where the State of Registry is an operator only registry, safety oversight will likely be delegated to an appropriate party or negotiated through the terms of the lease contract. In fact, it is in the best interest of lessors as party to an operating lease to ensure that their aircraft are leased to airlines within States that have a high

[210] *Supra* note 197.
[211] *Ibid* at vii.
[212] *Ibid* at 2–5.

effective implementation rate as they retain overall ownership of the aircraft during the term of the lease. With the above measures and tools already in place, safety therefore arguably does not pose an inherent risk from a practical perspective when examining registration and nationality of aircraft in the context the differing registration systems. Transparency of ownership on the other hand, raises certain concerns especially given the prevalence of using complex trusts and special purpose vehicles to facilitate registration. It also has an ultimate impact on the effective de-registration and transfer of aircraft.

(iii) Article 83*bis* in the Context of Leasing and De-Registration Risk

The implementation of the Article 83*bis* protocol represents the continued success of the Chicago Convention in finding the balance between private and public international air law. On one hand and from a public international air law perspective, Article 83*bis* prevents the fragmentation of safety related responsibilities, as discussed above, between the State of Registry and the State of Operator in leasing/financing transactions.[213] Safety of air transport is thereby improved by placing the responsibility for safety related functions on the state with the closest nexus to the aircraft.[214]

On the other hand, and from a private international air law perspective, Article 83*bis* is a tool whereby lessors are able to mitigate risk, whether perhaps due to political instability or an unpredictable judicial system of the operating State, by registering aircraft in owner-only registries and "lessor friendly" States.[215] Certain functions can then be

[213] "Aircraft registration and Article 83*bis* of the Chicago Convention: a practical overview," (15 July 2021), online: *Dentons* <https://www.dentons.com/en/insights/articles/2021/july/19/aircraft-registration-and-article-83*bis*-of-the-chicago-convention-a-practical-overview>at 2.
[214] *Ibid*.
[215] *Ibid*.

transferred to the State of Operator that would be better served by the State that has the closest nexus to the aircraft. In the event of default, hypothetically, the lessor/creditor as the registered party in an owner-only registry maintains the ability to de-register an aircraft, subject to the regulations of local law and whether the civil aviation authority requires consent from the operator for de-registration.

Article 83*bis* agreements can be heralded as an excellent tool to minimize risk (whether perceived or actual) and increase the willingness of creditors and lessors to enter into transactions in jurisdictions that were traditionally avoided as a result of elevated exposure.[216] However, as the premise of Article 83*bis* consists of an aircraft being operated in a different jurisdiction, repossession and export of the aircraft may still pose an issue. The unpredictability associated with aircraft financing and leasing in particular even in the face of tools such as the IPOA, as evidenced in the notorious *Kingfisher Airlines* case, resulted in a push to create a universal system of rights and remedies that protected both parties (i.e. lessors and lessees) of financing transactions which ultimately resulted in the Cape Town Convention.

III. Cape Town Convention

The Cape Town Convention (CTC) represents the culmination and desire of all parties in aircraft financing transactions to bolster their respective rights and to facilitate the cost-effective extension of credit by reducing transactional risk.[217] The CTC is a truly innovative treaty as it not only sets out ubiquitous rules of behavior, such as default remedies and a

[216] *Supra* note 181 at 2.
[217] Donald Bunker, *International Aircraft Financing*, 2nd ed(International Air Transport Association, 2015)at 466. Note also that the CTC was designed to be read in conjunction with a corresponding protocol that would apply to a specific industry, in this particular case, the Aircraft Protocol is of relevance.

hierarchy of priority rights to be followed in the event of default, but it also creates a novel international interest that is to be recognized in all contracting States.[218] This approach to the recognition of international rights is in stark contrast to the mechanisms that were established in the *Geneva Convention* which only attempted to ensure the recognition of rights created through national law.[219] As the CTC and the corresponding *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (*the "Aircraft Protocol")[220] are highly technical and complex and a fulsome discussion is outside the scope of this thesis, this section will concentrate on the methods in which the CTC establishes an international interest with its corresponding priority of rights and the default remedies that have been codified to enhance repossession and de-registration of aircraft.

(a) Creation of International Interests

The establishment of an "international interest" is a controlling concept to the CTC framework as it represents the triggering event for the attachment of rights and corresponding remedies under the CTC. Therefore, it is essential that the formalities for the constitution of an international interest are observed. In order for an international interest to be constituted under the framework, Article 2 of the CTC sets out that there must be an interest in relation to a "uniquely identifiable aircraft object" as set out in the Protocol and the interest must be constituted through one of three types of agreements

[218] *Supra* note 182 at 9.
[219] *Supra* note 217 at 463.
[220] *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment,* 16 November 2001.

(i.e., a “security agreement”, a “conditional seller under a title reservation agreement” or a “leasing agreement”).

A “uniquely identifiable aircraft object” is capable of being distinguished by “… reference to the manufacturer’s name, generic model designation and serial number…”.[221] The application of the CTC to aircraft objects is therefore contrasted with the Space Protocol in that the latter does not require objects to be identifiable as long as they fall into the general category of objects contemplated by the agreement.[222] For all intents and purposes, aircraft objects must by necessarily implication, be in existence and ascertainable at the time the agreement is made. The definition of “aircraft objects” is further elaborated through the Aircraft Protocol which indicates that the term includes “airframes”, “aircraft engines” and “helicopters”.[223] The combination of airframes and aircraft engines may in the aggregate create an “aircraft” but each aircraft object remains separate and distinct with respect to its ownership interest.[224]

The types of agreements contemplated by the CTC from which an international interest can be derived, namely, a security agreement, conditional sale offer and leasing agreement, are defined within Article 1 of the CTC and will not be repeated here. However, it is important to note that many national laws also contemplate the type of agreements noted above but for the purposes of the CTC, only the fulfilment of the requirements within the CTC in accordance with the prescribed definitions will be required

[221] “Practitioners’ Guide to the Cape Town Convention and the Aircraft Protocol,” (12 October 2020), online: *The Legal Advisory Panel of the Aviation Working Group* <http://awg.aero/wp-content/uploads/2020/12/Practitioners-Guide-December-2020.pdf> at 4.
[222] Royston Miles Goode, *Convention on International Interests in Mobile Equipment and protocol thereto on matters specific to space assets: official commentary*(Rome: Unidroit, 2013) at 275.
[223] *Supra* note 221 at 3.
[224] *Ibid*.

to constitute an international interest that is within the purview of the CTC. In other words, the "… constitution of the international interest derives from the [CTC], not from national law".[225]

These aforementioned "requirements" are found in Article 7 of the CTC and the requirements are relatively "simple" and include the following:

(i) That the agreement is in writing;[226]

(ii) That the object is identifiable;[227]

(iii) That the "chargor, conditional seller or lessor" has the power to dispose of the object, which includes the ability to sell the object but also other activities such as the ability of a lessee to enter a sub-lease;[228] and

(iv) Security obligations in a security agreement must be ascertainable but does not need to set out a sum or maximum sum, which enables agreements to contemplate sums that are advanced from time to time.[229]

It is therefore possible that an international interest is formed pursuant to the agreement even if the "…conditions would not be sufficient to create a lease, security interest, conditional sale or sale under otherwise applicable national law or if the international interest is of a kind not known under such national law".[230] It is also equally

[225] *Supra* note 222 at 275.
[226] *Supra* note 15 at s 7(a).
[227] *Ibid*s 7(c).
[228] *Ibid*s 7(b).
[229] *Ibid* at s 7(d).
[230] *Supra* note 221 at 10.

possible, given the commercially common requirements found in Article 7, that both an international interest and a national interest are created simultaneously.[231]

In addition to the formalities that must be met for the constitution of the international interest, formalities to establish a "connecting factor" as aptly referred to by Sir Roy Goode, is required to bring the international interest into the ambit of the CTC. Article 3 of the CTC requires that the "debtor"[232] of the transaction contemplated by the agreement (i.e., security agreement, title reservation, lease) is situated in a contracting state at the completion the transaction. Alternatively, the Protocol provides at Article IV that the CTC will also apply "… in relation to a helicopter, or to an airframe pertaining to an aircraft…" if it is contemplated in an agreement and the helicopter or airframe is registered in a Contracting State at the time of completion of the agreement. It is therefore evident that it does not matter where the creditor is located as long as one of the two criteria above are fulfilled.[233] Once an international interest has been established via the formalities within the CTC and corresponding Protocol, attention must be turned to the registration of that interest to preserve its priority against third parties. In determining the priority of the international interest, attention must be turned to Article 29 of the CTC that establishes the basic rules of priority.

(b) Registration of International Interests and Priority Rights under Article 29

[231] S*upra* note 222 at 275.
[232] *Supra* note 15 at s 1, a "debtor" is defined in Article 1 of the CTC as "…a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest".
[233] *Supra* note 217 at 195. Note however, that if the state of registration is relied upon as the connecting factor under the CTC, only the airframe will be covered and not the engines, whereas if the presence of the debtor or lessee in a CTC country is used as the connecting factor, then both airframe and engines are covered.

One of the main purposes of the CTC was to establish a searchable, electronic registry system through which interests, including but not limited to international interests, prospective international interests and non-consensual rights could be registered.[234] The premise of the registry is to provide third parties with notice of registered interests, the priority of which are governed via Article 29 of the CTC, subject only to certain exceptions such as the existence of non-consensual rights.[235] The general principle of priority under the CTC stipulates that all registered interests have priority over those that are unregistered, and Article 29(2) of the CTC makes it abundantly clear that this principle continues to apply even where an international interest may have arisen first but was unregistered and a subsequent international interest was registered by a party with full knowledge of the existence of the preceding international interest. The validity of a registered interest even with prior knowledge of an existing unregistered international interest was likely implemented to avoid lengthy disputes regarding whether the party with the registered interest was aware of the preceding international interest and to persuade parties to register their interests whenever possible.[236]

The rule in Article 29(1) like any other legal rule has many exceptions that vary the priority of interests. Given that the exceptions to the basic rule are lengthy and would require an entire scholarly article to fully discuss, only two exceptions will be addressed in this section. These exceptions namely being: (1) non-consensual rights and (2) outright purchase of an aircraft object.

[234] *Supra* note 221 at 1.
[235] *Supra* note 15, non-consensual rights will be discussed in detail at section (b)(i) below.
[236] *Supra* note 222 at 333.

(i) Non-Consensual Rights

Non-consensual rights (NCRs) are an exception to the rule in Article 29(1) and NCRs can rank in priority above registered international interests under Article 39 of the CTC (without registration) and under Article 40 (with registration). The operation of Articles 39 and 40 however, only arise where a contracting state makes a declaration to "opt-in" for the exercise of these respective sections.[237]

Article 39 allows Contracting States to elect for the application of NCRs that would normally arise via operation of national law and which by virtue of domestic law have priority over interests that are established through agreements that are equivalent to those contemplated by the CTC (i.e. security agreement, title reservation agreement, leasing agreement).[238] Further, Article 39 stipulates that NCRs that are contemplated via declaration will have priority *without the need for registration* over registered international interests. Common examples of NCRs that would fall under Article 39 include but are not limited to unpaid air navigation charges and liens for repairs but again, only where the national law contemplates for their priority.[239] It is therefore clear that the CTC does not create NCRs and but does provide a mechanism for their recognition. . Importantly, Article 39(1)(b) further allows a State (or State entity, intergovernmental agency or private entity providing public services) through a declaration to retain its right to "arrest and detain" an

[237] *Supra* note 221 at 19.
[238] *Ibid,* the AWG in the practitioner's guide notes that "A Contracting State does not need to specifically name each type of non-consensual right or interest for such right or interest to retain its priority, rather, the State can make a general declaration stating that all non-consensual rights or interests which, under applicable local law, would have, without regard to the Cape Town Convention, priority over competing interests, would also have priority over competing international interests". This declaration can be changed in the future and therefore, categories of NCRs could be added, removed or modified in the future. *See* supra note 2 at 378 for a further discussion.
[239] *Ibid* at 4.

aircraft object to secure payment of amounts owing to that said State.[240] Again, the emphasis is on the effect of rights by virtue of domestic law (and subject to the future modification or addition of categories of NCRs by the State) and not on the establishment of new rights pursuant to a declaration under the relevant sections of the CTC.

Article 40 provides for the recognition of domestic interests with priority over registered international interest but only *where the domestic interest is registered in the international registry*. Where a NCR category listed in the Article 40 declaration is not formally registered, it will be subordinate in priority to any subsequent registration but may still rank ahead of other unregistered interests as determined via the domestic law of the Contracting State. Although it may seem as though Articles 39 and 40 overlap, in practice the two Articles – and the declarations made via these Articles – are mutually exclusive. For instance, Goode provides the example whereby a State may make a declaration under Article 39 that allows for pre-default liens to have priority over registered international interests without registration. In turn the same State may make a declaration under Article 40 for post-default liens to rank prior to registered international interest but only where the post-default lien is appropriately registered.[241]

(ii) Outright Purchase of Aircraft Object

Article 29(3) of the CTC provides for another exception to the "basic rule" of priority in that an outright purchase of an aircraft object will have priority over all prior unregistered interests even if they have notice of those unregistered interests. The inclusion of this exception was likely to protect the interests of buyers whose interests pursuant to the

[240] *Ibid* at 20.
[241] *Supra* note 222 at 380.

formalities of the CTC would not be classified as an international interests and would therefore not be registrable in the international registry.[242] For the purposes of aircraft objects however, a further exception is made under Article III of the Protocol which extends the ability to register interests to both outright and prospective sales of aircraft objects. The cumulative effect of Article 29(3) of the CTC read in conjunction with Article III of the Protocol disapplies and replaces the rule in Article 29(3) of the CTC, as an outright sale of an aircraft object can be registered which would then be in priority before any subsequently registered interests and all unregistered interests.[243] It is also important to note that Article 29(3) provides for the registration of prospective sales that may arise through contracts of sale with a future completion date, title reservation agreements and leases with an option to purchase. The registration of a prospective sale protects a future buyers' interest in the event the creditor/lessor attempts to sell the aircraft object to another purchaser.[244]

As can be seen from the above, the CTC and the Protocol provide for a uniform set of rules with respect to priority but subject to certain exceptions. The preservation of the international interest, whatever its form, is an essential consideration. However, even where an interest is preserved and has priority, consideration must also be given to how an aircraft object will be de-registered and exported where necessary. The next section

[242] *Ibid* at 335.
[243] Roy Goode, "The priority rules under the Cape Town Convention and Protocols" (2012) 1:1 Cape Town Convention Journal 95 at 101.
[244] S*upra* note 222 at 438. See also Practitioners Guide supra note 183 at 26, the Practitioners Guide notes that for a prospective sale to be registered, more than just an intent to sell is required. The aircraft object that is the subject of the proposed transaction must be in existence and there must be requisite negotiations. It is further pointed out that there is no indications as to what would constitute sufficient negotiations to justify the registration of a prospective sale but in practice the registration generally occurs only a few days before the completion of the transaction.

will examine remedies under the CTC with particular emphasis on de-registration and export.

(c) Remedies under the Cape Town Convention and Aircraft Protocol

As much as the premise of the CTC was to generate predictable and uniform priority rules for security within an aircraft object, it also had a goal of establishing clear rules for the repossession, de-registration, and export of aircraft objects in the event of default. In fact, the Aircraft Working Group at the drafting of the CTC recognized that national rules were an impediment to the effective operation of asset-based aircraft financing. Evidently the groups concerns were well founded in their concerns given the Kingfisher Airlines example discussed above that materialized almost ten years after the signing of the CTC.[245]

(i) Event of Default

The material event that triggers the operation of remedies as set out in the CTC is a "default" and discretion is given to the contracting parties to determine the events that constitute a default but where the agreement does not contemplate the events of default, Article 11 provides a generic definition that notes an event of default is a circumstance that "… substantially deprives the creditor of what it is entitled to expect under the agreement".[246] As the generic definition of default provided via the CTC is incredibly broad and vague, it can be surmised that in practice, agreements would likely include detailed lists of events of default. This is certainly the case in the *Model Aircraft Dry Lease*

[245] S*upra* note 181 at 49.
[246] *Supra* note 15 at s 11(2).

*Agreement ("*Model Agreement*")*[247] drafted by IATA and the events of default in the model agreement include but are not limited to events such as:

1. Failure to take delivery of the Aircraft when the lessee is obligated to do so under the terms of the agreement.[248]
2. The lessee fails to pay any amounts owing to the lessor such as basic rent (i.e., agreed upon periodic amount) and supplemental rent (e.g. recognition of expense that may arise from the maintenance reserve).[249]
3. Discovery that any warranties or representations made pursuant to the agreement were materially incorrect or misrepresented.[250]
4. Cancelation of the registration of the aircraft.[251]
5. Failure to possess the requisite licenses and certificates for the operation of the Aircraft.[252]

As can be seen, on one hand certain events of default are within the control of the lessee (e.g., payment of basic and supplemental rent, ensuring that warranties and representations are made in good faith and provided accurately). On the other hand, certain events of default are evidently not within the control of the lessee, such as a sudden change in regulations by the civil aviation authority that affects the ability to operate such aircraft. Bunker provides an interesting example whereby the EU in the 1990's had attempted to prohibit the registration of hush-kitted aircraft which would have

[247] Donald Bunker, *International Aircraft Financing, Volume 2 Specific Documents*, 2nd ed(International Air Transport Association)at 145–146.
[248] *Ibid* at 145, Art 18.1(a) of the Model Agreement.
[249] *Ibid,* Art 18.1(b) of the Model Agreement.
[250] *Ibid,* Art 18.1(e) of the Model Agreement.
[251] *Ibid*, Art 18.1(g) of the Model Agreement.
[252] *Ibid,* Art 18.1(k) of the Model Agreement.

resulted in older aircraft (despite being in line with noise emission standards) no longer being permitted to operate in the EU.[253] Massive defaults would have occurred as a result of this change in regulation as these aircraft would not have possessed the requisite permits to continue operations, resulting in an "event of default" pursuant to the Model Agreement.[254]

(ii) General Remedies under the Cape Town Convention

When an event of default is established either pursuant to the agreement between the parties or via the generic definition provided in Article 11 of the CTC, a set of basic remedies found in Chapter III of the CTC (Articles 8 to 15) will become available to creditors. Gerber and Walton describe the remedies found in Chapter III of the CTC as reflective of "traditional" forms of recourse by "financiers", which generally include termination of the agreement, where applicable, and authority to take steps to obtain possession and control of the aircraft object.[255] As can be seen from Chapter III of the CTC, remedies available will be dependent on the form of agreement (i.e., security agreement, title reservation, lease) that exists. Article 8 applies only to security agreements and grants the chargee with the ability to take possession and control of the aircraft object,[256] sell or grant a lease of the aircraft object[257] and finally to collect or receive income or profits from the use of the aircraft object but subject to certain limitations (e.g.

[253] "Commission takes action to combat aircraft noise | News | CORDIS | European Commission," online: <https://cordis.europa.eu/article/id/9951-commission-takes-action-to-combat-aircraft-noise>.
[254] Bunker, *supra* note 247 at 147, see discussion on cross-default clauses and caution that should be taken before accepting cross-default clauses at face value.
[255] S*upra* note 181 at 53, see Practitioners Guide supra note 221 at 116 that argues the remedies in the CTC are not "traditional" as it deviates from remedies that are traditionally available in civil law jurisdictions.
[256] *Supra* note 15 at s 8(1)(a).
[257] *Ibid* at 8(1)(b).

income/profits collected must be paid towards the outstanding obligation, notice must be provided to the chargor and to other charges prior to the sale or granting of a new lease over the aircraft object).[258] Article 10 in contrast is "simple" as it only provides for a single remedy (i.e. the control and possession of an aircraft object) applicable to international interests that arose from title reservation agreements and leases. The stark difference in complexity between Article 8, which has six sections and Article 10, which has only one section, is the fact that agreements concerning title reservation agreements and leases necessitate an ownership interest.[259] Conditional sellers and lessors "simply" require the ability to repossess the aircraft object and to place it back into revenue generating service as soon as possible whereas a chargee has a more complex relationship to the aircraft object as they may not have any ownership interest at all, requiring a different set of remedies that protect and preserve their interests.

Articles 8 and 10 were designed as "self-help" remedies, or in other words actions that do not require leave of court, which derive authority through the CTC with the intention of avoiding the potentially obstructive nature of national laws and domestic judicial systems. Debtors are therefore able to act unilaterally upon satisfaction of requirements under the respective Articles. Specific to Article 8 of the CTC, the chargee must have obtained the agreement of the chargor for the application of the remedies listed. In practice, agreement would simply be obtained through an express provision within the security agreement. Article 10 in comparison does not require any prior agreement for the exercise of the remedies of termination of the agreement and possession and control of the aircraft

[258] *Ibid* at 8(1)(c).
[259] S*upra* note 222 at 288.

object. The availability of these self-help remedies are however, prefaced on a mandatory declaration under Article 54 made by a Contracting State that declares "… whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court".[260] A creditor must then determine if a Contracting State in which the aircraft object is situated has declared whether self-help remedies are available or if application to court is required.[261]

Although self-help remedies without a court order are theoretically possible, in practice the application of these remedies may be logistically difficult without a court order. Hanley notes that generally, speaking only of dry operating leases, an interim order will be sought without notice to the lessee for repossession of the aircraft pending the conclusion of substantive proceedings.[262] A lessor will in turn post a bond that will be paid to the lessee in the event the lessee is successful defending the claim that likely pays the lessee any loss in revenue due to loss of use of the aircraft object.[263] A creditor must also be aware of local laws as Article 14 of the CTC stipulates that remedies must be exercised "… in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised" and therefore a creditor may be subject for example to local regulations that require the civil aviation authority to approve a repossession.[264]

(iii) Remedies under the Aircraft Protocol

[260] *Supra* note 15 at s 54(2).
[261] See Practitioners Guide, note 221 at 123 for further discussion of self-help remedies.
[262] S*upra* note 9 at 143.
[263] *Ibid*.
[264] *Supra* note 221 at 37.

Article IX and XIII of the Aircraft Protocol expands the default remedies provided via Chapter III of the CTC by setting out additional recourse that can be taken by creditors to secure de-registration and export of an aircraft object. As discussed above, possession and control of an aircraft object is not sufficient to bring the aircraft object back to revenue generating status if it cannot be de-registered and/or exported from a foreign jurisdiction. The culmination of Article IX and XIII provides for two additional remedies that are commonly referred to as the "Court Route" and the "IDERA Route," respectively.[265]

The Court Route is the cumulative effect of numerous sections of the CTC and Aircraft Protocol. Importantly, Article 13 provides that a Contracting State shall ensure that a creditor may obtain an order for "speedy relief" in the form of an order granting the preservation, possession, lease or management of the aircraft object where the creditor adduces evidence of default. In addition to the relief noted in Article 13, Article IX of the Protocol provides for relief in the form of de-registration and export where applicable. It is interesting to note that Article 13 in essence guarantees that the creditor is capable of putting their claim before the judiciary but it does not guarantee that the judiciary will find sufficient evidence to ground the existence of an event of default. Arguably, the underlying goal of limiting the level of disruption due to jurisdictional differences, perhaps in the burden of proof to establish an event of default, is eroded as a result of Article 13. It is also clear from Article 13 that in order for this provision to apply, the creditor must have obtained the agreement of the debtor (e.g. through an express provision of the constituting agreement) and the Contracting State in which the aircraft is situated must

[265] *Supra* note 181.

have not made a declaration disapplying Article 13 in whole or in part.[266] Assuming an application via Article 13 is successful, the court order must then be made known to the relevant civil aviation authority (or whichever body manages registration of aircraft), which will then trigger a clock that requires the authorities to co-operate and give effect to the remedies granted within five working days, subject only to ".. applicable aviation safety laws and regulations".[267]

The irrevocable de-registration and export request authorisation route (i.e., IDERA Route) is applicable without a court order. However, as can be seen from Article XIII of the Aircraft Protocol, a Contracting State must make a declaration to recognize that Article XIII applies in that Contracting State.[268] If a declaration of this nature has been made, then pursuant to Article XIII an IDERA can be granted by the debtor to be filed with the registry authority that names an authorized party to be the "… sole person entitled to exercise the remedies specified in Article IX(1)". The remedy of de-registration and export stipulated under Article IX(1) is further elaborated in the context of an IDERA under Article IX(5) which requires a registry authority to comply with a request for de-registration and export subject to the request being validly filed and if required by the registry authority, a certificate from the authorized party attesting that parties with a priority interest have consented to the de-registration and/or export or discharge of their priority interest has been obtained. Similarly to the court route the de-registration/export of the aircraft object is subject to applicable safety laws and regulations.[269] As can be seen, one of the recurring

[266] *Supra* note 15 at s 55.
[267] *S*upra note 220 at s X(6).
[268] *Ibid at* s XXX(1).
[269] *Ibid*s IX(5).

themes of the CTC and the Protocol is to shield the creditor from the national laws of the contracting state and therefore if the provisions applicable to an IDERA are activated, a contracting state must not impose any further obligations to obtain the de-registration and/or export of the aircraft object.[270]

Applicable safety laws and regulations are not defined within the CTC or Protocol, but academic discussion seems to agree that adherence to "safety laws and regulations" only apply to export of an aircraft, not to the de-registration.[271] This is because de-registration is a paper based formality that involves no safety risk. Export of the aircraft object on the other hand may result in safety related issues if for example, the certificate of airworthiness of the aircraft has been revoked. Therefore, in certain jurisdictions a temporary permit can be obtained for the aircraft to be exported and re-registration and application for a new certificate of airworthiness can be obtained in the new jurisdiction.[272]

The applicability of the Court Route and IDERA, as can be seen from the above, is very much so dependent on multiple factors, including but not limited to declarations (i.e. to opt-in or opt-out) made by Contracting States, the agreement of debtors to the remedies contemplated and from a practical perspective, the location of the aircraft and the state of registry. It must also be recognized however, even with both routes, export may be impeded where a declaration has been made by a Contracting State pursuant to Article 39(1)(b) and the NCR of detention of the aircraft object is applicable.[273]

[270] *Supra* note 222 at 187.
[271] *Supra* note 181 at 62.
[272] *Ibid* at 64. See also Standard 509 - Export Airworthiness Certificates for Aircraft - Canadian Aviation Regulations, for a discussion regarding certificates provided via Transport Canada for the export of aircraft.
[273] *Supra* note 15 at s 39.

(iv) Summary

The above discussion concluded that the multiple registration systems around the world that arise due to discretion given to Contracting States under Article 19 of the Chicago Convention do have an impact on the ability of lessors and financiers to de-register an aircraft. Operator-based registries will be riskier than owner-based registries by virtue of the fact that lessors or financiers will maintain their status as "owner" in owner-based registries and retain their ability to de-register the aircraft without further consent from the operator. In order to mitigate the risks associated with de-registration, the Cape Town Convention attempts to establish tools in the form of remedies that assist with de-registration but as can be seen, the system of declarations that permit a Contracting State to opt-in or opt-out of the applicability of provisions, such as self-help remedies, takes away from the uniformity that the Cape Town Convention is hoping to achieve.

There is no doubt that where the de-registration remedies are available to a lessor or financier, the risk that de-registration is impeded in the event of default is highly mitigated. However, the ease in which an aircraft can be de-registered is also highly dependent on other factors. First, only 43% of the Contracting States to the Chicago Convention are parties to the Cape Town Convention.[274] That leaves 57% of Contracting States outside the purview of the CTC and the remedies available for de-registration. A recent case involving AerCap, the world's largest aircraft lessor, exemplifies the issue with the lack of coverage. An aircraft owned by AerCap was leased to Aeroflot. The airline had gone into financial trouble, coupled with the war in Ukraine, was in default of their

[274] There are a total of 83 contracting states to the Cape Town Convention and 193 contracting states to the Chicago Convention.

lease obligations. The aircraft in question was flown from Russia to Sri Lanka where it was detained. Even though AerCap produced evidence that Aeroflot was in default, they lost the battle in the Sri Lanka commercial court for an order to export the detained Airbus A330-300. The aircraft was eventually permitted to leave Sir Lanka for a return trip to Moscow.[275] Had Sri Lanka been a party to the CTC, AerCap would have had a much higher chance to arrest the aircraft, subject to the hypothetical declarations made by Sri Lanka at the time of ratification of the CTC. Although the case above was not an issue of de-registration per se, as the aircraft was registered in Ireland, the case does show that the CTC remedies are in effect only applicable where an aircraft remains situated in states that are contracting parties to the CTC.

Secondly, de-registration risk cannot be examined in isolation and the sole fact that a state is party to the CTC does not necessarily mean that de-registration risk is reduced. The World Aircraft Repossession Index, as seen in Figure 3 below, that is currently in its third edition assesses repossession risk by analyzing a series of weighted factors within a State to derive a repossession score.[276]

[275] Sylvia Pfeifer, "Leasing group AerCap loses bid to recover Aeroflot jet," (8 June 2022), online: <https://www.ft.com/content/42209f9c-40a2-4d06-863e-0a444f542652>.
[276] Mark Lessard et al, "World Aircraft Repossession Index," (November 2018), online: *Wolrd Aircraft Repossession Index* <https://www.pillsburylaw.com/images/content/1/2/v3/120554/BOOK-World-Aircraft-Repossession-Index-Third-Edition.pdf>.

Figure 3: World Aircraft Repossession Index Underlying Factors

Table: Summary of Factors and Sub-Factors

WEIGHTING	FACTORS	SUB-FACTORS
22.5%	Repossession	(1) Self-help remedies; (2) Requirement for a deposit, bond or other security in judicial proceedings; (3) Repossession taxes and fees; (4) Speed of repossession; (5) Legal cost of repossession; (6) ASU Cape Town Discount or Qualifying OECD Status.
12.5%	Insolvency	(1) Sophistication of insolvency laws; (2) Insolvency moratorium; (3) Overreaching of the lessee's insolvency estate.
10.0%	Deregistration	(1) Third party deregistration rights; (2) Historical precedent of refusing to deregister; (3) Convenience of deregistration.
10.0%	Export	(1) Third party export rights; (2) Export licenses and permits; (3) Export fees and taxes.
7.5%	Judgments and Arbitral Awards	(1) Enforceability of judgments; (2) Enforceability of arbitral awards.
7.5%	Preferential Liens	(1) Onerous and unusual preferential liens: non-possessory liens; (2) Onerous and unusual preferential liens: fleet-wide liens; (3) Onerous and unusual preferential liens: liens in favor of a lessee or debtor; (4) Government requisition and confiscation.
30.0%	Political Stability	(1) OECD States; (2) Sovereign credit rating; (3) World Justice Project – Rule of Law Index 2017-2018; (4) Heritage Foundation – 2018 Index of Economic Freedom; (5) World Economic Forum – Global Competitiveness Report 2017-2018.

For example, Fiji is a party to the Cape Town Convention with an overall repossession score of 51% but scored 0% on de-registration[277] whereas Greece which is not a party to the Cape Town Convention has an overall score of 64% and a de-registration score of 80%.[278] As can be seen from Figure 3 , de-registration accounts for 10% of the overall score of the State but other factors such as political stability and judgements and arbitral awards (e.g. recognition of foreign court orders) will nonetheless impact the assessment of de-registration risk. Suppose an aircraft is registered in State A which is a party to the CTC but has not made a declaration under Article XXX(1) of the Protocol. This means

[277] *Ibid* at 68.
[278] *Ibid* at 76.

that de-registration and export are still available under Article IX of the Protocol but the procedures set out in Article X(6) are not available to the lessor or financier. The lessor or financier in this hypothetical scenario also obtains a foreign court order. State A's score on judgements and arbitral awards (e.g. their history of recognizing foreign court orders) will undoubtedly impact whether the foreign court order is recognized to take advantage of the relief under Article IX of the Protocol. Political stability will have an impact as well on de-registration risk whereby the political stability score may indicate whether Contracting States will comply with their CTC obligations. Perhaps the most blatant example of non-compliance with the CTC in history occurred earlier this year when Russia illegally re-registered aircraft onto their aircraft registry despite the aircraft continuing to be registered in other jurisdictions.[279] Importantly, Russian airlines defaulted pursuant to the lease agreements and upon request by the lessor to repossess and export the aircraft, failed to comply with their obligations under the CTC. In conclusion, the CTC is not necessarily uniform in application and de-registration risk. Even with the applicability of the CTC, other factors must also be analyzed, including the possibility and history of conformity with international conventions.

(d) Case Study: Russia and Leased Aircraft

The CTC, as discussed above, assisted in creating uniformity, transparency and minimized costs in the aircraft financing process. This reality did not escape Russia and as of 2022, more than 400 aircraft – not including other aircraft objects such as engines – were leased to Russian operators from Western countries. Given the heavy reliance on

[279] "Analysis: Aircraft lessors gird to battle insurers over Russia jet default," (10 May 2022), online: *Reuters* <https://www.reuters.com/business/aerospace-defense/aircraft-lessors-gird-battle-insurers-over-russia-jet-default-2022-05-10/>.

leased aircraft by Russian operators, it is no surprise that on 24 February 2022, when Russia commenced military action against Ukraine, lessors around the world braced for an unprecedented disruption in the aircraft financing sector. It was not long before Western sanctions were imposed.[280]

One of the sanctions to note was implemented by EU Regulation 2022/328 which included a prohibition to "… sell, supply, transfer or export, directly or indirectly, goods and technology suited for use in aviation or the space industry" to any person or entity in Russia or for use in Russia.[281] In addition to a prohibition to future dealing with Russia, the EU Regulation 2022/328 required the termination of any existing aircraft leases with a deadline of 28 March 2022. Termination of the existing contracts likely occurred pursuant to Article 10 of the CTC, as discussed above, that allows for termination of the agreement and possession or control of the aircraft object in the event of default. The requisite event of default would have varied depending on the terms of the agreement between the parties and may have included one or more of the following:

(i) **Failure to pay regular rent -** one such event of default was likely non-payment of regular rent as the ability to make international transfers was impeded by Russian banks being removed from the SWIFT.[282]

[280] "On Reports of Potential Reregistration of Aircraft in Breach of the 1944 Chicago Convention," online: *Institute of Air & Space Law* <https://www.mcgill.ca/iasl/article-potential-reregistration-aircraft-breach-1944-chicago-convention>.
[281] "EU sanctions on Russian aviation – immediate EU lessor action required," online: <https://www.dentons.com/en/insights/articles/2022/march/4/eu-sanctions-on-russian-aviation>.
[282] Iain Coutts, "How EU Sanctions Will Affect Hundreds Of Leased Planes," (28 February 2022), online: *Simple Flying* <https://simpleflying.com/eu-russia-sanctions-leases/>.

(ii) **Failure to maintain adequate insurance** – EU Regulation 2022/328 also prohibited the provision of insurance to Russia. Although aircraft would have been domestically insured, reinsurance would have been from international markets and thus unavailable.[283]

(iii) **Failure to adhere to safety and maintenance requirements** – Article 83*bis* agreements have been signed between Russia and Ireland and between Russia and Bermuda. These Article 83*bis* agreements, however, did not delegate responsibilities pursuant to Article 31 of the Chicago Convention (i.e. airworthiness).[284] As a result of the breakdown in relations between Russia and their States of Registry (i.e. Ireland and Bermuda), information regarding airworthiness was not being transmitted and accordingly, Bermuda and Ireland proceeded to revoke certificates of airworthiness.[285]

In response to the sanctions and the termination of leases, Russia took steps to impede the ability of creditors to repossess their aircraft, which included[286]:

- Ordering Russian operators to return aircraft to territory within Russia immediately to minimize detention of aircraft outside the territory of Russia;
- Passed legislation that allows for the re-registration of leased aircraft onto the Russian aircraft registry despite the aircraft still being registered on another registry (i.e. Ireland or Bermuda) in direct contravention of Article 18 of the Chicago Convention that prohibits dual registration of aircraft;
- Requested friendly States to not comply with the terms of the CTC in order to prevent the detention and export of aircraft; and

[283] *Ibid*.
[284] Supra note 280.
[285] *Ibid*.
[286] *Ibid*.

- Suspended the operation of the Article 83*bis* agreement between Russia and Ireland and Russia and Bermuda and subsequently ordered operators to maintain aircraft in accordance with Russian standards rather than with the standards of Ireland or Bermuda which maintained responsibility for issuance of the airworthiness certificates.

With the above retaliatory measures by Russia to the Western sanctions, the export remedies contained within the various provisions of the CTC have proven to be wholly ineffective as the majority of aircraft remain stranded in Russian territory.[287] In fact, export of aircraft after detention in territories *outside* of Russia has proven to be equally difficult as seen in the discussion above involving AerCap .[288] The ICAO in a recent Assembly resolution recognized that Russia's breaches of multiple provisions of the Chicago Convention (Articles 18, 19, 29, 30 and 31) continues to jeopardize the safety of international aviation and as such has condemned their continued breaches.[289] With the recent Assembly declaration that instructed the Secretary General to draw the attention of Russia's contravention to all Contracting States, it is unlikely that the certificates of airworthiness will be recognized.[290]

CHAPTER IV: SUMMARY AND CONCLUSION

This thesis has examined and analyzed the existing regimes of aircraft registration and the disconnect between public international air law rules relating thereto from the realities of modern-day commercial aviation. In particular, it has been noted that such registration rules have, other than with regard to registration under Article 83*bis,* has

[287] Padraic Halpin, Conor Humphries and Tim Hepher, "Analysis: Aircraft lessors gird to battle insurers over Russia jet default," (10 May 2022), online: *Reuters* <https://www.reuters.com/business/aerospace-defense/aircraft-lessors-gird-battle-insurers-over-russia-jet-default-2022-05-10/>.
[288] S*upra* note 275.
[289] *ICAO, Infractions of the Convention on International Civil Aviation by the Russian Federation, A41-WP/430*at 2.
[290] *Ibid* at C–2.

remained unchanged since the inception of the Chicago Convention despite a drastically different aviation landscape (in particular, the reliance on aircraft leasing). This lack of adaptation has resulted in a multitude of issues, including failure by States to adhere to Article 21 of the Chicago Convention and the impediment of the efficient and effective cross-border transfer of aircraft that underpins the aircraft finance industry that exists today.

One of the underlying issues that arises, as discussed in Chapters II and III, is the lack of uniformity with respect to state registry practice. The lack of uniformity, and in particular a lack of a homogeneous definition of "owner", has resulted in limited adherence to Article 21 of the Chicago Convention and the implementation of complex legal structures to effectively register aircraft, which in turn affects transparency of ownership. Although steps have been taken to minimize the impact of differences in registry practices through the implementation of the model certificate of de-registration and the establishment of the ARN, it must be noted that the use of these tools are not necessarily compulsory. States are still free, due to concerns with sovereignty, to determine whether they integrate their existing registry with the ARN to improve overall transparency for all contracting states and at the same time fulfill obligations under Article 21 without any further onus. In addition, States that do not issue certificates of de-registration will not be caught by the mandatory use of the model certificate of de-registration. Balance from the ICAO perspective between mandatory provisions and sovereignty are evidently of concern as seen from the deliberations of the Article 21 Task Force which indicated that harmonized definitions of "owner" would not be considered, and that States would maintain the ability to dictate their own registry practices. Transparency in ownership of

aircraft and a clear understanding of the definition of ownership used should be viewed as fundamentally as aviation safety (a topic on which ICAO regularly makes mandatory amendments that States must implement). As the world becomes more interconnected, both physically and digitally, integration and compromise in the form of shared data and understanding of legal concepts are necessary. This fact is recognized even by States such as China (which has historically been highly protectionist) through their work towards implementation of the ARN and in particular the rules regarding the registration of drones. The implementation of the GATs can also be seen as an example for a push towards further integration through the recognition of the concept of the trust by states that historically do not recognize the trust as a legal entity. Although the development of the ARN was primarily driven by failure of States to adhere to Article 21 of the Chicago Convention, it arguably has become a platform through which other registration regimes can become integrated. For example, registrations through the Cape Town Convention may also be one day integrated despite the distinct purposes of the two registries. It has been argued that because the ARN and the International Registry serve such different purposes, an integration would not be necessary or appropriate. On one hand, this is correct in that the former deals with registration pursuant to international public air law while the latter deals with commercial matters. On the other hand, through this thesis, it can be seen that analysis of legal issues with respect to registration cannot be compartmentalized. It is undeniable that international aircraft transactions must be analyzed with an understanding of public air law concepts and the ARN should reflect this principle as well.

The other major issue that arises from the owner-operator divide (discussed at length in Chapter II and Chapter III), is the difficultly in de-registration and export of an aircraft object in the event of default as defined within a relevant agreement. Legal experts have devised ingenious methods of minimizing creditor risk such as the implementation of Article 83*bis* of the Chicago Convention, that has enhanced safety of aviation (by placing safety related obligations in the hands of the operator which has the closest nexus to the aircraft) and minimized de-registration risk. The Cape Town Convention, with its standard remedies and enhanced remedies within the Protocol, have also been an innovation that generally effectively protects the rights of both creditors and debtors. Although case studies, such as the ongoing dispute with Russia, may be used as an example of the ineffectiveness of the current risk mitigating measures, this author prefers to argue that the Russian case study is an anomaly. The tools as discussed in Chapter III, subchapter B, that can be employed through the Cape Town Convention are robust but the effectiveness of the tools are only effective where a State complies with its international obligations. Amendments to the Cape Town Convention are not necessary. Instead, there should be a further drive to have more contracting States to the Chicago Convention ratify the Cape Town Convention. Uniformity, again, is a vital factor in the recognition of rights and remedies and despite the elections that can be made by Contracting States under certain provisions, an underlying recognition of rights as a minimum will assist in mitigating creditor risk. Finally, a more robust risk analysis should be undertaken by creditors when choosing whether to enter into agreements. Like all commercial transactions, risks must be assessed and unfortunately in the case study of Russia the “worst case scenario” arose. Again, the recent Russian case study is the

exception and not the norm to the operation of the remedies and protections enshrined within the CTC, associated Protocols and other pre-CTC tools.

The elevation of transparency to the same level of importance as safety related matters will create a level of uniformity necessary for the digital age in which we currently exist. It will also help to mitigate the existence, albeit a small proportion, of special purpose vehicles and entities that have been used for criminal intent. Arguably, States have already started realizing the importance of transparency which can be seen through the opposition of States from removing Article 21 from the working agenda of the Legal Commission of ICAO. The further integration of the International Registry with the ARN, the promotion of knowledge and the recognition of rights will further promote harmony as States continue to recognize the interaction between public international air law and private international air law. As seen from the above, small steps towards harmonization of the registration system currently in place do not require significant amendments to international conventions or retraction of sovereignty which makes the suggestions noted above all the more feasible.

BIBLIOGRAPHY

Legislation

Canada

Canadian Aviation Regulations, SOR/96-433

United States

Title 49, USC.

Title 14, USC.

Ireland

Irish Aviation Authority (Nationality and Registration of Aircraft) Order, 2015, SI 107 of 2015.

Japanese

Civil Aeronautics Act, Act No231 of 1952.

International

Convention for the Regulation of Aerial Navigation, 13 October 1919, UKTO (11 July 1922).

Convention on damage caused by foreign aircraft to third parties on the surface, 7 October 1952, 310 UNTS 181 (entered into force 4 February 1958).

Convention on International Interests in Mobile Equipment, 16 November 2001, 2307 UNTS 285 (entered into force 01 March 2006).

Convention on the High Seas, 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

International Air Services Transit Agreement, 7 December 1944, 84 UNTS 389 (entered into force 30 January 1945).

International Convention in regard to Aerial Navigation drafted by the Conference held at Paris in 1910, presented as Appendix A to the Report of Special Committee No. 1 of the Civil Aerial Transport Committee (H.M. Stationery Office).

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 16 November 2001.

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

Jurisprudence

DVB Aviation Finance Asia PTE Ltd V Directorate General of Civil Aviation.

Nottebohm (Liechtenstein v Guatemala), Reports of Judgements, Advisory Opinions and Orders III.

The M/V "Saiga" (No 2) Case (Saint Vincent and the Grenadines v Guinea).

Secondary Materials: ICAO Documents

ICAO *A21TF, Task Force on the Implementation of Article 21 of the Chicago Convention Report—Part I.*

ICAO *A39-WP/159, Assembly, Implementation of Article 21 of the Chicago Convention.*

ICAO *A39-WP/159, Assembly—39th Session,* Technical Commission and Legal Commission (2016).

ICAO *A39-WP/507, Assembly, Report of the Legal Commission on the General Section and Agenda Items 44, 45, 46 and 47.*

ICAO *A39-WP237, Assembly, Facilitation of the Cross-border Transferability Process.*

ICAO *C-DEC 225/8, Council, 225th Session, 7 March 2022*.

ICAO *Doc 10059, Manual on the Implementation of Article 83bis of the Convention on International Civil Aviation, First Edition, 2017*.

ICAO *LC/37-WP/2-4, Legal Committee, Implementation of Article 21 of the Chicago Convention.*

ICAO *State Letter AN 11/47-10/67, Council, dated 24 September 2010*.

ICAO*, A21TF/2, Task Force on the Implementation of Article 21 of the Chicago Convention Report – Part II.*

ICAO, Infractions of the Convention on International Civil Aviation by the Russian Federation, A41-WP/430

Proposals for Amendment to Annexes 7 and 8, regarding registration, deregistration and transfer of registration of aircraft (2020).

Secondary Materials; Journal Articles

Bunker, Donald. “Aircraft Financing in the Future” 27 Annals Air & Space L 139.

Gerber, Dean N and David R Walton. “De-registration and Export Remedies under the Cape Town Convention” (2014) 3:1 Cape Town Convention Journal 49.

Goode, Roy. “International Interests in Mobile Equipment: A Transnational Juridical Concept” (2003) 15:(i) Bond Law Review.

Goode, Roy. “The priority rules under the Cape Town Convention and Protocols” (2012) 1:1 Cape Town Convention Journal 95.

Havel, Brian F and Gabriel S Sanchez. “Do We Need a New Chicago Convention?” (2011) 11 Issues Aviation L & Pol’y.

Narayanan, Nithya. *Aircraft Repossession in India—Turbulence Ahead, Buckle Up!*, SSRN Scholarly Paper, by Nithya Narayanan, papers.ssrn.com, SSRN Scholarly Paper ID 2353197(Rochester, NY, 2013).

Oxman, Bernard and Vincent Bantz. “The M/V ‘Saiga’ (No.2) (Saint Vincent and the Granadines v. Guinea), Judgment (ITLOS Case No.2)” (2000) 94 The American Journal of International Law 140.

Roper, Albert. “The Organization and Program of the International Commission for Air Navigation (C.I.N.A.)” 13.

Snodgrass, Phillip. “Aviation Flags of Convenience: Ireland and the Case of Norwegian Airlines International” (2015) 14 Issues in Aviation Law and Policy 245.

Wangard, Thomas Robert. “Solve the Problems with Non-Citizen Trusts: Do Away with Citizenship Requirements for Aircraft Registration in the United States” (2012–2013) 12:3 Issues Aviation L & Pol’y 539.

Secondary Materials: Books

Abeyratne, Ruwantissa. “Article 21 Report of Registrations” dans Ruwantissa Abeyratne, dir, *Convention on International Civil Aviation: A Commentary* (Cham: Springer International Publishing, 2014).

Abeyratne, Ruwantissa. *Aeronomics and Law: Fixing Anomalies* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012).

Bunker, Donald. *International Aircraft Financing*, 2nd ed (International Air Transport Association, 2015).

Bunker, Donald. *International Aircraft Financing, Volume 2 Specific Documents*, 2nd ed (International Air Transport Association).

Cooper, John C. *A Study on the Legal Status of Aircraft*, (Princeton: Institute for Advanced Study, 1949).

Fuller, Joseph & Dennet, Tyler. *Papers relating to the foreign relations of the United States, Vol 1:* (Washington: United States Government Printing Office, 1943

Goode, Royston Miles. *Convention on International Interests in Mobile Equipment and protocol thereto on matters specific to space assets: official commentary* (Rome: Unidroit, 2013).

Hanley, Donal. *Aircraft operating leasing: a legal and practical analysis in the context of public and private international air law*, second edition ed, Aviation law and policy series volume 9(Alphen aan den Rijn: Kluwer Law International B.V, 2017).

Huang, Jiefang. *Aviation safety through the rule of law: ICAO's mechanisms and practices*, Aviation law and policy series 5(Austin [Tex.] : Alphen aan den Rijn, The Netherlands : Frederick, MD: Wolters Kluwer Law & Business ; Kluwer Law International ; Sold and distributed in North, Central and South America by Aspen Publishers, 2009).

Mansell, John N K. *Flag state responsibility: historical development and contemporary issues* (Berlin: Springer, 2009).

Milde, Michael. *International air law and ICAO*, third edition ed, Essential air and space law v. 18(Hague, The Netherlands: Eleven International Publishing, 2016).

Proceedings of the International Civil Aviation Conference (Washington: United States Government Printing Office, 1948).

Secondary Materials: Websites

Bailey, Joanna. "Ireland Has Over 17,000 Aircraft Orders—But Not For Traditional Airlines," (24 January 2019), online: *Simple Flying* <https://simpleflying.com/ireland-aircraft-leasing/>.

Coutts, Iain. "How EU Sanctions Will Affect Hundreds Of Leased Planes," (28 February 2022), online: *Simple Flying* <https://simpleflying.com/eu-russia-sanctions-leases/>.

Garner, Bryan. *Black's Law Dictionary*, 11th ed(2019).

Gross, Edward, Erich Dylus, and Rauch Jonathan. "Under Scrutiny: The New GAO Recommendations for FAA Aircraft Registration," online: *Vedder Price* <https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2020/06/asl_v033n02_grossdylusrauch.pdf>.

Halpin, Padraic, Conor Humphries and Tim Hepher. "Analysis: Aircraft lessors gird to battle insurers over Russia jet default," (10 May 2022), online: *Reuters*

<https://www.reuters.com/business/aerospace-defense/aircraft-lessors-gird-battle-insurers-over-russia-jet-default-2022-05-10/>.

Lessard, Mark et al. “World Aircraft Repossession Index,” (November 2018), online: *World Aircraft Repossession Index* <https://www.pillsburylaw.com/images/content/1/2/v3/120554/BOOK-World-Aircraft-Repossession-Index-Third-Edition.pdf>.

Narayanan, Nithya. *Aircraft Repossession in India—Turbulence Ahead, Buckle Up!*, SSRN Scholarly Paper, by Nithya Narayanan, papers.ssrn.com, SSRN Scholarly Paper ID 2353197(Rochester, NY, 2013).

Office, U S Government Accountability. “Aviation: FAA Needs to Better Prevent, Detect, and Respond to Fraud and Abuse Risks in Aircraft Registration,” online: <https://www.gao.gov/products/gao-20-164>.

Pfeifer, Sylvia. “Leasing group AerCap loses bid to recover Aeroflot jet,” (8 June 2022), online: <https://www.ft.com/content/42209f9c-40a2-4d06-863e-0a444f542652>.

Pierre Denis and Etienne Brassard. “Aviation Finance in Canada: Overview,” online: <https://uk.practicallaw.thomsonreuters.com/9-628-1725?navId=0D7B692E59B3A740B1CD0867EF3E6397&comp=pluk&transitionType=Default&contextData=%28sc.Default%29>.

Tozer-Pennington, Victoria. *The Aviation Industry Leaders Report 2022: Recovery through Resilience*(KPMG, 2022).

“Air Canada Completes Aircraft Sale and Leaseback Transactions,” online: *News Release Archive* <https://aircanada.mediaroom.com/2020-10-08-Air-Canada-Completes-Aircraft-Sale-and-Leaseback-Transactions>.

“Aircraft registration and Article 83bis of the Chicago Convention: a practical overview,” (15 July 2021), online: *Dentons* <https://www.dentons.com/en/insights/articles/2021/july/19/aircraft-registration-and-article-83bis-of-the-chicago-convention-a-practical-overview>.

“Aircraft Registration and Recordation Process,” (June 2018), online: *US Department of Transportation Federal Aviation Administration* <https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/media/Aircraft%20Registration%20and%20Recordation%20Processes.pdf>.

“Aircraft Registry Network (ARN) & Wrap Up and Next Steps,” online: <://www.icao.tv/videos/droneenable2-aircraft-registry-network-arn-wrap-up-and-next-steps>.

“Analysis: Aircraft lessors gird to battle insurers over Russia jet default,” (10 May 2022), online: *Reuters* <https://www.reuters.com/business/aerospace-defense/aircraft-lessors-gird-battle-insurers-over-russia-jet-default-2022-05-10/>.

“Aviation Benefits Report 2019,” (2019), online: *ICAO* <https://www.icao.int/sustainability/Documents/AVIATION-BENEFITS-2019-web.pdf>.

“Aviation Finance & Leasing: Global Overview,” (5 April 2022), online: *Clyde & Co* <https://www.lexology.com/library/detail.aspx?g=5567c19a-b0f9-4d00-ab15-6e1a59ec350b>.

“Aviation Update: Beneficial Ownership Register of Trusts - Application to Aircraft Leasing and Structured Finance Transactions,” (20 March 2019), online: *Mason Hayes & Curran* <https://www.mhc.ie/latest/insights/aviation-update-beneficial-ownership-register-of-trusts-application-to-aircraft-leasing-and-structured-finance-transactions>.

“Civil War Ballooning,” online: <https://airandspace.si.edu/learn/highlighted-topics-/flight/civil-war-ballooning>.

“Commission takes action to combat aircraft noise | News | CORDIS | European Commission,” online: <https://cordis.europa.eu/article/id/9951-commission-takes-action-to-combat-aircraft-noise>.

“Delegation Agreement Between Irish Aviation Authority and Ministry of Transport State Authority of Civil Aviation of Russian Federation on the implementation of Article 83*bis* of the Chicago Convention,” (26 March 2002), online: <https://cfapps.icao.int/dagmar/Full_Text/2002/4576-E.pdf>.

“EU sanctions on Russian aviation – immediate EU lessor action required,” online: <https://www.dentons.com/en/insights/articles/2022/march/4/eu-sanctions-on-russian-aviation>.

“First nonstop flight from Europe to North America,” online: *HISTORY* <https://www.history.com/this-day-in-history/first-nonstop-transatlantic-flight-europe-to-north-america>.

“Frequently Asked Questions about USOAP,” online: <https://www.icao.int/safety/CMAForum/Pages/FAQ.aspx>.

“Future of Aviation,” online: <https://www.icao.int/Meetings/FutureOfAviation/Pages/default.aspx>.

“Global Aircraft Trading System (GATS),” online: *Global Aircraft Trading System (GATS)* <https://e-gats.aero/about-gats.>.

“On Reports of Potential Reregistration of Aircraft in Breach of the 1944 Chicago Convention,” online: *Institute of Air & Space Law* <https://www.mcgill.ca/iasl/article-potential-reregistration-aircraft-breach-1944-chicago-convention>.

“Practitioners’ Guide to the Cape Town Convention and the Aircraft Protocol,” (12 October 2020), online: *The Legal Advisory Panel of the Aviation Working Group* <http://awg.aero/wp-content/uploads/2020/12/Practitioners-Guide-December-2020.pdf>.

"Russian law creates new hurdle for foreign plane lessors," (14 March 2022), online: *Reuters* <https://www.reuters.com/world/putin-signs-law-registering-leased-planes-airlines-property-tass-2022-03-14/>.

"Safety Audit Results: USOAP interactive viewer," online: <https://www.icao.int/safety/pages/usoap-results.aspx>.

"South Korea extends support for ICAO Aircraft Registration Network," online: <https://www.icao.int/Newsroom/Pages/South-Korea-extends-support-for-ICAO-Aircraft-Registration-Network.aspx>.

"The Wright Brothers | The First Successful Airplane," online: <https://airandspace.si.edu/exhibitions/wright-brothers/online/fly/1903/>.

"Viewpoint: How WW1 changed aviation forever," *BBC News* (19 October 2014), online: <https://www.bbc.com/news/magazine-29612707>.

Secondary Materials: Miscellaneous

Garner, Bryan. *Black's Law Dictionary*, 11th ed (2019).

Yang, Yalan and Nicholas S Bardell. *A review of airworthiness assurance within international dry operating leases*(Australian Transport Research Forum 2017 Proceedings, 2017).