A Quest for Proportionality:

The Adverse Effects of Unilateral Sanctions on Civil Aviation

by

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Abstract

Since the beginning of the Russo-Ukrainian War, numerous countries have imposed comprehensive unilateral sanctions against Russia for its military aggression, with some reaching beyond the borders of the senders. Aimed at crippling Russia's infrastructural and financial capabilities at war, the sanctions cover most of Russia's core industries. The Russian civil aviation sector, a crucial component of the comprehensive sanctions, has been devasted with mounting challenges to its long-term sustainability. Following a series of tit-for-tat exchanges such as airspace closures and aircraft export restrictions between Russia and the sanctioning powers, the fundamental legal orders governing international civil aviation are under unprecedented challenge because the sanctions and retaliatory measures have created compliance paradoxes and legal dilemmas for aviation stakeholders worldwide. Aside from the direct impact on the targets, the sanctions have generated grave consequences for the freedom of air navigation, aircraft transactions, rights of third-party states, and multilateral air law treaties.

This article intends to examine the adverse legal and practical effects of unilateral sanctions on international civil aviation from multiple perspectives, including airlines, lessors, insurers, passengers, government bodies, and international organizations. It identifies common challenges from unilateral sanctions by analyzing factual evidence, treaty violations, legislative and diplomatic actions, and pertinent jurisprudences. Based on the findings, this article discusses the proportionality of unilateral sanctions not only against the Russian air transport industry, but for civil aviation in general without determining the legality of war-related sanctions. This article concludes that sanctions against civil aviation are best implemented on a collective basis and narrowly tailored to avoid disproportionate harms to non-targets and the safety of civilians, it also proposes an interim geopolitical response mechanism at the multilateral level.

Resumé

Depuis le début de la guerre russo-ukrainienne, de nombreux pays ont imposé des sanctions unilatérales globales contre la Russie pour son agression militaire, certaines s'étendant au-delà des frontières des émetteurs. Visant à paralyser les capacités infrastructurelles et financières de la Russie en guerre, les sanctions couvrent la plupart des industries clés du pays. Le secteur de l'aviation civile russe, composante cruciale des sanctions globales, a été dévasté, faisant face à des défis croissants pour sa viabilité à long terme. Suite à une série d'échanges de représailles tels que les fermetures d'espace aérien et les restrictions d'exportation d'avions entre la Russie et les puissances sanctionnatrices, les ordres juridiques fondamentaux régissant l'aviation civile internationale sont confrontés à un défi sans précédent, car les sanctions et les mesures de rétorsion ont créé des paradoxes de conformité et des dilemmes juridiques pour les acteurs de l'aviation dans le monde entier. Outre l'impact direct sur les cibles, les sanctions ont engendré de graves conséquences pour la liberté de navigation aérienne, les transactions d'aéronefs, les droits des États tiers et les traités multilatéraux sur le droit aérien.

Cet article vise à examiner les effets juridiques et pratiques néfastes des sanctions unilatérales sur l'aviation civile internationale sous de multiples perspectives, incluant les compagnies aériennes, les bailleurs, les assureurs, les passagers, les organismes gouvernementaux et les organisations internationales. Il identifie les défis communs posés par les sanctions unilatérales en analysant les preuves factuelles, les violations de traités, les actions législatives et diplomatiques, ainsi que les jurisprudences pertinentes. Sur la base de ces conclusions, cet article discute de la proportionnalité des sanctions unilatérales non seulement contre l'industrie du transport aérien russe, mais aussi pour l'aviation civile en général, sans déterminer la légalité des sanctions liées à la guerre. Cet article conclut que les sanctions contre l'aviation civile devraient être mises en œuvre sur une base collective et étroitement adaptées pour éviter des préjudices disproportionnés aux non-cibles et à la sécurité des civils. Il propose également un mécanisme de réponse géopolitique intérimaire au niveau multilatéral.

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1. Introduction

Sanctions have emerged as a prevalent instrument in the contemporary era of regional and global conflicts, functioning as both legal and policy mechanisms for states in navigating international affairs. Some sanctions, such as those imposed by the United Nations Security Council are multilateral, while others, such as those imposed by individual states are unilateral in nature. The legal ambiguity of unilateral sanctions, coupled with their growing extraterritorial reach, presents substantial obstacles to maintaining a rule-based international legal framework.[1] Some authors argue that unilateral sanctions are more effective than multilateral sanctions due to the differing objectives of each sender.[2]

In the realm of international civil aviation, however, unilateral sanctions can produce negative consequences far beyond the intended target. Parties located outside the sender and target states, both private and public, are vulnerable at the receiving end to the sanctions' lasting effects because of the lack of coordination.[3] International civil aviation thrives and depends on a harmonized system of legal and operational standards. This uniformity is exemplified by the near-universal adoption of common rules governing aircraft nationality, registration, minimum airworthiness standard, and numerous other aspects of aviation operations. Due to the incompatibility of unilateral sanctions against civil aviation in force with existing international legal framework, governments and commercial entities are left with compliance difficulties and commercial impossibilities. The sanctions against the Russian invasion of Ukraine showcased

[1] Surya P Subedi, *Unilateral sanctions in international law* (Oxford, UK: Hart Publishing, Bloomsbury Publishing Plc, 2021) at 5.
[2] Sumit Joshi & Ahmed Saber Mahmud, "Unilateral and multilateral sanctions: A network approach" (2018) 145 Journal of Economic Behavior & Organization 52–65.
[3] "Over-compliance with secondary sanctions adversely impacts human rights of millions globally: UN expert", online: *OHCHR* <https://www.ohchr.org/en/press-releases/2022/09/over-compliance-secondary-sanctions-adversely-impacts-human-rights-millions>.

the unprecedented global effects on international air transportation, they exposed the fragile state of our existing international framework governing civil aviation. The discrepancy between sanctions regulations and the requirements of international air law is detrimental to the long-term sustainability of the aviation industry.

Since the outbreak of the Russo-Ukrainian war, the United States and the European Union have each implemented comprehensive economic sanctions against Russia, these sanctions are not coordinated or implemented through any United Nations mechanism, but they are unilaterally imposed. Other nations including the United Kingdom and Japan have followed suit and implemented similar economic restrictions. These sanctions are designed to dismantle Russia's infrastructural and financial capability in its war efforts, and they cover most of Russia's core industrial sectors including banking, energy and transportation.

Amongst the damages inflicted by comprehensive measures taken by the group of nations, the Russian civil aviation sector is particularly hard hit as it becomes increasingly unsustainable from issues such as shortage of aircraft components due to multi-layered trade restrictions. The situation is further exacerbated by airspace closures and prohibition on services. The sanctions against Russia are ostensibly tailored and self-contained, however, a closer inspection can reveal that they in fact spillover to most if not all nations participating in the international civil aviation system. From defaulted aircraft leases to detoured flight paths, from airworthiness violations to broken bilateral air service agreements, the adverse effects of unilateral sanctions on Russian aviation infiltrate worldwide through major international treaties such as the Chicago Convention and the Cape Town Convention. These treaties are designed to bond civil air operations and transactions with commons sets of rules, nevertheless, they are under unprecedented stress test in the wake of comprehensive sanctions.

Under the backdrop of the Russian sanctions, this article holistically examines the adverse effects of unilateral sanctions on civil aviation from both legal and practical perspectives. Due to the complex nature of unilateral sanctions in international law, their justifiability or legality are outside the purview of this article. This author does not attempt to investigate the overall fitness of war-related sanctions against Russia. Instead, this work concentrates specifically on the legal and operational challenges facing civil aviation from an international perspective and proposes constructive solutions to mitigate the future impact of such sanctions. This article maintains a neutral stance on the imposition of sanctions by states, it strives to offer analyses grounded in facts and interpreted within the context of existing international and national laws.

The first two chapters of this article will layout critical factual details as they unfolded in the timeline of the Russian sanctions, it will also preview the scope and rules of the major sanctions regimes as they relate to civil aviation. The third part of this article will examine Russia's responses to various sanctions and identify its violations of relevant international treaties on civil aviation post-invasion. The fourth part of this article will address the unique operational and compliance issues faced by Russia post-sanctions and any defense or solution that may be available to counter these situations. The next two sections will inspect the impact on aviation leasing and insurance through the examination of relevant treaties and cases and analysis of their common challenges under restrictive measures. The seventh chapter will address the leakage of unilateral sanctions to third-party states and inquire into the legal obligations and relationships involved. The last substantive chapter reviews the anatomy of sanctions under public international law and elaborates on the proportionality of sanctions against civil aviation from key metrics. This article will conclude by summarizing the issues identified and suggesting potential paths forward.

2. The Timeline and Nuance of Sanctions Against Russian Aviation

On February 24, 2022, Russian President Vladimir Putin announced the authorization of the so-called "special military operation" against Ukraine on national television and mobilized troops on all fronts, effectively starting the undeclared Russo-Ukrainian War.[4] After the invasion, and on the same day, the U.S. State Department, Treasury Department, and Commerce Department collectively announced sweeping and unprecedented sanctions against Russian individuals and entities.[5] The Russian civil aviation sector became a part of the broader comprehensive sanction efforts against the nation, more specifically, the U.S. Department of Commerce implemented new license requirements under Export Administration Regulation (EAR) and updated the Commerce Control List 1 through 9 via the Bureau of Industry and Security.[6] Items that were previously permissible to Russia such as civil aircraft and their components became export restricted under Export Control Classification Number 9A991.d.[7] The U.S. also rolled out additional measures by other authorities to supplement the EAR to ensure maximum coverage and to deter evasion. This will be discussed in further detail in the next section.

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[4] Andrew Osborn & Polina Nikolskaya, "Russia's Putin authorises 'special military operation' against Ukraine | Reuters", (4 October 2023), online: *Reuters* <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/>.
[5] "Holding Russia and Belarus to Account", (10 November 2023), online: *United States Department of State* <https://www.state.gov/holding-russia-and-belarus-to-account/>.
[6] "Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR)", (3 March 2022), online: *Federal Register* <https://www.federalregister.gov/documents/2022/03/03/2022-04300/implementation-of-sanctions-against-russia-under-the-export-administration-regulations-ear>.
[7] *Ibid*.

The European Union Council has similarly adopted far-reaching sanctions against Russia on February 25, 2022, through Council Regulation 2022/328.[8] Under Article 3c of Regulation 2022/328, it is prohibited to sell, transfer, supply and export aviation and aerospace goods and technologies to any Russian individual or entity or for use in Russia.[9] The EU rule also made unlawful any ancillary services attached to or benefit the restricted aviation items.[10] The EU Regulation's language specifically banned insurance, reinsurance, financing and any technical services to Russian airplanes.[11] As part of the prohibition on ancillary services to Russian operated aircraft, the EU in Article 3c (5) mandated the block's aircraft lessors, financiers and insurers to terminate all service agreements with Russian carriers by the end of March 2022.[12]

After issuing trade and financial sanctions, on February 27, 2022, the E.U. and Canada announced the closure of their respective airspace to Russian aircraft, the ban applies to all planes registered, owned, leased, or controlled by Russian citizens and entities.[13] On March 1st 2022, President Biden announced the closure of U.S. airspace to all Russian flights. The Department of Transportation issued an order disapproving all Russian carriers' flight schedules and revoked the operational privilege of any Russian aircraft in U.S. airspace.[14] By March 2022, 33 countries, including the historically neutral Switzerland, have closed their airspace to Russian

[8] EU, *Regulation* 2022/328 of the Council of the European Union of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2022] OJ, L 49.
[9] *Ibid*.
[10] *Ibid.*
[11] *Ibid* 3c (2).
[12] *Supra* Note 8 3c (5).
[13] Allison Lampert & David Shepardson, "Europe and Canada move to close skies to Russian planes", *Reuters* (28 February 2022), online: <https://www.reuters.com/business/aerospace-defense/europe-moves-close-its-skies-russian-planes-2022-02-27/>.
[14] "Notification, Order Disapproving Schedules, And Order Suspending the Authority of Russian Foreign Civil Aircraft Operators To Navigate In The United States", Docket DOT-OST-2018-0073, U.S. Department of Transportation.

aircraft.[15] In response to the airspace bans, Russia retaliated by issuing reciprocal airspace prohibitions against 36 countries[16]

2.1 The Nature and Scope of U.S. Sanctions

The U.S. sanctions on Russian civil aviation should be broadly interpreted, it restricts not only U.S. manufactured aviation goods, but it extends to any items that contain certain level of U.S. technology or components of the overall value, depending on the classification.[17] For aircraft and components bound for Russia, this figure is 25%. For instance, a Brazilian-manufactured aircraft equipped with U.S. engines may be prohibited for exportation to Russia under the U.S. EAR because the percentage of U.S. components exceeded the threshold. The sanctions also control information technologies, such as U.S. designed navigation and meteorology software installed on aircraft. It is crucial to note that the U.S. sanctions are not limited to U.S.-originated exportations, but it comprehensively covers any movement of the restricted item within and outside the sanctioned state.[18] The U.S. is unique in enforcing its export control concepts such as "re-export"[19] and "in-country transfer", therefore, virtually all forms of movement of sanctioned

[15] Mia Jankowicz, "Map shows countries that have closed their airspace to Russia over Ukraine invasion", online: *Business Insider* <https://www.businessinsider.com/map-shows-countries-that-closed-airspace-russia-over-ukraine-war-2022-3>.
[16] *Ibid*.
[17] "De minimis Rules and Guidelines § 734.4 and Supplement No. 2 to part 734 of the EAR", (5 November 2019), online: Bureau of Industry and Security < https://www.bis.doc.gov/index.php/documents/pdfs/1382-de-minimis-guidance/file>.
[18] "Reexports and Offshore Transactions", online: Bureau of Industry and Security <https://www.bis.doc.gov/index.php/licensing/reexports-and-offshore-transactions>.
[19] Reexport is defined by the BIS as "the shipment or transmission of an item subject to the EAR from one foreign country (i.e., a country other than the United States) to another foreign country." See "What is a reexport? | Bureau of Industry and Security", online: *BIS* <https://www.bis.gov/articles/what-reexport>.

items are subject to export licenses. According to the BIS, with limited exceptions, license applications are subject to either the presumption of denial or the policy of denial.[20]

An enforcement action by the BIS in 2022 provides a straightforward illustration on the expansive scope of the above rule. The agency issued a Temporary Denial Order (TDO) and revoked all export benefits against Russian flag carrier Aeroflot for its use of several civilian aircraft containing more than 25% of U.S. contents.[21] The BIS cited ECCN 9A991.d as legal basis for export control and extracted evidence from public flight tracking service showing that Aeroflot violated sanctions by operating U.S.-made aircraft to several international locations without license. With the TDO in place, not only is the Russian carrier stripped away of any export privileges, but any person worldwide is prohibited from "exporting, re-exporting, or transferring any items subject to the EAR to the airline."[22] This highlighted the extraterritorial nature of U.S. sanctions. In a practical sense, in absence of appropriate license, Russian carriers who operate aircraft exceeding 25% U.S. contents to any location violate the BIS rules and are subsequently subject to TDOs. Based on recent BIS enforcement records, repeated uses of sanctioned aircraft can result in indefinite renewal of TDOs.[23]

Aircraft covered by the EAR are also subject to additional restrictions under the General Prohibition 10, which prevents any entity or individual to provide any service to items subject to the EAR with the knowledge that a sanction violation has occurred or about to occur.[24] For civil aircraft belonging to Russian air carriers, this means that any service, including maintenance,

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[20] 15 CFR Part 744 Supp. No.4.
[21] "Order Temporarily Denying Export Privileges, United States Department of Commerce", online: < https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2022/1365-e2717/file>.
[22] "U.S. BIS renews temporary denial of export privileges against Russian airline - KPMG United States", (4 April 2024), online: *KPMG* <https://kpmg.com/us/en/home/insights/2024/04/tnf-us-bis-renews-tdo-russian-airline.html>.
[23] *Ibid.*
[24] General Prohibition Ten, 15 CFR Part 736 (10).

repair, and refueling are disallowed without prior approval. The knowledge requirement can likely be fulfilled by the fact that the U.S. government publicly announced the measures against Russia and published official documents on government websites.

In addition to the export control rules, the U.S. has utilized other sanction tools such as Executive Orders and Specially Designated National and Block Persons list (SDN list).[25] Executive Order 14024 as amended authorizes the U.S. government to sanction any individual that have aided or participated in designated sectors of the Russian economy, the sanctions take place in the form of blocking assets and properties. This Executive Order was in place well before the invasion of Ukraine in 2022, it was dubbed "Russian Harmful Activities Sanctions" by the Treasury Department and its sectorial coverage was expanded several times since the Russia-Ukraine War.[26] For the purpose of limiting Russia's access to aviation goods and services, financial services and aerospace products were added to the Order by the end of March 2022.[27] The SDN list, on the other hand, is a list of sanctioned individuals and entities designated by the U.S. Office of Foreign Asset Control, their assets are blocked, and U.S. persons are prohibited from engaging in business transactions with SDN designees. Due to the significant reach of the U.S. financial system and currency in international trade, persons and entities on the SDN list can encounter immense difficulties in multiple sectors worldwide. The BIS also implemented license requirements for all export-controlled items to all actors on the SDN list.[28] Non-US

[25] Exec. Order No. 14024, 31 C.F.R Part 587.
[26] "Russian Harmful Foreign Activities Sanctions | Office of Foreign Assets Control", online: *US Department of Treasury* <https://ofac.treasury.gov/faqs/1126>.
[27] *Ibid.*
[28] "Export Administration Regulations End-User Controls: Imposition of Restrictions on Certain Persons Identified on the List of Specially Designated Nationals and Blocked Persons (SDN List)", (21 March 2024), online: *Federal Register* <https://www.federalregister.gov/documents/2024/03/21/2024-06067/export-administration-regulations-end-user-controls-imposition-of-restrictions-on-certain-persons>.

persons can likewise be exposed to secondary sanctions if knowingly provide service or conduct significant transactions with designees on the SDN list.

In sum, U.S. sanctions against the Russian aviation industry are multifaceted and extraterritorial, they leave little possibility to transact and service aircraft subjected to export control without penalty. In addition, the U.S. sanctioning regime is comprised of multi-agency efforts, it is therefore not uncommon to find multiple, and global deterrence on a single sanctioned subject.

2.2 The Nature and Scope of E.U. sanctions.

The breadth of the E.U. restrictive measures against Russian aviation sector are just as extensive as their U.S. counterparts, however, their biggest contrast stemmed from the extraterritoriality embedded in the sanctions. The E.U. measures are primarily limited to regulating the conduct of the block's persons and entities, although in the recent E.U. sanction packages, E.U. regulations began to cover certain activities in third countries and by non-EU or Russian actors. However, the scope of the E.U. sanctions does not liberally cover activities that do not have sufficient connection with the block.

In Council Regulation 2022/328, which amended Regulation 833/2014, individual and entities are prohibited from transacting "goods and technology suited for use in aviation or the space industry, whether or not originating in the Union." Unlike the U.S. BIS rules, the text of 2022/328 makes no distinction between EU and non-EU made products, therefore closing any debate on exporting and servicing foreign-made aerospace products to Russia. As previously mentioned, this regulation also mandated the termination of all existing contracts that service Russian aviation operators. It would appear on the surface that the EU Regulation is more restrictive, however, one cannot neglect the fact that the EU regulation only applies to actors within its member states. As explained by the European Commission, the regulations do not

ordinarily create legal obligations for non-EU actors, unless the conduct in question is connected at least partly to parties within the EU.[29] Moreover, the European Union does not recognize the extraterritoriality of foreign laws within its own boundary.

The limited scope of EU regulation makes meaningful difference in application and enforcement. Taking aircraft and related components as example, the EU regulation only restricts conducts that "sell, supply, transfer or export to any natural or legal person, entity or body in Russia or ***for use*** in Russia." The conditional wording "for use in Russia" in relation to the movement of aircraft is significant, unlike the U.S. BIS rules, which overwhelmingly prohibit any movement of restricted objects without license, the EU regulation permits those transfers that are destined for outside of Russia so long as the receivers do not fall within the scope the sanctions. This means that in cases where EU owners want to remove aircraft from Russia, no EU license is required.

Also absent in the EU regulation is the equivalency of the U.S. General Prohibition 10, as well as an administrative law akin to the U.S. Executive Order that specifically regulate the conduct of third parties without any nexus to the sanctions-sender state. This implies that actors in third countries are technically not as much at risk when it comes to performing services on Russian operated aircraft such as refueling outside the E.U. However, in practice, servicing non-U.S. aircraft still pose considerable risks due to the possible level of U.S. contents installed on many of them. (e.g. engines, which often account for substantial value of an aircraft)

The limited jurisdiction of EU regulations left certain room for restricted products to be diverted to Russia. To reduce the chances of circumvention, the EU has revised sanction packages several times since the invasion. In particular, the 12th package introduced a "no-Russia" clause which

[29] "Restrictive measures explained", online: *European Commission - European Commission* <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401>.

covers a list of sensitive goods including aircraft and related components.[30] This clause obliges EU individuals and entities to contractually prohibit their business counterparts in third countries from re-exporting sensitive goods to or for use in Russia.[31] The EU also requires "adequate remedies" in commercial contracts to deter non-E.U. actors from re-exporting restricted goods to Russia.

Overall, the E.U. sanction programs are sufficiently broad to encompass all transactions with Russian-owned and operated aircraft. The EU "no-Russia" clause sealed off a potential loophole in its sanctioning strategy, but it stops short of tracing re-exports down the stream or imposing a definitive penalty on violation. The E.U. sanctions have certain impact on third states, however, their extraterritorial effects are relatively limited.

2.3 Defining and Categorizing Sanctions

The term "sanction" is used throughout this article, but it is not a settled concept, some scholars use it to widely encompass all forms of detrimental measures from one state to another in the general sense[32] while others consider it more restrictively as an otherwise unlawful but justifiable measure in response to wrongful acts committed against the sender state.[33] Bogdanova argued that the word "sanction" is not a legal term of art, but it inhibits certain notoriety.[34] Indeed, the International Law Commission (ILC) has entirely refrained from using this term in its Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the terms

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[30] EU, *Regulation* 2023/2878 of the Council of the European Union of 18 December 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2023] OJ, L. 12g.
[31] *Ibid 12g.*
[32] Jan Klabbers, *International law*, second edition ed (Cambridge, United Kingdom: Cambridge University Press, 2017) at 165.
[33] Seyed M. Rowhani, "Rights-Based Boundaries of Unilateral Sanctions" (2023) 32 Wash. Int'l L.J. 127.
[34] Iryna Bogdanova, "Chapter 2 The Legality of Unilateral Economic Sanctions under Public International Law" in (Leiden, The Netherlands: Brill | Nijhoff, 2022) at 59.

"countermeasure" is used in place of "sanctions".[35] The ILC noted that sanctions are those measures levied through UN resolutions.[36] Despite the various approaches in attempting to define sanction, a consensus among a number of scholars is that sanctions are political tools in pursing compliance with legal obligations or foreign policy objectives.[37]

Unilateral economic sanctions do not fall under a single legal category.[38] Although there are often disputes on the legal implications of different sanctions, scholars mostly agree that they can be categorized as either retorsions or countermeasures. Retorsions are measures that are unfriendly, but nonetheless consistent with the engaging state's international obligations in response to an act it deems injurious to its legal rights.[39] In contrast with retorsions, Crawford notes that countermeasures are illegal actions contrary to a state's international obligations, but their wrongfulness are precluded if and to the extent that the measures constitute countermeasures to induce the other state to cease the injury, and to make reparation in line with its legal obligations.[40] Countermeasures are not limitless, as they are only intended to induce compliance, this position is supported by the International Court of Justice in the *Gabčíkovo-Nagymaros* case.[41]

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[35] International Law Commission, *Responsibility of States for Internationally Wrongful Act*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. [ARSIWA]
[36] *Ibid*.
[37] Lori F. Damrosch, "The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts", 37 BERKELEY J. INT'L L. 249 (2019) at 60, online: <https://scholarship.law.columbia.edu/faculty_scholarship/2927>. See also Alexandra Hofer, "The Proportionality of Unilateral 'Targeted' Sanctions: Whose Interests Should Count?" (2020) 89:3–4 Nord J Int Law 399–421, online: <https://brill.com/view/journals/nord/89/3-4/article-p399_399.xml>.
[38] *Ibid*.
[39] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, *in Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) at 128, online: <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.
[40] *Ibid*.
[41] *Gabčikovo-Nagymaros Project* (Hungary v Slovakia), [1997] ICJ Rep 7.

2.4 Invocation of Responsibility Against Russia

Countermeasures cannot sustain without the presence of an internationally wrongful act in the first place, in case of *United Stated Diplomatic and Consular Staff in Tehran*, the Court identified two elements of internationally wrongful act, firstly, the act needs to be imputable to that state; secondly, the act violates its treaty obligations in force or other applicable rules of international law.[42] The full scale invasion of Ukraine by Russia satisfied these conditions. It is also a well settled principle that only the injured state can invoke international responsibility against the state that committed the wrongful act.[43] To this effect, Ukraine may readily invoke responsibility against Russia for its violation of sovereignty by implementing countermeasures up to the level of injuries it has sustained. The major sanctioning powers including the U.S., UK, and EU member states, are not directly subjected to the harm of Russian invasion, as none of them were under attack nor an imminent threat of attack, and they are considered as third-party states from the belligerents' perspectives. However, injuries may give rise in the sense where certain economic and diplomatic rights such as overflying the Ukrainian airspace, conducting routine bilateral trades, and providing consular services to citizens abroad are infringed.

Insofar as to the ability of invoking responsibility by states not directly injured, the ARSIWA recognizes a narrow scope of obligation that is owed to a group of states or the international community as a whole.[44] The ICJ in the *Barcelona Traction* case determined certain essential obligations owed to the entire international community: "the outlawing of **acts of aggression**, and of genocide, as also…the principles and rules concerning the basic rights of the human

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[42] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1980] ICJ Rep 3 at para 56.
[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14.
[44] ARSIWA, *supra* note 35 art 48.

person, including protection from slavery and racial discrimination."[45] The Court in defining such obligation opined "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[46] In the case of Russian invasion, such universal obligation is undisputedly present. Countries not directly injured may therefore invoke responsibility against Russia under the notion of obligation *erga omnes*, consistent with Article 48 of the ARSIWA.

The implementation of countermeasures by states other than the injured on the other hand is a separate issue. Iovane and Rossi observed the inconclusiveness among legal scholars on whether the breach of an obligation *erga omnes* entitles all states to individually respond as injured parties, and they argued that the invocation of responsibility under obligation *erga omnes* compels for collective response, and decentralized measures are not permissible.[47] In supporting their claims, they noted that Article 48 of the ARSIWA limits the responses to claim from the responsible state to: (a) cessation, assurances and guarantees of non-repetition; (b) performance of obligation of reparation; whereas Article 42 prescribes the invocation of responsibility exclusively for injured state but without the any such limitations.[48] Iovane and Rossi further commented that collective response do not necessitate institutional process, such as UNSC resolutions, but "also whenever the international community comes together through processes of agglutination of state practice which may take place in institutional, political, or diplomatic settings."[49] The restrictive measures under the Russian sanction regimes are third-party

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[45] *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain), [1970] ICJ Rep 3 at 34. [emphasis added]
[46] *Ibid* at 33.
[47] Massimo Iovane & Pierfrancesco Rossi, "International Fundamental Values and Obligations Erga Omnes" in Massimo Iovane et al, eds, *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press, 2021) at 46.
[48] *Ibid*.
[49] *Ibid* at 66.

countermeasures, there are numerous indications that the western sanctions are indeed of coordinated nature, but they are also marked with individualized metrics in terms of territoriality and scope.

Additionally, it is inconclusive whether countermeasures are permitted by states not directly injured. However, "a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party."[50] Therefore, in the case of countermeasures, determining whether a sender state is injured is still relevant to the remedial rights available. The commentaries to the ARSIWA are silent on the overall legality of countermeasures by non-injured states, merely acknowledging their controversial and embryonic nature.[51] Even if the notion of collective countermeasures is deemed valid, it does not immunize unrestricted and indiscriminative measures against the target, this matter will be thoroughly explored in Chapter 8.

2.5 Summary

The Russian invasion of Ukraine has triggered some of the most severe sanctions against civil aviation of all times, Russian operators were denied access to several premium markets and the normal supply of aviation goods and services, while a significant portion of the world lost access to a vital and expansive airspace. The U.S. and E.U. produce more than half of the world's passenger aircraft, leveraging this benefit, they understandably imposed the most comprehensive sanctions against the Russian aviation industry. Although the two sanction programs are similar in their objectives in crippling Russia's industrial capability, the above analyses showed that they operate quite differently. These unilateral sanctions create lasting effects that go beyond Russia,

[50] ARSIWA Commentaries, *supra* note 35 at 127.
[51] See ARSIWA Commentaries, at 129 para (8).

as will be discussed in the next chapters, they affect lessors, insurers, foreign airlines, states, and even state-level cooperations at international organization.

In addition to the direct consequences of sanctions such as export bans and compulsory termination of service contracts, these international measures have triggered numerous reactive policies in Russia that arguably contravened its international obligations. These policies in turn translated into Russian aviation activities that are problematic at the very least to other parties globally. The secondary effects of sanctions should not be overlooked as they are not merely temporary and incidental. The next chapters will examine the Russian responses and their corresponding violations of relevant international aviation treaties.

3. Russian Responses and Violations of the Chicago Convention

After the imposition of international sanctions, Russia responded with several retaliatory measures against those states that adopted restrictive measures, as well as several national aviation policy changes that are incompatible with its international obligations under several international treaties. This chapter closely examines the legal and practical implications of these changes and identify their infractions of international treaties in place. This chapter will also attempt to analyze the reasons and logic behind these moves and violations.

A number of articles and column pieces since the Ukraine crisis appeared to take the rapid deterioration of the Russian civil aviation industry simply as granted by the consequences of sanctions as result of the invasion, and some authors regarded the prolonged presence and uses of western-owned aircraft in Russia as unlawful seizure at the state-level without elaboration. While these views are not erroneous from their own perspectives at specific points in time, they lacked in understanding of the intricate details, specifically, the legal and operational ramifications involved in the overall situation with Russian aviation. Due to the unique structure of the Russian

civil air fleet and the special legal characteristics of its equipment, it is imperative to first shed light on the major issues specific to Russia, it begins with the fleet structure.

3.1 Special Circumstances of the Russian Fleet

Most commercial workhorses in the Russian civil aviation network before the war in Ukraine, consisted of over 700 aircraft from approximately 30 Russian carriers that were foreign-registered, and among them over 500 aircraft were leased from international lessors and financiers.[52] These figures mean that over half of the Russian commercial fleet were foreign owned. In addition, the Russian carriers had transitioned their fleet from Soviet-era and Russian-designed aircraft into the more reliable western-made jets since the early 2000s.[53] With these precursors, Russian carriers faced two problems upon sanctions: 1. How to retrain these aircraft; 2. How to keep their aircraft flying.

As introduced in the previous chapter, both the U.S. and E.U. sanctions require the cessation of ancillary services of aircraft in Russia, they cover both financial and insurance services. The EU measures provided a deadline to terminate all existing contracts, while the U.S. sanctions were immediate. With these measures in place, the first and foremost threat to Russian carriers is the risk of aircraft repossession, because without the leased western jets, Russian carriers will simply not have the equipment to run their businesses. Even if Russian operators were able to retain these western airplanes, they still face the challenge of flying these aircraft according to the minimum standards promulgated by international treaty that Russia is a part of, such as the registration and airworthiness requirements from the Chicago Convention. As a large number of

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[52] "What do the recent sanctions on Russian operators mean for the aircraft leasing sector? - ACC Aviation", (7 March 2022), online: ACC Aviation <https://www.accaviation.com/what-do-the-recent-sanctions-on-russian-operators-mean-for-the-aircraft-leasing-sector/>.
[53] "Sanctions: Russia's commercial airlines face a slow death – DW – 11/18/2022", online: *dw.com* <https://www.dw.com/en/sanctions-russias-commercial-airlines-face-a-slow-death/a-63804157>.

Russian commercial planes were registered in foreign states, tasks such as maintaining proper registration and airworthiness were not entirely controlled by its own aviation regulators. Russian commercial jets were mainly leased from lessors based in Europe and Asia and were registered in Ireland and Bermuda for financial and tax reasons, with the sanction measures go into effect, what previously facilitated the rejuvenation of the Russian commercial aviation industry suddenly became prohibitive hurdles. About 740 Russian aircraft were registered in Bermuda and 34 were registered in Ireland as of March 2022.[54] The legal and administrative arrangements between Russia and the two states of registration are of great significance and they paved ways for a series of international treaty violations by Russia.

A crucial milestone in the aftermath of sanctions for Russian operators is the suspension of airworthiness certificates of all Russian aircraft by the Bermuda Civil Aviation Authority on March 12, 2022,[55] the Irish Aviation Authority replicated this action in the coming week over safety concerns.[56] Without valid airworthiness certificates, Russian airlines cannot legally operate beyond its borders.[57] Also relevant to the registration of aircraft is the validity of personnel licenses of the Russian crew members and radio licenses onboard all foreign-leased aircraft, which will be addressed in detail in the later parts.

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[54] "Irish civil aviation authority rescinds Russia-based COAs", online: *ch-aviation* <https://www.ch-aviation.com/news/113495-irish-civil-aviation-authority-rescinds-russia-based-coas>.
[55] "Bermuda suspends permits for Russian-operated planes over safety oversight concerns", *Reuters* (13 March 2022), online: <https://www.reuters.com/business/aerospace-defense/bermuda-revokes-licences-russian-operated-planes-over-safety-concerns-2022-03-13/>.
[56] "Irish aviation regulator suspends permits for Russian-operated planes | Reuters", (11 November 2023), online: <https://www.reuters.com/world/irish-aviation-regulator-suspends-permits-russian-operated-planes-2022-03-14/>.
[57] Convention on Civil Aviation, 7 December 1944, 15 U.N.T.S. 295 (entered into force 4 April 1947) [Chicago Convention] art 31.

The above issues concern not only Russian operators' ability to conduct flights, but they are also deeply interconnected with the relevant interests of international stakeholders such as lessors, insurers, and regulatory bodies in exercising their rights and duties.

3.2 Russian Policies on Aircraft Registration and Finance Post-Sanctions

The Russian Federation implemented several measures to counter the aviation sanctions from western nations. Shortly after the sanctions were in place, in response to the impending deadlines for international lessors to terminate leasing contracts, the Russian Federal Air Transport Agency requested Russian airlines to suspend international flights to prevent seizures.[58] Russian carriers complied pending further assessment of the situation.[59] On March 8, 2022, President Putin issued Presidential Order No. 100, instituting a temporary ban on the exports of certain products from Russia, and by March 9th, the Russian Government introduced a list a goods including aircraft in accordance with the Presidential Order and adopted Resolution No. 311.[60] Remarkably, on March 14, 2022, Russian President signed into law Federal Bill No. 56-FZ, amending the Russian Air Code and other related laws.[61] This legislation provided the Russian central government with the powers to determine the procedures of state registration of civil aircraft on the Russian State Register of Civil Aircraft, and the ascertaining of rights as well as the transactions in relation to civil aircraft. Following this amendment, the Russian Government

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[58] "Russia Bans Some Foreign Flights to Prevent Aircraft Seizure", (5 March 2022), online: *Bloomberg* <https://www.bloomberg.com/news/articles/2022-03-05/russia-bans-some-foreign-flights-to-shield-aircraft-from-seizure>.

[59] Katy Gillett, "Russian airlines suspend international flights", (6 March 2022), online: *The National* <https://www.thenationalnews.com/travel/airlines/2022/03/06/russian-airlines-suspend-international-flights/>.

[60] [Russian Government Resolution No. 311] Постановление Правительства Российской Федерации от 09.03.2022 № 311 "О мерах по реализации Указа Президента Российской Федерации от 8 марта 2022 г. № 100" | *On measures to implement the Decree of the President of the Russian Federation of March 8, 2022 No. 100*, 2022 g. No. 311. [translated by Apple Translate] [Resolution 311].

[61] [Federal Law on Russian Air Code and Other Laws] Федеральный закон от 14.03.2022 № 56-ФЗ "О внесении изменений в Воздушный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации" |*About introduction of amendments to the Air code of the Russian Federation and separate legal acts of the Russian Federation* 2006 g. N 56-FZ. [translated by Apple Translate].

adopted the controversial Resolution 411 on March 19, which administers among other things, the registration of civil aircraft owned by lessors from "unfriendly" foreign nations as determined by the Russian Government.[62] Regarding the so-called unfriendly foreign states, the Russian President had approved a list of over 30 nations, all of which have imposed restrictive measures against Russia, including all member states of the EU, US, UK and Singapore earlier on March 5th.[63] Unsurprisingly, these countries are also where the major service providers, including lessors and insurers for Russian aircraft are domiciled.

Resolution 411 effectively allowed the re-registration of foreign leased aircraft on the Russian Civil Aircraft Registry without the consent of creditors and de-registration on the prior foreign registry. Specifically, Under Resolution 411, an operator/applicant is no longer required to submit evidence of ownership of the aircraft seeking registration, as well as documents proving the aircraft's exclusion from the registry of civil aircraft of a foreign state.[64] In lieu of the previously required documents, Russian carriers who operate leased aircraft owned by "unfriendly foreign states" only need to submit copies of the lease agreements and the official notifications from foreign states on the termination or suspension of airworthiness certificate in relation to the civil aircraft.[65] It is readily apparent that Res. 411 was made in an attempt to

[62] [Russian Government Resolution No. 411] Постановление Правительства Российской Федерации от 19.03.2022 № 411 "Об особенностях государственной регистрации предназначенных для выполнения полетов гражданских воздушных судов в Государственном реестре гражданских воздушных судов Российской Федерации и особенностей государственной регистрации прав на воздушные суда и сделок с ними"| *On the specifics of state registration of civil aircraft intended for flight operations in the State Register of Civil Aircraft of the Russian Federation and the specifics of state registration of rights to aircraft and transactions with them.* 2022 g. No. 411. [translated by Apple Translate] [Resolution 411].
[63] "Russian government approves list of unfriendly countries and territories", online: *TASS* <https://tass.com/politics/1418197>.
[64] Resolution 411, *supra* note 61*,* (b) and (c).
[65] *Ibid.*

rehabilitate the credentials of Russian jets and was tailor-made for the suspension of airworthiness certificates by Bermuda and Ireland.

In addition to the law permitting the re-registration of foreign-owned aircraft, the Russian government also implemented Resolution 412, which prescribes revised requirements and procedures for financial obligations under lease contracts of aircraft owned by lessors of "unfriendly foreign states".[66] This resolution, inter alia, requires that any export of foreign-owned aircraft by Russian lessees must be carried out in accordance with the additional restrictions imposed by Presidential Order No. 100.[67] This means exports of foreign-owned aircraft connected with unfriendly states are ordinarily forbidden unless with special permission. Payments and other settlements in connection with the aircraft and engine leases from Russian lessees to foreign lessors from "unfriendly foreign states" must also be furnished in Russian Rubles as determined by the Central Bank Rate to a special "Type C" account opened with Russian banks in the names of the foreign lessors.[68] The most apparent function of this decree is to prevent the normal execution of aircraft repossessions under the terms of lease contracts, as well as the requirements of any existing international framework on mobile assets. The language of Res. 412 appears to "allow" the uninterrupted payments of existing leases but with a significant caveat that the funds received can neither be in foreign currencies nor can they be freely expatriated to foreign accounts. Therefore, Res. 412 works against the interest of most

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[66] [Russian Government Resolution No. 412] Постановление Правительства Российской Федерации от 19.03.2022 № 412 "Об утверждении особенностей исполнения договоров финансовой аренды (лизинга), договоров аренды иностранных воздушных судов, используемых для полетов лицами, указанными в пункте 3 статьи 61 Воздушного кодекса Российской Федерации, авиационных двигателей в 2022 году"| *On approval of the specifics of the execution of financial lease (leasing) agreements, lease agreements for foreign aircraft used for flights by persons specified in paragraph 3 of Article 61 of the Air Code of the Russian Federation, aircraft engines in 2022*. 2022 g. No. 412. [translated by Apple Translate]

[67] *Ibid* at 5.

[68] SEAMLESS Legal-Konstantin Baranov & Alexander Zhuravkov, "Ensuring the sustainable operation of aircraft and supporting Russian civil aviation: what market participants need to know", (12 May 2022), online: *Lexology* <https://www.lexology.com/library/detail.aspx?g=73afe171-742d-491b-9c21-6a1f5c743fe9>.

international lessors in aircraft repossessions while preserving the façade that Russia permits the continuation of existing leases.

The above post-sanction measures by Russia demonstrated the country's reliance on the existing international civil aviation ecosystem; on the one hand the restrictive measures against foreign-leased aircraft showed Russia's heavy reliance on western-built jets, on the other hand the federal re-registration law hinted that the Russian state is keen on keeping itself within the international civil aviation framework. These legislative actions appeared to temporarily alleviate Russian operators' primary concerns, namely the threat of losing aircraft and the trouble of not meeting minimum international operation thresholds. However, despite Russia's attempts to navigate the sanctions and to keep its ailing fleet afloat, these domestic legal measures are incompatible with its international obligations, and established international law precludes the invocation of internal law as a justification for treaty violation.[69]

3.3 Russian Infractions of the Chicago Convention

The Chicago Convention, officially known as the Convention on International Civil Aviation (hereinafter as "the Convention"), provides the foundation of all modern international civil aviation activities, and contracting states are bound by a common set of rules and standards in international flights operations.[70] Under the Convention, member states are to recognize as valid all licenses and certificates issued by the competent authorities of other nations on the condition that the issuing states have complied with the minimum standards set forth under the Convention and its annexes.[71] The Convention also established the aircraft nationality and registration regime where each aircraft bears the nationality of its state of registration, and a unique registration

[69] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 [VCLT] art 27.
[70] Chicago Convention *supra* note 57.
[71] *Ibid* at art 33.

number. The Convention provides certain privileges and restrictions on international flights among the contracting states, subject to the conditions of the Convention. By starting the Russo-Ukrainian war, Russia violated the fundamental principle against the use of force enshrined in the Charter of the United Nations[72], as well as the air sovereignty of Ukraine. In response of multiple international sanctions, Russia implemented countermeasures that further violated additional provisions of the Chicago Convention and disturbed the normal functioning of international civil air transportation. This section will examine these violations and provide analysis on the plausible motivations behind them.

*3.3.1 **Sovereignty of Ukraine***

The most serious and apparent infraction of the Chicago Convention is Russia's unequivocal violation of Article 1, which is the air sovereignty of Ukraine. Article 1 of the Convention states that "The contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory." This Article echoes the fundamental principle enshrined in Article 2 (4) of the UN Charter, which states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[73] Since the commencement of the Russo-Ukrainian war, Russia has invaded the airspace of Ukraine through all means of aerial offensives, including but not limited to fighter jets, ballistic missiles, and military drones.[74] The Russian military actions have violated both Article 1 of the Chicago Convention and Article 2 of the UN Charter.

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[72] UN Charter, 26 June 1945, Can TS 1945 No 7. [UNC]
[73] UNC art 2.
[74] "Ukraine in maps: Tracking the war with Russia", (24 February 2022), online: <https://www.bbc.com/news/world-europe-60506682>.

Russian officials attempted to justify its war efforts under Article 51 of the UN Charter, which provides the right to self-defense under certain conditions. Article 51 states that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[75] If an action can be appropriately justified under Article 51 of the UNC, it can also excuse the same action's otherwise breach of other international treaties. This is because of the supremacy clause integrated into the UNC under Article 103, which provides that obligations under the UNC prevails over all conflicting international agreements.[76]

The condition precedent to initiate self-defense was not present in the case for Russia, because there was no indication of armed attack against it prior to the war. In another effort, Russia argued that ethic Russian people in the regions of Donetsk and Luhansk were under prolonged abuse from actors in Ukraine, and after it swiftly recognized these regions as independent states on the eve of the war, it claimed that it was engaged in collective self-defense for these self-purported "states".[77] This Russian argument stood on very thin ice under recognized international law, Donetsk and Luhansk are not member states of the United Nations and therefore Russia cannot be said to have engaged in the collective self-defense of these regions against Ukraine. It is also far from clear how military operations into almost all parts of Ukraine lines up with its claim of regional abuse. Hence, the violation of Article 1 of the Chicago

[75] UNC art 51.
[76] UNC art 103.
[77] "Russian attempts to invoke international law dismantled", (9 March 2022), online: University of Cambridge <https://www.cam.ac.uk/stories/weller-ukraine>.

Convention is an active offense as the plain result of the invasion of Ukraine, Russia cannot use Article 51 of the UNC as a valid defense against its violation of the air sovereignty of Ukraine.

*3.3.2 **Airworthiness Violations Post-CoA Revocations***

The Chicago Convention imposes the requirement that every aircraft from contracting states that engage in international navigation shall carry a list of mandatory documents onboard, Article 29 of the Convention mandates the carrying of: (a) Certificate of Registration; (b) certificate of airworthiness; (c) the appropriate licenses for each member of the crew; (d) journey logbook; (e) radio station license; (f) passenger manifest; and (d) where applicable, cargo manifest.[78] As mentioned previously, Bermuda and Ireland each suspended the Certificates of Airworthiness (CoA) on all Russian operated aircraft shortly after the implementation of international sanctions. Hence, Russian aircraft that were registered in these countries could no longer lawfully conduct international flights.

But why couldn't Russia rehabilitate the airworthiness of the aircraft it operates on its own terms? To answer this question, one must trace back to the early arrangements of foreign-leased Russian jets at the sovereign level. The regulatory oversight functions of Bermuda-registered and Ireland-registered Russian airliners were governed by the two agreements Russia signed with each of these countries in the early 2000s respectively. These agreements were made pursuant to the authority provided under Article 83*bis* of the Chicago Convention, which allows certain functions and duties under the Chicago Convention to be transferred from the State of Registry to the State of Operator.[79] Hanley noted that lessors concerned with the ability to de-register leased aircraft from certain countries with operator-only registry, such as Russia, may take

[78] Chicago Convention, art 29.
[79] Chicago Convention, art 83*bis*

advantage of Article 83*bis* and register leased assets on their own registries.[80] This is precisely what lessors from Ireland and Bermuda did with aircraft leased to Russian operators. In each of the Article 83bis Agreement Russia signed, the oversight functions and duties pertaining to personnel licensing, rules of the air, and operation of aircraft were transferred to Russia, while Bermuda and Ireland each retained the oversight duties of the airworthiness of aircraft. Under the Russian 83*bis* arrangements, the delegation and transfer of oversight duties were made in reference to the Annexes of the Convention, where a series of standards and recommended practices (SARPs) are prescribed.

In the agreement between Russia and Bermuda for example, the state of registration and the state of operator were made collectively responsible to complying with the minimum standards set forth under Annex 1, 2, 6, and 8 of the Chicago Convention. [81] The Agreement explicitly transferred the duties under Annex 1 for personnel licensing, Annex 2 for rule of the air, and Annex 6 for operation of aircraft to Russia; and it retained Annex 8, which governs the airworthiness of aircraft, to Bermuda.[82] However, certain functions in Annex 6 overlap with Annex 8, and therefore there may be conflicts among the delegated duties. To ensure clear distribution of duties, the Agreement specifically made out a separate *Schedule* defining the detailed functions of each party. For instance, under *Schedule 2* of the Agreement, Russia was responsible with tasks such as aircraft maintenance and inspections and furnishing maintenance record periodically to the state of registration.[83] Bermuda on the other hand, was responsible for

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[80] Donal Hanley, Stefan-Micheal Wedenig, "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> at para 3.
[81] "Agreement Between the Government of Bermuda Department of Civil Aviation and Federal Aviation Administration of Russia Concerning the Transfer of Regulatory Oversight Functions and Duties", online: *International Civil Aviation Organization*< https://www.icao.int/secretariat/legal/83bis/4236-E.pdf>.
[82] *Ibid* art III.
[83] *Ibid* at *Schedule 2*.

tasks such as monitoring the continued airworthiness of aircraft, the issuance of Certificates of Airworthiness, and the approval of operator's maintenance programs. The agreement with Ireland is similar in structure and contents.[84]

The arrangements Russia made with the two countries of registration are the reasons it cannot manage airworthiness for any of the foreign-leased aircraft. For as long as these aircraft remain registered on the Irish and Bermudan Registries, Russian carriers must carry CoAs issued by Ireland and Bermuda on international flights. According to media reports and flight tracking data, after a brief suspension of international flights, it resumed international services to several "friendly" destinations using leased aircraft.[85] The use of foreign-registered aircraft without valid airworthiness certificates constituted a clear violation of Article 31of the Chicago Convention. Moreover, because of the onboard documentation requirements, Russia further violated Article 29 by flying civil aircraft internationally without carrying all mandatory certificates.

For Russia to reinstate the full legal status of its foreign registered aircraft, at least from a documentation standpoint based on the minimum requirements of the Chicago Convention, restoring its regulatory oversight power of the airworthiness of these aircraft appears to be the only solution in sight. One possible way to attain this goal is to bring back the registrations of these foreign-leased aircraft to Russia. The next section will examine Russia's attempts to furnish its desired outcomes and how they failed to deal with the existing problems and committed new violations of the Chicago Convention.

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[84] "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", (2 March 2022), online: *International Civil Aviation Organization*< https://www.icao.int/secretariat/legal/83bis/4576-E.pdf>.
[85] "Russia to resume flights with 52 'friendly' countries, PM says | Reuters", (8 December 2023), online: <https://www.reuters.com/world/russia-resume-flights-with-52-friendly-countries-pm-says-2022-04-04/>.

3.3.3 ***Re-registration of Aircraft***

In a bid to put its planes back into international skies, Russia resorted to some extreme measures that can only be described as desperate and unlawful. As indicated previously, Russia enacted a new federal law to amend its Air Code to allow for the registration of foreign-owned aircraft in Russia. In doing so, Russia empowered itself to issue certificates of airworthiness of domestically registered planes. As a sovereign state, Russia has every right to make laws to regulate the procedures of civil aircraft registration in any way it deems appropriate. However, this does not provide Russia with the liberty to contravene with its agreed international obligations.

The Russian Government Resolution No. 411 undermines the core principle on aircraft nationality under the Chicago Convention, while not specifically spelling the so-called re-registration, the new law relinquished the important requirement to prove ownership and de-registration and therefore opened the doors for duplicated nationalities. Article 17 of the Chicago Convention states that aircraft have the nationality of the state in which they are registered.[86] The Russian-operated planes were already registered in foreign states, they were either of Bermudan or Irish nationality. The Chicago Convention explicitly outlawed dual registration under Article 18: "An aircraft cannot be validly registered in more than one State".[87] But Article 18 leaves the opportunity for the change of registration from one state to another. Article 19 of the Convention defers the administration of aircraft registration and transfer to national laws: "The registration or transfer of registration of aircraft in any contracting state shall be made in accordance with its laws and regulations."[88] Equipped with the amended Russian Air Code, Russia directed the re-

[86] Chicago Convention art 17.
[87] Chicago Convention art 18.
[88] Chicago Convention art 18.

registration of hundreds of foreign-leased aircraft on its domestic registry.[89] These re-registrations were carried out without proper de-registrations from the previous states' registries, therefore, in clear breach of the rule against dual registration.

*3.3.4 **Termination of 83bis Agreement***

Shortly after passing the amended law on aircraft registration, Russia also terminated its Article 83*bis* Agreement with Bermuda, reportedly to aid its re-registration process.[90] In signing the government decree authorizing the termination of bilateral agreement with Bermuda, the Russian Prime Minister's Office stated the action will create conditions for the registration of civil aircraft on the Russian aircraft register and remove the risks for passenger air transportation.[91] The PM's Office further commented that the transfer of aircraft to Russian registry will enable the Russian federal air transport regulators to monitor the airworthiness maintenance.[92] It is clear from the these actions that the country intended to invalidate the regulatory oversight duties of Bermuda through the termination of the Article 83*bis* Agreement. However, such termination does not redelegate the airworthiness oversight to Russia, quite on the opposite, it had the effect of reverting all oversight functions and duties back to the country of registration.

Article 83bis provides the opportunity for aircraft to register on one state's national registry but to transfer some or all the permitted regulatory oversight duties and functions to the state of operator. The practical benefit of an 83bis agreement such as the one Russia signed with Bermuda is that the state of registration can be relieved of certain duties and functions in case of

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[89] "Data shows Russia has re-registered 360 aircraft after sanctions - AeroTime", (21 April 2022), online: <https://www.aerotime.aero/articles/30800-russia-re-register-aircraft-iba-data>.
[90] David Kaminski-Morrow16 March 2022, "Russia suspends Bermuda bilateral to aid re-registration of aircraft fleet", (6 November 2023), online: *Flight Global* <https://www.flightglobal.com/safety/russia-suspends-bermuda-bilateral-to-aid-re-registration-of-aircraft-fleet/147941.article>.
[91] *Ibid*.
[92] *Ibid*.

foreign-operated aircraft, however, it is significant to note that upon termination of an 83bis agreement, these functions and duties are not automatically extinguished. The Russian interpretation of the termination is erroneous in that it neglected the fact that its foreign-leased aircraft were still actively registered on the Bermudan registry by the time it suspended the agreement. Until the actual owners of aircraft request deregistration, Bermuda remains the sole obligator of all regulatory affairs to these aircraft. Hence, Russia's legislative attempts to overseeing the registration and airworthiness of foreign-owned aircraft were legally flawed.

The consequences of the termination of 83*bis* agreement with Bermuda is not limited to reverting the airworthiness oversight duties. In the Agreement, the duty to issue and maintain personnel licenses of air crew were transferred to Russia, therefore, the legal effect is that all Russian-issued licenses would be rendered valid on all Bermudan registered aircraft covered by the agreement. The termination, as correctly noted by the BCAA, effectively invalided all Russian pilot and crew licenses onboard all aircraft registered in Bermuda.[93] Since Russian carriers operated international flights with aircraft on the Bermudan registry after terminating the *83bis* agreement on March 16, 2022[94], it likely committed additional violations under Article 29(c) of the Convention, which is conducting international navigation without valid licenses. Furthermore, all other functions and duties originally delegated to Russia, such as the rule of air, are now back in the hands of the Bermudan authority.

As illustrated above, Russia's actions in allowing its civil aircraft to re-register without first verifying the de-registration status with operators failed to achieve its intended goal of

[93] "Article 83bis Agreement Bermuda-Russian Federation", (11 November 2023), online: *Bermuda Civil Aviation Authority* <https://www.bcaa.bm/article-83bis-agreement-bermuda-russian-federation>.
[94] For example, VP-BFI, an Airbus 321, re-registered as RA-73802, flew from Moscow to Dushanbe, Tajikistan on numerous occasions. Online: Flightradar24< https://www.flightradar24.com/data/aircraft/ra-73802#>

rehabilitating its foreign-leased fleet. In addition, instead of acquiring the regulatory powers to oversee the re-registered aircraft in Russia, the termination of the 83*bis* agreement with Bermuda injected additional challenges for Russian operators with leased aircraft in international airspace. The Russian moves were inconsistent with the Chicago Convention, and they created commercial and compliance hurdles for international stakeholders. As will be discussed in the proceeding chapters, the re-registration increased the workload of regulators worldwide and significantly hindered international lessors' ability to repossess aircraft.

3.4 Case Study: Sri Lanka repossession incident.

The large-scale re-registrations of leased aircraft by Russia made international headlines as the actions impeded upon the rights of the lessors, leading numerous authors to conclude that Russia was in fact seizing the aircraft. More than just the harms to private parties, the trouble that dual registration of civil aircraft can bring to a Chicago Convention contracting state is exemplified in an incident occurred in June 2022 in Sri Lanka.

On June 2, 2022, an Airbus A330-300 operated by Russian airline Aeroflot landed in Colombo International Airport.[95] This aircraft displayed the registration number RA-73702 on its fuselage, however, its previous registration number was VQ-BMY.[96] At the time this aircraft flew from Moscow to Colombo, as shown on the list of re-registered Russian operated aircraft published by the Bermuda Civil Aviation Authority, VQ-BMY was still actively registered on the Bermudan registry.[97] This aircraft was leased from Celestial Aviation Trading Limited from Ireland, and the

[95] "Sri Lanka detains Aeroflot A330 pending legal decision", (20 November 2023), online: *ch-aviation* <https://www.ch-aviation.com/portal/news/116232-sri-lanka-detains-aeroflot-a330-pending-legal-decision>.
[96] *Ibid*.
[97] "*Bermuda Aircraft Registry - Russian Air Operators.pdf*.<https://www.bcaa.bm/sites/default/files/Web%20Docs/Notices_BACs_OTARs/Bermuda%20Aircraft%20Registry%20-%20Russian%20Air%20Operators.pdf>.

aircraft was not fully paid for. Noticing the arrival of this aircraft, Celestial Aviation moved quickly to file a complaint against the aircraft, seeking its impoundment. Following the application from the lessor, the Colombo High Court issued an injunction preventing the A330 from leaving the airport shortly before its scheduled return to Moscow.

A number of issues are presented in this case. First and foremost, Aeroflot should not have flown the A330 in question to any international destination. As explained earlier, the airworthiness certificate of all Bermuda registered Russian jets were suspended, this means that Aeroflot was flying an aircraft without valid documentation. Building on this issue, if the pilots and crew onboard this flight carried Russian qualifications only, then the flight was operated without valid licenses. The second issue is about the registration of the aircraft. From a technicality perspective, the Aeroflot A330 had valid registration because it remained on the Bermudan registry for the time being, however, Article 20 of the Chicago Convention imposed the requirement that every aircraft in international flight should bear its appropriate nationality and registration marks.[98] The Aeroflot plane was bearing an "RA" registration while its only valid registration under the Chicago Convention was still VQ. It is likely that Aeroflot, like other Russian operators, used RA registration under the advice from Russian authorities so that it can be said to have carried an up-to-date Russian CoA. The next issue demonstrated the textbook example of how questionable decisions made by one contracting state can adversely impact others through the Chicago Convention. As contracting state of the Convention, Sri Lanka's civil aviation authority had an obligation to ensure that all civil aircraft engaged in international navigation in its airspace meet the minimum standards enumerated by the Convention. Allowing a foreign aircraft that was double registered and without a valid airworthiness certificate to enter

[98] *Chicago Convention* art 20.

its airspace and land at its airport, more likely than not that indicates Sri Lanka breached its international obligations under the Chicago Convention.

The lessor in this case sought to impound and to repossess the Airbus in question, it argued before the Sri Lanka court that Aeroflot illegally operated leased aircraft following the termination of lease agreement amid the EU sanctions prohibiting relevant services. Ordinarily, a court should decide on the substantive matters should it decide to exercise jurisdiction over the contested subject. However, the legal matter took a turn and became a diplomatic embroilment. The Russian Foreign Ministry summoned the Sri Lankan ambassador to Moscow and lodged an intensive diplomatic protest over the detainment of the Aeroflot aircraft, it was reported that Russia warned Sri Lanka about the danger to compromise the "traditionally friendly relation" between the two states.[99] Back in Colombo, the Attorney General of Sri Lanka submitted an appeal to the High Court and the court subsequently suspended the temporary injunction against the A330.[100] The aircraft departed Colombo on the same day over the objection of the lessor.

It is extraordinary in this case that Sri Lanka was willing to compromise its judicial system and international obligations to release the Russian-operated aircraft. It is also noteworthy that Sri Lanka is not and has never been a Cape Town Convention party as of 2024, otherwise its judicial decision over the leased A330 would have had far more implications for the state internationally. One may argue that the Sri Lanka repossession saga was an isolated case, because the country just went through a national fiscal disaster shortly before the incident. The Sri Lankan financial crisis arguably played a significant role in its reliance on certain foreign states in its diplomatic

[99] "Russian Foreign Ministry expresses protest to Sri Lankan envoy over detained plane", online: *TASS* <https://tass.com/politics/1460559>.
[100] "Colombo court lifts ban on detained Aeroflot Airbus A330 from leaving Sri Lanka - AeroTime", (6 June 2022), online: <https://www.aerotime.aero/articles/31222-colombo-court-lifts-suspension-on-aeroflot-a330>.

affairs, nonetheless, Sri Lanka could have avoided this hassle by strengthening its compliance with the Chicago Convention. It could have provided a notice to Russia that in keeping up with its international obligations, it declines to accept any foreign civil aircraft into its airspace without proper registration and documentations.

In fact, shortly following the suspension of CoA of all Russian-operated aircraft by Bermuda and Ireland, the International Civil Aviation Organization received several complaints from contracting states about the possible violations of the Convention by Russian airlines, it subsequently issued an electronic bulletin regarding flight safety as well as a State Letter to member states reminding them of their safety obligations in relation to monitoring foreign operators. The ICAO in a State Letter dated March 18, 2022, requested member states to ensure the full compliance of Annex 6, 11, 16, and 29.[101] The Letter also specifically highlighted the issue of reported use of dual-registered aircraft by "foreign operators" in member states' airspace, and the ICAO requested all contracting states to adhere to the single registration rule under Article 18.[102] Hence, Sri Lanka had prior notice of the situation, and it had ample opportunities to make changes to its policies. This author does not wish to infer the reasons behind the South Asian nation's inaction.

Despite the lack of compliance by Sri Lanka, this case highlighted the difficulties that some countries face in dealing with international civil aviation matters. Disturbingly, the Sri Lanka incident did not end with the departure of the Aeroflot A330, Russia reportedly demanded the

[101] International Civil Aviation Organization, State Letter AN 3/1.1- 22/41, *Safety obligations of ICAO Member States in relation to surveillance of foreign operators and adherence to the Chicago Convention*.
[102] *Ibid*.

reassurance from Colombo to guarantee the safety of its aircraft.[103] According to government statistics, Russia is Sri Lanka's second largest source of travel income.[104] While treading carefully with its international obligations, countries like Sri Lanka may have little choice but to also consider other factors relevant to its essential needs and survival. It is unclear whether or not Sri Lanka has adjusted its polices on Russian aircraft since the incident, but media report suggests that it decided to provide safe heaven to Russian operated aircraft.[105] What is certain from this outcome is that international lessors' chances of repossessing dual-registered Russian aircraft are close to non-existence in Sri Lanka, and the country's credibility in the aviation market took a heavy toll. Based on the facts here, it is not unreasonable to conclude that in this instance, the unilateral sanctions have worked to dismantle, at least in part, the uniformity of international civil aviation framework.

3.5 The Chinese and Turkish Ban on Re-registered Aircraft

In contrast with Sri Lanka, China acted pragmatically. In May 2022, the Civil Aviation Administration of China (CAAC) required all foreign carriers to update ownership and registration information.[106] Upon this request, Russian carriers could not provide satisfactory materials to prove proper de-registrations over aircraft that were re-registered. The information request from the Chinese regulator did not prevent Russian carriers from flying into Chinese

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[103] Reed Smith LLP- Jody Wood, "Russian diplomatic pressure trumps rule of law in Sri Lanka in close call for leased Aeroflot A330-343", (10 June 2022), online: *Lexology* <https://www.lexology.com/library/detail.aspx?g=d7176324-df42-4580-aab6-fa9fb4bceb0c>.
[104] "*Year in Review – 2023*", online: Sri Lanka Tourism Development Authority <https://www.sltda.gov.lk/storage/common_media/YearInReview2023Latest-2024-06-26.pdf>.
[105] Nabeel Shaikh, "Sri Lanka Guarantees Safety & Freedom of Russian Aircraft", (10 April 2023), online: *Simple Flying* <https://simpleflying.com/sri-lanka-guarantees-safety-russian-aircraft/>.
[106] "Report: China bars Russian airlines with foreign planes", (1 June 2022), online: *AP News* <https://apnews.com/article/russia-ukraine-putin-politics-european-union-c71b3bbdabb01adcce34b19e3d524c33>.

airspace, however, the measure effectively banned all re-registered Russian aircraft that were still owned by international lessors.

Based on the traditional close ties between China and Russia, could China ignore the Russian re-registration and continue to permit all Russian aircraft into its airspace like Sri Lanka? The answer depends on several factors, especially on the country's ultimate objective and any potential legal repercussions it could face. As a contracting state of the Chicago Convention, China has the legal obligations to ensure maximum compliance with the Convention, and dual registration is explicitly prohibited. Thus, accepting a re-registered aircraft without evidence of de-registration from the prior state of registry would be risky. From China's standpoint, in addition to the Chicago Convention, it is also a party to the Cape Town Convention. If China accepts a double-registered aircraft at one of its airports, it is foreseeable that an international lessor will move swiftly for repossession. Consequently, upon a lessor's successful showing of default by a Russian carrier, a Chinese court will have to decide on whether to rule in favor of the lessor and approve the arrest and export of the aircraft in question. Referring to the Sri Lanka incident, a court proceeding of this nature will likely result in a diplomatic standoff. Thus, in theory, China could have made any decision about the use of its own sovereign airspace and permitted the continuation of Russian traffics irrespective of registration status, but the drawbacks appear to have significantly outweighed the benefits. Accordingly, under the circumstances, issuing information update request was likely the best course of action for the Chinese regulator, as it not only maintained compliance with its obligations, but it also minimized the chance of both legal and diplomatic dramas. Similarly, in the face of growing

international pressure, Turkey officially banned dual-registered Russian aircraft from its airspace in late 2022.[107]

If the Sri Lankan acquiescence in the face of Russian intimidation worked to reduce the confidence in the Chicago Convention, the prohibition of dual-registered Russian aircraft by China and Turkey on the other hand demonstrated how the Convention could act as a safeguard to international civil aviation even in the wake of unilateral sanctions. It is highly probable that the later Russian settlements over some re-registered aircraft with international lessors, which will be addressed further in this article, were at least partially motivated by these airspace restrictions.

3.6 Summary

As examined, Russia committed several infractions of the Chicago Convention through its invasion of Ukraine and its post-sanctions domestic aviation policies. Arguably, some violations are more preventable than others, because the unilateral sanctions had concrete impact on Russia's overall ability to comply with some aspect of its international obligations. The next chapter will inspect the operational impact of sanctions on Russian aviation and the nation's compliance issues.

4. Operational and Compliance Issues

Under the current unilateral sanctions imposed on Russia, there exists several operational and compliance challenges. Russia's failure to adhere to international convention standards is

[107] "Turkey bans flights of Russian aircraft with dual registration", (20 November 2023), online: <https://finance.yahoo.com/news/turkey-bans-flights-russian-aircraft-141600046.html>.

evident, a working paper presented at the 41st Session of the ICAO Assembly reported the violations of the Chicago Convention by Russia, and the Assembly adopted Resolution A41-2 at the same Session asking the Russian Federation to cease all actions leading to the violations of the Chicago Convention and resolve the issues related to leased aircraft that were registered in other countries.[108]Resolution A41-2 further urged Russia to "prevent the operation of aircraft re-registered domestically without valid certificates of airworthiness".[109] However, it is worth examining Russia's practical feasibility to comply with the ICAO Resolution in light of all existing sanctions and in conjunction with the working structure of the Chicago Convention.

4.1 Registration-Airworthiness Duality

A brief inspection of the Chicago Convention can reveal that airworthiness is not an independent metric that can survive outside the registration regime, absent specific arrangement, the default obligation to maintain airworthiness of aircraft is on the state of registration. Article 31 of the Convention stipulates that "every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered."[110] In plain language, this means that the state of registry has the sole power to decide whether a given aircraft is airworthy. Article 33 further addresses the recognition of all certificates and licenses: "Certificate of airworthiness and certificates of competency and licenses issue or rendered valid by the contracting state in which the aircraft is registered, shall be recognized as valid by the other contracting states, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the

[108] ICAO, Doc 10184, Assembly Resolution in Force (as of 7 October 2022).
[109] *Ibid.*
[110] Chicago Convention art 31.

minimum standards…pursuant to this Convention."[111] This article imposes the duty for member states to recognize the certificates and licenses of others, on the condition that the recognizing/accepting states are satisfied that the certificates and licenses are at or above the Convention thresholds as enumerated in the Annexes. As can be seen from these provisions, the airworthiness of aircraft is deeply anchored to the state of registry, even in the case of cross-jurisdictional recognition. Hence, it is unreasonable to separate the discussion of airworthiness and registration in the context of international navigation.

To resolve the puzzle of Russian compliance in relation to foreign-leased aircraft, it is helpful to start with examining these questions: 1. Whether Russia can issue certificates of airworthiness over leased aircraft? 2. Whether Russia is able to demonstrate to the state(s) of registry that it can satisfactorily maintain its leased aircraft? As mentioned previously, Russia signed article 83bis agreements with Bermuda and Ireland respectively, and both agreements retained the oversight function of airworthiness to the states of registry. Therefore, Russia is not able to issue CoAs for any foreign leased aircraft for the purpose of international flight. Moreover, even after the cancellation of 83*bis* agreements, Russia still have no control over leased aircraft's certificates because under Article 31 of the Convention, a certificate of airworthiness is either issued by the ***state of registry*** or recognized as valid by such state. Thus, the answer to the first question is in the negative. Similarly, Russia unlikely has any hope to convince the two states of registry that it can properly maintain its leased fleet. As indicated by both Bermuda and Ireland, they were unable to confidently approve Russian aircraft's CoA due to the impact of sanctions. The Bermudan civil aviation authority explicitly questioned Russian authority's ability to conduct safety oversight, as airplane manufactures and OEMs stopped suppling parts to all Russian

[111] Chicago Convention art 33.

operators in the wake of sanctions induced restrictions.[112] The continuing airworthiness requirement under Annex 6 of the Chicago Convention requires operators maintain their aircraft with procedures acceptable to the State of Registry.[113] Based on the 83bis agreements, the continued airworthiness of Russian operated aircraft is contingent upon the satisfactory inspection of Russian maintenance records. Nonetheless, Russia's capability to procure genuine aircraft parts was compromised by the U.S. and EU comprehensive sanctions. Hence, Bermuda's concern was not unjustified and the answer to the second question is also in the negative.

Based on the above discussion, Russia's sole solution in compliance is left in the registration regime. Since the Convention only allows for one state of registration at a time, Russia has the options to either remain on foreign registries or migrating all registrations home. As established above, proving satisfactory airworthiness to foreign authorities would be futile while sanctions are still in place. The only realistic option for Russian carriers is to bring all regulatory oversight functions to Russia, that is to formally de-register leased aircraft. However, this is also uneasy because Russia cannot de-register these aircraft without the consent of international lessors. Article 19 of the Chicago Convention defers the registration and transfer procedures to the national laws of contracting states.[114] The vast majority of leased Russian jets were on the Bermudan registry, and using the BCAA rule on aircraft de-registration as an example, if a mortgage is registered against an aircraft, it cannot be removed from the registry until written authorization or otherwise proof that the mortgage has been discharged has been received from the relevant parties.[115] The Bermudan rule also allows for de-registration without the full

[112] note 34.
[113] Chicago Convention, Annex 6 Part I Chapter 8, 8.1.
[114] Chicago Convention, art 19.
[115] "De-registering an Aircraft", (12 November 2023), online: *Bermuda Civil Aviation Authority* <https://www.bcaa.bm/de-registering-aircraft>.

discharge of mortgage in rare circumstances, however, this would require the consent of all interested parties.[116] More likely than not that foreign lessors will not agree to de-registration until all mortgages are paid off.

Consequently, as Russia is neither in the position to convince foreign authorities to reinstate the airworthiness of its offshore-registered fleet, nor can it de-register aircraft without the consent of lessors, two possible ways are left in the view of this author. In the first way, Russia may achieve full compliance of the Chicago Convention by halting its entire fleet of foreign-registered aircraft from international operation altogether. In the second way, Russia may proceed with the formal de-registration from foreign registries by following all the necessary procedures. The first method if executed, can cease all controversies under the Chicago Convention because the Convention only applies to civil international flight. However, it is unrealistic for Russia from a practical perspective, because it will effectively suspend all international trades by air. Since unilateral sanctions have already severed much of its cross-border trade relations post-invasion, Russia likely relies on maintaining, if not strengthening commercial activities with nations on relatively friendlier terms in support of its faltering economy. The second method is technically possible, however, formal deregistration would require the full payment of leased aircraft, subject to certain conditions. There are two main issues for Russia when it comes to full payment, the first is economic viability, the second is the availability of such a redemption of aircraft by repayment. For Russia, it is not in its best interest to pay for long-term assets such as aircraft that cannot guarantee the full cycle usefulness under international sanctions. To better contextualize this idea, one would not normally buy a car without the assurances of after service.

[116] *Ibid.*

The large quantity of foreign leased aircraft in Russia also cast additional uncertainty to the economic feasibility for such an endeavor.

Moreover, it is crucial to note that "redeeming" leased aircraft is not a natural option associated with the leases unless such option explicitly exist in the contracts, because the aircraft are owned by the lessors and financiers, and upon terminal or default, the aircraft are due for redelivery to their owners. The Russian Prime Minister in presenting Resolution No.411 to the Federation Council emphasized that his government sought for solutions with international lessors to make repayment of leases and purchase of aircraft, but lessors insisted on the aircraft's return.[117] This result is unsurprising given the requirements of the sanctions and the urgency to preserve the condition of leased aircraft. At the early stage of sanctions' implementation, Russian operated aircraft were presumably still at relatively acceptable condition from a maintenance and valuation standpoint because the planes were installed with original parts and supplies, and they were not far off from their last update-to-standard maintenance checks. Thus, it was reasonable for lessors to seek repossessions rather than repayments under the circumstances for maximum redeployment potentials. Additionally, even if a lessor is willing to receive cash in instead of redelivery, the direct payment of aircraft from Russian lessees in exchange for the effective sale and deregistration may incur certain obstacles due to the restrictions in the sanctions.[118]

4.2 Special Designation: An Alternative Path for Compliance?

Interestingly, Hanley and Wedenig suggested in their article that one other possibility for Russia to keep flying its re-registered aircraft internationally (at least for the purpose of the Chicago

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[117] *Working Paper: Infractions of the Convention on International Civil Aviation by The Russian Federation, ICAO Assembly*, 41st Session Executive Committee, ICAO, A41-WP/430 EX/196 at 5.
[118] Such as the prohibition on financial services to aircraft leased to and for use to Russia, as well as the prohibition against the sales, exports, reexport and transfer of aircraft to Russia implemented by the US, EU and UK.

Convention) is by designating them as state aircraft, this way Russia may have an excuse that the Chicago Convention does not apply, which is also coincidentally convenient for Russian friendly states.[119] However, the designation of state aircraft can be problematic and fruitless in practice. Under the Chicago Convention, aircraft used in military, custom, and police services are deemed to be state aircraft, however, the convention supplied no specific definition or elaboration.[120] As Wouters and Verhoeven stated, there is no clear definition of State aircraft in public international law, and some nations have their own statutory definitions regarding the designation of this status.[121] There are mainly two approaches in defining state aircraft, one is by the ownership and operator, and the other is by the purpose and use.[122] Under the ownership and operator approach, all aircraft owned and operated, regardless of purpose can be considered as State aircraft. This approach is suspected of being too wide and general because a passenger aircraft for commercial operation can be regarded as state aircraft simply by the virtue of being owned or operated by the state. Many airlines are state-owned or state majority-owned worldwide, but they still fall within the confine of the Chicago Convention because the airlines are engaged in civilian and commercial operations. Thus, state operator or state ownership will unlikely be the deciding factor as a practical matter. On the other hand, defining State aircraft by purpose and use narrows the scope, where only aircraft used for state purposes or performing public tasks are considered State aircraft. Some states follow this approach, for example, the United States in Federal Aviation Regulations restricts public aircraft to those that are operated to carry out certain governmental functions or commissioned by government branches, and *not for commercial*

[119] *Supra* note 56.
[120] Chicago Convention art 3.
[121] Jan Wouters, Sten Verhoeven, "State Aircraft", online: *Oxford Public International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1223?prd=MPIL>.
[122] *Ibid*.

purpose or to carry an individual other than a crewmember or a qualified non-crewmember.[123] The FAR further defines commercial purpose as transportation of persons or properties for compensation or hire.[124] As narrow as this approach may appear on its surface, it nonetheless provides the opportunity for aircraft not directly owned or operated by the state to be considered State aircraft. To contextualize this concept, a commercial jet owned by a private entity chartered for official defense missions can be deemed as state aircraft under this method.

Professor Bing Cheng observed that the Chicago Convention adopted such a functional approach in limiting the category of aircraft excluded from the Convention's jurisdiction, whereas the Paris Convention, although employed a similar language, failed to reflect more accurately the contracting parties' intention.[125] Drawing a comparison between the wordings used by the Paris Convention and the Chicago Convention, Cheng noted the difference between "military, customs and police aircraft" in *Paris* and "aircraft used in military, customs and police services" in *Chicago*, the latter categorizes aircraft beyond the mere ownerships and affiliations.[126] In Cheng's view, the Chicago Convention limits State aircraft solely to those aircraft performing the 3 listed functions in Art. 3(b). Other aircraft not performing the designated functions whether or not owned or operated by a contracting state's government thereby shall not be treated as State aircraft for the purpose of the Convention. Similarly, Haeck and Bourbonniere identified a "Chicago-type" State aircraft category that is distinguishable from the more conventional understanding, this category only applies to airplanes with limited functionalities, whereas other aircraft, despite performing State-like tasks such as mail delivery, are not excluded from the

[123] 14 C.F.R § 1.1 Definitions and Abbreviations. Note: the U.S. uses "public aircraft" instead of "state aircraft".
[124] *Ibid.*
[125] Bin Cheng, "12 State Ships and State Aircraft" (1958) 11:1 Current Legal Problems 225–257.
[126] *Ibid* at 233.

application of the Convention.[127] They regarded the functional approach under Article 3 as restrictive but submitted that this approach has an effect to expand the scope of the Convention as discussed above, and such an expansive coverage is nonetheless consistent with the Convention's object and purpose.[128] These views highlight the Convention's broad scope and narrow exception, equally significant is the Convention's unique classification of State aircraft.

For foreign-registered aircraft in the Russian commercial fleet, unilaterally designating them as State aircraft while maintaining commercial operation for passenger carriages does not work well to exclude the application of the Convention. Firstly, not all Russian airlines are state-owned, and even if Russia were to nationalize all its carriers, the virtue of state ownership alone is insufficient to render aircraft performing commercial services State aircraft under Article 3(b). Moreover, a foreign state cannot accept this notion unless it is prepared to recognize all state-owned airlines equally from all Convention contracting parties as State aircraft, however, doing so will inevitably risk denying itself the benefits of the Chicago Convention in other jurisdictions where this position is rejected. Some states such as Russia in this scenario may wish to extend the notion of public authority in designating a status for its aircraft, but as Professor Cheng correctly noted, such extension is an exercise of domestic power, and it does not automatically amount to any international effect.[129] Therefore, other countries are under no obligations to accept such unilateral qualification unless [altered by consent, recognition, acquiescence or estoppel].[130] Secondly, international passenger carriage for the purpose of commercial profit

[127] Michel Bourbonniere, Louis Haeck., Military Aircraft and International Law: Chicago Opus 3, 66 J. AIR L. & COM. 885 (2001).
[128] One of such important purpose is found in the preamble, "the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner." Chicago Convention, Preamble.
[129] Cheng, *supra* note *125* at 235. *See also* VCLT art 26, art 27.
[130] *Ibid*.

makings can hardly be accepted as performing state services, let along the more specific functions under Article 3(b). A contracting state on the receiving end of Russian operated aircraft must therefore carefully evaluate whether the operation of regular passenger flights for revenue can fit the designation of "State aircraft" for the purpose of the Convention. Hence, unless performing a qualified state activity, the self-purported state aircraft designation will unlikely absolve Russia from its liabilities under the Chicago Convention for most of its international flights using foreign registered aircraft, it is a circumvention at best.

4.3 Summary

As illustrated above, there are limited options left for Russia to maintain the legal status of its air fleet under the Chicago Convention, there also appear to be little option to deregister leased aircraft without returning them to their respective lessors at the time. In all the efforts holding onto its leased aircraft, Russia repeatedly caught itself in a Catch-22 paradox where complying with the Convention registration rule means that it cannot simultaneously meet the airworthiness requirement, and vice versa. Such a vicious cycle may be initially induced by unilateral sanctions for their disruptions of commercial activities but aggravated by Russian legislative acts inconsistent with its international obligations. It is inadequate to address the Russian situation with the Chicago Convention alone, as seen in the preceding paragraphs, a crucial ingredient in Russia's airworthiness and registration paradox is found in the aircraft finance struggles post-sanctions. The next part will turn the attention to unilateral sanctions' impact on aircraft leases in Russia, it will lend significant focus to the Cape Town Convention and relevant insurance clauses in analyzing the issues confronting lessors and insurers.

5. Sanctions' Impacts on Leased Aircraft

5.1 The Cape Town Convention and Russian Operated Aircraft

The Convention on International Interests in Mobile Equipment, better known as the Cape Town Convention, [131] together with its Aircraft Protocol collectively facilitates and protects transactions involving high-value aviation assets, including airframes, aircraft engines and helicopters.[132] Aircraft and engines are highly mobile in nature, as they function by transporting from one place to another, this feature creates considerable uncertainties as to exercising the rights and interests for lessors and financiers across different jurisdictions. The primary objective of these instruments is to protect the interests of lessor and financiers in asset-based financing and leasing of equipment of such nature, and to serve this end, the CTC established the concept of international interest as well as a priority-based international interest recordation system called the International Registry (IR). This interest recordation regime provides lessors, banks and any other interested parties a transparent and accessible platform to view existing interests associated with relevant assets, as well as to record any additional interest required in new transactions. The Convention provides a set of rules on allocating the priorities of various interests on the IR. An international interest may be granted by the chargor under a security agreement, vested in a person who is the conditional seller under a title reservation agreement; or a person who is a lessor under a leasing agreement.[133] The CTC was created to build a unified and predictable framework so that the associated rights and interests are recognized and enforceable in all contracting states. Under Cape Town, subject to the declarations lodged by member states over

[131] *Convention on International Interests in Mobile Equipment*, 16 November 2001, 2307 UNTS 285 (entered into force 1 March 2006) [CTC].
[132] *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, 16 November 2001, 2367 UNTS 517 (entered into force 1 March 2006) [Aircraft Protocol].
[133] CTC, *supra* note 131 art 2 para 2.

certain alternatives provided for by the convention, contracting states must respect the contents and arrangements of transactional agreements between the parties.

A wide range of creditors are comprehensively protected by the CTC. The Convention defines a creditor as "a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement."[134] The CTC makes a distinction for creditors of different types such as conditional sellers and chargees in terms of remedies, however it does not differentiate among the various types of leases such as finance lease and operating lease.[135] With all the emphasis on the creditor, remarkably, the jurisdiction of the Cape Town Convention is not concerned with the creditor but is rather dependent upon the debtor. The CTC is applicable if the debtor is situated in a contracting state. [136] In addition to the applicability provided under Article 3 of the main convention, the Aircraft Protocol further extends the jurisdiction of the convention where an airframe pertaining to an aircraft, or helicopter is registered on the aircraft registry of a contracting state at the time of the creation of the agreement.[137] Aircraft leased to Russian airlines are covered by the Cape Town Convention because the airlines as debtors are domiciled in Russia, and furthermore, almost all the leased aircraft were registered (as a requirement of the leases) on the Bermudan and Irish registers, and these countries are contracting parties to the CTC.

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[134] CTC, *supra* note 131 art 1(i).
[135] Donal Hanley, *Aircraft Operating Leasing: a legal and practical analysis in the context of public and private international air law*, third edition ed, Aerospace law and policy series; v 9; volume 9 (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V., 2022).
[136] CTC, *supra* note 131 art 3 para 1.
[137] Aircraft Protocol, *supra* note 132 art VI (1). Note that the CTC also applies where the registration of an aircraft in a contracting state is made pursuant to an agreement for such undertaking, and the Protocol treats such registration as if it became effective at the time of the agreement for the purpose of jurisdiction.

5.2 How the CTC Interacts with the Russian Sanctions

Unlike the Chicago Convention, which is a public international law treaty that regulate the affairs between sovereign states, the Cape Town Convention on the other hand is an international treaty in private law that concerns the conducts of private commercial behaviors. Contracting parties under the CTC have the flexibility to agree on key terms such as events of default, payment terms, default remedies and forum choices. Despite this difference, the full force and effect of a private international law treaty such as the CTC still depend on the cooperation of the contracting states so that the rights and obligations of the parties can be enforced. In the case of internationally leased Russian airliners post-sanctions, the Russian Federation severely interfered with the rights, interests and obligations of private and commercial entities including airlines, lessors and insurers through its numerous state actions. These behaviors violated the core principles of the CTC and forcibly overrode contractual arrangements between commercial parties that are governed by the CTC. The sanctioning countries, through their mandatory measures, also derailed the normal course of business of lessors, financiers and insurers, leaving them with limited choices.

As previously introduced, the European Union in Regulation 2022/328 requires aviation manufactures and service providers including lessors, banks and insurers to cease any further business in relation to any aircraft and other aviation materials to any individuals or entities in Russia or for use in Russia. The EU also provided a grace period for winding down existing contracts entered before February 26, lessors, insurers and other interested providers had until March 28 to terminate all contracts involving Russian clients and comply with the prohibitions in full scale. The United Kingdom also implemented sanctions of similar fashion and prohibited all aviation related services to Russia. When the sanctions first came to light, it became clear that all

aircraft leased to Russian carriers must be repossessed for several reasons. First, the conditions for Russian carriers to conduct lawful commercial operations no longer exist, because under the sanctions announced by the EU, US and UK, Russian carriers became ineligible to receive continued support from OEMs of aircraft parts and supplies. As a result, leased aircraft would soon fall short of the requisite airworthiness standards under any lease agreement. Second, under the EU and UK sanctions, insurers from these regions would be barred from providing any service to Russian aviation after the end of March, this means that most Russian operators would have no way to maintain their required coverages. This impact is largely due to the fact that most if not all internationally leased aircraft in Russia were reinsured in the London and other international markets.[138] Last and most importantly, the lessors would no longer be able to continue with the leases after March 2022 under the sanctions, and they would have no lawful means to receive lease payments in the normal course afterwards.

Depending on the contractual language employed in each lease agreement, all Russian lessees (airlines) have defaulted over their lease agreements voluntarily or involuntarily in varying degrees. It is significant to note that a default is not necessarily triggered by the wrongful actions of a lessee, and it is not fault or causation based, but rather is contingent upon the occurrence of one or more of the events that the parties have agreed at the conclusion of the lease agreement. Thus, a lessee can be in default of the agreement for any number of reasons beyond its own control. Under Article 11 of the CTC, creditors and debtors in a transaction may agree in writing as to the events that constitute a default that gives rise to the rights and remedies specific in Article 8, 9, 10, and 13.[139] Typical examples of events of default in aircraft lease agreements

[138] Henry Lynk, "The Heated Battle Over Trapped Aircrafts in Russia continues", (1 March 2024), online: *Lester Aldridge* <https://www.lesteraldridge.com/blog/aviation/russia-sanctions-mega-trail/>.
[139] CTC, *supra* note 131, art 11 para 1.

include: non-payment, failure to perform conditions of the lease agreement, confiscation and seizure of aircraft, failure to maintain insurance coverages, and material adverse change in business or financial conditions.[140] Even in the case where the transacting parties have not agreed on the events that constitute default, the CTC provides that event which substantially deprives a creditor of what it is entitled to expect under the agreement can be considered as default for the purpose of exercising remedies under the convention.[141]

Since the implementation of post-invasion sanctions, Russian lessees' ability to make payments became severely restricted amid the designations of major Russian financial institutions and later expulsions from the SWIFT international telegraphic payment system by foreign governments.[142] Some operators have stopped payment over aircraft leases to foreign lessors altogether, while other operators like Aeroflot, upon the enactment of Federal Resolution No.95, opened domestic bank account dominated in the Russian currency to deposit what supposed to be lease payment.[143] Non-payment and payment in a currency/account other than what was required by the agreement can both constitute events of default. In addition to payment obligations, other common conditions which can trigger contractual default were likewise present in the case of Russian operators. For instance, Russian carriers' failure to maintain valid airworthiness certificates in the states of registry is exemplary. As the BCAA and IAA both announced the suspension of certificates of airworthiness over Russian operated aircraft, the event of default

[140] "Enforcement of Security Over an Aircraft", online (pdf): *Dillon & Eustace* < https://www.dilloneustace.com/uploads/files/Enforcement-of-Security-over-an-Aircraft.pdf>.
[141] CTC, *supra* note 131, art 11 para 2.
[142] "EU Cuts Seven Russian Banks From SWIFT, Bans RT And Sputnik", (2 March 2022), online: *RFE* < https://www.rferl.org/a/eu-swift-russian-banks/31732511.html>.
[143] "Five Russian airlines have returned leased jets -document", (2 June 2022), online: *euronews* <https://www.euronews.com/next/2022/06/01/ukraine-crisis-russia-airlines>.

had unquestionably occurred at least in some lease agreements.[144] Even in the absence of any agreement on default, the drastic changes in regulatory climate inside and outside of Russia under international sanctions may be deemed to have significantly deprived the benefits the lessors were entitled to expect in the lease agreements. It is also not uncommon for lessors to insert commercial illegality as a termination event in lease contracts, as in the case with sanctions against Russian war efforts, the existence of such a term would call for the rights of lessors to utilize the default remedies.

International lessors were confronted with large-scaled impending defaults by Russian operators due to unilateral sanctions in March 2022, meanwhile in Russia, instead of permitting lessors and financiers to exercise their default remedies under lease contracts in conformity with the Cape Town Convention, the Russian government took preemptive legislative actions to undermine and override some of the most fundamental provisions of the CTC. The Russian legislative acts significantly altered the commercial terms, especially those in relation to the primary obligations of Russian debtors in the lease agreements, rendering many if not all default remedies moot in Russia. For these reasons, a considerable number of media outlets and legal practitioners described the Russian move as an effective seizure of foreign leased aircraft.[145] Below will provide a brief introduction to the default remedies and examine the major obstacles in exercising them as result of the Russian legal amendments in contravention of the CTC.

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[144] For example, in the case of 3 aircraft leased to AirBridge Corporation in Russia and owned by BOC Aviation, the lease agreement required the lessee to maintain valid CoA with the Bermudan authority.

[145] "Canadian Bar Association - Unlawful Seizure: The Legal Implications of Russia's Re-Registration of Leased Aircraft", (11 November 2023), online: <https://www.cba.org/Sections/Air-and-Space-Law/Resources/Resources/2023/AirEssayWinner2023#_edn1>. Many news reports also described the Russian actions as seizures, for example, see also Chris Isidore Liakos Chris, "Russia moves to seize hundreds of planes from foreign owners | CNN Business", (16 March 2022), online: *CNN* <https://www.cnn.com/2022/03/16/business/russia-aircraft-seizure/index.html>.

5.3 Default Remedies Under the CTC

The CTC provides a list of default remedies under Chapter III: Article 8 contains the remedies for chargees, and Article 10 provides the remedies available for lessors and conditional sellers. To assess the impact of unilateral sanctions against Russia on aircraft leasing and financing, this article directs the attention to the remedies available for international lessors. Article 10 of the CTC enables a lessor in the event of default under a title reservation agreement or a leasing agreement to terminate the agreement and take possession or control of any object to which the agreement relates; or alternatively apply for a court order authorizing or directing either of these acts.[146] The events of default are as provided in Article 11, and are ordinarily those agreed by the parties in the leasing contracts.

The termination and repossession of aircraft are subject to the declarations made by the relevant contracting states under Article 54, specifically, paragraph 2 of this article allows a contracting state to declare whether or not any remedy available to the creditor under any provision of the convention not explicitly requiring the application to court be exercised without court approval.[147] The Russian Federation has declared in its Official Declaration that it ***does not*** require creditors to seek court approvals for those remedies.[148] The Aircraft Protocol provides creditors with enhanced default remedies in addition to those under the convention in Article IX: " In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter: (a) procure the de-registration of the aircraft; and (b) procure the export and physical

[146] CTC, *supra* note 131 art 10.
[147] CTC, *supra* note 131 art 54 para 2.
[148] UNIDROIT, "D - Russian Federation ct - UNIDROIT", (16 July 2021), online: <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/d-russian-federation-ct/>.

transfer of the aircraft object from the territory in which it is situated."[149] This article is made to ensure that upon default or termination, a creditor is entitled to not only taking the possession of the aircraft in question, but also to properly depose all other legal and administrative matters associated with the aircraft so that it may be remarketed for revenue. Notice the wording used in this clause, it is important to distinguish the term "aircraft" from "aircraft objects" here because the two terms bear similar but different operative meanings. An "aircraft" means aircraft as defined for the purpose of the Chicago Convention which are either airframes with engines installed or helicopters, while "aircraft object" means airframes, aircraft engines and helicopters.[150] Only an aircraft can be registered under the Chicago Convention but not aircraft engines, and the Cape Town Convention and its Aircraft Protocol extend protections against both objects. This is because engines are of significant value in proportion of an aircraft and are detachable for use from one aircraft to another. These remedies are in place to provide lessors with adequate protections, however recent Russian laws impose barriers on foreign lessors from exercising them.

5.4 Russian Impediments of the CTC Provisions

Following the occurrence of event(s) of default post-sanctions, and subject to any grace period allowed by the agreements, lessors to Russian operated aircraft were entitled to terminate the lease agreements and take possession as well as to export aircraft located in Russia and elsewhere. Significantly, these remedies do not require the application with a court in Russia as it has elected to forgo the process pursuant to Article 52(2) of the CTC. In reality, Lessors encountered not only physical challenges as byproducts of the airspace closures in repossessing

[149] Aircraft Protocol, *supra* note 132, art IX para 1.
[150] Aircraft Protocol, supra note 132 art I para 2 (a) and (b).

leased aircraft, but the Russian authorities acted in concert to prevent all efforts by the contracting parties to carrying out contractual previsions, as well as to exercising their respective rights and obligations provided under the CTC.

Specifically, at the first instance through Federal Law No.56-FZ, Russia overrode all contractual requirements in aircraft leases in connection with nationals from the so-called "unfriendly foreign states" (herein as UFS) by subjecting all leases to the mandatory rules and regulations adopted by the Russian government in relation to UFS.[151] This action effectively altered the primary obligations in all aircraft leases connected to the domiciles of major lessors including Ireland, Singapore, and Bermuda. Knowing the certainty and the consequences of contractual default, the Russian Federal Air Transport Agency reportedly asked all Russian operators to suspend international flights to prevent the arrest and seizure of aircraft abroad.[152] The Russian Deputy Prime Minister also corroborated the aviation regulator in public statements. It was later revealed in a litigation document that Russian carriers were advised by the regulators not to return aircraft to lessors upon receiving termination notices, they were instead instructed to engage in negotiations with foreign lessors.[153] These government tactics speak volumes about Russia's intention to delay any repossession attempt at all costs. As previously mentioned, Russia further altered the terms of lease agreements by explicitly directing and allowing Russian operators to re-register aircraft owned by UFS entities in Russia without deregistering from the foreign registers.[154] Lease agreements set forth the place of registration of aircraft for many legitimate reasons, they can be for ease of administrative procedure, risk management, taxations

[151] Regulation No.56-FZ amended the Russian Air Code as well as Regulation No.164-FZ on Foreign Trade Activity.
[152] "Russian air transport agency recommends national airliners to limit international flights", online: *TASS* <https://tass.com/economy/1417375>.
[153] *Zephyrus Aviation Partners v. Fidelis Underwriting Limited* [2024] EWHC 734 (Comm) at p136.
[154] See Russian Resolution No. 411.

and more. Also recall that the Chicago Convention only allows one state of registry at a time, the re-registration has serious implications beyond the violation of the Chicago Convention addressed in prior sections, because unconsented registration adds to the uncertainty for lessors to remarket aircraft even after successful repossessions. As observed by the Aviation Working Group in its statement following the Russian legislative actions, the re-registrations of leased aircraft hinder the creditors' ability to utilize the Irrevocable Deregistration and Export Request Authorization (IDERA) granted by the Aircraft Protocol.[155] Russia when acceding to the Cape Town Convention declared its application of Article XIII to the Aircraft Protocol.[156] This provision grants creditors the right to expedient repossession with pre-signed IDERA form irrespective of non-cooperative debtors. One additional issue brought forward by the Russian re-registration law under Resolution 411 is that the new law appears to also permit the concurrent registration of rights to the aircraft on the Russian register, while this does not confer valid legal titles of aircraft to the operators per se, it nonetheless has the potential to disrupt the priority of international interests held by the lessors.

The most devastating and egregious encroachment to the Cape Town remedies is laid by Resolution No.311, which prohibited the exportation of aircraft and other aviation related goods to anywhere except the Eurasian Economic Union without special permission, and the narrow exception only consisted of four close allies of Russia, none is home to a lessor serving Russian operators. This law rendered ineffective any remedies that lead to the exportation of aircraft objects, and it is in direct contradiction with Article 10 (1) of the CTC and Article IX (1) of the

[155] The Aviation Working Group, "AWG Statement on Russian State Action Constituting Breach of the Cape Town Convention - Release Date: 18 March 2022", online: *AWG* < https://awg.aero/wp-content/uploads/2022/03/AWG-Statement-Russian-State-Action-Constituting-CTC-Breach-March-18-2022.pdf>.
[156] *Supra* note 148.

Aircraft Protocol. In addition to prohibiting the export of aircraft objects, Resolution 311 also nullified the declaration Russia made pursuant to Article 54(2) of the CTC because under no circumstances can a foreign lessor exercise the self-help remedies provided for by the CTC or the lease agreements.

The Russian countersanctions also affect other obligations in the lease agreements in relation to Russian carriers, payment and insurance are the two key areas affected. Recall that Federal Law 56-FZ requires the compliance of Russian special economic regulations by aircraft lessors from UFS in addition to existing contractual terms, the amended Russian law under Resolution 95 mandates any financial settlement in relation to aircraft leases in connection with UFS be made in the Russian currency, and payments must also be furnished to domestic Russian accounts that are restricted. In contrast with Resolution 95, most Russian lessees are required by their contracts to make payments in a liquid international currency other than the Russian Roubles such as the U.S. Dollars or Euros. What is more troubling is that the type of account required by the law may be opened and maintained by a lessee in the name of the UFS lessor, and the amount to be settled in the Russian currency is exclusively determined by the Central Bank of Russia exchange rate on the payment date. The Russian special economic measure against UFS persons and entities significantly alters the contractual payment obligations of Russian lessees set forth by the lease agreements, and it further deprives lessors the rights to receive and access lease payments, as well as other fees that were overdue. It is highly probable that the compliance of Res.95 would trigger the default provisions in many agreements.

Adding to the woes on aircraft finance already inflicted by the EU sanctions, the Russian measures also prohibited Russian insurance companies from dealing with insurers and reinsurers from UFS. Russia enacted the amended Federal Law 55-FZ on March 14, 2022, among other

things, this law prohibits Russian insurance companies from entering into contracts with insurance and reinsurance companies, and insurance brokers located in UFS.[157] It also prohibits Russian insurance and reinsurance companies from making any payment including insurance premiums and proceeds to insurers and reinsurers in UFS.[158] Russian subsidiaries of UFS insurers as well as Russian insurers controlled by UFS nationals are both covered by the same prohibitions.[159] Under 55-FZ, insurance risks assumed by Russian primary insurers cannot be transferred to foreign reinsurers with higher ratings on the London and major international markets, making one of the key commercial terms in Russian aircraft leases impracticable. In addition to the insurance restrictions, Resolution No. 412 obligates Russian operators to procure insurance and reinsurance for leased aircraft owned by unfriendly states entities in Russian insurance and reinsurance organizations while maintaining these aircraft. Similar to other measures the Russian government has implemented, the prohibitions on insurance and reinsurance can also be lifted on a case-by-case basis by the Russian authority.

These Russian measures were implemented not only as retaliations against the states that issued unilateral sanctions, but more importantly, they were tailor-made to prioritize the preservation of the vastly foreign-owned Russian civil air fleet. For the Russian government, it appears that in its own judgment, the potential risks involved with losing the majority portion of its civil air transport capability outweighed the risks of infracting its international obligations under treaties. To a certain degree, the unilateral sanctions have successfully identified the vulnerabilities in Russia's sectoral capacity, however, in light of the Russian measures which denied CTC non-

[157] Russian Federal Law of 14.03.2022 No. 55-FZ.
[158] SEAMLESS Legal-Leonid Zubarev, "Russian counter-sanctions: an insurance perspective", (14 March 2022), online: *Lexology* <https://www.lexology.com/library/detail.aspx?g=38615ac2-0b73-4eda-9b17-3b7a90edd89c>.
[159] *Ibid*.

judicial remedies, they failed to halt the Russian civil aviation but left international lessors and insurers scrambling for their own rescues.

5.5 Lessors' Predicament in Post-sanction Repossession

In the immediate aftermath following the announcement of the EU and UK sanctions, international lessors commenced large-scaled efforts to terminate lease agreements and to repossess as much aircraft as they were practically able. Due to Russian governmental orders, most aircraft leased from foreign lessors either remained in Russia or had been called back to Russia.[160] International lessors' initial repossession attempts were primarily limited to Russian operated aircraft that were still abroad at the time, for instance, a Boeing 737 operated by Pobeda Airlines was detained at Istanbul in Turkey on February 27th , 2022, this aircraft was leased to the Aeroflot subsidiary carrier by Avolon Aerospace Leasing from Ireland.[161] There were approximately a total of 90 aircraft located outside of Russia by the end of March, 2022, and according to publicly available data compiled by CH-Aviation, these aircraft were outside of Russia for various reasons. Some aircraft such as VP-BAC, an Airbus A320-200 operated by Aeroflot, and owned by CMB Leasing was stranded at Amsterdam Schiphol Airport because of airspace closures to Russian operators; others such as VQ-BFE, a Boeing 747-8F freighter plane that was on an operating lease from BOC Aviation was under maintenance at Hong Kong International Airport.[162]

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[160] See Russian FATA requests from Russian operators.
[161] "Lessors start repossessing aircraft from Russian airlines", online: *ch-aviation* <https://www.ch-aviation.com/news/113010-lessors-start-repossessing-aircraft-from-russian-airlines>.
[162] Marija Verovic, "An overview of Russian aircraft outside of Russia - ch-aviation - Data Feeds", (17 March 2022), online: ch-aviation <https://about.ch-aviation.com/blog/2022/03/17/an-overview-of-russian-aircraft-outside-of-russia/>.

Among all the aircraft located at international locations, interestingly, some were the results of voluntary handovers from Russian lessees. About 5 Russian operators had flown their aircraft out of Russia despite the "recommendation" to the contrary by the Russian civil aviation regulator.[163] Most Russian operators defied lessors' demands to cease operation and return of leased aircraft, and as a result, most international lessors were only able to recover planes remained outside Russia. By March 2022, there were still over 400 leased jets stranded in Russia, lessors could neither immediately repossess them nor receive contractual payments amid the amended Russian regulations. Depending on the condition and the operational status of each aircraft, some lessors still pursue the return of their equipment, while others have completely switched their legal strategies from repossession to insurance payouts. Being caught in the crosshairs of unilateral sanctions and retaliatory measures, lessors' legal journeys in seeking aircraft repossessions and insurance payments face some treacherous and uphill battles. The next part will examine existing cases to illustrate the key challenges and legal uncertainties created by the sanctions and countersanctions on aircraft leases.

5.5.1 Entangled in sanctions: Lessors' Remedies and Key Provisions

Lessors and financiers are protected by the remedies provided under the lease terms and the CTC, and upon the occurrence of any of the stipulated events, these remedies can be activated and enforced for the benefit of the creditors. All aircraft lease agreements contain provisions that deal with situations where the debtors are unable to satisfactorily perform contractual obligations and situations where aircraft objects sustained damages or are destroyed. The first situation would usually permit a lessor to terminate the lease agreement and seek redelivery of the aircraft along with payment of any fees there were due; the second situation would often enable the

[163] *Supra* note 152.

lessor to seek compensation for the losses and damages at the agreed upon values, and depending on the terms of the contract, the parties may opted to, in addition to the termination of the lease agreement, transferring all rights in the aircraft to the lessee upon payment of all the associated fees. It is therefore crucial to identify and determine whether something that have occurred during the lease term can be legally considered as remedy-triggering event in any leasing dispute. The sanctions and countersanctions proceeding the Russian invasion of Ukraine have generated considerable legal ambiguities over the interpretations of some key lease provisions, particularly those concerning the rights of the lessors to exercise their contractual default remedies. In the case between Bank of China Aviation and Russia's AirBridgeCargo Airlines, the parties disputed over the interpretation of the default and loss provisions in the agreements.[164]

5.5.2 BOC Aviation Ltd. v. AirBridgeCargo Airlines, LLC.

This case concerns the lease agreements over three Boeing 747-8F cargo planes BOC Aviation leased to AirBridgeCargo Airlines (ABC), the three aircraft each bears the manufacture serial number 60117, 60118, and 60119, respectively.[165] (herein as aircraft 117, 118, and 119) ABC is a corporation organized under the laws of Russia, and it is wholly owned by Volga-Dnepr Logistics, a company registered under the Dutch laws and a member of the Volga-Dnepr Group of Russia. [166]All ABC's obligations associated with the three leases were guaranteed by its parent Volga-Dnepr, and the three 747-8Fs were leased to ABC airlines before the Russia-Ukraine War between 2017 and 2020. [167]The parties have selected New York law as the governing law in all three lease agreements. After the international sanctions took place amid the invasion of Ukraine

[164] *BOC Aviation Ltd. v. AirBridgeCargo Airlines, LLC*, 669 F. Supp. 3d 204 (S.D.N.Y. 2023).
[165] *Ibid* at 211.
[166] *Ibid*.
[167] *Ibid*.

by Russia, BOC Aviation was notified on separate occasions over the course of one week from March 1st, 2022 that the reinsurance coverages belonging to the leased 747s were suspended because of the newly imposed restrictions from sanctions.[168] BOCA promptly sent written notifications concerning the cancellation of reinsurance to ABC and demanded it to cease commercial operation as soon as possible and move the aircraft into storage at a location outside Russia on or before March 7, 2022. The 3 aircraft were each located at a different location outside Russia at the time of the BOCA demand, aircraft 117 and 119 were parked at two different airports in mainland China, and aircraft 118 was located at Hong Kong International Airport.[169] Since these aircraft were already outside of Russia, BOCA asked the Russian operator to ground these aircraft where they were present at the time, and the operator agreed to proceed as instructed. However, despite the lessor's instruction, ABC flew the two aircraft in China back to Russia two days later.[170] Learning about this, BOCA immediately demanded the Russian lessee to remove the aircraft away from Russia but to no avail. BOCA soon sent written letters to ABC, declaring "Events of Default" for each of the three aircraft and terminated the lease agreements, the lessor also asked for the immediate return of all aircraft and associated documentations, and any aircraft components not directly installed on the aircraft.[171]

Since aircraft 118 was still in Hong Kong at the time of the lease agreement termination, BOCA applied before the U.S. Federal Court in the Southern District of New York for an *ex parte* order for immediate repossession.[172] The New York court upon confirmation of events of default granted the *ex parte* order on March 14 for the immediate possession of the 118 aircraft in Hong

[168] *Ibid*.
[169] BOCA, *supra note 164* at 217.
[170] *Ibid*.
[171] *Ibid*.
[172] *BOC Aviation Ltd. v. AirBridgeCargo Airlines*, *LLC*, 22 Civ. 2070 (S.D.N.Y. Mar. 13, 2022).

Kong and enjoined ABC from controlling the aircraft in any way or interfering with the repossession efforts by BOCA from Hong Kong to a storage facility in Arizona, USA.[173] The court order also required ABC to cooperate with the lessor in regard to the registration and airworthiness of the aircraft in conformity with the lease terms.[174] The repossession for aircraft 118 by BOCA from Hong Kong to Arizona was uneventful except that the upon inspection, two of the four engines attached to aircraft 118 were not the ones that BOCA owned and delivered to ABC, one of them belonged to an affiliate company of the lessee called Rainbow and the other one owned by a company unrelated to any of the parties named SBLI.[175] BOCA successfully repossessed the aircraft with two of its own engines and put the other two engines in storage in Arizona. After the repossession, the Russian lessee notified BOCA that it had completely suspended all its commercial operations within the airlines by March 17, 2022, and that aircraft 117 and aircraft 119 as well as the two engines originally installed on aircraft 118 were all grounded in Russia as a result.[176] Since the beginning of these events in March, BOCA had repeatedly send payment demands to ABC over unpaid rents and stipulated loss of aircraft, but ABC did not respond or pay any of these bills.

With only one aircraft partially repossessed, BOCA instituted a lawsuit against AirBridgeCargo and its guarantor Volga-Dnepr for the recovery of all aircraft under the lease agreements along with associated fees and costs according to the lease terms. Aside from the order granting the immediate repossession of the aircraft, The New York court in its previous rulings ordered the defendants to redeliver the replacement engines of same or better model suitable for use on

[173] *Ibid*.
[174] *Ibid*.
[175] *Supra* note 141.
[176] BOCA, *supra note 164* at 218.

aircraft 60118, and because the original engines belonging to BOCA were left in Russia and subjected to export restrictions, the court also allowed the substitution of engines owned by defendants' affiliate group in Ireland.[177] Below will discuss the core issues about the contractual remedies of aircraft 117 and 119 addressed in the substantive rulings by the court.

5.5.3 Key Issues in Dispute

The lease agreements in this case concerning the three aircraft are similar with the exceptions of the dates, and relevant identifications of the aircraft. The lessor issued this lawsuit primarily on the basis of two provisions of the lease agreements: (1) Events of Default and (2) Events of Loss. The parties had little dispute over the Events of Default as the occurrence of a series of events since the implementation of the Russian sanctions undisputedly took place, but for the purpose of this article, it is relevant to discuss a few points addressed by the court to illustrate the impacts of unilateral sanctions on contractual obligations in civil aviation. The issue of Events of Loss was at the center of the parties' dispute, this provision of the lease agreement provides lessor with agreed upon monetary damages as remedies upon the occurrence of certain conditions where the aircraft in question can be deemed irretrievable. The parties litigated among other things, whether there were occurrences so that the aircraft were in fact unrecoverable from Russia and whether such determination is legally relevant in evaluating the invocation of Events of Loss under the agreements.

5.5.4 Events of Default

Under the lease agreements, the invocation of Events of Default presupposes the ability to physically repossess the aircraft, and the lessor is able to redeploy the aircraft free and clear of

[177] The NY Court essentially approved the title swaps of two engines.

any interests of the lessee. Article 18 of the BOCA-ABC Lease Agreement stipulates that: "If an Event of Default occurs, Lessor shall have the right to sell or re-lease or otherwise deal with the Aircraft Airframe, Engine or any Item of Equipment at such time and in such manner and on such terms as Lessor considers appropriate in its absolute discretion, free and clear of any interest of Lessee and without any duty to account to Lessee with respect to such action or inaction, as if this Lease had never been entered into."[178] Upon the happening of any event that can be considered default, all interests and rights in the aircraft and other associated items revert back to the lessor, and the lessor may exercise its default remedies to retake the aircraft. The Lease Agreements provides a list of occurrences that can be considered Events of Default including: (1) failure to pay rents; (2) failure to perform any condition of the lease agreement; (3) the lessee suspends all or substantially all of its commercial airline operations; (4) any change in any law of the jurisdiction of Lessee's incorporation or any jurisdiction in which lessee conducts business…materially adversely affects Lessee's ability to meet its obligations; (5) failure to procure and maintain in full force and effect any insurance required by Article 13 of the lease agreement.[179] The lease under Article 13 specifically requires that the lessee to maintain or cause to be maintained in full force and effect all-risk ground and flight aircraft hull insurance and war-risk hull insurance.[180]

The default remedies provide BOCA with the discretion to accept the Event of Default as a repudiation of contract and to terminate it, and upon providing termination notice, the lessee is required to promptly return the aircraft and any parts thereof, or alternatively at the lessor's

[178] *Ibid* at 214.
[179] *Ibid* at 212, 213. The court reproduced some clauses of the Event of Default provision under Art.19 of the Lease Agreements, the original texts of lease agreements are not publicly available, this author relies on the New York court's recitations.
[180] *Ibid*.

discretion, to take immediate possession of the aircraft and "remove the same…by summary proceeding or otherwise…"[181] The Event of Default provision also allows BOCA to deregister the plane from the Bermuda registry and execute legal instruments to effect exportation, termination and extinguishment. Although not disclosed by the court document, BOCA was likely in possession of a pre-authorized IDERA form.

After the implementation of EU Reg. 2022/328, Lloyd's Aviation Underwriters Association cancelled the hull-war reinsurance policies for all 747-8Fs leased to ABC by BOCA.[182] The cancellation of the reinsurance coverages triggered an Event of Default under the lease agreement, as the lessee was required to maintain full coverage of all-risk and war-risk insurances. In addition to the reinsurance lapses, the laws in the lessee's home jurisdiction and international jurisdictions where the lessee conducts its business had materially changed and, in all places, such changes significantly affected ABC's ability to meet the contractual obligations. The legal changes in Russia stemming from Presidential Decree 100 made it almost impossible for ABC to pay the lessor, who resides in an UFS; the sanction regulations in Europe and the U.S. further deprived ABC's ability to maintain airworthiness and insurances. Moreover, as indicated in ABC's correspondence with BOCA, the Russian operator had ceased all commercial operations within the airline, which caused another Event of Default as indicated in Clause (3) from the above. Last and most significantly, ABC failed to pay all rental and fee demands from BOCA since the sanctions began, defaulted on its payment obligations.

The occurrence of any of the above situations can invoke the lessor's remedies stipulated in the default provisions, however it is not difficult to see that all the defaults took place merely

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[181] *Ibid* at 214.
[182] "BOC Aviation sues Russia's AirBridgeCargo over B747-8(F)", online: *ch-aviation* <https://www.ch-aviation.com/news/113900-boc-aviation-sues-russias-airbridgecargo-over-b747-8f>.

incidental to the sanction-imposed regulations outside the control of the airline. Such a precarious situation may be unfair to a lessee who committed no wrong before the sanctions, nonetheless, the default provision is not based on fault. As the New York court correctly ruled, it is immaterial that the failure to pay rents and maintain full insurance coverages may have been a result of something the lessee had no control.[183] The Russian operator did not have an impossibility defense because the parties stipulated in the lease agreement that an occurrence constitutes an Event of Default irrespective of whether the occurrence be "[v]oluntary or involuntary or come about or be effected by operation of law."[184] Thus, the immediate effect of the Russian sanctions for aircraft leases is the near automatic contractual default. In the ideal situation where the lessee abides by all its obligations under the terms of the BOAC-ABC lease, the lessee should stop the operation of the aircraft in question and make the aircraft and all parts and documentations available to the lessor at the then-locations in China. Under the special circumstances created by the unilateral sanctions, flying the two 747s back to Russia, as ABC did, violated the lessor's rights under the CTC and the terms of the lease agreements. It was unclear whether BOCA had the opportunity to inform the Chinese aviation authorities about the revocation of insurances as it would have been likely in breach of most Civil Aviation Regulations worldwide. It is also noteworthy that BOCA did not send the termination notices to the lessee until aircraft 117 and 118 had already took off from China on March 6, it is theoretically possible for the lessor to terminate the leases further in advance and promptly notify relevant foreign authorities once it located the aircraft in this situation. Additionally, as the Russian aviation regulator recalled all Russian operated aircraft in the immediate aftermath of the EU sanctions, and with top Russian official publicly backing the decision, there were ample

[183] BOCA, *supra note 164* at 221.
[184] *Ibid*.

motivations for Russian operators to disregard the demands of international lessors in cases where their aircraft were located outside the coverage of the sanctions' airspace ban.

As illustrated, the default would have happened regardless of whether the Russian cargo operator had paid rents that were due, the operator had no alternatives than accepting the default. In a step further, as the airlines flew two aircraft over the objection of the lessor to Russia, planes and engines belonging to BOCA became unexportable from Russia without special governmental permission, BOCA insisted that one or more Events of Loss had taken place, and that ABC shall compensate it according to the Stipulated Loss Value of the aircraft. Once again, the sanctions took center stage at the dispute, only this time the Russian countersanctions became the subject of interpretations in a contract litigation.

5.5.5 Events of Loss

Unlike the Events of Default where the possession of aircraft is assumed, Events of Loss premise the remedies on payments for the aircraft objects that are deemed lost or irretrievable. The "loss" under the agreements included but need not be of physical nature, an Event of Loss is one that results in either the actual unavailability of the aircraft or the practical impossibility of the lessor to take possession. The obstacles created by the Russian countersanctions against the so-called unfriendly states were considered in great length by the New York court in determining whether the measures implemented can be considered Events of Loss under the agreements.

BOC Aviation is of the view that aircraft 117 and 119 and the engines belonging to BOCA incurred Events of Loss as result of Russia's special economic measures and Bermuda's suspension of certificate of airworthiness. An "Event of Loss" of any aircraft equipment item under the BOCA lease agreements is defined as: "(a) loss of such Items of Equipment or the use thereof due to disappearance for a period in excess of sixty (60) days (or such shorter period

ending on the date on which an insurance settlement has been reached on the basis of a total loss); (b) theft, destruction, damage beyond repair or rendering of such Items permanently unfit for normal use for any reason whatsoever; (c) any damage to such item which results in an insurance settlement which results in an insurance settlement with respect to such Item on the basis of an actual or constructive total loss; (d) the condemnation, **confiscation or seizure** of, or requisition of title to, or requisition of use (for a period in excess of sixty (60) days, but in any event no longer than the last day of the Term) of, such Item by any Government Body; or (e) as a result of any rule, regulation, order or other action by **any Aviation Authority**, **or other Government Body having jurisdiction**, the use of such Item in the normal course of air transportation of persons or property shall have been prohibited for a period of more than six (6) months." [185]

BOCA claimed that Events of Loss had occurred in the form of confiscation or seizure as described in (d) from the above, and in the form of regulatory changes by one or more aviation authorities as shown in (e). Regarding the first clause, BOCA contended that the Russian countersanctions which prohibited the exportation of aviation goods and materials constituted seizure under clause (d). The lessor also claimed that the Bermuda Civil Aviation Authority's suspension of all CoAs belonging to Russian carriers effectively prohibited ABC to engage in the normal course of air transportation.[186] The lessor argued that the normal course of air transportation was further prohibited by Russian government's special economic measures which banned the aircraft from flying out of Russia. [187] The lessee and its guarantor refuted both arguments, specifically, they argued that the BCAA suspension of certificate of airworthiness did

[185] *Ibid* at 215 [emphasis added].
[186] *Ibid* at 223.
[187] *Ibid*.

not constitute an event of loss because the Russian carriers have the ability to deregister from the Bermudan registry and reregister on the Russian registry under the BCAA rules.[188] They further claimed that Russian Resolution 311 does not prohibit the transportation of aircraft outside Russia, rather, it only restricts overseas operation without approval.[189] As for the claim of seizure by Russian regulations, the respondents argued that the Russian special economic measures against sanctions, including Res. 311 do not amount to seizures because they did not result in Russian government's possession of the restricted aviation items.[190]

5.5.6 Do Sanctions/countersanctions Amount to "Seizure"?

Clause (d) of the "Events of Loss" provides a broad range of government takings in various forms, but it gives no definition to any of the terms whatsoever. The New York court appears to have interpreted "seizure" as any meaningful interference with an individual (entity)'s possessory interest in a property, it referred to several U.S. Supreme Court precedents and provided examples of government requisition of commercial aircraft in the U.S.[191] In the court's opinion, the Russian Federation committed the seizure of BOCA's aircraft because a seizure does not require the accession of title by the Russian government. In so holding, the court reasoned that the term "seizure" within the meaning of the lease agreements should not be read in isolation of the literal language of the restrictive regulations, but instead it ought to be read in conjunction with the overall context surrounding the contract and consider the practical effect of the government restrictions in question.[192]

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[188] *Ibid* at 222.
[189] *Ibid*.
[190] *Ibid* at 223.
[191] *Ibid* at 228.
[192] *Ibid* at 228.

Indeed, as the lessee defendant argued, Russian Resolution 311 does not concern the government taking possession or the conveyance of aircraft titles to a government body. It is also true that Resolution 311 do not strictly prevent all exportations of aircraft because it imposed a licensing requirement for the certain exportations of transport vehicles. However, Resolution 311 contains provision that would frustrate the rights of the lessor and the purpose of the lease agreements. Specifically, under paragraph 2 of Res.311, the export ban does extend to vehicles of international delivery, **except for the aircraft which are exported for the purpose of their return** to lessors under the agreements of finance lease and other leases signed with lessors from foreign states on the list of Unfriendly Foreign States as defined by Resolution 430.[193] This provision interferes with the remedial benefits of the lessor in the lease agreements. The New York court opined that "[a]n export limitation itself does not necessarily effect a seizure, so long as the limitations do not infringe on those property rights negotiated and preserved by the parties under the Lease Agreements."[194] BOC Aviation reacquired all rights to the leased aircraft upon the occurrence of events of default and the termination of the agreements, the lessor by the lease terms should have the discretion to arrange the affairs of its assets in any ways it deems appropriate. Resolution 311 prevented BOCA from exercising its remedies given by the contract and consequently, it amounted to an "seizure" for the purpose of the lease agreements.

The court did not rely on any specific language in the Russian Resolution, it instead took note of a contractual provision requiring the lawful operation of leased aircraft under any applicable law, "**including without limitation** the United States export, re-export controls and trade and economic sanctions laws and regulations, or in any manner which may render the Aircraft liable

[193] Resolution 311, *supra* note 60 para. 2.
[194] BOCA, *supra* note 164 at 229.

or susceptible to condemnation, destruction, seizure, or confiscation by any Government Body"[195] Under the U.S. sanctions regime examined in the preceding chapters, any export, re-export or movement of U.S. aviation goods to, from, and within Russia is prohibited unless with the prior approval of the Bureau of Industry and Security. As a result, in addition to Res. 311, other Russian regulations, such as Res. 411 which directed Russian operators to re-register foreign-owned aircraft and conduct technical maintenance in Russia, exposed leased aircraft to U.S. sanctions regulations.[196] Additionally, they made leased aircraft susceptible to groundings and seizures overseas for violations of international treaties and national aviation laws.[197] These factors in turn, prevent the lawful operation of aircraft under applicable laws.

5.5.7 Do Sanctions/Countersanctions Prohibit Normal Course of Operation?

Similarly, the determination of a qualified occurrence under Clause (e) of the Events of Loss requires factual analysis of the practical impact of the Bermudan and Russian regulatory actions along with considerations of the lessor's rights under the lease agreements. As addressed previously, the BCAA had revoked the CoAs of all Russian operated aircraft, therefore Russian carriers cannot fly operate any Bermuda-registered plane until the airworthiness certificates are reinstated, or until the registrations have been lawfully transferred to Russia and valid CoAs are issued. The regulatory action by the Bermudan authority indeed appears to have prohibited the operation of aircraft leased to Russian carriers for as long as Russian airlines' aviation supplies are restricted by the sanctions. The lessee and its guarantor claimed that the Bermudan action did not amount to an Event of Loss because the BCAA in its public notice on March 14, 2022,

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[195] *Ibid* [emphasis added].
[196] The reregistration leads to at least the operation within Russia, which still violates U.S. sanctions. Technical maintenance in Russia of U.S. aircraft in light of sanctions, either require the use of illicitly imported items or unapproved components.
[197] The risks involved with flying a dual-registered aircraft internationally include seizure, and also the denial of entry, which results in prohibitions of normal course of operation.

indicated that it would "continue to deregister aircraft on request from the registered owner, in accordance with relevant BCAA legislation and procedures."[198] The BCAA issued this notice in response to Russia's legal amendment that enabled the re-registration of foreign owned aircraft, in its relevant part, the BCAA warned against the dual-registration of aircraft and stressed that it will process de-registration upon the discharge of mortgage or IDERA pursuant to the Cape Town Convention.[199]

The respondents' contention employed the logic that because of the availability of a deregistration mechanism at the BCAA, the prohibition imposed by the Certificate of Airworthiness cancellations can be resolved by effecting deregistration. This reasoning would be correct only if construed outside the context of the lease agreements, and it would necessitate the lessor to initiate the deregistration. However, the aircraft are required by the lease agreements to remain on the Bermudan registry unless the parties mutually agree to an alternative arrangement, hence, this reasoning is questionable considering the totality of circumstances. [200] The court accurately noted that even if there exists a possibility to deregister the aircraft, the prerequisite to effectuate deregistration was not met.[201] This is because the BCAA conditions the deregistration of aircraft on the discharge of financial obligations, unless a creditor has consented to such deregistration. The facts in this case have not suggested that BOCA would agree to discharge any obligations of the lessee without payment.

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[198] Bermuda Civil Aviation Authority, Notice - *Status of Bermuda Registered Aircraft Operated by Russian Air Operators* (Bermuda, 14 March, 2022) online: < https://bcaa.bm/sites/default/files/Web%20Docs/Notices_BACs_OTARs/Notice%20Status%20of%20Bermuda%20Registered%20Aircraft%20-%20Russian%20Air%20Operators%2014Mar.pdf>.
[199] *Ibid* at para 4.
[200] BOCA, *supra* 164 at 227.
[201] *Ibid*.

In addition to the court's observation, because Clause (e) of the Events of Loss provision widely encompasses the prohibition on the normal course of air transportation imposed by *any* governmental bodies having jurisdictions, even if the BCAA action is somehow not deemed to be an event of loss, ABC and Volga-Dnepr would still be caught by the U.S. sanctions. Specifically, the three Boeing 747-8Fs are U.S. aircraft, hence, they are subject to the export and re-export rules under BIS and OFAC regulations. Hypothetically, if this case were to proceed before a non-U.S. court, a foreign tribunal might not necessarily recognize and enforce U.S. sanctions on its own. However, one must recognize the reality that due to the expansive jurisdiction and the cross-border enforcement of the U.S. sanctions regulations, aviation service providers worldwide are prohibited from servicing aircraft operated in violation of sanctions.[202] Henceforth, the practical impact of the U.S. sanctions can result in the de-facto prohibition of "air transportation in the normal course."

Just like the Events of Default, the Events of Loss also do not provide the room for lessee to claim impossibility. It is irrelevant that the Russian countersanctions technically do not prevent the export of aircraft if a license is granted, and that the aircraft are not absolutely irretrievable. As governmental sanctions and countersanctions have concretely frustrated the lessor's ability to regain its aircraft following the occurrence of Events of Default, the BOCA court is not wrong in giving deference to the totality of circumstances surrounding the lease agreements in its evaluation and ruling in favor of the lessor. Many occasions under the Loss provision are not within the control of the lessee, but as the lessor has claimed, they are not unforeseeable because the risks were clearly laid out in the agreements. At least under the New York law, impossibility

[202] Service providers may serve the aircraft in question, but at the risks of secondary sanctions imposed on the providers.

is only a defense where the intervening act is entirely unforeseeable. Foreseeability is not determined by the unlikeliness of an event or whether a party must bear the consequences for things outside its control, but under a contract, it is solely based on whether the occurrence of such event is laid in black letters. Permitting the defense of impossibility over regulations imposed by unilateral sanctions in aircraft leases will undermine not only the contractual rights of creditors but also the primacy of the Cape Town Convention. On the other hand, it may be counterintuitive to walk into an aircraft lease agreement while envisioning the potential consequences of comprehensive sanctions of extreme magnitude, for which there would be little desire to enter the transaction in the first place. This exactly highlights the contradiction and divergence between the purpose of aircraft lease agreements and the objectives of comprehensive sanctions; the former places great emphasis on securing assets with adequate insurances (remedies), and the latter aims to dismantle the capacity of targets in existing and future transactions in designated areas at all costs.

5.6 Summary

In this case, changes in laws have resulted in the invocation of both the Events of Default and Events of Loss. It is significant that the Russian countersanctions were deemed a seizure of leased aircraft, and the Bermudan suspension of airworthiness a prohibition of normal air operation due to their respective practical effects. These interpretations and characterizations directly impact the recourses available to the parties. Invoking the Loss provision means that instead of the return of aircraft, the lessor is entitled to recover the stipulated loss value of the aircraft equipment. Under the terms of the BOCA-ABC lease agreements, should the lessor decide to seek payment for the loss, the lessor shall transfer to the lessee all rights, titles and interests in the aircraft upon full payment of the agreed upon value for the “loss” off the aircraft.

Therefore, a prospective consequence of sanctions regulations in this case aside from frustrating the lease agreements, is the conveyance of aircraft equipment to the Russian operator. Lessors are in the business of leasing and renting aircraft, they tailor their purchase of equipment from manufacturers to specific commercial demands and metrics.[203] A loss of aircraft equipment leads to missed rents and opportunities, and in some cases, this could also meet with the difficulty in finding replacements. Such hardship was an issue for BOCA with the two engines AirBridgeCargo took to Russia, because the General Electric GEnx-2B67/P engine ceased production the year before the litigation.[204] The New York court however, denied BOC Aviation's alternative remedy of specific performance to redeliver the engines, the court reasoned that specific performance is only available when monetary damages are inadequate to accomplish justice.[205]

Although the District Court awarded BOC Aviation liquidated damages by the contractual terms, the legal struggles between the lessor and the Russian operator are far from over. New reports suggest that the lessee's parent company Volga-Dnepr Logistics and its affiliated entities sought to reduce asset levels to evade sanctions and meeting judgements, and BOCA's counsels had to apply for court orders in the EU to counter Volga-Dnepr's efforts.[206] Likely due to the scarcity of the 747-8F since the end of its production, it also appears that BOCA eventually worked with the Russian lessee and pursued the return of aircraft 107 and 109 even in light of the monetary

[203] Rod D Margo, "Aircraft Leasing: The Airline's Objectives" (1996) Air and Space Law 166–174.
[204] "Time to say goodbye!", (16 December 2022), online: *Safran* <https://www.safran-group.com/news/time-say-goodbye-2022-12-16>.
[205] BOCA, *supra* note 164 at 241.
[206] "High Court extends orders freezing assets of Russian-owned logistics firm", online: *The Irish Times* <https://www.irishtimes.com/business/2023/07/04/high-court-extends-orders-freezing-assets-of-russian-owned-logistics-firm/>.

awards.[207] Nonetheless, the repossession only came two years after the default. It is not unfair to pronounce judicial remedies inadequate when it comes to resolving contractual disputes in aircraft leasing under sanctions, as can be seen from the BOCA case, the sanction-induced measures have placed considerable limitations on the actual recovery. Unlike the Event of Loss in the BOCA case where the judge was able to find constructive seizures from government actions, the sanctions and countersanctions added great uncertainties to the concept of "loss" in aviation insurance policies, the next section will inspect the impact of sanctions on aviation insurance.

6. Restrictive Measures' Impacts on (re)Insurance Claims

6.1 Overview of Aviation Insurance

Aside from the risks allocated among the contracting parties by the lease agreement, substantially all leased aircraft carry one or more types of insurance coverages to account for the various forms of risks on the ground and in the air. Aircraft leased to airlines are typically covered by three types of primary insurances in the first tier: (1) Hull All-Risks, (2) Hull War and Allied Perils Risks, and (3) Third Party Legal Liability. The hull all-risk covers the insured against all risks of loss or damage to aircraft on the ground and in the air, except for those that are specifically excluded by the policy; this is typically provided through bespoke terms tailored to the individual airlines.[208] The All-Risks insurance excludes war associated perils, typically incorporated through clause AVN48B or AVN48C.[209] For example, AVN48B provides that: "This

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[207] Lim Zi Yuan, "Voluntary Announcement – Board of Directors, BOC Aviation Limited", online: *Bank of China Aviation* < https://www.bocaviation.com/en/Investors/-/media/2EBD19281D7F46A59BE0885C51F53A6A.ashx#:~:text=The%20Company%20recovered%20possession%20of,the%20condition%20of%20the%20aircraft>.

[208] R D Margo et al, *Margo On Aviation Insurance: the law and practice of aviation insurance, including space and hovercraft insurance*, 4th ed (London: LexisNexis, 2014). [Margo]

[209] *Ibid* at 353, 361.

policy does not cover claims directly or indirectly arising from any one or any combination of any of the following causes or any consequence thereof: (a) *War.* War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power. (b) *Nuclear weapons*. Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter…(f) *Hi-jacking*…"[210] The Hull War policy on the other hand provides limited coverage to certain named war perils excluded by the All-Risks policies, these coverages are generally provided under the LSW555 series clauses.[211] The third type of insurance as the name suggests, encompasses general liabilities from third parties against the airline, and this type of insurance is also subject to the AVN48 series exclusions.[212] War risks were not always excluded in standard aviation hull insurance policies, the London market first induced the exclusion following the Israeli raid on Beirut airport in 1968.[213] Write back of the excluded risks is possible under clause AVN52, subject to the cancellation on advance notice.[214] This write back used to be available at nominal costs because of the relatively low level of major loss based on the then-historical records.[215] In recent development, immediately following the 9-11 terrorist attack in 2001, War Risks write backs were cancelled by insurers nearly globally due to the exponential increase in risk profiles

[210] *Ibid* at 354, n2. AVN 48B.
[211] *Ibid* at 362, n1.
[212] *Ibid* at 271.
[213] *Ibid* at 353.
[214] Cancellation of AVN52C takes effect after 7 days, for reference.
[215] Eugene Hoven, "Current State of the Coverage for War and Terrorism Risks in the Aviation Sector" in OECD, *Catastrophic Risks and Insurance* (2005) 73-79 at 74.

with civil aviation. Since then, air carriers mostly had to obtain standalone War-Risks hull insurance under the LSW555 series and pay the additional premiums.[216]

Absent special arrangement, these insurances pertain to the operators of aircraft, and the airlines are the primary insured and policy holders. As the technique and structure of aircraft financing became increasingly creative and sophisticated, the aviation financing and leasing market sought for improvements in insurance policies to better protect their interests. To address this demand, the London market introduced AVN67B and later updated with AVN67C, they are known as the Airline Finance/Lease Contract Endorsement. These endorsements provide lessors and financiers with simplified procedures for arranging and confirming insurance coverages and streamlined the workflow in aircraft leasing and financing for insurers.[217] Under the AVN 67 series clauses, where available, each lessor and financier may be added and recognized as an *additional insured* under the same policy of an operator for an additional premium. In its relevant part, AVN 67C provides that "The contract party(ies) are covered by the policy subject to all terms, conditions, limitations, warranties, exclusions and cancellation provisions thereof."[218] Any payments under the hull insurance policies in connection with the total loss of aircraft are payable to all Contract Parties, including the lessor and financers under the insurance policy.

In the cases of aircraft leased to Russia prior to the war, operators were obligated under the Russian law to procure primary insurance with Russian insurance companies, these primary insurances were then reinsured at the London and other international markets. To mitigate the risks in cases where the primary insurers are unable to furnish payments in a claim of loss,

[216] LSW555C and LSW555D, the latter is considered less restrictive than the former, in particular, it reintroduced some Weapons of Mass Destructions (WMD) exclusions.
[217] Margo, supra 208 at 605.
[218] AVN 67C.

lessors routinely require the insertion of a cut-through clause that enables the reinsurer(s) to make payments of the proceeds directly to the lessors. One effective way to materialize such operation is through an endorsement under AVN109. This cut-through provision is necessary in the event of a primary insurance failure either by financial reasons or as in the case with Russia, by operation of law, because otherwise a lessor is not in privity of the reinsurance contract(s).

In addition to the primary insurance and reinsurance, virtually all lessors globally obtain contingent and possessed insurances. These insurances typically provide coverage for risks in the event that the lessees failed to maintain adequate insurances, or their policies are suspended. For instance, when the insurance policies of an operator are revoked upon a commercial failure, the contingent coverage of the lessor will be activated; and the possessed insurance becomes active when the leased aircraft are pending or in the process of being repatriated by the lessor.[219]

The Russian aviation leasing fallout in the context of insurance is unlike other leasing defaults in that the core concept of "loss" is highly disputed by the litigating parties, this relatively often straightforward determination is mainly obfuscated by the unconventional measures under unilateral sanctions and Russian countersanctions. In light of the aviation insurance structures and features discussed above, there exist several major points of contention between international lessors and reinsurers over leased aircraft stranded in Russia, most notably, the proof of total physical loss, the applicability of war perils exclusions, and the payment prohibitions of sanctions. The next part will examine some fundamental issues in the insurance disputes arising out of aircraft leases with Russian operators post sanctions.

[219] "Aviation Insurance and Other Claims Arising out of Russian Sanctions | White & Case LLP", (12 July 2022), online: <https://www.whitecase.com/insight-alert/aviation-insurance-and-other-claims-arising-out-russian-sanctions>.

6.2 Key Matter(s) of Contention

The payment of insurance proceeds relies on the occurrence of stipulated loss events, for aviation insurance claims over aircraft stranded in Russia in the aftermath of the comprehensive sanctions, an insurer's obligations may be triggered upon the successful showing of requisite level of damages or a total loss of aircraft. So far in all the insurance claims arising out of leases in connection with Russian operators, major insurers from Europe and the United States have refused payment demands from lessors. Depending on the specific terms adopted by each insurance contract, as well as the jurisdictions where the policies were purchased, the interpretation of key loss provisions and standard of proof to effect claim payouts can vary significantly. At the time of this writing, there are no substantive decisions on Russia related aviation insurance litigations in Europe, but two diverging rulings from the U.S.

6.3 The Concept of Total Loss

The primary basis of insurance recovery for almost all lessor claimants is the occurrence of total loss of aircraft in Russia. The concept of total loss can be a subject of heated debate in aviation insurance, in particular whether the damage provision in a given policy requires the proof of total physical loss of aircraft or a constructive total loss, or an agreed total loss. A total loss occurs where an aircraft is lost or damaged beyond the possibility of repair, multiple jurisprudences held that when the cost of repair of damaged aircraft exceeded the insured value of the aircraft, the loss can be considered beyond the possibility of repair and rendered a total loss.[220] This notion is also referred as "beyond economic repair" by the insurance industry. The concept of loss in

[220] Margo, *supra* 208 at 236.

aviation insurance traces its root in marine insurance, where a total loss is defined as any loss other than a partial loss by the Marine Insurance Act of 1906.[221]

In the marine insurance context, a total loss can be an actual total loss or a constructive total loss. An actual loss is when the subject matter of the insurance policy is destroyed or severely damaged so that it no longer functions as the thing originally insured, or where the insured subject is irretrievably deprived thereof.[222] Whereas constructive total loss is defined as "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred."[223] This means that in the marine insurance context, a total loss may be established by showing the lack of method of subject recovery within reasonable efforts and expenditure. If this were true in the aviation context, aircraft stranded in Russia as result of restrictive governmental measures may qualify for insurance reimbursements under the notion of constructive total loss upon proving no repossession availability within reasonable cost in relation to the total value insured. However, as Margo noted, the marine term "constructive total loss" is not readily available for use in the interpretation of aviation insurance clauses.[224] Margo further expressed that while there may be similarities between aviation and marine insurance, there are also substantial differences, and aviation insurers have often sought to ensure that their polices are not interpreted by the marine standards.[225] This is because the existence of a large body of marine insurance legal precedents predating even the first aviation insurance policy, on the one hand aviation insurers do not wish

[221] Marine Insurance Act 1906 (UK), 6 Edw VII, c 41. [Marine Insurance Act]
[222] *Ibid* at s 56(1).
[223] *Ibid* at s 60(1).
[224] Margo, *supra* 208 at 15, para 2.10.
[225] *Ibid*.

to be bound by the marine-specific jurisprudences, and on the other hand they do not want their policies to be subjected to certain definitions of key terms in the marine context that maybe incompatible or disadvantageous in aviation-specific applications.

The strong will of the aviation insurance community was unequivocally declared in the wordings of the standard London aircraft policy clause AVN1C: "[T]his policy is not and the parties hereto expressly agree that it shall not be construed as a policy of marine insurance."[226] Regarding the application of constructive total loss in aviation insurance, Lord Justice Rix on the appeal of the case of Scott v. Copenhagen Reinsurance Co (UK) Ltd concurred with Justice Langley from the first instance that "aviation insurance is not marine insurance" and further emphasized that "the doctrine of constructive total loss does not apply outside marine insurance."[227] Similarly, across the Atlantic in the U.S., the marine standard also appears to gain no foot, courts tend to focus on the individual contractual terms while adhering to any applicable state laws governing insurance in interpreting total loss. Therefore, the sole source of interpretation of the insurance loss provision, including "constructive total loss" in aviation policies concerning Russian operated aircraft, if available at all, will likely be confined to the four corners of the insurance contracts and relevant precedents concerning aircraft leasing and financing disputes.

6.4 Assessing Loss Under Sanctions: Aercap Ireland LTD v AIG Europe SA.

The largest aircraft lessor in the world by inventory, Dublin-based Aercap instituted an insurance claim against AIG Europe and other underwriters for payment under Section 1 and Section 3 of the insurance policy for the loss of 141 aircraft and 29 engines leased to Russian operators.[228] Section 1 of the policy refers to the Hull All-Risks coverage and Section 3 refers to the Hull War

[226] AVN 1C, "London Aircraft Insurance Policy", s. VI (C) (6).
[227] Scott v Copenhagen Reinsurance Company (UK) Ltd [2003] EWCA Civ 688 at para 22, 38.
[228] AerCap Ireland Ltd v AIG Europe SA et al [2023] EWHC 96 (Comm).

Risks coverage, and the Irish lessor claimed approximately 3.5 billion USD under the All-Risks policy and alternatively, 1.2 billion USD under the War-Risks cover.[229] Aercap claimed that it has suffered a ***physical loss*** of the insured aircraft assets, that is, a deprivation of physical possession of the aircraft in circumstances where their recovery is uncertain or unlikely such that the loss can be deemed irretrievable deprivation.[230] The lessor relied mainly on 4 points as proof of physical loss: (1) the Russian operator's failure to return aircraft despite the termination of lease contracts; (2) Russian operators' continued operation of leased aircraft even though the aircraft registration authority had revoked the certificate of airworthiness and the lessor had instructed the Russian lessees against any such operations; (3) the lessees reregistered their aircraft on the Russian Civil Aircraft Registry, and (4) the inability of the lessees to procure genuine or approved aircraft parts due to sanctions and maintain the airworthiness of aircraft resulted in drastically deteriorated the physical conditions of aircraft such that the assets' values are lost.[231] Aercap demands that the loss be compensated by the Hull All-Risks cover led by AIG or alternatively, by the Hull War Risks policy led by Fedelis Insurance.

The reinsurers denied that the claims were payable because they claim that the aircraft left in Russia are not lost or damaged and are in possession with the Russian lessees at all times.[232] It appears that the policy also provided the possibility to claim constructive total loss, however, the reinsurers claimed that constructive total loss is only available where the aggregate damage to aircraft exceeds at least 75% of the insured value.[233] From the reinsurers' interpretation,

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[229] *Ibid* at para 2, 3.
[230] "Leased Aircraft Stranded in Russia: A Survey of the Pending Insurance Claim Litigation in Different Jurisdictions", online: <https://katten.com/leased-aircraft-stranded-in-russia-a-survey-of-the-pending-insurance-claim-litigation-in-different-jurisdictions>.
[231] *Ibid* at App.1 para 3.3.
[232] *Ibid*.
[233] "Aviation / War Risks: Ukraine conflict claims | Insurance law", online: <https://www.brownejacobson.com/insights/aviation-war-risks-ukraine-conflict-claims-to-be-heard-concurrently>.

deprivation of possession does not amount to constructive total loss. As this case concerns the loss of aircraft in the aftermath of the Russian invasion of Ukraine, the reinsurers also challenged whether the loss, if any, is the result a named war peril in the policy.[234] In other words, they alleged that the claimant has not proved the causal link between a qualified war event and the loss. Lastly, because the unilateral sanctions imposed on Russia have prohibited payment and services related to its aviation sector, the insurers argued that the Sanctions and Embargo Clause under AVN111 relieve them of any obligation of proceeds payments to the lessor.

6.4.1 Total Loss Under Hull All-Risks

As can be seen from the above, the main dispute over the hull insurances centers on the interpretation of the loss provision. The assessment of "total physical loss", which AIG mainly relies upon in this case, depends on several factors, including (1) whether the actual loss is required; (2) whether the planes can be legally repossessed under all applicable laws in all jurisdictions; and (3) whether the lessor has made reasonable efforts available to it to retake possession. First and foremost, on a high level, in order to sustain the claim of loss, the court needs to allow the interpretation of "total physical loss" without proving the actual total loss, that is, the physical destruction or substantial damage (to the agreed upon level) of the subject aircraft. As previously discussed, in the marine insurance context, actual total loss may be established by the showing of irretrievable deprivation of the subject matter insured. However, the marine doctrines on total loss do not automatically migrate to aviation insurance. Therefore, unless a judge decides to apply the marine standard in this case, any proof to establish an irretrievable deprivation of aircraft shall likely be based on non-marine, fact intensive inquiries only. Fortunately, under the English law, an insured is not required to show that the insured

[234] *Ibid*.

aircraft have been physically destroyed or can never be recovered, the insured needs only the demonstration of the uncertainty of recovery to entitle itself of indemnity under the policy.[235] This standard is affirmed by the court in the case of *Kuwait Airways Corpn v Kuwait Ins Co* concerning 15 aircraft seized by the Iraqi forces in 1990.[236] Hence, it is likely that Aercap's claim under the hull insurance covers will not compel the evidence of physical destruction of aircraft, but instead requires the showing of uncertainty of recovery.

6.4.2 Uncertainty of Recovery

A crucial factor in evaluating whether a loss has occurred from the uncertainty of recovery is that the recovery of the insured object remains uncertain after the insured has taken reasonable steps to recover the object. An important prerequisite to the recovery of aircraft leased to Russian carriers is the legal rights to such undertaking pursuant to the lease agreements, as García Arboleda suggested, "the assessment of the actual right to terminate the leasing of the aircraft and hence the right to repossess the aircraft will play a relevant role to the extent Russian law becomes relevant at some point."[237] As previously addressed, most lease agreements provide fairly comprehensive events of default, they commonly include but are not limited to failure to pay rent, lapse of insurance coverage, failure to maintain the legal status and documentations of aircraft. Certain Russian retaliatory measures enacted after the imposition of unilateral sanctions against it may complicate the evaluation to a limited degree, but their effects on the legal rights of lessors in pronouncing contractual default are weak. On payment obligations for example, insofar as the Russian Resolution 95 directs Russian operators to make rent payments into

[235] Margo, *supra* at 250, para 11.33.
[236] Kuwait Airways Corporation v Kuwait Insurance Company S.A.K., [1996] 1 Lloyd's Rep 664 (QB). [KAC]
[237] José Ignacio García Arboleda, "Notes on the AerCap v. AIG Europe S.A. and Lloyds Insurance Company S.A. Litigation on Hull Aviation Insurance and Russian Risks" (2023) Air and Space Law 339–352.

special domestic account and in the Russian currency, it does not have the legal capacity to overwrite contractual terms for aircraft leases governed by the Cape Town Convention. García Arboleda rightfully pointed to the possibility of a court to assess the applicability of the newly enacted Russian laws to the payment obligations under the aircraft lease agreements. However, it should be noted that as Russia has unquestionably declared the application of Article VIII of the Aircraft Protocol, which permits the freedom to choose the governing law by the parties in an aircraft lease agreement, all Aercap leases should be governed by the mutually agreed upon foreign law pursuant to the terms of the agreements. Thus, assuming the agreed choice of law is English law, Russian laws should have no place in any alteration of obligations in the agreements, and the payment default provisions should therefore be unaffected to the extent they are lawful under the English law. Similarly, other conditions of the lease agreements, such as the requirement to maintain aircraft registration on designated foreign aircraft registers and maintaining reinsurance with reinsurers on the London and international market, should likewise be unaffected by their corresponding Russian laws directing the opposite.

6.4.3 Irretrievability of Insured Aircraft

Difficult questions can arise when it comes to assessing the lessor's legal capability and reasonable efforts in repossessing the stranded aircraft. It will be relevant to inquire whether the lessor has indeed made actual attempts within all its legal capacity to retake the insured aircraft, this may include the question of whether the lessor visited its clients in Russia to address the situation in the immediate aftermath of the invasion and the sanctions. This question can create a derivative issue for the court, that is whether visiting its Russian clients under the circumstances is reasonable. To resolve this the court needs to analyze various factors, including the safety for foreign personnel, transportation feasibility under the airspace ban, and the availability of legal

remedies in Russia. The court may also need to reference the actions executed by other international lessors that were similarly situated by the totality of circumstances, for example, whether other lessors have visited Russia in attempts to repossess their aircraft. It is also crucial to inspect the legal undertakings pursued by the lessor towards the repossession of aircraft since the first event of default took place. Despite Russian laws that work against the interest of international creditors, it is undeniable that the state still has international obligations under relevant aviation treaties. Thus, one inquiry could be the inspection of Aercap's legal endeavors in Russia, if any, pursuant to its rights under the Cape Town Convention and Aircraft Protocols to export aircraft. If there are indeed records reflecting the Irish lessor's concrete legal steps in Russia, for instance any application before a Russian arbitration court to export leased aircraft, even to no fruition at all, can positively advance its argument under the notion of uncertainty of recovery. It may well be true that the Russian measures overrode the contractual terms and violated international obligations, however, there is a clear distinction between what is restrictive and what is prohibitive. Recall that the Russian retaliatory measures analyzed in the proceeding sections, the laws technically leave the possibility to obtain permits to export aircraft to unfriendly foreign states. As counterintuitive and as surreal as this may appear, the effort to obtain such a permit, even if nearly impossible to be approved, can likely produce different legal consequences in insurance litigations. Admittedly, this is a high bar for the lessor, and the court has the discretion to decide the standard of reasonable efforts in aircraft recovery.

Also relevant in the evaluation is the unlikelihood of aircraft redelivery by Russian lessees, because AIG has contended that some Russian lessees did in fact offer the return or have actually returned the aircraft. This inquiry is of factual intensive nature, the mere fact that some lessees have offered the return of aircraft does not make the recovery more certain for other aircraft,

unless such offers can be objectively proven to be genuinely redeemable. In a step further, the redeliveries of aircraft by some Russian lessees to other lessors likewise should not infer a better chance of recovery as they were executed under individualized, and different situational contexts. The court will need to investigate the reasons and natures of those redeliveries, and it may also be necessary to differentiate one lessor from another considering factors such as the ownership structure, governing law of the lease agreement, and business interests controlled by the lessor in relation to the priorities of the Russian State. For example, the fact that BOC Aviation, a Singapore-based lessor controlled by a state-owned bank of China was successful in exporting its freighter jets from Russia[238] is no promising sign for lessors in the EU to effect similar outcome. Accordingly, offers to return and existing redeliveries of aircraft should have limited impact on the court's analysis.

6.4.4 The Condition and Timing of Loss

There are moving pieces in the unilateral sanctions and the Russian countersanctions that may dynamically change the irretrievability of aircraft. It was reported that AIG claimed under the All-Risks policy that the insured aircraft left in Russia have not become sufficiently permanent because the Russian policies may change, and the aircraft were re-registered in lessors' name.[239] One may freely speculate that a modification or even the full withdrawal of unilateral sanctions will result in the termination of the Russian restrictive measures against unfriendly foreign states. In spite of this, prospective changes of political and legal conditions should not affect the legal analysis of irretrievable deprivation. On this issue, the principle set forth in *Holmes v Payne* can

[238] *Supra* note 207.
[239] "Aviation insurance: AerCap v insurers", (10 September 2024), online: *Mishcon de Reya LLP* <https://www.mishcon.com/news/aviation-insurance-aercap-v-insurers>.

provide helpful assistance.[240] In *Holmes*, the judge held that if an insured object is missing and remains unfound even after diligent efforts in searching for it within reasonable time, the insured item is considered lost for the purpose of insurance claim even if it resurfaces after the claim.[241] This principle is followed by the *KAC* case where Justice Langley held that the KAC aircraft were lost by the end of the day when the Iraqi forces invaded and took control of the Kuwait Airport, because the recovery of aircraft within a reasonable timeframe were deemed uncertain and unlikely. One may contrast the difference between *Holmes* and *KAC* that the former concerns a missing item whereas the latter deals with deprived items, however, this distinction has little impact on the assessment of whether the insured object can be deemed loss, but rather it concerns more with the timing and the event that ultimately caused the loss of the insured item. The timing of the loss may be a relevant issue for Aercap because the reinsurers have raised defense on the termination of lease agreements following the sanctions.[242] This author is of the view that the timing is also relevant in identifying the nature of the loss for the purpose of allocating it to the appropriate coverage. Consequently, a crucial question is when did the loss of aircraft to Russia occurred, and if at all, from what event(s). This issue can be challenging because even though the first event of default can be easily identified according to the lease terms, the subsequent Russian retaliatory regulations only took place subsequently and in a sequential manner.

In *KAC*, the Justices were asked to resolve whether the total loss of British Airways aircraft at Kuwait Airport rooted from the same event that resulted in the loss of KAC aircraft, that is the

[240] Holmes v Payne, [1930] 2 KB 301.
[241] *Ibid* at 310.
[242] note 205. The reinsurers claim that the covers were cancelled before the loss can occur because they were linked to the lease agreements, but the claimants deny that the insurance ceased upon the termination of lease agreements.

deprivation of aircraft upon seizure at the same location in 1990; the caveat here is that the BA aircraft were only physically destroyed in the year following the first seizure.[243] This case involves an insurance clause where the loss must be arising from any "one event", in the analyzing the events that had occurred prior to the physical loss of the BA aircraft, Justice Rix opined that there needs to be a strong causal link among the multiple "losses" so that they can be regarded a single unifying event for the purpose of aggregation under the insurance claim.[244] The loss of BA and KAC aircraft were treated as stemming from different events because unlike the KAC aircraft, where they were at home and the Iraqi forces intended to make them their own under the policy to claim sovereignty over the nation, there was no indication of similar intention towards the BA aircraft from the Iraqi government.[245] In addition, the destruction of the BA aircraft under the fire of the coalition forces were the result of the deterioration in geopolitics and international relations.[246] There are two important takeaways from the case of *KAC* for the current insurance dispute in connection with aircraft leased to Russia, one is that a total loss of aircraft without physical destruction as in the case of the KAC aircraft may be recognized if the intention of the seizer was clearly aimed at making the insured aircraft its own; the other is that in the case of a plurality of losses, the aggregation of them as one event can be achieved only if there is a significant causal link.

Should the court accept the notion of irretrievable deprivation in the non-marine context, analyses of the Russian restrictive measures against aviation exports and foreign creditors are required to determine whether the Russian State intends to illegally convert leased aircraft

[243] KAC, *supra* 236 at para 81-82.
[244] *Ibid*.
[245] *Ibid* at para 83.
[246] *Ibid* at para 79. "It was not until the November 1990 that non-Iraqi military operation became more likely than not."

irrespective of their title registration status. It is not unreasonable to find that the leased aircraft stranded in Russia were irretrievably lost when the Russian President signed Decree No. 100. Nonetheless, if the termination date of the insurances becomes an issue, the court likely needs to resolve whether the loss can be casually linked to the first deprivation of aircraft before the cancellation of all insurance policies, possibly at the juncture when Russian aviation regulator ordered Russian carriers not to comply with foreign lessors' redelivery requests. In any event, the inquiry regarding the timing of loss should be highly fact intensive. As for the reinsurers' claim of lack of reasonable time to proof the permanency of irretrievability, the *KAC* court rejected the "wait and see" approach on subject matters that are not "missing" (where the location is known) but simply irretrievable, as is the case with aircraft leased to Russian operators, hence, no passage of time is necessary to establish the loss for as long as the lessor's efforts in attempting to retake the aircraft were sufficient.[247]

6.4.5 Constructive Total Loss

As mentioned before, the notion of constructive total loss is not ordinarily applicable to non-marine situations and thus must take effect through contractual language. Since it is argued by the reinsurers in the Aercap case that constructive total loss can only apply where the insured can demonstrate a damage exceeding 75% of the value and this cannot be achieved through showing deprivation of possession, it is apparent that the policy contract must contain a specific clause on the constructive total loss based on an agreed value. The evaluation depends largely on the contractual terms detailing the conditions of such loss; however, one possible argument exists for the lessor on the ground of deteriorated value of aircraft in Russia.

[247] See *KAC*, *supra* 236 at para 76. The judge made the distinction between a missing item where a total loss can only be established upon a proper search, and an item that is not retrievable, but the location is certain.

Constructive total loss may be established if the lessor can demonstrate by objective evidence that the insured aircraft suffered significant damage of at least 75% of the insured value arising out of the lack of approved aircraft parts and proper maintenance consequential to the aviation restrictions of the unilateral sanctions. If pursing this way, the lessor needs to track and obtain aircraft records and possibly enlist third parties to appraise the value of each aircraft based on all available resources. The clear disadvantage of this is the complexity and volume of work involved in the acquisition of evidence due to restrictions imposed by the sanctions and countersanctions. Under the airspace ban, reasonable options to travel to Russia became extremely limited, adding to the trouble is the safety concern for foreign personnels on the ground, especially those from the so-called unfriendly states. For instance, the U.S. State Department has designated Russia as "Level 4 – Do not travel" on its travel advisory bulletin.[248] The Irish Department of Foreign Affairs has similarly advised citizens against all travels to Russia and urged those who are still present in the country to have plans to leave the country in anticipation of any deterioration of personal circumstances.[249] In addition, it can be difficult to obtain aircraft maintenance records to assess their actual airworthiness conditions given the reregistration of nearly all leased aircraft in Russia. As the unilateral sanctions have imposed prohibition on the servicing of aircraft for use in Russia[250], it is likewise challenging to obtain any maintenance record even in third countries where Russian carriers still operate, either because no parts can be sold to Russian operators or/and servicing Russian operated aircraft is impossible due to the risks of secondary sanctions. Moreover, even if records can be obtained

[248] "Russia Travel Advisory", online: <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/russia-travel-advisory.html>.
[249] "Russian Federation", online: *Ireland.ie* <https://www.ireland.ie/en/dfa/overseas-travel/advice/russian-federation/>.
[250] It is more restrictive in the case of U.S. sanctions, as moving and servicing U.S. aircraft subject to sanctions regulations are overwhelmingly prohibited globally.

from a Russian MRO, the credibility of any such report can be questionable, the Russian flag carrier has reportedly asked employees to underreport aircraft malfunctions.[251] Lastly, it is more likely than not that the assessment of damages to leased aircraft needs to be carried out on a one-on-one basis, therefore, the mere fact that some aircraft can be proven to have sustained the requisite level of damage cannot be used to the benefit of the lessor on the claims of others.

Accordingly, due to numerous challenges posed by the sanctions, unless the court is prepared to accept the appraisal of the stranded aircraft's values on a generalized level, or otherwise base the analysis on some expert testimonies without assessing physical evidence, it can be difficult for Aercap to find recovery under the notion of constructive total loss.

6.4.6 All-Risks or War Risks?

The All-Risks cover excludes War and Allied Perils named in the policy, AIG and other all-risks insurers contended that if a covered loss exists, such loss would stem from one or more of the war perils because of a series of events subsequent to the Russian invasion of Ukraine, therefore the lessor is limited to the agreed aggregate value under the War-Risks cover, which at 1.2 billion USD is considerably less than the amount it would have been entitled under the all-risks coverage. War Risks exclusions can encompass damages resulting from a broad range of perils, the following are excluded by AVN48B[252] and covered by LSW555D[253]:

> (a) War; (b) Strikes; (c) Act of political or terrorist purpose; (d) Malicious act or act of sabotage; (e) Confiscation, nationalization, seizure, restraint, detention, appropriation,

[251] The Moscow Times, "Russian Airlines Ask Employees to Report Fewer Aircraft Malfunctions – Proekt", (15 May 2023), online: *The Moscow Times* <https://www.themoscowtimes.com/2023/05/15/russian-airlines-ask-employees-to-report-fewer-aircraft-malfunctions-proekt-a81140>.
[252] AVN48B "Aviation War, Hijacking and Other Perils Exclusion Clause"
[253] LSW555D "Aviation Hull 'Ware and Allied Perils' Policy", Sec. One "Loss of or Damage to Aircraft."

requisition of title or for use by any government or public or local authority; (f) Hi-jacking.

Part (c) and (e) are of particular relevance to aircraft leased to Russia because the aircraft are placed under export restrictions, and the occurrence of any of the listed event alone is sufficient to trigger the exclusion. The All-Risks insurers relied on these clauses to advance its argument.[254] In defending their position, the reinsurers contended that all claims of loss of aircraft were caused by the acts of the Russian officials including the President, and other government bodies for political purpose.[255] They further claimed that the loss of insured aircraft was caused by one or more of the War Perils resulting from the Russian government's undertakings in Part (e) of the above: confiscation, nationalization, seizure, restraint, detention, appropriation, requisition of title or for use of leased aircraft.[256] Aercap refuted all of these claims, it argued that the loss was caused by the Russian lessees' decision to unlawfully keeping the aircraft against its will for their own commercial interests.[257]

The key issue here is whether the Russian countersanctions in enacting laws that prevent the normal course of aircraft exportation can be attributed to the loss of leased aircraft. Unlike in the Kuwait Airways case where the aircraft were physically seized or at least detained by the foreign invading forces in occupying the airport, in this case the status of leased aircraft is not nearly as straightforward. The Russian government did not take physical possession of leased aircraft, nor did it covert the title or claim ownership of them domestically. Nevertheless, the Russian countersanctions appear to have had two primary objectives: safeguarding its commercial

[254] *Supra* note 242 at app 3.4.
[255] *Ibid*.
[256] *Ibid*.
[257] *Ibid*.

aviation fleet and retaliating against entities from countries imposing sanctions. These aims align with the Russian government's official stance, as evidenced by cabinet members' public statements and presidential orders discussed in prior chapters, strongly suggesting that the aviation-related restrictions were politically motivated. Hence, if the Russian lessees are deemed to have held on to the leased aircraft under the color of government interference or instructions, the damages cannot be stemmed from the lessees' own actions or inactions thereof.

On the other hand, the analysis of the lessee's autonomy in decision-making must be reviewed in conjunction with their changing legal obligations over time in Russia. In plain sense, if the lessees had genuine opportunities to redeliver the aircraft after the first default notice from the lessor, or whenever the rights and interests in the lease aircraft reverted to the lessor according to the lease agreements, it does not follow that the lessees retained the aircraft by reasons of Russian export prohibitions enacted later. Yet, as previously introduced in earlier chapters, there are reports suggesting that the Russian regulator had "recommended", if not ordered all foreign leased aircraft to stay put in Russia to prevent seizure. Recall that in the *BOC Aviation* case, the Russian cargo operator flew two planes back to Russia after default and they clearly had the opportunity to leave the planes as instructed by the lessor, it claims that it was following an order from Russia to repatriate all planes.[258] There are also cases where Russian operators voluntarily returned aircraft to foreign lessors before the implementation of fresh export controls, it is unclear whether the lessees here had comparable opportunities. Accordingly, this issue is highly fact-dependent, and the court must find out the true extent of the lessees' freedom in exercising their business judgments post defaults.

[258] See *BOCA* at 233 para 2.

From a different perspective, if the Russian export restrictions are considered non-political and lessees are deemed to have acted in accordance with all governmental instructions, the War Risks insurers may have an argument that the Russian government forcibly *restrained* the return of aircraft despite that it may not have officially expressed the intention to exercising physical control or permanently seizing them. The Oxford English Dictionary defines the term restraint as "an ordinance or injunction which imposes a restriction; such a prohibition itself."[259] The OED also provides an alternative meaning that "the action or an act of restraining, checking, or stopping something."[260] The Russian government exerted legal restraint upon the exportation of aviation goods, therefore the deprivation or loss of aircraft falls within a named Perils. Furthermore, on the same level of analysis, the court may also investigate the possible exercising of "seizure" and "detention" by the Russian government, both could have the effect of depriving the possession of leased aircraft from their true owner without any intention to convert titles.

Aside from the necessarily intensive factual inquiries, the attribution of a covered loss under the insurance policy depends on the legal standard adopted by the court. At any rate, the legal determination of key insurance terms under various sanctions regulations becomes ever more perplexing.

6.4.7 Are Insurances Blocked by Sanctions?

A notable exclusionary clause in most aviation insurance policies is the Sanctions and Embargo Clause under AVN111, this clause exonerates the insurer's liability under a policy if at the inception or during the course of such policy, providing coverage to the insured becomes

[259] Oxford English Dictionary, Online Revised 2010 ed, sub verbo "restraint", online: < https://www.oed.com/dictionary/restraint_n?tab=meaning_and_use>.
[260] *Ibid*.

unlawful due to the imposition of embargos or sanctions.[261] As the EU and the UK have both prohibited further aviation insurance services to Russian nationals, the reinsurers unsurprisingly raised the defense that the sanctions prohibited all payments of insurance proceeds in connection with the loss of insured aircraft to Russian operators.[262] The EU has published clarifications regarding the scope of its sanctions regime, on the point of insurance services, it explained that providing coverages to non-Russian entities and individuals are not prohibited under 2022/328.[263] If the parties have properly inserted the lessor as the "additional insured" through a cut-through clause in the policy, the reinsurance coverage for the lessor would not provide benefits "for a person in Russia or for use in Russia", therefore the reinsurance claim should not be barred under AVN111. The UK provided similar clarifications on insurance and reinsurance prohibitions imposed by Regulation 29A[264] of the Russian Sanctions Regulations.[265] Consequently, as the reinsurance coverages apply to the benefit of the lessor, who is an EU resident unconnected to Russia, the existence of sanctions should not void the lessor's reinsurance claim.

6.4.8 Non-substantive Issues

The sanctions have also placed considerable hinderance on non-substantive matters in the reinsurance battle. In the same litigation, Aercap sought to obtain insurance and reinsurance documents from a third-party broker, out of caution that the disclosure of documents would constitute an insurance intermediation service and infract with the UK sanctions on Russia under

[261] ANV 111, "Sanctions and Embargo Clause" (01.10.10).
[262] *Supra* 242 at app 4.2.
[263] European Commission, "Consolidated version - European Commission", online: <https://finance.ec.europa.eu/publications/consolidated-version_en>.
[264] Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855, regs 29A (UK: HMSO, 2019).
[265] "Russia sanctions: guidance", online: *GOVUK* <https://www.gov.uk/government/publications/russia-sanctions-guidance/russia-sanctions-guidance>.

Regulation 29A, the broker refused Aercap's request despite that the Commercial Court previously permitted the disclosure of insurance contracts of Russian airlines in similar actions.[266] To secure these documents that could have been voluntarily provided, the lessor was forced to apply for a court mandated third party disclosure order.[267] In its ruling, the court held that the disclosure of insurance documents of Russian lessees in pretrial procedures does not amount to providing insurance service.

Another notable episode linked to the unilateral sanctions involves the exclusive jurisdiction clause in reinsurance policy, in that instance, the court granted the reinsurance litigation to proceed in the English court despite that the exclusive jurisdiction clause selecting Russia as the venue.[268] The reinsurers sought for a stay of action in English court and enforce the exclusive jurisdiction clause and remove the proceeding to a Russian court. The English Commercial Court weighed multiple considerations in light of the sanctions imposed on Russia from the invasion of Ukraine, significantly, the judge scrutinized Russian courts' ability to objectively adjudicate insurance claims with the exposure of Russian state interests[269]; the judge also expressed concerns over the likelihood of disapproving the legal effects of western sanctions on commercial contracts by Russian courts.[270] From these considerations, the Commercial Court ruled in favor of the lessor due to the low chance of fair proceedings in Russia.

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[266] "Court finds compliance with third party disclosure did not contravene applicable sanctions", (January 2024), online: *Hill Dickinson* <https://www.hilldickinson.com/insights/articles/court-finds-compliance-third-party-disclosure-did-not-contravene-applicable>.
[267] *Ibid*.
[268] *Zephyrus*, *supra* note 153 at para 9.
[269] The Russian National Reinsurance Company (RNRC) collectively reinsured leased aircraft with London reinsurers in a 5% to 95% ratio.
[270] *Ibid* at para 472.

6.5 Inconsistent Interpretations of Physical Loss

The previous sections briefly discussed the notion of total physical loss and some plausible interpretations in the English law context, the insurance doctrines under English law are of particular significance considering the London market's sophistication and popularity in the aviation insurance business. However, as the aviation industry is marked with its global posture, the interpretation of the same term under the common set of geo-political realities in another major market, the United States, should likewise not to be overlooked. The U.S. is the only jurisdiction at the time of this writing that has made rulings on the substantive issues in aviation insurance claims linked to Russian lessees after the Russian sanctions. Two U.S. courts from Florida and California respectively made inconsistent and diverging decisions on the issue of total physical loss. The two courts appear to have interpreted "physical loss" from their own standards based on the corresponding state laws, and in both cases the contractual provisions were silent on the precise definition of physical loss.

In the case of *Zephyrus Aviation Capital LLC et al v. Berkshire Hathaway International Insurance Ltd*, the aircraft lessor Zephyrus Aviation sought for recovery under the hull policy for aircraft previously leased to Russian operators arguing that it lost use and possession of the aircraft in the aftermath of the armed hostilities between Russian and Ukraine, and the airplanes remained in Russia.[271] The insurers led by Berkshire Hathaway in response to denied recovery and filed a motion to dismiss, alleging that the lessor failed to identify and prove a covered loss.[272] Under the insurance policy, the All-Risks coverage protects against "all risks of physical loss or damage", however, the insurance document provides no definition of "physical loss or

[271] *Zephyrus Aviation Capital LLC et al v. Berkshire Hathaway International Insurance Ltd*, 2023 WL 8599989 (Fla. Cir. Ct.).
[272] *Ibid*.

damage".[273] The insurers contended that even though the changes in law following the Russian-Ukrainian war and sanctions may have deprived the lessor of its use and possession of their aircraft, but such loss or deprivation has no bearing on the physical manifestation of loss or damage of the aircraft, which is required under the policy. They argued that Florida courts have consistently required physical loss. The lessor on the other hand argued that it has performed diligent efforts to repossess the aircraft from the Russian lessees but were unsuccessful due to numerous restrictions outside its control, and that it has suffered an actual loss from the deprivation of aircraft possession and such dispossession amounted to a "physical loss" under the policy.[274] The plaintiff essentially adopted the total physical loss concept akin to that of the English law, which does not necessarily require the actual destruction of the insured assets. The Florida court disagreed, it reasoned that the lessor did not show that the aircraft suffered any physical damage in Russia, and Florida precedents overwhelmingly require some physical change to the insured property under the term "physical loss". In the court's view, the aircraft sustained no loss or damage because they remained in active operations at the control of the lessees in Russia. Consequently, the lessor failed in its insurance claim. In the subsequent appellate ruling, the Florida appellate court affirmed this decision without any published opinion.[275]

In *Zephyrus* the court did not engage in any discussion of the restrictive measures following the crisis in Ukraine, it also addressed no practical impact of those measures on aviation insurance despite that the lessor was indeed deprived of its aircraft for the foreseeable future. The Florida

[273] *Ibid* at 2.
[274] *Zephyrus* supra 271 at 2, para 4.
[275] Zephyrus Aviation Capital, LLC, et al v Berkshire Hathaway International Ins Ltd, 2024 WL 2855753 (Fla 4th DCA 2024).

court appears to have based its interpretation of "physical loss" solely on the state law principle requiring actual physical change to the insured assets, and it gave little deference within its discretion as matter of public policy for circumstances commonly faced by aircraft lessors globally.

In stark contrast with the Florida decision, the Superior Court of California in the case of *BBAM US LP at al v. KLN 510 Tokyo Marine Kiln et al* found that "physical" loss or damage in aviation insurance policy could reasonably be interpreted to include government restrictions such as seizure and detention of aircraft.[276] In this case, just like in *Zephyrus*, the aircraft lessor BBAM sought insurance payment based on the All-Risks policy for physical loss and damage to aircraft formerly leased to Russian lessees. The insurers in their defenses relied at one point heavily on a California case addressing the insurance coverage for the damage and loss of use of commercial property in the context of Covid-19 government restrictions, where the Covid-19 virus and government measures did not constitute physical loss under the commercial property insurance.[277] The court contrasted the "temporary loss of use of property" from pandemic-related government closure orders without any physical loss of the property with the Russian government's restrictive measures in aircraft exportation, it also made the distinction between commercial property insurance's cover against specified risks from the All-Risks coverage in aviation insurance.[278] In the former comparison, the court pointed out that the Covid-19 measures were temporary, and they did not result in seizure or render the property stolen; whereas the Russian export restrictions imposed by Resolution 311 deprived the lessor of its assets and prevented the rightful repossession of aircraft after the termination of the lease

[276] BBAM US LP v KLN 510 Tokio Marine Kiln, 2024 WL 2855753 (Cal Super Ct 2024).
[277] *Another Planet Entertainment, LLC v. Vigilant Insurance Co*, 15 Cal 5th 1106 (2024).
[278] *BBAM*, *supra* note 276 at 7, 8.

agreements. [279]The court opined that the Russian law prevented the lessor from exercising contractual rights, in reaching its conclusion the California court concurred with the New York District Court's analysis in *BOC Aviation* on the practical effects of the Russian countersanctions in relation to the loss of aircraft possession.[280]

The California court seemingly drew parallels between the *BBAM* and *BOC Aviation* cases on their similar contextual factors leading to the loss, just like in *BOC Aviation*, it based its interpretation of "physical loss" on what it determined to be a de facto seizure by the Russian government. The court also declined to impose any permanency requirement to the meaning of "government seizure", it cited the New York court's reference to the U.S. Supreme Court decision holding the seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property.[281] As the Russian government measures had meaningfully affected the lessor, who had an undisputed contractual right upon default by the lessees in repossessing the aircraft out of Russia, they amounted to seizure for the purpose of physical loss under the All-Risks cover.

In the second comparison, the court noted that unlike a commercial property insurance where the covered perils are named, the All-Risks cover in this case does not specify the causes of loss except those expressly excluded in the policy.[282] Thus, government measures that resulted in the seizure of aircraft are not excluded from the policy. However, it is a different question whether government restrictive measures, even deemed as seizures, should be deferred to the War-Risks cover as discussed in the *AIG* case. Additionally, on the issue of loss, another relevant point

[279] *Ibid*.
[280] BBAM, *supra* note 276 at 12.
[281] *Ibid* at 13.
[282] Supra note 278.

addressed by the court is the distinction between *loss of use* and the *loss of property*. The defendants argued for the exclusion of "loss of use" in Section Three of the policy, the court succinctly observed that the loss of use and loss of property concern completely different theories of recoveries, because BBAM "seeks the Agreed Value for this from its Insurers, not the lost rental payment".[283] This author notes that the determination of the applicability of the "loss of use" exclusion hinges on whether the policy intended to exclude this cause from the "physical loss and damage" under the All-Risks cover, not merely based on the lessor's theory of damage recovery.

As seen from the above discussions, the notion of "physical loss" in aviation insurance context received opposite treatments by courts from two states in the U.S., the common theme of issue is the characterization of this term under the precarious circumstances created by the Russia-Ukraine war. These inconsistent outcomes raise further questions, for example, separate from the issue of government seizure, whether the continued use of leased aircraft after the termination of leases and the suspension of OEM supplies can be regarded as physical changes to aircraft? This author is of the view that aircraft retained by the Russian air carriers after the imposition of western sanctions deviated in physical conditions from those required by the lease agreements. Scheduled maintenance and periodic replacement of components are indispensable for the safety of modern commercial airplanes, however, unilateral sanctions limiting the export of aviation supplies and technical assistance made it virtually impossible to maintain the aircraft in Russia at satisfactory conditions under the lease agreements. Regrettably, the demonstration of such

[283] BBAM, *supra* note 276 at 15, footnote omitted.

alterations and losses from a legal standpoint, especially under the current circumstances, can be extremely challenging.

6.6 Summary

As highlighted by the aviation insurance litigations in the US and the UK, the assessment of total loss for aircraft stranded in Russia remains the foremost hurdle for lessors and insurers. Sanctions enacted in response to Russia's invasion of Ukraine have triggered a convoluted sequence of events including numerous countersanctions, further complicating an already intricate analysis. Despite certain sanction and war-related clauses, existing aviation insurance policies in leases to Russian carriers were ill-equipped to handle the magnitude of loss events unleashed by the sanctions. More likely than not, when drafting policy documents, neither insurers nor lessors envisioned a scenario where war-related sanctions would wield such comprehensive influence, abruptly severing access to the underlying assets. The insurance complications represent yet another negative consequence of unilateral sanctions on civil aviation, but the issues don’t stop here, because the ripple effect of sanctions can and have indeed infiltrated to third countries. The next section will address the leakage of sanctions.

7. Leakage of Sanctions and Practical Issues in Civil Aviation

The repercussions of unilateral sanctions imposed on a target state’s civil aviation sector extend far beyond its borders, reverberating globally through means such as international agreements and retaliatory measures. The majority part of economic sanctions regimes against the Russian aviation sector takes place in the form of primary sanctions, represented by their structures crafted to impose prohibitions or restrictions on persons and entities within the legal jurisdiction

of the sender states in dealing with specific parties and types of transactions.[284] In a highly globalized industry such as civil aviation, in addition to the direct impact on the target state, the secondary effects of unilateral sanctions can produce broad and unintended consequences to unrelated third party states.[285] It should be noted that the secondary effects of sanctions are to be distinguished from the concept of secondary sanctions, the former refers to the far-reaching impacts beyond the sanctions' primary target, whereas secondary sanctions are not directed against the target state, its nationals or businesses, but rather targeting third state natural or legal persons who continue engaging transactions with the primary target state.[286] In the case of Russian sanctions, both scenarios are present. For the purpose of this section, the unilateral sanctions include both the measures imposed by countries in response to Russia's military aggression and measures subsequently adopted by Russia in retaliation of western sanctions, as they are both unilaterally imposed and harmful to the uniformity of the global aviation system. Below will briefly review some of the most notable examples to demonstrate the adverse spillover effects of unilateral sanctions on civil aviation outside the target state.

7.1 Adverse Effects of Airspace Closures

For the foreseeable time since the rapid progression in aviation technologies after the Second World War, airspace has always played an instrumental role in geo-political tensions, the struggles ensued from the Russo-Ukrainian War are no exception. As discussed in the first chapter, Russia and other sanctioning countries exchanged a wide array of reciprocal retaliations, among them the airspace closures have had perhaps the most extensive ripple effects across

[284] "What are Economic Sanctions?", online: *Dow Jones Professional* <https://www.dowjones.com/professional/risk/glossary/sanctions/>.
[285] Anastasia Likhacheva, "Russia and Sanctions: The Transformational Domestic and International Effects of Unilateral Restrictive Measures" (2021) 6:4 Russian Politics 478–502.
[286] Patrick C R Terry, "Secondary Sanctions: Why the US Approach Is Unlawful and the EU's Response Is Ineffective" (2022) Global Trade and Customs Journal 370–379 at 371.

geographical spans. Consistent with Article 1 of the Chicago Convention where every state has complete and exclusive sovereignty over its airspace[287], the most apparent function of an airspace ban is prohibiting aircraft of restricted state(s) from utilizing the sovereign airspace of the sender state. The airspace closures between Russia and over 30 western nations are not the first time airspace is used to pursue political and foreign policy agendas in recent decades, what makes the airspace bans extraordinary this time is the vast geographical coverage and strategic location of the Russian airspace for international air traffics. The global civil aviation participants have had enjoyed the benefits of the Russian airspace since the mid 1980s, particularly on intercontinental services crossing between the east and west.

Historically, the Moscow regime's predecessor the Soviet Union had always prohibited most foreign airlines from flying over its airspace during the Cold War for various reasons, and it was not until the early 1970s the Socialist Republic slowly began to permit foreign airlines into its skies.[288] Unsurprisingly, the gradual opening of the Soviet airspace coincided with its accession to the Chicago Convention: Article 5 of the Convention provides contracting states the right to overfly the airspace of other contracting states by non-scheduled flights[289]; Article 6 provides the basis for member states to establish scheduled international air services by mutual agreements.[290] When the Soviet Union first opened its airspace, international flights on the West-East route were required to make a stopover in Moscow before continuing onward journeys, and this had led to the rerouting of most flights at the time around the USSR in transfer hubs like Anchorage in Alaska.[291] In 1985, the approval of the inaugural non-stop flight between London and Tokyo via

[287] Chicago Convention art 1.
[288] Bengt Söderlund, "The importance of business travel for trade: Evidence from the liberalization of the Soviet airspace" (2023) 145 Journal of International Economics 103812.
[289] Chicago Convention art 5.
[290] Chicago Convention art 6.
[291] *Supra* note 288 at 7.

Soviet airspace marked a significant milestone in intercontinental air operations, ushering in an era of shorter travel time and enhanced operational efficiency and revenue potential.[292] The possibility of cost efficient intercontinental flights were largely contributed to the Trans-Siberian air corridor, Tanaka and Söderlund estimate that on a flight between Europe and East Asia, travel time may be reduced by as much as 6 hours.[293]

With the introduction of the Russian airspace ban, the freedom of air navigation has been dialed back three decades. This not only significantly increased the time and cost of air travels, but on the other hand, due to the inconsistent overflight privilege of different nations since the Russia-Ukraine war began, the airspace ban has created a unique situation in air transport competition for third states unrelated to the sanctions. Moreover, the institution of airspace ban can raise valid questions about the effectiveness or even the necessity of the aviation environmental schemes at both the ICAO level and regional level.

Immediately following the airspace ban by Russia on 36 nations, international flights operated by European and American carriers to and from Asian destinations have been forced to take detours, resulting in extended flight durations comparing to some of their Asian peers not affected by the restriction.[294] In two pairs of parallel comparisons of flight paths and durations compiled by Reuters, the flight between Paris and Seoul operated by Korean Airlines takes 12 hours and 15 minutes, whereas the same flight operated by Air France takes 13 hours and 23 minutes.[295] Similarly, on the route between Beijing and Frankfurt, there is a 1-hour discrepancy in flight time

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[292] Kiyoyasu Tanaka, "*Face-to-face communication and production networks: Evidence from first trans-Siberian flights"* (2024).
[293] *Ibid*. Comparing with the flights using Anchorage, the flight time can be reduced for 6 hours; the trans-Siberian route can save about 3 hours for flights previously making stopovers in Moscow.
[294] "Unfriendly skies", *Reuters* (4 March 2022), online: <https://www.reuters.com/graphics/UKRAINE-CRISIS/AIRLINES/klpykbmropg/>.
[295] *Ibid*.

between Lufthansa and Air China.[296] The most drastic flight path alterations are found on some flights between Europe and Japan, remarkably, in a somewhat reminiscent to the cold war air travel, Japan Airlines flight 44 from London to Tokyo reinitiated the overflight of Alaska immediately after the war began, consuming approximately 26250 kgs of extra fuels.[297] Among the most affected global airlines is Finnair, whose business focused heavily on connecting Europe and Asia with its famous shortcut via the efficient routings through the Russian airspace.[298] According to the information collected by Flightradar24, flight AY73 from Helsinki to Tokyo has been rerouted via the arctic route and added an astonishing 4 hours from its original flight time before the airspace ban.[299] It was estimated that the new routing consumes approximately 40% more fuel compared to the pre-invasion flights.[300]

7.2 Impedance of Environmental Goals

These artificial inflations of flight cost-factors appear to contradict with the purpose of major aviation environmental schemes such as the EU's Emission Trading System (ETS) and the ICAO's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). For instance, under the CORSIA scheme, air carriers of contracting states are responsible for tracking their emissions in flight operations and offset the emissions according to a series of indicators such as the numerical offset requirements, the growth factors from specific formulas, and annual

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[296] *Ibid*.
[297] "How flights between Europe and Eastern Asia got disrupted / Open Aviation", online: *Observable* <https://observablehq.com/@openaviation/how-flights-between-europe-and-eastern-asia-got-disrupted>.
[298] "Avoiding Russian airspace: From a shortcut to a detour", (6 March 2022), online: *Finnair* <https://www.finnair.com/gb-en/bluewings/world-of-finnair/avoiding-russian-airspace--from-a-shortcut-to-a-detour-2553672>.
[299] Ian Petchenik, "Russian roundabout: how flights are avoiding Russian airspace", (10 March 2022), online: *Flightradar24 Blog* <https://www.flightradar24.com/blog/russian-roundabout-how-flights-are-avoiding-russian-airspace/>.
[300] "Polar express: How airlines are plotting a new route to Asia", online: *CNN* <https://www.cnn.com/travel/article/north-pole-air-route/index.html>.

allocated allowances under the Scheme.[301] The offsetting can be satisfied through the acquisition and redemption of emission units from different sources of emission reductions under various other eligible environmental schemes.[302] It can be seen from the previous section that the additional fuel consumed by detours can quickly build up carbon emissions, and it is not difficult to project a scenario where they quickly outpace offsets accomplished elsewhere. In contrast to achieving offset goals through green trading and indirect conversions using complex formulas under the likes of CORSIA, reducing the direct carbon output of aviation with optimized air routing can provide greater incentives and straightforward implementation for all participants. The efficient utilization of all usable airspace not only directly confronts the biggest source of carbon output in aviation, and more importantly it aligns with the interests of states and operators because of the economic prospects. In their current form, the sanctions-induced airspace restrictions by ICAO member states invite questions on the effectiveness of any aviation environmental schemes. Given these circumstances, it is logical to conclude that airspace restrictions resulting from unilateral sanctions significantly hinder global environmental initiatives. Furthermore, promoting such environmental programs is likely to be counterproductive for as long as airspace bans of the scale imposed by Russian sanctions persist.

7.3 Fair Competition in Fragmented Airspace

The airspace bans have also prompted airline fair competition issues in the form of uneven market access amongst states. Due to the significant rise in flight distance and duration, the costs of flights for consumers have also meaningfully increased, with the air carriers transferring much

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[301] ICAO, *Consolidated statement of continuing ICAO policies and practices related to environmental protection — Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)*, Assembly Res A41-22, online: ICAO < https://www.icao.int/environmental-protection/CORSIA/Documents/Resolution_A41-22_CORSIA.pdf>.
[302] Paul Stephen Dempsey & McGill University Institute of Air and Space Law, *Public international air law*, 2nd edition ed (Montreal, QC, Canada: William S. Hein & Co., Inc. for the Centre for Research of Air and Space Law, McGill University, 2017) at 612.

of the added operational expenses related to fuels and crews to the passengers.[303] In a quantitative research project studying the worldwide impact of airspace closures from the Russian invasion of Ukraine, researchers performed analyses and simulations based on global passenger and aircraft trajectory data.[304] In doing so, they first gathered country-specific metadata of international flights from prominent aviation databases such as the Sabre Market Intelligence with precision down to the identification of individual aircraft, they then grouped the collected data by operational criteria such as the number of flights affected and estimated additional fuel consumption, lastly the researchers mathematically processed the raw data into index figures to visualize the impact of Russia-related airspace closures. The study reveals that European states are most exposed to the airspace ban, with France and Germany being the most affected countries, occupying the top positions in two of the six criteria.[305] In North America, Canada reigns on top in the measure of additional fuel consumption, and the U.S. is among the top ten affected in overall figures. The study also reveals that the statistically most important airspaces, including the one above Russia, are all located in the Northern Hemisphere. The researchers conclude that the present airspace closures as the worst-case scenario in civil aviation, where the skies above the Northern Hemisphere are fragmentized according to the sanctions divisions.

Echoing the Cold War era, where ideological boundaries dictated the airspace restrictions to global airlines, the current airspace prohibitions from the Russia-related sanctions similarly separated the skies, but this time the airspace division has created a unique situation where

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[303] "Is avoiding Russian airspace making flights longer and more expensive?", (31 July 2024), online: *euronews* <https://www.euronews.com/travel/2024/07/30/heres-how-restrictions-on-flying-over-russia-are-making-flights-longer-and-more-expensive>.
[304] Xiaoyong Wang, Jun Zhang & Sebastian Wandelt, "On the ramifications of airspace bans in aero-political conflicts: Towards a country importance ranking" (2023) 137 Transp Policy (Oxf) 1–13.
[305] *Ibid*, Table 1 "Results for the Top-20 ranked countries by TOPSIS."

carriers of different nations across the political spectrums have disparate access to flight routes. To put this situation in perspective, airlines of certain third countries remain unaffected by any airspace restrictions, in contrast with the operators from the sanctioning states, these airlines are uniquely positioned to enjoy continued access to the Russian airspace in addition to any airspace they already use before the war. This situation naturally resulted in some airlines having noticeably lower operational costs than others from nations that have imposed sanctions on Russia, causing an unintendedly uneven playing field in terms of airline competitions. In extreme cases, airlines have had to cancel some routes due to the economic unviability without Russian overflights. For example, Air Canada has suspended the Delhi-Vancouver service and most of its services to China and Hong Kong from eastern Canada.[306] South of the border, United Airlines was unable to resume the once popular Chicago-Beijing service and several critical long-haul flights to Asian destinations from the east coast.[307] In Europe, British Airways has announce the suspension of the London-Beijing route after nearly 3 decades in service.[308] Meanwhile, carriers from countries such as the UAE, India and China are still able to fly through Russia, irking industry lobbyists and regulators in some sanctioning states to raise the issue on fair competition.

The US regulator took the fair competition issue related to the use of Russian airspace with Chinese carriers in negotiating the resumption of flights suspended during the global pandemic. The lobbying group representing the interests of major U.S. carriers advocated for the ban on certain foreign carriers from using Russian airspace on U.S.-bound flights in 2023 in a bid to

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[306] "A year into Russian airspace ban, flight costs and lengths are rising - National | Globalnews.ca", (5 November 2023), online: *Global News* <https://globalnews.ca/news/9645165/russian-airspace-ban-canada-flights-impact/>.
[307] According to a source from United, the continued suspension is mainly due to the profitability issue related to the Russian airspace ban.
[308] Gwyn Topham, "BA to axe direct flights from London Heathrow to Beijing", *The Guardian* (8 August 2024), online: <https://www.theguardian.com/business/article/2024/aug/08/ba-to-axe-direct-flights-from-london-heathrow-to-beijing>.

neutralize to the alleged unfairness suffered by its members.[309] It was reported that the US Department of Transportation drafted a policy proposal to prohibit Chinese airlines from using Russian airspace on flights to and from the U.S., the detailed contents of this proposal are not publicly available.[310] Without public explanation, in the subsequently approved US-China flight schedules, Chinese carriers added technical stops on all routes that were previously non-stop, particularly on flights to and from U.S. east coast.[311] For example, a technical stop in Los Angeles was added to Air China Flight 982 from New York to Beijing, this had increased the flight duration by as much as 10 hours from the past, and the technical stop was due to "weather and occupancy considerations".[312] According to flight data, all newly approved Chinese flights to and from the U.S. avoid the Russian airspace, when inquired about whether the Russian airspace was part of the Sino-U.S. negotiation, the USDOT declined to comment.[313] As of the time of this article, flight CA982 has switched to non-stop operations with the long-range Boeing 747-8I and is still bypassing Russian airspace.[314]

European regulators share similar concerns over the use of Russian airspace by foreign carriers. In July 2024 China Eastern Airlines applied for the Shanghai-Vienna nonstop service with the Austrian aviation regulator, the application was denied by the Austrian government on the

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[309] Kate Kelly & Mark Walker, "Banned From Russian Airspace, U.S. Airlines Look to Restrict Competitors", *The New York Times* (17 March 2023), online: <https://www.nytimes.com/2023/03/17/us/politics/russia-us-airlines-ukraine.html>.
[310] "US DOT mulls banning Chinese airlines overflying Russia", online: *ch-aviation* <https://www.ch-aviation.com/news/125687-us-dot-mulls-banning-chinese-airlines-overflying-russia>.
[311] U.S. Dept. of Transportation, *Notice Approving Certain Schedules*, Docket DOT-OST-2020-0052. (8 November 2023), online: < https://downloads.regulations.gov/DOT-OST-2020-0052-0165/attachment_2.pdf>.
[312] Lei Yan, "Why the U.S.-China Market May See a 2024 Shake-up | AirlineGeeks.com", (27 November 2023), online: *AirlineGeeks.com* | <https://airlinegeeks.com/2023/11/27/why-the-u-s-china-market-may-see-a-2024-shake-up/>.
[313] David Shepardson, "Newly approved US flights by Chinese airlines avoid Russian airspace", *Reuters* (2 June 2023), online: <https://www.reuters.com/world/chinese-airlines-avoiding-russian-airspace-new-us-flights-2023-06-01/>.
[314] Flightradar24, "CCA981 - Live Flight Tracker - Real-Time Flight Tracker Map", online: *Flightradar24* < https://www.flightradar24.com/CCA981/3742bc50 >.

ground of unfair competition over the use of Russian airspace.[315] Unlike the US regulator, the Austrian authority does not appear to have demanded a similar ban on traversing Russia.

Granted, the airspace bans from the Russian invasion of Ukraine have indeed created uneven market access for airlines of different national origin. Nevertheless, the discrepancies in operational costs are not the intentional manufacture of unfair advantages by third countries, instead, they are fringe benefits incidental to the unilateral sanctions on Russia. Under the lens of public international law, a state shall abide by its international obligations arising from treaties and *jus cogens*. The Chicago Convention imposes on contracting states the duty to apply for permission to use or transit through the national airspace of other states in scheduled international air services[316]; the International Air Services Transit Agreement of 1944 on the other hands provides contracting states the privilege of overflight in conducting scheduled international air services.[317] The Russian Federation was never a party to the IASTA, hence the use of Russian airspace is subject to its permission only. Under neither of the foregoing treaties a state unaffected by the Russian airspace closures owe any legal obligation towards other states, irrespective of their participation in sanctions, for the use of Russian airspace. However, as a practical matter, the Russian sanctions have certainly assimilated the effect of such an obligation.

From another perspective, it is equally true that each state has complete and exclusive sovereignty over its airspace, hence, the action of imposing additional conditions to international air services of foreign carriers is not unlawful *per se*. The imposition of unilateral sanctions has created a complex dilemma for states between safeguarding national interests and maintaining

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[315] "China Eastern refused Vienna rights over Russia transit", online: *ch-aviation* <https://www.ch-aviation.com/news/142729-china-eastern-refused-vienna-rights-over-russia-transit>.
[316] *Supra* note 290.
[317] International Air Services Transit Agreement, 7 December 1944, 84 UNTS 389 (entered into force 30 January 1945).

sustainable trade relations. The scenarios discussed above exemplify the additional secondary effects of unilateral sanctions, adversely affecting all stakeholders involved in civil aviation. The emerging practice of extending airspace restrictions to carriers not affected by airspace bans signals a troubling trend. It is conceivable that other sanctioning states in comparable positions may emulate this approach. Unfortunately, this situation will likely persist until sanctions policies are recalibrated.

8. The Proportionality of Sanctions Against Civil Aviation

As an integral part of modern transport infrastructure, the integrity of civil aviation is vital to the economic and humanitarian interests for all states. Given this, comprehensive economic sanctions against civil aviation should be exercised with a high degree of caution. Meanwhile, Russia's military aggression against the sovereignty of another country violated a fundamental international obligation enshrined under the UN Charter, it is therefore not unexpected that various forms of measures were implemented against it. Coordinated efforts at the UN level are preferred over unilateral sanctions for their uniformity and procedural fairness, but the UN Security Council is confronted with practical challenges in imposing coordinated sanctions due to Russia's veto power as a permanent member of the UNSC.[318] Under this condition, it is essential to address the legal foundation to impose detrimental measures against Russia for its breach of international obligations outside the UN framework. Chapter 2 has examined the various avenues and prerequisites in invoking responsibility against Russia and left open the possibility that third-party states may under certain conditions, impose sanctions contrary to their respective international obligations but are justified as lawful countermeasures. Importantly,

[318] "What are sanctions, do they ever work – and could they stop Russia's invasion of Ukraine? | Australian Human Rights Institute", online: <https://www.humanrights.unsw.edu.au/research/commentary/what-are-sanctions-do-they-ever-work-and-could-they-stop-russias-invasion-ukraine>.

countermeasures are not unrestrictive, and their limitations are subject to dispute.[319] This section directs the focus on the proportionality of sanctions against Russian civil aviation to assess whether these measures are appropriately tailored to achieve the intended goals without excessive damages to civilians and unrelated parties.

8.1 The Proportionality Standard

The rule of proportionality requires countermeasures be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[320] For instance, the ICJ in the *Gabčikovo-Nagymaros* case held that Slovakia's countermeasure in response to Hungary's abandonment of the joint water dam project, which involved the unilateral construction of a modified water dam that resulted in the total deprivation of shared water resources on the Danube, was unlawful because of its disproportionate effect compared to the injury sustained.[321] The principle of proportionality does not require precise equality in countermeasures. In the *Air Service Agreement* arbitration case between the United States and France, the French government's detainment of Pan AM aircraft upon arrival, for which France alleged that the bilateral agreement prohibited the change of gauge on services to Paris, led to the U.S. response of banning French carriers from operating the Paris-Los Angeles route altogether.[322] The tribunal held that the U.S. countermeasure was lawful despite it being more severe than the original injury, it reasoned that the assessment of proportionality considers not only the injuries suffered, but also involves the evaluation of interest at stake considering the

[319] James Crawford & Ian Brownlie, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 552.
[320] *Gabčikovo-Nagymaros*, *supra* note 41 at 58.
[321] *Ibid*.
[322] *Air Service Agreement* of 27 March 1946 between the United States of America and France (1978), 18 RIAA 416 (Arbitrators: Willem Riphagen, Thomas Ehrlich, Paul Reuter).

totality of circumstances.[323] In this case, the tribunal considered the French action's broader effects in the context of policy significance, namely the U.S. air transport policy adopted through numerous air services agreement with foreign states.[324] A disproportionate countermeasure would also enables the target state to respond as an injured state.[325] This could lead to a vicious cycle of retributions. In addition to the effect on the target states, it has also been suggested that interests of third states, especially those of essential humanitarian natures, should be accounted within the proportionality assessment.[326] The current international legal framework does not adequately address third state injures in sanctions, as they do not always have individual rights of claim in the matters.[327]

Some measures in a sanction regime, such as diplomatic limitations and embargos, may be considered as lawful retorsions. Whether a measure constitutes a retorsion depends on the individual relationship in question, the key to the assessment is that it cannot involve a violation by the sanctioning state of an international obligation owed towards the target state.[328] There is not a uniform approach to assess the appropriateness of retorsions. Some authors suggested that just like countermeasures, retorsions should likewise be limited by proportionality and necessity because it is illogical that acts of retorsion could be more damaging than countermeasures yet are deemed acceptable.[329] From a different approach, Giegerich is of the view that the proportionality limitations of countermeasures do not apply to retorsions, but they are not freely

[323] *Ibid* at 443.
[324] *Ibid*.
[325] Hofer, *supra* note 37 at 416.
[326] Cover, Avidan, "Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia" (2023). Faculty Publications. 2189 at 459.
[327] See ARSIWA Commentaries, at 130 para (5).
[328] Julia Schmidt, "The Legality of Unilateral Extra-territorial Sanctions under International Law" (2022) 27:1 Journal of Conflict and Security Law 53–81.
[329] Hofer, *supra* note 37 at 415, quoting White and Abbas.

deployable because they can be subject to procedural and substantive limits.[330] He also noted that retorsions can be rendered unlawful when used to interfere in the domestic affairs of another state, such that the measures can coerce changes and concessions in that state's *domaine réservé*.[331] This reasoning finds its root in the principle of non-intervention.[332] A state has within its sovereignty to freely decide its own matters, the ICJ in *Nicaragua* held that "[i]ntervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."[333] Accordingly, despite that there may be disagreements on the criterion for assessment, the consensus among legal scholars is that retorsions are not limitless.

Building on the principle of non-intervention, there is also the increasingly more relevant issue of extraterritoriality. Unlike traditional sanctions, which usually impose restrictive measures against the target states, extraterritorial sanctions further restrict the conduct of individuals and entities in third countries.[334] This can be achieved through either primary sanction with extensive extraterritorial effects, or secondary sanction specifically designed to bind non-nationals of the target state to follow the primary sanctions. The Russian Harmful Activities Sanctions Regulations (RHASR) contain a series of primary sanctions with extraterritorial effects, they regulate designated activities between the US and Russia and transactions with a US nexus, for instance, the use of US financial system. The scope of the RHASR has been modified to authorize secondary sanctions against foreign financial institutions investing and facilitating significant transactions in the so-called "Russian military-industrial bases" previously introduced

[330] Thomas Giegerich, 'Retorsion' in A Peters and R Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP, article last updated September 2020), para 14.
[331] Ibid at para 24-25.
[332] Maziar Jamnejad & Michael Wood, "The Principle of Non-intervention" (2009) 22:2 Leiden Journal of International Law 345–381.
[333] *Nicaragua*, *Supra* note 43 at 14.
[334] Hoffer, *supra* note 310 at 405.

in the first chapter, this latter concept has been expanded by the US OFAC to include all key industries including civil aviation.[335] There are also numerous secondary sanctions against third country nationals engaging in activities in key Iranian sectors. There is not a definitive answer on the legality of extraterritoriality of sanctions, as Schmidt concluded, unilateral extraterritorial sanctions are neither lawful nor unlawful under existing international law.[336]

It can be seen from the above that there is not a settled conclusion on the legality and limitation of unilateral restrictive measures, but the implementation of sanctions, whether categorized as countermeasures or retorsions, should not result in excessive harms and are subject to some restraints depending on each of their individual circumstances. Importantly, aside from all criteria discussed, it is uncontested that humanitarian limitations apply to all sanctions.[337] The UN Special Rapporteur has stressed on numerous occasions the urgency to protect human rights from unilateral sanctions. At the UN level, the Security Council has similarly adopted humanitarian exemptions to UN sanctions regimes.[338] It follows that some elements in a sanction package may be more appropriate than others, for example, in response to an armed aggression, an embargo on dual-use drones are more likely to be appropriate than an export ban on medical equipment. The legality of any given unilateral sanction, even if determined, can in no way negate the adverse consequences inflicted upon civilians of the target and innocent third parties. For the purpose of ensuring the integrity of international civil aviation system, sanctions should

[335] "As Russia Completes Transition to a Full War Economy, Treasury Takes Sweeping Aim at Foundational Financial Infrastructure and Access to Third Country Support", (20 September 2024), online: *US Department of the Treasury* <https://home.treasury.gov/news/press-releases/jy2404>.
[336] Schmidt, *supra* note 328 at 80.
[337] See ARSIWA Article 50.
[338] SC Res 2664, UNSCOR, 9214th Mtg, UN Doc S/RES/2664 (9 December 2022).

be tailored to minimize: (1) harm on aviation safety; (2) impact on the predictability of aviation transactions, and (3) extraterritoriality.

8.2 Factors Affecting the Proportionality Analysis

The sanctions against the Russian aviation sector are unique from other past sanctions involving civil aviation for their comprehensiveness, immediacy, and adverse impacts on third parties, even those residing in the sanctioning state. The sanctions have negatively affected among other things aviation safety, commercial predictability, and the rights of third countries through a series of chain reactions created by primary sanctions and the threat of secondary sanctions.

8.2.1 Aviation Safety

The most direct impact on aviation safety is the immediate prohibition of aircraft spare parts and technical services to Russia, reflected in the Irish Aviation Authority's suspension of airworthiness certificates. The revocation affected Russian airliners' ability to conduct lawful international operation, leading Russian legislators to promulgate controversial legal measures that not only placed its own citizens at risk, but also passengers from any destinations its carriers serve. Lacking the access to genuine aircraft parts for maintenance, any aviation regulator would be rightfully hesitant to approve continued airworthiness. Reports of aircraft cannibalizations, flight safety incidents, and importations of illicit parts have since increasingly surfaced.[339] It is not the first time a nation's civil aviation is under similar existential threat, Iran's civil aviation has been the subject of U.S. sanctions for nearly 4 decades. Unsurprisingly, it has less than stellar records in aviation safety.[340] Due to the similarity in restrictive measures, the struggle of the

[339] Robyn Dixon, "Russian air passengers face peril as planes show strain of sanctions", *Washington Post* (16 January 2024), online: <https://www.washingtonpost.com/world/2024/01/16/russia-air-travel-danger-sanctions/>.
[340] Kourosh Ziabari, "Just cause for fear of flying in Iran", (20 January 2022), online: *Asia Times* <http://asiatimes.com/2022/01/in-iran-there-is-reason-to-have-a-fear-of-flying/>.

Iranian civil aviation industry can provide helpful reference on the prospective impacts of aviation sanctions on Russia.

The average age of the Iranian civil aviation fleet is approximately 25 years, with some planes served for nearly 40 years.[341] Desperate to replace its ailing fleet, in negotiating the Joint Comprehensive Plan of Action (JCPOA) in 2016, Iran insisted the insertion of a clause to allow for the purchase of aircraft: "The United States will, as specified in Annex II and in accordance with Annex V, allow for the sale of commercial passenger aircraft and related parts and services to Iran; license non-U.S. persons that are owned or controlled by a U.S. person to engage in activities with Iran consistent with this JCPOA".[342] However, the U.S. only lifted certain secondary sanctions after the conclusion of JCPOA and they were reimposed after the Trump Administration withdrew from the deal. In the subsequent ICJ proceeding between Iran and the U.S. in the *Alleged Violations of the 1955 Treaty of Amity* case, the Court recognized civil aviation safety as an essential humanitarian interest and ordered the removal of export restrictions on aviation spare parts, equipment and associated services necessary for the safety of civil aviation.[343] The U.S. rejected the ruling on the ground that its policy already allowed for the exportation of civil aircraft spare parts.[344] The U.S. under the Iranian Transactions Regulations permits exports necessary for the safety of civil aircraft in Iran only with the approval of specific license and on a case-by-case basis.[345] However, there is little evidence supporting the regular issuance of such permit for Iranian airlines in practice. As a result, Iran relies on illicit spare parts

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[341] *Ibid*.
[342] UNSC, Joint Comprehensive Plan of Action, 14 July 2015, UN Doc S/2015/544 (not in force).
[343] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018, [2018] ICJ Rep 623.
[344] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Islamic Republic of Iran v United States of America), Preliminary Objections Submitted by the United States of America. (23 August 2019) at 18 para 2.16.
[345] *Iranian Transactions Regulations*, 31 C.F.R Part 560 § 560.528.

and resorts to the illegal smuggling of aircraft and components from time to time. Thus, under unilateral sanctions from major aircraft manufacturing states, the safety of Russian civil aviation will likely confront similar challenges. The harsh reality is that the only way to ensure aviation safety by international standards in Russia now is the complete grounding of all flight operations.

8.2.2 Extraterritorial Effects

The U.S. sanctions exhibit expansive extraterritorial applications, not only curtailing aviation exports and traffic rights of targeted state, but also dynamically imposing constraints on third parties, which raises concerns about the proportionality of these measures. In addition to applying sanctions on all U.S.-origin goods, the OFAC further prohibits non-U.S. persons from "engaging in conduct that evades U.S. sanctions."[346] The U.S. appears to have adopted a result-oriented approach in sanctions enforcement, the quoted language can be broadly interpreted to include all conducts achieving identical ends in which the US sanctions aim to prohibit. Leveraging its advantageous positions in the financial system and global commerce, the U.S. sanctions on civil aviation entrap third states who may otherwise freely exercise their own judgements in trade and other affairs with Russia. For instance, under the U.S. sanctions regime, Russian operators cannot legally purchase civil aircraft materials on the Commercial Control List from intermediaries in China, although Chinese companies are technically free to conduct the sales, but only at the risk of exposing themselves to severe penalties as the U.S. imposes civil and criminal liabilities for export control violations globally.[347]

The servicing of sanctioned aviation items by third country nationals is also prohibited under the U.S. sanctions. The U.S. government pressured Turkey from providing services to Russian

[346] US, Department of Commerce, Department of the Treasury & Department of Justice, "Tri-Seal Compliance Note: Obligations of foreign-based persons to comply with U.S. sanctions and export control laws" (6 March 2024) at 2.
[347] "Penalties", online: <https://www.bis.doc.gov/index.php/enforcement/oee/penalties>.

operated US-origin aircraft, senior US official warned that "Turkish individuals are at risk of jail time, fines, loss of export privileges and other measures if they provide services like refueling and spare parts" to U.S. made airplane.[348] Similar efforts have been likewise pursued against China and the UAE, and the U.S. OFAC actively tracks and sanctions foreign entities re-selling aircraft equipment to Russia.[349] The extraterritorial enforcements of sanctions deprive third countries their full capacities to freely conduct affairs within their *domaine réservé,* arguably encroaching upon their sovereignty. Meanwhile, the EU "No-Russia" clause does not regulate extraterritorially the behaviors of third parties other than the re-exports of EU-origin goods.

8.2.3 Overcompliance Under Sanctions

A large proportion of aviation transactions, especially in the field of aircraft leasing and financing are dominated in the U.S. dollars, therefore the unhindered access to US financial system (i.e. U.S. correspondent banks and currency) is instrumental to commercial viability for many. The grave consequences of breaching U.S. sanctions abroad are demonstrated in the *Huawei*[350] and *ZTE* cases.[351] In each of these cases, foreign companies breached U.S. sanctions by engaging in transactions with Iran. In the *Huawei* case, the company was accused of misleading a global financial institution headquartered outside the U.S. in transactions involving the sales of mobile equipment containing U.S. technologies to Iranian entities, therefore constituted "causing financial institutions to unwittingly violate sanctions".[352] These cases

[348] Jared Malsin, "WSJ News Exclusive | U.S. Leans on Turkey to End Russian Flights With American-Made Planes", *Wall Street Journal* (26 January 2023), online: <https://www.wsj.com/articles/u-s-leans-on-turkey-to-end-russian-flights-with-american-made-planes-11674731467>.
[349] "Treasury Hardens Sanctions With 130 New Russian Evasion and Military-Industrial Targets", (20 September 2024), online: *US Department of the Treasury* <https://home.treasury.gov/news/press-releases/jy1871>.
[350] *United States v. Huawei Techs. Co. Ltd*, 18-CR-457 (S-2) (AMD) (E.D.N.Y. Dec. 3, 2019).
[351] See *United States v. ZTE Corporation*, 3-17CR-0120K, (N. Dist. Tex. Mar 7, 2017). ZTE was charged with evading U.S. sanctions on Iran, the case resulted in the penalty of 661 million USD.
[352] *Supra* note 350.

demonstrate that the unfettered access to U.S. financial system is conditioned upon the compliance with all U.S. regulations globally. Consequently, overcompliance is not uncommon among commercial entities and financial institutions worldwide. Newman and Zhang noted that "[w]hile sanctions research demonstrates the economic hit of such policies on targets, there is growing concern about private sector overcompliance and its systemic impact."[353] They further observed that instead of performing targeted risk management, banks often shut down entire business lines to avoid being swept up in various investigations and reputational damages.[354]

The failed Iranian deals to purchase hundreds of western-designed aircraft also hinted the trouble of overcompliance. Nadimi argued in an article for the Washington Institute that Iran's aviation safety issues were not caused by foreign sanctions, he claimed that Iran could not seize the opportunity to complete the deals to purchase Boeing jets when the JCPOA was in force because banks still viewed it as high-risk jurisdiction.[355] This was misleading at best, the U.S. primary sanctions were not lifted simultaneously with the JCPOA, therefore the purchases were still subject to OFAC licenses in addition to any license banks must separately procure.[356] He further contended that Iranian aviation safety risks were caused by the "purchase of secondhand planes and spare parts using an elaborate network of front companies and murky financial arrangements around the world" by well-connected middlemen.[357] This claim neglected the fact that Iran has no access to aircraft parts in normal channels outside the "case-by-case" licensing stream, and even with an approval, it must also survive the compliance procedure of the supplier's bank.

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[353] Abraham L Newman & Qi Zhang, "Secondary effects of financial sanctions: Bank compliance and economic isolation of non-target states" (2024) 31:3 Review of International Political Economy 995–1021.
[354] *Ibid* at 1000.
[355] "Iran's Aviation Accidents Aren't Caused by U.S. Sanctions | The Washington Institute", online: <https://www.washingtoninstitute.org/policy-analysis/irans-aviation-accidents-arent-caused-us-sanctions>.
[356] See *Preliminary Objections Submitted by the United States of America*, *supra* note 344.
[357] *Ibid*.

The trouble of overcompliance is not limited to the targets of sanctions, but it applies equally to businesses in the sanctioning state. In *Celestial Aviation Services Ltd v UniCredit Bank AG*, UniCredit Bank refused payment to the Irish lessor of several Letters of Credit issued by Sberbank of Russia that it guaranteed due to the concern of legality under various Russian sanctions.[358] Among the key issues were the contractual payment in U.S. Dollars and the non-performance of payment under U.S. sanctions, for the latter issue the Bank relied on an English law doctrine excusing the performance of contractual obligations that are prohibited by the *lex loci*.[359] The English High Court in the first instance ruled in favor of the aircraft lessor, it held that USD payment may be executed in cash so as to avoid the possible U.S. restrictions.[360] On appeal, the court held that the bank could not avoid performance because it did not use reasonable efforts to acquire an OFAC license to approve a remittance using USD, but the Court of Appeal disagreed that the payment can be made in cash or other currencies because of contractual terms.[361] This case elucidates the intricate balance between sanctions adherence and commercial practicality, underscoring the far-reaching and often indiscriminate consequences of unilateral sanctions.

8.3 Summary

As illustrated, intertwining extraterritorial export restrictions with financial sanctions, the US sanctions regime against civil aviation is multi-layered and its coercive effects transcend industrial and national boundaries. On other hand, while the EU sanctions mostly refrained from regulating conducts of third state nationals, the trend appears to be gradually shifting away from

[358] *Celestial Aviation Services Ltd v UniCredit Bank AG (London Branch)* [2024] EWCA Civ 628.
[359] See *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 1 K.B. 614 (17 December 1919).
[360] *Celestial Aviation Services Ltd v UniCredit Bank AG* (London Branch) [2023] EWHC 663 (Comm).
[361] *Supra* note 358 at para 114, para 130.

its traditional stance against extraterritorial sanctions. Adding to the complication, the de-risking practice of overcompliance by commercial entities under sanctions present further hurdles for civil aviation stakeholders. As clearly conveyed in a statement by U.S. Treasury Secretary Yellen, "the United States is determined to sanction people and companies, no matter where they are located, that support Russia's unjustified invasion of Ukraine."[362] The pervasive effects of unilateral sanctions on global civil aviation are not incidental, but rather calculated strategic components designed to exert maximum pressure. These measures prompt crucial inquiries into the precision of their targets and the proportionality of their widespread repercussions. Considering the totality of circumstances, despite the lacuna in a uniform standard to assess unilateral sanctions, it is difficult to conclude that the sanctions against Russian civil aviation were proportionately tailored to curtail military aggression in the current context.

9. Conclusive Remarks

This article reviewed the adverse global impacts inflicted by unilateral sanctions against the Russian civil aviation sector from multiple perspectives, they attested the systemic influence of sanction measures both inside and outside the target state on a broad spectrum covering international conventions, aviation transactions and insurances, bilateral air service relations, and aviation safety. To this date, despite the efforts designed to apply maximum pressure on Russia, the comprehensive unilateral sanctions have not been successful in ending the crisis in Ukraine. As examined in this article, the unilateral restrictive measures against civil aviation presented the international community with more questions than answers, instead of dismantling the defense

[362] US Embassy in Kyiv, "Treasury Targets Actors Involved in Production and Transfer of Iranian Unmanned Aerial Vehicles to Russia for Use in Ukraine", (16 November 2022), online: *US Embassy in Ukraine* <https://ua.usembassy.gov/treasury-targets-actors-involved-in-production-and-transfer-of-iranian-unmanned-aerial-vehicles-to-russia-for-use-in-ukraine/>.

industrial capability of the aggressor towards a military truce, they induced among other things international treaty violations, commercial uncertainties, and third-party injuries. More than any other transportation industries, the well-being of civil aviation hinges on a harmonious global network of public and private participants. The effects of sanctions, however, are on the verge of further re-fragmenting the skies that had brought many prosperities to the global aviation community for decades since the collapse of the Cold War.

In addition to the destructive consequences of primary sanctions, their extraterritorial applications further exacerbated the situation for an industry that depends on international uniformity. The restrictive measures have created a complex and twisted landscape in civil aviation that is unnecessarily representative of the wills of countries, the risks of being subjected to secondary sanctions posed a strong incentive for otherwise non-targeted parties to adhere to sanctions restrictions beyond their legal obligations.[363] This effect is particularly pronounced when sanctions originate from countries that design and manufacture the majority of commercial aircraft.

On the transactional aspect, this article inspected the key issues in aircraft leasing and insurance disputes arising from the Russian sanctions and revealed that they commonly incurred difficulties in characterizing loss events under various legal systems. Most recently, several international lessors including Aercap, BOC Aviation, and SMBC Aviation have reportedly settled with Russian lessees.[364] The detailed allocations of these settlements are not presently clear; however, lessors have booked discounts of various degrees over their aircraft, with some

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[363] Christine Abely, ed, "Extraterritoriality" in *The Russia Sanctions: The Economic Response to Russia's Invasion of Ukraine* (Cambridge: Cambridge University Press, 2023) at 40.
[364] "Aviation lessor settlements with Russia over trapped planes", *Reuters* (20 June 2024), online: <https://www.reuters.com/business/aerospace-defense/aviation-lessor-settlements-with-russia-over-trapped-planes-2024-01-31/>.

suffered significant losses according to information disclosed in litigations and voluntary disclosures. For instance, BBAM settled with Russian lessees and transferred the title of two aircraft for less than 40% of the agreed value in the lease agreements.[365]

These settlements could not have taken place without regulatory approvals from relevant authorities of the sanctioning states such as the BIS and OFAC, these de-facto sales of aircraft were executed as insurance settlements with Russian State-owned firm NSK using specially designated funds from the Russian Ministry of Finance.[366] In the absence of definitive court decisions, negotiating settlements with Russian operators via Russian state insurance may offer the most practical compromise to contain losses for both lessors and insurers at the moment, despite the potential unfairness in bargaining.

Given the near-universal compliance with the prohibition on aircraft dual registration, Russia's motivation for seeking settlements likely stemmed, in part, from the need to legitimately deregister aircraft from foreign registers, thereby enabling lawful international operations. This development is a welcoming sign, as it underscores the enduring relevance and authority of the Chicago Convention in international civil aviation even in the face of sanctions. However, despite the reaffirmation of international norms, the Russian sanctions have left international lessors, financiers, and insurers with little room and time to maneuver, resulting in grossly disproportionate impacts. As with the Aviation Working Group's statements, future economic sanctions should as much as possible be consistent among the different regimes and allow for a

[365] BBAM, *supra* note 276 at 4 para 14.
[366] "Russia diverts $712 million to aircraft buyer from rainy-day fund | Reuters", online: <https://www.reuters.com/article/markets/russia-diverts-712-million-to-aircraft-buyer-from-rainy-day-fund-idUSL8N3BB47Z/>.

predictable and practicable wind-down; sanctions should also be narrowly tailored to avoid unintended injuries to non-targets.[367]

9.1 Moving Forward

At the heart of the Chicago Convention is civil aviation's multilateralism, yet the Russian-Ukrainian War exposed numerous vulnerabilities threatening our existing legal framework, with airlines, consumers, lessors, insurers, and third-party states left unprotected in the wake of unilateral sanctions. As much as the sanctions are justifiable under the common obligation of the international community, their disproportionate worldwide effects hinted that a change is imminent.

The current ICAO dispute resolution mechanism under Article 84 of the Convention is not equipped to handle the scale of conflict as presented in the Russian situation. As Woodworth observed, the current rules of procedure exclude member states of the Council that are parties to the conflict from voting in the dispute resolution proceeding and impose a statutory majority requirement to form a quorum.[368] Therefore, in a large-scale dispute involving the disqualification of a substantial number of Council members, as in the case of the dispute between Russia and certain sanctioning states, may fully paralyze the Council's function under Article 84.[369] Woodworth nonetheless conceded that maintaining the existing voting rule is preferable to ensure the fair representation of Council members in rendering decisions.[370]

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[367] Aviation Working Group, "Principles Relating to Economic Sanctions Impacting International Aviation Finance" (May 2024), online: < https://awg.aero/wp-content/uploads/2024/05/AWG-statement-on-sanctions-May-2024.pdf>.
[368] David Woodworth, "Moscow's Diplomatic Moves in Montreal: Voting Dilemmas for the ICAO Council" (2024) 49 Air and Space Law 269–292.
[369] *Ibid* at 292.
[370] *Ibid*.

Hence, it is ideal to establish a geopolitical response mechanism at ICAO to resolve civil aviation emergencies affecting the interests of all states outside the existing framework, and preferably without appointing liabilities on the merits. This mechanism is purposed to minimize harms through interim measures on a multilateral level in dire times and is not intended to circumvent any formal process. In addition, to prevent irreparable harms to civilians, civil aviation should be afforded some form of definitive protections from arbitrary sanctions at the international level under this measure. As shown in the aftermath of the ICJ provisional measures in *Alleged Violations*, the top court proceeding achieved little more than a declaratory judgment in recognizing the importance of civil aviation safety as an essential right, and the mere presence of "safety exceptions" in national sanctions regulations have not resolved the challenges in striking a balance between aviation safety and sanctions enforcement. A temporary, collaborative approach can yield pragmatic results while preserving the legal interests of all parties involved.

As for the challenges in aircraft leasing and insurance under comprehensive unilateral sanctions, relevant industry groups should reassess commercial transactions associated with high-risk jurisdictions from time to time and dynamically adjust business practices as needed. Useful practices for stakeholders may include but not limited to implementing optimized due diligence procedure, mandatory political risks insurance, clearly defined contractual terms, and enhanced collaboration with regulatory authorities.

Sanctions can serve as powerful and bona fide weapons to counter serious infractions of international legal orders, especially armed aggression and other threats to fundamental humanitarian interests. Nonetheless, given civil aviation's reliance on international uniformity, future restrictive measures on civil aviation are best instituted through collective efforts to achieve maximum compatibility with existing treaties and prevailing global priorities.

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