HOW TO FLY AN AIRCRAFT IN TOTAL LOSS: UNANSWERED QUESTIONS IN THE AFTERMATH OF RUSSIA'S AIRCRAFT SEIZURE

Abraham Manggala Pardede*

ABSTRACT

Russia's re-registration of foreign-owned aircraft following the 2022 sanctions created an unprecedented situation in international aviation law. In AerCap Ireland Ltd v AIG Europe SA & Ors (2025), the English High Court held that the lessors had suffered a "total loss" under war-risk insurance as a result of their permanent deprivation of possession, notwithstanding that the aircraft remained operational. This development raises a broader question: what is the legal, commercial, and regulatory status of an aircraft that has been deemed a total loss but continues to fly?

This paper considers the legal and practical consequences that arise where aircraft classified as a total loss continue to operate and may ultimately be sold, transferred, insured, or reintroduced into international aviation. In particular, the paper explores unresolved questions concerning ownership, insurability, and, most importantly, the continuing airworthiness of such aircraft. If the aircraft remain operational despite being deemed a total loss, what implications does the judgment have for their future marketability? Can such aircraft continue to obtain insurance coverage notwithstanding the payment of a total loss claim? Finally, what effect, if any, does the classification of total loss have on the assessment of continuing airworthiness within the framework of the Chicago Convention?

Keywords:
Airworthiness, State Responsibility, Aircraft War-Risk Insurance, International Safety Oversight, ICAO

I. INTRODUCTION

The re-registration of leased commercial aircraft by Russia[1] following the imposition of international sanctions in 2022[2] has given rise to an unprecedented situation in international

* Graduate Student at the Institute of Air and Space Law McGill University. Email: abraham.pardede@mail.mcgill.ca

[1] *see* Nicholas Gordon, "EU Sanctions Forced Jet Lessors to Cancel Contracts with Russian Airlines. Now They're Struggling to Get Their Planes Back", Fortune (29 March 2022) online: <https://fortune.com/2022/03/29/jet-lessors-russia-putin-aircraft-leasing-ireland-sanctions-eu/>; "Hundreds of Russia plane leases to be axed after EU sanctions" (28 February 2022), CNBC online: <https://www.cnbc.com/2022/02/28/hundreds-of-russia-plane-leases-to-be-axed-after-eu-sanctions.html>; *see also* David Kaminski-Morrow, "Russian authority claims over 650 foreign aircraft have undergone re-registration", FlightGlobal (25 July 2023) online: <https://www.flightglobal.com/air-transport/russian-authority-claims-over-650-foreign-aircraft-have-undergone-re-registration/154257.article>.

[2] *See* "Tracking Sanctions Against Russia", Reuters (9 March 2022), online: <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>; "EU Targets Russian Economy After 'Deluded Autocrat' Putin Invades Ukraine", Reuters online: <https://www.reuters.com/world/europe/eu-launch-new-sanctions-against-russia-over-barbaric-attack-ukraine-2022-02-24/>; United States, Department of State, "Ukraine and Russia Sanctions", online: <https://www.state.gov/division-for-counter-threat-finance-and-sanctions/ukraine-and-russia-sanctions/>.

aviation legal structure. Hundreds of aircraft leased by Russia and registered in Bermuda[3] or Ireland[4] pursuant to Article 83bis of the Chicago Convention[5] unilaterally re-registered in Russia[6] which consequently removed the control of the lessors. This situation enables the continued domestic and regional operation by Russian airlines. Russia's unilateral registration of the aircraft effectively caused legal and practical challenges, particularly in relation to ownership, possession, insurance, and safety oversight.

In hindsight, the situation generated at least three categories of aircraft, depending on the situation. Firstly, the aircraft that were sold to Russia's lessee following the re-registration;[7] the aircraft that has obtained a compensation from insurance claim;[8] and the aircraft that have not yet sold nor received insurance claim but still operated by Russia's lessee. This article will only discuss the legal implications of aircraft that has received insurance claims.

From insurance perspective, the insurance claims have been addressed in the recent judgment of *Aercap Ireland Ltd v AIG Europe SA & Ors*.[9] In that particular case, the lessors claim for an insurance payment because they have been denied the right and effectively unable to repossess the aircraft from Russian registry. The English Court considered that due to Russia's governmental measures which caused the lessors to be unable to repossess the aircraft, the aircraft has suffered a "total loss".[10] The Court concluded that the deprivation of possession resulting from Russia's unilateral registration was sufficient to constitute a total loss, notwithstanding the fact that the aircraft remained operational and not damaged.[11]

The *Aercap* judgment reflects an important feature of aviation insurance term. The classification of "total loss" commonly operates as a mechanism for allocating financial risks between the parties due to the damage suffered by the aircraft which caused the aircraft in no longer worthy for operational.[12] In *Aercap*, the Court is faced with the question whether the contractual relationship between lessors and insurers is sufficient to determine any compensation to the lessor in relation to the aircraft is 'lost' because of the re-registration of aircraft while the aircraft is still operational.

This situation creates a fundamental paradox of the term and implication in practice. Aircraft that are regarded as "lost" for the purpose of insurance payouts continues its operation, carry passengers and generates economic value. The continued operation of these aircraft raises

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[3] Government of Bermuda, Department of Civil Aviation & Federal Aviation Administration of the Russian Federation, *Agreement Concerning the Transfer of Regulatory Oversight Functions and Duties under Article 83 bis of the Convention on International Civil Aviation* (27 September 1999) ICAO.

[4] Irish Aviation Authority & Ministry of Transport, State Authority of Civil Aviation of the Russian Federation, Delegation Agreement on the Implementation of Article 83 bis of the Convention on International Civil Aviation (26 March 2002) ICAO.

[5] Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) [Chicago Convention] art. 83*bis.*

[6] Russia, Government of the Russian Federation, *Resolution No 311 of 9 March 2022 on Measures to Implement the Decree of the President of the Russian Federation of 8 March 2022 No 100* (entered into force 10 March 2022);

[7] Federal Air Transport Agency (Rosaviatsiya), "Rosaviatsiya Prepares Documents to Have ICAO's 'Red Flag' Removed" (13 March 2025), online: RuAviation <https://ruavia.su/rosaviatsiya-prepares-documents-to-have-icaos-red-flag-removed/>, "*In 2024, 345 Russian aircraft were re-registered, and 216 of these have been bought out by domestic airlines*".

[8] *See* James Holder, Anna Andreeva & Harrison Denman, "Aviation Insurance and Other Claims Arising out of Russian Sanctions" (12 July 2022), online: White & Case LLP < https://www.whitecase.com/insight-alert/aviation-insurance-and-other-claims-arising-out-russian-sanctions>.

[9] *AerCap Ireland Ltd v AIG Europe SA & Ors* (Russian Aircraft Lessor Policy Claims), (2025) EWHC 1430 (Comm) [AerCap Judgment].

[10] *ibid* at 192.

[11] *ibid* at 132 para 590.

[12] Katherine Posner, Tim Marland & Phillip Chrystal eds, *Margo on Aviation Insurance*, 4th ed (London, UK: LexisNexis Butterworths, 2014) [Margo on Aviation Insurance] at 236.

questions as to their legal status now, their potential reintegration into the global aviation market in the future and the integrity and readiness of the international system of safety oversight toward the aircraft. In particular, in consideration that the aircraft have been removed from the chain of oversight under the Chicago Convention system following the re-registration by Russia. The re-introduction of such aircraft into international aviation without clear mechanism for restoring certification of airworthiness on the missing years would be important.

This article does not seek to answer these questions. Rather, it aims to identify and frame a series of unresolved legal and regulatory issues arising from the continued operation of aircraft deemed a total loss for insurance purposes.

To identify these unresolved issues, this article proceeds in three parts. First, it sets out the legal and commercial framework governing aircraft leasing, aviation insurance, and the concept of "total loss" as interpreted in *AerCap*. Second, it examines the questions arising from the continued operation of aircraft deemed a total loss, with particular attention to ownership, insurability, and the continuity of safety oversight. Finally, it considers why these questions matter for the international aviation legal framework, including the role of ICAO and the responsibilities of Contracting States in evaluating continuing airworthiness and safety oversight.

II. SETTING THE FIELD

A. AIRCRAFT OPERATION, LEASE ARRANGEMENT AND RISK ALLOCATION

Modern commercial aviation procurement transaction is built upon the complex structure of financing, leasing and operational arrangements. Unlike the early years of civil aviation, when airlines are commonly owned the aircraft they operated,[13] the leasing arrangements emerged since the 1970s as an alternative method of aircraft procurement or acquisition.[14] Today, a significant proportion of global commercial aircraft fleet is operated under lease arrangements, where ownership remains with the lessor while the operational control is exercised by the airlines.[15] This structure offers significant commercial and accounting advantages to airlines, particularly by reducing upfront capital expenditure and enhancing fleet flexibility.[16]

The use of aircraft leasing arrangements has, however, fundamentally altered the allocation of risks associated with aircraft operation. In this context, an aircraft is not merely a vehicle or means of transportation but also a high-value mobile assets in which multiple parties have substantial economic interests. The acquisition and operation of a single aircraft may involve a complex network of interest holders, including banks and financial institutions as

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[13] Alan P Dobson, *A History of International Civil Aviation: From Its Origins through Transformative Evolution* (Abingdon, UK: Routledge, 2017).

[14] Graham Dunn, "Lessor Gains" (March 2024) Airline Business 34; Murdo Morrison, "In Short Supply" (March 2025) Airline Business 28; Ellis Taylor, "Lessors Eye Consolidation Trend Keenly" (24–30 January 2017) Flight International 17; Ashley Cooper, "Welsh Aviation Company Started in a Bedroom" (2001) 73:4 Aircraft Eng & Aerospace Tech 392; Michael Fleming, "The Leasing Industry's Impact on the Economy" (April 2004) Equipment Leasing & Finance 19

[15] ICAO Secretariat, "Aircraft Leasing in International Air Transport," Worldwide Air Transport Conference: Challenges and Opportunities of Liberalization, ICAO Doc ATConf/5-WP/9 (27 September 2002) at paras 1.1 and 3.1 (noting that by 2001, 84% of international scheduled airlines used leased aircraft and that leasing facilitates market entry in a liberalized environment).

[16] Donal Patrick Hanley, *Aircraft Operating Leasing: A Legal and Practical Analysis in the Context of Public and Private International Air Law* (PhD Thesis, Universiteit Leiden, 2011) at 18; International Air Transport Association, *Guidance Material and Best Practices for Aircraft Leases*, (Montreal/Geneva: IATA, 2017); European Civil Aviation Conference, Recommendation ECAC/21-1 on Leasing of Aircraft (1997).

lenders, leasing companies as owners and lessors, and airlines as operators.[17] Consequently, the economic significance of an aircraft and interests attached to it extends far beyond the revenue obtained by daily operation of the aircraft by the airline.

The highly mobile nature of aircraft creates a unique legal and commercial challenges to those interest holders. Unlike most financed assets, aircraft routinely move across multiple jurisdictions and are subject to different legal and regulatory systems throughout their operational life.[18] For owners and financiers, this mobility creates jurisdictional risks, affecting not only recognition of ownership or security interest but also the practical ability to enforce those rights in different jurisdictions.[19] The commercial value of the aircraft therefore not only depends on the continued operation but also on the ability of the interested parties to exercise their interests over the asset and enforce their contractual rights when necessary.

These concerns become significant in the context of aircraft leasing transactions. Under an operating lease arrangement, the lessor's business model depends upon its ability to recover possession of the aircraft at the end of the lease term and subsequently lease it to another operator.[20] Ownership remains vested in the lessor throughout the lease term, making repossession and follow-on lease essential components in this lease arrangement.[21] Although finance leases more closely resemble secured financing arrangements, lenders and lessors nevertheless retain a strong interest in recovering the aircraft in the event of default before the secured obligations have been fully discharged.[22] The ability to recover the aircraft therefore remains a critical consideration in both operating and finance lease structures.

Recognizing the importance of aircraft leasing to the development of international civil aviation, international aviation law has gradually adapted to accommodate these commercial realities. For instance, the adoption of Article 83bis of the Chicago Convention allows the transfer of certain safety oversight responsibilities from the State of Registry to the State of the Operator, thereby facilitating the operation of leased aircraft across jurisdictions.[23] In the Russian context, for example, a significant number of leased aircraft were registered in jurisdictions such as Ireland and Bermuda even though they were operated by Russian airlines.

The protection of proprietary and security interests also has been further strengthened by the Cape Town Convention and the Aircraft Protocol.[24] These instruments recognise and

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[17] Donal Patrick Hanley, "Risk Allocation in International Aircraft Lease Agreements" (2021) 46 Annals Air & Space L 37.

[18] Roy Goode, "Security in Cross-Border Transactions" (1998) 33:1 Tex Int'l L J 47 at 49; Walter W Eyer, "The Sale, Leasing and Financing of Aircraft" (1979) 45:1 J Air L & C 217 at 241.

[19] Herbert Kronke, "Financial Leasing and its Unification by UNIDROIT" (2011) UNIDROIT Gen Rep 23; B Patrick Honnebier, "Analysing the Conflict of Laws Rule of the Convention on the International Recognition of Rights in Aircraft: A Topical Issue / Die Kollisionsnormim Abkommen uber die International Anerkennung von Rechten an Luftfahrzeugen: Ein Aktuelles Thema / Analyse de la Regle sur le Conflit des Lois dans la Convention Relative a la Reconnaissance Internationale des Droits sur l'Aeronef: Un Sujet d'Actualite" (2010) 59:1 ZLW 23 at 28 at 28.

[20] Hanley, *supra note* 16 at 20.

[21] Hanley, *supra note* 17 at 40.

[22] International Accounting Standards Board, *Discussion Paper DP/2009/1: Leases - Preliminary Views* (London: IASB, 2009) at 29; *see also,* Roy Goode, "Financial Leasing: The 1988 UNIDROIT Convention and the UNIDROIT Model Law" in Roy Goode, Herbert Kronke & Ewan McKendrick, eds, *Transnational Commercial Law: Texts, Cases, and Materials*, 2nd ed (Oxford: Oxford University Press, 2015) 355 at 12.06 para 12.03; Donal Patrick Hanley, "Aircraft Financing (Finance and Operating Leasing) in *Elgar Concise Encyclopaedia of Aviation Law* (Cheltenham, UK: Edward Elgar Publishing, 2024) 71.

[23] International Civil Aviation Organization, *Guidance on the Implementation of Article 83 bis of the Convention on International Civil Aviation*, ICAO Circular 295 (2003) at 5.

[24] *Convention on International Interests in Mobile Equipment*, 16 November 2001 (entered into force 1 March 2006) [Cape Town Convention]; *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* [Aircraft Protocol], 16 November 2001; see also Jack Wright Nelson, "The Community Interest in the Cape Town Convention" (2024) 9:1 CTCJ 36 at 1 "*The Cape Town Convention*

protect international interests and rights *in rem* of aircraft objects and provide creditors with standardized remedies in the event of default or lease termination, including expedited relief[25] and the use of the Irrevocable De-registration and Export Request Authorisation (IDERA).[26] Such remedies enable the holder of international interest to recover the aircraft from other jurisdictions. Taken together, these mechanisms are intended to harmonize the fragmentation and improve legal certainty and reduce the risks associated with cross-border aircraft financing and leasing transactions.[27]

Nevertheless, legal protections alone cannot eliminate all risks associated with aircraft operation and leasing. The aviation industry continues to face risks arising from accidents and destruction,[28] confiscation, political intervention, and the inability to recover possession of aircraft.[29] For this reason, aviation financing and leasing arrangements have long been supported by insurance mechanisms designed to mitigate the financial consequences of such events. As a result, insurance has become an indispensable component of modern aircraft financing and leasing structures.[30]

B. AVIATION INSURANCE IN HINDSIGHT

Aviation insurance operates within a framework largely shaped by commercial practice rather than comprehensive sector-specific regulation. Although insurance activities are formally governed by national legal systems in relation to the solvency of an insurance company,[31] the substantive content of aviation insurance contracts is in principle determined by market practice.[32] Standardized policy wordings developed within the London aviation market, particularly by Lloyd's syndicates and aviation insurers, provide the foundation for most aviation insurance arrangements.[33] However, these standard clauses are frequently modified through negotiation to reflect the specific risks associated with a particular transaction or aircraft operation.[34]

As a result, aviation insurance policies often consist of a combination of standardized clauses assembled and adapted to achieve a desired allocation of risk between insurer and

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is viewed as a private law convention, with one of its principal objectives being to insulate creditors' and lessors' interests in aircraft objects from the often-turbulent finances that characterize the international civil aviation industry."

[25] *Ibid*, Cape Town Convention, art. 13(1); Aircraft Protocol art. X.

[26] Aircraft Protocol art. IX and XIII.

[27] *see* Roy Goode, "Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and Its Protocols" (2016) 65:3 Int'l & Comp LQ 523 at 538.

[28] Walter C. Crowdus, "Aviation Insurance" (1931) 2:2 J Air L 176 at 180; Sidney G Saltz, "Allocation of Insurable Risks in Commercial Leases" (2002) 37:3 Real Prop Prob & Tr J; Margo on Aviation Insurance, *supra note* 12, at 243 para 11.21 "*In general aviation, the risks of which aircraft are usually covered are loss or damage in 'flight', 'taxying', moored, or on the ground*'.

[29] Rod D. Margo, "Aspects of Insurance in Aviation Finance" (1996) 62 J Air L & Com 423 at 439, 445 and 460; David I Johnston, "Legal Aspects of Aircraft Finance (PartI)" (1963) 29 J Air L & Com 161, at 166.

[30] Berend Crans, "How to Make Sure Your Aircraft Lease Agreement Covers (Almost) Everything" (2004) 29:1 Air & Space L 29 at 36.

[31] John Birds & Katie Richards, *Birds' Modern Insurance Law*, 13th ed (London: Thomson Reuters, 2025) at 21 "*The insured entrusts their money to the insurer, but in return receives only a promise of payment…Regulation has been necessary in order to ensure so far as possible that insurers are able to meet their promises, that is that they will remain solvent.*"

[32] Margo on Aviation Insurance, *supra note* 12 at 185-187.

[33] *See discussion in* Margo, *ibid*, at 428.

[34] Stephen R. Kruft, "Leveraged Aircraft Leases: The Lender's Perspective" (1988) 44 Bus Lawyer 737 at 750: "*The complex subject of aviation insurance, a specialized form of casualty insurance written in highly specialized markets, with its own peculiar terminology and customs…*"

insured. Margo described this phenomenon as the "kebab principle" of insurance drafting, whereby provisions from various sources are combined into a bespoke policy tailored to the circumstances of the transaction.[35] This flexibility reflects the fundamentally commercial nature of aviation insurance. Unlike many areas of aviation regulation, which are governed by detailed international standards, aviation insurance remains largely a matter of contractual risk allocation between private parties.

Within this framework, aviation insurance generally distinguishes between two principal forms of coverage: hull all risks insurance and hull war risks insurance.[36] Hull all risks insurance typically covers physical loss of or damage to an aircraft arising from ordinary operational hazards, whereas hull war risks insurance addresses losses resulting from war, hostilities, terrorism, confiscation, seizure, or other forms of governmental intervention. For aircraft operated under lease arrangements, lessors commonly require both forms of coverage in order to protect their proprietary and financial interests. Additional protections, such as contingent and possessed insurance, are also frequently obtained to ensure coverage in circumstances where operator-provided insurance is unavailable or insufficient.

The commercial purpose of aviation insurance is to allocate and mitigate financial risk. Its objective is not to ensure the safety or airworthiness of the aircraft, but rather to compensate the insured when a covered loss occurs. This distinction is significant. International aviation law contains relatively limited insurance requirements, most of which concern liability toward third parties rather than the operational condition of the aircraft itself.[37] While States may require operators to maintain insurance as a condition of commercial operation,[38] neither the Chicago Convention nor its Annexes establish a comprehensive framework linking insurance to continuing airworthiness or safety oversight.

This distinction becomes particularly important in the context of the Russian aircraft re-registration dispute. The question before the court in *AerCap* was not whether the aircraft remained airworthy or operated under a recognised safety oversight framework, but whether the lessors had suffered a compensable loss under the relevant insurance policies.[39] It is therefore necessary to examine how the concept of "total loss" was interpreted by the Court and why that interpretation ultimately resolved the financial position of the lessors without addressing the future status of the aircraft themselves

3. AIRCRAFT RE-REGISTRATION AND "TOTAL LOSS"

Russia's re-registration of foreign-owned aircraft in 2022 exposed a category of risk that traditional aircraft financing and leasing structures had largely assumed would remain exceptional. Unlike a conventional confiscation or nationalisation, Russia's measures did not physically seize the aircraft or remove them from operation. Instead, the aircraft remained in the possession of Russian airlines and continued to operate domestically and regionally.

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[35] Margo on Aviation Insurance at 187, "*the 'kebab' principle of policy drafting, pursuant to which various clauses are garnered from various sources and skewered together, was criticised by Schiemann LJ in Kuwait Airways Corpn v Kuwait Insurance Co. He said "To one who has no familiarity with insurance policies it is astonishing that those active in this market are prepared to do business with one another on the basis of documents which are so difficult to understand.*"

[36] Margo on Aviation Insurance, *supra note* 12, at 607 para. 28.09.

[37] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999 (entered into force 4 November 2003); Regulation (EC) 785/2004 of the European Parliament of the Council of 21 April 2024 on Insurance Requirements for Air Carriers and Aircraft Operators (2004) OJ L138/1; *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, 7 October 1952, 310 UNTS 181; Margo on Aviation Insurance, *supra note* 12, at 17 para 3.01.

[38] Margo on Aviation Insurance, *supra note* 12, at 23-30.

[39] Aercap Judgment, *supra note* 9.

Nevertheless, the practical consequence was that lessors were unable to repossess the aircraft or exercise effective control over them. The result was substantial economic loss for aircraft owners and lessors, notwithstanding that the aircraft themselves remained operational.

To recover those losses, lessors sought indemnity under their insurance policies on the basis that they had effectively lost the aircraft through an enduring inability to recover possession. The insurers resisted those claims. In particular, they argued that the lessors had not been deprived of possession because the aircraft continued to exist and remained capable of generating economic value. According to the insurers, insofar as the lessors retained the ability to exercise incidents of ownership, such as agreeing to sell the aircraft or continue the lease, they should be regarded as having recovered the aircraft, or at least as not having been deprived of possession.[40]

The Court rejected that approach. Rather than focusing on the continuing economic value of the aircraft or their continued operation by Russian airlines, the Court focused on whether the lessors had been permanently deprived of possession as a consequence of the Russian measures. Significantly, Butcher J rejected the proposition that continued operation by the lessee necessarily precluded a finding of loss. As the Court observed, if a government ordered the grounding and impounding of an aircraft, a sufficiently permanent deprivation could constitute a loss. Equally, where the government permitted the aircraft to remain in the possession of the lessee, "the result should be the same", since drawing a distinction between the two situations would be "unrealistic and uncommercial".[41]

The judgment also recognised that such a loss may emerge progressively through the operation of a continuing peril. In explaining the "grip of the peril" doctrine, Butcher J held:

> "*if an insured is, within the policy period, deprived of possession of the relevant property by the operation of a peril insured against and, in circumstances which the insured cannot reasonably prevent, that deprivation of possession develops after the end of the policy period into a permanent deprivation by way of a sequence of events following in the ordinary course from the peril insured against which has operated during the policy period, then the insured is entitled to an indemnity under the policy*."[42]

The insurers further argued that the deprivation could not be regarded as permanent because it was impossible to predict with certainty whether recovery might occur at some point during the remaining commercial life of the aircraft.[43] The Court rejected this submission and held that permanence should be assessed on the balance of probabilities. The question was not whether recovery was theoretically possible, but whether there existed a realistic prospect that the lessor would regain possession within a commercially meaningful timeframe.[44]

The significance of *AerCap* lies in the fact that the Court did not approach the dispute through a conventional constructive total loss analysis based upon physical damage or destruction.[45] The aircraft remained physically intact, operational, and commercially valuable. Nevertheless, the Court concluded that a total loss had occurred because the lessors had been permanently deprived of possession. The judgment therefore demonstrates that, for insurance purposes, an aircraft may be regarded as totally lost to the insureds notwithstanding that it continues to fly, carry passengers, and generate revenue.

In this respect, the Court's analysis reinforces that a finding of "total loss" in insurance law reflects the permanence of dispossession of an asset. It serves the commercial function of allocating financial risk between the parties and does not determine questions of airworthiness,

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[40] Aercap Judgment, *supra note* 9, para 537.
[41] *ibid,* para 322.
[42] *Ibid,* para 963.
[43] *Ibid,* para 490.
[44] *Ibid,* para 530.
[45] Margo on Aviation Insurance, *supra note* 12 at 236.

safety, or regulatory compliance. The situation resulting from the Russian measures may therefore be understood as creating two different realities between insurance law and aviation regulation: for insurance purposes the aircraft are treated as permanently lost to the lessor, while for public law purposes the same aircraft continue to exist as operational aircraft subject to ongoing, albeit disputed, regulatory oversight. This distinction forms the starting point for the questions examined in the following section.

III. ASKING THE QUESTIONS

While *AerCap* resolves the question of compensation between lessors and insurers, it leaves unanswered the status of the aircraft themselves. The aircraft continue to exist, remain operational, and retain economic value despite having been characterised as a total loss for insurance purposes. This gives rise to a series of unresolved questions concerning ownership, insurability, and, most importantly, continuing airworthiness.

A. OWNERSHIP AND RESIDUAL INTERESTS

At first glance, it may be assumed that ownership passes to the insurer upon payment of a total loss claim. The legal position, however, is considerably more complex because insurance payment does not operate as a method to transfer of title. Indeed, under general principles of insurance law, the payment of an indemnity typically gives rise to rights of subrogation, allowing the insurer to step into the position of the insured and pursue any rights or remedies that may exist against third parties.[46] Subrogation functions to prevent double recovery and enables the insurer to assert certain rights that previously belonged to the insured but does not automatically transfer title to the insured property.[47]

This distinction between title transfer and subrogation is particularly relevant under the Cape Town Convention. Creditor protection under the Cape Town Convention depends on the existence of a qualifying transaction, such as a lease, security agreement, or conditional sale, giving rise to an international interest.[48] Insurance compensation does not constitute such a transaction. The existence of a subrogation rights, therefore, does not necessarily resolve questions of title.[49] Nevertheless, the Convention recognises that rights acquired through legal or contractual subrogation may be registered in International Registry.[50] As explained by Professor Goode, "…where such rights arise under the applicable law, there is no reason that the right of subrogation should not be treated as to enable the acquisition of rights to be registered in International Registry".[51] Consequently, insurers who have indemnified lessors might become Cape Town creditors but not in the conventional qualifying transactions, rather

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[46] Ronald Scheinberg, *The Commercial Aircraft Finance Handbook*, 2nd ed (Abingdon, UK: Routledge, 2018) at 154 "..*the basic premise is that where one person (that is, typically an insurer or a guarantor) makes a payment on an obligation which, in law, is the primary responsibility of another party, then the person making the payment is subrogated to the claims of the person to whom they made the payment with respect to any claims or remedies which are exercisable against the primarily responsible party*."

[47] Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary*, revised ed (Rome: International Institute for the Unification of Private Law (UNIDROIT), 2008) at 83 para 2.145 "…*many national laws provide that the surety or insurer…acquires the creditor's interest and all the rights of the creditor under the agreement. Whether this is so in particular case is determined not by the Convention (except in cases within Article 9(4)) but by the applicable law*."

[48] Cape Town Convention, art. 2.

[49] Reuben Hasson, "Subrogation in Insurance Law – A Critical Evaluation" (year) 5:3 Oxford J Leg Stud 416 at 425.

[50] Cape Town Convention, art. 9(4); 16; and 38.

[51] Goode, *supra note* 156 at. 185 para 4.94.

from subrogated rights. Questions of title and ownership, however, remain governed by the applicable law and, in the context of aircraft transactions, are typically evidenced by a bill of sale.[52]

A related question concerns the doctrine of salvage. In conventional insurance practice, the payment of a total loss claim may entitle the insurer to the residual value of the insured property.[53] The concept of salvage under marine insurance[54] is quite straightforward that the insurer should be entitled to benefit from any subsequent recovery once having indemnified the insured for the entire value of the asset following a total loss.[55] In the context of the aircraft affected by the Russian measures, however, the practical application of this principle is far from clear. The continued operation of the aircraft raises the possibility that they may retain substantial residual value despite having been classified as a total loss for insurance compensation.

If, *arguendo*, the aircraft continue to operate and remain marketable assets, it is probable that they may eventually be transferred, leased, or even sold. Such a scenario raises difficult questions concerning the legal relationship between ownership, possession, and subrogated interests to govern the agreements for the purpose of such transfer, lease or sale. Can an insurer that has indemnified the lessor subsequently claim proprietary rights over the aircraft? Can it act as a seller on the basis of salvage rights if the aircraft becomes recoverable? If the aircraft is sold by the operator or another party exercising control over it, what effect would such a transaction have on the insurer's interests?

The significance of these questions lies not merely in the legal uncertainty they create, but in the practical reality that the aircraft continue to exist as commercially valuable assets. Unlike constructive total loss scenarios, the aircraft have neither been destroyed, damaged nor removed from economic market circulation. As long as they remain operational and capable of generating economic and commercial value, the possibility of future transactions cannot be excluded. The *AerCap* judgment therefore leaves unanswered a fundamental question in relation to the private law regime: who, if anyone, is entitled to determine the future commercial life of the aircraft?

B. INSURABILITY AND COMMERCIAL CONTINUITY

Even if, *arguendo*, questions relating to ownership and title can ultimately be resolved, the continued commercial viability of the aircraft will then depend in large part on the availability of insurance coverage. Aircraft that cannot be insured may face significant practical and commercial problems to continued operation, financing, sale or leasing. On the other hand, if insurance remains available, the aircraft may continue to operate commercially.

From a commercial perspective, there is little reason to assume that aircraft classified as a total loss under the *AerCap* judgment are necessarily uninsurable. Regardless of any

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[52] Hanley, *supra note* 22.

[53] Margo, Aspects of Insurance Payment, *supra note* 29, at 441 "*On the occurrence of a total loss of the aircraft, the airframe owner will receive the full agreed value for the aircraft, and each engine owner will receive the agreed value for its engine. The insurers will receive title to the salvage of the airframe and then-installed engines, as well as the remaining good engine originally delivered with the airframe*."

[54] *see* Arnold W. Knauth, "Round Table III - Aviation Insurance Law - Aviation and Salvage: The Convention of 1938 and the Pending Bill, S.7" (1941) 1941 ABA Sec Ins Negl & Comp L Proc 106 at 108 "…*the insurance underwriters have the greatest possible financial interest, as every successful salvage turns a sure total loss into some sort of a partial loss. This in turn operates to keep down premiums, which is to the strong financial advantage of every owner of ships and of cargoes afloat on the water*."

[55] Robert Riegel & Jerome S. Miller, *Insurance Principles & Practices*, 3rd ed. (New York: Prentice-Hall, 1947) Chapter 30 (Aviation Insurance) at 650; See discussion in F. D. Rose, "Aversion and Minimisation of Loss under English Marine Insurance Law" (1988) 19:4 J Mar L & Com 517.

concern relating to the maintenance history or continuing airworthiness, many of these aircraft remain operational.[56] Aviation insurance functions primarily as a mechanism for allocating and pricing risk.[57] Accordingly, insurers are generally capable of providing coverage for activities involving increased operational, technical, or political risks, provided that those risks can be identified, evaluated, and reflected in the policy terms and premium charges.[58] The existence of heightened risk does not necessarily preclude insurability; rather, it affects the conditions upon which premium or coverage is offered.[59]

There is likewise minimum legal requirements within the existing international aviation framework that would prevent insurers from offering such coverage. As discussed above, insurance requirements under international aviation law are primarily directed toward liability to third parties, while domestic legal systems typically require such insurance as a condition of operation. There is no comprehensive requirement under the Chicago Convention regulating the circumstances under which insurers cannot provide hull or war risks coverage for a particular aircraft. Questions concerning insurability, therefore, remain largely matters of commercial assessment of insurance market rather than legal framework or regulatory compliance.

In practical terms, if an operator is willing to pay a higher premium, an insurer may choose to offer coverage of risks associated by ownership disputes, sanctions or uncertain maintenance histories. Such policies may contain bespoke exclusions, limitations or conditions tailored to the particular risks involved. These concerns may affect the premium charges and scope of coverage under the policy, but not necessarily the availability of the insurance itself. As long as insurance remains obtainable, the possibility of continued operation and marketability of the aircraft cannot be excluded. This is because insurability is fundamentally different from airworthiness. The availability of insurance therefore does not resolve questions concerning the airworthiness of the aircraft or the continuity of safety oversight.

C. SAFETY OVERSIGHT AND AIRWORTHINESS

Even if ownership and insurability concerns can ultimately be addressed through commercial mechanisms, those solutions do not resolve the separate question of aviation safety. An aircraft may remain commercially valuable and insurable because the associated risks can be quantified and transferred, yet still raise serious concerns from the perspective of airworthiness and safety oversight. While *AerCap* resolves questions of insurance compensation, it does not address the safety implications of the aircraft's continued operation. This omission is understandable. The dispute before the Court concerned the compensation of the lessors under the relevant policies. Questions of airworthiness and safety oversight belong to an entirely different legal framework.

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[56] Avani Gupta, "The Impact of Russian Re-Registration of Foreign-Owned Aircraft on the Cape Town Convention and the Chicago Convention" (2023) 48 Annals Air & Space L 145 "…*extensive Western sanctions banning provision of maintenance services and spare parts to Russia would result in improper maintenance, usage of unauthorised spare parts and probable cannibalisation of the fleet, making any future recovery of the aircraft futile."*.

[57] Margo, Aspects of Insurance in Aviation, *supra note* 29, at 424, "*Financiers seek protection against every contingency which might delay or interrupt the flow of lease or loan payments. Insurers, on the other hand, analyze risk in light of the possibility that they will be required to pay in the event of a loss*."

[58] Peter MacDonald Eggers, Simon Picken and Patrick Foss, *Good Faith and Insurance Contract*, 4th ed (New York, US: Informa Law from Routledge, 2018) at 381 para 12.25 "… [t]he insurer…even when apprised by the assured of the facts peculiar to the risk, will have to make further enquiries and use his skill in insurance to quote terms to the assured."

[59] Margo on Aviation Insurance, *supra note* 12, at 177 para 9.02.

These concerns are particularly relevant in the Russian context. Russia's unilateral re-registration of foreign-owned aircraft violated the principle of single registration[60] and consequently disrupted the concept of safety oversight functions under Article 83bis.[61] This condition ultimately resulted in ICAO identifying a Significant Safety Concern (SSC) relating to the dual registration of aircraft and the validity of the associated certificates of airworthiness and radio licenses.[62] SSC reflects a situation in which a State permits certificate holders to exercise privileges associated with those certificates despite a failure to satisfy applicable international standards, thereby creating an immediate safety concern for international civil aviation.

Russia, has rejected that assessment, arguing that neither before nor after 2022 had accidents, incidents, or operational developments occurred that would call into question its ability to comply with ICAO airworthiness standards.[63] Russia further maintains that its civil aviation oversight system continues to satisfy ICAO requirements and has undertaken efforts to strengthen its domestic airworthiness and safety management mechanisms.[64] The broader issue, however, is on the verifiability of action rather than intention. The question for purposes of international civil aviation is not whether Russian authorities consider the aircraft airworthy, but whether other Contracting States possess a sufficiently reliable basis upon which to reach the same conclusion.

In this respect, safety cannot be reduced to the existence or issuance of a Certificate of Airworthiness alone. A certificate may indicate that an aircraft has been found airworthy by the issuing authority, but the assessment of continuing airworthiness extends beyond the certificate itself. This is particularly evident in the practice of aircraft leasing transactions, where lessors, operators, financiers, maintenance organisations or prospective purchasers rely heavily upon records relating to maintenance history, repairs, modifications, engine shop visits, major inspections such as C-checks, and the accumulation of flight hours and flight cycles by the airframe, engines and auxiliary power unit. These records are essential not only for preserving the commercial value of the aircraft but also for demonstrating its continued airworthiness.

The importance of such information is also reflected in the broader international framework governing aircraft operation. Aircraft Protocol to the Cape Town Convention, which defines an aircraft object as including not only the airframe and engines but also the associated technical data, manuals, records, and other information relating to the aircraft.[65] Further, Annexes 6 and 8, for example, place continuing responsibilities upon the State of Registry to

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[60] Chicago Convention Article 18.

[61] Pablo Mendes de Leon, *Introduction to Air Law* (Alphen aan den Rijn: Wolters Kluwer Law International, 2022) at 41"*This provision has been considered as an exception to the 'genuine link' which normally, that is, via national law provisions, exists between an aircraft and the State of registry. 'Flags of convenience', or more appropriately 'flags of non-compliance' are to be avoided, and are avoided by the afore-mentioned Article 83bis, safety oversight conducted in the context of bilateral ASAs, ICAO, the US Federal Aviation Administration (FAA) and, in Europe, the European Aviation Safety Agency (EASA)*."

[62] ICAO, Circular No SSC/AIR-01/05-2022/RUS (2022); International Civil Aviation Organization, "Safety Audit Results: USOAP Interactive Viewer", online: ICAO <https://www.icao.int/usoap/safety-audit-results-usoap-interactive-viewer>.

[63] ICAO Assembly, ICAO Policies and Procedures for Assigning the Significant Safety Concern (SSC) Status (submitted by the Russian Federation), Working Paper A42-WP/437, EX/194, 42nd Sess (29 July 2025) at para 2.6 – 2.7.

[64] David Kaminski-Morrow, "Russia Drafts New Flight-Safety Laws to Reinforce Airworthiness Management" (28 April 2026), online: FlightGlobal <https://www.flightglobal.com/archive/2026/04/russia-drafts-new-flight-safety-laws-to-reinforce-airworthiness-management/>.

[65] Aircraft Protocol, art. I.2; see also Donald H Bunker, *International Aircraft Financing: General Principles*, vol 1, 2nd ed (Montreal: International Air Transport Association (IATA), 2015) at 274 "…*a proper definition of an aircraft…includes…very importantly, the aircraft documents, without which the equipment amounts to nothing more than scrap metal, glass and rubber*."

ensure that maintenance information is preserved and that aircraft remain in an airworthy condition throughout its operational life.[66] The State safety oversight framework reflected in Annex 19 similarly emphasizes continuous surveillance, monitoring and the provision of safety-critical information necessary to support confidence in the aviation safety.[67]

The above considerations are particularly significant in light of the principle of mutual recognition under Article 33 of the Chicago Convention.[68] States cannot recognise a certificate of airworthiness issued by other States simply because a document exist, but because there is confidence that the issuing authority has exercised effective and continuous oversight process in accordance with internationally accepted standards.[69] The legal significance of a Certificate of Airworthiness therefore does not stand alone and cannot be separated from the broader system of aircraft maintenance, certification and oversight process that gives such certificate meaning.[70]

Accordingly, Chicago Convention itself contemplates circumstances in which an aircraft may not fully satisfy applicable international standards. Articles 39 and 40 permit the operation of aircraft whose certificates disclose specified departures from international standards, subject to the discretions and acceptance of the importing States. Yet, even though the standards as contemplated by Annex 6 and 8 implicitly carries the importance of the uninterrupted information on maintenance and aircraft conditions, many certification and oversight functions established therein are not always precise or comprehensive in their application.[71] Assessment of continuing airworthiness therefore depends upon the broader system of maintenance records, certification history, technical documentation, and continuing regulatory oversight that enables other Contracting States to place confidence in the aircraft's operational status.

These considerations have become significant in the Russian context. Industry observer suggested that restriction on the supply of aircraft parts and maintenance support due to the sanctions may lead operators to rely increasingly on cannibalisation of portions of the existing fleet in order to sustain continued operations.[72] Whether or not such prediction materialise is beside the point. This observation illustrate that the issue is whether the maintenance records, oversight history and technical documentation can be independently verified in a manner capable of generating confidence of Contracting States of the Chicago Convention on the airworthiness of the aircraft.

The issue is therefore no longer whether the aircraft can physically continue to fly, nor whether the absence of accidents can by itself demonstrate compliance with international standards. Rather, it is whether there remains a sufficiently reliable and verifiable basis upon which other Contracting States can maintain confidence in the continuing airworthiness of the aircraft. As discussed above, the continued economic value of these aircraft means that their eventual sale, lease, or transfer cannot be excluded. If such aircraft are ultimately reintroduced

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[66] Annex 6; Annex 8; International Civil Aviation Organization, Safety Oversight Manual, Doc 9734, Part A: The Establishment and Management of a State's Safety Oversight System, 3rd ed (Montréal: ICAO, 2017).
[67] Chicago Convention, Annex 19.
[68] Chicago Convention, Article 33.
[69] *see* ICAO Assembly Resolution A36-6, State Recognition of the Air Operator Certificate of Foreign Operators and Surveillance of their Operations, 36th Sess, ICAO Doc 10075 (2007) "Recalling that ultimate responsibility for safety oversight rests with Contracting States, who shall continuously review their respective safety oversight capabilities;"
[70] *see* Senarath D Liyanage, "Aviation Safety Oversight Assessment" [1996] 21 Annals Air & Space L 235 at 240; International Civil Aviation Organization, Manual of Procedures for Operations Inspection, Certification and Continued Surveillance, ICAO Doc 8335-AN/879, 4th ed (Montreal: ICAO, 1995) at para 8.1.1.
[71] Mikolaj Ratajzyk, *Regional Aviation Safety Organisations: Enhancing Air Transport Safety through Regional Cooperation*, (The Netherlands, Kluwer Law International BV 2015) at 34.
[72] "How long can Russian Airlines Maintain Their Aircraft?" (11 April 2022), online: IBA Group <https://www.iba.aero/resources/articles/how-long-can-russian-airlines-maintain-their-aircraft/>.

into international operations, how should the international aviation system evaluate an aircraft whose oversight history has been subject to years of disruption and dispute? Can airworthiness be restored if the continuity of oversight, certification history, maintenance records, and technical documentation has become disputed or difficult to verify over an extended period? Put differently, can years of airworthiness oversight conducted following a contested re-registration simply be accepted without further verification if the aircraft subsequently obtains a new registration or certification?

IV. IMPLICATIONS ON THE LEGAL FRAMEWORK

The questions discussed above reveal that the consequences of a "total loss" determination extend well beyond the relationship between lessors and insurers. The *AerCap* judgment resolved the immediate issue of financial compensation, but it did not resolve the future legal and operational status of the aircraft themselves. As long as the aircraft continue to exist, remain operational, and retain economic value, questions concerning ownership, subrogation, salvage, and future disposition cannot be avoided.

Many of these issues are fundamentally commercial in nature. The aviation industry has long relied upon private transactions, contractual arrangements, insurance markets, and financing structures to allocate risk and resolve uncertainty. Questions concerning ownership, competing claims, salvage rights, and future transfers may ultimately be addressed through commercial negotiations, litigation, or contractual arrangements between the parties concerned. There is little reason to assume that the private-law mechanisms that govern aircraft transactions will cease to function merely because an aircraft has been characterised as a total loss for insurance purposes in this context.

The same may be said, to a large extent, of insurability. Aviation insurance has historically operated as a market-based mechanism for the assessment and pricing of risk. Aircraft affected by ownership disputes, sanctions, uncertain maintenance histories, or unusual operational circumstances are not necessarily uninsurable. Such factors may influence premium charges, exclusions, or policy conditions, but they do not automatically prevent insurers from offering coverage. If a market exists for these aircraft, it is entirely possible that insurance products will emerge to support their continued operation, transfer, or reintroduction into commercial service.

Recent efforts by Russia to remove the Significant Safety Concern associated with the dual-registration and airworthiness issue demonstrate that the aircraft is in a marketable condition. The continued airworthiness of these aircraft ultimately depends on confidence in the integrity of their maintenance, certification, and oversight histories. Where those histories have been subject to years of questionable practice, ICAO and Contracting States may eventually face the challenge of determining how that confidence towards oversight capability and airworthiness can be evaluated and, if necessary, restored before such aircraft are reintroduced into international aviation notwithstanding their earlier classification as a total loss.

The difficulty of the issue lies in the fact that the concerns identified in this paper arise at the intersection of private commercial arrangements and public safety oversight. Questions concerning ownership, marketability, and insurability largely fall outside ICAO's regulatory mandate and are generally left to private parties and domestic legal systems. At the same time, the existing ICAO safety oversight framework is principally directed toward the oversight capabilities of States rather than the identification or classification of individual aircraft which could potentially possess a continuing risk to international civil aviation. Any attempt to subject particular aircraft to special observation solely because of their questionable oversight history may therefore raise difficult discussion concerning consistency, equal treatment, and the limits of international oversight.

If, as some commentators have suggested, aviation safety reflects obligations owed to the international community as a whole, the practical responsibility may ultimately fall upon individual States.[73] Should these aircraft eventually be sold, leased, or transferred to operators outside Russia, it may be for the Contracting States to determine whether the available maintenance records, certification history, and oversight documentation provide a sufficiently reliable basis upon which continuing airworthiness can be recognised. The challenge identified in this paper therefore extends beyond the settlement of insurance claims. As commercial incentives may ultimately favour the transfer, sale, leasing, or continued operation of these aircraft, the unresolved question is whether the international aviation system possesses a sufficiently reliable basis upon which their continuing airworthiness can be assessed once they are reintroduced into international aviation after years of questionable oversight.

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[73] Ludwig Weber, *International Civil Aviation Organization (ICAO)* (Alphen aan den Rijn: Wolters Kluwer Law International, 2021) at 52; see also discussion regarding the erga omnes nature of *aircraft safety* in Huang Jiefang, *Aviation Safety and ICAO* (Alphen aan den Rijn: Kluwer Law International, 2009) at 165 to 238; Huang Jiefang, “Aviation Safety, ICAO and Obligations Erga Omnes” (2009) 8:1 Chinese J Int'l L 63 at 71.