MAY 15, 2022
YEAR 16 | NO. 12

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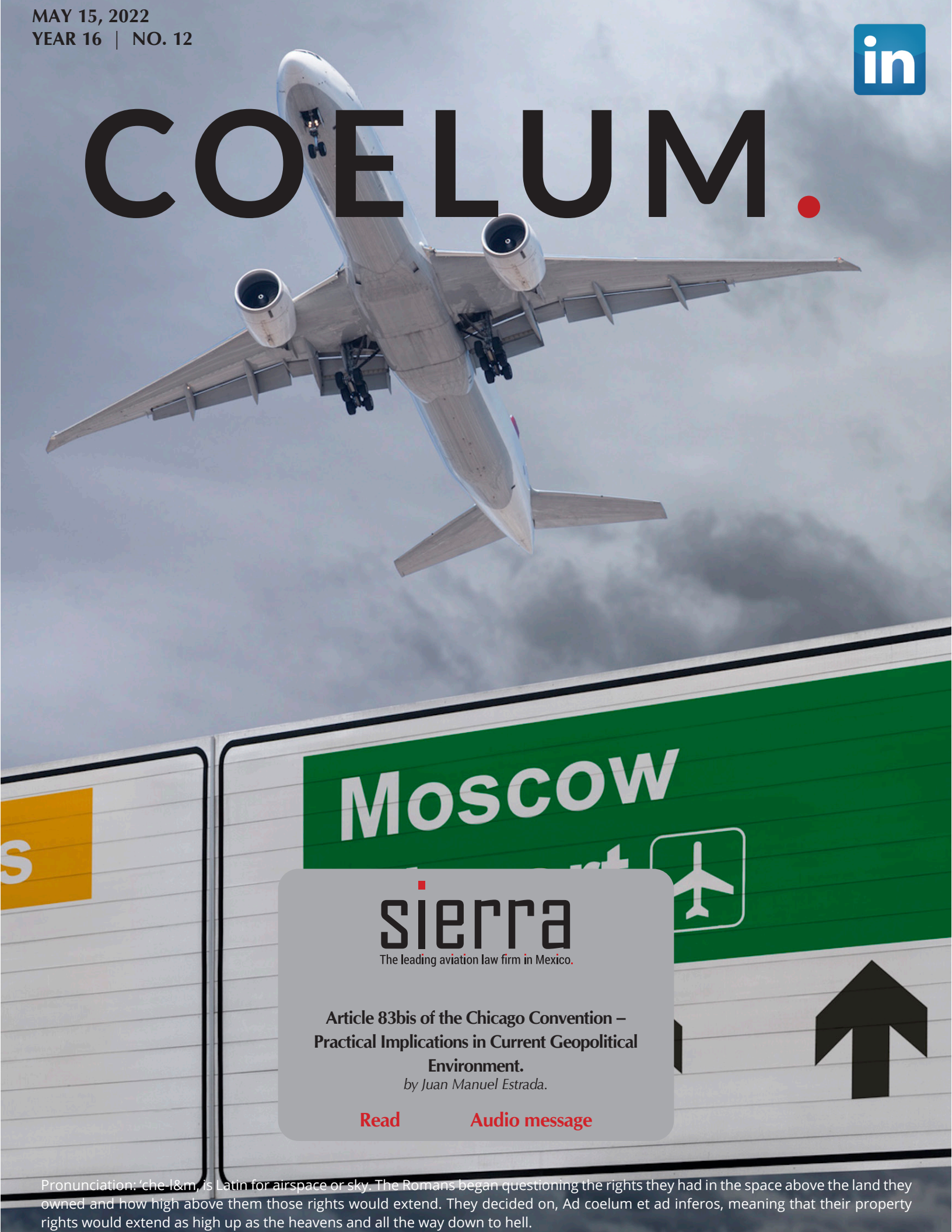

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Article 83bis of the Chicago Convention – Practical Implications in Current Geopolitical Environment.

by Juan Manuel Estrada.

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Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and how high above them those rights would extend. They decided on, Ad coelum et ad inferos, meaning that their property rights would extend as high up as the heavens and all the way down to hell.

Article 83bis of the Chicago Convention – Practical Implications in Current Geopolitical Environment.

by Juan Manuel Estrada

The Convention on International Civil Aviation ("Chicago Convention")[1] enacted on Chicago, Illinois in 1944 is widely regarded as the cornerstone of international civil aviation law. This multilateral agreement sets forth the basic principles that regulate, *inter alia*, aircraft airworthiness and operation, licensing and registration as well as aircraft nationality and State sovereignty pretraining aircraft oversight.

Amongst the relevant provisions of the Chicago Convention, we find the definition of both State of the operator of an aircraft, and State of registration of an aircraft. In broad terms, the former constitutes the State that oversees and regulates the commercial operations of an aircraft operator, while the latter refers to the State the ensures that an aircraft is compliant with international operational and safety standards[2]. At the time of the inception of the Chicago Convention the concepts of State of the Operator and the State of Registration were interchangeable as in most cases they referred to the same country.

This, however, changed with the rapid development of the international aircraft leasing industry which boomed in the late 1980's[3], as aircraft financiers and lessors adopted leasing and ownership structures intended to avoid "unfriendly" jurisdictions, which did not provide for sufficient legal certainty. As a result, it became more common for the State of Registration and State of Operator to be different States.

The rapid development of this industry gave way to the adoption of Article 83 bis of the Chicago Convention, which set forth the legal framework that allows States of Registration to transfer to a State of Operation its oversight responsibility on aircraft compliance. In order for this transfer of responsibility to be valid, States are required to comply with the following:

a) the member States that intend to engage in this practice have to ratify the provisions of Article 83bis; and
b) they have to enter into an Article 83bis agreement detailing the responsibilities that will be transferred from the State of Registration to the State of Operator, which has to be delivered to the International Civil Aviation Organization ("ICAO").

In this respect, Article 83 bis arrangements had been considered to be a highly successful tool to diminish risk in certain jurisdictions.

Implications of New Russian Aircraft Re-Registration

Russia's experience with Article 83 bis, particularly arising from the agreement concluded with Bermuda in 1999 and Ireland in 2002[4], had been classified as two of the most successful examples of the benefits that these arrangements could derive to the aircraft leasing industry, as such agreements enabled Russian operators to finance and lease large fleets of aircraft registered in those jurisdictions successfully (according to analytics firm Cirium, out of a total of 980 commercial aircraft in Russia, 515 were leased from foreign leasing companies)[5].

Unfortunately, the success of this agreements came to a complete halt this past March when the President of the Russian Federation, Vladimir Putin, signed a bill into law that allowed Russian airlines to re-register foreign owned airplanes on the Russian national register. This retaliatory action enacted by the Russian Government against the sanctions imposed on their

1.- https://www.faa.gov/about/initiatives/iasa/, access on May 20, 2021.
2.- "Aircraft registration and Article 83bis of the Chicago Convention: a practical overview", available at https://www.dentons.com/en/insights/articles/2021/july/19/aircraft-registration-and-article-83bis-of-the-chicago-convention-a-practical-overview
3.- D.P. Handley, "Aircraft operating leasing: a legal and practical analysis in the context of public and private international air law", available at https://scholarlypublications.universiteitleiden.nl/access/item%3A2915220/view.
4.- See "Aircraft registration and Article 83bis of the Chicago Convention: a practical overview", page 2.
5.- Steven Walker "Will Dual Registration Laws Prevent Leased Aircraft Being Re-Registered In Russia?" https://simpleflying.com/dual-registration-laws-prevent-leased-aircraft-reregistered-russia/

aviation industry over Russian's invasion of Ukraine constitutes a serious breach on the international regulatory regime, as it directly undermines both the provisions of the Chicago Convention as and Convention on International Interests in Mobile Equipment ("Cape Town Convention").

Pursuant to Article 18 of the Chicago Convention, aircraft cannot be validly registered in more than one State, however, registration can be changed from one state to another. In order to do so, the current State of registration would be required to first de-register the aircraft from its registry. Without the consent of the State of registration, the de-registration and subsequent re-registration in the registry of another State would constitute a breach of the aforementioned Article 18 of the Chicago Convention.

Further to this, as a consequence of the sanctions imposed against Russia, the authorities of Bermuda and Ireland have been required to proceed with revocation of the certificate of airworthiness of all Russian operated aircraft incorporated to their registry. From a practical standpoint the cancelation of the certificate of airworthiness of such aircraft entails their immediate grounding, as aircraft are required to hold a certificate of airworthiness that evidences aircraft compliance with international safety standards.

Sovereignty, war and emergency conditions

From a preliminary review of the facts, one would be tempted to unequivocally conclude that Russia's actions breached international law. However, it is important to mention that one of the overarching principles of the Chicago Convention is state sovereignty. This is not only enshrined within its Article 1, but it can be further extrapolated from the provisions of article 89 which states the following:

> *In case of war, the provisions of this Convention **shall not affect the freedom of action** of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.*

To the best of the author´s knowledge, the implications, scope and effective reach of the provisions of this article have never been contested before ICAO's counsel, however, the broad nature of this provision could be used as legal basis to lawfully breach the international obligations arising from the Convention itself.

Prospective issues with ad hoc states of registration.

As per the bilateral agreement entered by Russia with Bermuda and Ireland, the Civil Aviation Authority of said States have the responsibility to overseeing airworthiness of multiple Russian operated aircraft. However, as a consequence of the sanctions imposed to Russia said aviation authorities suspended the certificates of airworthiness for the Russian aircraft under their jurisdiction, arguing the existing geopolitical complexities as an impediment to ensure the airworthiness of such aircraft.

This unilateral decision, although valid pursuant to the terms of the bilateral agreements, could be deemed as a cause of concern. This due to the fact that, in most cases, the registry of such counties are runed as private institutions (with private agendas?), and are elected as ad hoc jurisdictions. Which could come to question the underlining motives behind the actions of such institutions

Conclusion

The effects of the current geopolitical environment have brought light on conflicting principles vested in the Chicago Convention. Perhaps this comes as a result of the naïve idea that that mankind had learned from its previous mistakes and that scenarios such as the ones we are living now would be a thing of a distant past. It is uncertain what the legal implications of this conflict will be, however, the aftermath will surely require a reflection and reevaluation of the current international regulatory framework.

IATA Continues to Promote Gender Balance.

The International Air Transport Association (IATA) announced that its “25 by 2025” global initiative, pursues the increment of female representation in the aviation industry. “The campaign urges participating companies to increase female representation to 25 percent, at least, by 2025”. IATA's major focus is diversity and inclusion, to make the aviation industry more gender balanced. Two out of Mexico’s three largest airlines are currently participating in the initiative. *www.mexicobusiness.news/aerospace/news/iata-continues-promote-gender-balance?tag=aerospace* April 04, 2022.

Recovery of aviation safety category 1 status will occur by August at the latest.

The recovery of Category 1 air safety status will, in the most conservative scenario, last until August, said a federal government source involved in the audit and downgrade process. The 'Technical Review' will take place in early May, with results 40 to 50 days later, and the final audit a month after that. These dates are tentative, but feasible, so that the Mexican aeronautical authority could recover the first category in this period, which would be extended one month more than expected by the Ministry of Infrastructure, Communications and Transport (SICT). *www.elfinanciero.com.mx/empresas/2022/04/06/recuperacion-de-categoria-1-en-seguridad-aerea-ocurrira-a-mas-tardar-en-agosto-fuente/* April 06, 2022.

Mexican Space Agency promotes space sector in Congress.

In order to promote education and space research in Mexico, the Mexican Space Agency (AEM) participated in the Conference of the Science, Technology and Innovation Commissions of the Chambers of Deputies and Senators of the Congress. The President of the Senate's Board of Directors, Olga Sánchez Cordero, emphasized that advances in new technologies represent opportunities for the development of our society and of young people, who are part of the generation of technological change, and who should be approached to break the technological barrier. Those present agreed to promote the use of space science and technology and satellites, in order to improve connectivity, health, education, and equal rights, among others. *www.a21.com.mx/aeroespacial/2022/04/07/impulsa-aem-sector-espacial-en-congreso* April 07, 2022.

Queretaro to Become an Aerospace Powerhouse.

Aerospace industry in Mexico keeps growing, Queretaro plays an important role development of the aerospace development industry. The Mexican State for more than 15 years has been the receptor with the most FDI to manufacture aerospace equipment in Mexico the state received US$981 million. The State produces aerostructures, special treatments, complex components of aerostructures, landing gear, engines, and composite materials. Therefore, the Mexican State has great potential to enter the aerospace sector. *www.mexicobusiness.news/aerospace/news/queretaro-become-aerospace-powerhouse?tag=aerospace* April 19, 2022.

Mexican President Andres Manuel Lopez Obrador sends initiative to prevent illicit air operations.

The initiative proposes the creation of the Mexican Airspace Surveillance and Protection System, whose objective will be to coordinate the agencies and entities of the Federal Public Administration (APF) that comprise it to inhibit illicit air operations and those that threaten national security. Proposes to delimit the functions of the Ministry of Infrastructure, Communications and Transportation and the Ministry of National Defense as the main bodies responsible for guaranteeing the legal use of airspace. *www.forbes.com.mx/amlo-envia-iniciativa-para-impedir-operaciones-aereas-ilicitas/* April 28, 2022.

In this month extract was prepared by A. Fragoso, P. Arandia, R. Nerio, R. Mancilla, J. García, S. Robles, Alexis Pérez.

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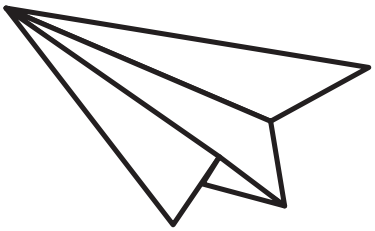

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