

**Annex 5 – Cape Town Papers Series, Volume I:**  
**Contract Practices under the Cape Town Convention**

The Legal Advisory Panel of the Aviation Working Group has prepared a paper describing basic principles relating to contract practices for aircraft transactions in the light of the Cape Town Convention.

The paper comments on the consolidated text of the Convention and Aircraft Protocol (the *Convention*) and is to be read in conjunction with the Official Commentary. The attachments to the paper include an appendix illustrating where considerations arising from the Convention relate to particular transaction documents. This is a summary of the main points in the paper.

**What the Convention does**

What the Convention does is to provide a legal framework for customary types of transactions to be more effective by making the rights and interests enforceable with much greater legal and timing certainty. The Convention provides for remedies to be available in Contracting States to enable asset based financing and leasing transactions to be capable of speedy enforcement, including in the case of insolvency.

The Convention provides that engines are to be considered to have an independent property to be recognised as such in all Contracting States irrespective of the engine's installation on or removal from any particular airframe.

Priority of interests is determined under the Convention by reference to the electronic, notice-based International Register. That priority is established on a first in time basis. In order to assist in the process of closing complex transactions registration can also be made of a prospective interest.

The Register will also show transfers pursuant to sale transactions.

**Pre-existing transactions**

Unless a relevant Contracting State has made a declaration requiring all existing transactions to be registered, the rights and priority created by pre-existing transactions is preserved. There is therefore no need under the Convention for any existing transaction to be restated, filed in the International Register or any other steps taken. It is possible for information to be submitted to the registrar concerning an existing transaction. The registrar records information submitted, it does not scrutinise documents. However, registration only provides the benefits described in the Convention if the registration relates to an international interest which has been created after the relevant country became a Contracting State

**Amendment and restatement**

Amending and restating an existing transaction after a relevant country has become a Contracting State will not necessarily create an international interest. The nature of the amendment and restatement must be such that it constitutes a new grant of a security interest, a lease or conditional sale. While there may be circumstances in which it is appropriate to do this in order to benefit from the Convention when it comes into force, the granting of new security interests, leases and conditional sale agreements may have consequences for priority, bankruptcy hardening periods and tax treatment which will need to be carefully analysed.

### **Further assurances**

A normal further assurances clause may be insufficient to require parties to take all necessary steps to take advantage of the Convention when it comes into force and a specific clause referring to the Convention would be appropriate. However, care needs to be taken so that the clause does not oblige the parties to take steps which, as described above, may have unintended consequences. From the point of view of a borrower or lessee it is important that the wording of a further assurances clause does not preclude its ability to negotiate matters with its creditor where the Convention expressly provides for the parties to have the ability to override its provisions.

### **Relationship with national law**

International interests are created by the Convention. They are sui generis interests and if the requirements of the Convention are satisfied then an international interest will have been created. In most cases a document creating an international interest will also create a corresponding national interest.

National law is relevant to deciding matters of capacity and authority and any issue arising as to the characterisation of the international interest for the purpose of deciding which of the Convention remedies are applicable to it. Where remedies are exercised under the Convention the relevant tribunal is obliged to act in accordance with the rules of the Convention although, to the extent compatible with the Convention, the procedural rules of that tribunal will need to be complied with.

### **Party autonomy**

The Convention does not seek to impose commercial solutions but allows parties maximum autonomy in the application of the Convention to transactions. The Convention's function is to enhance the enforceability of aircraft financing documents. It does not reduce the need for negotiation of the terms of those documents.

### **Term sheets**

A term sheet should identify the international interests to be created, specify the quiet enjoyment rights, identify the priorities to be reflected in the registration of the international interests, identify the prospective filings of international interests which are to be made and provide for their removal if the transaction does not close. The various provisions of the Convention subject to contractual modification should be considered and if practicable the parties' choices should be recorded.

If the Convention is not yet in effect but provision is to be made in case it comes into effect during the life of the transaction then a further assurances clause dealing with the steps that are appropriate on it coming into force should be included.