

**Annex 6 – Outline of Cape Town Papers Series, Volume II (Paper II):
Advanced Contract Practices under the Convention – Registrations,
Legal Opinions and Closing Procedures¹**

A. BACKGROUND

1. As part of the Legal Advisory Panel’s commitment to provide thoughts and support to the Aviation Working Group (the *AWG*) on the institutionalisation and implementation of the Convention, the Legal Advisory Panel is drafting Paper II. Paper II will discuss various steps in relation to registrations, legal opinions and closing considerations (i.e. generally those steps that were not covered in detail by Cape Town Papers Series, Volume I (*Paper I*)²) that may be taken with respect to a transaction in light of the Convention.

2. Paper II will be drafted in accordance with the following guidelines:

(a) To aid understanding, the discussions in Paper II will be applied to the following example transaction structure:

- (i) a special purpose company Owner purchases the aircraft objects;
- (ii) the Owner (located in a non-Contracting State which is a typical jurisdiction for incorporating special purpose vehicles) is funded by a syndicated loan from various Financiers (who have appointed a Security Trustee to hold security on their behalf);
- (iii) the Owner enters into a finance lease with the Lessee, and the aircraft is registered in the Lessee’s jurisdiction (which is a Contracting State); and
- (iv) the Lessee enters into an operating sublease with the Sublessee (who is located in a non-Contracting State).

Appendix A of this note sets out a diagram of the principal non-security documents and the principal security documents for such example transaction structure.

In order that the example transaction structure may further reflect practical reality, each Contracting State in such structure will be allocated a set of Convention declarations – i.e. the discussions in Paper II relating to the example transaction structure will have to consider the impact of such declarations.

(b) There should be no unnecessary duplication in Paper II of matters already covered in Paper I – though Paper II will cross refer to and expand upon Paper I as thought desirable.

3. In light of the expectation that the Convention will come into force during the summer of 2005, it is intended that Paper II is completed and published in the fall of 2005.

¹ The Legal Advisory Panel of the AWG reserves the right to amend this outline at any time prior to finalisation and publication of the Paper II.

² The details for ordering Paper I, which is entitled “Contracting Practices under the Cape Town Convention” are contained in the Aviation Working Group website (www.awg.aero). To order Paper I, please go to this website on the heading “Legal Advisory Panel”, and the resulting webpage will contain the details needed to order Paper I.

4. Part B of this note sets out, an outline structure/contents of Paper II.

B. OUTLINE STRUCTURE/CONTENTS OF PAPER II

1. Foreword/Preface/List of the Legal Advisory Panel

Paper II will contain an appropriate foreword, preface, and list of the Legal Advisory Panel.

2. Introduction

The Introduction would (amongst other things) deal with the following:

- (a) Explain the scope and purpose of Paper II.
- (b) Set out and introduce the example transaction structure and related diagrams and related Convention declarations.
- (c) Emphasise that much of the discussions in Paper II will be by reference to the example transaction structure.
- (d) Set out any relevant assumptions on which Paper II is drafted.
- (e) Set out the broad chronological phases of a transaction, and the aspects of these phases that Paper II would discuss/explain. It is anticipated that such phases would be as follows:
 - (i) Initial Due Diligence Phase: This relates to issues the parties might consider before entering into the term sheet. For example a party may wish to undertake due diligence on matters such as the applicability of the Convention to its proposed transaction, and the legal effect of the declarations made by the various jurisdictions that may be involved in the transaction. Such discussions would be applied to the example transaction structure.
 - (ii) Term Sheet Phase: Paper II will build on the term sheet discussions at paragraph F of Paper I and apply such discussions to the example transaction structure.
 - (iii) Prospective Registration Phase.³ Paper II will explain the rationale and steps/requirements for prospective registrations, and apply such discussions to the example transaction structure.
 - (iv) Documentation and Negotiation Phase: The only aspect of the documentation and negotiation phase that Paper II will deal with will be in relation to the form of opinion wording (and opinion practice) relating to Convention matters (i.e. because the tables in Appendix 3 of Paper I sets out the issues that the parties may consider in relation to core transaction documents).

³ For the sake of convenience, it is anticipated that all matters relating to registrations (e.g. see B2(d)(iii), (v) and (vii)(A)) will generally be discussed together in the relevant section(s) of Paper II. Such section(s) would also deal with the registration of pre-existing rights and non-Convention rights (e.g. in relation to giving public notice for local law purposes).

- (v) Closing Phase (registration matters):⁴ Paper II will explain the rationale and steps/requirements for closing registrations, and will apply such discussions to the example transaction structure. It is anticipated that closing registrations would generally only be relevant to:
- (A) registrations that (for some reason) have not been entered prospectively;
 - (B) registrations that cannot be made prospectively; and
 - (C) registrations of deregistration and export request authorisations with local aviation authorities.
- (vi) Closing phase (non-registration matters): Paper II will build on the discussions at paragraph G of Paper I and would apply such discussions to the example transaction structure – e.g. matters such as the *lex situs* of the airframe/engines at closing.
- (vii) Post-closing phase: There is, potentially, a post-closing transaction phase during which both registration and non-registration matters may arise. *If time permits, any such registration matters will be dealt with in the relevant section(s) of Paper II relating to registration matters, and any such non-registration matters will be dealt with in a “Variation” section of Paper II (see further footnote 4⁵).* Examples of such post-closing matters are as follows:
- (A) Post-closing (registration matters): If time permits Paper II will explain and expand on the rationale and steps/requirements for post-closing registrations, and apply this discussion to the example transaction structure. It is anticipated that post-closing registrations would primarily apply to matters such as:
 - (I) International Registry registrations which were not made prior to closing;
 - (II) subordination agreements which are needed to alter the existing priority of interests;
 - (III) registrations of non-Convention matters to give local law public notice; and

⁴ Please see Footnote 2.

⁵ The matters referred to in B2(d)(i) to (vi) above are regarded as the core subjects that Paper II will cover. If time permits, there will be a “Variation” section in Paper II which will deal with =further subjects over and above such core subjects – e.g.:

- (a) the post-closing transaction phase matters discussed in B2(d)(vii)(B).
- (b) how the discussions in Paper II might apply to a different example transaction structure containing different Contracting/non-Contracting States, declarations, documentation and/or parties etc.).

(IV) the registration of interests which are constituted/created after closing (e.g. perhaps in relation to pre-existing interests); and

(B) Post-closing (non-registration matters): If time permits, Paper II will consider the impact on transactions (and the example transaction structure) of the post-closing applicability or inapplicability of the Convention, and the post-closing withdrawal or making of declarations.

Post-closing applicability of the Convention to pre-existing transactions has been dealt with in some detail in paragraph E of Paper I. However, Paper II would build on Paper I and look at the practical steps that might be taken pre and post-closing in relation to the example transaction structure if the non-Contracting State that the Owner is located in becomes a Contracting State post-closing.

(f) Explain that a range of factors would have to be considered by the parties before they decide for themselves the extent to which they will continue to avail themselves of any available local law registrations, benefits and/or remedies. For example, the parties might consider it useful to avail themselves of any available local law registrations, benefits and/or remedies in circumstances where local law might confer benefits/remedies over and above those conferred by the Convention, or where (for some reason) the Convention might be (or prove to be) inapplicable (e.g. in such a situation, at least local law benefits/remedies would still be available to the parties).

(g) Set out a table of the most recent International Registry fee structure as at publication of Paper II, together with information regarding the relevant website for obtaining the most up to date information on such fees.

3. Section on Initial Due Diligence Phase

It is intended that this section will be structured (e.g. perhaps as a checklist table) so as to highlight due diligence points that parties to a transaction may wish to consider. Such discussions would be applied to the example transaction structure.

4. Section on Term Sheet Phase

This section would build on the term sheet discussions at paragraph F of Paper I and apply such discussions to the example transaction structure.

5. Section on Registrations (e.g. prospective registrations, closing registrations and (if time permits) post-closing registrations)

The section on registrations (which could also cover pre-existing interests, deregistration and export request authorisations, and the registration of non-Convention interests (e.g. in order to give public notice for local law reasons)) might be structured as follows:

(a) Background: Amongst other things, this subsection would:

(i) set out some of the basic principles relating to effecting registrations. There would be an explanation of:

- (A) the factors that need to be satisfied before a registrable interest/assignment/sale etc. actually exists; and
 - (B) the legal position under the Convention and the Regulations in relation to registering a non-Convention interest (e.g. it is anticipated that the Regulations will make it clear that registering a non-Convention interest is possible for a fee (provided that debtor consent has been obtained), but that such a registration will have no effect under the Convention (though it may have consequences/benefits under local law));
- (ii) explain the reasons why registration is fundamental to the protection of interests (e.g. the first in time priority rule, the need to register subordinations to bind assignees etc.);
 - (iii) emphasise that engines (and not just airframes) now fall within the scope of priority registrations (see paragraph B(b) of Paper I); and
 - (iv) emphasise the utility of the prospective registration regime (e.g. see paragraph B(c) of Paper I).
- (b) Regulations: A copy of the AWG's commentary on the Regulations will be part of Paper II. Amongst other things, this subsection will briefly explain the function of the Regulations, and how they interrelate with the Convention. Various diagrams/schematics would be set out in this subsection detailing the following aspects of the Regulations:
- (i) the relationship structure of the various official bodies/persons involved in the registration process and/or the Regulations;
 - (ii) the International Registry approval processes that have to be satisfied in connection with the making of registrations; and
 - (iii) the authorisation, submission and consent processes that have to be satisfied in connection with registrations.
- (c) Registrations: Amongst other things, this subsection will be structured to deal with the following matters:
- (i) Explain the steps which have to be satisfied for Convention interests/sales/assignments/deregistration and export requests/documents etc. and non-Convention interests/sales/assignments etc. to be registered pursuant to the Convention/Regulations (e.g. expand on how a person could become a registered user of the Registry, what debtor consent is needed etc.). Such an analysis could cover prospective registrations (if available), closing registrations and (if time permits) post-closing registrations in relation to each of the aforementioned items. It is envisaged that this may be done in tabular form – with questions such as the following (and any other relevant questions) being addressed in relation to each such item:
 - (A) What steps do the Convention/Regulations prescribe in relation to registering such an item prospectively (if permitted) or otherwise.

- (B) Which parties might be interested in such a registration (e.g. a lessee might be interested in a leasing interest being registered in order that its quiet enjoyment rights under Art 18 of the CT are crystallised).
 - (C) In which register does the Convention envisage that such item be registered (e.g. most items will be registered in the relevant part of the International Registry, though deregistration documents will need to be registered with the relevant local aviation authority)?
- (ii) Consider the various interests/sales/assignments/documents etc. arising under the example transaction structure, and explain what registration matters might be relevant to each of them.

6. Documentation and Negotiation Phase – Legal Opinion matters

- (a) *AWG's suggested form of legal opinion*: The AWG's suggested form of legal opinion (which will include explanatory annotations) will be part of Paper II.
- (b) *Background*: Paper II will set out some basic thoughts on legal opinion practice, and how and why these might need to change to in light of the Convention.
- (c) *Example Transaction Structure*: Paper II will analyse the example transaction structure (document-by-document and jurisdiction-by-jurisdiction), and explain and set out which elements of the AWG form of legal opinion are relevant to each such jurisdiction and each such document.

7. Closing matters (non-registration matters)

Paper II will develop the themes discussed in paragraph G of Paper I, and apply such discussions to the example transaction structure.

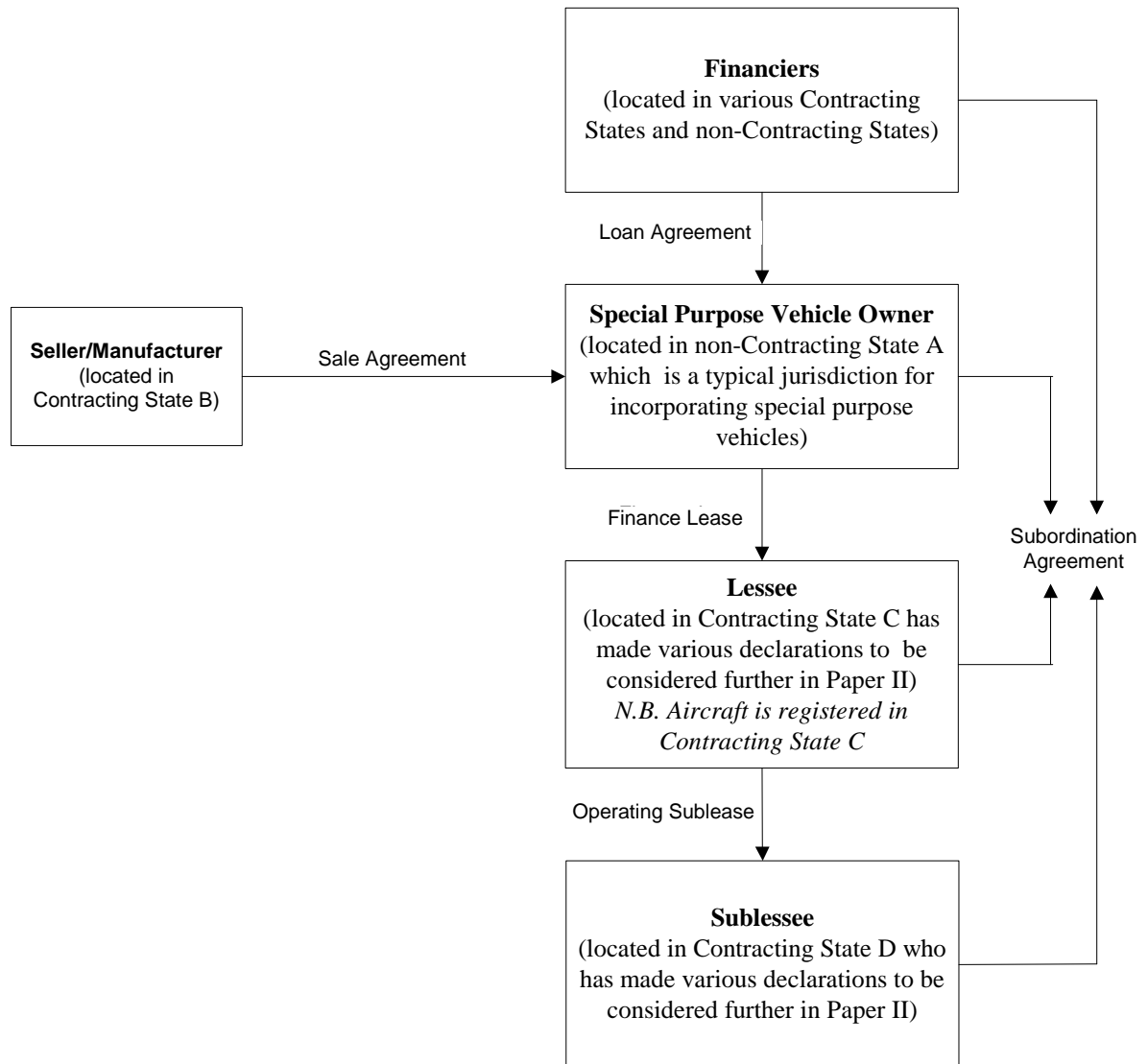
8. "Variation" section

Please see footnote 4. The Variation section will only be drafted if time permits, and would consider the matters discussed in footnote 4.

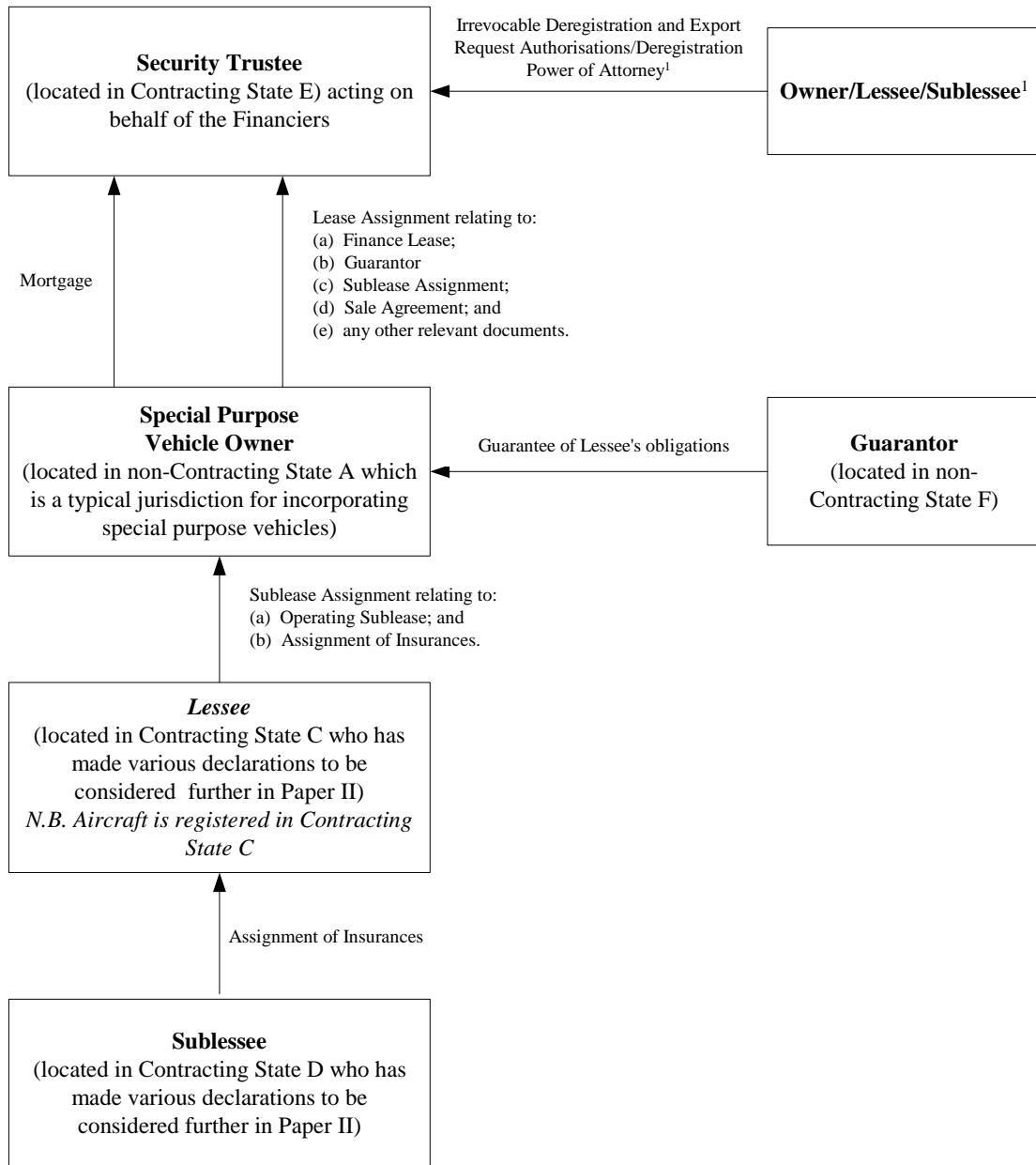
APPENDIX A

EXAMPLE TRANSACTION STRUCTURE

Part 1: Structure of principal non-security documents



Part 2: Structure of Principal security documents



¹ Depending upon where the Aircraft is registered and the nature of the registry (e.g. is it an owner based registry or an operator based registry?), one of the Owner/Lessee/Sublessee could be able to grant:

(a) an Irrevocable Deregistration and Export Request Authorisation (**DERA**) as envisaged by Art. 25 of the Consolidated Test (i.e. if a declaration has been made by the relevant jurisdiction); and/or

(b) a Deregistration Power of Attorney (**DPA**) that is valid under applicable local laws/rules.

It is assumed that the DERA/DPA will be granted in favour of the Security Trustee (i.e. though it could be granted to someone else in the transaction structure).