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Cape Town Convention closing opinions in aircraft finance transactions: custom, standards and practice

Phillip L Durham* and Kenneth D Basch

One of the most significant challenges facing the practitioner in an aviation finance transaction is determining the scope and substance of a Cape Town Convention closing opinion. This article attempts to assist in the development of a global standard for Cape Town Convention closing opinions in aircraft finance transactions by viewing and analysing such opinions through the lens of current global Cape Town Convention closing opinion custom and practice.

1. Introduction

The best interpreter of the law is custom.[1]

Since the entry into force of the Convention on International Interests in Mobile Equipment, 16 November 2001 (hereinafter the 'Convention') and the Protocol on Matters Specific to Aircraft Equipment, 16 November 2001 (hereinafter the 'Protocol' and together with the Convention, collectively, the 'Cape Town Convention') in the United States, Ireland and elsewhere in March of 2006, practitioners in the aviation industry have been working on a real time basis to understand not just the substance of the Cape Town Convention itself, but also the implications that the Cape Town Convention has on live aircraft finance transactions.[2] Perhaps in no area has this challenge been more profound than in the issuance of Cape Town Convention closing opinions by practitioners in aircraft finance transactions. Although the Cape Town Convention's aim is to provide a 'sound, internationally adopted legal regime for security, title-retention and leasing interests'', the Cape Town Convention regime does not (nor does it claim to) operate in a sterile vacuum shielded from pre-existing national legal systems.[3] Rather, numerous aspects of an aircraft finance transaction to which the Cape Town Convention applies will continue to be governed by national law.[4] Similarly, the Cape Town Convention does not (and does not purport to) operate

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[1] Marcus Tullius Cicero, Paulus in Justinian's *Digest* 1.3.37.

[2] In this Article the term 'aircraft finance transaction' is intended in the broadest sense so as to include operating leases, finance leases, loans secured by aircraft and the like.

[3] Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment: Official Commentary* (hereinafter, 'Official Commentary') (3rd edn, UNIDROIT 2013) 13.

[4] See ibid 16–19 for numerous examples of various areas of aircraft finance transactions that remain subject to national law even when the Cape Town Convention applies to the transaction.

independently of all conflict of laws rules.[5] While it avoids the need for recourse to conflict of laws in many areas of a covered aircraft finance transaction, the Cape Town Convention still expressly leaves various matters to the 'applicable law under the rules of private internal law of the forum State'.[6] Thus the practitioner has been faced with the herculean task of not only determining which opinions can and should be given in respect of the Cape Town Convention, but also by whom those opinions should be given.

This article, in an attempt to aid the practitioner in moving closer to overcoming this challenge and towards a global standard for Cape Town Convention closing opinions in aircraft finance transactions, offers an analysis of how current global Cape Town Convention closing opinion practice and custom in aircraft finance transactions can inform the goal of standardization. The analysis begins with a discussion of the value of Cape Town Convention closing opinions in aircraft finance transactions. Section 3 then proceeds to offer an account of a survey of current global Cape Town Convention closing opinion practice and custom in aircraft finance transactions. Section 4 offers some thoughts on how the aircraft finance bar can move closer to a global standard for Cape Town Convention closing opinions in aircraft finance transactions. This Article concludes with Annex A, a proposed form of opinion to be used by attorneys in the State where the airline debtor or lessee is situated and the aircraft is registered.

2. The value of Cape Town Convention closing opinions in aircraft finance transactions

While the value of a closing opinion is difficult to quantify, it is 'undeniable that legal opinions have value'.[7] Setting aside a true value-added analysis, which would hold that the value of a closing opinion is positive if the transaction it relates to is worth more as a result of the giving of the opinion, less the net opinion cost,[8] the most compelling theories on the value of a Cape Town Closing opinion are (i) the oversight role of the attorney rendering the opinion,[9] (ii) the closing of the information gap between the parties by having the attorney rendering the opinion also typically be the party with the most efficient and least costly access to the information,[10] and (iii) the attorney rendering the opinion pledging its reputation as a warranty of the accuracy of the information contained in the opinion, increasing the accuracy and value of the information given to the recipient of the opinion.[11]

However, when one begins to parse through the Cape Town Convention closing opinions currently being given in aircraft finance transactions, it becomes clear that the value of each individual opinion is not equal. For example, the opinion that 'the [international interest]/[prospective international interest]/[contract of sale]/[prospective sale]/[assignment of associated rights]/[prospective assignment] related to [insert the relevant Transaction Documents] and the necessary consents to permit [registration] [discharge] have been registered with the International Registry in accordance with the Convention as of [the date and time of registration of international interest, sale or assignment shown on the

[5] ibid 14.

[6] ibid 15.

[7] Ambro and Bidwell Jr, 'Some Thoughts on the Economics of Legal Opinions' (1989) *Colum Bus L Rev* 307, 313.

[8] ibid.

[9] ibid. See also Jonathan C Lipson, 'Cost-Benefit Analysis and Third-Party Opinion Practice', (2008) 63 *Bus Law* 1187, 1198.

[10] ibid. See also Ronald J Gilson, 'Value Creation by Business Lawyers: Legal Skills and Asset Pricing', (1984) 94 *Yale LJ* 239, 275 (noting that requiring opinions reduces costs by placing the burden of information production on the party able to produce at the least cost). An exception to this may be in the rendering of enforceability opinions, which 'typically require the less-expert lawyer to offer the opinion, even though he or she would not be its "least-cost" producer'. See Jonathan C Lipson, 'Price, Path & Pride: Third-Party Closing Opinion Practice Among US Lawyers (A Preliminary Investigation)', (2005) 3 *Berkeley Bus LJ* 59, 64.

[11] ibid.

priority search certificate]'[12] appears to provide little to no information beyond what is in the priority search certificate itself.[13] While there is an argument that there is a slight value from an oversight or reputational pledging perspective if the attorney providing the opinion is also making the relevant registration,[14] this opinion appears to have more in common with the much maligned 'good standing opinion' than with other customary Cape Town Convention closing opinions.[15]

Contrast the simple registration opinion with the opinion concerning the validity, registration and enforceability of an IDERA. The latter would need to be given by an attorney in the jurisdiction where the aircraft is registered and would efficiently close the information gap for the parties not located in the state of registration, while also requiring the issuing attorney to oversee the IDERA registration process and, perhaps most importantly, pledge her reputation as to her diligence in that process. In placing her reputation for diligence and honesty at risk, the issuing attorney will be paid a fee for that pledge.[16] However, the cost of that fee is far less than the cost of subsequent issues that may arise out of the information gap that exists without the opinion.[17]

3. Current custom and practice in Cape Town Convention closing opinions in aircraft finance transactions

In order to provide empirical evidence of current global Cape Town Convention closing opinion practice and custom in aircraft finance transactions, a random survey was conducted of aircraft finance attorneys practising in 17 different Contracting States of various significance to the aircraft finance industry.[18] Unsurprisingly, the two jurisdictions with attorneys that regularly act as special International Registry counsel for aircraft finance transactions, Ireland and the United States, offer robust and relatively standardized opinions from a substantive perspective. However, when one moves beyond these two jurisdictions the Cape Town Convention closing opinions being issued become far less uniform in scope and substance.[19] In fact, in

[12] 'Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol' <www.awg.aero> Annex D. References in this Article to the Practitioner's Guide are references to the version posted in September 2015.

[13] Official Commentary, Goode (n 3) 314 ('Such electronic transmission (which is specifically prescribed by Article 18(1)(a) satisfies the requirement of a consent in writing (see the definition of "writing" in Article 1(nn))').

[14] Query whether the advent of the international registry closing room lessens this value by involving each party in the registration process. See William B Piels and Tan Siew Huay, 'Generation II of the International Registry Website The Closing Room: A Transactional Approach to Registrations' (2013) 2 *Cape Town Convention Journal* 165–84.

[15] 'Because opinion preparers customarily do nothing more than rely on certificates of government officials (which normally are presented at closing), good standing opinions usually add little of value analytically. However, good standing opinions do provide comfort that the opinion preparers do not know the certificates to be unreliable and do place on them the responsibility for confirming that appropriate certificates have been obtained from the proper officials. In situations in which the benefits of good standing opinions are marginal, the Committee believes that the opinion process could be streamlined if opinion recipients were to refrain from requesting them and relied on the certificates alone': 'Third-Party "Closing" Opinions', A Report of The TriBar Opinion Committee (1998) 53 *Bus Law* 591.

[16] Gilson (n 10) 290.

[17] ibid.

[18] The countries surveyed (in alphabetical order) were Brazil, Canada, China, Colombia, Indonesia, Ireland, Kenya, Malaysia, Malta, Mexico, Norway, Panama, Russia, Singapore, Turkey, the United Arab Emirates and the United States of America. The UK was not a Contracting State at the time this Article was written and was thus excluded from the survey.

[19] Neither the long-form comprehensive model opinion prepared under the auspices of the AWG's Legal Advisory Panel found at Annex E of the 'Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol' nor any other common practitioner's tool appear to be a common basis for Cape Town Convention closing opinions in these jurisdictions.

many jurisdictions the practice has been that once such a jurisdiction became a Contracting State, the lawyers in that jurisdiction simply added a new section to their existing closing opinion form to cover the Convention and the Protocol. Thus, most of the surveyed Cape Town Convention closing opinions are in a single opinion addressing both national law and the Convention and Protocol as relatively few attorneys outside of Dublin and the United States act as special International Registry counsel and render closing opinions limited to Cape Town matters. In many of those jurisdictions, especially those where the Cape Town Convention has been in force for a relatively short amount of time, the additional coverage for the Cape Town Convention is merely a general confirmation that the Cape Town Convention and Protocol are in force[20] coupled with a repetition of that the jurisdiction's Declarations.[21] A typical formulation would be limited to:

> The Republic of [____] has adopted the Cape Town Convention on International Interests in Mobile Equipment and the Cape Town Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the 'Convention') by means of Law No [____] and no other action is needed for the Convention to be effective in the Republic of [____].

Just as the scope of the Cape Town Convention closing opinions is limited, so are the attorneys in those jurisdictions who will issue such opinions. In virtually all the jurisdictions surveyed the position was consistent: in-house attorneys working for airlines and other operators would only issue extremely limited Cape Town Convention closing opinions and instead the parties would look for any needed Cape Town Convention closing opinions to be addressed by external attorneys hired by leasing companies, financiers or export credit agencies.

In addition to whether the attorneys in a particular jurisdiction regularly act as special International Registry counsel on aircraft finance transactions, another determinative factor in defining the scope of the Cape Town closing opinions typically rendered in a jurisdiction is the authorizing entry point requirements of that particular jurisdiction. At present there are eight jurisdictions that require authorizing entry point codes. The jurisdictions, listed in alphabetical order, are Albania, Brazil, People's Republic of China, Mexico,

[20] The formulations between different jurisdictions were surprisingly similar. A more detailed formulation common in Brazil would read along the lines of the following: 'The Federative Republic of Brazil deposited its instrument of accession to the Cape Town Convention with the International Institute for the Unification of Private Law (UNIDROIT) on November 30, 2011. The Federative Republic of Brazil made the following declarations under the Convention on International Interests in Mobile Equipment signed at Cape Town on 16 November 2001, as amended (the 'Convention'): (i) declaration under Article 39, paragraph 1, (a); (ii) declaration under Article 39, paragraph 1, (b); (iii) declaration under Article 39, paragraph 4; (iv) declaration under Article 53; and (v) declaration under Article 54, paragraph 2. The Federative Republic of Brazil also made the following declarations under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment signed at Cape Town on 16 November 2001, as amended (the 'Protocol'); (i) declaration under Article XXX, paragraph 1, with respect to Article VIII; (ii) declarations under Article XXX, paragraph 2, in regard to Article X with respect to its full application; (iii) declaration under Article XXX, paragraph 3, with respect to Article XI; (iv) declaration under Article XXX, paragraph 1, with respect to Article XII, (v) declaration under Article XXX, paragraph 1, with respect to Article XIII and (vi) declaration under Article XIX, paragraph 1.'

[21] In some opinions counsel obtain Contracting State Certificates from the International Registry and rely on those certificates to affirm a jurisdiction's particular Declarations. Another practice is to refer to the local implementing law or legal authority to confirm Declarations. Although both sources should be equally reliable, the reference to the national implementing law brings more value to a local law opinion. Any person can download and review a Contracting State Certificate and the simple repetition of the contents of one, although convenient, does not necessarily add any value to the due diligence or oversight aspects of an opinion.

Ukraine, United Arab Emirates, United States of America and Vietnam.[22] As would be expected, the attorneys practising in jurisdictions where authorizing entry point codes are required tend to be asked to make registrations on the International Registry and then to render Cape Town Convention closing opinions in respect of aircraft finance transactions far more frequently than attorneys in jurisdictions that do not require authorizing entry point codes. In the case of Brazil, which has what are probably the most restrictive authorizing entry point code rules in the world,[23] the Brazilian attorney's Cape Town Convention closing opinion may be the only such opinion rendered in a transaction.

One surprising finding in the survey that may or may not be attributable to an over reliance on the Cape Town Convention closing opinions provided by special International Registry counsel is the lack of coverage for specific elements of the Cape Town Convention that are either expressly reserved for national law or that have a strong national law component due to the manner in which the Cape Town Convention was implemented in a particular jurisdiction. For example, the survey demonstrated a frequent lack of specific closing opinions relating to IDERAs in jurisdictions that have made the relevant declaration under Article XXX(1) of the Protocol. Given that it is only an attorney in that particular jurisdiction who can offer a meaningful opinion on the validity, enforceability and registration of an IDERA,[24] it is troubling that such coverage does not appear to be more uniformly included in standard forms of Cape Town Convention closing opinions for aircraft registered in those jurisdictions. Similarly indicative of this trend is the almost uniform absence of an opinion confirming the potential re-characterization by national law of an agreement established as an international interest under the Cape Town Convention as a security agreement, title reservation agreement or leasing agreement.[25] Given the dramatic impact that a re-characterization can have on the parties expectations of the remedies available under the Cape Town Convention in a default scenario, one would expect to see a broader practice of coverage on this somewhat sophisticated point.

Just as the survey revealed uniformity in the opinions that are not being included in the Cape Town Convention closing opinions in a number of jurisdictions, so did the survey establish a particular uniformity amongst most jurisdictions in the qualifications that are being used in Cape Town Convention closing opinions. The most frequent qualification, now common in many jurisdictions, is a general

[22] 'Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol' <www.awg.aero> Annex D.

[23] Authorizing entry point codes issued by the Brazilian Aeronautical Registry (the 'RAB') are available exclusively to persons who have previously registered with the RAB and have given written undertakings to the RAB to comply with applicable Brazilian law and regulations applicable to the Cape Town Convention and Aircraft Protocol. The undertaking must be given in Portuguese and includes an express acknowledgement of civil and criminal penalties in the event that the person violates such laws and regulations. One of the regulations prohibits the disclosure of authorizing entry point codes to third parties, which in practice means that for Brazilian-registered aircraft only Professional User entities located in Brazil make registrations at the International Registry. Brazilian Civil Aviation Agency – ANAC, Resolution 309/2014 of 18 March 2014, Arts 8 and 12.

[24] There is some discussion concerning the separate and distinct use of IDERAs for deregistration and export, in particular in jurisdictions such as Russia, which allows the widespread use of aircraft registered in other jurisdictions. This discussion has not arisen in jurisdictions such as Brazil where airlines are required to register their fleets on the Brazilian Register. For further details concerning this issue see Dean Gerber and David Walton, 'Deregistration and Export Remedies under the Cape Town Convention' (2014) 3 *Cape Town Convention Journal* 64–65.

[25] Official Commentary, Goode (n 3) 267 ('Hence the initial characterization is prescribed by the Convention itself. But this is purely for the purpose of determining whether the interest is a Convention interest at all. Once it is established that the interest does fall within one of the three categories specified in Article 2(2), its characterization for the purposes for subsequent provisions of the Convention … is determined by applicable law').

qualification that due to the lack of Cape Town precedent the attorney cannot predict how a court might treat the first Cape Town case or issue.[26] Opinions issued in Indonesia, Turkey and Brazil seem to most consistently include this type of qualification, possibly due to the novelty of the provisions of the Convention when compared to prior national law. These are not, however, the only jurisdictions where such qualifications are included. Law firms concerned with their reputations will always be reluctant to issue unqualified opinions relating to new untested laws and it is generally expected that these qualifications will diminish only after counsel have more precedent on which to rely, though forward-looking opinions have traditionally been qualified due to the uncertain nature of court or administrative agency behaviour and this practice is likely to continue.[27] Opinions from certain jurisdictions where pre-Cape Town national laws and precedents may have been more 'creditor' or 'lessor' friendly and Cape Town Convention remedies may not differ as significantly from pre-existing national law, counsel seem to have more confidence opining on the effectiveness of Cape Town without these types of qualifications.

Finally, in our survey we sought to learn from counsel in several jurisdictions whether and where lawyers are subject to objective standards for the issuance of legal opinions. In particular we asked counsel whether there any objective standards established by law, regulation, law societies or other sources for legal opinions. The unanimous answer we received was that no such standards exist. It is possible that there are jurisdictions with such objective standards, however, we did not find any among the major Cape Town Contracting States. Naturally firms issuing opinions on Cape Town matters are subject to general ethical standards concerning diligence and accuracy of advice.

4. Towards a standardized Cape Town Convention closing opinion in aircraft finance transactions

The story of current global Cape Town Convention closing opinion practice and custom in aircraft finance transactions reads as two separate and distinct stories. That handful of jurisdictions where there is a combination of a high volume of aircraft finance transactions and a robust aircraft finance bar have a highly developed, sophisticated and relatively standardized opinion practice.[28] Standing in stark contrast to the jurisdictions with developed Cape Town Convention closing opinion practice are those jurisdictions where the Cape Town Convention has been newly ratified, there is a lower volume of aircraft finance transactions in the jurisdiction generally and/or there is a limited aircraft finance bar. In these jurisdictions Cape Town Convention closing opinion practice and custom tends to be inconsistent and undeveloped. The challenge for the aircraft finance practitioner and the broader industry is that these jurisdictions tend to be those where there are either implementation problems or the prospects for renationalization are higher than elsewhere.[29]

[26] A typical qualification was 'Ratification of the Convention and Protocol is quite recent in [_____] and due to the general lack of precedent it is not possible to foresee how the Convention and Protocol would be interpreted in case of a judicial dispute in the courts of [_____]'.

[27] 'Third-Party "Closing" Opinions', A Report of The TriBar Opinion Committee (1998) 53 *Bus Law*, 607, 620.

[28] It should come as no surprise that two of these jurisdictions, Ireland and the United States, have nearly a decade of experience with the Cape Town Convention and in that time have developed a legal industry geared specifically towards making International Registry registrations in aircraft finance transactions and providing an accompanying Cape Town Convention closing opinion.

[29] See, eg, Brian F Havel and John Q Mulligan, 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic' (2014) 3 *Cape Town Convention Journal* 81–94 for a discussion of the threat of renationalization.

This poses a challenge for the both the practitioner and the aircraft finance industry more generally as it is in exactly these jurisdictions that the value of closing the information gap is greatest.[30] For example, were it not for a sophisticated Cape Town Convention closing opinion practice in Brazil, the implementation issues surrounding operating leases[31] and the effective date of the Convention in Brazil,[32] the practitioner representing a creditor of a Brazilian airline would be wholly unaware of these issues as they do not appear on a Brazilian Contracting State search certificate. An annotated form of opinion for counsel in these jurisdictions with a less developed Cape Town Convention closing opinion practice has been annexed to this Article in order to help provide guidance to practitioners in these jurisdictions. This annotated form opinion is not intended to address every potential opinion that could be given under the Cape Town Convention in an aircraft finance transaction nor is it intended to apply in scenarios where there is a mismatch between the State that the debtor is situated in and the jurisdiction where the aircraft is registered. Instead, it is intended to lay out the basic building blocks for a Cape Town Convention closing opinion a practitioner in those jurisdictions can use to help identify potential areas where there are implementation or renationalization issues (ie, those areas where a 'clean' opinion cannot be given) and to aid in understanding the expectations as to the general scope of opinion that the attorney should be prepared to render.

[30] See, eg, Ambro and Bidwell (n 7).

[31] Article 1(q) of the Convention contains the following definition '"leasing agreement" means an agreement by which one person (the lessor) grants a right to possession or control of an object (with or without an option to purchase) to another person (the lessee) in return for a rental or other payment'. Although the Brazilian Law containing a Portuguese version this definition includes language such as 'with or without an option to purchase', the expression used to define 'leasing agreement' is an expression that at one time was reserved to finance leases in Brazil. This has created some speculation that the Cape Town Convention should apply to finance leases but not operating leases. The Brazilian Civil Aviation Agency applies the Convention to both types of leases; however, most Brazilian opinions contain a qualification that the Convention might eventually be interpreted as being applicable to finance leases only. There are efforts underway in Brazil to eliminate the ambiguity in the definition.

[32] Brazil validly deposited the Convention and Protocol with UNIDROIT on 30 November 2011. Under the terms of the Convention itself (Art 49), the effective date of the Convention and Protocol in Brazil was 1 March 2012. But the Law implementing the Convention and Protocol in Brazil was not promulgated until May 2015 (Brazilian Law 8.008/2015). Even after that Law was approved and published the Brazilian Civil Aviation Agency did not publish regulations until April 2014 (ANAC Resolution 309/2014). Those regulations stipulate that 15 May 2013 was the effective date of the Convention and Protocol in Brazil. These discrepancies are frequently cited in Brazilian legal opinions, especially in relation to transactions concluded between 1 March 2012 and 15 May 2013.

Annex A

[*Sample Opinion of Local Counsel*][33]

To the addressees on Schedule 1 attached hereto

You have asked us to render an opinion in connection the [____] model aircraft bearing manufacturer's serial number [____] and [name of jurisdiction] registration mark [or registration number] [___] (the '**Aircraft**') and specifically in relation to the Contract of Sale between [____] as seller and [____] as purchaser (the '**Contract of Sale**'), the Lease between [____] as lessor and [____] as lessee (the '**Lease**')] and the Mortgage between [____] as mortgagor and [____] as mortgagee (the '**Mortgage**'), each dated [____] (collectively, the '**Transaction Documents**'').[34]

[33] Much of this sample opinion is founded on the model opinion included in the 'Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol' <www.awg.aero> Annex E (hereinafter the 'Annex E Form'). We are grateful to the AWG and its Legal Advisory Panel for making the Annex E Form available.

[34] All of the transaction documents should be listed here. The sample opinion mentions a contract of sale, a lease and a mortgage only, however, this list might

For the purpose of issuing this opinion we have reviewed the following documents [choose as applicable]:

(a) Evidence of registration of the [Airframe] [Helicopter] in [the national aircraft registry of a Contracting State];[35]
(b) Each of the Transaction Documents;
(c) The Priority Search Certificates issued by the Registrar on [date] at [time] covering registrations describing the '[Airframe]/[Engine]/[Helicopter]', which includes the registration of an international interest in the '[Airframe]/[Engine]/[Helicopter]' on the International Registry;[36]
(d) The Irrevocable De-registration and Export Request Authorization (the '**IDERA**') issued by [name of debtor] in respect of the [Aircraft] [Helicopter], dated [], naming [_____] as the authorized party;[37]
(e) [citations to any national approvals and documents that are necessary for counsel's opinions];[38]
(f) [all other documents, approvals and consents of whatever nature and wherever kept which were, in our judgment and to our knowledge, necessary or appropriate to examine to enable us to give the opinion expressed below.][39]

For the purpose of this opinion the '**Convention**' means the Convention on International Interests in Mobile Equipment signed in Cape Town on 16 November 2001 and the '**Protocol**' means the Protocol to the Convention on Matters Specific to Aircraft Equipment, as each has been adopted by [name of jurisdiction] pursuant to [Law No. ____]. The Convention and the Aviation Protocol are read and interpreted together as a single document as required by Article 6(1) of the Convention and reference to the Convention in this opinion includes the Aviation Protocol.

Defined terms used herein (whether or not capitalized)[40] and not otherwise defined in

include a Conditional Sale Agreement, an Assignment, a Novation or and/or a Subordination Agreement.

[35] Art 29(a) Convention on International Civil Aviation, 7 December 1944, 61 Stat 1180, 15 UNTS 295, commonly referred to as the 'Chicago Convention'. There may be some situations where such certificates are unavailable. For example, when dealing with new aircraft many jurisdictions issue interim certificates of registration. In the case of Brazil, for example, international ferry flight authorizations take the place of interim certificates of registration. The opining law firm should have some written evidence from the civil aviation authority of the country of registration that the aircraft or helicopter is registered.

[36] Without a doubt the opining law firm must obtain and review priority search certificates from the Registrar prior to issuance of the opinion. There is a common practice of attaching priority search certificates to opinions. Although we do not find the practice objectionable, we do not think that it necessarily adds to an opinion. At the same time this practice can make opinions physically longer and harder to reproduce.

[37] At the time of most closing date opinions the opining law firm will not yet have received an official response from the national aircraft registry authority confirming registration of an IDERA; however, if such confirmation has been received then the language from the Annex E Form confirming that such IDERA has been recorded should be included. If the jurisdiction provides evidence of filing that is not sufficient to confirm recording then the opinion should refer to the filing evidence. If a certified designation confirmation letter has been issued in accordance with Article XIII(3) of the Protocol then reference to such letter should be included in this subpart.

[38] These would typically include non-Convention documents such as import licences, foreign exchange authorizations in jurisdictions that require them, licences, air operator certificates and any other relevant licence or approval. Although these may be unrelated to the Convention their inclusion will usually be expected in a local counsel opinion.

[39] General catch-all reliance paragraphs are common, appropriate and useful to the opinion giver. 'Third-Party "Closing" Opinions', A Report of The TriBar Opinion Committee (1998) 53 *Bus Law*, para 1.4(c).

[40] We found in our research (including opinions from our own respective firms), that opinions frequently capitalize all terms that are defined in the Convention and Protocol (eg, 'International Interests'). This is a natural tendency, however, most of the terms used in the Convention and Protocol are not capitalized. Although not a major problem, we recommend that opining law firms follow the capitalization usage of the Convention and Protocol as closely as possible. Transaction documents and labels for parties such as 'Security Trustee' will usually be capitalized.

this opinion may be used as defined in the Convention or Protocol, as applicable.[41]

Our opinions set out below are subject to the assumptions and qualifications attached on Schedule 2. Based on the documents listed above and the relevant laws of [jurisdiction],[42] we are pleased to advise that in our opinion:

(1) The Aircraft has been duly registered with the civil aviation registry of [____],[____] is the sole registered owner of the Aircraft,[43] and at the time of conclusion of the [name of the Transaction Document], the Convention and the Protocol were in effect in [Contracting State].

(2) The [Lease] [Novation] [Conditional Sale Agreement] [Mortgage] is effective to constitute an international interest as defined in the Convention in the '[Airframe]/[Engine]/[Helicopter]'.[44]

(3)

(A) The [Lease]/[Conditional Sale Agreement] falls within the meaning of [leasing agreement]/[title reservation agreement] as defined in the Convention.[45]

(B) The [Mortgage / Security Agreement] falls within the meaning of security agreement as defined in the Convention.][46]

[41] A longer variation, which the Annex E Form provides and could be used for would be: 'The following terms [modify as appropriate] used in this opinion, "assignment", "associated rights", "contract of sale", "creditor", "debtor", "Depositary", "International Registry", "international interest", "leasing agreement", "prospective assignment", "prospective international interest", "prospective sale", "Registrar", "registry authority", "sale", "security agreement" and "title reservation agreement", shall have the meaning given to them in (or, as appropriate, shall be construed in accordance with) the Convention. "Contracting State" shall mean those countries which have ratified or adhered to the Convention; "Contracting State search certificate" and "priority search certificate" shall have the meaning given to each of them in the Regulations issued by the Supervisory Authority pursuant to Article 17 of the Convention and Article XVII of the Protocol.' The shorter formulation used in the text will probably be adequate in most opinions.

[42] The Preamble to the Convention sets a goal of establishing an autonomous system of transnational law for aircraft finance (Convention Preamble) see Jeffrey Wool and Andrej Jonovich, 'The Relationship of Translational Law Treaties and National Law', 2 *Cape Town Convention Journal* 69. This has led some practitioners to the view that that law firms may render legal opinions relating to the Convention and the Protocol based on 'international law' instead of the law of the jurisdiction where the firm is licensed to practice (eg, 'Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol' (n 12) fn 484). While we sympathize with this view we would recommend that law firms carefully consider their ability to opine on matters of 'international law' that have not been incorporated into the laws of their own jurisdictions. If any such opinions are rendered the firm should clearly indicate the basis of the opinion to avoid a misconstruction that certain precedents or other authority have been incorporated into the national laws of the State where the firm practices.

[43] If the opining firm is located in a State where it is possible to verify ownership and lien status then an ownership opinion should be included.

[44] Most of this draft opinion is taken verbatim from the Annex E Form, however, we added a potential reference to a 'Novation'. A lease novation, since it is essentially a new lease, would create an international interest in the same way as a lease (Official Commentary, Goode (n 3) para 2.43–2.44). Counsel should take care to ensure that the relevant agreement is a true novation. In some cases documents purporting to be novations are actually assignments and in other cases documents with names like 'assignment assumption agreement' may be novations. The Official Commentary states that the distinction between novations and assignments is to be determined by reference to the Convention and not national law. We agree with this approach, however, the opining firm cannot ignore the possibility of a legitimate dispute in the future concerning characterization of an agreement as a novation or an assignment. Consequently this is an opinion counsel may want to give on a reasoned basis since it may be subject to more uncertainty or inconsistent determinations. ('Third-Party "Closing Opinions', A Report of The TriBar Opinion Committee (1998) 53 *Bus Law* para 1.9(j)).

[45] This language is taken verbatim from the Annex E Form and should be relatively easy to provide in most opinions, though there may be cases where this fairly simple confirmation is problematic.

[46] If the mortgage is governed by the law of the jurisdiction of the counsel rendering the opinion this should be a fairly simple (and important) opinion to include. If the opinion is based on a mortgage governed by the laws of another jurisdiction then this seemingly simple opinion may require qualification. The opining

(4) The Bill of Sale[47] is effective to be a contract of sale as defined in the Convention with respect to the '[Airframe]/[Engine]/[Helicopter]' and to transfer the interest of the seller in the '[Airframe]/[Engine]/[Helicopter]' to the buyer according to its terms.[48]

(5) The [Assignment][49] is effective to transfer to the [Assignee] the international interests relating to the '[Airframe]/[Engine]/[Helicopter]' constituted in favour of the [Assignor] and to transfer [some/all] related associated rights and all the rights, interests and priorities of the [Assignor] under the Convention in relation to such international interests.[50]

(6) The [international interest] [contract of sale] [assignment of associated rights] related to [insert the relevant Transaction Documents] and the necessary consents to permit [registration] [discharge] have been registered with the International Registry in accordance with the Convention as of [the date and time of registration of international interest, sale or assignment shown on the priority search certificate].

(7) No further filing is required or advisable under the Convention for the international interest under the [Lease] [Novation] [Conditional Sale

firm should first consider the Convention's definition of 'Security Agreement', which can be found at Section 1 (ii): 'security agreement' means an agreement by which a chargor grants or agrees to grant to a chargee *an interest* (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person' [emphasis added]. The Convention does not expressly define 'an interest', however, the Official Commentary states that the expression refers to a right *in rem* (Goode (n 3) para 2.33). Certain States provide in their national law that rights *in rem* over aircraft are governed by the law of the jurisdiction of registration (the *lex registrori*). If an aircraft is registered in such a State and a mortgage governed the law of a different State purports to create a security interest over such aircraft then such a mortgage would not have created a valid right *in rem* over the aircraft. Under this analysis, consequently, such a mortgage would not qualify as a 'security agreement' under the Convention. This conclusion, however, would contradict the general rule of the Official Commentary, stated at para 4.69, which stipulates that the constitution of an international interest is created so long as it complies with Article 7 of the Convention, and that this determination is not remitted to national law. The requirements of Article 7, which are fairly simple are that the document creating the international interest: '(a) is in writing; (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose; (c) enables the object to be identified in conformity with the Protocol; and (d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.' Over time this issue may be clarified by court decisions or other legal authorities, but for the time local counsel faced with facts such as the foregoing would need to qualify any opinion given in relation to any opinion that a foreign law mortgage constitutes a 'security agreement' under the Convention.

[47] Although this opinion relates to a Contract of Sale the opinion will usually be based on a bill of sale and not on a purchase agreement.

[48] This opinion can be given if the governing law of the bill of sale (or other contract of sale) effectively transfers title. The International Registry is not a title registry ['Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol' para II.B]. If the opining firm is located in a jurisdiction where title can be verified then this opinion can and should be given.

[49] This assignment could include an assignment intended to extend the Convention and Protocol to a pre-existing transaction (sometimes referred to as an 'AOSA'). It is conceivable that the opinions in (1)–(4) might not be applicable to a transaction and only this opinion (5) would apply. For further discussion on such assignments and their validity see the Official Commentary, Goode (n 3) para 2.65 and the first authorized annotation to the Official Commentary, which can be found at <http://cdm15895.contentdm.oclc.org/cdm/ref/collection/p15895coll11/id/82> accessed 10 September 2015.

[50] When a transaction includes a security assignment, a written notice of assignment and, in particular, an express acknowledgement of assignment an additional opinion would be appropriate to confirm to the assignee its rights against the lessee. The Annex E Form included such an opinion, which we suggest could be simplified to 'The Lessee is obligated, in accordance with the terms of the [acknowledgement of assignment] to [direct payments to the Assignee / to comply with instructions received from the Assignee] under the [Transaction Document]'.

Agreement] [Mortgage] to be effective against third parties.[51]

(8) No further filing is required or advisable under the Convention for the Contract of Sale to be effective against third parties.

(9) No further filing is required or advisable under the Convention for the [Assignment] to be effective against third parties.

(10) No further filing is required or advisable under the Convention for the subordination of [international interest B] to [international interest A] under the [Subordination Agreement], by or with the consent in writing of [the person whose interest has been subordinated] and consequently [international interest A] has priority over [international interest B] under the Convention.

(11) The rights and interests of the [insert relevant party][52] with respect to the '[Airframe]/[Engine]/[Helicopter]' pursuant to the [international interest]/[sale]/[assignment] constituted under the [insert relevant Transaction Document] will be subject only to:[53] (i) the rights and interests of the [Lessee]/[Sublessee] in the '[Airframe]/[Engine]/[Helicopter]' pursuant to the Convention [and] [the quiet enjoyment provisions set out in [the Transaction Documents]/[Subordination Agreement], (ii) a pre-existing right or interest which enjoyed under the applicable law before the effective date of the Convention a priority higher than an international interest constituted under the [insert the relevant Transaction Document], provided that if the Convention is applicable to such pre-existing right or interest, the priority of such pre-existing right or interest will only be retained if it is registered on the International Registry within the time frame specified by the relevant Contracting State,[54] and (iii) the non-consensual rights or interests included in the categories[55] covered by [the Contracting State]'s declaration[56] under Article 39 of the Convention.[57]

[51] The Annex E Form uses alternative language. We recommend the formulation above, which we consider more concise and relevant. Based on the survey this language is already more commonly used in opinions. If the opinion is being rendered prior to registrations having been made then the words 'Upon the registration of … ' should be introduced at the beginning of each of these affirmations. Our combined experience, as well as the information we collected in our research, indicates that opinions are usually rendered after registrations have been made and priority search certificates have been issued and reviewed. The value of an opinion to a party to a transaction will be considerably enhanced if the registrations have been made. Also, with the advent of the Closing Room feature of the International Registry we expect the practice of issuing opinions prior to registrations having been made will diminish over time.

[52] In most cases the relevant party will be a security trustee or mortgagee. If more than one party holds registered international interests this paragraph should be repeated and an indication of the party with priority should be included.

[53] The Annex E Form includes a paragraph for registrations that have priority. In our experience most transactions have a single party that ultimately holds all international interests directly, by assignment or subordination. Therefore we did not include the paragraph relating to priority interests registered prior to the interests of the ultimate creditor, however, if there are any such prior interests they should be noted.

[54] This opinion is frequently overlooked and should be considered in jurisdictions where the Convention and Protocol have only recently become effective.

[55] If possible a description of the categories should be included.

[56] There have been suggestions that the opinion refer to current or future declarations of a Contracting State (eg, Annex E Form). Our view is that there is no need for an opinion to refer to future changes in law since opinions are given as of a particular date. Other than enforceability opinions opining firms should refrain from forward-looking 'predictions'.

[57] Article 39 of the Convention allows a State to grant priority over registered interests to certain unregistered interests. The most common type of category would be navigational charges and charges for use of airports. For a detailed discussion of Article 39 see John Pritchard and David Lloyd, 'Analysis of Non-Consensual and Interests under Article 39 of the Cape Town Convention' (2013) 2 *Cape Town Convention Journal* 3. To date local law opinions have not included Article 39 opinions, however, we consider this an integral

(12) The IDERA is in the form required by the Convention and the Aviation Authority[58] and has been [submitted for recordation to] [recorded by] the [Aviation Authority].

(13) The IDERA, [having been recorded] [after being recorded] by the [Aviation Authority] will be effective and enforceable in [name of Contracting State where aircraft is registered], which, has promulgated specific rules applicable to the enforcement of IDERAs.[59]

(14) [Contracting State] has adopted Alternative A[60] of Article XI of the Protocol[61] and has declared the waiting period (after an insolvency-related event) of __ days under Article XI(2). The insolvency administrator or the debtor, as applicable, would be obligated to give possession of the Aircraft to [name of relevant Party or, if in doubt, the 'creditor entitled to such possession'], no later than[62] the end of such waiting period.[63] [Contracting State] is the debtor's primary insolvency jurisdiction as defined in the Convention.

(15) In accordance with the declaration of [name of Contracting State] under Article XXXI of the Protocol,[64] [as well as the national law of [Contracting State], the law of [insert name of country][65] as chosen by the parties to govern [insert the relevant Transaction Documents][66] in whole or in part will be upheld as a valid choice of law with respect to the contractual rights and obligations of the parties under such agreements in any action in the courts of [the Contracting State].[67]

part of an opinion and recommend that it be included so that opinion recipients are aware of possible subordination of their registered interests.

[58] Substitute the name of the relevant aviation authority, as applicable. Some opinions refer solely to the Convention, however, our recommendation is that the opinion confirms that the IDERA has been executed in a form that is acceptable to the relevant aviation authority. Some aviation authorities have imposed certain formalities such as signatures of witnesses or translations. We do not purport to comment on the validity of such additional formalities; however, if they apply in a particular jurisdiction the opining firm should ensure that they have been followed.

[59] Local counsel opinions should include some reference to enforcement of IDERAs if the relevant jurisdiction has promulgated regulations for the enforcement of IDERAs a brief description of the provisions of the regulations could be included. For example, in Brazil regulations have been promulgated which stipulate that the Brazilian Aeronautical Registry will deregister an aircraft within five business days of receipt of an application from an authorized party named in an IDERA provided notice of the exercise has been given to other interested parties.

[60] To date only one jurisdiction, Mexico, has adopted Alternative B. Therefore we have not included a suggested formulation for Mexican opinions. The survey confirmed that experienced law firms in Mexico are familiar with Alternative B.

[61] If a country has made no declaration for either Alternative A or Alternative B then the opinion should include a standard national law opinion concerning the national insolvency law and the applicable procedures, right, obligations and waiting periods.

[62] If the national law stipulates a period to time that is shorter than the waiting period provided in a State's declarations then the shorter period should be mentioned instead of the end of the waiting period.

[63] Protocol Art XI, Alternative A, para 7. There are many jurisdictions where Article XI of the Protocol will substantially alter prior insolvency procedures and there have been no test cases. In such jurisdictions it is reasonable for the opining firm to make a particular note of the lack of precedent. Although this may be seen as 'diluting' the firmness of the opinion, it makes the opinion recipient aware of possible uncertainty in future insolvency cases.

[64] The opining firm should verify that this declaration was made.

[65] This should be included only if the national laws support freedom of parties to elect national law.

[66] Article VIII(2) of the Protocol refers to 'to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement'. The Convention (Art 1(a)), defines agreement as 'a security agreement, a title reservation agreement or a leasing agreement'. Thus in principle any of these transaction documents could be inserted here, though opining counsel should take care to consider inclusion of security agreements, as explained in footnote 46 above.

[67] This opinion or a variation of it is nearly always requested by opinion recipients.

(16) Neither [Lessee] nor its assets is entitled to any right of immunity; and the entry into and performance of any Transaction Documents constitute private and commercial acts.[68]

(17) The written agreement between [insert the name of the parties] contained in [insert the relevant Transaction Document] that the courts of [the relevant forum Contracting State] are to have [exclusive]/[non-exclusive] jurisdiction in respect of any claim brought by either of them under the Convention will be recognized under the laws of [the applicable Contracting State].[69]

Schedule 2
Assumptions and Qualifications

(A) [insert firm's standard qualification concerning equity][70]

(B) This opinion is limited to matters of the law of [name of Contracting State]. We express no opinion with respect to the law of any other jurisdiction.

(C) This opinion may be relied upon by the addressees and their respective assignees and legal advisers only, and may not be disclosed to nor relied on by any other person or used for any other purpose.

(D) The opinions expressed herein shall be effective only as of the date of this Opinion. We do not assume responsibility for updating this Opinion as of any date subsequent to the date of hereof.

(E) We have assumed:
   a. the genuineness of all signatures on the Transaction Documents;
   b. the authenticity and completeness of the facsimiles of the Transaction Documents delivered to us;
   c. that each of the Transaction Documents that is not governed by the laws of [opining firm's jurisdiction] is valid and binding under the laws by which it is expressed to be governed; and
   d. that each party has taken all corporate steps to authorise the execution of the Transaction Documents to which it is a party.[71]

(F) We have further assumed:

[68] This is a standard formulation for a transaction involving debtors that are not owned or controlled by a sovereign government. We included this formulation since it is the most common. If a transaction involves a sovereign that has waived immunity then the formulation suggested by the Annex E Form would be appropriate. That language is: 'Pursuant to the written waiver of sovereign immunity between the parties, the [name of party waiving sovereign immunity] is not entitled to sovereign immunity from jurisdiction in connection with the Transaction Documents to which it is a party in the courts of the Contracting State chosen by the parties pursuant to the Convention, the courts of the Contracting State where the "[Airframe]/[Engine]/[Helicopter]" is situated or in which the Aircraft is registered or the courts of the Contracting State where the debtor is situated, in each case with respect to such claims or requests for relief as are specified in the Articles 42 and 43 of the Convention, respectively, or relating to enforcement of rights and interests relating to the "[Airframe]/[Engine]/[Helicopter]". Footnote 531 of the "Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol" clearly summarizes diligence the opinion firm would need to conduct before giving this opinion. "In order to make this opinion, the opining lawyer must confirm that the waiver of sovereign immunity from jurisdiction of the courts specified in Articles 42 and 43 of the Convention is in writing and contains a description of the [Airframe]/[Engine]/[Helicopter]. The opinion may be given by counsel in the Contracting State in which the applicable sovereign is located despite the absence of a local statute on waiver of sovereign immunity since the Convention should override national law".'

[69] Opining counsel should refer to the Article 42 of the Convention.

[70] Parts (A)–(D) are generic and not specifically related to the Convention and Protocol. They have been included merely to remind opining law firms to include some form of each of these qualifications.

[71] If the opinion includes a corporate authorization opinion then this qualification should be adjusted accordingly.

a. that the information contained in any priority search certificate referred to herein is complete, current and accurate in all respects;
b. that each priority search certificate contains all the registered information and data on the International Registry in connection with the '[Airframe]/[Engine]/[Helicopter]' to which it relates;
c. that the conditions to full effectiveness of any registrations made as prospective have been met and such interests are no longer prospective;[72]
d. that each of the following registrations, which are indicated on the priority search certificates we have obtained and reviewed, reflect properly constituted international interests, assignments, contracts of sale, or agreements to subordinate registered interests, as applicable:[list relevant file numbers];[73]
e. that [each of][74] the [seller] [lessor] [conditional seller] [chargor] had the power to dispose of the '[Airframe]/[Engine]/[Helicopter]' by way of the [Contract of Sale] [Lease]/[Conditional Sale Agreement]/[Mortgage];[75]
f. the free-text description of the [describe relevant object] is accurate and complete;[76]
g. the '[Airframe]/[Engine]/[Helicopter]' is correctly identified and described by manufacturer's serial number, name of manufacturer and generic model designation.

[72] Occasionally lawyers are asked to opine on the validity of prospective international interests or other prospective filings. Such opinions can be problematic, in part because priority search certificates make no distinction between registrations of prospective interests and registrations of interests. Our view is that an opining firm is fairly limited in the scope of an opinion on a prospective interest and that it is easier and more useful to opinion recipients to receive opinions confirming registered interests. The practice of registering prospective international interests over helicopter engines is widespread due to uncertainties as to whether a helicopter engine is an object for purposes of the Convention and the Protocol: 'Practitioner's Guide to the Cape Town Convention and the Aircraft Protocol', Part III(E).

[73] Whenever a law firm finds pre-existing registered interests that it is not discharging the law firm must assume that those interests were correctly constituted and filed. This qualification should not extend to international interest filings being made by the opining law firm.

[74] The opining firm should adjust this paragraph to be expressed in the singular or plural, as applicable.

[75] In many jurisdictions the concept of the 'power to dispose' is new and was unknown prior to implementation of the Convention. Due to the lack of precedent most firms will assume such power. There may be instances, for example in a jurisdiction where a seller has a registered ownership interest on an owner register, where the power to dispose could be the subject of an opinion instead of an assumption.

[76] Most major aircraft and engine manufacturers have registered airframes, helicopters and engines on the International Registry; however, a few have not. Registering interests over such objects requires the professional user entity to type a description of the object's manufacturer and model. At first glance this would seem to be a simple exercise, however, in practice there are many ways to type this information. For example, some manufacturers use stylized upper case or lower case letters and many objects may have suffixes added to their model designations (in upper or lower case variations). Just the inclusion or exclusion of a hyphen can alter a search result. Therefore lawyers opining on registrations of free-texted objects should include an assumption for the description of that object. If the holder of the interest is an entity engaged in regular financing of similar objects it may have a pre-established policy concerning description of the object. Counsel should always seek the instructions or recommendations of the holder of the interest.