

Cape Town Convention & Aircraft Protocol - Accession of the European Community

Background

This briefing follows on from our client briefings¹ on the Convention on International Interests In Mobile Equipment 2001 and the Protocol thereto on Matters specific to Aircraft Equipment 2001 (the "Cape Town Convention" and "Protocol"). It considers the implications of the Council of the European Union's decision (the "EU Decision") on behalf of the European Community ("Community"), on 3 April 2009, to accede to the Convention and Protocol.²

Application of the Convention to EU

The Convention only applies as between countries that have ratified both the Cape Town Convention and the Protocol (the "Contracting States"). However, the Convention includes a provision allowing Regional Economic Integration Organisations ("REIOs") to accede to the Convention to the extent the REIO has "exclusive competence" over matters governed by the Convention. The Community qualifies as an REIO and has now acceded to the Convention to the extent it has exclusive competence,³ although, as will be seen below the effect of the Community's accession is more of an enabling act that allows Member States to accede themselves rather than something that will automatically result in all Member States being Contracting States.

The 3 areas of exclusive competence, and which are to be regulated by the Community rather than the Member States are: (i) jurisdiction and recognition and enforcement of judgements in civil and commercial matters,⁴ (ii) procedural aspects of insolvency proceedings (which includes the choice of which Member State should be the primary jurisdiction for dealing with an insolvency of a company but does not include control over the substantive aspects of rights and remedies on an insolvency),⁵ and (iii) choice of the law for contractual obligations.⁶

KEY ISSUES

Path cleared for 24 EU Member States to accede to the Convention

The Community's accession does not mean that the whole Convention automatically applies to all EU Member States

Most decisions regarding the Convention still remain with EU Member States

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¹ See [Cape Town Convention and Aircraft Protocol - Next Steps To Consider For Transactions](#) and [Cape Town Convention and Aircraft Protocol - Outline](#).

² For convenience, further references in this note to the "Convention" are references to the Convention as it applies to aircraft objects AND to the Protocol. The instruments will be referred to individually as the "Cape Town Convention" and the "Aircraft Protocol".

³ Council Decision on the accession of the European Community to the Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001, 15013/08. The Community has since deposited instruments with Unidroit as the relevant depository for the Convention, and the accession should become effective from 1 August 2009.

⁴ This will remain governed by Council Regulation (EC) No 44/2001 of 22 December 2001.

⁵ This will remain governed by Council Regulation (EC) No 1346/2000 of 29 May 2000

⁶ This will remain governed by Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 ("Rome 1"). Currently, the UK is not bound by this Regulation (and so the EU Decision does not bind the UK in relation to choice of law provisions) and instead the UK remains bound by 1980 Rome Convention on the law applicable to contractual obligations, which is broadly equivalent to Rome 1. The Council expects that if the UK accedes to the Convention and Protocol before its accession to Rome 1 that the UK will make a declaration such that the choice of law provisions under the Convention as they apply in the UK are consistent with the approach of the rest of the Community.

In practical terms, what this means is that current EU law relating to these matters will continue to apply to these, and the implementation of the Convention will not override these provisions.

The previous accessions of Ireland and Luxembourg have been seen as exceptional and were related to the establishment of the relevant registries for the Aircraft Equipment protocol in Ireland and the Rolling Stock protocol in Luxembourg. The EU Decision effectively clears the way for the Member States to accede individually now that the Community has dealt with those areas of the Convention that only it, under Community law, had competence over.

Excluded from the EU Decision

Whilst the EU Decision is potentially a major step forward, it is also important to consider what it does not cover:

- It does not mean that once the accession by the Community becomes effective,⁷ international interests will be created by "debtors" located anywhere within the Community - in practical terms, the Convention will only apply in full in relation to any Member State once it has ratified the Convention for itself and it has put the Convention into effect as a matter of its own national laws.
- The EU Decision does not require any Member State to accede to the Convention.
- Most Opt-Ins and Opt-Outs under the Convention will still remain for the Member States to decide on, including the decision as to whether to apply the Option A or Option B insolvency provisions from the Protocol.
- The EU Decision does not apply to Denmark, which has not delegated to the Community responsibility for the matters covered by the EU Decision, and territories of Member States that are not within the Community (eg Overseas Territories of the UK such as the Cayman Islands and Bermuda).

Next Steps - Future Ratification By Member States?

It is unclear at this early stage which additional Member States will choose to ratify the Convention and, if so, which options they will choose, however, it is something that we will all be following with interest.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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⁷ 1 August 2009 according to the Unidroit web-site (<http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>)