



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03.03.2003
SEC(2002) 1308 final/2

2002/0312(ACC)

CORRIGENDUM

Annule et remplace les 11 versions du doc. SEC(2002)1308 final
du 17.12.2002 (document RESTREINT UE).

Suite à la déclassification du doc., la 2ème décision fait l'objet d'un acronyme
2002/0312(ACC)

Proposal for a

COUNCIL DECISION

**on the signing by the European Community of 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**

Proposal for a

COUNCIL DECISION

**on the conclusion by the European Community of 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**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. PURPOSE OF THE PRESENT PROPOSALS

The Commission is proposing that the Community should sign and conclude the Convention on International Interests in Mobile Equipment ("the Cape Town Convention" or "the Convention") and its Protocol on matters specific to aircraft equipment ("the Aircraft Protocol") adopted, at a Diplomatic Conference held in Cape Town from 29 October to 16 November 2001, under the combined auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organisation (ICAO).

2. THE CAPE TOWN CONVENTION

2.1. Objective and scope

The Cape Town Convention (Article 2) lays down uniform rules for the constitution and effects of an international interest (security agreement, title reservation agreement or leasing agreement) in certain categories of mobile equipment designated in the Protocols relating to the following categories: aircraft (airframes, aircraft engines and helicopters), railway rolling stock and space assets.

The Convention applies when the debtor is situated in a contracting State (Article 3) since the various protocols provide for specific connecting factors (the State of registration in the case of aircraft – Article IV of the Protocol). The interest established by the Convention (Articles 1 and 2) concerns the asset registered, but also associated rights and proceeds, and the relevant protocol may provide for the Convention to apply to the sale of an asset (Article 41 of the Convention), as is the case with the Aircraft Protocol (Article III).

The Convention strengthens the rights of the beneficiaries of this unified interest in rem in mobile equipment assets if the debtor should default on his obligations (Articles 8 to 15).

The Convention finally establishes an international system for creditors to register interests in the various categories of mobile equipment assets (Articles 16 to 26), giving priority to the creditor's registered interest (Article 29).

2.2. Objectives

These instruments are intended to facilitate the financing of high-value aircraft equipment by creating a particularly strong international guarantee for creditors (sellers on credit and institutions supplying credit for such sales) which gives them "absolute" priority over these assets in an international register.

Such instruments, to which many of the Community's main trading parties are party, are likely to be of great benefit to the European aerospace industry by encouraging the provision of financing for the purchase of assets. Before the Community can benefit from them, however, it must ratify them.

3. COMMUNITY POWERS

Since the Community has jurisdiction over certain matters governed by the Convention and its Aircraft Protocol and affecting Council Regulations (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹ and (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings,² the Member States cannot ratify these instruments independently.

On 29 October 2001, the Council authorised the Commission to negotiate on behalf of the Community, at the Diplomatic Conference in Cape Town, provisions of the Convention and Aircraft Protocol which fell within the exclusive powers of the Community and affected its two Regulations. The Community did not sign the Cape Town Convention and its Aircraft Protocol at this Diplomatic Conference. Two Member States signed the Convention in Cape Town on 16 November 2001 and another in December 2001. On this occasion, they issued a statement to the effect that, by virtue of the Treaty establishing the European Communities, the Community had jurisdiction over certain matters falling within the scope of the Convention and the Protocol, and secondly that the signature or conclusion of these acts would be decided upon by the Community's bodies in accordance with the Treaty. The Cape Town Convention and its Aircraft Protocol will be open for signing until they enter into force.

Under the Convention and its Aircraft Protocol, "Regional Economic Integration Organisations" may become party to these instruments (Articles 48 and XXVII respectively). For the purposes of the Convention and its Aircraft Protocol, a "Regional Economic Integration Organisation" is taken to mean an organisation which has competence over certain matters governed by the Convention or the Protocol and may sign, approve, accept or accede to them. This definition will allow the Community to become a party to these two instruments on condition that it obtains the necessary approval of the Community institutions. Any reference in the Convention or the Protocol to "Contracting State(s)" or "States Parties" also applies to the Community when so required by the context (Articles 48(3) and XXVII(3) respectively).

The two instruments require that at the time of signature, acceptance, approval or accession, the Community must make a general declaration indicating the matters covered by the Convention and the Protocol which fall within the Community's jurisdiction (Articles 48(2) and XXVII(2) respectively). To this end a draft declaration is attached in Annex A. The text has been drawn up on the basis of the Community's present powers conferred by Council Regulations (EC) n° 44/2001 of 22.12.2000 and n°1346 of 29.05.2000.

The Convention will enter into force when three states have deposited their instruments of ratification (Article 49), but only as regards a category of objects to which a Protocol applies, as from the time of entry into force of that Protocol and between States Parties to the Convention and that Protocol.

The Protocol may in fact amend or modify the provisions of the Convention where circumstances specific to the aerospace industry so require. Here it is the Aircraft Protocol, and not the Convention, which takes precedence as regards this category of equipment (Article 6(2)). As a result, the obligations of the Member States by virtue of the Convention will differ depending on their accession to the Aircraft Protocol, since the Convention cannot

¹ OJ L 12, 16.1.2001, p. 1.

² OJ L 160, 30.6.2000, p. 1.

apply to a given category of equipment until the relevant Protocol has entered into force, and only as regards the Parties to that Protocol. Similarly, a Member State may not become party to the Aircraft Protocol unless it also becomes a party to the Convention. However, the Convention and the relevant Protocol must therefore be subsequently read and applied as if they were a single instrument (Article 6(1)).

The Aircraft Protocol will enter into force when eight states have deposited their instruments of ratification (Article XXVIII).

4. DECLARATIONS ON MATTERS FALLING WITHIN THE SCOPE OF THE COMMUNITY'S EXCLUSIVE JURISDICTION

In the course of the Cape Town Diplomatic Conference in November 2001, the Community obtained provisions allowing it to apply Community law instead of the Convention and the Aircraft Protocol in matters covered by the two Regulations mentioned above. The Community will be required, at the time of conclusion, to make declarations on the matters falling within the Community's exclusive jurisdiction. These declarations deal with the following matters:

4.1. Interim relief (Article 55 of the Convention and Article X of the Protocol)

With regard to compatibility with Articles 13 and 43 of the Convention, it should be pointed out that the only measures which are provisional or protective measures within the meaning of Article 31 of Regulation No 44/2001 are measures which, in the areas within its scope, are intended to maintain a *de facto* or *de jure* situation in order to safeguard rights which the court hearing the case is requested to recognise.³

Moreover, the grant of provisional or protective measures pursuant to Article 31 of the Regulation is subject, in particular, to the condition that there is a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.⁴

The Community will have to declare that the grant of interim relief under Article 13 of the Convention by the courts which have jurisdiction under Article 43 will be possible, where the debtor is domiciled in the Community, only in accordance with Article 31 of Regulation No 44/2001 (Article 24 of the Brussels Convention of 27 September 1968, as interpreted by the Court of Justice of the European Communities).

Under Article X(1) (which incorrectly refers to Article XXVIII) and Article XXX(2) of the Protocol, Article X of the Protocol, which covers interim relief, applies in whole or in part only if a Contracting State has made a positive declaration to that effect. This Article includes the sale of the object in the list of forms of interim relief set out in Article 13 of the Convention. Where a Contracting State makes such a declaration with regard to Article X(2), it must specify the required time-period for obtaining the forms of interim relief set out in Article 13(1) of the Convention. It is proposed that the Community should not make the declaration referred to in Article X pursuant to Article XXX(2).

³ Judgment of 31 March 1982 *C.H.W. v G.J.H.* (Case 25/81 [1982] ECR 1189).

⁴ Judgment of 17 November 1998 *Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Another* (Case 391/95 [1998] ECR I-7091).

4.2. Insolvency (Articles XI and XII of the Protocol)

Articles XI and XII of the Aircraft Protocol on insolvency of the debtor apply only where a Contracting State that is the primary insolvency jurisdiction makes a positive declaration to this effect pursuant to Article XXX.

Article XI lays down the detailed rules for giving possession of the aircraft object which is the creditor's surety in the event of the debtor's insolvency (Alternative A or B). These rules are provisions of substantive law, designed to protect the creditor secured by a right in rem from any possible consequences of the debtor's insolvency.

Regulation 1346/2000 lays down rules on jurisdiction, recognition and enforcement and rules on conflict of laws applicable to insolvency proceedings opened in the Community. However, Article 5 stipulates that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. This is a substantive provision of private international law, which directly determines what happens to rights in rem in immovable assets situated in a Contracting State other than that in which the proceedings are opened. Rather than referring either to the law of the State in which the proceedings are opened or to the *lex situs* to determine whether the assets subject to rights in rem form part of the insolvency estate, the Regulation directly stipulates that the rights in rem in respect of these assets are not affected by the opening of the insolvency proceedings.

Recital 12 to the Regulation states that "the main insolvency proceedings ... have universal scope and aim at encompassing all the debtor's assets", irrespective of the Member State in which the assets are located, except where territorial insolvency proceedings are opened under Article 3(2) of the Regulation. It follows that the State in which proceedings are opened under Article 4 should determine which assets form part of the assets in the main proceedings and which are excluded. As regards assets subject to rights in rem, the Regulation does not require them to be included in the estate in the main proceedings, or to be excluded from it. Article 5 merely stipulates that the rights in rem of third parties in respect of assets situated within the territory of a Contracting State other than the State in which the main proceedings are opened must be respected. Consequently, even if the law of the State in which proceedings are opened lays down that all assets form part of the estate, the holder of the right in rem does not lose any particular right attached to that right, especially the possibility of realising the asset in order to be satisfied. Thus, Article 5 of the Regulation and Article XI of the Protocol have in common the provision that an asset subject to a right in rem does not form part of the insolvency estate.

It follows that, pursuant to the Court of Justice's ruling in *AETR*,⁵ the Community has exclusive power to enter into external commitments in this area, and to decide whether or not to make the declaration referred to in Article XXX(3) in order to specify the Alternative chosen (A or B) and the time-period required by Article XI.

The Commission considers that, where the primary insolvency jurisdiction is in a Member State, Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings should in any case be applicable instead of the Convention and the Aircraft Protocol. To achieve this objective and preserve certainty in the law, it recommends that the Community should not opt

⁵ Case 22/70.

for full or partial application of either of the alternatives set out in Article XI of the Protocol. This would seem to be the only solution which would guarantee the uniform operation of Regulation No 1346/2000 within the Community, when there is no justification for derogating from it for aircraft equipment.

It follows that the Community will not make the declaration referred to in Article XI of the Protocol pursuant to Article XXX(3), or the declaration on insolvency assistance referred to in Article XII, which is linked to that in Article XI, pursuant to Article XXX(1).

4.3. Jurisdiction of the place of registration

Finally, with regard to Article XXI of the Protocol, we think it preferable to avoid a situation whereby this new rule on jurisdiction creates an exception from the provisions of Community law. If the debtor is situated within the Community in accordance with Article 4 of the Convention, then Community law should be applied uniformly. Article XXX(5) of the Protocol allows Contracting States to declare that they will not apply this Article. It is proposed that the Community should declare that it will not apply this Article, which will enable it to apply Regulation No 44/2001.

5. DECLARATIONS UNDER ARTICLE VIII OF THE PROTOCOL

Since the Member States are all bound by the 1980 Rome Convention on the law applicable to contractual obligations, the Commission proposes that they should not make a declaration pursuant to Article XXX(1) of the Protocol that they will apply Article VIII of the Protocol concerning the choice of law.

In view of the foregoing, the Commission proposes that the Council adopt the decisions set out below:

- authorising signature of the UNIDROIT Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment, by making the abovementioned declarations, the text of which is attached in Annex A; and
- authorising conclusion of the Convention and its Protocol, by making the abovementioned declarations, the text of which is attached in Annex B.

**Proposal for a
COUNCIL DECISION**

on the signing by the European Community of 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) The Commission has negotiated on behalf of the Community, for the parts falling within the latter's jurisdiction, the Convention on International Interests in Mobile Equipment ("the Cape Town Convention") and its Protocol on matters specific to aircraft equipment ("the Aircraft Protocol").

(2) The Regional Economic Integration Organisations, which have powers over certain matters governed by the Cape Town Convention or the Aircraft Protocol, may sign the Convention and the said Protocol, which remain open for signature until their entry into force.

(3) The Community has exclusive external jurisdiction over some of the matters covered by the Cape Town Convention and the Aircraft Protocol, while the Member States have jurisdiction over other matters covered by the two instruments.

(4) Article 48 of the Convention and Article XXVII of the Protocol provide that, at the time of signature, the Community must make a declaration indicating the matters covered by the Convention and the Aircraft Protocol which fall within the Community's jurisdiction.

(5) Subject to their possible conclusion, the Community should sign 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,

HAS DECIDED AS FOLLOWS:

Article 1

Subject to their possible conclusion, the President of the Council is hereby authorised to designate the person empowered to sign, on behalf of the European Community, the Convention on International Interests in Mobile Equipment and the Protocol on matters specific to aircraft equipment adopted in Cape Town on 16 November 2001.

Article 2

1. At the time of signature of the Cape Town Convention, the Community will make the declaration set out in point I of Annex A.
2. At the time of signature of the Aircraft Protocol, the Community will make the declaration set out in point II of Annex B.

Done at Brussels,

For the Council
The President

**Proposal for a
COUNCIL DECISION**

**on the conclusion by the European Community of 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**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) in conjunction with the first subparagraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,⁶

Whereas:

(1) The Commission has negotiated on behalf of the Community, for the parts falling within the latter's jurisdiction, the Convention on International Interests in Mobile Equipment ("the Cape Town Convention") and its Protocol on matters specific to aircraft equipment ("the Aircraft Protocol").

(2) The Regional Economic Integration Organisations, which have powers over certain matters governed by the Cape Town Convention or the Aircraft Protocol, may sign the Convention and the said Protocol, which remain open for signature until their entry into force.

(3) The competent Regional Economic Integration Organisations may also ratify or approve the Convention and its Protocol by depositing a formal instrument to that effect with UNIDROIT.

(4) The Community has exclusive external jurisdiction over some of the matters covered by the Cape Town Convention and the Aircraft Protocol, while the Member States have jurisdiction over other matters covered by the two instruments.

(5) The Convention and the Protocol were signed, on behalf of the Community, on 2002 subject to possible conclusion, in accordance with Council Decision .../.../EC of 2002.⁷

(6) Article 55 of the Cape Town Convention provides that a Contracting State may declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part.

⁶ OJ C ...,[2002], p. ...

⁷ OJ L ...,[2002], p. ...

Articles X, XI, XII and XXI of the Aircraft Protocol apply only where a Contracting State has made a declaration to that effect pursuant to Article XXX of the Protocol and under the conditions specified by that declaration.

(7) Since the application of the abovementioned provisions falls within the Community's jurisdiction, it is for the Community to decide whether or not to make the relevant declarations.

(8) Application of Article VIII of the Protocol concerning the choice of law is also subject to a declaration which may be made by any Contracting State pursuant to Article XXX. In the Community, all the Member States are parties to the 1980 Rome Convention on the law applicable to contractual obligations, on which work is in progress within the Commission with a view to transforming it into a regulation.

(9) The Community should approve 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,

HAS DECIDED AS FOLLOWS:

Article 1

The Convention on International Interests in Mobile Equipment and the Protocol on matters specific to aircraft equipment, adopted in Cape Town on 16 November 2001, are hereby approved on behalf of the European Community.

Article 2

The President of the Council is hereby authorised to designate the person empowered to deposit, on behalf of the European Community, the instrument referred to in Article 47(4) of the Convention on International Interests in Mobile Equipment and Article XXVI(4) of the Protocol on matters specific to aircraft equipment.

Article 3

1. At the time of conclusion of the Cape Town Convention, the Community will make the declaration set out in point I of Annex A.
2. At the time of conclusion of the Aircraft Protocol, the Community will make the declaration set out in point II of Annex A.

Article 4

The Member States will not make a declaration pursuant to Article XXX(1) of the Protocol that they will apply Article VIII of the Protocol.

Done at Brussels,

*For the Council
The President*

General declarations concerning the powers of the Community to be made at the time of signature of the Cape Town Convention and the Aircraft Protocol

I. Declaration concerning the powers of the European Community over matters covered by the Convention on International Interests in Mobile Equipment adopted in Cape Town on 16 November 2001, in respect of which the Member States have delegated their powers to the Community (Cape Town Convention).

1. Article 48 of the Cape Town Convention provides that the Regional Economic Integration Organisations constituted by sovereign States and which have competence over certain matters governed by this Convention may sign it on condition that they make the declaration referred to in Article 48(2). The Community has decided to sign the Convention and is accordingly making that declaration.

2. The current Members of the European Community are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

3. However, this declaration does not apply to the Kingdom of Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaties.

4. This declaration is not applicable in the case of the territories of the Member States in which the Treaty establishing the European Community does not apply and is without prejudice to such acts or positions as may be adopted under the Cape Town Convention by the Member States concerned on behalf of and in the interests of those territories.

5. In respect of matters covered by the Convention, the Member States of the European Community have transferred power to the Community for the matters covered by Council Regulations (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁸ and (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.⁹ This includes matters covered by the following provisions: Articles 1(d), (h) (k), and (l), 13, 30, 37, 53 and 55, and Chapter XII of the Cape Town Convention.

6. The exercise of powers which the Member States have transferred to the Community pursuant to the EC Treaty is, by its nature, liable to continuous development. In the framework of the Treaty, the competent institutions may take decisions which determine the extent of the powers of the European Community. The European Community therefore reserves the right to amend the present declaration accordingly, without this constituting a prerequisite for the exercise of its powers with regard to matters governed by the Cape Town Convention.

⁸ OJ L 12, 16.1.2001, p. 1.

⁹ OJ L 160, 30.6.2000, p. 1.

II. Declaration concerning the powers of the European Community over matters covered by the Protocol on matters specific to aircraft equipment to the Convention on International Interests in Mobile Equipment adopted in Cape Town on 16 November 2001, in respect of which the Member States have delegated their powers to the Community (Aircraft Protocol).

1. Article XXVII of the Aircraft Protocol provides that the Regional Economic Integration Organisations constituted by sovereign States and which have power over certain matters governed by this Protocol may sign it on condition that they make the declaration referred to in Article XXVII(2). The Community has decided to sign the Protocol and is accordingly making that declaration.

2. The current Members of the European Community are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

3. However, this declaration does not apply to the Kingdom of Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaties.

4. This declaration is not applicable in the case of the territories of the Member States in which the Treaty establishing the European Community does not apply and is without prejudice to such acts or positions as may be adopted under the Aircraft Protocol by the Member States concerned on behalf of and in the interests of those territories.

5. In respect of matters covered by the Aircraft Protocol, the Member States of the European Community have transferred powers to the Community for the matters covered by Council Regulations (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁰ and (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.¹¹ This includes matters covered by the following provisions: Articles I(2)(m) and (n), X, XI, XII, XXI, XXII and XXX of the Aircraft Protocol.

6. The exercise of powers which the Member States have transferred to the Community pursuant to the EC Treaty is, by its nature, liable to continuous development. In the framework of the Treaty, the competent institutions may take decisions which determine the extent of the powers of the European Community. The European Community therefore reserves the right to amend the present declaration accordingly, without this constituting a prerequisite for the exercise of its powers with regard to matters governed by the Aircraft Protocol.

¹⁰ OJ L 12, 16.1.2001, p. 1

¹¹ OJ L 160, 30.6.2000, p. 1

Declarations to be made by the Community and the Member States at the time of conclusion of the Cape Town Convention and the Aircraft Protocol concerning certain provisions and measures contained therein

- I. Declaration by the Community pursuant to Article 55 of the Convention on International Interests in Mobile Equipment adopted in Cape Town on 16 November 2001.

Pursuant to Article 55 of the Cape Town Convention, where the debtor is domiciled in the territory of a Member State of the Community, the Member States bound by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹² will apply Articles 13 and 43 of the Convention for the purpose of granting interim relief only in accordance with Article 31 of Regulation No 44/2001 as interpreted by the Court of Justice of the European Communities in the context of the Brussels Convention of 27 September 1968¹³ (Article 24).

- II. Declaration by the Community pursuant to Article XXX of the Protocol on matters specific to aircraft equipment to the Convention on International Interests in Mobile Equipment adopted in Cape Town on 16 November 2001.

In accordance with Article XXX(5) of the Protocol, Article XXI thereof will not apply within the Community and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁴ will apply to this matter for the Member States bound by this Regulation or by any other agreement designed to extend its effects.

¹² OJ L 12, 16.1.2001, p. 1

¹³ OJ C 27, 26.1.1998, p. 1

¹⁴ OJ L 12, 16.1.2001, p. 1