

11 May 2021

Professor Sir Roy Goode  
CBE QC FBA  
42 St John Street, Oxford  
OX1 2LH, United Kingdom

**Re – Cape Town Convention and aircraft protocol – application of Article XI of the Aircraft Protocol by Member States of the European Union**

Dear Professor Sir Roy Goode,

I write to you in my capacity as a director of the Cape Town Convention Academic Project (**CTCAP**).

In light of the need for enhanced guidance, the CTCAP is working on an annotation to the relevant provisions of the Official Commentary 4th Edition for the Cape Town Convention (the **Convention**) and its Aircraft Protocol (the **Aircraft Protocol**) to address the above referenced matters.

Based on our discussions and assessments, can you kindly confirm that the following reflects your views on these matters:

- 1) Contracting States may follow alternative routes to provide for the application of Alternative A or Alternative B of Article XI, one being the deposit of a declaration under Article XXX(3) with the Depositary (UNIDROIT) (a **declaration**), and the other, in EU Member States, where the ability to such a deposit is constrained by European Union law, by enacting domestic legislation having the same effect as Article XXX (3) and depositing notice of such enactment with the Depositary (an **EU State notified domestic legislation**).
- 2) The term ‘declaration’ in Article XXX(4) should be interpreted so as to apply equally to a Contracting State’s declaration and to EU State notified domestic legislation. Such an interpretation should be adopted in line with Article 5 of the Convention.
- 3) The reasons for the conclusions in paragraphs 1 and 2 above are as follows.

(a) When the European Community, as it then was,<sup>1</sup> acceded to the Convention and the Aircraft Protocol on 28<sup>th</sup> April 2009, it sought to ensure that nothing in these instruments affected the uniform application of Brussels I and the Insolvency Regulation which fell within the EC's exclusive competence. One of the EC's declarations made at that time included the statement: "the Community will not make ... any of the declarations permitted under Article XXX(2) and (3). The Member States keep their competence concerning the rules of substantive law as regards insolvency." This statement reflected paragraph 10 of the Preamble to the Council Decision of 6<sup>th</sup> April 2009, and left Member States at liberty to make decisions on the treaty's substantive insolvency provisions through domestic legislation. The result is that the domestic legislation route was intended to be an alternative, for EU Member States, to the Article XXX(3) declaration route.

(b) As a result of discussion at a seminar for Member States of the EC held in Rome on 26<sup>th</sup> November 2009, the Declaratory Memorandum<sup>2</sup> was amended to include (inter alia) a statement that "EU Member States would not be able to make a declaration under Aircraft Protocol Article ...XI, but would be able to amend their national law so as to produce the same substantive outcomes as if a declaration had been made".<sup>3</sup> The interpretation set out in paragraph 2 above is necessary to effect those 'same substantive outcomes'.

(c) Article XXX(4) provides lenders to debtors whose COMI State has made a declaration with important protection and therefore encourages and facilitates access to finance for such debtors. There is no indication in the records relating to the European Union's accession to the Convention and Aircraft Protocol (including the discussion at the November 2009 seminar) that the European Union intended to deprive those of its Member States who use the domestic legislation route of this advantage for their debtors. On the contrary, the records show that the European Union intended those Member States and their debtors to have precisely the same advantage as non-Member States who were able to use the declaration route.

(d) The purposes of the Convention (including uniformity, facilitation of asset finance and predictability) with respect to Article XI can only be achieved if both the Article XXX(3) declaration route and the domestic legislation route trigger the application of Article XXX(4). In addition, a narrower interpretation would be contrary to the purposes of Article

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<sup>1</sup> The European Community was dissolved into the European Union as a consequence of the entry into force of the Treaty of Lisbon on 1 December 2009. Thus, any reference to an action taken before that date is made to the EC, and any action taken thereafter is attributed to the EU. However, they are both the same legal entity.

<sup>2</sup> Available at <https://www.unidroit.org/english/documents/2011/depositary/dc09-dep-01rev4-e.pdf>

<sup>3</sup> Depositary Memorandum paragraph 34.

48(2), which was intended to allow a Regional Economic Integration Organization such as the EU to establish the sphere of competence for its Member States without depriving them of the ability to realize the benefits of the Convention and Aircraft Protocol in full.

(e) The domestic legislation route is publicised by the UNIDROIT Depository to an extent that is equal to the publicity given to the declaration route, since, in accordance with arrangements facilitated by the Depository and best international practice, EU Member States that have decided to make the terms of Article XI Alternative A or Alternative B applicable through domestic legislation should deposit notice of that fact with the Depository, and the Depository, in turn, would inform all Contracting States of the same (as directed by Article 62(2)(a) and article XXXVII(2)(a), and publicize that fact on its website. These actions, taken together, result in the domestic legislation route having the characteristics of a functional equivalent of a 'declaration' for purposes of Article XXX(4) and reinforce the conclusion that the domestic legislation route was intended to operate as such a functional equivalent.

4) The conclusions in paragraphs 1 and 2 above apply in respect of former EU Member States that have made Article XI applicable by domestic legislation and that have deposited a notice of such enactment with the Depository, pending a reasonable transition period by the end of which they have made a deposit of a declaration under Article XXX(3) with the Depository.

Please confirm that you intend to address these matters in a similar way in the next version of Official Commentary to the Aircraft Protocol.

Finally, please confirm that we may share this letter, and your reply to it, with interested parties, and may post the foregoing on the CTCAP website.

Sincerely yours



Jeffrey Wool  
Director, Cape Town Convention Academic Project

**CC:** Louise Gullifer, University of Cambridge  
Ignacio Tirado, UNIDROIT

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Jeffrey Wool Esq.  
Director  
Cape Town Academic Project

11 May 2021

Dear Mr Wool,

**Re Cape Town Convention and Aircraft Protocol - application of Article XI of the Aircraft Protocol by Member States of the European Union**

Thank you for your letter of today's date.

I confirm that in my view, for the reasons set out in your letter, domestic legislation by EU Member States and former EU Member States implementing Articles XI of the Aircraft Protocol to the Cape Town Convention is to be treated for all purposes as equivalent to a declaration under Articles XXX(3) and (4) of the Protocol. I intend to express this view and my reasons for it in the fifth edition of the Official Commentary on the Convention and Aircraft Protocol, which in consultation with governments and observer organisations, including in particular the Aviation Working Group, I plan to produce by January 2022 and to have published by UNIDROIT in April 2022.

I am happy for you to share with interested parties the contents of your letter to me and this reply.

With best wishes

