



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONALE POUR L'UNIFICATION DU DROIT PRIVE

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**MAC Protocol
Committee of Governmental Experts
First session
Rome, 20 – 24 March 2017**

UNIDROIT 2017
Study 72K – CGE1 – Doc. 6
Original: English
February 2017

COMMENTS

(prepared by the World Bank Group)

Preliminary Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (the “MAC Protocol” or the “Protocol”)

World Bank Group Comments

1. The World Bank Group appreciates the opportunity to complement the comments provided by its representatives during the Study Group's deliberations and welcomes the opportunity to present further comments on the MAC Protocol for the consideration of the Committee of Governmental Experts.
2. The UNIDROIT Secretariat and Study Group are to be commended on the presentation of the MAC Protocol, which not only provides a very complete text for the taking of international interests in mining, agricultural and construction equipment, but which also provides the basis for coordination with other international instruments and local legal frameworks on secured transactions in general. In particular, the Study Group is to be commended for its in-depth consultations with industry and private sector groups, including equipment manufacturers and lenders. Their inputs contribute a perspective that will help significantly in the practical implementation, operation and use of the Protocol.
3. Setting the scope of the Protocol presents significant challenges with regard to identifying the types and items of mining, agricultural and construction equipment to be covered by the Protocol. Of the three initial characteristics identified as requisites for inclusion (high-value, international mobility and uniquely identifiable), use of the Harmonized Commodity Description and Coding System of the World Customs Organisation ("WCO") provides a very practical solution to perhaps the most complex issue confronted by the Study Group. The process for selecting items of equipment with the participation and expertise of the WCO and industry groups helps to establish very clear distinctions between equipment covered by the Protocol and equipment covered by national law.

Specific Comments

1. Article I – Defined terms, 2 (f) "immovable-associated equipment":

4. Several items of equipment listed in Annexes 1-3 to the draft Protocol are likely to be affixed to land, becoming "immovable-associated equipment" under the Protocol. However, the definition and operation of the concept of "immovable-associated equipment" could benefit from additional clarity.

5. As mentioned in the explanatory report, adding a uniform definition for "fixture" would prove challenging, particularly given that states may not only have different rules for what is considered a fixture, but also may have long-standing practices based on the application of such local rules. However, the current definition seems to lack an element required for affixation: namely, the performance of an act by the debtor to associate or physically affix the equipment with the land. Absent this element, it may be possible for an interest in the land to automatically cover an item of equipment by simple virtue of the equipment being placed on the land. This rule -- whereby a real estate mortgage can automatically glom-on to any movable item located thereon -- exists in numerous states and seems to be recognized by the present definition and rule in the draft Protocol. However, with no element of intent or action on behalf of the debtor, the rule may apply to the equipment while in transit, storage or by simple virtue of being physically located on a plot of land.

6. To account for this issue, the present definition could be amended to require that the debtor or third party perform a deliberate act that results in the equipment becoming immovable-associated, or by requiring that the equipment become materially incorporated into the land. Alternatively, it may be feasible to classify Annexes 1, 2 and 3 by goods that may become affixed to land and those which, by their simple nature, cannot become so affixed.

2. Article I – Defined terms, 2 (h) and (i):

7. Definitions (h) "mining equipment" and (i) "primary insolvency jurisdiction" currently appear as subparagraphs of definition (g) "insolvency-related event." We suggest reformatting this section.

3. Article V – Identification of MAC Protocol equipment:

8. The draft Protocol provides numerous criteria for identification of mining, agricultural and construction equipment serving as collateral under the Convention on International Interests in Mobile Equipment (the "Convention"), among these: 1) descriptions by individual items of equipment are permitted both in the security agreement and in the registration; 2) descriptions by type of equipment are permitted in the security agreement only; 3) descriptions by all assets are permitted in the security agreement only; and 4) descriptions by serial number and name of manufacturer are required by the Convention (Article XVI), and the registry search criterion under the Protocol (Article XVII).

9. Further complicating the application and effects of these description requirements, national law generally establishes different criteria for items or categories of mining, agricultural and construction equipment not covered by the Protocol. As a result, transactions that cover both Protocol and non-Protocol items may be subject to two different description regimes, with different implications for the contractual and registration purposes. The legal analysis prepared by the Secretariat provides significant detail on the operation and effect of collateral descriptions for contractual and registry purposes, under both the Convention and national law. However, the report, legal analysis and Official

Commentary should provide more in-depth analysis and comparison of these complementary systems. In particular, transactions in which a security agreement covers all future equipment, whether by national or Convention law, should be examined in detail.

4. Article VII – Individual legal identity:

10. Draft Protocol Article VII provides alternative rules in relation to an international interest in immovable-associated equipment. Alternative A creates a blanket priority in favor of a lender with an interest in the equipment. Alternative B, however, conditions priority on whether an item of equipment has (or has not) lost its "individual legal identity." In this respect, the report explains that the draft Protocol reverts to national law to determine the circumstances under which an item of collateral would lose its individual legal identity. The text of the Article, however, makes reference to local law only with regards to the creation of an interest over the immovable; not with regard to the identity of equipment associated therewith. Consequently, it may be necessary to amend the text to reflect the policy desired by the report.

11. Resolution of this issue notwithstanding, it is necessary to determine the advisability of centering this rule on the loss of the "individual legal identity" of the equipment. First, not all states have a legal (legislative or court-based) method to determine whether movable goods have lost their legal identity, which could add uncertainty to the determination under local law (even if the text of the Article is revised). Second, the most specific mention in the draft Protocol with regard to legal "identity" appears in Articles XVI and XVII which require that identity is based on the name of the manufacturer and the manufacturer's serial number on the relevant item of equipment. If these factors were to be taken into account to establish legal identity, neither would be lost by simple affixation to land.

5. Domestic reforms:

12. The issue of immovable-associated equipment is generally problematic under the current legal framework of many states. Current laws favor interests in land and provide priority to a mortgage lender over a lender with a security interest in movables (including equipment under the Protocol). In the World Bank Group's experience with respect to member state secured transactions reforms, however, we note that numerous states have begun adopting the concept of fixture filings - a procedure that allows a lender with an interest in movables to perfect and receive priority over movables prior to their affixation to the land, via the filing of a registration form in the relevant land registry. These reforms would allow a contracting state under the Convention and Protocol to use the fixture filing system to resolve the issue addressed by the three alternatives to Article VII. As a result, the draft Protocol and/or the Official Commentary should allow contracting states to revise their selections in this respect, depending on the state of reform.

6. Article VIII – Modification of default remedies provisions:

13. In the title, it is not clear that the word "modification" refers to the differences between default remedies under Chapter III of the Convention and those under Chapter II of the Protocol. In paragraph two, consider adding the following clause in line two, between the words "interest" and "ranking": "over the relevant equipment".

14. Article VIII section 4 introduces the terms "chargee" and "chargor" as used in the Convention. However, with the exception of Article VIII, the draft Protocol uses the terms "creditor" and "debtor". It is understood that a chargor can be the debtor or a third party allowing for the creation and perfection of a security interest in the collateral. However, unless there is a specific need to add the Convention language exclusively in Article 8, consistency in terminology would be helpful/desirable. To this effect, it may be possible to add the term "chargor" in addition to the term "debtor", only for those cases in which the person creating an interest in the collateral is not the debtor itself.

7. Article XV – Designated entry points:

15. In order to permit filing to take place directly with the International Registry, the Protocol does not require the use of designated entry points. However, States that do designate entry points should be classified into two categories: 1) those that do not count with a reformed secured transactions system and operating collateral registry; and 2) those that do count with a reformed system and a collateral registry. For those States in the latter category, the Protocol should establish that, if the State elects to designate an entry point to the International Registry, that entry point should be the local collateral registry. This requirement would reduce the existence of multiple registry points and operators, and would further allow for coordination between interests in mining, agricultural and construction equipment created under national law and filed in the local collateral registry, with those created under the Convention and filed in the International Registry.