The Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (the "MAC Protocol") was adopted on November 22, 2019 in Pretoria, South Africa by a number of countries (the "Contracting States"). The MAC Protocol is an extension of the Convention on International Interests in Mobile Equipment (the "Cape Town Convention") and both instruments must be applied together. All declarations made by a Contracting State under the Cape Town Convention are deemed to be subject to the MAC Protocol. However, a Contracting State may choose, using its instrument of accession/ratification, to modify existing declarations under the Cape Town Convention specifically for their application under the MAC Protocol.

Canada has not yet confirmed whether it will ratify the MAC Protocol. The MAC Protocol will only take effect in Canada after it is ratified. In light of the matters set out in this article, creditors involved in mining, agricultural and construction transactions to which the MAC Protocol will apply should be aware of the possible new legal obligations that could affect their practice.

The Cape Town Convention applies to categories of equipment to which a Protocol applies. In order for a new Protocol (like the MAC Protocol) to be established under the Cape Town Convention, three elements of an equipment category must be demonstrated. The equipment category must be: (i) high-value; (ii) mobile; and (iii) uniquely identifiable. These criteria are met under the specific Harmonized Commodity Description and Coding System ("HS") for identified equipment listed in the respective MAC Protocol Annexes for mining, agricultural and construction equipment. Therefore, the scope of the MAC Protocol is limited to listed HS-coded equipment types.
A Contracting State can limit the application of the MAC Protocol to specific Annexes, but it cannot select specific HS-coded equipment within an Annex (for example, it can include mining equipment, but not agricultural or construction equipment). Equipment covered under an applicable MAC Protocol Annex will fall within the scope of the MAC Protocol, regardless of the use made of the equipment under another MAC Protocol Annex or of any intended or actual use of the equipment.

The MAC Protocol proposes several declarations alternatives to Contracting States related to critical aspects of equipment financing, including inventory financing and association of the equipment with, or affixation of the equipment to, immovable/real property. For instance, the MAC Protocol allows Contracting States to decide whether they want their national legal regimes to apply to inventory financing. Also, Contracting States must choose between different regime alternatives regarding the association of equipment with, or affixation to, immovable/real property, to better reflect their national legal regime or the MAC Protocol. The different alternatives proposed to the Contracting States under the MAC Protocol are based on the protocols adopted under the Cape Town Convention. As a matter of policy, UNIDROIT recommends that when choosing an alternative, Contracting States be consistent with the previous protocols that they have chosen.

Concerning remedies on insolvency, a declaration by a Contracting State to apply the MAC Protocol insolvency regime means the adoption of a creditor-friendly approach allowing for expedited remedies for parties holding international interests. In contrast, the Aircraft Protocol provides for two alternative insolvency regime proposals, while the Railway Protocol offers three alternative insolvency regime proposals.

MAC-Protocol equipment interest(s) that constitute an international interest may be registered at the International Registry for further enforceability. A supervising authority will be responsible for establishing an International Registry for MAC equipment. Registration of an international interest made under the MAC Protocol will supersede domestic interests.

Gowling WLG has been registered as a Professional User Entity at the International Registry of Mobile Assets since the Canadian government ratified the Cape Town Convention in 2012. We have the expertise to register an entity as a Transacting User Entity (“TUE”) at the International Registry and to act as its administrator in order to register and consent to International Interests for TUEs.

For further information about the Cape Town Convention and the MAC Protocol, please
contact Marie-France Béland at Gowling WLG (Canada) LLP.


[2] MAC Protocol Legal Analysis, par. 9; In the event of any inconsistency, the MAC Protocol shall prevail over the Cape Town Convention (6(2) Cape Town Convention).


[10] Article II(1) MAC Protocol; There are 96 HS codes listed in the MAC Protocol Annexes, several of which are listed in two or three MAC Protocol Annexes (MAC Protocol Legal Analysis, par. 41).

[11] Article XII MAC Protocol; Contracting States can elect to opt out of the MAC Protocol application to inventory financing. This possibility is given in the event that Contracting States have well established national regimes inventory financing systems.


[13] The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives (https://www.unidroit.org/about-unidroit/overview).


[16] Alternative A is considered creditor-friendly, Alternative B is considered debtor-friendly and Alternative C is a European comprise found is Continental Europe legal regimes. Alternative A and B are proposed under the Aircraft Protocol and all three alternatives are proposed under the Railway Protocol.


[18] Article 16 and 17 Cape Town Convention.


[20] Id.; Resolution 2 Relating to the Establishment of the Supervisory Authority of the International Registry for Mining, Agricultural and Construction Equipment convened to invite the International Finance Corporation to act as a supervising authority responsible for establishing an International Registry.
Related

Article 29 Cape Town Convention.

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