DEVELOPMENT OF A FOURTH PROTOCOL TO THE CAPE TOWN CONVENTION ON MATTERS SPECIFIC TO AGRICULTURAL, CONSTRUCTION AND MINING EQUIPMENT

The purpose of this document is to provide information regarding the current International Institute for the Unification of Private Law (UNIDROIT) project to develop an additional Protocol to the Cape Town Convention relating to Agricultural, Construction and Mining Equipment (the MAC Protocol).

**What is the Cape Town Convention?**

When high-value equipment crosses international borders, it has historically been difficult for a creditor to be confident that their security interest or ownership right will be enforceable—promptly and reliably—in whatever jurisdiction the asset happens to be located when a debtor defaults or becomes insolvent. The Cape Town Convention on International Interests in Mobile Equipment (Convention) was developed to address this specific problem.

The Convention creates an international system for the creation, registration, and enforcement of security interests in defined categories of equipment. It allows creditors, sellers and lessors of defined categories of equipment to protect their rights against the debtor and third parties (including insolvency administrators) irrespective of the location of the equipment. The Convention was concluded in 2001 and entered into force in 2006.

The Convention has a two-tiered structure, that is, the Convention itself, which is not equipment specific, and Protocols that govern each specific category of equipment. Thus far, three Protocols have been adopted: i) the Aircraft Protocol, ii) the Railway Assets Protocol, and iii) the Space Assets Protocol. The Convention and the Protocols must be read and interpreted together as a single instrument. However, pursuant to Article 6 of the Convention, the applicable Protocol prevails in the event of inconsistencies with the Convention.

The Convention is complementary to domestic laws that govern financing, leasing and selling of equipment on credit. It provides an alternative and superior form of protection for creditors whom often struggle to efficiently enforce their rights under outdated and cumbersome domestic laws that impose unnecessary costs and formalities, and also cause delays.
2. MAC PROTOCOL

How does the Cape Town Convention operate?
The Convention applies to a transaction where the debtor is located in a state that is party to both the Convention and the relevant Protocol. Accordingly, the primary beneficiaries of the Aircraft Protocol have been the airlines located in those states that have ratified the Convention and the Protocol. The states that have ratified these instruments include not only the most developed economies, such as the United States, but also developing nations that have undertaken efforts to modernize their legal frameworks, such as Malawi.

The Cape Town regime was designed to apply to high-value identifiable equipment that is capable of being moved across borders. However, the equipment does need to move across international borders for an international interest under the Convention to become effective; approximately 50% of the aircraft objects covered by the Aircraft Protocol do not cross borders, yet they still benefit from the Cape Town regime.

The Convention establishes a centralized international registry for the security interests and ownership rights, which enables a creditor to preserve its priority against other creditors, for each type of equipment covered by the three Protocols. Priority is established by first-in-time registration. The entire registration process is electronic and may be completed by the creditor themselves. This process eliminates the need to get a document notarized or otherwise verified by a third party, which further reduces transactional costs. The actual security, sale or lease agreement does not need to have its validity verified by the registrar. The International Registry under the Aircraft Protocol has processed more than 500,000 registrations relating to aircraft objects.

The Convention also provides a creditor with basic remedies in the event of a debtor default. The creditor can take possession of the asset, lease it to a third party, or collect any income from the asset. Each state can decide whether court action is needed to enforce these remedies, and vast majority have declared that remedies may be enforced extra-judicially. The Convention also provides for speedy interim judicial relief pending final resolution of claims and protections to the creditor when the debtor files for insolvency proceedings.

What are the economic benefits of the Cape Town Convention?
The Aircraft Protocol has delivered significant cost savings to the manufacturers, intermediaries and end-users, such as airlines. For instance, the savings on the financing of a new Airbus A380 has been estimated to be about US$2.5 million. The Aircraft Protocol has allowed airlines from the countries that have ratified it to acquire airplanes at a historically low cost. In some instances, an investment of a foreign airline was conditioned on the ratification of the Aircraft Protocol by the government that operated the domestic airline. The cost savings also benefit the manufacturers that are able to sell more of their equipment. The Aircraft Protocol was supported by both manufacturers, such as Boeing, but also by major airlines as the end-users of the equipment.
**Should the Convention be extended to Agricultural, Mining and Construction Equipment?**

Due to the success of the Cape Town Convention in facilitating the financing of aircraft, a number of UNIDROIT member states requested that an additional Protocol pertaining to mining, agricultural and construction equipment be drafted (the MAC Protocol).

Initial studies have concluded that the agricultural, construction and mining industries would reap the benefits of significant cost savings and increased access to more reasonably-priced credit.\(^1\) The MAC Protocol should also facilitate the growing trend of the mechanization of agricultural production.

In addition to the end-users of equipment and dealers, the benefits from this new framework should accrue primarily for small and medium-sized enterprises (SMEs) involved in exports of equipment, but also for large manufacturers. The MAC Protocol may result not only in economic growth in the general terms measured by an increase in the overall gross domestic product (GDP), but also facilitate the building of modern infrastructure and job growth. The actual economic impact of this framework will depend on a number of variables, including the global price for commodities, availability of tax incentives, etc. For this effort to be successful, private sector input will be key, as was the case with the previous Protocols.

**Promotion of the project**

For such a Protocol to be successful, it must address the needs of those who manufacture, sell, finance, purchase, lease and use MAC equipment. To reach this goal and to ensure the development of a strong and widely-supported Protocol, private sector input is necessary. UNIDROIT has a history of extensive private sector participation in the development of its instruments, and such participation will be expected for this project as well—including during the eventual intergovernmental negotiations of the Protocol.

Private sector consultation is facilitated by the MAC Protocol Working Group, which is an independent body of private sector stakeholders which represents and communicates private sector views during the MAC Protocol drafting process. Historically, the role of private sector Working Groups have been crucial to the success of UNIDROIT instruments; the Aviation Working Group was extremely influential in the development of the Aircraft Protocol.

If your company has any questions regarding the Working Group, please do not hesitate to contact its Executive Board Member Phillip Durham (phillip.durham@hw.com, +1.212.513.3381).

**Next steps**

In 2014, UNIDROIT convened a group of international experts in secured transactions law (the Study Group) to prepare a draft MAC Protocol. The group of experts developed a draft instrument working over four sessions between November 2014 and March 2016. The draft fourth Protocol was recently

approved by the UNIDROIT Governing Council at its 95th session in May 2016, and will proceed to be considered by a Committee of Governmental Experts in early 2017.

It is anticipated that the Committee of Governmental Experts will meet twice in 2017 to further develop the draft MAC Protocol, with a view to convening a Diplomatic Conference in 2018 to finalise the treaty.