



**Asia-Pacific
Economic Cooperation**

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**International Institute for the Unification of Private
Law's Contribution to Legal Certainty, International
Commerce and Economic Growth: a Long Story of
Success Program**

Submitted by: UNIDROIT



**Stocktake Workshop on the Strengthening
Economic Legal Infrastructure Online Dispute
Resolution Work Plan
Santiago, Chile
2-3 March 2019**



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



UNIDROIT'S CONTRIBUTION TO LEGAL CERTAINTY, INTERNATIONAL COMMERCE AND ECONOMIC GROWTH: A LONG STORY OF SUCCESS

APEC-SELI

Santiago de Chile

2 March 2019

Prof. Ignacio Tirado

Secretary General

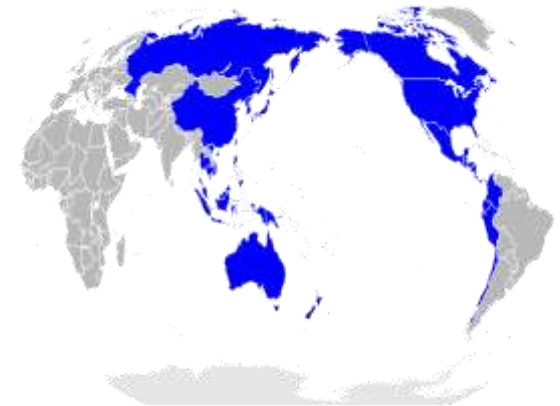
UNIDROIT



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INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

UNIDROIT

- **Institute for the Unification of Private Law (UNIDROIT)**
- **Membership in all continents (63 member States)**
 - (10 APEC member States: Australia, Canada, Chile, China, Indonesia, Japan, Korea, Mexico, Russia and the United States)
- **UNIDROIT Mission is to develop internationally harmonised, modern standards for commercial law.**
- **Strong legislative role: 28 international instruments (treaties, principles, rules, model clauses) created**
- **UNIDROIT is active in the Asia-Pacific region, but it has become a strategic target**



INTERNATIONAL
COMMERCIAL
CONTRACTS



- **UNIDROIT Principles of International Commercial Contracts (1994; 2004; 2010; 2016)**
- UNIDROIT Guide on International Franchise Agreements (1998; 2007)
- *Current projects: Principles of Reinsurance Contracts – Cooperation with UNCITRAL and HCCH on a guidance document on international sales*

INTERNATIONAL
FINANCIAL DEVICES



- **UNIDROIT Conventions on International Financial Leasing and International Factoring (Ottawa, 1988)**
- **UNIDROIT Model Law on Leasing (2008)**
- **CAPE TOWN Convention on International Interests in Mobile Equipment (2001), with Aircraft (2001) Rail (2007) and Space (2012) Protocols - Draft Protocol on Mining, Agricultural and Construction Equipment (MAC Protocol) (exp. 2019)**

CAPITAL MARKETS
PRIVATE LAW
REGULATION



- **GENEVA Convention on Substantive Rules for Intermediated Securities (2009)**
- **UNIDROIT Principles on the Netting of Financial Instruments (2013)**
- **UNIDROIT Legal Guide on Intermediated Securities (2017)**

INTERNATIONAL
PROTECTION OF
CULTURAL PROPERTY



- **UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995)**
- **UNESCO-UNIDROIT Model Legislative Provisions on State ownership of undiscovered cultural objects (2011)**
- *Current project: Private Art Collections (2016-date)*

TRANSNATIONAL CIVIL
PROCEDURE



- **ALI/UNIDROIT Principles of Transnational Civil Procedure (2004)**
- **Draft ELI/UNIDROIT Rules on European Civil Procedure (2014-date)**
- **Principles of effective enforcement (on WP)**

LAW AND DEVELOPMENT IN
AGRICULTURE



- **UNIDROIT-FAO-IFAD Legal Guide on Contract Farming (2015)**
- **Current project: Legal Guide on Agricultural Land Investment Contracts**

- UNIDROIT has produced instruments on dispute resolution and prevention both in relation to:
 - Dispute resolution and prevention by parties through contracting
 - Systemic standards for dispute resolution
 - UNIDROIT Principles of International Commercial Contracts
 - Legal Guide on Contract Farming + ALIC
 - Transnational Civil Procedure Regional Rules
 - Effective Enforcement Project
- Complementarity: ODR's aims coincide with UNIDROIT's scope of activity:
 - Other side of coin
 - Tackle institutional problem of dispute Resolution
 - Solving problems for SME



Cape Town Convention

ARCHITECTURE: flexible two-tier structure

(Convention provides common core rules/ specific Protocols adapt to needs of specific equipment - market)

- Aircraft Protocol**
 - Rail (Luxembourg) Protocol**
 - Space Protocol**
 - “MAC” Protocol on Mining, Agricultural and Construction Equipment (approved by Governing Council in May 2018 and diplomatic conference to be held in 2019)**
- **Convention applies to a specific type of equipment only in conjunction with the relevant Protocol**
- **Convention and Protocol to be interpreted as a single instrument**

Cape Town Convention

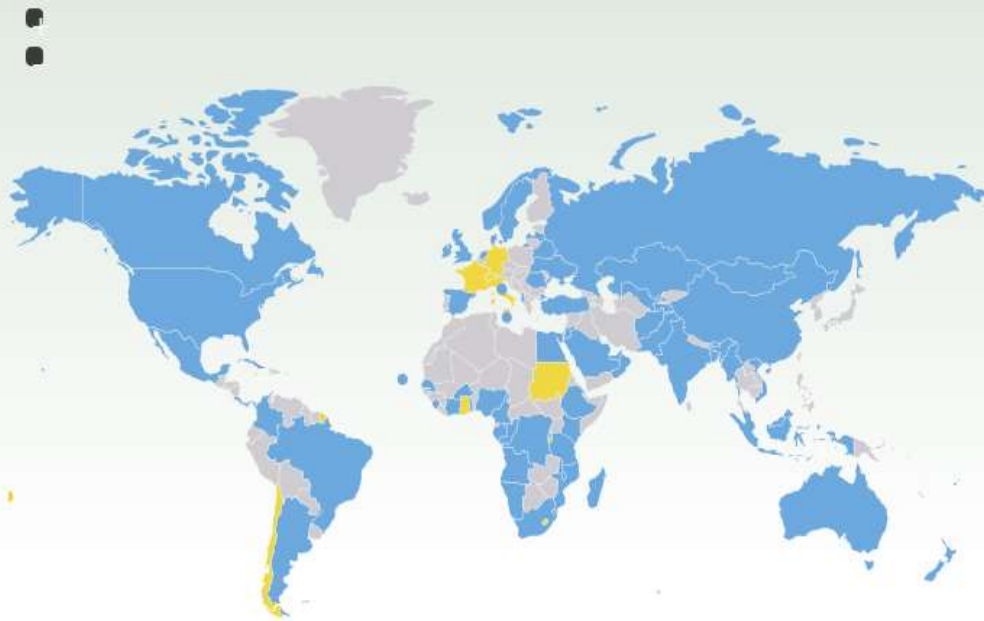
- Growing global need for financing in the construction, acquisition and use of high value mobile equipment
- CTC and its Protocols aim at increasing certainty and reducing risks in asset-based financing and leasing of certain types of uniquely identifiable, high value equipment
- it does so by offering parties to a security agreement, retention of title sale or leasing the option to create and register internationally an autonomous “international interest” enforceable in contracting States
- this results in the **removal of legal obstacles** to cross-border use and enforcement of asset-based financing devices, but also, and especially,
- it improves **predictability** and lowers the cost of credit

Aircraft Protocol: status map

STATUS MAP - CAPE TOWN CONVENTION - AIRCRAFT PROTOCOL (2001)

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STATUS MAP OF THE PROTOCOL TO THE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT - SIGNATURES, ENTRY INTO FORCE



Signature ■ Entry into force ■

CTC and AP in numbers

Political acceptance:

- **CTC: 79 contracting States + 1 REIO (EU)**

Volume of transactions:

- **Almost 1 Million registrations in the AP Registry since 2006**
- **Around 100,000 additional filings each year**
- **Estimated value of collateral 500 billion US\$**

Quantifiable economic benefits deriving from the lowering of the cost of credit:

- **“Cape Town Discount” practiced by Export Credit Agencies (OECD)**
- **Improved rating in recourse to capital market debt financing**
- **Better conditions for commercial credit (including leasing operations)**

Key legal features of the CTC Model

- ❑ **AUTONOMOUS INTERNATIONAL INTEREST:** Parties to a financing transaction can create an autonomous “international interest” over the equipment
- ❑ **INTERNATIONAL REGISTRY:** The international interest is registered in a dedicated international asset-based wholly electronic registry. **ODR to play key role**
- ❑ **ENFORCEABILITY OF REGISTERED INTEREST:** CTC and Protocols ensure (cross-border) effectiveness and enforcement of the registered international interest in contracting States; and ensures effective and swift **enforcement measures**, largely based on the contractual agreement, and including advance relief
- ❑ **CLEAR PRIORITY RULES:** Clear rule for determining priorities, including as against interests in national law, with clearly identified and transparent exceptions: a registered interest prevails over unregistered and later registered interests. **Protection in insolvency for secured creditor envisaged**

ACCESS TO CREDIT: OPERATIONAL FINANCING

- **Factoring** (international and domestic):
 - The UNIDROIT Convention on International Factoring. Created to:
 - Adopt uniform rules providing a legal framework to facilitate international factoring
 - Maintain a fair balance of interests between the different parties involved in factoring transactions
 - **New Work: A Model Law on Factoring, e-factoring and supply chain financing at the request of the World Bank**
 - **ODR to play a key role**
- **Leasing:** A Model Law and a Convention on International Financial Leasing

WORK ON NEW BUSINESS MECHANISMS

- **New Work to be started on:**
 - **Distributed Ledger Technology**
 - **Smart Contracts**
 - **Artificial Intelligence**
- **Work related to private law matters:**
 - **Contract-related rules**
 - **Mediation, dispute resolution**
 - **Property rights**
 - **Liability**
 - **Insolvency**
 - **Enforcement**

CONTRACTUAL MECHANISMS: THE PRINCIPLES

- **UNIDROIT Principles International Commercial Contracts**
- **Soft law instrument (non-binding)**
 - Based on extensive comparative law studies carried out over decades
 - Prepared by a group of eminent experts in the field representing all major legal systems and geo-political regions of the world
- **Not as originally envisioned, Rarely used as codification of domestic laws**
- **Most successful as global background law, in a gap-filling role**
 1. Chosen as applicable law for parties to international commercial contracts
 2. Used by adjudicators when *lex mercatoria* is chosen by parties
 3. Used by adjudicators where there is an absence of a choice of law
 4. Used as international trade or customs usages
 5. Used in arbitrations
 6. Used by adjudicators in domestic contractual disputes

Legal Guide on Contract Farming

- *“Agriculture production carried out according to an agreement between farmers and a buyer which places conditions on the production and/or marketing of the commodity.”*

Why is Contract Farming important?

- **Industrialisation of agriculture**, move away from fragmented production.
- Retreat of Government from subsidising agriculture, need for **private sector finance** to fill vacuum.
- **Contract farming is a credit mechanism** for agricultural producers.





Legal Guide on Contract Farming

Benefits of Contract Farming

- Allows the contractor to **optimise operations** by securing a steady supply of quality products, following a precise processing method, without having to acquire land.
- Offers **greater certainty for the producer** in terms of marketing its products, cheaper and better quality inputs, access to credit, and opportunities in new markets, while **shifting part of the production risks to the contractor**.
- **Protects both parties** from market fluctuations by providing certainty and stability.
- Contract farming can also have **wider positive economic, social and environmental advantages**, not only for the parties but also for the community at large.



Legal Guide on Contract Farming

Dispute Resolution

- Comprehensive guidance on dispute resolution in Chapter 7 of the Legal Guide.
- **Preventative approach** – focus on addressing dispute resolution in agricultural production contracts, considerations that parties should take into account:
 - Nature of the dispute, time factor, interim relief
 - Fairness, confidentiality
- If a dispute occurs, specific guidance on both judicial and non-judicial (mediation, conciliation and arbitration) dispute resolution, as well as enforcement by public authorities and private enforcement mechanisms.

ALIC Overview of the Future Legal Guide

- **Purpose:** To offer contractual guidance that is consistent with the UN Guiding Principles, and other international instruments in order to promote greater and more responsible agricultural investment.
- **Scope:** Agricultural land investment contracts involving grants of tenure and related rights for a specified time (e.g. investment contracts, concessions, leases) and related agreements (e.g. community development agreements), including diverse contractual arrangements between investors, governments, local communities, legitimate tenure right holders and private landowners.
- **Target audience:** Legal counsel involved in the preparation, negotiation and implementation of agricultural land investment contracts.
- **Approach:** A comprehensive but concise Legal Guide which is based upon contract principles and actual investment operations and avoids duplicating existing guidance.



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UNIDROIT Regionals Rules of Transnational Civil Procedure

ALI – UNIDROIT Regional Rules

- In 2004 UNIDROIT adopted the Principles of Transnational Civil Procedure prepared by a joint American Law Institute/UNIDROIT Study Group.
- The Principles, consisting of 31 provisions, aim at reconciling differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones. They may serve not only as guidelines for code projects in countries without long procedural traditions, but may also initiate law reforms even in countries with long and high quality procedural traditions; they may also be applied by analogy in international commercial arbitration.



UNIDROIT Regionals Rules of Transnational Civil Procedure

ALI – UNIDROIT Regional Rules Scope and Implementation

These Principles are standards for adjudication of transnational commercial disputes. These Principles may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure.

24. Settlement

24.1 The court, while respecting the parties' opportunity to pursue litigation, should encourage settlement between the parties when reasonably possible.

24.2 The court should facilitate parties' participation in alternative-dispute-resolution processes at any stage of the proceeding.

24.3 The parties, both before and after commencement of litigation, should cooperate in reasonable settlement endeavors. The court may adjust its award of costs to reflect unreasonable failure to cooperate or bad-faith participation in settlement endeavors.



UNIDROIT Regionals Rules of Transnational Civil Procedure

ELI – UNIDROIT Regional Rules

- Based on success of ALI/UNIDROIT Rules, in 2013 UNIDROIT and the European Law Institute.

Recent years have seen the emergence of a growing body of rules at European level in the field of procedural law, in the wake of the enlargement of the EU competences towards judicial co-operation. The joint ELI / UNIDROIT project will serve as a useful tool to avoid a fragmentary and haphazard growth of European civil procedural law. It may further represent a first attempt towards the development of other regional projects adapting the ALI / UNIDROIT Principles to the specificities of regional legal cultures, leading the way to the drafting of other regional rules.

- Expected completion: 2019.



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Effective Enforcement

- Although the ALI-UNIDROIT Principles are comprehensive, they are designed to give guidance for first instance procedures and only minimally address issues of enforcement. In particular, Principle 29 emphasises the need for speedy and effective enforcement, but the comment makes it clear that the topic as such was beyond the scope of the 2004 Principles.
- In 2016 a preliminary feasibility study was conducted by Professor Rolf Stürner. The Study provides a detailed analysis of the legal obstacles created by the lack of general principles on enforcement mechanisms in transnational civil procedure and of the advantages of filling in the gaps of the ALI/ UNIDROIT Principles of Transnational Civil Procedure in this regard.
- Adopted on UNIDROIT Work Programme 2017-2019 (lower priority)



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THANK YOU



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