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Contract Enforcement Through the Use of Different International Instruments

Submitted by: UNIDROIT



**Seminar on Use of International Instruments to
Strengthen Contract Enforcement in Supply Chain
Finance for Global Businesses Including Micro,
Small, and Medium Enterprises**
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Use of International Instruments to Strengthen Contract Enforcement in Supply Chain Finance for Global Businesses

Contract enforcement through the use of different international instruments

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Overview

- UNIDROIT Principles of International Commercial Contracts
 - Operation of the principles
 - Uses in the contract enforcement context
- Other UNIDROIT Instruments promoting the enforcement of contractual rights:
 - Cape Town Convention on International Interests in Mobile Equipment
 - Future fourth Protocol on Agricultural, Construction and Mining equipment



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Principles of International Commercial Contracts

- **UNIDROIT Principles of International Commercial Contracts (1994, 2004 and 2010)**
 - UNIDROIT Model Clauses for Use of UNIDROIT Principles of International Commercial Contracts (2013)
- **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 of international contract law representing all major legal systems and geo-political regions of the world



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Principles of International Commercial Contracts

A Successful Alternative to Legislative Harmonisation

- **Challenges in worldwide harmonisation of the law of international business transactions through international treaties**
- **Non-binding “Principles” instead**
 - need not be approved by a diplomatic conference
 - need not be ratified by States
 - are applied for their persuasive value
 - can be easily adapted to changing conditions of international trade



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Principles of International Commercial Contracts

Content of the Principles

- **The Principles cover the most important areas of contract law**
 - formation,
 - interpretation,
 - validity,
 - performance,
 - non-performance and remedies,
 - agency,
 - third party rights,
 - set-off,
 - assignment of claims and transfer of obligations,
 - limitation periods



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Principles of International Commercial Contracts

UNIDROIT Principles: Comparison to the CISG

- **Like the Vienna Convention (CISG), the Principles represent an effort to harmonise the law of international contracts through rules that are**
 - Acceptable in different legal systems
 - Drafted to address the special needs of international trade
- **Unlike the Vienna Convention, the Principles**
 - Have no binding force
 - Are not limited to one type of contract and cover a wide spectrum of subjects on the law of obligations



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Principles of International Commercial Contracts

Use of the UNIDROIT Principles

- **Not used as originally envisioned**
 - Rarely used as codification of domestic laws (Lithuania, Spain, Scotland)
- **Instead, 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



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Principles of International Commercial Contracts

The UNIDROIT Principles and contract enforcement

The UNIDROIT Principles aid contract enforcement:

- By providing a well-balanced, internationally accepted restatement of international contract law
- Use as a Gap-filling mechanism may help to an international commercial contract is enforceable
- Use in international arbitral proceedings
- Recent amendments relating to long-term contracts assist parties involved in longterm commercial relationships (as is often the case in supply chain relationships)
- Model clauses (2013) assist choosing the UNIDROIT Principles as the applicable law governing an international commercial contract



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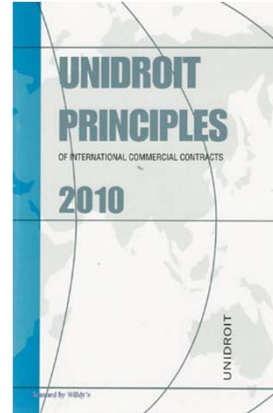
Principles of International Commercial Contracts

Further Resources

Upcoming regional event:

- **31 March 2017:** International legal conference on the UNIDROIT Principles in Beijing, China
- Current UNCITRAL/HCCH/UNIDROIT coordination project on international contract instruments
- Further information on UNIDROIT website:

<http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>



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Cape Town Convention

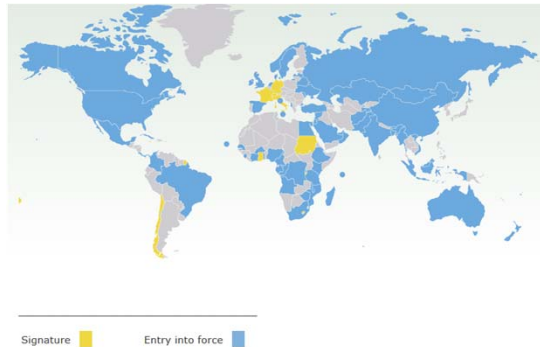
- **Purpose of the Cape Town Convention:** to encourage the provision of finance and reduce its cost by introducing a sound, internationally adopted legal regime for the creation and enforcement of security interests in high-value mobile equipment
- **Legal risks in equipment financing:**
 - A security interest in mobile equipment perfected under the law of the origin could not guarantee efficacy in other jurisdictions
 - Traditional approach (*lex rei sitae*) not always suited to mobile assets
 - Legal systems vary in their approach to **recognition of security interests** (e.g. **title-retention** and **leasing agreements**), the process for **enforcement**, and the **remedies** available
 - **Uncertainty = higher risk = higher costs**



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Cape Town Convention

- Adopted in 2001
- **Entered into force 1 March 2006**
- 73 Contracting States:
 - Australia
 - Canada
 - Chile (signed)
 - China
 - Fiji
 - Indonesia
 - Mexico
 - New Zealand
 - United States
 - Viet Nam



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Cape Town Convention

- The Cape Town Convention established an **electronic international registry** for the registration of **international interests** to give notice to third parties and enable the creditor to preserve its priority
- Cape Town Convention offers **clear rules for establishing priority**, including as against interests under domestic law

Key Aspects:

- 1) Limited scope (high value, mobile and uniquely identifiable)
- 2) Functional approach to security interests
- 3) Few formalities required
- 4) Clear priority system
- 5) Default and insolvency remedies



Key aspects

5. Default and insolvency remedies

- Convention and Protocols provide the creditor with a range of **basic default and insolvency-related remedies** and, in case of default, a means of obtaining **speedy interim relief** pending final determination of a claim on the merits
- **Default remedies** include taking possession or control of an object, sale or granting a lease of an object or collecting or receiving any income or profits from an object (Article 8).
- **Relief pending final determination** include preservation of the object and its value, possession, control or custody of the object, immobilization and lease/income (Article 13).
- **Very strong enforcement record** (statistics indicate security agreement enforced in vast majority of circumstances)



Innovative Features

Umbrella structure

- The Cape Town Convention is an **umbrella treaty**, which allows for the creation of **specific protocols** which bring certain categories of equipment within the scope of the umbrella treaty.
- This allows each protocol to be drafted taking into account the **particular requirements of specific equipment types**, within the need to amend the original text of the Convention itself.





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Status

- **Cape Town Convention:** entered into force 2006, 73 contracting states.
- 1) **Aircraft Protocol:** entered into force 2006: 65 contracting states.
- 2) **Luxembourg Rail Protocol:** adopted 2007, not yet in force, ratified by Luxembourg, approved by EU in December 2014.
- 3) **Space Protocol:** adopted 2012, not yet in force.
- 4) **MAC Protocol:** Currently under negotiation



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The MAC Protocol

Future Fourth Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Agricultural, Construction and Mining Equipment (**the MAC Protocol**)

Purpose:

- (1) To give parties engaged in agriculture, construction and mining, especially in the developing world, the ability to acquire equipment they would otherwise not be able to acquire and thus to permit them to optimise their activity,
- (2) the desire of producers of equipment to export to markets that without such a protocol would remain closed to them.



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The MAC Protocol

What Equipment does it cover?

Identifies types of high value agricultural, construction and mining equipment (MAC equipment) through the **Harmonized System** developed by the World Customs Organisation.

The Harmonized System is utilised by more than 200 countries for the main purposes of establishing customs tariffs and compiling trade statistics.

36 codes included in the current draft (US\$117 billion, UN COMTRADE)



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The MAC Protocol

Benefits of the MAC Protocol

Agricultural, Construction and Mining Operators: Better access to high tech equipment, lower financing costs

Manufacturers: Increased sales, access to new markets

Countries: Increased GDP due to increases in economic activity and increases in efficiency through mechanization of MAC industries (higher benefits for developing countries)





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The MAC Protocol

How to become involved

All United Nations member States invited to participate in intergovernmental negotiations on preliminary draft text of the treaty (Convention also open to ratification for UNIDROIT non-member countries)

First session of the Committee of Intergovernmental Experts begins **20 - 24 March 2017 in Rome**

Anticipated completion date of the treaty: **2018**

More information: <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol>



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Thank you for your attention!

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