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“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”



**MAC Protocol:
Overview and Challenges.**
by Juan Estrada* Co-author Vitor Barbosa

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This is the beginning of an initiative to strengthen the cooperation between the two firms and foster the professional development of both Brazilian and Mexican lawyers.

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MAC Protocol: Overview and Challenges.

by Juan Manuel Estrada* Co-author Vitor Barbosa.

As a consequence of the undeniable success and high degree of certainty that the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment (“Cape Town Convention”) brought to asset-based securitized transactions¹, many stakeholders within the mining, agriculture and construction industries pushed for the adoption of the fourth alternative Protocol to the Cape Town Convention. Such efforts paid off on November 22, 2019, when the long-awaited Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agriculture and Construction Equipment (“MAC Protocol”) came into effect after several years of intense negotiation, lobbying and drafting by UNIDROIT². Although the MAC Protocol has been officially adopted, its final text is currently being subject to a ninety days revision term in order to unify and make consistent the different languages under which it will be published³.

This article intends to provide an overview of the economic benefits as well as the relevant features that come along with the enactment of the MAC Protocol as well as some prospective challenges that the protocol will face, much like its predecessors did.

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Economic Benefits

Similarly to the inception process of its predecessors, the adoption of the MAC Protocol comes as a response to the lack of an internationally uniform legal framework for asset-based securitized transactions on matters specific to mining, agriculture and construction. With the development of such unified systems, comes a higher degree of certainty for stakeholders and particularly to prospective financiers and creditors, who benefit from an international regime that provides a higher degree of protection for their interests in mobile equipment, particularly in cross-border transactions. This in turn could result in better credit options, higher access to equipment and more competitive financing alternatives, as a consequence of a higher credit risks assessment⁴, which would increase the productivity of the mining, agricultural and construction sectors to the benefit of developing counties such as Mexico⁵.

It is certainly interesting to address the reasons why mining, agricultural and construction

1.- UNIDROIT, *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment – Status*, available at <http://www.unidroit.org/status-2001capetown-aircraft>

2.- Phillip L. Durham and Marek Dubovec, “More Good News From Cape Town: How the New MAC Protocol Will Benefit the Mining, Agriculture and Construction Industries”, *Journal of Equipment Lease Financing*, VOLUME 35, number 1.

3.- UNIDROIT, “MAC PROTOCOL – TEX”, <https://www.unidroit.org/570-instruments/security-interests/cape-town-convention-mac-protocol-2019/2717-protocol-to-the-convention-on-international-interests-in-mobile-equipment-on-matters-specific-to-mac-protocol-test-pretoria-november-2019>, assessed on March 03, 2020.

4.- Warwick Economics Associates – *MAC Protocol Economic Assessment*, page 6.

5.- <https://macprotocol.info/economic-benefits/>, access on February 25, 2020 – 09:10 a.m.

equipment were proposed for a fourth protocol, which as described by UNIDORIT, are two-fold as follows: “a) because it would allow enterprises engaged in the mining, agricultural and construction sectors the ability to acquire equipment they would otherwise not be able to acquire and thus to permit them to optimize their activity; and b) it would allow producers of equipment to export to markets that without such a protocol would remain closed to them.”⁶

Scope of the MAC Protocol

After broadly describing the potential economic benefits that can be expected with the entering into effect of the MAC Protocol, we will now enter into the scope of application of this novel instrument.

a) Applicability of the MAC Protocol

As provided for in Article 3 of the Cape Town Convention, the MAC Protocol is applicable to agreements creating international interests when the debtor is situated in a Contracting State at the time the agreement is created.

b) Equipment subject to the MAC Protocol

The MAC Protocol categorizes the equipment that can be subject to its terms by through the implementation of a six-digit Harmonized System codes (“HS codes”). Such HS Codes are categorized within the MAC Protocol under three different annexes: a) Annex 1 covering mining equipment, b) Annex 2 covering agricultural equipment; and c) Annex 3 covering construction equipment⁷.

As with other protocols, the MAC Protocol has been designed to be applicable on an exclusive basis to high-value assets, which are typically valued within the range of USD \$10,000 – \$7,000,000⁸.

c) Creditor Remedies

With respect to Creditor remedies in case of insolvency, Article X of the MAC Protocol provides for the different optional declaration to which Contracting States can opt to (Alternatives A, B or C). In the absence of any such alternative, national laws applicable to insolvency would apply. For reference purposes, the applicable remedies provided for under the Convention are the following:

- (i) Take possession or control of the object;
- (ii) Sell or grant a lease of any such object;
- (iii) Collect or receive any income or profits arising from the management or use of such object; and
- (iv) Obtain a court speedy relief determining: (a) preservation of the object and its value; (b) possession, control or custody of the object; (c) immobilization of the object; and (d) lease or management of the object and income therefrom.

6.- <https://www.unidroit.org/work-in-progress/mac-protocol#a1>, access on February 25, 2020.

7.- <https://macprotocol.info/legal-operation/>, access on March 03, 2020.

8.- THE HARMONIZED SYSTEM CODES PROPOSED FOR INCLUSION IN THE MAC PROTOCOL ANNEXES, Available at <https://www.unidroit.org/english/documents/2019/study72k/dc/s-72k-dc-06-e.pdf>.

Prospective Challenges

Unlike other protocols to the Convention, the MAC Protocol has faced substantial complications and challenges arising from the unique characteristics of the industries it intends to regulate. Particularly relevant are those related to the scope of the equipment that the MAC Protocol intends to regulate⁹.

As previously mentioned, the intention of the Cape Town Convention is to regulate “high-value”, “mobile” and “uniquely identifiable” equipment. This rule however is not strictly followed by the MAC Protocol which extends its scope of application to certain lower value and immovable assets (“The MAC Protocol has extended its reach to shovels or a weed trimmers, and non-movable irrigation equipment”)¹⁰.

“Unlike other protocols to the Convention, the MAC Protocol has faced substantial complications and challenges arising from the unique characteristics of the industries it intends to regulate.”

Conclusion

As a final remark and as stated throughout this paper, the general expectation is that the MAC Protocol will contribute to the increase the number of financing transactions involving MAC equipment, especially in developing countries. As stated by UNIDROIT “Countries hosting MAC equipment manufacturers will also benefit from a boost to growth in their economic output through the increased production and export of an additional \$90 billions of equipment over the ten year assessment period.”¹¹ Thus as mentioned above, it is expected that the adoption of the MAC Protocol will result in desirable benefits for both creditors (which would have a greater legal certainty with respect to the remedies and rights applicable upon the occurrence of insolvency related events) and debtors (which would obtain better financing conditions).

It is definitely too soon to determine whether the MAC Protocol will follow have the success of the Aircraft Protocol or if on the contrary, it will continue to face substantial challenges as the Rail and Space Protocols. We can only hope that stakeholders continue to enforce this in order to obtain further ratifications by developing states such as Mexico

9.- Benjamin von Bodungen and Charles W. Mooney, Jr, “Immovable-Associated Equipment under the Draft Mac Protocol: A Sui Generis Challenge for the Cape Town Convention”, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481481.

10.- THE HARMONIZED SYSTEM CODES PROPOSED FOR INCLUSION IN THE MAC PROTOCOL ANNEXES, Available at <https://www.unidroit.org/english/documents/2019/study72k/dc/s-72k-dc-06-e.pdf>.

11.- UNIDROIT, “The MAC Protocol: An Economic Assessment of the Fourth Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, available at https://www.elfaonline.org/docs/default-source/advocacy/fed/mac_ea_2018.pdf?sfvrsn=c592820d_2.

Mexico says U.S. returning sharply fewer migrants under 'Remain in Mexico'.

Mexico's foreign minister declared that the number of migrants returned to Mexico to await the outcome of U.S. immigration cases has fallen significantly, although activists said large numbers of people remain in the program. About 2,000 migrants were sent to Mexico under the program in January, down from a peak of around 12,000 in August last year. www.reuters.com/article/us-usa-immigration-mexico/mexico-says-u-s-returning-sharply-fewer-migrants-under-remain-in-mexico-idUSKBN20622B 12/02/2020.

López Obrador announces a reform to the Judicial Branch focused on the fight against corruption.

The ambitious plan of President Andrés Manuel López Obrador on reforming the Mexican justice system will have to wait. Since, the Executive has decided to fragment the compilation of initiatives proposed in January and announced its support on the proposal of the President of the Supreme Court of Justice, Arturo Zaldívar, to reorganize the Judicial Branch. This proposal focuses on the fight against corruption and nepotism, a boost to gender parity and the strengthening of public defenders for the legal assistance of the most vulnerable sectors and with less access to justice. www.elpais.com/internacional/2020/02/12/mexico/1581527478_742039.html 13/02/2020.

Mexican women call for a national strike after a series of brutal feminicides.

After recent feminicides cases the outrage in Mexico has risen, reason why all feminist activists, social media users, and women in general, are calling for a national strike on March 9 a day after the international Women's day. As heard before, in Mexico at least 10 women are brutally murdered every day, therefore with this movement women are raising their voices to demand gender equality, justice, education and eradication of gender violence, especially feminicide. So, what will happen on the aforementioned day? Women plan on not attending to work, school, college, the streets, shops etc. The main goal is to give visibility of the impact that women have in Mexico, and to make a radical statement against feminicide, misogyny and inequality. www.eluniversal.com.mx/english/mexican-women-call-national-strike-after-series-brutal-femicides 19/02/2020.

Mexican port denies cruise ship permission to dock over coronavirus fears.

Mexican port authorities revoked the permission for cruise ship MSC Meraviglia to disembark on the island of Cozumel due to coronavirus' spread fears, after Jamaican and Grand Cayman authorities denied the permission as well. However, the Ship operator of MSC Cruises stated that the medical records of the MSC Meraviglia show "one single case of common seasonal flu" by a passenger who has not traveled in any areas impacted by the outbreak. www.reuters.com/article/us-china-health-mexico-port/mexican-port-denies-cruise-ship-permission-to-dock-over-coronavirus-fears-idUSKCN20K33F 26/02/2020.

Secretariat of Finance and Public Credit, concerned about recession.

Treasury Secretary, Arturo Herrera, acknowledged that the federal government is concerned that the national economy is in recession, so they are working to find a way out of this situation. The National Institute of Statistics and Geography (INEGI) published the final figures of the Gross Domestic Product (GDP) in which it was confirmed that the economy contracted 0.1% during the fourth quarter of 2019. www.informador.mx/economia/Hacienda-preocupada-por-recesion-20200225-0156.html 26/02/2020.

Trump says U.S. considering restrictions at Mexican border over coronavirus.

The United States is considering shutting the country's southern border with Mexico to control the spread of the new coronavirus after Mexico's government detected three cases of coronavirus infection in three men who recently traveled to Italy, making the country the second in Latin America to register the fast-spreading flu-like illness. However, Mexico's foreign ministry said it had not been notified of any restrictions at the border. www.reuters.com/article/us-china-health-usa-mexico-exclusive/trump-says-u-s-considering-restrictions-at-mexican-border-over-coronavirus-idUSKBN20N0WP 29/02/2020.

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