



THE CAPE TOWN CONVENTION AND ITS PROTOCOLS. ADVANTAGES AND RISKS OF THE ACCESSION TO THE MAC PROTOCOL

The Cape Town Convention on International Interests in Mobile Equipment (Convention, CTC) aims to create a unified legal regime that allows securing the performance of obligations in the field of international lending. For today, the Russian Federation has ratified the CTC and the Aircraft Protocol and is considering participating in the MAC Protocol. The scope of regulation of this document applies to a wide range of equipment: mining, agricultural, construction (MAC equipment), which is a significant part of the Russian economy.

The purpose of this study is to consider the advantages and risks of accession to the MAC Protocol for the Russian Federation and to determine possible ways to offset the risks.

Analysis of international security mechanisms and their correlation with the relevant national regulation is important to find the most harmonious and effective approach to protecting the interests of creditors, regardless of their national status.

The results of the study can be used to make a decision on the ratification of the MAC Protocol and to choose the most optimal ratification conditions for the Russian Federation and the Russian market participants.

Conclusions

1. The MAC Protocol extends the conventional priority regime of registered international interests arising from a security agreement, a title reservation agreement, or a leasing agreement to MAC equipment.
2. On the one hand, accession to the MAC Protocol will allow creditors to use uniform and predictable security mechanisms on a priority basis in all jurisdictions covered by this document. On the other hand, the extension of such universal mechanisms to equipment that is not functionally intended for cross-border movement — and, in some cases, is also constructively connected with a land plot — raises some doubts in terms of consistency with original goals of the Convention and with the market needs of the harmonization of such regulation.
3. The accession to the MAC Protocol presupposes the expression of consent to be bound by some of its provisions. At the same time, each acceding State can determine the conditions of the accession to the extent permitted by the Protocol.
4. The Convention and the MAC Protocol apply both to cross-border and internal transactions. However, if internal transactions are excluded from the scope of the Convention and the MAC Protocol (a clause in accordance with Article 50 of the Convention), internal creditors will be deprived of the opportunity to use the remedies provided by the Convention and the MAC Protocol. However, they will retain the right



to appeal to the priority of the registered interest, because some of the Convention's provisions apply regardless of the clauses made by acceding State.

5. Upon ratification of the MAC Protocol, the security, title reservation, or leasing agreements regarding the MAC equipment will be regulated not by internal Russian law but by the international instruments of UNIDROIT. Accordingly, it will be necessary to conduct an independent economic analysis of the impact of such accession not only on the development of lending when acquiring foreign equipment but also on the development of the internal market for agricultural, construction, and mining equipment, its production in the Russian Federation, as well as its subsequent leasing and securing for loan repayment. In addition, the legislature and law enforcement authorities will need to analyze and explain to market participants relations between the international interest mechanism and the provisions of the Russian security law.

6. If a decision is made on the economic and political expediency of the accession to the MAC Protocol, it is recommended to extend its scope to all three types of equipment specified in Annexes 1-3 (mining, agricultural, construction), which will allow banks / leasing companies to protect their interests when the debtor moves equipment of any kind listed abroad or in case of the debtor's insolvency.

7. In order to implement the obligations on the functioning of the International Register of Mobile Assets, market regulator's clarifications about the priority of interests registered in it over any others (including records in the Russian notary register of notifications) and, possibly, amendments to certain Russian regulatory legal acts are required. It is necessary for minimizing the risks associated with the double registration and the competition of charge and other security rights in relation to equipment covered by the MAC Protocol, as well as for fully informing Russian creditors and debtors.

8. When accessing to its protocols, the Convention allows declaring the rights in respect of which the priority of international interest is not applicable (Article X(12) of the MAC Protocol). It seems appropriate to extend to MAC equipment the declaration made by Russia on subparagraph "b" of Article 39 (1) of the Convention about the absence of the international interest priority in cases of the protection of the public interests listed in the declaration.

9. The MAC Protocol allows choosing one of three alternatives that solve the problem of the competition of security rights for immovable-associated equipment. When choosing Alternative A of Article VII of the MAC Protocol, if an immovable-associated equipment is related so closely with immovable property, the international interest will keep its priority over the security rights to the immovable property, which means that the bank / leasing company will be provided with the greatest protection, and loans for enterprises in the relevant industries may become cheaper. Alternatives B and C contain risks of abuse that could nullify the positive effect of the accession to the MAC Protocol.

10. Choosing applicable law is allowed only in relation to the obligations of the parties to the international interests and only if the acceding State has made a declaration to this effect by expressing its agreement to the application of the provisions of Article VI of the MAC Protocol. There are no risks of adopting such an option for Russia since the corresponding provision is already implemented in Russian legislation. In addition, in this case, there will be no risk that the absence of a declaration on the application of Article VI of the Protocol will be misinterpreted by the Russian courts as the legislator's will to prohibit the parties from choosing foreign law as applicable.

11. Article IX of the MAC Protocol modifies the provisions of the Convention regarding relief pending final determination for the protection of rights. It seems that in order to make a decision on expressing



consent to the binding nature of these provisions, it is necessary to involve the judicial community in the discussion and also analyze the relation of relief pending final determination and mechanisms provided by the procedural codes.

12. Article X of the MAC Protocol provides an opportunity to establish a waiting period after the occurrence of an insolvency event, and when this period expires, the creditor has the right to pick up the equipment to pay off existing obligations without bidding or to require payment of the debt in full. Considering that Russia has expressed its consent to be bound by similar provisions of the Aircraft Protocol with the establishment of the 60 calendar days waiting period, it seems appropriate to extend this approach to the MAC Protocol.

13. In accordance with Article XI of the MAC Protocol, the courts of the Contracting State in which the equipment is located must provide the maximum possible cooperation to foreign courts and foreign insolvency administrators if the Contracting State has expressed its consent to the application of this article. At the same time, even without such manifestation, interested persons will still have the opportunity to appeal to foreign courts. In addition, the inapplicability of Article XI to the MAC Protocol will not matter for insolvency proceedings in Russia. Thus, there are no risks for Russian creditors in this part.

14. In order to ensure the stability and the predictability of the legal regulation, there are no grounds for changing the general principle of *ex nunc* effect of a regulatory legal act and using the opportunity provided by the Convention to extend the effect of the MAC Protocol to previously concluded transactions (*ex tunc* effect).

For the full text of the research (in Russian), please visit www.iclrc.ru

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