

Transforming Contract 'Makers' to Contract 'Takers': UNIDROIT Instruments and the Sustainable Development Goals of the United Nations

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1. Introduction

No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were¹

This essay will discuss how the International Institute for the Unification of Private Law ('UNIDROIT') instruments can achieve the sustainable goals as envisioned by the United Nations ('UN SDGs') through the proposition that UNIDROIT instruments transform contract 'takers' to contract 'makers'. In that spirit, the essay will examine in turn four UNIDROIT instruments. Finally, some suggestions will be posited.

2. To Transform Contract Takers into Contract Makers

The primary function of contract law is to facilitate an exchange.² Contract law does not concern itself with the value in which parties confer the goods in exchange. Rather, 'it is instead left to parties to decide what figure is sufficient inducement to them to buy and sell', and if the good and price are regarded by parties as equivalents, the law will accept the exchange as such.³ Once terms have been agreed upon, contract law only provides assurances that each party will be held to their undertaking during the exchange,⁴ irrespective of whether one party dictated the terms undertaken whilst the other had but to acquiesce: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it".⁵

To this end, UNIDROIT instruments address, *inter alia*, the exchange between buyers and sellers of mobile equipment, the exchange between pledgors and pledgees of warehouse receipts, and the exchange between agricultural cooperatives and global value chains.⁶ As these instruments are the harmonised result of several domestic law approaches, UNIDROIT instruments come to represent a cornucopia of balanced legal perspectives on how exchanges ought to be facilitated. In turn, the implementation of UNIDROIT instruments to exchanges will

¹ John Donne, 'No Man is an Island', *Devotions upon Emergent Occasions*, MEDITATION XVII (1624)

² Ewan McKendrick *Goode on Commercial Law* (5th edn, Penguin Books 2016), 67

³ *Ibid* 68

⁴ McKendrick (n 2)

⁵ *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308, 1316

⁶ Respectively, the Convention on International Interests in Mobile Equipment, the Model Law on Warehouse Receipts, and the Legal Structures of Agricultural Enterprises.

level the playing field between how parties govern their exchanges, so as to ensure the grounds upon which they exchange are not tilted towards the benefit of one sole party.

The UN SDGs broadly aims for countries to decouple economic growth from interference with the natural environment⁷ and to ensure that ‘no one will be left behind’ on the collective journey:⁸ a recognition that no man is an island, but instead a part of the main.⁹ Each of the UN SDGs are interrelated and call for integrated solutions.¹⁰ By equally providing parties with a stable platform on which they may facilitate their contractual exchanges, UNIDROIT instruments will create inroads into this decoupling and reach the furthest behind first.¹¹ The instruments’ collective effect of liberalising trade and reducing the cost of obtaining credit is an overall enhancement of economic growth, a diffusion of sustainable technologies, and a meeting of consumer demand for sustainably-produced goods.¹² Therefore, a discussion on how contract takers may be transformed into contract makers¹³ is a discussion connecting micro initiatives to macro effects.¹⁴ How the implementation of UNIDROIT instruments may allow a party to gain bargaining power, gain choice through the access of markets, and gain partnerships will be this essay’s leitmotif.

3. The Convention on International Interests in Mobile Equipment

Urbanisation, as a process of reallocating people and economic activity within an area,¹⁵ has the potential to become a positive transformative force for sustainable development.¹⁶ Sustained

⁷ Enshrined in UN SDGs, Goal 8

⁸ Enshrined in UN SDGs, Preamble

⁹ John Donne, ‘No Man is an Island’, Devotions upon Emergent Occasions, MEDITATION XVII (1624)

¹⁰ UN SDGs, Our Shared Principles and Commitments; Wenmei Fei ‘The Critical Role of the Construction Industry in Achieving the Sustainable Development Goals (SDGs): Delivering Projects for the Common Good’ (2021) 13 Sustainability 9112; Måns Nilsson, Dave Griggs and Martin Visbeck ‘Map the interactions between Sustainable Development Goals’ (2016) 534 Nature 320

¹¹ UN SDGs, Introduction

¹² Respectively, the Convention on International Interests in Mobile Equipment, the Mining Agricultural and Construction Protocol, and the Legal Structures of Agricultural Enterprises; Organisation for Economic Co-operation and Development ‘Policies to Enhance Sustainable Development’ (OECD, 2001) <<https://www.oecd.org/greengrowth/1869800.pdf>> accessed 30 April 2022

¹³ Fabrizio Cafaggi and Paola Iamiceli ‘The limits of contract laws. The control of contractual power in trade practices and the preservation of freedom of contract within agrifood global supply chains’ in Fernando Gomez Pomar and Ignacio Fernandez Chacon (eds), *Estudios de Derecho Contractual Europeo* (Thomson Reuters Aranzadi 2022); Amitav Acharya ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’ 58 International Organization 239; Jeffrey T Checkel ‘Norms, Institutions, and National Identity in Contemporary Europe’ 43 International Studies Quarterly 83

¹⁴ Rob Tulder, Suzana B. Rodrigues, Hafiz Mirza and Kathleen Sexsmith ‘The UN’s Sustainable Development Goals: Can multinational enterprises lead the Decade of Action?’ (2021) 4 Journal of International Business Policy 1

¹⁵ United Nations Department of Economic and Social Affairs ‘World Social Report 2021: Reconsidering Rural Development’ (United Nations publication, 2021) <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2021/05/World-Social-Report-2021_web_FINAL.pdf> accessed 30 April 2022, 45

¹⁶ Enshrined in the UN SDGs, Goal 1 and Goal 10

infrastructure investment has a demonstrable positive impact on both growth and poverty reduction.¹⁷ This necessitates the purchase of equipment to build or improve infrastructure. However, equipment to build or improve infrastructure is invariably capital intensive, making their purchase on credit vital. Yet, such equipment is additionally mobile in nature, and this credit risk compounds to inflate the ultimate price of financing such equipment.

Enter the Convention on International Interests in Mobile Equipment ('the Convention') as an independent legal regime governing the creation and perfection of 'international interests' in mobile and high-value goods.¹⁸ These international interests represent a security right *in rem*, or a right in an asset,¹⁹ arising from an agreement.²⁰ This is critical when a party advances credit, as a security right in a debtor's assets may be given by a debtor to a creditor to ensure repayment of the debtor's indebtedness.²¹ Having security in or over a *res*, or asset, the creditor in return gains priority of payment over other creditors and stands outside the *pari passu* distribution in the event of the debtor's insolvency.²² With the Convention and its Protocols containing the cornerstones of a secured transactions regime, i.e. the creation, perfection, priority and enforcement of security interests,²³ the practice of giving and receiving security rights *in rem* is safeguarded irrespective of the asset's geographic mobility or by the parties being from different countries. A debtor may give an international interest in or over their financed asset to a creditor to ensure repayment, and a creditor may receive the international interest with the assurance that their security will have priority over other creditors in the event of the debtor's insolvency.²⁴ The risks of advancing credit on mobile goods is thereby equally allocated between debtor and creditor; the playing field is levelled. On this score, the Convention's *sui generis* rules²⁵ reduce the ultimate price of financing mobile equipment and makes their purchase more widely accessible. The Convention has also proved to be a springboard for ameliorating sector-specific concerns.

¹⁷ Food and Agriculture Organization 'The State of Food and Agriculture: Leveraging Food Systems for inclusive Rural Transformation' (FAO, 2017) <https://reliefweb.int/sites/reliefweb.int/files/resources/a-I7658e_0.pdf> accessed 30 April 2022, xvi

¹⁸ The Convention on International Interests in Mobile Equipment, Article 2(1)

¹⁹ Roy Goode *Legal Problems of Credit and Security* (1st edn Sweet & Maxwell, 1988), 1

²⁰ Roy Goode *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment, Official Commentary* (UNIDROIT, 2021), [2.48]

²¹ Roy Goode *Legal Problems of Credit and Security* (1st edn Sweet & Maxwell, 1988), 1

²² In this respect, 'the final liquidation ceremony' of a debtor is often described as resembling 'an inversion of the miracle of the loaves and the fishes': Michael Bridge 'The Quistclose Trust in a World of Secured Transactions' (1992) 12 *Oxford Journal of Legal Studies* 333

²³ Michel Deschamps 'The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol: A comparative law analysis' (2013) 2 *Cape Town Convention Journal* 51

²⁴ The Convention, through its Protocols, sets up a Registry to overcome the legal hurdles that follow when a creditor seeks recognition of his priority in a cross-border setting.

²⁵ Mark Lessard, Paul Jebely and Jeffrey Wool 'Of Swords and Shields: The Role and Limits of Courts in the Enforcement of the Cape Town Convention's Substantive Repossession Remedies' (2017) 6 *Cape Town Convention Journal* 78; the Convention on International Interests in Mobile Equipment, Article 2

For example, the Convention's Aircraft Protocol mitigates risk in financing aircraft by providing time-bound remedies of repossession.²⁶

On a broader level, an essential feature of commerce in any developed economy is the provision of suitable media for the extension of credit.²⁷ The state of secured transactions law has long been recognised as being dismal, with 'the sad result of slowing capital'.²⁸ Where a creditor deems there to be a lack of a suitable media for extending credit, the Convention and its Protocols' *sui generis* rules may overcome this legal hurdle.²⁹ The upshot is an expected increase in the availability of cheaper credit for much-needed equipment in rural communities. In this respect, the Convention may become a metric for domestic secured transactions law reform, and a policy tool-kit for governments seeking to fund and improve national infrastructure.³⁰

3.1. The Mining Agriculture and Construction Protocol of the Convention

Building sustainable cities and communities³¹ requires access to construction equipment to build such infrastructure, and consequently access to credit. However, only a limited number of contractors are capable of managing large projects, and thereby barriers to entry are high.³² Moreover, underinvestment in agricultural capital stock has long been accompanied by underfunded agricultural research across developing economies.³³ To compound matters further, there are specific legal barriers when it comes to the funding of mining, agricultural, and construction equipment ('MAC equipment'). Legal rules govern the association between equipment and the land on which it rests upon. Jurisdictions vary from the degree such equipment must associate with land, or 'immovable property',³⁴ for equipment to become part of

²⁶ The Convention on International Interests in Mobile Equipment, Article 8; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Article XI

²⁷ Ewan McKendrick *Goode on Commercial Law* (5th edn, Penguin Books 2016), 623

²⁸ Mark J. Sundahl 'The Cape Town Approach: A New Method of Making International Law' (2006) 44 *Columbia Journal of Transnational Law* 339;

²⁹ The legal hurdle is expressed 'where a creditor considering a transaction secured by collateral in a particular country might find the law of that jurisdiction does not validate a certain type of security interest at all... lending is expected to be substantially riskier and credit therefore more expensive': Hannah Buxbaum 'Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform' (2003) *Articles by Maurer Faculty*, Paper 366

³⁰ As the writer is inclined to refer to, the 12th Malaysian Plan as set by the Malaysian government <https://pulse.icdm.com.my/wp-content/uploads/2021/09/Twelfth-Plan-Document_compressed-1.pdf>; <<https://www.theedgemarkets.com/microsite/12-malaysia-plan>> (accessed 1 May 2022)

³¹ UN SDGs, Goal 11

³² Gerard de Valance 'Project Finance Model for Small Contractors in USA' (2012) 7 *The Australian Journal of Construction Economics and Building* 29

³³ United Nations Department of Economic and Social Affairs 'World Social Report 2021: Reconsidering Rural Development' (United Nations publication, 2021) <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2021/05/World-Social-Report-2021_web_FINAL.pdf> accessed 30 April 2022, 53

³⁴ As referred to by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, Article I(2)(k)

the land.³⁵ For a creditor looking to advance credit on MAC equipment, there is a valid concern that any of their *in rem* interests fastened onto the financed equipment may be lost to the equipment's association to the land underneath, rendering them no better than an unsecured creditor subject to *pari passu* distribution despite the taking of security.

To this end, the MAC Protocol of the Convention creates a framework that harmonises legal rules governing MAC equipment's association with land, and the degree to which such association may still preserve any *in rem* rights separately fastened on MAC equipment.³⁶ The result is a stable legal regime for financing MAC equipment.³⁷ The MAC Protocol also creates a Registry,³⁸ and places a creditor who registers an international interest in a position where they could search the domestic immovable property registry (i.e., a land registry), and then if such creditor is prepared to move forward in the transaction, may negotiate an acceptable arrangement with the holder of the interest in the immovable property.³⁹ The MAC Protocol's simplification of rights in mobile equipment and immovable property will also allow for a domestic court sitting in the state of the immovable property, or sitting in another state, to apply and enforce, providing *ex ante* certainty for a creditor who has made the bargain to advance credit in return for an international interest.⁴⁰

By regulating the substantive rights of holders of interests in MAC equipment, the application of the MAC Protocol may reduce these barriers of entry for new entrants and incentivise new creditors to enter financing syndicates. A wealth of options arguably increases a debtor's negotiating power. As a stable regime, the MAC Protocol may also incubate long-term relationships between debtors from developing economies and creditors from developed economies, the latter of which may possess a greater ability to shoulder more credit risk than creditors from developing economies. This kind of creditor-debtor relationship may engender the requisite financing and construction of housing to replace urban slums, and a

³⁵ i.e., in some jurisdictions it suffices that the equipment physically rests by its own weight on immovable property without any kind of attachment, whereas in other jurisdictions some form of attachment is required; Roy Goode *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Mining, Agricultural and Construction Equipment* (UNIDROIT, 2021), [3.39]

³⁶ One of the cornerstones of secured transactions law is the concept of attachment, and the effect of attachment is that a security interests fastens on the asset so as to give the creditor rights *in rem* against the debtor himself: Roy Goode *Legal Problems of Credit and Security* (1st edn Sweet & Maxwell, 1988)

³⁷ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, Article VII and its three alternatives, Alternative A, B & C

³⁸ The Convention on International Interests in Mobile Equipment, Article 16

³⁹ Charles W Mooney Jr, Marek Dubovec and William Brydie-Watson, 'The Mining, Agricultural and Construction Equipment Protocol to the Cape Town Convention Project: The Current Status' (2016) 21 *Uniform Law Review* 332, 354

⁴⁰ 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' (2017) 6 *Cape Town Convention Journal* 37

reduction of project costs through the cheaper lines of credit for purchasing MAC equipment by the MAC Protocol.⁴¹

Additionally, as an asset-based financing regime, the MAC Protocol dismantles the barriers farmers in the 'missing middle' face.⁴² Typically, initiatives to scale up by purchasing better equipment are barred by the fact that many agricultural loans are merely short-term loans or loans exclusively for select agricultural activities, i.e. the purchase of chemical fertiliser.⁴³ Equally discouraging is the fact that many creditors require farmers to offer security in the form of land.⁴⁴ For farmers in this position, the process of obtaining credit to scale up translates to a costly process of having to offer up their only source of livelihood: their land. By providing farmers the alternative of offering creditors security in their financed asset, it is hoped⁴⁵ that the MAC Protocol's asset-based financing regime will equilibrate the scales between a farmer and their creditors. The MAC Protocol may therefore be the answer for farmers in the 'missing middle' seeking to scale up their production.

4. Model Law on Warehouse Receipts

Warehouse receipts, as negotiable instruments, may be traded, sold, and used as collateral to support borrowing. The use of warehouse receipts enable farmers to extend the sales period of modestly perishable products well beyond the harvesting season, and reap the benefits of reasonable price swings as opposed to selling off such goods when the harvest season begins.⁴⁶ As a device to support the conversion of agricultural products into tradeable instruments, the

⁴¹ It is envisioned that regenerating urban slums in developing economies could significantly contribute to the realisation of many SDGs, including the ending of poverty (or, Goal 1 of the SDGs), clean water and sanitation (or, Goal 6 of the SDGs) and affordable and clean energy (or, Goal 7 of the SDGs); Zafu Assefa Teferi and Peter Newman 'Can the 1.5 °C Carbon Reduction Work with SDGs in these Settlements?' (2018) 3 Urban Planning 52

⁴² Defined as producer associations and other forms of small- and medium-sized enterprises in agriculture: Alan Doran, Ntongi McFadyen, Robert C. Vogel 'The Missing Middle in Agricultural Finance' (Oxfam GB Research Report, 2009) <<https://oxfamlibrary.openrepository.com/bitstream/handle/10546/112348/rr-missing-middle-agricultural-finance-171209-en.pdf?sequence=1&isAllowed=y>> accessed 30 April 2022

⁴³ Angela Hilmi and Aksel Naerstad 'Investments in small-scale sustainable agriculture' (More and Better Network, <https://ag-transition.org/wp-content/uploads/2017/02/Investments_in_agriculture_MaB_WEB.pdf> accessed 30 April 2022

⁴⁴ Ibid

⁴⁵ At the time of writing, the MAC Protocol has yet to enter into force in accordance with Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment, Article XXV

⁴⁶ Jacqueline Bass and Katrena Henderson 'Innovations in Microfinance' (2000, Technical Note No. 5) <https://pdf.usaid.gov/pdf_docs/PNACQ697.pdf> accessed 30 April 2022; Richard Lacroix and Panos Varangis 'Using Warehouse Receipts in Developing and Transition Economies' (1996) Finance and Development International Monetary Fund 36 <<https://www.imf.org/external/pubs/ft/fandd/1996/09/pdf/lacroix.pdf>> accessed 30 April 2022

overall efficiency of agricultural markets is thus greatly enhanced by warehouse receipts.⁴⁷ The availability of secure warehouse receipts also allow pledgors of inventories to borrow abroad in currencies where real interest rates are lower, as is practised in Kenya and Uganda where coffee stocks are often financed in pounds sterling.⁴⁸

While still an inchoate instrument of UNIDROIT, the upcoming Model Law on Warehouse Receipts ('the MLWR') will contribute to the transformation of warehouse receipt users from contract takers into contract makers able to negotiate competitive financing terms.⁴⁹ A model law will create a harmonised legal baseline for countries to adopt as to what constitutes a receipt's 'transferability', i.e. that nothing in the law or on the face of the document prevents the pledgor/borrower from transferring his rights under the receipt to the pledgee/lender.⁵⁰ Effectively, the MLWR will empower an existing credit system that creates security interests in fungible and perishable commodities such as grain by harmonising the way in which a security interest may be attached and perfected in law.⁵¹ The MLWR is a fitting example of how the harmonisation of security interests, as an area of law traditionally rife with legal inconsistencies,⁵² may inclusively empower a credit system already practised amongst agricultural communities. Progress in the legal development of warehouse receipts will enable small-producers to participate in commodity markets beyond their own borders and thereafter scale up the value chain. By setting a cross-border standard for the form and content requirements of a warehouse receipt and the contractual rights and obligations of parties,⁵³ the MLWR will galvanise small-producer practices, and serve to make small agribusinesses more competitive.⁵⁴ The MLWR additionally seeks to incorporate for the digitisation of warehouse receipts to bolster the creation of a decentralised platform to trade commodities pledged on warehouse receipts, taking cues from UNIDROIT's Digital Assets project of best practices for the holding, transfer, and use of

⁴⁷ Panos Varangis and Donald Larson 'How Warehouse Receipts Help Commodity Trading and Financing' (2015) FARM-D 123 <<https://www.farm-d.org/app/uploads/2019/05/How-warehouse-receipts-help-commodity-trading-and-finance.pdf>> accessed 30 April 2022

⁴⁸ Richard Lacroix and Panos Varangis 'Using Warehouse Receipts in Developing and Transition Economies' (1996) Finance and Development International Monetary Fund 36 <<https://www.imf.org/external/pubs/ft/fandd/1996/09/pdf/lacroix.pdf>> accessed 30 April 2022

⁴⁹ UNIDROIT Working Group on a Model Law on Warehouse Receipts, Issues Paper, UNIDROIT 2021 Study LXXXIII - W.G.3 - Doc.2 <<https://www.unidroit.org/english/documents/2021/study83/wg03/s-83-wg03-02-e.pdf>> accessed 30 April 2022, [33]

⁵⁰ Jonathan Coulter *Inventory Credit - An approach to developing agricultural markets* (FAO 1995) <<https://www.fao.org/3/v7470e/V7470E06.htm#Annex%20%20-%20Legal%20issues>> accessed 30 April 2022, Annex 2

⁵¹ Ibid

⁵² Largely, what the Convention on International Interests in Mobile Equipment sought to harmonise

⁵³ UNIDROIT Working Group on a Model Law on Warehouse Receipts, Issues Paper, UNIDROIT 2021 Study LXXXIII - W.G.3 - Doc.2 <<https://www.unidroit.org/english/documents/2021/study83/wg03/s-83-wg03-02-e.pdf>> accessed 30 April 2022, [82]

⁵⁴ UNIDROIT/UNCITRAL Webinar Model Law on Warehouse Receipts Project Summary Report <<https://www.unidroit.org/english/news/2020/200326-warehouse-receipts/report-e.pdf>> accessed 30 April 2022, [14]

digital assets.⁵⁵ A digital decentralised platform for warehouse receipts arguably advances the ability of parties to acquire a warehouse receipt free of conflicting claims,⁵⁶ and reduces warehouse receipt fraud.⁵⁷ This improves a creditor's appetite to accept warehouse receipts as secure collateral.

As a backdrop for a legal structure of warehouse receipts, the MLWR may provide the necessary credibility and predictability for financial institutions to increase the provision of cheaper loans to farmers. For countries with a sizable agricultural economy, the benefits for food security and economic growth will be readily discernible.

5. Legal Structure of Agricultural Enterprises

Cooperatives⁵⁸ have become an important facet of agricultural credit policy in a landscape where the realisation of income and the act of expenditure do not occur at the same time.⁵⁹ Cooperatives serve utility in agricultural credit policy by being optimally placed to tackle credit management problems of small-producers, as rural credit not only involves the disbursal of credit, 'but also specialised and democratic management structures'.⁶⁰ Sustainable development occupies today's *zeitgeist*, resulting in consumers conscientious about the socio-economic and environmental conditions of their food and requiring a corresponding increase in assurances of credence attributes from suppliers (i.e., 'Fair Trade').⁶¹ As such, cooperatives serve further utility as

⁵⁵ UNIDROIT Working Group on a Model Law on Warehouse Receipts, Issues Paper, UNIDROIT 2021 Study LXXXIII - W.G.3 - Doc.2 <<https://www.unidroit.org/english/documents/2021/study83/wg03/s-83-wg03-02-e.pdf>> accessed 30 April 2022, [53], [58] and [68] - [77]

⁵⁶ Otherwise, *nemo dat quod non habet*; UNIDROIT Digital Assets and Private Law Working Group, Issues Paper, UNIDROIT 2020 - Study LXXXII - W.G.1. - Doc. 2

<<https://www.unidroit.org/english/documents/2020/study82/wg01/s-82-wg01-02-e.pdf>> accessed 30 April 2022, [44]

⁵⁷ UNIDROIT Working Group on a Model Law on Warehouse Receipts, Issues Paper, UNIDROIT 2021 Study LXXXIII - W.G.3 - Doc.2 <<https://www.unidroit.org/english/documents/2021/study83/wg03/s-83-wg03-02-e.pdf>> accessed 30 April 2022, [53]

⁵⁸ Often defined as 'formal forms of farmer collective action for the marketing and processing of farm products and/or for the purchase and production of farm inputs': Jos Bijman, Roldan Muradian and Andrei Cechin 'Agricultural cooperatives and value chain coordination' in A. H. J. (Bert) Helmsing and Sietze Vellema *Value Chains, Social Inclusion and Economic Development: Contrasting theories and realities* (Routledge 2011)

⁵⁹ Bhupat M. Desai and John W. Mellor *Institutional Finance for Agricultural Development. An Analytical Survey of Critical Issues* (International Food Policy Research Institute, 1993) 12

⁶⁰ Bhupat M. Desai and John W. Mellor *Institutional Finance for Agricultural Development. An Analytical Survey of Critical Issues* (International Food Policy Research Institute, 1993) 19

⁶¹ Performance measurement costs are particularly problematic in markets for products that incorporate environmental and social concerns such as 'eco-friendly', 'animal friendly', 'organic', 'GMO free' and 'Fair Trade': Jos Bijman, Roldan Muradian and Andrei Cechin 'Agricultural cooperatives and value chain coordination' in A. H. J. (Bert) Helmsing and Sietze Vellema *Value Chains, Social Inclusion and Economic Development: Contrasting theories and realities* (Routledge 2011), 82

'juridical vehicles'⁶² to coordinate 'vertical' activities (such as, providing information about market requirements)⁶³ and 'horizontal' activities (such as, standardising product quality)⁶⁴ in supply chains for specific goods.⁶⁵ Thus, cooperatives represent an opportunity for small-producers to capitalise on the increase in demand for environmentally sustainable agricultural produce.

As another inchoate instrument of UNIDROIT, the upcoming Legal Structure of Agricultural Enterprises ('the LSAE') will empower small-holders as participants in cooperatives by seeking to make recommendations on the legal coordination of cooperatives.⁶⁶ Presently, it remains to be seen whether the scope of the LSAE will elect for coordination by way of contracts or alternatively by cooperative governance rules.⁶⁷ Yet by either measure, the LSAE will provide cooperatives with a blueprint to increase their ability to aggregate and represent small-producer interests. A legal guide on coordination by way of contracts will redistribute power dynamics within agrifood supply chains. Chain leaders often 'regulate the architecture of contracting' unilaterally⁶⁸ by using contracts to set rules on issues such as farming techniques,⁶⁹ to the extent that small-holder participants 'rarely participate in the definition of rules'.⁷⁰ By making recommendations on contracts, the LSAE may rebalance the scales between chain leaders and small-holders, and offer the latter a chance to set more favourable contract terms. Conversely, a legal guide on coordination by way of cooperative governance rules may assist a group of farmers

⁶² Consultation Webinar, Legal Structure of Agricultural Enterprises Project, Summary Report <<https://www.unidroit.org/wp-content/uploads/2022/02/Report-LSAE-Consultation-Webinar-15-16-April-2021.pdf>> accessed 21 May 2022, [49]

⁶³ International Labour Organization 'Value Chain Development' <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_182602.pdf> accessed 1 May 2022

⁶⁴ Jos Bijman, Roldan Muradian and Andrei Cechin 'Agricultural cooperatives and value chain coordination' in A. H. J. (Bert) Helmsing and Sietze Vellema *Value Chains, Social Inclusion and Economic Development: Contrasting theories and realities* (Routledge 2011), 85

⁶⁵ Jos Bijman, Roldan Muradian and Andrei Cechin 'Agricultural cooperatives and value chain coordination' in A. H. J. (Bert) Helmsing and Sietze Vellema *Value Chains, Social Inclusion and Economic Development: Contrasting theories and realities* (Routledge 2011); UNIDROIT Working Group for the preparation of a Guide on Legal Structure of Agricultural Enterprises, Issues Paper, UNIDROIT Study LXXXC - W.G.1 - Doc. 2 <<https://www.unidroit.org/wp-content/uploads/2022/05/Study-LXXXC-W.G.1-Doc.-2-Issues-Paper-1.pdf>> accessed 21 May 2022, [44]

⁶⁶ Governing Council 99th Session (B), (c) Legal Structure of Agricultural Enterprises, UNIDROIT 2020 C.D. (99) B.5 <<https://www.unidroit.org/english/governments/councildocuments/2020session/cd-99-b/cd-99-b-05-e.pdf>> accessed 21 May 2022, [8] - [9]

⁶⁷ Consultation Webinar, Legal Structure of Agricultural Enterprises Project, Summary Report <<https://www.unidroit.org/wp-content/uploads/2022/02/Report-LSAE-Consultation-Webinar-15-16-April-2021.pdf>> [14], [20], [32], [34]

⁶⁸ Fabrizio Cafaggi and Paola Iamiceli 'The limits of contract laws. The control of contractual power in trade practices and the preservation of freedom of contract within agrifood global supply chains' in Fernando Gomez Pomar and Ignacio Fernandez Chacon (eds), *Estudios de Derecho Contractual Europeo* (Thomson Reuters Aranzadi 2022)

⁶⁹ UNIDROIT Working Group for the preparation of a Guide on Legal Structure of Agricultural Enterprises, Summary Report of the First Session, UNIDROIT 2022 Study LXXXC - W.G.1 - Doc. 3 <https://www.unidroit.org/wp-content/uploads/2022/05/Study-LXXXC-W.G.1_Summary-Report.pdf> accessed 21 May 2022, [61]

⁷⁰ Fabrizio Cafaggi and Paola Iamiceli 'Contracting in global supply chains and cooperative remedies' (2015) 20 *Uniform Law Review* 135

‘willing to take over the role of first buyer’ and aid the choosing of a legal structure for a joint activity,⁷¹ capturing the fact that members of cooperatives continue to operate their farms as separate businesses but agree to join together in certain stages of their operations.⁷² This will in turn increase a cooperative’s legitimacy and bargaining power, and possibly become more attractive recipients of climate change financing.

Again, by either measure, implementation of the LSAE will arguably improve the participation of small-producers and farmers in the ‘missing middle’ in global value chains by allowing them to set better contract terms against global value chain leaders⁷³ and sell their produce for higher prices across larger markets. Agricultural sectors will increasingly demonstrate relationships of high interdependence as quality of the final product continues to depend on their inputs.⁷⁴ Therefore, the LSAE’s initiative of improving the coordination of cooperatives will reduce the costs associated with performance measurement and compliance.⁷⁵ The end-result may be a greater availability and a consumer price reduction of sustainably-grown agricultural produce.

Allied to the benefits of the LSAE focussing on cooperatives may be an uptake of vulnerable groups as participants. Women account for 43% of the agricultural workforce in developing countries, yet a majority of women are segregated into lower-paid occupations.⁷⁶ The ability of cooperatives to coordinate performance to meet detailed input specifications has resulted in several cooperatives successfully marketing the produce of female small-producers.⁷⁷ In this respect, the LSAE may catalyse an increase of women and young entrepreneurs participating in agricultural markets.

⁷¹ This includes defining property rights, setting decision-making rules and deciding how disputes between members may be settled: Issues Paper, UNIDROIT Study LXXXC - W.G.1 - Doc. 2 <<https://www.unidroit.org/wp-content/uploads/2022/05/Study-LXXXC-W.G.1-Doc.-2-Issues-Paper-1.pdf>> accessed 21 May 2022, [49]

⁷² Ronald L. Mighell and Lawrence A. Jones *Vertical Coordination in Agriculture* (U.S. Government Printing Office, 1963) 40

⁷³ Fabrizio Cafaggi and Paola Iamiceli ‘Contracting in global supply chains and cooperative remedies’ (2015) 20 *Uniform Law Review* 135

⁷⁴ Issues Paper, UNIDROIT Study LXXXC - W.G.1 - Doc. 2 <<https://www.unidroit.org/wp-content/uploads/2022/05/Study-LXXXC-W.G.1-Doc.-2-Issues-Paper-1.pdf>> accessed 21 May 2022, [45]; Jos Bijman, Roldan Muradian and Andrei Cechin ‘Agricultural cooperatives and value chain coordination’ in A. H. J. (Bert) Helmsing and Sietze Vellema *Value Chains, Social Inclusion and Economic Development: Contrasting theories and realities* (Routledge 2011), 86

⁷⁵ Jos Bijman, Roldan Muradian and Andrei Cechin ‘Agricultural cooperatives and value chain coordination’ in A. H. J. (Bert) Helmsing and Sietze Vellema *Value Chains, Social Inclusion and Economic Development: Contrasting theories and realities* (Routledge 2011), 85

⁷⁶ Food and Agriculture Organization ‘Closing the gender gap in agriculture’ (7 March 2011) <<https://www.fao.org/news/story/en/item/52011/icode/>> accessed 30 April 2022

⁷⁷ UN Women, ‘Women’s cooperatives boost agriculture and savings in rural Ethiopia’ (1 August 2018) <<https://www.unwomen.org/en/news/stories/2018/7/feature-ethiopia-cooperatives-boost-agriculture-and-savings>> accessed 21 May 2022; UNIDROIT Working Group for the preparation of a Guide on Legal Structure of Agricultural Enterprises, Issues Paper, UNIDROIT Study LXXXC - W.G.1 - Doc. 2 <<https://www.unidroit.org/wp-content/uploads/2022/05/Study-LXXXC-W.G.1-Doc.-2-Issues-Paper-1.pdf>> accessed 21 May 2022, [53]

6. Conclusion

Disparities between rural and urban areas remain pronounced.⁷⁸ The UN SDGs recognise that achievement of the SDGs is a collective journey where no one is to be left behind:⁷⁹ each is part of a main.⁸⁰ In response, the application of UNIDROIT instruments echoes the UN SDGs commitment to achieve sustainable development in its three dimensions:⁸¹ by levelling the economic playing field between how parties govern their exchanges, with a particular emphasis on parties in rural landscapes, the social and environmental benefits accordingly follow. As an organisation, UNIDROIT has done well to gather perspectives from multidisciplinary groups of stakeholders. Continued capacity building initiatives may ensure that UNIDROIT instruments will be consistently interpreted so as to cement the instruments' function as stable legal regimes for parties to ground their exchanges upon.

⁷⁸ The United Nations 'The Millennium Development Goals Report 2015' (United Nations, 2015) <[https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf)> accessed 1 May 2022, Foreword by Ban Ki-Moon

⁷⁹ UN SDGs, Preamble

⁸⁰ John Donne, 'No Man is an Island', Devotions upon Emergent Occasions, MEDITATION XVII (1624)

⁸¹ The three dimensions of sustainable development — economic, social, and environmental