

The Space Assets Protocol – A Look Ahead

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The March 2012 diplomatic conference in Bremen, Germany, for the adoption of the Protocol to the Cape Town Convention on International Interests in Mobile Equipment in Matters Specific to Space Assets is the closing of one chapter in the life of this unique instrument of private international law, and the beginning of another. The Space Assets protocol has developed over the course of its drafting and negotiation history, and its potentials are as yet untested. The focus of this paper is discussing and examining the possible (and perhaps likely) future of the Space Assets Protocol and its impact. Chiefly, the Space Assets Protocol can help developing nations and smaller entities fund and start their own domestic space programs or projects. The already existing and robust satellite industry will likely not benefit from the Protocol's international interest and registry system, but states and industries with emerging interest, demand, and with growing capabilities (both financial and technical) may benefit from the long diplomatic work resulting in the Space Assets Protocol. Ratification of the Space Assets Protocol in developing space-capable countries in South-East Asia, Africa, and Latin America will signal that the protocol will be used for the industry needs to which it is best tailored.

1. Introduction

The impetus behind the Cape Town project of Convention and Protocols, and the work of UNIDROIT (the International Institute for the Unification of Private Law), are not lightly explained. Put succinctly, when movable assets cross borders into different jurisdictions with different insolvency rules, the legal/financial interest/rights of creditors can be jeopardized by foreign rules which are difficult to predict. The traditional rule of *lex rei sitae* ("law of the place of the situation of the thing"¹) caused uncertainly and heightened risk for creditors, especially if they would act on their interests in foreign jurisdictions. The

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1 *Blacks Law Dictionary*, Sixth ed. (West). ("The law of the place of situation of the thing. It is said to be an inexact mode of expression.") pg. 913. Also *Lex Situs* ("Modern law Latin for 'the law of the place where property is situated.' The general rule is that lands and other immovables are governed by the *lex situs*; *i.e.*, by the law of the country in which they are situated.") *Cf. lex rei sitae* and *lex situs* with *lex loci*

Cape Town Convention and its Protocols seek to mitigate, reduce, or even dissolve this risk of unknowable or unpredictable foreign insolvency rules by creating an international legal/financial interest/right in movable assets – a right displayed on an international registry of interests, and one to which uniform default/insolvency provisions exist. Establishing this international homogeneity in legal treatment is meant to decrease uncertainty. Economically speaking, legal uncertainty correlates with financial risk as two elastic variables that move together. Conversely, decreasing legal uncertainty and financial risk can decrease the cost of financing movable assets.

For those unfamiliar with the Space Assets Protocol, much scholarly secondary literature already exists for consultation, both on the Convention and on the various protocols, of which the Space Assets Protocol is the newest. Reference can be made to a history of the general Cape Town Convention and its key features, along with a history of the Protocol on Space Assets.² Secondary literature also exists investigating the relationship of the Space Assets Protocol to the existing body of public international law, to its sister protocols (the Aircraft Protocol, and the “Luxembourg” Protocol on Rail Assets), and to related topics. Reference to broader works on commercial law, and the concepts and laws related to financial interests in movable assets is also highly recommended.³

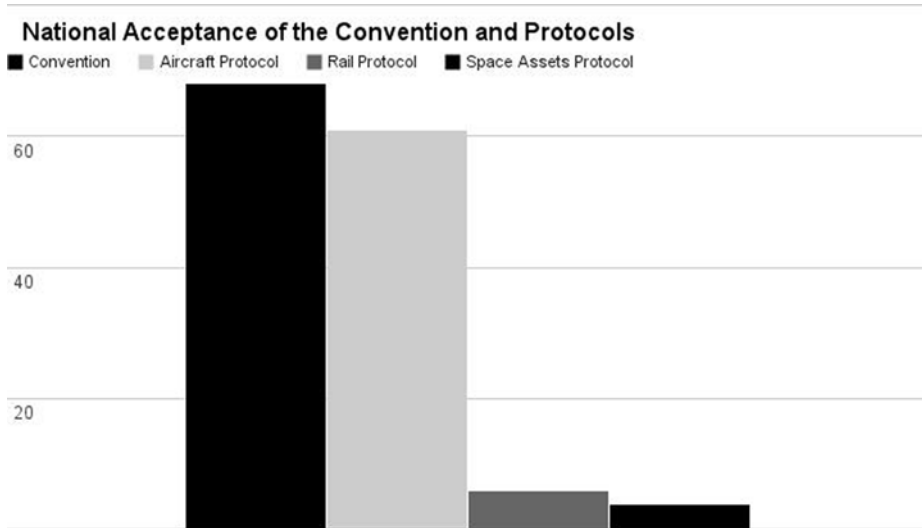
2. Current Status of the Convention and of the Protocols

A quantitative investigation of the adoption of the underlying Convention and the related protocols must be included in a forecasting of the Space Assets Protocol’s future. To date, the Cape Town Convention has been adopted by 66 signatories. Adopted on 16 November 2001, it did not enter into force until 1 March 2006 (a little over four years). The Convention’s first and most successful Protocol, the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (henceforth “the Aircraft Protocol”), has been adopted by 61 signatories and entered into force on the same date as the Convention. The Luxembourg Rail Protocol on Rail Assets

contractus (“the law of the place where the contact was made”) and *lex loci delictus* (“the law of the place where the crime or wrong took place”).

- 2 For a short history of the Cape Town Convention and the Aircraft Protocol, see Roy Goode, “From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols” (2012) 4 *Uniform L. Review* 599. For a longer analysis of the Convention and its articles, see Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Equipment* (Rome: UNIDROIT, 2008). See also Christopher Johnson, *Financing for Commercial Space: Asset-Backed Financing, International Space Law, and the UNIDROIT Draft Protocol on Space Assets*, Leiden University, 2010 [unpublished], available at <<http://ssrn.com/author=1832081>>.
- 3 Ewan McKendrick, *Goode on Commercial Law*, Fourth ed (London: Penguin Books, 2010) at 620–30, 665, and 1214–1221.

Figure 1 *National Acceptances of the Cape Town Convention and protocols, showing wide discrepancy between the Convention and Aircraft Protocol and subsequent protocols for rail and space assets. Updated March 2013.*



(henceforth the “Rail Protocol”) adopted on 23 February 2007 and yet to enter force, has been adopted by five States (Gabon, Germany, Italy, Luxembourg, and Switzerland) and also by the European Union. The Rail Protocol will only enter into force after the ratification/acceptance/approval/accession of four countries, and the establishment of an operational registry. The Protocol on Matters Specific to Space Assets (henceforth the “Space Assets” protocol), adopted on 9 March 2012, has received signatures by four states (Burkina Faso, Germany, Saudi Arabia, and Zimbabwe). The Space Assets Protocol will enter into force only after two necessary conditions have been met: 1) ten state parties have signed; and, 2) a registry has been established. Figure-1 displays the relative acceptance rates of the Convention and Protocols. The ratification by Germany, subject to internal German municipal acceptance, lends authority, legitimacy, and credibility to the protocol as a whole. However, it will not be shocking to see the Space Assets Protocol fail widespread adoption in other rich westernized countries.

3. Hesitancy and Resistance

Attention and consideration should be paid to the hesitancy and resistance towards the draft protocol by an appreciable portion of the satellite industry – including satellite operators, spacecraft manufacturers, launch service providers, space insurers and underwriters, satellite and space-related organizations and institutions, and members of the international financial community. Perhaps the most engaged and vocal member of this community of dissenters is the Satellite Industry Association (SIA), a trade organization headquartered in

Washington D.C., whose concerns and criticisms have been consistent throughout the later stages of the drafting of this protocol. The SIA's substantive concerns related to, *inter alia*, the salvage rights of insurers. Their proposed solution to a perceived unintended consequence of the Space Assets Protocol which could result in subsequent creditors asserting rights superior to insurers with previous contractual salvage rights was to ask the drafting committee for provisions including the following: "Nothing in the Convention or this Protocol affects any rights of an insurer under the applicable law or contract to salvage".⁴ This carve-out essentially allows for contractual provisions to intervene and supersede the uniformity of an international registry and the intended transparency such an open system would engender. Of course, business prerogatives and the essential freedom of contract supports this drafting suggestion. Concurrent with the specific drafting comments from the SIA has been a more generalized resistance to the protocol and the international regime it would create. This resistance, which began as a tentativeness and progressively hardened, was reflected in a number of open letters during the final phases of the drafting and even unto the diplomatic conference, and voiced the beliefs that the draft protocol will introduce "new and unnecessary regulation", and "serious negative consequences"; that the Space Assets Protocol is "inconsistent with market practices", "incorporates numerous impractical features", and "would add increased costs to our businesses, including higher insurance premiums and higher transactional costs".⁵ The opinion was voiced that the protocol offers "no tangible benefits for commercial space operators", "would impose unnecessary and costly bureaucratic burdens", and that the protocol addresses no identifiable problem in the current financing environment.⁶ Crucially, detractors state that in their opinion: "the current process has worked consistently well for the numerous new and established operators that in recent years have secured financing by banks, export credit agencies and other financing parties" and "no satellite financings have failed to proceed or been unduly expensive due to impediments over the granting and perfection of security interests".⁷ Along with these views must be a critical examination of whom the Protocol is intended to serve, and consequently why the views of the established satellite industry players is not necessarily demonstrative of the protocol's merit. Without a lengthy discursion into the history of industry involvement in the negotiation and drafting of this international instrument, it can be stated that participants from the large global satellite industry were initially enthusiastic

4 UNIDROIT, *Diplomatic Conference for the Adoption of the Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets* (Berlin: UNIDROIT, 2011); See also Marcia S Smith, "Satellite Industry 'Denounces' UNIDROIT Approval", (2012), online: *Space Policy Online*, Available at: <www.unidroit.org/english/conventions/mobile-equipment/conference2012/dcmesp-06-e.pdf>.

5 *Ibid.*, at 5.

6 *Ibid.*, at 6.

7 *Ibid.*, at 6.

over the prospect of the Space Assets Protocol, but eventually their interest gave way to disenchantment, worry, and perhaps finally resignation that the Protocol would be drafted and finalized despite their concerns being addressed. It might be the case that the international regime for internationally registered rights and uniform default provisions affects their longstanding and profitable business practices, where any *lex rei sitae* related risks are solved using *ad hoc* contractual solutions. The statement that “no satellite financings have failed to proceed or been unduly expensive...” belies its potentially tautologous assumption – indeed, all those firms who were successful at securing financing and could proceed with their satellite project were obviously financially capable of doing so under prevailing market conditions. What about all those who were not able to find financing? What about all those potential borrowers in jurisdictions where it is either impossible or extremely difficult to create, perfect, and enforce security interests? These potential borrowers are left out of this conception of the existing and robust satellite financing community’s business practices.

4. The West and the Rest

A salient rejoinder to the foregoing critical views is the possibility that the Space Assets Protocol may indeed be very helpful in bringing access to space to those it has previously been inaccessible, including new market entrants, start-up companies, and smaller operators. While the developing countries were not sending in critical letters to the various drafting conferences at UNIDROIT, they were sending in delegates. A look at the list of participants at the later stages of the drafting of the protocol, including the later meetings of governmental experts, reveals that the draft protocol on space assets was of considerable interest to countries who have traditionally not been the major players in the satellite community, countries where the large well-known names in satellites manufacturing and operation, finance, and insurance are not headquartered, nor where their stocks are traded. The list of participants at the third and fourth sessions of the committee meetings of governmental experts includes delegates from Albania, Algeria, Argentina, Brazil, Burkina Faso, Chad, China, Colombia, India, Indonesia, Iran, Kazakhstan, Kenya, Latvia, Nigeria, Pakistan, Paraguay, Romania, Senegal, the Slovak Republic, Slovenia, Sudan, Syria, Turkey, Uruguay, and Venezuela.⁸ These delegates represent nations comprising hundreds of millions of people, each with existing and growing needs for telecommunications, Earth observation, remote sensing and disaster management,

8 UNIDROIT, *Committee of Governmental Experts for the Preparation of a Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets - Third Session - Report* (Rome, 2009) at 35–46; UNIDROIT, *Committee of Governmental Experts for the Preparation of a Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets - Fourth Session - Report* (Rome, 2010) at 42–53.

telemedicine, and related space applications. They have a crucial interest in reducing the risk and cost of satellite financing.

These interested regions and countries have both overlapping and distinct needs and priorities in space. African countries, in furtherance of the 2011 Mombasa Declaration on Space and Africa's Development, are focused on using space based technologies, both existing and emerging, to better the lives of Africans. Africa is looking to develop its regional space infrastructure and capabilities, and this market for satellite financing will grow. An international registry with uniform default provisions can help potential debtors across Africa finance their access to space. Elsewhere, South East Asia wants to procure goods and services developed and manufactured elsewhere, as does Latin America.

The recognition of the space needs of developing countries has already been recognized by UNIDROIT, which has addressed this specific interest on a variety of occasions and even helped capacity-building workshops in these regions, stressing that uniform, predictable and commercially-oriented regime has the "potential to make a considerable difference to the quality of life of countless human beings in the emerging and developing worlds through the enhanced access to satellite services (for such life-and-death matters as disaster forecasting) and the broader diversity of satellite operators that it will foster."⁹ It should also be recognized that the Space Assets Protocol is not meant to change the already robust business model for the largest actors in space financing, but to "provide prospective debtors, the world over, with an additional financing option..."¹⁰

5. Conclusion

Like the aircraft protocol, the support of the industrial community was sought - along with the support of the most advanced spacefaring nations. However, the existing business models and financial tools used by the industry already exist, and stakeholders have proven hesitant to embrace change. Consequently, it must be realized that they don't need the international regime created by the space protocol. Going forward, the space assets protocol will work for countries across South East Asia, Africa, and Latin America. These are the countries that the potential benefits of the protocol and entire Cape Town regime should

9 MJ Stanford, *UNIDROIT's project for the creation of a new international regime governing the taking of security over high-value mobile equipment: a window of opportunity for the financing of railway rolling stock and commercial space activities* (Tijuana, 2001) at 8; MJ Stanford, *The preliminary draft Protocol to the Cape Town Convention on Matters Specific to Space Assets: a unique opportunity to expand the benefits of space-based services and to broaden the market for commercial space activities in general* (Tehran, 2009), section 1.

10 MJ Stanford, *The UNIDROIT Protocol to the Cape Town Convention on Matters Specific to Space Assets* (Naples: International Astronautical Federation, 2012) at 14-15.

be addressed to. Advocates for space commercialization, international lawyers and others interested in private international law and space law, those interested in industrial development and industrial policy, and all those hoping to bring the benefits of space applications, should all be making potential stakeholders, including governments and potential start-ups, aware of the space assets protocol, and explaining how international uniformity and transparency makes investment safer and cheaper. The Convention and Protocol solves various complex problems, and there is every reason for potential debtors in jurisdictionally inconvenient locales to be able to benefit from the safeguards of the Convention/Protocol.

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