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Private International Law Regarding Space Activities (1.)

REGARDING FORMATION OF THE INTERNATIONAL SPACE PRIVATE LAW

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ABSTRACT

For several years international lawyers specializing in the field of international space law have been discussing formation of international space private law. This discussion has been also supported by a number of countries' official delegations at UN COPUOS and its Legal Subcommittee. To date this issue has not been comprehensively analyzed.

This paper raises the issue of formation of international space private law; gives an analysis of its legal sources, principal institutions and evaluates the perspectives and tendencies of its future development. In light of the growing tendencies towards globalization, commercialization and privatization, international space private law could provide adequate legal regulation for private space activities.

The author defines international space private law as a body of legal norms comprising substantive law norms and rules of conflict of laws regulating connected with space activity property and personal non-property relations, complicated with "foreign element". International space private law is characterized by its specific subject of legal regulation; and methods of legal regulation such as: substantive law method, method of conflict of laws, international and national methods of legal regulation.

Principal existing and potential legal sources of the international space private law comprise:

• The 2001 Cape Town Convention on International Interests as Applied to Space Assets (the title in accordance with the Art. II of the Preliminary Draft Space Assets Protocol) where is emphasized the primary character of UN space treaties;

• National space legislation (its growing role can not be denied but it would not be right to rely only on civil and national methods in commercial space activity regulation);

• Space law cases (for those states where they are applicable).

This paper also contains a brief analysis of legal status of subjects of the international space private law, of problems of space activity licensing, responsibility of private legal entities, space insurance and other actual issues. Finally the author analyzes the perspectives and tendencies of development of the international space private law. The author hopes that rather soon these ideas will evolve from "imagination" to reality as the objectives, principals and legal background for it already exist, even if there is still much to be done.

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FULL TEXT

INTRODUCTION

By the end of the XX century significant changes took place in the world cosmonautics. At the present time space activity is characterized by the growing tendencies towards privatization, commercialization and globalization. As Prof. Dr. Yuri M. Kolosov notes "the private sector literally "digs in" the outer space making it closer to the practical needs of a human being and at the same time creating new legal problems to be resolved by states in the near future"[1].

Contemporary international space law allows space activity of non-governmental entities provided that such activity is authorized and supervised by the appropriate State – Party to the Treaty on Principles Governing the Activity of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967) (hereinafter referred to as "Outer Space Treaty") for assuring that national activities are carried out in conformity with the international space law provisions. States Parties to the Outer Space Treaty bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or non-governmental entities[2].

In view of the growing tendencies of space activity privatization and commercialization an update of the existing space law provisions is required. Private entities' activity at the international telecommunication services market in laissez faire conditions and development of national space legislation in a number of countries predetermine formation of the international space private law[3]. Moreover, this tendency was distinguished earlier. In 1990 Prof. O Kunc expressed opinion that international private space law would be formed just as international private maritime law had been formed[4].

I. INTERNATIONAL SPACE PRIVATE LAW (DEFINITION, SUBJECT AND METHODS OF LEGAL REGULATION)

It should be noted that the notion "international space private law" is not strict and so far relative. Unfortunately, this issue has not been comprehensively analyzed.

The author of this paper defines ***international space private law*** as *a body of legal norms comprising substantive law norms and rules of conflict of laws regulating connected with space activity property and personal non-property relations, complicated with "foreign element"*[5].

In official documentation *space activity* is defined as exploration of outer space and celestial bodies and their use in practical purposes effected with space technology. This kind of activity is not limited by the sphere of outer space. It can also expand to Earth provided that it is organically connected either with launch of a space object and its operation or with reentry of this object.[6]. Still there is no definition for *commercial space activity* in space law; however it could be determined as activity concerning sale, purchase and exchange or

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commercial use of space goods and services.

International space private law is characterized by its specific ***subject of legal regulation*** comprising connected with space activity property and personal non-property relations complicated with "foreign element". "Foreign element" may be distinguished by subject of relation, object of relation or juridical act, on grounds of which legal relationship arises, changes or terminates.

Subject of legal regulation requires specific ***methods of legal regulation.*** In this case applicable are the following methods: substantive law method, method of conflict of laws, international and national methods of legal regulation.

Existence of these objective preconditions (specific subject requiring specific methods of legal regulation) is enough to raise the issue of formation of a new branch of law – international space private law that could be able to fill in the actual "vacuum" in regulation of commercial space activities.

II. OVERVIEW OF THE LEGAL SOURCES OF THE INTERNATIONAL SPACE PRIVATE LAW

As any other branch of law international space private law has its own legal sources. Existing and potential legal sources of international space private law both at international and national level are analyzed hereafter.

1. The Cape Town Convention on International Interests in Mobile Equipment and the Preliminary Draft Protocol on Matters specific to Space Assets[7].

Convention on International Interests in Mobile Equipment (hereinafter referred to as "Convention") was prepared in frames of the International Institute for the Unification of Private Law (hereinafter referred to as "UNIDROIT"), opened to signature at the diplomatic Conference held in Cape Town on 16 November 2001, entered into force on 1 March 2006[8].

The aim of the Convention is to increase the efficiency of financing high-value "mobile equipment" (aircraft objects, space objects (assets), railway rolling stock, etc.), because such equipment moves from jurisdiction to jurisdiction, and because not all jurisdictions provide equivalent recognition of creditor's rights, creditors face higher risks and this increases the cost of obtaining credit. The Convention establishes internationally applicable legal regimen for security, title-retention and leasing interests: this will reduce the risks faced by creditors and thereby reduce the costs of financing high value mobile equipment. Financiers will be able to assure themselves that their proprietary interests in a financed asset are superior to all potential competing claims against that asset, and upon default will be able to promptly realize the value of that asset.[9] In course of preparation of the Convention it was decided to divide the rules to be prepared in those general rules applicable to all types of high-value mobile equipment and those special rules needed to adapt the general rules to the specific characteristics of each type of equipment: the general rules were to be placed in the Convention and the equipment specific rules were to be placed in separate protocols applying to each such type of equipment. The both documents (the Convention and the corresponding Protocol) shall be used and interpreted in integrity;

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validity of these documents being impossible in case the Convention is ratified without a protocol and vice versa.

The first developed protocol that was opened to signature and entered into force on the same date with the Convention is the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Aircraft Protocol)[10]. The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (The Rail Protocol) was opened to signature at the Diplomatic Conference held in Luxembourg on 23 February 2007 and has not yet entered into force[11].

Another protocol dealing with the application of the Convention to *space assets* is also under development. This protocol will address the difficult task of applying the benefits of the Convention to space assets which are increasingly being financed by private sector investors rather than by governments. The preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as "draft Protocol")[12] is currently under consideration by an inter-governmental negotiation process which includes representation by private sector financiers and the space industry. In accordance with the Article XXIV of the draft Protocol this Protocol will enter into force on the first day of the month following the expiration of three months after the date of the deposit of the [fifth][13] instrument of ratification, acceptance, approval or accession, between the States which have deposited such instruments.

Important is the fact that the document intended to regulate commercial space activities is elaborated under auspices of UNIDROIT, and not less is important that the unique experience of the UN COPUOS, in particular of its Legal Subcommittee, is used in this work. For the first time the Legal Subcommittee considered examination of the preliminary draft Protocol as item for discussion at its fortieth session in 2001[14]. Examination of the draft Protocol continues and the Subcommittee agreed that examination and review of the developments concerning the draft Protocol should remain on the agenda of forty-eighth session[15].

The Convention consists of Preamble, 14 chapters and 62 articles, the draft Protocol consists of Preamble, 6 chapters and 23 articles.

In the words of the Preamble of the draft Protocol, the Protocol "implements" the Convention in relation to space assets. The draft Protocol, in effect, provides special rules adapting the rules of the Convention to the specific characteristics of space assets. In accordance with Article II, p.1 of the draft Protocol "The Convention shall apply in relation of space assets as provided by the terms of this Protocol". According to p. 3 of the same Article "the Convention and this Protocol shall be known as the Convention on International Interests in Mobile Equipment as applied to space assets".

Pursuant to Article I, p. 2, subp. (f) of the draft Protocol *"space assets"* means:

"(i) any identifiable asset that is intended to be launched and placed in space or that is in space;

(ii) any identifiable asset assembled or manufactured in space;

(iii) any identifiable launch vehicle that is expendable or can be reused to transport persons or goods to and from space; and

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(iv) any separately identifiable component forming a part of an asset referred to in the preceding sub-paragraphs or attached to or contained within such asset".

It is to be mentioned that the definition of "space assets" given in the draft Protocol is rather detailed but in some aspects less clear than the definition provided in Convention on International Liability for Damage Caused by Space Objects. (1972) and Convention on Registration of Objects Launched into Outer Space (1976)[16].

"International interest" under Article 2, p.2 of the Convention means interest granted by the chargor under a security agreement (a), or vested in a person who is conditional seller under a title reservation agreement (b) or a lessor under a leasing agreement (c). An interest is constituted as an international interest in case it is registered in the International Registry (see Chapter IV of the Convention "The international registration system"), is made in writing (a); relate to an object of which the chargor, conditional seller or lessor has power to dispose (b); enable the object to be identified in conformity with the Protocol (c); and in the case of a security agreement, enable the secured obligations to be determined, but without the need to state a sum or maximum sum secured (d) (Article 7 of the Convention).

The particular benefit of asset-based financing is that it enables the debtor to pay off his debt through the revenue that he manages to generate by his use of the asset, at the same time, enabling the creditor, in the event of default by the debtor, to go against the asset. The fact that the creditor has this guarantee improves his risk analysis on the transaction and thus simplifies the transaction and lowers the cost of the financing he can provide.

In view of the issue in consideration (formation of a new branch of law) important is the question of correlation between the Convention as applied to space assets and the founding documents of the contemporary international space law. The primary character of the established principles of space law, including those contained in the international space treaties under the auspices of the United Nations, is emphasized both in the Convention and in the draft Protocol. Moreover, in accordance with the Article XXIbis of the draft protocol "the Convention as applied to space assets does not effect State Party rights and obligations under the existing United Nations Treaties or instruments of the International Telecommunication Union".

As to the correlation of the provisions of the Convention and the draft Protocol, it is pointed out in Article 6, p.2 of the Convention that in case of any inconsistency between the Convention and the corresponding Protocol, the Protocol shall prevail.

At the forty-seventh session of the UN COPUOS Legal Subcommittee one of the delegations expressed the view that the draft Protocol is a good example of efforts being made to find a solution to the deficiencies in the existing United Nations treaties on outer space without compromising the interests safeguarded in those treaties. That delegation also noted that private and commercial space activities should be regulated[17].

Thus, the adoption of the Convention and the continuing work on the draft Protocol could be considered as one of the first efforts at the international level to modernize space law and to adapt it to the growing commercial space activity, on one hand, and as important preconditions for the formation of international space private law, on the other hand.

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Both the Convention and the draft Protocol require more detailed and profound analysis but in this paper they are analyzed primarily as *potential first internationally applicable legal sources of international space private law.*

2. National Space Legislation Overview

In recent decades the tendencies of legal regulation of space activity have significantly changed. Individuals' and legal entities' space activities required national regulation. In accordance with the Article VI of the Outer Space Treaty, States Parties bear international responsibility for all national activities in outer space even if they are carried on by private entities. . Therefore, in practice the states adopt and will continue to adopt national space laws first of all regulating issues of licensing, insurance, export control in this field. Without any doubt national space legislation shall be in full conformity with international obligations of states.

In this paper *national space legislation* is considered as *one of the legal sources of the international space private law.*

The state that encourages the most commercial space activities is the *United States of America.* Legal regimen of national space activity regulation consists of:

- Communications Act (1934) that establishes licensing and operating requirements for satellites and associated ground stations;
- National Aeronautics and Space Exploration Act (1958);
- Communications Sattelite Act (1962);
- Commercial Space Launch Act (1984; as amended in 2004). This act envisages licensing of space Activity in the US.;
- Land Remote Sensing Policy Act (1984);
- Export Control Act (1998)
- Federal Aviation Administration (FAA) "Human Space Flight Requirements for Crew and Space Flight Participants" (2006).

Commercial Space Launch Act (CSLA) is administered by the Office of Commercial Space Transportation, FAA of the U. S. Department of Transportation. In accordance with CSLA provisions FAA license is required for launch/reentry in US; by US citizen outside US; by US citizen outside US and outside territory of foreign country, unless foreign country's government has an agreement with US on jurisdiction over the launch or operation; and by US citizen in foreign country if US has jurisdiction by agreement with government of foreign country. Thus, national activity includes both the activity of US citizens and activity that is carried on from US territory regardless of national identity of individuals or legal entities.

A licensee must obtain third party liability insurance or demonstrate financial ability to pay maximum probable loss arising from third party claims.

The US Minister of Transport supervises and coordinates operations on commercial space launches and reentries, is responsible for issuance and transfer of licenses authorizing such operations, for protection of national health and security, property safety and interests of national security and foreign policy of the US.

United Kingdom. The Outer Space Act was adopted on 18 July 1986. The

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Act applies to United Kingdom nationals, Scottish firms, and bodies incorporated under the law of any part of the United Kingdom (p. 2(2) of the Act). The application of the Act is extended in particular to Isle of Man, Guernsey, Cayman Islands, and Bermuda (by the corresponding statutory instruments[18]).
The Secretary of State is empowered to license launching or procuring the launch of a space object, operating a space object or any activity in outer space. The Secretary of State exercises its powers through British National Space Center (BNSC).

In *Russian Federation* licensing (permission) procedure for the pursuit of space activity in scientific and national-economy purpose is established under Article 9 of the Federal Law of the Russian Federation № 5663-1 about Space Activities (18 July 1993; as in force on 12 December 2006). Subject to licensing shall be space activity of organizations and citizens of Russian Federation or space activity of foreign organizations and citizens under the jurisdiction of Russian Federation, if such activity includes tests, manufacture, storage, preparation for launching and launching of space objects, as well as control over space flights. Carrying out space activity by an organization or a citizen without a license or in willful violation of the terms of the license shall be punishable by virtue of the legislation of Russian Federation. Actions of state bodies to license space activity may be claimed in the court of law or in the arbitration tribunal.
In accordance with Article 6 of the aforementioned Law, the Russian Space Agency shall, within its competence, issue licenses for the types of space activity. This provision is confirmed in the List of Federal Licensing Bodies, adopted by Decree № 326 of the Government of the Russian Federation about Types of Activities Licensing (11 April 2000; as in force on 17 November 2000) and in the Regulation on Licensing of Space Activities, adopted by the Resolution № 403 of the Government of Russian Federation (30 June 2006).
Types, forms, and terms of licenses, the conditions and procedures for their issue, withholding, suspension or termination, as well as other questions of space activity licensing are governed by the Regulation on Licensing of Space Activities.

The growing role of national space legislation in commercial space activities regulation can not be denied, but nevertheless it shall have a "supportive" character since solely national legislation is insufficient for regulation of global activity in the interests of the whole humanity.

3. Space Law Cases And Arbitration Practice

Space law cases and arbitration practice could also be considered as potential legal sources of international space private law for those states where they are applicable.

III.SUBJECTS OF THE INTERNATIONAL SPACE PRIVATE LAW.

Subjects of the international space private law are individuals, legal entities, states and international organizations. Of major interest are non-governmental entities.
In space law there is a specific correlation between public and private law aspects. It is challenged by certain character of the involved relations (e. g. only space law envisages absolute liability without indication of its limits[19]; states bear international

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responsibility for all national activities in outer space (under Article VI of the Outer Space Treaty); cosmonautics effects interests of the whole global community etc.).

Interrelations of subjects of international space private law are predetermined by articles VI and VII of the Outer Space Treaty. In compliance with these articles states bear international responsibility also for space activities carried on by non-governmental entities (private companies). Therefore such activity shall be carried on under continuing supervision of the corresponding State Party to the Outer Space Treaty.

Subjects of international space private law in their turn are obliged to comply with international and national law provisions regulating space activities.

In view of the perspective of space tourism development actual also becomes the issue of legal status of space tourists.

PERSPECTIVES

Definition of international space private law as a body of legal norms comprising substantive law norms and rules of conflict of laws regulating connected with space activity property and personal non-property relations, complicated with "foreign element" is still relative.

However, international space private law can be already characterized by its specific subject of legal regulation and methods of legal regulation and this is necessary and sufficient for formation of a new branch of law.

In light of actual tendencies the Convention on International Interests on Mobile Equipment as Applied to Space Assets is of special importance. This document, consisting of typical for private international law substantive law norms and rules of conflict of laws, is one of the first potential internationally applicable legal sources of international space private law.

In view of increasingly growing space activities of non-governmental entities actual are issues of space activity licensing and insurance, responsibility of non-governmental entities. At present all this issues are more or less regulated in national space legislation. And moreover of special interest are issues of private property and intellectual property rights in space law.

The growing commercial space activity, various international space projects require and already get, to some extent, necessary legal regulation, but it is still much to be done[20].

The author thinks and hopes that international space private law could gradually fill in the existing "vacuum" in the regulation of space activities and provide adequate legal regulation for private space activities.

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[1] А. В. Яковенко/ Прогрессивное развитие международного космического прав. Актуальные проблемы. – «Международные отношения» - Москва, 1999, Предисловие – Ю. М. Колосов -С. 8. (A. V. Yakovenko/ Progressive Development of the International Space Law. Actual Problems. – "International Relations"- Moscow, 1999. Foreword by Prof. Dr. Yuri M. Kolosov- P. 8)

[2] See the Article VI of the Outer Space Treaty.

[3] Международное космическое право/ Отв. редакторы проф. Жуков Г. П. и проф. Колосов Ю. М.. - «Международные отношения». – М.,1999 г., С.133. (International Space Law/Edited by Prof. Dr.

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Gennady P. Zhukov and Prof. Dr. Yuri M. Kolosov. – "International Relations". – Moscow, 1999. - P. 133)

[4] Кунц О. Международное космическое право и международное частное право/Новое в космическом праве (на пути к международному частному космическому праву)// Отв. редактор проф. Верещетин В. С. – М., 1990. – С.13. (O. Kunc/International Space Law and Private International Law/Novelty in Space Law (Towards International Private Space Law)//Edited by Prof. V. S. Vereshetin – Moscow, 1990. –P.13).

[5] In this paper general theoretical issues of private international law are not covered. The author's aim is to raise the issue of formation of international space private law.

[6] International Space Law/Edited by Prof. Dr. Gennady P. Zhukov and Prof. Dr. Yuri M. Kolosov. – "International Relations". – Moscow, 1999. - P. 7.

[8]For the status of Convention please see: http://www.unidroit.org/english/implement/i-2001-convention.pdf

[9] For the Convention background please see: http://www.unidroit.org/english/workprogramme/study072/main.htm

[10] For the status of the Aircraft Protocol please see: http://www.unidroit.org/english/implement/i-2001-aircraftprotocol.pdf

[11] For the status of the Rail Protocol please see : http://www.unidroit.org/english/implement/i-2007-railprotocol.pdf

[12] The text of the preliminary draft Protocol used in this paper is that revised by the Committee of governmental experts at its first session (cf.C.G.E.SpacePr./1/Report/Appendix VI).

[13] In line with UNIDROIT practice, the Space Working Group at its fifth session, taking the view that the entry into force of the Convention as applied to space assets should be accomplished with the minimum number of ratifications/accessions possible, suggested that the appropriate number would be five.

[14] UN Document A/AC.105/C.2/L.225

[15] See UN Document A/AC.105/917, P. 18

[16] On this issue please see UN Document A/AC.105/C.2/2003/CRP.6. P.41,47.

[17] See UN Document A/AC.105/917, P. 18

[18] Statutory Instrument 1990 № 596 Outer Space Act 1986 (Isle of Man); Statutory Instrument 1990 № 248 Outer Space Act 1986 (Guernsey) Order 1990; Statutory Instrument 1998 № 2563 Outer Space Act 1986 (Cayman Islands) Order 1998; Statutory Instrument 2006 № 2959 Outer Space Act 1986 (Bermuda) Order 2006.

[19] International Space Law/Edited by Prof. Dr. Gennady P. Zhukov and Prof. Dr. Yuri M. Kolosov. – "International Relations". – Moscow, 1999. - P. 219.

[20] Actual and still "open", to some extent, also are the issues of private property and intellectual property rights in space law, legal status of space tourists etc.