The Negotiations at Berlin – What Promise for the Future?

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A. Brief Review of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin Protocol)

National laws on secured financing vary widely from one country to another. Some jurisdictions are highly supportive of security interests, whereas others are more hostile or restrictive.[1] This does not cause that much problems in relation to the financing of high value equipment, as long as it does not cross borders. If it does, however, security interests may lose their validity, considering that according to the traditional conflict of law rule in relation to proprietary rights – the *lex rei sitae* principle – security interests are governed by the law of the State where the property is located.[2] Thus, potential financiers might be discouraged from extending credit or credit costs may substantially increase.[3]
In the light of these shortcomings in 1988 the International Institute for the Unification of Private Law (UNIDROIT) included the subject of security interests in mobile equipment in its Work Programme with the aim to stimulate investment by means of an international legal regime that provides secured lenders, conditional sellers and lessors with an autonomous international interest in high value mobile equipment.[4]
It was decided to split the future instrument into, on the one hand, a Convention providing for general rules and, on the other, asset-specific Protocols that

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1 *Goode*, Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets, 2013, 12, para. 2.5.

2 *Cuming*, International Regulation of Aspects of Security Interests in Mobile Equipment, UNIDROIT Study LXXII – Doc. 1, 1989, 6 et seq; *Heinrich & Pellander*, Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung, in: IPRax 2013, 384, 384 et seq.

3 *Goode*, Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets, 2013, 12, para. 2.5.

4 The Preparatory Work of the Cape Town Convention and its three Protocols is available at: <www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR4>.

shall adapt the general rules to the needs of the respective industry sector. Accordingly, a general Convention governing all kinds of mobile equipment was adopted in Cape Town on 16 November 2001 – Convention on International Interest in Mobile Equipment (Cape Town Convention). The first asset-specific Protocol – the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Aircraft Protocol) – was adopted together with the Cape Town Convention. The second one – the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock – was adopted in Luxembourg on 23 February 2007.

After many years of preparatory work and five sessions of a Committee of Governmental Experts on 9 March 2012 the last of the so far three asset-specific Protocols to the Cape Town Convention – the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin Protocol) – was opened for signature within the scope of a diplomatic Conference held in Berlin.

The International Interest created under the Cape Town Convention and its Protocols is protected by registration in an International Registry to be established in relation to each subsequent Protocol.[5] The Cape Town regime does, moreover, provide for default remedies in order to enable a creditor to enforce its international interest.[6] Taking into account the distinctive features of space financing, the general rules on both the registration system and default remedies needed to be adapted.

As far as the registration of an international interest in a space asset is concerned it needs to be highlighted that under the Cape Town regime it is required that the asset is "uniquely identifiable".[7] In this regard the Aircraft Protocol simply refers to the manufacturer's name, generic model designation and serial number.[8] For space assets, however, these criteria are not suitable. Serial numbers are often not used and even if they are they may not be visible when a space asset is orbiting in outer space. Therefore, a sub-committee of the Committee of Governmental Experts dealing with the identification criteria for space assets suggested additional data , most of which were taken from the Convention on Registration of Objects Launched into Outer Space.[9] These data are the name of the asset, its orbital parameters such as inclination, nodal period, apogee and perigee, the country of administration in respect of the space asset, the ground station and the date of launch. Nevertheless, it was, finally, decided to leave it up to the regulations on the operation of the International Registry to be adopted by its Supervisory Authority to determine the criteria for identification of space

5 Art. 16 Cape Town Convention.

6 Chapter III Cape Town Convention.

7 Art. 2 (2), Art. 7 c) Cape Town Convention.

8 Ar. VII Aircraft Protocol.

9 *Goode*, Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets, 2013, 206, para. 3.100.

assets for registration purposes.[10] This approach claims to allow a flexibility to meet the needs of the rapidly developing space sector, which would be missing if the identification criteria were to be set in stone in the Berlin Protocol.[11]
A matter which is strongly linked to the identification of a space asset for the purpose of registration is the scope of application of the Berlin Protocol with respect to a payload and a part of a spacecraft or payload such as a transponder. In this regard Art. I (2) k) of the Berlin Protocol requires that a payload and a part of a spacecraft or payload needs to be separately registrable. In other words, the scope of application of the Berlin Protocol with respect to those types of assets will be governed by the identification criteria for registration purposes to be determined by the Supervisory Authority.[12] The Drafting Parties refused an enumerative approach for the definition of the term space asset and the scope of application of the Berlin Protocol respectively to ensure that valuable components will not be excluded.[13]
In relation to the remedies of the creditor in case of default several issues linked to the transfer of ownership in outer space are to be taken into account, namely that

- a creditor cannot (yet) take physical possession of the asset while in outer space;
- the enforcement of an international interest in a space asset that is physically linked with another asset, such as a transponder, may impair or interfere with the operation of the other asset;
- the operation of a space asset is by virtue of Art. VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (OST) subject to national authorisation;
- the use of orbital positions and frequencies is subject to national authorisation;
- space assets are regularly subject to export control regulations;
- the enforcement of an international interest may affect national security;
- space assets regularly provide essential public services, such as weather broadcasting.

Due to the impracticability of repossessing a space asset while in outer space creditors attach greater value to the revenue steam accruing to the debtor from third parties, which can be assigned to the creditor as additional collateral. This is the reasoning why the Berlin Protocol does, in contrast to the Protocols on

10 Art. XXX Berlin Protocol.
11 *Goode*, Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets, 2013, 206, para. 3.100.
12 Art. XXX Berlin Protocol.
13 *Schmidt-Tedd & Pellander*, From Cape Town to Berlin – A new instrument for financing space assets, in: Aviation & Space Journal 2012, 32, 34.

aircraft equipment and railway rolling stock, provide for elaborate provisions by which the debtor can assign its claims against third parties to the creditor.[14] With regard to the issue of competing rights in physically linked assets the Berlin Protocol gives priority to inter-creditor agreements. In absence of such an agreement the creditor may not enforce an international interest in a physically linked asset so as to impair or interfere with the operation of another asset, if the international interest in the other asset has been registered prior to the international interest being enforced.[15]

The exercise of default remedies shall, moreover, not affect the powers the Contracting States. Art. XXVI Berlin Protocol makes it clear that the Protocol does not affect the right of a Contracting State to authorise and supervise its national space activities, as required by Art. VI OST, nor does it limit the right of the Contracting States to authorise the use of orbital positions and frequencies. Art. XXVI Berlin Protocol does, furthermore, stipulate that the Berlin Protocol shall not "be construed so as to require a Contracting State to recognise or enforce an international interest in a space asset when [it] [...] would conflict with its laws and regulations concerning: (a) the export of controlled goods, technology, data and services; or (b) national security".

Finally, one should bear in mind that the enforcement of an international interest in a space asset may make the space asset unavailable for the provision of a public service. Not surprisingly, the inclusion of a provision limiting the right of the creditor to exercise default remedies with respect to space assets providing essential public services was one of the most controversial issues from the very beginning of the drafting negotiations. Such a provision needs to balance the interest of States in maintaining essential public services and the right of the creditor to be paid.[16] The Drafting Parties, finally, agreed on the compromise that a creditor shall not exercise default remedies in a way that would make the space asset unavailable for the provision of a public service prior to the expiration of a period from three to six month, which shall be specified by a Contracting State in a declaration to be made at the time of ratification, acceptance, approval or accession to the Berlin Protocol.[17]

These are generally speaking the modifications and specifications that have been made on the general rules laid down in the Cape Town Convention in order to address the specific features of space financing and to meet the needs of the commercial space, financial and insurance communities.

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14 Art. IX et seq. Berlin Protocol.

15 Art. XVII (3) Berlin Protocol.

16 *Schmidt-Tedd & Pellander*, From Cape Town to Berlin – A new instrument for financing space assets, in: Aviation & Space Journal 2012, 32, 35.

17 Art. XXVII Berlin Protocol.

B. European Union (EU)[18] Competences and the Berlin Protocol

Most of the matters governed by the Cape Town Convention and the Berlin Protocol fall under the competence of the EU Member States. Only some minor matters addressed by the Cape Town Convention and the Berlin Protocol, however, are under the competence of the EU.
These matters are:
- jurisdiction and the recognition of judgements in civil and commercial matters;[19]
- insolvency proceedings;[20] and
- law applicable to contractual obligations.[21]

In order to ensure that the Cape Town Convention and its Protocols are applied in conformity with EU Law the EU, on the one hand, negotiated those provisions subject to EU law on behalf of its Member States. On the other, those provisions which may contravene EU Law are subject to a declaration to be made at the time of ratification, acceptance, approval of, or accession. Those declarations are to be made by the EU on behalf of itself and its Member States.[22] As a matter of EU Law Member States shall apply those provisions in the manner specified by the EU by virtue of its declarations.[23] Both the participation of the EU in the negotiations and the declarations to be made by the EU, thus, provide for evidence that the Cape Town Convention and its Berlin Protocol will not contravene EU Law.
One example for a matter that is within the competence of the EU is the choice of law the law governing contractual obligations, which is subject to Regulation (EC) 893/2008 of 17 June 2008 (Rome I). According to the three Protocols to the Cape Town Convention Contracting States are free to choose the law governing their contractual obligations.[24]
Under the Aircraft and Railway Protocol the respective provisions are subject to an opt-in declaration, whereas the provision on the choice of law in the Berlin Protocol is subject to an opt-out declaration.
In relation to the Aircraft Protocol the EU stated in the decision of the Council on the conditions of accession to the Cape Town Convention and the Aircraft Protocol that "[a]t the time of accession to the Aircraft Protocol the Community will not make a declaration pursuant to Art. XXX (1) concerning the ap-

18 References to the EU referring to the time before the entry into force of the Treaty of Lisbon should be read as references to the European Community.
19 Regulation (EC) No 44/2001.
20 Regulation (EC) No 1346/2000.
21 Regulation (EC) 893/2008 (Rome I).
22 *Goode*, Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Space Assets, 2013, 144 et seq., para. 3.100.
23 *Ibid.*
24 Art. VIII Aircraft Protocol; Art. VI Luxembourg Protocol; Art. VIII Berlin Protocol.

plication of Art. VIII" on the choice of the law governing contractual rights and obligations.[25] In other words, the EU made it clear that the choice of the law governing contractual obligations shall be governed by Rome-I. Accordingly, EU Law on the choice of law governing contractual rights and obligations is not affected by the implementation of the Cape Town Convention and the Aircraft Protocol. It is most likely that the EU will make a declaration to the same effect when it becomes party to the Berlin Protocol.[26]

It is true that in the light of competences of the EU on some minor matters governed by the Berlin Protocol EU Member States shall according to EU Law refrain from ratifying, accepting, approving or acceding to the Berlin Protocol as long as the EU did not become a party to this instrument.[27] This does, however, not lead to the conclusion that Member States are not entitled to promote the Berlin Protocol through its signature of the Berlin Protocol, which is as a matter of public international law to be considered a political statement rather than a legally binding commitment.[28] The signature of the Berlin Protocol does neither hamper EU Law nor does it limit the ability of the EU to make declarations on those minor matters falling under its competence to the effect that the Protocol will be implemented in conformity with EU Law. In this regard it shall be highlighted that State practice in relation to the signature of the Cape Town Convention, the Aircraft and the Railway Protocol provides for evidence hat Member States are free to sign the Berlin Protocol at their own discretion.[29] It is, thus submitted that the EU – having competence over some minor matters of the Berlin Protocol – is not entitled to decide on the signature of the Berlin Protocol by its Member States, in particular, taking into consideration that most of the matters governed by the Berlin Protocol are under the competence of the EU Member States.

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25 Council Decision of 6 April 2009 on the accession of the European Community to the Convention on International Interests in mobile equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001 (2009/370/EC).

26 During the diplomatic Conference the representative of the EU made a statement to this effect.

27 *Bollweg & Schultheiß*, Das Berliner Weltraumprotokoll, in: German Journal of Air and Space Law (ZLW) 2012, 389, 401; *Heinrich & Pellander*, Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung, in: IPRax 2013, 384, 390.

28 *Ibid.*

29 Luxembourg even acceded to the Cape Town Convention before the EU did become a party to the Convention. The status of the Cape Town Convention is accessible at: <www.unidroit.org/english/implement/i-2001-aircraftprotocol.pdf>.

C. Implementation of the Berlin Protocol

Together with the Protocol the Berlin Conference adopted by virtue of the Final Act[30] five Resolutions on
- setting up of the Preparatory Commission;[31]
- establishment of the Supervisory Authority;[32]
- Regulations of the International Registry;[33]
- reasonable Discounts on Exposure Rates;[34]
- Official Commentary.[35]

The Final Act was signed by 25 States and by one regional economic organisation, namely the EU.
The five Resolutions are of particular concern for the implementation of the Protocol and shall be briefly reviewed in the following.

I. Resolution 1

Resolution 1 resolves to establish a Preparatory Commission (PrepCom) to act with the full authority as Provisional Supervisory Authority for the establishment of the International Registry for Space Assets – the key element of the Berlin Protocol.
Upon entry into force of the Berlin Protocol the PrepCom's task ends and the Supervisory Authority takes over.
It will be composed of persons having the necessary qualifications and experience nominated by 1/3 of the negotiating States.
Resolution 1 explicitly invites the International Telecommunication Union (ITU), the International Civil Aviation Organization (ICAO), the Intergovernmental Organisation for International Carriage by Rail (OTIF) and representatives of the commercial space, financial and insurance communities to participate as observers.
The participation of the ICAO, which is the Supervisory Authority of the Aircraft Protocol, and OTIF, which will become the Supervisory Authority of the Railway Protocol may serve the purpose to adapt the procedures employed

30 UNIDROIT 2012 – DCME-SP – Doc. 43, available at: <www.unidroit.org/english/workprogramme/study072/spaceprotocol/conference/documents/dcme-sp-43-e.pdf>.
31 Resolution 1 – Relating to the Setting Up of the Preparatory Commission for the Establishment of the International Registry for Space Assets.
32 Resolution 2 – Relating to the Establishment of the Supervisory Authority of the International Registry for Space Assets.
33 Resolution 3 – Relating to the Regulations of the International Registry for Space Assets.
34 Resolution 4 – Relating to the Provision of Reasonable Discounts on Exposure Rates to Debtors by Financing Organisations.
35 Resolution 5 – Relating to the Official Commentary on the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets.

in establishing the International Registry for aircraft objects and for railway stocks, as mandated by the preamble of Resolution 1.
The Prep Com acts, as stated above, provisionally with full authority as Provisional Supervisory Authority. In this regard it has three specific functions, namely

- to set up of the international registration system under an objective selection process and that it become ready to be operated with a target date of three years from the adoption of the Protocol, by the time of the entry into force of the Protocol;
- to ensure the necessary liaison and co-ordination with the commercial space, financial and insurance communities (user community); and
- to work on other matters relating to the International Registry for Space Assets as may be required.

II. Resolution 2

The ITU Council authorised the Secretary General to attend the Berlin Conference and to express the interest for ITU to become the Supervisory Authority without prejudice to a final decision, as it would be up to the ITU Plenipotentiary Conference 2014 to decide.
The Supervisory Authority's tasks are *inter alia*

- to appoint the registrar and to establish the International Registry for Space Assets[36] and
- to establish a commission of experts and entrust it with the task of assisting the Supervisory Authority in the discharge of its functions.[37]

The function of the Supervisory Authority is, thus, key for the implementation of the Berlin Protocol.
Resolution 2 resolves to invite the governing bodies of the ITU to consider the matter of the ITU becoming Supervisory Authority upon or after the entry into force of the Protocol and take the necessary action, as appropriate; and to inform the Secretary-General of UNIDORIT accordingly.
In its 2012 session the ITU Council authorised the Secretary General to continue to express interest in the ITU becoming the Supervisory Authority, noting that the matter of whether or not ITU could become the Supervisory Authority should not be prejudged at this stage. In its 2012 session the ITU Council also authorised the Secretary-General or his representative to participate in the work of the PrepCom as an observer to obtain information that will assist the ITU Plenipotentiary Conference in its deliberations.
Resolution 1, however, provides a fall-back option by resolving that in the event of the governing bodies of ITU deciding that ITU should not become the Supervisory Authority the General Assembly of UNIDROIT should appoint another International Organisation or entity to act as Supervisory Authority.

36 Art. 17 Cape Town Convention.
37 Art. XXVIII Berlin Protocol.

III. Resolution 3

The limitation of remedies in relation to components was one of the key issues within the drafting negotiations of the Berlin Protocol.
Taking into account that a payload or parts thereof are under the scope of the Protocol the Drafting Parties agreed that there is a need to ensure that the enforcement of an international interest in a space asset does not impair or interfere with the operation of another asset.[38]
In the light of this provision it is, however, required that a creditor can identify physically linked assets and the interests registered against such assets.
Therefore, a joint proposal submitted by the delegation of Germany and of the USA proposed to adopt a Resolution, which resolves to invite the Supervisory Authority to ensure that, so far as practicable, any search of the International Registry relating to physically linked assets reveal all international interests registered against such assets. This proposal met the approval of the Berlin Conference.

IV. Resolution 4

Resolution 4 "[r]esolves to encourage all Contracting States, and international, national, as well as private financing institutions, to assist the developing Contracting States by providing them with reasonable discounts or rebates on any exposure rates or similar charges levied by such financing institutions". Thereby the drafting parties agreed on the need to strengthen debtor's rights in order to achieve the objectives of the Berlin Protocol, i.e. to stimulate investment, in particular in developing countries.

V. Resolution 5

Resolution 5 resolves to request *Sir Roy Goode*[39] to prepare an official commentary on the Berlin Protocol. As requested by Resolution 5 the official commentary has been "circulated for comment in draft form among the States and observers that participated in the [diplomatic] Conference". Its publication has been authorised in April 2013.

D. The Way Forward

The entry into force of the Berlin Protocol does, on the one hand, require a number of ten ratifications[40] and, on the other, that the International Registry is fully operational.[41] Accordingly, the work to be done in relation to the estab-

38 Art. XVII (3) Berlin Protocol.

39 Reporter of the diplomatic Conference.

40 Four States initiated at the end of the conference an untypical high number of necessary ratifications for the entry into force of the Berlin Protocol Art. XXXVIII (1) a) "after […] tenth instrument of ratification, acceptance, approval or accession […]" in contrast to eight for the Aircraft Protocol (Art. XXVIII), four for the Railway Protocol (Art. XXIII) and three for the Convention (Art. 49). The original proposal of Canada asked for even 20 ratifications for the entry into force of the Protocol.

41 Art. XXXVIII (1) b) Berlin Protocol.

lishment of the International Registry is of particular importance and shall be briefly highlighted in the following.
As stated above, it is up to the PrepCom – acting with the full authority as Provisional Supervisory Authority – to establish the international registration system.
The first session of the PrepCom took place in Rome at the headquarters of UNIDROIT on 6 and 7 May 2013.
Despite some formal procedures such as the opening of the session, the adoption of the agenda and the adoption of the Commission's Rules of Procedure, five substantial issues have been on the agenda, namely

- election of the Chair and Vice-Chair of the PrepCom;
- consideration of matters relating to the appointment of a Supervisory Authority;
- establishment of a Working Group to develop draft regulations for the International Registry;
- establishment of a Working Group to draft a request for proposal for the selection of a Registrar;
- time-table and planning of further work.

As far as the election of the Chair and Vice-Chair is concerned the PrepCom elected *Sergio Marchisio*[42] to the chair. One of the authors – *Bernhard Schmidt-Tedd* – was elected first Vice-Chair.
On the matters relating to the appointment of a Supervisory Authority the ITU representative reported that following the diplomatic Conference ITU Secretary General continued to express interest in the possibility for ITU to accept the role of Supervisory Authority without prejudice to a final decision by the Plenipotentiaries. The ITU representative stressed the importance of determining in advance a strict timeline to be able to take an informed decision on the issue in October 2014. It was underlined that good progress of the work undertook by the PrepCom would be needed to allow a decision of the Plenipotentiaries by 2014.
The PrepCom, moreover, established a Working Group to develop draft regulations for the International Registry under the aegis of *Igor Porokhin*[43], who was elected to the chair. It was agreed that *Sir Roy Goode* shall produce a first draft with proper advice from the other members of the PrepCom. Two major areas of concern were highlighted, namely,

- the elaboration of appropriate criteria for the identification of space assets for registration purposes;[44]
- the provision of rules on assignment and reassignment of the interest.

42 Italy, former Chairman of the Commission of the Whole during the Berlin Conference.
43 Russia, Partner, Inspace Consulting L.L.C.
44 Art. XXX Berlin Protocol.

Furthermore, a Working Group to draft a request for proposal for the selection of a Registrar was established under the chairmanship of *Bernhard Schmidt-Tedd*. It was agreed that the Working Group should deliver a draft request for proposal for the selection of a Registrar, taking duly into account the development of the discussion within the Working Group on registry regulations. The Working Group, moreover, should collect the most appropriate documents to be used as a model for the request for proposal

The PrepCom, finally, agreed on a strict timeline on each of the matters addressed and agreed in the meanwhile to reconvene at the end of January 2014 for its 2nd session.[45]

45 This paper was concluded in December 2013. For the most recent development the authors refer to <www.unidroit.org>.