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How the Rescue and Return Agreement Can Protect (and Harm) the Interest of a Creditor under the Cape Town Convention

*Prof. Mark Sundahl**

This paper examines how the operation of the *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Space* (the Rescue and Return Agreement) could benefit, and in certain cases harm, a creditor who holds an international interest in a space object under the *Convention on International Interests in Mobile Equipment* (the Cape Town Convention). The benefits flowing from the Rescue and Return Agreement could arise in several situations and would enhance the Cape Town Convention's facilitation of commercial transactions. For example, the duty of a state party to the Rescue and Return Agreement to retrieve an errant space object and return it to the launching authority could assist the creditor in the repossession of the object upon the debtor's default. Although satellites that reenter the atmosphere and return to Earth will not survive, a reusable space capsule (or a space plane) may very well make the landing without suffering damage. In such a situation, the Rescue and Return Agreement could be of benefit to a creditor seeking to enforce its remedies against the space capsule or space plane under the Cape Town Convention. The paper will also explore those scenarios in which the operation of the Rescue and Return Agreement could harm the interests of a creditor. For example, a state may be required to return an errant space plane to a state that is not a party to the Cape Town Convention, thus depriving the creditor of the ability to exercise its remedies under the Convention.

I Introduction

The extension of the Convention on International Interests in Mobile Equipment (commonly referred to as the Cape Town Convention) to the financing of space assets by way of the Space Assets Protocol broke new ground in international space law.¹ Unlike the five existing U.N. treaties on space law which address governmental rights and obligations, the Cape Town Convention governs

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private transactions in space. In particular, the Convention creates a new international regime for the priority and enforcement of leases, conditional sales, and security interests in space assets.² These transactions have in common an “asset-backed” nature that grants the lessor, conditional seller, or chargee (collectively, the “creditor”) recourse to the asset that is the subject of financing.

In light of the different subject matter addressed by the Cape Town Convention, as opposed to the existing U.N. treaties, there is little opportunity for conflict between the treaties.³ Nevertheless, some intersections (and even some potential conflicts) do arise and should be kept in mind by practitioners involved in the application of the Cape Town Convention. In the event of a conflict, the Space Assets Protocol gives explicit primacy to the U.N. treaties, which could, in turn, allow for the operation of the treaties to potentially interfere with the application of the Cape Town Convention.⁴

Most of the discussion in existing literature about the intersection of the Cape Town Convention and existing space law focuses on the Liability Convention and the Registration Convention. In some cases, positive intersections arise from certain features of the Cape Town Convention that complement the operation of existing space law. For example, the attribution of liability can be assisted by the information contained in the registration of the creditor’s interests

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- 1 Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. Treaty Doc. No. 108-10, available at <www.unidroit.org/english/conventions/c-main.htm> [hereinafter Cape Town Convention]; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, in *Final Act of the Diplomatic Conference for the Adoption of the Draft Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, UNIDROIT Doc., DCME-SP-Doc. 43 (9 March 2012), available at <www.unidroit.org/english/workprogramme/study072/spaceprotocol/conference/documents/dcme-sp-43-e.pdf> [hereinafter Space Assets Protocol].
 - 2 The Space Assets Protocol also expands the scope of the Convention to include the sales of space assets. Space Assets Protocol, art. IV.
 - 3 van Fenema, P., “The UNIDROIT Space Protocol, the Concept of ‘Launching State’, Space Traffic Management and the Delimitation of Outer Space (Report of the 41st Session of the UNCOPUOS Legal Subcommittee)”, 27 *Air & Space Law* 266, 275 (2002); Larsen, P.B., “UNIDROIT Space Protocol: Comments on the Relationship between the Protocol and Existing International Space Law, in *Proceedings of the Forty-Fourth Colloquium on the Law of Outer Space* 187, 193 (2002); Larsen, P.B., “Critical Issues in the UNIDROIT Draft Space Protocol”, in *Proceedings of the Forty-Fifth Colloquium on the Law of Outer Space* 2, 3 (2003); Ribbelink, O.M., “The Protocol on Matters Specific to Space Assets”, *European Review of Private Law* 37, 41 (2004); Yun, Z., “Revisiting Selected Issues in the Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets”, 76 *Journal of Air Law & Commerce* 805, 827 (2011). For the views of the UNCOPUOS Legal Subcommittee see U.N. Committee of Peaceful Uses of Outer Space, Report of the Legal Subcommittee on its forty-first session, U.N. Doc A/AC.105/787 (2002).
 - 4 Space Assets Protocol, art. XXXV.

under the Cape Town Convention. In other cases, the commercial transactions contemplated by the Cape Town Convention can interact with the treaties to exacerbate certain tensions in the fabric of existing space law. For example, the Convention was designed to facilitate sales and leaseings that will separate the control of the space asset from the launching state (since the launching state will no longer have control over a satellite after the transfer of control to an entity that is not under the jurisdiction of the launching state). This creates a lack of fairness when the launching state is left strictly liable for any damage caused by the asset in airspace or on the surface of the earth pursuant to the Liability Convention.

The Cape Town Convention's intersections with the Rescue and Return Agreement have received less attention.⁵ There are, in fact, several scenarios in which the Rescue and Return Agreement (as well as the provisions of the Outer Space Treaty regarding the duty to return errant space objects) may be implicated in a transaction governed by the Cape Town Convention. Most of these scenarios involves the operation of the Rescue and Return Agreement to the benefit of the holder of an international interest, while other situations may arise in which the Rescue and Return Agreement may operate in a manner that would be detrimental to the interests of a creditor.⁶

II Remedies under the Cape Town Convention

As mentioned above, the remedies provided under the Cape Town Convention and the Space Assets Protocol allow for the preservation of the value of the asset and the creditor's eventual recourse to the asset. In the event of a debtor's default on its obligations under a lease, conditional sale, secured loan, the creditor has the right to pursue these remedies.⁷ For example, in the case of a creditor who holds a security interest in a satellite to secure a loan obligation of the satellite operator, the creditor has the right to take possession or control of the satellite and sell (or lease) the satellite to another operator in the event of the debtor's default.⁸ Under certain circumstances, the creditor also has the option of taking title to the satellite in satisfaction of all, or part, of the loan

5 This intersection between existing space law and the Cape Town Convention has been touched upon by Larsen and Heilbock. Larsen, P.B., and Heilbock, J.A., "UNIDROIT Project on Security Interests: How the Project Affects Space Objects", 64 *Journal of Air Law & Commerce* 703, 719 (1999).

6 For a thorough discussion of the duty to rescue astronauts and return space objects see Sundahl, M.J., "The Duty to Rescue Space Tourists and Return Private Spacecraft", 35 *Journal of Space Law* 163 (2009).

7 Cape Town Convention, arts. 8(1), 9(1) & 10.

8 *Id.* art. 8(1). The creditor can also collect the proceeds from the continued operation of the satellite. *Id.*

obligation.⁹ In the event of default under the terms of a conditional sale or lease of the satellite, the seller or lessor has the right to take possession or control of the asset and terminate the agreement.¹⁰ Interim relief is also available in the event that the enforcement of one of the primary remedies is stalled in litigation. In this event, the creditor has the right to seek an order from the court to preserve the value of the asset, take possession or control of the asset, immobilize the asset, lease the asset, or manage the asset.¹¹ Whether the ability of the creditor to pursue these remedies is enhanced or inhibited by the duty of states to return assets and rescue astronauts under existing space law is the question at hand. But before we reach this question, a summary of the duty to rescue and return is provided in the following section.

III The Duty to Rescue Astronauts and Return Space Assets

The duty to return errant space objects is found in multiple places in the space treaties. Article VIII of the Outer Space Treaty requires the return of any space object to the state of registry whenever the object is found outside of that state's jurisdiction, regardless of the circumstances surrounding leading to the finding of the object.¹² Article 5 of the Rescue and Return Agreement restates this duty to return the space objects of another state, but modifies the duty in some respects. First, the space object (or component parts) must, upon request, be returned to the "launching authority" rather than state on whose registry

⁹ *Id.* art. 9(1).

¹⁰ *Id.* art. 10.

¹¹ *Id.* art. 13(1). The types of interim relief are not limited to these examples. *Id.* art. 13(4).

¹² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205, art. VIII [hereinafter Outer Space Treaty]. The duty to return space assets was originally contained in Paragraph 7 of the 1962 Declaration of Principles and in Article VIII the 1968 Outer Space Treaty. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962 (XVIII), U.N. Doc. A/RES/1962 (Dec. 24, 1963), 3 I.L.M. 157, para. 7; Outer Space Treaty, art. VIII. Just one year after the Outer Space Treaty was completed, the Rescue and Return Agreement was concluded in order to elaborate upon the duty to rescue and return that had been established in the Outer Space Treaty. The Moon Agreement also addresses the duty to return space objects by explicitly extending the provisions of the Rescue and Return Agreement to objects found on the Moon or other celestial bodies. Agreement Governing Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 3, art. 12(2) [hereinafter Moon Agreement].

the object is carried.¹³ The term “launching authority” is defined as “the State responsible for launching” the object.¹⁴

Second, Article 5 of the Rescue and Return Agreement requires a state “which receives information or discovers that a space object or its component parts has returned to Earth in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State” to notify the launching authority and the Secretary-General of the United Nations.¹⁵ Third, Article 5 requires a state on whose territory a spacecraft lands to “take such steps as it finds practicable to recover the object” upon the request of the launching state.¹⁶ Finally, Article 5 places the cost of recovery and return upon the launching authority.¹⁷

The duty to rescue astronauts as first expressed in Article V of the Outer Space Treaty requires states to give astronauts “all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas.”¹⁸ Article 2 of the Rescue and Return Agreement elaborates on the Outer Space Treaty by requiring that a state “immediately take all possible steps” to rescue spaceflight personnel in the event of an unintended landing in that state’s territory.¹⁹ Article 3 of the Rescue and Return Agreement complements Article 2 by addressing accidents that occur outside of a state’s jurisdiction and provides that if a state discovers that “the personnel of a spacecraft have alighted on the high seas or in any other place not under the jurisdiction of any State, those Contracting Parties which are in a position to do so shall, if necessary, extend assistance in search and rescue operations.”²⁰ Although this provision (and the analogous provision in the Outer Space Treaty) only requires assistance for the rescue of personnel, such rescue actions are likely to result in the retrieval of the spacecraft as well, which would only benefit any creditor with an interest in the spacecraft. A contracting state also has the duty to inform the launching authority and the Secretary-General of the United Nations in the event that it learns that a spacecraft is in distress or has made an unintended landing.²¹

13 Rescue and Return Agreement, art. 5(3).

14 When a space object is launched by an intergovernmental organization, such as the European Space Agency, that organization is treated as the “launching state, provided that that organization declares its acceptance of the rights and obligations provided in the Rescue and Return Agreement and a majority of the states that are members of the organization are contracting parties to the Rescue and Return Agreement and the Outer Space Treaty. *Id.*

15 *Id.* art. 5(1). Although there is a notification requirement in the Outer Space Treaty, it only requires states to inform other states of “any phenomenon ... which could constitute a danger to the life or health of astronauts.” Outer Space Treaty art. V.

16 *Id.* art. 5(2).

17 *Id.* art. 5(5).

18 *Id.* The language of Article V closely tracks the wording of Paragraph 9 of the Declaration of Legal Principles.

19 Rescue and Return Agreement, art. 2.

20 *Id.* art. 3.

21 *Id.* arts. 1, 2, & 3.

As illustrated in the scenarios described below, all of these provisions could be of benefit to the creditor who holds an international interest in a space asset that has landed in a foreign territory. However, there is also at least one scenario in which the duty to return space objects to the launching authority could be contrary to the interests of a creditor with an international interest in the object.

IV How the Duty to Rescue and Return Protects the Interest of a Creditor

The duty to retrieve and return space objects (as well as rescue personnel) can protect the interest of the creditor under the Cape Town Convention after default when the creditor is seeking to enforce remedies against the asset – as well as prior to the default of the debtor. Throughout the discussion below, it should be kept in mind that the duties under the Rescue and Return Agreement, as well as the Outer Space Treaty, are only triggered with respect to those spacecraft or other space objects that have been “launched into outer space.”²² This means that creditors cannot look to the Rescue and Return Agreement or Outer Space Treaty for assistance in recovering errant space assets unless the assets have been launched. A satellite warehoused in a foreign state prior to launch will have to be recovered without the aid of these treaties.

A After Default

Following the debtor’s default (which may be precipitated by an accident involving its space assets), the creditor will likely pursue remedies against the appropriate space asset under the Cape Town Convention. The duty of states to rescue personnel and retrieve and return space assets could assist the creditor in enforcing these remedies.

The duty of a state that is a party to the Rescue and Return Agreement to notify the launching authority upon receiving information of the landing of a space object in its territory or on the high seas could benefit a creditor because such notice could assist in the retrieval (pursuant to the creditor’s right of to take possession of the asset upon default) and preservation of the space asset. Although a reentering satellite would not return to the planet in operational condition, a space plane that was forced down and unable to communicate might only be taken into possession by the creditor due to notification of a state that received information of its descent pursuant to its duties under the Rescue and Return Agreement.

A creditor with an interest in preserving an asset would likewise benefit from the duty imposed on states party to the Rescue and Return Agreement to retrieve the asset in the event that it lands in their territory. Although satellites that reenter the atmosphere and return to Earth will not survive the landing, a reusable space capsule or a space plane that has been forced down in a foreign country due to an emergency may very well make the landing without suffering damage. The retrieval of the asset would be the first step in preserving the value of the asset, provided that the asset would ultimately come back into the hands

²² *Id.* Preamble, First Recital; art. 5(3); Outer Space Treaty, art. VIII.

of the debtor or creditor. This assistance from a foreign state in the recovery of an errant spacecraft may also take place under the Outer Space Treaty and the Rescue and Return Agreement insofar as these treaties require any states party to these treaties to take all possible actions to rescue the personnel of a spacecraft that has landed regardless of where such landing takes place (with some qualifications).²³

The greatest benefit of the Rescue and Return Agreement would flow from the core duty of states party to the treaty to return a space object to the launching authority. The benefit of this duty to return errant space objects is not as significant if both the finding state and the launching authority are parties to the Cape Town Convention and the Space Assets Protocol. In this case, even if the finding state did not return the asset to the launching authority, the creditor could proceed to enforce its international interest against the asset in the courts of the finding state under the Cape Town Convention – and should be able to, for example, enforce a security interest by gaining possession and shipping the asset back to where the auction of the asset will be held.

Imagine the scenario, however, in which a space plane takes off from State X, which is a party to the Cape Town Convention, and is forced down in State Y, which is not a party to the Cape Town Convention, but is a party to the Rescue and Return Agreement. The creditor with an international interest in the space plane would not be able to proceed against the space plane under the Cape Town Convention in State Y. However, State Y would be required under the Rescue and Return Agreement to return the space plane to State X, which would then allow the creditor to proceed under the Cape Town Convention in State X to repossess the space plane and pursue other remedies.

B Prior to Default

Even prior to default of the debtor, the duty to rescue, retrieve and return can benefit a creditor. Prior to the default of the debtor, the creditor's interest is two-fold. First, the creditor wants the debtor's business to succeed so that it is able to stay current on the financial obligations owed to the creditor. Second, the creditor wants the equipment in which it has an international interest under the Cape Town Convention to remain in good condition so that its value is not diminished.

The duty of a state to rescue the crew (and potentially the passengers) of a spacecraft could be of great benefit to the viability of a debtor in the human spaceflight business. Safety is of greatest concern to customers of every type, from governmental agencies purchasing crew delivery services, such as NASA, to individual passengers who are customers of a space tourism company. The duty to retrieve and return a space object could also be of great importance to

23 The Outer Space Treaty requires states to “render to [astronauts] ... all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas.” Outer Space Treaty, art. V. The language of Article V of the Outer Space Treaty closely tracks the wording of Paragraph 9 of the Declaration of Legal Principles.

the continued operation of a space company. For example, the solvency of a company whose operations rely on the repeated launching of a reusable launch vehicle would be endangered if one vessel of a small fleet of vehicles was lost. Even the duty of a state to give notice to the launching authority and Secretary-General could be very valuable because it would allow the company to quickly engage in rescue and retrieval operations itself (assuming the information were ultimately passed on to the company).

V How the Duty to Rescue and Return Could Harm the Creditor's Interest

While all of the preceding scenarios envision the Rescue and Return Agreement aiding the creditor, some scenarios may arise in which a state's obligation under the Rescue and Return Agreement could lead to a result that is contrary to the interests of a creditor. For example, a spacecraft might be returned to a state that is not friendly to the financier and not a party to the Cape Town Convention – and may therefore impede the exercise of the creditor's remedies under the Convention. Consider the scenario in which a company operates a fledgling suborbital space tourism business using a reusable launch vehicle. In this scenario, a bank has extended an operating loan to a company that is secured on the company's space vehicle. The vehicle takes off from State X, which is not a party to the Cape Town Convention. Assume now that the vehicle is forced down unexpectedly in State Y, which is a contracting party to both the Rescue and Return Agreement and the Cape Town Convention. Under the terms of the loan agreement, the emergency landing triggers a default and, as a result, the bank attempts to enforce its international interest under the Cape Town Convention by seeking a court order in State Y to allow the bank to take possession of the vehicle. At the same time, the company tries to avoid the repossession of the vehicle by asking the government of State X to demand the return of the vehicle from State Y pursuant to State Y's obligations under the Rescue and Return Agreement.

What will be the outcome in this scenario? On the one hand, the Cape Town Convention requires the courts of State Y to grant Bank possession. On the other hand, the Rescue and Return Agreement requires State Y to return the vehicle to State X. Under the Cape Town Convention, primacy is given to the Rescue and Return Agreement and the court will likely have to deny the bank's request for an order of repossession. When the space plane is returned to State X, the bank will only be able to proceed against the vehicle under the domestic laws of State X (which may lack the creditor-friendly provisions of the Cape Town Convention).²⁴ This application of the Rescue and Return Agreement may be sought out by debtors who could choose to launch from a state that is not a party to the Cape Town Convention in an attempt to use the Rescue and Return Agreement to deprive its creditors from availing

24 Of course, if Country A were a party to the Cape Town Convention and Protocol, once the asset were returned to State A under the Rescue and Return Agreement, the courts of Country A would have to enforce the creditor's right to enforce its remedies under the Convention. See Larsen 2002, *supra* note 3, at 192.

themselves of the remedies of the Cape Town Convention. Conversely, in order to protect themselves banks would be wise to include in their loan documents a provision prohibiting the debtor from launching from a state that is not a party to the Cape Town Convention.

VI Conclusion

The Cape Town Convention is a promising expansion of space law into the realm of private transactions. Although the Convention occupies a field of law that is not addressed by the existing space treaties, there are intersections that should be taken into consideration by the practitioners and judges who apply the Convention. In short, whoever works with the Cape Town Convention should also understand the greater field of space law in order to comprehend the legal environment in which the Convention operates. As this paper shows, existing space law can work to promote the interests of the creditor under the Cape Town Convention and, in at least one scenario, can be potentially adverse to a creditor's interests.

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