

Identifying the assets under the Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural and construction equipment

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Abstract. The purpose of this article is to analyze the specifics of qualification of objects, the regulation of rights to which is devoted to the new Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural and construction equipment. Methodology: After the analysis, the study uses generalization method to compile comprehensive view on approaches enshrined in the Convention and the Protocol. Results: Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural and construction equipment establishes a new flexible approach, taking into account the specifics of the regulation of rights to these types of equipment, namely, introducing a special category “immovable-associated equipment”. This approach makes it possible to establish a balance between the international interest in the equipment and the interest arising under the internal law of the state where the equipment is located. Conclusions: The Protocol on matters specific to mining, agricultural and construction equipment contains a flexible approach to qualifications for mining, agricultural and construction machines, which could help reduce the number of conflicts of laws and improve the conditions for cross-border commercial activities in this area.

1 Introduction

In the context of the ongoing changes in social relations, including the intensification of cross-border circulation of various types of goods and equipment and an increase in the number of contracts concluded between parties from different states, as a result of which it becomes possible to open a larger number of new high-tech industries, attention to conflict and material legal regulation of security transactions, the subject of which is machinery and equipment. Interest in this topic is also due to the interest of commercial structures in reducing the legal risks of security transactions concluded in respect of expensive machinery

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and equipment and complicated by a foreign element, and in reducing the cost of credit for such transactions.

These circumstances have led to the fact that the issues of legal regulation of rights to various types of machinery and equipment in the field of cross-border activities attracted the attention of the international scientific community and structures engaged in activities in the field of unification of private international law. The work to harmonize these issues resulted in the adoption of the Cape Town convention on international interests in mobile equipment, 2001. Protocols dealing with certain types of machinery and equipment supplement the Convention. Special attention was paid to mining, agricultural and construction equipment, since these categories of equipment are expensive, often subject to international trade and are of great importance for the development of the respective areas of economic activity. To regulate the rights to these facilities, a new Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural and construction equipment was developed. It has not yet entered into force, as there are not enough ratifications for this. The protocol is intended to provide favorable conditions for the implementation of cross-border commercial activities related to security transactions concluded with respect to these types of equipment.

An important aspect of the application of the Protocol is the correct qualification of types of equipment since this determines whether the relevant legal relationship will fall within the scope of the Convention and the Protocol. The qualification of the object in this case is also of great importance for the registration of international interest in it. The provisions of the Protocol reflecting new approaches to the qualification of an object require theoretical comprehension and analysis.

2 Methodology

The article is aimed to tackle practical research problem of qualification of assets in cross-border relations under the Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural and construction equipment. We should note that there's not much research around the problem in the domestic science of private international law. This research is based heavily on the analysis of the Convention on international interests in mobile equipment and the Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural, and construction equipment. The special attention was paid to the rules governing security transactions for certain types of equipment. After the analysis, the study uses generalization method to compile comprehensive view on approaches enshrined in the Convention and the Protocol. The research method of effectiveness analysis of legal regulation is a part of a traditional methodology for this field of research, and the article uses it specifically for issues of legal regulation of security transactions in relation to mining, agricultural and construction machines, enshrined in the text of international legal acts.

3 Results

In terms of the qualifications of types of equipment, Protocol on matters specific to mining, agricultural and construction equipment differs from all other Protocols to the 2001 Cape Town Convention. The multifunctionality of the use of mining, agricultural and construction equipment leads to the impossibility of identifying universal physical and functional criteria inherent exclusively to these types of equipment, which would make it possible to unambiguously identify these objects and thereby ensure the application of the Protocol. That is why, unlike other Protocols, it fixes the definition of agricultural, construction and mining

equipment not through the unique characteristics and functions inherent only in this equipment, but through reference to the Harmonized System Codes of the World Customs Organization. A partial departure from the criteria specified in article 51, paragraph 1, of the Cape Town Convention was thus deemed justified for the purposes of qualifying agricultural, mining and construction equipment.

One of the features of the Protocol on matters specific to mining, agricultural, and construction equipment is the definition of a category of equipment associated with immovables (Article VII of the Protocol), which is new for international conventions in the field of private international law. According to the Protocol a Contracting State must make a mandatory declaration on the application of one of the alternative legal structures - Alternative A, Alternative B or Alternative C - to rights to equipment associated with immovable property located in the territory of that Contracting State.

4 Discussion

4.1 The notion of mining, agricultural and construction equipment according to Harmonized System Codes of World Customs Organization

It seems that the most effective way to resolve conflicts of laws is a large-scale unification and harmonization of legal regulation of security transactions, the subject of which is equipment, including agricultural, construction and mining equipment. In the process of unifying the relevant regulations, the 2001 UNIDROIT Convention on international interests in mobile equipment was adopted. This convention is complemented by Protocols, each of which is dedicated to a different type of equipment, as shown in Table 1:

Table 1. Protocols to the Convention on International Interests in Mobile Equipment.

Protocol to the Convention on International Interests in Mobile Equipment	Date of adoption	Entry into force	Type of assets
Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment	16 November 2001	Entered into force in 73 Contracting Parties	gliders, aircraft engines and helicopters
Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock	23 February 2007	Not in force	railway rolling stock
Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets	9 March 2012	Not in force	space assets (including spacecraft, payloads, etc.)
Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to mining, agricultural, and construction equipment	22 November 2019	Not in force	mining, agricultural and construction equipment in accordance with the Harmonized System Codes of the World Customs Organization

The Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural, and construction equipment, regulating the provisions on mining, agricultural and construction machinery, has not yet entered into force as it does not have a required number of ratifications. But new approaches to the regulation of rights to

equipment, which is the subject of a security transaction, enshrined in the text of the Protocol, require theoretical analysis and comprehension.

In terms of the qualifications of types of equipment, Protocol on matters specific to mining, agricultural and construction equipment differs from all other Protocols to the 2001 Cape Town Convention. Unlike other Protocols, it fixes the definition of agricultural, construction and mining equipment not through the unique characteristics and functions inherent only in this equipment, but through reference to the Harmonized System Codes of the World Customs Organization.

Each of the types of mobile equipment has special characteristics and performs a completely specific function. Aircraft, unlike other categories of mobile equipment, are capable of taking off into the air; they move in the airspace as vehicles. Railway rolling stock also differs in the way it moves in space, namely, only along railway tracks. In the course of their functioning, space vehicles move in the Earth's orbit, which also distinguishes them from all other types of mobile equipment. Thus, these types of equipment, due to their intrinsic nature and their inherent features and functions, made it possible to formulate universal definitions that make it possible to unambiguously distinguish these objects from all other types of equipment. [1] However, this approach turned out to be inapplicable in the case of agricultural, mining and construction equipment, since, for example, some types of equipment can be used simultaneously both for agricultural work and in a household not related to agricultural production. It turned out that the multifunctionality of the use of these types of equipment leads to the impossibility of identifying universal physical and functional criteria inherent exclusively to these types of equipment, which would make it possible to unambiguously identify these objects and thereby ensure the application of the Protocol. [2]

Special feature of construction, agricultural and mining equipment as an object of qualification lies in the variety of its forms and designs, namely in the form of cars (for example, agricultural harvesters), tools (for example, drills for the development of mines), etc. The difference in the forms and designs of this equipment does not allow formulating universal external criteria and distinguishing them on the basis of these criteria. [3]

The problem with the definition of "agricultural, construction and mining equipment" is that in some cases this equipment may not meet the criteria for mobile equipment formulated in article 51 of the Cape Town Convention on international interests in mobile equipment, 2001. Thus, paragraph 1 of Article 51 of the Convention specifies the criteria that must be met by facilities in respect of which new Protocols to the Convention can be adopted, in addition to aircraft, aircraft engines, helicopters, space vehicles and railway rolling stock. These criteria include: 1) high economic value of the equipment, 2) each component is uniquely identifiable, 3) belongs to the category of mobile equipment (has a mobility feature). However, even though agricultural, construction and mining equipment does not always meet all the specified criteria, the cross-border circulation of these types of equipment is of great importance for the international community. [4] For this reason, the drafters of the Protocol on Agricultural, Construction and Mining Equipment needed to develop a different approach to qualifying equipment subject to the Protocol. The solution to these problems was the appeal to the Harmonized System Codes of World Customs Organization. This solution seems to us to be very successful, since the Harmonized System has a vast "geography" of application, most countries in the world use this system. Its main application was to fix the types of goods and equipment to determine the corresponding customs tariffs. [5] The appeal of the drafters of the Protocol on matters specific to mining, agricultural, and construction equipment to the use of Harmonized System Codes is also a good solution because the creators of this system have already carried out large-scale work to systematize all types of equipment, including agricultural, construction and mining equipment, which is the subject of cross-border trade turnover. For this reason, the drafters of the Protocol could be confident that the Harmonized System covered most of the varieties of this equipment.

Thus, the qualifications of equipment, the rights to which fall within the scope of the Protocol, are determined through the list of codes of the Harmonized System, drawn up in the form of three annexes to the Protocol, each of which is dedicated, respectively, to a variety of agricultural equipment, construction equipment or mining equipment. Only if a particular equipment belongs to one of the names specified in the Harmonized System Codes, the rights to it belong to the scope of the Protocol on matters specific to mining, agricultural, and construction equipment. A partial departure from the criteria specified in article 51, paragraph 1, of the Cape Town Convention was thus deemed justified for the purposes of qualifying agricultural, mining and construction equipment. [6] Certain types of such equipment can be strongly associated with immovable property (for example, heavy equipment in the mining industry, installed deep underground). In this case, the equipment does not meet the mobility criterion specified in article 51 of the Convention. However, such equipment is expensive, and it is practical to extend the scope of the Convention to this equipment. [7] The use of Harmonized System Codes made it possible to partially change the general approach to the qualification of equipment and to expand the list of types of equipment related to the scope of the Convention and the Protocol.

4.2. Qualification of equipment associated with immovable property

One of the features of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to mining, agricultural, and construction equipment is the definition of a category of equipment associated with immovables (Article VII of the Protocol), which is new for international conventions in the field of private international law. [8] In the law of various states, examples of such equipment are large construction cranes, heavy mining equipment that is installed deep underground, irrigation equipment installed at the place of production of agricultural products, etc.

The term "immovable-associated equipment" means agricultural, construction or mining equipment that is so related to immovable property that, in accordance with the law of the state of the location of the immovable property, the rights to immovable property also extend to the equipment. Article VII of the Protocol lacks a unified definition of "equipment related to immovable property". In fact, this article contains only a reference to the internal law of the state. Thus, the qualification of this type of equipment in order to determine whether there is an interest in this equipment, based on national law concerning immovables, is carried out on the basis of the conflict of laws principle "the law of the country where the thing is located". In general, the categories of movable and immovable property are mentioned quite rarely in international documents, since the division of property into movable and immovable is different in the internal law of states, which gives rise to a large number of conflicts of laws. [9] The application of the conflict principle "the law of the country where the thing is located" allows not to formulate a unified definition of the concept of "immovable-associated equipment" and thereby avoid conflicts of laws. [10]

An interesting question is how the rights to equipment related to immovable property are regulated when this equipment is located both in the territory of one of the Contracting States and in a State that is not a member of the States that have acceded to the Protocol. Article VII of the Protocol contains such rules. Part 1 of Article VII of the Protocol deals with equipment related to immovable property that is located on the territory of a state that has not acceded to the Protocol. [11] In accordance with this article, the domestic law of the State of the location of the equipment applies to the questions of whether international interest in the equipment ceases in connection with its association with immovable property, whether the international interest is subject to other rights and interests in respect of this equipment. At the same time, the Protocol does not affect the application of the domestic legislation of the state to these issues.

If this provision were not contained in the Protocol, then Article 29 of the 2001 Cape Town Convention (in conjunction with the Protocol) could be applied in such a way that international interest in equipment related to immovable property would have priority over those rights and interests that may arise in accordance with the domestic law of the state of the location of the immovable property as a result of the association of equipment with immovables. [12] It is clear that such an application of Article 29 of the Convention would lead to significant controversy. For this reason, the approach to the regulation of equipment in association with immovable property, enshrined in Article VII of the Protocol, seems to be much more acceptable: a Contracting State must make a mandatory declaration on the application of one of the alternative legal structures provided for in the protocol - Alternative A, Alternative B or Alternative C - to rights to equipment associated with immovable property and located in the territory of that Contracting State.

Alternative A is the balancing of international interest in equipment with interest arising from the association of that equipment with immovable property under the national law of a State, so that priority is given to the international interest registered under the Convention and the Protocol, provided that the equipment is separable from immovable property. If the property is inseparable from immovable property, then the Protocol does not apply. Alternative A is most in line with the general approach underlying the Cape Town Convention. If a Contracting State makes a declaration of the choice of Alternative A, then the international interest in equipment associated with and separable from immovable property remains unaffected by the relationship of the equipment to immovable property and will have priority over any rights to this equipment arising under the national law of the state. location of the immovable property. It should be noted that the priority of international interest in this equipment will not depend on the moment when the fact of association of equipment with immovable property arises. [13] Regardless of whether this legal fact took place before or after the emergence of international interest, the legal regulation of the rights to the equipment remains unchanged.

Alternative C specified in the Protocol is the opposite of Alternative A and is formulated in such a way that domestic legal regulation has priority over international interest in equipment associated with immovable property. Obviously, Alternative C contradicts the main idea of the Cape Town Convention and is a provision enshrined in order that states that do not agree with the priority of international interest over interests in equipment arising under the national law of these states nevertheless join the Convention. From this point of view, it seems to make little practical sense. However, Alternative C provides the greatest protection to the owner of the immovable property with which the equipment is associated.

Alternative B represents a compromise between Alternative A and Alternative C. According to Alternative B, the category of equipment associated with immovable property and therefore has lost its legal separateness (identity) is distinguished. With regard to rights in this equipment, the Protocol does not affect the operation of the domestic law of the State where the equipment is located. However, if the equipment has retained its legal separateness (identity), then the interest arising from the association of the equipment with immovable property under national law will have priority over international interest in this equipment only if two important conditions are met: 1) rights to immovable property must be registered earlier than the registration of international interest, and must also be valid at the time of its registration; 2) the legal fact of association of equipment with immovable property must take place before the registration of international interest.

Alternative B appears to be capable of protecting the rights of both the holder of an international interest in the equipment and the owner of the immovable property. [14] The owner of immovable property may not be able to know in advance that the exercise of his rights may be complicated in the future by the fact of the association of immovable property with the equipment and the fact of registration of international interest in this equipment. [15]

However, if the right arising under national law as a result of the association of equipment with immovable property has priority, then the person intending to register an international interest in this equipment in accordance with the Convention and the Protocol will be able to obtain the relevant information and make a decision whether to refuse the transaction or to come to an agreement with the owner of immovable property.

5 Conclusions

Protocol to the Convention on international interests in mobile equipment on matters specific to mining, agricultural and construction equipment establishes a new flexible approach, considering the specifics of the regulation of rights to these types of equipment, namely, introducing a special category “immovable-associated equipment”. This approach makes it possible to establish a balance between the international interest in the equipment and the interest arising under the internal law of the state where the equipment is located. It seems that the approach to identify the mining, agricultural and construction machines enshrined in the Protocol could help reduce the number of conflicts of laws and improve the conditions for cross-border commercial transactions.

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