

# **EXPANSION OF THE CAPE TOWN CONVENTION TO MARITIME AND RENEWABLE ENERGY EQUIPMENT: DIFFICULTIES AND POSSIBLE SOLUTIONS**

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## Abstract

Cape Town Convention on International Interests in Mobile Equipment was drafted to standardize transactions involving movable property. This treaty is one of the most important works of the International Institute for the Unification of Private Law (UNIDROIT) in the field of secured transactions law. This establishes a secured transactions system that can ensure a continuous economic growth for sectors that involve high-cost movable property.

The Convention was recently expanded with a new Protocol, which includes mining, agricultural, and construction (MAC) equipment. This was possible because of its uniquely flexible system, a key feature that allows its expansion to other areas in the future, too. The basis of this expansion is laid down in Article 51(1) of the Convention, which states that only high-value, mobile and uniquely identifiable equipment could be covered.

The strong protection afforded to creditors by the Convention would drastically reduce the borrowing costs for the financing of the pricy renewable energy equipment, thus the speed of the switch to green energy would increase. This Protocol would help uniting the global economy in the protection of the world climate.

The other area in which the Convention can achieve success is the financing of maritime equipment. One has to note that the Aircraft Protocol has significantly eased up international aircraft financing, and the parallels between the two industries are easily drawn. These areas, although very different, are ready to be adapted into new Protocols.

The first part of thesis is an analysis if the current existing legal framework of maritime financing and the possible applicability to the aforementioned Convention while in the second part it will explore the feasibility of a potential renewable energy equipment Protocol that would significantly reduce the financing of these.

## **Research and Methodology Issues**

The research for this thesis has been conducted mainly on materials that have been issued by the UNIDROIT. One can notice the unusually low amount of footnotes that have been used during the writing of this thesis, and this can be attributed to the fact that currently the option of expansion of this treaty has not been widely researched. The excellent books of Professor Sir Roy Goode have been a staple in understanding how the previous Protocols work and how can one build on the foundations laid down in these. The expansion of the CTC to these potential new territories has been allowed by the innovations laid out in the latest Protocol that we will explore, thus conclusion had to be drawn from this, and about the potential pitfalls of these two industries.

I rely predominantly on materials provided by UNIDROIT and research papers that tried to crack these problems in the past. Although there is very little written about these, I managed to complete my research with a couple of national provisions from Romanian law that might lead to answers regarding these Protocols. This choice was made because of my familiarity of this legislation and the similarity of the Romanian legislation to the French one.

## **List of abbreviations**

Aircraft Protocol - Protocol to the Convention on International Interests in Mobile Equipment on matters specific to aircraft equipment

CMI - Comité Maritime International

CTC - The Cape Town Convention on International Interests in Mobile Equipment

MAC Protocol – Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to mining, agricultural, and construction equipment

UCC - Uniform Commercial Code

UNIDROIT - International Institute for the Unification of Private Law / Institut international pour l'unification du droit privé

WCO - World Customs Organization

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Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets

Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural, and Construction Equipment

Cape Town Convention on International Interests in Mobile Equipment

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## **I. Introduction - The importance of secured transactions in the world of finance**

The world of financing and acquisition of high value equipment is already a precarious one; add to this an unstable legal regime and it can easily become the recipe for disaster. This issue was addressed by the UNIDROIT (International Institute for the Unification of Private Law / Institut international pour l'unification du droit privé) in 2001, when one of the most impactful commercial treaties, the Convention on International Interests in Mobile Equipment (Cape Town Convention or CTC) was drafted in Cape Town, South Africa. This entered into force in 2006, and ever since the number of ratifications has increased rapidly. <sup>1</sup>

The Convention's primary role is to establish a system that would create certain set of opposable rights to high-value assets that have no fixed location. This problem arises from the fact that different legal systems have diverging approaches when it comes to securities, title retention agreements and lease agreements thus creating an uncertain legal regime that makes lending institutions insecure about the effectiveness of their rights. This uneasiness makes borrowing costs higher, thus stymieing the development of these industries.

The Convention uses a unique two-tier architecture that combines the Convention with sector-specific Protocols. This umbrella-like structure ensures that this system can be easily adapted to the needs of different sectors. There has already been a

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<sup>1</sup> In March 2022, there were 80 Contracting States, together with the European Union as a regional economic organization. See the latest information on Contracting States at <https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/> (accessed 23 March 2022).

successful adaptation of this to the aviation, space and railway industries, as Article 51 of the CTC lays down the groundwork for its future expansion potential.

This intent of this thesis is to provide an overview of the Cape Town system and to analyse its expansion potential. The two most likely industries that would benefit from the use of this system but would also qualify would be the maritime and the renewable energy sectors. The newest protocol that was adopted in 2019 to extend the Convention's framework to equipment used in mining, agriculture and construction showcased the flexibility of the system<sup>2</sup>. A great parallel can be drawn between this expansion and potential future ones. The thesis will begin with a run-through of the CTC, followed by the discussion of the difficulties and possible solutions for the implementation of the two potential Protocols.

## **II. The Cape Town Convention's Architecture**

The Convention together with its Protocols is designed to overcome the problem of obtaining easy and readily enforceable rights in objects such as aircraft, railway rolling stock and space assets which are not bound to any location.<sup>3</sup> The Convention creates an international interest<sup>4</sup> that is recognized in all contracting states, thus reducing the risk of lending for the financing of these objects and by that, reducing the overall cost of the transactions. This largely benefits parties in developing countries, where the legal system is less credible and this may discourage financiers from doing business in these countries. One of the main arguments that made the United States and France - the world's two leading airplane manufacturing countries

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<sup>2</sup> Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to mining, agricultural, and construction equipment (MAC).

<sup>3</sup> Professor Sir Roy Goode, "The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing", (2002) *Uniform Law Review*, p.4.

<sup>4</sup> In the thesis, interest is not used as an expression of interest for something but an *In Rem* (proprietary) right of which the most commonly known types are possessory pledges and mortgages.

with companies such as Boeing and Airbus - ratify the CTC was that these companies can now gain customers from markets which were deemed too risky for creditors to lend in the past.<sup>5</sup> Arguably the most important invention of the CTC is its automated International Registry in Dublin. Every Protocol has its own registry, and so far the Aircraft Protocol has been by far the most successful of them. In this registry, one can register the financial interests in aircraft objects that fulfil the minimum threshold. This is open to anyone<sup>6</sup>, and one can easily search in it using the manufacturer's serial number. Every aspect of this financing can be recorded in the registry, such as defaults, remedies, priorities and aircraft deregistration. In case of a default, the creditor can deregister the aircraft and export it, take control over it or even collect the income arising from the use of the aircraft object.

## **1. Security interests and the differing forms of financing**

The Convention's most important Protocol, the Aircraft Protocol which has been covering the financing of aircraft, has been mostly involved with asset financing. The counterpart of this traditional type of financing is project finance, which covers mostly the financing of high value and large scale energy projects. The differences between these two need to be highlighted to understand how the Convention can be adjusted to fit both.

For movable collateral (the types of assets the Convention has covered in the past) asset financing can be regarded as the traditional field of application of proprietary security rights. In these transactions, the lender usually extends credit to the borrower, which purchases the assets with the borrowed money. The lender is interested in the repayment of this loan, thus obtaining a stable income flow. Strong

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<sup>5</sup> HFW-The Cape Town Convention: a summary, June 2015.

<sup>6</sup> <https://www.internationalregistry.aero/ir-web/>, last accessed on 30.04.2022.

security right are required, because in case of a default, the creditor might want to sell the collateral, which is the asset that the borrower bought originally. Having access to an efficient cheap and quick enforcement process will ease things up.

The creditor is usually not interested in the continuation of the borrower's business, and when asking for the repayment of the loan, the borrower can lose a large chunk of its revenues. The creditworthiness of the borrower is very important in these transactions, and it can drive the price up or down. Australia's Transport Minister, Anthony Albanese estimated in 2013, that adopting the convention will save Australian airlines \$330.000 on every new ATR 72 turboprop and a staggering \$2.5M on an Airbus A380. <sup>7</sup>While the Cape Town Convention cannot influence the personal creditworthiness of a certain institution or individual, it can create a strong set of enforcement rights in case of a default which will increase the likeliness of a transaction while also decreasing the uncertainty surrounding it and the price.

When talking about large scale investments, the most probable type of financing is a project-financing structure. This, compared to its traditional alternatives ensures that the lender is entitled to some part of the project's cash flow, benefitting from its profits too. <sup>8</sup>Because of the scale of the investment, the lender is much more inclined to continue the operation and to seek profit from it in case of a default, in contrast to an asset-financed project. In a project financing loan structure, the lender relies on

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<sup>7</sup> David Knibb, "How new export credit rules will change aircraft finance" <https://www.flightglobal.com/in-focus-how-new-export-credit-rules-will-change-aircraft-finance/108522.article>, last accessed on 30.04.2022.

<sup>8</sup> Philip R. Wood, "Project Finance, Securitisation, Subordinated Debt" The Law and Practice of International Finance Series, 2nd Edition, Vol 5, London, 2007 p 37.

the project's cash flow for repayment, while the project's assets are being held as secondary collateral.<sup>9</sup>

One can clearly observe that for a huge wind farm investment, the project finance structure will be more beneficial. Because of the alternative structure, the proprietary security rights will be used in a different way as well. Because the lenders will try and keep the business afloat, these rights will not be used for enforcement, rather to have a way of fending off other creditors who have the possibility to interfere with the continuation of the project, because they have obtained a proprietary interest in the project. Ole Böger describes the role of proprietary security interests in project financing as a shield, not a sword, because they will be used as a last resort for the lender, when the continuation of the project is no longer possible.<sup>10</sup>

## **2. Insolvency proceedings**

One of the many inventive steps of the Convention is that contracting states of the CTC can choose between two separate insolvency proceedings or remain with their domestic ones. The Aircraft Protocol states these provisions in its Articles 11, remedies on insolvency. These two are drafted by the UNIDROIT and countries can opt to transpose them into their domestic legislation thus having a special insolvency regime for these objects. This will only apply if the Contracting State is the “primary insolvency jurisdiction” of the debtor. The centre of main interest of the debtor has to be in that jurisdiction to be considered its primary insolvency jurisdiction.<sup>11</sup>

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[https://www.investopedia.com/terms/p/projectfinance.asp#:~:text=Project%20financing%20is%20a%20loan,%2Dbalance%20sheet%20\(OBS\).](https://www.investopedia.com/terms/p/projectfinance.asp#:~:text=Project%20financing%20is%20a%20loan,%2Dbalance%20sheet%20(OBS).,), last accessed on 05.04.2022.

<sup>10</sup> Ole Böger, “A possible Protocol to the Cape Town Convention on renewable energy Equipment”, Unif. L. Rev., Vol. 23, 2018, p. 250.

<sup>11</sup> Practitioners’ Guide to the Cape Town Convention and the Aircraft Protocol, page 133.

Alternative A that the CTC offers is more beneficial to the creditors because it grants them a more layered protection compared to traditional domestic insolvency and bankruptcy rules. Upon the occurrence of an insolvency event, the debtor has two options according to the CTC:

- (i) give possession of the aircraft covered by the contract to the secured creditor; or
- (ii) cure all defaults and agree to perform all future obligations under the contract no later than the earlier of the end of the waiting period specified by the Contracting State or the date on which the secured creditor would be entitled to possession if the Cape Town Convention was not applicable.<sup>12</sup>

The deregistration and the exportation of the aircraft also needs to be done in less than five working days, which also speeds up the insolvency proceedings considerably. This timetable that is set out by this alternative cannot be extended by the courts and other alternatives such as payment or other performance will not be accepted. Until the creditor is given opportunity to retake possession over the object, the debtor or the insolvency administrator must preserve the value of the asset.

The secured creditors can also be sure that their interest will be prioritized. Namely, Alternative A states that during insolvency proceedings, only non-consensual interest following a declaration under Article 31(1)<sup>13</sup> of the CTC will have priority over rights published in the Registry in Dublin.<sup>14</sup> Most Contracting States have opted to adopt Alternative A.

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<sup>12</sup> Practitioners' Guide to the Cape Town Convention and the Aircraft Protocol, page 130.

<sup>13</sup> Article 31 of the Aircraft Protocol— Effects of assignment.

1. Except as otherwise agreed by the parties, an assignment of associated rights made in conformity with Article 32 of the Aircraft Protocol, also transfers to the assignee:

- (a) the related international interest; and
- (b) all the interests and priorities of the assignor under this Convention

<sup>14</sup> Article XI, Alternative A (12) of the Aircraft Protocol.

Alternative B has a softer approach compared to its counterpart. It does not have the same exact time periods that the debtor must comply with. To an extent, is very similar to the local bankruptcy law in many jurisdictions. Nonetheless, so far only Mexico has declared to adopt this alternative<sup>15</sup>.

### **3. The criteria of high-value, mobile, and unique identifiable equipment**

When initially drafted, the Cape Town Convention was only intended to fit a certain amount of high-value, mobile and uniquely identifiable set of equipment. When talking about its expansion potential, this criterion is specified in Article 51 (1) of the Convention. The first Protocol to stretch the boundaries set out by the Convention was the MAC Protocol, because the drafter of the legislation had to decide between interpreting the aforementioned criteria in a generous manner, thus including equipment which is not mobile or limit its application by sticking to the original scope of the treaty.

The MAC Protocol did not set a minimum threshold price from which the Protocol would apply, because it would have hindered the second hand market. The drafter of the legislation achieved this indirectly, by listing only a select number of HS codes for which the Protocol would apply. The term HS codes refer to a harmonised system, the Harmonised Commodity Description and Coding System (Harmonised System or HS) developed by the World Customs Organization (WCO) as an international nomenclature to classify products and goods in world trade.

The biggest question that the MAC Protocol needed to address is the issue of mobility. Whereas former Protocols' equipment was naturally mobile, this protocol

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<sup>15</sup> [https://uk.practicallaw.thomsonreuters.com/3-628-2742?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-628-2742?transitionType=Default&contextData=(sc.Default)&firstPage=true), last accessed on 30.04.2022.

and even a potential Renewable Energy Protocol would have more question marks around their equipment's mobility. Some questions were smoothed out at the 85<sup>th</sup> session of the UNIDROIT Governing Council, where it was discussed that although the original idea was to only cover equipment which moved from one country to another in the course of its operation, the drafters of the Convention left the possibility of a potential expansion open because mobility can be also defined as the movement of the equipment from the country where it has been bought to the country in which it is intended to be operated. This element of internationality can also draw in elements of an international contract of sale under retention of title or international lease. These secured transaction elements should be kept in mind in these cases. Thus, the definition of mobility can be interpreted in a generous manner, this is why the MAC Protocol was adopted and it also gives the green light to a potential Renewable Energy Protocol.

One can even observe that the Official Commentary of the Cape Town Convention mentions that just the possibility of cross-border movement of the asset triggers the minimal threshold needed for the protection granted for mobile equipment under the Protocol.<sup>16</sup>

The main criterion to search this equipment in the database is still the manufacturer's serial number, as of Article 18(1) of the CTC, because the philosophy of the convention is still asset-centered.<sup>17</sup>

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<sup>16</sup> Professor Sir Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment*, Official Commentary, ed. 2, Rome 2008, para. 2.41.

<sup>17</sup> Teresa Rodriguez de las Heras Balell, "Right to Accession, Ownership of Property, and Extension of Security Interests: Concepts, Conflicts and Rules" III (2016) *Philippines Journal of Legal Education*, pp. 1-30.



### III. Renewable Energy Equipment

The idea of the implementation of a potential protocol for renewable energy came up in 2011, when the Secretariat of the UNIDROIT was requested to draft up legislation concerning matters specific to offshore wind power generation.<sup>18</sup> The ensuing discussions lead to the expansion of the idea to cover a broader scope of equipment. This was included in the Work Programme for 2020-2022 as “Preparation of other Protocols to the Cape Town Convention”, although it only had a low priority status.<sup>19</sup> The triennial work programme of the UNIDROIT will be updated at the end of this cycle, and with the completion of The Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Mining, Agricultural and Construction Equipment (the “MAC Protocol”), this can achieve a higher priority status in the years to come. As seen with the past protocols, the complete procedure of implementation of these takes years, and the most important first step is discussing the need for it with the industry and its important players.

According to the UN’s Renewables Global Status report of 2021, renewable energy reached its highest recorded share in the global electricity mix in 2020, an estimated 29%.<sup>20</sup> This increase can surely be attributed to the abnormal years of the pandemic, where lockdowns attributed to a reduced electricity demand. Nevertheless, this number needs to continuously grow if the economies of the world want to comply with their goals set out by the Paris Agreement in 2015. According to the World

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<sup>18</sup> Ole Boger, “A possible Protocol to the Cape Town Convention on renewable energy Equipment”, *Unif. L. Rev.*, Vol. 23, 2018, p. 245.

<sup>19</sup> <https://www.unidroit.org/about-unidroit/work-programme/>, last accessed on 04.04.2022.

<sup>20</sup> Ember, *Global Electricity Review 2021* (London: 2021), <https://ember-climate.org/project/global-electricity-review-2021>.

Energy Investment's summary<sup>21</sup>, the global power sector investment is set to increase by around 5% in 2021 to more than USD 820 billion. The renewable energy sector is dominating investment in new power generation and is expected to account for 70% of 2021's total of USD 530 billion spent on all new generation capacity. <sup>22</sup>This showcases the potential and a need for a future protocol, because even the slightest cost reduction can help economies reach their goals faster.

## 1. Onshore wind farms

During the pandemic year of 2020, onshore wind electricity generation increased by 144 TWh according to the International Energy Agency, which is an astronomic increase of 11%. <sup>23</sup> If we account that the overall electricity generated by wind was 1592 TWh in 2020, which is a 12% growth compared to the prior year, we can already see that there is a clear need for onshore renewable energy equipment.

To achieve the net Net Zero Emissions by 2050 Scenario, we should see an increase on average of 18% per year during 2021-2030. To achieve this 6% extra growth, there has to be a stable and reliable legal framework, so that countries with less developed economies can benefit from this source of energy other than the two big players, China and the United States<sup>24</sup>. This is where the role of a potential Protocol on Renewable Energy comes in.

The main problem that needs to be dealt with in the case of onshore wind turbines is their stance on becoming permanently affixed to the land they are installed on. In Roman law, the principle was *superficies solo cedit*, which meant that everything

<sup>21</sup> <https://www.iea.org/reports/world-energy-investment-2021/executive-summary>, last accessed on 05.04.2022.

<sup>22</sup> Ember, Global Electricity Review 2021 (London: 2021), <https://ember-climate.org/project/global-electricity-review-2021>.

<sup>23</sup> <https://www.iea.org/reports/wind-power>, last accessed 18.05.2022.

<sup>24</sup> <https://worldpopulationreview.com/country-rankings/wind-power-by-country>, last accessed 18.05.2022.

that has been erected on a piece of land becomes the property of the landowner and an integral part of the land.<sup>25</sup> The land on which the turbine and the tower is placed is usually not owned by the wind turbine operators; there is a long term lease agreement drafted between the parties, which usually stipulates that the equipment will be removed at the end of the leasing.<sup>26</sup> The German Supreme Court decided in 2017, that the wind turbine does not become a part of the property of the landowner if that is the intention stipulated in the contract.<sup>27</sup> As I have mentioned before, if the wind turbine has a removal date at the end of the lease an exception can be made from the universally used accession rules. This ruling keeps this type of equipment mobile, thus the Cape Town Convention would still be applicable for it.

In the United States, according to the UCC a separate proprietary security interest can be created which is separate from the land on which they are placed.<sup>28</sup> These have to be registered in the appropriate land register (fixture filing) or in the general debtor-indexed register of the UCC.<sup>29</sup>

In other legal systems, the superficies right can be used. In Romanian law (and all other legal systems inspired by the French Civil Code) the civil code states in its article 693 that the right to use the turbine can be separated from the landowner's rights thus the turbine owner gets the right to erect a structure on one's land and exploit it.

Having in mind these examples, it is clear that more clarity is needed regarding the situation of onshore wind farms. Looking at the aforementioned examples, every

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<sup>25</sup> Urszula Drozdowska, "The superficies solo cedit principle in Polish civil law." (2008).

<sup>26</sup> Ole Boger, "A possible Protocol to the Cape Town Convention on renewable energy Equipment", *Unif. L. Rev.*, Vol. 23, 2018, p. 258.

<sup>27</sup> Bundesgerichtshof (Supreme Court), decision of 7 April 2017, V ZR 52/16, (2017).

<sup>28</sup> UCC Secs. 9-501(a)(1)(B), 9-502(b).

<sup>29</sup> UCC Secs. 9-501(a)(2), 9-502(a).

legal system has its own approach towards immovable assets, and the biggest issue that the new Protocol would need to cover is to unify these legal provisions. We have already seen an example in the most recent work of the UNIDROIT, the MAC Protocol that there is a chance that states will let their national laws be overridden by this Convention. In its Article VII, the aforementioned Protocol gives three options for the Contracting States to apply the selected laws in relation to an international interest in immovable associated equipment.<sup>30</sup> There has to be political willingness for a state to let a convention overrule the national law, but if the positives of this can be proven, the states will not be reluctant to adopt it. Having an international standard for the definition of movable property of wind turbines would ease up the creation of an international movable interest in them.

Another road which the Protocol can go on is the differentiation of the parts of the wind turbine. If one looks at these machines, it can be separated into its foundation and the tower which has the turbine itself. The former can be categorized as immovable property while the latter (which is more expensive and the main part of the equipment) can be categorized as movable property to which the Protocol would apply. This was a certain part of the machinery becomes affixed to the land and the other would remain movable property.

## **2. Offshore wind farms**

Compared to its onshore counterparts, offshore wind farms are much more efficient and consistent. The average offshore windfarm produces on average 3.6 MW while the onshore ones average around 2.5 to 3 MW, this can mainly be attributed to the

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<sup>30</sup> <https://www.unidroit.org/instruments/security-interests/mac-protocol/>, last accessed on 19.05.2022.

lack of physical interference in the sea and to the higher speeds of the wind.<sup>31</sup> The only negatives of these renewable equipment types are that the maintenance costs are higher and they are less accessible thus repairs become more challenging.

This clean type of energy can provide many benefits for a set economy, but according to the Global Wind Energy Council, 82% of the total installations are installed in the UK, Germany and China, while the rest of the World counts for only 18%.<sup>32</sup> To achieve a more balanced field and allow developing economies to draw in the necessary funding to use this type of equipment a stable legal framework needs to be built. A potential Renewable Energy Protocol to the Cape town Convention could achieve this task, but similarly to the onshore wind turbines this category of equipment has its own legal mysteries.

Before underlining the main issues, one needs to define a state's maritime borders. Apart from some rare internal waters, the baseline is where one's water starts. The first 12 nautical miles represent territorial sea, while the next 200 nautical miles are considered the exclusively economic zones of the state.<sup>33</sup> After these points, there are only International waters, which are outside of the Territorial sea. These baselines are defined by the 1982 Law of the Sea Convention drafted by the United Nations. According to Article 3 of the aforementioned Convention, the applicable property law regime for the first 12 nautical miles from the coast baseline is the law of the set State.

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<sup>31</sup> Onshore vs offshore wind energy: what's the difference? | National Grid Group, <https://www.nationalgrid.com/stories/energy-explained/onshore-vs-offshore-wind-energy>, last accessed on 21.05.2022.

<sup>32</sup> These 3 countries are global offshore wind powerhouses | World Economic Forum, <https://www.weforum.org/agenda/2019/04/these-3-countries-are-global-offshore-wind-powerhouses/>, last accessed on 21.05.2022.

<sup>33</sup> NOAA Office of General Counsel International Section - Ballast Water - Maritime Zones and Boundaries, [https://www.gc.noaa.gov/gcil\\_maritime.html#:~:text=The%20maritime%20zones%20recognized%20under%20international%20law%20include,continental%20shelf%2C%20the%20high%20seas%20and%20the%20Area,](https://www.gc.noaa.gov/gcil_maritime.html#:~:text=The%20maritime%20zones%20recognized%20under%20international%20law%20include,continental%20shelf%2C%20the%20high%20seas%20and%20the%20Area,) last accessed on 21.05.2022.

The problematic part is the economic zone that stretches for the further 200 nautical miles. In the Romanian Civil Code, Article 2613(2) stipulates that platforms and any other resource exploitation means placed in that area are considered immobile good, thus accepting the fact that the State does have jurisdiction over these goods. Other states have seldom enacted rules for this, thus one needs to focus on the principles of private international law if these are nowhere to be found. Most authors argue that the law of the coastal State should be applied.<sup>34</sup> Without a clearly defined international set of rules, one can get lost in the vast criteria used by the principles of private international law; if the legal system of the owner is used, or even the legal system of the transporting vehicle the rules would mean completely different property rules that could hinder transactions as parties would be more and more confused as to which law should be used.

Another issue that is familiar from the onshore wind assets analysis is the probable affixation of the asset to the land.<sup>35</sup> While in the previous discussion there was a window of discretion regarding the stipulation of certain aspects in a lease agreement thus ensuring that the assets remain mobile, here the license needs to be obtained from the State. This leaves room for uncertainty wherever this can be included in the operator's license. The possibility of having security rights over offshore wind equipment taken out in the form of real property rights can also be excluded, as the coastal State usually does not allow ownership by private persons.<sup>36</sup>

The registration of these assets can become problematic, too. A security interest is usually created for the certain wind turbine in the manufacturing county which

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<sup>34</sup> The International and Comparative Law Quarterly, Jul., 1977, Vol. 26, No. 3 (Jul., 1977), pp. 585-618.

<sup>35</sup> UNIDROIT 2013 – C.D. (92) 5 (c)/(d), paragraph 142.

<sup>36</sup> In England, the ownership belongs to the Crown;  
<http://www.environmentlaw.org.uk/rte.asp?id=281#:~:text=Ownership%20of%20the%20seabed%20and,of%20public%20and%20private%20ownership>, last accessed on 24.05.2022.

becomes effective from its registration. This can become obsolete once the asset arrives to its destination if there is no cross-border recognition of the certain security between these two countries.<sup>37</sup> This could be solved by the creation of a similar registry to the Airport Protocol one. This system of registration of security interests would be accessible worldwide and it would ensure that creditors can keep track of the offshore assets. <sup>38</sup> The success of these international registries has been proven in the past, alas the creation of a new one is can be considered a low risk strategy.

Another issue that needs to be addressed is the enforcement of security rights over the offshore wind equipment. With the help of a uniform legal system and a centralized registration system that a possible new Protocol might provide, the courts will be more inclined towards the enforcement of these rights. While the offshore wind equipment is of crucial importance to the financiers, they usually also seek to acquire security rights over the revenue claim which is generated by the electricity obtained from the farm. <sup>39</sup> This approach has already been used in one of the previous Protocols of the Cape Town Convention, the Space Protocol. This covers the debtor's rights to payments related to the mobile assets covered by the Protocol; this assignment can be done by a mere agreement in writing, without the need for a notification from the debtor. <sup>40</sup>

A potential Protocol on renewable energy that would include offshore wind equipment would be easier to apply for States, as it would provide rights of international law, not domestic law as in the case of their onshore counterparts. <sup>41</sup> The States would me much more willing to adopt this, because it would resolve

<sup>37</sup> UNIDROIT 2013 – C.D. (92) 5 (c)/(d), paragraph 152.

<sup>38</sup> Art. 16(1) of the Cape Town Convention.

<sup>39</sup> UNIDROIT 2013 – C.D. (92) 5 (c)/(d), paragraph 176.

<sup>40</sup> Art. IX of the Space Protocol.

<sup>41</sup> Ole Boger, "A possible Protocol to the Cape Town Convention on renewable energy Equipment", *Unif. L. Rev.*, Vol. 23, 2018, p. 264.

several conflicts of laws that may arise in the exclusive economic zone of the State. This type of equipment would be regarded as mobile by the Protocol and an international interest could be created for them with the help of the registry system.

#### **IV. Ships and Maritime Equipment**

Among the existing Protocols of the Cape Town Convention, the most successful one has undoubtedly been the Aircraft Protocol. When drawing parallels, it's easy to observe how many similarities the aircraft and ship industries have. The use of extremely high value equipment as collateral to secure cross-border financing, while this collateral (the aircraft or in this case, the ships) are traveling from one jurisdiction to another frequently. <sup>42</sup>Just as in the case of the Aircraft Protocol, if a default occurs, the creditor would like to seize the asset; the problem is that different jurisdictions have different rules thus preventing the seamless and fast seizure of the ship.

The current international framework contains many conflict of laws, thus creditors will be careful in deciding the next destination of a ship. If the legal system of a certain port does not recognize the foreign security interest in a ship, this machine will seldom dock there. The same argument can be made for the creation of a new Protocol for this industry as with the aforementioned renewable energy one. If UNIDROIT would green light the drafting this new Protocol, it would drastically reduce the legal uncertainty related to conflict of laws situations and simplify insolvency related risks thus reducing the overall price of ship financing. <sup>43</sup>

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<sup>42</sup> Ben Kohler, "Heading towards Cape Town: Some Remarks on the Preparation of a Future Protocol to the Cape Town Convention with Respect to Ships and Maritime Equipment." *Uniform Law Review* 22, no. 3 (August 1, 2017); p.509.

<sup>43</sup> Ole Böger, "The Cape Town Convention and Proprietary Security over Ships" (2014) 19



Even during the drafting of the Cape Town Convention, a potential coverage of ships and maritime equipment was considered.<sup>44</sup> This was however disregarded by the industry, as the International Convention on Maritime Liens and Mortgages (Geneva Convention) was in works and it was feared that the two would overlap.<sup>45</sup> This convention ended up to become a failure, because as of May 2022, it has only 19 signatory States. The process and successfully, the failure to create an international regime on the unification of maritime liens did not start in 1993, because the industry tried it 70 years prior with the drafting of the Brussels Convention (1926 International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages) which to this day was only able to achieve 24 contracting States, thus being regarded as a failure itself, too.

International legal harmonization in the area of private law can be a difficult process, especially if one involves property law issues. One of the successful treaties in this matter is the Cape Town Convention, which is to this day one of the most successful treaties in the area of private law.<sup>46</sup> In his reaction paper, Dr Vincent Power argues however, that the success of the Aircraft Protocol can be attributed to the fact that there was an urgent need to fill the gaps of the existing legislation.<sup>47</sup> This however, cannot be said about the maritime world, because there is no such urgent need for unification in the area of securities over ships. The maritime legislation has much more history than the aviation one, and simply drafting a new Protocol to the Cape Town Convention could not solve the complex issues presented in previous areas.

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Uniform Law Review 24, p. 28.

<sup>44</sup> UNIDROIT 1992, Study LXXII, Doc 4 <<http://www.unidroit.org/english/documents/1992/study72/s-72-04-e.pdf>; last accessed on 25.05.2022.

<sup>45</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-D-4&chapter=11&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en).

<sup>46</sup> Ole Böger, "The Cape Town Convention and Proprietary Security over Ships" (2014) 19

Uniform Law Review 24, p. 1.

<sup>47</sup> Vincent Power, 'Assessing the Legal and Economic Case for a Shipping Protocol to the Cape Town Convention', Cape Town Convention Conference, <https://comitemaritime.org/wp-content/uploads/2018/11/Annex-6-1.pdf>

A clear pattern can be seen to develop, as one can observe that the industry clearly does not consider this this unification as an issue.

The full maritime community needs to be involved in the decision making regarding a new Protocol; this industry holds big organizations such as the International Maritime Organization and the Comité Maritime International, whose support should be granted before succeeding. The former has already established a Working Group on Ship Financing Security Practices, which drafted a questionnaire for the industry regarding their approach toward these issues.<sup>48,49</sup>

The extension of the Cape Town Convention to maritime issues is a match made in heaven for the two, but one has to stay realistic regarding the current needs of this delicate industry. The political will needs to be accorded for the project to go forward and there needs to be a clear co-ordination between this Protocol and other maritime laws and principles.

## **V. Conclusion**

The developments of these two Protocols are still in very early stages. The Triennial Work Programme of the Organisation will be adopted in December 2022; this is when the potential expansions of the Cape Town Convention will be discussed.<sup>50</sup> Before drafting anything, the will of the industries needs to be considered. The survey format which was proposed by the CMI could be used to find out if there is

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<sup>48</sup> Ship Finance - <https://comitemaritime.org/work/ship-finance/>, last accessed on 27.05.2022.

<sup>49</sup> Ship Financing Security Practices - Questionnaire - <https://comitemaritime.org/wp-content/uploads/2018/05/Ship-Finance-security-practices-questionnaire-final.pdf>

<sup>50</sup> Adoption of the Work Programme of the Organisation for the 2020-2022 triennium  
<https://www.unidroit.org/wp-content/uploads/2021/05/ag-78-03-e.pdf>

even a considerable gap in these legislations that disturbs these industries so much that the system of the Cape Town Convention could remedy these issues.

After the drafting of the MAC Protocol, the mobility threshold was lowered which lead to the possible future expansion of the original Convention. The general umbrella like structure and its principles allow the system developed by the UNIDROIT to be adopted to assets that are very different compared to current existing one that are covered. The most obvious one that could be drafted into a future Protocol is the one that covers off shore wind equipment, because the industry needs the stabilization and clarification of the legal system and this would have a minimum interference into domestic property laws of the States. The only issue with this potential Protocol would be the limited amount of States that could benefit from signing it, it only being useful for coastal ones. The inclusion of on shore wind energy equipment would require lots of political effort because the rules of the Protocol would clearly override national rules. Although there is clearly a lot of work ahead of the team working on the expansion of the Cape Town Convention, there is a need for new Protocols and it can have positive impact on the ever growing renewable energy market.

The other analysed area, maritime equipment has its own set of unique issues, too. The most important one is the questionable need for this coming from the industry. It is clear that the focus of UNIDROIT from 2022 onwards should focus on the drafting of the Renewable Energy Protocol, as it has the most potential in reaching the limelight in the future.