



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS  
FOR THE PREPARATION OF A DRAFT PROTOCOL TO  
THE CONVENTION ON INTERNATIONAL INTERESTS IN  
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO  
SPACE ASSETS  
Fourth session  
Rome, 3/7 May 2010**

UNIDROIT 2010  
C.G.E./Space Pr./4/W.P. 4 rev.  
Original: English / French  
April 2010

*Revised version of the preliminary draft Protocol to the Convention on  
International Interests in Mobile Equipment on Matters specific to Space Assets*

*(as prepared by Professor Sir Roy Goode (United Kingdom) and Mr M. Deschamps (Canada),  
as Co-chairmen of the Drafting Committee - to reflect the conclusions reached by  
the Committee of governmental experts during its third session,  
held in Rome from 7 to 11 December 2009, and to incorporate drafting improvements –  
and as reviewed by the Drafting Committee):*

*Comments*

*(submitted by Governments, Organisations and representatives of the international  
commercial space, financial and insurance communities)*

## **INTRODUCTION**

Between 18 and 23 February 2010 the UNIDROIT Secretariat transmitted, under cover of invitations to Governments, Organisations and representatives of the international commercial space, financial and insurance communities to attend the fourth session of the UNIDROIT Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *Committee*), the text of the revised preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets as proposed to the Drafting Committee by Sir Roy Goode (United Kingdom) and Mr M. Deschamps (Canada), as Co-chairmen of the Drafting Committee, to reflect the conclusions reached by the Committee of governmental experts at its third session, held in Rome from 7 to 11 December 2009 (C.G.E./Space Pr./4/W.P. 3) (hereinafter referred to as the *revised preliminary draft Protocol*), with an invitation to formulate comments thereon for consideration by the Committee at its fourth session.<sup>1</sup>

As of the morning of 28 April 2010 the UNIDROIT Secretariat had received comments on the revised preliminary draft Protocol from:

---

<sup>1</sup> In the meantime, as indicated in the asterisked footnote on the first page of the revised preliminary draft Protocol, the latter has been reviewed by the Drafting Committee. The text of the revised preliminary draft Protocol as reviewed by the Drafting Committee is contained in C.G.E./Space Pr./4/W.P. 3 rev.

- the Governments of the People's Republic of China, the Czech Republic, Greece and Japan and Mr V. Kopal, on behalf of the delegation of the Czech Republic,
- Ms N. Eskenazi (SES), Mr O. Gebler (Baker & McKenzie), Mr K. Gude (Intelsat), Ms M. Leimbach (Crédit Agricole S.A.), Mr P.D. Nesgos (Milbank, Tweed, Hadley & McCloy LLP), Mr C. Stott (ManSat) and Mr T. Ueda (SKY Perfect JSAT Corporation), as advisers to the Committee, on behalf of the international commercial space, financial and insurance communities, and Ms P. Cooper (on behalf of the Satellite Industry Association of the United States of America), Mr S. Gibson (Ciel Satellite), Mr W.L. Lawrence (O3b Networks), Mr C. Serna Alvear (QuetzSat), Mr K. Singarajah (Avanti Communications) and Mr W. Steenbakkens (ING), also on behalf of the international commercial space, financial and insurance communities,
- Mr R. Cowan (Aviareto Ltd),
- Mr S. Kozuka, who represented the Government of Japan at the third session of the Committee, Mr P.B. Larsen, who represented the International Institute of Space Law, as an observer, at the same session, and Ms L. Ravillon (Professor of Law in the University of Bourgogne and Dean of the Faculty of Law of Dijon) in their personal capacity.

These comments are reproduced hereunder.

#### **COMMENTS AND PROPOSALS SUBMITTED BY GOVERNMENTS AND GOVERNMENT DELEGATIONS**

##### ***People's Republic of China***

1. *Re: Article IV(5) (Application of the Convention to sales and salvage insurance)*

According to the insurance law of China, *right of subrogation* means the right of the insurer, who has compensated the insured for the loss, to assume the position of the insured, and to claim against the person who is liable for the insured's loss, to the extent covered by the compensation. However, the word *subrogation* as used in Article IV(5) of the revised preliminary draft Protocol seems to bear a different meaning. It is suggested that the word *subrogation* here be reconsidered or clearly defined.

2. *Re: Article X(1) (Effects of rights assignment)*

Article X(1) provides: "A rights assignment made in conformity with Article IX transfers to the creditor the debtor's rights the subject of the rights assignment to the extent permitted by the applicable law". According to Article VIII of the revised preliminary draft Protocol, in a case where the Contracting State has not made a declaration pursuant to Article XL(1), "applicable law" is the law chosen by the parties in the contract. If the parties choose the law of a third country, in which no restriction is made on the assignment of certain rights, while it is not the case in the law of the debtor's country, the rights assignment cannot be realised either. Therefore, it is suggested that this paragraph be amended to read as follows:

"... to the extent permitted by the applicable law, and without violating the mandatory provisions of the law of the debtor's country".

3. *Re: Article XVI (Duty of debtor as to licences)*

This provision lacks operability in practice. Satellite-related licences are strictly controlled in most countries. The transfer of licences or the granting of a new licence is beyond the control of the debtor. Therefore, it is recommended that the wording of this provision be reconsidered.

4. *Re: Article XXIII(2) (Insolvency assistance)*

Considering that existing national laws in most countries may have provided the principles on recognition and enforcement of foreign court's bankruptcy adjudications, it is suggested that the expression in square brackets "in accordance with the law of the Contracting State" be retained.

5. *Re: Article XXVII bis (Limitations on remedies)*

(a) The current wording of paragraph 1 is still vague. The expression "vital interest" needs to be further explained in order to prevent abuse or ambiguity.

(b) In paragraph 1, it is noted that the State which has the right to object to the exercise of default remedies is referred to as "a State", instead of "a Contracting State". Does this mean that even if that country is not a Contracting party, it is still subject to the rights and obligations laid down under this Article? However, it is the common understanding that the "Protocol" shall not be binding on non-Contracting parties.

(c) According to paragraph 2, "... the creditor may exercise the right to step in and assume responsibility for the provision or maintenance of the relevant service ...." and according to paragraph 3, "if the creditor chooses not to exercise its rights under paragraph 2, the State that objects to the exercise of default remedies by the creditor under paragraph 1 shall have the option of .... "

First, this provision lacks operability. It is doubted that the creditor can exercise the right to step in and assume relevant responsibility in practice. Taking into account the strict control exercised over satellite-related licences in most countries, the consent of the State and the licensing State could hardly be obtained. Secondly, one situation needs to be added to paragraph 3: if the creditor chooses to exercise the right under paragraph 2, while the State concerned does not consent, paragraph 3 should also be applied. It is suggested that paragraph 3 be amended to include the aforementioned situation.

6. *Re: Article XXXI(3) (Additional modifications to Registry provisions)*

According to practice, the construction term of a GEO communication satellite is generally 30 months, compared to which, [one year] seems too short. It is suggested the time-limit be extended or modified to read "within one year or the period agreed by the parties".

7. *Re: Article XXXIV (Relationship with the United Nations Outer Space Treaty and instruments of the International Telecommunication Union)*

Given that international outer space law is still in development and that the United Nations principles on outer space and the related General Assembly Resolutions play an important role in the legal regimen of international outer space, whilst also considering the varying status of the international agreements relating to Outer Space, it is suggested that this Article be amended to read "... United Nations Outer Space Treaty or other relevant instruments".

### **Czech Republic**

Within the framework of its competence the Ministry of Justice has analysed pertinent provisions, i.e. the provisions on choice of law, default remedies, provisions regarding relief pending final determination, remedies on insolvency, jurisdiction, R.E.I.O.'s and relevant declarations.

Generally, the Ministry of Justice is satisfied with the text of the analysed provisions. Nevertheless, we allow ourselves to emphasise that, in our view, the analysed provisions of the revised preliminary draft Protocol should be as much as possible in conformity with the relevant provisions of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (hereinafter referred to as the *Rail Protocol*). The proximity of the texts of the given Protocols and the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) should be retained. Unless necessary, owing to the specificity of the future Protocol on Space Assets, the solutions originally adopted should be adhered to.

The Ministry of Justice has the following particular comments:

- As regards the note to **Article VIII** on choice of law, which submits for consideration the possible extension of the choice of law provisions to cover assignments and reassignments of debtor's rights, the Ministry of Justice can be flexible as long as such provisions are in conformity with the regulation (EC) No. 593/2008 (Rome I). This regulation itself does not impede choice of law in the case of assignments or reassignments. In this respect, we would welcome a concrete text of such an extension of the choice of law provisions.
- As regards **Article XXI (5)** on provisions regarding relief pending final determination, which is in square brackets, the Ministry of Justice is of the opinion that the text should remain as it is. As mentioned above, this provision should correspond as much as possible to the parallel provisions of the Aircraft Protocol and the Rail Protocol and any derogations thereto should be carefully reflected upon.
- As regards the declaration to **Article VIII** pursuant to **Article XL**, which provides for an opt-out declaration as contrasted to the parallel opt-in declaration in the Aircraft Protocol, the Ministry of Justice invites this solution as it contributes to wider acceptance of the principle of party autonomy.

### **Greece**

1. The fourth clause of the preamble should be written as follows:

*"MINDFUL of the established principles of space law contained in the five United Nations treaties on outer space,"*

because these are the only "containers" of positive international law rules on space activities. Besides, that is the formal reference to those instruments in all official U.N. (G.A. and COPUOS) documents.

Of course, the problem that the five space-faring superpowers had with the really pioneering and revolutionary principles of the Moon Agreement are well known. But, beyond any political utilitarianism, the Agreement still being there binding at least on all its Contracting Parties, we should not ignore the fact that, its provisions being in force for already 26 years, they have also

been transformed into rules, if not of international *jus cogens* (in the meaning of Article 53 of the 1969 Vienna Convention on the Law of Treaties), at least of customary law, therefore, legally binding also on non-Contracting States, even though no activity has been carried out on the Moon during all these years.

2. The definition of the term "*space assets*" (as only in the plural - and not in the singular - does this term have the meaning of object (*res*), means, goods, valuables, property, possessions, etc.) needs more substantial and linguistic improvements (with a view, in particular, to being less descriptive), in order to avoid any inconsistency with technical factors determining the structural integrity and functional efficiency and operability of a space object, as also the misinterpretation or even the "misuse" of it by concerned creditors. Instead of that term, it would be preferable to use one of the most common terms in international space law taxonomy and practice, such as "*space object*", "*spacecraft*" or "*space vehicle*" but I think it is now too late to make such a change.

3. Equally, it is advisable to reconsider the provisions of the proposed new Article XXVII *bis* ("*Limitations on remedies in respect of public service*") in order to give priority to the interests of the State rather than those of creditors as regards the ensuring of the constant and uninterrupted provision or maintenance of public service. Therefore, it should be for the creditors - and not for the State (of registry or of licensing) - to proceed first to the taking of all necessary steps in ensuring the continuity in the provision of public service.

4. Finally, nowhere in the text is there a relevant specific express provision excluding remedies in respect of the use of the natural resource orbit/radio frequency band (belonging to Humanity according to Space Law) and the succession of the creditor to the rights of the licensed operator without the previous explicit consent and formal authorisation of the licensing State.

### **Japan**

The Government of Japan takes this opportunity to commend the efforts of the Drafting Committee and the UNIDROIT Secretariat for all their efforts in preparing the revised preliminary draft Protocol. We support the idea of facilitating financing over space assets and promoting commercial operations in outer space with the expected result that more people enjoy the fruit of space activities in their daily life. We are convinced that the revised preliminary draft Protocol is an important step toward this goal.

One of the issues that is still left undecided is the limitations on remedies when the space asset is used for "public service." The revised preliminary draft Protocol tentatively contains a provision on such limitations as Article XXVII *bis*, within square brackets.

We fully acknowledge that there is public interest in maintaining a public service provided by space assets, most typically by satellites. Still, we doubt that the proposed Article XXVII *bis* is the best way to serve the public interest. It must be remembered that facilitating financial transactions itself serves the public interest, because otherwise commercial activities in space would not take place and the public could never enjoy the services to be provided by such commercial activities. Any mechanism that will deter financiers from financing space assets should be avoided for this reason.

Similar issues are known with regard to transactions other than financing of space assets, as is detailed in the note by Professor Kozuka, appended to this document as Appendix I. The note informs us that subjecting finance transactions to the so-called step-in procedure by the Government is not a common practice. Rather, the note points out that such a step-in right reserved by the Government will have deterrent effects on finance transactions, not least because of the banking regulation for supervisory purposes (prudential regulation). We are afraid that the

proposed Article XXVII *bis* will weaken the outcome that the members of the Drafting Committee are trying to achieve in the revised preliminary draft Protocol, having a similar effect of discouraging space financing. At the same time, we argue that it is too early to include this Article in the revised preliminary draft Protocol at this stage, because sufficient discussion has not taken place in the Committee. In the first place, the definition of “public service” has not been fully discussed in that forum, even though the proposed Article XXVII *bis* can be a seriously controversial point when the planned Protocol enters into force. The Committee has not reached a conclusion on the criteria of public service. The Committee does not have a certain answer yet. In addition, the Committee has not assessed the impact on social benefit and loss by comparing the advantage for the public side against the private side through the introduction of such an Article. Moreover, the concern about reserving a step-in right for Government can be partly or fully resolved by different regimes, such as domestic legislation and each contract.

Further, the note points out that the procurement of public service from commercial entities can take various forms. Introducing a regulation inspired by the P.F.I. scheme as applicable to every type of transaction will result in harming the public interest at this stage, when the practice in space financing has not been established at all, and would not be appropriate for this reason as well.

Based on these considerations, we should like the proposed Article XXVII *bis* not to be included in the planned Protocol at all.

As stated above, we share the concerns about maintaining public service, in particular in the case of the insolvency of the satellite operator. The best way of addressing this concern, however, would be through devising contractual arrangements that will fit each type of transaction. The international space community, including UNIDROIT as the international Organisation working on the planned Space Protocol, can play an important role in developing good practices with regard to such contractual arrangements. The Government of Japan will also be pleased to co-operate toward that end.

***Mr V. Kopal (on behalf of the delegation of the Czech Republic)***

*General remarks*

The delegation of the Czech Republic appreciates the efforts of the Drafting Committee to facilitate the forthcoming session of the Committee, with a view to facilitating the finalisation of its work. In general, we support the endeavours of the Drafting Committee to clarify some provisions and to express their meaning in more concise language (e.g. in **Article XXIV** of the revised preliminary draft Protocol). These efforts should still continue during the final stages of the negotiations and both the Committee and the Drafting Committee should avoid including further conditions, restrictions and other details in individual provisions, unless quite necessary, leaving the regulation of such details to the agreement of the parties concerned and to the applicable law.

*Comments on individual provisions*

At the third session of the Committee, we already supported the retaining of the definition of “space” in **Article I (2) (k)**. We now also agree with the redrafted definition of “space asset” in **Article I (2) (l)**.

At the end of **Article I**, we do not understand what is meant by the note, particularly which instruments should be referred to for completeness.

Neither do we understand the note at the end of **Article IV**, where we are to find a separate note relating to paragraphs 2, 4 and 5.

As to the note at the end of **Article VIII**, it would be better, indeed, to extend this Article in order to cover assignments and reassignments of debtor's rights.

**Article X(1)**, as now redrafted, is not quite clear to us.

We consider the redrafted version of **Article XXVII** and the newly added **Article XXVII bis** as a substantial improvement, which creates a good basis for reaching a full consensus on the resolution of this issue at the fourth session of the Committee.

In our opinion, the present wording of **Article XXXIV** dealing with the relationship with the United Nations Outer Space Treaties and instruments of the International Telecommunication Union is satisfactory. An enumeration of the United Nations Space Treaties is not necessary. Therefore, we propose the removal of the square brackets around this Article.

At the same time, we agree with the conclusion mentioned in paragraph 6(n) of the explanatory note on the draft agenda for the fourth session prepared by the UNIDROIT Secretariat (C.G.E./Space Pr./4/W.P. 2) that **the concept of "jurisdiction and control" used in the 1967 Outer Space Treaty and the concept of "jurisdiction" employed by the Convention** are completely different.

In **Article XXXVI (3)** we would suggest adding, after the words "a Regional Economic Integration Organisation", the phrase "having competence over certain matters governed by this Protocol". Then the end of the draft provision "where the context so requires" would follow.

In **Article XXXVII (1)(b)**, does the reference in square brackets to the Secretariat mean the UNIDROIT Secretariat?

#### **COMMENTS AND PROPOSALS SUBMITTED BY REPRESENTATIVES OF THE INTERNATIONAL COMMERCIAL SPACE, FINANCIAL AND INSURANCE COMMUNITIES**

##### ***Ms P. Cooper (on behalf of the Satellite Industry Association (S.I.A.))***

###### *General remarks*

The Satellite Industry Association (S.I.A.)<sup>2</sup> wishes to reiterate its serious concerns regarding the revised preliminary draft Protocol. At the third session of the Committee, certain delegations decided to give completion of the proposed Protocol the highest priority. This was done despite the

---

<sup>2</sup> S.I.A. is a U.S.-based trade association providing worldwide representation of the leading satellite operators, service providers, manufacturers, launch services providers, and ground equipment suppliers. S.I.A. is the unified voice of the U.S. satellite industry on policy, regulatory and legislative issues affecting the satellite business. S.I.A. Executive members include: Artel, Inc.; The Boeing Company; CapRock Government Solutions; The DIRECTV Group; Hughes Network Systems, LLC; DBSD North America, Inc.; Echostar Satellite Services, LLC; Integral Systems, Inc.; Intelsat, Ltd.; Iridium Satellite, LLC; Lockheed Martin Corporation.; Loral Space & Communications, Inc.; Northrop Grumman Corporation; Rockwell Collins Government Systems; SES World Skies, Inc.; SkyTerra Communications, Inc; and TerreStar Networks, Inc. SIA Associate Members include: Arqiva Satellite and Media; ATK Inc.; Cobham SATCOM Land Systems; Comtech EF Data Corp.; DRS Technologies, Inc.; EchoStar Satellite, LLC; EMC, Inc.; Eutelsat, Inc.; Globecom Systems, Inc.; Glowlink Communications Technology, Inc.; iDirect Government Technologies; Inmarsat, Inc.; Marshall Communications Corporation.; Panasonic Avionics Corporation; SatGE, Inc.; Spacecom, Ltd.; Spacenet Inc.; Stratos Global Corporation; Telesat Canada; Trace Systems, Inc.; and ViaSat, Inc. Additional information about S.I.A. can be found at <http://www.sia.org>.

serious concern expressed by S.I.A. and even stronger opposition from many important satellite industry representatives at the session.<sup>3</sup>

As acknowledged at the third session of the Committee, industry support is critical for the development of any such Protocol. In the light of industry objections, UNIDROIT prepared a revised version of the preliminary draft Protocol with the aim of addressing concerns voiced by various parties and ensuring a commercially viable Protocol that would enhance opportunities for asset-based financing in space.

After reviewing the revised preliminary draft Protocol, S.I.A. and its members are of the view that virtually all the concerns it had previously raised in its correspondence with UNIDROIT remain unresolved.<sup>4</sup> It reiterates its view that the revised preliminary draft Protocol does not meet the goals it was designed to achieve and, given the significance of such issues, S.I.A. still believes that it will actually hinder asset-based satellite financing. Moreover, the fundamental concern continues that the revised preliminary draft Protocol will impose an additional, unnecessary, burdensome, and vague layer of law through broad, unclearly defined rules on ownership, security interests and salvage rights in space assets.

The following issues remain as some of the most troubling to S.I.A.:

1. The sphere of application of the revised preliminary draft Protocol with particular reference to the definition of "space assets";
2. The priority of competing rights regarding components in the context of the exercise of default remedies;
3. The public service exemption from default remedies;
4. The issue of salvage interests in space assets;
5. Criteria for the identification of space assets for the purposes of registration; and
6. Debtor's rights and the assignment of debtor's rights.

We have outlined our detailed concerns for each of these points below.

Based on these remaining and unresolved concerns, S.I.A. has concluded that the revised preliminary draft Protocol simply does not address adequately the concerns raised by the satellite industry. The revisions indicate a drafting trend that is more responsive to the requirements and concerns of Governments, rather than those of the satellite and the financial community most affected by the proposed Protocol. The only justification for a legal instrument such as the proposed Protocol is that it is intended to facilitate the fundamental capital-raising needs of the commercial space and financial communities. Without this, its ability to assist the satellite industry in attracting investment is inevitably compromised. We believe that the current preliminary draft Protocol does not satisfy this goal and, in fact, would cause confusion, add layers of bureaucracy and discourage investment.

Given the foregoing and our continued serious concerns, S.I.A. does not believe that there is a compelling need for a new layer of supra-national law addressing ownership and collateral security issues relating to certain space assets. Many existing legal regimes already address adequately the granting of security in space based assets and no asset-based satellite financings have failed to proceed or been unduly burdened due to impediments over the granting and

---

<sup>3</sup> AON, Asia-Pacific Satellite Communications Council, Barclays Capital, Ciel Satellite Group, elseco limited, European Satellite Operators Association, Eutelsat, ING, Intelsat, ManSat, Marsh, O3B Networks, Satellite Industry Association, SES, Telesat, QuetzSat

<sup>4</sup> See the letters of 3 November 2009 and 23 November 2009 from S.I.A. to Mr M.J. Stanford, Deputy Secretary-General of UNIDROIT, reproduced in Appendices II and III to this document respectively.

perfection of security interests. We see no need in adopting this Protocol and therefore we continue to oppose it.

S.I.A. and its members respectfully request that you cease work toward the draft Protocol, considering the satellite industry's vigorous objections and the potential deleterious effect such a Protocol would wreak on sector worldwide.

*Detail of S.I.A. specific concerns with the revised preliminary draft Protocol*

1. The sphere of application of the revised preliminary draft Protocol, with particular reference to the definition of "space assets"

The previously proposed definition of "space assets" took the approach of enumerating assets that are to be considered space assets, such as "satellite", "satellite bus", "satellite transponder", "payload", etc. (Article I.2(k) of the 2009 version of the preliminary draft Protocol). S.I.A.'s primary concern with this approach was that, based on its experience, it is very difficult, if not impossible, to get universally accepted definitions of such terms in the industry.

Industry has previously raised S.I.A.'s concerns with regard to the criterion used to qualify "space assets", i.e. components that are not capable of independent control or of being independently owned or used. S.I.A.'s view was that there may be valuable components that do not fall under this criterion, components which may be of interest to creditors and which, under such definition of "space assets", would not be governed by the proposed Protocol.

The revised preliminary draft Protocol takes a slightly different approach by defining a space asset as "any man-made uniquely identifiable asset [capable of being independently owned, used or controlled,] in space or intended to be launched into space without losing its distinct identity, such as a satellite, space station, satellite bus, transponder, module, space vehicle, launch vehicle or space capsule [including any such asset in course of manufacture or assembly], together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating to its ownership, use or control." Although the "definition by enumeration" approach was abandoned, the criterion of "capable of being independently owned, used or controlled" is still present, albeit bracketed for now. A footnote to the revised preliminary draft Protocol explains that the square brackets are not to suggest disagreement with the need for some language but rather the desirability of more appropriate language. Thus the concern we previously raised regarding the consequences of such limitation of the sphere of application of the proposed Protocol remains.

Additional issues of concern that we previously expressed with regard to the definition of "space assets" are unresolved, such as, for example, with regard to the category of objects "intended to be launched into space [...], [including any such asset in course of manufacture or assembly]", which in our view raises the question as to how the regimen of the revised preliminary draft Protocol would interact with the regimen under the applicable national law of secured financing, since it is likely that a creditor having an interest in such an object would be advised to file a financing statement under domestic law, especially given the risk (and likelihood) that the object will not be launched within the proposed time-frame (i.e. one year before possible registration discharge) and the creditor would have to de-register its interest under the proposed Protocol, losing its priority vis-à-vis other creditors with competing interests in the same object. The benefit for creditors of adding the Protocol regimen on top of the relevant domestic regime(s) applicable to assets on the ground is highly questionable and, more likely, will be viewed as potentially confusing and disadvantageous.

2. Priority of competing rights regarding components in the context of the exercise of default remedies

Industry concerns were first raised by a proposal made during a UNIDROIT meeting in Berlin in 2008. During this meeting, language was proposed whereby creditors should only exercise default remedies in respect of a space asset if such exercise would not impair ownership rights in an independent component that was either physically or functionally linked to that space asset. This approach effectively provides non-disturbance or quiet enjoyment rights to owners or creditors of component parts and may, therefore, impair the ability of owners of the asset with the component parts from securing financing.

We understand that a provision is still under consideration regarding enforcement against a space asset that is functionally linked to another space asset in which another creditor has an interest. We remain doubtful that any alternative language will adequately address our concern that the financing of component parts of satellites, such as transponders and hosted payloads, and other space assets be recognised adequately and accurately. Therefore, industry's initial concerns remain.

We also object to an approach effectively providing non-disturbance or quiet enjoyment rights to owners or creditors of component parts that may, therefore, impair the ability of owners of the asset with the component parts from securing financing. Issues between and among creditors are usually dealt with as a matter of negotiation on a case-by-case basis. Our proposal then was, and still is, to allow creditors to settle potential conflicting rights as regards assets and their component parts that may be separately financed via inter-creditor agreements.

3. Public service exemption from default remedies

One of the most significant issues of concern, the limitations on the exercise of creditors' remedies with respect to space assets performing a public service, remains outstanding in the revised preliminary draft Protocol. Despite UNIDROIT'S declared aim to balance the interests of Governments in the continuance of telecommunications services of public importance and the rights of creditors to be paid, the current proposal still incorporates the "public service" condition for creditor remedies, even where only a portion of a space asset may be considered to be serving a public purpose. As such, this creates uncertainty in the economic value of the security taken by creditors in space assets and thus may discourage financing.

The revised preliminary draft Protocol provides in Article XXVII *bis* that a State has the right to object to the exercise of default remedies in respect of a space asset needed for the provision or maintenance of a public service that is in the vital interest of that State if the exercise of those remedies would cause interruption in the provision or maintenance of that service. A mechanism is provided for the creditor to exercise the right to step in and assume responsibility for the provision or maintenance of the services or to appoint a substitute entity for that purpose, once it has been notified by the State of its objection to the exercise of remedies by the creditor. If the creditor does not exercise such step-in right, the State that objects to the exercise of default remedies by the creditor has the option either to cure the debtor's default by paying the creditor "all sums outstanding for the entire period of default" or to take or procure possession, use or control of the space asset and assume the debtor's obligations by stepping into the obligations of the debtor for the provision of a public service in the State concerned.

The proposed wording provides that a State has 90 days to exercise such rights after it objects to the exercise of default remedies by the creditor. A State may only invoke the right to object to the exercise of default remedies if it has registered in the International Registry a notice recording that the space asset is used for providing a public service in the vital interest of that

State prior to the registration of an international interest in that space asset by a creditor “[or if it has registered such notice within six months of the launch of a space object, even if after the registration of an international interest by the creditor.]”

As a result, the concerns S.I.A. expressed previously regarding the public service limitation on remedies remain and are even further amplified. These include:

(a) the term “public service” is not defined by the revised preliminary draft Protocol and, under the current proposal, it will be subject to various interpretations by various Contracting States, adding another layer of uncertainty to the requirements for enforcement of default remedies by creditors;

(b) most countries already impose certain conditions or requirements on communications service providers related to matters of emergency, national security or related communications. Adding yet another, amorphous layer of limitation at the international level will create confusion and lack of uniformity;

(c) satellites may offer “public service” communications to differing and varying degrees in a manner that would be difficult or impossible for any creditor to predict or control. It is possible that the use of a single transponder for occasional use emergency services, news gathering or live important events could “qualify” the entire satellite as one providing a “public service;”

(d) by entitling a State to prohibit the exercise of default remedies that would result in the interruption of a public service provided by the space asset, the revised wording is still extremely restrictive on default remedies;

(e) allowing for a “step-in right” in favour of the creditor in the event of default by the debtor providing the public service, even if by appointing a substitute entity for such purpose, may not be a feasible option for some of the creditors, since it entails taking over the operation of a space asset and would require assumption of costly and potentially long-term legal, regulatory, technical, commercial and financial rights and obligations and, even if it could do so, liabilities associated with such operation;

(f) since satellites services are inherently international in nature providing services across many borders, the many States served may have rights and differing interpretations of public service, resulting in potentially varying and conflicting requirements. This is true even assuming licences and authorisations to operate the satellite were timely obtainable by a substitute entity in each affected State;

(g) there is no condition on any State registering its right to object other than its own determination that the asset is used for providing a public service in the vital interest of that State;

(h) allowing for a “step-in right” in favour of the Contracting State in the event of default by the debtor providing the public service appears to create an “open door” for a form of appropriation and, as such, may deter potential creditors, especially if there are concerns as to whether compensation to be provided by the State for such appropriation (if any) would be “fair” and forthcoming in a timely manner;

(i) as noted even by the drafters, the practical implications of the question as to how a State could exercise a step-in right in respect of an operator licensed in a foreign country or operating through equipment located in a third country needs to be considered; and

(j) the right of a State to record a notice with the International Registry that will affect not only the rights of creditors that record their interests after such notice but also the rights of creditors that have already recorded their rights at the time of such notice adds a level of uncertainty as to the applicable regimen that will likely be unacceptable to most creditors and would therefore likely discourage lending to the types of entities that UNIDROIT seeks to assist.

S.I.A. reiterates its previously stated belief that any provision that makes reference to a limitation on creditors' remedies based on such an undefined and overly broad "public service" concept will sharply undercut the level of predictability needed to attract asset-based financing. S.I.A. further reiterates that such a provision is unnecessary given existing national regulation and will deter, not facilitate, satellite financing. No public service exception should exist.

#### 4. Salvage interests in space assets

Certain insurers requested and obtained revisions to the preliminary draft Protocol to protect their salvage interests under launch and in-orbit insurance policies covering the risk of loss of, or damage to, satellites. The revised preliminary draft Protocol creates, in Article IV(5), a right of subrogation to the interest of the creditor whose debt has been discharged. The provision further specifies that the insurers have the right of subrogation to the creditor's associated rights and related international interest and any recorded debtor's rights in the space asset to the extent of the insurer's salvage interest. This right of subrogation is intended to be in addition to and not affect any right of subrogation the insurer may have under national law or the insurance policy. Besides, it is a fundamental tenet of insurance law that an insurer cannot subrogate against its insured and, so, indirectly permitting this against the insured's assets is questionable.

S.I.A.'s previously expressed concern remains. In our view, such salvage rights in favour of insurers create potential priority issues unacceptable to creditors with interests in the space asset (and whose debt has not been discharged at the time of the subrogation) that undermine the clarity financial institutions expect. Moreover, where more than one insurer exists (as is invariably the case) or more than one creditor exists (such as creditors of debtor's rights as well as other international interests), the relative priorities and rights of the universe of creditors will be very challenging to define and reconcile.

Recognition of insurers' rights to salvage is wholly unnecessary to facilitate satellite financing and would be an unprecedented right that is currently unavailable in aircraft or rolling stock financing, where salvage rights are and should be subject and subordinate to rights of secured lenders. Forcing upon satellite operators the need to address the rights of insurers relative to financial institutions as a condition of placing launch and in-orbit insurance will serve to delay or jeopardise the placement of insurance and likely force inter-creditor arrangements between lenders, other creditors and insurers (which would involve numerous parties that tend to change over time).

It remains S.I.A.'s belief that creating and elevating insurers' rights to salvage will result in significant impediments to satellite financing and a lack of clarity in relative rights of creditors.

#### 5. Identification of space assets for the purposes of registration

The Convention requires the unique identification of a space asset before an international interest can be constituted and registered. There has been much debate and confusion over how a space asset will be identified and defined. Uncertainty with regard to the applicable identification criteria is still present in the revised preliminary draft Protocol.

Article XXX of the revised preliminary draft Protocol distinguishes, in terms of identification of space assets for registration purposes, between space assets that have not been launched and space assets that have been launched. With regard to a space asset that has not been launched, Article XXX(1) provides that "a description of the space asset that contains the name of its manufacturer, its manufacturer's serial number, and its model designation and satisfies such other requirements as may be established in the regulations is necessary and sufficient to identify the space asset for the purposes of registration in the International Registry." With respect to a space

asset that has been launched, Article XXX(2) provides that “a description of the space asset that contains the date and time of its launch, its launch site, the name of its launch provider and [...] and satisfies such other requirements as may be established in the regulations is necessary and sufficient to identify the space asset for the purposes of registration in the International Registry.”

Many of the core identification criteria enumerated above are meaningless in providing certainty of identification both before and after launch. Moreover, S.I.A.’s previously expressed concern regarding the need to satisfy “requirements as may be established in the regulations” in addition may undermine the level of certainty expected by creditors as to the identification of space assets for the purposes of registration.

#### 6. Debtor’s rights and the assignment of debtor’s rights

The revised preliminary draft Protocol maintains the approach that assignments to the creditor of debtor’s rights and related rights are themselves registrable as international interests. Article I(2)(b) defines “debtor’s rights” as “all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset.” Article I(2)(i) defines “rights assignments” as “a contract by which the debtor confers on the creditor an interest (including an ownership interest) in or over the whole or part of existing or future debtor’s rights to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates.”

The revised preliminary draft Protocol provides in Article IV(2) that the provisions of the Protocol applicable to rights assignments also apply to an assignment to the buyer of a space asset of rights to payment or other performance due or to become due to the seller by any person with respect to the space asset as if references to the debtor and the creditor were references to the seller and the buyer respectively. Note also that, according to Article IV(4), an interest in a space asset acquired by a satellite insurer as a salvage interest is deemed to have been acquired by way of sale. The priority as between an assignee of debtor’s rights under a rights assignment and an assignee under an assignment of rights deriving from the space asset but unconnected to an international interest is still under consideration.

Virtually all the concerns S.I.A. has previously raised remain unresolved. The scope of application of the concept of “debtor’s rights” remains unclarified. The reference to “all” in its definition (*i.e.*, “‘debtor’s rights’ means all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset”), for example, implies that the assignment of less than all rights would not be recognised. Moreover, not all rights with respect to a space asset would necessarily extend just to the debtor, as opposed to other related parties. The provisions of Article IV(2) raise the question, and create potential confusion, as to whether the revised preliminary draft Protocol is intended to apply to an outright sale of debtor’s rights and how such sale could be affected where an international interest exists with respect to the underlying space asset.

The addition of Article IV(4) raises questions as to newly created rights of insurers as “buyers” under the revised preliminary draft Protocol and how those rights affect the rights of other outright buyers that are not creditors as well as the rights of debtors relative to sellers of space assets. The extension of those rights for the benefit of insurers and, possibly, of assignees under arrangements unconnected with an international interest creates the prospect of confusion and ambiguity regarding the rights of creditors having, or expecting, an international interest in the underlying asset.

It is also not clear within the definition of "rights assignment" what obligation "associated with the space asset" means. This may be of particular concern where, for example, capacity agreements may relate to separate transponders or payloads but not to the satellite itself to which an international interest may have been first granted.

Whilst it is well understood that the International Registry is asset-based and that, as a result, any debtor's rights should derive from the underlying space asset, there may be instances where debtor's rights may be intended to secure the financing of a separately identifiable part of the international interest to which they first may have been associated. This may result in limitations on the flexibility of satellite financing otherwise currently available to prospective debtors.

S.I.A. notes that, pursuant to Article IV(1) and (3), an owner of a satellite may have to register in the International Registry the sale through which it takes title to the satellite, even if such sale is not part of a financing. Requiring every owner of a satellite to register its interest in order to protect internationally its ownership is an unnecessary administrative burden with potentially drastic consequences if not undertaken.

It is understandable that a decision was taken to eliminate related rights (essentially licences) from the scope of the proposed Protocol. However, Article XVI of the revised preliminary draft Protocol has not been changed, despite our expressed concerns and still imposes on the debtor an onerous and unqualified obligation to take all steps within its power to procure the transfer of its licence to the creditor on the termination of its licence and the grant of a new licence to the creditor and must fully co-operate with the creditor to that end. We remain of the view that reconsideration of the obligation imposed on the licence-holder to ensure the transfer or cancellation and reissuance of any licence is essential. The unintended consequences for satellite operators would be severe.

***Ms N. Eskenazi (SES), Mr S. Gibson (Ciel Satellite), Mr K. Gude (Intelsat), Mr C. Serna Alvear (QuetzSat), Mr K. Singarajah (Avanti Communications), Mr W. Steenbakkers (ING) and Mr C. Stott (ManSat)***

We, as representatives of the satellite industry, have several issues of continuing concern regarding the revised preliminary draft Protocol. Although it was acknowledged that industry support is critical for the development of the proposed Protocol and despite serious concerns expressed and even opposition from many important satellite industry representatives. At the request of several Government representatives to postpone any further work on refining the text until the completion of an economic assessment of its benefits, several delegations decided during the UNIDROIT meeting in Rome that completion of the preliminary draft Protocol was to be given the highest priority. As a result, a revised version of the preliminary draft Protocol was prepared by UNIDROIT with the aim of addressing concerns voiced by various parties and ensuring a commercially viable Protocol that would enhance opportunities for asset-based financing in space.

After reviewing the proposed revised text, we are of the view that virtually all the concerns we previously raised in our correspondence with UNIDROIT remain unresolved. We reiterate our view that the revised preliminary draft Protocol does not meet the goals it was designed to achieve and, given the significance of such issues, we still believe that it will actually hinder asset-based satellite financing. Moreover, the fundamental concern continues that the revised preliminary draft Protocol will impose an additional, unnecessary, burdensome, and vague layer of law through broad, unclearly defined rules on ownership, security interests and salvage rights in space assets.

The following issues remain as some of the most troubling to us:

1. the sphere of application of the revised preliminary draft Protocol with particular reference to the definition of "space assets";
  2. the priority of competing rights regarding components in the context of the exercise of default remedies;
  3. the public service exemption from default remedies;
  4. the issue of salvage interests in space assets;
  5. the criteria for the identification of space assets for the purposes of registration; and
  6. debtor's rights and the assignment of debtor's rights.
1. The sphere of application of the revised preliminary draft Protocol, with particular reference to the definition of "space assets"

The previously proposed definition of "space assets" took the approach of enumerating assets that are to be considered space assets, such as "satellite", "satellite bus", "satellite transponder", "payload", etc. (Article 1(2)(k) of the 2009 version of the preliminary draft Protocol). Our concern with this approach was that, based on our experience, it is very difficult, if not impossible, to get universally accepted definitions of such terms in the industry.

We also expressed concern with regard to the criterion used to qualify "space assets", i.e. components that are not capable of independent control or of being independently owned or used. Our view was that there may be valuable components that do not fall under this criterion, components which may be of interest to creditors and which, under such definition of "space assets", would not be governed by the proposed Protocol.

The revised preliminary draft Protocol takes a slightly different approach by defining a space asset as "any man-made uniquely identifiable asset [capable of being independently owned, used or controlled,] in space or intended to be launched into space without losing its distinct identity, such as a satellite, space station, satellite bus, transponder, module, space vehicle, launch vehicle or space capsule [including any such asset in course of manufacture or assembly], together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating to its ownership, use or control." Although the "definition by enumeration" approach was abandoned, the criterion of "capable of being independently owned, used or controlled" is still present, albeit bracketed for now. A footnote to the revised preliminary draft Protocol explains that the square brackets are not to suggest disagreement with the need for some language but rather the desirability of more appropriate language. Thus the concern we previously raised regarding the consequences of such limitation of the sphere of application of the proposed Protocol remains.

Additional issues of concern that we previously expressed with regard to the definition of "space assets" are unresolved, such as, for example, with regard to the category of objects "intended to be launched into space [...], [including any such asset in course of manufacture or assembly]", which in our view raises the question as to how the regimen of the revised preliminary draft Protocol would interact with the regimen under the applicable national law of secured financing, since it is likely that a creditor having an interest in such an object would be advised to file a financing statement under domestic law, especially given the risk (and likelihood) that the object will not be launched within the proposed time-frame (i.e. one year before possible registration discharge) and the creditor would have to de-register its interest under the proposed Protocol, losing its priority vis-à-vis other creditors with competing interests in the same object. The benefit for creditors of adding the Protocol regimen on top of the relevant domestic regime(s) applicable to assets on the ground is highly questionable and, more likely, will be viewed as potentially confusing and disadvantageous.

2. Priority of competing rights regarding components in the context of the exercise of default remedies

Our concerns were first raised by a proposal made during a UNIDROIT meeting in Berlin in 2008. During this meeting language was proposed whereby creditors should only exercise default remedies in respect of a space asset if such exercise would not impair ownership rights in an independent component that was either physically or functionally linked to that space asset. This approach effectively provides non-disturbance or quiet enjoyment rights to owners or creditors of component parts and may, therefore, impair the ability of owners of the asset with the component parts from securing financing.

We understand that a provision regarding enforcement against a space asset that is functionally linked to another space asset in which another creditor has an interest is still under consideration and currently being drafted. We remain doubtful that any alternative language will adequately address our concern that the financing of component parts of satellites, such as transponders and hosted payloads, and other space assets be recognised adequately and accurately. Therefore, our initial concerns remain.

We also object to an approach effectively providing non-disturbance or quiet enjoyment rights to owners or creditors of component parts that may, therefore, impair the ability of owners of the asset with the component parts from securing financing. Issues between and among creditors are usually dealt with as a matter of negotiation on a case-by-case basis. Our proposal then was, and still is, to allow creditors to settle potential conflicting rights as regards assets and their component parts that may be separately financed via inter-creditor agreements.

3. Public service exemption from default remedies

One of the most significant issues of concern, the limitations on the exercise of creditors' remedies with respect to space assets performing a public service, remains outstanding in the revised preliminary draft Protocol. Despite UNIDROIT's declared aim to balance the interests of Governments in the continuance of telecommunications services of public importance and the rights of creditors to be paid, the current proposal still incorporates the "public service" condition for creditor remedies, even where only a portion of a space asset may be considered to be serving a public purpose. As such, this creates uncertainty as to the economic value of the security taken by creditors in space assets and thus may discourage financing.

The revised preliminary draft Protocol provides in Article XXVII *bis* that a State has the right to object to the exercise of default remedies in respect of a space asset needed for the provision or maintenance of a public service that is in the vital interest of that State if the exercise of those remedies would cause interruption in the provision or maintenance of that service. A mechanism is provided for the creditor to exercise the right to step in and assume responsibility for the provision or maintenance of the services or appoint a substitute entity for that purpose, once it has been notified by the State of its objection to the exercise of remedies by the creditor. If the creditor does not exercise such step-in right, the State that objects to the exercise of default remedies by the creditor has the option either to cure the debtor's default by paying the creditor "all sums outstanding for the entire period of default" or to take or procure possession, use or control of the space asset and assume the debtor's obligations by stepping into the obligations of the debtor for the provision of a public service in the State concerned.

The proposed wording provides that a State has 90 days to exercise such rights after it objects to the exercise of default remedies by the creditor. A State may only invoke the right to object to the exercise of default remedies if it has registered in the International Registry a

notice recording that the space asset is used for providing a public service in the vital interest of that State prior to the registration of an international interest in that space asset by a creditor “[or if it has registered such notice within six months of the launch of a space object, even if after the registration of an international interest by the creditor.]”

As a result, the concerns we expressed previously regarding the public service limitation on remedies remain and are even further amplified. These include:

(a) the term “public service” is not defined by the revised preliminary draft Protocol and, under the current proposal, it will be subject to various interpretations by various Contracting States, adding another layer of uncertainty to the requirements for enforcement of default remedies by creditors;

(b) most countries already impose certain conditions or requirements on communications service providers related to matters of emergency, national security or related communications. Adding yet another, amorphous layer of limitation at the international level will create confusion and lack of uniformity;

(c) satellites may offer “public service” communications to differing and varying degrees in a manner that would be difficult or impossible for any creditor to predict or control. It is possible that the use of a single transponder for occasional use emergency services, news gathering or live important events could “qualify” the entire satellite as one providing a “public service;”

(d) by entitling a State to prohibit the exercise of default remedies that would result in the interruption of a public service provided by the space asset, the revised wording is still extremely restrictive on default remedies;

(e) allowing for a “step-in right” in favour of the creditor in the event of default by the debtor providing the public service, even if by appointing a substitute entity for such purpose, may not be a feasible option for some of the creditors since it entails taking over the operation of a space asset and would require assumption of costly and potentially long-term legal, regulatory, technical, commercial and financial rights and obligations and, even if it could do so, liabilities associated with such operation;

(f) since satellites services are inherently international in nature providing services across many borders, the many States served may have rights and differing interpretations of public service, resulting in potentially varying and conflicting requirements. This is true even assuming licences and authorisations to operate the satellite were timely obtainable by a substitute entity in each affected State;

(g) there is no condition on any State registering its right to object other than its own determination that the asset is used for providing a public service in the vital interest of that State;

(h) allowing for a “step-in right” in favour of the Contracting State in the event of default by the debtor providing the public service appears to create an “open door” for a form of appropriation and, as such, may deter potential creditors especially if there are concerns as to whether compensation to be provided by the State for such appropriation (if any) would be “fair” and forthcoming in a timely manner;

(i) as noted even by the drafters, the practical implications of the question as to how a State could exercise a step-in right in respect of an operator licensed in a foreign country or operating through equipment located in a third country needs to be considered; and

(j) the right of a State to record a notice with the International Registry that will affect not only the rights of creditors that record their interests after such notice but also the rights of creditors that have already recorded their rights at the time of such notice adds a level of

uncertainty as to the applicable regimen that will likely be unacceptable to most creditors and would therefore likely discourage lending to the types of entities that UNIDROIT seeks to assist.

We reiterate our previously stated belief that any provision that makes reference to a limitation on creditors' remedies based on such an undefined and overly broad "public service" concept will sharply undercut the level of predictability needed to attract asset-based financing. We further reiterate that such a provision is unnecessary given existing national regulation and will deter, not facilitate, satellite financing. No public service exception should exist.

#### 4. Salvage interests in space assets

Certain insurers requested and obtained revisions to the preliminary draft Protocol to protect their salvage interests under launch and in-orbit insurance policies covering the risk of loss of, or damage to, satellites. The revised preliminary draft Protocol creates, in Article IV(5), a right of subrogation to the interest of the creditor whose debt has been discharged. The provision further specifies that the insurers have the right of subrogation to the creditor's associated rights and related international interest and any recorded debtor's rights in the space asset to the extent of the insurer's salvage interest. This right of subrogation is intended to be in addition to and not affect any right of subrogation the insurer may have under national law or the insurance policy. Besides, it is a fundamental tenet of insurance law that an insurer cannot subrogate against its insured and, so, indirectly permitting this against the insured's assets is questionable.

Our previously expressed concern remains. In our view, such salvage rights in favour of insurers create potential priority issues unacceptable to creditors with interests in the space asset (and whose debt has not been discharged at the time of the subrogation) that undermines the clarity financial institutions expect. Moreover, where more than one insurer exists (as is invariably the case) or more than one creditor exists (such as creditors of debtor's rights as well as other international interests), the relative priorities and rights of the universe of creditors will be very challenging to define and reconcile.

Recognition of insurers' rights to salvage is wholly unnecessary to facilitate satellite financing and would be an unprecedented right that is currently unavailable in aircraft or rolling stock financing, where salvage rights are and should be subject and subordinate to rights of secured lenders. Forcing upon satellite operators the need to address the rights of insurers relative to financial institutions as a condition of placing launch and in-orbit insurance will serve to delay or jeopardise the placement of insurance and likely force inter-creditor arrangements between lenders, other creditors and insurers (which would involve numerous parties that tend to change over time).

It remains our belief that creating and elevating insurers' rights to salvage will result in significant impediments to satellite financing and a lack of clarity in relative rights of creditors.

#### 5. Identification of space assets for the purposes of registration

The Convention requires the unique identification of a space asset before an international interest can be constituted and registered. There has been much debate and confusion over how a space asset will be identified and defined. Uncertainty with regard to the applicable identification criteria is still present in the revised preliminary draft Protocol.

Article XXX of the revised preliminary draft Protocol distinguishes, in terms of identification of space assets for registration purposes, between space assets that have not been launched and space assets that have been launched. With regard to a space asset that has

not been launched, Article XXX(1) provides that "a description of the space asset that contains the name of its manufacturer, its manufacturer's serial number, and its model designation and satisfies such other requirements as may be established in the regulations is necessary and sufficient to identify the space asset for the purposes of registration in the International Registry." With respect to a space asset that has been launched, Article XXX(2) provides that "a description of the space asset that contains the date and time of its launch, its launch site, the name of its launch provider and [...] and satisfies such other requirements as may be established in the regulations is necessary and sufficient to identify the space asset for the purposes of registration in the International Registry."

Many of the core identification criteria enumerated above are meaningless in providing certainty of identification both before and after launch. Moreover, our previously expressed concern regarding the need to satisfy "requirements as may be established in the regulations" in addition may undermine the level of certainty expected by creditors as to the identification of space assets for purposes of registration.

#### 6. Debtor's rights and the assignment of debtor's rights

The revised preliminary draft Protocol maintains the approach that assignments to the creditor of debtor's rights and related rights are themselves registrable as international interests. Article 1(2)(b) defines "debtor's rights" as "all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset." Article 1(2)(i) defines "rights assignments" as "a contract by which the debtor confers on the creditor an interest (including an ownership interest) in or over the whole or part of existing or future debtor's rights to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates."

The revised preliminary draft Protocol provides in Article IV(2) that the provisions of the Protocol applicable to rights assignments also apply to an assignment to the buyer of a space asset of rights to payment or other performance due or to become due to the seller by any person with respect to the space asset as if references to the debtor and the creditor were references to the seller and the buyer respectively. Note also that, according to Article IV(4), an interest in a space asset acquired by a satellite insurer as a salvage interest is deemed to have been acquired by way of sale. The priority as between an assignee of debtor's rights under a rights assignment and an assignee under an assignment of rights deriving from the space asset but unconnected to an international interest is still under consideration.

Most of the issues of concern we have previously raised remain unresolved. First, it is still not entirely clear what the scope of application of the concept of "debtor's rights" is. The reference to "all" in its definition (i.e. "debtor's rights' means all rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset"), for example, implies that the assignment of less than all rights would not be recognised. Moreover, not all rights with respect to a space asset would necessarily extend just to the debtor, as opposed to other related parties. The provisions of Article IV(2) raise the question, and create potential confusion, as to whether the revised preliminary draft Protocol is intended to apply to an outright sale of debtor's rights and how such sale could be affected where an international interest exists with respect to the underlying space asset.

The addition of Article IV(4) raises questions as to newly created rights of insurers as "buyers" under the revised preliminary draft Protocol and how those rights affect the rights of other outright buyers that are not creditors as well as the rights of debtors relative to sellers of space assets. The extension of those rights for the benefit of insurers and, possibly, of assignees

under arrangements unconnected with an international interest creates the prospect of confusion and ambiguity regarding the rights of creditors having, or expecting, an international interest in the underlying asset.

It is also not clear within the definition of "rights assignment" what obligation "associated with the space asset" means. This may be of particular concern where, for example, capacity agreements may relate to separate transponders or payloads but not to the satellite itself to which an international interest may have been first granted.

While it is well understood that the International Registry is asset-based and that, as a result, any debtor's rights should derive from the underlying space asset, there may be instances where debtor's rights may be intended to secure the financing of a separately identifiable part of the international interest to which they first may have been associated. This may result in limitations on the flexibility of satellite financing otherwise currently available to prospective debtors.

We note that pursuant to Article IV(1) and (3), an owner of a satellite may have to register in the International Registry the sale through which it takes title to the satellite, even if such sale is not part of a financing. Requiring every owner of a satellite to have to register its interest in order to protect internationally its ownership is an unnecessary administrative burden with potentially drastic consequences if not undertaken.

It is understandable that a decision was taken to eliminate related rights (essentially licences) from the scope of the proposed Protocol. However, Article XVI of the revised preliminary draft Protocol has not been changed, despite our expressed concerns and still imposes on the debtor an onerous and unqualified obligation to take all steps within its power to procure the transfer of its licence to the creditor on the termination of its licence and the grant of a new licence to the creditor and must fully co-operate with the creditor to that end. We are still of the view that reconsideration of the obligation imposed on the licence-holder to ensure the transfer or cancellation and reissuance of any licence is essential. The unintended consequences would be severe on satellite operators.

## Conclusion

The revised preliminary draft Protocol does not address adequately the concerns raised by the satellite industry. The revisions indicate a drafting trend that is more responsive to the requirements and concerns of Governments rather than those of the satellite and the financial community most affected by the proposed Protocol. The only justification for a legal instrument such as the proposed Protocol is that it is intended to facilitate the fundamental capital-raising needs of the commercial space and financial communities. Without this, its ability to assist the satellite industry in attracting investment is inevitably compromised. We believe that the revised preliminary draft Protocol does not satisfy this goal and, in fact, would cause confusion, add layers of administrative burden and discourage investment. The various drafting attempts over the last eight years have failed to satisfy the expectations of its main constituencies, the satellite industry and financial institutions.

Given the foregoing and our continued serious concerns, we do not believe there is a compelling need for a new layer of supra-national law addressing ownership and collateral security issues relating to certain space assets. Many existing legal regimes already address adequately the granting of security in space based assets and no asset-based satellite financings have failed to proceed or been unduly burdened due to impediments over the granting and perfection of security interests. We see no need in adopting this Protocol and therefore we continue to oppose it.

**Mr O. Gebler (Baker & McKenzie)**<sup>5</sup>*Re Article XXVII bis (3)(a)*

Finance practitioners have expressed their concern that this proposal will not be bankable. If the State chooses financially to support the existing debtor rather than exercising its step-in right, the bank will expect not only to receive all outstanding amounts but also that the State guarantees the borrower's future obligations under the financing.

I would, therefore, propose adding the words "and providing a bank guarantee or other adequate security for the remainder of the financing" after the word "default" at the end of Article XXVII *bis* (3)(a).

*Re Article XXVII bis (3)(b)*

A bank usually obtains credit approval for a particular borrower. Banks will normally not be prepared to agree up front to substitution of the original borrower by a party unknown to it. Therefore a step-in by the State can only be exercised with the creditor's consent. If such consent is not given, the State must take out or re-finance the bank if it wants to exercise the step-in right.

I would, therefore, propose adding the words "provided that if the creditor objects to the step-in by the State, the State shall repay the creditor in full" after the word "concerned" at the end of Article XXVII *bis* (3)(b).

**Mr W.L. Lawrence (O3b Networks)**

We write to reiterate our position regarding the proposed draft Space Assets Protocol to the Convention as set forth in our prior letter to you of 1 December 2009. As members of the space industry, we commend the efforts of Unidroit in modernising, harmonising and co-ordinating private law. However, we remain concerned with the direction of the current preliminary draft Protocol. We do not believe that the proposed Protocol will facilitate financing for the space industry but will, instead, add a new layer of unnecessary and vague supranational law. The result could be a chilling effect on space asset financing.

Therefore, we respectfully urge you to reconsider the need for the proposed Protocol.

**Ms M. Leimbach (Crédit Agricole S.A., on behalf of French banks)**<sup>6</sup>

By way of a preliminary remark, it should be noted that French banks feel that clarification is required in the revised preliminary draft Protocol, failing which the legal issues at stake will become confused:

- on the one hand, the practical aspects of the space asset :
  - *ownership of the asset*, in the sense of "usus, fructus" and "abusus",
  - *operation of the asset*, in the sense of positioning and controlling (in particular technically) the space asset,

---

<sup>5</sup> Mr Gebler indicated that his comments were the outcome of discussions he had had with asset / project finance practitioners in financial institutions (KfW, Deutsche Bank and Santander).

<sup>6</sup> In the message under cover of which Ms Leimbach submitted these comments, she indicated that they were the result of consultations involving BNP Paribas, Crédit Agricole S.A., HSBC, Natixis and Société Générale.

- *turning the asset to use ("exploitation")*, in the economic and financial sense of its commercial use by an operator through applications and services and,
- *making use of the asset ("utilisation")*, in the sense of the technical use made of satellite applications through the transmission of data to users;

- on the other hand, the parties involved and their role:

- *debtor/owner/operator*,
- *creditor/financial institution and*,
- *lessee/user*.

### 1. *Sphere of application of the revised preliminary draft Protocol*

In order for the revised preliminary draft Protocol to be applicable, the debtor has to be located in a Contracting State at the time of the conclusion of the agreement under which the international interest was constituted or provided for.

The fact that the creditor or the asset on the ground, on application of the *lex rei sitae*, is found to be situated in a Contracting State cannot lead to the application of the revised preliminary draft Protocol.

This may raise a problem if the security interest is taken over an asset which is being constructed in country A, is launched in country B and is intended to become the property of a debtor located in country C.

The creditor would need to take successive security interests in each country concerned without any guarantee of effectiveness.

No definition is provided of the place where "the debtor is situated".<sup>7</sup> It needs to be clarified whether the place where the debtor is situated is the place where it has its registered office, where it has the centre of its main interests or whether a mere place of business suffices.

### 2. *The definition of space asset and related rights*

The task is to identify those corporeal or incorporeal movable assets that may be the subject of a security interest, as being capable of individual identification, which means being capable of independent ownership, use or control and being accessible to the creditor in the event of default, that is being able to be "repossessed", physically in the case of assets still on the ground or legally - in the sense of being operated, turned to use and resold by the financial institution where they are in space.

In order for the revised preliminary draft Protocol to be applicable, the asset must fit the definition of "space asset".

- According to Article I(2)(l), the term "space asset" means "any man-made uniquely identifiable asset [capable of being independently owned, used or controlled,] in space or intended to be launched into space without losing its distinct identity, such as a satellite, space station, satellite bus, transponder, module, space vehicle, launch vehicle or space capsule [including any such asset in course of manufacture or assembly], together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating to its ownership, use or control".

---

<sup>7</sup> *Note by the UNIDROIT Secretariat*: this is a reference to Article 3 of the Convention.

(a) Individualisation of the asset

Financial institutions are in favour of the space asset being apprehended as a whole, without distinguishing the components (satellite bus and payload), which corresponds to current practice. They consider, moreover, that a security interest cannot be taken in a transponder, in that what is involved is not a movable asset but a service.

The conjunction used in the definition should be "and" rather than "or", in that the criteria for the individualisation of a space asset are cumulative.

We would, accordingly, propose deletion of the reference to "satellite bus" and "transponder" in the definition.

(b) Future assets

What is at issue are assets under construction, being transported or on a launching site.

- The definition of "space asset" in Article 1(2)(l) includes "any ... asset in course of manufacture or assembly".

- The Convention and the revised preliminary draft Protocol provide for the possibility of registering "an interest that is intended to be created or provided for in an object as an international interest in the future, upon the occurrence of a stated event (which may include the debtor's acquisition of an interest in the object), whether or not the occurrence of the event is certain or not".<sup>8</sup>

It is, therefore, intended to be possible, under the revised preliminary draft Protocol, to register a prospective international interest in an asset that is being constructed, to provide security for the obligation that arises in favour of financial institutions progressively as funding is advanced toward the construction price and the launch of the asset and insurance policies.

This point is an essential factor for financial institutions, since, the construction, the launch and the insurance being financed and paid for prior to the launching of the space asset, the security interest needs to be constituted beforehand too.

Financial institutions are in favour of the inclusion of this possibility.

On the other hand, they are not favourable to the registration of a prospective international interest covering all future space assets of the debtor without these being identified individually. Unless I am mistaken, this is possible under certain types of security, such as the Canadian "security interest" and the English "floating charge", but not under French law.

(c) Assets assembled or manufactured in space

No specific reference is made in the revised preliminary draft Protocol to assets that may be manufactured in space or on other celestial bodies but the inclusion in the definition of space asset of "assets in space" does not exclude them.

However, to the extent that their registration and, therefore, their connection to a State, their status, authorisations and the assumption of responsibility for them are not organised, the

---

<sup>8</sup> *Note by the UNIDROIT Secretariat:* this is a reference to Article 1(y) of the Convention.

question may be asked whether, at this stage, they should not be expressly excluded from the revised preliminary draft Protocol.

(d) The rights and authorisations related to a space asset

Under Article XXVII(2), “[a] Contracting State ... may restrict or attach conditions to the exercise of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol, including the placement of command codes and other data and materials pursuant to Article XX, where the exercise of such remedies would involve or require the transfer of controlled goods, technology, data or services, or would involve the transfer or assignment of a licence, or the grant of a new licence, to the creditor.” It is not the creditor who will be the beneficiary of the licence.

The ability to register an interest in these related rights (some of which, such as frequencies, may be made use of and negotiated in some countries);

Imposing an obligation on the State either to accept the substituting of a new operator proposed by the financial institution if it satisfies the legal, technical, financial and commercial conditions predefined in the licence or to compensate the creditor financial institution if it refuses to transfer the licence or issue a new licence would provide an element of legal reassurance which might make the revised preliminary draft Protocol attractive to financial institutions.

These related rights break down into two categories:

(i) *the corporeal and incorporeal elements linked to the operation and control of a satellite*

The satellite is part of a composite system of corporeal and incorporeal elements, in particular the control and command software and the access codes (telemetry, tracking and control services) and the ground stations. It would be difficult to include the latter, being real property in nature, in the planned Protocol, whether this be as a right related to the space asset or as a debtor’s right, unless one were to treat them as a right *in personam* and not a right *in rem*.

- The definition of space asset does not make any specific reference to the former, referring only to “all data, manuals and records relating to its ownership, use or control”.
- On the other hand, Article XX permits “the placement of command codes and other data and materials with another person in order to afford the creditor the opportunity to take possession of, establish control over or operate the space asset”.

Financial institutions would like to see the control and command software and access codes feature in these two Articles as rights related to the space asset, capable of forming part of the international interest.

(ii) *The “licence”: regulatory authorisations, including orbits positions and frequencies*

- According to Article I(2)(g) of the revised preliminary draft Protocol, “licence” means: “any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of, a national or intergovernmental or other international body or authority, when acting in a regulatory capacity, to manufacture, launch, control, use or operate a space asset, or relating to the use of orbits positions or the transmission, emission or reception of electromagnetic signals to and from a space asset”;

The terms "control, use or operate" should be reviewed, in terms of the terminological clarification called for above.

- On the subject of licences, financial institutions would like to see a provision under which "the debtor shall at the request of the creditor take all steps within its power to procure the transfer of its licence or the termination of its licence and the grant of a new licence to the operator substituted, pursuant to the invocation of a step-in right, by the creditor, as the transferee of the space asset and the debtor's rights following the enforcement of the international interest, and shall fully co-operate with the creditor to that end".

If the owner /operator is in default in the reimbursement of the financing of the space asset, in no case will a financial institution either wish or be able to become the owner/operator of the satellite. On the contrary, such a financial institution will seek to guarantee the continuity of the operation of the asset until such time as it may, possibly, be able to realise its security by bringing in a new operator.

Agreements for the use of satellite capacity, which generate income, will continue to be performed in particular if a step-in right provided in the appropriate agreements in favour of the financial institution enables that party to bring in a new operator without need for the agreement of the original operator and the existing lessee.

### 3. *Associated rights: debtor's rights*

- The rights assignments provided for under Article IX and the following Articles enable a financial institution to register in its favour, alongside an international interest, the assignment of the lease rentals generated by the transponders, whether by way of security or absolutely.

The current practice is for satellite financing, even those satellite financing transactions structured on a corporate basis (as, for example, certain financings recently guaranteed by Coface), to provide in most cases for the delegation ("délégation") by the operator of the right to receive the rentals from the transponders, the delegation by the manufacturer of its rights under the manufacturing contract and by the launcher of its rights under the launch agreement and always the delegation, a "stipulation pour autrui" (a provision in the contract conferring a benefit on a third party) (a loss payee clause) or the assignment of the insurance policies (launch, in-orbit and civil liability) but not of the security interest in the asset, which, for the moment, is judged by financial institutions to be ineffective.

This group of rights should feature in the revised preliminary draft Protocol as part of the debtor's rights to payment.

- Article 2(5) of the Convention provides that an international interest in an object "extends to proceeds of that object".

It is not made explicit in the revised preliminary draft Protocol that insurance policies and compensation constitute a debtor's right.

The revised preliminary draft Protocol should be clarified on this point.

- A financial institution as creditor is not in a conflict of interests with the insurer seeking to strengthen its right of recovery if and when payment of the compensation in its favour permits the total reimbursement of the amount owing to it. This condition needs to be inserted in the current text but is not the problem already dealt with in Article 9 of the Convention?

- The provisions relating to insurance could feature in a special Article headed "Assignment of debtor's rights" rather than in Article IV, since it is a question of "rights to payment" of compensation and the effects of such payment. Article IV(2) could, on this same logic, be moved to this Article.
- Financial institutions would like to propose the term "rights to recovery" of insurers instead of "salvage rights", which is not clear.
- Regarding "rights to performance", there is need for greater precision as to the class of right contemplated, in that, as currently formulated, it might be thought that this term includes the debtor's rights to use the financing, which makes no sense.

#### 4. *The secured obligation*

Article 36(2) and (2)(a) of the Convention provide that "associated rights are related to an object only to the extent that they consist of rights to payment or performance that relate to a sum advanced and utilised for the purchase of the object".

Unless I have misunderstood, this provision is not applicable in space financings, where complete freedom needs to be left to the creditor to cover not only the financing of the costs of construction but also the costs of launch and insurance, as well as, subsequently, the needs connected with the operation of the space asset and the current activity of the operator.

The revised preliminary draft Protocol provides for the granting of security in respect of a future obligation that is neither liquid nor due, as, for example, an obligation to arise by virtue of the opening of a credit line at a time when the financing is available but has not yet been used.

Through this very broad drafting, the revised preliminary draft Protocol also makes it possible to cover other situations, such as future advances from financial institutions to fund current activity, that is the operational needs of the debtor over and above acquisition.

French law requires that obligations are capable of being determined, which includes obligations that are still at the "seed" stage or are conditional but excludes possible obligations where the agreement is not signed.

The revised preliminary draft Protocol should be more explicit about the notion of future obligations.

- Article 1692 of the French Civil Code provides that "[t]he sale or assignment of a claim includes the accessories of the claim, such as security, prior charges and mortgages".

Under the revised preliminary draft Protocol, the obligation is, on the contrary, treated as an accessory of the security interest assigned with the latter.

Financial institutions would like to see a return to the principle of the security interest as an accessory of the obligation.

#### 5. *The law applicable to the security agreement*

This clause raises the question as to whether the freedom granted to the parties under Article VIII of the revised preliminary draft Protocol in respect of the choice of the law applicable to the security agreement is total, without application of conflict of laws rules.

Financial institutions would be in favour of a provision under which the law applicable to the security agreement would be the law of the debtor, which would in part resolve the difficulty raised by the application to the space asset of successive laws.

6. *The registration of the international interest in the International Registry*

Unless I am mistaken, nothing is provided in the revised preliminary draft Protocol on the subject of the registration of debtor's rights. Yet the agreements for the leasing of satellite capacity, which generates income, are neither unconditional nor irrevocable. The users may change and it is necessary to provide for new registrations during the satellite's operation.

7. *The exception of "public service"*

- Article XXVII *bis* provides:

"1. - A State has the right to object to the exercise of default remedies, as provided in Chapter III of the Convention and Articles XVIII to XXIII of this Protocol, in respect of a space asset needed for the provision or maintenance of a public service which is in the vital interest of that State if the exercise of those remedies would cause interruption in the provision or maintenance of that service.

2. - Within twenty days from the date on which the State has notified the creditor of its objection to the exercise of remedies under the preceding paragraph, the creditor may exercise the right to step in and assume responsibility for the provision or maintenance of the relevant service in the State concerned or appoint a substitute entity for that purpose, with the consent of that State and of the licensing State.

3. - If the creditor chooses not to exercise its rights under the preceding paragraph, the State that objects to the exercise of default remedies by the creditor under paragraph 1 shall have the option of:

(a) curing the default by the debtor by paying to the creditor all sums outstanding for the entire period of default; or

(b) taking or procuring possession, use or control of the space asset and assuming the debtor's obligations by stepping into the obligations of the debtor for the provision of a public service in the State concerned.

4. - A State that objects to the exercise of default remedies by the creditor under paragraph 1 shall exercise its rights under the preceding paragraph within ninety days. After such period, the creditor shall be free to exercise any of the remedies provided in Chapter III of the Convention and in Articles XVIII to XXIII of this Protocol, in respect of the relevant space asset.

5. - A State may only invoke the right to object to the exercise of default remedies in accordance with this Article if it has registered in the International Registry a notice recording that the space asset is used for providing a public service in the vital interest of that State prior to the registration of an international interest in that space asset by a creditor [or if it has registered such notice within six months of the launch of a space object, even if after the registration of an international interest by the creditor]."

The issue at stake: the risk of opposition by the State to the enforcement of the international interest in a case of interruption of a public service, the State requiring that the continuity of the public service be assured come what may;

The definition of public service: it could be a service falling within the competence of the State, because the general interest justifies a sharing of costs and profits so that all citizens enjoy the same service at the same price;

It is desirable to distinguish those types of public service the delivery of which is the prerogative of the State (health, education, safety, security), as in the space field, more specifically military satellites, observation satellites, navigation satellites and meteorological satellites, from service to the public, such as telecommunications and broadcasting. It is difficult to imagine that the retransmission of a football match could be considered to be a public service.

The reference to "a public service which is in the vital interest of [a] State" opens up a margin of interpretation which would give rise to legal uncertainty.

The situation that the clause is intended to regulate is not clear:

One needs to imagine the case of a satellite which is owned by a private operator, over which security has been granted to the financial institution that has financed it and one part of the transponders of which are used by or on behalf of a State, with the other part being used by a private operator. In such a case, it would be difficult to see why the State concerned should be treated differently from the other users.

In reality, this hypothesis would seem to be theoretical, in that one may assume that a State intending to secure the delivery of a public service by a private operator will conclude a public/private partnership (P.P.P.). In such a case, involving as it does a sovereign risk, financial institutions will not take security over the asset.

We need to know more about the situation of the space market in terms of public/private satellites and public/private services in order to determine whether an exception is truly warranted but, in any case, it would not seem to make much sense in financing terms, because financial institutions will not take the risk of a conflict between public and private interests or, rather, will anticipate them contractually.

The current wording of this clause does not appear designed to fit reality:

A creditor will never take the place of an operator and it is difficult to understand how the substitution of another operator by the creditor will settle the problem if the latter is not technical but financial. We should have to imagine that the new operator would take over all the rights and duties, including those of a financial character. This is unrealistic in the periods of time envisaged.

There is confusion as regards the State as between the position of the operator/debtor and that of the lessee/user. One does not see how nor why a State, if it is only the lessee of the transponders, should have to ensure the service of the debt and could stand in as operator/owner of the space asset.

## Conclusion

We would ask for:

Over and above the registering of a municipal law security interest in an international registry, the creation of a veritable uniform international security interest in space assets in order to resolve the problems raised by both mobile conflicts and the absence of a satisfactory legal instrument under national law.

Failing that and as a minimum, the strengthening of the position of financial institutions by the taking into account of related rights and the benefit of a step-in clause for the operator as a means of enforcement without which the revised preliminary draft Protocol will achieve little in terms of facilitating financing in relation to the situation as it obtains at present.

In view of the functions currently exercised by, and the expertise of the I.T.U., financial institutions would look favourably upon the designation of the latter as Supervisory Authority.

***Mr P.D. Nesgos (Milbank, Tweed, Hadley & McCloy LLP)***

As you know, I have the highest esteem for UNIDROIT, you<sup>9</sup> and Sir Roy. It is for this reason that I write to express my continuing concerns about the revised preliminary draft Space Protocol.

From the time of the establishment of the Space Working Group (S.W.G.), I have been committed to ensuring that the preliminary draft Space Protocol represents a commercially responsive and valuable instrument that would encourage satellite financing. As you recall, Milbank decided to stand down on the S.W.G. effort in August 2007, until the key constituents in the space industry joined in providing the support required to finalise the planned Protocol based on their recognised need for the benefits afforded the space business by the Convention and the proposed Space Protocol. Given that many major constituents among satellite operators, the aerospace industry and the financial, insurance and governmental agencies that support them, continue to express vigorous opposition to the revised preliminary draft Protocol, it is clear that the circumstances that led to our standing down have not changed. There continues to be a clear lack of meaningful support for the proposed Protocol from the space industry participants the planned Protocol was intended to assist.

Many of the specific issues articulated in numerous letters to UNIDROIT from space industry participants reflect sound and valid concerns based on practical experience with satellite financing. These include, *inter alia*, the inadequate definition of "space assets", the worrisome public service exemption from default remedies, the bringing into play of insurers' salvage interests in space assets, the unsettled issue of priority of competing rights regarding components in the context of exercise of default remedies and the confusing provisions regarding debtor's rights and assignment of debtor's rights.

We respect the fact that you continue to seek the practical advice of industry. However, after years of attempts to draft and redraft the preliminary draft Protocol, its current version is still very far from what would be the commercially viable instrument the satellite industry should expect. Even if industry was willing to support a Space Assets Protocol in the first place, the prospect of reaching a commercially useful and acceptable Protocol in the next few months is highly unlikely.

Based on my experience in representing the space industry and financial institutions, adopting a Protocol that is not responsive to the expectations and needs of its constituents would actually impair, not foster, satellite financing. In the light of this, I urge UNIDROIT to reconsider the pursuit of this initiative until such time as the entities it is intended to benefit step forward to support it in a meaningful way.

---

<sup>9</sup> These comments have been taken from a letter addressed to Mr M.J. Stanford, Deputy Secretary-General of UNIDROIT.

**Mr T. Ueda (SKY Perfect JSAT Corporation)**

*Re Article XXVII bis*

In the light of the concern relating to the public service exemption from default remedies, we submit the following comment and hope that this comment will be favourably considered by UNIDROIT.

(a) Framework of the Convention

The Convention has established an international regimen introducing the following new regimen and concepts.

The new regimen and concepts are well accepted, in particular in the context of aircraft finance. As a result, the Convention and the Aircraft Protocol entered into force on 1 March 2006.

(i) Realisation of transparency in relations between rights and obligations

- constitution of an international interest (Article 2 of the Convention)
- establishment of the international registration system (Article 16 of the Convention)
- priority of competing interests (Article 29 of the Convention)

(ii) Realisation of swift default remedies

- remedies of chargee (Article 8 of the Convention)
- remedies of conditional seller or lesser (Article 10 of the Convention)

(iii) Realisation of effects in insolvency proceedings

- effects of insolvency (Article 30 of the Convention)
- jurisdiction in respect of insolvency proceedings (Article 45 of the Convention)

(b) Extension of the Convention to space assets

Based upon the broad understanding that it is desirable to implement the Convention as it relates to space assets, in the light of the purposes set out in the Convention, the preliminary draft Protocol has been intensively discussed to adapt the Convention to meet the particular demand for space assets and to finance their acquisition and use as efficiently as possible.

In this context, the necessary concepts to adapt the Convention have been agreed. Namely the new terms, such as debtor's rights, licence and rights assignment, have been introduced. Provisions relating to the recording of a rights assignment as part of the registration of an international interest, the priority of recorded rights assignments and the duty of the debtor / assignor as to licences have also been put in place.

We understand that the benefits from expanded space-based services which the future Protocol together with the Convention may yield are to be enjoyed by all Contracting States. It is significant to ensure the benefits by carefully avoiding incorporating inconsistent concepts into the revised preliminary draft Protocol.

(c) Concern about the public services exemption

As commented in our previous message of 14 October 2009,<sup>10</sup> SKY Perfect JSAT Corporation shares the concern at the idea of giving Contracting States a right to limit the exercise of default remedies in respect of public services that did not exist before, as this might negatively affect the benefits to be yielded by the future Protocol.

Article XXVII *bis* of the revised preliminary draft Protocol stipulates that a State has the right to object to the exercise of default remedies in respect of a space asset needed for the provision or maintenance of a public service. Looking back on the past, we do not think sufficient and extensive discussion took place regarding the introduction of such a new right. For example, it should be noted that, after the second session of the Committee, only eight Governments responded to the request from the UNIDROIT Secretariat for information on the treatment of public services in their jurisdictions.

Regarding the assessing of the likely economic impact of a public service exemption from the exercise of default remedies in Asia and the Asia-Pacific region, one of the previous initiatives, a colloquium organised by the UNIDROIT Secretariat in Kuala Lumpur in April 2004,<sup>11</sup> is suggestive. The practical role and significance of retaining existing national control over licensing in respect of default remedies was pointed out as follows.

It was likely that a financier exercising its remedies would look for another owner or operator prepared to operate the space asset under the terms of the existing licence or for an operator able to use the space asset in another orbital position or using different frequencies but the availability of these options would depend on national laws and regulations.

This understanding indicates the possibility for the revised preliminary draft Protocol not to place direct limitations on the exercise of creditors' remedies for space assets providing service to the public. In this context, because licences would rarely be transferable, it is appropriate for the revised preliminary draft Protocol to impose a duty on a debtor under a rights assignment or rights reassignment to take all steps and co-operate in either the transfer of a licence to a creditor or the termination of its own licence and the procuring of a new licence for the creditor.

It should also be noted that the Aircraft Protocol carefully avoids a broad public service exemption considering the possible negative effect. Since space-based financing is more risky, the likely negative effect it would have on the revised preliminary draft Protocol is greater.

Careful consideration should be given to the question of balancing the need of Contracting States to guarantee the continuation of a public service with the rights of creditors. We have to be careful about introducing a premature international right and obligation.

The question as to how best to achieve such a balance should be left to the development of business practice in the coming years. Legislation-based solutions can also be alternatively realised by agreement-based contracts originating in intensive negotiations among the parties. It is important to understand the dynamics of the commercial and financial communities and respect the agreements to be reached by the parties concerned, including Contracting States.

---

<sup>10</sup> UNIDROIT 2009 - C.G.E./Space Pr./3/W.P. 9, p. 9 *et seq.*

<sup>11</sup> Cf. The preliminary draft Protocol to the Convention on Matters specific to Space Assets: an opportunity for representatives of Government and industry to compare notes (a colloquium organised by UNIDROIT in co-operation with the Malaysian National Space Agency and the Space Working Group, Kuala Lumpur, 22 / 23 April 2004): summary report (prepared by the UNIDROIT Secretariat) (UNIDROIT 2004 - C.G.E./Space Pr./2/W.P. 5).

(d) Conclusions

Based on the aforementioned understanding, SKY Perfect JSAT Corporation has reached the following conclusions:

1. The proposed Article XXVII *bis* might create a new right and, as a result, seriously impair the core concepts originally intended to be introduced by the revised preliminary draft Protocol together with the Convention, which are the realisation of transparency in relations between rights and obligations, the realisation of swift default remedies and the realisation of effects in insolvency proceedings.
2. Concern at the idea of giving Contracting States a right to limit the exercise of default remedies is to be broadly shared without sufficient and extensive discussion among the parties concerned.
3. The question as to how best to balance the need of Contracting States with the rights of creditors should be left to the development of business practice, on the understanding that it will be important to respect the agreements of the parties concerned.

***COMMENTS SUBMITTED BY MR R. COWAN (AVIARETO)***

*Improved governance through the development and adoption of a standard for electronic registries*

It is proposed that a resolution be adopted at the diplomatic Conference for adoption of the future draft Space Protocol supporting the development of an internationally recognised standard for the design and operation of electronic registries.

Such a standard would allow Cape Town Registrars (Aircraft, Rail and Space) to show that they had met the requirements of best practice as set out in Article 28 of the Convention but, more importantly, it would allow them to be measured against an independent standard.

A long-term risk to the adoption and success of the Convention is the proper operation of the associated registries and the optimum selection of technology to support the requirement for high data integrity over many years. Over time internal standards can slip and complacency is a real risk. The countermeasure of such complacency is good governance.

Good governance is critical to the operations of future registries and one component of that is the process of being regularly and independently reviewed against an objective standard the results of which are then available to the Supervisory Authority.

Aviareto, as the first Cape Town registrar, has done some initial research into this area. A standard could be developed under the auspice of the International Standards Organisation (I.S.O.). The National Standards Authority of Ireland (N.S.A.I.) is willing to lead this initiative. To be useful, such a standard would have to be general enough to include electronic registries in a wide variety of sectors, though perhaps initially in the finance and asset-based security industries. Some initial and very preliminary thoughts on the standard are set out below.

Benefits

- Will act as an enabling standard for the development of electronic registries, thus enhancing the economic and social benefits such registries bring;

- Will allow registries to demonstrate they meet an internationally recognised standard, the standard becoming a benchmark;
- Will reduce uncertainty for outside bodies and third parties, such as insurance companies;
- Will become a vehicle for inter-organisational learning;
- Will allow an electronic registry industry to develop, increasing competition while reducing costs. Such an industry will increase options available to registrars and reduce software development time, reducing reliance on bespoke systems and single supplier situations;
- Could allow registries to become fundamental building blocks for electronic commerce.

### COMMENTS SUBMITTED IN A PERSONAL CAPACITY

**Mr S. Kozuka**

#### *General remarks*

I believe that the revised preliminary draft Protocol, when adopted as the third Protocol to the Convention and ratified by many space-faring countries, will contribute to facilitating finance transactions over space assets. The future Protocol will establish the private law rules relating to commercial transactions in Outer Space for the first time and, therefore, enhance the certainty and transparency of transactions.

#### *Remarks regarding specific provisions*

1. Definition of space asset (Article I(2)(I))

As noted in footnote 2 to the text of the revised preliminary draft Protocol, most of the delegates at the third session of the Committee were of the view that the assets eligible for being registered in the International Registry must be limited by some criteria. Small nuts and bolts for generic purposes might have economic value that some financiers are interested in but are not appropriate to be entered into the International Registry for "space assets". Based on the comments made by experts and engineers, I believe that the criteria should be whether the asset has an independent "function" for some kind of space activity. I would propose that the wording of the definition reflect such criteria.

Suggested new wording for Article I(2)(I) of the revised preliminary draft Protocol:

"'space asset' means any man-made uniquely identifiable asset independently owned, used or controlled *for a certain function specific to space activities*, in space or ..." (emphasis added).

2. Salvage interests (Article IV(4) and (5))

I fully support the idea of referring to salvage interests in the way that the revised preliminary draft Protocol does. It may need to be made sure, though, that the relevant industry finds no problem with the exact wording, since the issue was raised by the insurance industry that argued that the absence of a proper reference to salvage interests in the future Protocol would harm the practice that is already established in the space business.

3. Assignee of rights unconnected to an international interest (Article XIII)

As the Japanese delegation emphasised at the last session of the Committee, Article XIII needs to provide proper protection to the assignee of the rights of the debtor when the assignment

was made before any international interest was registered in the International Registry and, therefore, the assignee has had no opportunity to record its status. On the other hand, the assignee of the debtor's rights under a rights assignment should not be affected by the hidden transaction that he could not have been aware of at the time of the rights assignment.

Having seen that the revised preliminary draft Protocol has not adopted the proposal that I submitted to the last session of the Committee regarding the definition of "rights assignment" but rather chooses to mention an assignment made unrelated to the international interest by another term, I would propose the following new provision, which has been slightly modified from the proposal made at the last session, to be inserted as a new paragraph 3 of Article XIII.

Suggested new Article XIII(3) of the revised preliminary draft Protocol:

"Nothing in this paragraph affects the validity of any assignment of a right to payment or other performance due, or to become due, to the debtor made before the first recorded rights assignment when all the requirements under the applicable law are completed."

#### 4. Identification criteria for space assets (Article XXX)

(a) In order to establish unique identification criteria for space assets that can be searchable without failure, we are of the view that the criteria need to be simple and unique. Even assets that are registered after launch should be identified by the same criteria as in paragraph 1, i.e. the name of the manufacturer, its manufacturer's serial number and its model designation. Needless to say, these elements cannot be confirmed by physically looking at the stencil or plate once the asset is launched into space. Still, they can be checked by other means, such as examining the manufacturer's design-specification data. Therefore, the special rule contained in paragraph 2 is not needed.

Suggested amendments to Article XXX of the revised preliminary draft Protocol:

Delete paragraph 2 of Article XXX and incorporate the necessary words into paragraph 1, in place of "additional data specified in paragraph 2" (see the proposal under paragraph (b), *infra*, as an example).

(b) The second sentence of paragraph 1 contains the idea of providing additional data about the space asset for reference purposes only. If the proposal mentioned in paragraph (a) *supra* for criteria for assets registered after launch is accepted, the "additional data" may be provided with regard to such assets at the same time as registration in the International Registry or thereafter.

Whether the additional data is provided after registration or simultaneously, it is important to preclude the possibility that the additional data added to the International Registry under the future Protocol differ from the data in the United Nations Register as much as possible, because inconsistencies in the information between databases will only result in complicating commercial transactions. Therefore, I would propose that such addition of data is done, when possible, by providing the URL that links to the relevant data in the Register maintained by the Secretary-General of the United Nations.

Suggested new wording for Article XXX(1) of the revised preliminary draft Protocol:

"... After launch of the space asset the creditor may add to its registration data all or any of the additional data specified in the regulations, such as the date and time of its launch, its launch site, the name of its launch provider and [...], but failure to do so or the addition of incorrect data

shall not affect the validity of the registration. The additional data shall be provided by providing the URL that links to such data contained in the Register maintained by the Secretary-General of the United Nations pursuant to the Convention on Registration of Objects Launched into Outer Space, when it is possible to do so."

***Mr P.B. Larsen***

1. I agree that the future Space Protocol must be commercially viable. That has been the guideline from the beginning of the first space industry working meeting on the planned Protocol. For that purpose, we need broad participation by all sectors: satellite operators as well as manufacturers, bankers, insurers as well as academics such as myself. I emphasise that the future Protocol should serve all participants, large as well as small; developed as well as emerging economies. It should not favour one group over another. At this stage of the negotiations I hope the individual Government delegations will solicit input from all their commercial sectors in preparation for the May meeting and for the diplomatic Conference.

2. You asked specifically about my legal assessment of the planned Space Protocol. It has consistently been my view that a private international Space Protocol must, in principle, follow and be subordinate to the existing public international law treaties. Private contracts are always concluded subject to existing public laws. We have included in the draft several provisions expressing and explaining this principle. They are all useful, particularly in establishing legal certainty and in giving non-lawyers confidence in the viability of the planned Space Protocol.

3. The longer we work on the planned Space Protocol, the longer, more detailed and complicated it gets. That causes it to be difficult for non-lawyer users to understand and that, in turn, causes lack of confidence in its use. It also limits the ability of lawyers to fashion a contract to the client's particular circumstances. Simplicity rather than more complexity is, in my view, a desirable objective. An example is the recent proposal additionally to cover in the treaty choice of law regarding assignments and reassignments of debtor's rights. It seems that we could extend the planned Protocol endlessly into the areas usually regulated by national laws. Such further extensions may not be necessary.

***Ms L. Ravillon (University of Bourgogne / Faculty of Law of Dijon)***

It is important to underline the importance of this instrument of substantive law, as the first international private law instrument in the space field. In view of the public international law character of the legal framework governing space activities, the Convention involves rules of both private and public law. These relationships may be considered in relation to national space laws, which may provide the basis for the raising of opposition by a State to the possible taking of possession of a satellite belonging to that State by private firms through a possible problem concerning the transfer of technology, above all military technology. These relationships may also be looked at from the point of view of international space law: this involves the problem of the launching State, which maintains liability for the space object, even when it no longer exercises its jurisdiction and control as a result of the transfer of the space object to a creditor under the jurisdiction and control of another State. In such a case, the initial launching State remains liable, whereas a space object subject to a security interest has been transferred to a creditor following the exercise of the remedies provided for by the Convention and such a State is no longer, in practice, capable of exercising control over such object.

This instrument has the advantage of establishing priorities among security interests and international judicial recognition of the international interest.

Contrary to the space law treaties, which have been greatly criticised in this regard, it provides carefully thought out definitions, which are important for its implementation.

It seems to me that, through the work provided by all players in the space sector and by the UNIDROIT Secretariat, the principal obstacles to the success of the revised preliminary draft Protocol have been overcome, thanks to the representation of all those taking part in space projects and an improved balance among the different stakeholders, in particular financial institutions and insurers (even if all the potential conflicts of interest - between banks, between banks and insurers and between banks and States - are not regulated and no mechanism for the settlement of disputes is included in the revised preliminary draft Protocol).

There are, therefore, many ways in which the revised preliminary draft Protocol represents progress in relation to previous drafts.

The security interest provided for under the Convention has the advantage of being autonomous in relation to national laws. This explains how the Convention covers classic security interests but also the interests of sellers under title reservation agreements and those of lessors under leasing agreements. Article 2(2), in fact, provides that an international interest in mobile equipment is an interest (a) granted by the charger under a security agreement, (b) vested in a person who is the conditional seller under a title reservation agreement or (c) vested in a person who is the lessor under a leasing agreement.

Problems remain which are capable of jeopardising the effectiveness of the security interest, in particular where authorisations for use and operation of a satellite (orbital position and radio-electric frequencies) are concerned, since these are not always transferable by reason of their *intuitu personae* character (but the revised preliminary draft Protocol cannot provide a solution to this problem), and where the applicable law is concerned, in that Article VIII of the revised preliminary draft Protocol insists on the role played by the applicable law and Article X, dealing with rights assignments, specifies that "a rights assignment ... transfers to the creditor all the debtor's rights the subject of the rights assignment to the extent permitted by the applicable law" (determined by the parties or, where the parties' agreement is silent, by the judge or arbitrator in the event of litigation, thereby introducing private international law aspects into a substantive law Convention and thus, potentially, prejudicing the revised preliminary draft Protocol's expressed vocation to provide "a uniform and predictable regimen governing the taking of security over space assets and facilitating asset-based financing of the same" (last clause of the preamble).

There also remain possible problems in the inter-relationship between the revised preliminary draft Protocol and, on the one hand, national space laws and, on the other, the space law treaties. Even more generally, the revised preliminary draft Protocol needs to fit with all the instruments potentially linked to its contents. In addition to the space law instruments that have already been mentioned, reference may be made to the international Conventions and other instruments relating to the financing of international trade (UNIDROIT and UNCITRAL) or the instruments relating to the protection of intellectual property rights.

*Re: Article I (definition of space asset):*

The exclusion of the reference to components in the definition of "space asset" is to be applauded.

In spite of everything, the conception of space asset remains extensive, in that it encompasses not only transponders but also the data, manuals and records relating to its ownership, use or control. A question may be raised as to the interest of considering manuals as a space asset and as to the limits of this notion of space asset. In a document (the report on the

third session of the Committee, prepared by the UNIDROIT Secretariat (C.G.E./Space Pr./3/Report rev.), the UNIDROIT Secretariat raises the question whether it would not be appropriate to introduce the reference to all data, manuals and records in the definition of "debtor's rights" rather than in the definition of "space asset". This would, in fact, seem to be more suitable.

The components of a satellite, such as transponders, are taken into consideration, whereas it is difficult to apprehend a transponder independently of a satellite, even if it would appear that there have been some instances of the financing of individual transponders.<sup>12</sup> *Quid* in the case of the registration of a security interest in the satellite and by other creditors in the transponder? How should such a conflict of interests be regulated?

The definition, even if it is much less broad than it was initially (components are no longer mentioned), remains vast.

*Re: Article II(3) (Application of the Convention as regards space assets and debtor's rights):*

Regarding the difference between the notion of a space asset and the notion of an aircraft object, the Conventions relating to aircraft only applying to the latter, is it so easy always to distinguish these assets/objects? In particular, one thinks about sub-orbital vehicles that are inhabited, these being hybrid vehicles.

*Re: Article IV (Application of the Convention to sales and salvage insurance):*

Reservations were expressed in relation to the preliminary draft Protocol on the ground of its silence on the matter of the registration of the salvage rights which insurers may claim where a satellite that has been declared a total loss conserves a residual market value, which did not fall within the definition of the interests capable of being registered in the International Registry. This Article ought to satisfy the insurers and enable the revised preliminary draft Protocol to come closer to the reality of the links between insurers and bankers.

*Re: Article XVI (Duty of debtor assignor as to licences):*

In spite of the abandonment of related rights in the sphere of application of the revised preliminary draft Protocol, which is welcomed, the transfer referred to in this Article will, without doubt, not be as simple as it appears in the Article, in practice. Such a transfer will not only depend on the debtor. Such transfers are linked to the role of States, which will deliver such authorisations by virtue of their domestic public law, in response to certain international obligations.

It is appropriate to recall the terms of the French Act No. 2008-518 of 3 June 2008 on space operations, Articles 2 and 3 of which provide as follows:

"Article 2: The following shall obtain an authorisation from the administrative authority:

1. Any operator, whatever its nationality, intending to proceed with the launching of a space object from the national territory or from means or facilities falling under French jurisdiction, or intending to proceed with the return of such an object onto the national territory or onto facilities falling under French jurisdiction;
2. Any French operator intending to proceed with the launching of a space object from the territory of a foreign State or from means or facilities falling under the jurisdiction of a foreign

---

<sup>12</sup> A. de FONTMICHEL, "Commentaires sur l'avant-projet de Protocole sur les questions spécifiques aux matériels d'équipement spatial au projet de Convention d'UNIDROIT relative aux garanties internationales portant sur des matériels d'équipement mobiles", *ZLW*, 2001/4, p. 543.

State or from an area that is not subject to the sovereignty of a State, or intending to proceed with the return of such an object onto the territory of a foreign State or onto means and facilities falling under the jurisdiction of a foreign State or onto an area that is not subject to the sovereignty of a State;

3. Any natural person having French nationality or juridical person whose headquarters are located in France, whether it is an operator or not, intending to procure the launching of a space object or any French operator intending to command such an object during its journey in outer space.

Article 3: The transfer to a third party of the commanding of a space object which has been authorised pursuant to the terms of the present Act is subject to prior authorisation from the administrative authority.

Pursuant to the provisions of paragraph 3 of Article 2, any French operator intending to take the control of a space object whose launching or control has not been authorised under the present Act shall obtain to this end a prior authorisation from the administrative authority.”<sup>13</sup>

*Re: Article XVIII (Modification of default remedies provisions as regards space assets):*

Who is to assess whether a remedy is exercised in a commercially reasonable manner, as laid down in Article XVIII(2)(b)(i) and (ii)?

*Re: Article XXII (Remedies on insolvency):*

At Community level, what will be the relationship with the European Regulation of 29 May 2000 on Insolvency Proceedings?

*Re: Article XXVII (Limitations on remedies):*

This private law Convention, nevertheless, grants a role to the State, in view of the sensitive character of the space sector and the existence, in particular, of laws on the control of the exporting of sensitive assets. This question is sensitive, in that it is necessary to ensure a balance between the necessary intervention of the State, which must be able to oppose the transfer of a space asset where that ran the risk of disturbing a public service, and the effectiveness of the real rights of a creditor, protected as they are by different international instruments, recognising the fundamental character of the right of ownership, and the need for compensation (according to which modalities in this case?).

*Re: Article XXVIII (The Supervisory Authority):*

What will be its exact role? Should one consider that it is the description of his role in the Convention which will apply or will it have a specific role in the space field?

*Re: Article XXX (Identification of space assets for registration purposes):*

One difficulty relating to the sphere of application of the revised preliminary draft Protocol has concerned the point of departure of coverage. Different points of view have been advanced in opposition to others, some suggesting that national laws offered solutions when the satellite had

<sup>13</sup> The UNIDROIT Secretariat acknowledges its debt of gratitude to Professor Joanne Irene Gabrynowicz, Editor-in-Chief of the *Journal of Space Law*, for permission to reproduce these excerpts from the unofficial translation of the French Act, by Messrs Philippe Clerc and Julien Mariez, of the Legal Department of the French Centre National d'Etudes Spatiales, that appeared in the *Journal of Space Law* 2008, Vol. 34, No. 1, at p.453 *et seq.*

not yet been launched and others desiring better protection for lenders during the phase of the satellite's construction. The advanced application of the Convention as provided for under the revised preliminary draft Protocol is such as to reassure those banks intervening at the time of the manufacture of the space asset.

This Article does not completely coincide with the very broad definition of space asset retained in Article I, in that, in relation to a space asset that has not yet been launched, it mentions the serial number assigned to the space asset by the manufacturer: do transponders admit the possibility of such numbers?

## APPENDIX I

*The practice of P.F.I. in Japan for addressing the need to maintain public service*  
(a note by Souichirou Kozuka, Professor of Law in Gakushuin University)

## 1. Scope of this note

This note aims to explain the practice of P.F.I. (public finance initiative) transactions in Japan as background to consideration of the provision on limitations on remedies when public service is concerned.

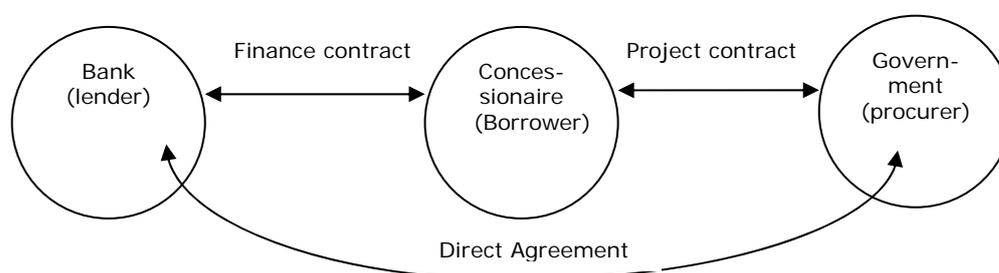
It needs to be emphasised that the procurement of goods and services is made through various types of arrangement. The information in this note, which was summarised in a report of 2004 by the Committee on issues of P.F.I. projects, is mainly concerned with the project finance scheme. This does not mean that the public service provided by an operator owning a space asset will exclusively use this type of financing scheme. On the contrary, project finance has not been employed with regard to space activities for providing public services in Japan. In this sense, the information below is intended to be used only as a reference for considering how public service can be maintained in the financial scheme.

## 2. The maintenance of public service in P.F.I.

According to the above-mentioned report, the common practice is that the Government (the procurer) and a financial institution (the lender) enter into a Direct Agreement and decide upon the measures to be taken in the case of default by the operator. The Direct Agreement is a separate agreement from the finance contract between the financial institution (the lender) and the operator (the borrower) and the service contract between the operator and the Government. It supplements the two contracts by preparing the necessary arrangements for a case where the operator becomes insolvent.

First, it is to be noted that the Direct Agreement provides that it is the duty of the local Government to perform its obligations under the project contract and that it is the duty of the financial institution to perform its obligations under the finance contract. In other words, the Direct Agreement is intended not to affect the obligations under the two original contracts.

The second point to be noted is that the typical Direct Agreement provides a step-in right for the lender (the financial institution), rather than for the Government. The idea behind this practice is that the lender has a stake in ensuring the cash-flow from the service and, therefore, will wish to maintain the service to the extent possible. This fact implies that the lender and the Government basically have a common interest, rather than that they are in conflict with one another, when the borrower (operator) becomes insolvent.



Thirdly, where the lender has a security interest and wishes to enforce it, the Direct Agreement might request the lender to consult the Government in advance but not entitle the Government to block enforcement of the security interest. The aforementioned report notes, in this regard, that for the purposes of banking supervision (so-called prudential regulation), a loan qualifies as "secured loan" only when there are no limitations on enforcement of the security. This means that subjecting the remedies to the consent of the Government will significantly deter banks from lending. Some practitioners are worried that even a provision requesting a lender to consult the Government could cause the same problem.

Fourthly, the Direct Agreement makes it a duty for both the lender and the Government to advise the other side upon becoming aware of any concern of default or other breaches by the operator (the borrower). The aim of this provision is to prevent the default of the operator at the earliest stage possible.

### **3. Conclusion**

In Japan, there is no statutory rule that derogates from general private law, even when the transaction is for procuring a public service. In the case of a P.F.I. scheme, the necessary arrangements are made contractually. It seems to be more suited to the reality of finance transactions to employ contractual arrangements, rather than imposing mandatory regulation by statutes.

**APPENDIX II**

*Letter addressed to the UNIDROIT Secretariat by the  
Satellite Industry Association of the United States of America  
on 3 November 2009*

November 3, 2009

Mr. Martin J. Stanford  
Deputy Secretary-General  
International Institute for the Unification of Private Law (UNIDROIT)  
Via Panisperna 28  
00184 Rome, Italy

Via Email at: [mi.stanford@unidroit.org](mailto:mi.stanford@unidroit.org)

*Re: Proposed Draft Space Assets Protocol to the Cape Town Convention*

Dear Mr. Stanford:

On behalf of the Satellite Industry Association ("SIA"), I write to you regarding the proposed draft Space Assets Protocol to the Cape Town Convention (the "Protocol"). SIA is a consensus-based trade association which serves as the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business. SIA represents the leading global satellite operators, service providers, manufacturers, launch services providers, integrators, ground equipment suppliers, and satellite radio and television providers. \*

SIA supports the general goal of the UNIDROIT to seek to facilitate financing of high value assets through the formulation of various protocols. While our membership commend the efforts of UNIDROIT, we have significant concerns with the direction of the current draft Protocol.

First, we doubt that this draft Protocol will facilitate financing for the satellite industry. On the contrary, we fear that the draft Protocol will instead deter financing by imposing an additional, unnecessary, burdensome and vague layer of law through broad, unclearly defined rules on ownership and security interests in space assets.

Second, SIA believes that existing national law more than adequately addresses the issue of granting of security in assets located in space. As a result, the satellite industry does not see a need for, and therefore does not support, a new layer of supranational law addressing ownership and collateral security issues relating to space assets. Indeed, based upon the current draft, we believe the Protocol would create potential additional conflicts, potentially chilling the very space asset financing UNIDROIT seeks to encourage.

---

\* SIA Executive Members include: Artel Inc.; The Boeing Company; CapRock Government Solutions; The DIRECTV Group; Hughes Network Systems, LLC; DBSD North America, Inc.; Integral Systems, Inc.; Intelsat, Ltd.; Iridium Satellite, LLC; Lockheed Martin Corp.; Loral Space & Communications Inc.; Northrop Grumman Corporation; Rockwell Collins; SES World Skies, Inc.; SkyTerra Communications, Inc; and TerreStar Networks, Inc. Associate Members include: ATK Inc.; Comtech EF Data Corp.; DRS Technologies, Inc.; EchoStar Satellite, LLC; EMC, Inc.; Eutelsat Inc.; iDirect Government Technologies; Inmarsat Inc.; Marshall Communications Corp.; Panasonic Avionics Corporation; Spacecom Ltd.; Stratos Global Corp; SWE-DISH Space Corp; Telesat Canada; ViaSat Inc.; and WildBlue Communications, Inc. Additional information about SIA can be found at <http://~www.sia.ortl>.

Asset-based satellite financing is infrequent relative to other classes of high-value mobile assets, such as aircraft, vessels and rolling stock. Parties seeking such financing typically are already able to obtain necessary financing. SIA members are concerned that the proposed supranational law would neither aid the satellite industry nor facilitate financing.

The absence of supportive representation from U.S. and international satellite operators and the financial community in exercise of drafting this Protocol should serve to indicate to UNIDROIT and the Committee of governmental experts the insufficiency of support and of need for the proposed regime.

We respectfully urge you to reconsider the need for the Protocol and stand ready to discuss these concerns with you at your convenience.

With Regards,

Patricia Cooper  
President  
Satellite Industry Association

cc: Ambassador Philip L. Verveer  
Deputy Assistant Secretary of State and U.S. Coordinator for International Communications  
and Information Policy  
U.S. State Department

Mr. Hal Burman  
Executive Director, Office of Legal Adviser U.S. State Department

**APPENDIX III**

*Letter addressed to the UNIDROIT Secretariat by the  
Satellite Industry Association of the United States of America  
on 23 November 2009*

November 23, 2009

Mr. Martin J. Stanford  
Deputy Secretary-General  
International Institute for the Unification of Private Law (UNIDROIT)  
Via Panisperna 28  
00184 Rome, Italy

Via e-mail at: [mj.stanford@unidroit.org](mailto:mj.stanford@unidroit.org)

*Re: Proposed Draft Space Assets Protocol to the Cape Town Convention*

Dear Mr. Stanford:

Thank you for your letter of November 6, 2009. For the reasons stated in our letter dated November 3, 2009, the Satellite Industry Association (SIA) \* firmly opposes the creation of a Space Assets Protocol. After extensive consultation and internal discussion, we have concluded that there is simply no need for such a Protocol. Moreover, the Protocol's adoption may have negative and costly consequences on our members and the U.S. and international satellite industry in general.

You have asked us to enumerate areas where the draft Protocol is deficient. Such expressions of concern have been conveyed several times over the past years and, as a group, we now have concluded that both the text and the construct of the draft Protocol are incurable. Despite the many years exploring this project, we believe that the Protocol fails to achieve its goal of commercial viability. As stated in our previous letter, we remain convinced that the Protocol risks actually deterring the ability of the satellite industry to secure necessary financing by creating conflicts with existing law and by adding an unnecessary layer of administrative burden.

Again, we urge you to reevaluate the need for the Protocol, consider its potential deleterious effect on the satellite industry worldwide, and stop all efforts to create the Protocol.

With Regards,

Patricia Cooper  
President  
Satellite Industry Association

---

\* SIA is a consensus-based trade association which serves as the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business. SIA represents the leading global satellite operators, service providers, manufacturers, launch services providers, integrators, ground equipment suppliers, and satellite radio and television. SIA Executive Members include: Arrowhead Global Solutions, Inc.; Artel Inc.; The Boeing Company; DataPath, Inc.; The DIRECTV Group; Hughes Network Systems LLC; ICO Global Communications; Integral Systems, Inc.; Intelsat, Ltd.; Iridium Satellite LLC; Lockheed Martin Corp.; Loral Space & Communications Inc.; Mobile Satellite Ventures LP; Northrop Grumman Corporation; SES Americom, Inc.; and TerreStar Networks Inc. Associate Members include: ATIC Inc.; Comtech EF Data Corp.; EchoStar Corporation; EMC Inc.; Eutelsat Inc.; Inmarsat Inc.; Marshall Communications Corp.; New Skies Satellites, Inc.; Spacecom Ltd.; Spacenet Inc.; Stratos Global Corp; SWE-DISH Satellite Systems; Telesat Corp., XTAR, LLC and WildBlue Communications, Inc.

cc: Ambassador Philip L. Verveer  
Deputy Assistant Secretary of State and U.S. Coordinator for International Communications  
and Information Policy U.S. State Department

Mr. Ken Hodgkins  
Director, Office of Space and Advanced Technology U.S. State Department

Mr. Hal Burman  
Executive Director, Office of Legal Adviser U.S. State Department