



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**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
Fifth session
Rome, 21/25 February 2011**

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*REVISED PRELIMINARY DRAFT PROTOCOL TO THE CAPE TOWN CONVENTION ON MATTERS
SPECIFIC TO SPACE ASSETS*

*(as amended by the Committee of governmental experts at its fourth session,
held in Rome from 3 to 7 May 2010)*

Comments

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

INTRODUCTION

Between 3 and 7 December 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 fifth session of the Committee of governmental experts (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 amended by the Committee at its fourth session, held in Rome from 3 to 7 May 2010 (C.G.E./Space Pr./5/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 fifth session.

As of the morning of 26 January 2011 the UNIDROIT Secretariat had received comments on the revised preliminary draft Protocol from:

- the Governments of Australia and the United States of America; and
- the Asia-Pacific Satellite Communications Council (A.P.S.C.C.).

These comments are reproduced hereunder.

COMMENTS AND PROPOSALS SUBMITTED BY GOVERNMENTS

Australia

Re: Article XXVII bis (Limitations on remedies in respect of public service)

Whilst acknowledging the intention of this Article, the six-month limitation period for the enforcement of remedies by creditors may be an arbitrary figure requiring further consideration. We query whether six months may be too short a time in which to acquire alternative services and propose that evidence of average re-acquisition times for satellite data services be adduced to the Committee to assist its consideration of this issue.

United States of America

I. General comments

We thank UNIDROIT and its Secretariat who have made this meeting possible and have provided extensive documentation for its facilitation. We believe this is an important meeting which will set the stage for a decision whether to conclude this effort. The general comments of the United States of America are largely in the same direction as those that we set out at the outset of the fourth session of the Committee, held in May 2010.

We welcome the effort to bring to the outer space asset finance sector the benefits created by the Aircraft Protocol for the commercial airspace sector under the Cape Town Convention. The Aircraft Protocol and Registry have evidenced the effect that secured finance, if based on an effective Protocol regimen, can produce. Such a Protocol can in the future expand the important role private finance has had for outer space commerce, which can benefit small- and medium-size as well as larger participants, and thereby facilitate the future expansion of space commerce.

However, we remain very concerned that important participants within the outer space commerce sector such as the Satellite Industry Association of the United States of America (S.I.A.) continue to take the position that this effort will not reach that goal and should not be concluded until there is a demonstrated ability to do so, which would call for further study and the elaboration of the economic effects of the planned Protocol and the various proposed solutions. The United States of America supported that view at the fourth session of the Committee and continues to do so.

We also believe that, in order to achieve economically useful goals, it would be critical to adhere to the approach that made the Aircraft Protocol successful, i.e. to fashion provisions that attract secured finance by facilitating existing transactional practices in that sector. This is especially important for the space sector, since, unlike the Aircraft and Rail Protocols, the enforcement of creditor's secured finance rights will be subject to general national regulatory and licensing regimes and thus would already be less certain. It is, therefore, even more important to avoid disincentives that are not applied to-day to other forms of space asset financing. Such disincentives can sharply reduce potential secured finance and render the work of the last several years ineffective.

On the positive side, we recognise the progress made at the intersessional meetings organized by UNIDROIT and that, if that progress is sustained, effective solutions may be found. Our comments here outline several key open issues the resolution of which we believe is necessary to promote effective commercial finance or to ensure that the planned Protocol reaches a sufficient scope of financing activity so as to make it and a new International Registry viable, both technically and economically. These comments may be supplemented and other technical and drafting issues addressed prior to and at the fifth session of the Committee.

II. The process

We believe it is important at this time to recognise the process employed to bring the Aircraft Protocol to a successful result, which would presumably be applied to the planned Protocol as well. The Aircraft Protocol and the Rail Protocol, taken together with the Cape Town Convention, once concluded, provided a workable framework for a second phase, set out in the case of each of those Protocols in diplomatic Conference Resolutions. Those Resolutions provided for the establishment of a formal Preparatory Commission of States to bring to a conclusion the second phase, i.e. the activation of a new registry system.

The Preparatory Commission for the Aircraft Protocol concluded the process of selecting a Registrar to work under the Supervisory Authority. (The Supervisory Authority can be designated either by the diplomatic Conference, if that in fact is feasible, or chosen in accordance with its Resolutions.) The Preparatory Commission process included registry, industry and transactional experts along with States and spelled out the details for a Registry system that would implement the general provisions and definitions of both the Cape Town Convention and the relevant Protocol. The flexibility necessary for that phase would be expected to be applied to the future functioning of the Registry so as to ensure that the Registry system can incorporate changes in registration, technical descriptive, transaction and finance practices.

It is not until completion of the second phase and the bringing of the new registry system online that many States and industry can truly gauge the effectiveness of the new financing system. Given this recognized method of producing a workable and economically viable Registry system, we believe it is useful to initiate informal discussions at the fifth session of the Committee in order to ensure that they may be concluded satisfactorily at a diplomatic Conference if that is approved by the UNIDROIT Governing Council. A target for concluding the second phase, based on prior experience, might be two years from the selection of a Registrar following conclusion of the planned Protocol.

*III. Key open issues **

(a) Definitions

Key terms, including "space asset", need to be general and sufficient so that detailed definitions which support registration and search criteria can be worked out when the Registry system is established in the second phase.

As a practical matter, until the Registry system is established, the priority regimen of the planned Protocol would not be operative for space assets in general. This is consistent with the notice-filing concept established by the Cape Town Convention, i.e. registration puts other parties on notice of a possible valid claim that would be superior in priority but does not itself establish the validity of those rights.

(b) Scope

1. The inclusion of debtor's rights is critical to expanding the reach of the revised preliminary draft Protocol so as to make it economically useful, although a number of technical financing law matters need to be clarified.
2. On balance, we support extending the coverage of the revised preliminary draft Protocol back to the earliest point where the asset is sufficiently identifiable so that registration and search

* Additional explanatory comments may be circulated and elaborated upon at the forthcoming session.

criteria can be effective before launch. This, coupled with registration of prospective interests as is done under both prior Protocols, can provide flexibility to accommodate future financing practices.

3. To ensure that practices under the planned Protocol can expand to encompass developing financing practices, we believe it is highly important to provide for component financing, as well as financing of the whole asset, in a manner readily achieved by financing parties without undue complexity.

(c) Limitations on remedies

(i) *Component financing*

The concept of secured rights and priority once perfected through a Registry must be maintained, with very limited State-based exceptions permitted by declaration in the Convention, in order for the treaty system to have value in the credit and financing markets. During the consideration of this issue, we have seen that, when different interests (such as hosted payloads) are being financed, a default standard would create complexity and favour one set of interests over another and we believe a default standard is very unlikely to work effectively with market participants. Priority issues that may arise, for example between interests in separate but connected assets, such as a satellite vehicle versus hosted payloads, are uniformly resolved to-day by inter-creditor agreements and there is no necessary reason in financing practice to unsettle this. We are committed, as are others, to continue to examine this issue and work with others towards accommodation of special circumstances where that can be done.

(ii) *Public or other special services*

There remains the possibility that additional exceptions to enforcement for (as yet undefined) public services will create a significant obstacle to the planned Protocol's ability to facilitate finance in this sector. We recognise the useful progress made in informal discussions and believe it presents an opportunity to refine this issue further so that limited exceptions do not present that obstacle. However, it is important to recall that even narrow limitations on enforcement of this nature do not exist for current sources of financing for the space sector and that the responsibility for providing for continuity of service generally falls on the entity procuring the service and/or the licensing State's regulatory authorities, as foreseen by Article XXVII(2) of the revised preliminary draft Protocol.

For example, bank lending on the basis of corporate balance sheet and income factors, which is the primary source of such financing to-day, would be unaffected by the planned Protocol. It is likely that to load new types of enforcement obstacles on secured financing could render secured finance non-competitive. In that event, it is likely that no new financing would be generated and concluding a Protocol would seem to have limited purposes. We anticipate that there may be sufficient value in opening up more avenues for finance in this sector so that such a result should be avoided.

(d) Additional interests – insurers' salvage interests

As with the previous item (Public or other special services), we and others have spent considerable time seeking solutions. We have, however, now joined those who think that only quite narrow issues might be dealt with without significantly unsettling the current financing patterns in this sector, as well as unacceptably altering the priority system of the Cape Town Convention. The types of right insurers gain after satisfying their contractual duties to pay vary considerably from jurisdiction to jurisdiction and we have seen that any general rule would not be workable. Currently, insurers' pay-out rights are in many countries not entitled to a priority position vis-à-vis secured

creditors. It is instructive that, for much the same reasons, neither the Aircraft nor the Rail Protocol provides such special rights for insurers and that the finance community remains seriously in opposition to this initiative.

Granting insurers rights they generally do not enjoy to-day in many jurisdictions would increase both the complexity and the cost of initial financing for space assets. Concluding the planned Protocol in that manner could potentially lead lenders to avoid the secured finance route altogether. Absent some further solutions than those we have seen so far, it would seem that the appropriate result would be to delete this category of interest or, possibly, to confine it to cases where prior secured debt is satisfied in full or the parties otherwise agree. In particular, revenue salvage appears unworkable in the context of the revised preliminary draft Protocol and a special provision on title salvage has not been justified as necessary to facilitate secured finance. We remain open to possible solutions which would preserve such rights as insurers obtain in particular jurisdictions subject to declarations for that purpose by ratifying States.

(e) Economic realisation; step-in operator

We encourage the consideration of provisions which will reinforce the payment and security rights and other benefits intended by the policies of the revised preliminary draft Protocol and which can, pursuant to declarations by those States that wish to do so, provide procedures for the approval in advance of step-in operators in the event of enforcement.

IV. Additional technical issues

Technical issues that are important and need further analysis and resolution but which do not necessarily present the same level of policy options as those above also need to be addressed. Examples are discussed below:

Re: Article I(2)(a) - definition of the term "debtor's rights"

As currently drafted, the term "debtor's rights" picks up certain categories of "proceeds", such as governmental requisition and like payments. In order to avoid uncertainty about the priority of an international interest with respect to proceeds of a space asset, debtor's rights might be defined to exclude such proceeds. For the same reason, proceeds of a space asset might be excluded in Article IV(2) dealing with transfers to a space asset buyer of rights to payment or performance.

Re: Article I(3) - location or situation of a space asset

We suggest that Alternatives A and C be combined and included in the provision. We do not think selecting one Alternative and allowing the other Alternative only if location is unavailable under the first is an appropriate limitation. We are also open to consider additional jurisdictional references. The revised preliminary draft Protocol should provide sufficient points of possible jurisdiction in order to make interim remedies practical.

Re: Article III(3) - definitional relationship with the Aircraft Protocol

It appears preferable for the revised preliminary draft Protocol to define its own scope rather than to define the scope of the Aircraft Protocol in situations where there may be ambiguity and possible overlap in the definitions of the terms "aircraft object" and "space asset". In the event of an overlap, we think the Aircraft Protocol should govern. The future Official Commentary may be helpful in clarifying certain types of object which are intended to fall within the scope of the

planned Protocol, such as re-usable launch vehicles and vehicles similar to the space shuttle which are capable of space flight and re-entry but not sustained flight in the atmosphere.

Re: Articles XII and XIII - treatment of "associated rights" which also constitute "debtor's rights"

We note that certain types of associated right may also constitute debtor's rights under the revised preliminary draft Protocol and the Cape Town Convention. A good example is a sub-lease of a space asset. In order to provide clarity in several provisions of the Cape Town Convention and the revised preliminary draft Protocol, debtor's rights might be defined to exclude associated rights.

Other examples include:

- (a) refinements to insolvency Alternative A;
- (b) consideration of general identification criteria for space assets; and
- (c) consideration of the relationship of the planned Protocol to the Financial Leasing Convention and whether the solution in prior Protocols is appropriate for this sector.

We look forward to the discussions at the forthcoming session and support the process by which possible solutions are sought under UNIDROIT auspices which can further establish private sector financing and commercial development in outer space.

COMMENTS AND PROPOSALS SUBMITTED BY ORGANISATIONS

Asia-Pacific Satellite Communications Council (A.P.S.C.C.)

On 25 November 2009, the A.P.S.C.C. sent out a letter titled "Re: Space Assets Protocol to the Cape Town Convention" on behalf of the members of the A.P.S.C.C. urging UNIDROIT, as a collective voice, to reconsider the current need for the revised preliminary draft Protocol. Then on 11 February 2010, the A.P.S.C.C. requested UNIDROIT to update the list of the A.P.S.C.C. members, which had not been part of the decision making regarding the A.P.S.C.C. letter on the revised preliminary draft Protocol.

Recently, the A.P.S.C.C. has made a change both in the organisational structure and in the composition of its members. * Particularly in accordance with a result of the change in its members,

* The current Platinum, Gold and Regular Members of the A.P.S.C.C. are as follows: AAE Systems, Inc.; Aetheric Engineering Ltd; APSI (Asia Pacific Satellite Industries. Co. Ltd); APT Satellite Holdings Limited; Arianespace; Asia Broadcast Satellite (HK) Ltd (ABS); Asia Cellular Satellite Systems (ACeS); Asia Satellite Telecommunications Co., Ltd (AsiaSat); Astrium; Boeing Satellite Systems International Inc.; Broadcasting Satellite System Corp. (B-Sat); China Great Wall Industry Corp.; Cobham Patriot Antenna Systems; Dongbu Insurance Co., Ltd; Electronics and Telecommunications Research Institute (ETRI); Eutelsat S.A.; Gilat Satellite Networks Ltd; Globecom Systems, Inc.; Glowlink Communications Technology Inc.; GMV, S.A.; High Gain Antenna Co. Ltd; Hughes; Hyundai Marine & Fire Insurance; iDirect Technologies Inc.; Indian Space Research Organisation (ISRO); INMARSAT; Integral Systems; Intellian TechnologiesTM; Intelsat; International Launch Services (ILS); International Space Brokers Group (ISB); INTERSPUTNIK (International Organization of Space Communications); Iranian Space Agency (ISA); Iridium Satellite LLC; Jiang Tai Insurance Broker Co., Ltd; Korea Aerospace Industries, Ltd; Korea Aerospace Research Institute; Korea Digital Satellite Broadcasting (SkyLife); KT Corp.; LG UPLUS Corp.; LIG Insurance Co. Ltd; Lockheed Martin Commercial Space Systems; Marsh Ltd; MEASAT Satellite Systems Sdn. Bhd.; Meritz Insurance Co. Ltd; Mitsubishi Electric Corporation; Mitsubishi Heavy Industries, Ltd; Nanotronix; National Institute of Information and Communications Technology (NICT); NEC Corporation (NEC); Northern Sky Research (NSR); Orbital Sciences Corporation; Papua New Guinea: Papua New Guinea Radiocommunications and Telecommunications Technical Authority (PANGTEL); PT. Telekomunikasi Indonesia, Tbk.; Russian Satellite Communications Company (RSCC); Samsung Fire & Marine Insurance Co. Ltd; Satel Conseil International; Satellite Evolution Asia, DS Air Publications; Sea Launch Company, LLC; SES WORLD SKIES; SingTel (Singapore Telecommunications Ltd); SK Telecom; SKY Perfect

the ratio of members which support reconsideration of the current need for the revised preliminary draft Protocol is no longer a majority of the Organisation. In this regard, with a view to the forthcoming session of the Committee, the A.P.S.C.C. is willing to have a neutral stance regarding the issue of the revised preliminary draft Protocol and would like to respect its members and leave it to their discretion to express their position on the revised preliminary draft Protocol independently by themselves and not as a collective voice on the matter.

JSAT Corporation; Space Systems/Loral; SpeedCast Ltd; Telesat; THAICOM Public Company Limited; Thailand: MICT (Ministry of Information and Communication Technology, Thailand); Thales Alenia Space; Thuraya Satellite Telecommunications Company; Via Satellite, Access Intelligence; ViaSat, Inc. and Vietnam Telecom International (VTI).

The current Associate Members of the A.P.S.C.C. are as follows: ASSI (The Indonesian Satellite Association); ASTOS (The Association of Specialist Technical Organisations for Space); CASBAA (Cable and Satellite Broadcasting Association of Asia); CSA (California Space Authority); CUA-SCBT (Chinese Users Association for Satellite Communications, Broadcasting & -Television); ITSO (International Telecommunications Satellite Organization); MSUA (Mobile Satellite Users Association); PTC (Pacific Telecommunications Council); PITA (Pacific Islands Telecommunications Association); SIA (Satellite Industry Association); SUIRG (Satellite Users Interference Reduction Group, Inc.) and WTA (World Teleport Association).