

The Need for Timeous Completion of the Preliminary Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets

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For the past decade, the International Institute for the Unification of Private Law (Unidroit) has been working on a uniform international legal regimen for the registration and enforcement of security and equivalent interests in space assets. Its implementation is aimed at encouraging growth in the commercial space sector by means of asset-based financing. The international negotiations are currently in a critical state. This paper describes the status of the proposed legal instrument, the preliminary draft Protocol to the Cape Town Convention and points out what has to be done in order to materialize its potential benefits, which is particularly timely and needed in the current state of the global economy.

Unidroit's Approach

Emerging entrepreneurs, having seen the benefits of outer space ventures, are seeking to launch new space-based projects all over the world, utilising the latest technology to provide new and improved services. However, access to the investment capital and finance needed to launch such ventures is extremely difficult to obtain, especially for new start-up companies, due to the legal and economic uncertainty that goes hand in hand with equipment that regularly moves across and beyond national borders in the normal course of business. One option that is available to such entrepreneurs, particularly would-be satellite operators, is asset-based financing, whereby an operator can use the asset that he is seeking to finance, such as a satellite, as collateral or security for a prospective creditor in need of assurances.

In order to encourage growth in the commercial space sector by means of asset-based financing, the International Institute for the Unification of Private Law (Unidroit), an intergovernmental organisation based in Rome, is seeking to create a uniform international legal regimen in space for this type of finance based on practicality, freedom of contract,

predictability, transparency and sensitivity to different national legal cultures. This effort is materialising in the form of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*). Unidroit has sought to ensure the commercial practicality of this project by involving not only the Governments of the key-space faring nations in the preliminary draft Protocol's development, but also representatives of the international commercial space and financial communities.

Background of the Preliminary Draft Protocol

The preliminary draft Protocol is designed to implement the Convention on International Interests in Mobile Equipment, opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Cape Town Convention*). This instrument will establish a uniform legal framework across participating national jurisdictions for the registration and enforcement of security and equivalent interests held by creditors, conditional sellers and lessors of high-value mobile equipment, such as aeroplanes, trains and satellites. The Cape

Town Convention employs a two-instrument approach, through the auxiliary use of asset-specific Protocols, to create a reliable general legal framework for asset-based financing that is still sufficiently flexible to deal with the unique needs of different classes of asset, including specially tailored definitions, regulations for an international registration system and default remedies and limitations thereto. The Cape Town Convention and each individual Protocol are meant to be read as a single instrument, but, where inconsistencies arise, the specific provisions of the Protocols prevail over the general provisions of the Cape Town Convention.

The Cape Town Convention creates an international interest in a uniquely-identifiable mobile asset – an interest that is either granted by the chargor under a security agreement, vested in a person who is the conditional seller under a title reservation agreement or vested in a person who is the lessor under a leasing agreement - ¹ and provides an International Registry in the form of an electronic database, available on the internet 24 hours a day, where these interests may be registered, giving potential creditors the opportunity to search for previously existing secured obligations in a particular, unique asset, regardless of where the asset, creditor or debtor is located. Such a resource provides prospective creditors with additional transparency and certainty that was very difficult to come by in the past.

The Cape Town Convention benefits creditors, and, therefore, investment, in various ways.

In this way, the Cape Town Convention assures creditors that a basic, uniform set of rules will be applied in the event of default to provide speedy relief, thereby reducing the risk of investment and increasing the likelihood that an operator will be able to secure financing for mobile equipment at an affordable cost.

Development of the Preliminary Draft Protocol

At the invitation of the President of Unidroit, a

¹ Cf. Article 2(2) of the Cape Town Convention. An interest falling under the first of these categories may not fall under the latter two.

special working group, comprising experts from across the international commercial space and financial communities who dealt with space asset transactions on a day-to-day basis, the Space Working Group (S.W.G.), was organised to prepare a first draft of a preliminary draft Protocol on Matters specific to Space Assets. Upon being advised by the Steering and Revisions Committee, convened by Unidroit, that the resulting text was in harmony with the Cape Town Convention, the Unidroit Governing Council, at its 80th session, held in Rome from 17 to 19 September 2001, authorised the Secretariat to transmit the preliminary draft Protocol to Governments and to convene a Committee of governmental experts for the preparation of a draft Protocol to the Cape Town Convention on Matters specific to Space Assets (hereinafter referred to as the *Committee of governmental experts*) capable of being submitted for adoption to a diplomatic Conference.

The Committee of governmental experts has to date held two sessions, both in Rome, the first from 15 to 19 December 2003 and the second from 26 to 28 October 2004. At its first session, the Committee of governmental experts considered the text drawn up by the S.W.G., producing the current text of the preliminary draft Protocol. At its second session, the Committee of governmental experts considered several key outstanding policy issues, referring some of these issues to intersessional work, including, first, the examination of the issues arising out of extension of the Cape Town Convention as applied to space assets to cover debtor's rights and related rights, discussed below, secondly, examination of the treatment of public service under national law and in practice and consideration of possible solutions to that problem, also discussed below, and, thirdly, examination of certain issues relating to the future international registration system for space assets.

This intersessional work first took the form of two Government/industry meetings, organised by the Unidroit Secretariat and the S.W.G. The first of these meetings, held in London, at the kind invitation of the Royal Bank of Scotland, on 24 April 2006, brought representatives of the key space-faring nations and the international commercial space and financial communities together to discuss the most effective means of

ensuring greater industry support in the development of the preliminary draft Protocol. Here, it was agreed that timeous completion of the preliminary draft Protocol was crucial, particularly if the international commercial space and financial communities were to continue providing critical support. The second of these meetings, held in New York, at the kind invitation of Milbank, Tweed, Hadley & McCloy (New York), on 19 and 20 June 2007 (hereinafter referred to as the *New York meeting*), saw the consideration of possible solutions to the key outstanding policy issues. Here, it was agreed that, if the objective of timeous completion were to be realised, it was desirable that the sphere of application of the preliminary draft Protocol be narrowed so as to concentrate essentially on the satellite, in its entirety, acknowledged as representing 80% of the space assets covered by the preliminary draft Protocol currently the subject of asset-based finance. In addition, it was agreed that, prior to resuming the intergovernmental consultation process, additional consensus should be built around the provisional conclusions reached at the New York meeting.

Following these meetings, the Unidroit General Assembly, at its 61st session, held in Rome on 29 November 2007, established a Steering Committee to build consensus around the provisional conclusions reached in New York (hereinafter referred to as the *Steering Committee*), open to those that had participated in the Government/industry meetings. The Steering Committee held its launch meeting in Berlin, at the kind invitation of the German Ministry of Justice, from 7 to 9 May 2008. The provisional conclusions reached by the Steering Committee on the aforementioned key outstanding issues were referred to the co-chairmen of the Drafting Committee of the Committee of governmental experts, Canada and the United Kingdom, for the development of an alternative text to the preliminary draft Protocol, which would illustrate the proposed means of resolving the outstanding issues. The idea is for this alternative text to be laid before the Committee of governmental experts, once reconvened, side by side with the original text of the preliminary draft Protocol, as it had emerged from the first session of the Committee of governmental experts, with a view to the latter deciding which aspects of the two to adopt.

In May 2009, specific issues should be solved to clear the way for further governmental negotiations.

Additionally, the Steering Committee invited two sub-committees to meet and make recommendations regarding two of the outstanding issues; the first Sub-committee was invited to consider the issue of default remedies in relation to components with a view to incorporating any resulting recommendations into the alternative text of the preliminary draft Protocol. This Sub-committee met in Berlin, at the kind invitation of Commerzbank, on 31 October and 1 November 2008. The second Sub-committee has been invited by the Steering Committee to develop options for a solution to the abovementioned issue of public service that could be laid before the Committee of governmental experts. This Sub-committee is scheduled to meet later this year in Paris, at the kind invitation of Crédit Agricole S.A., on 13 May 2009. Following this meeting, the Steering Committee will also be reconvened, also in Paris, under the auspices of the European Centre for Space Law, on 14 and 15 May 2009, to consider the recommendations of its sub-committees and to determine whether the time is ripe for the reconvening of the Committee of governmental experts.

Features of the Preliminary Draft Protocol

In order to meet the special needs of the commercial space sector, the preliminary draft Protocol employs several special features, described below. While this article reflects what is contained in the current text of the preliminary draft Protocol, work is on-going, as noted above, to ensure that the final relevant provisions are those most conducive to the needs of both Governments and the international commercial space and financial communities.

Definition of "space asset"

One of the first special challenges facing the preliminary draft Protocol is defining the class of asset that will be covered within the sphere of application provisions. Because the Cape Town Convention provides for an asset-based registry, it is vital that an object be uniquely identifiable for the purpose of registering an

international interest. While this task might be relatively straightforward with equipment such as aircraft and railway rolling stock, the rapid pace of technological advances in the commercial space sector requires that the preliminary draft Protocol be flexible enough to provide not only for existing classes of equipment but also for future technological developments, some of which may not yet have been imagined. For this reason, the current definition of “space asset” found in the preliminary draft Protocol is broadly defined to include those assets in existence to-day and those that might be developed in the future, along with any separately identifiable high-value components that might be viewed as credit-worthy for separate financing.² However, in the light of the New York meeting and the recommendation that the preliminary draft Protocol be simplified, this issue is still under consideration.

“Debtor’s rights” and “related rights”

Another unique obstacle that the preliminary draft Protocol must overcome relates to the legal rights associated with a space asset, particularly in relation to satellites. Many experts from the international commercial space and financial communities have stated that, when considering extending credit for a space asset, notably for a satellite, due to the impracticality of bringing the asset back down to earth, it is the rights to the overall business plan surrounding the space asset that provides value to a creditor, particularly the right to move, sell or operate an asset. Without such rights, the value of the physical asset to a creditor is virtually non-existent. Consequently, creditors have indicated that, in order to obtain timeous judicial relief, it is of the utmost importance that they have recourse to “debtor’s rights” and “related rights”.

“Debtor’s rights” include payments due to an operator, such as the future stream of rentals or any other right to performance.³ These rights are included in the preliminary draft Protocol to ensure that a creditor will have access to the future revenue generated by a unique space asset and, ultimately, be able to recoup an

investment. “Related rights” refers to those special permits and licences granted to a debtor for the manufacture, launch and operation of a space asset by a Government.⁴ Such rights are usually exercised through the use of access or command codes which, under the preliminary draft Protocol, may be placed with a third party in order to allow a creditor the opportunity to take constructive possession of a space asset in the event of default, provided that any transfer of such rights is done in accordance with the national laws that granted them.

Addressing some concerns that inclusion of rights was not compatible with an asset-based registration system, the Steering Committee provisionally concluded that these rights, in order to qualify for coverage under the Cape Town Convention as applied to space assets, should be inextricably linked to the physical asset and that they should be recorded in the future International Registry against the registration of an international interest in the physical asset concerned, ensuring that “debtor’s rights” and “related rights”, once annotated on the Register against the relevant asset, could be relied upon in any State Party to defeat any competing interests in these rights without altering the asset-based nature of the Cape Town Convention.

Default Remedies and Limitations Thereto

Some of the most important features of the Cape Town Convention as applied to space assets are its default remedies and the limitations thereto. These are the rules that provide for timely relief in the event of default, enabling a creditor to, first, subject to what has already been said regarding the practical feasibility of repossessing an asset located in space, take possession or control of the asset, secondly, sell or grant a lease of the asset, thirdly, collect any incoming rentals from the asset and, fourthly, seek a court order for any of these.⁵

For those instances where immediate relief is necessary for the preservation of the value of equipment, the Cape Town Convention as applied to space assets permits States to opt

² Cf. Article I(2)(g) of the preliminary draft Protocol. Available at: <http://www.unidroit.org/english/documents/2004/study72j/s-72j-13rev-e.pdf>.

³ Cf. Article I(2)(a) of the preliminary draft Protocol.

⁴ Cf. Article I(2)(f) of the preliminary draft Protocol.

⁵ Cf. Article 8 of the Cape Town Convention. Available at: <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

into expedited relief provisions under which a creditor may adduce *prima facie* evidence of default before a national court and, pending final relief, obtain a judicial order for, first, preservation of the asset and its value, secondly, possession, control, custody or management of the asset, thirdly, sale or lease of the asset, fourthly, application of the proceeds or income of the asset and, fifthly, immobilisation of the asset.⁶

While the preliminary draft Protocol provides for the timeous relief of creditors, it also provides limitations where the interests of Governments are crucial. First, a Contracting State may restrict or attach any conditions to remedies that involve the transfer of controlled goods, technology, data or services or involve the transfer or assignment of any other related right as defined above.⁷ Secondly, the question is also under consideration as to the appropriate balance to be struck in the preliminary draft Protocol as between the need of a Government to guarantee the continuation of a public service performed by a privately-owned and operated space asset where the debtor is in default, on the one hand, and the rights of the creditor upon such a default under the Cape Town Convention as applied to space assets, on the other.⁸ As noted above, a Sub-committee has been invited to consider possible solutions to this issue that might be put forth for consideration at the next session of the Committee of governmental experts, once reconvened.

The Work Ahead

The preliminary draft Protocol has reached a critical time period; there is widespread support for the timely completion of the preliminary draft Protocol from both Governments, including the key space-faring nations, and the international commercial space and financial communities, as is evident from the participation by both groups in the most recent meetings of the Steering Committee. As time goes by, the commercial space sector continues to make technological leaps that could significantly benefit all mankind, including affordable wireless internet for people all across the globe, commercial space flights and even clean solar-energy from satellites.

Progress has to be made soon in order to secure potential benefits for the space sector.

The preliminary draft Protocol seeks to ensure that those benefits are made available to the widest range of recipients by removing obstacles to the flow of capital from potential investors to enterprising parties. It is essential that all efforts are deployed by both Governments and the international commercial space and financial communities to achieve the timely completion of the preliminary draft Protocol. The commercial space sector is a rapidly evolving sector with high economic potential, it is crucial that the appropriate legal basis are swiftly adopted in order to adequately realise the full potential of the sector.

⁶ Cf. Article 13 of the Cape Town Convention. See also Article X(3) of the preliminary draft Protocol.

⁷ Cf. Article XVI(2) of the preliminary draft Protocol.

⁸ Cf. Article XVI(3) of the preliminary draft Protocol.



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