

LONDON INSTITUTE OF SPACE POLICY AND LAW
COMMENTS ON THE SPACE PROTOCOL
DRAFT OF 25 FEBRUARY 2011

FINANCING SPACE ASSETS: THE UNIDROIT¹ SOLUTION EXAMINED

LEGAL ISSUES²

CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT³
PROTOCOL TO THE CONVENTION ON MATTERS SPECIFIC TO SPACE ASSETS⁴

THE CONVENTION

1. Consistently with the Vienna Convention on Treaties,⁵ the Convention provides that when interpreting it “... regard is to be had to its purposes as set forth in the preamble [and] to its international character ...”⁶ Words used in a treaty, such as the Convention, are to be given their ordinary meaning in the context of its purpose.⁷
2. The purpose of the Convention is “to facilitate financing of the acquisition of [mobile] equipment in an efficient manner.”⁸ It therefore relates to *mobile* equipment, which is not defined in the Convention. This is confirmed by the interest being created by the Convention, namely “...an international interest in certain categories of *mobile* equipment ...”⁹
3. As noted, to interpret its meaning regard must be had to the “international character” of the Convention.¹⁰ In that context the only reasonable interpretation of the term “mobile” is that the relevant asset must be one that in the normal course of use moves from one jurisdiction to another. This is the case with the other two categories of assets specified in the Convention, aircraft objects and railway rolling stock.¹¹ This interpretation is further supported by the provisions relating to its sphere of application, clearly contemplating that the debtor and the creditor are in different jurisdictions.¹²
4. The Space Protocol also recognises, and is to be interpreted, in the context of international law, including ITU instruments¹³ and the Outer Space Treaty.¹⁴

¹ The International Institute for the Unification of Private Law.

² Presentation by *Professor Sa'id Mosteshar*, Director of the London Institute of Space Policy and Law. The views expressed here are those of the author and not necessarily of the Institute.

³ UNIDROIT, signed at Cape Town on 16 November 2001; “Convention.” Entered into force on 1 March 2006, Art. 49(1).

⁴ “Space Protocol;” Unidroit 2011 C.G.E./Space Pr./5/Report/Appendix XV. Original: English March 2011.

⁵ Vienna Convention on the Law of Treaties 1969, Art. 31(1); United Nations, Treaty Series, Vol. 1155, p. 331, (“Vienna Convention”).

⁶ Convention, Article 5(1).

⁷ Vienna Convention, Art. 31(1).

⁸ Convention, Preamble, first paragraph.

⁹ Convention, Art. 2(1); emphasis added. The relevant interest in the equipment is to the physical asset and not the income or revenue from its use; see further argument below.

¹⁰ Convention, Art. 5(1).

¹¹ Convention, Art. 2(3).

¹² Convention, Art. 3.

¹³ Space Protocol, Preamble, fourth paragraph; see also the International Telecommunication Union, “ITU.”

5. The Space Protocol definition of “space asset”¹⁵ is wide-ranging:

‘Space asset’ means any man-made uniquely identifiable asset in space or designed to be launched into space, and comprising

- (i) a spacecraft, such as a satellite, space station, space module, space capsule, space vehicle or reusable launch vehicle [in respect of which a registration may be effected in accordance with the regulations], whether or not including a space asset falling within (ii) or (iii) below;
- (ii) a payload (whether telecommunications, navigation, observation, scientific or otherwise) in respect of which a separate registration may be effected in accordance with the regulations; or
- (iii) a part of a spacecraft or payload such as a transponder, in respect of which a separate registration may be effected in accordance with the regulations,

together with all installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto.

Clearly, while being manufactured or assembled, the space asset is not *mobile*, nor prior to launch.¹⁶ The main relevant question is whether it is *mobile* after launch.

SPACE LAW

6. The Outer Space Treaty provides:¹⁷

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

It follows that a space asset, in the course of its use, does not traverse jurisdictions, and is therefore not *mobile* within the meaning of the Convention.¹⁸ A change in

¹⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, United Nations, Treaty Series Vol. 610, p. 205, (“Outer Space Treaty”).

¹⁵ Space Protocol, Art. 1(2)(I).

¹⁶ Note that the reference is not to “movable” or “transportable.”

¹⁷ Outer Space Treaty, Art. 8.

¹⁸ At a meeting between UNIDROIT and industry representatives and BNSC in London on 27 November 2009, it was contended by UNIDROIT representatives that a geostationary satellite was “mobile” because it does not keep perfect station at its assigned orbital slot. There are, of course, many lower orbit satellites that are not stationary in relation to the Earth. However, physical movement alone is not the relevant criteria, unless it is to be argued

the State of registration cannot and does not occur lightly, or frequently.¹⁹ Any financing arrangement can simply include appropriate provisions to come into effect in the event of a change.

REMEDIES

7. Under the Space Protocol, the remedies available to a chargee include taking possession²⁰ of the charged object. This can only be of benefit in the limited period prior to launch. However, the State with jurisdiction and control over the space asset is included among those with interlocutory jurisdiction under the Convention.²¹ But, the Space Protocol does not require harmonisation of State laws or extension of creditor priority laws to space objects, creating a level of uncertainty in enforcement of the any remedies.
8. Control of a space asset is invariably subject to regulatory requirements and restrictions. These affect both control of the physical object and control of the operation of the space asset.²² The Space Protocol recognises and allows for restrictions on the transfer of control, or ownership of a space asset, where the Contracting State's laws impose limits on its transfer or require licences for the ownership or operation of the space asset.²³
9. The scope and nature of such restrictions vary among States, thus introducing a level of uncertainty in the determination of the remedies available and the action and undertaking by the chargee and the chargor necessary to complete the relief sought.

DEFINITIONS

10. Furthermore, the definitions used in the Space Protocol are unclear and open to differing interpretations. Some of the difficulties inherent in the definitions have been expressed by others elsewhere.²⁴ The latest revision of the Protocol seeks to address some of those concerns. Whether it does so is not addressed here.
11. However, the definition of *space asset* does present some broad issues that should be considered. For example, it is not clear by what criteria an asset is to be *uniquely identifiable* to qualify as a *space asset*. The definition attempts to avoid the difficulties by providing a definition that includes any part of a spacecraft or payload that the Supervisory Authority may by regulation define as subject to

that the Convention should apply to a much wider class of equipment, such as houseboats, drilling platforms in territorial waters etceteras. See also note 16 above.

¹⁹ See Convention on Registration of Objects Launched into Outer Space, 1975, ("Registration Convention"), Art. II (2). In any event, it is arguable whether a change in jurisdiction and control, as a consequence of legal action alone, can render an asset "mobile" within the meaning of the Convention.

²⁰ Convention, Art. 8 (1)(a).

²¹ Convention, Art. 43; Space Protocol, Art. I (3).

²² Following the bankruptcy of Iridium, a number of bidders were disqualified on grounds of technical capabilities, operational plans and the business plans acceptable to the FCC and to the Court.

²³ Space Protocol, Arts. I (2)(e), XXVI (*Limitations on Remedies*), and XXVII (*Limitations on Remedies in Respect of Public Service*).

²⁴ See for example letters to BNSC from SES, Inmarsat and Atrium.

registration.²⁵ There are no clear criteria to be applied by the Supervisory Authority.²⁶

12. It is also not clear whether the whole of the payload on a satellite is to be registered or each payload element. Some satellites carry a combination of payloads, such as telecommunication transponders and observation sensors. Nor is there clear distinction between “spacecraft” and “payload”, the former being defined to include any “satellite,” which would normally comprise the bus and payload.

NATURE OF AN INTERNATIONAL INTEREST

13. An *international interest* is defined by the Convention as “an interest held by a creditor to which Article 2 applies.”²⁷

Article 2 provides:

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.
2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7,²⁸ in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:
 - (a) granted by the chargor 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.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3. The categories referred to in the preceding paragraphs are:
 - (a) airframes, aircraft engines and helicopters;
 - (b) railway rolling stock; and
 - (c) space assets.
4. The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph.
5. An international interest in an object extends to proceeds of that object.

²⁵ Space Protocol, Art. I (2)(l).

²⁶ Space Protocol, Art. XXX specifies some criteria, but they can be augmented by the Supervisory Authority.

²⁷ Convention, Art. 1(o).

²⁸ Art. 7 relates to formal requirements and does not create any substantive rights.

14. Other equally important purposes of the Convention are to “facilitate [*asset-based* financing] by establishing clear rules to govern them,”²⁹ and to “establish a legal framework for international interests in [*mobile*] equipment and for [the] purpose [of *asset-based* financing] to create and international registration system for their protection.”³⁰ The Space Protocol recalls the purposes set out in the Convention,³¹ and reiterates the need to facilitate *asset-based* finance of space projects.³²
15. The Space Protocol attempts to extend its application to *project-based* finance by a wide interpretation of the term “*associated rights*.”³³ Whether such interpretation and extension are merited is open to question. It is arguable that “*associated rights*,” as defined in the Convention are those relating to the asset and not to its use. The Convention definition expressly relates the relevant right to the *object*, when it could have easily referred to the *object or its use*, had that been the intention.
16. The above interpretation of the Convention is also more consistent with the purpose of the Convention and of the Space Protocol to create the conditions for *asset-based* finance. There is a strong argument that the Space Protocol goes beyond and is outside the scope of the Convention. In particular, the use of the words “*in respect to a space asset*,” in the definition of “*debtor’s rights*,” in the Space Protocol³⁴ is wider than the *associated rights* included in the Convention, unless they relate only to rights arising from the asset and not generated by its use.³⁵
17. It is notable that Protocols relating to the other categories of equipment encompassed by the Convention, namely aircraft and rolling stock, do not cover income generated from their use.³⁶ The use of both such equipment also generate revenue for the Debtor. Those Protocols do not extend to *debtor’s rights*, or similar rights of the Debtor.³⁷ Clearly, excluding the rights of the Debtor to payment from the scope of international interest in the asset, does not affect the availability of such payments for relief in the case of default.

UNIDROIT AND ITS REMIT

18. UNIDROIT, is governed and has the powers granted under its Statute.³⁸ This provides:³⁹

²⁹ Convention, Preamble, second paragraph.

³⁰ Convention, Preamble, fifth and sixth paragraphs.

³¹ Space Protocol, Preamble, first paragraph.

³² Space Protocol, Preamble, fifth paragraph.

³³ “associated rights” means all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object; Convention, Art. 1(c).

³⁴ Space Protocol, Art. I(2)(a).

³⁵ The distinction being drawn here is that between capital and revenue.

³⁶ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 16 November 2001), Art. II; Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 23 February 2007), Art. II.

³⁷ See Space Protocol, Arts. II(1), I(2)(a) and (i).

³⁸ UNIDROIT Statute, Official translation approved by the General Assembly at its 45th session on 26 November 1991.

The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law.

To this end the Institute shall:

- (a) prepare drafts of laws and conventions with the object of establishing uniform internal law;
- (b) prepare drafts of agreements with a view to facilitating international relations in the field of private law;
- (c) undertake studies in comparative private law;
- (d) take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary;
- (e) organise conferences and publish works which the Institute considers worthy of wide circulation.

19. A question that arises is the extent to which the convention and the Protocol may be said to *harmonise* or *coordinate* the private laws of States. The provision addressing the preparation of “drafts of laws and conventions with the object of establishing uniform internal law,”⁴⁰ specifically relates to the “end” of achieving the harmonisation and coordination and not to creation of new rights.
20. It may be argued that nowhere in the Statute is there power for UNIDROIT to devise independent solutions and laws creating new rights or to establish entities such as the Supervisory Authority.⁴¹ Indeed, UNIDROIT recognises that the Convention is a “radical departure”⁴² from its normal role to seek “to harmonise the rules of national law on a given subject with a view to promoting international commercial intercourse.”

CONCLUSION

21. One fundamental question that may be posed is whether the convention and the Space Protocol are within the remit of UNIDROIT.
22. There is also a strong argument that *space assets*, are not *mobile* within the meaning of the Convention. They cannot be put beyond the reach of a chargor by transfer to a different jurisdiction, and are beyond the scope of the Convention and its purpose.

³⁹ UNIDROIT Statute, Art. 1.

⁴⁰ UNIDROIT Statute, Art. 1(a).

⁴¹ Convention, Art. 1(kk); Space Protocol, Art. XXVIII.

⁴² “Those international Conventions in the commercial law field developed in the past by the International Institute for the Unification of Private Law (Unidroit) normally sought to harmonise the rules of national law on a given subject with a view to promoting international commercial intercourse in that field. The Convention on International Interests in Mobile Equipment, opened to signature in Cape Town on 16 November 2001, 2 marks a radical departure from that pattern: it seeks rather to promote and expand the availability of a particular financing technique, asset-based financing, in respect of a particular class of asset, high-value mobile equipment normally moving from country to country or beyond any national jurisdiction in the ordinary course of business.” Paper presented by Martin J Stanford, Deputy Secretary-General, Unidroit, Bangkok, November 2010.

23. If, contrary to the view expressed here, the Convention were to apply to a *space asset* as provided by the Space Protocol, for the reasons given here, it introduces uncertainty and unpredictability in securing remedies for default by the chargor. It is contended that a *space asset* is akin to any high value equipment that may be constructed and assembled in different countries and delivered to its final location of use.
24. The Space Protocol is complex in its provision, and the meanings of the words and terms used are uncertain. Without making any commercial judgment on the value of it, any legal dispute between a chargor and a chargee will be difficult to resolve.
25. It is contended that a convention to ensure each Registration State extends its asset security and priority laws to a space object would better meet the objectives enumerated in the Convention, while falling within the Unidroit remit.

Sa'id Mosteshar
20 April 2011