

SECURED INTERESTS IN SATELLITES

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II. Introduction

As the outer space business changes from government sponsorship to private enterprise, it is increasingly dependant on private financing by the manufacturers or by financial institutions.

Private financiers need security in space equipment, enabling them to seize control of the equipment in case of default, bankruptcy, appropriation by other creditors, fraudulent sale of the equipment, or illicit changes in priorities among creditors. The difficulty of the financiers' position is evident. The inherently international nature of the space business places on them the risk of disuniform national legal regimes on security interests in space equipment. National rules governing conflict of laws rules inadequately resolve the problems caused by the divergent national laws on recognition of security interests in movable property. Financial institutions encounter difficulties when mobile property is moved into a foreign jurisdiction and when these institutions seek enforcement in the foreign jurisdiction of security interests that were defined in the home jurisdiction.¹ Satellites and other space property in outer space present additional problems because they are located in outer space,

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outside of any national territory, yet subject to the space law treaties.

Continental European laws and international Conventions in ships and aircrafts tend to respect legal rights derived from the laws of the original situs of the mobile property if those legal rights can be accommodated within the municipal laws of the new situs. Common law, on the other hand, tends to recognize the law of the original situs, while the applicable law in the United States is determined under the UCC by the debtor's principal place of business. Especially the *lex situs* rule is entirely inadequate to determine the law applicable to the validity and priority status of security interests in a modern economy where equipment is frequently moved from one state to another.² The unpredictability of the *lex situs* rule to a large extent prevents asset-based elaborate project finance.

Registration of security interests is important because public registries tend to protect the registered security holders from encroachments by persons who possess or control the property. Again, uncertainties exist depending on whether or how the locale law treats foreign registrations and foreign security interests.³ Adoption by treaty of an international registry giving registered security interests priority over interests which are not registered would not only facilitate

identification of security interests but also establish certainty as to their nature. It would put the public and subsequent security holders on notice about prior registrations of security interests in the same object.

In 1991 the UNIDROIT Council decided to establish a working group on security interests in mobile equipment, which began its work in 1992. At its initial meeting the working group saw no reason to exclude satellites from the Convention⁴. UNIDROIT, which is an independent international organization located in Rome, Italy, is not part of the United Nations. UNIDROIT is responsible directly to its 58 member governments, including Australia, Brazil, Canada, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States. UNIDROIT seeks to harmonize private law by preparing draft conventions and laws with the objective of making the law of specific areas uniform.

IV. Proposed UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

The current draft version was prepared during the fourth session of the UNIDROIT study group for the preparation of uniform rules on international interests in mobile equipment, which was held in Rome in November 1997.

1. Definition of Covered Mobile Objects, Article 3 of the Convention

The future Convention provides for the creation of a uniform international interest in mobile equipment. Besides other movables⁵, the proposal also addresses space property.⁶ A final list of movables shall be prepared under an additional protocol, which shall also include rules solely applicable for each specific object. Regarding the relationship between the future Convention and the Protocol, UNIDROIT settled on the following: (i) the Convention will only enter into force in respect to a category of equipment at such time as the Protocol in respect to that category itself enters into force, (ii) the Convention will enter into force in respect to a category of equipment subject to the terms of the Protocol applicable to that category, and (iii) the Convention will only enter into force in respect to a given category of equipment as between contracting states that are Parties to the Protocol applicable to that category.⁷

2. Creation of an International Interest, Chapter II of the Convention

a. Application of the Convention

The Convention applies when at the time of the execution of the

agreement which creates the international interest, the obligor is located in a contracting state or the object to which the international interest relates has been registered in a nationality register or a state-authorized asset register. This application provision basically combines the US approach under UCC with the European *lex situs* rule.

b. Types of Agreements

The international interest can be derived from three different types of agreements:

- security agreement
- title reservation agreement
- leasing agreement.⁸

Whether an interest derives from a security agreement, title reservation or leasing agreement has to be determined by the applicable national law under Private International Law.

c. Form of Agreement

Article 8 of the future Convention requires that any agreement creating an international interest must be in writing and must enable the object to be identified in conformity with the applicable protocol, of which the chargor, seller or lessor has power to enter into such an agreement. In the case of a security agreement, it must identify the secured obligations expressly or by reference to another agreement.

d. Priority of International Interest

A registered international interest has priority over any subsequently registered or unregistered interest.⁹ Even in cases where the registered international interest was acquired or registered with actual knowledge of other interests or in cases where the holder has given value with knowledge of other interests, the international interest has priority. The priority of competing interests may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered.

e. Assignment of International Interest

According to Article 30 of the future Convention, the holder of an international interest may assign the international interest to another person, if (i) the assignment is in writing, (ii) it enables the identification of the international interest and the object to which it relates, and (iii) in the case of an assignment by way of security, enables the identification of the secured obligations. Where the assignment of an international interest has been registered, the assignee has priority regarding associated rights related to (i) a sum

advanced and utilized for the purchase of the object, (ii) the price payable for the object, (iii) the rentals payable in respect of the object, and (iv) the reasonable costs incurred in the exercise of any default remedies.¹⁰ The assignment is subject to all defenses and any rights of set - off available to the obligor against the assignor. Any assignee of an international interest may register the assignment by transmitting an assignment notice to the registry. The obligor is bound by such an assignment if the obligor has been given written notice by or with the authority of the assignor, and the obligor does not have actual knowledge of any other person's superior right and the written notice identifies the international interest.¹¹ The buyer of an object acquires its interest subject to an interest registered at the time of its acquisition of that interest, and free from an unregistered interest even if she has actual knowledge of such an interest.

3. Creation of an International Registry, Chapter IV and V of the Convention

a. Establishment and Operation

Article 16 of the future Convention provides for the establishment of an international registry for international interests, prospective international interests and registrable non-consensual rights and interests, assignments and prospective assignments of

international interests, and subordination of interests and information relating to international interests. Different registries may be established for different categories of objects. The protocol will designate an intergovernmental regulator who establishes the international registry, and designates the registrar.¹² In addition, the Protocol will provide for contracting states to designate operators of registration facilities in their territories, which can transmit information required for registration and can preclude alternative access to the international registry. A procedure will be established to review acts or omissions of the registrar or operators of registration facilities. Such an international registry is an international organization which is not subject to the laws of the state where it is situated.

b. Registration

An international interest may be registered by the holder if the agreement relating to it conforms with Article 8 of the future Convention. In case of a security agreement, the chargor must have consented in writing to the registration, and the requirements for registration under the future protocol must have been fulfilled. The registration of a registered interest may be amended by the holder of such an interest if the chargor has consented in writing. The registration shall be asset-based

and use any asset identification marks, such as the manufacturer's serial number. The criteria for the identification of the object which must be fulfilled in order to effect a registration will be described in the Protocol and the regulations. The document sent for registration is a registration notice and not the security agreement itself. The notice must contain at least a description of the type of asset, any identification mark, the name and location of the debtor and the secured party and a certificate by the secured party attesting that the debtor has given his written consent to the registration. The international registry will record the date and time a registration takes effect.

c. Effect of Registration

An international interest registered under this Convention has priority over any other interest subsequently registered.¹³ During an ongoing debate at UNIDROIT on the legal impact of the registration, lawyers trained in civil law countries argued that registration should be an aspect of creation of the security agreement equivalent to a notarization, while those lawyers trained in common law successfully took the position that registration should not have any inter partes significance. Therefore, an unregistered security agreement is valid between the parties, but will have a lower priority than a registered security agreement.

d. Public Access and Searches

Any person may search in the registry concerning any registered interest. The registrar will issue a registry search certificate with respect to any object stating all registered pertinent information, together with a statement indicating the date and time such information was registered or stating that there is no information in the registry relating to this object.¹⁴ Such a certificate is prima facie evidence that it has been so issued and of the facts redited in it, including the date and time of registration of the information required by the protocol and the regulations.

e. De-Registration

When the obligations secured by a security interest or the obligations for a registrable non-consensual right or interest have been discharged, or the condition under a title reservation agreement have been fulfilled, the obligor may, by written demand delivered to the holder of such a registered interest, require the holder to remove the registration relating to the interest.¹⁵

4. Default Procedure, Chapter III of the Convention

a. Remedies

Default under Chapter III of the future Convention is not limited to the default by the chargor under a security agreement but is also

intended to cover situations where the default is related to security granted by a third party. If the debtor fails to perform substantially under the secured obligation, the chargee has four choices: she may (i) take possession or control of such object; (ii) sell or grant a lease of any such object; (iii) collect or receive any income or profits arising from the management or use of any such object; or (iv) apply for a court order authorizing or directing any of the above acts.¹⁶ The debtor and chargee may amend these remedies in a written agreement. Any act shall be exercised in a commercially reasonable manner and in conformity with the procedural law of the place where the remedy is to be granted. Any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be granted to the extent that they are not inconsistent with the future Convention.

b. Interim Judicial Reliefs

The future Convention defines five different orders as interim judicial reliefs, if the obligee can adduce prima facie evidence of default by the obligor such as (i) preservation of the object or its value, (ii) possession, control, custody or management of the object, (iii) sale or lease of the object, (iv) application of the proceeds or income of the object, (v) immobilization of the object,¹⁷ none of which shall be a limitation of

other forms of available interim judicial relief under the applicable law. A court of a contracting state has jurisdiction to grant interim judicial relief where the object is within the territory of that state or one of the parties has its place of business within that territory or the parties have agreed to submit to the jurisdiction of that court and the contracting state of this place has not declared a reservation regarding available interim judicial relief under this Convention.

c. Distribution of Surplus - Article 9

If the charged object is sold following the chargor's default and the amount realized by the sale is in excess of the amount due to this chargee, the surplus should go to the holder of that international interest ranking immediately after the chargee's. If there is no other international interest, the surplus should go to the chargor.

V. Prospects for Future UNIDROIT Convention

An international convention on security interests in space objects would facilitate and stabilize space commerce. It would clearly identify and make available the collateral for financial transactions. Creditors would be more likely to lend money for space commercial transactions because dependable and accessible (reachable) collateral would come into existence. The cost of

transactions would also be reduced because the financial risk of space property transactions would decrease. Transactions which were not possible or desirable prior to such an international convention now would become financially feasible. Insurance cost also would be affected.

Both space and aviation commercial interests are expressing great need for unification of the law on security interests in mobile property affecting these two areas of commerce. International security interests in both space and aviation commerce are linked together since the underlying basic agreement on security interests in mobile property must be executed, before the special protocols in space and aviation commerce can be finalized. This approach emphasizes the need to succeed with the basic convention on international security interests in mobile equipment. However, it also holds the two areas of commerce hostage to the success of the basic convention.

Without the basic convention on international interests in mobile equipment, it would be advisable for space and aviation industries either to join efforts to create a treaty on space and aviation property, or to seek separate treaty instruments. The best solution would be to prepare a basic comprehensive convention that all the states can agree to. However, the bottom line is that the Convention for a Protocol

on space property needs to be solidified in order for the very worthwhile effort of the unification of the law of security interests in space property to succeed.

¹ Study LXXII-Doc 1, 3.
² See UNIDROIT, International Regulation of Aspects of Security Interests in Mobile Equipment, 1989 Study LXXII-Doc. 2, p.
³ Study LXXII-Doc 1, 9.
⁴ UNIDROIT 1992, study LXXII - Doc. 5, at 4.
⁵ Airframes, aircraft engines, helicopters, registered ships, oil rigs, containers, railway rolling stock, and objects of any other category uniquely identifiable and habitually moving from one state to another in the ordinary course of business.
⁶ See Article 3 h of the proposed UNIDROIT Convention.
⁷ See Article X of the proposed UNIDROIT Convention.
⁸ See Article 2 of the proposed UNIDROIT Convention.
⁹ See Article 28 of the proposed UNIDROIT Convention.
¹⁰ See Article 36 of the proposed UNIDROIT Convention.
¹¹ See Article 33 of the proposed UNIDROIT Convention.
¹² See Article 17 of the proposed UNIDROIT Convention.
¹³ See Article 28 of the proposed UNIDROIT Convention.
¹⁴ See Article 23 of the proposed UNIDROIT Convention.
¹⁵ See Article 27 of the proposed UNIDROIT Convention.
¹⁶ See Article 9 of the proposed UNIDROIT Convention.
¹⁷ See Article 15 of the proposed UNIDROIT Convention.