SPACE ASSET FINANCING AND TRADE ISSUES

By Paul B. Larsen, Georgetown University Law Center*)
(PBLspace@aol.com)

FIRST PART: UNIDROIT SPACE PROTOCOL

The International Institute for Unification of Private Law (UNIDROIT) is modernizing the law governing security interests in high value mobile property. The Convention on International Interests in Mobile Equipment was adopted in Cape Town, South Africa on 16 November, 2001. 1/ The Cape Town conference took the first step of extending the treaty to aviation assets by a special protocol. 2/ The next steps are to extend the Cape Town Convention to space assets and to railroad assets by special protocols. Adoption of a special protocol for space assets would facilitate international trade in space assets, expand financing opportunities and would lower the cost of financing. 3/

An industry working group on space asset financing has met several times. Represented on the working group are manufacturers, financers, insurers and operators as well as space lawyers. The intent is to involve people with practical experience in financing of space assets and space law. The group is chaired by Peter D. Nesgos. In several meetings the space industry working group drafted a protocol which was transmitted to UNIDROIT in January 2002. 4/ UNIDROIT in turn transmitted the protocol to Governments.

The space industry working group, joined by a number of invited government representatives, met again at the European Space Agency (ESA) in Paris on September 5, 2003. This Paris colloquium was chaired by Dr. Sergio Marchisio, vice chairman of the European Center for Space Law. The participants examined the draft space protocol, raising issues for the working group to consider in the short term. Some of these interesting issues include:

1. Are the Convention and the draft space protocols too open-ended? 5/ Blanket incorporation of existing space law may complicate financing under the space protocol because some space law is implemented and some is not.
2. Should satellite salvage rights to space assets be regulated ? 6/
3. Do national security restrictions on transfer of dual use space assets create uncertainty about the rights of the insurers and financiers to space assets? 7/
4. Are the creditors' remedies in cases of default by the debtor too vague? For example is the provision in the Convention's Art 8 (1) that the creditor shall exercise his rights for repossession, sale, or collection of income in a "commercially reasonable manner" too vague to be effective?
5. Is the space protocol project too ambitious? Should the scope of the space protocol be narrowed to simply establish an international registry enabling creditors and debtors to register and locate secured interests and nothing further?
6. Is there a need to redefine "associated rights" in the Space

Protocol's Art 1?
7. How should space assets be identified in the registry of secured assets? Should the registry permit multiple search criteria for identification of assets in the registry?

Conclusion to Part I:

The chairman stressed that the major purpose of the Space Protocol is to facilitate and expand financing of space assets rather than to harmonize the law governing secured interests in space assets. He encouraged COPUOS to continue its examination of the relationship between the space protocol and existing space law.

The space industry working group plans to remain active during the three years that the governmental experts are working on the Space Protocol. One reason for continued vigilance is that the government experts represent their sovereign governments and are not bound by the preparatory work of the industry working group. Individual members of the industry working group will assist the government experts or may even become such experts representing their governments. Furthermore, the working group will meet in between meetings of the government experts in order to assess the progress made. The chairman of the working group also plans to coordinate work on special topics (such as the topic discussed in Part II of this paper).

Another colloquium directed at Eastern Hemisphere communities is planned for Kuala Lumpur, Malaysia, in early 2004. The governmental experts' first meeting is in Rome, December 15 - 19 December 2003. That is to be followed by three more meetings at about eight months intervals. According to this schedule the diplomatic conference on the space protocol may take place in 2005 or 2006

SECOND PART: RESTRICTIONS ON TRADE IN SPACE ASSETS

The purpose of this Part is to list restrictions on trade in space assets. As parties to financing know, transfers of property rights to space assets are often restricted by national and international regulation. National and some international restrictions tend to be related either to trade competition or national security. Occasionally there are mixed motivations. Nevertheless an attempt is made below to sort out the restrictions according to their trade or security category. The list is compiled from U.S. law, but because so much of international trade in space assets touches on the United States, these restrictions affect many countries.

RESTRICTIONS WHICH ARE NOT RELATED TO NATIONAL SECURITY

A. ITU International Laws and Regulations: The ITU Constitution, Arts 33-44, 8/ gives ITU members the right to terminate illegal radio transmissions. Art 36 provides that ITU members may suspend international telecommunications service after due notice to ITU. Thus financial transactions are subject to ITU's international laws and regulations.

B. Unfair Trade Practices: U.S. Trade Act of 1974, section 301, 9/ prohibits unreasonable burdens and restrictions on U.S. Commerce. In 1985 a U.S. company, Transspace, 10/ filed a petition under Sec. 301 before the U. S. Trade Representative against ESA for subsidizing Arianespace and thus competing unfairly with Transspace alledging that:
1. Arianespace used a two tier pricing policy (a). a higher price to ESA members, (b) a lower price to others.
2. France subsidized range launch facilities
(3) France provided free technical experts.
(4) Arianespace provided free insurance

The ITR compared ESA practices to US practices. The ESA practice was found to be not sufficiently different from US practices to be considered unreasonable. Transspace lost the case thus indicating that Section 301 is perhaps not a very effective tool for regulation of unfair trade practices in space assets.

C. Nationality requirements for use of radio frequencies: Many States, including the United States, regulate transfer of radio frequencies for public policy reasons. The Federal Communication Commission (FCC) requires its permission to transfer use of radio frequencies and orbital slots.. Under Sec 301 of the Communications Act of 1934 11/ the FCC requires that no person shall use any radio frequencies except pursuant to license granted by the FCC. The FCC determines whether the public convenience and necessity would be served by the grant of an application for a license. In making its decision whether to grant a license The FCC considers several factors: availability of spectrum, effect on competition, technical characteristics, radio interference, eligibility requirements, as well as national security, law enforcement, foreign policy and trade. Prior to transfer of an existing license to another entity the FCC must find that the transfer will serve the public interest.

The US Communications Act limits foreign ownership of certain US radio licenses. These limitations involve ownership by foreign governments, corporations and individuals. 12/ Section 310(4) is of particular significance because it requires the FCC to address indirect ownership greater than 25% in broadcast common carrier licenses. In reviewing proposed foreign investment pursuant to Section 310, the FCC relies on principles set forth in the 1997 Foreign Participation Order which has a rebuttable presumption that foreign investment from WTO member countries is consistent with the public interest.

D. Rules on Competition: The Communications Act 13/ states that monopolies in radio communication are not permitted. The FCC is given the task of enforcement in the area of satellite communication. The U.S. Government may regulate monopolies and mergers under the anti trust laws (by the Department of Justice and the Federal Trade Commission). Application and enforcement of the European Union rules on competition are also possible.

NATIONAL SECURITY RESTRICTIONS ON TRADE

A. Wassenaar Agreement: 14/ The

Wassenaar Agreement requires export control of conventional arms and dual-use goods and technologies. Members of the Wassenaar agreement must inform its members when arms are transferred. Its purpose is to promote transparency; increase responsibility; and establish reporting requirements

B. The Missile Technology Control Regime (MTCR): 15/ The MTCR is a voluntary arrangement to stop missile proliferation. 29 member states agree to limit and restrict proliferation of missile technology. (The USA and many developed countries are members of the MTCR. China is not a member). "Missile" is defined as technology capable of carrying a 500 kg payload at least 300 km as well as delivery of weapons of mass destruction (WMD). (Included are ballistic missiles, space launch vehicles, unmanned air vehicles, cruise missiles including GPS satellites used to guide cruise missiles).

Enforcement is divided into two categories according to severity of the danger: Category I is most severe. It is subject to presumption of denial of permission to export. Category II covers a diversity of parts and components such as propellants, structural materials, test equipment, and flight instruments. These may be exported on a case by case basis.

C. U.S. Export Control Legislation of 1999: 16/
Particular problems with Chinese launch access of U.S. payload provoked US Congress concerns with satellite exports to China. Discussions in Congress were based on the Cox Report. The US legislation establishes the primary importance of national security over business interests.
1. Required export license plan must be approved by the Department of Defense (DOD).
2. Crash Investigation license is required for U.S. participants in the investigation. DOD will monitor such investigations. This requirement does not apply to NATO allies.
3. Annual report to Congress on export of US satellites for launch by China.
4. Registration and licensing requirements include all articles whether of US or foreign manufacture. Nothing may be exported or imported without a license. A $250 license fee payable to Department of State. Violation is a criminal offense.
5. Munitions transactions with countries that support terrorism are prohibited.
6. The President may waive trade restrictions if essential for the national security. 17/

D. ITARs and EARs: 18/ Control is maintained by the State Department under the International Traffic in Arms Regulations (ITARS) and by the Department of Commerce under the Export Administration Regulations (EARS).
Stricter US export control of space technology was established in 1999 when the US Congress moved responsibility for satellite export control from the Department of Commerce (DOC) to the Department of State (DOS). Satellites were placed in the same export category as military weapons systems. DOS regulation proved to be more extensive, restrictive and time consuming than DOC regulation. Added regulations resulted in added cost. Most of the impact on US business has been felt in the satellite

manufacturing side. US market share of satellite manufacturing has fallen from 75%to 45% in 2000. Export and import controls are also having adverse effect on the US launch vehicle market. 19/

E. Iran Non-proliferation Act of 1999:
20/ The Act bars the United States from buying space assets from Russia unless the President can certify that the Russian supplier is not supplying sensitive military technology to IRAN. For example this law restricts use of Russian spacecraft to supply the International Space Station.

Conclusion to Part II:

In the absence of the international regulation the parties to financing contracts are subject to existing national and international laws and regulations restricting trade in space assets.
The current draft space protocol provides the contracting states room to exercise existing national laws in the case of a creditor's insolvency. The draft protocol provides the parties to the treaty the following options: (1) They may opt to be subject to the insolvency laws provided under national law; (2) they may select space protocol article XI , Alternative A , which requires the debtor to hand over the space asset to the creditor at the end of a waiting period specified in a declaration filed by the contracting state which has primary jurisdiction over the insolvency, or (3) the contracting state may opt for space protocol, Alternative B, which requires the debtor to give notice to the creditor to cure the default or permit the creditor to take possession in accordance with applicable national law.

Footnotes

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1. Convention on International Interests in Mobile Equipment, U.N. Doc. No. A/AC.105/C.2/2002/CRP.3 (Nov. 16, 2001).

2. Id.

3.Nesgos letter, New York, 31 August, 2003

4. Id. Larsen, Future Protocol on Security Interests in Space Assets, 67 J. Air L. & Com. 1071 at 1081 (2002)

5. Larsen supra n. 4 at 1085.

6. Salvage rights are extensively regulated in maritime law, Healy & Sweeney, Marine Collision, Ch. 15 (1998)

7. See Part II below.

8. ITU Convention, Project 2001, Legal Framework for Commercial Use of Outer Space (Satellite Communications), June 8-9, 2002 Berlin, Germany at 214 - 16.

9. 19 U.S.C. 2411(a)

10. 50 Fed. Reg. 29631 (1985).

11. 47 U.S.C. 301

12. 47 U.S.C. 310

13. 47 U.S.C. 314.

14. Wassenaar Agreement, see http://www.bis.doc.gov.Wassenaar/default.htm

15. Missile Technology Control Regime, see http://www.fas.org/nuke/control/mtcr/docs/mtcr96.htm

16. P.L. 105-261 (1998)

17. Boeing (Hughes) agreed to pay $32 million penalty and Loral agreed to pay $20 million penalty when the two American contractors provided sensitive rocket technology information to China during investigation into two separate failures of the Chinese Long March launch vehicle.

18. 22 CFR Part 120-130; 15 CFR 730 et seq.

19. Space industry has raised questions whether the U.S. Department of State has enough personnel to handle the large number of export license applications.

20. Iran Non-Proliferation Act of 1999