Transfer of Possession and Control under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets

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I Opening to Signature of the Space Protocol

After many years of work, the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *Space Protocol*) was opened to signature in Berlin, at the conclusion of a diplomatic Conference kindly hosted by the Government of Germany, on 9 March 2012.[1] The Conference witnessed differences of opinion regarding the ripeness for adoption of the draft Protocol submitted to the Conference: four Governments indicated that their space industries did not believe the draft Protocol was ready for finalisation but the vast majority of Governments participating in the Conference took the view that the draft Protocol was ready, given what they saw as the potential benefits accruing to developing and emerging economies under the draft Protocol in particular and the enhanced access to commercial space markets that they expected the future Protocol to open up to smaller operators and start-up companies in general: these Governments took the view that the draft Protocol should be finalised at the Conference. The Conference was attended by the representatives of 40 Governments, a considerable proportion of which hailed from the developing

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1 The text of the Space Protocol is set forth in Annex I to the Final Act of the Berlin diplomatic Conference.

and emerging worlds. Three Governments (Burkina Faso, Saudi Arabia and Zimbabwe) signed the Space Protocol on 9 March 2012. Unidroit was designated Depositary of the Space Protocol, which will remain open for signature at the seat of Unidroit in Rome until it enters into force. Its entry into force will be triggered by the deposit of the tenth instrument of ratification or accession and the certification by the Supervisory Authority of the future International Registry for space assets that the Registry is fully operational.

II The Nature of the Problem which the Space Protocol Seeks to Deal with

The possibility of the transfer of possession of, or control over a secured asset from one party to another is a fundamental characteristic of the type of financing dealt with in the Convention on International Interests in Mobile Equipment opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Convention*),[2] namely asset-based financing. The key factor of this financing is that the creditor must be able to exercise its default remedies over the specific secured asset: he must, in particular, under Article 8(1)(a) of the Convention, be able to take possession or control of the relevant asset. Note, though, that we are here talking about transfer of possession of, or control and not ownership: the Space Protocol does not purport to deal with issues of ownership. However, the taking of possession or control of assets of the type regularly moving across national boundaries, such as aircraft, or beyond such frontiers, in the case of space assets, can be extremely complicated, owing to the differences between the national and international rules that may be applicable to the owning and operating of such assets. Nowhere is this more true than in the case of space assets, such as satellites, where the plethora of existing laws and regulations can be the source of a high degree of uncertainty regarding the effective transfer of possession or control, thus increasing the risks faced by creditors contemplating the financing of space assets and, consequently, raising the cost of such financing for prospective space entrepreneurs. This cost will be even higher for entrepreneurs located in those parts of the world where laws regarding financing are not as well defined as those in more developed markets.

In implementing the default remedies of the Convention for space assets, the authors of the Space Protocol have always been careful not to interfere in any way with the sovereign right of States to effect the transfer of licences and authorisations necessary to complete the effective transfer of ownership in such assets. They have, in this way, acknowledged the limitations of the regimen that they have put in place; some even argued for the passing by the diplomatic Conference that adopted the Space Protocol of a resolution encouraging States to facilitate the transfer of licences necessary to complete the effectiveness of

2 At the time of writing (March 2012), 51 States and the European Union were Parties to the Convention.

the default remedies of the Convention for space assets (that would have facilitated the transfer of ownership of space assets under the Convention while simultaneously respecting the existing national and international rules that apply to the ownership and operation of such assets).

III The Key Structural Elements of the Cape Town Regimen: Protocols and Registries

The Convention aims in particular to provide increased transparency and predictability for the taking, perfecting and enforcing of international interests in high-value mobile assets. The principal way in which it seeks to achieve this is through the electronic International Registry - designed to ensure the priority of such interests once registered[3] and capable of being searched by parties the world over 24 hours a day, seven days a week - to be established pursuant to each of the Protocols implementing the Convention for specific classes of high-value mobile asset.

The new regimen introduced by the Convention consists in a two-instrument system, with the Convention laying down the general rules governing the taking of security in all classes of high-value mobile asset and equipment-specific Protocols adapting those general rules to the particular needs of each class of such asset, the relevant Protocol prevailing over the Convention where any inconsistencies might arise.[4] This reflects the fact that the different categories of asset contemplated by the new regimen will require differently tailored provisions to reflect the differing pattern of asset-based financing relating to each class of asset.[5]

Prior to the Berlin Conference Protocols had already been adopted for aircraft equipment - the Protocol to the Convention on Matters specific to Aircraft Equipment opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Aircraft Protocol*)[6] - and railway rolling stock - the Protocol to the Convention on Matters specific to Railway Rolling Stock opened to signature in Luxembourg on 23 February 2007 (hereinafter referred to as the *Rail Protocol*).[7] The Space Protocol seeks to extend the benefits of the Convention - which, as has been seen from the overwhelming success of the Aircraft Protocol, are significant - to space assets.

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3 Cf. Article 29 of the Convention.

4 Cf. Articles 6 and 49 of the Convention.

5 Cf. Sir Roy Goode: *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment: Official Commentary (revised edition)*, §§ 2.9-2.11.

6 At the time of writing (March 2012), 44 States and the European Union were Parties to the Aircraft Protocol.

7 At the time of writing (March 2012), the Rail Protocol was not yet in force.

IV Relevant Examples of the Way in Which the Space Protocol Adapts the Convention to the Pattern of Commercial Space Financing

(a) Extending the Sphere of Application of the Convention as Applied to Space Assets to "Debtor's Rights"

It was during the preparation by the Space Working Group[8] of the preliminary draft Space Protocol that certain representatives of the commercial space sector first raised the concern that it would be necessary for the Convention, through the future Protocol, to apply to those intangible rights granted by contract or a State Authority, such as the rights to the income generated by the satellite, which would be necessary for the profitable operation of a space asset. These rights, it was argued, would need to be covered if a creditor were to be capable of enforcing its international interest in a space asset through the taking of control or possession of the relevant satellite and the enjoyment of the commercial benefits deriving therefrom.[9] This was viewed as especially important since, in the case of an asset that had already been launched into space, it would be economically impracticable physically to retrieve that asset from orbit in order to take possession of, or to change the established function of such an asset. In the words of one legal expert from the commercial space sector, "[o]btaining a security interest in an orbiting satellite clearly does not benefit a creditor if,

8 This working group was organised, at the invitation of the President of Unidroit, by Mr P.D. Nesgos. The idea was for it to comprise representatives of the different sectors of the space industry, that is essentially manufacturers, operators, launch service providers, financiers and insurers, and of the relevant international Organisations. It was the preliminary draft Space Protocol prepared by this working group which, once authorised for transmission to Governments for finalisation by the Unidroit Governing Council, provided the basis for the work of the Unidroit Committee of governmental experts for the preparation of a draft Protocol (hereinafter referred to as the *Committee*), which, over the course of five sessions (held between December 2003 and February 2011), prepared the draft Protocol that was submitted to the Berlin diplomatic Conference, for adoption.

9 Cf. Unidroit 2000 – Study LXXIIJ – Doc. 1, Restricted informal group of experts to identify and engage in a preliminary discussion of the issues which merit consideration in the context of the relationship between the draft Unidroit Convention on International Interests in Mobile Equipment and the preliminary draft Protocol thereto on Matters specific to Space Property and the existing body of international space law (Rome, 18/19 October 2000): Report, § 14. Cf. also Unidroit 2003 – C.G.E. Space Pr. /1/W.P.7, The preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment: an opportunity for Government and industry to compare notes in the run-up to the intergovernmental consultation process: a colloquium organized by Unidroit, in co-operation with the European Centre for Space Law (E.C.S.L.), at the Head Office of the European Space Agency (E.S.A.) (Paris, 5 September 2003), § 20.

upon default, the creditor is limited to physical or constructive possession of the satellite."[10] At that time, however, the view was that it would not be appropriate for the Convention to contemplate other than the physical asset and its associated rights,[11] all the more so given the existence of the 2001 United Nations Convention on the Assignment of Receivables in International Trade: to cite the Official Commentary on the Convention, "the . . . Convention is concerned with international interests, not with assignments of receivables as such. So the Convention does not cover assignments detached from the related international interest".[12]

At the first session of the Committee, however, it was tentatively agreed that consideration would need to be given to the inclusion of "debtor's rights" in the future Space Protocol, although only in so far as such rights were inextricably tied to an interest in the asset itself.[13] [14] As already mentioned, this last point was of especial importance given the asset-based nature of the Convention regimen as a whole and of the registration system established pursuant to each

10 Cf. Unidroit 2003 – C.G.E. Space Pr./1/W.P.5, 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, first session (Rome, 15/19 December 2003): The preliminary draft Protocol on Matters specific to Space Assets: an overview of its objectives and key provisions, by Mr D. Panahy, p. 4.

11 Under Article 1(c) of the Convention, "associated rights" are defined as "all rights to payment or other performance by a debtor under an agreement which are secured by or associated with the object". Under Article 1(a) of the Convention, "agreement" is defined as "a security agreement, a title reservation agreement or a leasing agreement". Under Article 1(u) of the Convention, "object" is defined as "an object of a category to which Article 2 applies". Article 2(2) of the Convention provides that " "[f]or the purposes of the Convention, an international interest in mobile equipment is an interest . . . in a uniquely identifiable object of a category of such objects listed in paragraph 3 . . ." Article 2(3) of the Convention provides that "[t]he categories referred to in the preceding paragraphs are: (a) airframes, aircraft engines and helicopters; (b) railway rolling stock; and (c) space assets".

12 *Op. cit.*, § 4.302.

13 Cf. Unidroit 2000 – Study LXXIIJ – Doc. 1, Restricted informal group of experts to identify and engage in a preliminary discussion of the issues which merit consideration in the context of the relationship between the draft Unidroit Convention on International Interests in Mobile Equipment and the preliminary draft Protocol thereto on Matters specific to Space Property and the existing body of international space law (Rome, 18/19 October 2000): Report, § 14.

14 The Space Protocol, moreover, provides a link between the recording of debtor's rights and the registration of the physical asset to which those rights pertain: under Article XII(1) of the Space Protocol, "the holder of an international interest . . . who has acquired an interest in or over debtor's rights under a rights assignment or by subrogation may, when registering the international interest . . . record the rights assignment or acquisition by subrogation as part of the registration".

Protocol in particular: the Convention is designed essentially to cover tangible, uniquely identifiable assets rather than receivables.[15] It was agreed that the feasibility of such an extension of the Convention regimen in respect of space assets should be carefully considered at the following session of the Committee on the basis of the definition of debtor's rights supplied by the Space Working Group.[16]

Under that definition, "debtor's rights" was expressed to cover "all rights to performance or payment due to a debtor by any person with respect to a space asset",[17] the inclusion of which would enable a creditor to enforce an interest over the revenue generated by a space asset in the event of default and facilitate the transfer of the economic incidents of possession of, or control over a space asset from one party to another.

While the drafting of this definition and the case for the inclusion of the concept in the future Protocol were only finally agreed upon some time later, namely at the third session of the Committee, held in Rome in December 2009, the concept of "debtor's rights" would prove to be a lasting feature in the Space Protocol. [18] States, though, would continue to have the final say over the transferability of the licences inclusive of these rights: in particular, it is States which, under the United Nations outer space treaties,[19] bear the burden of liability for the activities of commercial space entities. The assignment of "debtor's rights" is, accordingly, made subject under the Space Protocol to the applicable law, namely the law of the Contracting State under the authority of which the debtor was operating the space asset.[20]

(b) Taking Account of "Related Rights" in the Context of the Convention as Applied to Space Assets

For a long time - indeed up until the fourth session of the Committee, held in May 2010 - the preliminary draft Space Protocol was also designed to extend the application of the Convention to "related rights", namely any permit, licence, authorisation, concession or equivalent instrument that enabled a party to manufacture, launch, control and use or operate a space asset, albeit only

15 Cf. Article 2(5) of the Convention, which provides that "[a]n international interest in an object extends to proceeds of that object".

16 Cf. Unidroit 2003 - C.G.E./Space Pr./1/W.P. 13.

17 Cf. Article I(2)(a) of the draft Protocol as it emerged from the first session of the Committee (Unidroit 2003 C.G.E. Space Pr./1/W.P. 3).

18 Cf. Article I(2)(a) of the Space Protocol.

19 Cf. Article VI of the United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter referred to as the *Outer Space Treaty*) and the United Nations Convention on International Liability for Damage Caused by Space Objects (hereinafter referred to as the *Liability Convention*).

20 Cf. Article X of the Space Protocol.

to the extent that such rights were capable of being transferred or assigned under the applicable law.[21] This proposed delimitation of the extension of the application of the Convention as applied to space assets by reference to the applicable law reflected the fact that such rights "were granted by national, intergovernmental or international [A]uthorities" and that it was not, therefore, "reasonable to expect a transfer of such rights, through the creation of such an international interest, being allowed, in particular for reasons of national policy and security".[22]

At a certain stage, it was, however, recognised that even this proposed limited extension of the application of the Convention as applied to space assets would not work, in so far as such transfers were completely prohibited under certain national laws.[23] Furthermore, it was acknowledged that, even where a financial institution might provisionally enquire of a Government regarding the transferability of a "related right" relating to a particular asset, there was no guarantee that authorisation for such a transfer would be granted once formally requested.

During the work on the preliminary draft Space Protocol that took place between the second session of the Committee, held in Rome in October 2004, and the third, a proposal was put forward to replace the references in the preliminary draft Protocol to "related rights" by a definition of "licences", based on the definition of "related rights", along with a provision imposing the "duty on a defaulting debtor/assignor to co-operate, to the fullest extent possible, in either the transfer of the relevant licence to a creditor/assignee or, where this was not permitted [by national or international law], the termination of its own licence and the procuring of a new licence for a creditor/assignee".[24] It was felt that this approach would ensure the facilitation of the transfer of possession or control from a debtor to a creditor without presuming to impose obligations on a Government to grant or transfer licences.

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21 Cf. Article I(2)(f) of the draft Protocol as it emerged from the first session of the Committee (Unidroit 2003 C.G.E. Space Pr./1/W.P. 3). Cf. Unidroit 2004 – C.G.E./Space Pr./2/W.P. 4, Proposal for the application of the Convention and the Space Assets Protocol to debtor's rights and related rights, by the Space Working Group.

22 Cf. Unidroit 2008 – Study LXXIIJ – Doc. 14, Steering Committee to build consensus around the provisional conclusions reached by the Government/industry meeting regarding the preliminary draft Space Assets Protocol held in New York on 19 and 20 June 2007: Launch meeting, (Berlin, 7/9 May 2008): summary report, p. 14.

23 Cf. Unidroit 2009 – Study LXXIIJ – Doc. 17, Steering Committee to build consensus around the provisional conclusions reached by the Government/industry meeting regarding the preliminary draft Space Assets Protocol held in New York on 19 and 20 June 2007: second meeting (Paris, 13 May 2009): summary report, p. 11.

24 Cf. Unidroit 2009 – Study LXXIIJ – Doc. 17, Steering Committee to build consensus around the provisional conclusions reached by the Government/industry meeting regarding the preliminary draft Space Assets Protocol held in New York on 19 and 20 June 2007: second meeting (Paris, 13 May 2009): summary report, pp. 11-12.

While this view was generally endorsed, significant concerns were still voiced that this solution would create more regulatory problems for Governments and satellite operators than it would resolve.[25] In the light of the understanding that regulatory and contractual practices already existed in the international commercial space field to deal with the issuance of licences and permits for new operators, it was, therefore, agreed at the fourth session of the Committee, held in Rome in May 2010, that this provision should be deleted and left to be dealt with by inter-creditor agreements and the applicable law.

(c) Permitting the Placement of Data and Materials with a Third Party

In an effort to find ways to facilitate commercial space financing, the Committee at its second session introduced a new Article designed to permit the placing of command codes and other materials with a third party in order to give a creditor the opportunity to take possession of, or control over the space asset in question.[26] This was considered to be an incentive to creditors, as a means of ensuring their ability to control the relevant space asset in the event of default by the debtor. But, while being an attractive feature of the future Space Protocol, this proposal, much like the proposal regarding "related rights", raised concerns having to do with already applicable national laws, this time connected with the fact that such a placement might "not take account of the strictness of national export control regulations, which did not usually accommodate the placement in escrow of information such as satellite command codes".[27] And, while the desirability of the inclusion of such a provision was never questioned, the means of ensuring simultaneous respect for national laws and policies regarding the transfer of sensitive information led to the Article relating to this issue in the Space Protocol being prefaced by the proviso "[s]ubject to Article XXVI," being a reference to the provisions of the Space Protocol dealing with the preservation of the powers of Contracting States, provisions of particular relevance for the issue of the transfer of ownership of space assets under the Convention as applied to space assets.

(d) Confirming the Preservation of the Powers of Contracting States

At the Berlin diplomatic Conference the question of the transfer of ownership rights was one of the principal issues on which certain States expressed concern. These States in particular drew attention to the need to consider the issue of State responsibility under Article VI of the Outer Space Treaty, indicating that it was

25 Cf. Unidroit 2010 – C.G.E./Space Pr./4/Report, 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, fourth session (Rome, 3/7 May 2010): Report, §§ 37-38.

26 Cf. Unidroit 2004 – C.G.E./Space Pr./2/W.P. 3, Article IX *bis*.

27 Cf. Unidroit 2004 – C.G.E./Space Pr./2/Report, § 44.

> "felt to be imperative that the draft Protocol take into account existing regulations and practices regarding space debris mitigation and export control of sensitive technology. Furthermore, it was proposed that more precise wording was needed with regard to the transfer of licences, notably in respect of the requisite State consent."[28]

In this context, a number of Articles were referred for examination to an informal working group during the Conference. These Articles included Articles XIX (Placement of data and materials) and XXVI (Limitations on remedies).[29] The result was the mechanism embodied in Article XXVI of the Space Protocol as adopted. Under this provision, it was spelled out that the Space Protocol did not affect a Contracting State's ability to exercise its authority over space assets in accordance with its domestic laws and policies, in particular in respect of the granting of "licences, approvals, permits or authorisations for the launch or operation of space assets". In particular, this Article stated that

> "Nothing in this Protocol shall be construed so as to require a Contracting State to recognise or enforce an international interest in a space asset when … such interest would conflict with its laws or regulations concerning:
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> (a) the export of controlled goods, technology, data and services; or
> (b) national security."[30]

The adoption of this Article in Berlin clarifies the limited circumstances in which transfers of possession of, or control over a space asset may be expected to be authorised, at least at the present time: it leaves in no doubt the stark fact that Contracting States retain the final say on whether or not a commercial transaction involving goods which are of a sensitive nature, in particular of concern to national security, is to be permitted at all.

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28 Cf. Unidroit 2012 - DCME - SP - Doc.16, para. 7.

29 Cf. Unidroit 2012 - DCME - SP - Doc.16, para. 8. The Informal Working Group comprised representatives of Canada, the People's Republic of China, France, Germany, India, Luxembourg, the Russian Federation, Saudi Arabia and South Africa, as well as the observer of the International Telecommunication Union.

30 Cf. Article XXVI(3) of the Space Protocol. In the draft Space Protocol, "controlled" had been defined, for the purpose of Article XXVI (Limitations on remedies), as relating to "the transfer of the goods, technology, data or services … subject to governmental restrictions" (Cf. Unidroit 2011 - DCME - SP - Doc.3); this definition was left out of the new Article XXVI (Preservation of powers of Contracting States) which replaced this Article in the Space Protocol as adopted by the Conference (Cf. Unidroit 2012 - DCME - SP - Doc.43).

V Conclusion

As stated above, it was never the intention of the authors of the Space Protocol to interfere with the sovereign right of States to control the transferring of licences. This was a clear limitation on the scope of the project from the very outset. The extent to which such transfers were contemplated by the then preliminary draft Protocol was always delimited by reference to the applicable law: if such transfers were not possible under the applicable law, then that was that. This is a limitation that affects all forms of commercial space financing and, rather than being seen as a hindrance to implementation of the Space Protocol, should, it is submitted, be seen as constituting a realistic approach to the question of the extent to which the default remedies of the Convention as applied to space assets may achieve their full effect: it is an approach that is a necessary concomitant of the prerogative of States to determine their own policies on issues involving national security, the use of orbits, the exporting of controlled goods and the predictability required by prospective creditors. In this context, the Space Protocol assures States that ratification will in no way limit their control over those commercial space activities for which they are responsible but, rather, create a mechanism whereby creditors and Contracting States can be surer of their financial footing, even in outer space. It has, above all, to be recognised that the Space Protocol is the first international space law treaty in three decades and that, for all its imperfections and limitations, it, nevertheless, represents a most important first building-block in the construction of that regimen governing the commercialisation of outer space that one member of the United Nations Committee on the Peaceful Uses of Outer Space proposed as a new project already quite a few years ago.

In much the same way as adoption of the Convention and the Aircraft Protocol gave a fillip to aircraft financing, it is expected that the Space Protocol will lead to greater access to investment capital for a wider range of players in the commercial space sector, leading to increased competition amongst operators which will, in turn, lead to an increase in the quality of services while simultaneously driving down the cost of those services for the public all over the world.