

Statement of the Satellite Industry Association (SIA)
on the Revised Preliminary Draft Protocol to the Convention on International
Interests in Mobile Equipment on Matters Specific to Space Assets
at the UNIDROIT Consultations with Representatives of the International
Commercial Space and Financial Communities
(18 October 2010, Rome, Italy)

The Satellite Industry Association (SIA) is a consensus-based trade association that serves as the unified voice of the U.S. satellite industry on policy, regulatory and legislative issues affecting the satellite business. The SIA represents leading global satellite operators, service providers, manufacturers, launch services providers, integrators, ground equipment suppliers and satellite radio and television providers.¹

In many prior instances, the SIA and its members have stated their concerns that the proposed Preliminary Draft Space Assets Protocol to the Cape Town Convention² is not an effective instrument for increasing capital flow to commercial space projects. The SIA considers that the Protocol adds an unnecessary supra-national layer of law at a time when neither the SIA nor the financial community that supports its members believes a new legal regime is needed to expand space-based services or facilitate asset-based financing.

The SIA opposes the continuation of a drafting process seeking to resolve identified deficiencies when the rationale for the establishment of a structure intended to promote legal certainty and increased availability of capital for the space industry requires reconsideration. Moreover, there is no evidence that financings have failed or could have attracted more favorable pricing due to uncertainty over the granting and perfection of security interests in the satellites being financed. No compelling need for the Protocol has been demonstrated, which explains why most of the space industry does not want it.

The specific issues the SIA has identified below to support its position that the Protocol will jeopardize or disadvantage space asset financing have not been presented as problems to solve or provisions to be refined but as examples of why the Protocol must be reassessed.

¹ A list of members of the SIA as of October 2010 is attached.

² Reference to the draft Protocol is as revised by the Drafting Committee established by the 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 on 3 May 2010.

1. Sphere of Application/Definition of Space Assets

The proposed definition of “space assets” (Article I.2.(1) of the draft Protocol), which delineates the sphere of application of the Protocol, raises many concerns. As defined, the same asset (and its subparts) may be independently owned, used or controlled by different debtors and buyers at different times. At what point in time is an asset that is “intended to be launched into space” identifiable as such “in course of manufacture or assembly”? And how can an international interest or a prospective interest in pre-launch assets clearly interact with the secured financing regime under applicable national law from the commencement of production and assembly, through storage, transportation and launch without losing its priority? Finally, how can pre-launch financing be within the sphere of the Protocol if the principal value in a space asset (which cannot be individually identified until ready for delivery and launch) lies in the contract for its manufacture whereas the Protocol requires that a rights assignment be recorded as part of the registration of an international interest in a space asset?

2. Components

The inability of the Informal Working Group on default remedies in relation to components to reach a solution regarding enforcement against a space asset physically linked to another space asset in which another creditor has an interest (Article XVIII.3) reflects a fundamental deficiency in the Protocol. A clash in legal systems jeopardizes the utility of the Protocol as the financing of hosted payloads, condosats and transponders will continue to expand as a cost-effective means of deploying satellites.

We are also concerned by the statement made by the Informal Working Group that it was not desirable for it to become locked into a particular system for the determination of those assets that should qualify for registration in the future International Registry for space assets.³ In connection with this, the Informal Working Group saw the regulations to be prepared by the Supervisory Authority as being able to play a part in providing flexibility in the establishment of identification criteria for the registration of international interests in assets that might become valuable to creditors in the future. Such an approach would allow the Supervisory Authority unfettered discretion to alter and introduce criteria having an adverse impact on clarity and uniformity of what would constitute a space asset. This proposed approach to addressing component financing is all the more perplexing when the matter currently is adequately addressed through intercreditor arrangements.

³ See in UNIDROIT Report C.G.E./Space Pr./4/Report, ¶145.

3. Public Service Exemption from Default Remedies

Perhaps the most controversial issue from the SIA's perspective is the limitation of default remedies against a space asset performing a "public" service. This became even more worrisome by the proposed introduction of Article XXVII.3. The ambiguity inherent in the term "service which is in the vital interest of that State" will discourage financing since it will not be possible to provide any legal assurance as to the scope of the language not only as to the nature of the service but also as to which states could be affected within the footprint coverage of any particular satellite.

In addition, the new proposal advanced by the Informal Working Group on limitations on remedies for "space assets needed for the public service which is in the vital interest of that State", added as Alternative B to the previously proposed Article XXVII *bis*, coupled with an elaborate cure mechanism involving any affected State, is cumbersome and time-consuming. As has been stressed on many previous occasions, this limitation on remedies will sharply undercut the level of predictability needed to foster asset-based satellite financing.

4. Salvage Interest in Space Assets

We reiterate our concern that creating and elevating insurers' rights to salvage will result in significant impediments to satellite financing and a lack of clarity in the relative rights of creditors. Recognition of insurers' rights to salvage is wholly unnecessary to facilitate satellite financing and would be an unprecedented right that is currently unavailable in aircraft or rolling stock financing, where salvage rights are and should be subject and subordinate to rights of secured lenders. The Committee of Governmental Experts is not equipped to appreciate the consequences of acceding to the position of the proponents of salvage interests and its possible permutations, including partial and constructive total losses, security extending to more than one identifiable space asset, the multiplicity of insurers each having proportional interests in the salvage value of a space asset (each seeking to register its interests at different times) and the timing of insurance placement versus financing of a space asset. Persisting in extending the Protocol to insurer salvage interests will compel satellite operators to require their insurers to forgo the registration of their salvage rights so as not to impede the financing of their satellites.

5. Identification of Space Assets for the Purposes of Registration

Uncertainty continues as to appropriate identification criteria for space assets for purposes of registration. Many of the core identification criteria enumerated in Article XXX are meaningless in providing certainty or uniformity of identification both during manufacture and after launch. Moreover, our previously expressed concern regarding the need to satisfy "requirements as may be established in the regulations" merely postpones the inevitable quandary of establishing suitable criteria. The inability of the Subcommittee to Examine Certain Aspects of the Future International Registration System

for Space Assets to establish identification criteria for space assets is a telling indicator of the inherent impediments in promoting uniform and predictable rules governing the taking of security over indeterminate, evolving and disparate assets that all happen to be located in a particular, undefined medium.

Another issue of concern is the application of Article XXX to space assets in respect of which a first international interest is registered before launch and then a second international interest is registered after launch. The possibility of different search criteria against the same asset could lead to separate registrations against the same asset, each with the same priority ranking.

6. Debtor's Rights, Assignments and Reassignment Rights

While the thoughtful effort and intricate drafting undertaken to accommodate the prevalence in satellite financing of intangible rights appurtenant to space assets is impressive, the resulting complexity is extraordinary. The benefits of introducing rights assignments, rights reassignments, rights to payment or other performance including debtor's rights, registration of contracts of sale and contracts of prospective sale in Articles IV, V and IX to XV can no longer be viewed as outweighing the requisite complexity of the added concepts.

7. Other Issues of Concern

In addition to these major issues of outstanding concern, there are additional aspects raised by other commentators, such as jurisdiction, transition provisions, insolvency and economic enhancement provisions, that are also problematic for the SIA.

Conclusion

The Protocol fails to achieve its expressed goal of facilitating the financing of space assets through a uniform and predictable legal regime governing the taking of security over space assets. The SIA is not alone in its opposition to the substance and direction of the Protocol. Other industry participants representing a significant proportion of the space business in the U.S., Europe and Asia have all voiced their concerns.⁴ This is not an environment that is conducive to the promulgation of a complex international treaty intended to foster the development of the global commercial space industry.

⁴ The European Satellite Operators Association (ESOA) (on behalf of its 10 members and 10 supporting members), the Asia-Pacific Satellite Communications Council (APSCC) (representing over 100 members from Asia, Europe and North America), Global VSAT Forum (comprising more than 200 companies from 100 countries in every major region of the world and from all sectors of the satellite industry), ING, Barclays Capital, ManSat, QuetzSat, Ciel Satellite, O3b Networks, Elseco, Marsh, Aon-ISB, SES, Intelsat, Eutelsat and Avanti Communications, among others, have each expressed their concerns about the Protocol and its effect on space commerce.

A Protocol that has no meaningful support or input from its principal stakeholders is counterproductive. Until UNIDROIT's members and the satellite industry can align their interests, endeavoring to conclude the drafting of an instrument that ignores fundamental concerns jeopardizes its adoption by those states attuned to the needs and interests of their space industry. The SIA again urges reconsideration of the need for the Protocol and expresses its serious concerns over its adverse consequences on the financing of space assets the world over.



SIA MEMBERS

(updated October 2010)

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ARTEL Incorporated
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Hughes Network Systems
ICO Global Communications
Integral Systems
Intelsat
Iridium Satellite LLC
Lockheed Martin
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