



**SUB-COMMITTEE OF THE STEERING
COMMITTEE TO BUILD CONSENSUS AROUND
THE PROVISIONAL CONCLUSIONS REACHED
BY THE GOVERNMENT/INDUSTRY MEETING
HELD IN NEW YORK ON 19 AND 20 JUNE
2007 ON DEFAULT REMEDIES IN RELATION
TO COMPONENTS
Berlin, 31 October/1 November 2008**

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SUMMARY REPORT

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

(a) Origins of the establishment of the Sub-Committee

In the light of the different views expressed on the issue of default remedies in relation to components at the launch meeting, held in Berlin on 7 to 9 May 2008, of the Steering Committee to build consensus around the provisional conclusions regarding the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets reached by the Government/industry meeting held in New York on 19 and 20 June 2007 (hereinafter referred to as the *Steering Committee*), it was agreed to set up a Sub-committee on the question of default remedies in relation to components (hereinafter referred to as the *Sub-committee*) in order to find a solution satisfactory to all, that would, in particular, ensure the commercial viability of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (hereinafter referred to as the *preliminary draft Protocol*).¹ It was decided that this Sub-committee would be co-ordinated by the Government of Germany and organised by the UNIDROIT Secretariat.² It was agreed that the Sub-committee should be made up of the Governments of Canada, Germany, the United Kingdom and the United States of America, Mr O. Gebler (Baker & McKenzie), Mr F.P. Giobbe (EADS Astrium), Mr R.W. Gordon (Boeing Capital Corporation), Mr I. Jarritt (ManSat), Ms M. Leimbach (Crédit Agricole) and Mr B. Schmidt-Tedd (German Space Agency), supplemented by the Government of Italy, as Chairman of the Steering Committee.³ However, it was agreed that participation in the work of the Sub-committee should be open to other members of the Steering Committee.⁴

¹ Cf. Study LXXIIJ - Doc. 14, p. 27.

² Cf. *idem*.

³ Cf. *idem*.

⁴ Cf. Study LXXIIJ - Doc. 14, p. 28.

In preparation of, and with a view to facilitating progress at the meeting, the Ministry of Justice of the Federal Republic of Germany formulated a questionnaire on the issue of default remedies in relation to components. The Secretariat distributed this questionnaire among members of the Sub-committee and other representatives of the international commercial space and financial communities. In accordance with the agreement reached by the Ministry of Justice of the Federal Republic of Germany and the Secretariat, the latter prepared a summary of the responses received.⁵

II. HOLDING OF THE SUB-COMMITTEE MEETING

(a) Opening of, and participation in the meeting

The Sub-committee met, at the kind invitation of Commerzbank, in Berlin on 31 October and 1 November 2008. Representatives of four of the five Governments appointed to the Sub-committee by the Steering Committee, namely the Governments of Germany, Italy, the United Kingdom and the United States of America, and eight representatives of the international commercial space and financial communities - Mr D. Arlettaz (Commerzbank), Mr M. Borello (Thales Alenia Space France), Mr R.H. Brandow (Boeing Capital Corporation), replacing Mr Gordon, Mr Gebler, Mr Giobbe, Ms Leimbach, Mr Schmidt-Tedd, accompanied by Ms I. Arnold - participated in the deliberations of the Sub-committee. Two additional experts, namely Mr O. Heinrich and Mr S. Kozuka, attended in their personal capacity.⁶ The meeting was opened at 9.30 a.m. on 31 October 2008 by *Mr H.-G. Hauser*, Chief, Berlin Liaison Office, Commerzbank AG, who welcomed all participants on behalf of Commerzbank and expressed his and Commerzbank's support of UNIDROIT and its efforts to develop a Protocol to the Cape Town Convention on Matters specific to Space Assets. *Mr M.J. Stanford* (Deputy Secretary-General of UNIDROIT) thanked Mr Hauser and recalled the special importance of the support of financial institutions for the project.

As agreed by the Steering Committee, Mr S. Marchisio (Italy), as Chairman of the Steering Committee and the Committee of governmental experts, acted as Chairman of the Sub-committee.

(b) Adoption of the agenda

Noting the concerns that had been communicated to the Secretariat by three leading satellite operators and one regional association of such operators regarding the general direction taken by the Steering Committee, in particular as evidenced in the first alternative version of the preliminary draft Protocol prepared by Mr J.M. Deschamps (Canada) and Sir Roy Goode (United Kingdom) to reflect the decisions reached at that Committee's launch meeting (hereinafter referred to as the *first alternative version*), and the consequent proposal by the Secretariat to revise the provisional agenda for the meeting of the Sub-committee in such a way as to permit discussion of the question "Policy considerations regarding development of the preliminary draft Protocol" to be dealt with under item No. 6 (Any other business), *the Chairman* proposed that this question be taken at the very beginning of the meeting, given its implications for the remainder of the business to be disposed of. As thus amended, the agenda was adopted.⁷

(c) Documentation for the meeting

Revised draft agenda (prepared by the UNIDROIT Secretariat);

⁵ Cf. Summary of responses to the questionnaire on default remedies in relation to components prepared by the German Ministry of Justice (prepared by the UNIDROIT Secretariat), reproduced in Appendix I to this report.

⁶ Cf. List of participants reproduced in Appendix II to this report.

⁷ A copy of the agenda as thus adopted is reproduced in Appendix III to this report.

Revised provisional order of business (prepared by the UNIDROIT Secretariat);

Extract from summary report on Steering Committee meeting regarding default remedies in relation to components (prepared by the UNIDROIT Secretariat);⁸

Summary of responses to the questionnaire on default remedies in relation to components prepared by the German Ministry of Justice (prepared by the UNIDROIT Secretariat);

Responses to the questionnaire on default remedies in relation to components prepared by the German Ministry of Justice (prepared by the UNIDROIT Secretariat).

III. REVIEW OF POLICY CONSIDERATIONS REGARDING THE DEVELOPMENT OF THE PRELIMINARY DRAFT PROTOCOL

The three leading satellite operators and the regional association of such operators that had expressed concern to the Secretariat regarding the general direction taken by the Steering Committee had in particular taken the view that the preliminary draft Protocol would neither benefit the satellite industry nor facilitate future finance in that it would add new and burdensome layers of law and impose vague and broad rules on ownership and security interests in certain types of undefined space asset. The provisions of the preliminary draft Protocol to which they had specifically drawn attention included those dealing with default remedies in relation to components.

In the light of the raising of these concerns, one representative of the international commercial space and financial communities, while reaffirming his support for the preliminary draft Protocol, nevertheless, encouraged the Secretariat and the Steering Committee to step back and re-evaluate their work, not least as a means of confirming the consensual basis for the prosecution of the task of timeously completing the preliminary draft Protocol.

The Secretariat accordingly invited the Sub-committee to advise as to whether it felt that the direction taken by the Steering Committee, as reflected in the first alternative version, should be seen as adding complications to space asset financing and, if so, what should be done.

All members of the Sub-committee were agreed that the value of the preliminary draft Protocol lay in its potential to provide additional transparency and legal certainty to space asset financing and that such a benefit was sure to invite additional capital to that industry. There was unanimity in the Sub-committee that, while the concerns expressed by operators contained specific points that were valid, these could be addressed in the ongoing process for revision of the first alternative version and the basic direction decided upon by the Steering Committee should be maintained, on the understanding that the idea behind the ongoing development of the alternative version was to prepare a simple, user-friendly tool that would be useful for all States, in particular those with developing economies, as well as the majority of the international commercial space and financial communities, and in particular small operators and start-up ventures. To achieve this, the Sub-committee confirmed that simplification of the preliminary draft Protocol, the essential objective being pursued through the process of preparing an alternative version, was eminently desirable, especially if, as intended, the possibility was left open for modification to take account of technological developments.

⁸ A copy of this extract is reproduced in Appendix IV to this report.

IV. CONSIDERATION OF DEFAULT REMEDIES IN RELATION TO COMPONENTS

(a) Background

Article IX(4) of the preliminary draft Protocol, which was in square brackets, provided that:

“When two space assets, one of which is a separately identifiable component of the other within the meaning of Article I(2)(f), are subject to two separate registered interests, both registered interests shall be valid and have priority as determined under Article 29 of the Convention unless otherwise agreed between the holders of such registered interests”.⁹

In the light of the recommendation made by the Steering Committee at its launch meeting on the definition of “space assets” in relation to components, in the context of its discussion of the question of the sphere of application of the preliminary draft Protocol,¹⁰ the Government of Germany and the German Space Agency had proposed, by way of addressing the problem of conflicts between creditors seeking to exercise their respective default remedies in respect of a space asset and an independent component which was either physically or functionally linked to that space asset, that Article IX(4) of the preliminary draft Protocol be amended so as:

- first, to limit the possibility for a creditor to exercise its default remedies where this would impair ownership rights in such independent components, an amendment that they considered necessary if the sphere of application were to extend to independent components;
- secondly, on the other hand, to allow a creditor freely to exercise any default remedies where it had previously obtained the consent of those possessing an interest in an independent component or where the party whose ownership rights would be impaired was fairly compensated by the creditor.¹¹

It was the absence of general consensus within the Steering Committee on the question of how best to resolve this issue which had led to the constitution of the Sub-committee.

(b) Discussion

Some Governments’ representatives proposed three different solutions to the question of default remedies in relation to components: first, the drafting of a complex rule providing for the inclusion of both space assets as a whole and components capable of being uniquely identified and independently controlled; secondly, leaving the question of default remedies in relation to components solely to inter-creditor agreements and, thirdly, excluding components from the sphere of application of the preliminary draft Protocol altogether, eliminating the need for a rule on default remedies in relation to components.

Some Governments’ representatives, however, expressed concern at the idea of components being excluded altogether, particularly because, from the point of view of creditors, this might exclude a group of valuable assets and, additionally, might hinder the financing of space stations. Some Governments’ representatives were agreed that, should there be a default remedy for components, it should be one that would protect both creditors and debtors in situations where inter-creditor agreements could not be reached.

⁹ The text of Article IX(4) was accompanied by a footnote indicating that “[t]his paragraph needs further consideration by the Committee of governmental experts as to whether the protection provided is sufficient or needs extending, especially in order to protect a user of components who is neither in default nor insolvent”.

¹⁰ Cf. Study LXXIJJ - Doc. 14, p. 10.

¹¹ A copy of this working paper is reproduced in the Annex to Appendix IV to this report.

Noting that the Sub-committee's discussions had tended essentially to focus on satellites as a whole and transponders rather than any other type of space asset or component, one representative of the international commercial space and financial communities pointed out that in satellite financing it was not the physical transponder that was used as security but rather the potential for revenue generation, namely the business model presented. Another representative of the international commercial space and financial communities noted that, in the satellite financing industry, all parties involved in the financing of a satellite usually agreed on what action was to be taken in the event of default by a single debtor through inter-creditor agreements, so that the legal and factual frameworks under which financing of the satellite was obtained would not be impaired by the introduction of a third-party creditor. Overall, there was strong agreement that the preliminary draft Protocol should not impair the current use of inter-creditor agreements, as providing the most effective tool for dealing with the wide array of unique hurdles faced by individual financial endeavours and partnerships involving space assets.

The representative of one Government suggested another possible solution, under which default remedies in relation to components would only be invoked in the absence of an inter-creditor agreement. The representative of another Government expressed concern that this solution would limit a creditor's options in financing negotiations, by imposing a pre-determined minimum remedy on creditors' available remedies, an approach that, in the view of this representative, was inconsistent with modern secured financing practice. However, the representatives of some other Governments agreed that there should be a default remedy that would, in addition to providing protection, encourage the reaching of inter-creditor agreements.

The representative of one Government expressed concern that the default remedies in question would allow a junior interest in the component of a satellite negatively to impact the senior interest of a creditor whose interest resided in the satellite as a whole, including the relevant component. A representative of the international commercial space and financial communities suggested that one solution to this problem might be for the regulations for the future International Registry for space assets, to be drawn up pursuant to the preliminary draft Protocol, to require a party with an interest in the whole asset to register an interest in each separate component as well, thus eliminating the possibility of competing parallel interests in the same asset pursuant to separate registrations. Some representatives of the international commercial space and financial communities, however, expressed concern at the complexity of this proposal and endorsed their preference for a simpler preliminary draft Protocol that excluded components altogether.

Some representatives of the international commercial space and financial communities who supported a simplified preliminary draft Protocol noted that one problem with the default remedies available under the Convention on International Interests in Mobile Equipment in relation to components was that it was difficult to distinguish components from the asset as a whole, given the general tendency for components to be deeply integrated into the satellite as a whole. It was further noted by these representatives that the continuing development of satellite technology would result in satellites the components of which would be even more deeply integrated in the satellite, so that, given the definition of "space asset" in the first alternative version, there would be even less of a distinction between transponders and the satellite as a whole. These representatives pointed out that a satellite was typically financed as a whole by a group of investors who would then divide their interest in the satellite *pro rata*, foregoing the need to distinguish components.¹² They, accordingly, reiterated their support for a simplified preliminary

¹² Cf. Summary of responses to the questionnaire on default remedies in relation to components prepared by the German Ministry of Justice (prepared by the UNIDROIT Secretariat), at p. 5, regarding Question No. 6 of the questionnaire (the relationship between creditors with an interest in the whole space asset and creditors with an interest in a lesser component), where it was stated that:

"One respondent noted that there were no agreements that divided secured objects, such as the main object and a transponder, among creditors but rather they awarded interests *pro rata* to each bank's participation in financing with equal rights at the various levels of capital structure. In regard to the actual use

draft Protocol from which components would be excluded and under which additional complications would be avoided. However, the representatives of some Governments noted that in the future high-value components might be used as security for financing and, despite the difficult technical issues involved, accordingly, favoured the retention of such components within the sphere of application of the preliminary draft Protocol. The representative of one Government noted, however, that these technical difficulties could be dealt with as the future International Registry developed.

The discussions having thus indicated the desirability of reconsidering the sphere of application of the preliminary draft Protocol, and in particular the definition of “space asset”, a question which it was recognised was beyond the remit of the Sub-committee, *the Chairman* suggested that the Steering Committee be invited to look afresh at this issue but that the Sub-committee deal with the question of default remedies in relation to components on the assumption that components were to remain within the sphere of application of the preliminary draft Protocol.

Referring to the proposal contained in the working paper submitted to the Steering Committee by the Government of Germany and the German Space Agency, the representative of one Government expressed concern at the way in which default remedies in relation to components would apply to a satellite constellation, a group of functionally linked satellites.¹³ It was noted by some representatives, both of Government and the international commercial space and financial communities, that there was a significant difference in the circumstances under which satellites were functionally linked, on the one hand, and under which a satellite and a component were physically linked, on the other. In the former situation, it was agreed that the risk of a creditor with an interest in a single satellite removing his satellite from the constellation would fall on the contracting parties who financed the constellation (although this would seldom occur, since the financing of a satellite constellation typically included the entire constellation as a revenue-generating venture, which would provide sufficient incentive to keep the constellation intact). There was also concern that limiting the exercise of remedies in respect of a satellite constellation would be more in the nature of requiring “guarantees of performance” than a part of “secured financing”.

It was suggested that one way to explain the different situations arising in the cases of functionally-linked assets, on the one hand, and physically-linked assets, on the other, was to take the analogy of a commercial vehicle used for the carriage of goods and its load: if the commercial vehicle were part of a fleet of such vehicles, then the creditor of such a vehicle should be able to keep the option of removing the individual commercial vehicle from the fleet and using it for a different purpose, absent an inter-creditor agreement. On the other hand, if that creditor had an interest in the commercial vehicle and not in the load carried by that commercial vehicle, then the creditor should be able to seize the commercial vehicle but not to touch the load. But the problem with this analogy was that, because the asset in question was in space and could not, consequently, have its payload removed (owing to physical or financial constraints), a remedy would need to be established to protect the interest of the creditor of the payload. This analogy and the conclusion reached via this analogy, namely that it should not be permissible for a creditor to remove a satellite from its orbit where it contained a transponder owned by another creditor, received wide-ranging support from representatives of both Government and the international commercial space and financial communities.

of different parts of the asset by different parties, this respondent pointed to “offtake” agreements ([where one] contracting party agrees to purchase the output of the satellite or transponder at a pre-determined rate) in which the user (such as a television broadcaster or a telephony provider) would agree to allow a creditor to step into the place of an operator in default. These agreements, whilst intended to reach the maximum level of revenue generation, were typically arranged among the parties themselves and only once the creditor had the ability to control the asset. Another respondent noted that, while not having direct experience of this type of situation, he believed that the use of various components was governed by lease agreements which should have been but might not have been in harmony with the credit agreements secured by the main object.”

¹³ Cf. Working paper on sphere of application and default remedies relating to components reproduced as Appendix IV to Study LXXIJJ - Doc. 14, § 16.

(c) *Conclusions*

There was general agreement that the preliminary draft Protocol should only address remedies that affected physically-linked assets, such as the physical movement of a satellite from one orbit to another, and their ability to generate revenue. In addition, it was agreed that a proposed new Article IX(4), based on the proposal submitted by the Government of Germany and the German Space Agency yet designed to take account of the Sub-committee's discussions, should be drafted and incorporated into the second alternative version of the preliminary draft Protocol, that was to be prepared following the meeting of the Sub-committee. It was further agreed that references to functionally-linked assets, such as satellite constellations, should be removed from the text of the proposed new Article IX(4).

V. FOLLOW-UP TO THE CONCLUSIONS OF THE SUB-COMMITTEE

The Sub-committee decided that the proposed new Article IX(4) should be formulated by the representatives of the Governments of Germany and the United States of America and then submitted to the Secretariat and the co-chairmen of the Drafting Committee of the 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 - to whom the Steering Committee had agreed to entrust responsibility for the drafting of the alternative version – for incorporation into the second alternative version.

In view of the issues that discussion of the question of default remedies in relation to components had thrown up with regard to the sphere of application of the preliminary draft Protocol, the Sub-committee believed that it would also be appropriate for the Steering Committee to be reconvened to consider the conclusions that the Sub-committee had drawn.

It was agreed that a second meeting of the Steering Committee should, accordingly, be organised, in particular for this purpose, for Spring 2009, in Paris. The Steering Committee would, in this way, be able to review both the question as to whether components should be included in the sphere of application of the preliminary draft Protocol - and, if so, to what extent – and the proposed new Article IX(4) to be prepared on default remedies in relation to components. In conducting this review, the Steering Committee would be able to consider the second alternative version of the preliminary draft Protocol. *The Chairman* kindly indicated that he would be happy, as President of the European Centre for Space Law, to arrange for this meeting of the Steering Committee to be held on the premises of the European Space Agency.

It was further agreed that this second meeting of the Steering Committee should be organised back-to-back with the meeting that had been proposed by one member of the Sub-committee of the Steering Committee on public service - the work of which would be launched shortly - and a seminar designed to familiarise, in particular, the international commercial space and financial communities with the potential benefits of the work accomplished by the Steering Committee; such a seminar, it was noted, would be particularly helpful in explaining to the operators the concerns of which had been brought to the attention of the Sub-committee the thinking behind, and the objectives pursued by the Steering Committee in relation to the preliminary draft Protocol and in providing them with an opportunity to discuss their concerns with members of the Steering Committee, notably in the light of the second alternative version and the Steering Committee's review of this. *Ms Leimbach* kindly indicated that she would be happy to arrange for the meeting of the Sub-committee on public service and the seminar to be held on the premises of Crédit Agricole S.A., also in Paris.

The idea would be for the meeting of the Sub-committee on public service to be held first, in particular so as to permit the conclusions reached at such a meeting properly to be considered by the Steering Committee as a whole, then for the Steering Committee to meet and for the seminar to be held last.

VI. OTHER BUSINESS

No other business being raised, *the Chairman* declared the meeting closed at 1 p.m. on 1 November 2008.

STEERING COMMITTEE

to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government / industry intersessional meeting held in New York on 19 and 20 June 2007:

SUB-COMMITTEE ON COMPONENTS

(Berlin, 31 October / 1 November 2008)

Summary of responses to the questionnaire on default remedies in relation to components prepared by the German Ministry of Justice

(responses submitted by Mr D. Arlettaz, Deputy General Manager for the Paris Branch and Head of Corporate Banking, Commerzbank AG¹; Mr R.H. Brandow, Senior Director, and Mr R.W. Gordon, Vice President, Space & Defense, Boeing Capital Corporation; Mr O. Gebler, Partner, Baker & McKenzie, Frankfurt am Main; Mr P. McAllister, General Counsel and Secretary to the Board of Directors, Eutelsat S.A.; Mr J. Purvis, Senior Vice President and General Counsel, SES S.A.; Mr P. Spector, Executive Vice President and General Counsel, Intelsat S.A. and Mr S.D. Weiss, Managing Director, Head of Telecom Asia Telecom, Media and Technology Banking Global Banking & Markets, ABN AMRO Bank N.V., Hong Kong)

(prepared by the UNIDROIT Secretariat):

I. Introduction

In the light of the different views expressed on the issue of default remedies in relation to components at the launch meeting of the Steering Committee (held in Berlin on 7 to 9 May 2008) to build consensus around the provisional conclusions reached as regards the preliminary draft Space Protocol to the Cape Town Convention on International Interests in Mobile Equipment (hereinafter referred to as the *preliminary draft Protocol*) by the Government / industry meeting held in New York on 19 and 20 June 2007, it was agreed to set up a Sub-committee on the question of default remedies in relation to components (hereinafter referred to as the *Sub-committee*) in order to find a solution satisfactory to all that would, in particular, ensure the commercial viability of the preliminary draft Protocol. It was decided that this Sub-committee would be co-ordinated by the Government of Germany and organised by the UNIDROIT Secretariat. A meeting of that Sub-committee was set up to be held, at the kind invitation of Commerzbank, at the Haus der Commerzbank in Berlin on 31 October and 1 November 2008.

In preparation of that meeting, the Ministry of Justice of the Federal Republic of Germany formulated a questionnaire on the issue of default remedies in relation to components with a view to the Sub-committee meeting. The Secretariat distributed this questionnaire to members of the Sub-committee and other representatives of the international commercial space and financial communities. In accordance with the agreement reached by the Ministry of Justice of the Federal Republic of Germany and the UNIDROIT Secretariat, the latter has prepared a summary of the responses received.

¹ In communicating these responses, Mr Arlettaz noted that they had been agreed between him and other colleagues at Commerzbank.

II. TEXT OF THE QUESTIONNAIRE ON COMPONENTS AND RESPONSES

1) *How many creditors are typically involved in the financing of one single space asset? What are the typical sources of finance (national financiers / regional financiers / global financiers)? How are legal relationships regulated as between the creditors themselves (inter-creditor agreements?) and what are the characteristic elements of the agreements concluded? Are they distinguishable, one from the other, according to the type of object that is to be financed?*

Nearly all respondents indicated that the number of creditors involved in the financing of a space asset was, first, dependent on whether the space asset was commercial or non-commercial in nature (non-commercial satellites were less likely to have commercial funding, except where a commercial bank was supporting the manufacturer of an “emerging markets Government-owned asset”). In the case of commercial space assets, the number of creditors, particularly banks, involved in the financing of a single space asset, while varying according to the size of financing and / or the location of creditors, could range anywhere from two to ten or more creditors, although the number of investors could have been much larger, with two to four of those creditors acting as lead creditors. One respondent further pointed out that these creditors all retained the same rights at each level of capital structure.

Several respondents noted that, while financing was provided by a number of institutions, including banks, global capital markets and insurance companies, it was typically the major international banks that took the lead role, because they, as larger lenders, had the expertise needed for such financing. One respondent noted that it would be highly unusual to have a single lender financing a space asset.

Nearly all respondents verified that the relationships between creditors in a single investment pool were governed by inter-creditor agreements that were individually negotiated to meet the specific needs and unique risks involved in the financing of a particular space asset. These agreements dealt with such arrangements as capital structure (such as who controlled the asset and what was to be done with derived cash-flow) or how the value of the asset should be preserved (ensuring that the value of the asset would not be jeopardised by a creditor unwilling to “stand still” until a decision by a majority of investors had been taken). Several respondents pointed out that the value of inter-creditor agreements was in their versatility, a benefit that should be safeguarded in the development of the preliminary draft Protocol.

Because these specially-tailored inter-creditor agreements addressed the unique risks involved in the financing of specific assets, respondents verified that there was great variability among these types of agreement.

2) *How does the creditor normally realise his security in the event of default? What kind of remedies are normally exercised?*

Several respondents stated that, in the event of default, a creditor realised his remedies through national courts and under national law, depending on the specific terms of the loan agreements involved in the financing. One respondent noted that, because physical recovery of a satellite was either impossible or prohibitively expensive, the important concept regarding remedies was “control” of the satellite and its operations. Several respondents stated that, following the acquisition of control, the creditors could have sold the asset or transferred its operation to another operator at the direction of the creditors. However, this was complicated by regulatory and security issues that should have been addressed during the negotiation of financing between creditor and debtor.

Another respondent stated that in insolvency proceedings banks were treated ahead of other unsecured creditors. Outside such proceedings, banks were able to sell the asset and apply enforcement proceedings against unpaid claims.

3) *Is it only the main object (e.g. satellite, space station) over which security is taken, or are there in practice also independent interests in the components that are independently operated and commanded? In relation to the possibility of finding finance for a component, what role is played by a component's capability of independent operation and command? What are the criteria used to distinguish, if necessary, between those components over which security can be taken and those over which security cannot be taken?*

Several respondents stated that, in most cases, parties took blanket security over the main object (such as a satellite or space station), including ground stations (the basis of control). However, they also noted that creditors hardly ever based their loans solely on the physical asset but rather on its ability to generate future income (whether it was based on the earning power of the borrower for established business, prospects of a profitable business plan based on probable or confirmed long-term usage contracts or third party support where future income was indefinite). One respondent pointed out that, in the case where the physical asset had little or no value of its own, the value of an asset to generate income was dependent on the continuation of a legal or factual framework, such as the co-operation of third parties, non-withdrawal of consents and the ability to transfer operational licences. This ensured that the creditor would be able to continue receiving income. To protect this interest in the event of default, the same respondent noted that creditors would ask for step-in rights and direct agreements with third parties that ensured continued operation.

Regarding independent interests taken in components that were independently operated and commanded, respondents noted, first, that it was very difficult to define components such as a transponder as being truly "independently operated and commanded", since they were integrated in, and interdependent on the larger satellite. These respondents pointed out that component financing, particularly by way of transponder leases and the sale of satellite broadcasting capacity, was based on the value of the contractual intangible right to use capacity on the space craft and not on the space asset itself. One respondent further noted that, in negotiations for the financing of a component, an operator of a component would be asked by his financier to provide declarations from the operator of the main space asset ensuring co-operation with any other future financier and that the original arrangements of operation would be preserved.

Another respondent noted that there was, indeed, a debate regarding the separation of components from commercial satellites as a whole but that this was limited to mixed-use (commercial and military) satellites, where there were different transponders for different uses. However, in the event of default it was unclear who retained control. This same respondent referred back to Question No. 2 and wondered how two different transponders could be controlled by two different parties.

Another respondent opposed any attempts to strengthen the position of the financier of a secondary space asset (such as a transponder or other similar component) under the preliminary draft Protocol for three reasons, because, first, it would make it more difficult for the debtor to secure the legal or contractual framework needed to achieve an acceptable level of comfort for financiers, secondly, financiers of secondary components could achieve such a legal framework by way of contractual negotiations and, thirdly, any interference by the preliminary draft Protocol might limit such negotiations. Equally, another respondent was concerned that the requirement that an object was "capable of independent control" would imply the removal of significant classes of separately financeable asset, such as shared payloads, from the benefits and protections of the preliminary draft Protocol where, previously, such protections might have been arranged through inter-creditor agreements, a device which, according to this same respondent, would no longer be a practical alternative in space asset financing.

Another respondent was unclear on the meaning of the term "independently operated" and requested an example of such an asset.

4) *In a case where security is taken over the main object only, what will this interest actually cover? Does it also cover (mandatorily or by agreement) the components that are linked to the object and are capable of being independently operated and commanded, or does it cover some of them? In this connection, does it make any difference whether the main object and the components belong to the same person?*

Several respondents stated that a security interest taken over the main object of a space asset was simply that: a security interest over the physical asset. However, through negotiations, financiers would try to take a separate security interest over as much as could have been negotiated, such as tracking, telemetry and control assets, including software, licences and ground stations.

As mentioned above, respondents noted that component financing did not involve security over the physical asset because it was the capacity, not the physical component, which was being contracted for. One reason cited for this arrangement was that it was difficult to define a component as “independently operated and commanded”, as the component was integrated into the main space object’s operating system (such as orbital station-keeping, heating, cooling and solar power arrays).

Several respondents pointed out that, if another party did have a prior security interest in a component, then an inter-creditor agreement would have to be arranged to resolve conflict in the case of default.

It was further noted that security might also be taken over financial assets, such as receivables.

5) *In a case where security is taken over the main object only, how is security taken over the financing of components that are capable of being independently operated and commanded if they are often independently used and financed? What are the criteria that a creditor applies in order to evaluate the security taken over a component?*

Several respondents expressed concern over this question, owing to the difficulty arising out of the labelling of components as “independently controlled and commanded”. As mentioned above, several respondents reported that the financing of components such as transponders was not the financing of the physical asset but rather the leasing of transmission capacity available on that particular space asset.

One respondent explained that a financier’s greatest concern with the value of an asset was its “expected realisation value”, typically the market value of the asset. This value was determined by the asset’s ability to generate future income, based either on its own physical asset-value or on the continuation of a legal or factual framework. In this context, operators of components were asked by potential financiers to provide a statement from the operator of the main object that such a framework would be maintained despite a potential default, notably in the main object.

6) *Assuming that security is taken over both the main object and those of its components that are capable of being independently operated and commanded:*

a) *How are the relationships regulated between the entitled users inter se (among themselves) and also between entitled users and the creditors of the various secured objects, particularly in a case where there is recourse to individual objects, in order to avoid impairments of the use and of the rights relating to objects that are not affected by such recourse?*

b) *Assuming that agreements are made in this respect: when does this happen (when security is taken or in the event of recourse?), who enters into these agreements, and what are the characteristic terms of the agreements reached between the various creditors or between the debtors and the creditors?*

c) *Where do the benefits and the disadvantages lie for the respective parties concerned, and how is a balance struck between the interests concerned?*

d) *In comparison to the contractual agreements existing at the present time: How far could creation of an international interest generate advantages vis-à-vis present financing practice?*

As stated above, nearly all the respondents noted that the relationships between creditors were managed by inter-creditor agreements that were negotiated prior to the actual financing of the space asset. These agreements ensured the legal and factual frameworks that originally gave the financiers the confidence to lend to the operator / debtor. Respondents also indicated that these agreements ensured that operators and creditors were willing to co-operate with other subsequent creditors or operators in the interest of maintaining the income-generating function of the space asset.

One respondent noted that there were no agreements that divided secured objects, such as the main object and a transponder, among creditors but rather they awarded interests *pro rata* to each bank's participation in financing with equal rights at the various levels of capital structure. In regard to the actual use of different parts of the asset by different parties, this respondent pointed to "offtake" agreements² in which the user (such as a television broadcaster or a telephony provider) would agree to allow a creditor to step into the place of an operator in default. These agreements, whilst intended to reach the maximum level of revenue generation, were typically arranged among the parties themselves and only once the creditor had the ability to control the asset. Another respondent noted that, while not having direct experience of this type of situation, he believed that the use of various components was governed by lease agreements which should have been but might not have been in harmony with the credit agreements secured by the main object.

Regarding the benefits of inter-creditor agreements, one respondent noted that it was useful to be able to negotiate such agreements on a case-by-case basis and that full knowledge of all parties' rights and duties provided for a more meaningful negotiation. For this reason, the respondent stated that the future International Registry would create additional transparency and would lead to greater legal certainty in the field of space finance. Another respondent reiterated the importance of the responsibility for forming inter-creditor agreements being left to the relevant parties which would ensure the greatest level of flexibility in negotiations.

7) *Is security also taken over the software with which the space asset (main object or component) is operated? If that is the case, how is this done?*

Several respondents confirmed that some financing agreements specified "control codes" as part of the security. One respondent added that some creditors appointed a third-party operator to control the asset, provided there were no regulatory issues. Another respondent noted that it was very important for

² An "offtake" agreement is one in which the contracting party agrees to purchase the output of the satellite or transponder at a pre-determined rate.

the software to be taken as security as well, so that the business could continue to operate and generate income.

8) *In connection with the financing of space assets: are there other objects remaining on earth to which claim is laid as security? What commercial significance is to be attached to security of this kind, particularly in relationship to the taking of security over the space asset? In addition to this, is there use of securities in personam (obligation imposed on a specific person: e.g. by guarantee, surety)?*

Several respondents noted that the importance of ground-based assets associated with the secured space asset depended on the nature of the space asset, though ideally a creditor would have taken security over all a debtor's assets. They noted that, as with most satellites, the ground stations represented a minor percentage of the value of the asset to the operator, because the satellites were controlled from various ground stations. However, in the case of specialised satellites or Low-Earth Orbit (LEO) satellites, ground stations were crucial to control and were usually included in a security agreement. Another respondent noted that sometimes a creditor would take security in a spare satellite that was still grounded in storage.

Another respondent pointed out that purchasers of services from the operator of a satellite would need an arms-length contract to secure the continuation of service in the event of default by the operator / debtor. This same respondent wondered whether a creditor could have re-negotiated such a contract so that a debtor would have been solvent.

It was further noted by one respondent that *in personam* security over a space asset was unlikely.

9) *Are there special model financing schemes that are used only until the launch, or during other phases of use? What are the characteristics of these models? What advantages could an international interest create here?*

Several respondents noted that, up to the actual time of launch, a space asset was governed by national law and treated much like any other moveable asset. In order to secure financing, debtors used the actual asset which was still on the ground and left creditors the option of taking the physical asset in the event of default for its residual value. The benefit of this scheme, noted one respondent, was an economic one.

Another respondent noted that security was also taken for a launch service but in this case the security was taken out on the launch-service contract.

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STEERING COMMITTEE

to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:

SUB-COMMITTEE ON COMPONENTS

(Berlin, 31 October/1 November 2008)

Revised draft agenda

(prepared by the UNIDROIT Secretariat)

1. Opening of the meeting by Mr Hans-Georg Hauser, Chief, Berlin Liaison Office, Commerzbank AG
2. Adoption of the agenda
3. Organisation of work for the meeting
4. Policy considerations regarding development of the preliminary draft Protocol
5. Consideration of the issue of default remedies in relation to components under the preliminary draft Space Protocol, in particular in the light of the discussions of the Steering Committee on this issue at its launch meeting, held in Berlin from 7 to 9 May 2008 (cf. Summary report (Study LXXIIJ - Doc. 14), pp. 10 - 12), and responses to the Questionnaire prepared by the Ministry of Justice of the Federal Republic of Germany
6. Follow-up to the conclusions reached by the meeting
7. Any other business.

STEERING COMMITTEE

to build consensus around the provisional conclusions reached as regards the preliminary draft Space Assets Protocol to the Cape Town Convention on International Interests in Mobile Equipment by the Government/industry intersessional meeting held in New York on 19 and 20 June 2007:

SUB-COMMITTEE ON COMPONENTS

(Berlin, 31 October/1 November 2008)

EXTRACT FROM

SUMMARY REPORT

(prepared by the UNIDROIT Secretariat):

(Omissis)

III. THE COMMITTEE'S CONSIDERATION OF THE KEY OUTSTANDING ISSUES

(a) Sphere of application: definition of space assets in general and components in particular

(i) Background

Article I(2)(g) of the preliminary draft Protocol defined "space assets" as:

"(i) any identifiable asset that is intended to be launched and placed in space or that is in space;

(ii) any identifiable asset assembled or manufactured in space;

(iii) any identifiable launch vehicle that is expendable or can be reused to transport persons or goods to and from space; and

(iv) any separately identifiable component forming a part of an asset referred to in the preceding sub-paragraphs or attached to or contained within such asset".

Already at its second session the Committee of governmental experts addressed the concern that the definition of space assets found in Article 1(2)(g) might be too broad as it included "any separately identifiable component intended to be launched into space".¹ This posed the problem of having parties potentially registering interests in an indeterminate number of components that might or might not have a significant contribution to the overall space asset.

¹ Cf. C.G.E./Space Pr./2/Report, § 12.

Then, one of the sets of comments submitted to the Sub-committee, referring to the issue of the identification of space assets, submitted that one reason why there were difficulties in the identification of space assets was because the definition of “space assets” was too broad, covering *anything* that was intended to be launched into outer space, whereas the Convention had originally envisaged only covering high-value assets.²

These comments were, to a certain extent, borne out by the responses received to the Secretariat’s questionnaire on the subject of the criteria for the identification of space assets sent out among satellite manufacturers, launch service providers and financiers.

(*Omissis*)

Of the three respondents who addressed the issue as to whether the inclusion of components was warranted only one, the representative of a major satellite manufacturer, recommended their exclusion, on the ground that the overwhelming majority of satellite finance focussed on the satellite as a whole and addressing the issues raised by the inclusion of components could extend considerably the time needed for the preliminary draft Protocol’s completion.³ On the other hand, another respondent, the representative of a major financial institution, cautioned that, while excluding components from the sphere of application would accelerate the preliminary draft Protocol’s completion, it was a fact that satellites were made up of components and it would not, therefore, be justified to exclude components simply for the sake of avoiding further delay.⁴

These and the other responses received by the Secretariat were duly reflected in the interim report on the criteria for the identification of space assets that it prepared for the New York meeting and, doubtless, played a part in reinforcing the conviction of those attending that meeting that, if the preliminary draft Protocol were to be capable of timeous completion, then it was desirable that the scope of the problems that it raised be simplified as far as possible and that the sphere of application, therefore, be narrowed so as to concentrate essentially on the satellite, in its entirety, acknowledged to represent 80% of the space assets covered by the preliminary draft Protocol currently the subject of the type of financing envisaged by the Convention.

(ii) Discussion

In his proposal for an alternative text of the preliminary draft Protocol, Sir Roy Goode had proposed narrowing the definition of space assets to those objects that were independently identifiable, including the satellite as a whole, transponders and certain types of other object, referred to as “principal objects”.⁵ His view was that this proposal would resolve the difficulties surrounding identification criteria and avoid the registration of an interest in an indeterminate number of components. To cover additional identifiable parts, he suggested that an interest should only be registrable where there was an agreement with the satellite owner that a component should retain its separate identity after being attached to the larger space asset, thus ensuring that only the holders of interests in components which were considered to be of sufficient importance to merit the negotiation of such an agreement would be able to register an international interest therein. With a view to permitting the registration of future complex space developments, such as “space hotels”, Sir Roy had also proposed adding the words “or other object capable of independent control”⁶ to the definition of space asset, these additional words being designed to

² Cf. Interim report on the criteria for the identification of space assets, § 5.

³ Cf. *idem*, § 23.

⁴ Cf. *idem*, § 24.

⁵ Cf. Proposed revisions to the Space Protocol, § 2.

⁶ Cf. *idem*, Appendix I: Article 1(2)(l) of the proposal for an alternative text of the preliminary draft Protocol.

act as an overall label for future developments that did not appear in the enumerated list of space assets. His view was that the continual addition of objects to the list of “principal objects” identified in the future Protocol should be avoided.

This proposal was endorsed by the representatives of a number of Governments and the international commercial space and financial communities. One Government representative feared, however, that this solution might leave third parties with an interest in independent components of a space asset, such as a transponder, exposed to negative effects as a result of a creditor exercising remedies, thus creating a conflict of interests. Another Government representative responded that the existence of the future International Registry for space assets would cure this legal difficulty by putting third parties on notice of any prior international interests in the space asset concerned.

Certain Government representatives expressed concern over the proposed elimination of “components”, noting that such a reduction in the categories of asset covered might be prejudicial to the future Protocol’s capacity to anticipate future developments in space technology. On the other hand, representatives of both Government and the international commercial space and financial communities suggested that a broader definition of space assets with more flexibility would be preferable to an enumerated list. Otherwise, it was suggested that a mechanism be incorporated into the definition of space assets to enable the future Protocol to be updated from time to time so as to permit the taking into account of future space developments.

A representative of the international commercial space and financial communities suggested a mixed approach made up of both an enumerated list of the specific space assets covered and an additional clause capable of broader interpretation. The possible elements of such an additional clause were included in the working paper submitted by the German Government and the German Space Agency on the sphere of application and default remedies relating to components, where, in addition to an enumerated list of “principal objects”, it was suggested that “space assets” also be defined as “any other uniquely identifiable item capable of being independently operated and commanded attached to, or intended to be attached onto the satellite, space station, space vehicles, launch vehicle, reusable space capsules”.⁷ This approach was endorsed by a number of representatives of Government and the international commercial space and financial communities, who agreed that the additional requirements of “uniquely identifiable” and “capable of independent control” would limit the sphere of application to a reasonable number of high-value assets while not excluding the possibility of the future Protocol also catering for future space developments.

In this context, one Government representative, noting the link between the list of space assets to be covered by the preliminary draft Protocol and the requirements which would establish the classes of space asset in which an international interest might be registered in the International Registry, suggested that additional flexibility could more easily be built into the preliminary draft Protocol by the incorporation of a method permitting the updating of such registration requirements so that it would not be necessary to update the future Protocol each time such a new development occurred.

(iii) Conclusions

It was agreed that the proposals of both Sir Roy Goode and the Government of Germany and the German Space Agency were fundamentally compatible. Thus it was recommended that the categories of space asset to be covered by the preliminary draft Protocol should be defined on the basis of both an enumerated list of “principal objects” and the additional requirement that a space asset to be capable of coverage must be “uniquely identifiable” and “capable of independent

⁷ Cf. Working paper on sphere of application and default remedies relating to components, §§ 3-10 and 16.

control". Additionally, it was recommended that a procedure be incorporated in the preliminary draft Protocol permitting the updating of registration requirements so as to allow for future space developments.

(b) *Default remedies: components*

(i) Background

Article IX(4) of the preliminary draft Protocol, which was in square brackets, provided that:

"When two space assets, one of which is a separately identifiable component of the other within the meaning of Article I(2)(f), are subject to two separate registered interests, both registered interests shall be valid and have priority as determined under Article 29 of the Convention unless otherwise agreed between the holders of such registered interests".

The text of Article IX(4) was accompanied by a footnote indicating that "[t]his paragraph needs further consideration by the Committee of governmental experts as to whether the protection provided is sufficient or needs extending, especially in order to protect a user of components who is neither in default nor insolvent".

(ii) Discussion

In the light of the Committee's recommendation on the definition of "space assets" in relation to components in the context of its discussion of the question of the sphere of application of the preliminary draft Protocol, the Government of Germany and the German Space Agency proposed, by way of addressing the problem of conflicts between creditors seeking to exercise their respective default remedies in respect of a space asset and an independent component which was either physically or functionally linked to that space asset, that Article IX(4) of the preliminary draft Protocol be amended so as:

- first, to limit the possibility for a creditor to exercise its default remedies where this would impair ownership rights in such independent components, an amendment that they considered necessary if the sphere of application were to be extended to independent components;
- secondly, on the other hand, to allow a creditor freely to exercise any default remedies where it had previously obtained the consent of those possessing an interest in an independent component or where the party whose ownership rights would be impaired was fairly compensated by the creditor; and
- thirdly, to prevent a creditor from exercising its default remedies during the launch phase, a complex period during the life of a space asset in both technical and financial terms, when its exercise of such remedies could, therefore, severely impair the rights of third parties, both technically and financially.

Both representatives of Government and the international commercial space and financial communities expressed deep concern over the proposed limitations on default remedies, on the ground that, by creating the possibility that creditors with senior interests could have their rights impaired by junior interests, the financing of space assets would be deterred. The view was expressed that sufficient protection was already provided for junior interests by the priority rule found in Article 29 of the Convention and the notice of prior interests that would be provided by the future International Registry for space assets, with the result that a junior creditor would have a sufficient opportunity to assess the risk involved in financing an independent component of a larger space asset.

In reply, one Government representative pointed out that the issue being addressed was not only that of senior and junior interests in the same asset but rather the conflict of interests that could arise between interests in completely separate assets, such as a satellite and an independent component attached to that same satellite, as envisaged by the new definition of space asset agreed upon by the Committee. It was further noted that the priority rule found in Article 29 of the Convention only applied to different international interests in the same asset, not to different international interests in different assets. The same Government representative added that some of the default remedies available in Chapter III of the Convention would not affect ownership rights in independent components (such as the taking of profits being generated by a space asset) but that other remedies would have a great impact on independent components and potentially render ownership rights (such as the taking of control over a satellite and the changing of its orbit) economically valueless. A representative of the international commercial space and financial communities reinforced the validity of these arguments by reference to the impact that exercise of the current default remedies in respect of a satellite would have for the operation of a constellation of satellites.

A number of representatives of the international commercial space and financial communities observed, however, that the problem of conflicting interests in components was a risk which was already assessed and provided for by creditors of both space assets and components by way of inter-creditor agreements, which prevented the impairment of ownership rights through the enforcement of default remedies. A concrete example given, drawn from actual practice, was that of an agreement relating to the financing of a satellite by the Government of Malaysia where the transponders were financed by separate owners. In that case, an inter-creditor agreement was arranged whereby the operator promised not to interfere with the signals being broadcast from any of the on-board transponders. Another representative of the international commercial space and financial communities added that, very typically, in a situation where a creditor saw potential conflicts of interest between the space asset as a whole and the components, the creditor would simply choose to finance the entire space asset and thus forgo any potential conflicts. It was further stressed by representatives of the international commercial space and financial communities that the preliminary draft Protocol should not become entangled in a problem that was already resolved in practice.

One Government representative, nevertheless, submitted that, while an inter-creditor agreement might provide the best solution to the problem, this was no reason for not developing a default rule designed to protect parties unable to reach such an agreement.

In the interest of finding a compromise solution, one representative of the international commercial space and financial communities suggested that the proposed new provisions could be included in the preliminary draft Protocol, with the contracting parties simply agreeing to exclude the application of these proposed provisions in an inter-creditor agreement if they preferred alternative protection for international interests in independent components.

One Government representative, however, voiced concern at the idea of granting default provisions for the protection of creditors of components via the preliminary draft Protocol, as this might provide an incentive not to reach an inter-creditor agreement with the creditor of the larger space asset. Such provisions, that representative added, would give negotiating power to parties who did not possess such power in a free market-place and could reduce the overall financing of space assets.

It was further suggested that the issues involved in the question of default remedies for components physically attached to a space asset were quite different from those involved in the question of default remedies for components that were functionally linked, such as in a constellation, and that it might, therefore, be better to deal with the two questions separately.

(iii) Conclusions

In the absence of general consensus as to how best to resolve the issue of default remedies in regard to components, the Committee decided that a Sub-committee should be invited to seek a commercially viable and agreeable solution.

(Omissis)

IV. THE WAY FORWARD

(Omissis)

There was broad agreement within the Committee on the definition of space assets and components but the question of default remedies in relation to components, given the different views that had emerged on this issue, had been referred to a Sub-committee for resolution. This Sub-committee, the work of which would be co-ordinated by the Government of Germany, with organisational support being provided by the Secretariat, was composed of the Governments of Canada, Germany, the United Kingdom and the United States of America, Mr Olaf Gebler, Mr Francesco Giobbe, Mr Robert Gordon, Mr Ian Jarritt, Ms Martine Leimbach and Mr Schmidt-Tedd, supplemented by the Chairman.

(Omissis)

It was, however, agreed that participation in the work of the Sub-committees established by the Committee should be open to other members of the Committee.

The Committee invited the co-chairmen of the Drafting Committee of the Committee of governmental experts, Canada and the United Kingdom, in the persons of the representatives of those Governments participating in the Committee, namely Mr Michel Deschamps and Sir Roy Goode, to implement the conclusions that it had reached on the key outstanding issues, in an alternative version of the preliminary draft Protocol, to be prepared in English. The timetable for the preparation of this alternative version was for a first alternative version to be ready for the consideration of all members of the Committee by the end of June 2008, for this first alternative version to be circulated amongst all members of the Committee with an invitation for them to formulate such comments as they might see fit – notably as regards the extent to which it was considered faithfully to reflect the decisions reached by the Committee - by mid-September 2008 and for a second alternative version to be prepared by Mr Deschamps and Sir Roy, in the light of any such comments, by mid-November 2008, with the Sub-committees established by the Committee being invited to forward their conclusions by such time. It was essential that a decision on the reconvening of the Committee of governmental experts could be taken, on a sound basis, by that time.

It being essential for the Secretariat to be able to get to work as soon as possible on building consensus around the conclusions reached by the Committee as reflected in the alternative version, in line with the decision taken by the UNIDROIT General Assembly - among not only those Governments serving on the Committee of governmental experts not represented on the Committee but also key players in the international commercial space and financial communities likewise not involved in the Committee's work – it was recognised that it would be appropriate for the Secretariat to commence these consensus-building efforts as from July 2008, namely upon completion of the first draft of the alternative version. In this way, the Secretariat would be able to forward any comments emerging from this consultation procedure to Mr Deschamps and Sir Roy with a view to the preparation of a final alternative version.

In this connection, the intention was for such a final alternative version to be completed, on the basis of not only the comments submitted by members of the Committee and the conclusions of the work of its Sub-committees but also the outcome of reactions to the Secretariat's consensus-building exercise among those Governments and key representatives of the international commercial space and financial communities not represented on the Committee, by mid-January 2009 so as to permit invitations to go out for a third session of the Committee of governmental experts, which it was hoped could be convened for May 2009, in February 2009.

It was agreed that, to the extent possible, the Sub-committees established by the Committee should seek to carry out their work without the need for meetings that would involve travel.

(Omissis)

It was finally agreed that it would be essential for those involved in all work concerning the Sub-committees established by the Committee, the informal working group on salvage interests and the informal consultative working group to look at insolvency options at all times to keep the Secretariat fully informed so that it might properly discharge the functions of oversight and overall control conferred upon it by the UNIDROIT General Assembly in relation to the Committee.

ANNEX**WORKING PAPER ON THE SPHERE OF APPLICATION AND
DEFAULT REMEDIES RELATING TO COMPONENTS**

(prepared by the Government of Germany and the German Space Agency (D.L.R.))

I. Systematic nature of the Cape Town Convention and its Protocols

1. The Aircraft Protocol and the Luxembourg Railway Protocol to the Cape Town Convention have a closely defined sphere of application. The Aircraft Protocol enables creation of an international interest in airframes, aircraft engines and helicopters and the Luxembourg Railway Protocol does the same for railway rolling stock. The enumeration given is conclusive.

2. With regard to items of these secured objects, the Cape Town Convention makes provision only to the extent that, pursuant to Article 29(7), the taking of security is to be possible under the relevant applicable law.

II. Sphere of application of the Space Protocol

3. The use of space equipment and the concomitant taking of security for the financing thereof is much more extensive and more complex than in the case of aviation and the railway sector; today it is already the case that there is a need for regulation in relation to a large number of different space assets and technological developments are not over yet.

4. To do justice to the needs resulting therefrom, in particular those connected with financing and the taking of security over such assets, the Space Protocol's sphere of application already has to be defined in broader terms than was the case with the parallel Protocols: besides covering satellites and space stations, the preliminary draft Protocol already includes numerous other assets in relation to which an independent international interest can be constituted under the Cape Town Convention.

5. Space assets can be the subject of an independent international interest only in so far as their differentiation and registration remains possible but above all only where securing and having recourse to such assets in the event of default does not impair ownership, rights in (particularly international interests) and the use of other independent space assets.

(a) Results of the negotiations thus far

6. Following the deliberations to date, agreement has manifestly been reached to the effect that security can be taken, under the Space Protocol, over at least satellites, space stations, space vehicles, launch vehicles, reusable space capsules in, or intended to be launched in or into, space or intended to be used as a launch vehicle.

7. The assets referred to share the common feature that – at least in relation to their fundamental purpose – they are capable of being independently operated, used and commanded. These properties at the same time enable operative accessibility to the asset over which security is taken and therefore a practicable chance of recourse in the event of default.

(b) Further development of the present proposal to extend the sphere of application

8. In addition to the space assets referred to, there are still a large number of other items linked to the individual space assets mentioned, which frequently have enormous commercial value and utility, which are regularly debt financed and in relation to which the possibility of the taking of security would therefore also be advantageous.

9. These other items can be classified into two categories: on the one hand, there are items (i) which can be operated, used and commanded solely in dependence on the linked space asset (e.g. propulsion devices and solar cell panels). On the other hand, there are those items (ii) whose dependence on the linked space asset is limited to the physical link and which can otherwise be operated, used and commanded independently (e.g. transponders and sensors). A decision on whether to include such items in the sphere of application is to be based on this distinction.

(i) The items referred to first would not – for want of operative access – be open to the possibility of recourse by a creditor who has been granted an interest in respect of such items. Furthermore, the problem would arise that an interest of this nature would be totally worthless if there were to be recourse to the linked space asset (and vice-versa). Hence, it makes no sense to include these items in the Protocol's sphere of application.

(ii) As regards the items referred to in the second place, there is, however, operative accessibility independent of the linked space asset, which makes recourse possible. Practicable possibilities of recourse are also conceivable where use of the linked asset is not impaired but there are other possibilities of recourse, under the Convention, which can impair the linked asset (and vice-versa).

10. The Protocol's sphere of application should therefore be extended only to those items that are capable of being independently operated and commanded. Items lacking in this capability should therefore remain excluded (new Article I(2)(g)).

III. Balancing interests in the framework of the exercising of default remedies

11. Where there is limited extension of the sphere of application to items that are capable of being independently operated and commanded, conflicts of interest can, however, develop between the parties involved in the event of default, especially between different creditors. Nevertheless, it may not be concluded, as a result of this risk of impairment of the rights in, or the use of an object through recourse to the other object linked thereto, that international interests can be allowed only in respect of one of these objects – for instance, in respect of the superordinate satellite or of the space station or also of the more valuable of the objects – and that the other linked parts are to be excluded as an independent secured object. This kind of categorical solution would not meet the need for the taking of security over independently financed objects and it would also fail to take account of the fact that an impairment of the rights and the use of the other object will only occur where, in the event of default, steps are undertaken for the purpose of recourse.

12. A solution must rather be sought at the level where the problem of impairment of rights in the event of default is to be located in systematic terms and a regulation must be found in the domain of default remedies, being a regulation that reconciles the various interests. The UNIDROIT Committee of governmental experts also shared this view and has tried to find a corresponding solution in Art. IX(4), in conjunction with footnote 18, of the preliminary draft Protocol; this topic has not yet been definitively clarified.

(a) *Exercise of default remedies without impairment of the rights and interests of third parties*

(i) Physically linked space assets

13. Germany and the German Space Agency (D.L.R.), in its function as a member of the Space Working Group, therefore propose a provision to the effect that components are indeed to be included up to a certain extent as independent secured objects but that the avenues of recourse to such components are to be limited in such a manner that there is avoidance of impairments of ownership, rights in, and the use of other objects physically linked to the secured object (new Article IX(4)).

(ii) Functionally linked space assets

14. Such dependence of more than one space asset as is comparable to a physical link also exists where the space assets concerned are, of necessity, functionally synchronised. This can, for instance, be the case where several satellites are linked through an interposed orbital relay station and this entire constellation would no longer be able to function if an individual satellite were to be removed from the constellation. Here, too, recourse should only be possible to the extent that mutual impairment can be ruled out (new Article IX(5)).

(b) *Exercise of default remedies where third party rights and interests are safeguarded*

15. Restrictions on recourse must, however, meet their limit at the point where adequate account is otherwise taken of the interests of another protected creditor. It is therefore proposed that the restrictions on recourse should not take effect where the chargee taking recourse offsets the other chargee sustaining impairment as a result of the recourse taken, or where the parties agree on the recourse measure (new Article IX(6)).

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16. **Based on the foregoing considerations, the following proposals are made for adjustment of the text.**

Article I (2) (g):

Space asset means

(i) **satellite, space station, space vehicles, launch vehicle, reusable space capsules in, or intended to be launched in or into space or used, or intended to be used as a launch vehicle and**

(ii) **any other uniquely identifiable item capable of being independently operated and commanded attached to, or intended to be attached onto the satellite, space station, space vehicles, launch vehicle, reusable space capsules.**

Article IX(4) - (6):

(4) The creditor shall only exercise default remedies in accordance with Chapter III of the Convention in so far as this does not affect the use of, international interests in and other rights relating to other space assets physically linked to the secured space asset.

(5) The preceding paragraph shall apply with necessary modifications where space assets are not physically linked to each other but where the essential use of one such asset is not possible without the other asset.

(6) In the cases referred to in paragraphs 4 and 5, recourse shall be permitted where

(a) the person impaired by recourse consents to the recourse or

(b) the creditor offsets the impairment of the use of the international interest or of the other right in the space asset by taking equivalent technical measures.

Additional proposal

17. While this paper was being drafted, Germany and D.L.R. realised that – irrespective of the question of the taking of security over, and the having of recourse to components – there is a need for special temporary protection against recourse in respect of all secured objects during the launching phase, which represents a particularly delicate phase in both technical and financial terms, in order to keep them clear of all unnecessary disruptions. Otherwise, recourse to an individual secured object that is temporarily linked to other secured objects during this phase might, in certain circumstances, lead to a termination or postponement of the launch, so that assets are impaired on a much greater scale and extensive damage caused. Relative to the success of the entire project and the avoidance of immense total loss, short-term postponement of recourse seems reasonable. In this respect the following additional provision is proposed:

Article IX(7)

The creditor shall not exercise default remedies in accordance with Chapter III of the Convention during the launching phase. The launching phase begins on arrival at the final launch position; it ends on arrival at the first orbital position or on departure from the final launch position on account of termination of the launch.