



**DIPLOMATIC CONFERENCE FOR THE ADOPTION
OF THE DRAFT PROTOCOL TO THE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT ON MATTERS SPECIFIC TO
SPACE ASSETS**

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**DRAFT PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS
IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO SPACE ASSETS**

as established by 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 at the conclusion of its fifth session, held in Rome from 21 to 25 February 2011, and authorised for transmission to a diplomatic Conference, for adoption, by the UNIDROIT Governing Council at its 90th session, held in Rome from 9 to 11 May 2011:

COMMENTS

(submitted by Governments, Organisations and representatives of the international commercial space, financial and insurance communities)

INTRODUCTION

On 6 and 7 September 2011 the UNIDROIT Secretariat transmitted, under cover of the invitations that it addressed, on behalf of the Government of the Federal Republic of Germany, to Governments, Organisations and representatives of the international commercial space, financial and insurance communities to attend the diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets to be held in Berlin from 27 February to 9 March 2012, the text of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (DCME-SP – Doc. 3) (hereinafter referred to as the *draft Protocol*) that will constitute the basic working document of the diplomatic Conference, with an invitation to formulate comments thereon for consideration by the diplomatic Conference. The draft Protocol was established by 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 (hereinafter referred to as the *Committee of governmental experts*) at the conclusion of its fifth session, held in Rome from 21 to 25 February 2011.

As of 19 December 2011 the UNIDROIT Secretariat had received comments on the draft Protocol from Ms Pamela Meredith, Zuckert Scoutt & Rasenberger, L.L.P., and Mr Phillip Spector, Executive Vice President, Business Development, and General Counsel, Intelsat on behalf of the satellite operators, spacecraft manufacturers, launch services providers, insurance and financial companies listed as signatories to the comments communicated by him.

These comments are reproduced hereunder.

**COMMENTS AND PROPOSALS SUBMITTED BY REPRESENTATIVES OF THE
INTERNATIONAL COMMERCIAL SPACE, FINANCIAL AND INSURANCE COMMUNITIES**

Ms Pamela Meredith, Zuckert Scoutt & Rasenberger, L.L.P.

The draft Protocol: proposed solution for insurers' salvage

An insurer's right to salvage after the payment of insurance proceeds is a well-recognised legal principle, which dates back hundreds of years.

Accordingly, the satellite insurance contract generally provides that, when the insurers of a satellite pay proceeds after a satellite loss, they are entitled to salvage in the form of title to, sales proceeds from, or a percentage of the revenues generated by the defective satellite. Because the defective satellite may continue to operate in a degraded form for many years, the salvage value can be substantial.

An unintended consequence of the draft Protocol is that its priority provisions may serve to extinguish salvage even *after* it has vested in insurers. For example, if a creditor registers an international interest in the satellite after salvage has vested, the creditor's interest still takes priority over salvage; likewise, a buyer of the satellite that registers the sale takes the satellite free and clear of salvage.

The Committee of governmental experts recognises this problem and has considered several solutions proposed by leading space insurers.¹ One solution discussed during the February 2011 session is to exclude salvage expressly from the application of the Protocol. That solution avoids the unintended consequences noted above and retains the *status quo* in satellite insurance. It can be accomplished by inserting this language: "**Nothing in the Convention or this Protocol affects any rights of an insurer under the applicable law or contract to salvage.**"

Finding an acceptable solution for salvage is critical given the key role insurance plays in satellite financing. For example, creditors with a security interest in the satellite customarily require the satellite operator to obtain property insurance as a condition of the loan facility. Salvage is customarily a key ingredient in such insurance policies and, given its substantial value, preserving salvage is necessary for current policy terms to be available. Insurers do not require the draft Protocol; they prefer the *status quo*.

I. Satellite Insurance AND Salvage

Satellite owners generally take out property insurance for the replacement value of the satellite. The insurance protects the satellite owner in the event of a loss of the satellite during launch or malfunction, defect or damage in orbit, depending on the specific terms.

¹ Leading space insurers represented by Zuckert Scoutt & Rasenberger, L.L.P., include Munich Reinsurance Company, Swiss Reinsurance Company, SCOR Global P&C SE, Allianz Global Corporate & Specialty (France)/SpaceCo and La Réunion Spatiale.

Satellite launch and in-orbit insurance policies usually include a salvage clause. The clause entitles the insurer to salvage after it has paid the insurance proceeds following a loss of the satellite. Salvage may take the form of, for example, title to, a percentage of revenues generated by, or proceeds from the sale of the defective satellite. In the United States of America and some other jurisdictions, the insurers are entitled to salvage also by operation of law.

Salvage plays a unique role in satellite insurance because:

(a) the threshold for deeming the satellite a constructive total loss is relatively low, which means the defective satellite may still have many years left in operation (*i.e.* substantial salvage value); and

(b) the insurers typically agree to pay the replacement value of the satellite in the event of a constructive total loss (which creditors value).

Salvage is a key consideration for insurers in agreeing to these terms.

Satellite insurance is different from aviation insurance in that the satellite insurer cannot gain access to or take physical possession of its satellite salvage, which is in space. For that reason, satellite salvage is especially vulnerable to extinction through the unintended consequences of the Protocol.

II. *The draft Protocol's unintended consequences for salvage*

The draft Protocol protects interests that are registrable. Salvage does not qualify for registration under the draft Protocol. It is not an “international interest” or other registrable interest.² Registered interests take priority over any unregistered interests, *i.e.* salvage. Therefore, a buyer or creditor registering a sale of or a security interest in the satellite *after* the insurer has paid for the loss and obtained salvage may extinguish that salvage. Specifically:

(a) a buyer who registers the sale of a satellite in which insurers have a salvage interest takes title to that satellite free and clear of any “unregistered interest,” *i.e.* salvage.³

(b) a creditor who registers a security interest after the insurer has become entitled to salvage has priority over any “unregistered interest,” *i.e.* salvage.⁴

(c) a creditor who records a debtor’s rights⁵ assignment (for example, an assignment of transponder lease revenues *due to* the insured/debtor) has priority over any other transfer of

² An international interest is defined as an “interest held by a creditor” that is: (1) granted under a security agreement; (2) vested in the conditional seller under a title reservation agreement; (3) vested in the lessor under a leasing agreement; or (4) vested in a buyer under a contract of sale. Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*), Arts. 1(o), 2(2)(a)-(c); *Id.* Art. 41 (providing that Protocols may specify that the Convention shall apply to sales and prospective sales); draft Protocol, Art. IV (applying the Convention to a contract of sale and treating the buyer as the creditor and the seller as the debtor). A salvage interest is not “held by a creditor” as that term is defined. Convention, Arts. 1(i) and 2(2); draft Protocol, Art. IV. Salvage is not an interest granted under a security agreement, because it is not intended “to secure the performance of any existing or future obligation of the [debtor/insured] or a third person.” See Convention, Art. 1(ii). Salvage is not an interest vested in a conditional seller under a title reservation agreement or in a lessor under a leasing agreement. See *id.* Art. 1(q), (II).

³ Draft Protocol, Art. XXIII(1) (“The buyer of a space asset under a registered sale acquires its interest in that asset free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.”).

⁴ Convention, Art. 29(1) (“A registered interest has priority over any other interest subsequently registered and over an unregistered interest.”).

⁵ Draft Protocol, Art. I(2)(a) (Debtor’s rights are “rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset.”). An example of a debtor’s right is revenue from a transponder lease.

debtor's rights (*i.e.* salvage) even if the assignment occurs after the insurer has become entitled to salvage.⁶

This applies even if the new buyer or creditor knows that the insurer's salvage has vested.⁷ In the event of default on the part of the insured/debtor, the new creditor under the draft Protocol may collect the funds intended as the insurer's salvage.⁸

III. *The proposed solution*

Insurers propose a solution that would exclude salvage from the application of the draft Protocol and instead let the parties' contract and the applicable law govern. This solution retains the *status quo* and avoids the unintended consequences of the draft Protocol described in Section II, above. It can be accomplished by inserting this language: "Nothing in the Convention or this Protocol affects any rights of an insurer under the applicable law or contract to salvage." This sentence would replace all current draft language concerning salvage in Articles I and IV.

This solution was discussed briefly towards the end of the February 2011 session of the Committee of governmental experts in Rome. The Committee of governmental experts had initially considered a more elaborate provision, which was unacceptable to the insurers.⁹ At the close of the session, the Committee of governmental experts agreed to bracket the salvage provisions for further discussion,¹⁰ indicating that the first passage "Nothing in the Convention or this Protocol affects any rights of an insurer under the applicable law to revenue salvage" could be a stand-alone provision.¹¹ Further work on the provision was deferred to inter-sessional discussions.

Following the close of the February 2011 session, the insurers have continued discussions with members of several key delegations and have received support for the insurers' proposed language and its application to all types of salvage.

⁶ *Id.* Art. XIII(1) (A recorded debtor's rights assignment has "priority over any other transfer of debtor's rights ...").

⁷ *Id.* Art. XXIII(1) ("even if the buyer has actual knowledge of the unregistered interest."); Convention, Art. 29(2) ("The priority ... applies: (a) even if the [subsequent interest] was acquired or registered with actual knowledge of the other interest ...").

⁸ Convention, Art. 8(1)(c) (A creditor may "collect or receive any income or profits arising from the management or use of any such object").

⁹ See Report, Committee of governmental experts, fifth session (C.G.E./Space Pr./5/Report), March 2011) (hereinafter referred to as the *Report*), at 15 ("One adviser indicated that, following consultations with satellite insurers on [the salvage provision] as it had developed during the session, the satellite insurance industry had come to the conclusion that the revised preliminary draft Protocol would prejudice their interests and, accordingly, requested that the text as it had developed over the session be withdrawn").

¹⁰ See draft Protocol, Arts. IV(4)-(5), I(2)(h), (m) (showing the bracketed text). See also Report, at 15-16, reporting as follows:

"One delegation proposed, in view of the concerns existing in the satellite insurance industry and with a view to identifying a possible future solution on this issue, that all Article IV(5) be placed in square brackets, with the language from the beginning of that paragraph down to the phrase "applicable law to revenue salvage" [*i.e.* "Nothing in the Convention or this Protocol affects any rights of an insurer under the applicable law to revenue salvage"] being inserted in a further set of square brackets, a full stop being inserted after the phrase "applicable law to revenue salvage" and the remainder of the language in Article IV(5) being inserted in yet another set of square brackets. This delegation indicated that it would be undertaking further consultations on this provision with the insurance sector and other relevant interests. This proposal was accepted, as also the consequential proposal that the definition of "revenue salvage" in Article I(2)(h), the definition of "title salvage" in Article I(2)(m) and Article IV(4) [*i.e.* title salvage] be also placed in square brackets "

¹¹ See Report, at 15-16.

Over the years, the insurers have proposed and the Committee of governmental experts has considered several other approaches to addressing salvage, for example:

- (a) registration of salvage under the draft Protocol;
- (b) expressly recognising insurers' rights to subrogation into creditor's international interest upon payment of proceeds; and
- (c) treating title salvage as a contract of sale.

The two former approaches were rejected and the latter severely restricted, leading the insurers, in the alternative, to propose the solution discussed above.

IV. Conclusion

To ensure that insurer salvage is not wiped out as an unintended consequence of the priority provisions of the draft Protocol it is necessary to include the following language: "Nothing in the Convention or this Protocol affects any rights of an insurer under the applicable law or contract to salvage." Maintaining salvage in good order is very important because insurance is a critical underpinning for the credit and financing the draft Protocol aims to promote.

Mr Phillip L. Spector, Executive Vice President, Business Development, and General Counsel, Intelsat on behalf of the satellite operators, spacecraft manufacturers, launch services providers, insurance and financial companies listed below

The undersigned are leading satellite operators, spacecraft manufacturers, launch services providers, insurance and financial companies that provide services to those in the satellite industry, and satellite and space-related associations. We write to urge UNIDROIT and its members to reconsider the adoption of the draft Protocol, which we understand will be the subject of the diplomatic Conference for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets, to be held in Berlin in February/March 2012.

The undersigned believe that the current draft, if adopted and implemented, would introduce new and unnecessary regulation for the financing of satellites, which would have serious negative consequences, impairing the real-world businesses of the critical industries we represent. The current draft Protocol is inconsistent with the market practices of commercial space financing, incorporates numerous impractical features that would deter potential investors in the satellite industry, and would add increased costs to our businesses, including higher insurance premiums and higher transactional costs.

The draft Protocol was created to encourage and aid space financing. However, few satellite operators or financiers globally have advocated for this new legal instrument or endorsed its adoption. In fact, a substantial part of the global satellite sector has directly opposed the initiative, as evidenced by this letter.

The major associations that represent the satellite industry, including the European Satellite Operators Association (E.S.O.A.) and the U.S. Satellite Industry Association (S.I.A.), have repeatedly voiced concerns that:

- the draft Protocol offers no tangible benefits for commercial satellite operators and financiers;
- the draft Protocol would impose unnecessary and costly bureaucratic burdens on the satellite industry;

- there is no identifiable problem in the current financing environment that is addressed by the draft Protocol, and indeed there is substantial evidence that the draft Protocol is not required:
 - o The current process has worked consistently well for the numerous new and established operators that in recent years have secured financing by banks, export credit agencies and other financing parties, with successful enforcement of security, where needed; and
 - o No satellite financings have failed to proceed or been unduly expensive due to impediments over the granting and perfection of security interests.

UNIDROIT has not addressed these concerns in the draft Protocol. Indeed, the Organisation has consistently disregarded the views of the satellite manufacturing, operator and financing communities in the UNIDROIT meetings and drafting.

The premise of the draft Protocol is that space objects should be identified on an international registry in order to create and protect an international interest in such objects. This would constitute a new supranational layer of regulation, in addition to the existing national regulatory requirements, resulting in duplicative or supplemental filing requirements. It is unclear how this registry would benefit financial institutions. We believe that creditors would find the system unnecessary, confusing and cumbersome, effectively impeding the financing of satellite systems that the draft Protocol was meant to encourage.

As leaders of all sectors of the satellite industry, we urge UNIDROIT to halt its plans to adopt the current draft Protocol. We believe that the draft Protocol is unnecessary and would, if adopted, create new uncertainties and additional regulatory processes that could actually limit the access to investment capital that the Protocol was designed to promote.

For the Satellite Operators:	
	Arabsat
	Asia Broadcast Satellite
	Asia Cellular Satellite
	AsiaSat
	Astrium Services
	Avanti
	Ciel
	EchoStar Corporation
	EgyptSat
	Empresa Argentina de Soluciones Satelitales
	Eurasiasat
	Eutelsat
	Globalstar
	Hellas Sat
	Hispamar
	Hispasat
	Horizons LLC
	Hughes Communications, Inc.
	Inmarsat
	Intelsat
	Iridium

	Korea Telecom
	Kypros Satellites
	LightSquared
	Measat
	New Dawn Satellite Company Ltd.
	NewSat
	O3b Limited
	Optus Satellite
	Quetzsat
	RapidEye
	SES
	SKY Perfect JSAT
	Spacecom
	StarOne
	SWANsat Holdings, LLC
	Telenor Satellite Broadcasting AS
	Telesat
	Telespazio
	Thuraya
	Turksat
	ViaSat
	WildBlue
	XTAR, LLC
	Yahsat
For the Spacecraft Manufacturers and Launch Service Providers:	
	Arianespace
	Astrium Satellites
	Boeing
	International Launch Services
	Lockheed Martin
	Mitsubishi Electric Corp. Space Division (MELCO)
	OHB AG
	Orbital Sciences Corporation
	Sea Launch
	Space Systems/Loral
	SpaceX
	Thales Alenia Space
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	Atrium Space Insurance Consortium
	Brit Insurance
	Elseco Limited
	Global Aerospace Underwriting Managers Ltd.
	Hiscox
	International Insurance Company of Hannover Limited
	JLT Specialty Limited

	Liberty Syndicate Management
	Marsh Space Projects
	Munich Reinsurance Company
	Satec srl
	SCOR Global
	Swiss Reinsurance Company
	Watkins Syndicate
	Willis Inspace
	XL Insurance America
For the Financial Community:	
	Banco Bilbao Vizcaya Argentaria
	Bank of America Merrill Lynch
	Barclays Capital
	Commerzbank
	Deutsche Bank
	Goldman Sachs
	ING
	JP Morgan
	Lazard
	Morgan Stanley
	UBS
Other Satellite- and Space-Related Organizations and Institutions	
	Cable & Satellite Broadcasting Association of Asia
	European Satellite Operators Association
	Global VSAT Forum
	ManSat LLC
	Mobile Satellite Users Association
	Satellite Action Plan Regulatory Group
	Satellite Industry Association
	Space Industry Association of Australia