



**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
Fifth session
Rome, 21/25 February 2011**

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**INTERSESSIONAL MEETING OF THE INFORMAL
WORKING GROUP ON LIMITATIONS ON REMEDIES**

(Rome, 20/21 October 2010):

REPORT

(prepared by the UNIDROIT Secretariat)

I. BACKGROUND

1. The Informal Working Group on limitations on remedies (hereinafter referred to as the *Informal Working Group*) was established at the third session 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 (hereinafter referred to as the *Committee*), held in Rome from 7 to 11 December 2009. It was given the task of finding a solution to a problem which, in its essence, comes down to the appropriate balance to be struck in the planned Protocol between, on the one hand, the interests of a creditor seeking to exercise remedies against a space asset performing a “public” service in the event of its debtor’s default, and, on the other, those of one or more organs of the State anxious to ensure the continuity of the performance of the particular “public” service, notwithstanding the debtor’s default.¹

2. Following meetings of the Informal Working Group held during the third and fourth sessions of the Committee, the latter, at the conclusion of its fourth session, held in Rome from 3 to 7 May 2010, decided that an intersessional meeting of the Informal Working Group should be held prior to the holding of the fifth session of the Committee, to be held in Rome from 21 to 25 February 2011, with a view to advancing the work hitherto accomplished by the Informal Working Group.

¹ C.G.E./Space Pr./3/Report rev., §§ 27-33.

II. OPENING OF, PARTICIPATION IN AND DOCUMENTATION FOR THE INFORMAL WORKING GROUP MEETING

(a) *Opening and moderation of, and participation in the Informal Working Group meeting*

3. The intersessional meeting of the Informal Working Group was held in Rome, at the seat of UNIDROIT, on 20 and 21 October 2010, after the consultations with representatives of the international commercial space and financial communities, held on 18 October 2010,² and, in part, at the same time as the meeting of the Informal Working Group on default remedies in relation to components, held from 19 to 21 October 2010.³ The Informal Working Group meeting was attended by representatives of the Governments of Canada, the People's Republic of China, the Czech Republic, Germany, Italy, Japan, the Russian Federation, the United Kingdom and the United States of America and observers from Crédit Agricole S.A. and the German Space Agency.⁴ Mr J.A. Estrella Faria, Secretary-General of UNIDROIT, acted as moderator and opened the Informal Working Group meeting at 2.30 p.m. on the 20th, sketching the background to the meeting and indicating the progress made to date on the subject.

(b) *Adoption of the agenda*

4. The draft agenda, as prepared by the Secretariat⁵ was adopted.⁶

(c) *Documentation for the Informal Working Group meeting*

5. The text of the revised preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets prepared by Sir Roy Goode (United Kingdom) and Mr J.M. Deschamps (Canada), as Co-chairmen of the Drafting Committee of the Committee, to reflect the conclusions reached by the Committee at its third session, held in Rome from 7 to 11 December 2009, and reviewed by the Drafting Committee, as amended during the fourth session of the Committee (hereinafter referred to as the *revised preliminary draft Protocol as amended*)⁷ was the basic working document of the meeting. In addition to the draft agenda, the following documentation was submitted to the Informal Working Group meeting:

- Explanatory note on the draft agenda (prepared by the Secretariat);⁸ and
- Comments (submitted by Governments and representatives of the international commercial space and financial communities).⁹

III. DISCUSSION OF THE BUSINESS BEFORE THE INFORMAL WORKING GROUP

(a) *Divergent views as to the best way of achieving a balanced solution*

6. There were two divergent views as to the best way of achieving a balanced solution to the public service issue under the planned Protocol.¹⁰

² Cf. C.G.E./Space Pr./5/W.P. 4.

³ Cf. C.G.E./Space Pr./5/W.P. 5.

⁴ Cf. the list of participants reproduced in Appendix I to this report.

⁵ C.G.E./Space Pr./Inters'l meetings/I.W.G. Limitations on remedies/W.P. 1.

⁶ The agenda as adopted is reproduced in Appendix II to this report.

⁷ C.G.E./Space Pr./4/Report, Appendix VIII.

⁸ C.G.E./Space Pr./Inters'l meetings/I.W.G. Limitations on remedies/W.P. 2 rev. (reproduced in Appendix III to this report).

⁹ C.G.E./Space Pr./Inters'l meetings/I.W.G. Consultns/W.P. 3 and Addenda 1 and 3 (reproduced in Appendices IV to VI to this report respectively).

¹⁰ Cf. § 1, *supra*.

7. On the one hand, the international commercial space and financial communities had in general expressed their concern at the approaches taken in the alternative texts of Article XXVII *bis* of the revised preliminary draft Protocol as amended. In particular:

- they found the term “public service” unclear and capable of causing operators additional legal difficulties;
- they saw the alternatives as imposing new duties on operators and creditors, as a result of which the creditor would find himself bound to maintain a public service even when it might not have been a party to the contract providing for that service; and
- they feared lest the alternatives would force a creditor to maintain a service that would, in most cases, be a business venture that was already in financial difficulties.

8. The representatives of some Governments, moreover, took the view that the incorporation in the planned Protocol of a public service limitation would place creditors in a position where they would have no choice but to interpret the legal implications of such a rule, a process which could be both complex and costly, in addition to the existing national laws of a State, thereby increasing the costs of financing. It was argued that this could not but prejudice the overall financing available for space assets and that it was, therefore, preferable to refrain from incorporating a public service limitation in the planned Protocol.

9. On the other hand, the representatives of other Governments supported the inclusion of a rule on public service in the planned Protocol, recalling that it was important to bear in mind not only the concerns of the international commercial space and financial communities but also the interest of States in ensuring that vital public services be not interrupted through a creditor’s exercise of remedies. In particular:

- it was felt that, rather than being the source of additional complexity and costs, the inclusion of a public service limitation in the planned Protocol would add clarity and certainty to space asset financing, by clearly defining the limits within which public service limitations could be invoked;
- it was noted that, in practice, it was likely that a creditor would maintain a public service, since the satellite would still need to generate some revenue; and
- it was further noted that not all cases of default were the result of an unsuccessful business plan relating to the relevant public service.

The representative of another Government supported this view, adding that many States could not, under current financing schemes, afford to acquire their own space assets for the provision of public services and would, in that sense, be primary beneficiaries of the planned Protocol.

(b) Implications of the choice to be made

10. The representative of one Government suggested that, regardless of the approach that might ultimately be adopted by way of solution to this issue, language should be included in the planned Protocol ensuring that it did not interfere with the right of the relevant national regulatory authority to appoint or approve new operators of a space asset.

11. Recognising the merits of a simple approach, a representative of the Government that had proposed the “rights approach” featuring in Alternative B of Article XXVII *bis* at the fourth session of the Committee noted that the approach that had been advocated by his Government would end up being adopted by the parties through inter-creditor agreements even if the planned Protocol were silent on the issue and, accordingly, withdrew his Government’s proposal.

12. The representative of another Government noted that the maintenance of a public service was particularly complicated where the debtor in default who had been providing the public service

was located in a State other than the State receiving the public service, by reason of the fact that the State receiving the service would normally have no say in the regulatory negotiations regarding the space asset in question. The representative of yet another Government, however, expressed concern that the State receiving the public service, which might only represent a fraction of the services carried by the relevant satellite, might, as the result of the incorporation in the planned Protocol of a rule on public service, be able to exercise a disproportionate influence on the remainder of the services carried by the satellite.

13. The representative of one Government referred to the approach used to address the public service issue in Article XXV of the Protocol to the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*) on Matters specific to Railway Rolling Stock and wondered whether a similar approach might not be adopted in the planned Protocol. However, the representative of another Government recalled that, when the idea of following said approach had been proposed at an earlier stage in the development of the revised preliminary draft Protocol as amended, it had been decided that it would not be appropriate to do so, *inter alia* because of the risk of creditors being obliged to maintain an unprofitable service inherent in such an approach.¹¹

14. In the light of this risk, the representative of one Government proposed that one solution might be to set a time limit on the duty to maintain a public service: under such a solution, the creditor would have the duty of maintaining the public service while the State receiving the service would assume the duties of the defaulting debtor and look for alternative means of maintaining the service. This proposal was supported by the representatives of some Governments, however with the qualification that, if the creditor incurred economic losses in the period during which it was under the duty of maintaining the service, the State invoking the public service limitation would have to compensate such creditor by assuming the duties of the debtor. And, by the same token, it was felt that, where such a State duly performed the outstanding duties of the debtor, that State should be entitled to receive any profits that might be generated by the service during the period it was carrying out those duties.

15. The representative of one Government suggested that it be clarified that the creditor exercising its default remedies was not bound to maintain the public service itself but could contract the performance of this duty out to a third party, as most creditors would be financial institutions and, as such, not at all versed in the technical aspects of operating a satellite.

16. With a view to bridging the divergent opinions voiced on this issue, the representative of another Government proposed that any rule on public service to be incorporated in the planned Protocol should be subject, on the one hand, to a declaration giving States the choice of opting into the rule and, on the other, to the possibility for the parties to the agreement providing for the public service to contract out. This proposal was supported by the representatives of many Governments, in particular given the low representation of the developing world on the Informal Working Group and as a more balanced solution than simply deleting Article XXVII *bis*.

IV. CONCLUSIONS OF THE INFORMAL WORKING GROUP

17. In the light of the foregoing considerations, upon a proposal tabled by the representative of one Government,¹² the Informal Working Group agreed upon the features of a proposed new alternative version of Article XXVII *bis*.

18. This proposed new solution comprised the following features:

¹¹ Cf. Study LXXIIJ – Doc. 16., p. 6.

¹² Cf. the discussion paper on this subject submitted during the meeting of the Informal Working Group reproduced as Appendix VII to this report.

- a creditor intending to exercise one or more of its Convention remedies in respect of a space asset providing a public service that would have the direct effect of interrupting that service would, provided that the State in receipt of that service was not in default of its contractual duties and that the contract for the provision of the public service was with the debtor or an entity directly controlled by the debtor, be required to provide notice to the Registrar of the future International Registry for space assets (hereinafter referred to as the *Registrar*) of its intent to do so, whereupon it would be for the Registrar to notify that State of the time (a period of six months) which it had to find an alternative means of maintaining the service, a time during which the debtor would be under the duty to absolve itself of all duties owed by it to the creditor¹³ and the creditor under that of abstaining from the exercise of any one or more of its Convention remedies that would have the direct effect of interrupting the service;
- the service would have to be acknowledged by the parties to the contract providing for that service as being in the nature of a “public service” both in that contract and, by means of a notice, in the future International Registry for space assets, this element of the proposal being designed to ensure that a creditor with a previously-registered interest in the space asset would not be bound by any public service limitation that might be incorporated in the planned Protocol (although consensus on making this last point a requirement of the proposed rule was not achieved¹⁴); and
- the requirement that the creditor give notice to the Registrar of its intent to exercise remedies that would have the effect of interrupting the public service would not, however, preclude the creditor, during the time to be allowed for the State in receipt of that service to find an alternative means of maintaining it, from engaging in any activities that might facilitate the exercise of its remedies, such as the seeking of new licences and contracts for the operation of the space asset in question, whilst, on the other hand, the State in receipt of the public service would, specifically, be able to participate in any proceedings of the regulatory authority of the licensing State that the debtor might take part in and, generally, the creditor, the debtor and the State in receipt of the public service would, during the time to be allowed for that State to find an alternative means of maintaining the service, be bound to co-operate in good faith to find a commercially reasonable solution that would permit its continuation.

19. It was agreed that the question as to whether the proposed new alternative version should be subject, on the one hand, to a declaration giving States the choice of opting into the rule and, on the other, to the possibility for the parties to the agreement providing for the public service to contract out¹⁵ should be referred to the Committee.

20. The proposed new alternative version particularly commended itself to the Informal Working Group for the opportunity that it would give the State in receipt of the public service to be directly involved in any proceedings of the regulatory authority of the licensing State that the debtor might take part in, whether or not the creditor or debtor was located within that State.

21. It was agreed that the proposed new alternative version should, once drafted on the basis of § 18 *supra*, be included, inside square brackets, in a footnote to the text of Article XXVII *bis* of the revised preliminary draft Protocol as amended to be sent out with the invitations to the fifth session of the Committee. The Informal Working Group believed the proposed new alternative version to be preferable to either of the alternative versions currently featuring in Article XXVII *bis* and recommended that it should, therefore be taken as the basis of the Committee’s further deliberations on this question, a belief and a recommendation that should also be reflected in the footnote.

¹³ As indicated by the appearance of the relevant clause of the aforementioned discussion paper in square brackets, consensus on making this last point a requirement of the proposed rule was not achieved.

¹⁴ As again indicated by the appearance of the relevant clause of the aforementioned discussion paper in square brackets.

¹⁵ Cf. § 16, *supra*.

V. CLOSING OF THE INFORMAL WORKING GROUP MEETING

22. No other business being raised, *Mr Estrella Faria*, after thanking all the participants for their contributions to the discussions, declared the Informal Working Group meeting closed at 6 p.m. on 21 October 2010.

VI. IMPLEMENTATION OF THE CONCLUSIONS OF THE INFORMAL WORKING GROUP

23. In line with the decision taken by the Informal Working Group, the Secretariat has drafted a tentative new Alternative C of Article XXVII *bis*, which, as reviewed by the Co-chairmen of the Drafting Committee of the Committee, reads as follows:

“[Alternative C ¹⁶

1. An entity of a Contracting State that enters into a contract with the debtor or an entity controlled ¹⁷ by the debtor for the provision of a service acknowledged by the parties as being a public service in that Contracting State and involving access to or the use of a space asset in respect of which the debtor has entered into an agreement with a creditor governed by this Protocol may register a notice in the International Registry, in accordance with Article 16 of the Convention, stating that the space asset is providing or intended to provide a public service. ^{18 19}

2. A creditor holding an international interest in a space asset of a kind that is the subject of a notice registered in accordance with the preceding paragraph may not exercise any of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol in respect of that space asset that would result in the interruption of the public service covered by that notice prior to the expiration of six months after its registration of a notice in the International Registry, in accordance with Article 16 of the Convention, of its intention to exercise any such remedies, if the debtor does not cure its default within that period. ²⁰

3. The Registrar shall notify the State entity of the date of expiry of the six-month period referred to in the preceding paragraph. ²¹

4. During the period referred to in the preceding paragraph:

(a) the creditor, the debtor and the State entity shall co-operate in good faith with a view to finding a commercially reasonable solution permitting the continuation of the public service; and

¹⁶ It was proposed by the Informal Working Group that this or any other rule on the subject that might be included in the planned Protocol should be subject, on the one hand, to the possibility for States, via the lodging of a declaration, to opt into the rule and, on the other, to the possibility for the parties to the agreement providing for the public service to contract out.]

¹⁷ Concern was expressed by one of the Co-chairmen of the Drafting Committee as to the uncertainty that use of the concept of “control” might engender.

¹⁸ It is suggested by the Co-chairmen of the Drafting Committee that, in so far as the notice provided for under this paragraph would need to identify a specific space asset, a requirement of identifiability will need to be incorporated in this paragraph, in accordance with the requirements of the envisaged International Registry for space assets.

¹⁹ It is noted by the Co-chairmen of the Drafting Committee that, in so far as the notice envisaged by this paragraph does not fall within one of the categories listed under Article 16 of the Convention, the preliminary draft Protocol will need to amend Article 16 on this point.

²⁰ It is noted by the Co-chairmen of the Drafting Committee that, in so far as the notice envisaged by this paragraph does not fall within one of the categories listed under Article 16 of the Convention, the preliminary draft Protocol will need to amend Article 16 on this point.

²¹ It is suggested by the Co-chairmen of the Drafting Committee that consideration should be given to it being required that the creditor also inform the State entity of any notice that it might be intending to give to the International Registry under paragraph 2.

(b) the State entity may participate in any proceedings of the regulatory authority of the licensing State in which the debtor may participate, subject to the approval of the regulatory authority of that State if it is not a Contracting State.

[5. Notwithstanding paragraphs 2 and 3, the creditor is free to exercise any of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol if, at any time during the period referred to in paragraph 2, the State entity fails to perform its duties under the contract referred to in paragraph 1.]

[6. The limitation on the remedies of the creditor provided for in paragraph 2 shall not apply in respect of an international interest registered prior to the notice referred to in paragraph 1.]”

APPENDIX I

LIST OF PARTICIPANTS

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APPENDIX II

AGENDA

1. Adoption of the agenda
2. Organisation of work
3. Continuation of consideration of the appropriate balance to be struck in the Convention on International Interests in Mobile Equipment as intended to apply, through the planned Protocol thereto on Matters specific to Space Assets, to space assets between, on the one hand, the interests of a creditor seeking to exercise remedies against a space asset performing a “public” service in the event of its debtor’s default, and, on the other, those of one or more organs of the State anxious to ensure the continuity of the performance of the particular “public” service, notwithstanding the debtor’s default, in particular in the light of the discussion paper that emerged from the work accomplished by the Informal Working Group during the third session of the Committee of governmental experts and the discussion proposal that emerged from the Informal Working Group’s work during that Committee’s fourth session (Alternatives A and B of Article XXVII *bis* of the revised preliminary draft Protocol on Matters specific to Space Assets as it emerged from the fourth session of the Committee (C.G.E./Space Pr./4/Report, Appendix VIII) respectively)
4. Any other business.

APPENDIX III

EXPLANATORY NOTE ON THE DRAFT AGENDA

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

(a) Remit of the Informal Working Group on limitations on remedies

1. The Informal Working Group on limitations on remedies (hereinafter referred to as the *Informal Working Group*) was established at the third session of the Committee, held in Rome from 7 to 11 December 2009. It was given the task of finding a solution to a problem which, in its essence, comes down to the appropriate balance to be struck in the planned Protocol between, on the one hand, the interests of a creditor seeking to exercise remedies against a space asset performing a “public” service in the event of its debtor’s default, and, on the other, those of one or more organs of the State anxious to ensure the continuity of the performance of the particular “public” service, notwithstanding the debtor’s default.²²

(b) Organisation of, and participation in the intersessional meeting of the Informal Working Group

2. Following meetings of the Informal Working Group held during the third and fourth sessions 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 (hereinafter referred to as the *Committee*), held in Rome from 7 to 11 December 2009 and 3 to 7 May 2010 respectively, the Committee at the conclusion of its fourth session decided that an intersessional meeting of the Informal Working Group (hereinafter referred to as the *meeting*) should be held prior to the holding of the fifth session of the Committee, to be held in Rome from 21 to 25 February 2011, with a view to advancing the work hitherto accomplished by the Informal Working Group. The meeting will be held in Rome on the afternoon of 20 and on 21 October 2010, with the possibility of extra time being found on the morning of 23 October 2010, if necessary.

3. All Governments participating to date in the work of the Informal Working Group and that of the Informal Working Group on default remedies in relation to components, also established by the Committee at its third session, have been invited to attend the meeting, together with those representatives of the international commercial space and financial communities having participated to date, as observers, in the work of the Informal Working Group. The meeting will be moderated by the Secretary-General of UNIDROIT.

II. PROGRESS ACHIEVED TO DATE BY THE INFORMAL WORKING GROUP

(a) Progress made during the third session of the Committee

4. The work accomplished by the Informal Working Group during the third session of the Committee was reflected in a discussion paper setting out a proposal for a new provision on limitations on remedies prepared by the Secretariat, on the basis of informal proposals submitted by the representative of Germany.²³ In presenting this paper to the Committee at the conclusion

²² C.G.E./Space Pr./3/Report rev., §§ 27-33.

²³ C.G.E./Space Pr./3/W.P. 23.

of that session, the Secretary-General noted, however, that it had neither been approved by the Informal Working Group nor reviewed by the Drafting Committee but was rather intended as the basis for further consultations.²⁴ Significantly, though, a number of delegations welcomed the discussion paper as providing an important step forward in the development of a balanced solution.²⁵

(b) *Progress made during the fourth session of the Committee*

5. The consultations continued at the fourth session of the Committee, where the Informal Working Group came up with a new discussion proposal, couched in two technical approaches - one a rights approach and the other a remedies approach - to the achieving of the conceptual goal of ensuring that contractual obligations for the provision of public services be maintained both where a creditor was exercising its rights under the Convention on International Interests in Mobile Equipment (hereinafter referred to as *the Convention*) as applied to space assets and where the ownership of a space asset was being transferred.²⁶ Several delegations viewed the new discussion proposal as a positive step toward the goal of finding an acceptable solution on public service and indicated that they would be happy to make it the subject of further consideration by their Governments and consultations with their commercial space sectors.²⁷

6. Following discussion, it was decided that the discussion paper that had emerged from the work accomplished by the Informal Working Group during the third session of the Committee and the discussion proposal having emerged from the Informal Working Group's work during the Committee's fourth session should be presented as Alternatives A and B of Article XXVII *bis* of the revised preliminary draft Protocol as it emerged from the fourth session of the Committee (hereinafter referred to as *the revised preliminary draft Protocol*) respectively, as options for further consideration.²⁸

7. Some delegations noted that the retention of the discussion paper that had emerged from the work accomplished by the Informal Working Group during the third session of the Committee alongside the later discussion proposal need not preclude amendment of the former.²⁹

8. Article XXVII *bis* of the revised preliminary draft Protocol, which appears in square brackets, reflecting the fact that the Committee has not to date taken a decision on the matter, accordingly reads as follows:

[Article XXVII *bis* – *Limitations on remedies in respect of public service*

[Alternative A

1. – A State has the right to object to the exercise of default remedies, as provided in Chapter III of the Convention and Articles XVIII to XXIII of this

²⁴ C.G.E./Space Pr./3/Report rev., § 34.

²⁵ *Idem*, § 37. One delegation, though, noted that paragraph 5 of the discussion paper did not take account of its proposal that the requirement of prior notice be treated as unnecessary in the event that the State had exercised an option pursuant to paragraph 3. It was agreed that, given the nature of the discussion paper as a basis for further consultations, this matter could be dealt with at the following session of the Committee (C.G.E./Space Pr./3/Report rev., § 35). Another delegation sought clarification that the ability of a State, under paragraph 5 of the discussion paper, to register a notice recording that a space asset was used for the provision of a public service in the vital interest of that State within six months after the launch of that asset did not prohibit a State from filing such a notice after the six-month period but that any previously recorded interests would not be affected by such a notice (*idem*, § 36). This point was agreed (*idem*).

²⁶ C.G.E./Space Pr./4/W.P. 13.

²⁷ C.G.E./Space Pr./4/Report, § 137.

²⁸ *Idem*, § 139.

²⁹ *Idem*, § 138.

Protocol, in respect of a space asset needed for the provision or maintenance of a public service which is in the vital interest of that State if the exercise of those remedies would cause interruption in the provision or maintenance of that service.

2. – Within twenty days from the date on which the State has notified the creditor of its objection to the exercise of remedies under the preceding paragraph, the creditor may exercise the right to step in and assume responsibility for the provision or maintenance of the relevant service in the State concerned or appoint a substitute entity for that purpose, with the consent of that State and of the licensing State.

3. – If the creditor chooses not to exercise its rights under the preceding paragraph, the State that objects to the exercise of default remedies by the creditor under paragraph 1 shall have the option of:

(a) curing the default by the debtor by paying to the creditor all sums outstanding for the entire period of default; or

(b) taking or procuring possession, use or control of the space asset and assuming the debtor's obligations by stepping into the obligations of the debtor for the provision of a public service in the State concerned.

4. – A State that objects to the exercise of default remedies by the creditor under paragraph 1 shall exercise its rights under the preceding paragraph within ninety days. After such period, the creditor shall be free to exercise any of the remedies provided in Chapter III of the Convention and in Articles XVIII to XXIII of this Protocol, in respect of the relevant space asset.

5. – A State may only invoke the right to object to the exercise of default remedies in accordance with this Article if it has registered in the International Registry a notice recording that the space asset is used for providing a public service in the vital interest of that State prior to the registration of an international interest in that space asset by a creditor [or if it has registered such notice within six months of the launch of a space object, even if after the registration of an international interest by the creditor].³⁰

[Alternative B

Concept

Contractual obligations for the provision of public services should be maintained both where a creditor is exercising its rights under the Convention as applied to space assets and where the ownership of a space asset is being transferred.

³⁰ A footnote to the text of Alternative A indicates that it constitutes a discussion proposal that emerged from the Informal Working Group on limitations on remedies during the third session of that Committee.

Two technical approaches to achieve this goal

I. Rights approach

Article ...

1. – A lease of a space asset for the provision of public services which is so acknowledged by the parties may be registered by notice in accordance with Article 16 of the Convention.

2. – The registration of a notice of a public services lease made within a six-month period after the date of launch of a satellite prevails over other rights previously registered.

3. – Any transfer of ownership of a space asset, either through a sale or through the exercise of the remedies provided in Chapter III of the Convention and Chapter II of this Protocol, is subject to the previously registered lease notice. The transferee is bound by the obligations of the lessor under the lease.

4. – Any lease registered by notice under paragraph 2 which is in breach of a previously registered financing contract may be struck from the International Registry at the request of the creditor.

II. Remedies approach

Article ...

1. – The creditor may not exercise the remedies provided in Chapter III of the Convention and Articles XVIII to XXIII of this Protocol in respect of a space asset which is used for the provision or maintenance of a public service, to the extent that this could interfere with the contractual obligations of the debtor concerning the provision or maintenance of the public service.

2. – The preceding paragraph shall only apply if a notice is registered in the International Registry recording that the debtor is contractually obliged to provide or maintain public service through that space asset

(a) prior to the registration of the international interest in that space asset by the creditor exercising remedies or

(b) within [six months] from the date of launch of the space asset, even if after the registration of the international interest by the creditor.

Such a notice can be registered by the parties to the contract or by the State to which the public service is provided.] ³¹]

III. ASSISTING THE WORK OF THE INFORMAL WORKING GROUP

9. With a view to facilitating progress at the forthcoming meeting of the Informal Working Group, the UNIDROIT Secretariat would invite those participating in its work to consider formulating proposals taking account of the discussions held during the third and fourth sessions of the

³¹ A footnote to the text of Alternative B indicates that it constitutes a discussion proposal that emerged from the Informal Working Group on limitations on remedies during the fourth session of that Committee.

Committee, as reflected in Alternatives A and B of Article XXVII *bis* of the revised preliminary draft Protocol respectively.

IV. ACTION TO BE TAKEN IN RESPECT OF THE OUTCOME OF THE MEETING

10. The Informal Working Group will be invited to report back to the Committee at its fifth session on the outcome of the meeting.

APPENDIX IV

COMMENTS

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

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

SKY Perfect JSAT Corporation

1. RE THE PUBLIC SERVICES EXEMPTION

As shown in our previous comments, in the light of the concerns expressed regarding the public service exemption from default remedies, the issue of limitations on remedies is significant among the key issues outstanding in respect of the revised preliminary draft Protocol.

SKY Perfect JSAT Corporation submits the following comments and hopes that these comments will be favourably considered at the consultations.

I. Framework of the Convention on International Interests in Mobile Equipment (hereinafter referred to as the *Convention*)

The Convention establishes an international regimen introducing the following new regimen and concepts.

The new regimen and concepts are well accepted, in particular, in the context of aircraft finance and, as a result, the Convention and the Protocol to the Convention on Matters specific to Aircraft Equipment (hereinafter referred to as the *Aircraft Protocol*) entered into force on 1 March 2006.

(a) Realisation of transparency in the relationship between rights and duties

- Constitution of an international interest (Article 2);
- Establishment of the international registration system (Article 16);
- Priority of competing interests (Article 29)

(b) Realisation of swift default remedies

- Remedies of chargee (Article 8);
- Remedies of conditional seller or lessor (Article 10)

(c) Realisation of effects in insolvency proceedings

- Effects of insolvency (Article 30);
- Jurisdiction in respect of insolvency proceedings (Article 45).

II. Extension of the Convention to space assets

Based upon the broad understanding that it is desirable to implement the Convention as it relates to space assets, in the light of the purposes set out in the Convention, the preliminary draft Space Protocol is being discussed intensively with a view to adapting the Convention to meet the particular demand for space assets and to finance their acquisition and use as efficiently as possible.

In this context, the necessary concepts to adapt the Convention have been agreed, through the introduction of new terms such as “debtor’s rights”, “licence” and “rights assignment” and of provisions relating to the recording of rights assignment as part of the registration of an international interest, the priority of recorded rights assignments and the duty of the debtor assignor as to licences.

We understand how the benefits from expanded space-based services which the planned Space Protocol together with the Convention may yield are to be enjoyed by all Contracting States. It is significant to ensure the benefits by carefully avoiding incorporating inconsistent concepts into the revised preliminary draft Protocol.

III. Concerns regarding the public services exemption

As noted in its previous messages of 14 October 2009 and 7 April 2010, SKY Perfect JSAT Corporation shares the concerns expressed at the idea of giving Contracting States a right to limit the exercise of default remedies in respect of public services that did not exist before, as this might negatively affect the benefits to be derived from the revised preliminary draft Protocol.

Article XXVII *bis* of the revised preliminary draft Protocol, presented as a discussion proposal, might virtually give Contracting States a right to limit the exercise of default remedies in respect of a space asset for the provision or maintenance of a public service. We note that Alternative A stipulates that a Contracting State would have the right to object to the exercise of default remedies in respect of a space asset needed for a public service and that the rights approach of Alternative B would make the transferee bound by the obligations of the lessor under the public service lease. Under the remedies approach of Alternative B, the creditor might not exercise the remedies in respect of a space asset which was used for the provision or maintenance of a public service.

Looking back upon the past, we do not think sufficient and extensive discussion took place for the introduction of such a new right. For example, it should be noted that, after the second session of the UNIDROIT Committee of governmental experts for the preparation of a draft Space Protocol, only eight Governments responded to the request from the UNIDROIT Secretariat for information on the treatment of public services in their jurisdictions.

It should also be noted that the Aircraft Protocol carefully avoided a broad public service exemption in view of the possible negative effect. Since space-based financing is more risky, the likely negative effect it would have on the preliminary draft Protocol is, therefore, even greater.

Careful consideration should be given to the question of balancing the need of Contracting States to guarantee the continuation of a public service with the rights of creditors. We have to be careful not to introduce a premature international right and obligation.

The question as to how best to arrange this balance is best left to the development of business practice in the coming years. Legislation-based solutions can also, alternatively, be worked out in contracts, on the basis of agreements resulting from intensive negotiations among the parties. It is important to understand the dynamics of the commercial and financial communities and to respect the agreements made by the parties concerned, including Contracting States.

IV. Conclusions

On the based of the aforementioned considerations, SKY Perfect JSAT Corporation has reached the following conclusions:

1. The proposed Article XXVII *bis* might create a new right and, as a result, seriously impair the core concepts originally intended to be brought in by the revised preliminary draft Protocol together with the Convention, which are the realisation of transparency in the relationship between rights and duties, the realisation of swift default remedies and the realisation of effects in insolvency proceedings.

2. Concern at the idea of giving Contracting States a right to limit the exercise of default remedies is to be broadly shared, if the intention of the revised preliminary draft Protocol together with the Convention is to meet the particular demand for space assets and to finance their acquisition. We have to be careful in introducing a premature international right and obligation without sufficient and extensive discussion among the parties concerned.

3. The question as to how best to balance the need of Contracting States with the rights of creditors should not be dealt with in the revised preliminary draft Protocol but, instead, be left to the development of business practice, on the understanding that it is important to respect the agreements reached among the parties concerned.

(Omissis)

APPENDIX V

COMMENTS

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

COMMENTS AND PROPOSALS SUBMITTED BY GOVERNMENTS

United States of America

1. ISSUES AND STATUS

I. Overview and timing

The U.S. Government's position from the outset has been and remains that the purpose of the planned draft Protocol is to make financing more available or available on more favourable terms to expand commercial activities in outer space. This requires that the proposed draft, as was the case with the Aircraft and Rail Protocols, recognise applicable industry and financing practices necessary to attract private capital. Any efforts to create further obligations on secured financing parties, greater than exist now absent the Protocol, will reduce its value and make it unattractive to industry. This is especially the case given the already greater risk for investment and finance in the space sector as compared to commercial airspace. It is for these reasons that the U.S. Government has supported the concerns of key industry interests and will continue to do so.

The U.S. Government at the May 2010 session of governmental experts in Rome raised substantial issues on its behalf and on behalf of the Satellite Industry Association (S.I.A.), noting that, without the support of key space industry sectors, the planned draft Protocol could not achieve its objective. This was accommodated at the May 2010 session of the UNIDROIT Governing Council and the original time schedule, which contemplated a final conference at the end of 2010, was altered so as to allow additional time to seek agreement between participating States and industry.

The next session of governmental experts will now be in February 2011 and, if then approved by the UNIDROIT Governing Council, a diplomatic Conference could take place at the end of 2011 or early in 2012.

Note that the conclusion of a Protocol does not imply acceptance of the text. States would have to ratify the Protocol as a treaty instrument, along with the Cape Town Convention, in order to implement its terms.

II. Issues

There follows a summary of issues, together with comments on the status of these (i.e. any changes resulting from the May 2010 Rome session of governmental experts), and other issues:

(Omissis)

(d) Limitation of remedies, including the public service exemption

See point No. 3 of the S.I.A. comments circulated at the May 2010 session of governmental experts.³²

³² *Idem*, 10-12.

Current status: nothing resulted from the May 2010 session of governmental experts. A wide gap remains between the U.S. Government and supporters, including S.I.A., who have sought deletion of this provision, and those seeking maintenance of an as yet unspecified scope of public service obligations for user-contract countries. Proponents of the previous step-in rights proposal have withdrawn support for that but new alternatives have been tabled that are aimed at an enforcing creditor's obligation to continue certain undefined public services for user countries not in default, possibly for a limited time.

There is as yet no evidence that space financing interests would accept these or other modified proposals. Absent that, we expect to restate our initial position, i.e. the effort to constrain enforcement of remedies by regulating the provision of services beyond what may be required by a licensing authority is unworkable. Further compromise proposals may emerge with more narrow service obligations but willingness of financing interests to support such an approach would appear necessary for any agreement.

To place this in context, unlike the Aircraft and Rail Protocols, the revised preliminary draft Protocol will already condition the exercise of remedies by enforcing creditors by recognising the primacy of national regulatory and licensing requirements. The U.S. Government has supported that limitation (Article 27(2)) based on regulators' concerns in countries participating in the sessions of governmental experts.

However, from the outset, the U.S. Government and like-minded States have not supported a further and additional limitation on the exercise of remedies resulting from a proposed public service exemption and have argued that such an exemption should be subsumed in the exemption for national licensing and regulation. This position has gathered a certain amount of support from other delegations but not enough so far to prevail. An earlier approach that attempted to limit any public service exemption to safety, navigation and similar matters has failed so far to gain substantial support but may resurface as a compromise. Proponents of a public service obligation have objected to leaving decisions as to the maintenance of public services in third countries which have contracted for such services with the initial licensing State. No agreement has been reached.

The initial public services draft proposal appears to be effectively off the table because step-in rights for third countries met significant opposition. Counter-proposals have now been made by the Canadian and German delegations that would provide a public service exemption to the extent of existing leases or contracts that are not in default and possibly for a limited period of time, to be determined. Essentially, this proposal would provide for a limited non-disturbance right in favour of such performing leases or contracts. *However, it is important to distinguish between a provision that amounts to a stay of a creditor's enforcement rights, which could be relevant to the scope of the revised preliminary draft Protocol, and a guarantee of services, which would be outside the reach of the revised preliminary draft Protocol.* The acceptability of this scaled down compromise has yet to be determined. An alternative approach might be to allow a ratifying State to elect a public service exemption as an optional declaration.

The related issue of the definition of "critical public services" remains. Absent agreement on a definition, it is not clear what options there are for a State contracting for public services itself determining whether the services qualify for the exemption.

(Omissis)

APPENDIX VI

COMMENTS

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

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

Satellite Industry Association of the United States of America

The Satellite Industry Association (S.I.A.) is a consensus-based trade association that serves as the unified voice of the U.S. satellite industry on policy, regulatory and legislative issues affecting the satellite business. The S.I.A. represents leading global satellite operators, service providers, manufacturers, launch services providers, integrators, ground equipment suppliers and satellite radio and television providers.³³

In many prior instances, the S.I.A. and its members have stated their concerns that the revised preliminary draft Protocol³⁴ is not an effective instrument for increasing capital flow to commercial space projects. The S.I.A. considers that the revised preliminary draft Protocol adds an unnecessary supra-national layer of law at a time when neither the S.I.A. nor the financial community that supports its members believes a new legal regime is needed to expand space-based services or facilitate asset-based financing.

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

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

(Omissis)

³³ As of October 2010, the executive members of the S.I.A. were as follows: ARTEL Incorporated, The Boeing Company, [CapRock Government Solutions](#), DirecTV, Hughes Network Systems, ICO Global Communications, Integral Systems, Intelsat, Iridium Satellite LLC, Lockheed Martin, Loral Space & Communications, Northrop Grumman, [Rockwell Collins](#), [SES World Skies](#), SkyTerra and TerreStar Networks. As of the same date, the associate members of the S.I.A. were as follows: [Argiva Satellite & Media](#), Alliant Techsystems, [Cobham SATCOM Land Systems](#), Cisco, [Comtech EF Data](#), [DRS Technical Services, Inc.](#), [EchoStar](#), Emerging Markets Communications, Inc., Eutelsat, [GE SATELLITE](#), [Glowlink](#), [iDirect Government Technologies](#), Inmarsat, Marshall Communications Corp., [Panasonic Avionics Corporation](#), Spacecom, Ltd., [Spacenet](#), Stratos Global, TeleCommunication Systems, Inc. – Government Solutions, [Telesat](#), [Trace Systems](#), [ViaSat](#) and Wildblue Communications.

³⁴ Reference to the preliminary draft Protocol is as revised by the Drafting Committee established by the Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets on 3 May 2010.

3. PUBLIC SERVICE EXEMPTION FROM DEFAULT REMEDIES

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

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

(Omissis)

Conclusion

The revised preliminary draft Protocol fails to achieve its expressed goal of facilitating the financing of space assets through a uniform and predictable legal regime governing the taking of security over space assets. The S.I.A. is not alone in its opposition to the substance and direction of the revised preliminary draft Protocol. Other industry participants representing a significant proportion of the space business in the U.S., Europe and Asia have all voiced their concerns.³⁵ This is not an environment that is conducive to the promulgation of a complex international treaty intended to foster the development of the global commercial space industry.

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

³⁵ The European Satellite Operators Association (E.S.O.A.) (on behalf of its 10 members and 10 supporting members), the Asia-Pacific Satellite Communications Council (A.P.S.C.C.) (representing over 100 members from Asia, Europe and North America), Global VSAT Forum (comprising more than 200 companies from 100 countries in every major region of the world and from all sectors of the satellite industry), ING, Barclays Capital, ManSat, QuetzSat, Ciel Satellite, O3b Networks, Elseco, Marsh, Aon-ISB, SES, Intelsat, Eutelsat and Avanti Communications, among others, have each expressed their concerns about the revised preliminary draft Protocol and its effect on space commerce.

APPENDIX VII

DISCUSSION PAPER

LIMITATIONS ON REMEDIES IN RESPECT OF PUBLIC SERVICE - PROPOSED PRINCIPLES

The following conditions must exist in order for the provision to be invoked:

1. A contract for the provision of public services that requires the use of a space asset, which is so acknowledged by the parties, has been registered by notice in accordance with Article 16 of the Convention.
2. The party contracting for the provision of public services is not in default of its contractual obligations.
3. The exercise of a remedy with regard to a space asset would directly result in the interruption of the provision of the public services.
4. [The registration of a notice by the party contracting for the provision of the public services is prior to the registration of the security interest.]
5. The contract for the provision of the public services must be with the debtor or another entity under the direct control of the debtor.

Prior to enforcing its remedy, the creditor must register a notice of enforcement, which gives rise to a six-month stay of enforcement. Following registration of this notice, the Registrar notifies the party contracting for the provision of the public services. During the six-month period, in order to facilitate the continuation of the public services, the creditor, the debtor and the party contracting for the provision of public services shall co-operate in good faith to find a commercially reasonable solution that would permit the continuation of the public services.

Once invoked:

1. There is a six-month stay in the enforcement of a remedy that would directly result in an interruption of the public services.
2. The party contracting for the provision of the public services may take part in any proceedings of the regulatory authority of the licensing State in which the debtor may participate.
3. [The continuation of the stay is conditional on the party contracting for the provision of the public services performing its material obligations, including the payment of amounts due by it to the other party under that contract.]

NOTE: Should this be subject to an optional state declaration?