

59th INTERNATIONAL ASTRONAUTICAL CONGRESS
(Glasgow, 29 September / 3 October 2008)

***LATEST DEVELOPMENTS IN RESPECT OF UNIDROIT'S PREPARATION OF A
NEW INTERNATIONAL REGIMEN FOR COMMERCIAL SPACE FINANCING***

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I. *Background to, and status of implementation
of Cape Town Convention in general*

The Convention on International Interests in Mobile Equipment, opened to signature on 16 November 2001, is, as most of you will already know, designed to make the cost-efficiency benefits of asset-based financing more widely available to those categories of high-value mobile equipment regularly moving either across or beyond national frontiers in the ordinary course of business, such as aircraft, railway rolling stock and satellites. The thinking is that the legal certainty that will flow from States adopting the new international regimen, in particular through operation of a fully computerised international registry recording financial interests taken in such highly mobile assets, can only encourage financial institutions to lend money against such assets, which otherwise would, in most cases, be seen as somewhat risky, in view of the uncertainty as regards the applicable law to any disputes that might arise.

Not surprisingly, these benefits are such that the Convention goes from strength to strength. One measure of this strength is to be seen in the one-third reduction by the Export-Import Bank of the United States of America of its exposure fee on the export financing of large commercial aircraft for buyers in Contracting States to the Convention and the Protocol thereto on Matters specific to Aircraft Equipment.

With the entry into force of the Aircraft Protocol, the Convention entered into force in respect of aircraft objects on 1 March 2006 - the Convention only enters into force as regards a category of assets to which a Protocol applies as from the time of the entry into force

of that Protocol. As of 23 September 2008, the Convention as applied to aircraft objects is in force between 23 States, representing a good mix of developing and industrialised countries, and is set fair to enter into force among a considerable number of additional States, in view of the amended proposal submitted last month by the Commission of the European Communities for a Council decision on the conclusion by the European Community of the Convention and the Aircraft Protocol. The International Registry for Aircraft Objects has been in operation since the entry into force of the Convention as applied to aircraft objects. It is run by Aviareto Limited, an Irish company based in Dublin. In 2007 47,266 international interests were registered against 22,365 aircraft objects. It already covers over 50% of the world's commercial aircraft transactions. There can be no doubt that the International Registry for aircraft objects has got off to an excellent start and has earned wide acceptance in the user community.

A second Protocol to the Convention, this time on Matters specific to Railway Rolling Stock, was opened to signature in Luxembourg on 23 February 2007. Although the Protocol has not yet entered into force - to date it has only been signed by four States - it is attracting great interest, particularly among those developing countries anxious to develop their rail infrastructure.

II. *Preliminary draft Space Protocol*

(a) *Specific features*

As most of you, again, will know, the new international regimen which will apply to commercial space financing once the Convention is in force in respect of space assets

is designed, first and foremost, to create a new international interest in space assets. This international interest amounts to what most of you would understand as an international mortgage. The international regimen sets out to endow the international interest with clear and commercially oriented international rules; these will provide, notably, for the prompt enforcement of remedies and guarantee that the priority rules and enforcement mechanisms of the international regimen will not be modified or qualified as a result of the insolvency of the debtor. As mentioned a moment ago, the key feature of the international regimen is the creation of an international registry and the fact that the new international interest will be enforceable against third parties in all States Parties provided it is registered in the International Registry to be set up under the future Protocol. It will be possible, through this Registry, for a financier considering advancing credit against a particular asset to evaluate instantaneously the exact status of the asset for financing purposes.

The general rules of this new regimen are carried in the Convention. The future Protocol, like the existing Protocols, is designed to carry those special rules necessary to implement the Convention in respect of space assets. First and foremost, this naturally means providing a clear definition of the categories of space asset covered and establishing the future International Registry for space assets. To the extent of any inconsistency between the Convention and a given Protocol, it is the latter that will prevail; in other words, the Protocol controls the Convention and not the other way round.

(b) Intergovernmental negotiations and referral of key issues to intersessional work

A preliminary draft Protocol, drawn up by a special working group representative of the different sectors of the international commercial space and financial communities, is currently before Governments. The Government of the Russian Federation has intimated that it is prepared to host the diplomatic Conference for the adoption of the draft Protocol that emerges from these

negotiations, in the event of these negotiations being successful. A couple of sessions of intergovernmental negotiations have already been held. 44 Governments are participating in these negotiations. These Governments represent not only Unidroit member States but also members of the United Nations Committee for the Peaceful Uses of Outer Space. The degree of interest in this project by both Governments and industry is extremely encouraging.

However, a number of key issues were identified at the last session of governmental experts as requiring intersessional work. These issues are essentially three in number, first, examination of the issues arising out of extension of the Convention as applied to space assets to cover debtor's rights and related rights, secondly, examination of the treatment of public service under national law and in practice and consideration of possible solutions to the problem as to how best to balance the need of Governments to guarantee the continuation of a public service performed by a space asset where the debtor was in default with the rights of the creditor upon such default under the Convention as applied to space assets and, thirdly, examination of certain issues relating to the future international registration system for space assets, in particular the criteria for the identification of space assets for the purposes of their registration in the future International Registry for space assets.

Following important intersessional work on these issues spearheaded by Unidroit, with significant support from both the key space-faring nations and the international commercial space and financial communities, the General Assembly of Unidroit member Governments last November established a Steering Committee designed to build consensus, both within Government and industry, around the provisional conclusions reached by Government/industry meetings held over the previous 18 months, with a view to completing the project as timeously as possible. Both the Governments of the key space-faring nations and leading representatives of the international commercial space and financial communities having taken an active

part in the intersessional work up to that point, the General Assembly decided that representatives of both the Governments and the international commercial space and financial communities having participated in that work should be invited to serve on the Steering Committee, on an equal footing, in particular with a view to ensuring that the end-product be commercially viable. The crucial message conveyed by the previous intersessional work was the need for the Steering Committee to take the necessary steps to simplify the preliminary draft Protocol so as to permit timeous completion of the project. In particular, the unanimous view of those participating in the intersessional work was that the sphere of application of the preliminary draft Protocol should be narrowed down to concentrate on those categories of space asset which were, realistically, the likely subject of asset-based financing transactions in the immediate future. The general view was, therefore, that the future Protocol should concentrate on the satellite, albeit viewed in its entirety, rather than aiming to cover also assets which might be the subject of asset-based financing one day, but not in the near future, such as assets manufactured in space. The thought was that the satellite, viewed in its entirety, accounts for some 80% of the potential asset-based financing market among those assets hitherto covered.

(c) Current status of project: work of Steering Committee

The Steering Committee got off to a great start, in no small measure thanks to the generous hospitality of the Government of the Federal Republic of Germany, which was quick to respond to the call issued by representatives of the international commercial space and financial communities during the intersessional work for Governments to give a lead on the prosecution of this project if the international commercial space and financial communities were to be convinced of the seriousness of the intention to complete the project timeously. The launch meeting of the Steering Committee was held in Berlin in May. A representative sample of Governments and the different sectors of the space industry and the financial

communities attended. The Steering Committee, aware of the need to ensure a successful transition back to the Committee of governmental experts, elected Professor Sergio Marchisio (Italy), Chairman of the Committee of governmental experts, Chairman of the Steering Committee too.

The progress accomplished by the Steering Committee on all but one of the key outstanding issues was such as to warrant the decision, at the end of its launch meeting, that the co-chairmen of the Drafting Committee of the Committee of governmental experts (Canada and the United Kingdom), both of whom were present in Berlin, should essay an alternative version of those provisions of the preliminary draft Protocol affected by its decisions on these key outstanding issues. The item which the Steering Committee consciously deferred, to a sub-committee, was the issue of public service, it being agreed that the Sub-committee in question should seek to come up with various options capable of being put to the Committee of governmental experts with a good chance of commanding broad support.

What were the issues then on which the Steering Committee was able to reach consensus? First, it has to be borne in mind that the intersessional work accomplished on the criteria for the identification of space assets had thrown up two consequential ancillary issues, both related to the sphere of application of the preliminary draft Protocol. One of these was the categories of asset to be covered in general, notably in function of the extent to which they lent themselves to unique identification for the purposes of registration. The other was the issue of the coverage of components in particular, especially given that the Convention is, already in its preamble, described as applying to high-value assets and the question that must inevitably arise as to the compatibility of a high-value threshold and the average, common-garden category of components. The Steering Committee accordingly concluded as to the need to narrow the definition of space assets employed in the preliminary draft Protocol down to those assets which were independently identifiable, in particular the satellite as a whole, transponders

and certain types of other component, referred to as “principal objects”, as well as other assets capable of independent control, this last introduction being designed to permit the registration of future developments, such as space hotels. The advantage seen in this solution was its exclusion of those non-principal components, the value of which would not be consistent with the intention of the drafters of the Convention.

Secondly, there was agreement with the intersessional conclusions reached by Sir Roy Goode on the issue of the most appropriate manner in which to accommodate the extension of the Convention as applied, through the future Protocol, to space assets to those debtor’s rights and related rights which are such important elements of a satellite’s value as collateral in the event of the debtor’s default. Most of you will not require further elucidation in this regard, I am sure, but, for those of you who may, I should mention that the typical sort of related rights are those permits, licenses or authorisations granted to control, use or operate a space asset, relating to the use of orbits positions and the transmission, emission or reception of electromagnetic signals to and from a space asset. Debtor’s rights, on the other hand, is the term used to denote those contractual rights to performance or payment due to a debtor by any person with respect to a space asset. There was agreement within the Steering Committee as to the need for these rights also to be covered by the future international regimen, not, though, with the idea of their being registered separately but rather with the intention of their being noted in the future International Registry against the relevant space asset.

Thirdly, the Convention system of registration being posited on the basis of unique identification criteria being available for the different categories of asset to be registered, it has, ever since the outset of work on the preliminary draft Protocol, been recognised that, in order to be registrable, space assets will need to have some sort of unique identification criteria. The initial text laid before Governments in 2003 provided five specific criteria, such as the name and address of the

debtor and the creditor, a general description of the asset and its intended location, the date and location of launch and, in the case of a component, a description of such component, the space asset of which it forms a part, to which it is attached or within which it is contained and each of the other identification criteria prescribed for such a space asset, as well as allowing for the regulations to be established by the Supervisory Authority under the future Protocol to specify additional criteria. This list of specific criteria was simply abandoned at the first session of governmental experts, the idea being to leave the question to be dealt with in the regulations. At the second session of governmental experts there was a feeling that the future Protocol needed to include at least some identification criteria, since otherwise the scope of the future Protocol would be left unclear. This matter was, therefore, referred to intersessional work. The solution decided upon by the Steering Committee was to take the system adopted in the Rail Protocol. In that context it had been agreed that there was no need for unique identification to be provided in the agreement between the contracting parties and that it would be sufficient for the asset to be capable of being identified as falling within the scope of the agreement. This would enable a class of assets or future assets to be covered by the same agreement and avoid the need for a separate agreement each time the debtor acquired a new asset. This said, it was agreed that identification criteria for registration purposes should not be left solely to the regulations but that certain basic identification criteria needed to be spelled out in the future Protocol, albeit with the idea that these basic criteria could then be supplemented by others to be laid down in the future regulations.

One issue on which it proved impossible to reach complete consensus concerned the question as to the enforcement regimen to apply in respect of a component functionally linked to another space asset in which another creditor has an interest. There was a widespread feeling among members of the Steering Committee that this was a matter customarily dealt with in inter-creditor agreements and that the future Protocol would, therefore, do better to stay silent on the issue,

especially if the intention was not to put off financiers. A minority, nevertheless, remained wedded to the idea of the matter being covered in the future Protocol. The difference of opinion led to the decision to set up a sub-committee to find a solution agreeable to all. A questionnaire has already been drawn up on this issue and a number of responses received, notably from financial institutions and those advising them. The Sub-committee will be meeting in Berlin next month, at the invitation of Commerzbank.

such completion, next summer or immediately thereafter.

III. Conclusions

As I hope you will agree, we are well on the way to sorting out the key outstanding issues and to bringing the results of the Steering Committee's work back to the Committee of governmental experts with a view to a speedy completion of the project at the diplomatic Conference which the Government of the Russian Federation has already indicated its preliminary willingness to host. Progress has been reached across a broad canvas of issues and we would anticipate later in the year being in a position to begin seeking to build consensus around the solutions advocated by the Steering Committee among those Governments and industry players not represented on the Steering Committee, with a view to preparing the ground for a successful resumption of the full intergovernmental consultation process. It has been most encouraging to see the way in which both the key space-faring nations and leading players from the international commercial space and financial communities have come together to work out solutions acceptable to both, for it is clear that only a Protocol that is going to work in practice and which may be expected, therefore, to enhance the chances of greater access to commercial finance for those operators and start-up companies in the less advantaged parts of the world is going to fly. I always find it egregious being drawn on precise time-tables but, as I have indicated, we are firmly committed to early completion of the project and would hope to be in a position to reconvene the Committee of governmental experts, with an accelerated programme for