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Legal Aspects of Transfer of Ownership and Transfer of Activities

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Introduction

The issue which had been chosen by IISL and ECSL is quite interesting. It is not theoretical but indeed very practical. Multiplication of the commercial activities in outer space and therefore of the possibility of transfers of ownership either because the companies would like to adapt their fleet of satellites to their commercial need, because the company itself or its control is transferred to the national(s) of an other country or because the company had given the satellite as security for a loan for instance under the UNIDROIT protocol or otherwise. This transfer of ownership or control may have important consequences in many fields of law. Because many are telecommunication satellites, special national laws on telecommunication or television broadcasting would apply, a control by the State may be done. Because satellites are very sensitive devices, domestic legislation may also require special authorisation to be sold to a national of a foreign country.
It is not the points we are going to consider today.
We are going to address to day the question of space laws which is posed in the case of a transfer of ownership of a satellite while in orbit. In fact it is necessary to expend the wording to transfer of activities because the ownership itself is not always the only way to transfer a satellite. In the 2006 resolution on Launching States and in the 2007 resolution on registration the word “changes in the supervision” is used. It is also larger than the notion of “transfer of ownership” but “transfer of activity” seems better for the purpose of our today discussion as it refers to a fact – whether ownership or activity - not to the legal consequence of this fact.

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The issue is based on the difficult logical connection between three main articles of the Outer Space Treaty: article VI on responsibility for national activities in Outer Space, article VII on liability of the launching States and article VIII on registration, jurisdiction and control over space objects.
This presentation will be done in three parts. In the first one the current legal framework of article VI, VII and VIII will be presented. In a second one the difficulty of transfer of ownership will be addressed; in a third, practical solutions will be envisaged.

I Presentation of the Current Legal Framework

Article VI of the Outer Space Treaty

This is a very central provision of the treaty. States are responsible for every "national activity" in outer space even when this activity is conducted by private persons, here referred to as "non governmental entities". I will not come back to the importance of this provision for legal and political reasons. The relevant point here is that during all the life in orbit of a space object, especially satellites, the State is responsible; this activity is assimilated to a governmental activity within the notion of "national activity". The State must authorise and continuously supervise the activity. This means that the link created by article VI is related to the nationality of the "non governmental entity" which conduct this activity in outer space, in other word the operator of the satellite. This link is established on a fact which may change if the "nationality" of the activity changes. Then the responsible State may change according to the change of ownership or more generally control over the satellite. As a consequence of this change, the obligation of authorisation and continuous supervision would change.

Article VII of the Outer Space Treaty and the Liability Convention

Liability of the launching State for damage caused by a space object.
I will not insist on this very well known issue. Let me only stress the most relevant points.
When they decided to organise the liability for damage in Outer Space, the States choose to put the burden of the risk on the launching State(s). This is done once for ever on the States which launches, procures the launch, offers the facilities or the territory of the launch. The solution is quite good for many reasons among them because it is the best time to control the satellite because at that time, States have a strong and not disputed jurisdiction mostly territorial. The fact that the liability lies on a well known State is also quite important and protective to the victim.
There is still a problem which is that the liability is determined for ever at the time of the launch and will not change afterward. If a space object is sold, if it comes to be under the control of another operator, the launching State(s) does not change, it stays as it was at the time of the launch. This liability stays until the space object is no more a space object i.e. after it is back to earth. This is extremely protective for the victims but may pose some difficulties of control and sharing of the burden of the risk during the life in orbit of the satellite.

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Registration under Article VIII of the Outer Space Treaty[1] and the Registration Convention

Article VIII is the last article of this trilogy. Article VIII of the Outer Space treaty provides the State "on whose registry an object launched into outer space is carried" with "jurisdiction and control over such object". Registration of space objects is legally the establishment of a legal link between a State and a space object. For that purpose, it may be compared to the flag of a ship or the registration of an aircraft. Like for the flag of a ship[2] or the registration of an aircraft[3] only one legal link of this nature may be established. Article II/2 of the registration convention clearly states that only one State can register a space object[4].

Indication of a Liable Launching State by the Registration of a Space Object

In coherence with the liability convention which is expressly referred to in the preamble of the convention, it is necessary to indicate to every potential victim one liable launching State. The registration does not make a State liable but it shows at least one of the liable launching States whose qualification as such cannot be denied. For that reason, only a launching State can register a space object.

II The Transfers of Ownership and Control of a Space Object

First point: the legality of a transfer the ownership or control of a space object.

<u>A space object may be sold/bought while in outer space.</u>

There is no objection to a transfer of ownership of a space object. Article VIII of the outer space treaty states that "*Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth*."

This means that a space object may be owned, the property rights on it are not affected by its presence in outer space. This ownership may be changed as it is on Earth.

1 See the excellent article VIII in the Cologne Commentary on Space Law by B. Schmidt-Tedd and Stephan Mick, 146 ff.
2 Law of the Sea convention article 92; Montego Bay convention UNCLOS 1982, 1833 UNTS 396
3 Convention on International Civil Aviation Chicago 1944 article 17f ; 15 UNTS 295
4 Registration Convention *article 2. Where there are two or more launching States in respect of any such space object, they shall jointly determine which one of them shall register the object in accordance with paragraph 1 of this article, bearing in mind the provisions of article VIII of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and without prejudice to appropriate agreements concluded or to be concluded among the launching States on jurisdiction and control over the space object and over any personnel thereof.*

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The registration of a space object may be changed as far as it respects the provisions of article II of the registration convention. (transfer between two launching States of the object). This was the case of the two Asia sat satellites which were registered by the UK for Hong Kong. When China took over the responsibility for Hong Kong these satellites were transferred from the register of the UK to the register of China; these transfers were transcribed on the UN registry. Given article 2/1 of the registration convention, "When a space object is launched into earth orbit or beyond, the launching State shall register the space object by means of an entry in an appropriate registry which it shall maintain,". . . the State which registers must be one of the liable launching States. The reason of this has been seen before: one main purpose of the registration is to show a liable launching State in order to ease a possible action of a potential victim.
What is the legal effects of this?

1. The property is transferred, including the rights and obligations which are connected to property in every legal system.
2. The responsibility for "national activity" according to article VI OST is transferred because it is related to a fact: the link of nationality of the operator. This activity must be authorised and continuously supervised by the "appropriate State".
3. The liability of the launching State(s) is unchanged as it is related to the time of the launch
4. The State of the new owner can register and have jurisdiction and control over the object if it is a launching State because of article II of the registration convention. If it is not it cannot.

If the new State or the State of the new owner was a launching State everything is ok. There is no change in the liability of the launching States, the registration can be changed, jurisdiction and control follows this change, the State responsible for the activity is the State of nationality of the new owner, it can efficiently control the activity. Everything is fine.

If the new State or the State of the new owner was not a launching State, it cannot register the object, it cannot have jurisdiction and control over the satellite, the "original" launching State stays liable for damage caused by the space object according to the liability convention. The State of the new owner is responsible for this "national activity" 'OST article VI[5]) without having jurisdiction and control (OST article VIII). This solution is rather impeding.

I. The "original" launching State stays liable even if it cannot in practice have any control over the satellite.
II. The State of the "national activity" is responsible according to OST article VI but cannot register it and have jurisdiction and control over it.

5 Interestingly Jean Francois Mayence makes a distinction between " jurisdiction on the activities (according to article VI) and jurisdiction on the space object (according to article VIII) The Belgian Law on the activities of launching operating and monitoring of space objects Brussels Belgian Senate April 26 2006 p.9.

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For that reason, some States require an authorisation for the change of ownership or control of space objects licensed under their legislation. The Belgian law at Chapter IV article 13 request an authorisation in case of a "transfer to a third party of authorised activities or real or personal rights" At point 5 the law precises the case of a transfer to an operator not established in Belgium. The Minister may refuse the authorisation in the absence of a specific agreement with the home State of the third party in question and which indemnifies the Belgian State against any recourse against it under its international liabilities or claims for damage".
This interesting provision is quite relevant as the issue is that the launching State of an object stays liable for ever and practically until the return of the object on the earth. If the satellite is transferred, this State may well be unable to have any control over it.
In the French 2008 law we took the same solution at article 3[6]. In both texts the transfer of control including ownership of a space object to another operator must be authorised. It of course also requires authorisation when the transferee is a Belgian or French company this falls under the general obligation to get an authorisation before entering into any space activity.

III Solutions

Which points have to be addressed?

It should be good that if the ownership or the control over a space object is transferred to a foreign State or company, the State of the new owner could register it and thus have jurisdiction and control over it. In that case the status of the space object would be much more appropriate.

What may be the solutions to avoid these difficulties?

To my opinion it should not be appropriate to envisage a general change of the conventions especially of the registration convention. The current system is quite good as a whole and could not be saved in the case of a general reconsideration.

6 Loi sur les activités spatiales Juin 2008 (translation) Article 3: Transfer to a third party of the control of a space object which has been authorised under this present Law is subject to a prior licence from the competent administrative authority.
In accordance with the conditions of article 2-3 above, any French operator who intends to take over the control of a space object whose launch or control has not been authorised under this present Law must for these purposes obtain a prior licence from the competent administrative authority.
The procedures for implementation of this article are stipulated by a decree of the Council of State.

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How can we find a solution to solve this problem without having to modify the registration convention?

If I may, I would like to propose a solution. I am aware of the difficulty but my knowledge of the work of the COPUOS makes me confident that it may be possible by a consensus to find a satisfactory solution to this very practical issue. Therefore, we have to keep in mind the different interests to consider and respect.

a First of all, the interest of every potential victims of an accident. The solution should not limit or even reduce the protection granted to the victim by the very "victim oriented" mechanism of the liability and registration conventions. The solution should not have any detrimental effect on the victim and should not modify its possibility to ask for compensation to any jointly and severally liable launching States.
b The interest of the "original" launching State. If the space object is transferred, this State should be protected from any final obligation to indemnify the victim if it has no more control over the space object.
c The interest of the "new" State which should have "jurisdiction and control" over the space object in order to be in a position to fulfil its obligations under article VI because this activity become a "national activity" in outer space. Therefore it should be authorised to register the object. Taking into consideration that only one State can register.

I suggest utilising a strong bilateral agreement network between the concerned States for solving the question of liability and a legal way within the United Nations system for registration.
The "original" launching State who has registered the object passes an agreement with the "new" State, (the State to whom the satellite has been transferred) by which the "new" State accept to guarantee the "original" launching/registration State if any accident happens to this satellite which causes an obligation to pay compensation to a victim.[7]
A declaration by which the "new" State accepts to recognise vis-à-vis third parties the same obligations as a launching State for the satellite.

The UN COPUOS could ask the UN General Assembly to ask the UN Secretary General to accept the change in the registry of space objects. If the declaration and agreement seen before are accepted, the UN Secretary General could accept the registration of the "new" State with every consequences.

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7 Some other provisions may be advisable for such an agreement. For instance the acceptance of a participation of the new launching State in a litigation caused by the accident (see for analogy the US Commercial Space Launch Act and the compulsory intervention of the government in case of an accident which would fall under the provisions involving a guarantee by the US government. 51 USC CHAPTER 509 - COMMERCIAL SPACE LAUNCH ACTIVITIES at section 50915 at point b (2)) or the possibility to encourage the State of the victim to sue the new liable State.

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I am quite aware of the difficulties and of the necessity to have a very pragmatic view in order to make this interpretation possible. With a consensus in our Committee and in the UN General Assembly a lot is possible. May I draw your attention to the very positive effects of such an interpretation?
The effects to States:
– The victim is even better protected as the number of the launching States is increased by one.
– The "original" launching State(s) is (are) still liable exactly as formerly. The only modification is that the victim may ask compensation to another State, the one in charge of the satellite.
– The "original" launching State is protected by the agreement with the new one. It will still be liable but can transfer the final burden of the risk to the "new" State.
– The preventive effects of the liability plays fully as the State able to control its satellite because of its new ownership is not only responsible for this "national activity" but is also liable as a launching State.

The effects to private operators:
– This would ease and lower the obligation for States to control the satellites operators.
– Because they have no more the burden of the risk, the "original" launching State will accept more easily the transfers of ownership or control to other companies and countries.
– Therefore the price of the "second hand" satellite will be much higher which is quite good even if the satellite is not sold.
– The possibility to use satellites as financial guarantee will not be limited by the risk of a difficulty or even an impossibility to transfer the satellite. This is a condition for a good functioning of the UNIDROIT protocol.