

UNIDROIT SPACE PROTOCOL WORKSHOP SUMMARY

1 INTRODUCTION

To address and discuss the Protocol from all perspectives, the Institute held a Workshop on the terms and impact of the Protocol on 9 February 2011. Presentations were made by Professor Sir Roy Goode, on behalf of Unidroit, as well as representatives of the industry body, the European Satellite Operators Association (ESOA), Avanti and Inmarsat, satellite operators, ING Bank, and Atrium Space Insurance Consortium, each addressing the views of many in their respective sectors. The Institute Director presented a legal analysis.

The presentations at the Workshop closely reflected the views expressed to the United Kingdom Government by those who responded to its consultation. However, the views expressed here are not necessarily those of the Institute nor of the organisations named, unless explicitly indicated.

2 THE UNIDROIT POSITION

Readers will be familiar with the arguments presented by Unidroit about the need for the Protocol and its advantages. [1] It is broadly that the Protocol will facilitate financing space projects, particularly by small operators and those in developing countries, by providing a single international register of priority among lenders and other creditors. Professor Goode referred to the ProtoStar bankruptcy case, where two alternative States of Registration were involved, as an example of uncertainty leading to inability to establish priority for one of the creditors. [2]

3 ESOA PRESENTATION

ESOA draws a distinction between aircraft, where the equipment is mobile and *recoverable*, as opposed to space assets that are not recoverable by physical possession.

It was pointed out that ESOA is not aware of any projects with a valid business plan failing to attract investment. On the contrary, over recent years there are plenty of examples including of developing countries such as Vietnam and Kazakhstan successfully procuring and launching satellites, demonstrating that ample satellite financing is available.

A number of concerns were expressed, including:

- i. Lack of clarity how the Space Protocol interacts with existing national laws.
- ii. Difficulty in identifying at what point an asset becomes and remains a *space asset*.

- iii. Distinction between how to finance a part of an asset, such as a hosted payload or a component that may form part of a larger asset (such as equipment that might be on a space station).
- iv Many parts of a space project not covered by the Protocol, such as licenses, insurance and ground equipment, which constitute an integral part of a space project and which will require national law analysis.
- v. Limitations on the exercise of remedies in ways that are not clear, such as when the space asset has any public service purpose (as many satellites do).

4 AVANTI PRESENTATION

A new and small operator, Avanti has raised £224 million in debt finance. It was pointed out that the funding was project and not asset based. It was driven by sound business and focussed implementation plans, credible enabling assets (know-how, licences, etc.) and a management team, with demonstrable ability to execute Avanti demonstrates that existing equity and debt financing opportunities and mechanisms are sufficient.

Avanti argues that the Protocol would have offered no clear advantages for start-up or emergent satellite operators, but would have created uncertainties and been a disincentive to financiers, who dislike overlapping laws under different legal systems.

5 INMARSAT VIEW

Inmarsat supported the views expressed by ESOA. In addition, it further emphasised the absence of clarity and appropriate provisions relating to public service obligations.

6 ING BANK PRESENTATION

A number of critical points were made by ING Bank. First, that the finance markets have supported satellite companies and their projects, in particular over the past few years, with an average annual financing of some US\$17bn.

The satellite finance market is *not* an asset-based finance market as a satellite system is specifically designed to support a business case using pre-determined radio frequencies and tailored antennas. Therefore, the lending has to be based on the cash flow projections of commercially viable businesses. The cash flow will drive the valuation of the satellite. There is no secondary market for space assets, apart from “placeholder satellites,” used to safeguard certain orbital frequency rights, or those assets used for “early entry” strategies.

In fact, the Protocol introduces a new concept that the satellite industry has never been confronted with: public service restrictions. These restrictions provide States with enhanced rights in the event that one deems a satellite asset providing a public service to the State as crucial. This hampers enforcement action on defaulting borrowers and substantially diminishes the value of the asset.

The Protocol will have a negative effect on the appetite of financial institutions or investors to provide financing, not only to existing satellite operators but perhaps more fundamentally to companies with projects that more heavily rely on debt.

7 INSURANCE PERSPECTIVE

A major concern expressed by the insurers is the impact of the Protocol on salvage rights of insurers. Typically they pay out on a Constructive Total Loss of 75% capability, relying on the 25% to reduce premiums and increase insurance capacity. The Protocol will potentially eliminate that remaining capacity available to insurers, leading to higher premiums.

8 LEGAL ANALYSIS

The arguments advanced in the legal analysis relate to the nature of space assets, the interpretation of the Convention and of the Protocol and the remit of Unidroit.

- i. It is argued that *space assets* are not *mobile* within the meaning of the Convention, moving from one jurisdiction to another, and therefore not appropriate for its application. This is based in part on the legal reality that only the State of registration has jurisdiction and control over the assets.
- ii. The remedies under the Convention are linked to the State on whose territory the asset is located, thus making its provision of limited relevance to assets in outer space.
- iii. A question arises also as to whether any part of a *space asset*, other than a complete satellite, is *capable of independent use*.
- iv. It is uncertain whether the Unidroit remit to *harmonise* or *coordinate* the private laws of States can be said to extend to the Convention and the Protocol.

It was also argued that the ProtoStar bankruptcy case, and the failure of any creditor to take appropriate steps open to it under existing law, does not provide a rationale for the Protocol.

DISCUSSION

The participants commented on matters raised in the presentations, and asked questions about the Protocol. Concerns were raised about unresolved definitions, additional layers of law which could lead to complication, delay and disincentive to finance projects.

Other issues that arose merit further exploration, and are summarised here.

- Is the Protocol necessary, given that present arrangements seem to function where there are well-negotiated contracts and properly-constructed projects?

- What exactly are the problems that the Protocol is meant to address?
- As national laws vary, is a uniform international regime essential, or should States extend their relevant laws to space objects (as with intellectual property rights)?
- In relation to the two cases mentioned (the ProtoStar case, and an example cited of a failed bid due to lack of Export Credit Agency approval), was either sufficiently indicative of systemic problems to warrant the adoption of the Protocol?
- Would the OST and the ITAR complicate matters?
- What countries supported the Protocol?
- Given the length of this process (a workshop 10 years ago was cited) and the wide range of concerns expressed, is the Protocol not being driven by a commitment to complete the process, rather than a demonstrable need for it?
- Will the parties concerned not be best served by a full benefits analysis?
- Was the Protocol intended to lead to a system of asset-based financing, rather than project-based, or would it in reality create a registration system for projects which would treat them as if they were assets?
- Could all of the elements of “value” of an asset be articulated in such a way that the registry would be of real use?
- Would the system be so complicated that it would inhibit the financing of space projects? (Areas of concern included very short leases leading to many registrations, delays in obtaining export licenses.)
- How would insurer’s rights, in particular salvage rights, be protected?
- In the case of an impaired transponder, how would delays be avoided in recovery and use of remaining capacity?
- How can the public service obligations be resolved?

In relation to the UK position, it was stated by a representative of the UK Space Agency that the Government was happy for the drafting of the Protocol to be finalised. The position of the UK Government is that before it adopts any new legislation, there must be evidence that the regulation proposed would meet the objectives that it sets out to achieve. The UK Space Agency position was therefore as stated previously: that there should be an economic impact study of the draft Protocol before the UK might be in a position to sign up.

Professor Goode explained the next steps to be taken. The February (2011) meeting of experts may not be the final one, as some issues still need to be resolved. These include public service obligations, creditors’ rights, and the definition of space assets.

If a text emerges, it will be submitted to the Unidroit conference in May, and then to Diplomatic conference. It will then be examined *de novo*. This (body) will include specialists from the space industry. If adopted by the Diplomatic conference, it can then be submitted to the various States for ratification.

The Workshop concluded with thanks to Professor Goode, the presenters, and the participants.

NOTES:

- [1] For the Unidroit Convention, Protocols, documents and other information, see: <http://www.unidroit.org/english/workprogramme/study072/spaceprotocol/study72j-archive-e.htm#NR1>
- [2] In re: ProtoStar Satellite Systems Inc, U.S. Bankruptcy Court, District of Delaware (Delaware), No.09-12658. The case and its disposition were widely reported.