I. Introduction

The diplomatic conference on the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (Space Protocol) took place in Berlin Germany, February 27 - March 9, 2012. The conference concluded the final treaty instrument, the text of which may be accessed at www.unidroit.org. Readers are referred to the full text of the Space Protocol published by UNIDROIT for complete details.

The Space Protocol to the Cape Town Convention on International Interests in Mobile Equipment is one out of three separate Protocols to the Cape Town Convention. Protocols on rail and aircraft equipment were previously concluded. Whereas the 2001 Cape Town Convention establishes the basic framework, each of its three modal protocols (aircraft, rail and space) are specially designed to suit the needs of the individual modes. Thus the Cape Town Convention applies only as modified and separately applied by each Protocol. The Aircraft Protocol is adopted by 44 countries. The first two protocols significantly influenced the drafting of the Space Protocol.

The context of the Space Protocol is particularly interesting to the IISL because of the interplay between the public law space law treaties and the private international law Space Protocol. Art. XXXIV of the Protocol specifically provides that the Protocol shall not affect States’ rights and duties under the existing UN space law treaties and the legal instruments of the ITU. Whether the final Space Protocol, as drafted, fully respects this public law supercession clause may be the subject of subsequent scrutiny.

The conference was well attended by more than 40 States from developed and many developing countries. Many commercial space industry representatives attended, some of whom participated as members of national delegations and some as special observers. Representatives of the industry working groups on the aviation and rail protocols to the Cape Town Convention facilitated the discussions by explaining how similar problems had been resolved in their Protocols.

The Berlin conference plenary session was chaired by Prof Herbert Kronke, Germany. The conference quickly reformed itself into a working Commission of the Whole ably chaired by Prof. Sergio Marchisio, Italy. He was assisted by the Unidroit Secretary General, Jose Angelo Estrella Faria, Deputy Secretary General Martin Stanford and by the rapporteur Sir Roy Goode, UK, who had prepared an exhaustive analysis of the draft space protocol. The new treaty instrument was finally adopted by the diplomatic conference on March 9, 2012.

The Space Protocol, on entry into force, establishes a separate international registry of security interests in space assets. The registry and the registrar will be guided by the Supervisory Authority. Properly registered security interests will be specially identified in and protected (have priority) under the terms of the Cape Town Convention, as modified by the Space Protocol. The objective is to lower the cost of space asset financing by facilitating the financing. Whether the new legal regime will achieve its cost saving objective and whether it will improve present space asset financing remains to be seen. Advocates of the Space Protocol point to the success of the popular protocol on aviation assets. Major commercial satellite operators are unconvinced of the need for the new legal instrument. Advocates, however, believe that the space protocol will be a valuable tool for small satellite operators and start-up companies and will make the industry more competitive.
II. Resolution of Contentious Legal Issues at the Conference

1. **Space assets**: The scope of the Space Protocol is limited by the definition of space assets. The definition will include satellites, space vehicles, reusable launch vehicles, and parts of spacecraft and payloads which are capable of separate registration.

2. **Salvage rights to space assets**: The Space Protocol now, at the request of insurers, leaves salvage rights to space assets totally outside the scope of the Space Protocol regime. Salvage rights remain subject to national laws.

3. **Internal transactions**: The Space Protocol construes space assets, when in outer space, to be located in the state of registry. They are space objects for the purpose of the Outer Space Treaty, the Registration Convention and UNGA Resolution 1721 (of 1961). Furthermore, in the event of insolvency, creditors may receive the assistance of courts in the state of registry, the state which issued the operating license or of the state having mission control over the space object or asset.

4. **Space assets versus aircraft assets**: The aircraft protocol will prevail in case of overlapping assets.

5. **Creditors' preservation of security rights in space assets**: Creditors’ rights prevail when space assets are docked with other space assets, or are installed or removed from other space assets, or are returned from outer space.

6. **Priority of creditors**: The Space Protocol provides priority for creditors’ interests in space assets that are physically linked to other space assets, if those other assets are also registered with the space asset registry. Retroactive priority is given to sales that are registered within three years from effective date of the Protocol.

7. **Rights of licensing states**: The Space Protocol specifically does not disturb the contracting states’ authority over launches and operation of space assets. Neither does it disturb state regulation of title transfers. The Protocol does not affect use of orbital slots or radio frequencies. It does not affect states’ control of command codes. Furthermore the Protocol does not require contracting States to recognize application of the Protocol when such would result in conflicts with export or national security regulations.

8. **Public Service**: The rights of States to continue commercial satellite service after insolvency and default of commercial satellite service providers was a contentious issue throughout the conference. The Protocol now provides that if a space asset is the subject of a state filing of a "public service notice," the asset must remain available for service in that state for a period of three to six months while the debtor seeks to remedy payment default. During that period the creditor may seize control of the space asset to provide continued service.

III. Next steps.

The diplomatic conference adopted resolutions (1) establishing a Preparatory Commission to act as provisional supervisory authority for the establishment of the registry of security interests in space assets, (2) inviting ITU or some other UN agency to consider becoming Supervisory Authority on entry into force of the Protocol, and (3) requesting the preparation of an official commentary on the Protocol to facilitate its application.

For further details readers are referred to the final text of the Space Protocol published by UNIDROIT.