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B. Operation of Business. In a chapter 11 proceeding, the Debtor may continue to operate in the “ordinary course of business” without a court order. The term “ordinary course of business” is not defined by the Bankruptcy Code. Whether a specific transaction is considered to be within the “ordinary course of business” depends upon the Debtor’s size and type of business.

C. Automatic Stay. The filing of a bankruptcy petition under any chapter, whether voluntary or involuntary, immediately invokes the “automatic stay”. *The automatic stay prevents parties from pursuing any action against the Debtor or the Debtor’s property without the bankruptcy court’s permission, including, without limitation, enforcement of rights under a contract entered into by the Debtor prior to the filing of the bankruptcy proceeding.*

D. Distribution Scheme. The Bankruptcy Code sets forth the following distribution scheme for creditors, in descending order from the most likely to the least likely to receive a distribution:

Secured Creditors: Secured creditors receive the proceeds from their collateral up to the value of their claim. If their claim exceeds the value of the collateral, the amount of the deficiency is treated as an unsecured claim.

Administrative Creditors: The reasonable and necessary costs of preserving the estate, such as attorney’s fees, wages, post-petition rent and lease payments, are first priority among unsecured claims.

Priority Creditors: The Bankruptcy Code gives priority above unsecured claims to certain other claims, including certain tax claims, as a matter of public policy.

Unsecured Creditors: Unsecured creditors get paid only after all secured claims, administrative claims and priority claims (up to their respective caps where applicable) are paid in full. If there is insufficient money available to pay unsecured creditors in full, their claims are paid on a pro rata basis.

Equity Holders: The general rule is that equity holders do not receive any distribution until all creditors are paid in full.



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IV. Discussion

A. The Status of the PSA in a Chapter 11 Proceeding

1. Relief from the Automatic Stay and Specific Performance. For purposes of this part of this Memorandum we have assumed that Intelsat would file a chapter 11 proceeding and attempt to reorganize (as opposed to a chapter 7 proceeding where its assets would be liquidated and Intelsat would, in effect, go out of business).

As indicated above, if Intelsat were to initiate a chapter 11 proceeding, *the “automatic stay” would prevent ITSO from enforcing any of its contractual rights under the PSA and enforcing the Core Principles.*⁴ In other words, if Intelsat were to disregard its obligations under the PSA during the pendency of its bankruptcy proceeding, ITSO could not seek to enforce whatever rights and remedies it has under the PSA without either making a motion to the bankruptcy court for permission to do so or filing a complaint in the bankruptcy court seeking essentially the same relief. Since ITSO’s principal right under the PSA is to supervise and presumably to enforce the performance of Public Service Obligations,⁵ ITSO would, in effect, need to ask the bankruptcy court *to condition Intelsat’s use of the assets, which were transferred to Intelsat by ITSO as part of the restructuring process, on Intelsat (i) specifically performing the Public Service Obligations, and (ii) complying with the reporting requirements imposed on Intelsat under the PSA* (the “Requested Relief”).

In order to obtain the Requested Relief, ITSO would have to show how the failure of Intelsat to perform the Public Service Obligations would cause irreparable harm or serious adverse consequences to ITSO, the Lifeline Connectivity Customers (LCO) whose interests it protects, or its 148 member countries. The fact that Intelsat is the *exclusive provider* of

⁴ For the sake of brevity, the discussion in this Memorandum will refer to the Public Service Obligations and not to both the Public Service Obligations and the Core Principles. Since the Public Service Obligations and the Core Principles are substantially identical, the discussion with respect to the Public Service Obligations generally applies to the enforcement of the Core Principles. While Intelsat is not a signatory to the Treaty, we would expect a bankruptcy court to consider the Treaty in making any determination with respect to the Requested Relief.

⁵ We note that the PSA provides that, in its supervisory role, ITSO is to ensure that Intelsat “honors” the Public Service Obligations. We believe a court would interpret this to mean that ITSO has the right to enforce these Obligations.



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international and domestic satellite telecom services to certain LCO customers and member countries should be a significant factor might be the support of the regulatory authorities in the United States and United Kingdom, as well as the actual participation at court hearings of ITSO's member countries. Assuming that ITSO could make the required showing, the bankruptcy court would then weigh those considerations against the impact on Intelsat if it is granted the Requested Relief. More specifically, if requiring Intelsat to perform the Public Service Obligations would materially impact the ability of Intelsat to reorganize, the bankruptcy court would, in all probability, not grant the Requested Relief to ITSO, regardless of the potential negative consequences to ITSO and its members.

Obviously, it is difficult to assess with certainty how the bankruptcy court would resolve such a motion. However, as a general rule, obtaining an order from a bankruptcy court in the United States requiring a debtor to perform its obligations under a pre-petition contract is a difficult fight and such relief is not often obtained. However, an Intelsat bankruptcy proceeding could present a unique set of facts where specific performance might be obtained. It also is difficult to assess what role, if any, the FCC would play in a bankruptcy of Intelsat. Ideally, as noted above, to the extent that the United States supports ITSO's position, it will carry weight with the bankruptcy court.

There are additional arguments that could be made by ITSO to the bankruptcy court to obtain the Requested Relief as follows:

(a) As the Transfer Agreement evidences, it was a condition to the transfer of ITSO's assets to Intelsat that Intelsat enter into the PSA. Intelsat recognized the requirement to perform the Public Service Obligations both in the PSA and its bylaws.⁶ Therefore, ITSO should argue that the failure of Intelsat to perform the Public Service Obligations is a breach of the condition giving rise to Intelsat's right to use the transferred assets. In essence, ITSO would ask the bankruptcy court for *an injunction barring Intelsat from using the transferred assets* except to the extent that Intelsat honors the Public Service Obligations. In the alternative, ITSO could also

⁶ Without the consent of ITSO, Intelsat removed the provisions relating to the Public Service Obligations from its bylaws in March 2005. Since the removal was not consented to by ITSO, a bankruptcy court should not give any weight to the removal or the fact that the current bylaws of Intelsat no longer contain references to the Public Service Obligations.



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request that such assets be reconveyed to ITSO.⁷ While there is no specific language in the Transfer Agreement or Restructuring Agreement that provides for either injunctive relief or reconveyance of the transferred assets if Intelsat breaches its obligations under the PSA, a bankruptcy court might still grant such relief.

(b) ITSO could also argue that the PSA is, in essence, a license or trust agreement. The argument would be that Intelsat's rights to use the transferred assets are conditioned on Intelsat's continued performance of the Public Service Obligations. This argument appears to be consistent with the supervisory role entrusted to ITSO. While the PSA does not explicitly contain language stating it is a license or trust arrangement, a bankruptcy court has the power to construe the PSA as such.

2. Enforcing the PSA as an Executory Contract. The Bankruptcy Code treats certain contracts to which the debtor is a party as "executory". The term "executory contract" is not defined in the Bankruptcy Code. The generally accepted definition is that an executory contract is "a contract under which obligations of both the [debtor] and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." While recent case law suggests that courts have found contracts to be executory even when there are not material obligations on both sides, under the generally accepted definition and most of the case law, there is a significant chance that the PSA would not be held to be executory since ITSO appears to have no material performance obligations to Intelsat.

Assuming, that the PSA is an executory contract, Intelsat would have three fundamental options regarding its disposition: (i) to assume the contract; (ii) to reject the contract or (iii) to assume the contract and assign it to a third party. The Bankruptcy Code does not supply a legal standard for choosing among these options. The bankruptcy courts will defer to the debtor's business judgment as to which of the three options the debtor believes are in its best interests. Under the "business judgment" test, a debtor may reject a contract which is onerous or disadvantageous and retain a contract which is advantageous. Under the majority of the case law, rejection of an executory contract constitutes a breach of that contract as of the date immediately preceding the filing of the bankruptcy petition. Rejection usually has the effect of

⁷ We note that the experience of the European Telecommunications Satellite Organization may be relevant to, although not binding on, the bankruptcy court, regarding actions to ensure that Eutelsat S.A. complies with the Basic Principles of its privatization, including the member countries' evaluation of Eutelsat's right to use the frequencies and orbital locations assigned to its space stations, and the possibility of making this right subject to payment.



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making the resulting contract claim a pre-petition unsecured claim. If Intelsat determines to assume the PSA it must cure all monetary and non-monetary defaults and thereafter perform its obligations under the PSA. If Intelsat determines to assume and assign the PSA then it must show the assignee is capable of performing the Public Service Obligations. The anti-assignment language in the PSA will not, in and of itself, prevent Intelsat from assigning its obligations under the PSA.⁸

The advantage for ITSO if the PSA is an executory contract is that the Bankruptcy Code permits the “non-debtor party” (ITSO) to make a motion to require Intelsat to “assume” or “reject” the PSA within a period of time specified by ITSO in its motion. Simply stated, such a motion requests that the court require Intelsat to determine within a fixed period of time whether to “assume” or, in other words, honor its obligations under the PSA or to “reject” those obligations. If the court grants such relief, ITSO will gain certainty as to how Intelsat intends to deal with its obligations under the PSA.

3. Enforcing the PSA if it is not an Executory Contract

If the bankruptcy court determines that the PSA is not an executory contract or ITSO determines that it would be better strategy not to argue that the PSA is an executory contract, then ITSO can file a complaint in the bankruptcy court against Intelsat for specific performance. However, it could take a significant amount of time for a court to decide the issues raised by such a complaint. ITSO would thus be left with uncertainty regarding the status of the PSA during the time the litigation is pending. The better approach would be to raise the issue of specific performance in a motion in the context discussed in part IV.A.1 above.

4. Arbitration

Article 6.03 of the PSA provides that any dispute, controversy or claim shall be submitted to arbitration. Generally speaking, bankruptcy courts will respect an arbitration clause. *However, if arbitration is likely to interfere with Intelsat’s attempts to reorganize, then the*

⁸ While the issue of how LCO Contracts would be treated in a bankruptcy proceeding of Intelsat is beyond the scope of this Memorandum, in all probability the LCO Contracts are executory contracts. Therefore, with respect to the LCO Contracts, Intelsat could seek to reject, assume or assume and assign those contracts to a third party discussed in this section.



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*bankruptcy court can refuse to enforce the arbitration clause.*⁹ In any event, in order for ITSO to enforce the arbitration clause in the PSA it would be required to make a motion for relief from the automatic stay to commence the arbitration proceeding.

It is also to be noted that enforcement through the arbitration clause has been estimated to cost between \$2 to \$5 million and potentially to take up to three years or more to conclude. Therefore, this enforcement alternative may not be a viable option, given the limited resources provided to ITSO at the time of privatization. In addition, the possible length of the arbitration process may be a sufficient reason for a bankruptcy court to refuse to enforce the arbitration clause.

5. Status of ITSO'S Claim

ITSO's claim against Intelsat in a chapter 11 or chapter 7 proceeding for Intelsat's breach of the PSA or, assuming the PSA is an executory contract, arising from Intelsat's rejection of the PSA, would most likely be a *general unsecured claim*. However, the issue that exists is whether ITSO's claim arising out of the breach by Intelsat of the PSA or rejection of the PSA by Intelsat is a monetary claim. Under Section 6.06.3 of the PSA, the "arbitrator(s) may award damages to the extent the financial interests of the parties have been injured." This section suggests ITSO could have a monetary claim against Intelsat. Assuming, that ITSO had a monetary claim, it would receive its pro rata share of any distribution to unsecured creditors in order of the priorities in section III.D hereof.

A. The Status of the PSA in a Chapter 7 Proceeding

In a chapter 7 proceeding, a trustee will be appointed to liquidate the assets of Intelsat. The trustee will try and sell the business of Intelsat as a whole, failing which he would try and sell off the assets on a piecemeal basis. The trustee will seek to sell the business or assets for the highest and best price typically using an auction-like sale process.

⁹ Section 157(b)(1) of Title 28 of the United States Code provides that certain proceedings are specifically entrusted to the jurisdiction of the bankruptcy court. The proceedings are known as "core" proceedings. One of these is a proceeding involving the use of property. Therefore, it is also possible that, if ITSO were to make a motion to request the bankruptcy court for permission to arbitrate its disputes with Intelsat, the court could deny the motion on this basis.



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If the PSA is found to be an executory contract, then the trustee would have the same alternatives in dealing with the PSA as Intelsat would have had if the Intelsat bankruptcy proceeding was in chapter 11. Like a chapter 11 proceeding, in a chapter 7 proceeding, ITSO can ask the court to fix a period of time to assume or reject the PSA. Unlike a chapter 11 proceeding, the trustee in a chapter 7 proceeding has 60 days after the date the petition is filed by Intelsat or a chapter 11 proceeding is converted to a chapter 7 proceeding, in which to assume an executory contract. If the trustee does not assume the PSA in that time period, the PSA would be deemed rejected and ITSO would have an unsecured claim for damages. The 60-day period may be extended for cause by the trustee upon motion to the court within the 60-day period.

B. The Assignment Issue

If Intelsat seeks to sell its assets in a chapter 11 proceeding or if a bankruptcy trustee seeks to sell Intelsat's assets in a chapter 7 proceeding, one issue that might arise is whether the purchaser of Intelsat's assets would be bound by the PSA or to perform the Public Service Obligations. Presumably the intent of the parties under the Transfer Agreement and the Restructuring Agreement was that any purchaser of Intelsat assets would be bound to perform the Public Service Obligations. The sections of the Bankruptcy Code governing sale of property by a debtor would allow ITSO to argue that the sale of Intelsat's assets be conditioned on the purchaser performing the Public Service Obligations or that the sale is simply not permitted under applicable non-bankruptcy law. The uniqueness of the factual circumstances here should bolster the chance of success but the prevailing attitude of the bankruptcy courts is to permit the assets of a debtor to be sold.

V. Possible Courses of Action

The following is a summary of specific courses of action, which would provide ITSO with better protection in the event of an Intelsat bankruptcy and which ITSO should pursue because of certain provisions of the Bankruptcy Code. We would strongly suggest that ITSO approach Intelsat as soon as possible to discuss implementation of strategies to protect the Public Service Obligations, particularly since certain of these actions, if taken within a ninety day period prior to any bankruptcy filing by Intelsat, could be held to be ineffective by the bankruptcy court.



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1. **Calculate Monetary Value of Public Service Obligations**

ITSO should seek a third party evaluation and calculation of the monetary value of the Public Service Obligations, including the cost of continuing these obligations with a third party satellite provider in the event of Intelsat default on its public service obligations. This study would include the value of alternative satellite capacity for global coverage and connectivity, replacement contracts for satellites, and price adjustments to maintain the commitments to LCO customers.

This study should be funded, in its entirety, by Intelsat as the recipient of the transferred assets and the entity entrusted with the obligations for public service. ITSO, in its supervisory role, should have independent authority to supervise this study in conjunction with ITSO's supervisory role over the private Intelsat, Ltd. company.

2. **Obtain a Lien on Assets of Intelsat**

ITSO could seek to obtain a lien on the assets of Intelsat to secure performance of the Public Service Obligations. If ITSO obtains a lien, ITSO would then be a secured creditor with all of the attendant rights. (See part III.D above). As a secured creditor, ITSO would still need to make a motion for relief of the stay to enforce its rights to the collateral. In such a motion the bankruptcy court could either grant the relief or provide to ITSO "adequate protection" of its interest in the collateral as the *quid pro quo* for Intelsat's continued use of the collateral during the bankruptcy. Adequate protection is usually monetary compensation, but could include a requirement that Intelsat perform the Public Service Obligations.

3. **Obtain a Third Party Guaranty or Standby Letter of Credit**

ITSO could request that Intelsat provide a guaranty from a solvent third party or a letter of credit from a bank in a sufficient amount to compensate ITSO and its member countries for any damages caused by Intelsat's failure to discharge its Public Service Obligations. The principal advantage of a third party guaranty or letter of credit is that the automatic stay which comes into effect on a bankruptcy filing by Intelsat, does not apply to third party guarantees or letters of credit since they are not obligations of the Debtor. A letter of credit would be preferable to a third party guaranty since, under certain circumstances, it is possible for Intelsat to obtain an injunction against ITSO proceeding against the guarantor, whereas such injunctive relief from a bankruptcy court would be almost impossible for Intelsat to obtain to prevent ITSO from drawing on a letter of credit.



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4. Modification of PSA

We would further suggest that several changes be made to the PSA to improve ITSO's position and to avoid certain issues which might be raised in the event of a bankruptcy filing by Intelsat. These would include changes to the following provisions:

(a) ITSO should change the provisions of section 6.02 to eliminate the need to meet with Intelsat if Intelsat files a bankruptcy petition or, at the very least, shorten the thirty day period contained in that section to no more than three business days after a filing. The reason for this change is to avoid any argument by Intelsat that ITSO cannot immediately go into bankruptcy court seeking some form of relief if Intelsat is in breach of the Public Service Obligations.

(b) The PSA should also contain an express recognition that the failure of Intelsat to perform the Public Service Obligations would cause irreparable damage to ITSO and its members which cannot be *adequately* compensated by money.

(c) In bankruptcy, as discussed above, the court can condition the continuation of the automatic stay or Intelsat's use of property on the provision of "adequate protection". While it is unclear that any contractually specified measure of adequate protection would be enforceable, the PSA could provide that in the event Intelsat files for bankruptcy the parties agree that "adequate protection" is the Requested Relief or, more specifically, that Intelsat (i) specifically perform the Public Service Obligations, and (ii) comply with the reporting requirements imposed on Intelsat under the PSA.

5. Enforcement Rights of Member Countries as Sovereign States

In conjunction with the courses of action outlined above, we also advise ITSO and its member countries to utilize their leverage, particularly with regard to their continued sovereign interests in the landing rights and the orbital locations. In addition, it is critical that the regulatory authorities of the United States and the United Kingdom, in their capacity as the "Notifying Administrations" for the Common Heritage orbital locations transferred to Intelsat, immediately bring pressure to bear in connection with the required consents to Intelsat's proposed acquisition of Panamsat.



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VI. Conclusion

If Intelsat files a petition under the United States Bankruptcy Code, no assurance can be given to ITSO that the bankruptcy court would require Intelsat to perform the Public Service Obligations during the pendency of the proceedings or require a purchaser of Intelsat's assets to perform the Public Service Obligations. Although there are several meritorious arguments that ITSO can make, it is also uncertain whether the current requirements in the PSA that Intelsat perform the Public Service Obligations would survive a successful chapter 11 reorganization of Intelsat or the sale of Intelsat's assets.

Based on the PSA (and the other documents that govern and gave rise to the relationship of ITSO with Intelsat as they currently exist), were Intelsat to breach its obligations to ITSO to perform the Public Service Obligations, ITSO would, for the most part, be an unsecured creditor of Intelsat. As such, ITSO's right is to its pro rata share of any distribution to unsecured creditors in order of the priorities in section III.D hereof.

ITSO should act immediately to take the suggested courses of action discussed above in order to maximize the effectiveness of the legal arguments that ITSO would make to a United States bankruptcy court were Intelsat to file a bankruptcy proceeding and to enhance ITSO's leverage in such a proceeding. Specifically, as we suggest in Part V above, we believe that ITSO should pursue: (a) obtaining a lien on assets of Intelsat to secure the obligations of Intelsat to ITSO and/or obtaining a standby letter of credit or third party guaranty of such obligations; and (b) obtaining certain changes to the PSA to strengthen ITSO's legal arguments to require Intelsat to perform the Public Service Obligations were a bankruptcy of Intelsat to occur. As soon as possible, ITSO should also attempt to quantify, through a third party expert retained by ITSO but paid for by Intelsat, the damages that would be incurred by ITSO and its members if Intelsat fails to perform the Public Service Obligations.

In addition to dealing directly with Intelsat to effect the above, ITSO should seek to enlist the assistance of the FCC in seeking to ensure that, if Intelsat were to file a bankruptcy proceeding as a result of the Panamsat acquisition or otherwise, Intelsat would be required to perform the Public Service Obligations.