

UNIDROIT 2000  
Study LXXIIJ – Doc. 2  
(Original: English/French)

UNIDROIT

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
=====

**SPACE WORKING GROUP**

**(Rome, 19/20 October 2000):**

***REPORT***

(prepared by the UNIDROIT Secretariat)

Rome, December 2000

## I. – INTRODUCTION

### (a) *Background to the meeting*

1. – In the context of the development of the preliminary draft Protocol to the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*) within the Space Working Group, set up by the President of UNIDROIT in 1997, and in view of the decisions taken at the 43<sup>rd</sup> session of the United Nations Committee on the Peaceful Uses of Outer Space (C.O.P.U.O.S.), held in Vienna from 7 to 16 June 2000, first, to include consideration of the draft Convention and the preliminary draft Protocol on the agenda of the Legal Subcommittee of C.O.P.U.O.S. at its 40<sup>th</sup> session, to be held in Vienna from 2 to 12 April 2001, as a single issue discussion item and, secondly, to invite the Secretariats of UNIDROIT and the United Nations Office for Outer Space Affairs (O.O.S.A.) to prepare a joint background paper for that session, the Secretariat of UNIDROIT decided, following consultation with O.O.S.A., that it would be useful to convene back-to-back meetings of the Space Working Group and an *ad hoc* restricted informal group of experts to focus in a preliminary way on the issues to be discussed at the aforesaid Legal Subcommittee meeting and at the same time to advance the work of the Space Working Group, in particular by updating the then current working draft of the preliminary draft Protocol (prepared in January 2000 by Mr Peter D. Nesgos, co-ordinator of the Space Working Group, assisted by Mr Dara A. Panahy, for discussion within that group).

For reasons of administrative convenience, it was decided to hold the meeting of the *ad hoc* restricted informal group of experts before the meeting of the Space Working Group. Thus, the restricted informal group of experts met on 18 and the morning of 19 October 2000,<sup>1</sup> whereas the Space Working Group met on the afternoon of 19 and on 20 October 2000.

### (b) *Opening of the meeting*

2. – The meeting of the *Space Working Group* was opened by Mr Peter D. Nesgos, co-ordinator of the Space Working Group, at the seat of UNIDROIT at 3 p.m. on 19 October 2000.

3. – The meeting was attended by the following experts:

#### *Experts designated by international Organisations*

Ms Gabriella CATALANO SGROSSO

Professor of International Law, University of Rome, Rome; member of Board of Directors, International Institute of Space Law

Ms Lisa CURRAN

Attorney, Brosio, Casati & Associati – Allen & Overy, Rome / Co-chairman, Sub-committee E8 of the Section on Business Law (Financing Transactions), International Bar Association

Ms Cécile FEYTE

Aviation and Space Department, Marsh S.A., Levallois-Perret / Legal Consultant, European Centre for Space Law

---

<sup>1</sup> For the report on the meeting of the restricted informal group of experts, held on 18 and the morning of 19 October 2000, cf. Study LXXIIJ-Doc. 1.

Mr Robert W. GORDON	Vice President, Space & Defense, Boeing Capital Corporation, Renton / <i>Aviation Working Group expert</i>
Mr P. Ruari McDOUGALL	<i>Legal Officer, United Nations Office for Outer Space Affairs, Vienna</i>
Mr Peter D. NESGOS	Partner, Milbank, Tweed, Hadley & McCloy LLP, New York / <i>Co-ordinator of the Space Working Group</i>
Mr Dara A. PANAHY	Associate, Milbank, Tweed, Hadley & McCloy LLP, Washington, D.C. / <i>Assistant to the co-ordinator of the Space Working Group</i>
Mr Jeffrey WOOL	Partner, Perkins Coie, Washington, D.C. / <i>Group Secretary and General Counsel, Aviation Working Group</i>

***Representatives of international commercial aerospace and financial communities and others***

Mr Yann AUBIN	Head of Legal Affairs, Astrium S.A.S., <i>Velizy-Villacoublay</i>
Ms Darcy BEAMER-DOWNIE	Liability Consultant, Airclaims Limited, <i>London</i>
Mr Jacques BERTRAN DE BALANDA	Clifford Chance Limited Liability Partnership, <i>London</i>
Mr Claude H. DUMAIS	Legal Adviser, Arianespace, <i>Evry</i>
Mr Louis E. EMERY	Counsel, Export-Import Bank of the United States of America, <i>Washington, D.C.</i>
Mr Michael GERHARD	Legal Adviser, Legal Support Agency, German Aerospace Centre, <i>Cologne</i>
Mr Arwed W. HESSE	Senior Manager, Legal and Contracts Affairs / Space Services, EADS Germany G.m.b.H., Space Services, <i>Munich</i>
Mr Robert H. LANTZ	Assistant General Counsel, Legal Department, Lockheed Martin Global Telecommunications, <i>Bethesda</i>
Mr Paul B. LARSEN	Adjunct Professor, Georgetown University Law Centre, <i>Washington, D.C.</i>
Mr Alfons A.E. NOLL	Of Counsel, Baker & McKenzie, <i>Geneva</i> / <i>former Legal Adviser to the International Telecommunication Union</i>

Mr Olivier M. RIBBELINK	Senior Researcher, Department of Research, T.M.C. Asser Instituut, <i>The Hague</i>
Mr Thomas SCHMID	Legal Consultant, Airclaims Limited, <i>London</i>
Mr Bradford L. SMITH	Senior Intellectual Property Counsel, Intellectual Property Department, Alcatel, <i>Paris</i>
Ms Caroline M. VIDELIER	Legal Expert, Navigation Systems Department, Alcatel Space Industries, <i>Toulouse</i>

4. – The restricted informal group of experts adopted the draft agenda, which is reproduced as Appendix I to this report.

5. – The restricted informal group of experts was seized of the following materials:

(1) Draft agenda (Study LXXIIJ – S.W.G., W.P. 1);

(2) Text of the draft [UNIDROIT] Convention on International Interests in Mobile Equipment, as approved by the UNIDROIT Governing Council at its 79<sup>th</sup> session, held in Lisbon from 10 to 13 April 2000;

(3) Text of the draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, as approved by the UNIDROIT Governing Council at its 79<sup>th</sup> session, held in Lisbon from 10 to 13 April 2000;

(4) Current working draft of a preliminary draft Protocol to the draft Protocol to the draft [UNIDROIT] Convention on International Interests in Mobile Equipment on Matters specific to Space Property, prepared in January 2000 for discussion within the Space Working Group by Mr Peter D. Nesgos, co-ordinator of the Space Working Group, and Mr Dara A. Panahy;

(5) “The prospective UNIDROIT Convention on international interests in mobile equipment as applied to space property,” an article by Mr Dara A. Panahy and Mr Raman Mittal, reproduced from the *Uniform Law Review* 1999/2, 303 *et seq.*;

(6) “The preparation by UNIDROIT of a new international regimen governing the taking of security in high-value mobile equipment, in particular space property,” a presentation by Mr Martin J. Stanford to the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, at its 39<sup>th</sup> session, held in Vienna from 27 March to 7 April 2000.

6. – In introducing the business of the meeting, *Mr Nesgos* indicated that the Working Group essentially had three tasks before it, first, to review the draft Convention and the preliminary draft Protocol, in the light not only of the amendments made to the draft Convention and the draft Protocol thereto on Matters specific to Aircraft Equipment (hereinafter referred to as the *draft Aircraft Protocol*) at the third Joint Session of the UNIDROIT Committee of governmental experts and the Sub-Committee of the I.C.A.O. Legal Committee, held in Rome from 20 to 31 March 2000, but also of the discussions of the restricted informal group of experts to identify, and engage in a preliminary discussion of the issues which merit consideration in the context of the relationship between the draft Convention and the preliminary draft Protocol and

the existing body of international space law, held in Rome on 18 and 19 October 2000, secondly, to plan its future work and, thirdly, to consider the presentation of the preliminary draft Protocol at the 40<sup>th</sup> session of the Legal Subcommittee of C.O.P.U.O.S. (cf. § 1, *supra*).

## II. CONSIDERATION OF THE PRELIMINARY DRAFT PROTOCOL IN THE LIGHT OF THE AMENDMENTS MADE TO THE DRAFT CONVENTION AND THE DRAFT AIRCRAFT PROTOCOL AT THE THIRD JOINT SESSION AND THE DELIBERATIONS OF THE RESTRICTED INFORMAL GROUP OF EXPERTS

7. – At the suggestion of one expert, *Mr Jeffrey Wool*, hitherto co-ordinator of, and now Group Secretary and General Counsel to the Aviation Working Group, illustrated the principal amendments made to the draft Convention and the draft Aircraft Protocol at the third Joint Session. He indicated that the cross-references in the preliminary draft Protocol to provisions of the draft Convention and the draft Aircraft Protocol as a result no longer corresponded to the current numbering of those provisions and that these would have to be updated to bring them into line with the texts that had emerged from that Joint Session (UNIDROIT CGE/Int.Int./3-Report; ICAO Ref. LSC/ME/3-Report). He took the view that on certain important matters it would be necessary for the preliminary draft Protocol to diverge from the draft Aircraft Protocol, in view of the specificity of space property.

8. – *Mr Nesgos* reported the results of the deliberations of the restricted informal group of experts. On the question of the definition of space property (cf. Study LXXIIJ – Doc. 1, §§ 13-21), and in particular tangible space property, there was agreement in favour of a broad definition of space property, subject to the limitation that such broad coverage did not interfere with national law, which would mean not including certain categories of tangible property, such as ground installations, that were subject to the jurisdiction of the law of the State where they were situated. As regards intangible rights associated with space property, their inclusion in the definition of space property created greater difficulties in view of the special nature of certain of these rights, such as governmental permits, licences, approvals and authorisations and intellectual property rights. It was nevertheless recognised that, if the definition of space property were to encompass only tangible property, then the anticipated economic benefits of the proposed new international regimen could well be jeopardised. He mentioned that the idea of extending the benefit of the international interest to cover the pre-launch phase had also been discussed. Apart from the definition of space property, he considered that the other critical area of the preliminary draft Protocol was the provisions dealing with the enforcement of remedies (cf. Study LXXIIJ – Doc. 1, §§ 24, 27-29). In this connection, he referred to the possibility of the remedies granted under the proposed new international regimen being blocked on the ground of their being contrary to the public order of certain States, as also to the specific problems connected with legislation prohibiting the transfer of technology and space property that was State property.

9. – On the question of the definition of space property (cf. *the fifth paragraph of Article I(2)*), one expert took the view that transponders should be excluded, on the grounds that they had no value on their own, that is, separate from the satellite to which they were affected, and that a creditor could not expect to satisfy his economic interest in the transaction by enforcement against a transponder alone. Another expert however noted that what was important was the operational value of the asset and that it was necessary to recognise that it was possible to finance separately the different components of a satellite. *Mr Nesgos* in this connection noted that transponders had been financed separately for almost 20 years. He took the view that, even if an individual creditor's enforcement of his remedies against a component of an item of space property could create specific problems for the rights in that item of other creditors, this was not

a reason for excluding such a component from the definition of space property. *Mr Wool* was of the opinion that this issue was not that different from that of the inclusion of aircraft engines in the definition of aircraft objects for the purposes of the draft Aircraft Protocol.

10. – One expert took the view that the definition of space property should be as broad as possible in order to take account of items of such property functioning as part of a broader satellite system, with a view to giving a creditor the possibility of access to such a system as a whole. He nevertheless recognised that, in order to have such access, a creditor would need to be able to use the relevant ground control installations. With a project in which several satellites were involved, the ground control installations were usually spread out over the territory of more than one State, each such installation being subject to the law of the State on the territory of which it was located. Even if it would be difficult for this reason to encompass ground installations in the definition of space property without bringing the preliminary draft Protocol into conflict with the national law of States, it was recognised that thought should be given to the exploration of means of informing other creditors of the interest such installations represented for a creditor seeking to enforce his remedies under the proposed new international regimen. Such notice, the modalities and legal effects of which would have to be resolved, would have an important role to play in the event of the debtor's insolvency and could reduce the negative effects for such a creditor of the national peculiarities of the insolvency regimen to be applied.

11. – Regarding *Article IX (Modifications to default remedies provisions)* (cf. Study LXXIIJ – Doc. 1, § 24), one expert emphasised the importance, given the short life of space property, of including a time factor in the enforcement of the remedies available to the creditor under the proposed new international regimen. Some experts raised the question whether recourse to arbitration should be allowed in the event of disputes in the enforcement of these remedies. One Space Working Group expert noted that, in a case where a State raised the defence of public order in relation to the creditor's enforcement of his remedies, there was nothing in the proposed new international regimen that would prevent the inclusion of an arbitration clause in the transaction that might be entered into by that State and the creditor. One expert however enquired whether, in a case where the debtor proved reluctant to supply the creditor with the necessary access codes, only recourse to the courts of the State concerned should be envisaged or whether arbitration should not be expressly provided for in the preliminary draft Protocol. Following clarification that the reference to an "arbitral tribunal" in the definition of "court" included in the draft Convention (cf. Article 1(k)) only envisaged those special arbitral tribunals having lawful authority under the law of certain States, in particular the Russian Federation, to bind parties in the same way as courts did under the law of other States, it was proposed by several experts that a reference to arbitration should be included in the preliminary draft Protocol.

12. – Regarding the public order defence referred to in *Article IX(3)(b)(3)* (cf. Study LXXIIJ – Doc. 1, § 27; cf. also § 11, *supra*), *Mr Wool* considered that such a defence was perfectly justified in view of the specificity of the subject-matter of the preliminary draft Protocol. However, this concept of public order would need to be specific to the preliminary draft Protocol in order to reduce the risk of it being perceived negatively by a creditor. So as to lessen the drawbacks that the raising of such a defence could cause for such a creditor, several experts suggested that a State invoking such a defence should have the obligation to indemnify the creditor for the financial loss resulting to him thereby.

13. – Regarding *Article XI (Remedies on insolvency)*, one Aviation Working Group expert recalled the solutions proposed in the draft Convention and the draft Aircraft Protocol, and in particular the choice States were given to opt as between Alternative A, Alternative B or neither

of these alternatives. He agreed with other experts that these provisions raised extremely complicated questions which merited in-depth consideration. At the suggestion of *Mr Nesgos*, it was agreed to set up an informal working group on this subject.

14. – One expert suggested that thought might usefully be given to the involvement of a private sector element in the operation of the Supervisory Authority (cf. *Article XV*; cf. also Study LXXIIJ – Doc. 1, § 26), the functions of which were currently contemplated as being exercised by an intergovernmental Organisation or a body representing a certain number of Contracting States. *Mr Ruari McDougall*, speaking on behalf of O.O.S.A., suggested that it might be preferable to think in terms of representatives of the private sector being *consulted on*, rather than *involved in* the operation of the Supervisory Authority if the intention was to entrust this task to an intergovernmental Organisation.

15. – At the suggestion of *Mr Nesgos*, it was agreed to set up an informal working group to consider the relationship between the preliminary draft Protocol and those international instruments, whether already adopted or under preparation, that might be expected to impact, in one way or another, on the provisions of the former (cf. Study LXXIIJ – Doc. 1, §§ 28-29).

### III. ORGANISATION OF FUTURE WORK

16. – One Aviation Working Group expert favoured dividing the future work to be accomplished in respect of the preliminary draft Protocol into two stages. The first stage, which he anticipated as being of relatively short duration, would be to finalise a first Protocol that would seek basically to settle only the questions of the setting up of an international registry and priorities and would leave the issue of the enforcement of remedies to be dealt with under national law. During the preparation of such a first Protocol, working groups would be able to gather their thoughts further on those issues that raised particularly delicate problems, such as insolvency and remedies, and the issues associated therewith. At the same time, efforts could be undertaken to raise the level of awareness of the benefits that might be expected to flow from the greater availability of asset-based financing for space property with a view to preparing the ground for the launching of the second stage, which would consist in the preparation of a second Protocol, completing the work begun by the first. This two-stage approach was supported by a number of experts, who considered that it might be more attractive to States. Other experts, on the other hand, took the view that such an approach was not likely to arouse the necessary degree of interest from the international commercial aerospace and financial communities, whereas, if the project was to be successful, it was clearly indispensable that everything possible should be done to ensure the support of those sectors. It had to be borne in mind that, once seised of an attractive draft, these sectors would not fail to convey this message to their Governments. One expert favoured the preparation of two drafts and leaving the choice as to which to adopt to States.

17. – With a view to promoting the preliminary draft Protocol in the international commercial aerospace and financial communities, *Mr Nesgos* invited those participating in the meeting to do their utmost to bring it to the attention of those sectors. He noted that, if the preliminary draft Protocol were to be successful, then this would inevitably be a reflection of the degree of support given thereto by professional circles.

18. – Taking his inspiration from the study that had been carried out into the likely economic impact of the draft Convention as applied to aircraft equipment (cf. “Proposed UNIDROIT Convention on International Interests in Mobile Equipment as applicable to aircraft equipment through the Aircraft Equipment Protocol: economic impact assessment, a study

prepared under the auspices of INSEAD and the New York University Salomon Centre by Anthony Saunders and Ingo Walter” (September 1998)), one expert raised the question as to whether the most effective promotional tool would not be to commission a similar report on the economic benefits that were likely to flow from the draft Convention/preliminary draft Protocol. Another expert however cautioned that the highly confidential nature of some of the information that would be necessary for the preparation of such a study in respect of space property would have the effect of making its preparation extremely difficult.

19. – Several experts stressed the importance for the successful completion of the work of the Space Working Group of the role to be played by the co-ordinator of the Working Group in co-ordinating not only the work of the Working Group but also the exchange of information and the maintaining of regular contacts between members thereof. It was noted that for the co-ordinator of the Space Working Group to be able adequately to shoulder these responsibilities and to organise the necessary meetings of the Working Group had certain financial implications. It was accordingly agreed that those representatives of the international commercial aerospace and financial communities that had been invited to attend the meetings of the restricted informal group of experts and the Space Working Group should be approached, as a matter of urgency, by Mr Nesgos with a view to ascertaining their willingness to make a financial contribution to the Space Working Group and, where possible, to act as sponsors thereof. *Mr Nesgos* also emphasised that continuing participation in the review of the work of the Space Working Group and the encouragement of others to participate was as important as financial support.

20. – Regarding the consideration of the draft Convention and the preliminary draft Protocol by the Legal Subcommittee of C.O.P.U.O.S. at its 40<sup>th</sup> session (cf. § 1, *supra*; cf. also Study LXXIIJ – Doc. 1, §§ 31 and 32), *Mr Nesgos* noted the importance of this instance of co-operation with the body responsible for the preparation of the international space treaties. *Mr McDougall* stressed the need to identify precisely what the Space Working Group and UNIDROIT expected from C.O.P.U.O.S., in the sense of its future role in this project. This was one of the points which would need to be clarified in the joint background paper to be prepared by the UNIDROIT and O.O.S.A. Secretariats for the attention of the Legal Subcommittee at its forthcoming session (cf. § 1, *supra*).

21. – *Mr Nesgos* sketched a timetable for the completion of the preliminary draft Protocol and its submission to the UNIDROIT Governing Council at its 80<sup>th</sup> session, scheduled for September 2001. A new updated version of the preliminary draft Protocol would need to be prepared in time for the forthcoming session of the Legal Subcommittee of C.O.P.U.O.S. This would require a further meeting of the Space Working Group before the session in question; such a meeting was tentatively scheduled to take place in the United States of America in March 2001. An additional meeting of the Space Working Group would be necessary, in particular to take account of the views expressed by the Legal Subcommittee, so as to finalise the text of the preliminary draft Protocol to be submitted to the UNIDROIT Governing Council in time for its September 2001 session; this meeting was tentatively scheduled to take place in Europe in June 2001.

22. – A diagram showing the milestones to be achieved and the action to be taken by the Space Working Group over the October 2000/October 2001 period is set out in Appendix II to this report.



**SPACE WORKING GROUP**

**(Rome, 19/20 October 2000)**

**DRAFT AGENDA**

1. Adoption of the agenda.
2. Organisation of work.
3. Background to, and reasons for the convening of the meeting (oral reports by the UNIDROIT Secretariat and the co-ordinator of the Space Working Group).
4. Consideration of the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as the *draft Convention*) and the preliminary draft Protocol thereto on Matters specific to Space Property (hereinafter referred to as the *preliminary draft Protocol*), in the light of the amendments made to the draft Convention and the draft Protocol thereto on Matters specific to Aircraft Equipment at the third Joint Session of the UNIDROIT Committee of governmental experts and of the Sub-Committee of the ICAO Legal Committee, held in Rome from 20 to 31 March 2000, and the deliberations of the restricted informal group of experts to identify, and engage in a preliminary discussion of the issues which merit consideration in the context of the relationship between the draft Convention and the preliminary draft Protocol and the existing body of international space law, held in Rome on 18 and 19 October 2000.
5. Organisation of future work, in particular:
  - (a) finalisation of the preliminary draft Protocol;
  - (b) efforts to promote the preliminary draft Protocol in the world aerospace industry and financial community; and
  - (c) consideration of the most appropriate means of the funding of future work.
6. Presentation of the preliminary draft Protocol at the 40<sup>th</sup> session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), to be held in Vienna from 2 to 12 April 2001.
7. Any other business.

# UNIDROIT SPACE WORKING GROUP MILESTONES & ACTION ITEMS

Phase I (October 2000 – October 2001)

## Milestones

## Action Items

