



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS
FOR THE PREPARATION OF A DRAFT PROTOCOL TO
THE CONVENTION ON INTERNATIONAL INTERESTS IN
MOBILE EQUIPMENT ON MATTERS SPECIFIC TO
SPACE ASSETS
Fifth session
Rome, 21/25 February 2011**

UNIDROIT 2011
C.G.E./Space Pr./5/W.P. 15
Original : English
22 February 2011

**SUMMARY REPORT
FOR
22 FEBRUARY 2011**

(prepared by the UNIDROIT Secretariat)

Opening of the session

1. The Chairman opened the session at 9.45 a.m.

Agenda Item No. 3 on the draft agenda: consideration of the revised preliminary draft Protocol as it emerged from the fourth session of the UNIDROIT Committee (C.G.E./Space Pr./5/W.P. 3): continued

Consideration of outstanding issues regarding the revised preliminary draft Protocol (C.G.E./Space Pr./5/W.P. 2, pp. 3-7) (continued)

- (ii) Default remedies in relation to components (continued)

2. The delegations on the opposite sides of the division of opinion that had emerged on the issue of default remedies in relation to components the day before both noted that, notwithstanding informal consultations that had taken place between them in the interim, little ground had been gained in the finding of an agreeable solution to this issue but that both delegations remained willing to work towards a mutually agreeable solution.

3. Some delegations took the view that the ideal solution to this issue would be to have no provision on default remedies in relation to components but that, should it be decided to have a provision on this matter, it would be better that such a provision should, in the first place, be subject to existing inter-creditor agreements and, where there was no such agreement, refer the matter to the applicable law, as had been suggested by an observer on the previous day.

4. One delegation suggested a four-tier approach whereby, first, inter-creditor agreements would prevail in questions concerning the exercise of default remedies over physically-linked assets, secondly, in the absence of an inter-creditor agreement, parties would be required to negotiate for the conclusion of an inter-creditor agreement, thirdly, if the parties could not reach such an agreement, the proposed Article XVIII(3) and (4) would be applied and, fourthly, in the event that a creditor still sought to exercise a default remedy as a result of which a non-defaulting third party was adversely affected, then compensation would be required. Another delegation supported this approach.

5. One adviser suggested that one solution could be, in the context of space assets performing docking and rendez-vous manoeuvres, for language to be inserted into Article III providing that such manoeuvres would not affect the ownership or interests previously acquired in such assets.

6. It was agreed to refer the matter, and in particular the two new proposals tabled, to the Informal Working Group on default remedies in relation to components constituted at the third session of the Committee, in the membership of the Governments of Canada, the People's Republic of China, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom and the United States of America, with the advisers from BHO Legal, the Groupe Crédit Agricole and the German Space Agency as observers.

(iii) Article XXVII(2): Limitations on remedies

7. One delegation queried whether it was necessary to include the words "or would involve the transfer or assignment of a licence, or the grant of a new licence", particularly in the light of the decision by the Committee at its previous session to delete Article XVI (Duty of debtors as to licences).

8. However, there was general agreement that the removal of such language would weaken the revised preliminary draft Protocol and it was, therefore, agreed to keep the language in question in the text.

(iv) Article XXVII *bis*: Limitations on remedies

9. Reporting on the progress made at the October 2010 meeting of the Informal Working Group on limitations on remedies (C.G.E./Space Pr./5/W.P. 6), the Secretary-General highlighted the proposed new Alternative C that had emerged at that meeting, noting that this alternative had been considered by the Group as a whole to be preferable to both Alternatives A and B and had, therefore, been recommended to the Committee as the basis of its further deliberations on this issue (C.G.E./Space Pr./5/W.P. 6, § 21).

10. There was general consensus that, if a public service provision were to be included in the revised preliminary draft Protocol, any further discussions should be based on the proposed new Alternative C, subject to drafting refinements.

11. One delegation suggested that those delegations which had difficulty in accepting a rule on public service might be more inclined to accept such a rule if it were made subject to an opt-in provision, whereby States would have to avail themselves of the protections of a public service rule by opting into such a provision by declaration. This proposal received general support from those delegations that still felt that no provision on this issue was the best solution.

12. One delegation suggested that the language in sub-paragraph (4)(a) of Alternative C was too broad and should be recast along the lines of sub-paragraph (3)(a) of Alternative A.

13. One delegation noted that paragraphs 5 and 6 had been placed in square brackets but were crucial to the overall public service rule proposed in Alternative C and that the square brackets should, therefore, be removed. Some delegations, however, expressed concern that the effect of these paragraphs would be to render the public service rule useless; in particular, it was suggested a propos of paragraph 6 that a creditor would always be in a position to register an interest in a particular space asset through its involvement in the financing of the space asset from the outset of the space asset's life, before a Government would be able to register a notice in the future International Registry for space assets stating that the space asset was providing or

intended to provide a public service. Another delegation noted, however, that, in current practice, Governments were often involved during the creation of the business plan behind a space asset and would, therefore, have ample opportunity to register such a notice of public service, making Alternative C a useful form of protection.

14. One delegation wondered whether, under paragraph 1 of Alternative C, it should, in some circumstances, be left to private parties to determine whether a contracted service was a public service. In this connection, the delegation proposed that a mechanism should be incorporated that would enable a Contracting State to participate in defining whether a service was of a public nature that would fall under the protection of Alternative C. It was suggested by another delegation that a Contracting State, through its relevant licensing Authorities, could oblige a debtor seeking to provide a service that that Contracting State considered to be of a public nature to refer to the service as such in the debtor's negotiations with its potential creditors, putting those creditors on notice that the relevant asset might be subject to public service limitations on remedies.

15. It was agreed that, subject to the suggestions made during the discussions, Alternative C should replace the other Alternatives found in Article XXVII *bis* and be referred to the Informal Working Group on limitations on remedies, constituted at the third session of the Committee, in the membership of the Governments of Canada, the People's Republic of China, the Czech Republic, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom and the United States of America.

(v) Article XXX: Identification of space assets for registration purposes

16. Some delegations expressed their support for Article XXX, notably in the light of the new definition of "space asset". One delegation suggested that paragraph 1 was appropriate for the purpose of providing the necessary and sufficient criteria for the unique identification of a space asset for the purposes of registration and that paragraph 2 might, therefore, be deleted. It was suggested by another delegation that, if the Committee considered paragraph 1 to provide necessary and sufficient criteria on its own, the first phrase and last sentence of paragraph 1 could also be deleted.

17. It was suggested by another delegation that, even if the criteria in paragraph 1 were considered to be necessary and sufficient, paragraph 2 could still be useful in setting forth additional information, such as the date of launch, that might help parties searching the future International Registry to identify or track a specific asset, even if this information might not be considered necessary and sufficient for registration purposes and failure to register it would not result in the incurring of sanctions. Some delegations supported this proposal.

18. There was general consensus to adopt this approach and the text was referred to the Drafting Committee for further drafting refinements.

(vi) Proposed new Article I(2)(f): definition of "licence"

19. One delegation proposed a new definition of "licence" (C.G.E./Space Pr./5/W.P. 11). This proposal was supported by other delegations, subject to the deletion of the words "that could be so recognised". It was so agreed.

(vii) Proposed new Article IX(2): Formal requirements for rights assignment

20. One delegation proposed a new Article IX(2) (C.G.E./Space Pr./5/W.P. 12), noting that the issues of rights assignments and the protection of national strategic areas were very important to its Government. Although one delegation supported the proposal, other delegations indicated that

the issue would be covered by Article XXVII(2), which was itself the subject of a proposal submitted by another delegation. It was decided that further consideration of the proposal should, therefore, be deferred until after the Committee had considered Article XXVII(2).

(viii) Proposed new Article XVI: Economic realisation of interests; step-in operators

21. One delegation provided an overview of its proposal (C.G.E./Space Pr./5/W.P. 8) for a new Article XVI and indicated that the proposal was designed to deal with an existing barrier to the enforcement by creditors of their rights, namely the difficulties associated with arranging for a step-in operator to take the place of the debtor, by providing for pre-approval of step-in operators. Some delegations indicated that they would require further information and explanation of the proposal in order fully to understand and consider it.

22. Some delegations indicated qualified support for the second paragraph of the proposal, although questions were raised about its drafting, potential inconsistencies with other provisions of the preliminary draft Protocol, including Articles XVIII, XXVII(2) and XXIX, and the appropriateness of the preliminary draft Protocol including a provision that essentially invited a Contracting State to amend its own law.

23. Some delegations raised questions about the first paragraph of the proposal, including the uncertainty that could potentially be created through the inclusion of concepts such as "in a discriminatory manner" and "policies of the Convention and of this Protocol" and its relationship with other limits on the exercise of remedies contained in other provisions of the preliminary draft Protocol. One delegation indicated that the proposal could be reformulated to provide for a Contracting State to collaborate with creditors in relation to the exercise of remedies.

24. Noting that the proposal had been controversial, the Chairman invited the delegation that had made this proposal to redraft it to take account of the comments that had been made by delegations and to present the revised proposal to the Committee.

(ix) Proposed new Article II(3): Application of the Convention as regards space assets and debtor's rights

25. An observer suggested that Article II(3), dealing with the preliminary draft Protocol's relationship with the Aircraft Protocol, should be reviewed. He suggested that any potential overlap between the two Protocols would be limited to the case of aircraft that had an ability to enter outer space and that it would be appropriate for international interests created in relation to such aircraft to be governed by the Aircraft Protocol. The observer proposed that Article II(3) be amended to provide either that, in the event of conflict between the two Protocols, the provisions of the Aircraft Protocol should prevail or that an object that was an aircraft object pursuant to the Aircraft Protocol should not be capable of being a space asset pursuant to the preliminary draft Protocol.

26. One delegation indicated that Article II(3) had been intended to address the different question of whether a space asset that had not yet been launched into outer space could be considered to be an aircraft under the Aircraft Protocol. Another delegation indicated a preference for the second formulation proposed by the observer. Yet another delegation indicated that the observer's proposal raised a broader question as to whether the preliminary draft Protocol might inadvertently amend the Aircraft Protocol. The Chairman indicated that consideration of this issue would continue on 23 February 2011.

27. The Chairman adjourned the session at 5.03 p.m.