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Legal Analysis

(Prepared by the UNIDROIT Secretariat)

<i>Summary</i>	Analysis of major legal issues facing the creation of the MAC Protocol.
<i>Action to be taken</i>	Discussion.
<i>Related documents</i>	<i>UNIDROIT 2015 - Study 72K – SG2 – Doc. 5</i>

Introduction

1. The purpose of this document is to set out the most significant legal and technical issues facing the creation of the MAC Protocol. Part I considers existing legal issues that the Study Group has not yet reached a position on. Part II provides a summary of legal issues that the Study Group has considered and resolved during previous meetings. There is no specific need for the Study Group to reconsider the legal issues in Part II of the document, its purpose is to provide a summary of previously resolved issues in the event that the Study Group wishes to give a previous issue additional consideration.

2. The document is to be considered in conjunction with the Second Annotated Draft Protocol (*UNIDROIT 2015 - Study 72K – SG2 – Doc. 5*). This document will reference the Article(s) of the Protocol that will need to be adapted to solve the legal and technical issues considered.

3. It should be reiterated that the commentary in Part I of this document is a discussion tool, and should not be considered as providing final views of how legal issues should be solved.

4. The issues dealt with in this document are as follows:

Part I – Existing legal issues

- A. Use of the Harmonised System
- B. Multiple purpose equipment
- C. Interaction between the MAC and Rail Protocols
- D. Insolvency
- E. Fixtures
- F. Application to sales

Part II – Resolved legal issues

- A. Use of Article 51(1) Criteria
- B. Severability
- C. Accessions
- D. Merged collateral
- E. Inventory
- F. Interaction with domestic secured transactions regimes
- G. Public service exception
- H. De-registration and export request authorisation
- I. Modification of assignment provisions

PART I – EXISTING LEGAL ISSUES

A. Use of the Harmonised System

5. At the first meeting of the Study Group, it was agreed that the best likely method of delineating the scope of the MAC Protocol was by use of the Harmonised Commodity Description and Coding System (HS).¹ The use of the HS is considered in detail in document *UNIDROIT 2015 - Study 72K – SG2 – Doc. 2*.

B. Multiple purpose equipment

6. At the first Study Group meeting it was concluded that, in principle, the Protocol should not cover equipment that is general in nature.² In determining the purpose of equipment, it was suggested that the design rather than the use of the equipment should be considered. It is suggested that the use of the HS will further resolve this issue, because equipment that is general in nature (for example, trucks) will not be listed under HS codes associated with the agriculture, construction and mining fields. As such, the use of the HS itself will serve as a filter to prevent the listing of general-purpose equipment under the Protocol.

7. An additional issue considered at the first Study Group meeting was equipment that is predominantly used in agriculture, construction or mining, but is also used in one or more of the other MAC areas (for example, a drill used in both mining and construction). This becomes an issue both in relation to (i) which list in the annex the item is added to, and (ii) what happens if equipment is listed in two lists and a Contracting State opts out of one of the categories. For example, if an encumbered mining asset is listed under the mining equipment annex is used in the construction industry, and the relevant Contracting State applies the Protocol only to mining.

8. The first Study Group meeting suggested that where a type of MAC equipment has the possibility to be listed under more than one of the classes (agriculture, construction and mining), then it should be listed under each class independently. However, it was decided to give this issue further consideration at the subsequent Study Group meeting.

9. Further analysis of the initial list of HS codes provided by the Working Group should assist in determining the likelihood of this issue (MAC equipment being used in one or more MAC areas) occurring in actual practice.

10. The Study Group is invited to confirm its previous views on this matter:

- (a) The use of the HS to delineate the scope of the MAC Protocol should prevent it from covering equipment that is general in nature
- (b) In the limited circumstances that a type of MAC equipment has the possibility of being used in one or more of the agricultural, construction and mining fields, then it should be listed under each class independently.

C. Interaction between MAC and Rail Protocols

11. At the first Study Group meeting it was noted that there could be an overlap between the MAC Protocol and the Luxembourg Rail Protocol, due to the broad definition of railway rolling stock contained in the Luxembourg Rail Protocol.³ It was noted that if the MAC Protocol limits its scope by identifying specific types of equipment through the HS system, then it would have a stricter approach to scope than the description-based approach of the Luxembourg Rail Protocol.

¹ [UNIDROIT 2015 - Study 72K – SG1 – Doc. 5](#), paragraphs 6-9.

² [UNIDROIT 2015 - Study 72K – SG1 – Doc. 5](#), paragraphs 20-24.

³ [UNIDROIT 2015 - Study 72K – SG1 – Doc. 5](#), paragraph 25.

12. It was further suggested that if the MAC Protocol adopted this stricter approach to scope, it should prevail over the Luxembourg Rail Protocol in the event of a conflict between the scopes of the two Protocols.

13. The first Study Group meeting suggested two alternative approaches for dealing with the overlap between the two Protocols: (i) limiting the scope of the MAC Protocol or by (ii) inserting a priority rule into the MAC Protocol. These two potential options are set out by the second draft Protocol.

14. The Study Group decided to defer its decision on how to resolve conflicts between the scopes of the MAC and Rail Protocols until the second meeting, and requested that the Secretariat gather information on the likelihood of MAC equipment falling under the definition of railway rolling stock under the Luxembourg Rail Protocol.

15. The HS System covers "Railway or tramway locomotives, rolling-stock and parts thereof; railway or tramway track fixtures and fittings and parts thereof; mechanical (including electro-mechanical) traffic signalling equipment of all kinds" under Chapter 86. The Preliminary List of HS codes suggested for inclusion under the scope of the MAC Protocol does not include any item from Chapter 86. However, that does not mean that some equipment types included in the List may not be used for a purpose that would seem to be covered by the Luxembourg Rail Protocol.

16. Initial research has identified one type of equipment currently under consideration for inclusion under the MAC Protocol that would likely fall within the scope of the Rail Protocol: Tamping machines and road rollers (HS code 842940). A tamping machine or ballast tamper is a machine used to pack (or tamp) the track ballast under railway tracks to make the tracks more durable. In operation, it appears to run on rail tracks, which would bring it within the scope of the Rail Protocol.

17. Further research may identify additional types of MAC equipment that fall within the scope of both Protocols. It is also possible that other types of machinery could be modified to run on tracks, which would also bring them within the scope of both Protocols.

18. The Study Group is invited to give further consideration to this matter, taking into account the draft Articles in the second draft Protocol which deal with this issue.

D. Insolvency

19. At the first Study Group meeting it was tentatively agreed that Alternatives A, B and C should be kept in the draft Protocol, pending further discussion. Given that Alternative B is included in all three previous Protocols, it would be reasonable for its inclusion in the MAC Protocol as well. The first Study Group meeting was supportive of also including Alternative C, on the basis that it takes into account the Continental European approach to insolvency.

20. Alternative C features only in the Rail Protocol, and was designed as a compromise between Alternatives A and B. As in Alternative A, the obligation of the insolvency administrator under Alternative C is triggered by the occurrence of an insolvency-related event (i.e. with no need for a request from the creditor). As consistent with Alternative B, Alternative C requires the administrator to either cure all defaults or provide the creditor with the 'opportunity' to take possession 'in accordance with the applicable law' within a specified period. However, the administrator can defer the obligation for such time as the court orders (but no later than when the underlying agreement would have expired), provided that sums accruing to the creditor during the suspension period are paid, and the rolling stock and its value are maintained.⁴

21. After the expiration of the cure or the further suspension period, where ordered the exercise of the default remedies available to the creditor under the Convention and Protocols can no longer be prevented or delayed, as consistent with Alternative A. This provision requires the displacement (from the end of the cure period or further suspension period) of procedural

⁴ Kristin Van Zwieten, 'The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives', *Cape Town Convention Journal* (2012) Volume 1, page 69.

restrictions, such as a stay, that could otherwise bar the exercise of default remedies in insolvency. As such, the core difference between Alternative A and Alternative C is the possibility of delays in the exercise of default remedies under Alternative C where a suspension order is made.⁵

22. As a matter of policy, there is also benefit in giving Contracting States the widest variety of options in selecting insolvency remedies, as long as they remain consistent with the approaches in the previous Protocols. As such, the current proposal is to recommend that the MAC Protocol include Alternatives A, B and C, as consistent with the approach in the Rail Protocol. This approach is set out in Article IX of the second draft Protocol.

23. There is a scarcity of available information as to why Alternative C was excluded from the Space Protocol, having been previously included in the Rail Protocol. Due to the relative similarity in the nature of aircraft and space objects, the Space Protocol Study Group adopted the policy that the provisions in the Aircraft Protocol should be followed (as opposed to those in the Rail Protocol), unless there was a demonstrably strong rationale for deviating from the Aircraft Protocol. This reasoning may be part of the rationale as to why the Space Protocol did not adopt Alternative C, as it would have been a deviation from the Aircraft Protocol provisions. The Secretariat will continue to research this issue, with the intent of providing an in-depth study on the issue in advance of the next Study Group meeting.

Compatibility of special insolvency regimes with the MAC Protocol

24. The first Study Group meeting requested further research on special insolvency regimes for farmers or other enterprises likely to own MAC equipment. The Secretariat is continuing to research this issue, and will provide a verbal update at the second Study Group meeting.

25. In considering this issue, it should be noted that given that the MAC Protocol will be restricted in its application to high value equipment, it is likely that vast majority of the equipment covered by the Protocol would not be utilised by the small, family farming enterprises that are often the parties protected by such special agricultural regimes. As such, it is likely that any conflict between domestic family farmer insolvency protections and the insolvency regime in the Protocol would be rare. However, special insolvency regimes or exemptions from general insolvency regimes may also apply to mining enterprises that are State-owned or in which the State has a stake.

E. Fixtures⁶

26. Issues may arise where MAC equipment requires physical affixation to real property and thus could be treated as a fixture under domestic law. This is a difficult and complex issue, as any attempt by the MAC Protocol to interfere with domestic law in relation to fixtures may be resisted by States.

27. The first Study Group meeting considered this issue in some depth.⁷ It was noted that under German law, simply placing a moveable asset onto land (rather than affixing it to the land) might subject the asset to an interest in the land. It was further noted that under the UNCTIRAL Legislative Guide on Secured Transactions, which refers to fixtures as attachments to immovable property, the national security law governing immovable objects has priority over interests in mobile objects and that no loss of individual identity of the mobile object need occur for this priority of the national interest to come into effect. Under the UNCITRAL Legislative Guide, a party can remove an affixed mobile object; however, the party may do so only if it has priority as against competing rights in the immovable property and will owe an obligation to compensate the mortgagee under the domestic immovable property law for any damage incurred in removing the

⁵ Kristin Van Zwieten, 'The Insolvency Provisions of the Cape Town Convention and Protocols: Historical and Economic Perspectives', *Cape Town Convention Journal* (2012) Volume 1, page 69.

⁶ NLCIFT pages 57 – 58.

⁷ [UNIDROIT 2015 - Study 72K – SG1 – Doc. 5](#), paragraphs 37-43.

affixed object, other than any diminution in its value attributable solely to the absence of the fixture.

28. One potential solution identified at the first Study Group meeting was to exclude all items capable of being affixed from the scope of the MAC Protocol. An alternative solution was the creation of a simple mechanism which could be included in the Protocol that defers to domestic law governing security interests over immovable property, and that this could be drafted alongside a model domestic law that properly facilitates priority between an international interest in affixed/attached mobile equipment and a domestic interest in immovable property.

29. The first Study Group meeting instructed the Secretariat to conduct further research in relation to fixtures on the following issues:

- (a) how many types of equipment in the HS list suggested by the private sector actually require some degree of affixation and
- (b) how priority between interests in mobile affixable property and domestic interests in immovable property is currently resolved under domestic legal regimes
- (c) Whether the drafting of Article 29(7) of the Convention (which deals with installations) could be instructive in addressing this issue

Types of MAC equipment capable of affixation

30. There are a number of types of equipment contained in the preliminary list of HS codes for inclusion under the MAC Protocol that may require some degree of affixation to property in order to operate. In particular, the following types of equipment drawn from *Study 72K - SG2 - Doc. 3* may require some degree of affixation:

- (a) 820713 - Rock drilling or eather boring tools.
- (b) 841350 - Other reciprocating positive displacement pumps.
- (c) 842620 - Tower Cranes. The tower crane is a fixed crane that is mounted on-site. It present itself like a vertical metallic structure having a horizontal boom that can turn over an angle up to 360°
- (d) 842649—Derricks etc self-propelled not on tires. A Derrick is a kind of crane with a movable pivoted arm for moving or lifting heavy weights.

31. It is likely that further items capable of affixation will be identified as the preliminary list of HS codes is further refined. As anticipated, majority of equipment capable of affixation appears to be produced for use in the construction and mining sectors.

Interests in mobile affixable property under domestic legal regimes

32. Given the relatively short time between the first and second Study Group meetings, the Secretariat was unable to undertake sufficient research do address this issue at the second meeting. The Secretariat will work with the Working Group in consulting the private sector as to how they currently resolve this issue, and report back to the Study Group at its third session.

Treatment of installations under Article 29(7) of the Cape Town Convention

33. Article 29 of the Convention deals with the priority of competing interests. Paragraph 7 of Article 29 provides:

This Convention:

- (a) does not affect the rights of a person in an item, other than an object, held prior to its installation on an object if under the applicable law those rights continue to exist after the installation; and
- (b) does not prevent the creation of rights in an item, other than an object, which has previously been installed on an object where under the applicable law those rights are created.

34. Paragraph 7(a) deals with the installation of an item which is not covered by the Convention (such as a computer or spare part) on an object which is covered by the Convention. It provides that installation or incorporation does not affect pre-existing rights, if they are preserved by applicable law. Alternatively, if the applicable law provides the right to the installed or incorporated item passes under the doctrine of accession to the owner of the internationally registered object as the principal asset, then the pre-existing right will be extinguished.⁸ Paragraph 7(b) states that where the applicable law so provides, rights in such items which have previously been installed may be created in them after removal from the object.

35. Article 29(7) defers to the applicable national law to determine how to treat installations on objects over which there is an international security interest under the Cape Town Convention. Under this Article, deferring to the applicable law for installations does not affect the priority of the international secured interest over the object itself.

36. This approach may be problematic to adopt in relation to the MAC Protocol (i.e. allowing applicable national law to govern what happens when a piece of relevant MAC equipment is affixed to property), as it could significantly diminish the effectiveness of an international interest under the Convention. The Study Group may wish to discuss whether Article 29(7) is instructive in dealing with fixtures under the MAC Protocol.

F. Application to sales

37. The first Study Group meeting discussed whether the MAC Protocol should extend to sales, in conformity with the approaches in the Aircraft and Space Protocols. It was noted that the Aircraft Protocol was extended to sales because of the existing practice in the industry of registering sales on the title registry. It was further noted that registration of sales was also important in the aircraft industry because of the very high value of aircraft and that payment was often made to a seller before the sale.

38. The first Study Group meeting examined the approach taken in Article XVII of the Luxembourg Rail Protocol in relation to notices of sale. Article XVII of the Luxembourg Rail Protocol allows for the registration in the International Registry of notices of sale covering railway rolling stock. However, such registration of a notice of sale is for information purposes only and does not have any legal effect under the Convention or Protocol. The first Study Group meeting noted that the benefits of this approach were that it allowed for more accessible information on the sales of equipment to be provided, and it generated additional fees for the International Registry.

39. It was further noted that while the registration of notices of sale under the Luxembourg Rail Protocol did not have any legal effect under the Convention or Protocol, it would likely have an effect under domestic law in jurisdictions where knowledge of a prior interest in an asset can affect the priority rules relating to that asset. This approach is still adopted in several countries. By way of example, knowledge of a prior interest may affect priority rules under the Spanish civil law. Conversely, the French legal system has a new rule where knowledge of a prior interest is irrelevant.

40. The first Study Group meeting decided that the approach in Article XVII of the Luxembourg Rail Protocol should be adopted in the MAC Protocol. As such, the second draft Protocol now contains the newly inserted Article XVII governing Notices of Sale.

41. The first Study Group meeting also requested that the Secretariat conduct further research on how such notices of sale affect domestic law priority rules. Given the relatively short time between the first and second Study Group meetings, the Secretariat was unable to undertake sufficient research to address this issue at the second meeting. The Secretariat will conduct additional research and report back to the Study Group at its third session.

⁸ Official Commentary to the Aircraft Protocol (3rd Edition), paragraph 4.197.

PART II – RESOLVED LEGAL ISSUES

A. Use of Article 51(1) Criteria

42. By way of background, the natural starting point when considering the scope of the MAC Protocol is Article 51(1) of the Cape Town Convention itself, which provides:

The Depositary may create working groups, in co-operation with such relevant non-governmental organisations as the Depositary considers appropriate, to assess the feasibility of extending the application of this Convention, through one or more Protocols, to objects of any category of high-value mobile equipment, other than a category referred to in Article 2(3), each member of which is uniquely identifiable, and associated rights relating to such objects.

43. Article 51(1) sets out three clear elements that equipment must demonstrate to be capable of being the subject of a future Protocol: i) high-value, ii) mobile and iii) uniquely identifiable. In doing so, Article 51 naturally limits the scope of the Convention by ensuring it is not of general application in regulating international secured transactions law.

44. At the first meeting of the Study Group, it was agreed that the best likely method of delineating the scope of the MAC Protocol was by use of the Harmonised Commodity Description and Coding System (HS). The HS could be utilised to identify and list certain types of agricultural, construction and mining equipment that were of sufficiently high value and uniquely identifiable for inclusion under the MAC Protocol. The Study Group concluded that it could be possible to determine the high value criteria of the Protocol on a case by case basis by reference to the unit prices of equipment under the HS, however further research on the HS was required.

45. The Study Group further concluded that for MAC equipment to be considered for inclusion under the scope of the Protocol, it would have to be uniquely identifiable by serial number or other means.

46. However, the Study Group also concluded that there was no need to explicitly define mobility in the MAC Protocol.⁹ At the first Study Group meeting it was noted that the definition of mobility also arose during the negotiation of the Luxembourg Rail Protocol and that a solution could not be identified. To some extent, use of the HS itself addresses the mobility criterion, as it is a system specifically designed for identifying different types of equipment that are traded internationally. Finally, it should be noted that majority of security interests registered under the International Registry for the Aircraft Protocol are aircraft that actually service domestic rather than international routes. As such, it is clear that demonstrated routine international mobility for every piece of equipment is not required for a Protocol to the Cape Town Convention to be successful.

B. Severability

47. It has been suggested during consultations that it may be worth splitting the MAC Protocol into three Protocols covering agriculture, construction and mining separately. The basis for this view is that the three fields are very different from one another, with diverse groups of stakeholders and categories of equipment that need to be considered. Further, the national Questionnaire completed by different jurisdictions in 2008 revealed that certain States favoured the creation of a Protocol regulating secured transactions for one of the three areas, but not necessarily for the others.

48. At the first Study Group meeting it was concluded that the Protocol should be maintained as a single Protocol, while allowing states to opt out of any of the three classes

⁹ [UNIDROIT 2015 - STUDY 72K – SG1 – DOC. 5](#), paragraphs 11-13.

(agricultural, construction and mining) of equipment.¹⁰ This opt out option for Contacting States is located in Article II of the second Draft Protocol.

C. Accessions¹¹

49. As discussed in the NLCIFT paper, there are certain accessions for MAC equipment that could be of substantial enough value to warrant consideration for inclusion under the Protocol. At the first Study Group meeting it was discussed whether the MAC Protocol should include alternate provisions to deal with accessions.

50. At the first Study Group meeting it was noted that in negotiating the Luxembourg Rail Protocol a decision had been made not to allow the registration of discrete interests in railway engines. While there were circumstances where railway engines were removed and put into other trains, this practice was not widespread enough to warrant including a separate provision allowing for the registration of an interest in railway engines in the Luxembourg Rail Protocol. The first Study Group meeting distinguished this from the longstanding practice in the aviation industry of separate financing for aircraft engines.

51. As such, the first Study Group meeting concluded that unless there was widespread commercial practice of separate financing of accessions to MAC equipment, then accessions would not be separately registerable under the MAC Protocol.

D. Merged Collateral¹²

52. An established practice in the financing industries is to provide financing to customers for new equipment in the form of a financial lease which takes a security interest over both the new equipment and other assets of the customer as additional collateral. The additional collateral is typically other machinery.

53. Where all equipment involved in the transaction (both the new equipment and the equipment being used as additional collateral) is MAC equipment within the scope of the Protocol, the security interests could all be internationally registered, which would have priority over any prior registered interests under national law. However, where the collateral equipment falls outside the scope of the Protocol, there is a significant burden on the creditor to comply with the requirements of two distinct regimes to perfect its security interest in the entire package of assets (i.e. the creditors would have to register their interest in the new MAC equipment in the international registry, but the associated collateral equipment would require registration and compliance with the domestic secured transactions laws.)

54. Ultimately, the first Study Group meeting concluded that merged collateral was not an issue unique to the financing of MAC equipment and there was no need to diverge from the approach of the previous Protocols.

E. Inventory¹³

55. In principle, there is no problem with MAC equipment within the scope of the Protocol being held as inventory and international interests covering such items being registered in the international registry. However, the issue becomes slightly more complex when considering unfinished MAC equipment held by the manufacturer, which may also constitute inventory against which the manufacturer may seek secured financing.

¹⁰ [UNIDROIT 2015 - Study 72K – SG1 – Doc. 5](#), paragraph 19.

¹¹ NLCIFT pages 52 – 56.

¹² NLCIFT pages 60 – 61.

¹³ NLCIFT pages 59 – 60.

56. It was discussed at the first Study Group meeting whether the MAC Protocol should contain additional provisions dealing with the financing of equipment being held on inventory. It was suggested that the Protocol should not create a distinction between inventory and equipment. Further, the first Study Group meeting confirmed that for an interest in equipment to be registerable under the Protocol the equipment itself must be uniquely identifiable. As such, unfinished inventory was unlikely to be uniquely identifiable and thus interests thereto could not be registered under the MAC Protocol. The piece of equipment would become registerable once it became uniquely identifiable by serial number or other means.

57. The first Study Group meeting concluded that there was no need for the MAC Protocol to contain additional provisions covering inventory.

F. Interaction with domestic secured transaction regimes¹⁴

58. Assets covered by the Cape Town Convention and its three existing Protocols are typically excluded from general domestic secured transaction regimes, as consistent with Recommendation 4 of the UNCITRAL Legislative Guide on Secured Transactions. However, when such assets are covered by a regime that provides for the creation and registration of interests therein creating a potential collision between such national laws and the Cape Town system, Article 29 of the Cape Town Convention provides that the international interest takes priority. It is suggested that interests registered under the MAC Protocol should be expected to have priority over those interest made effective under national laws, as consistent with the previous Protocols.

G. Public service exception¹⁵

59. Article XXV of the Rail Protocol and Article XXVII of the Space Protocol provide an exemption to the operation of certain aspects of the Cape Town Convention and the relevant Protocols in relation to the provision of public services. While the approach to this issue in the two Protocols is materially different, the underlying policy is the same: the State has a natural interest in ensuring that a creditor exercising its rights under the Convention/Protocol does not cause the abrupt termination of a service of public importance.¹⁶

60. Article XXV of the Rail Protocol provides that a Contracting State may, at any time, enter a declaration that it will continue to apply its domestic law in force at the time of the declaration that precludes, suspends or governs the exercise by the creditor of any remedies under the Convention/Protocol in relation to public service railway rolling stock. Article XXV applies to both passenger vehicles and freight vehicles that must be habitually providing a service of public importance (i.e. a passenger vehicle habitually carrying a substantial number of passengers on a main line would ordinarily be considered to provide a service of public importance).¹⁷ If the public service is exercised by the Contracting State, it has duties to preserve and maintain the asset and pay to the creditor compensation under either the national law or the market lease rental within 10 calendar days of taking possession of the asset (and thereafter on the first day of each successive month). There is no time limit on the period the Contracting State can prevent the creditor from exercising a remedy in relation to public service stock.

61. Under Article XXVII of the Space Protocol, a debtor who enters into a contract providing the use of a space asset to provide public services can agree with other parties to the contract for the provision of the public service and the Contracting State to register a public service notice under the Protocol. Technically, it does not require the creditor's consent, as the creditor is not a party to the contract for the provision of public services. However, the creditor can impose contractual restraints on the debtor's consent to registration of a public service notice at the time of the creation of the international interest, and therefore in practice is likely to be a part of the

¹⁴ NLCIFT pages 68 – 75.

¹⁵ NLCIFT pages 65 – 67.

¹⁶ Space Protocol Official Commentary, page 194.

¹⁷ Rail Protocol Official Commentary, page 181.

negotiations.¹⁸ Subject to certain exceptions, a creditor may not exercise any Convention/Protocol remedies in the event of a debtor default on an asset that is subject of a public service notice. The period that a creditor cannot exercise its remedial rights is limited to 3-6 months. During the suspension period, the creditor, debtor and public service provider are required to cooperate in good faith with a view to find a commercially reasonable solution permitting the continuation of the public service. The approach in Article XXVII appears to be more complex than the approach in the Rail Protocol.

62. The types of important public services relating to rail transport (carriage of persons and goods) and space assets (national security, transport safety, communications) are obvious. Conversely, the agriculture, construction and mining sectors do not provide public services. Rather, they simply operate in fields of significant public interest.

63. The first Study Group meeting agreed to adopt a cautious approach to this issue, given the difficulty involved in its negotiation in the previous Protocols. The first Study Group meeting highlighted the important distinction between objects that actually provide a public service covered under the Rail and Space Protocols, and objects that are used in performing functions that are of significant public interest. For example, construction equipment may be used in the building of important infrastructure projects that are central to the public interests of a country; however the construction equipment itself is not providing a continuous public service. It was further noted that the most common types of MAC industry-related projects of national importance would have a degree of public financing and as such would be unlikely to be financed by private financing agreements covered by the Cape Town Convention.

64. The Study Group agreed that it was not necessary to include a public service exception article in the draft MAC Protocol, on the basis that MAC industries do not provide continuous public services. The Study Group agreed that this issue should be sufficiently covered by a note in the text of the revised annotated Protocol.

H. De-registration and export request authorisation

65. The first Study Group meeting discussed whether it was necessary to include an Article in the MAC Protocol on 'de-registration and export request authorisation', as consistent with Article XIII of the Aircraft Protocol. It was noted that the two separate de-registration and export powers are two of the most powerful instruments in the Aircraft Protocol. It was further noted that a similar export power exists in Articles VII(5) and IX(8) of the Luxembourg Rail Protocol which provide that subject to any applicable safety laws and regulations, a Contracting State shall ensure that the relevant administrative authorities shall expeditiously co-operate with and assist a creditor in procuring the export and physical transfer of equipment from the territory in which it is situated where the debtor has defaulted on their obligations or have become insolvent.

66. The first Study Group meeting noted that there seemed to be no need for an explicit de-registration provision for the MAC Protocol, as countries did not have title registries for MAC equipment in the same way they do for aircraft, nor was there a clear 'relevant administrative authority' for MAC equipment from which a party might require assistance. Page 405 of the Luxembourg Rail Protocol Official Commentary provides that the reference to 'relevant administrative authority' did not intend to effect or refer to export/customs rules. The first Study Group meeting reaffirmed that this approach was correct.

67. The first Study Group meeting considered that while a single relevant administrative authority could not be identified, assistance from authorities other than export/customs authorities might be required in moving certain types of equipment within a territory. It was concluded that the approach in Article VII of the Luxembourg Rail Protocol should be retained for the MAC Protocol, however more detail on the meaning of 'relevant administrative authority' should be provided in the Official Commentary to the MAC Protocol. This approach is reflected in Article VII(5) of the second draft Protocol.

¹⁸ Space Protocol Official Commentary, page 196.

I. Modification of Assignment provisions

68. The first Study Group meeting discussed whether it was necessary for the MAC Protocol to modify the assignment provisions in the Cape Town Convention, as consistent with Article XV of the Aircraft Protocol and Article XXIV of the Space Protocol. It was noted that Article XV of the Aircraft Protocol modified Article 33 of the Cape Town Convention, by adding the additional requirement of obtaining a debtor's consent in writing before an assignee may enforce the debtor's duty to make payment or give other performance. It was further noted that this additional requirement was included in the Protocol because it reflected the established practice in aircraft financing and that the airline industry did not want to have it removed. The Luxembourg Rail Protocol did not follow this approach as such a practice was not followed in the rail industry.

69. The first Study Group meeting concluded that the precedent in the Luxembourg Rail Protocol was to be followed and there was no need for the MAC Protocol to modify the original assignment provisions in the Cape Town Convention.