

# The Public Service Exemption in the Space Protocol in Light of That Found in the Luxembourg Protocol

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## Abstract

The public service provision proved to be one of the most controversial issues during the legislative history of the Space Protocol. This was also the case for the Luxembourg Protocol. The goal of this paper is to analyze the public service provision in the Space Protocol in order to examine if a compromise can be found in the existing mechanism between diverging interests of States and creditors in light of the approach found in the Luxembourg Protocol.

## 1. Introduction

In contrast to the beginning of the space age, private entities now play a central role in space operations under the influence of commercialisation of space activities.<sup>1</sup> The changing context of space has raised the issue of financing for these entities.<sup>2</sup> The development of the space sector requires, like all other sectors, “an efficient law of secured transactions”.<sup>3</sup> The Cape Town Convention on International Interests in Mobile Equipment,<sup>4</sup> concluded under the auspices of International Institute for the

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- 1 Francis Lyall & Paul B. Larsen, *Space Law, A treatise*, Ashgate, 2009, at 1, 30 and 443, 497; Stephan Hobe, “The impact of new developments on international space law (New actors, commercialization, privatization, increase in the number of “Space-faring Nations”)”, in *Uniform Law Review*, 2010-3/4, at 869, 874; Mireille Couston, *Droit spatial*, Ellipses, 2014, at 207, 209.
- 2 Edward Ridley Finch & Amanda Lee Moore, *Astrobusiness, a guide to the commerce and law of outer space*, Praeger publishers, 1984, at 47, 54.
- 3 Mark J. Sundahl, *The Cape Town Convention, its application to space assets and relation to the law of Outer Space*, Martinus Nijhoff Publishers, 2013, at 7, 14.
- 4 The Cape Town Convention on International Interests in Mobile Equipment, adopted in Cape Town on 16<sup>th</sup> November 2001 (referred to hereinafter as the Convention).

Unification of Private Law (UNIDROIT), creates an international system of security interest recognized and enforceable in Contracting States and aims to encourage and facilitate the financing of three types of mobile equipment of high-value: aircraft, railway rolling stock and spacecraft.<sup>5</sup> The Convention was first supplemented by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment;<sup>6</sup> secondly, by the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock;<sup>7</sup> and finally, by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets,<sup>8</sup> which is the first instrument of international private space law.<sup>9</sup>

Nevertheless, the financing of space assets raises difficulties such as problems stemming from repossession, conflict of laws, state responsibility, liability, national security and export control concerns.<sup>10</sup> Indeed, these difficulties raised in space financing complicated finding solutions to key issues in the legislative history of the Space Protocol; one of these being the public service exemption.<sup>11</sup>

The concept of public service has always been problematic, and even more so, in recent years. In fact, economic and technological changes have led to a dynamic concept of public service. It comes as no surprise that the sphere of application of public service provided by States or local authorities has expanded as modern society becomes increasingly dependent on space activities: navigation, communication, natural disaster warning, tele-

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5 Paul B. Larsen, “Berlin Space Protocol: Update”, in *Zeitschrift für Luft- und Weltraumrecht*, 2015/2, at 362, 365.

6 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001), in force from 1 March 2006, (referred to hereinafter as the Aircraft Protocol).

7 Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007), not yet in force (referred to hereinafter as the Luxembourg Protocol).

8 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 2012), not yet in force. (Referred to hereinafter as the Space Protocol).

9 Paul B. Larsen, “Berlin Space Protocol: Update”, note 5 above, at 362.

10 Dietrich Weber-Steinhaus & Deirdre Ni Chearbhaill, Security rights over satellites: An overview of the proposed Protocol to the Convention on International Interests in Mobile equipment on matters specific to space assets, in *Contracting for Space, Contract practice in the European Space Sector*, Edited by Lesley Jane Smith and Ingo Baumann, Ashgate, 2011, at 222, 223.

11 Du Rong, “An innovative repossession right in the UNIDROIT Space Protocol and formation of new contract practices in the space sector”, in *Proceedings of the 56<sup>th</sup> International Institute of Space Law Colloquium on the Law of Outer Space (2013)*, Eleven, 2014, at 74.

education etc. The disruption of these activities, even if only for a limited time, has the very real potential to paralyze our daily lives.

Consequently, the public service exemption was one of the most controversial issues during the legislative history of the Space Protocol.<sup>12</sup> The fact that each country has differing concepts of public service has complicated finding a definition. It is very difficult to have one single meaning of this concept throughout the world.<sup>13</sup> Fixing certain criteria such as: “*mandatory*”, “*emergency*” or “*essential*” in the description of public service was recommended but the meanings of these words also differ from one State to another.<sup>14</sup> Professor Roy Goode brings some clarifications in his explanatory notes preceding the Berlin Diplomatic Conference by remarking, “the phrase “public service” is not defined but broadly covers a service to the public which Contracting States have an interest in ensuring is not abruptly terminated or suspended through the exercise of creditors’ remedies”.<sup>15</sup> Finally, the Space Protocol avoided the problem of this definition, by leaving it to the applicable law of the relevant Contracting State.<sup>16</sup>

Such as the problem of definition, the insertion (or exclusion) of an exemption in the Protocol gave rise to a great deal of discussion. During the first session of the Committee of Governmental Experts, there were two main approaches regarding the public service exemption. The first was in favor of an insertion of the exemption in all circumstances<sup>17</sup> while the second proposed that, if the insertion of an exemption was necessary, it must be provided for only in certain circumstances.<sup>18</sup> The majority of delegations

12 See for instance, Comments submitted by Satellite Industry Association of the United States of America in UNIDROIT 2010 – C.G.E./Space Pr./5/W.P. 4 – Appendix VIII, at ii: “Perhaps the most controversial issue from the S.I.A.’s perspective is the limitation of default remedies against a space asset performing a “public” service”.

13 UNIDROIT 2004 C.G.E./Space Pr./1/Report, § 91.

14 *Ibidem*, § 92.

15 Convention on international interests in mobile equipment and draft protocol thereto on matters specific to space assets: Explanatory note, prepared by Professor Sir Roy Goode, UNIDROIT 2011 DCME-SP – Doc. 4., § 69.

16 See Appendix A, Article XXVII – Limitations on remedies in respect of public service.

17 See the Proposal by the delegations of Argentina, France, Germany and Sweden concerning the public service problem in UNIDROIT 2003 – C.G.E. Space Pr./1/W.P.17: [A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare whether and to what extent the remedies provided in Chapter III of the Convention and in Articles IX and XII of this Protocol shall be exercisable for space assets as far as they are used for establishing or maintaining its public services as specified in its declaration or determined by a competent authority of the State notified to the Depository].

18 See the Proposal by the delegation of Mexico concerning public services in UNIDROIT 2003 – C.G.E. Space Pr./1/W.P.18: [A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare whether and to what extent the remedies provided in Chapter III of the Convention

promoted the continuous character of public services and favored the insertion of public service exemption into the draft.<sup>19</sup> For instance, the Indian delegation emphasized the importance of space activities for emerging countries and favored inserting certain protections in order to maintain public service.<sup>20</sup> Nonetheless, the Space Working Group was concerned about the idea of inserting a provision concerning public service because of its possible negative impact on the space sector.<sup>21</sup> Similarly, representatives of the international commercial space and financial communities objected the insertion of an exemption.<sup>22</sup> In their view, the issue of how to strike a right balance between differing interests must be left to the commercial practice.<sup>23</sup> As Professor Goode recognised, in practice, “many States have laws designed to ensure the continuity of a public service, either by restricting the exercise of creditors’ remedies or by the provision of a sovereign guarantee of the debtor’s solvency or a combination of the two”.<sup>24</sup> For instance, in Japan, the maintenance of public service in a public finance initiative (PFI) is provided for by way of a “direct agreement” concluded between the government and the financial institution, which is a separate agreement from the financial agreement, and the public service agreement.<sup>25</sup> In the same way, a representative of the international commercial space and financial communities reminded us that, in inter-creditor agreements, limitations regarding public services were provided for and that this practice have already demonstrated its effectiveness.<sup>26</sup> Given this context, representatives of

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and in Articles IX and XII of this Protocol with respect to space assets designed and used for flight control and navigation of aircraft, maritime navigation, search and rescue and similar public services as specified in its declaration or determined by a competent authority of the State notified to the Depository].

19 UNIDROIT 2004 C.G.E./Space Pr./2/Report, at 5.

20 Comments submitted by the Delegation of India UNIDROIT 2003 C.G.E./Space Pr./1/W.P. 12, § 9. See in the same way, Position Paper, submitted by the National Space Agency of Ukraine, UNIDROIT 2009 C.G.E./Space Pr./3/W.P. 18, at 4.

21 UNIDROIT 2004 – C.G.E./Space Pr./2/Report, § 30.

22 See for instance, Comments and proposals submitted by Ms P. Cooper, on behalf of the Satellite Industry Association (S.I.A.) UNIDROIT 2010 C.G.E./Space Pr./4/W.P. 4 rev., at 11, 12.

23 Martine Leimbach, ‘Rapport sur les avancées du protocole Espace d’Unidroit’, in *Revue française du droit aérien et spatial*, 2011/1, at 17.

24 Roy Goode, *Convention on international interests on mobile equipment and protocol thereto on matters specific to space assets*, UNIDROIT, 2014, reprinted with corrections, § 3.78. (hereinafter referred to as, “Official Commentary (the Space Protocol)”).

25 A note by Souichirou Kozuka, “The practice of P.F.I. in Japan for addressing the need to maintain public service”, UNIDROIT 2010 – C.G.E./Space Pr./4/W.P. 4 rev Appendix I.

26 UNIDROIT 2010 C.G.E./Space Pr./5/W.P. 4, § 25.

these communities criticised the insertion of a public service exemption in the Protocol as a source of confusion.<sup>27</sup>

Finally, the Protocol brings limitations on remedies that a creditor may exercise in the event of default of the debtor in order to maintain public service. However, there is a restriction only if the remedy that the creditor may exercise causes disruption of public service. The question posed here is: in exchange for the continuation of the public service, are the creditors' rights protected? It would be appropriate to examine if the mechanism put in place by the Space Protocol finds a compromise between differing interests of parties in the light of the public service provision found in the Luxembourg Protocol.<sup>28</sup> The comparative method will be resorted to as the solution found to the issue in the latter. This was recommended by certain delegations as a model during the legislative history of the Space Protocol.<sup>29</sup>

## 2. Different Approaches in Three Protocols to the Convention

The goal of facilitating finance in each sector (aviation, railway rolling stock, space) requires logically safeguarding the creditors' interests. However, the specificity of each sector leads to different approaches in producing public service provisions in three Protocols to the Convention.<sup>30</sup> In fact, the issue is not directly addressed in the Convention but indirectly by Article 39(1) (b) as part of the preservation of certain non-consensual rights or interests.<sup>31</sup> The Contracting States may specify, in a declaration to the Registry, the types of non-consensual right or interests, which have priority (without registration) over an international registered interest, in the sense of Article 39(1) (a). However, according to the Article 39(3), international interests registered prior to the declaration made by a Contracting State are not affected and are subject to the priority rule provided in Article 29 (1) of the Convention.<sup>32</sup>

27 Comments and proposals submitted by Ms P. Cooper, note 22 above, at 11.

28 See Appendix B, Article XXV – Public service railway rolling stock.

29 UNIDROIT 2003 C.G.E./Space Pr./1/W.P. 14, § 59, UNIDROIT 2008 Study LXXIII, Doc. 14, at 24.

30 Howard Rosen, "Public service and Cape Town Convention", in *Cape Town Convention Journal*, 2013, at 143.

31 *Ibidem*, at 132. See in general, John Pritchard & David Lloyd, "Analysis of Non-Consensual Rights and Interests under Article 39 of the Cape Town Convention", in *Cape Town Convention Journal*, September 2013, at 3, 40.

32 Nevertheless Article 39 (4) provides that: "Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession".

Nevertheless, Professor Goode emphasises the relevance of 39(1) (b) for aircrafts more so than space assets.<sup>33</sup> The Aircraft Protocol solves the public service issue more easily than the other two protocols, as it does not pose a problem for the aviation sector.<sup>34</sup> Article XXIV of the Aircraft Protocol designs its relationship with the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft signed at Rome on 29<sup>th</sup> May 1933. According to Article XXIV (1) of the Aircraft Protocol, the Roma Convention supersedes the Convention unless a contracting State declares that it will not apply this Article. However, if a Contracting State makes a declaration under 39 (1) (b) of the Convention, the Roma Convention will not govern the rights of arrest preserved by this declaration.<sup>35</sup>

Contrary to the Aircraft Protocol approach, the public service issue was one of the key provisions during the legislative history of the Luxembourg Protocol.<sup>36</sup> According to Article XXV (1) of the latter, Contracting States can make clear which rules of law they will apply to public service railway rolling stock at the time of or subsequent to ratification. To a certain measure, the different approach to the issue between the Space Protocol and the Luxembourg Protocol can be explained by the possibility (or impossibility) of physical repossession.<sup>37</sup> Even if the solution brought to issue in each protocol is different, it is easy to point out similar discussions. In this respect, the mechanism of exemption in the sense of these two protocols must be examined in the light of the concerns of Parties.

### **3. The Mechanism of Public Service Exemption in the Space and the Luxembourg Protocol**

#### **3.1. Public Service Notice and Declarations**

According to Article XXVII (1) of the Space Protocol, a public service contract has two parties: the debtor and the public service provider. Howard

33 Roy Goode, "Official Commentary (Space Protocol)", note 24 above, § 4.271.

34 Christoph Henrichs, "Public service exemptions, specific issues of particular importance under the preliminary draft rail protocol", UNIDROIT 2004 – Study LXXII H – Doc. 15, § III, at 104, 105; Martin J. Fleetwood, All tracks lead to Luxembourg: the Luxembourg Rail Protocol, in *Butterworths Journal of International Banking and Financial Law*, June 2007, at 319.

35 Roy Goode, *Official Commentary to Convention on international interests on mobile equipment and Protocol thereto on matters specific to aircraft equipment*, UNIDROIT, 2013, § 5.107.

36 Roy Goode, *Official Commentary to the Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock*, UNIDROIT, 2008, § 3.14 (hereinafter referred to as, "Official Commentary (Luxembourg Protocol)").

37 Howard Rosen, "Public service and Cape Town Convention", note 30 above, at 134.

Rosen draws attention to the focus of the other two protocols being on the relationship between the creditor and the debtor, while the Space Protocol's emphasis is between the debtor and the public service provider.<sup>38</sup>

Consequently, for the registration of a public service notice, the agreement of the parties (the debtor and the public service provider) and the relevant Contracting State is necessary according to Article XXVII (1). Since the creditor is not part of the public service contract, their consent is not necessary.<sup>39</sup> Nevertheless, the creditor, in a strong position by contractual means, can limit the debtor's consent to the registration of public service notice.<sup>40</sup>

Using this approach, the Space protocol creates a system of "notice on a case-by-case basis".<sup>41</sup> Therefore, it is not possible for States to declare, "in advance on what is a public service that could potentially be covered by a public service notice" which is a main reason for creditors to lack confidence.<sup>42</sup> Even if the system of a case-by-case basis creates a high degree of uncertainty for creditors, this uncertainty is reduced for the creditor for the reason underscored above by Roy Goode.

Contrary to the Space Protocol approach, Contracting States can declare which rules of law they will apply to public service railway rolling stock according to Article XXV(1) of the Luxembourg Protocol. As Roy Goode recognises, "what constitutes 'rules of law' is a matter for the law of the declaring State and could include administrative rules and procedures as well as legislative provisions and judicial decisions".<sup>43</sup> Therefore, the Luxembourg Protocol offers more transparency needed by creditors depending on the degree of clarification of the declaration made by a Contracting State. Certainly, a general declaration referring to applicable law will create a high degree of uncertainty for creditors. Regarding the declaration, the creditor will evaluate the situation with respect to risks due to public service restrictions.<sup>44</sup> If a Contracting State does not make a declaration in the sense of Article XXV (1) of the Luxembourg Protocol, the creditor will be free to exercise all remedies provided for in the Cape Town Convention and the Protocol. By contrast, the creditor will be free to exercise all remedies depending on the existence of a public service notice according to the Space Protocol.

38 *Ibidem*, at 136.

39 Roy Goode, "Official Commentary (Space Protocol)", note 24 above, § 3.80.

40 *Ibidem*.

41 Howard Rosen, "Public service and Cape Town Convention", note 30 above, at 143.

42 *Ibidem*, p. 137.

43 Roy Goode, "Official Commentary (Luxembourg Protocol)", note 36 above, § 5.76.

44 Howard Rosen, "Reconciling the Luxembourg rail protocol with the public interest", presentation to the International Rail Transport Committee "Berner Tage" on International Rail Transport Law Bern 29/30 November 2007, at 3.

Also different from the Space Protocol approach, a declaration in the sense of Article XXV (1) of the Luxembourg Protocol refers to a specific type of equipment.<sup>45</sup> The solution proposed in the latter provides more explication on the meaning of public service because the specific type of equipment referred must be “*habitually used*” (not occasionally) and “*a service of public importance*”.<sup>46</sup> However, the interpretation of these words is left to the discretion of the Contracting States.<sup>47</sup> Professor Sir Roy Goode notes that the interpretation will depend upon the facts of each case with regard to two criteria: “the volume of traffic carried by the service” and “the perception of public importance of the service in the Contracting State in the question”.<sup>48</sup>

### 3.2. Period of Suspension and Its Implementation

According to Article XXVII (4) of the Space Protocol, the beginning of the period of suspension starts from the date of registration by the creditor, of a notice in the International Registry. The length of this period is not less than three months nor more than six months and is left to the Contracting States to specify by way of a declaration. The delegations of Germany and the United States of America, in a joint proposal, proposed to replace “six months period” (proposed in the final session of the Committee of governmental experts) with “three months” during the diplomatic Conference.<sup>49</sup> This proposal was welcomed by most of the delegations,<sup>50</sup> while the length of three months was found short by some delegations<sup>51</sup> At the end of long discussion, the Secretary-General of UNIDROIT proposed an optional character of the length between three to six months to be specified by way of declaration, with the intention of assuring flexibility, and this proposal was adopted.<sup>52</sup>

At the end of the period of suspension, the creditor shall promptly notify the debtor and the public service provider according to the Article XXVII (6) of the Space Protocol.<sup>53</sup> The creditor may exercise all remedies provided by Convention and Space Protocol, if the debtor does not cure its default during

45 Howard Rosen, “Public service and Cape Town Convention”, note 30 above, at 134.

46 Roy Goode, “Official Commentary (Luxembourg Protocol)”, note 36 above, § 3.15.

47 Christoph Henrichs, “Public service exemptions ...”, note 34 above, § VI-3 par. b, at 107.

48 Roy Goode, “Official Commentary (Luxembourg Protocol)”, note 36 above, § 3.15.

49 UNIDROIT 2012 DCME-SP – Doc. 18.

50 UNIDROIT 2012 DCME-SP – Doc. 22, § 27.

51 UNIDROIT 2012 – DCME-SP – Doc. 31, § 8.

52 UNIDROIT 2012 – DCME-SP – Doc. 41, at 1.

53 However, “failure to give timely notification is nevertheless a *breach of the creditor’s duty under the Protocol and on general principles the creditor should be precluded by its fault from contending that the suspension period began prior to giving the notification*”. Roy Goode, “Official Commentary (Space Protocol)”, note 24 above, § 3.86.

this period. Obviously, the possibility of repossession of a space asset by the creditor, at the end of the period, will create pressure on States. Howard Rosen writes that “it will be intriguing to see whether governments will ultimately be prepared to accept such a situation”.<sup>54</sup>

According to Article XXVII (3), the creditor is not prevented from exercising its default remedies provided for in Convention and Protocol, which do not cause the disruption of public service such as the collection of income or profits.<sup>55</sup> Additionally, the creditor may exercise remedies provided by the applicable law.<sup>56</sup> The Space Protocol also provides for four exceptions to the suspension of creditor’s remedies:<sup>57</sup>

- “Temporary step-in by creditor” (Article XXVII (5)): If the relevant authorities of the Contracting State authorize the creditor, they may temporarily step-in during the suspension period where the debtor is neither able to operate nor ensure the continued operation of a space asset used in a public service.<sup>58</sup> Roy Goode underscores that this is not strictly the remedy provided in Chapter 3 of the Cape Town Convention but can be seen as an additional remedy agreed upon by the parties in the sense of Article 12 of the Convention.<sup>59</sup> Nevertheless, the Chinese delegation warned that in practice it was very difficult for creditors to have consent of the States due to strict politics on authorization issues.<sup>60</sup> Possibly, in the same way, creditors would not be able to take responsibility of juridical, technical and commercial obligations stemming from the step-in.<sup>61</sup>
- “Proceedings to replace the debtor with a new operator” (Article XXVII(7)(c)): In line with the rules of the licensing authorities, the creditor may initiate proceedings for the replacement of another person as operator of the space asset.<sup>62</sup>
- “Default by the public service provider” (Article XXVII (8)): During the period of suspension, if the public service provider does not perform its obligations vis-à-vis the debtor (such as non-payment of sums due to the debtor under a lease capacity agreement or license), the creditor may exercise all the remedies (provided in the Convention or in the Space Protocol) even before the expiration of this period.<sup>63</sup>

54 Howard Rosen, “Public service and Cape Town Convention”, note 30 above, at 144.

55 Roy Goode, “Official Commentary (Space Protocol)”, note 24 above, § 3.82.

56 *Ibidem*.

57 *Ibidem*, § 3.89-3.93.

58 *Ibidem*, § 3.90.

59 *Ibidem*.

60 UNIDROIT 2010 – C.G.E./Space Pr./4/W.P. 4 rev., at 3.

61 Comments and proposals submitted by Ms P. Cooper, note 22 above, at 11.

62 Roy Goode, “Official Commentary (Space Protocol)”, note 24 above, § 3.91.

63 *Ibidem*, § 3.92.

- “Registration of international interest before the public service notice” (Article XXVII(9) (10)): If the international interest is registered before the registration of a public service notice, the creditor is free to exercise any remedies provided (in the Convention or in the Space Protocol), unless otherwise agreed by the parties according to Article XXVII (9) (a). It is also the case for a creditor, if it had no knowledge of the public service contract at the time of registration of the international interest in the sense of Article XXVII (9) (b). Nevertheless, if the registration of the public service notice takes place within six months of the launch of the space asset, the creditor will not be able to exercise remedies against the space asset (Article XXVII (10)).<sup>64</sup>

The mechanism of suspension period in the Luxembourg Protocol is clearly different from that put in place by the Space Protocol. A contracting State, which had already made a declaration under the Article XXV (1), can prevent the creditor from taking possession of the public service railway rolling stock. However, the State or a person appointed by a government agency shall preserve and maintain the asset from the intervention until possession, use or control is restored to the creditor (Article XXV (2)).

According to Article XXV (3) of the Luxembourg Protocol, the State or the person appointed by the governmental agency has an obligation to compensate the creditor. Indeed, with the solution provided by Article XXV (2) (3), “the creditor is restored to the position it would be in had it not been barred from repossessing the railway rolling stock”.<sup>65</sup> Nonetheless, according to Article XXV (4) of the Luxembourg Protocol,<sup>66</sup> a Contracting State, by way of a separate declaration to the Depository, may specify that it is not able to assume the obligations of maintenance and payment.<sup>67</sup> In fact, this paragraph introduces a certain flexibility for States like Germany whose domestic laws do not permit taking obligations provided for in this article.<sup>68</sup> Regarding this separate declaration, the creditors will evaluate the situation in respect of risks before financing railway rolling stock used in public

<sup>64</sup> *Ibidem*, § 3.93.

<sup>65</sup> Benjamin B. von Bodungen & Konrad Schott, “The Public Service Exemption under the Luxembourg Rail Protocol: a German Perspective”, in *Uniform Law Review*, 2007, at 580.

<sup>66</sup> “Without question, Article XXV (4) is the most difficult paragraph in Article XXV and, arguably, the most difficult paragraph in the Protocol, but the drafters of the Protocol had to take a pragmatic approach”. See Howard Rosen, “Reconciling the Luxembourg rail protocol with the public interest”, note 44 above, at 6.

<sup>67</sup> However, in this case, a public or private entity may assume these obligations. See Roy Goode, “Official Commentary (Luxembourg Protocol)”, note 36 above, § 3.20.

<sup>68</sup> Christoph Henrichs, “Public service exemptions...”, note 34 above, § VI-4 par. c, at 108.

service. However, Article XXV (6) can be seen as a warning to States for the economic impact of this declaration on railway rolling stock sector.<sup>69</sup>

#### 4. Conclusions

In spite of being so complicated for the drafters of each Protocol (Space and Luxembourg) to find a compromise between diverging interests, they found appropriate solutions to the public service issue. Article XXVII succeeds in reducing the negative impact of maintaining public service for the creditor. Creditors are able to exercise remedies provided for in the Convention and in the Protocol, which do not cause disruption of public service, during the suspension period. At the end of this period, they are free to exercise all remedies. Four exceptions to the suspension of creditors' remedies also give them assurance. Finally, it would be better to assure creditors more by providing for the obligation of compensation of the loss caused by the continuation of public service.

The Luxembourg Protocol finds compromise between diverging interests especially by way of compensation. The Protocol provides more transparency if the declaration of the Contracting States does not include a general reference to the applicable law. Such a reference may put in danger the certainty and clarity expected by the international commercial and financial communities.

#### **Appendix A (The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets)**

##### **Article XXVII – Limitations on remedies in respect of public service**

1. – Where the debtor or an entity controlled by the debtor and a public services provider enter into a contract that provides for the use of a space asset to provide services that are needed for the provision of a public service in a Contracting State, the parties and the Contracting State may agree that the public services provider or the Contracting State may register a public service notice.
2. – For the purposes of this Article:
  - (a) “public service notice” means a notice in the International Registry describing, in accordance with the regulations, the services which under the contract are intended to support the provision of a public service recognised as such under the laws of the relevant Contracting State at the time of registration; and

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<sup>69</sup> Bruno Poulain, “La Convention du Cap et le Protocole de Luxembourg: évolutions du point de vue français”, in *Revue de Droit Uniforme*, 2007, at 526.

- (b) “public services provider” means an entity of a Contracting State, another entity situated in that Contracting State and designated by the Contracting State as a provider of a public service or an entity recognised as a provider of a public service under the laws of a Contracting State.
3. – Subject to paragraph 9, a creditor holding an international interest in a space asset that is the subject of a public service notice may not, in the event of default, exercise any of the remedies provided in Chapter III of the Convention or Chapter II of this Protocol that would make the space asset unavailable for the provision of the relevant public service prior to the expiration of the period specified in a declaration by a Contracting State as provided by paragraph 4.
  4. – A Contracting State shall at the time of ratification, acceptance, approval of, or accession to this Protocol specify by a declaration under Article XLI(1) a period for the purposes of the preceding paragraph not less than three months nor more than six months from the date of registration by the creditor of a notice in the International Registry that the creditor may exercise any such remedies if the debtor does not cure its default within that period.
  5. – Paragraph 3 does not affect the ability of a creditor, if so authorised by the relevant authorities, temporarily to operate or ensure the continued operation of a space asset during the period referred to in that paragraph where the debtor is not able to do so.
  6. – The creditor shall promptly notify the debtor and the public services provider of the date of registration of its notice under paragraph 3 and of the date of expiry of the period referred to therein.
  7. – During the period referred to in paragraph 3:
    - (a) the creditor, the debtor and the public services provider shall co-operate in good faith with a view to finding a commercially reasonable solution permitting the continuation of the public service;
    - (b) the regulatory authority of a Contracting State that issued a licence required by the debtor to operate the space asset that is the subject of a public service notice shall, as appropriate, give the public services provider the opportunity to participate in any proceedings in which the debtor may participate in that Contracting State, with a view to the appointment of another operator under a new licence to be issued by that regulatory authority; and
    - (c) the creditor is not precluded from initiating proceedings with a view to the replacement of the debtor by another person as operator of the space asset concerned in accordance with the rules of the licensing authorities.
  8. – Notwithstanding paragraphs 3 and 7, the creditor is free to exercise any of the remedies provided in Chapter III of the Convention or Chapter II

- of this Protocol if, at any time during the period referred to in paragraph 3, the public services provider fails to perform its duties under the contract referred to in paragraph 1.
9. – Unless otherwise agreed, the limitation on the remedies of the creditor provided for in paragraph 3 shall not apply in respect of an international interest registered by a creditor prior to the registration of a public service notice pursuant to paragraph 1, where:
    - (a) the international interest was created pursuant to an agreement made before the conclusion of the contract with the public services provider referred to in paragraph 1; and
    - (b) at the time the international interest was registered in the International Registry, the creditor had no knowledge that such a public services contract had been entered into.
  10. – The preceding paragraph does not apply if such public service notice is registered no later than six months after the initial launch of the space asset.

#### **Appendix B (The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock)**

##### **Article XXV – Public service railway rolling stock**

1. A Contracting State may, at any time, declare that it will continue to apply, to the extent specified in its declaration, rules of its law in force at that time which preclude, suspend or govern the exercise within its territory of any of the remedies specified in Chapter III of the Convention and Articles VII to IX of this Protocol in relation to railway rolling stock habitually used for the purpose of providing a service of public importance (“public service railway rolling stock”) as specified in that declaration notified to the Depositary.
2. Any person, including a governmental or other public authority, that, under rules of law of a Contracting State making a declaration under the preceding paragraph, exercises a power to take or procure possession, use or control of any public service railway rolling stock, shall preserve and maintain such railway rolling stock from the time of exercise of such power until possession, use or control is restored to the creditor.
3. During the period of time specified in the preceding paragraph, the person referred to in that paragraph shall also make or procure payment to the creditor of an amount equal to the greater of:
  - (a) such amount as that person shall be required to pay under the rules of law of the Contracting State making the declaration; and
  - (b) the market lease rental in respect of such railway rolling stock.
 The first such payment shall be made within ten calendar days of the date on which such power is exercised, and subsequent payments shall be

made on the first day of each successive month thereafter. In the event that in any month the amount payable exceeds the amount due to the creditor from the debtor, the surplus shall be paid to any other creditors to the extent of their claims in the order of their priority and thereafter to the debtor.

4. A Contracting State whose rules of law do not provide for the obligations specified in paragraphs 2 and 3 may, to the extent specified in a separate declaration notified to the Depositary, declare that it will not apply those paragraphs with regard to railway rolling stock specified in that declaration. Nothing in this paragraph shall preclude a person from agreeing with the creditor to perform the obligations specified in paragraphs 2 or 3 or affect the enforceability of any agreement so concluded.
5. Any initial or subsequent declaration made under this Article by a Contracting State shall not adversely affect rights and interests of creditors arising under an agreement entered into prior to the date on which that declaration is received by the Depositary.
6. A Contracting State making a declaration under this Article shall take into consideration the protection of the interests of creditors and the effect of the declaration on the availability of credit.