Advance Relief in Aircraft Finance and the Cape Town Convention

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ABSTRACT

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The Cape Town Convention came into force on the 1st April 2004 and the Aircraft Protocol came into force on 1st March 2006. To date, the Convention has sixty-six States Parties, the Aircraft Protocol fifty-eight States Parties, and together they can be regarded as one of the most successful recent commercial law treaties. The Convention's overriding object is to offer creditors the highest possible protection in the form of an effective, speedy and strong legal remedial framework for the international enforcement of creditors rights in the event of the debtor's default or insolvency. The underlying rationale is that this will lead to significant reductions in borrowings costs for lenders to the advantage of all interested stakeholders in the aircraft sector. However, without effective implementation of the remedial system of the Convention and the Aircraft Protocol, it is difficult for financiers to have confidence that they are able to defend their legal rights effectively.

First, this thesis examines the legal nature and purpose of Article 13 ("Relief Pending Final Determination") of the Cape Town Convention, since it does not fit any traditional remedy under domestic law. Secondly, this thesis answers the crucial questions whether, and to what extent, elements of national procedural law in a Contracting State are relevant to the application of advance relief under the Convention. Further, to the extent that domestic procedural law may be applicable, the thesis examines if the relevant domestic rules of procedure are in conformity with the fundamental principles of the Cape Town Convention and the legal nature of advance relief. Ultimately, it thereby clarifies the relationship between the Convention and national procedural law in the context of Article 13.

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1 Introduction

The Cape Town Convention came into force on the 1st April 2004 and the Aircraft Protocol on 1st March 2006. To date, the Convention numbers sixty-eight and the Aircraft Protocol fifty-nine signatory states; together they can be regarded as one of the most successful commercial-law treaties in history.[1]

1.1 Necessity of a Uniform and Autonomous Interpretation

To guarantee the future success of the Convention in providing creditors with a certain, effective and speedy enforcement system upon debtors' default or insolvency, it is insufficient to merely establish and put into force the Convention and the Aircraft Protocol. Their implementation can prove to be a difficult task and there are a number of problems that endanger their uniform and predictable application.

The risk of diverging interpretations of an international commercial treaty is rooted in the nature of international private and comparative law. First and foremost, these international commercial instruments are intended to facilitate cross-border transactions and hence, lawyers from various countries, with different legal cultures, apply them. Lawyers educated in one particular legal system will lean towards applying uniform legal instruments from the perspective of their own system, endangering uniformity and predictability. Practitioners must also be aware of the imperfections in the different translations of international instruments. The Cape Town Convention itself explicitly provides, for the purpose of its interpretation, that all texts in the English, Arabic, Chinese, French, Russian and Spanish versions are equally valid and authentic. This is problematic, in particular when the comparison of different language versions reveals critical differences in relation to the interpretation and application of the same provisions. Again, lawyers tend to resort to terms and legal concepts that appear familiar to them due to verbal (but often not conceptual) overlap with terminology peculiar to their own legal system.

To address the problem of diverging ways of application, academia has devoted much time to highlighting the importance of a uniform and autonomous interpretation of international instruments. Today, most international commercial instruments include

[1] UNIDROIT, 'Status of the Cape Town Convention' (*http://www.unidroit.org/status-2001capetown*) accessed 17th August 2015.

express provisions to guide judicial interpretation in order to minimize the danger of diverging interpretations by mandating an autonomous interpretation, meaning that interpretations in light of domestic law should be avoided as far as possible. In this regard, the Cape Town Convention expressly states in Article 5(1) that the instrument must be interpreted having regard to '*its international character and to the need to promote uniformity and predictability in its application*.' Surprisingly, this dogma of autonomous interpretation in international commercial law has, until recently, mostly centred on substantive law issues.

1.2 Importance of Procedure for the Cape Town Convention

There has been a general scarcity of discussions with regards to procedural issues in international commerce, presumably because international instruments seldom include procedural rules, and, even when they do, they leave many crucial questions unsettled. It also appears that there has been either a lack of will, or a lack of awareness on the part of regulators to create uniform procedural law, notwithstanding that most international players have always been well aware of procedure being frequently decisive for the outcome of disputes. Nevertheless, due to the increasing number of international disputes, the situation has changed. The first step was taken in 2004, when the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) completed the development project of the Principles of Transnational Civil Procedure, a procedural framework bridging common law and civil law perspectives and specifically designed towards transnational commercial disputes. Apart from the aforementioned Principles of Transnational Civil Procedure, a more recent development is the ELI-UNIDROIT joint endeavour to further develop and refine the Transnational Principles to Rules of European Civil Procedure. The project is expected to be completed in 2017. All these developments highlight that the significance of a uniform body of procedural rules for international disputes has arrived in today's legal world.

With regard to the Cape Town Convention procedure is crucial too. Regulators and academics today appreciate that an effective interplay between an international legal convention and national procedural law is not an easy endeavour. In the case of the Convention, the historical materials demonstrate that lengthy discussions took place on this topic at the Cape Town Diplomatic Conference. In the author's opinion, the instrument clearly reflects the drafters' dilemma between excluding and including procedural questions into the Convention's scope of applicability: on the one hand,

Article 14 is intended to tackle the issue by stating that any procedural questions have to be resolved in accordance with *lex fori;* on the other hand, several provisions within the Convention expressly address procedural questions.

1.3 Scope of the Present Thesis

Article 13 of the Cape Town Convention together with the Aircraft Protocol reads as follows:

Article 13 — Relief Pending Final Determination

1. Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:

(a) preservation of the object and its value;
(b) possession, control or custody of the object;
(c) immobilisation of the object; and
(d) lease or, except where covered by sub-paragraphs (a) to (c), management of the object and the income therefrom.

2. In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:

(a) in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or
(b) fails to establish its claim, wholly or in part, on the final determination of that claim.

3. Before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.

4. Nothing in this Article affects the application of Article 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1.

At first glance, the rule appears unambiguous since it explicitly establishes certain advance relief remedies at the request of the creditor. However, on closer examination, it becomes evident why this provision has drawn increasing attention in academic discourse and legal practice: Article 13 does not fit any traditional remedy under domestic legal

systems and it leaves open the question of its nature.[2] Chapters 2 and 3 are devoted to the crucial question: what is the legal nature and function of the relief pending final determination? In order to answer the foregoing question, we have to consider why advance relief exists in the first place.

While the legal nature and function is crucial to the understanding, interpretation and application of Article 13, it also raises some other issues. The second part of this thesis will examine first, whether, and to what extent, elements of national procedural law in a Contracting State are relevant to the application of advance relief under the Convention. Further, to the extent that domestic law of procedure may be applicable, it examines if the relevant domestic rules of procedure are in conformity with the principles of the Convention and the legal nature of advance relief. Chapters 4 to 8 seek to establish that the application of national procedural law in the context of Art 13 cannot guarantee its smooth operation in legal practice. Given the remedy's special nature and purpose, the thesis argues that, in order to fill its procedural gaps, one cannot resort to the applicable law by virtue of the rules of private international law. Rather, closing the gaps requires resorting to the general principles on which the Convention is based. This part of the thesis aims to provide legal responses based on specific provisions and general principles of the Convention to fill the gaps of Article 13, with said legal responses creating certainty and uniformity in its application. Four issues in relation to advance relief will illustrate this point: standard of proof, rules of evidence, safeguards, finality and appeal.

The examples are drawn principally from two major, representative jurisdictions in aircraft finance, namely Germany and England. The United Kingdom government ratified the Cape Town Convention and Aircraft Protocol on 27th July 2015, which will enter into force on 1th November 2015. On the other hand, Germany, which signed both legal instruments on the 17th September 2002, has not yet ratified the Convention. The two jurisdictions were chosen primarily because the former constitutes a classic example of a civil law jurisdiction, whereas the latter is a classic representative of the common law tradition. Still, there are other important reasons: Both jurisdictions have a well-developed jurisprudence and are regarded as economic powerhouses in Europe;

[2] Gilles Cuniberti, 'Advance relief under the Cape Town Convention' 2012 Cape Town Convention Journal 79; Anna Veneziano, 'Advance relief under the Cape Town Convention and its Aircraft Protocol: A comment on Gilles Cuniberti's interpretative proposal' 2013 Cape Town Convention Journal 185; Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (3rd edn, UNIDROIT 2013), para 2.104.

furthermore, Germany and England were chosen because of the author's access to the legal materials and his familiarity with them.

In completing the analysis Chapter 9 takes stock of the overall impact, potential and limits of an autonomous interpretation in the context of the relief pending final determination under the Convention and the Aircraft Protocol. In so doing, the final section of the thesis resolves the question of how the concept of Art 13 can be effectively interpreted and applied given its particular characteristics and its inherent procedural gaps. It will thereby guide the legislative measures of recasting Article 13 of the Convention within the boundaries of national law. Throughout this thesis, the relief pending final determination shall be called 'advance relief'[3] and the Cape Town Convention 'Convention' for brevity.

[3] The Official Commentary itself refers to the term 'advance relief': Roy Goode (n 2), para 4.110.

2 Purpose of Advance Relief

The starting point, then, is to examine the purpose of advance relief. Rather than analysing the definition in the legal instrument, we will consider more generally the economic function of remedies under the Cape Town regime.

2.1 Purpose of Remedies under the Cape Town Regime

Creditors base their decisions whether to lend on the evaluation of their lending risk and the predicted value of the transaction. The creditor's confidence in securing possession of the aircraft in case of default of the debtor is of particular importance to the rating of credit risk. [4] It follows that the principal function of remedies is to protect creditors who enter into financing transactions of high-value and highly-mobile aircraft against credit risk relating to the respective debtor. By making this legal remedial framework internationally available and effective, the Convention confers confidence to international financiers that they will be able to exercise their rights expeditiously in case of debtor default.

The number of remedial provisions in the treaty is relatively low.[5] Nevertheless, these provisions are crucial to facilitating the financing of mobile equipment through asset-based and lease financing. In addition, the Convention prescribes many provisions that supplement and guarantee the availability and effectiveness of the default remedies. To take an obvious example, the international registry for the registration of international interests in aircraft objects gives public notice of international interests and makes them effective against third parties.[6] Similarly, the priority rules for registered international interests in Article 29 of the Convention serve to regulate which person or legal entity has the right to enforcement.[7] Thus, it is not surprising that the remedies comprise an essential part of the Cape Town Convention.

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[4] McGairl Stephen, 'The proposed Convention: international law for asset finance (aircraft)' (1999) 4 Uniform Law Review 439, 439; Ludwig Weber and Artur Eberg, 'The Cape Town Convention and Its Implementation in Russia and the Commonwealth of Independent States (CIS)' (2014) 39 Air and Space Law 1, 9.

[5] Chapter III: 'Default Remedies' of the Convention and Chapter II: 'Default Remedies, Priorities and Assignments' of the Protocol.

[6] Mooney Charles W., 'The Cape Town Convention's Improbable-but-Possible Progeny Part One: An International Secured Transactions Registry of General Application' (2014) 55 Virginia Journal of International Law 1, 3.

[7] Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (Oxford University Press 2007), para 12.46.

2.1.1 Predicted Economic Benefits

It is important to stress the economic benefits stemming from an effective, speedy and strong legal framework for the international enforcement of creditors' rights. First, the increased creditor confidence has the effect of lowering credit costs.[8] Second, the significant reduction in credit risk means that (at least in theory) the cost of credit insurance for lenders, and thus the cost to borrowers of the whole aircraft industry, is lowered. Third, broader access to capital is made available to all parties involved, because established financiers will be prepared to take on more potential credit risk and newcomers who have heretofore shunned the aircraft sector will enter the market. This may well enable debtors from developing countries, who would not otherwise be able participate in the finance market for mobile equipment, to do so. Fourth, stronger airlines would be able to access credit through capital markets at lower cost, e.g. through enhanced equipment trust certificates ('EETCs'), and their reliance on export credit agency-supported financing would substantially decrease. Fifth, the use of marketable securities in aircraft finance further increases the liquidity and attractiveness to financiers, resulting in more favourable pricing for borrowers. Finally, the overall risk in aircraft finance is lessened.[9] Indeed, the creation of significant economic benefits – estimated macro-economic gains of several billion dollars – is supported by an economic impact assessment.[10]

2.1.2 Actual Economic Benefits

The predicted economic benefits were later confirmed by the fact that one year after the conclusion of the CTC, the official export credit agency of the United States, the Export-Import Bank of the United States declared that it would offer buyers of large US commercial aircraft located in signatory states a one-third discount on the exposure fee.[11] Equally, the intergovernmental Organization for Economic Co-operation and

[8] Roy Goode, 'The preliminary draft Convention on International Interests in Mobile Equipment: the next stage' (1999) 4 Uniform Law Review 265, 266 and 267; Roy Goode, 'From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols' (2012) 17 Uniform Law Review 599, 601; Ludwig Weber and Artur Eberg, (n 4) 9.

[9] For a practical discussion of the economic impact of the Convention, see: Nettie Downs, 'Taking Flight from Cape Town: Increasing Access to Aircraft Financing' (2014) 35 University of Pennsylvania Journal of International Law 863.

[10] Anthony Saunders and Ingo Walter, 'Proposed Unidroit Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment' (1998) 23 Air and Space Law 339; Roy Goode, (n 8) 266 and 265; Roy Goode, 'From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols', (n 8) 604.

[11] Export-Import Bank of the United States, 'Cape Town Treaty on Cross-Border Financing of Aircraft, Helicopters and Aircraft Engines, Takes Effect Today' (2006) <http://www.exim.gov/news/cape-town-treaty-cross-border-financing-aircraft-helicopters-and-aircraft-engines-takes-effect> accessed 7th October 2015.

Development ('OECD') and several export credit agencies joined the effort to offer favourable financing terms to airlines based in signatory states of the Convention.[12] This discount on the borrowing rate offered to debtors located in signatory states became known as the 'Cape Town Discount'.

Clearly, then, there is an argument for having a strong and speedy remedial regime that empowers the international enforcement of creditor rights. The next part considers the specific role of advance relief.

2.2 Immediate Relief for Creditors in Urgent Situations

Advance relief fulfils an important function in minimizing credit risk. It does this by protecting the substantive right of the creditor, through expeditious court remedies in advance of a final determination of the creditor's claim. Article 13 explicitly establishes certain advance relief remedies at the request of the creditor, namely preservation of the object and its value; possession, control or custody of the object; immobilization of the object and lease or management of the object and the income therefrom. It should be emphasised that, in aircraft finance, the lengthier the process for a creditor to regain possession of an aircraft object, the higher the risk of its exposure.[13] Indeed, all the remedies provided in Article 13 can be understood as addressing two principal concerns of creditors in aircraft finance, namely: preservation of the economic value and use of the aircraft object until final determination of the merits of their claim. Obviously, the purpose of advance relief is to provide the creditor with immediate relief in urgent situations.

[12] OECD, 'Aircraft Sector Understandings on Export Credits for Civil Aircraft' (2015) <http://www.oecd.org/tad/xcred/ctc.htm> accessed 7th October 2015.

[13] Ludwig Weber and Artur Eberg, (n 4) 9;Anthony Saunders and Ingo Walter, (n 10) 354.

3 Legal Nature of Advance Relief

As described so far, advance relief fulfils a function of provisional, protective or interim relief: it would apply, for example, in English law to freezing orders[14] that restrain a defendant from removal or disposal of his assets from the jurisdiction, or to civil search warrants[15], which allow a plaintiff to conduct a search of the defendant's premises and to remove relevant items to which the plaintiff asserts a claim. Further, it would apply to the two main interim procedural devices available under German law, i.e. seizure orders[16], which allow the court the *in rem* attachment of debtor assets, or interim injunctions[17], which aim to preserve the status quo by preventing any change in the factual situation that may hinder the enforcement of any party's rights.

Essentially, advance relief is no different from any other form of provisional, protective or interim relief available under domestic law. Thus, it has been understandably argued that advance relief should be interpreted as a special form of interim relief built on the law of remedies in national legal systems.[18] But is advance relief really a special form of interim relief?

3.1 Interpretation of Advance Relief

3.1.1 Literal Interpretation

In fact, at first glance, a literal interpretation of the Convention supports the contention that advance relief could be interpreted as a special form of interim relief. The Convention contains (at least) one express reference which equates advance relief with interim relief. For instance, Article 13(4) provides in its relevant part that '*nothing in this Article affects the application of Article 8(3) or limits the availability of forms of interim relief other than those set out in paragraph 1*'. Further, the wording in the declaration of Article 55 affirms that a Contracting State shall '*specify under which conditions the relevant Article will be applied, in case it will be applied partly, or otherwise which other forms of interim relief will be applied*'. Finally,

[14] 'Freezing order', pursuant to CPR 25.1(1)(f) (formerly known as *Anton Piller* orders).

[15] 'Search order', pursuant to CPR 25.1(1)(h) (formerly known as *Mareva* injunctions).

[16] 'Arrest', pursuant to Sections 916-934 ZPO.

[17] 'Einstweilige Verfügung', pursuant to Section 935 and Section 936 ZPO.

[18] Gilles Cuniberti, (n 2) 88 and 89.

the jurisdictional provision of advance relief, Article 43(2) supports the argument that advance relief is a special form of interim relief. It reads as follows: '*Jurisdiction to grant relief under Article 13(1)(d) or other interim relief by virtue of Article 13(4) may be exercised …*'.[19]

These provisions are not the only ones supporting the interpretation of Article 13 as interim relief. There are various instances in the equally authentic and official translation of the Convention which confirm this conclusion. From a purely linguistic point of view, the Arabic, French, Russian and Spanish translations classify advance relief expressly as interim relief.[20] Similarly, the unofficial German and Italian translations available on the UNIDROIT website use the term 'interim relief'.[21]

However, linguistic evidence favouring the view of advance relief as a special interim relief remedy should not necessarily suggest that this solution is correct, and should therefore be accepted *a priori*. It should be emphasised that in accordance with Article 5(1), the Convention has to be interpreted with consideration to its purposes as set forth in the preamble, to its international character, to the need to promote uniformity in its application and to predictability in its application.

Moreover, Article 5(2) states that in matters governed by the Convention, gaps have to be filled on the basis of the general principles underlying the Convention, and only when no such principles are found should the judge resort to the relevant domestic law, according to the applicable conflict of law rules. Thus, it should be clear that even where an expression employed in the Convention literally mirrors the expression found in a particular domestic legal system - such as in the case of 'interim relief' - it has a specific meaning that is autonomous and different from the domestic concept.[22]

Despite the uncertainty created by the different variants of the Convention, the Official Commentary in its current version also reinforces this view. It clarifies that the description of Article 13 as 'Relief Pending Final Determination' – correctly used in the English and Chinese versions of the Convention – was intentionally chosen to point out

[19] For a discussion of the linguistic references in the Convention to the interim nature of advance relief see: ibid, 81; Anna Veneziano, (n 2) 86.

[20] See e.g. French: 'Article 13 — Mesures provisoires', Russian: 'Статья 13. Временные меры по защите прав' and Spanish: 'Artículo 13 — Medidas provisionales sujetas a la decisión definitive'.

[21] See e.g. German: 'Artikel 13 - Vorläufiger Rechtsschutz'; Italian: 'Articolo 13 – Misure provvisorie'.

[22] On the interpretation of international uniform law see: Martin Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) 5 Uniform Law Review 683.

the *sui generis* nature of the relief and to differentiate it from interim relief.[23] From a more substantive legal point of view, this then begs the questions of what distinguishes advance relief from interim relief? What, if anything, is special about advance relief?

3.1.2 Purposive Approach

Arguably, one special feature of advance relief is that the Aircraft and the Luxembourg Protocols add to the remedies of Article 13 the sale of the object and application of proceeds therefrom.[24] From the perspective of civil law systems, the sale of an object is usually not associated with interim measures due to its actual or perceived finality. For example, the aforementioned traditional interim remedies under German law – seizure and interim injunction – do not allow a creditor to obtain satisfaction and are both of temporary nature. The main characteristic of these procedural remedies is that they do not prejudice the outcome of the dispute.[25]

On the other hand, however, common law systems usually consider a sale as a form of interim relief (since they associate the claim with the proceeds of the sale), particularly in cases in which the subject matter at issue might deteriorate during pending proceedings. For example, according to Section 25.1(1)(c)(v) of the English Civil Procedure Rules, the '*sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly*' is explicitly regarded as an interim remedy. This significant difference in legal usage was also of concern during the preparation of the draft Convention. Ultimately, moving the sale-related remedy to the Aircraft Protocol solved the issue.[26] Overall, this is, however, not sufficient to draw a line between advance relief and interim relief. There are more fundamental differences to be highlighted.

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[23] Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.104.

[24] Article X(3) of the Aircraft Protocol and Article VIII(3) of the Rail Protocol.

[25] Jens Grunert, 'Interlocutory remedies in England and Germany: a comparative perspective' [1996] Civil Justice Quarterly 18, 20; Stefan Heuer and Björn G. Schubert, 'Vorläufiger Rechtsschutz durch Eilverfahren: Arrest und einstweilige Verfügung' Juristische Arbeitsblätter 202, 202.

[26] UNIDROIT, 'Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report' <http://www.unidroit.org/english/documents/2000/study72/s-72-jointsession3-report-e.pdf> , para 106 and 115.

3.1.3 Dogmatic Approach

The next section is devoted to establishing that advance relief contains elements that are in contradiction with the concept of interim relief as defined in national legal systems. In order to do this, the traditional concept of interim measures in national legal systems must be examined. Then, advance relief will be examined against the concept of interim relief. This shall be done to draw a final conclusion about the legal nature of advance relief.

3.1.3.1 Interim Relief Available under Domestic Law

Typically, before the court can grant interim relief, the applicant has to fulfil certain requirements that are shared among different legal systems. For the purposes of the present analysis, it is necessary to examine more closely the primary examples of Germany and England. Let us scrutinise, for example, the English freezing injunction, formerly known as the *Mareva* injunction[27], on the one hand, and the German seizure order of a collateral[28], also known as the 'Arrest', on the other hand:

3.1.3.1.1 English Freezing Injunction

Under English law, an applicant seeking a freezing injunction usually has to demonstrate that he has at least '*a good, arguable case'*, that the respondent is in the possession of assets within or outside the jurisdiction, and that there are well-founded grounds for believing that the defendant may dispose of these assets before the final judgment has been rendered[29] English courts determine whether the just mentioned requirements are fulfilled and then, as a matter of discretion, admit or deny the motion.[30] In a similarly discretionary manner, the judge will grant certain safeguards to protect the respondent if the applicant were to lose his case.[31] In most cases, the court requires the applicant to give an undertaking in damages to ensure that the respondent is offered adequate protection in case the claimant loses on the merits of his claim.

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[27] *Nippon Kaisha v Karageorgis* [1975] 1 WLR 1093, [1975] 3 All ER 282 (CA); *Mareva Campania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA).

[28] Sections 916-934 ZPO.

[29] Andrew Dickinson, 'English Private International Law Aspects of Provisional and Protective Measures' (2006) 17 European Business Law Review 785, 786-787; Benjamin Andoh, 'The Freezing Injunction Today' (2010) 31 Business Law Review February 28.

[30] For example: *Derbe and Co Ltd v Weldon (No. 1)* [1990] Ch 48 (CA); *Thane Investments Ltd v Tomlinson (No.1)* [2003] EWCA Civ 1272, [21]; *Allen v White Eagle Modern Building Solutions Ltd* [2015] EWHC 2359 (QB), [6-8].

[31] Chapter 7:Advance Relief and Safeguards Section 7.2.2.1 England, 56.

3.1.3.1.2 German Seizure Order

German courts require the applicant for a seizure order to make a plausible showing ('*Glaubhaftmachung*') that the following two conditions are met: firstly, that the applicant has a meritorious monetary claim against the defendant ('*Arrestanspruch*') and, secondly, that there is a ground for the measure ('*Arrestgrund*'), meaning that without interim relief protection, the enforcement of the final judgment would be hindered, e.g. the judgment would have to be enforced abroad, making the granting of interim relief protection necessary.[32] If these conditions are met and sufficiently proven, the judge has no other option than to grant the requested measure. It is important to point out, however, that in cases where the applicant fails to provide sufficient evidence to establish one or both of the general requirements of a seizure, e.g. the affidavit of an important witness cannot be presented in due time, courts may still – as a matter of discretion – grant an order for the seizure of the collateral if adequate security is provided to prevent the defendant from any potential harm.[33] The concrete amount of the required security that the applicant has to provide in order to protect the defendant is, again, within the judge's discretion.[34] Where there is a complete absence of evidentiary showing, this option is not available.

3.1.3.1.3 Features of Interim Relief

The English freezing injunction and the German seizure order share at least two major characteristics: both measures require the applicant to substantiate the likely entitlement to a monetary claim against the opponent in the main proceedings, and that there are grounds for seeking the measure due to the risk that the respondent might attempt to dissipate assets or move them to another jurisdiction. Further, court discretion plays an important role in two respects: it is central to whether a court will grant the measure or not, and is relevant when it comes to the determination of the safeguards to protect the debtor.

3.1.3.2 Contrasting Features of Advance Relief

Based on the foregoing analysis, we can now look at advance relief and compare it with interim relief under domestic law. It is evident that advance relief under the Convention does not share most of the just discussed elements that are essential to the concept of

[32] Section 920(2) ZPO; Jens Grunert, (n 25) 21; Stefan Heuer and Björn G. Schubert, (n 25) 202-203.

[33] Section 921 ZPO.

[34] Section 108(1) ZPO.

traditional interim relief in England and Germany. In addition, there are several peculiar features of advance relief that stand out, most of which will be easily recognizable to anyone familiar with substantive and procedural remedies.

3.1.3.2.1 No Role for Discretion

The first point is that Article 13(1) in its relevant part states that '*a creditor who adduces evidence of default by the debtor may … obtain from a court speedy relief*'. The wording shows that there is no room for judicial discretion in two respects: first, once the applicant has substantiated the debtor's default, the court has to issue an order for advance relief and second, it has to grant the remedy specified in the creditor's application.

3.1.3.2.2 Lack of an Evidentiary Standard

Moreover, in contrast to interim remedies found in national legal systems, advance relief stipulates no standard of proof required for the successful application. There is considerable uncertainty as to whether the standard of evidence required to prove the debtor's default is different from the one used at the main trial. A widely shared view amongst academics argues that the standard of proof should be lower;[35] another academic opinion asserts that Article 13 does not provide for a lower standard of proof.[36] The solution to this issue has recently attracted increasing attention in academia.[37] It will be discussed in more detail in a subsequent part of this thesis.[38]

3.1.3.2.3 Limited Availability: Declaration and Agreement Requirement

Third, advance relief is also distinct from provisional measures because of its limited availability. Its availability is dependent on two conditions set out in Article 13(1) and Article 55. The former provision requires prior agreement between the parties regarding the application of advance relief at any time, whereas the latter requires a declaration allowing for the application of advance relief made by the relevant Contracting State. These requirements are cumulative. It follows that where one of the aforementioned prerequisites is missing, for example, if the parties to the financing agreement have not

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[35] Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 4.110; Anna Veneziano, (n 2) 187.

[36] Gilles Cuniberti, (n 2) 85: '*It seems clear therefore that Article 13 should not be considered as setting a lower standard of proof.*'

[37] Ibid, 84 and 85; Anna Veneziano, (n 2) 13; Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.106.

[38] Chapter 5:Advance Relief and Standard of Proof, 22.

stipulated a clause providing for the availability of Article 13, it will not be available, even if the Forum State is a Contracting State that has made a declaration under Article 55.

The requirement of advance relief declaration can be explained at least partially by the principle of sensitivity. The Convention provides an elaborate system of declarations, which allow Contracting States to exempt themselves from rules in the Convention which they regard as incompatible with their national law. Given the special nature of advance relief, it is not surprising that this is also the case for Article 13 in some jurisdictions. What is surprising, however, is the fact that agreement by the debtor is required for the availability of advance relief. Although this condition is not unique in the Convention, since Article 8(1) offers the same protection to debtors in relation to self-help remedies, the availability of traditional interim relief is usually not dependent on the debtor's express agreement. Indeed, many jurisdictions consider the right to interim relief a logical and direct consequence resulting of the protection of substantive rights.[39] It appears likely that there must be a significant rationale behind the enhanced protection for debtors.

In order to find out the reason, a closer examination of the kinds of transactions and the key players involved is required. Generally speaking, the aircraft industry is concerned about high-value, cross-border transactions which involve sophisticated and experienced parties which, in turn, benefit from constant counselling by experienced lawyers and accountants. These parties tend to have a lot of experience and enter similar transactions on a regular basis. So why, then, does advance relief require an express agreement in the form of a contractual clause providing for the international interest to become available to the creditor? It is exceptional that sophisticated parties are protected in this manner.

The explanation for the special protection of debtors is two-fold. First, it was the intention of the drafters to emphasize the principle of party autonomy in managing the debtor's default.[40] This is also evidenced by the requirement of agreement by the debtor for the availability of self-help remedies.[41] Nevertheless, this view does not give due

[39] Gilles Cuniberti, (n 2) 85 footnote 23.

[40] The Preamble of the Convention states in its relevant Part: 'BELIEVING that such rules must …. promote the autonomy of the parties necessary in these transactions'.

[41] Article 8(1) of the Convention.

consideration to the efficacy and effectiveness of self-help remedies and, in particular, advance relief. It has been established in the legislative history of Article 13 that the protection of the debtor was a matter of major concern with regard to the '*effects of the remedies envisaged*'.[42] In fact, when Article 13 was drafted, it was asserted that a high standard of proof should be required by the creditor to prove that the debtor had defaulted. The point is that the drafters of the Convention were aware of the fact that advance relief is an extraordinary, *sui generis* remedy, which goes well beyond traditional interim remedies in terms of efficacy, effectiveness and speediness. It should therefore be treated with great caution even among sophisticated debtors, because the primary purpose of the rule is to ensure the protection of the creditor in urgent cases. This is not only expressly stated in the Official Commentary, but also reinforced in the Protocols of the Convention.[43]

3.1.3.2.4 Contractual Exclusion of Safeguards

Article 13(2) of the base Convention provides certain safeguards that aim to protect debtors' rights in the proceedings; however, the Aircraft Protocol (including the other Protocols currently available) permit parties to agree in writing to exclude the application of Article 13(2) of the Convention.[44] This is, of course, quite puzzling since this rule is arguably the primary and most significant method available to courts in order to protect debtors' interest. Without this provision, debtors are left without meaningful protection, thus favouring a speedy recovery by the creditor. In contrast, under English and German law parties are not permitted to agree in writing to exclude the application of safeguards in the context of interim relief.

3.1.3.2.5 Decision Time-limit for Courts or Administrative Authorities

Finally, when the Convention was drafted, it was considered important that judicial proceedings of advance relief should be completed within the period set forth in a declaration. Although many delegations expressed constitutional concerns, the idea was well received and subsequently included into the final version of Article 13. The wording explicitly refers to 'speedy relief' and is further concretised within the framework of the Protocols. Pursuant to Article X(2) of the Aircraft Protocol, the modification of

[42] UNIDROIT, 'Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report', (n 26) para 106.

[43] Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.107.

[44] Article X(5) of the Aircraft Protocol; Article VIII(5) of the Rail Protocol; Article XX(5) of the Space Protocol.

provisions regarding advance relief – common to all the Protocols – requires Contracting States to specify in a declaration the maximum number of calendar days from the filing date of the application for advance relief within which the competent court or administrative authority has to reach a decision. Indeed, the majority of Contracting States declared a fairly short time frame of 10 days for completion of the proceedings in respect of the advance relief remedies in Article 13(1) a) to c), and 30 days for actions specified in Article 13(1) d) to e).[45]

3.2 Conclusion: Evolutionary, *Sui Generis*, Early-Enforcement Remedy

From what has been said thus far in respect to the elements of advance relief, it appears that its defining attribute, which is not necessarily shared by other forms of interim, protective or provisional remedies, is its extremely creditor-friendly approach to resolving business disputes. This explains why, in order to be available, advance relief requires the debtor's agreement. It can therefore be argued that the idea behind the remedy was to create an evolutionary, *sui generis*, early-enforcement remedy to address the inadequate creditor protection provided by domestic interim remedies in cases of extreme urgency. Advance relief responds to the unique problems of creditors in aircraft finance by providing them with a remedy unparalleled in terms of speed, efficacy and effectiveness. These characteristics of advance relief allow creditors to swiftly satisfy their economic needs for resolving cross-border and high-value financial disputes. A significant development in international financial transactions is that, of late, commercial parties need to revolve their disputes immediately, failing which creditors experience great difficulties in maintaining the value of their investment.

[45] UNIDROIT, 'Article XXX(2) - Declarations' <http://www.unidroit.org/depositary-2001capetown-aircraft?id=450> accessed 15th August 2015.

4 Procedural Requirements of Advance Relief

4.1 Lack of Fundamental Regulations on Procedural issues

Having clarified the purpose and the legal nature of advance relief, the focus of the present thesis now turns to the application of advance relief in court proceedings. Without clear and predictable rules, advance relief cannot perform its intended task of providing immediate relief to creditors in urgent situation. Crucial to the application of advance relief, in legal practice is an efficient procedural legal framework. Problematic in this respect, however, is that Article 13 does not deal with these issues exhaustively. In fact, there is a lack of fundamental regulations on procedural issues as will be discussed below.

4.2 Gap-Filling under the Convention

In the event of gaps, the Convention provides guidance in Article 5(2), which stipulates that for internal gaps one should resort to the underlying principles of the Convention, whereas external gaps should be filled by resorting to the applicable domestic law by virtue of the rules of private international law of the forum. Thus, one can observe that the consequences differ substantially, depending on whether the gap is considered external or internal. Internal gaps are issues not expressly settled by the Convention which '*are to be settled in conformity with the general principles on which it is based*', whereas external gaps are issues completely outside of the scope of the Convention which must be settled by resorting to the '*law applicable by virtue of the rules of private international law of the forum State*'.[46]

Unfortunately, the dividing line between these gaps is often blurred. Therefore, the present thesis applies these two approaches to the aforementioned procedural aspects in order to gain enhanced insight into their practicality and feasibility in court proceedings. The following chapters aim to demonstrate that domestic law offers no adequate solutions to fill the gaps which exist in relation to advance relief. It is argued that recourse to national law is subject to a number of problems, which makes the practical application of Article 13 difficult, if not impossible. The point is that, due to the serious obstacles in domestic law to the application of this remedy, an autonomous interpretation is required to guarantee the smooth application of Article 13 in legal

[46] Article 5(2) and Article 5(3) of the Convention.

practice. Consequently, the thesis suggests adequate solutions which address these procedural issues based on the provisions and underlying general principles of the Convention and the Aircraft Protocol.

5 Advance Relief and Standard of Proof

The standard of proof, has long been a topic of controversy in international commercial law. There is no generally accepted definition of the legal concept of standard of proof, so that interpretation varies widely, depending on domestic law and legal traditions. It is important to note however, that civil and common-law systems attempt to describe the same notion from different conceptual perspectives: the minimum of evidence required for the court to accept a claim as established. Common-law jurisdictions typically describe the standard of proof in terms of a balance of probabilities, i.e. that a proposition is more probable than not. On the contrary, civil law systems refer to the standard of inner satisfaction of the judge when talking about the standard of proof. [47]

In relation to Article 13, the standard of proof was a highly debated issue during the drafting process of the Convention at the Cape Town Diplomatic Conference: The diverging views presented during the third Plenary Session of the Joint Session and the ICAO did not allow agreement to be reached on the required degree of evidence on debtor default.[48] The initial view in favour of a *prima facie* evidence of default was rejected by the argument that *prima facie* evidence in the chapeau of the Article was not a sufficiently high standard, considering the effects of the remedies envisaged.[49] The delegations were also not able to compromise on the subsequent view: that the applicable standard should be 'clear' evidence of default. A number of delegations indicated that the word 'clear' would be acceptable to them, but that they could also consider not including a degree of evidence at all. Since some delegations did not have strong opinions about the standard of proof, the last viewpoint finally prevailed and it was not included in the final text.[50]

Thus, the drafters were only able to introduce a provision that was a compromise between the different legal views presented during the joint meeting. Article 13 limits

[47] Vit Makarius, 'The Nature of the Burden and Standard of Proof in International Commercial Arbitration' in Alexander J. Belohlávek, Filip Cerný and Nadezda Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration - Borders of Procedural and Substantive Law in Arbitral Proceedings - 2013* (JurisNet, LLC 2013), 55-56.

[48] Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.106.

[49] UNIDROIT, 'Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report', (n 26) para 106 and 113.

[50] Ibid, para 113 and Gilles Cuniberti, (n 2) 85.

itself to merely stating that the creditor should bear the burden of proof of the debtor's default. In other words, Article 13 does not stipulate the standard of proof or how the degree of evidence is to be determined by a court, in the absence of explicit guidance in the Convention. Today, this is probably one of the most practical problems with regards to advance relief, as evidenced by the attention it has attracted in academic writings. Indeed, debate has been going on among legal scholars as to what degree of evidence is sufficient to regard the debtor's default as proven.[51] What is clear for the purposes of Article 13 is that if a creditor fails to establish the degree of evidence required to prove the debtor's default, the creditor's application for advance relief will be unsuccessful.

The lack of specificity in Article 13 on the degree of proof required to establish the debtor's default is not a critical issue in and by itself. In the absence of agreement on the degree of proof, the Convention requires the parties to refer to the gap-filling provisions of the Convention and answer one significant question: whether the issue of standard of proof is a matter not expressly settled, but inside the instrument, i.e. as an internal gap, or is one completely outside the scope of application of the Convention, i.e. as an external gap? And, should the latter apply, is it governed by *lex causae* or *lex fori*?

But how does one decide whether there is an internal gap to be filled autonomously on the basis of the underlying principles, or an external gap to be filled on the basis of the applicable domestic law?[52] Unfortunately, neither the Convention nor the Protocols provide much guidance in this respect. It follows that, in the absence of any explicit criteria, it is necessary to ponder the options identified above and consider whether the matter of standard of proof in the context of Article 13 ought to be governed by the principles of the Convention, or the law applicable by virtue of the rules of private international law.

5.1 Determination of the Standard of Proof on the Basis of Domestic Law

One could assume that the issue of determining the standard of proof not governed by the Convention at all. Thus, as an external gap it has to be filled by resorting to the law applicable by virtue of the rules of private international law of the forum according to

[51] Gilles Cuniberti, (n 2) 85; Anna Veneziano, (n 2) 187; Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.106 and 2.107.

[52] Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.58 and 4.64.

Article 5(3). It follows that the applicable non-harmonized national law would govern the standard of proof.[53]

5.1.1 Justification for an Interpretation of the Standard of Proof in Light of Domestic Law

The justification for the determination of the standard of proof on the basis of domestic law appears to reside mainly in the drafting history of Article 13, which illustrates that the delegates were unable to agree on a specific standard and, as a result, left the issue to be resolved according to the rules of private international law of the forum. This interpretation may also be explained on the grounds that procedural issues are in principle not dealt with by the Convention. This is indicated by Article 14 of the Convention which reads as follows: '*Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.*' In light of the foregoing considerations, it is at least conceivable to consider the standard of proof as an issue beyond the Convention's scope of application and thus subject to the applicable domestic law. This leads us to the next questions: how to identify the applicable law and what is the applicable law for the standard of proof?

5.1.2 Application of the Rules of Private International Law of the Forum

Evidently, both questions are fraught with uncertainty. First, the issue of standard of proof, among other matters of evidence, is not necessarily a matter of procedural law in all jurisdictions.[54] In fact, the characterization of the standard of proof as procedural or substantive law is not clear and controversial.[55] It does not only vary from jurisdiction to jurisdiction, rather there is a significant divide between common and civil law countries about the legal nature of the standard of proof. As a general rule, civil-law systems tend to regard the legal concept as a matter of substantive law, while their peers in common-law systems tend to characterise it as a matter of procedural law.[56] This crucial distinction raises the problem of classifying the legal concept as a matter of substantive or

[53] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

[54] Chiara Orlandi, 'Procedural law issues and uniform law Conventions' (2000) 5 Uniform Law Review 23, 26; Anna Veneziano, (n 2) 190.

[55] Vit Makarius, (n 47) 55-56; Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (CH Beck 2011), Article 74 para 10; Michael J. Bond, 'The Standard of Proof in International Commercial Arbitration' (2011) 77 Journal of International Arbitration 304, 315-316; Allan Redfern and others, 'The Standards and Burden of Proof in International Arbitration' (1994) 10 Arbitration International 317, 334.

[56] Vit Makarius, (n 47) 56.

procedural law. The decision on the classification of the standard of proof as a matter of procedural or substantive law has namely a significant impact on identifying the applicable law.

5.1.2.1 Standard of Proof as a Procedural Matter outside the Scope of the Convention

If a court regards the matter as part of procedural law it will have to resort to Article 14 of the Convention. Consequently, any question involving the standard or application of the standard of proof would be governed the law of the forum.

5.1.2.2 Standard of Proof as a Substantive Matter outside the Scope of the Convention

In contrast, if a court decides to qualify the matter as part of substantive law the court will resort to Article 5(3) of the Convention and apply *lex causae* to the matter, which typically would be the law of the contract between the parties.

For example, in the vast majority of EU Member States, the first step towards determination of the applicable law in relation to substantive contractual rights is to make recourse to the Rome I Regulation, applicable to contractual obligations that came into existence on or after 18 December 2009.[57] The Rome I Regulation contains no special rule in relation to the standard of proof since Article 18 deals exclusively with the burden of proof. Hence, in the absence of a valid choice of law agreement designating the applicable law pursuant to Article 3(1) of the Regulation, the applicable law will be determined in accordance with Article 4. This provision makes applicable the law with the closest connection to the contract, which is presumed to be the law of the habitual residence of the party whose performance is characteristic of the contract.[58] Since the characteristic performance of the leasing agreement of an aircraft or aircraft object (both operating lease or financing lease) has to be effected by the lessor, it is the standard of proof of the country where the lessor has its place of business.[59] As far as the law

[57] For a detailed analysis of how to determine the applicable law under Rome I: Volker Behr, 'Rome I Regulation: A - Mostly - Unified Private International Law of Contractual Relationships within - Most - of the European Union' (2011) 29 Journal of Law and Commerce 233; Ulrich Magnus, 'Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice' in Franco Ferrari and Stefan Leibl (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier European Law Publishers 2009).

[58] Article 4(2) and (4) of the Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

[59] Franco Ferrari and others, *Internationales Vertragsrecht* (2nd edn, C.H. Beck 2011), para 147; *Kommentar Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Thomas Rauscher ed, Sellier European Law Publishers 2011), para 93.

applicable to the conditional sale agreement under the Rome I Regulation is concerned, the characteristic performance has to be executed by the seller; hence, it is the standard of proof of the country where the seller has its habitual residence, which is confirmed by Article 4(1) lit a. In respect of a security agreement between a chargee and a chargor, the characteristic performance has to be performed by the chargor by granting a security interest in or over an aircraft object to secure the performance of any existing or future obligation. It follows that the law of the country where the chargor has its place of business governs the standard of proof. Only if significant factors point towards the law of another country being more closely connected to the contract shall the law of the party whose performance is characteristic of the contract be disregarded by virtue of the escape clause in Article 4(3) of the Regulation.

5.1.3 Pleading and Proof of Foreign Law

Having determined the applicable law, there are still a considerable number of problems to be resolved with regard to the domestic law approach. Arguably, the most significant issue relates to the differences between civil and common-law systems when it comes to pleading and proof of foreign law. There are major distinctions to be pointed out. To begin with, we need to consider whether a court has a legal duty to apply *lex causae* if the rules of private international law mandate so, or if there is a requirement for the parties to plead the applicability of foreign law in order to introduce it into the proceedings. Equally important is the question whether the burden of proof to establish the content of the foreign law lies with the parties, or if the court is required to ascertain the foreign law *ex officio*. This raises another question: by which means may the court or the parties establish the content of the foreign law. To answer the foregoing questions, again, it is useful to examine the two major representatives England and Germany. As will be illustrated, there are significant differences between those jurisdictions.

5.1.3.1 England

5.1.3.1.1 Application of Foreign Law

Under English law, a judge dealing with a case closely linked to foreign law has no obligation to apply the rules of private international law, nor is he legally bound to ascertain the content of the foreign law. English courts do not have the power to investigate *ex officio* the applicability of foreign law or conduct independent legal research

about its contents.[60] In adversarial legal systems such as England's, parties bear the principal responsibility of pleading the applicability of foreign law.[61] It is the parties' strategic and voluntary decision to introduce foreign law into the proceedings.[62] The party invoking the applicability of foreign law has the burden of proof on a balance of probabilities to establish its content. In default of sufficient evidence, English courts will treat the case as a purely domestic one on the assumption that the foreign law mirrors domestic law.[63] Thus, instead of applying the applicable law by virtue of the rules of private international law, a court will apply the English law or, in other words, *lex fori*. This approach will be followed unless the parties agree on the applicability and the content of foreign law. This just leaves one more question with regards to the English approach: what are the means by which the parties may prove the content of the foreign law?

5.1.3.1.2 Means of Proof

5.1.3.1.2.1 Expert Evidence

In English law the judge rules on the content of foreign law based solely on the evidence presented. It is not sufficient to bring the content of foreign law to the knowledge of the court by presenting foreign court decisions or relevant legal texts. Instead, parties are usually required to prove the foreign law by expert witness testimony. An expert witness is typically someone who possesses in the Court's opinion the suitable knowledge and experience in the relevant subject matter.[64] Establishing the contents of foreign law by way of expert testimony is usually an expensive and time-consuming process – even more so when the experts disagree.[65] England is a Contracting State of the 1968 European Convention on Information on Foreign Law, although it has been of no

[60] Kirsty Hood, 'Drawing Inspiration? Reconsidering the Procedural Treatment of Foreign Law' (2006) 2 Journal of Private International Law 181, 183.

[61] Adrian Briggs, 'The meaning and proof of foreign law' [2006] Lloyd's Maritime & Commercial Law Quarterly 1.

[62] Carlos Esplugues Mota, José Luis Iglesias and Guillermo Palao Moreno, *Application of Foreign Law* (De Gruyter Sellier 2011), 393.

[63] Kirsty Hood, (n 60) 185; *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA) (CA).

[64] Civil Evidence Act 1972, Section 4(1); *Re AB* [2014] EWFC 2758.

[65] Trevor Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' (1996) 45 International and comparative law quarterly 271, 283-284.

practical importance, mostly because it does not address the parties' obligation to submit expert evidence to establish the content of foreign law.[66]

5.1.3.1.2.2 Domestic Precedents

Instead of proving the content of the foreign law by way of expert testimony, parties may also rely on Section 4(2) of the Civil Evidence Act 1972. This notable exception to the general rule allows parties to use domestic precedents which address questions of foreign law and appear in citable form as evidence in proving foreign law.[67] A prior determination on a point of foreign law in precedent constitutes a rebuttable presumption that this earlier determination was correct.[68] Whether Section 4(2) of the Civil Evidence Act 1972 is applicable to interim proceedings in England is uncertain. However, there is a Hong Kong precedent which remains persuasive in England, *the Andhika Samyra* case, of the Civil Evidence Act 1972 being applied analogously in interim proceedings.[69]

5.1.3.2 Germany

5.1.3.2.1 Application of Foreign Law

Unlike in England, the question of proof of foreign law is treated as a matter of law under German law, and not as a matter of fact. Obviously, from the perspective of procedural law, this distinction bears significant consequences that define the relationship and the balance of power between the parties and the judge in the main proceedings. As can be seen from the example of England, factual questions must typically be proven and pleaded by the parties. Obviously, this is not the case for legal questions. As a general rule, matters of law must be taken into account by the presiding judge *ex officio*.[70] This is frequently described by the Latin term *iura novit curia*, meaning that the court knows the law. In other words, a court not only has the power to investigate the law, but rather the

[66] Juliette Van Doorn and Barry J. Rodger, 'Proof of foreign law: the impact of the London Convention' (1997) 46 International & Comparative Law Quarterly 151, Carlos Esplugues Mota, José Luis Iglesias and Guillermo Palao Moreno, (n 62) 105.

[67] *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 All ER (Comm) 138 (QB).

[68] *JSC BTA Bank v Mukhtar Kabulovich Ablyazov* [2013] EWHC 3691 (Ch).

[69] *Re the Andhika Samyra* [1988] HKCFI 111 (HCAJ).

[70] Carlos Esplugues Mota, José Luis Iglesias and Guillermo Palao Moreno, (n 62) 101-103.

judge is legally required to determine, assess and apply the law ('Grundsatz der Amtsermittlung').[71]

Hence, a German court confronted with the determination and application of foreign law is required to ascertain, interpret and apply the law *ex officio*.[72] When it comes to proving the content of the foreign law, the parties' role is limited. In fact, even when the parties agree as to the content of foreign law, the judge is not released from his legal obligation to investigate this question *ex officio*. But parties may submit expert opinions or foreign legal materials to aid the judge in his investigation.[73] However, it is important to stress that, in contrast to English procedure, parties may never call an expert on foreign law as a witness. Again, this is due to foreign law being considered as law, rather than fact. Overall, the important role of judges in Germany may be explained, on the one hand, by the inquisitorial nature of civil law systems and, on the other hand, by the notion that foreign and national laws stand on an equal footing.

5.1.3.2.2 Means of Proof

5.1.3.2.2.1 Personal Knowledge of the Judge

Apparently, the principle of *iura novit curia* assumes the knowledge of foreign law by German courts in all cases. Section 293 ZPO provides a notable exception to the general principle. The provision mandates German courts to proof the content of foreign law if they do not possess the necessary knowledge themselves. At the same time, this rule implicitly empowers judges to inform themselves about the legal situation in a foreign country by means of assessing the relevant legal texts, academic literature and jurisprudence.[74] Correspondingly, one possible way to determine the content of foreign law may be the judge's own knowledge. Apparently, this option may be particularly relevant in respect of other German-speaking legal systems, i.e. Austrian and Swiss, as pointed out by the German Federal Court. But by which other means may a German court ascertain and proof the content of foreign law, should the judge not be familiar with it himself? There are two additional ways for a judge to determine foreign law.

[71] BGH NJW 2009, 916; NJW 1993, 2305; NJW 1995, 2097; NJW 1996, 54; NJW 1998, 1321 = RIW 1998, 318.

[72] BGH NJW 2009, 916: '*Die Regelungen des internationalen Privatrechts ... beanspruchen allgemeine Verbindlichkeit, ohne dass es darauf ankäme, ob sich eine der Parteien auf die Anwendung ausländischen Rechts beruft*.'

[73] Carlos Esplugues Mota, José Luis Iglesias and Guillermo Palao Moreno, (n 62) 105.

[74] BGH NJW 2014, 1244.

Before turning to them, it is important to note that the scope and the measure(s) of the investigation into the content of the foreign law lies within the judge's discretion.

5.1.3.2.2.2 Expert Evidence

German Courts' primary method of determining the content of foreign law is by way of formal consultation of an appropriate expert in the respective field.[75] The German Federal Court sets rather high standards for experts' qualifications, by which knowledge of the black letter law in the book it is not sufficient. Rather, legal experts are required to be familiar with the judicial theory and practice in the respective country. The Federal Court also requires a certain track record.[76] As a consequence, the most common method for judges to determine the contents of the foreign law and to meet the required standard of expertise is to request an expert opinion from the Max-Planck Institute for Foreign Law and Private International Law in Hamburg or an equally knowledgeable law institute of a German university. The advantages of this approach are obvious: the domestic expert consulted is not only familiar with the contents of the foreign law, but also with German substantive and conflict of law rules. Furthermore, he will not only provide guidance on the abstract legal situation in the foreign country, but also provide a concrete opinion on how the case at hand should be decided, based on the German rules of private international law and the applicable law determined. Although experts' opinions are not binding on the court, judges will virtually always rely on recommendations set forth in experts' opinions. If the parties have doubts about the expert's opinion, they may request his participation in the proceedings, where he will be required to explain and defend his legal opinion in detail. The court must give the parties the opportunity to challenge the expert's position by presenting contrary evidence and opinions. In contrast to England, the use of expert opinions in German courts is usually limited to the case at hand. It must not be used in other legal proceedings, unless the expert specifically agrees.

5.1.3.2.2.3 Informal Consultation

Instead of assessing the content of foreign law by way of the judge's own knowledge or by the formal request of an expert opinion, courts may also rely on informal procedures which are not necessarily within the scope of the Civil Procedure Code. In principle, a

[75] BGH NJW 1994, 2959.

[76] BGH NJW 1991, 1418.

judge is free to request further information on the question of foreign law from other domestic or foreign entities, as long as he gives the parties the possibility to express their opinion. For instance, a judge may request legal information about the law of the respective country from foreign authorities or embassies. Similarly, a judge is also free to informally consult private persons. In this regard, it must also be noted that Germany is also a Contracting State of the previously mentioned European Convention on Information on Foreign Law; German courts may therefore file a request for assistance under the Convention, although it is of no practical importance in Germany either.[77] The time-consuming and costly process due to the involvement of experts and translators, the inconsistent quality of replies' content and the variable response times render this method ineffective, especially in accelerated proceedings.[78]

5.1.4 Application of the Applicable Foreign Law

Aside from the aforementioned difficulties in determining the content of foreign law in a timely manner, the hardships of setting an appropriate standard of proof for Article 13 on the basis of domestic law do not stop here. Rather, it is worth pointing out that in some legal systems the domestic statutes do not provide for a civil standard of proof at all. This is, for instance, the case in France, Italy and Spain.[79] How can, one may ask, the degree of evidence be established which would suffice to demonstrate a debtor's default, in a case of advance relief? Then again, in other legal systems, the statutory provisions often provide for multiple different standards of proof applicable to civil proceedings, which raises another major question: what is or should be the threshold of evidence among the different standards available under national law for the application of advance relief? Or more precisely: what, then, would be the best criterion for choosing among the different standards?

At this point, some examples may be useful to better demonstrate the impact of the different degrees of evidence in the various legal systems. Consider, for a more detailed

[77] Council of Europe, 'Status of the European Convention on Information on Foreign Law' <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=062&CM=8&DF=18/09/2013&CL=ENG> accessed 17th August 2015.

[78] According to Article 14 of the 1968 European Convention on Information on Foreign Law any request for information, as well as the response thereto, must be in the language of the state whose law is being examined. Further, according to Article 4(1) any request for information must specify the precise legal questions on which information concerning the law of the respective state is desired.

[79] Michele Taruffo, 'Rethinking the Standards of Proof' (2003) 51 The American Journal of Comparative Law 659, 667-669; Moritz Brinkmann, 'The Synthesis of Common and Civil Law Standard of Proof Formulae in the Ali / Unidroit Principles of Transnational Civil Procedure' (2004) 9 Uniform Law Review 875, 880.

examination of the legal standards of proof in civil proceedings, England on the one hand, and Germany on the other hand.

5.1.4.1 Standard(s) of Proof under Domestic Law

5.1.4.1.1 England

5.1.4.1.1.1 Balance of Probabilities'

In English law the concept of the standard of proof is a probabilistic concept. Unlike German Civil Law, English common law knows only two standards of proof applicable to civil and criminal proceedings. On the one hand, with regards to civil cases there is the 'balance of probabilities' standard; on the other, in criminal cases there is the 'proof beyond reasonable doubt' standard.[80] Lord Denning describes the former standard in *Miller vs. Minister of Pensions* as follows: '*If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.*'[81] It follows that in order to prevail under English law, the plaintiff has to establish that a given claim is more likely than not. Various authors have often described this standard in numerical terms, requiring a decision threshold in the form of a probability of more than 50%.

However, the question of whether English law recognises a third standard of proof is legitimate. For instance, in the United States it is well established that an intermediate standard applies to serious matters in civil proceedings, e.g. fraud claims, in which the claimant has to prove his allegations on the basis that they are substantially more likely than not. In fact, debate has been going on whether English law recognises the same standard.

This uncertainty was reinforced by the decision of *In re H*, where Lord Nicholls stated that: '*When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence.*'[82]

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[80] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013), para 2.53.

[81] *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB).

[82] *In re H (Minors)* [1996] AC 563 (HL).

Despite the uncertainty created by the above-mentioned decision, the correct view is that English courts have always refused to accept such a standard and that there is no specific, heightened standard of proof in English law. In the recent decision *In re B (Children)*, the House of Lords put to rest any controversy in academia and left no room for interpretation with regards to this matter. Lord Hoffmann correctly rejected the view which suggested that English law knows a third standard of proof and resolved the matter by clearly stating that: '*I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.*'[83] Notably, the Supreme Court of the United Kingdom has relied twice upon the above-mentioned decision, so far.[84]

It seems clear therefore that under English law, Article 13 should be considered as requiring the creditor to establish the debtor's default on a balance of probabilities standard, meaning that the debtor's default is more likely than not.

5.1.4.1.2 Germany

5.1.4.1.2.1 Full Conviction

In Germany, the traditional standard-of-proof doctrine ('Beweismaß') distinguishes between at least two different standards. Ordinarily, German civil litigation is governed by a free conviction standard, under which the plaintiff must convince the judge of the truth of a factual allegation beyond reasonable doubt.[85] In fact, Section 286(1) of the German Civil Procedure Code reads as follow: '*The court shall decide at its free conviction, by taking into account the whole substance of the proceedings and the results of any taking of evidence, whether a factual allegation should be regarded as true or untrue. The grounds that prompted the court's conviction shall be stated in the judgment.*'[86]

This standard law has been described by the German Federal Supreme Court ('Bundesgerichtshof') in the famous and frequently cited Anastasia case as follows: '*personal conviction [...] in doubtful cases, the judge may and must be content with a degree of certainty*

[83] *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11; See also *D (Children)* [2009] EWCA Civ 472.

[84] *S-B (Children)* [2009] UKSC 17, [2010] 1 AC 678; *J (Children)* [2013] UKSC 9, [2013] 1 AC 680, [2013] 2 WLR 649.

[85] Moritz Brinkmann, (n 79) 879-880.

[86] Translation by ibid, 879.

useful for practical life that silences doubt without completely excluding it.'[87] From this definition, it becomes clear that the standard of proof is a nonprobabilistic concept.[88] It does not deal with the mere assessment of probabilities, which is also reinforced by the fact that German Courts have never used a quantified description of concept in their decisions, but rather expressly rejected the idea.[89] In essence, this means that, to establish facts, it is not sufficient to bring the judge to a fixed, quantified decision threshold; rather, the judge needs to be convinced that the allegations brought forward by the plaintiff are true. Absolute certainty is not the aim, but the judge must overcome any doubts about the plaintiff's allegations.

However, it is worth pointing out that the German Law's 'inner conviction' approach is not a purely subjective standard.[90] As usual, upon closer examination, the concept is more nuanced and features an objective facet, as well. Section 286(1) ZPO requires the judge to give rational reasons for his factual conclusion in the final judgment.[91] In reaching his conviction regarding the truth of an allegation, the judge is generally not bound by formal rules of evidence, but rather follows the principle of free evaluation of proof, as expressed in Section 286(2) ZPO.[92]

5.1.4.1.2.2 Overwhelming Likelihood

The German Civil Code of Procedure prescribes several exceptions to the standard of full conviction. A lesser degree of proof applies in this line of civil cases. The crucial feature of this standard, generally known as the 'Glaubhaftmachung' and found in Section 294 ZPO, is that, interpreted literally, the applicant has to demonstrate that his claim is at least '*credible'*. In other words, this means that the evidentiary requirements are met if there is an 'overwhelming likelihood', ('überwiegende Wahrscheinlichkeit') that the

[87] Translation by Mark Schweizer, 'The civil standard of proof – what is it, actually?' <http://EconPapers.repec.org/RePEc:mpg:wpaper:2013_12> accessed 19th April 2015, 4.

[88] Christoph Engel, 'Preponderance of the Evidence versus Intime Conviction A Behavioural Perspective on a Conflict between American and Continental European Law' (2009) 33 Vermont Law Review 435, 440; Kevin M. Clermont, 'Standards of Proof Revisited' (2009) 33 Vermont Law Review 469, 472; Kevin M. Clermont and Emily Sherwin, 'A Comparative View of Standards of Proof' 50 The American Journal of Comparative Law 243; Michele Taruffo, (n 79) 668.

[89] Christoph Engel, (n 88) 441; Mark Schweizer, (n 87) 4.

[90] Moritz Brinkmann, (n 79) 879-880.

[91] BGH NJW 1970, 946.

[92] Michele Taruffo, (n 79) 667.

factual allegations are true.[93] The test is predominantly applied by German courts in summary proceedings, such as in proceedings about the rejection of the presiding judge, applications for proceedings to be reinstituted ('*restitutio in integrum*') and, most frequently, in interim relief proceedings.

The lesser degree of evidence is built on the assumption that in summary proceedings a court is ordinarily confronted with the problem of making decisions on the basis of incomplete and one-sided evidence. The reason for that is that, under German law, an application for interim relief is usually approved without a prior hearing of the opposing party, if the purpose of the measure would otherwise be thwarted or significantly hampered. It follows that, due to the presentation of evidence by just one party, a judge cannot be convinced of the truth of the allegations. Quite to the contrary, a prudent judge may only be reasonably convinced that the factual claims of the applicant are (at least) credible. This is particularly true in cases in which largely hypothetical questions, such as potential damages, must be assessed. Furthermore, a lesser degree of evidence may also be justified on the grounds that interim measures must usually be implemented swiftly. Given the temporary nature of interim measures, a lower standard of proof also appears to be appropriate.[94]

5.1.4.1.2.3 Prima Facie

At this point, it is worth mentioning that the German legal system might contain a third standard of proof. Indeed, it is a matter of controversy in German practice and academia whether the 'Anscheinsbeweis' or *prima facie* proof, can be qualified as an exception to the generally applicable full conviction standard.[95] This is due to the fact that its legal nature, its classification as substantive or procedural law and the details of the concept remain uncertain. Various commentators assert that *prima facie* proof should be classified as a matter of burden of proof. Other scholars, however, argue in favour of the view that Anscheinsbeweis provides for a lower standard of proof. Yet other authors suggest that Anscheinsbeweis contains no structural differences to the general full conviction standard.[96] What is clear, however, is the effect of *prima facie* proof. If a claimant is able to

[93] BGH NJW 2003, 3558; VersR 1976, 928; NJW 1994, 2898.

[94] Moritz Brinkmann, *Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht* (Carl Heymanns 2005), 53-54.

[95] Ibid, 54.

[96] Ibid, 54-55.

prove Fact A, the law will create a rebuttable presumption that Fact B has been established for the purpose of the proceedings. The opposing party must then provide contradicting evidence to defeat the presumption.

Under German law it is at least debatable whether the applicable standard of proof for advance relief would be a *prima facie* or a 'Glaubhaftmachung' standard. On the basis that German courts typically apply latter standard in summary proceedings, it is perfectly conceivable that the same standard would also apply to advance relief proceedings. On the other hand, if Article 13 is understood as a *sui generis* remedy that is quite distinct from the concept of interim relief, there is an argument there that the lower *prima facie* standard of proof should apply, since it corresponds more closely to the remedy's nature and speediness.

5.1.5 Conclusion: Inadequacy of the Determination of the Standard of Proof on the Basis of Domestic Law

The conclusion which can be drawn from the previous analysis: the domestic law approach does not provide an adequate solution to address the Convention's lack of standard of proof definition for advance relief, because it is afflicted with several complex and unsolvable issues. To summarize, the determination of the standard of proof on the basis of domestic law is problematic in the following respects:

First, the determination of the standard of proof on the basis of domestic law requires classifying standard of proof either as a matter of procedure, or as one of substantive law. Several commentators have argued that such a distinction in the field of transnational commercial law is artificial, out-dated and also very much dependent on the circumstances of each particular case.[97] The classification is highly relevant to the decision whether to apply *lex causae* or *lex fori* to the matter. As illustrated, there are significant differences between civil and common-law systems in the way standard of proof is classified and defined, not to mention the differences that may exist within the jurisdictions that belong to the same legal traditions.[98]

[97] Ingeborg Schwenzer, 'The CISG—Successes and Pitfalls' (2009) 57 The American Journal of Comparative Law 457, 471-472; John Y. Gotanda, 'CISG Advisory Council Opinion No 6' (*http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html*, 2006) accessed 31th August 2015, para 2.5; Janeen M. Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 The International and Comparative Law Quarterly 691, 694-695; Chiara Orlandi, (n 54) 25.

[98] Text to n 55 in Chapter 5 Advance Relief and Standard of Proof, 24.

What becomes apparent is that the drafters of the Convention mistakenly assumed that all Contracting States share a clear distinction between substantive and procedural law issues. Indeed, the Convention provides different conflict-of-law rules for substantive and procedural issues in Article 5(3) and Article 14 of the Convention, but does not give any guidance on whether a certain topic should be regarded as procedural or substantive. This perfectly illustrates a common pitfall of comparative law, namely that jurists tend to look at foreign law from the perspective of their own legal system. The lack of clarity leaves the courts with considerable room for discretion, which in effect runs counter to the principles of predictability and uniformity. There is a significant risk that courts may classify standard of proof as a procedural matter because it would allow them to apply the law they are most comfortable with, that is, the law of the forum, in accordance with Article 14 of the Convention.

Furthermore, even if the question above could be settled, uncertainty persists because resort to the domestic law applicable by virtue of the rules of private international law leaves many questions unsettled: what standard of proof applies if the applicable law under the rules of private international law provides for multiple standards? What are the selection criteria among those different standards? What if the applicable domestic law provides for no standard of proof in civil proceedings?

The third argument is as follows: The primary purpose of advance relief is to provide creditors with relief in urgent matters. Therefore, domestic courts will have to act immediately, relying on an efficient and clear procedural regime before a final decision of the dispute is reached. This is also expressed in the wording of Article 13. It states that a creditor shall obtain speedy relief from a court. In the context of the Aircraft Protocol, 'speedy' is not a vague term, but is clearly defined. Pursuant to Article X(2) of the Aircraft Protocol, Contracting States have to specify the maximum number of calendar days from filing date in a declaration, by which deadline the relief must be made available to the creditor. Given the nature of advance relief, in particular the timeliness requirement, it can be seen that the procedural rules on pleading and proof of foreign law represent a major obstacle. The first problem is that most procedural rules to determine the content of foreign law are tailored for the main proceedings. In this context, the reliance on expert witnesses to answer questions about the content and the application of foreign law is adequate. However, when it comes to accelerated proceedings, in which time is of the essence, the same rules regarding the proof of

foreign law are not suitable. From a practical point of view, the reliance on expert advice in civil and common law countries cannot meet the time limits set forth in the Convention and the Aircraft Protocol for advance relief proceedings.

It is evident that that the determination of the standard of proof on the basis of domestic law does not only violate the Convention's interpretive rule of Article 5 but it also ultimately undermines the objectives of the Conventions. The applicable domestic law determined by virtue of the rules of private international law of the forum in the context in high-value international security transactions does not provide predictability or practicability for the parties, nor does it guarantee the uniform application of the Convention. Hence, in the author's view, the issue at hand has to be dealt with as an internal gap, thus a matter that falls within the Convention's sphere of application.[99] It follows that the standard of proof has to be interpreted autonomously and filled by resorting to the general principles on which the Convention is based. Obviously, the aforementioned problems would be irrelevant if the standard of proof were to be interpreted autonomously. Veneziano also favours an autonomous interpretation of the issue in her article.[100]

5.2 Determination of the Standard of Proof on the Basis of the General Principle

However, there is a difficulty with that view: the question has to be addressed whether, in asset-based financing and leasing transactions, issues such as the standard of proof or rules of evidence – which may often be decisive for the outcome of an advance relief application – can be settled on the basis of the general principles of the Convention, such as the principle of prompt enforcement or practicability. In fact, it has been argued in the context of Article 13 that procedural issues are not expressly governed by the Convention and that it is '*highly unlikely that the principles of the Convention will be useful for determining rules of procedure*'.[101] So, one might ask, what are the particular elements of the Convention which support the view that the standard of proof is a matter governed by and not excluded from its scope of applicability?

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[99] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

[100] Anna Veneziano, (n 2) 187: '*Again, my contention is that national judges should interpret the rules on evidence in Article 13 autonomously, by taking its overarching purpose as a speedy remedy into account, without referring to any regime based on domestic law*.'

[101] Gilles Cuniberti, (n 2) 80.

5.2.1 Standard of Proof as a Matter within the Convention's Scope of Applicability

In the author's opinion, a closer examination clearly indicates that even though the drafters did not set the standard of proof in Article 13, they did not intend the standard of proof to be governed by domestic law. This view finds support not only in the advantages of an autonomous interpretation in comparison to a domestic law approach, but also in the Convention itself. The Convention appears to deal with the matter of the burden and standard of proof in its legal text, which is why it is difficult to imagine that the Convention does not deal with the issues at hand. With respect to the burden and standard of proof, there are a number of provisions that demonstrate these issues are indeed in the Convention's scope of applicability. In the author's view, it is hence justified to hold that the lack of the standard of prof constitutes an internal gap, which thus must be filled by adhering to the general principles of the Convention itself.

5.2.1.1 Burden of Proof in the Convention

First, Article 13 itself assigns the burden of proof to the creditor by stating that the creditor has to adduce evidence of default. It is hardly conceivable that the drafters' intention was to treat such closely-linked matters as the burden of proof and the standard of proof differently: that one is settled in the Convention, whereas the other needs to be filled with the applicable law by virtue of the rules of private international law. Further, Alternative B of the remedies on insolvency stipulated in Article XI of the Aircraft Protocol likewise requires the creditor to produce evidence of its claims and proof that its international interest has been registered.

5.2.1.2 Standard of Proof in the Convention

Secondly, with regard to the issue of standard of proof in the Convention, there is also at least one provision in the Convention that addresses the matter precisely. The rules on the evidentiary value of certificates settled in Article 24 state that a certificate issued by the International Registry provides *prima facie* proof that it has been so issued and of the facts included in it. It is important to point out that this rule directly interferes with the applicable domestic procedural rules relating to the assessment of evidence.

As a consequence, in the author's opinion the issue of standard of proof is an internal gap, meaning a matter governed by the Convention, although not expressly

settled in it.[102] Therefore, pursuant to Article 5(2), reference must be made to the general principles underlying the Convention to fill the gap. This autonomous solution is preferable to the domestic law approach, whereby one should resort to diverging domestic law. It creates certainty, reduces complexity and leads to uniformity in respect of the application of advance relief in court proceedings.

5.2.2 Defining the Standard of Proof under the Convention

There is another problem, though; in terms of setting the evidence threshold in a manner that best advances the objectives of the Convention. The importance of the answer to this question becomes evident if one considers the differences that exist between the procedural rules of different countries.

5.2.2.1 Incompatibility between Advance Relief and a High Standard of Proof

The purpose of advance relief is to preserve the economic value and the use of the aircraft object until final determination of the merits of a claim. Whether the risk of deterioration exists depends heavily on whether the creditor will successfully assert his substantive claim at the main trial. In this respect, it has been said that the correct interpretation must be that Article 13 does not provide for a lower standard of proof than in the final hearing, on the grounds of the explicit exclusion of the matter in the legislative history and the fact that there is no linguistic evidence in the texts that indicates otherwise.[103] This opinion corresponds with the view held by some experts during the third joint session, who suggested that a *prima facie* evidence standard is '*not a sufficiently high standard considering the effects of the remedies envisaged*.'[104]

But requiring a creditor to demonstrate the debtor's default according to a high threshold of evidence would offer insufficient protection to the creditor. As mentioned before, the justification for the remedy of advance relief is to protect the creditor in urgent situations from the risk that the economic value of the aircraft deteriorates. If so, a high standard of proof of the debtor's default, which is typically required to prove the merits at the final hearing, is unjustified. This is because it would mean that the remedy would only be available to creditors in an open-and-shut case, where the debtor's default is not disputed or the debtor's defence is evidently meritless. For example, in the

[102] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

[103] Gilles Cuniberti, 85.

[104] UNIDROIT, 'Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report', (n 26) para 106.

situation of a contested case, in which the debtor claims that the delivered aircraft object is defective, creditors would be confronted with proving the debtor's default on a high threshold of evidence in a significantly shorter period of time. As a result, creditors would be denied their entitlement to effective court assistance, which would render the concept of advance relief irrelevant in aircraft finance. Further, a high standard of proof also undermines the purpose of the main trial. If all questions were already settled at the advance relief hearing, a final hearing would be superfluous. It is therefore suggested that a balance must be struck between the need to protect the debtor's right to be free from restraint, on the one hand, and the need to give efficient protection to proprietary creditors' rights of in high-value, mobile equipment.

5.2.2.2 Setting the Standard of Proof for Advance Relief

What, then, would be the best standard for the level of evidence required to prove the debtor's default? Or to put it differently, what degree of evidence can be reasonably expected from a creditor in advance relief proceedings, given the time constraints and the risk that his assets may deteriorate. In this author's opinion, the balance tilts in favour of requiring a creditor who applies for an advance relief order to show *prima facie* evidence that the debtor defaulted. Obviously, this is not supposed to affect the accuracy or rigor with which a judge examines the evidence. The evidence needs to merely suffice to substantiate the claimant's burden of production that the debtor defaulted. After the creditor has established a *prima facie* case, the burden shifts to the debtor to articulate a legitimate reason for his non-payment. If the debtor is able to sustain the burden, the creditor then has again the opportunity to present evidence showing that the debtor's stated reason for non-payment was irrelevant. Although the concept of *prima facie* evidence is frequently found in domestic laws or in the area of international law, it is important to point out that the Cape Town Convention mandates an autonomous interpretation.[105]

A similar approach to this issue has also been taken by the Official Commentary and by Veneziano's article. In the latter, it is suggested that a lesser degree of evidence is required for advance relief, although the level of evidence required should be dependent on the facts of the case and to the type of relief sought by the creditor.[106] In conclusion,

[105] Article 5(1) of the Convention.

[106] Anna Veneziano, (n 2) 187.

this view favours a lower but shifting standard of proof which takes into account the circumstances of the particular case. Similarly, the Official Commentary stresses the importance of a lower degree of evidence, adapted to the facts of each particular case.[107] Hence, the view that the degree of evidence for advance relief should be a lower standard of proof than the one required at the final hearing appears to meet with the approval of the majority of academics, because it is in accordance with the principles of the Convention and guarantees the function and efficacy of Article 13.

5.3 Conclusion: *Prima Facie* Standard on the Basis of the General Principles

In this chapter, we dealt with the question of whether the gap regarding the standard of proof should be settled in accordance with the underlying principles of the Convention, or by resort to the applicable domestic law determined by virtue of the rules of private international law of the forum. It was demonstrated that latter solution that regards the gap as external is untenable for practical and dogmatic reasons. The opposite view is the correct solution. The standard of proof issue constitutes an internal gap which must be filled by adhering to the general principles of the Convention. These principles mandate a *prima facie* standard to establish the debtor's default.

[107] Roy Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 2) para 2.106 and 2.107.

6 Advance Relief and Rules of Evidence

This part goes one step further than the previous part and considers by which means of evidence the parties can establish a debtor's default and, further, how a court should evaluate the evidence presented by the parties. Both these questions will be addressed in this chapter, after a brief introduction of the concept of default under the Convention. The first part of the chapter will examine the rules of evidence in the sample jurisdictions of England and Germany. The focus will be on the general principles of evidence and how they apply in accelerated proceedings such as interim relief. In the second part of this chapter, it will be asserted that the Convention contains provisions and general principles that allow for the determination of admissible evidence in the context of advance relief. Accordingly, it will be established that recourse to any national law according to the rules of private international law for the purpose of gap filling under the Convention is not required and should be treated as *ultima ratio*. In conclusion, an alternative autonomous approach for the admissibility of evidence will be suggested.

6.1 Meaning of Default under the Convention

Before turning to the rules of evidence, it is necessary to consider the concept of default under the Convention. The first and main question is: what constitutes a default in relation to the Convention and the Aircraft Protocol? The Convention expressly defines default in Article 11(2) as an event which '*substantially deprives the creditor of what it is entitled to expect under the agreement*'. But this definition only becomes relevant in the absence of an agreement by the parties. Article 11(1) enshrines the general principle of party autonomy by stating that '*The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.*' Accordingly, the parties have absolute discretion in defining the concept of default under the Convention. Since we are dealing with highly experienced and sophisticated parties, it is very likely that the typical security agreement will give guidance in this respect, so that, a court would not have to resort to the rather vague restatement of default set forth in Article 11(2).

6.2 Determination of the Rules of Evidence on the Basis of Domestic Law

One way to interpret the rules of evidence is to treat them as an external gap, thus a matter that is excluded from the scope of the Convention.[108] If so, rules of evidence would be governed by the applicable law by virtue of the rules of private international law of the forum. That is why it is important to consider the national solutions in the sample jurisdictions England and Germany in more detail.

Once again, there is one important point to recall before turning to the review of the jurisdictions. When determining the applicable law pursuant to the rules of private international law of the forum, a court will be confronted with the question of whether evidence should be regarded as a matter of substantial or procedural law. The reason is that rules on evidence are not classified in a uniform manner as substantive or procedural in all jurisdictions, not to speak of the divergent approaches to evidence in different legal systems.[109] This issue of classification in relation to the standard of proof has already been addressed earlier in the thesis.[110]

6.2.1 England

6.2.1.1 General Principles of Admissibility

As a matter of general principle, parties seeking to establish a fact in support of their claim are ordinarily free to rely on any sort of evidence. At the same time, English courts may, as a matter of discretion, admit any piece of evidence they consider relevant for the case or exclude any item of evidence they regard as having no probative value for the particular case.[111] The question of admissibility of evidence is further refined by three legal concepts that shall now be addressed.

The first matter judges typically have to consider when evidence is offered or requested for production is the principle of relevance. Under this doctrine, a piece of evidence is considered relevant if and when it renders a fact in question more or less

[108] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

[109] Chiara Orlandi, (n 54) 26 and 28 with further references.

[110] Text to n 54 in Chapter 5 Advance Relief and Standard of Proof, 24.

[111] CPR 32.1(2); Adrian Zuckerman, (n 80) para 22.80.

probable than it would be without the evidence. Evidence as such must also have at least a prospect of having an impact on the court's conclusion.[112]

The second requirement for evidence to be admissible is that it must not fall within the scope of an exclusionary rule.[113] These rules are traditionally a common-law concept and are designed to exclude evidence on the grounds of public policy. For example, evidence may be barred by an exclusionary rule in civil litigation on the basis that it is protected by legal professional privilege, that its production would be harmful to the public interest or that it contains commercially or privately sensitive information. However, the test for admissibility of evidence does not end here.

After it has been established that the evidence is relevant for the case and does not fall within the scope of an exclusionary rule, there is one last hurdle to tackle: the proportionality condition. Evidence is only admissible if its probative value is in proportion to the costs and time of taking it. The underlying rationale is that this ensures the efficiency of civil litigation.[114]

Lastly, is must be pointed out that the fact that a particular piece of evidence fulfils all of the mentioned requirements does not guarantee its admission in trial. The final decision whether an item of evidence is admissible or inadmissible still rests with the court according to CPR 32.1.

6.2.1.2 Admissibility in Interim Proceedings

By contrast, a slightly different approach is taken in relation to evidence in interim proceedings. The primary reason is that an application for interim relief, such as a freezing injunction, requires a procedural framework that reflects its expeditious nature. It is therefore not surprising that special rules with regards to evidence are found in the English Civil Rules and Practice Directions. CPR 25.3 stipulates that the parties are required to support any application for interim relief with sufficient evidence, unless the court orders otherwise. Applications for freezing injunctions or search orders specifically require affidavit evidence. This is generally not the case for other interim measures such as for example interim payments or disclosure orders. By virtue of CPR 25.3(2), such

[112] Ibid, para 22.81.

[113] Ibid, para 22.82-22.84.

[114] Ibid, para 22.94-22.99.

applications may be accompanied by (1) witness statements, (2) by a statement of the case that is a supported statement of truth or (3) by the application itself, provided that a statement of truth verifies it.[115]

In the event of a hearing other than at trial, the question of admissible evidence is set forth in CPR 32.6(1). This provision rules that parties may normally only adduce evidence by way of witness statement. Instead, the applicant may also rely on the evidentiary matters set out in his statement of case, or his application notice, provided that a statement of truth accompanies these by virtue of CPR 32.6(2).

6.2.1.3 Weight of Evidence

Although some exclusionary rules prevent judges from considering relevant evidence under English common law, there is no rule of law requiring the court to give evidence different weight depending on the type of evidence. Rather, the court is free in evaluating and assessing the probative value of any sort of evidence put forward by the parties: for instance, in the event of conflicting evidence, a court may find it necessary to disregard expert testimony on the basis of a witness statement. What is necessary, however, is that the court gives sound legal reasons for its decision to prefer one item of evidence over another.[116]

6.2.2 Germany

6.2.2.1 General Principles of Admissibility

In Germany, the general rule is that the parties may submit any evidence that is relevant or material to the ruling of the case ('Entscheidungserheblichkeit'), although a court has the power to exclude evidence on the basis of considerations of procedural economy and proportionality. Parties are ordinarily not required to comply with formalities when introducing evidence. Rather, any form of producing evidence or any type of evidence is admissible to prove that an allegation is true. This is described by the principle of the so-called 'Freibeweis'.[117]

[115] Ibid, para 10.176.

[116] Ibid, para 21.15-21.17

[117] Olaf Muthorst, 'Der Beweis im Zivilprozess' [2014] JuS 686, 687-689.

6.2.2.2 Admissibility in Interim Proceedings

In the context of interim proceedings, the German Code of Civil Procedure stipulates in Section 294(1) ZPO that any evidence including an affirmation in lieu of an oath is admissible to satisfy the evidentiary standard. Thus, the parties may in principle rely on any means of evidence set forth in Sections 371-455 ZPO to satisfy the evidentiary standard. But the rule is subject to an important restriction which is founded in the nature of interim proceedings. Section 286(2) ZPO prescribes that, although there is no limitation on the type of evidence, parties may only rely on evidence that is immediately available for the court's assessment at the court hearing. To put it differently, the postponement of oral proceedings for the purpose of taking evidence is not possible due to the aforementioned rule.[118]

In effect and despite this limitation, the parties have a wide spectrum of means to prove their claim. For example, they may rely on the following evidence: (1) written documents (2) affirmations in lieu of an oath of a party or third person (3) an affirmation of an attorney with reference to his professional duty (4) written statements of witnesses or photocopies of original documents (5) written expert opinions (6) information by telephone. Further, the court may also take oral evidence under two conditions. The first is that courts must have provided for an oral hearing at all, and second, if so, the witnesses or experts to be questioned must be present at the date of the hearing.[119]

6.2.2.3 Weight of Evidence

After the taking of evidence, the court has to decide upon consideration of the entire content of the proceedings and the adduced evidence, according to its free conviction, whether the legal conditions for the requested provisional measure are fulfilled or not. In reaching its decision, the court is not bound by formal rules to attach significance to evidence gathered the proceedings according to its type or source, but rather is free in evaluating the evidence.[120] For instance, there is 'no parol evidence' rule for contracts. This principle is settled in Section 286(1) of the German ZPO. Exceptionally, pursuant to Section 286(2) ZPO, the principle of free evaluation of evidence is displaced by special statutory rules of evidence. These exceptions are, however, rare and relatively

[118] Ibid, 689.

[119] *Handbuch Einstweiliger Rechtsschutz im Zivilrecht* (Erich Schmidt Verlag 2005), Chapter 6 para 29-30.

[120] Olaf Muthorst, 689; Michele Taruffo, (n 79) 669; Moritz Brinkmann (n 79) 879.

insignificant. For example, pursuant to Section 416 ZPO, the law establishes a rebuttable presumption that a contractual writing is complete and accurate.

6.2.3 Conclusion: Inadequacy of the Determination of the Rules of Evidence on the Basis of Domestic Law

At first glance, the jurisdictions share some common ground when it comes to the admissibility and evaluation of evidence. First, as previously illustrated, both jurisdictions allow courts to freely evaluate the evidence adduced by the parties. This is generally known as the principle of free evaluation of evidence. Second, both English common law and German civil law provide under ordinary circumstances wide discretion to the parties as to the sort of evidence they can put forward to prove that a fact of a particular case is true. At the same time, courts possess wide powers to exclude evidence on the grounds that it is irrelevant, redundant or too burdensome to take, considering its probative value. Third, as indicated, evidence in interim proceedings is usually confined to affidavit evidence with some exceptions, allowing the court to take a rapid decision. This is true both for notice and for without-notice proceedings.

Turning to the problematic aspects of the determination of the rules of evidence on the basis of domestic law by virtue of the rules of private international law of the forum, there are – despite the aforementioned similarities – significant differences among the sample jurisdictions in the extent to which the principle of free evaluation of evidence is constrained and in the admissibility of oral evidence in interim proceedings. The same applies to the existence and scope of exclusionary rules of evidence. Further, the jurisdictions require different types of evidence in support of an application in interim proceedings. It needs to be recognized that these national divergences endanger the Convention's ultimate goal, the creation of uniformity and predictability.

On top of this, the determination of the rules of evidence on the basis of the applicable law by virtue of the rules of private international law of the forum is afflicted with the issue of the ambivalent legal nature of evidentiary rules in national legal systems.[121] The reason is that some legal systems – the English and the German ones, for example – consider the rules of evidence purely as procedural law.[122]

[121] Chiara Orlandi, (n 54) 26 and 28 with further references.

[122] Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (2010), 174.

Conversely, other jurisdictions tend to classify evidentiary questions such as the admissibility of evidence and the taking of evidence as substantive law – for instance in the Swiss legal system.[123] Others again, for instance in both the Italian and French legal systems, take an intermediate position: in these systems, rules of evidence are to be found both in the Civil Code and in the Code of Civil Procedure.[124] It can be seen that the distinction between substance and procedure is not a clear-cut one. The ambivalent legal nature of evidentiary rules causes significant inconsistencies and creates uncertainty for the parties as to the applicable law, which runs counter the Convention's objectives of uniformity and predictability.

Clearly, then, due to the divergent approaches to evidence in different legal systems there is a strong argument for treating the rules of evidence as a an internal gap and having them settled by the general principles underlying the Convention.[125] In order to overcome these obstacles courts should not resort to the applicable law according to the rules of private international law of the forum. It is therefore suggested that a solution to the question of rules of evidence should be found within the Convention itself.

6.3 Determination of the Rules of Evidence on the Basis of the General Principles

The starting point, then, is to determine and clarify the general principles of evidence that can be found within the Convention. This is, of course, not an easy task and there might be different nuances in the application of an autonomous interpretation of rules of evidence. Indeed, the precise determination of the general principles of the Convention which are applicable to evidentiary matters appears anything but straightforward. In essence, there are merely a few provisions in the Convention and the Aircraft Protocol that expressly govern important rules pertaining to evidence.

[123] Chiara Orlandi, (n 54) 31.

[124] Ibid, 26 footnote 14 and 22; Markus Benzing, (n 122) 138 and 271.

[125] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

6.3.1 Rules of Evidence within the Convention

6.3.1.1 Burden of Proof

First, as far as the burden of proof is concerned, Article 13(1) of the Convention and Article XI(4) Alternative B of the Aircraft Protocol have to be mentioned. Both state that the creditor has to adduce evidence in order to be granted either advance relief. From these provisions dealing with the burden of proof an evidentiary principle can be derived by analogy, according to which the burden of proof is on the party invoking a specific remedy.

6.3.1.2 Standard of Proof

Second, as mentioned earlier, it must be noted that the Convention contains at least one provision that explicitly deals with standard of proof. Article 24 of the Convention, titled '*Evidentiary* value of certificates' (emphasis added), prescribes '*that a certificate issued by the International Registry is prima facie proof*'. Thus, not only does the Convention prescribe *prima facie* standard of proof, it also allows to draw the inference from the heading of the rule above that the intention of the drafters was, in fact, to regulate evidentiary issues in the Convention. Accordingly, it is possible to identify the standard of proof not only as an internal gap but also as an evidentiary principle underlying the Convention and the Aircraft Protocol.

6.3.1.3 General Principle of Admissibility

Although, the Convention and the Protocol does not expressly provide for a solution to the question of what constitutes admissible evidence, this internal gap has to be interpreted autonomously with regards to the general underlying principles set forth in the Convention.[126] In the author's opinion, there is a general principle regarding the admissibility of evidence upon which the Convention is based and which entitles creditors in advance relief proceedings to rely solely on written evidence presented in due course. The rule applies both to proceedings with and without notice. For instance, if the debtor's default were contested, the creditor would be able to build *prima facie evidence* in the form of bank statements, written witness statements or written expert evidence. The means of written evidence in the example above should not be considered as a final or exhaustive list. This evidentiary principle can be inferred from the rules and general principles of the Convention on the following grounds.

[126] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

6.3.1.3.1 Dominance of Provisions Relying on Written Form

First and foremost, there are several provisions which either rely on a written agreement or require the written form in the Convention and the Aircraft Protocol. Concerning agreement formalities, the following Convention articles must be mentioned, among others: the rules on the constitution of an international interest in Article 7; on the registration of an international interest in Article 20; the formal requirements for an assignment in Article 32; and the formalities for a jurisdictional clause in Article 42. The Aircraft Protocol further supports this contention, because Article 5 prescribes that a contract of sale must be in writing to be effective. However, those are not the only references in the instrument that support this conclusion.

It is important to highlight Article 15 of the Convention in this respect, the provision dealing with the variation or derogation from provisions of the Convention. Once again, it reinforces the principle of written evidence by stipulating that the parties may only deviate from the standard provisions of the Convention by written agreement. The requirement of written form is also stipulated in Article IV(3) of the Aircraft Protocol. Most if not all the provisions that promulgate the principle of party autonomy include a formal written form requirement. Defining the meaning of default requires, for instance, a written agreement pursuant to Article 11(1) of the Convention. The same is true for an exclusion of the application of Article 13(2) in conformity with the Aircraft Protocol.

It must be recognized that the concept of a writing is clearly defined under the Convention and the Aircraft Protocol. The crucial reference can be found in Article 1 of the Convention, the provision laying down a rather comprehensive list of defined terms and their specific meaning in the context of the Convention and the Aircraft Protocol. Paragraph (nn) defines the concept of 'writing' under the Convention *as 'a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.*'

6.3.1.3.2 Nature of Advance Relief

Third, the basis for the principle finds also support in the nature of advance relief. The crucial argument is that the instrument's *sui generis* nature mandates a restriction on evidence, because its purpose is to protect the interests of creditors in urgent situations.

If this principle were followed in practice, national courts would be able to respond to the particular needs of the Aircraft sector. This may well enable courts to comply with the time limit for completion of the proceedings pursuant to Article X(2) of the Aircraft Protocol. Based on the text of the Convention and the legal nature of advance relief, one can thus gather that there is indeed such a principle of written evidence in the instrument. This solution is also likely to receive wide acceptance because, as evidenced by the comparative legal analyses, legal systems tend to restrict the admissibility of evidence in interim proceedings, as well. That is all the more reason to provide restriction in advance relief proceedings.

6.4 Conclusion: Standard of Proof, Burden of Proof and Admissibility on the Basis of the General Principles

In this chapter, we dealt with the question of whether the gap regarding the rules of evidence should be settled in accordance with the underlying principles of the Convention, or by resort to the applicable domestic law determined by virtue of the rules of private international law of the forum. It was illustrated that latter solution that regards the gap as external is problematic in various aspects. The opposite view is the better solution. It could be demonstrated that the Convention and the Protocol contains several evidentiary principles dealing with the standard of proof, the burden of proof and admissibility. For example, the admissibility principle mandates to only allow for written evidence presented in due course in advance relief proceedings. However, it must be noted that there are still evidentiary matters that clearly falls outside the scope of the Convention. For instance, the decision whether the submitted evidence is convincing or not should continue to be treated as an external gap and settled in accordance with *lex fori*.[127]

[127] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

7 Advance Relief and Safeguards

Given that much of the discussion in previous chapters centred on a creditor-friendly interpretation of advance relief, one might ask: why devote a separate chapter to the protection of debtors? The answer is that the profound importance that safeguards have in the context of accelerated proceedings has not been explored yet in this thesis. The main focus of this chapter will be on the legal devices a court may use for the protection of debtors and other interested parties in the context of advance relief. Safeguards target two specific problems: regulation of the increased risk to the debtor resulting from a non-discretional and frequently *ex parte* grant of advance relief, and prevention of abuse of advance relief remedies by fraudulent creditors. Ultimately, safeguards should normatively aim at achieving a fair balance between the interests of debtors and creditors.

7.1 Importance of Safeguards for the Protection of the Debtor

The effectiveness of advance relief has a significant economic impact on the debtor's business. For instance, consider the serious disadvantages stemming from the creditor's ability to take possession or control of the debtor's leased aircraft. In situations in which the creditor unexpectedly takes control of the debtor's assets, its ability to operate in the market is significantly hampered. The reputation and credit rating of the company will be marred. Other creditors may follow and make a run on their assets. Ultimately, there is a significant risk that the debtor's business will run out of cash and expire, as it cannot generate sufficient revenue. Clearly, advance relief orders place debtors in a difficult situation, particularly because they may be available upon an application without notice. Due to the significant disruptive effect on the debtor's business, it is only right that a creditor, who gains advance protection for a claim that he has yet to prove, must in turn provide reasonable assurances that protect the debtor's interests if he does not prevail with his action. Central to the court's power to resolve these two contradictory positions are the safeguards set out in Article 13(2) and Article 13(3) of the Convention.

7.1.1 Art 13(3) Notification of the Interested Persons upon Application

Article 13(3) of the Convention allows the court to decide, depending on the facts of the case, whether advance relief is available upon an application with or without notice of the defendant(and other interested persons). It provides that: '*before making any order under paragraph 1, the court may require notice of the request to be given to any of the interested persons.*' The

court's latitude is tailored towards responding to situations of urgency, in which practical circumstances allow no time for notification of the respondent, and to situations where notice to the opposing party would defeat the purpose of the measure. Given the function of advance relief, this is why an application for advance relief without prior notice to the interested parties is the norm, rather than the exception.

7.1.2 Art 13(2) Safeguards for Advance Relief

Precisely because of this, the Convention affords in Article 13(2) the court the necessary flexibility to grant additional safeguards to achieve a fair balance between the parties' conflicting interests. The relevant part of the paragraph reads as follows: '*In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons … .'* What is surprising, however, is that the wording does not indicate whether the safeguards at the court's disposal depend on the applicable law by virtue of the conflict of laws rules, or whether they should be treated as an internal gap and interpreted autonomously from any existing domestic counterpart.[128]

Further, Article X of the Aircraft Protocol, which only applies if a Contracting State has made a declaration under Article XXX(2) of the Aircraft Protocol and only to the extent specified in such declaration, contains an important supplement in relation to safeguards. According to Article X(5) of the Aircraft Protocol, parties are free to derogate by agreement to exclude the application of safeguards provided for in Article 13(2) of the Convention. Where such an agreement exists, a court would have no discretion to include safeguards in the order to safeguard the debtor's interests. The application of this provision raises a number of questions and problems which are addressed in detail below.[129]

First of all, this chapter considers the likely operation and effect of safeguards under Article 13 in practice. It will examine the validity of a contractual exclusion of safeguards by the parties under the Convention and the Aircraft Protocol. Subsequently, the focus will turn to the more detailed examination of the legal effect of a contractual exclusion of Article 13(2) under a national and an autonomous approach to interpretation. Finally, the chapter concludes with a discussion of the significance of

[128] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

[129] Chapter 7: Advance Relief and Safeguards Section 7.1.4 Effect of Exclusion of Safeguards, 54.

adequate protection of both parties to the smooth operation of the Convention and the Protocol as a whole.

7.1.3 Validity of Exclusion of Safeguards

Consider the following illustrative scenarios regarding the possible practical application of safeguards and their exclusion under the Convention and the Aircraft Protocol:

Illustration 1

> State A is a Contracting State under the Convention and has acceded to the Aircraft Protocol. Under Article 55, State A declared to apply the provisions of Article 13 and Article 43 of the Convention. Further, State A made a declaration under Article XXX(2) of the Protocol, undertaking to apply the modifications to Article 13 set forth in Article X of the Protocol.
>
> Airwings Co. enters into an agreement for the lease of an aircraft. The agreement contains a provision that allows for the application of Article 13, while excluding the application of Article 13(2) pursuant to Article X(5) of the Aircraft Protocol. A creditor's advance relief application for possession of the aircraft is subsequently filed in State A, where the aircraft is currently located.

The main issue is whether a court in State A must respect the agreement between the parties to apply Article 13 and exclude the application of Article 13(2) under the Convention. The effect of State A's declaration under Article 55 of the Convention and under Article XXX(2) of the Protocol is that creditors may file an application for advance relief according to the conditions set out in Article 13 and Article X of the Protocol, if the parties agreed in addition to apply Article 13. Pursuant to the lease agreement, this is the case. The key issue is, then, whether the parties' agreement to exclude the application of Article 13(2) is valid. This question mainly depends on the relationship between Article 15 of the Convention and Article X(5) of the Protocol.

On one hand, Article 15 stipulates that Article 13(2) belongs to the mandatory provisions of the Convention, meaning that the parties may not derogate from or vary the effect of this article. On the other, Article X(5) of the Protocol explicitly provides for the possibility of disapplication. When there is a conflict between the provisions of the Convention and the Protocols, it is necessary to resort to Article 6 of the Convention, which defines the principles of the relationship between the Convention and the

Protocol. According to Article 6(1), the Convention and the Protocols must be read and interpreted as a single instrument forming an integral whole. More importantly, Article 6(2) prescribes that in the event of a conflict between the Convention and the Protocols, the Protocol's provisions are supreme. It follows that the correct view must be that the parties have effectively excluded by written agreement the application of Article 13(2) by virtue of Article X(5) of the Aircraft Protocol.

7.1.4 Effect of Exclusion of Safeguards

Thus far, this chapter has addressed the importance of safeguards and the validity of their exclusion under the Convention and the Aircraft Protocol. This part now turns to considering the more controversial aspect of this provision: the legal effect of the exclusion.

The court's power to grant safeguards is a core strategy to strike a fair balance between creditors and debtors. Consequently, if parties were allowed to exclude the application of safeguards, there would be an inherent risk that, due to creditors' intrinsic bargaining power, this enabling provision could soon become the industry standard for lending agreements. This raises one question, essentially: does this exclusion effectively prevent courts from granting safeguards, with the exception of the notice requirement provided by Article 13(3), or is there an alternative interpretation which enables courts to fairly balance the interests of debtors and creditors – since leaving debtors without any protection would arguably be unacceptable in some jurisdictions. Consequently, in order to answer the aforementioned question, it is essential to consider the likely operation and impact of Article X(5) of the Aircraft Protocol in conjunction with Article 13(2) under first a domestic and secondly an autonomous approach to interpretation.

7.2 Determination of Safeguards on the Basis of Domestic Law

Among the different ways in which safeguards could be applied according to the principles set forth in Article 5 and Article 14 of the Convention, one of the most interesting and yet controversial cases concerns their interpretation as an external gap that must be filled with reference to domestic law.[130] It is at least conceivable to regard safeguards as an external gap, meaning that Article 13(2) should be understood as an explicit reference to the safeguards available under the applicable national law. It is worth

[130] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

considering this interpretation and its legal consequences on the exclusion of safeguards under Article X(5) of the Aircraft Protocol.

Accordingly, Article 14 of the Convention would govern the determination of the applicable law. The rule applies to procedural requirements in relation to any remedies of the Convention, and therefore governs, *inter alia*, the matter of safeguards. Article 14 gives effect to *lex fori* – the law of the place where the remedy is to be exercised. If a judge were to apply safeguards pursuant to Article 13(2), he would resort to the safeguards which are typically granted by courts in his jurisdiction.

This view leads to an interesting problem, namely: if safeguards under Article 13(2) ought to be understood as building on national legal systems and if the drafters' goal was to integrate them into the Convention's remedy of advance relief, an exclusion of safeguards would significantly impact the balance struck between debtors and creditors. Debtors would be left with the minimum protection provided by Article 13(3) of the Convention, that is, whether notice of an application for advance relief to the interested parties should be given, and Article 8(3), which prescribes that the Convention's remedies must be exercised in a commercially reasonable manner. This raises another essential question: what are good reasons to disapply the safeguards under Article 13(2) and to disregard the most fundamental debtors' rights? Arguably, an interpretation of safeguards in the spirit of domestic law could be justified on the basis of the following theoretical arguments.

7.2.1 Justification for an Interpretation of Safeguards in Light of Domestic Law

First, debtors are already sufficiently protected by the need for several opt-in declarations introduced by the Convention and the Aircraft Protocol before Article X(5) can apply. For these to be effective, a state must not only be a Contracting state to the Convention and the Protocol, but also have made the two qualifying declarations under Article 55 of the Convention and under Article XXX(2) of the Aircraft Protocol. Thirty-nine states currently fulfil these requirements.[131] Besides the aforementioned declarations, debtors must specifically assent to the application of Article 13 of the Convention and also agree to the exclusion of Article 13(2) of the Convention pursuant to Article X(5) of the

[131] UNIDROIT, 'Status of the Cape Town Convention' UNIDROIT, 'Status of the Aircraft Protocol' (*http://www.unidroit.org/status-2001capetown-aircraft*) accessed 17th August 2015.

Aircraft Protocol. Considering the fact that we are dealing with highly experienced and sophisticated parties, these protective mechanisms offer more than adequate protection.

Second, an interpretation in the light of domestic law also has the advantage of emphasising the principles of party autonomy set forth in the preamble: parties to a binding security agreement stand to receive precisely what they bargained for: a creditor-friendly remedy in exchange for more beneficial credit terms. A different interpretation of safeguards, e.g. if courts were in a position to grant safeguards despite their contractual exclusion, would arguably have a negative impact on the availability and the financing terms of lending agreements. The reason is that creditors would insist on being compensated for the additional risk of not receiving the legal position they bargained for.

Third, the domestic law approach presents the advantage of having resort to a developed and certain jurisprudence under *lex fori*. Courts could rely on their practical experience in interim proceedings and would not be forced to reinvent the wheel with regard to safeguards under Article 13(2) of the Convention. This allows for a faster, more efficient and transparent application of safeguards. The safeguards available under domestic law will now be discussed.

7.2.2 Available Safeguards under Domestic Law

7.2.2.1 England

7.2.2.1.1 Notice

As a general rule, English law requires giving notice to the respondent if an application for an interim measures has been filed with the court as a matter of justice.[132] Proceedings without notice are only available to the applicant if he can establish a strong justification to forego notice to the respondent.[133] This is settled in Section 25.A Practice Direction, Interim Injunctions, 4.3(3) of the English Civil Procedure, which reads as follows: '*except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.'* Freezing injunctions call for secrecy by their very nature. They are granted invariably in without-notice proceedings, since notifying the

[132] Adrian Zuckerman, (n 80) para 10.177.

[133] Thane Investments Ltd v Tomlinson (No.1), [21]: '*… An order against a person in his absence, particularly when it is a freezing order, which is a very serious infringement of his rights and liberties, can only be justified on appropriately clear and strong facts and risks. It should only be granted in circumstances which provide maximum protection for the person against whom the order is to be made. The courts have frequently emphasised the importance of compliance with the various requirements of the Rules relating to the obtaining of without notice orders.*'

respondent would essentially defeat the purpose of the interim measure. As a further exception, without-notice applications are permissible in situations of urgency.[134] In this line of cases, the applicant must persuade the court that, due to the imminent threat to his interests and to practical reasons, a timely notice to the respondent is not possible. To compensate for forgoing the respondent's right to be heard in without-notice proceedings, English law has developed two approaches that shall now be addressed: the duty of full disclosure and the undertaking in damages.

7.2.2.1.2 Full Disclosure

The applicant is obliged by the court to make full, fair and accurate disclosure of all material information that is relevant to the exercise of the court's discretion. This includes not only facts that are favourable to the applicant, but also those that favour the respondent.[135] As will have become clear, this duty aims to enable the judge to reach a balanced decision by taking into account the arguments of both sides. Due to the inherently high risk resulting from the sole submission of one-sided information, the court has several measures at its disposal if the applicant neglects or violates his duty to make proper disclosure. Firstly, improper disclosure may result in the discharge of the without-notice interim order.[136] Secondly, the court may order the applicant to indemnify the respondent, i.e. compensation under the undertaking in damages.[137] This will be addressed shortly in more detail.[138] Apart from the sanction of discharge and indemnification, a respondent who is in breach of the terms of an injunction may be held in contempt of the court, even when the respective breach was not intentional but merely a result of gross and continuous negligence. In the event of a severe and intentional breach of the duty to make full disclosure, so that it amounts to an abuse of

[134] *Beese (Managers of Kimpton Church of England Primary School) v Woodhouse* [1970] 1 WLR 586, [1970] 1 All ER 769 (CA); *National Commercial Bank Jamaica Limited v Olint Corp Limited* [2009] UKPC 16, [13]: '*a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act.*'

[135] *Brink's-MAT Ltd v Elcombe* [1988] 1 WLR 1350 (CA); *Lloyds Bowmaker Ltd v Britannia Arrow Holdings* [1988] 1 WLR 1337 (CA); *Behbehani v Salem* [1989] 1 WLR 723 (CA); *Memory Corp Plc v Sidhu (No.1)* [2000] 1 WLR 1443 (CA); Adrian Zuckerman, (n 80) para 10.186.

[136] *Knauf UK GmbH v British Gypsum Ltd (No.1)* [2001] EWCA Civ 1570, [2002] 1 WLR 907, [65]: '*there is a "golden rule" that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the grant of such relief*'.

[137] Adrian Zuckerman, (n 80) para 10.200.

[138] Chapter 7:Advance Relief and Safeguards Section 7.2.2.1.3 Undertaking in Damages, 58.

legal process, the applicant may face several legal consequences.[139] The court may punish his aggravated breach by fine, imprisonment, or in the case of a legal entity, sequestration of assets.[140]

7.2.2.1.3 Undertaking in Damages

CPR 25A PD 5.1(1) stipulates that, in order for the court to grant an interim injunction, the claimant has to undertake before the court to pay any damages the court deems appropriate to cover the losses incurred by the respondent, unless otherwise stated in the order. From the text of the provision, one can easily gather that the court may exercise its discretion as to whether an undertaking regarding damages is required in support of an interim injunction. The undertaking in damages is subject to the criteria set forth in the order. It is only in conformity with the terms of the undertaking that the respondent may recover damages from the person specified in the undertaking.

In English common law there is no general legal practice that requires the claimant to provide reasonable security in support of the undertaking. Courts will only require the claimant to provide adequate security in two situations; first, if there are doubts that the claimant will be able to pay damages in the event his substantive claim is unsuccessful, and, second, when the applicant has his residence or place of business outside the English jurisdiction.[141] As a matter of right, the respondent may, at the time when the order is granted, apply for adequate security from the applicant.[142] The applicant is under a legal obligation to inform the court of any material changes in his financial situation which may impact on his ability to meet his liability under the undertaking in damages.[143] In contrast to Germany, however, it has been said that, once an undertaking without fortification has been submitted, the court may subsequently decide against imposing such a requirement on the claimant.[144]

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[139] *Motorola Credit Corp v Uzan (No 2)* [2003] EWCA Civ 752, [2004] 1 WLR 113; *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695, [2000] 2 All ER 395 (CA).

[140] Andrew Neils, 'Injunctions in Support of Civil Proceedings and Arbitration' in Rolf Stürner and Masanori Kawano (eds), *Comparative Studies on Enforcement and Provisional Measures* (Mohr Siebeck 2011), 323.

[141] Adrian Zuckerman, (n 80) para 10.160.

[142] *Commodity Ocean Transport Corp v Basford Unicorn Industries Ltd* [1987] 2 Lloyd's Rep 197 (QB).

[143] *Staines v Walsh* [2003] EWHC 1486; Adrian Zuckerman, (n 80) para 10.19.

[144] Adrian Zuckerman, (n 80) para 10.162.

7.2.2.2 Germany

7.2.2.2.1 Notice

In Germany, the question of whether notice of an application for seizure order must be given to the respondent is a matter of discretion.[145] Courts will typically strike a balance between the applicant's need for instant action to prevent irremediable harm and the respondent's right to be heard before a court. Without-notice proceedings require the applicant to persuade the court that there are good reasons to forego the respondent's right to be heard. In reaching its decision, the court will consider the evidence and the facts provided by the initial application. If the claimant succeeds, the respondent has no initial opportunity to provide contradicting evidence. Nevertheless, pursuant to Section 924 ZPO, the respondent may challenge the decision as a whole. If the respondent challenges the seizure order, the court must then conduct an oral hearing to review its decision. The appeal process for decisions in interim proceedings will be discussed in detail at a later stage.[146]

7.2.2.2.2 Adequate Security

Due to the inherent risk of non-notice proceedings, the law enables German courts to exercise discretion over the precise terms of a seizure order in two respects. In particular, by virtue of Section 921 ZPO, it is within the discretion of the court to decide whether the applicant has to provide adequate security. If so, it is further at the judge's discretion to specify the type and amount of security required pursuant to Section 108 ZPO. In the majority of cases, however, the applicant has to provide an irrevocable, time-unlimited, unconditional and absolute bank guarantee or a court deposit in the required amount to cover any potential claim for damages in case the pre-attachment of the collateral subsequently proves to have been granted without justification.[147] In the event that the circumstances change substantially, the court may subsequently amend or supplement the terms of the original seizure order. Overall, bank guarantees play a very important role in the German legal system.

[145] Section 128(4) ZPO in connection with Section 922(1) ZPO.

[146] Chapter 8:Finality and Procedural Requirements for an Appeal of Advance Relief Section 8.3.1.2 Germany, 72.

[147] Section 108(1) ZPO.

7.2.2.2.3 Damages

Should an injunction subsequently prove to be unjustified, the respondent is entitled to claim damages in accordance with Section 945 ZPO. Three situations must be distinguished. The first one involves the lifting of the injunction following a review process, because it was wrongfully granted in the first instance, e.g. an appeal. In that situation, the findings of the court would be binding upon subsequent proceedings dealing with the compensation for the damage suffered by the respondent. Second, a respondent is also entitled to damages from the applicant pursuant to Section 926(2) ZPO, if the latter fails to file an action on the merits within the time limit set forth in the provisions of the injunction. Lastly, the respondent has a right to compensation in accordance with Section 942(3) ZPO if the applicant fails to give timely notice of the respondent's required presence at the main hearing. For each case, the amount in damages is limited to the consequential adequate, direct and indirect damages suffered as a result of the enforcement of the order and its conditions.

7.2.2.3 Conclusion: Inadequacy of the Determination of Safeguards on the Basis of Domestic Law

A review of the two jurisdictions reveals that they use fundamentally similar legal strategies to protect the defendant in the event of interim proceedings. Broadly speaking, Germany and England follow a roughly similar notice and security strategy for protecting the interests of debtors – though by no means always the same solution. For example, in both sample jurisdictions it is within the court's discretion whether the applicant must provide notice of an application to the respondent; and both English and German law require the applicant, in principle, to lodge adequate security in without notice proceedings. Despite these global similarities, however, there are important differences in court practice, e.g. the conditions of how security is to be provided. In addition, English law requires the applicant to fully disclose all material information including those that are not favourable to the applicant himself.

Despite the advantages of the determination of safeguards on the basis of domestic law, there are also several substantial arguments against its application. These arguments overlap to some extent, but are listed separately for clarity of exposition.

The first is the argument that safeguards must not be characterised by reference to concepts of the national law of a Contracting State. Such an interpretation with

reference to domestic law disregards the general principles of the Convention and also violates the interpretative provisions set forth in Article 5(1) of the Convention. The correct interpretation must be that the forms of safeguards provided for in Article 13(2) of the Convention are intended to be *sui generis*. Hence, in this author's opinion, the concept of safeguards is one to be interpreted with regard to the Convention's international character and the need to promote uniformity and predictability in its application.

The second argument is as follows: As the above comparative analysis has shown, reference to domestic law approach may cause greater complexity: although it is true that the comparative analysis of English and German legal practice has shown similarities, there are still significant differences in some matters of detail. Further, it is quite likely that even more significant divergences will be found in the law of other jurisdictions, especially in countries with less developed commercial law. These variations in national law endanger the main objective of international commercial instruments, because they increase complexity and hence, the costs of international finance transactions. These divergences would be irrelevant if safeguards were to be interpreted autonomously, without any reference to domestic law, as dictated by the interpretative rules of the Convention.

The third is the argument that safeguards should not be limited to those traditionally granted by courts in the context of provisional measures. Given the special nature of advance relief, such an interpretation would lack the necessary flexibility to deal with high-value disputes in urgent situations. In addition, it would be against the wording of Article 13(2) which explicitly states that the court may impose '*terms as it considers necessary*'. An autonomous interpretation facilitates the development of appropriate tools to respond adequately to the requirements of the Aircraft sector in conformity with the underlying principles of the Convention and the Protocol. The current uncertainty regarding the general application of safeguards under Article 13(2) will be reduced as time passes, since the passage of time will allow national courts to develop settled-case law. The argument mentioned above that an interpretation in light of domestic law has the advantage of predictability is wrong, because of the complexity resulting from the

divergences in national law.[148] Over the long term, an autonomous interpretation creates better predictability and more certainty.

Fourth, from a purely legal point of view, the determination of safeguards on the basis of domestic law is not convincing, because it relies heavily on a flawed application of the provisions of Article 14. Although it is generally true that the Convention mandates reference to the procedural law of the forum in relation to remedies, it is nonetheless hardly comprehensible that the procedural law of the forum contains any provisions on the *sui generis* concept of advance relief. Indeed, it has been illustrated in the first chapter of the thesis that advance relief and interim relief differ considerably from one another. It follows that the procedural law of the forum cannot be of much help, because it contains only provisions on safeguards that are tailored towards domestic provisional measures. As a result, it does not appear conceivable that safeguards under domestic law could be used to support the application of Article 13(2). In conclusion, the domestic law approach is faced with a number of problems. These difficulties may require an alternative approach which is consistent with the Convention and guarantees the most fundamental rights of debtors.

7.2.3 Autonomous Interpretation of Safeguards

Hence, in this author's opinion, the better view is that the concept of safeguards is a matter governed by, but not expressly settled in the Convention. It must be interpreted autonomously having regard to its '*international character and to the need to promote uniformity and predictability in its application without regard to domestic law*' as is dictated by Article 5(1) of the Convention.

7.2.3.1.1 Complete Exclusion of Safeguards by Way of Autonomous Interpretation

This view circumvents most of the problems discussed above, except one: creditors could still use their bargaining advantages to exclude the application of Article 13(2), thus putting the debtor's interests at risk. Further, judges may be reluctant to accept the limitation of their power to determine safeguards, because it would restrict their decision-making freedom. For these reasons, courts may be hesitant to uphold such a provision or may find ways to still guarantee debtors' fundamental rights. For instance, in some jurisdictions, courts may find that the complete exclusion of safeguards constitutes a

[148] Chapter 7:Advance Relief and Safeguards Section 7.2.1 Justification for an Interpretation of Safeguards in Light of Domestic Law, 55.

threat to public policy or that it violates constitutional rights. Due to the absence of precedents, it is difficult to predict how courts would deal with this matter. Consequently, there is at least the theoretical possibility that creditors may be denied access to the exclusionary provision in the contract. In this respect, it is vital to make a clear distinction between two types of situations.

The first one concerns the situation in which a court deliberately disregards the agreement between the parties. In such a situation, the application of safeguards despite their explicit contractual exclusion is not a legal issue; rather, it amounts to non-compliance by the Contracting State. Issues of non-compliance cannot be addressed by legal interpretation.[149] The question of how to address this should be reserved for another discussion, because the focus of the present thesis is on the legal analysis.

More important is the situation in which courts exercise their discretion to protect debtors within the legally permitted boundaries. For example, if judges feel that they cannot sufficiently protect the debtor due to the disapplication of Article 13(2), the logical consequence would be for them to resort to Article 13(3). As mentioned earlier, this provision enables judges to decide as a matter of discretion whether notice of an application should be given to the respondent or not. In effect, advance relief might not be available in without-notice proceedings, because courts would rely on Article 13(3) to strike a fair balance between creditors' and debtors' interests. Although this solution complies with the Convention, such legal practice is incompatible with the objective to provide speedy relief to creditors in urgent situations and in situations in which it is essential to take the debtor by surprise. The usefulness of this remedy could be undermined to the point of making advance relief meaningless. Fortunately, the illustrated approach is not the only autonomous approach that may result in more predictability and certainty. Indeed, there is an alternative autonomous interpretation of the issue.

[149] For a detailed discussion regarding compliance the Convention see: Jeffrey Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention' (2012) 17 Uniform Law Review 633; Jeffrey Wool and Andrej Jonovic, 'The relationship between transnational commercial law treaties and national law: A framework as applied to the Cape Town Convention' 2013 Cape Town Convention Journal 65; Jeffrey Wool, 'Compliance with Transnational Commercial Law Treaties – A Framework as Applied to the Cape Town Convention' 2014 Cape Town Convention Journal 5;Brian F. Havel and John Q. Mulligan, 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic' 2014 Cape Town Convention Journal 81.

7.2.3.1.2 Limited Exclusion of Safeguards by way of Autonomous Interpretation

It involves a straightforward application of Article 13(2) and Article 14 of the Convention. In essence, this view makes a clear distinction between convention-based and national safeguards, while allowing courts to resort to both as a matter of choice. Convention-based safeguards would be applicable by virtue of Article 13(2), whereas domestic safeguards would be applicable in accordance with Article 14, which clarifies that advance relief must be exercised in conformity with the procedural law of the place where the remedy is to be exercised. Correspondingly, where it can be established that the debtor and creditor have agreed by contract to disapply safeguards under Article 13(2), this would actually not eliminate the court's power to grant safeguards. Courts would interpret the agreement in a narrow sense, so that the parties only agreed to waive the application of safeguards under the Convention. This means that courts could still resort to the domestic safeguards established under *lex fori*, by virtue of Article 14.

The advantages are obvious. First of all, this view gives courts maximum flexibility to achieve a just solution whenever faced with such a dilemma. Depending on the circumstances of the case, a judge would be free to decide whether to apply safeguards under the Convention or under *lex fori*. The former have the benefit that they are specifically tailored towards the aircraft sector, whereas domestic safeguards are more general, but allow judges to resort to familiar instruments.

Second, this interpretation avoids the problem that the court may circumvent the agreement of the parties to disallow the application of Article 13(2) pursuant to Article X(5) of the Aircraft Protocol. Thus, if the parties were to exclude the application of said paragraph by contract, courts would respect the parties' agreement. More importantly, creditors would still benefit from such exclusion: advance relief would still be available in without-notice proceedings in urgent situations or in situations where notification of the debtor would defeat the purpose of the measure.

This solution, although attractive, is not perfect, because it is afflicted with two problems. First of all, this approach suffers from one of the problems of the domestic law approach, namely that of the flawed application of Article 14 in the context of advance relief. It has already been pointed out that, considering the fact that advance relief is a *sui generis* remedy, reference to domestic procedural law cannot be of much help.

Second, such an interpretation runs counter to the Convention's principle of party autonomy. A narrow interpretation of the parties' exclusion of Article 13(2) by the court does not only disregard the intention of the parties, but also ignores the fact that the Convention protects debtors' interests by several opt-in provisions. In conclusion, in the author's opinion, the correct solution is the aforementioned autonomous interpretation of safeguards, without reference to Article 14.[150]

7.3 Conclusion: Determination of Safeguards on the Basis of the General Principles

This chapter has given another example of how the application of domestic procedural law is problematic in the context of advance relief and the Cape Town Convention. A domestic law interpretation of safeguards is associated with a number of difficulties that limit the practical importance and the reliability of advance relief in legal practice. The legal analysis has revealed that a more feasible and better solution would be an autonomous interpretation of safeguards.

[150] Chapter 7:Advance Relief and Safeguards Section 7.2.3.1.1 Complete Exclusion of Safeguards by Way of Autonomous Interpretation, 62.

8 Finality and Procedural Requirements for an Appeal of Advance Relief

The previous chapters dealt mainly with the legal conditions that must be satisfied for a successful application of advance relief. Arguably, the urgent nature of advance relief demands a procedural framework which ensures accelerated and effective proceedings. Indeed, that is why, it is argued for instance that, applicants must only meet *prima facie* evidentiary standards to prove debtors' default, or why debtors' right to be heard is restricted in without-notice proceedings. To still ensure the adequate protection of debtors in such proceedings, it is important to implement legal mechanisms which protect debtors' legitimate interests and compensate for that shortcomings. Providing safeguards to protect debtors' interests is a step in the right direction, but does not suffice, since safeguards do not address both parties' equal right to be heard by an independent and impartial court. Safeguards are also not concerned with the decision-making process and judicial error. Therefore, it is essential that the law provide parties with the possibility to review the legality of courts' decisions. Bearing this in mind, it is striking that the Convention and the Aircraft Protocol are only concerned with the conditions for the initial grant of advance relief, but remain silent on the question of whether a debtor or creditor are entitled to appeal the court's initial decision.

The first issue that will be examined in this chapter is whether a respondent is legally entitled to challenge the court's initial decision to grant advance relief and, if so, whether and to what extent elements of national law are relevant to the review process of advance relief under the Convention and the Aircraft Protocol. In considering the likely operation and effects of an appeal under the Convention, this chapter will examine the remedial framework of interim proceedings in England and Germany. Finally, the chapter then turns to considering an autonomous solution in more detail and concludes with a discussion of the significance of an autonomous interpretation in relation to the application of advance relief.

8.1 Does the Convention Provide for an Appeal of Advance Relief?

The first question is whether the finality of an advance relief order complies with the basic standards and fundamental principles of the Convention and the Protocol. The lack of provisions in the Convention dealing with appeals permits two conclusions to be drawn.

8.1.1 Arguments Against the Possibility of an Appeal

One possible conclusion is that the failure to address this issue reflects the drafters' intention to exclude the possibility of appeal (at least in the context of the Aircraft Protocol). The effect of this conclusion would be that the initial grant of advance relief is irrevocable until the court has rendered a judgment on the substantive claim at the main trial.

8.1.1.1 Nature of Advance Relief

This position is mainly supported by advance relief being a contractual and creditor-friendly, *sui generis* remedy. It follows that the remedy should be interpreted and implemented to further the purpose of advance relief, i.e. to provide creditors with immediate and certain relief in urgent situations, notwithstanding debtors' legal rights. Arguably, such an interpretation is also in line with the prompt-enforcement principle enshrined in the Convention.

8.1.1.2 Sufficient Protection of Debtors

In addition, the second argument is that debtors are already sufficiently protected by the safeguards and opt-in requirements provided by the Convention and the Protocol.[151] These include, among others, the contractual opt-in requirement in Article 13(1); the safeguards in Article 13(2) and Article 13(3); and the opt-in requirement that Contracting States undertake to apply the provision of Article 13.[152]

8.1.1.3 Decision Time-limit for Courts or Administrative Authorities

The third argument in support of the finality is Article X(2) of the Aircraft Protocol, which requires Contracting States to specify the maximum period (in working days) from the date of filing of the application for relief within which the court's decision must be made. The majority of Contracting States declared a fairly short time frame of 10 days for completion of the proceedings in respect of the advance relief remedies in Article 13(1) a) to c), and 30 days for actions specified in Article 13(1) d) to e).[153] In the event of an appeal, there is an argument that courts or administrative authorities may not be able to reach a decision on the appeal within the time limit set, especially when one applies

[151] Text to n 131 in Chapter 7 Advance Relief and Safeguards, 55.

[152] Text to n 131 in Chapter 7 Advance Relief and Safeguards, 55.

[153] UNIDROIT, 'Article XXX(2) - Declarations' (n 45).

the Contracting State's declared time limit to both the initial proceedings, starting with the application, and the appeal proceedings. The underlying rationale of this interpretation of Article X(2) of the Aircraft Protocol would be that the creditor only obtains relief if and when the court grants a legally effective order, meaning that the respondent has exhausted all legal remedies available. It is undoubtedly true that such an interpretation would increase the pressure on courts in Contracting States to comply (although it must be noted that this provision provides two additional interpretations which will be discussed in the next section).

This argument finds support mainly in legislative history, because it becomes apparent that several delegations were significantly concerned about a fixed decision period for remedies. In the context of Article X ('Modification of provisions regarding relief pending final determination') of the Protocol, the legislative materials reveal that a provision relating to the remedies that commands completion of judicial proceeding within a period set forth in a declaration '*was found to be highly controversial*'.[154] Several delegations indicated that their countries would face significant constitutional problems with such a provision. Presumably, this is why Article X(2) belongs to the 'opt-in' provisions of the Convention and the Aircraft Protocol.[155] It must be noted that the UK Government decided, for this and other reasons, not to specify the term 'speedy' in the wording of the instrument. At the same time, however, the UK Government pointed out that it was not aware of any cases in which English courts had failed to respond in due time to urgent applications for interim measures.[156]

8.1.2 Arguments in Support of the Possibility of an Appeal

Based on the foregoing arguments, it is at least conceivable that the initial grant of advance relief as final. However, there are also strong arguments against this view which support the conclusion that the initial grant of advance relief should not be considered final under the Convention and the Protocol. They will now be discussed.

[154] UNIDROIT, 'Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report', (n 26) para 118.

[155] Ibid, para 119.

[156] UK Department for Business Innovation & Skills and The Insolvency Service, 'Consultation outcome of the UK Government on the Cape Town Convention and the Aircraft Protocol' <https://www.gov.uk/government/consultations/international-interests-in-mobile-equipment-convention-aircraft> accessed 21th May 2015, paras 42-44.

8.1.2.1 Intention of the Drafters

To start with, it is first more convincing that, despite the omission of specific provisions relating to appeals, the drafters' intention was not to deny debtors' right to contest the courts' initial decisions. It is hardly conceivable that the omission of rules relating to appeals should be regarded as an exclusion of appeal. If so, this would mean that any remedy under the Convention or Aircraft Protocol is final. The reason for this gap is simply that the Convention and Aircraft Protocol are primarily concerned with substantive and not procedural legal matters.

8.1.2.2 Decision Time-limit for Courts or Administrative Authorities

Second, the 'Decision Time-limit' argument discussed above is debateable. It must be recognized that the wording of Article X(2) of the Aircraft Protocol leaves relatively great room for interpretation, because its exact meaning and scope remains rather unclear. The main question is namely to what extent this rule applies to each procedural part of a proceeding. Article X(2) of the Aircraft Protocol. The answer to this question depends on how the expression '*of obtaining relief*' is interpreted. Besides the one already discussed in the previous section, there are two other possible scenarios. First, it is also conceivable that the decision period applies separately to each part of the proceeding. In other words, the time limit would reset after the initial grant of advance relief and resume after an appeal was filed. Another interpretation is to apply the time period measurement only to the original, relief-granting part of the proceedings, but not to a subsequent review process.

In the author's opinion, latter is the correct and better interpretation since such a view is supported by the specific purpose of advance relief and the strong enforcement character of the remedies it provides. The reason is that, once the initial application was successful, there is no further necessity for the speediness requirement in an appeal process. At this point, the creditor is already sufficiently protected and, hence, advance relief will have exhausted its purpose. This view would implicitly require that a court order become immediately effective and enforceable, notwithstanding the fact that a respondent might appeal the court order. The basis for an immediately effective and enforceable order against the respondent is found in the general principles underlying the Convention and the Aircraft Protocol, especially the principles underlying asset-based financing and leasing, as cited in the Preamble. The central purpose of the Convention is to enhance the enforceability of international interests, which is also apparent in the very

nature of advance relief. It follows that anything other than immediate enforceability would run counter to the facilitation of credit and would therefore diminish the importance of the remedy. On the contrary, if the initial application by the creditor fails on substantial grounds, the urgency situation presumably expires at the date of the appeal. Consequently, the decision-time limit should not apply to any subsequent review process. A further argument in favour of this position is the assumption that, if an ambiguous obligation for a Contracting State arises from a provision of the Convention, the respective Contracting State intended to minimise the burden of that provision. Finally, this view also has the merit of solving the aforementioned timeliness difficulties without major doubts, and hence, is supported by the *travaux préparatoires*.[157]

8.1.2.3 Fair Balance between the Interests of Creditors and Debtors

Third, the standard provisions of the Convention express a clear preference for a fair balance between the interests of creditors and debtors. The main argument supporting this point is to be found in Article 13(2) and Article 13(3) of the Convention. In equipping the court with the power to grant safeguards and to require notifications of interested parties, these provisions clearly intend a fair balance between the interests of creditors and debtors. The equal consideration of both interests is not only enshrined in Article 13, but runs through the entire Convention.

This, clearly, does not mean that parties may not deviate from the default solution, mostly by way of written agreement, because party autonomy shares at least the same significance under the Convention. Rather, the parties' right to be heard at some point in the proceedings should be protected and, hence, they should be entitled to challenge court decisions in accelerated proceedings as a matter of fundamental justice. This is all the more true for advance relief. Consider a scenario in which a without-notice application for repossession of the aircraft object was successful and the parties' security agreement excluded safeguards. It would be striking if the respondent were not allowed to challenge the decision by presenting contradicting evidence.

8.2 Conclusion: No Finality but Immediate Enforceability on the Basis of the General Principles

In conclusion, it is therefore asserted that, despite the omission of specific provisions relating to appeals, the drafters' intention was not to deny debtors' right to contest the

[157] Text to n 154 in Chapter 8: Finality and Procedural Requirements for an Appeal of Advance Relief, 67.

courts' initial decisions. In the author's opinion, the question of finality should therefore be regarded as an internal gap to be filled on the basis of the Convention's general principles.[158] One general rule can be suggested: provided that the parties have not contractually excluded appealing advance relief orders, the parties should be able to appeal the order which becomes immediately enforceable.

8.3 What are the Requirements of an Appeal of Advance Relief?

In the previous section it was established, on the grounds of the underlying principles of the Convention, that the Convention and the Protocol do not embrace a policy that restricts the appealability of advance relief, hence, the court's initial decision on the matter is not considered final, but only the first step in the proceedings. Thus, the last problem that has to be addressed now is the procedure applicable to appeals against court orders made in the context of advance relief. The question to be addressed is whether the procedural requirements and effects of an appeal are to be found within the Convention or should be settled by resort to the applicable domestic law, by virtue of the rules of private international law. Again, the starting point is Article 5(2) of the Convention.

8.3.1 Appeal of Interim Measures in Domestic Law

If we take the position that the procedural requirements of an appeal are not governed by the Convention, it is necessary to find a solution in conformity with the applicable law. Thus, pursuant to Article 14, the law of the forum governs this procedural matter. In this respect, the remedies and their effects in England and Germany have to be considered.

8.3.1.1 England

The previous chapter illustrated that freezing injunctions are granted in without-notice proceedings; hence, they typically operate *ex parte*. Thus, initial court decisions are not irrevocable. Rather, the initial freezing injunction is only the first step in a two-tier process. That is why court orders usually contain a statement that the provisional measures remain valid until final judgment is passed, or up to a fixed date when the court will decide in the parties' presence whether to prolong the validity of the order.[159] It is an accepted court practice that, in virtually all cases, the merits of without notice interim

[158] Text to n 46 in Chapter 4 Procedural Requirements of Advance Relief, 20.

[159] CPR 25A PD 5.1(3) and Annex 'Freezing Injunction'.

measures are reviewed at an *inter partes* hearing.[160] In that regard, it must also be pointed out that CPR 23.9(3) mandates that any order made without notice must include a statement to the effect that, pursuant to CPR 23.10, the respondent has a right to request setting aside or varying the order within seven clear days of service of its issuance. At the with-notice hearing held to hear the respondent's application to discharge the granted measure, on the onus falls on the applicant to establish the grounds for maintaining the order, although the respondent may well be required to convince the presiding judge that there is no risk of harm to the applicant's rights.[161]

Once an interim measure has been granted, the claimant is bound by its very nature to continue the main action against the defendant, except by the court's special permission. This also results in the claimant's duty to pursue the action diligently and to promptly notify the court of any change of circumstances, e.g. that a freezing injunction has exhausted its purpose. Upon application by either the respondent or the applicant, the court has the power to vary or revoke the order according to CPR 3.1(7). Further, the parties are entitled to appeal such an order to the next level of judge in the court hierarchy since CPR 52A PD 3.8(2) specifically states that the grant or refusal of an interim measure is not final.[162]

8.3.1.2 Germany

In Germany, the law of remedies against interim orders can generally be divided into two groups: on the one hand, general remedies that are designed towards ordinary proceedings and, on the other hand, special remedies which take into account the particularities of interim proceedings.

8.3.1.2.1 General

Whether a party resorts to the former or the latter category of remedies essentially depends on the legal form of the court's decision. In the absence of an oral hearing in interim proceedings, courts are required to render interim measures in the form of court orders ('Beschluss'), which may only be reviewed by resort to special remedies. One the other hand, if interim measures are granted after an oral hearing, the decision takes the form of judgment ('Urteil'), which in turn may only be appealed by resort to the general

[160] *Aerotransleasing LLC v Closed Joint Stock Company Aviakompaniya Polet* [2014] EWHC 1318 (Comm).

[161] Adrian Zuckerman, (n 80) para 10.166 and 10.184.

[162] Ibid, para 24.26 and 24.31.

remedies.[163] Within the latter category, the most important remedy is the traditional appeal ('Berufung'), by which the aggrieved party may challenge the initial grant of a seizure order pursuant to Sections 511 et seqq ZPO.

General remedies such as the just-mentioned appeal are, however, not specific enough to take into account the particularities of interim proceedings and interim relief. Therefore, the law provides a set of special remedies to limit the duration of the initial order and allow a simplified review of the court's decision under less stringent rules with regard to the standard of proof and the right to be heard. In this respect, three special remedies have to be mentioned. The aggrieved party is generally free to choose between the different remedies if the prerequisites are fulfilled. However, the party may not file these remedies concurrently, due to the principle of *lis pendens*.

8.3.1.2.2 Simplified Appeal ('Widerspruch')

First of all, the most common representative in this category is the simplified appeal ('Widerspruch').[164] It is specifically tailored to reviewing decisions made in interim proceedings without an oral hearing. The simplified appeal is, by its legal nature, no genuine remedy, because it does not suspend the enforcement of the court's original decision, nor does a different court decide about the appeal. Upon special application, a court may, however, consider postponing the enforcement of the order.[165] In other words, the 'Widerspruch' under German law has neither a suspensive, nor a devolutionary effect.[166] Rather, its purpose is to transform a court order granted in accelerated proceedings without oral hearing into a formal judgment ('Urteil'), which, in turn, can be reviewed in its entirety by ordinary appeal ('Berufung').

8.3.1.2.3 Time Limit and Annulment Applications ('Fristssetzungs- und Aufhebungsantrag')

Interim measures are characterised by the fact that they are not designed to provide a final resolution of the dispute. Rather, they are intended to protect substantive rights pending litigation. This explains why they are usually granted only before a decision on

[163] Section 922(1) ZPO.

[164] Section 924 ZPO.

[165] Section 924(3) ZPO.

[166] Section 924(3) ZPO.

the merits has been made. This essential principle is manifested in the annulment proceedings set forth in Section 926 ZPO. Generally, under German law, the duration of interim orders is unlimited. Therefore, the aggrieved party has to file an application in accordance with the aforementioned paragraph. Once the respondent applies for a limitation of the duration of an interim order ('Antrag auf Fristsetzung'), the court will specify, pursuant to Section 926(1) ZPO, a reasonable period within which the claimant has to commence an action on the merits of the case. After expiration of this deadline, the aggrieved party may, in conformity with Section 926(2) ZPO, file an application for annulment of the interim measure ('Antrag auf Aufhebung der Entscheidung nach Fristablauf'). This accomplished, the court's decision will take the form of a judgment. A party may now submit an ordinary appeal to further review the decision.

8.3.1.2.4 Annulment Proceedings Due to Changed Circumstances ('Aufhebungsverfahren wegen veränderter Umstände')

A further possible way to challenge an interim order is, by virtue of Section 927 ZPO, the 'annulment proceeding due to changed circumstances.' This remedy is intended to enable the respondent to claim that the relevant circumstances have substantially changed subsequent to the issuance of the interim order, which should therefore be lifted. The term 'changed circumstances' is, however, construed broadly. In effect, the remedy does not only cover situations in which new facts become known subsequently, but also applies if facts were already available at the date of the original proceeding but could not be brought to the attention of the court. In addition, a decision adopted without an oral hearing justifies an application for annulment due to changed circumstances. Further, an aggrieved party may also proceed under this paragraph if he either lodges adequate security to prevent any harm to the applicant, or if the risk of asset dissipation has ceased to exist.[167] Once again, the proceeding concludes with a judgment, which can be subsequently challenged by way of general remedies.[168]

8.3.2 Conclusion: Similar Structure but Differences in the Law of Remedies

A review of the jurisdictions of England and Germany reveals that they use relatively similar legal strategies to review the merits of interim measures. For example, in both jurisdictions the parties are generally entitled to review the grant of a without notice

[167] Section 927(1) ZPO.

[168] Section 927(2) ZPO.

interim measure at an *inter partes* hearing. Further, under English and German law the parties are entitled to appeal such an order (that has been reviewed at such a hearing) to the next level in the court hierarchy. Despite these global similarities, however, there are important differences in the law of remedies, e.g. the specific remedies available, the procedural requirements of these remedies and their legal consequences.

8.3.3 Autonomous Interpretation

On the other hand, if we take the opinion that the procedural requirements of an appeal are governed by, but not expressly settled in the Convention, it is necessary to find a solution based on the Convention's underlying general principles. In this respect, the Convention does not expressly provide under what circumstances and by what procedure a respondent can appeal the court's decision. Thus, it is obvious that a clear and developed concept of 'appeal' does not exist yet. Upon closer examination, however, it becomes apparent that the Convention's provisions and principles provide – at the very least – some guidelines in this respect. Thus, in order to achieve uniformity in the Convention's application, it is argued that the underlying principles of the Convention and the Protocol at least significantly shape the appeal process. But even when this is the case and the Convention indicates a solution, it does not make recourse to procedural domestic law, applicable by virtue of conflict of law rules, superfluous. It is suggested that the correct solution for an appeal must be a balanced and structured interplay between national procedural law and the Convention. This is the only way to achieve uniformity and predictability.

8.3.3.1 Autonomous Concept of Appeal

In the author's opinion, the underlying principles of the Convention, together with the autonomous solutions established in this thesis, can represent a starting point for developing the concept of "appeal" under the Convention. The first example can be drawn from the prompt-enforcement principle. In the context of advance relief, it mandates that an order becomes immediately enforceable. This interpretation is the best solution to enhance the effectiveness of advance relief and serve the purpose of the Convention. Thus, it is only under exceptional circumstances that a court should consider the opposite effect upon individual application. On the basis of the aforementioned considerations, it is also sensible to abide by the restriction in relation to rules of evidence during the appeal: the court should only admit relevant evidence in

written form. Of course, there may be exceptional circumstances, in which the court would be justified to admit other types of evidence, as well.

Finally, the autonomous interpretation of the standard of proof has to be mentioned, because, in the context of with-notice and without-notice applications, *prima facie* standards significantly impact the appeal procedure.[169] Consider again the operation of this solution: it requires the creditor to establish a *prima facie case* of the debtor's default. This, then, shifts the burden of proof onto the debtor to give valid reasons for his non-payment under the security agreement. It can be seen that this concept presupposes that both parties are treated equally, especially with regard to their right to be heard. Indeed, the standard of proof should shape the procedure and structure of an appeal. For this reason, the following structure of appeal processes is suggested for without-notice and with-notice proceedings.

8.3.3.2 Structure of an Appeal

8.3.3.2.1 Without-Notice Proceedings

After the applicant has filed an application for advance relief accompanied by supporting written evidence, the court should either grant or deny the order as a matter of discretion. If the application is successful, the order should not be considered irrevocable, but will become instantly enforceable. The consequence of the *ex parte* grant, however, should be that the merits of the measure must be reviewed at an *inter partes* hearing, on which occasion the court should decide in the applicant's and respondent's presence whether to vary, discharge or extend the validity of the order. At this stage, the respondent should be given the opportunity to submit legal reasons for his non-payment, while the applicant should argument the necessity of the order – both by way of written evidence. The court's decision at the *inter partes* hearing should be regarded as final, unless the applicable domestic procedural law provides for an additional review process.

8.3.3.2.2 Notice Proceedings

On the contrary, a different structure is suggested for with-notice proceedings, since both applicant and respondent can present their respective cases and submit written evidence in support of their allegations at the first hearing. The court should then render a decision on the basis of the evidence produced. Once again, although the order is not

[169] Text to n 105 in Chapter 5: Advance Relief and Standard of Proof, 39.

irrevocable, the applicant may immediately enforce the order against the respondent. The respondent is free to appeal the court order in conformity with *lex fori* and the above considerations.

8.4 Conclusion: Interplay between National Procedural Law and the Convention

Evidently, this is just one example of how the appeal process could be fashioned in the context of advance relief. The correct solution for an appeal must be a balanced and structured interplay between national procedural law and the Convention. There may be different approaches in defining the notion of 'appeal'. The suggested solution has the merits that it takes into account the *sui generis* nature of advance relief and, furthermore, that it is compatible with the applicable law of procedure.

Less clear are the exact boundaries of this approach, because it must be stressed that, in some situations, the applicable domestic procedural law may constitute a severe obstacle to the purpose of advance relief and the Convention. If there is a direct conflict between the underlying principles of the Convention and domestic law, it is suggested that disapplication of procedural rules can be justified in circumstances in which the interests of the Convention to provide speedy relief and ease of enforcement outweigh the justification and the benefits of domestic rule. Clearly, in case of doubt, preference must be given to the principles of the Convention. But even when this is the case and the Convention indicates a solution, it does not make recourse to procedural domestic law, applicable by virtue of conflict of law rules, superfluous.

9 Conclusion: *Sui Generis* Remedy and the Necessity of an Autonomous Interpretation of Substantive and Procedural Matters

The argument made in this thesis is as follows:

First, advance relief is a *sui generis* remedy, quite distinct from interim measures. Besides guaranteeing the protection of substantive rights, it also provides early enforcement, thus bolstering creditors' confidence in their ability to defend their legal rights effectively. Therefore, advance relief should ideally be interpreted in accordance with its nature and the general principles enshrined in the Convention: swiftness, efficacy and effectiveness on the one hand, and the principles of prompt enforcement, commercial practicability, predictability and party autonomy, on the other.

Second, its very purpose being the immediate resolution of business disputes, advance relief requires the establishment of a faster and simplified procedure. For example, the examination of applications should involve simplified proof of matters and rules of evidence. Time-consuming procedures should be disapplied in favour of accelerated proceedings. The most important aspect, at least with regards to disapplication of national procedural rules, is meeting the time limit for completion of the proceedings pursuant to Article X(2) of the Aircraft Protocol. For example, the requirement to adduce evidence of default should be interpreted as a requirement to provide *prima facie* proof of the alleged default. Further, admissible evidence in the context of advance relief should be limited to evidence in written format presented in due course in advance relief proceedings.

Third, an autonomous interpretation of both substantive and procedural matters alike in the context of advance relief offers a feasible, if not the most convincing solution. Many procedural gaps such as safeguards or the standard of proof can be treated as an internal gap and closed by resorting to the general principles on which the Convention is based. Thus, lawyers are not required to fully comply with the applicable law for procedural matters, because legal systems around the world differ significantly in this respect. An autonomous approach to selected procedural issues circumvents the national differences that still persist in the procedural field and confers confidence to creditors that they will be able to exercise their rights expeditiously in case of debtor default. This advances the goal of the Convention to establish uniformity and

predictability in its application, which ultimately creates economic benefits to all interested parties of the aircraft sector.

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