

**PRINCIPLES OF IMPLEMENTATION:
A COMPARATIVE ANALYSIS OF THE CAPE
TOWN CONVENTION'S REMEDIES**



**THOMAS TRASCHLER
HARRIS MANCHESTER COLLEGE**

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ABSTRACT

Principles of Implementation: A Comparative Analysis of the Cape Town Convention's Remedies

The Cape Town Convention and the Aircraft Protocol came into force on 1st March 2006. To date, the Convention has seventy-four States Parties, the Aircraft Protocol sixty-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.

This thesis investigates the structure and contents of the Convention's remedial system in a chronological order, but it does not purport to be a comprehensive and systematic monograph on the Convention's remedies as already done by the Convention's Official Commentary. It consists of four parts each of which investigates a particular core aspect of the implementation and operation of the Convention's remedial system in practice. In particular, it investigates the Convention's declaration system, and its procedural, substantive and insolvency remedies to ensure an effective and comprehensive protection of creditors in aircraft finance. In doing so, it identifies critical lessons for the implementation of the treaty in civil and common law jurisdictions.

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Chapter 1 Scope of the Thesis

A. Introduction

'Most commercial aircraft can be valued and manufacturers, lessors and lenders will, in many circumstances, base transactions on predictions of future values. The availability of the aircraft in case of default is the core of the problem. The asset cannot fully support the financing if the financier's right to the asset cannot be enforced in the jurisdiction where it happens to be at the time of default, if the rights of other creditors have priority in that jurisdiction, if repossession is held up by a bankruptcy moratorium or if significant delays in enforcement are a probability. Given the mobility of the asset this is something of a lottery.' (McGairl, 1999)¹

The Cape Town Convention on International Interests in Mobile Equipment (the 'Convention') and the Aircraft Protocol (the 'Protocol') came into force on 1st March 2006. To date, the Convention has secured seventy-four and the Protocol sixty-eight ratifications, including the European Union; together they can be regarded as one of the most successful commercial-law treaties in history. Articles 8 to 15 of the Convention and Articles IX to XIII of the Protocol define the default remedies of conditional sellers, lessors, and chargees under the Convention. Moreover, protocol-specific amendments and supplements of creditor-rights such as deregistration of the aircraft or export and physical transfer of an aircraft object are stipulated in Art IX and Article XI of the Protocol. The number of remedial provisions in the treaty is relatively low.² Nevertheless, these provisions are crucial to facilitating the financing of mobile equipment through asset-based and lease financing. The drafters' intent was to offer creditors the highest possible protection in the form of an effective, speedy and strong legal remedial framework for the

¹ McGairl Stephen, 'The proposed Convention: international law for asset finance (aircraft)' (1999) 4 Uniform Law Review 439, 439.

² Chapter III: 'Default Remedies' of the Convention and Chapter II: 'Default Remedies, Priorities and Assignments' of the Protocol.

international enforcement of creditor's rights in the event of the debtor's default or insolvency. The underlying assumption is that this will lead to significant reductions in borrowing cost for lenders to the advantage of all interested stakeholders in the aircraft sector.³

Thus, it is important to stress the economic benefits stemming from an effective, speedy and strong legal framework for the international enforcement of creditors' rights. Firstly, the increased creditor confidence has the effect of lowering credit costs.⁴ 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 to 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.⁵ Indeed, the creation of significant economic benefits is supported by

³ Roy Goode, 'The preliminary draft Convention on International Interests in Mobile Equipment: the next stage' (1999) 4 *Uniform Law Review* 265, 266 et seq; Roy Goode, 'From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols' (2012) 17 *Uniform Law Review* 599, 604.

⁴ Goode, 'The preliminary draft Convention on International Interests in Mobile Equipment: the next stage', (n 3) 266 and 267; Goode, 'From Acorn to Oak Tree: the Development of the Cape Town Convention and Protocols', (n 3) 601; 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 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.

a number of economic impact assessments.⁶ Further, 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.⁷ Equally, the intergovernmental Organization for Economic Co-operation and Development ('OECD') and several export credit agencies joined the effort to offer favourable financing terms to airlines based in signatory states of the Convention.⁸ Clearly, then, there is an argument for having a strong and speedy remedial regime that empowers the international enforcement of creditor rights.

B. Significance of an Effective Implementation for the Cape Town Convention

However, without effective implementation of the remedial system of the Convention and the Protocol, it would be difficult for financiers to have confidence that they are able to defend their legal rights effectively. Hence, the legislative measures of recasting the remedies of the Convention into national law are decisive for the success or failure of the Convention. But the effective implementation can prove to be a very difficult task. Legal systems around the world differ significantly how they deal with the substantive and procedural protection of legal rights. This explains why there is no universal solution to the implementation of the Convention's remedies for all Contracting States. Furthermore,

⁶ 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' (1999) 23 Air & Space Law 339; Anthony Saunders, Anand Srinivasan and Ingo Walter, 'Innovation in International Law and Global Finance: Estimating the Financial Impact of the Cape Town Convention' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=894027> accessed 19th July 2017; Vadim Linetsky, 'Economic Benefits of the Cape Town Treaty' <<http://www.awg.aero/assets/docs/economicbenefitsofCapeTown.pdf>> accessed 19th June 2017; Vadim Linetsky, 'Accession to the Cape Town Convention by the UK: An Economic Impact Assessment Study' <<http://www.awg.aero/assets/docs/UKCTC%20Econ%20Impact%20Final%20Version.pdf>> accessed 19th June 2017.

⁷ 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.

⁸ OECD, 'Arrangement on Officially Supported Export Credits – Annex III Sector Understanding on Export Credits for Civil Aircraft' (2016) <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg\(2017\)1](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2017)1)> accessed 27th August 2017; Marisa Chan, 'New OECD Sector Understanding on Export Credits for Civil Aircraft' (2007) 1 Law & Financial Markets Review 511.

in the legal practice of international commercial law, disputes as to the application of specific treaty provisions are an inevitable occurrence. Thus overall, it is critical to draw a distinction between effective and desirable, and ineffective and undesirable implementation results of the Convention. The first and main question then is: how to judge an effective and correct implementation of the Convention's remedies into national law? It is the assumption of the thesis, *that a Contracting State decided to ratify and implement the Convention for the purpose of realising most if not all of its predicted economic advantages*. This implementation problem in relation to the Convention together with the Protocol is the focus of the present thesis – although the lessons learned may equally be applicable in the context of the Rail and Space Protocol.

Due to the tension between international commercial law and state regulation, it is argued that in principle, there are two approaches of how to judge an effective implementation. The first one takes a viewpoint of state parties to treaty implementation. It understands the Convention primarily as an expression of state sovereignty, highlighting a state's regulatory power. Thus, from this traditional perspective, a successful implementation of the Convention's remedies regime should, be measured against the question of how far it furthers governmental interests, promotes principles, rules and values of the domestic legal system. The second one takes the viewpoint of private actors in the financial market and the business community. It understands the Convention primarily as a tool of commercial law, highlighting its private law character. Thus, from this commercial perspective, a successful implementation of the Convention's remedies regime should solely be tested against the question of how far it promotes its purpose to provide maximum protection to financiers creating economic advantages to all interested stakeholders. Given this controversy, the thesis asks: in a comparison between the traditional and the commercial approach, can either be found to be more favourable than the other?

Against this background, the thesis argues that the unique and commercially minded approach taken by the Convention's drafters, evidenced by the high degree to which the aircraft industry was involved and the unparalleled use of economic impact assessment⁹ in international commercial law reform, has significantly influenced if not completely changed the way that legislators and international lawyers should think about the implementation of this treaty.¹⁰ Thus, it is submitted that the result of an implementation may only be defended on the basis that it is in conformity with the Convention's overarching commercial purpose that is providing financiers with a strong and speedy remedial regime. In the interest of striking a proper balance between non-state parties' and state parties' interests, the thesis places a balanced commercial approach to the implementation of the Convention's remedies on a firm footing within the Convention. It shows that such an approach is based upon an objective understanding of the text, the intention of the drafters, and the need to create legal certainty and predictability in its application. Ultimately, the thesis demonstrates that a traditional approach to implementation cannot achieve the smooth application of the Convention's and the Aircraft Protocol's remedies in legal practice. Thus, a balanced commercial instead of a traditional approach has to be taken to the implementation of the Convention's remedial framework.

⁹ See footnote 6.

¹⁰ Mark J. Sundahl, 'The "Cape Town Approach": A New Method of Making International Law' (2006) 44 *Columbia Journal of Transnational Law* 339, footnote 7: *The Cape Town Convention was ground-breaking in other respects as well, such as the degree to which private industry was involved in the drafting process, and the unparalleled primacy placed on commercial expediency over the more traditional approach of harmonization (which is guided by the idea of drafting a treaty representing a common ground, or compromise, between the common law and civil law systems).*; Jeffrey Wool, 'The Case for a Commercial Orientation to the Proposed UNIDROIT Convention as applied to Aircraft Equipment' (1999) 4 *Uniform Law Review* 289.

C. Course of Investigation

To demonstrate the point, the thesis investigates the structure and contents of the Convention's remedial system in a chronological order, but it does not purport to be a comprehensive and systematic monograph on the Convention's remedies as already done by the Convention's Official Commentary. The thesis consists of four parts each of which investigates a particular core aspect of the implementation and operation of the Convention's remedial system in practice. In particular, it investigates the Convention's declaration system, and its procedural, substantive and insolvency remedies to ensure an effective and comprehensive protection of creditors in aircraft finance. In doing so, it identifies critical lessons for the implementation of the treaty in civil and common law jurisdictions.

Chapter 2 outlines and critically examines the concept of declarations under the Convention. It suggests a wider and inter-disciplinary understanding of declarations with an economic dimension. Based on the foregoing, this part challenges the widely held assumption that the economic benefits of the Convention stem primarily from a set of qualifying declarations relating to the remedial framework of the Convention, when in fact the availability of uniform rules is far more important. It clarifies the relationship between the qualifying declarations and the economic advantages of the Convention and thereby demonstrates that both civil- and common- law jurisdictions would benefit significantly from the Convention itself even without making the qualifying declarations.

Chapter 3 examines the legal nature and purpose of Article 13 ('Relief Pending Final Determination') of the Convention, since it does not fit any traditional remedy under domestic law. It 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. It clarifies that the relationship between the

Convention and national procedural law has to be defined on the basis of a modern commercial approach that relies on an extensive autonomous interpretation for procedural and substantive alike, and not solely on the basis of domestic law as mandated by a more traditional public law approach, if Article 13 is to be an effective remedy.

Chapter 4 examines the substantive remedies set forth in Articles 8, 9 and 11 with a focus on the option of self-help remedies provided by the declaration of Article 54(2). It shows that self-help remedies are in practice essential for the implementation of the Convention in both civil and common-law jurisdictions, and thus, should be implemented to the widest extent possible. It shows that Article 54(2) has been misapplied and misinterpreted by at least one authoritative scholar and, also, it is likely to have been misapplied and misinterpreted by a number of experienced practitioners and state officials to the disadvantage of a wide and successful implementation of the Convention's self-help remedies. Finally, it addresses the question how Article 54(2) should be correctly interpreted and applied, given the relationship between the Convention and self-help remedies available under domestic laws.

Chapter 5 considers the legal analysis of the insolvency provisions of the Convention and the Protocol, and domestic insolvency laws. The primary focus is on the core insolvency remedies provided by Article XI of the Protocol, that is, the hard rule, 'Alternative A' and the softer one, 'Alternative B'. It demonstrates that Alternative A of the Protocol has a significant advantage over Alternative B in terms of predictability, speediness and economic benefits. Consequently, to reap the Convention's economic advantages, Contracting States should rely on Alternative A. This is because Alternative A is not only in line with the underlying rationale of the Convention but also carries significant improvements from the US experience under the United States Bankruptcy Code. Furthermore the examination shows that the gap between civil- and common-law

jurisdictions in relation to Alternative A is not as wide as one might expect and thus Contracting States may adopt Alternative A without significant amendments to their legal system. Nevertheless, Contracting States should pay close attention to the various insolvency proceedings and their requirements under domestic insolvency laws when implementing Alternative A.

Chapter 6 takes stock of the overall impact, potential and limits of a traditional and a commercial approach to the effective implementation of the Convention's remedies as far as it applies to aircraft. In so doing, the thesis resolves the question of how to judge an effective and correct implementation of the Convention's remedies into national law. In conclusion, each chapter establishes at least one guiding principle for meeting the contemporary aims, objectives and challenges of the Convention and the Protocol. In broader terms, the thesis helps states to form a view as to whether they should rethink their approach to implementation with regards to the Convention. Presumably, the principles may also have a wider use for other international commercial law treaties. Ultimately, the thesis makes a substantive contribution to deliberations on the role that national law should play in the functioning and implementation of the Convention and the Protocol.

The examples are drawn principally from four major, representative jurisdictions in aircraft finance, namely Germany, France, England and the United States. The United Kingdom government ratified the Cape Town Convention and Aircraft Protocol on 27th July 2015 and both instruments entered into force on 1th November 2015.¹¹ The United States government ratified the Cape Town Convention and Aircraft Protocol on 28th October 2004, and they came into force on 1st March 2006. On the other hand, Germany, which signed both legal instruments on 17th September 2002, and France, which signed

¹¹ Mark Bisset, 'Ratification of the Cape Town Convention by the United Kingdom' (2016) 41 *Air & Space Law* 49.

both legal instruments on the 16th November 2001, have not yet ratified the Convention. The four jurisdictions were chosen primarily because Germany and France constitute classic examples of civil law jurisdictions, whereas England and the United States are classic representatives of the common law tradition. Still, there are other important reasons: the selected jurisdictions have a well-developed jurisprudence and are globally regarded as economic powerhouses; furthermore, they were chosen because of the author's access to the legal materials and his familiarity with them. However, the thesis makes reference to the laws of other jurisdictions to make specific points such as for example Spain and Mexico.

Chapter 2 Significance of the Qualifying Declarations

A. Introduction

Academics and practitioners have often urged that Contracting States will not receive the Convention's economic benefits unless they (i) properly implement the Convention into national law *and* (ii) make the declarations collectively known as the 'qualifying declarations' under the OECD Sector Understanding on Export Credits for Civil Aircraft (hereinafter referred to as the 'ASU'). The qualifying declarations, as expressed in the current version of the Aircraft Sector Understanding¹², are primarily those declarations relating to the exercise of non-judicial remedies¹³, advance relief¹⁴, availability of the lease remedy¹⁵, IDERA¹⁶, remedies on insolvency and insolvency assistance procedures¹⁷. Among the various economic benefits associated with them, perhaps the most cited example is the Cape Town Discount.¹⁸ Thus, it has been understandably argued, that the qualifying declarations are a reliable indicator for a successful implementation of the Convention into national law,¹⁹ and that they play an important

¹² OECD, (n 8), 85 et seqq.

¹³ Application of extra-judicial remedies pursuant to Article 54(2) of the Convention.

¹⁴ Application of Relief Pending Final Determination under Article 13 of the Convention and its modifications introduced by Article X of the Aircraft Protocol (including the suggested time limits Article X (2) of the Aircraft Protocol).

¹⁵ Application of the remedy that a chargee can grant a lease of the object in that territory pursuant to Article 54(1) of the Convention.

¹⁶ Application of the De-registration and export request authorisation under Article XIII of the Aircraft Protocol.

¹⁷ Application of Alternative A under Article XI of the Aircraft Protocol to all types of insolvency proceeding and that the waiting period for the purposes of Article XI (3) of that Alternative shall be no more than 60 calendar days.

¹⁸ Ludwig Weber, 'Public and private features of the Cape Town Convention' (2015) 4 Cape Town Convention Journal 53, 54; Kristin van Zwieten, 'The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives' (2012) 2 Cape Town Convention Journal 53, 72; Roy Goode, 'Private Commercial Law Conventions and Public and Private International Law: The radical approach of the Cape Town Convention 2001 and its Protocols' (2016) 65 International and Comparative Law Quarterly 526-527; Yoshinobu Zasu and Ikumi Sato, 'Providing credibility around the world: effective devices of the Cape Town Convention' (2012) 33 European Journal of Law and Economics 577, 587; Chan, (n 8) 512; 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, 645; Jeffrey Wool, 'Compliance with Transnational Commercial Law Treaties - A Framework as Applied to the Cape Town Convention' (2014) 3 Cape Town Convention Journal 5, 21; 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) 3 Cape Town Convention Journal 81, 91.

¹⁹ See for example: Aviation Working Group, 'Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol - Summary of National Implementation' October 2013 <<http://www.awg.aero/assets/docs/CTC-IP%20Summary%20Chart.pdf>> accessed 27th September 2016: 'By effective implementation, AWG means that: (i) a strong, commercially oriented set of declarations were made by a country when ratifying or acceding to the Treaty ... As an objective proxy

role, if not the most significant role, in guaranteeing the advantages of the Convention.²⁰ Some of them go even further, and see the qualifying declarations as a *conditio sine qua non* for the receipt of the Convention's economic benefits.²¹

This chapter seeks to challenge this widely held assumption²² that the benefits of the Cape Town Convention stem primarily from a set of qualifying declarations relating to the remedial framework of the Convention, when in fact the majority of economic benefits generated by the Convention and its related Protocol stem from other sources, especially its uniform rules creating legal certainty and predictability, and its worldwide ratification allowing for global enforcement of security interests.²³ Thus, if states are not prepared to make the qualifying declarations, this should not deter them from ratifying the Convention and the Protocol. The point is that states should put less emphasis on achieving compliance with the qualifying declarations and rather, focus on ratifying and correctly implementing the treaty.

To illustrate this, this chapter of the thesis proceeds as follows. Section 2 provides an analysis of the concept and underlying purposes of declarations. It will thereby serve

for whether such declarations were made, we summarise whether a country made the Qualifying Declarations, as set out in the OECD Sector Understanding on Export Credits for Civil Aircraft (2011) (hereinafter referred to as the ASU).'; Weber, (n 18) 57.

²⁰ See footnote 19 and 18, 22.

²¹ Weber, (n 18) 57; Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention', (n 18) 645. UNIDROIT Secretariat, 'Summary Report: The European Community and the Cape Town Convention' <<http://www.unidroit.org/english/documents/2010/depositary/dc09-dep-08-e.pdf>> accessed 27th September 2016, 3; Teresa Rodríguez de las Heras Ballell, 'The accession by Spain to the Cape Town Convention' (2014) 19 Uniform Law Review 1, 9; Teresa Rodríguez de las Heras Ballell and Jorge Feliu Rey, 'Modernisation of the Law of Secured Transactions in Spain' in Orkun Akseli Louise Gullifer (ed), *Secured Transactions Law Reform* (Hart Publishing 2016), 282.

²² See for example: Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention', (n 18) 645: 'The rule is prescriptive and binary: the discount is available if, and only if, the qualifying declarations are made. The same underlying reasoning applies to all other forms of EB. **Contracting States seeking EB must make the qualifying declarations.**'; Secretariat, 3; Weber, (n 18) 56: 'As has previously been pointed out, the States that have failed to make the mandatory declaration under Article 54(2) **should be regarded as not fully compliant with the CTC.**'; Rodríguez de las Heras Ballell, (n 21) 9: 'At the time of ratification of the Protocol, the set of declarations to be made should be carefully selected **in order to exploit to the full the benefits of implementing the Cape Town system** – pondering OECD 'qualifying declarations' - and to prevent internal contradictions between the CTC and its Protocols.'. Rodríguez de las Heras Ballell and Feliu Rey, (n 21) 282: 'First, the careful selection of declarations to be made by a contracting State is critical for two reasons. On the one hand, **in terms of economic benefits, ...**'.

²³ Neil B. Cohen, 'Harmonizing the Law Governing Secured Credit: The Next Frontier' (1998) 33 Texas International Law Journal 173; V. Bazinas Spiros, 'Modernising And Harmonising Secured Credit Law: The Example Of The UNCITRAL Draft Legislative Guide On Secured Transactions, Part 1' (2006) 21 Journal of International Banking & Financial Law 20; V. Bazinas Spiros, 'Modernising And Harmonising Secured Credit Law: The Example Of The UNCITRAL Draft Legislative Guide On Secured Transactions, Part 2' (2006) 21 Journal of International Banking & Financial Law 58; Orkun Akseli, *International Secured Transactions Law* (Routledge), 67 et seqq.

to establish the foundation for an investigation and assessment of the usefulness of the qualifying declarations as a tool to measure the successful implementation of the Convention into national law.

Based on the foregoing, Section 3 continues with a more specific examination of the economic impacts of the qualifying declarations. The essential factors for the creation of the economic benefits under the Convention and its related Protocols for Contracting States will be examined in order to answer the crucial question whether, and to what extent, the qualifying declarations are really relevant for the generation of economic advantages. This will show that there is a significant gap between the actual and perceived economic significance of the qualifying declarations in academic, legal and political discourse.

In completing the analysis, Section 4 takes stock of the overall impact, potential and limits of the qualifying declarations. It concludes with the assessment that although the qualifying declarations are of value and have ordinarily reached sound results, their economic significance is overestimated and Contracting States benefit significantly from the Convention itself even without making the qualifying declarations.

B. Concept of Declarations in Treaty Law

1. Introduction

This section looks at the role played by declarations in the field of international private law. It asks whether a traditional understanding of the concept of declarations²⁴ as a legal instrument for providing more flexibility for states and achieving a wider ratification of international instruments is sustainable in the context of the Convention and Protocol. This shall be done to provide the basis for the examination the legal and economic significance of the qualifying declarations. Before turning to this issue, there is one important point to consider; that of the crucial differentiation between reservations and declarations in international law, both in general and in particular under the Convention.

2. Difference between Reservations and Declarations

In the context of the Convention, declarations have to be clearly distinguished from reservations since the Convention expressly authorizes only the declarations listed in its Article 56 and those specified in Article XXXII of its related Protocol. Reservations are not allowed in the context of the Convention and hence, have no effect.²⁵ The 1969 Vienna Convention on the Law of Treaties defines in Article 2(1)(d) reservations as ‘*a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.*’ It follows that the decisive element of a reservation is its unilateral nature,

²⁴ Brian F. Havel and Gabriel S. Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2014), 354 et seq; ‘The purported purpose was to be able to attract as many countries as possible ...’; Sundahl, (n 10) footnote 46 stating that: ‘flexibility was built into the protocols in order to avoid the catastrophic result that states might refuse to ratify a protocol that promoted commercial efficiency over more debtor-friendly public policies.’ Marco Torsello, ‘Reservations to international uniform commercial law Conventions’ (2000) 5 Uniform Law Review 85, 119 stating with regard to Reservations: ‘Reservations, indeed, allow a degree of flexibility that renders the Conventions to which they apply suitable for adoption by a larger number of States’; Jeffrey Wool, ‘Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: a Preliminary Proposal for Development of a Policybased Unification Model’ (1997) 2 Uniform Law Review 46, 49 proposing a policy-based unification mode that ‘leaves important related policy-type decisions with contracting states to produce the greatest level of support for a convention.’

²⁵ Article 56 of the Convention states that ‘No **reservations** may be made to this Convention **but declarations** authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these provisions.’. See also Goode, ‘Private Commercial Law Conventions and Public and Private International Law: The radical approach of the Cape Town Convention 2001 and its Protocols’, (n 18) 532.

meaning that it does not have a binding effect on another Contracting State unless specifically accepted by that Contracting State.²⁶ This is also why it offers the greatest possible flexibility to a reserving Contracting State with regards to the legal effect of an international instrument.²⁷ On the contrary, the contents of declarations are usually specifically defined in the international instrument, such as for example in case of the Convention in Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60. The same is true for the date of entry into force or the date of withdrawal of declarations. For example, the Convention specifies in Article 57(2) that subsequent declarations shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Equally, a withdrawal of a declaration takes effect according to Article 58(1) on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Having clarified the difference between reservations and declaration, the next section turns to the question what is the purpose of declarations in private international law and under the Convention?

3. Purpose of Declarations in Treaty Law

The primary rationale behind declarations is simple; they provide states with flexibility in the ratification process in cases where provisions of the international instrument are in fundamental conflict with a national legal system. They can be understood as addressing three principal concerns of states; namely: protection of national interests, preservation of legal traditions, and control over public policy concerns. The assumption behind declarations in international private law is that the framework they create leads to higher ratification numbers of uniform law instruments.²⁸ The lack of widespread ratification

²⁶ Roy Goode rightfully points out that the 1969 Vienna Convention on the Law of Treaties is not entirely consistent with regards to the unilateral nature of reservations. For more details see *ibid*, 532 footnote 48.

²⁷ Torsello, (n 24) 88 et seqq; Laurence R. Helfer, 'Flexibility in International Agreements' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2012).

²⁸ See footnote 24.

creates severe problems. It undermines the significance of uniform law instruments²⁹, or, even worse, can mean they may not enter into force at all³⁰, since the requisite number of ratifications has not been achieved. As an example of a well functioning system of declarations, one only need look to at the Convention (and the Protocol) because for decades the unification of personal property securities law has been historically regarded as both undesirable and infeasible, especially owing to the deeply rooted legal traditions and cultures enshrined in domestic legal rules.³¹

4. Purpose of Declarations under the Convention

If one considers the Convention's structure of declarations, four different groups may be identified: opt-in declarations, opt-out, mandatory, and other declarations. By means of so-called 'opt-in' declarations a Contracting State gives effect to a particular provision. The declarations under Article 39 ('Non-consensual rights and interests having priority without registration'), Article 40 ('Registrable non-consensual rights or interests'), and Article 60 ('Application of Convention priority rules to pre-existing rights or interests') fall in this category. Opt-out declarations provide the possibility of excluding the applicability of a certain provision, as applied by a Protocol, in that Contracting State. The declarations under Article 54 ('Declarations regarding remedies'), under Article 55 ('Declarations regarding relief pending final determination'), and under Article 50 ('Internal transactions') are of this kind. Mandatory declarations require states to make this kind of declaration since without them the depository will not accept any state's deposit of a binding instrument of ratification or accession. The declarations under Article 54(2) for the availability of self-help remedies and Article 48(2) for REIO's ('Regional

²⁹ See, for example, the UNIDROIT Convention on International Financial Leasing (1988) and the UNIDROIT Convention on International Factoring (1988).

³⁰ See, for example, the Convention on Agency in the International Sales of Good (1983).

³¹ Goode, 'Private Commercial Law Conventions and Public and Private International Law: The radical approach of the Cape Town Convention 2001 and its Protocols', (n 18) 532: *'The declarations feature was designed to ensure that States otherwise favouring the Convention might feel obliged to refuse to ratify it.'*

Economic Integration Organisations’) fall in this category. Finally, there last grouping of declarations is a catchall category. Under Article 53 (‘Determination of courts’) provision, Contracting States may define the relevant court for the purposes of the Convention. Pursuant to Article 52 (‘Territorial units’), Contracting States may also declare that the Convention may only extend to certain territorial units of a Contracting State. It is important to note that the Aircraft Protocol provides for further declarations. This is also true for the other protocols relating to railway rolling stock and space assets.

If one considers the various types of declarations, it is recognisable that primarily opt-out declarations – in particular Articles 54, 55 of the Convention – serve the purpose of flexibility in the ratification process. Nevertheless, the traditional assumption that the Convention’s use of declarations is just opening doors for states to maintain their legal peculiarities has to be questioned. It is now coming to be recognised that declarations also have an economic impact. The reason is that state parties and private actors are all able to quickly draw conclusions about the financial risk and legal situation based on the declarations made by Contracting States. This transparency arises mainly from two provisions. First, Article 62(1) of the Convention states that UNIDROIT is designated as Depositary of the Convention. Second, UNIDROIT’s role as a depositary is further defined by the legal duties set forth in Article 62(2). The most important aspect of these various duties is the depositary’s extensive information obligation, requiring the depositary to inform all Contracting States of the current status of the Convention and the declarations made by Contracting States to these instruments. UNIDROIT meets this obligation by operating an online presence displaying both this and further information.

C. The Qualifying Declarations

1. Introduction

The economic function of declarations under the Convention is evidenced by the qualifying declarations. They have been frequently cited as a critical factor for the creation of the Convention's economic benefits. Thus, this section seeks to resolve the question: what advantages can directly be attributed to the qualifying declarations that are internationally recognised as determinants of a proper implementation of the Convention into national law? In order to answer this question, the first subsection explores the internal legal and economic mechanics of these advantages to better understand how they really function. Then, the theoretical economic benefits afforded to the Contracting States by the qualifying declarations are contrasted with the way in which they operate in practice. It will be shown that most academics and practitioners wrongly assume that the Convention's primary economic benefits may be directly or indirectly attributed to the qualifying declarations, when in fact the availability of uniform rules is far more important.³²

2. Benefits Associated with the Qualifying Declarations

In order to assess the merits of the qualifying declarations, one has to understand why they exist in the first place. In general, it is a difficult task to convince state officials to ratify a uniform international commercial instrument. Thus, simply providing the underlying policy of the international instrument and its relatively abstract advantages is not sufficient, as a government is likely to demand hard facts that support the contention that it stimulates economic growth and benefits the economy. The main rationale behind the qualifying declarations is exactly this, providing potential Contracting States *ex-ante*

³² Rodríguez de las Heras Ballell and Feliu Rey, (n 21) 282, Rodríguez de las Heras Ballell, (n 21) 9; Weber, (n 18) 54; Zasu and Sato, (n 18) 581.

with a concrete and measureable incentive – or in other words, with a tool to quantify the economic advantages.³³

2.1. Cape Town Discount

Whenever the debtor is located in a Contracting State that has made the declarations strengthening the position of a creditor holding security in aircraft objects, the availability of preferential financing terms including the most prominent one, the ‘Cape Town Discount’ for aircraft transactions will be present. In particular, under the ASU a Contracting State is expected to opt for the declarations set out in Article 2 of Annex I, and refrain from the declarations listed in Article 3 of this Annex I.

2.1.2. Requirements of the Cape Town Discount

The Participants³⁴ of the ASU maintain an eligibility list (the ‘Cape Town List’) of Contracting States that have been determined through OECD procedures (a) to be a Contracting Party to the Cape Town Convention (b) to comply with the qualifying declarations and (c) to have effectively implemented the Cape Town Convention, including the qualifying declarations into national law.³⁵ Consequently, if a debtor is located in a Contracting State enumerated in the Cape Town List it should (at least in theory)³⁶ be eligible for the Cape Town Discount of up to 10 percentage points off the otherwise applicable up front fee or per annum spread. Notably, the Cape Town Discount is not permanent and may be withdrawn at any time if a Contracting States shows non-

³³ Weber, (n 18) 54: *The relatively high rate of ratifications of the CTC and its Protocol and the high volume of registrations can be explained by four main factors: ... a ‘Cape Town discount’ for aircraft operators reducing the cost of credit, made available by governmental export credit agencies under an OECD understanding, starting in 2006.*

³⁴ The Participants are: Australia, Canada, the European Community (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom), Japan, Korea (Republic of), New Zealand, Norway, Switzerland and the United States. See OECD, ‘Summary Overview of the Arrangement’ (2016) <<http://www.oecd.org/trade/xcred/summaryoverviewofthearrangement.htm>> accessed 27th September 2016.

³⁵ OECD, ‘Arrangement on Officially Supported Export Credits – Annex III Sector Understanding on Export Credits for Civil Aircraft’, (n 8) 79 et seqq.

³⁶ *Ibid*, 52. The ASU and its related Cape Town Discount is a multilateral gentlemen’s agreement, thus strictly speaking it is not legally binding.

compliance with the Convention through OECD procedure.³⁷ It can be seen that the qualifying declarations thereby also have an *ex-post* economic effect after the Convention and its related Protocol enters into force in a Contracting State.³⁸

Astonishingly, there are however relatively few Contracting States entitled to the discount, if one considers the current status of the Convention's ratification and the fact that the overwhelming majority of Contracting States has made the 'qualifying declarations'.³⁹ In fact, the Cape Town List includes only twenty-six States, namely Angola Malaysia, Panama, Australia, Malta, Rwanda, Canada, Mongolia Senegal, Ethiopia Myanmar, Singapore, Fiji, New Zealand, Sweden, Indonesia, Nigeria, Tajikistan, Kazakhstan, Norway, Turkey, Kenya, Oman, Viet Nam, Luxembourg and Pakistan.⁴⁰ As a result, the AWG (the 'Aviation Working Group') has asserted that more Contracting States should be added to this list.⁴¹ The fairly short Cape Town List could be explained by a number of factors.

2.1.2. Exceptions to the Cape Town Discount

2.1.2.1. Home Market or Home Country Rule

First, it should be noted that airlines in both in the United States and partially the European Union – in particular UK, France, Germany and Spain – do not qualify for beneficial export credit under the ASU because of the so-called 'home market' or 'home country' rule. This rule is a gentleman's agreement between the major export credit

³⁷ Ibid, 81: 'Any Participant or non-Participant which provides official support for aircraft may propose to that a State be removed from the Cape Town List if they are of the view that such State has taken actions that are inconsistent with, or failed to take actions that are required by virtue of, that State's Cape Town Convention commitments.'

³⁸ Zasu and Sato, (n 18) 593 described as 'Ex post commitment constraint'.

³⁹ UNIDROIT, 'Status of the Aircraft Protocol' (<http://www.unidroit.org/status-2001capetown-aircraft>) accessed 28th September 2016
UNIDROIT, 'Status of the Cape Town Convention' (<http://www.unidroit.org/status-2001capetown>) accessed 28th September 2016.

⁴⁰ OECD, 'Cape Town Convention (CTC) Contracting Parties Qualifying for a CTC Discount' <<http://www.oecd.org/tad/xcred/ctc.htm>> accessed 28th September 2016.

⁴¹ Aviation Working Group, 'Cape Town Convention and Export Credit' (2015) <<http://www.awg.aero/projects/capetownconvention/>> accessed 4th March 2016, states that: 'AWG believes select other countries should be added to this list and are consulting with relevant parties in that regard.'

agencies – that is the Export-Import Bank of the United States, the Export Credits Guarantee Department (UK), the Compagnie Française d’Assurance pour le Commerce Extérieur (France); and the Euler Hermes (Germany) not to provide financial assistance to competing airlines based in France, Germany, Spain, United Kingdom, and the U.S.⁴²

2.1.2.1. *Non-Application or Pending Procedure*

Secondly, another possible explanation might be that some Contracting States, although compliant with the qualifying declarations did not apply to go through the OECD procedure to be added to the Cape Town List or are still in the process of doing so. Further, one has to recognise that the Cape Town Discount is a gentlemen’s agreement among the OECD Participants.⁴³

2.1.2.1. *Compliance and Political Risk*

However, the third and more convincing explanation seems to be that many states not found in the Cape Town List have ratified the Convention in compliance with the ASU but still are considered as not having *effectively implemented* the Cape Town Convention, *including* the qualifying declarations into national law by the OECD. Put simply, if the law on the books does not match the law in practice in terms of the Convention, the Cape Town Discount will not be available. India, while not the only example, is a good example of this. It acceded to the Convention in 2008 and is *fully compliant with the ‘qualifying declarations’*, though it is not entitled to the Cape Town Discount under the Cape Town List. Arguably, there are good reasons for this, if one considers the *Kingfisher Airlines* litigation⁴⁴ and the subsequent *SpiceJet*⁴⁵ cases as shown below. It is important to

⁴² For a more detailed analyses: Dean N. Gerber, ‘The 2011 Aircraft Sector Understanding: Calming the Turbulent Skies’ (2011) 24 *The Air & Space Lawyer* 1, 15; David Knibb, ‘IN FOCUS: How new export credit rules will change aircraft finance’ <<https://www.flightglobal.com/news/articles/in-focus-how-new-export-credit-rules-will-change-aircraft-381363/>> accessed 28th September 2016.

⁴³ OECD, ‘Arrangement on Officially Supported Export Credits – Annex III Sector Understanding on Export Credits for Civil Aircraft’, (n 8) 5:Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland and the United States.

⁴⁴ DVB Aviation Finance Asia PTE Ltd v Directorate Generale of Civil Aviation, et al, WP (C) 7661/2012 and CM No 4208/2013 (8 April 2013) (India); See also Dean N. Gerber and David R. Walton, ‘De-registration and Export Remedies under the Cape Town Convention’ (2014) 3 *Cape Town Convention Journal* 49 et seqq.

note that the Convention was not applicable in *Kingfisher Airlines* litigation – India ratified the treaty and the Protocol on Monday 31st March 2008 after the acquisition and delivery of the aircraft – but the financial market considered it as a landmark decision because it was seen as an indicator for the government's commitment to abide by the Convention in future.

(i) *Kingfisher Airlines litigation*

In October 2012, Kingfisher, an Indian air carrier, ceased flying operations because the Indian Directorate General of Civil Aviation (the 'DGCA') suspended its flight certificate due to the airline's inability to repay debts of more than 1 billion USD. Unsurprisingly, the financier DVB Bank ('DVB') sought to de-register and repossess its aircraft. While repossession was unproblematic, the de-registration of the aircraft by the Indian Directorate General of Civil Aviation ('DGCA') was harder to accomplish. Despite the fact that DVB possessed a de-registration power of attorney and was explicitly entitled to do so under the under DGCA Rule 30(2)(a)(iv), DGCA refused to deregister the aircraft unless Kingfisher confirmed that it had no objection to the de-registration of the aircraft in question. DVB was left with no choice and had to take legal action against both Kingfisher and the DGCA and demand, among other things, the immediate de-registration of the aircraft. Although ultimately successful, the troublesome, expensive and time-consuming enforcement of DVB's rights through court's raised concerns among financiers who considered the disregard of the irrevocable de-registration power of attorney as outrageous. Like DVB, the International Lease Finance Corporation ('ILFC') encountered similar problems in obtaining possession of its six aircraft objects from Kingfisher Airlines.

⁴⁵ AWAS 39423 Ireland Ltd & Ors v Directorate General of Civil Aviation & Anr (2015) WP(C) 871/ 2015 (India); Wilmington Trust SP Services (Dublin) Limited v Directorate General of Civil Aviation & Anr (2015) WP(C) 747/2015 (India). The joint decision is available online at the Cape Town Academic Project website: <<http://cdm15895.contentdm.oclc.org/utis/getdownloaditem/collection/p15895coll4/id/3/filename/4.pdf/mapsto/pdf/type/singleitem>> accessed 28th September 2016.

(ii) *SpiceJet litigation*

In contrast to the Kingfisher litigation, the Convention was applicable in the SpiceJet cases. In December 2014, SpiceJet Limited ('SpiceJet'), an Indian air carrier, failed to meet its payment obligations under a lease agreement of three aircraft. The leasing company AWAS 39423 Ireland Ltd immediately terminated the lease in accordance with the terms of the lease, and issued a demand to SpiceJet for re-possession. SpiceJet refused to comply and consequently, the lessor was prompted to seek de-registration of the aircraft directly from the DGCA, on the basis of both an Irrevocable De-Registration Power of Attorney (IDPOA) and an Irrevocable De-Registration and Export Request Authorization (IDERA). Again, the lessor's attempt to achieve de-registration of the aircraft without delay was not fruitful, and it had to seek relief in court. The Delhi High Court, interpreting the Convention, made it clear that the DGCA has no discretion in the matter if the lessor seeks deregistration and export of the aircraft under a valid IDERA issued by the debtor. Also, it clarified that there is no requirement of prior termination for the remedies of de-registration and/or re-possession of the aircraft objects in Article IX of the Protocol. Thus, it directed the DGCA to de-register the aircraft objects.

The significant point that one can draw from the Indian cases is that failure to implement properly can be a reason for not getting the Cape Town discount. Thus, making the required qualifying declarations does not guarantee entitlement to the discount and by extension the creation of economic benefits of the Convention as often stated in academic writings. The question, then, becomes what is added by the qualifying declarations to the legal and economic analysis of the Convention's implementation?

2.2. Recognition of the Interrelationship of the Convention's Remedies

In the author's opinion, one key lesson that one can draw from the qualifying declarations and the Indian cases is that although the various remedies under the Convention may be

technically independent from each other, as correctly pointed out by the Indian Supreme Court, their isolated assessment poses some difficulties.

Take, for example, the right to termination of the agreement. It is itself pointless if the creditor is not entitled to obtain possession, control or custody of the aircraft and/or de-registration of the object afterwards as highlighted by the *SpiceJet* case. Likewise, the right to repossession would be of no avail for the creditor if the aircraft object cannot be de-registered in the current jurisdiction and re-registered in another as illustrated in the *Kingfisher* case: the creditor was able take possession of the aircraft in Turkey but failed to obtain de-registration in India. Without successful de-registration, the aircraft will just sit with the creditor quickly deteriorating and without generating any revenue due to the Convention on International Civil Aviation (the ‘Chicago Convention’).⁴⁶

Thus, the real rationale behind the qualifying declarations is that the treatment of certain declarations (taken together) as qualifying recognises the interrelationship of the various remedies of the Convention and the Protocol. This only makes sense because the enforcement system provided by the treaty must work at all stages of proceedings, if it is to be effective. This just leaves one question: what, if anything, justifies the integration of the qualifying declarations in the economic assessment of the Convention?

2.3. Convergence of Secured Transactions Law

Is it that the qualifying declarations in question create measureable economic advantages other than the Cape Town Discount? It could be argued that they embrace the principles of modern secured transactions legislation that are pre-requisite for economic development and general wealth.⁴⁷ More specifically, the prompt enforcement principle and the bankruptcy law enforcement principle are incorporated in the qualifying

⁴⁶ This is, because Article 18 of the Chicago Convention states that ‘*An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.*’ Consequently, the prohibition on dual registration effectively establishes a link between the right to re-possession and the right to de-registration.

⁴⁷ See footnote 23.

declarations.⁴⁸ This is firstly because Contracting States must not opt-out of advance relief and declare 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). This ensures a prompt realisation at market value of the aircraft assets given as security. Further by requiring Contracting States to applying the entirety of Alternative A under Article XI with a waiting period of no more than 60 calendar days, secured creditors have the ability to promptly recover the value of the aircraft equipment further in insolvency proceedings.

In this way, the qualifying declarations have a signalling function for non-compliant Contracting States that is comparable to soft law instruments since they provide concrete recommendations to national legislators in terms of the future development of their domestic secured transaction law, creating economic benefits for the internal market, (although the same argument is true for the Convention itself to a large extent). Notably, the benefits of the qualifying declarations are of a subjective nature, meaning that compliance with them transfers economic benefits mostly to the adopting Contracting State. States with under-developed secured transactions laws will benefit the most from implementing the qualifying declarations and states with highly developed secured transactions laws will benefit the least.⁴⁹ Thus, the primary attribute that the qualifying declarations possess which the provisions of the Convention do not *per se* is or ought to be that they promote the most creditor-friendly version of a secured transactions legislation in domestic law as well as in terms of the Convention's implementation. In other words, they promote a special type of convergence in secured transactions law and a small amount of uniformity among the ratifying states. In the long term, the convergence

⁴⁸ For a detailed discussion of the principles in the Convention see: Saunders and Walter, (n 6) 10 et seq.

⁴⁹ Saunders, Srinivasan and Walter, (n 6) 9.

of national commercial law will benefit the globalised market and international transactions due to reduced transactions and financing costs.

3. Risks Associated with the Qualifying Declarations

3.1. Overestimation of Economic Importance

In conclusion, there are several lessons to be drawn. First, the qualifying declarations operate rather differently from how they are perceived in academic literature and practice, especially with regards to their limited economic significance as illustrated by the convergence effect and the infrequently granted Cape Town Discount. What is sometimes lost is the fact that the vast majority of economic benefits can be attributed to the Convention's uniform legal regime that seeks to protect financiers against the enforcement risk relating to different states, and not, as some observers might wrongly perceive, from the qualifying declarations.⁵⁰ Consider the following example.

At some point in the future, there is a chance that the debtor will default, and the creditor wants to make sure that it can rapidly repossess the aircraft. But that is exactly the problem: the high mobility of aircraft objects makes the jurisdiction of enforcement unpredictable at the time of default. There is a likelihood that the location of the aircraft might be in a jurisdiction where the security interest is not adequately recognised or even worse, not recognised at all. This is where the Convention comes in: it creates a *uniform legal regime for the creation, registration, and protection of international interests in aircraft in an effort to avoid national differences that still persist in domestic secured transactions law*. Thus, the more states become parties to the Convention, the less the location of the aircraft matters and the more effective the instrument will be creating

⁵⁰ Saunders and Walter, (n 6) 23: '*The primary microeconomic impact of the proposed Convention/Aircraft Protocol is the potential benefits that will accrue by virtue of the reduced cost of financing and the increased availability of credit for the acquisition and use of commercial aircraft from asset based financing. The general order of magnitude of these benefits ... appears to be significant on a stand-alone basis.*'; Other often non-measurable economic benefits mentioned in the study are pass-through benefits to passengers and other users of commercial air transport services, lower transactions costs as a result of harmonisation that come in the form of delays, professional fees, and resale prices of aircraft under distress conditions and improved efficiency in fleet planning and equipment allocation. See also Saunders, Srinivasan and Walter, (n 6).

maximum macro, micro- and development economic benefits for all interested stakeholders worldwide.⁵¹ Clearly, then, a high number of ratifications provides more economic benefits than sole compliance with the qualifying declarations. It follows that ratifying the Convention without making the qualifying declarations still provides the vast bulk of economic benefits since their effect is negligible in comparison.

3.2. Deterrence Effect

Ironically, the usefulness of the qualifying declarations in achieving a high number of ratifications can be questioned alongside their economic importance. The primary reason is that at least one of the qualifying declarations requires Contracting States to integrate concepts in their legal systems based on common law. Take, for example, the required self-help declaration of Article 54(2). The legal concept of self-help is frequently found in common law, and is typically not found in civil law as will be explained later in more detail. It follows that common-law jurisdictions may declare for the availability of self-help without any amendments to their legal systems. On the contrary, civil law jurisdictions may face significant hurdles in doing so. This would not be a problem at all, if one appreciates the public law purpose of declarations under the Convention to accommodate the different legal views of civil and common-law countries. More problematic, however, is that the financial market stigmatises Contracting States that are non-compliant with the qualifying declarations.

On the positive side, this pressure may provide incentives for Contracting States to amend national law in accordance with the legal position of the Convention, to the benefit of uniformity and predictability. On the negative side, however, due to the legal obstacles raised by the qualifying declarations for civil-law jurisdictions, they may refrain from

⁵¹ Linetsky, 'Economic Benefits of the Cape Town Treaty', (n 6) 2: *'the ratification and effective implementation of the C.T.T. results in significant risk reduction to lenders in secured aircraft financing transactions.'* Further, Vadim Linetsky estimates that the total savings directly resulting from the risk reduction due to **reducing the worldwide repossession delay** from ten to two months are on the order of US\$161 billion in the period of 2009-2030.

ratifying the Convention at all. The main reason is that the current group of non-compliant Contracting States is rather small, and mostly consists of emerging and non-developed states such as Brazil, China, Cuba, Egypt, Kuwait, Mexico, Saudi Arabia, and the United Arab Emirates. There is an argument there that advanced legal systems with a developed commercial jurisprudence, such as France and Germany, might fear that joining this group will send an unfortunate signal to the financial market. These states may also find it more difficult to make substantial changes proposed by the qualifying declarations since they face a significant risk of disturbing the balance of their highly developed commercial laws. The point is that the qualifying declarations might have created a deterrence effect for developed civil law jurisdictions considering ratifying the Convention if they cannot comply with the requirements posed by the qualifying declarations. Clearly, this is an unwanted outcome in terms of achieving a wide acceptance and it runs counter the very purpose of the sophisticated Convention's declaration system.

D. Conclusion: Limited Significance of the Qualifying Declarations

The argument made in this chapter is as follows:

The traditional concept of declaration is out-dated in the context of the Convention and the Protocol. Declarations do have an economic effect for Contracting States. The qualifying declarations are a good example of this; they embrace a combined legal and economic approach to declarations, as evidenced by the Cape Town Discount and their convergence effect. They are a significant concept for Contracting States in the implementation process for several reasons. First, from a legal perspective, the treatment of certain declarations (taken together) as qualifying recognises the interrelationship of the various remedies of the Convention and the Protocol. This only makes sense because the enforcement system provided by the treaty must work at all stages of proceedings, if it is to be effective, as reinforced by the *Spice* and *Kingfisher* litigations. These cases emphasise the fact that Contracting States should ensure that legislative, judicial, executive, and administrative branches apply the Convention and the Protocol as drafted and intended. Second, the qualifying declarations are designed to provide Contracting States with measureable economic incentives to ratify the treaty, most importantly, the Cape Town Discount. Nevertheless, one has to recognise that the related economic benefits of the qualifying declarations – if granted at all – are rather marginal in comparison to the global economic benefits that flow from the Convention. Consequently, the compromising function of declarations should not be carelessly sacrificed to the belief that meeting the requirements of the qualifying declaration is the be-all and the end-all prerequisite for the successful implementation of the Convention as frequently contended in practice and scholarship. Indeed, the primary functions of declarations remain to be allowing states to ratify the Convention while maintaining national legal sensitivities in civil and common law systems.

Chapter 3 Advance Relief under the Convention

A. Introduction

Article 13 of the Cape Town Convention 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 immobilisation 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; it leaves open the question of its legal nature; and it does not address questions that are essential to its application in national courts, thus ultimately creating uncertainty as to its surrounding legal framework.⁵² Sections 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 chapter 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 the 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. Sections 4 to 8 seek to establish that the application of national procedural law in the context of Article 13 cannot guarantee its smooth operation in legal practice. Given the remedy's special nature and purpose, this chapter 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

⁵² Gilles Cuniberti, 'Advance relief under the Cape Town Convention' (2012) 1 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) 2 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.

chapter 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. Three issues in relation to advance relief will illustrate this point: standard of proof, rules of evidence and safeguards.

In completing the analysis Section 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 Protocol. In so doing, the final section of the chapter resolves the question of how the concept of Article 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’⁵³ for brevity.

⁵³ The Official Commentary itself refers to the term ‘advance relief’: Roy Goode, (n 52) para 4.110.

B. 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, the following part will consider more generally the economic function of remedies under the Convention.

1. Purpose of Remedies under the Cape Town Regime

Creditors base their decisions whether to lend and what rate of charge 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.⁵⁴ It follows that the principal function of remedies is to protect creditors who enter into financing transactions of high-value and involving 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. 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.

1.1. 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

⁵⁴ Stephen, (n 1) 439; Weber and Eberg, (n 4) 9.

possession of an aircraft object, the higher the risk of its exposure.⁵⁵ 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.

⁵⁵ Weber and Eberg, (n 4) 9; Saunders and Walter, (n 6) 354.

C. Legal Nature of Advance Relief

1. Introduction

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 orders⁵⁶ that restrain a defendant from removal or disposal of his assets from the jurisdiction, or to civil search warrants⁵⁷, 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 orders⁵⁸, which allow the court the *in rem* attachment of debtor assets, or interim injunctions⁵⁹, 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.⁶⁰ But is advance relief really a special form of interim relief?

2. Interpretation of Advance Relief

2.1. 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*

⁵⁶ 'Freezing order', pursuant to CPR 25.1(1)(f) (formerly known as *Anton Piller* orders).

⁵⁷ 'Search order', pursuant to CPR 25.1(1)(h) (formerly known as *Mareva* injunctions).

⁵⁸ 'Arrest', pursuant to Sections 916-934 ZPO.

⁵⁹ 'Einstweilige Verfügung', pursuant to Section 935 and Section 936 ZPO.

⁶⁰ Cuniberti, (n 52) 88 and 89.

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, 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 ...*'.⁶¹

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.⁶² Similarly, the unofficial German and Italian translations available on the UNIDROIT website use the term 'interim relief'.⁶³ 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

⁶¹ For a discussion of the linguistic references in the Convention to the interim nature of advance relief see: *ibid*, 81; Veneziano, (n 52) 86.

⁶² 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 definitiva'.

⁶³ See e.g. German: 'Artikel 13 - Vorläufiger Rechtsschutz'; Italian: 'Articolo 13 – Misura provvisoria'.

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.⁶⁴

Despite the uncertainty created by the different texts 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 the *sui generis* nature of the relief and to differentiate it from interim relief.⁶⁵ 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?

2.2. Purposive Approach

Arguably, one special feature of advance relief is the remedy added by Article X(3) of the Aircraft Protocol (including the other Protocols currently available) providing for the sale of the object and application of proceeds therefrom.⁶⁶ It should be noted that Article 6 of the Convention mandates that the Convention and Protocol ‘*shall be read and interpreted together as a single instrument*’ and further, that ‘*to the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail*’.

Interestingly, common law systems usually consider a sale as a form of interim relief (since the claim becomes associated with the proceeds of the sale), particularly in cases in which the subject matter at issue might deteriorate during pending proceedings.

⁶⁴ On the interpretation of international uniform law see: Martin Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’ (2000) 5 Uniform Law Review 683.

⁶⁵ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.104.

⁶⁶ See Article VIII(3) of the Rail Protocol and Article XX(2) of the Space Protocol.

Under English law, CPR 25(1)(c)(v), 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, meaning that courts would apply the procedure relating to interim remedies. Quite the contrary applies in civil law systems, where the sale of an object is not associated with interim measures due to its perceived finality. Under German law, the traditional interim remedies – seizure (Sections 916-934 ZPO) and interim injunction (Sections 935-936 ZPO) – do not include realisation of the asset and are of a temporary nature. The main characteristic of these procedural remedies is that they do not prejudice the outcome of the dispute.⁶⁷ 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.⁶⁸ Overall, this is, however, not sufficient to draw a line between advance relief and interim relief. There are more fundamental differences to be highlighted.

2.3. 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.

2.3.2. *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

⁶⁷ Jens Grunert, ‘Interlocutory remedies in England and Germany: a comparative perspective’ (1996) 15 Civil Justice Quarterly 18, 20; Stefan Heuer and Björn G. Schubert, ‘Vorläufiger Rechtsschutz durch Eilverfahren: Arrest und einstweilige Verfügung’ [2005] Juristische Arbeitsblätter 202, 202.

⁶⁸ 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>> accessed 19th June 2017, para 106 and 115.

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* injunction⁶⁹, on the one hand, and the German seizure order of a collateral⁷⁰, also known as the ‘Arrest’, on the other hand:

2.3.2.3. *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.⁷¹ English courts determine whether the just mentioned requirements are fulfilled and then, as a matter of discretion, admit or deny the motion.⁷² In a similarly discretionary manner, the judge will grant certain safeguards to protect the respondent if the applicant were to lose his case.⁷³ In most cases, the court requires the applicant to give an undertaking in damages to ensure that the defendant is prevented from suffering any harm.

2.3.2.3. *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

⁶⁹ *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).

⁷⁰ Sections 916-934 ZPO.

⁷¹ 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.

⁷² 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].

⁷³ See page 90.

would have to be enforced abroad, making the granting of interim relief protection necessary.⁷⁴ 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.⁷⁵ 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.⁷⁶ Where there is a complete absence of evidentiary showing, this option is not available.

2.3.2.3. 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.

2.3.2. 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

⁷⁴ Section 920(2) ZPO; Jens Grunert, (n 67) 21; Stefan Heuer and Björn G. Schubert, (n 67) 202-203.

⁷⁵ Section 921 ZPO.

⁷⁶ 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 recognisable to anyone familiar with substantive and procedural remedies.

2.3.2.3. *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.

2.3.2.3. *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;⁷⁷ another academic opinion asserts that Article 13 does not provide for a lower standard of proof.⁷⁸ The solution to this issue has recently attracted increasing attention in academia.⁷⁹ It will be discussed in more detail in a subsequent part of this chapter.⁸⁰

2.3.2.3. *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

⁷⁷ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.110; Veneziano, (n 52) 187.

⁷⁸ Cuniberti, (n 52) 85: ‘*It seems clear therefore that Article 13 should not be considered as setting a lower standard of proof.*’

⁷⁹ *Ibid*, 84 and 85; Veneziano, (n 52) 13; Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.106.

⁸⁰ See page 49.

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 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.⁸¹ 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

⁸¹ Cuniberti, (n 52) 85 footnote 23.

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.⁸² This is also evidenced by the requirement of agreement by the debtor for the availability of self-help remedies.⁸³ Nevertheless, this view does not give due 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*'.⁸⁴ 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. This is not only expressly stated in the Official Commentary, but also reinforced in the Protocols of the Convention.⁸⁵ Thus, the agreement requirement of the debtor was introduced to meet concerns of Article 13. Nevertheless, it appears likely that the standard terms of security agreements will usually contain a clause providing for the availability of Article 13.

⁸² 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'.

⁸³ Article 8(1) of the Convention.

⁸⁴ UNIDROIT, 'Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report', (n 68) para 106.

⁸⁵ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.107.

2.3.2.3. *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.⁸⁶ 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. The precise effect of the contractual exclusion of Article 13(2) will be considered at a later stage.⁸⁷ 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.

2.3.2.3. *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 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

⁸⁶ Article X(5) of the Aircraft Protocol; Article VIII(5) of the Rail Protocol; Article XX(5) of the Space Protocol.

⁸⁷ See page 88.

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).⁸⁸

3. Summary: 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 resolve their disputes immediately, failing which creditors experience great difficulties in maintaining the value of their investment.

⁸⁸ UNIDROIT, 'Article XXX(2) - Declarations' <<http://www.unidroit.org/depositary-2001capetown-aircraft?id=450>> accessed 15th August 2015.

D. Procedural Requirements of Advance Relief

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.

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'*.⁸⁹

Unfortunately, the dividing line between these gaps is often blurred. The following sections 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

⁸⁹ Article 5(2) and Article 5(3) of the Convention.

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 practice.

E. Standard of Proof

1. Introduction

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.⁹⁰

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.⁹¹ 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.⁹² 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

⁹⁰ 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.

⁹¹ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.106.

⁹² UNIDROIT, ‘Report of Third Joint Session (Rome, 20-31 March 2000) UNIDROIT CGE/Int.Int./3-Report’, (n 68) para 106 and 113.

standard of proof, the last viewpoint finally prevailed and it was not included in the final text.⁹³

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 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.⁹⁴ One author suggests 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.⁹⁵ Others take the view 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.⁹⁶

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

⁹³ Ibid, para 113 and Cuniberti, (n 52) 85.

⁹⁴ Cuniberti, (n 52) 85; Veneziano, (n 52) 187; Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.106 and 2.107.

⁹⁵ Cuniberti, (n 52) 85.

⁹⁶ Veneziano, (n 52) 187.

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?⁹⁷ 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 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.

2. Functional Requirements

From a more substantive legal point of view, this then begs the questions of what 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? There are a number of factors which one has to take into account when deciding about this issue.

2.1. Risk of Rapid Deterioration

First, as previously, argued the justification for advance relief is to protect the creditor in urgent situations from the risk that the economic value of the aircraft rapidly deteriorates. This risk is largely attributable to the following factors. First, by their nature, aircraft physically deteriorate quickly. Second, this risk of deterioration is significantly increased by the fact that aircraft require routine maintenance and care programmes, otherwise they become non-airworthy almost immediately, meaning that they cannot be re-deployed without incurring significant additional costs. Third, particularly in insolvency situations, unprotected aircraft are frequently exposed to cannibalisation, referring to the

⁹⁷ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.58 and 4.64.

unauthorized asset stripping or part removals from the aircraft by the debtor. Fourth, for financiers unused aircraft assets also represent a substantial loss of revenue. All these points only reinforce why it is so crucial that domestic courts act immediately, relying on an efficient and clear procedural regime before a final decision of the dispute is reached.⁹⁸

2.2. 10-day Maximum Period

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. Indeed, the overwhelming majority of Contracting States have declared pursuant to Article X(2) of the Aircraft Protocol a 10-day maximum period.

Given these factors, a high standard of proof of the debtor’s default, which is typically required to prove the merits at the final hearing, is unjustified. It would mean that creditors would be confronted with proving the debtor’s default on a high threshold of evidence within 10 days or less. For example, in the 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.

⁹⁸ Donald Gray, Jason MacIntyre and Jeffrey Wool, ‘The interaction between Cape Town Convention repossession remedies and local procedural law: a civil law case study’ (2015) 4 Cape Town Convention Journal 17, 17-18 and 24.

2.3. Purpose of the Main Trial

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. Similarly, the Official Commentary stresses the importance of a lower degree of evidence, adapted to the facts of each particular case.⁹⁹ A similar approach to this issue is taken by Veneziano's article. In her article 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.¹⁰⁰

3. Prima Facie Standard on the Basis of the General Principles

If one accepts the argument up to this point, then one also must accept its conclusion that is firstly that advance relief requires a lower standard of proof than at the final hearing and secondly, that it is justified to hold that the lack of the standard of proof constitutes an internal gap, which thus must be filled by adhering to the general principles of the Convention itself.¹⁰¹ For the reasons above, it is submitted that these principles mandate a *prima facie* standard to establish the debtor's default. Thus, 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 Convention mandates an autonomous interpretation.¹⁰²

⁹⁹ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 2.106 and 2.107.

¹⁰⁰ Veneziano, (n 52) 187.

¹⁰¹ See page 47.

¹⁰² Article 5(1) of the Convention.

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’*.¹⁰³ This is also 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.’* 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?

3.1. Standard and Burden of Proof as a Matter within the Convention

From a purely legal perspective, 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.

3.1.3. 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

¹⁰³ Cuniberti, (n 52) 80.

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.

3.1.3. 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.¹⁰⁴

4. Comparison: Determination of the Standard of Proof on the Basis of Domestic Law

Yet, these factors are not the only arguments supporting an autonomous solution for the standard of proof issue in the context of advance relief. Based on the foregoing analysis, we can now look at the alternative option of filling the gap by reference to national law and compare it with the aforementioned solution of a *prima facie* standard based on the general principles of the Convention and the Protocol. The following examination makes evident that reference to national law cannot achieve the smooth application of advance relief in legal practice, given its rapid nature and functional requirements. In addition, there are several problematic theoretical and practical aspects of a domestic law approach that stand out, most of which will endanger a uniform and predictable application of

¹⁰⁴ See page 47.

advance relief. Thus, the only feasible option is an autonomous solution based on the general principles of the Convention.

4.1. Characterisation of the Standard of Proof

A judge applying the Convention would be faced with the following questions: how to identify the applicable law and what is the applicable law for the standard of proof? 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.¹⁰⁵ In fact, the characterization of the standard of proof as procedural or substantive law is not clear and controversial.¹⁰⁶ 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.¹⁰⁷ This crucial distinction raises the problem of classifying the legal concept as a matter of substantive or 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.

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.

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.

¹⁰⁵ Chiara Orlandi, 'Procedural law issues and uniform law Conventions' (2000) 5 Uniform Law Review 23, 26; Veneziano, (n 52) 190.

¹⁰⁶ Makarius, (n 90) 55-56; Stefan Kröll, Stefan Kröll, Loukas Mistelis and María Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (C.H. Beck 2011), Article 74 para 10; Allan Redfern and others, 'The Standards and Burden of Proof in International Arbitration' (1994) 10 *Arbitration International* 317, 315-316.

¹⁰⁷ Makarius, (n 90) 56.

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 2009.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ As far as the law 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

¹⁰⁸ 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).

¹⁰⁹ 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.

¹¹⁰ Franco Ferrari and others, *Internationales Vertragsrecht* (2nd edn, C.H. Beck 2011), para 147; *Kommentar Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Sellier European Law Publishers 2011), para 93.

whose performance is characteristic of the contract be disregarded by virtue of the escape clause in Article 4(3) of the Regulation.

4.2. 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. 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.

4.2.4. England

4.2.4.2. 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.¹¹¹ In adversarial legal systems such as England's, parties bear the principal responsibility of pleading the applicability of foreign law.¹¹² It is the parties'

¹¹¹ Kirsty Hood, 'Drawing Inspiration? Reconsidering the Procedural Treatment of Foreign Law' (2006) 2 Journal of Private International Law 181, 183.

¹¹² Adrian Briggs, 'The meaning and proof of foreign law' [2006] Lloyd's Maritime & Commercial Law Quarterly 1.

strategic and voluntary decision to introduce foreign law into the proceedings.¹¹³ 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.¹¹⁴ 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*. Nevertheless, it has to be noted that the true rationale behind the assumption is that in English courts an issue of foreign law is a question of fact, not of law, and facts have to be pleaded and proved. Thus, unless foreign law is pleaded and proved by expert evidence as to its content it does not come before the court at all and English law will be applied. 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?

4.2.4.2. *Means of Proof*

(i) *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.¹¹⁵ Establishing the contents of foreign law by

¹¹³ Carlos Esplugues Mota, José Luis Iglesias and Guillermo Palao Moreno, *Application of Foreign Law* (De Gruyter Sellier 2011), 393.

¹¹⁴ Hood, (n 111) 185; *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362 (CA).

¹¹⁵ Civil Evidence Act 1972, Section 4(1); *Re AB* [2014] EWFC 2758.

way of expert testimony is usually an expensive and time-consuming process – even more so when the experts disagree.¹¹⁶ England is a Contracting State of the 1968 European Convention on Information on Foreign Law, although it has been of no practical importance, mostly because it does not address the parties’ obligation to submit expert evidence to establish the content of foreign law.¹¹⁷

(ii) *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.¹¹⁸ A prior determination on a point of foreign law in precedent constitutes a rebuttable presumption that this earlier determination was correct.¹¹⁹ 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.¹²⁰

4.2.4. Germany

4.2.4.2. 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

¹¹⁶ Trevor Hartley, ‘Pleading and Proof of Foreign Law: The Major European Systems Compared’ (1996) 45 *International and Comparative Law Quarterly* 271, 283-284.

¹¹⁷ Juliette Van Doorn and Barry J. Rodger, ‘Proof of foreign law: the impact of the London Convention’ (1997) 46 *International and Comparative Law Quarterly* 151, Esplugues Mota, Luis Iglesias and Palao Moreno, (n 113) 105.

¹¹⁸ *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 All ER (Comm) 138 (QB).

¹¹⁹ *JSC BTA Bank v Mukhtar Kabulovich Ablyazov* [2013] EWHC 3691 (Ch).

¹²⁰ *Re the Andhika Samyra* [1988] HKCFI 111 (HCAJ).

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*.¹²¹ 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 judge is legally required to determine, assess and apply the law ('Grundsatz der Amtsermittlung').¹²²

Hence, a German court confronted with the determination and application of foreign law is required to ascertain, interpret and apply the law *ex officio*.¹²³ 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.¹²⁴ 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.

4.2.4.2. *Means of Proof*

(i) *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

¹²¹ Esplugues Mota, Luis Iglesias and Palao Moreno, (n 113) 101-103.

¹²² BGH NJW 2009, 916; NJW 1993, 2305; NJW 1995, 2097; NJW 1996, 54; NJW 1998, 1321 = RIW 1998, 318.

¹²³ 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.'

¹²⁴ Esplugues Mota, Luis Iglesias and Palao Moreno, (n 113) 105.

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.¹²⁵ 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. 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.

(ii) *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.¹²⁶ 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.¹²⁷ 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

¹²⁵ BGH NJW 2014, 1244.

¹²⁶ BGH NJW 1994, 2959.

¹²⁷ BGH NJW 1991, 1418.

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.

(iii) 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 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.¹²⁸ The

¹²⁸ 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.

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.¹²⁹

4.3. Summary: Impracticability of Pleading and Proof Requirements

Overall, it can be seen that the time-consuming means due to the involvement of experts and translators, seems considerably contrary to the purpose of providing creditors advance relief in urgent situations in a timely manner. In fact, reference to national law would plainly undermine the 10-day maximum period allowed under the Convention and the Protocol, especially in jurisdictions based on the common law tradition.

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.¹³⁰ 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.

¹²⁹ 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.

¹³⁰ 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.

Consider, for a more detailed examination of the legal standards of proof in civil proceedings, England on the one hand, and Germany on the other hand.

4.4. Standard(s) of Proof under Domestic Law

4.4.4. England

4.4.4.4. 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.¹³¹ 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.*’¹³² 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.

¹³¹ Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013), para 2.53.

¹³² *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB).

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.*’¹³³

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.*’¹³⁴ Notably, the Supreme Court of the United Kingdom has relied twice upon the above-mentioned decision, so far.¹³⁵

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.

¹³³ *In re H (Minors)* [1996] AC 563 (HL).

¹³⁴ *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11; See also *D (Children)* [2009] EWCA Civ 472.

¹³⁵ *S-B (Children)* [2009] UKSC 17, [2010] 1 AC 678; *J (Children)* [2013] UKSC 9, [2013] 1 AC 680, [2013] 2 WLR 649.

4.4.4. Germany

4.4.4.4. 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.¹³⁶ 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.'*¹³⁷

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 useful for practical life that silences doubt without completely excluding it.'*¹³⁸ From this definition, it becomes clear that the standard of proof is a nonprobabilistic concept.¹³⁹ 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.¹⁴⁰ In essence, this means that, to establish facts, it is not sufficient to bring the judge to a fixed,

¹³⁶ Brinkmann, (n 130) 879 et seq.

¹³⁷ Translation by *ibid*, 879.

¹³⁸ Mark Schweizer, 'The civil standard of proof – what is it, actually?' <http://EconPapers.repec.org/RePEc:mpg:wpaper:2013_12> accessed 19th April 2015.

¹³⁹ 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' (2002) 50 The American Journal of Comparative Law 243; Michele Taruffo, (n 130) 668.

¹⁴⁰ Engel, (n 139) 441; Schweizer, (n 138) 4.

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.¹⁴¹ 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.¹⁴² 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.¹⁴³

4.4.4.4. *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 factual allegations are true.¹⁴⁴ 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 reinstated ('*restitutio in integrum*') and, most frequently, in interim relief proceedings.

¹⁴¹ Brinkmann, (n 130) 879 et seq.

¹⁴² BGH NJW 1970, 946.

¹⁴³ Taruffo, (n 130) 667.

¹⁴⁴ BGH NJW 2003, 3558; VersR 1976, 928; NJW 1994, 2898.

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.¹⁴⁵

4.4.4.4. *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.¹⁴⁶ 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

¹⁴⁵ Moritz Brinkmann, *Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht* (Carl Heymanns 2005), 53-54.

¹⁴⁶ *Ibid.*, 54.

standard.¹⁴⁷ What is clear, however, is the effect of *prima facie* proof. If a claimant is able to 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.

Thus, under German law it is 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. Summary: 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 determination of the standard of proof on the basis of domestic law cannot provide an adequate solution in the context of advance relief since it is afflicted with several practical and unsolvable issues.

First, for purposes of determining the applicable law by virtue of the rules of private international law, the question whether the standard of proof is to be characterised as procedural (*lex fori*) or substantive law (*lex causae*) is controversial. 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.¹⁴⁸ The classification is highly relevant to the decision whether to apply *lex*

¹⁴⁷ *Ibid.*, 54 et seq.

¹⁴⁸ 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

causae or *lex fori* to the matter. Indeed, 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.¹⁴⁹ 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. Given the speedy nature of advance relief, the procedural rules on pleading and proof of foreign law represent a major obstacle. The main problem in this area 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

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; Orlandi, (n 105) 25.

¹⁴⁹ See page 49.

time limits set forth in the Convention and the Aircraft Protocol for advance relief proceedings.

Accordingly, 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.¹⁵⁰ It follows that the standard of proof has to be interpreted autonomously and filled by resorting to the general principles underlying the Convention. These principles mandate a *prima facie* standard to establish the debtor's default in the context of advance relief. Ultimately, this solution creates certainty and legal predictability for the parties, and guarantees the uniform application of the Convention.

¹⁵⁰ See page 47.

F. Rules of Evidence

1. Introduction

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 section, after a brief introduction of the concept of default under the Convention. In the first part of this section, 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*. To underline this point, the second part of the section 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.

2. 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).

3. Means of Proving Default under the Convention

Having clarified the concept of default under the Convention, the next question then becomes by which means a creditor may furnish *prima facie* evidence to demonstrate the debtor's default? Once again, it is important to recapitulate that the Article 13 procedure envisaged by Contracting States is a rapid one as evidenced by the fact that almost all of them have made declarations specifying a maximum of 10 days between application and the hearing. The reason is that following default, every hour that passes before the creditor is able to repossess the aircraft place the creditor at risk of theft, cannibalisation, as well as physical and commercial depreciation. Accordingly, the admissible evidence that the creditor can be expected to adduce is only that which he can be expected to gather in the extremely limited time available and that can be quickly evaluated by a court. All these points only reinforce why it is important that there is a restriction on the admissible evidence in advance relief proceedings.

3.1. Principle of Written Evidence

Although, the Convention and the Protocol does not expressly provide for a solution to the question of what constitutes admissible evidence, it is asserted that this internal gap has to be interpreted autonomously with regards to the general underlying principles set forth in the Convention.¹⁵¹ In particular, besides the already mentioned burden of proof and standard of proof, it is asserted that it is possible to identify the means of evidence for advance relief proceedings as an evidentiary principle underlying the Convention and the Aircraft Protocol. Thus, in the author's opinion, there is a general principle which entitles

¹⁵¹ See page 47.

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. 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.

3.2. Definition of Writing

The means of written evidence in the example above should not be considered as a final or exhaustive list. It must be recognised 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.'* This evidentiary principle can be inferred from the rules and general principles of the Convention on the following grounds.

3.3. 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.

4. Summary: Means of Proof on the Basis of the General Principles

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 will be shown by the following 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. But again, these are not the only reasons supporting an autonomous solution for the evidence issue in the context of advance relief, especially if one considers the alternative option of filling the gap by reference to national law.

To start with, it has to be pointed out 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.¹⁵² The reason is that some legal systems – the English and the German ones, for example – consider the rules of evidence purely as procedural law.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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. This issue of classification in relation to the standard of proof has already been addressed earlier in the thesis.¹⁵⁶

Second and more importantly, reference to domestic law runs counter the Convention’s objectives of uniformity and predictability. The comparative legal analysis will show that — despite the aforementioned tendency to restrict the admissibility of evidence in interim proceedings — there are remarkably different approaches to evidence in legal systems. That is why it is important to consider the national solutions in the sample jurisdictions England and Germany in more detail.

¹⁵² Orlandi, (n 105) 26 and 28 with further references.

¹⁵³ Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer 2010), 174.

¹⁵⁴ Orlandi, (n 105) 31.

¹⁵⁵ *Ibid.*, 26 footnote 14 and 22; Markus Benzing, (n 153) 138 and 271.

¹⁵⁶ See page 49.

5. Comparison: Determination of the Standard of Proof on the Basis of Domestic Law

5.1. England

5.1.5. 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.¹⁵⁷ 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 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.¹⁵⁸

The second requirement for evidence to be admissible is that it must not fall within the scope of an exclusionary rule.¹⁵⁹ 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.

¹⁵⁷ CPR 32.1(2); Zuckerman, (n 131) para 22.80.

¹⁵⁸ *Ibid*, para 22.81.

¹⁵⁹ *Ibid*, para 22.82-22.84.

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.¹⁶⁰

Lastly, it 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.

5.1.5. 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 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.¹⁶¹

¹⁶⁰ Ibid, para 22.94-22.99.

¹⁶¹ Ibid, para 10.176.

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).

5.1.5. 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.¹⁶²

5.2. Germany

5.2.5. 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*'.¹⁶³

¹⁶² Ibid, para 21.15-21.17

¹⁶³ Olaf Muthorst, '*Der Beweis im Zivilprozess*' [2014] *Juristische Schulung* 686, 687 et seq.

5.2.5. 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.¹⁶⁴

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.¹⁶⁵

5.2.5. 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

¹⁶⁴ Ibid, 689.

¹⁶⁵ Christian Berger (ed), *Handbuch Einstweiliger Rechtsschutz im Zivilrecht* (Erich Schmidt Verlag 2006), Chapter 6 para 29-30.

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.¹⁶⁶ 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 insignificant. For example, pursuant to Section 416 ZPO, the law establishes a rebuttable presumption that a contractual writing is complete and accurate.

5.3. Summary: 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, 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

¹⁶⁶ Muthorst, (n 163) 689; Taruffo, (n 130) 669; Brinkmann, 'The Synthesis of Common and Civil Law Standard of Proof Formulae in the Ali/Unidroit Principles of Transnational Civil Procedure', (n 130) 879.

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 recognised that these national divergences endanger the Convention's ultimate goal, the creation of uniformity and predictability.

In conclusion, it can be seen that a solution that regards the gap as external is problematic. 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*.¹⁶⁷

¹⁶⁷ See page 47.

G. Safeguards

1. Introduction

Given that much of the discussion in previous sections centred on a creditor-friendly interpretation of advance relief, one might ask: why devote a separate section 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 section 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-discretionary 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.

2. 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.

2.1. 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.

2.2. 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 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 under Article 13 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.¹⁶⁸

First of all, this section 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). Finally, the section concludes with a discussion of the significance of adequate protection of both parties to the smooth operation of the Convention and the Protocol as a whole.

2.3. 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

¹⁶⁸ See page 88.

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.

2.4. Effect of Exclusion of Safeguards

Thus far, this section 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 under Article 13(2), 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. 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 one question, essentially: does this exclusion effectively prevent courts from granting safeguards 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. The point is that Article 13(2) requires an interpretation that is consistent with the Convention and guarantees the most fundamental rights of debtors. 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) in more detail.

3. Autonomous Interpretation: Distinction between Convention-based and Domestic Safeguards

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, 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 power to

grant safeguards under Article 13(2) 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.

Put simply, it is critical to strike 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. As a result, 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.

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 safeguards available under domestic law will now be considered.

4. Available Safeguards under Domestic Law

4.1. England

4.1.4. 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.¹⁶⁹ Proceedings without notice are only available to the applicant if he can establish a strong justification to forego notice to the respondent.¹⁷⁰ 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 secrecy¹⁷¹ 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 respondent would essentially defeat the purpose of the interim measure. As a further exception, without-notice applications are permissible in situations of urgency.¹⁷² 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.

¹⁶⁹ Zuckerman, (n 131) para 10.177.

¹⁷⁰ *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.’

¹⁷¹ Aircraft repossession actions are a case where *ex parte* relief is usually essential. Enforcement officers need to be able to strike quickly and without notice to avoid the aircraft being spirited away to another jurisdiction.

¹⁷² *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.’

4.1.4. 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.¹⁷³ 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.¹⁷⁴ Second, the court may order the applicant to indemnify the respondent, i.e. compensation under the undertaking in damages.¹⁷⁵ This will be addressed shortly in more detail.¹⁷⁶ 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 legal process, the applicant may face several legal consequences.¹⁷⁷ The court may punish his aggravated breach by fine, imprisonment, or in the case of a legal entity, sequestration of assets.¹⁷⁸

¹⁷³ *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 131) para 10.186.

¹⁷⁴ *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'.

¹⁷⁵ Zuckerman, (n 131) para 10.200.

¹⁷⁶ See page 92.

¹⁷⁷ *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).

¹⁷⁸ Neil Andrews, 'Injunctions in Support of Civil Proceedings and Arbitration' in Rolf Stürmer and Masanori Kawano (eds), *Comparative Studies on Enforcement and Provisional Measures* (Mohr Siebeck 2011), 323.

4.1.4. 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. Nevertheless, the undertaking is now considered to be a general legal practice and it is implicit in the grant of the order, even if not expressly given.¹⁷⁹ 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. 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.¹⁸⁰ Courts in doubt about the enforceability of the undertaking will require the claimant to provide adequate security ('fortification of the undertaking') 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.¹⁸¹ The respondent may, at the time when the order is granted, also apply for adequate security from the applicant.¹⁸² 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.¹⁸³

¹⁷⁹ Zuckerman, (n) para 10.109 et seqq.

¹⁸⁰ *Staines v Walsh* [2003] EWHC 1486; *ibid*, (n 131) para 10.19.

¹⁸¹ *Ibid*, para 10.160.

¹⁸² *Commodity Ocean Transport Corp v Basford Unicorn Industries Ltd* [1987] 2 Lloyd's Rep 197 (QB).

¹⁸³ Zuckerman, (n 131) para 10.162.

4.2. Germany

4.2.4. 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.¹⁸⁴ 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.

4.2.4. 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.¹⁸⁵ In the event that the circumstances change substantially, the court may subsequently amend or supplement the

¹⁸⁴ Section 128(4) ZPO in connection with Section 922(1) ZPO.

¹⁸⁵ Section 108(1) ZPO.

terms of the original seizure order. Overall, bank guarantees play a very important role in the German legal system.

4.2.4. 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.

4.3. Summary: Similar Legal Strategies with Differences

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.

5. Justification for an Autonomous Interpretation

There are several substantial arguments to support this autonomous interpretation of safeguards under Article 13(2). These arguments overlap to some extent, but are listed separately for clarity of exposition.

The first is the argument that it would be in conformity with the wording of Article 13(2) which explicitly states that the court may impose '*terms as it considers necessary*'. It can be seen that Article 13(2) gives courts much wider power to grant safeguards than has yet been granted under national law. This is important because safeguards should not be limited to those traditionally granted by courts in the context of provisional measures, especially in jurisdictions with less developed legal systems. Given the special nature of advance relief, a different interpretation would lack the necessary flexibility to deal with high-value disputes in urgent situations. Thus, 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.

Second, judges may be reluctant to accept an interpretation that limits their power to determine safeguards. For instance, in some jurisdictions, courts may find that the complete exclusion of safeguards constitutes a 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.

Third, 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.

Fourth, as the above comparative analysis has shown, reference to domestic law 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 under Article 13(2) were to be interpreted autonomously, without any reference to domestic law, as dictated by the interpretative rules of the Convention. Nevertheless, it is acknowledged that, despite having a much wider power to apply any safeguards it likes, a court will likely apply those applicable under the *lex fori* since they will be the ones with which it is familiar and in relation to which there will be a court structure to give effect to them, such as for example, a payment into court.

Hence, in this author's opinion, the better view is that the concept of safeguards provided by the Convention and Protocol 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.

An autonomous interpretation of Article 13(2) circumvents most of the problems discussed above, except one: what benefit a creditor gets from using his bargaining advantages to exclude the application of Article 13(2)? In the author's opinion, a creditor has the benefit of certainty and predictability, because a judge would be limited to the much narrower power to grant safeguards available under domestic laws pursuant to Article 14. This is especially true in a case where the legal proceedings would be in the home state of the debtor and not in the state where the aircraft is at the time of default.

6. Summary: Autonomous Interpretation of Safeguards under Article 13(2)

This section 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 under Article 13(2).

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

The argument made in this chapter 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, courts 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.

Chapter 4 Self-Help Remedies under the Convention

A. Introduction

Non-judicial remedies or self-help remedies are a key factor for the efficient implementation of the Convention and the Protocol in both civil and common-law jurisdictions, and thus should be implemented to the widest extent possible. Interestingly, there has been a general scarcity of discussion especially with regards to non-judicial remedies in civil law jurisdictions, presumably because of both the common perception that they are an illegitimate way of enforcement and also because civil law jurisdictions tend to prefer a debtor-protective approach relating to secured transaction law.¹⁸⁶ It also appears that there has been either a lack of will or a lack of awareness on the part of regulators to allow the exercise of non-judicial remedies, notwithstanding that mandatory administrative or judicial intervention causes delays and increased credit cost to the disadvantage of both creditors and debtors: if creditors don't get what they bargained for, they will in consequence demand higher interest rates and impose more stringent requirements on debtors.¹⁸⁷ In relation to the implementation of the Convention and the Protocol, the exercise of non-judicial remedies is not only a problem in theory but of utmost practical significance. The starting point, then, is to examine the relevant declaration of Article 54(2). It reads as follows:

Article 54 — Declarations regarding remedies

2. A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor

¹⁸⁶ Jan-Hendrik Röver, 'The EBRD's Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions' (2010) 15 Uniform Law Review 479, 499; Ross Cranston, 'Credit, Security and Debt Recovery: Law's Role in Reform in Asia and the Pacific' (1995) 39 Saint Louis University Law Journal 759, 781-782.

¹⁸⁷ Akseli, 42; Cranston, (n 186) 781 et seqq; 'Self-Help in Contract Law: An Exploration and Proposal' (1998) 33 Wake Forest Law Review 839, 847 et seqq; M. Garro Alejandro, 'The OAS-sponsored Model Law on Secured Transactions: Gestation and Implementation' (2010) 15 Uniform Law Review 391.

under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

At first glance, the provision appears unambiguous since it requires Contracting States to declare whether the Convention's remedies may be exercised with or without leave of the court. Thus, if a Contracting State has made an Article 54(2) declaration that leave of the court is not required, a chargee may, in these jurisdictions: repossess or control the aircraft object; sell it or grant a lease of any such object; collect or receive any income or profit arising from the management or use of any such object (Article 8); and may be vested with the ownership of the aircraft object (Article 9) without any intervention of the court, provided that an agreement between the charge and debtor has been reached in this matter. Further, a conditional seller or lessor may in these jurisdictions terminate the security agreement and take possession or control the aircraft object (Article 10) without recourse to the court. Conversely, if a Contracting State declares under Article 54(2) that leave of the court is required, all the aforementioned remedies may only be exercised with judicial intervention. This provides an excellent example of how the Convention's principle of sensitivity allows for a wider ratification of the Convention.

However, on closer examination, it becomes evident why this Article 54(2) declaration allowing for prompt enforcement remedies for the creditor upon the debtor's default without supervision of the court has drawn increasing attention in academic discourse and legal practice: it is striking and unusual that only one Contracting State out of seventy-two, that is Brazil¹⁸⁸, does not take an all-or-nothing approach to self-help remedies under this declaration.¹⁸⁹ This interpretation of Article 54(2) or declaration

¹⁸⁸ Brazil declared: *'that all remedies available to the creditor under any provision of this Convention and the Protocol may be exercised only with the authorization of the Judiciary, with the exception of the remedy provided for in Article XIII of the Protocol ...'*.

¹⁸⁹ UNIDROIT, 'Status of the Cape Town Convention', (n 39).

practice would not be a problem if the degree of implementation for self-help remedies could be described in the form of binary ones and zeroes. But self-help remedies under national laws and under the Convention are far more complex, such that they cannot be properly described through a simple 'yes or no' decision. Spain provides a good example of this: it fully declared against the availability of self-help remedies notwithstanding their partial availability under national laws. Thus, this part seeks to establish that Article 54(2) of the Convention has been inadvertently misinterpreted or misapplied. Consequently, to achieve a broad and efficient implementation of non-judicial remedies in civil and common-law jurisdictions, the interpretation of Article 54(2) must be clarified, if not corrected. The main arguments are as follows.

Firstly, if Article 54(2) is correctly interpreted and applied, Contracting States may decide for each of the Convention's remedies specifically whether it must be exercised with or without leave of the court (*'pick-and-choose-approach'*). This is crucial because there are remarkable differences with regard to the extent to which national legal systems recognise non-judicial remedies. As a general rule, common-law systems tend to fully recognise them, while their peers in civil law systems tend to recognise them to a lesser extent. For this reason, it must be acknowledged that non-judicial remedies in general are not a problem, as perceived. Indeed, many non-judicial remedies, such as for example, the right to extra-judicial termination and private sale, can be found in jurisdictions of both legal traditions. Rather, the core problem appears to be that civil law jurisdictions have a significant legal problem with the remedy of non-judicial repossession. Consequently, for most Contracting States based on the civil law tradition it would be sufficient to make declaration under Article 54(2) in favour of extra-judicial remedies with the exception of the remedy of repossession.

Secondly, even if a Contracting State, such as for example Spain, declares against

non-judicial remedies under the Convention, this does not prevent a secured creditor from resorting to non-judicial remedies available under national law pursuant to Article 12 of the Convention, as has been previously argued by one scholar.¹⁹⁰ To illustrate this, this part of the thesis proceeds as follows.

Section 2 provides a legal analysis of Article 54(2) of the Convention. It is devoted to the crucial question: what is the correct interpretation of Article 54(2) and why? In doing this, the section will engage in a critical evaluation of the established declaration practice of Article 54(2). The examination will demonstrate that this provision has been misinterpreted in practice and scholarship for a number of economic, legal and practical reasons.

Based on the foregoing, Section 3 continues with a more specific examination of the self-help remedies in various national legal systems. The examination illustrates that the gap between civil- and common-law jurisdictions in relation to self-help remedies is not as wide as one might expect, and can primarily be attributed to the right to possession without judicial intervention. Accordingly, for the purpose of a wide and successful implementation of self-help remedies, a correct interpretation and application under Article 54(2) of the Convention, makes indeed a significant difference, especially for civil-law jurisdictions.

In completing the analysis, Section 4 resolves the question of how Article 54(2) can be effectively interpreted and applied by Contracting States given its particular characteristics to ensure an effective and broader implementation of self-help remedies in civil and common law jurisdictions alike. It concludes that a pick-and-choose approach to self-help remedies under Article 54(2) of the Convention is appropriate, and that for most civil-law jurisdiction it would be enough to make a declaration prohibiting the exercise of

¹⁹⁰ Rodríguez de las Heras Ballell and Feliu Rey, (n 22) 293.

the non-judicial remedy of possession. Ultimately, it thereby clarifies the complicated relationship between self-help remedies under the Convention and national law in the context of Article 54(2).

B. Article 54(2) – Declaration Regarding Self-help Remedies

At first glance, the interpretation of Article 54(2) of the Convention seems unambiguous. According to this provision, Contracting States are required to declare whether the Convention's remedies may be exercised with or without leave of the court. Consequently, if a Contracting State has lodged a declaration requiring the leave of the court, exercising any remedy under any provision of the Convention requires judicial intervention and *vice versa*.

However, on closer examination, it becomes evident that Article 54(2) has been subject to misinterpretation in scholarship and legal practice: In her article¹⁹¹, Teresa Rodriguez de las Heras Ballell contends that the effect of Spain's declaration¹⁹² under Article 54(2), requiring the leave of the court for any of the remedies set out in the Convention, is twofold. First, she notes that judicial intervention is required for the Convention's remedies regardless of the availability of extra-judicial remedies in the national law. Secondly, she asserts that although additional remedies permitted by the applicable law would be available to the creditor pursuant to Article 12 of the Convention, the effect of Article 54(2) is overriding in a sense *'that out-of-court enforcement as enshrined by domestic legislation would be deactivated in relation to the remedies provided for by the international text.'* Consequently, she concludes that the commonly used notary-supervised enforcement proceedings of security interests under the Spanish legal systems would not be available in the context of international interests.

¹⁹¹ Ibid.

¹⁹² Spain's declaration reads as follows: *'Pursuant to article 54.2 of the Convention, Spain declares that all remedies available to the creditor under the provisions of the Convention, the exercise of which is not subordinated by virtue of such provisions to a petition to the court, may be exercised only with leave of the court.'*

She refers to this problem as the ‘*blocking effect*’ of Article 54(2). Teresa Rodriguez de las Heras Ballell’s argument is of practical consideration of very considerable importance.

Firstly – and interestingly – it reveals that Spain lodged a declaration providing for the non-availability of extra-judicial remedies, notwithstanding their at least partial availability under national law. On the assumption for the time being that Spain’s declaration was not a mistake, but reflects its intention to effectively implement the Convention, this demonstrates that Spain interpreted the wording of Article 54(2) as requiring an all-or-nothing approach¹⁹³ to self-help remedies under the Convention and the Protocol, and not as allowing a more subtle differentiation between them. Considering the fact that Spain is not an isolated case, and in fact, only one Contracting State, that is Brazil¹⁹⁴, does not take an all-or-nothing approach under of Article 54(2), this is more than conceivable. The point is: what good reason is there for Contracting States disapplying these admittedly useful provisions concerning extra-judicial enforcement of security interests under the Convention if they are at least to some extent provided by national laws? In the author’s opinion, Article 54(2) has been inadvertently misinterpreted and misapplied for the following reasons.

The first is the problem that the qualifying declarations provide a concrete and complete textual recommendation for the Article 54(2) declaration.¹⁹⁵ To qualify for the Cape Town Discount, Contracting States must declare under Article 54(2) *‘that any remedies available to the creditor under any provision of the Convention which are not expressed under the relevant provisions thereof to require application to a court may be*

¹⁹³ Example A: *‘The Contracting States declares that all remedies available to the creditor under any provision of this Convention and the Protocol may be exercised without judicial authorisation’*; Example B: *‘declares that all remedies available to the creditor under the provisions of the Convention, the exercise of which is not subordinated by virtue of such provisions to a petition to the court, may be exercised only with leave of the court.’*

¹⁹⁴ UNIDROIT, ‘Status of the Cape Town Convention’, (n 39).

¹⁹⁵ OECD, ‘Arrangement on Officially Supported Export Credits – Annex III Sector Understanding on Export Credits for Civil Aircraft’, (n 8) 85 states: *‘Method for Exercising Remedies: State Party declares under Convention Article 54 (2) that any remedies available to the creditor under any provision of the Convention which are not expressed under the relevant provisions thereof to require application to a court may be exercised without leave of the court (the insertion “without court action and” to be recommended (but not required) before the words “leave of the court”).’*

exercised without leave of the court'.¹⁹⁶ The criteria for the qualifying declarations encourage an all-or-nothing approach to the availability of self-help remedies instead of allowing a differentiation between the various non-judicial remedies provided in the domestic legal system. Of course, from a purely rational and legal perspective, the actual text of the recommendation of the qualifying declarations is entirely irrelevant for the interpretation of the Convention according to Article 5(1).

Another reason appears to reside in the drafting history of Article 54(2). The initial provision, formerly known as Article 12(2), contained a presumption in favour of non-judicial remedies. It read: '*Any remedy available to the obligee under Articles 8 to 10 which is not there expressed to require application to the court may be exercised without leave of the court except to the extent that the Contracting State where the remedy is to be exercised has made a declaration under Article Y or in the Protocol*'.¹⁹⁷

Presumably, a third factor contributed to the misinterpretation may also be found in the final provision itself. In particular, the wording '*any remedy*' might have led Contracting States to read Article 54(2) as requiring an all-or-nothing approach in relation to the exercise of non-judicial remedies as evidenced by the current practice of Article 54(2) declarations.¹⁹⁸ From a purely linguistic point of view, it is difficult to deny that the wording could be interpreted both ways. The same ambiguity exists not only in the equally authentic and official French, Russian and Spanish translations, but also in the unofficial German and Italian translations of the Convention. However, linguistic evidence favouring one view or the other should not necessarily suggest that one solution is correct, and therefore should not be accepted *a priori*. It must be clear that solely

¹⁹⁶ Ibid, 83.

¹⁹⁷ See Attachment F-13, UNIDROIT, 'Report of Second Session (Montreal, 24 August - 3 September 1999) UNIDROIT CGE/Int.Int./2-Report' <<http://www.unidroit.org/english/documents/2000/study72/s-72-jointsession3-report-e.pdf>> accessed 19th June 2017.

¹⁹⁸ The relevant part stipulates that '(a) Contracting State shall declare whether or not **any remedy** available to the creditor under any provision of this Convention ... to require application to the court ... (emphasis added)'.

looking at the wording employed in the Convention is not sufficient. Rather, it is necessary to find a plausible interpretation of Article 54(2) that is in conformity with Article 5(1). According to this provision, 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. Thus, the main and crucial question is: what is the correct interpretation of 54(2) and why?

The Official Commentary is very clear in this regard. It unequivocally clarifies that Article 54(2) must be interpreted as allowing Contracting States to decide about the exercise of non-judicial remedies individually.¹⁹⁹ This interpretation might not be the first thought in the minds of some lawyers applying the Convention, especially those who have established the current declaration practice, but it is the only one which is in line with the underlying principles and objectives of the Convention, that is strengthening the legal position of creditors with regards to the enforcement of international security interests. There is no reason why partially compliant states should be prohibited from lodging an appropriate declaration that differentiates between the individual self-help remedies under national law. This makes sense, because states with at least some extra-judicial remedies are more attractive for creditors than those without. From a more substantive legal point of view, this just leaves one more question: what is the precise effect if a Contracting State lodges a declaration under Article 54(2) requiring the leave of the court for any of the remedies available to the creditor under any provision of the Convention? Or, put differently, is there really a blocking effect as suggested by Teresa Rodriguez de las Heras Ballell?

¹⁹⁹ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.330.

In the author's opinion, such an interpretation of Article 54(2) is neither tenable nor desirable. First and foremost, it was not the drafters' intention to limit or significantly impair the exercise of the creditor's remedies under domestic law. Again, the overarching objective of the Convention 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. This is not only reflected in the drafting history, the Preamble, or the Official Commentary, but most importantly in the text itself. Article 12 clearly states that '*any additional remedies permitted by the applicable law, including any remedies agreed upon by the parties*' shall be available to the creditor.

Clearly then, the drafter's intention was not that Article 54(2) should negatively impact or hinder the exercise of more favourable remedies available under the applicable domestic law pursuant to Article 12. To the contrary, creditors benefit from any extra remedies provided that are in conformity with the mandatory provisions listed in Article 15. A close reading of these mandatory provisions (composed of Article 8(3) to (6), 9(3) and (4), 13(2) and 14) suggests that there are no elements pointing towards a reading of Article 54(2) with a blocking effect on non-judicial remedies provided by the national legal system. Further, the Convention provides in Article 14 that all remedies have to be exercised in accordance with the procedural requirements of the place where the remedy is to be exercised. Most importantly, Article 54(2) specifically states that its scope of application is limited to '*any remedies available to the creditor under any provision of the Convention*' and accordingly, does not affect or even modify the requirements for the exercise of domestic remedies. Therefore, pursuant to Article 12, there is a strong argument for having extra-judicial remedies available for creditors if the domestic law provides them even if a Contracting State has declared against the exercise of the Convention's extra-judicial remedies under Article 54(2). Yet, these provisions are not

the only arguments supporting a different interpretation of Article 54(2). There are countervailing practical considerations of very considerable importance too.

The first is that a blocking effect would be to the disadvantages of civil law jurisdictions, since common law jurisdictions, due to their familiarity with the exercise of non-judicial remedies in their legal systems, in principle fully support the exercise of non-judicial remedies under Article 54(2). Fundamentally, states with a basis or roots in civil law have fully declared against the availability of self-help remedies on account of both an incorrect interpretation of Article 54(2) and the fact that some (but not all) non-judicial remedies are generally viewed with a good deal of scepticism.

Consequently, a blocking effect would lead to an odd result: most basic rights such as for example the right to extra-judicial termination, frequently found in the domestic laws of civil law (and of course, common law) jurisdictions, might not be available in situations where the international interests does not to meet the legal requirements of security interests under domestic law.

C. Self-Help Remedies under the Convention and Domestic Law

The availability of an efficient, speedy, and cost-effective set of remedies at the enforcement stage is often underestimated in the field of secured transactions law. It is of utmost practical significance that creditors may rely on an efficient enforcement system when realising collateral, because it will maximise the value of the collateral to the advantage of both debtors and creditors by avoiding delays and costs that increase the cost of credit. Thus, given the purpose of the Convention to facilitate the financing of the acquisition and use of aircraft equipment in an efficient manner, such enforcement remedies would be available to the secured creditor without court intervention. To underline the point that self-help remedies exist in the common-law tradition, and to a lesser extent also in the civil law tradition, this section examines the existence of non-judicial remedies in the domestic laws of various jurisdictions in more detail. It will be shown that the right to extra-judicial termination and private sale, among others are already found in most, if not all, of the selected civil-law jurisdictions. The primary obstacle for jurisdictions based on the civil-law tradition is, therefore, not self-help remedies in general, as perceived, but in particular the right to extra-judicial possession. To the contrary, jurisdictions based on the common-law tradition extensively recognise self-help remedies, including a right to extra-judicial possession. Before turning to the examination, it is necessary to consider the remedies provided for in the Convention in more detail.

1. Self-Help Remedies under the Convention

According to Article 8 and 9 of the Convention, a chargee may rely on an exceptionally flexible array of enforcement remedies. Article 8(1) of the Convention reads as follows:

Article 8 — Remedies of chargee

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

(a) take possession or control of any object charged to it;

(b) sell or grant a lease of any such object;

(c) collect or receive any income or profits arising from the management or use of any such object.

It can be seen that the rights under Article 8 include taking possession and control of the object, selling or granting a lease of any such object, or collecting or receiving any income or profits arising from the management or use of any such object. Furthermore, Article 9 of the Convention provides that a chargee may at any time after default agree with all interested persons including the debtor that upon the debtor's default, ownership to the secured collateral would automatically pass to the chargee. The relevant part of this provision reads as follows:

Article 9 — Vesting of object in satisfaction; redemption

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

Moreover, according to Article 10 of the Convention a creditor under a title reservation agreement or under a leasing agreement is entitled in the event of default to

terminate the contract and take possession or control of the aircraft object. The provision reads as follows:

Article 10 — Remedies of conditional seller or lessor

In the event of default under a title reservation agreement or under a leasing agreement as provided in Article 11, the conditional seller or the lessor, as the case may be, may:

(a) subject to any declaration that may be made by a Contracting State under Article 54, terminate the agreement and take possession or control of any object to which the agreement relates; or

(b) apply for a court order authorising or directing either of these acts.

Where there is no agreement between the debtor and creditor, default means pursuant to Article 11 of the Convention, an event that ‘*substantially deprives the creditor of what it is entitled to expect under the agreement*’. Therefore, not just any breach of a provision will trigger the aforementioned remedies. This definition, however, only becomes relevant in the absence of an agreement by the parties. Under Article 11(1) of the Convention, the parties have absolute discretion in defining the concept of default at any time in writing. Unsurprisingly, the question of what constitutes a default will be subject to intense negotiation in practice, since it allows the parties to balance the risks and benefits for each transaction in an efficient manner.

2. Self-Help Remedies under Domestic Law

Bearing these in mind, there is one important point to consider before turning to the examination of the right to termination in the selected jurisdictions. The Convention makes a critical distinction between the remedies of a chargee, and those of a conditional seller or the lessor. This is explained by the different proprietary legal position: whereas a conditional seller or the lessor is the owner of the asset, a chargee solely has a security

interest. It is important to note that the distinction between a financial lease and a conditional sale on the one hand, and a security agreement on the other, is not, however, relevant in jurisdictions that take a functional approach to security interests. For example, in the United States, any transaction with a security function is re-characterised as a security interest under Article 9 of the UCC and a secured creditor may, according to Section 9-609, take possession of the collateral after default. There is no need for prior termination. This is why the question of termination in the United States will not be addressed.

2.1. Right to Termination of the Agreement

2.1.2. England

At one end of the continuum is English law that is tailored to facilitate the innocent party's right to be released from his obligation upon occurrence of a breach that is of the essence of the contract. It emphasises the principle of self-help and aims to provide maximum freedom to the parties in regulating their affairs creating predictability and legal certainty. The general rule under English common law is that an innocent party may unilaterally terminate an agreement without court intervention upon occurrence of a sufficiently important breach of contract.²⁰⁰ The effect of such termination is that both parties are released from their future obligations. The critical question under English common law is, however, whether such a breach amounts to the relevant threshold that entitles the innocent party to terminate the agreement.²⁰¹ If so, the breach will be repudiatory. English courts have employed various terms to describe the required minimum degree of seriousness of a breach that gives rise to the right of termination,

²⁰⁰ Hugh Beale, *Chitty on Contracts*, vol 2 (32nd edn, Sweet & Maxwell 2015), para 24-001; Edwin Peel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015), para 18-030 and 18-031, 18-064; *Rice (t/a Garden Guardian) v Great Yarmouth BC* [2003] TCLR 1, (2001) 3 LGLR 4: 'The question for the court ... is whether the cumulative effect of the breaches of contract complained of is so serious as to justify the innocent party in bringing the contract to a premature end.'

²⁰¹ *Ioannis Valilas v Valdet Januzaj* [2014] EWCA Civ 436, at [31]: 'The essential question is whether the breach or breaches are such as to justify the summary termination of the contract by the other party, having regard to all the circumstances'.

including that the breach that 'goes to the root of the contract'²⁰², will 'substantially deprive' a party to what he is entitled to expect under the contract,²⁰³ or will 'frustrate' the purpose of the contract.²⁰⁴ In principle, there are three categories of breach of contract that must be distinguished.

The first and most important one is the breach of a condition, generally also known as a breach of an essential term of the contract.²⁰⁵ A breach of condition is generally repudiatory, and entitles the innocent party to terminate the contract and claim compensatory damages. Whether a term constitutes a condition is determined is by reference to the general nature of the contract and the intention of the parties at the time of conclusion of the contract. Parties are however free to expressly stipulate that a particular term is a condition²⁰⁶, even though the most minor or trivial of breaches²⁰⁷ may not be applicable. To take an example, parties may stipulate the following clause: *'The Lessor and the Lessee agree that it is a **fundamental term and condition** of this Agreement that the Lessee shall obtain, maintain and keep in full force and effect physical loss and damage insurance with respect to the Aircraft and liability insurance with respect to the Aircraft satisfactory to the Lessor during the Lease Period and that a violation of this obligation constitutes a repudiatory breach by the Lessee of this Agreement and a Termination Event.'*

²⁰² *Telford Homes (Creekside) Limited v Ampurius Nu Homes Holdings Limited* [2013] EWCA Civ 577, [2013] 4 All ER 3 at [34]: '... I think that if the breach goes **'to the root'** or **substantially deprives** the innocent party of the benefit of a significant part or stage, it constitutes a repudiatory breach...'

²⁰³ *Telford Homes (Creekside) Limited v Ampurius Nu Homes Holdings Limited* [2013] EWCA Civ 577, [2013] 4 All ER 3.

²⁰⁴ Peel, (n 200) para 18-031; Beale, (n 200) para 24-042.

²⁰⁵ Peel, (n 200) para 18-046; Beale, (n 200) para 24-040.

²⁰⁶ *Lombard North Central Plc v Butterworth* [1987] QB 527, [1987] 2 WLR 7: 'It is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision. ... the consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.'

²⁰⁷ *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] UKHL 2, [1974] AC 235.

The second category is the breach of an innominate term, generally also known as a breach of an intermediate term.²⁰⁸ An innocent party may terminate the contract on a breach of an innominate term if that breach is sufficiently serious, meaning that it substantially deprived the innocent party of the whole benefit of the contract.²⁰⁹ Thus, not every breach entitles the innocent party to terminate the contract.

The third category is the breach of a warranty, generally also known as a breach of a non-essential term.²¹⁰ Warranties are merely minor terms of a contract that are not essential to the purpose of a contract. Therefore, the innocent party is merely entitled to sue for damages, but may not terminate the agreement upon breach of a warranty.²¹¹

The difficulty of classifying the type of term broken and whether the breach of that term gives right to a right to terminate has created a lot of uncertainty in legal practice. Many practitioners have reacted by addressing this issue in the contract by themselves and resorting to termination clauses.²¹² The reason is that, according to English case law, it is possible to stipulate under the terms of the contract that any breach or event of defaults that would not otherwise be regarded by law as a repudiatory breach, entitles the innocent party to terminate the agreement immediately.²¹³ In other words, the parties have full control of all details of the termination and they may well be drafted in very general terms. To take an example, a standard termination clause may look like this: *'If either party shall **in any respect** fail or neglect to observe or perform **any of the provisions** of this Agreement; or an Event of Insolvency arises, then either party may by notice to the defaulting party any time after such occurrence terminate this Agreement.'*

²⁰⁸ Beale, (n 200) para 24-041.

²⁰⁹ *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 2 WLR 474.

²¹⁰ Beale, (n 200) para 24-039.

²¹¹ *Bettini v Gye* (1876) 1 QBD 183.

²¹² Beale, (n 200) para 13-026.

²¹³ *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711, [1981] 2 All ER 540.

However, this principle is subject to one crucial limitation. Courts may disregard the literal meaning of such a clause, if its interpretation defeats its commercial purpose.²¹⁴

2.1.2. France

At the other end of the continuum is French law, which has long had the reputation of being hostile to towards the institution of self-help. Historically, there was an understanding that wrongful unilateral termination of a contractual relationship could cause significant damages to the economy. In particular, extrajudicial termination was seen to be not only incompatible with the principle of the binding force of contracts but also contractual morality. Thus, it is not surprising that the legal system was and still is largely build around the intent to maintain the contract between parties.²¹⁵

The rules of the French Civil Code (the 'Code civil') relating to the termination of the agreement set forth in Article 1184 (*'résolution judiciaire'*) are particular good examples of this.²¹⁶ Article 1184(2) in its original version prescribed that in the event of a breach of contract the innocent party has the right to either compel performance or seek termination of the agreement in court.²¹⁷ Notably, Article 1184(3) expressly stated that the innocent party might only terminate the agreement by resorting to judicial proceedings. In other words, there was no possibility for a unilateral and extrajudicial termination under this provision. Even more surprising, the injured party could not legally demand termination of the contract. Rather, the competent judge had full discretion as to whether it will grant the termination of the contractual relationship due to a sufficiently

²¹⁴ *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch): 'A **reasonable commercial person** would understand clause 19 as meaning that if either party shall in any respect fail or neglect to observe or perform any provision of the Agreement in a way that amounts to a repudiatory breach, or if an insolvency event arises, ...'.

²¹⁵ Rowan Solène, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press 2012), 80, 82 et seq.

²¹⁶ Article 1184 Code civil (in force from the 17th February 1804 till the 1st October 2016).

²¹⁷ The relevant part of Article 1184, in force from the 17th February 1804 till the 1st October 2016, stated that: '... *Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances.*'.

important breach or a grace period for performance.²¹⁸ In order to compensate for the shortcomings of this rule certain exceptions to this rule were developed through jurisprudence.²¹⁹

The most practically significant one was, and still is, an express termination clause (*'clauses résolutoire de plein droit'*) in the agreement, setting out the events and the seriousness of the breach that give rise to the remedy of immediate, unilateral and non-judicial termination.²²⁰ Nevertheless, French courts have interpreted the exception rather narrowly and termination clauses are subject to stringent drafting requirements. French jurisprudence demands, for example, that unless expressly excluded in the clause, the breaching party has to be sufficiently notified about the breach, the intention to terminate the agreement and provided with a reasonable grace period without success. This substantiated notice is generally known as *'mise en demeure'*. Termination clauses must also be exercised in good faith.²²¹

With the recent reform of French contract law aiming to increase legal certainty and economic efficiency, the situation has notably changed.²²² One crucial feature of the reform is the codification of a right to unilateral and extrajudicial termination upon a sufficiently serious breach by way of notification, a remedy which until then had only a

²¹⁸ Article 1184(3) Code civil (in force from the 17th February 1804 till the 1st October 2016); Solène, (n 215) 81 et seq; John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2008), 357 et seqq; Allan E. Farnsworth, 'Comparative Contract Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 925; Rowan Solène, 'Fault and Breach of Contract in France and England: Some Comparisons' 22 *European Business Law Review* 467.

²¹⁹ Solène, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance*, (n 215) 82 et seqq, Bell, Boyron and Whittaker, (n 215) 358.

²²⁰ Civ. 2 July 1860, DP 1860.1.284; Catalin-Gabriel Stanescu, *Self-help, private debt collection and the concomitant risks: a comparative law analysis* (Springer 2015), 87-89; Solène, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance*, (n 215) 84 et seq; Bell, Boyron and Whittaker, (n 218) 358.

²²¹ For a more detailed analysis of the drafting requirements with references to French jurisprudence: Solène, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance*, (n 215) 84 et seq. See also: Ichay & Mullenex Avocats, 'Early termination clauses in commercial agreements (France)' <<http://www.lexology.com/library/detail.aspx?g=2fdab868-be74-4dad-800e-ee821e2929bb>> accessed 12th October 2016.

²²² Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.

limited scope of applicability and recognition in jurisprudence.²²³ The right to non-judicial termination is, however, not unconditional and largely mirrors the aforementioned procedure for termination clauses. The innocent party is firstly required to give formal notice (*mettre en demeure*) to the breaching party, providing a reasonable period of time to rectify the situation (unless the fixing of a period is dispensable due to urgency).²²⁴ Then, if rectification is still not forthcoming, the innocent party may then exercise his right of termination.²²⁵ He does so at his own risk because the allegedly breaching party is entitled to challenge its lawfulness in court proceedings.²²⁶ If challenged, a court will then enquire whether the termination was justified. It may approve the termination, order performance within a set time period, or award a claim for compensatory damages. While extrajudicial termination represents a great step into the direction of more efficiency, it must be emphasised that the original options of judicial termination and termination clauses remain intact. They stand on an equal footing with the right to non-judicial termination.²²⁷

2.1.2. Germany

This section describes the basic default remedy of termination of a conditional seller and lessor in Germany. It should be born in mind that due to the adhesion of a formalistic approach to security interests in the German legal system, a differentiation between the rights of a conditional seller and lessor has to be drawn.

In principle, a conditional seller is generally entitled to terminate the contract without involvement of the court and take possession – although through mandatory judicial enforcement proceedings – of the collateral upon the debtor’s default. But to

²²³ Rowan Solène, ‘The new French law of contract’ (2017) 66 *International and Comparative Law Quarterly* 805, 823.

²²⁴ Article 1226(1) Code civil.

²²⁵ Article 1226(3) Code civil.

²²⁶ Article 1226(1) and (3) Code civil.

²²⁷ Bénédicte Fauvarque-Cosson, ‘The French Contract Law Reform in a European Context’ [2014] *ELTE Law Journal* 59, 69.

accommodate the concerns of debtors, Sections 449(2) and 323(1) BGB generally require the setting of a reasonable grace period for rectifying performance by the conditional seller.²²⁸ Parties are, however, entitled to extend or limit the rights of creditors under this provision.²²⁹ Thus, for example, commercial parties may contractually exclude the requirement of setting a grace period after occurrence of default under the general terms and conditions (*Allgemeine Geschäftsbedingungen*) or by way of an individually negotiated agreement (*individualvertragliche Vereinbarungen*). This can be considered as the common practice in the aviation sector.²³⁰

Pursuant to Section 543(1) BGB a lessor is generally entitled to terminate a leasing agreement for a compelling reason (*wichtiger Grund*) without involvement of the court.²³¹ Again to accommodate the concerns of lessors, Section 543(3) BGB generally requires the setting of a reasonable grace period for rectifying performance by the conditional seller or an unheeded warning notice subject to important exceptions.²³² For example, a notice period or a warning notice is specifically not required if the lessee is in a *qualified default* of payment of rent as defined in Section 543(2) No. 3 BGB. Again, commercial parties may contractually derogate from this requirement.²³³

²²⁸ The setting of a grace period is not required in the cases listed under Section 323(2) BGB, namely if the (1) the obligor seriously and definitively refuses performance; (2) the obligor does not render performance by a date specified in the contract or within a period specified in the contract when it is of essential importance to the obligee, or (3) in special circumstances in which, when the interests of both parties are weighed, justify immediate revocation.

²²⁹ Heinz Georg Bamberger and Herbert Roth, *Beck'scher Online-Kommentar BGB* (42nd edn, C.H. Beck 2017), 323 BGB para 3; Franz Jürgen Säcker and others, *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th edn, C.H. Beck 2017), 323 BGB para 277 et seqq; BGH NJW 1985, 267: *'Die Revision hat darin Recht, daß § 326 BGB nachgiebiges Recht enthält. Die Vertragsparteien können deshalb die in § 326 BGB vorgesehenen Rechte erweitern, beschränken oder durch andere ersetzen.'*

²³⁰ Benjamin von Bodungen, *Mobiliarsicherungsrechte an Luftfahrzeugen und Eisenbahnrollmaterial im nationalen und internationalen Rechtsverkehr: zugleich ein Beitrag zur internationalen Vereinheitlichung des Rechtes nationaler Mobiliarsicherheiten durch das Kapstadt-Übereinkommen* (LIT 2009), 299 et seqq.

²³¹ According to German case law, a leasing agreement is qualified as an atypical rental contract. Accordingly Section 543 applies to termination. See, for example, BGH NJW 1990, 1113: *'Leasingverträge über bewegliche Sachen hat der Konkursverwalter des Leasinggebers wegen ihres mietrechtlichen Charakters ohne ein Wahlrecht (§ 17 KO) zu erfüllen.'*

²³² The setting of a grace period is not required in the cases listed under Section 543(3) BGB, namely if the (1) a notice period or a warning notice obviously shows no chance of succeeding, (2) immediate termination for special reasons is justified, weighing the interests of both parties, or (3) the lessee is in default of payment of rent (a) on two successive dates or of a portion of the rent that is not insignificant or (b) in a period of time spanning more than two dates of the rent in an amount that is as much as the amount of rent for two months.

²³³ von Bodungen, (n 230) 301 et seq.

2.1.2. Spain

Under the Spanish legal system, in accordance with Article 1124 of the Spanish Civil Code, the general principle is that termination must be effected with judicial intervention. Notably, the injured party cannot legally demand termination of the contract. Rather, pursuant to Article 1124, the competent judge has discretion as to whether it will grant termination of the contract upon a sufficiently serious breach or a grace period for performance. Similar to the French legal systems, the right to termination must be exercised in good faith.²³⁴ As an exception to this general principle, a right to extra-judicial termination by informal notice to the other party is available if the defaulting party accepts it. Further, by virtue of Article 1255 that establishes the principle of freedom of contract, parties may specifically agree on the grounds and procedure for extra-judicial termination. For example, they may well exclude the application of Article 1124. Therefore, a well-drafted termination clause is essential. Interestingly, termination clauses based on the debtor's insolvency are unenforceable due to Article 61(3) of the Spanish Insolvency Act which provides that: *'Those clauses affording the parties the right to cancel or terminate the relevant agreement on the basis of a mere declaration of insolvency of the other party, will be regarded as though they had not been established in the agreement.'*²³⁵

2.1.2. Summary: Recognition of a Right to Self-help Termination

A review of these jurisdictions reveals that the right to termination without recourse to the court is generally recognised in civil and common law traditions. Even the most traditional examples of civil law jurisdictions, namely France and Spain, have moved

²³⁴ Supreme Court Judgment 4279/2015 of 15 October 2015; Osborne Clarke, 'Contractual breach and resolution' <<http://www.osborneclarke.com/insights/contractual-breach-and-resolution/>> accessed 7th December 2016.

²³⁵ Gabriel Núñez and Federico Tarín, 'Spain: Early Termination Clauses Based on a Declaration of Insolvency Will no Longer be Enforceable in Spain' <<http://www.mondaq.com/x/23387/Insolvency+Bankruptcy/Early+Termination+Clauses+Based+on+a+Declaration+of+Insolvency+Will+no+Longer+be+Enforceable+in+Spain>> accessed 7th December 2016.

forward to allow for extra-judicial termination in their civil code. Still, there are considerable differences with regards to the formalities. Whereas English law confers a relatively broad and immediate right to terminate on the innocent party upon a sufficient breach, French and German law follow a more rigid notice and grace-period termination strategy. Broadly speaking, England, Germany, France and Spain law grants the parties the power to modify and extend the right to termination to various degrees and subject to the discussed requirements.

The crucial lesson to be drawn from this is that the right to extra-judicial termination is recognised in all examined jurisdictions (at least to some extent). In other words, there is no reason for states based on the civil or common law to declare against the availability of non-judicial termination under Article 54(2). Furthermore, a blocking effect on non-judicial remedies available under domestic law pursuant to Article 12 of the Convention would severely limit the creditor's choice in the selection of the most efficient and suitable remedies. For example, creditors may be required to resort to judicial termination under the Convention despite the availability of extra-judicial termination under national law if the international interest does not meet the requirements of a security interest under national law, effectively undermining the efficiency of the whole instrument. Clearly then, there is a strong argument that Article 54(2) must not be read as providing for a blocking effect.

The next part of the thesis is thus devoted to the crucial question: if the right to extra-judicial termination is not problematic, what are the extra-judicial remedies under the Convention that are problematic, and why do they raise implementation issues in domestic law in certain jurisdictions? It is submitted that the primary reason why civil law jurisdictions have lodged a declaration under Article 54(2) providing for the non-availability of self-help remedies is the remedy of possession without judicial

intervention. This is not surprising, because the civil law tradition has long had a reputation for being against this legal concept. Thus, the next step is to examine the right to extra-judicial possession more generally under domestic laws. This may well allow civil law and common law based legal systems to learn from each other.

2.2. Right to Possession

The justification for this legal right under the Convention and the Protocol is to protect the creditor in urgent situations from the risk that the economic value of the aircraft rapidly deteriorates. This risk is largely attributable to the following factors.²³⁶ Firstly, by their nature, aircraft physically deteriorate quickly. Second, this risk of deterioration is significantly increased by the fact that aircraft require routine maintenance and care programmes, otherwise they become non-airworthy almost immediately, meaning that they cannot be re-deployed without incurring significant additional costs. Third, particularly in insolvency situations, unprotected aircraft are frequently exposed to cannibalization, that is, unauthorized asset stripping or the removal of parts from the aircraft by the debtor. Fourth, for financiers, unused aircraft assets also represent a substantial loss of revenue.

All these points only reinforce why the process of obtaining possession of the aircraft without intervention of the court is of the essence for creditors in the aviation sector. Yet, little attention has been paid to self-help possession in academic writings. The general consensus on its definition, scope and practical significance indeed remains limited. Legal systems even disagree on whether the concept should be considered as a legitimate and effective route of enforcement for secured creditors. Hence, the availability and requirements of extra-judicial possession under the Convention gives rise to difficult questions.

This section is structured into three parts. The first part seeks to grasp the concept of self-help possession in the national laws of the selected jurisdictions. It illustrates that there are not only significant differences between legal traditions, but also within the legal traditions themselves. It shows that the generally accepted rule is the principle that

²³⁶ Gray, MacIntyre and Wool, (n 98) 24.

common law usually confers a non-judicial right to possess the collateral on default, whereas civil-law jurisdictions generally prohibit, even if contractually provided, any such right. The examination further identifies the roots and main arguments in support of each view, before turning to question of whether the remedy of extra-judicial possession should and could be equally implemented in both civil and common law jurisdictions alike under the Convention and the Protocol, and domestic law.

2.2.2. Definition of the Right of Self-Help Possession

The starting point, then, is to define self-help possession. Due to differences between national laws, a closer look at this concept is necessary, since unfortunately neither the Convention nor the Protocol defines it and the precise terminology remains unsettled. The only generally accepted rule in relation to the exercise of self-help possession within the Convention is the principle that this remedy has to be exercised in a commercially reasonable manner and in accordance with the law of the place where the remedy is to be exercised.²³⁷

Nevertheless, as a general rule it can be asserted that most of the civil and common-law systems agree that the right of possession without judicial intervention refers to the legal process that allows secured creditors to protect their interest in continuous payments by private repossession without judicial assistance. This definition can further be confirmed with the terms employed in Black's Law Dictionary. It stipulates that '*repossession*' refers to the '*process where the lender takes back property or assets when the borrower is in default*' and is '*extra-judicial*' in the fact that it is '*effected outside the course of regular judicial proceedings*'. But there is thus no settled view as to the critical questions of whether and which additional obligations and standards under

²³⁷ Articles 8(3) and 14 of the Convention.

domestic law are applicable. Indeed, the relationship between national law and the Convention's remedy of self-help is difficult and must be examined.

2.2.2. The Common Law Perspective

From the perspective of common law jurisdictions, the right to extra-judicial self-help possession is one of the crucial aspects of a modern secured transaction law since they regard it as the most effective, rapid and cost-effective enforcement instrument to realise a security interest in a collateral. There is a consensus that judicial enforcement methods for security interests are to the disadvantage of both debtors and creditors due to the delays, costs and unsatisfying outcomes.²³⁸ Therefore, the right of possession without court intervention is well recognised in common law jurisdictions and nowadays perceived as a legitimate alternative to judicial enforcement subject to certain legal safeguards. It may be useful to examine the law of England and the United States in this respect.

2.2.2.2. England

From a technical and terminological point of view, English law differentiates between the right to repossession (also referred to as *recapture*²³⁹) by a lessor, and the right to possession by a security interest holder. The difference is explained by the fact that a security interest holder is very unlikely to have possessed the aircraft contrary to a lessor who has possessed the aircraft before the lease for a short period of time at least constructively.²⁴⁰ In principle, lessors and security interest holders are both entitled to possess the collateral upon the occurrence of an event of default after termination of the

²³⁸ Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin 2010), 123.

²³⁹ *Ibid*, 123, Beale, (n 200) para 30-14 et seq.

²⁴⁰ *Michael Gerson (Leasing) Ltd v Wilkinson*, [2000] 3 WLR 1645.

agreement.²⁴¹ Nevertheless, for the purpose of this argument, the analysis will focus on the enforcement of mortgages in aircraft.

Under English law, it is generally accepted that a legal mortgagee has a right to possession without court involvement, regardless of the of the debtor's default.²⁴² This is, for example, expressed in *Fourmaids Ltd v Dudley Marshall (Properties) Ltd*²⁴³: 'The right of a mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagor may go into possession at any time after execution of the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right.' In practice, parties prefer to derogate from the mortgagee's expansive right to possession and typically clearly set out the conditions for non-judicial possession actions in the mortgage agreement. This is also because the question of whether an equitable mortgage provides for a non-judicial right to possession (and to a private sale) without an express contractual provision is controversial.²⁴⁴ Interestingly, the precise extent of the non-judicial right to repossession is unclear.²⁴⁵

²⁴¹ Peter Thorne, 'Aircraft Mortgages' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998), 719-720; Andrew Evans, 'Enforcement of security over an aircraft' <<http://www.fieldfisher.com/pdf/enforcement-security-over-aircraft-feb-08.pdf>> accessed 5th March 2016; Ravi Nath and Berend Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, vol 1 (Kluwer Law International 2009), 285; Norton Rose Fulbright, 'Taking English or New York law mortgages over foreign-registered aircraft: a comparison' <<http://www.nortonrosefulbright.com/knowledge/publications/54098/taking-english-or-new-york-law-mortgages-over-foreign-registered-aircraft-a-comparison>> accessed 23th July 2016.

²⁴² *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 WLR 931; *R v Judge Dutton Briant, Ex p. Abbey National Building Society* [1957] 2 QB 497, [1957] 3 WLR 249; *National Westminster Bank Plc v Skelton* [1993] 1 WLR 72; *Western Bank Ltd v Schindler* [1977] Ch 1, [1976] 2 All ER 393.

²⁴³ *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 WLR 931.

²⁴⁴ Michael Bridge and others, *The Law of Personal Property* (Sweet & Maxwell 2013), para 18.007 et seq; Steve Evans, 'A scrutiny of powers of sale arising under an equitable mortgage: a case for reining these in' [2015] *The Conveyancer and Property Lawyer* 123; Julian Farrand and Alison Clarke, *Emmet and Farrand on Title*, vol 2 (Sweet & Maxwell 2017), para 25.223; Hugh Beale and others, *The Law of Security and Title-Based Financing* (2nd edn, Oxford University Press 2012), para 18.33; John McGhee, *Snell's Equity* (33rd edn, Sweet & Maxwell 2016), para 39-013.

²⁴⁵ Michael A. Jones, Anthony M. Dugdale and Mark Simpson, *Clerk & Lindsell On Torts* (21st edn, Sweet & Maxwell 2015), para 30-14; Bridge and others, (n 244) para 16-059; Beale, (n 200) para 39-340; *R. v Mitchell* [2003] EWCA Crim 2188, [2004] RTR 14: 'That there is such a right [common law right of recaption of a chattel] there can be no doubt, but the precise extent of it may be unclear' and 'The law has not been clarified since the Law Reform Committee Report and one certainly cannot deduce from such scant authority as there is on recaption of chattels the general rule that a person is entitled to use reasonable force to recover a chattel of which he has been wrongfully deprived.'

First of all, there is no independent and separate standard for the exercise of the non-judicial right to possession. Rather, criminal and tort law define the outer boundaries of this legal right. With regard to potential criminal liability, Section 6 of the Criminal Law Act 1977 has to be mentioned. It provides that any person who, without lawful authority, uses or threatens *violence* for the purpose of securing entry into any premises for himself or for any other person is criminally liable, irrespective of whether a person has a right to possession.²⁴⁶

The question of whether there is further a risk of civil liability depends on several factors. Generally speaking, there is legal authority that a mortgagee may recapture his secured asset peacefully or by using reasonable force.²⁴⁷ However, it appears that a mortgagee may not enter the premises of a mortgagor or any other third party to recapture them unless consent has been obtained, e.g. in the form of a licence, especially if the debtor's possession was obtained by consensual delivery.²⁴⁸ For these reasons, a standard clause for possession of aircraft under any security agreement may look like this:

At any time after the occurrence of any listed termination event and provided that the same is continuing, the mortgagee may retake possession of the Aircraft, and the mortgagor agrees that the mortgagee may for this purpose enter upon any premises of the mortgagor where the Aircraft or any part therefore may be located.

As it can be seen, the following three elements are critical to prevent civil liability for trespass to land. First, the events of default under which the mortgagee is authorised to enter the debtor's premises to repossess the aircraft must be specified. Secondly, the

²⁴⁶ Criminal Law Act 1977 Section 6(1) and (2).

²⁴⁷ Bridge and others, (n 244) para 16-059; Beale, (n 200) para 39-340 with further references in case law.

²⁴⁸ Beale, (n 200) para 39-340 et seq; Jones, Dugdale and Simpson, (n 245) para 19-34 and 30-14; The only exception to this rule may be in the case where the secured asset was taken and put there by the wrongful act of the claimant.

clause has to precisely stipulate the debtor's obligations of cooperation in the process of repossession. Finally, the conditions under which the mortgagee may enter the premises of the debtor must be defined.

Notably, upon possession a mortgagee owes significant duties to the mortgagor, such as a duty to act in good faith²⁴⁹, a duty to obtain a fair price on sale²⁵⁰ (since it must account for the proceeds to a junior encumbrance or to the mortgagor) and most interestingly for the purpose of this analysis, a duty not to damage²⁵¹ the collateral.²⁵² With regards to these duties, an interesting feature of English law is the concept of a receiver. A receiver is a person contractually appointed by a mortgagee or by the court whose role is to manage the secured property as an agent for the mortgagor.²⁵³ Appointing a receiver has significant advantages for mortgagees, as the receiver will assume liability for his actions, e.g. taking possession and selling the secured collateral, and not the mortgagee itself.²⁵⁴ Thus, in practice, most mortgage agreements contain express terms giving the mortgagee the right to appoint a receiver, who will take on behalf possession of the aircraft and sell it while isolating the mortgagee from any civil liability.²⁵⁵

²⁴⁹ *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, 311; *PK Airfinance SARL v Alpstream AG* [2015] EWCA Civ 1318; Farrand and Clarke, (n 244) para 25.082

²⁵⁰ *Palk v Mortgage Services Funding PLC* [1993] Ch 330, [1993] 2 WLR 415, 338; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 WLR 1207: 'A mortgagee, when exercising his power of sale, owes a duty to the mortgagor to take reasonable care to obtain a proper price.'

²⁵¹ Beale and others, (n 244) para 18.39; *Medforth v Blake* [2000] Ch 86, 102; *Palk v Mortgage Services Funding PLC* [1993] Ch 330, [1993] 2 WLR 415: 'He [the mortgagee] must also take reasonable care of the property.'

²⁵² Gavin Lightman and others, *Lightman & Moss on the Law of Administrators and Receivers of Companies* (6th edn, Sweet & Maxwell 2017), para 13-005.

²⁵³ Beale and others, (n 244) para 18.56.

²⁵⁴ *Silven Properties Ltd v Royal Bank of Scotland Plc* [2003] EWCA Civ 1409, [2004] 1 WLR 997, at paragraph 29: 'the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee'.

²⁵⁵ Beale and others, (n 244) para 18.19.

2.2.2.2. *United States*

In the United States, the general rule is that upon the occurrence of a default creditors are entitled to possess the collateral either through self-help or judicial process. There is no requirement of prior termination, notice or consent. The specific right to self-help possession is set forth in Section 9-609 the American Uniform Commercial Code (the ‘UCC’) which gives any secured party the right to possess the collateral or render it unusable without judicial intervention upon the debtor’s default provided the creditor accomplishes it without a ‘breach of peace’.²⁵⁶ However, the standard of what constitutes a breach of the peace is not defined in the UCC nor is it the subject of agreed parameters.²⁵⁷ This is easy to explain: the UCC is solely a model code, meaning that it does not have legal effect unless it is enacted in each of the fifty states and further that they are free to exclude or amend its provisions.²⁵⁸ Contrary to the goal of predictability and legal certainty, this means that the precise requirements of the right to self-help repossession in the UCC, in particular with regards to the ‘*breach of peace*’ standard, varies significantly between states.²⁵⁹ This despite the fact that the official commentary – although not binding for state courts in the interpretation of the UCC – states that a secured party may not use physical force to obtain possession or resort without prior judicial process to the assistance of a law-enforcement officer.²⁶⁰

Some state courts, for example, use a five-factor balancing test to determine whether a breach of the peace has occurred.²⁶¹ The relevant factors considered are: '(1) where the possession took place, (2) the debtor's express or constructive consent, (3) the

²⁵⁶ Stanescu, (n 220) 104.

²⁵⁷ See, e.g., *Clarín v. Minnesota Repossessors, Inc.*, 198 F.3d 661, 664 (8th Cir. 1999): ‘*Unfortunately, the UCC does not provide a definition of breach of the peace.*’

²⁵⁸ It should be noted that the right to self-help repossession is enacted in all states except Louisiana, which is based on civil law.

²⁵⁹ Ryan McRobert, ‘Defining Breach of the Peace in Self-Help Repossessions’ (2012) 87 *Washington Law Review* 569.

²⁶⁰ Nath and Crans, (n 241) 1035; Stanescu, (n 220) 114.

²⁶¹ *Giles v. First Va. Credit Serv.*, 560 S.E.2d 557, 565 (N.C. Ct. App. 2002); *Clarín v. Minnesota Repossessors, Inc.*, 198 F.3d 661, 664 (8th Cir. 1999); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn. Ct. App. 1991); Ryan McRobert, (n 259) 579.

reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception.' Many other courts have used a fact-specific approach for each case to determine if a possession action was undertaken without a breach of the peace.²⁶² In particular, they have established certain but not necessarily consistent rules. For example, courts have ruled that a breach of the peace occurs, when actions by a creditor incite violence or are likely to incite violence²⁶³, or when a creditor uses threats to enter a residence without debtor's consent or seize property over a debtor's objections²⁶⁴ to name a few. To the contrary, others courts have hold that a breach of the peace must involve some violence or threat of violence²⁶⁵ and further that oral protest²⁶⁶ is not sufficient to constitute a breach of the peace. It can be seen there is no consistent line of cases of what constitutes a breach of the peach. A remarkable difference in comparison to England is further that a secured creditor is generally liable for breaches committed by third parties in the process of taking possession when done on their behalf due to the non-existence of the concept of receivership.²⁶⁷

2.2.2. Summary: Recognition of a Right to Self-help Repossession

The examination reveals that both England and the United States are familiar with the concept of self-help possession, and generally recognise the creditor's right to possess the collateral upon the debtor's default as a legitimate enforcement remedy. Generally speaking, both jurisdictions agree that criminal and tort law define the outer boundaries of this right. But it is important to note that despite these commonalities, there are significant differences in the details.

²⁶² Ibid, 579 et seqq.

²⁶³ Birrell v. Indiana Auto Sales & Repair, 698 N.E.2d 6, 8 (Ind.App.1998).

²⁶⁴ Wade v. Ford Motor Credit Co., 8 Kan.App.2d 737, 668 P.2d 183, 189 (1983).

²⁶⁵ McCall v. Owens, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991).

²⁶⁶ Chrysler Credit Corp. v. Koontz, 277 Ill.App.3d 1078, 214 Ill.Dec. 726, 661 N.E.2d 1171, 1173-74 (1996); Clarin v. Minnesota Repossessors, Inc., 198 F.3d 661, 664 (8th Cir. 1999).

²⁶⁷ Ryan McRobert, (n 259) 576; Philip R. Wood, *Comparative Law of Security Interests and Title Finance* (2nd edn, Sweet & Maxwell 2007), para 20-023.

At first sight, besides the different terminology, the most important distinctive feature is that English law differentiates between repossession by a lessor and a mortgagee taking possession, which is not the case in the UCC. Furthermore, English law does not have an independent standard governing self-help [re]possession. On the contrary, under the American UCC self-help possession is governed by the ‘*breach of peace*’ standards, which differs considerably between the states within the United States. Notably, Louisiana decided not to include the remedy of self-help possession within their version of the UCC, which can partially be explained by the fact that it is based on French and Spanish civil law as a result of history. Another crucial difference is the potential risk of civil liability for creditors. English law takes a more creditor-friendly approach: by appointing a receiver for the act of repossession mortgagees are able to shield themselves from civil liability. To the contrary, the default position under the UCC is that secured creditors remain liable for the acts undertaken by third parties for the purpose taking possession of the secured collateral. This having been said, unsurprisingly, the United States and England have – due to their familiarity with this remedy – made an Article 54(2) declaration under the Convention and the Protocol to allow for extra-judicial possession. A closer look shows, however, that their declarations are notably different.

*Pursuant to Article 54(2) of the Convention, the Government of the United Kingdom of Great Britain and Northern Ireland declares that any remedy available to the creditor in the United Kingdom of Great Britain and Northern Ireland or the territory of Gibraltar, the Cayman Islands or the Island of Guernsey under any provision of the Convention which is not there expressed to require application to the court **may be exercised without the leave of the court** (emphasis added).*

*Pursuant to Article 54 of the Convention, all remedies available to the creditor under the Convention or Protocol which are not expressed under the relevant provision thereof to require application to the court may be exercised, **in accordance with United States law, without leave of the court** (emphasis added).*

Whereas England's declaration can be seen as rather uninteresting from a legal point of view in comparison to the declarations lodged by the overwhelming majority, the United States' declaration can be seen as to add another interesting aspect, as, from its wording, the declaration specifically requires self-help remedies to be exercised in accordance with United States law on top of the requirements set forth by the Convention. The question then arises as to first, whether one can attach a particular significance to the interesting addition to United States' declaration and secondly, if so, whether such a declaration is within the meaning of Article 54(2) and consequently effective under the Convention.

In order to answer these questions, one has to firstly determine which rules govern the interpretation of the Convention's declarations in general and in particular Article 54(2). As mentioned earlier, it was the drafter's deliberate choice not to allow for reservations but to do so for declarations. As a result, courts and judges should not resort to the interpretative guidelines of the Vienna Convention on the Law of Treaties, as some might argue, for the purpose of interpreting reservations. Rather, it is submitted that the applicable rules of interpretation for declarations are exclusively those provided for within the Convention. It is, therefore, particularly important to interpret declarations in light of the goals of the Convention to promote uniformity and predictability in its application as expressed in Article 5(1). This is because any declaration to the Convention by definition reduces the degree of uniformity achieved and ultimately renders the

practical application of the Convention's remedies more difficult. So, what does this mean in practice for the United States' declaration under Article 54(2)?

One possible interpretation could be that this reflects the intention that the right to self-help possession under the Convention must be exercised in conformity with the applicable law of each federal state, including its applicable '*breach of the peace*' standard. If this is true, the actual impact of the wording remains limited if not completely superfluous when it comes to the application of the Convention. Firstly, because Article 14 already provides that the Convention's remedies must be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised and secondly, because civil, criminal, and other laws that are clearly outside the scope of the Convention remain unaffected.

A different interpretation of the declaration could be problematic, especially because the Depository, UNIDROIT, has no power under the Convention to refuse or modify an excessive but complying declaration made by a Contracting State. Article 54(2) expressly states that Contracting States may only declare whether the Convention's remedies may be exercised with or without leave of the court. Therefore, Contracting States should not be authorised to specify additional requirements except those given by domestic law for the exercise of the remedies in addition to any requirements set out in the Convention itself such as provided by Article 14 of the Convention. Otherwise there is a chance that the Convention's remedies would be less favourable compared to national ones. Preference should always be given to an interpretation that supports the exercise of the creditor's remedy in an efficient way and is in compliance with the objective of the Convention. This view is further reinforced by Article 56(1) which clearly stipulates that '*No reservations may be made to this Convention but declarations authorised by Articles 39, 40, 50, 52, 53, 54, 55, 57, 58 and 60 may be made in accordance with these*

provisions. (Emphasis added).’ In conclusion, a declaration beyond the wording and scope of Article 54(2) should be considered either effective to the extent it is in line with the declaration's original purpose or completely ineffective if it is contrary to the declaring State's intention.

Finally, at least, in the context of aircraft finance, it must be emphasised that although self-help possession is a remedy found in aviation practice, it still relies on the debtor’s cooperation in some cases. A debtor who is no longer making the required payments under the agreement is likely to ignore any clause for possession and will create major obstacles to the creditor's attempts to take possession. For this reason, before taking action a creditor typically has to be fully aware of the location of the aircraft, the engines, and the documentation. These items are equally essential for the creditor, because a secured aircraft without proper maintenance records cannot be re-marketed and subsequently re-deployed in the aviation market. Furthermore, the location is of considerable practical importance, because the aircraft might be located on the premises of a third party whose co-operation must be sought. In such cases, there is an additional risk of civil and criminal liability. In conclusion, while the right to possession remains a feasible option in common law jurisdictions, the need for interim protection from a competent remains at least equally important for the creditor.²⁶⁸ It also highlights why the remedy of advance relief is an essential remedy for secured creditor.

2.2.2. The Civil Law Perspective

In civil law jurisdictions, it is a widely accepted principle that taking possession of the aircraft cannot be achieved without judicial assistance. Even with an express agreement to the contrary, creditors are ordinarily required to first obtain an enforceable title or

²⁶⁸ Roger Whipp, ‘Aircraft repossession - practical and legal aspects of Isle of Man Registry’ <<http://www.kennedyslaw.com/article/aircraftrepossession/>> accessed 23th July 2016; Nath and Crans, (n 241) 285 and 287; Thorne, (n 241) 719.

equivalent deed, i.e. through a competent court or a notary, and subsequently go through the mandatory enforcement proceedings.²⁶⁹ If creditors violate this principle, there is a significant risk of civil and criminal liability. For example, a creditor may be liable for damages caused to the debtor or third parties. More importantly, however, they may risk severe criminal charges for committing a breach of the peace or wilful damage to property among many others offences. The associated risk of excesses and abuses, the protection of the citizen's confidence in a fair legal system, and fundamental doctrinal disputes regarding enforcement of security interests in mobile assets partly explain why extra-judicial possession is still difficult to approach, and there is considerable resistance to accept such a private enforcement remedy in virtually all of these jurisdictions. It may be useful to examine the roots of this prohibition in the civil law tradition in more detail, so as to determine whether a reform towards a right to extra-judicial possession can be envisaged in practice, or whether a declaration against self-help possession under Article 54(2) of the Convention is the only viable option.

First, in some countries based on the civil law tradition, the prohibition against self-help possession is so strongly rooted in the law that it is explicitly specified in the Constitution. For example, in the relevant section, Article 14 of the Mexican Constitution stipulates: *'No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.'* (Emphasis added). Further, the relevant part of Article 16 provides: *'No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken.'* (Emphasis added). Finally, in part, Article 17 provides: *'No one may take the law into his*

²⁶⁹ Eric Dirix, 'Remedies of Secured Creditors Outside Insolvency' in Horst Eidenmüller and Eva-Maria Kieninger (eds), *The Future of Secured Credit in Europe* (De Gruyter 2008), 230; Ulrich Drobnig, 'Die Verwertung von Mobiliarsicherheiten in einigen Ländern der Europäischen Union' (1996) 60 *The Rabel Journal of Comparative and International Private Law* 40, 50 et seq.

own hands, or resort to violence in the enforcement of his rights. The courts shall be open for the administration of justice at such times and under such conditions as the law may establish'.²⁷⁰ Clearly, then, there is a strong incentive for Mexico to have a declaration that disallows self-help possession under the Convention in accordance with Article 54(2) and this is, exactly what Mexico has done.

This prohibition is likewise strongly rooted in French, German and Spanish law. For example, in Germany, Section 858(1) BGB (together with Section 229 BGB) specifically prohibits creditors to obtain possession without judicial intervention unless consent is given before or at the time of the interference.²⁷¹ It is important to note that consent can be subsequently withdrawn at any time. Thus, for example, even if the debtor has given written prior consent in the security agreement to the creditor who is trying to repossess the aircraft, the debtor may deny consent at the critical time of repossession.²⁷² Although the debtor's behaviour would constitute a breach of contract resulting in a claim for damages²⁷³, the creditor would not be entitled to obtain possession through non-judicial measures of the secured asset without risking civil and criminal liability.²⁷⁴ Thus, in fact, under German law, taking possession will generally be achieved through a court

²⁷⁰ Carlos Sierra, 'Mexico's Ratification and Effect of Declarations' (Latin American Cape Town Treaty Seminar, Sao Paulo, 17th April 2012).

²⁷¹ Section 858 BGB ('Verbotene Eigenmacht'); von Bodungen, (n 230) 135,165 and 301; Ravi Nath and Berend Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, vol 2 (Kluwer Law International 2010), 67; Mark Aschenbrenner, *Die Sicherungsübereignung im deutschen, englischen und brasilianischen Recht* (Mohr Siebeck 2014), 265 et seq; Beate Gsell and others, *beck-online.GROSSKOMMENTAR zum Zivilrecht* (C.H. Beck 2013), 858 BGB para 40 et seqq; Michael Duchstein, 'Die Selbsthilfe' [2015] Juristische Schulung 105.

²⁷² BGH NJW 77, 1818: 'Wenn nämlich bei Eingriff in den Besitz der Wille des Besitzers, eine solche Maßnahme zu gestatten, nicht mehr vorhanden ist, liegt trotz vorheriger Zusage im Vertrag verbotene Eigenmacht vor.'

²⁷³ BGH NJW 2010, 3434: 'Die nicht durch einen gerichtlichen Titel gedeckte eigenmächtige Inbesitznahme einer Wohnung und deren eigenmächtiges Ausräumen durch einen Vermieter stellt eine unerlaubte Selbsthilfe dar, für deren Folgen der Vermieter verschuldensunabhängig nach § 231 BGB haftet.'

²⁷⁴ Bundesministerium der Justiz und für Verbraucherschutz, 'English Translation of the German Criminal Code' <http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html> accessed 17th January 2017, Section 123 of the German Criminal Code ('Burglary'): 'Whosoever unlawfully enters into the dwelling, business premises or other enclosed property of another, or into closed premises designated for public service or transportation, or whosoever remains therein without authorisation and does not leave when requested to do so by the authorised person, shall be liable to imprisonment not exceeding one year or a fine.'; Section 240 of the German Criminal Code ('Using threats or force to cause a person to do, suffer or omit an act'): 'Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine.'; OLG Köln, NJW 1996, 472.

bailiff on the basis of a court order.²⁷⁵ The roots of this provision can be traced back to the Articles 20(2) and (3) of the German Constitution. The Federal Constitutional Court held that the prohibition of enforcement of legal claims between private parties is a direct consequence of the rule of law and the state's monopoly on the use of physical force.²⁷⁶ Again, there is a strong incentive for Germany to prohibit self-help possession under Article 54(2) of the Convention due to ordinary law and constitutional concerns.

In the case of Spain, the right to self-help possession raises concerns that are not very different from the ones found in Mexico and Germany. For example, the Spanish Constitution of 1978 establishes several fundamental rights that are in direct conflict with the right to self-help repossession.²⁷⁷ First, Article 18(1) establishes the right to private and family life, and, secondly, Article 18(2) expressly provides that the home is inviolable. Clearly, then any violation of the personal sphere of the debtor by the creditor without consent or an express permission by a competent court (or an authority vested with specific powers) constitutes a violation of these fundamental rights. This conclusion may further be derived from Article 33 that recognises the right to personal property and stipulates that any act of depriving of private property may only be based on justified grounds of public utility or social interest (and with a proper compensation). Likewise, Article 24 stipulates contrary to extrajudicial enforcement remedies, that *'every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended'*. These constitutional provisions are not the only ones supporting a prohibition of self-help possession in the Spanish legal system. There are various instances in the Spanish Civil

²⁷⁵ Section 883 ZPO.

²⁷⁶ BVerfG NJW 2012, 2869 note 8 with further references; Hans-Joachim Musielak and Wolfgang Voit, *ZPO: Zivilprozessordnung* (13th edn, Franz Vahlen 2016), Chapter Einleitung para 6: *'... Als Ausgleich für das Verbot der Selbsthilfe besteht die Verpflichtung des Staates, dem Einzelnen bei der Durchsetzung seines Rechts zu helfen. ... Dieser Anspruch wird Justizgewährungsanspruch oder Justizanspruch genannt.'*

²⁷⁷ Agencia Estatal Boletín Oficial del Estado, 'English Translation of the Spanish Constitution' <<https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>> accessed 17th January 2017.

Code that reinforce this conclusion.²⁷⁸ Just to give an example, Article 1870 of the Civil Code stipulates that a creditor cannot use collateral without the debtor's consent and more importantly, Article 1872 specifically requires the secured creditor to possess the pledged asset under the proper procedure before a public notary.

In France, the Declaration of human and civic rights of 26 August 1789 of the French Constitution states in Article 3 that, '*the principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.*' Furthermore, Article 17 mandates that '*the right to Property is inviolable and no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.*'²⁷⁹ Equally, Article 2279 of the Code Civil states that '*possessory actions may be brought ... provided by the Code of Civil Procedure.*'²⁸⁰

Again, in others, such as for example in the civil law influenced jurisdiction of Louisiana in the United States, the 'prohibition' or rather non-availability of a right to self-help possession is a matter of ordinary law. This is simply because Louisiana made the deliberate choice not to include the right to extra-judicial possession as a matter of public policy in their version of the UCC²⁸¹ notwithstanding the fact that the Louisiana Supreme Court held that such a right does not conflict with the United States' constitution.²⁸² Accordingly, Louisiana would, at least in theory, also have an incentive to disallow self-help possession under Article 54(2).

²⁷⁸ World Intellectual Property Organization (WIPO), 'English Translation of the Spanish Civil Code' <http://www.wipo.int/wipolex/en/text.jsp?file_id=221319> accessed 17th January 2017.

²⁷⁹ Constitutional Council of the French Republic, 'English Translation of the Declaration of Human and Civic Rights of 26 August 1789' <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf> accessed 17th January 2017.

²⁸⁰ Legifrance, 'English Translation of the French Civil Code' <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 17th January 2017.

²⁸¹ Nath and Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, (n 241) 1035 footnote 3.

²⁸² Andrew Wesley Hamilton, 'Price v. U-Haul Co.: The Louisiana Supreme Court Authorizes Self-Help Repossession' (2000) 74 *Tulane Law Review* 2237; Price v. U-Haul Co., 745 So. 2d 593, 600 (La. 1999).

But it does not stop here. A brief examination of the remaining Contracting States which have declared the non-availability of self help remedies under Article 54(2), including Colombia²⁸³, United Arab Emirates²⁸⁴, China²⁸⁵, Brazil²⁸⁶, and Egypt²⁸⁷ – which are representatives of or at least have roots in the civil law tradition – confirm the general trend that the prohibition against self-help possession may not only be a policy choice but also a complicated legal issue. This just leaves one more question: does the remedy of self-help possession have a chance of being adopted in civil law jurisdictions? At least from a legal perspective, the answer appears to be no, rather than yes; especially because in the majority of cases the legal position against self-help possession is not only a matter of ordinary law but of express or implicit constitutional principles, if not a combination of both. Before turning to the answer of the aforementioned question in more detail, it is necessary to firstly examine the relationship between international law (and in particular treaties) and national law. This is significant because one might argue that the Convention as an international treaty is superior to national law from the standpoint of international law theory. Thus, it would be at least conceivable that an Article 54(2) declaration under the Convention in favour of non-judicial remedies may overwrite a prohibition of self-help remedies under domestic laws.

The first important point to consider is, then, the distinction between monist and dualist legal systems.²⁸⁸ In states with a dualist system international law has no effect domestically without further legislative action. Typically, the implementing legislation

²⁸³ Graham S. McBain and Richard Hames (eds), *Aircraft Finance: Regulation, Security and Enforcement* (Sweet & Maxwell 2015), Chapter Colombia para 12.

²⁸⁴ Angeliqe Watkins, 'Mortgagee Repossession of Aircraft in the UAE' <<http://www.tamimi.com/en/magazine/law-update/section-8/october-4/mortgagee-repossession-of-aircraft-in-the-uae.html>> accessed 24th October 2016; McBain and Hames, (n 283) Chapter UAE para 12.

²⁸⁵ McBain and Hames, (n 283) Chapter China para 12; Nath and Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, (n 241) 229.

²⁸⁶ McBain and Hames, (n 283) Chapter Brazil para 12.

²⁸⁷ *Ibid*, (n 283) Chapter Egypt para 12.

²⁸⁸ Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law* (Oxford University Press 2007), para 3.07 et seqq.

determines the hierarchical rank of the treaty within the domestic legal system.²⁸⁹ For example, in England the Convention and its related Protocol has been enacted by passing the '*International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015*'. The dualist doctrine is followed in, alongside England, Australia, India, and Canada, among others – mainly representatives of the common law tradition.²⁹⁰

On the contrary, in states with a monist system, international law has direct effect domestically without further legislative endorsement once it has been concluded.²⁹¹ Nevertheless, in some states, legislative acts are required to authorise government officials to conclude the treaty. Monist systems have, however, only reached a limited degree of agreement with regards to the question of the hierarchical rank of a treaty, such as the Convention and its related Protocol, within the domestic legal order upon ratification of that treaty; a question that is critical in determining whether self-help possession may be adopted in civil law jurisdictions under the Convention. Consider, for a more detailed examination, Louisiana (United States), Mexico, and Germany.

In the United States, for example, international law treaties are higher than state law, equivalent to federal statutes, and below the constitution.²⁹² Therefore, in the case of a conflict between a treaty, e.g. the Convention, and state law, e.g. Louisiana's UCC, the Convention will ultimately prevail.²⁹³ Consequently, the Convention's remedy of self-help possession is available in the civil-law based Louisiana notwithstanding its decision not to permit self-help possession within its territory. In conclusion, there is no need for legislative action.

²⁸⁹ David Sloss, 'Domestic Application of Treaties' <<http://digitalcommons.law.scu.edu/facpubs/635/>> accessed 20th October 2016, 3 et seqq; Goode, Kronke and McKendrick, para 3.07 and 3.08.

²⁹⁰ Sloss, (n 289) 3.

²⁹¹ Ibid, 7; Goode, Kronke and McKendrick, (n 289) para 3.07 and 3.08.

²⁹² The Supremacy Clause, that is Article VI Clause 2 of the United States Constitution, provides that: '*all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*'. Consequently, a treaty into which the U.S. federal government enters, trumps a state law or even a state constitution (*Missouri v. Holland*, 252 U.S. 416, 434 (1920)).

²⁹³ Nath and Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, (n 241) 1037 footnote 3.

In Mexico, the situation is the opposite. Article 133 of the Mexican Constitution prescribes that the constitution, the federal laws and all international treaties are the supreme law of the land. Thus, an international treaty has direct effect domestically without further legislative endorsement provided by the President of the Republic with the approval of the Senate, and more importantly, provided that they are substantively in accordance with the Mexican constitution.²⁹⁴ Notably, the Mexican constitution and in particular Article 133 do not address the question of the status of international treaties within the hierarchy of Mexican law.²⁹⁵ Therefore, this question has unsurprisingly already led to both significant legal disputes at the Mexican Supreme Court over the years and, unfortunately, to an incoherent line of cases reviewing the hierarchy between treaties and federal statutes. In an early Supreme Court decision, the court held that international treaties are on an equal footing with federal law.²⁹⁶ In 1999, the Court began reinterpreting the provision of Article 133 and came to the conclusion that international treaties (approved by the Senate) are ranked above federal laws but below the constitution.²⁹⁷ The Mexican Supreme Court reinforced latter position. It held that treaties are below the constitution but placed above all federal, state and municipal laws.²⁹⁸

Considering this and due to the fact that the remedy of self-help repossession is in direct conflict with Articles 14, 16 and 17 of the Mexican constitution, it appears that the extra-judicial remedy of possession cannot be adopted without considerable amendments to the Mexican constitution. Since the procedure to amend the constitution requires, in accordance with Article 135, a majority of two-thirds of members of the Congress of the

²⁹⁴ Alonso Gómez-Robledo Verduzco and Jorge Carpizo Mac Gregor, 'International treaties, the right to information and the right to privacy' (2004) 2 Mexican Law Review.

²⁹⁵ For a detailed analysis with references to jurisprudence: *ibid*; Juan Angel Becerra, *Interpretation and Application of Tax Treaties in North America* (2nd edn, IBFD 2013) 123-126; Maria Angela Jardim de Santa Cruz Oliveira, *International Trade Agreements Before Domestic Courts: Lessons from the EU and Brazilian Experiences* (Springer 2015), 186.

²⁹⁶ Suprema Corte de Justicia de la Nación, Amparo en Revisión, 2069/91 (Mexico).

²⁹⁷ Suprema Corte de Justicia de la Nación, Amparo en Revisión, 1475/98 (Mexico).

²⁹⁸ Suprema Corte de Justicia de la Nación, Amparo en Revisión, 120/2002 (Mexico).

Union in both chambers, as well as a majority of the state legislatures, this option is unlikely to happen.²⁹⁹ With this in mind, the fact that Mexico has lodged a declaration requiring the leave of the court for the exercising of the Convention's remedies including self-help possession seems well justified.

A similar legal position is found in Germany. There, treaties are equivalent to statutes but rank lower than the Constitution.³⁰⁰ Due to the demonstrated incompatibility of the German legal system with self-help possession, as expressed by ordinary legal provisions as well as express and implicit constitutional rules, it is expected that Germany would have to make a declaration requiring the leave of the court for the exercising of the Convention's remedies. This is especially true because the legal requirements for a constitutional amendment are equally high: Article 79 of the German constitution prescribes that an absolute two-thirds majority of the '*Bundestag*' along with a simple two-thirds majority of the '*Bundesrat*' is required.³⁰¹

The situation is not very different in France or Spain either. Article 96(1) of the Spanish constitution states that '*validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order*' and Article 95(1) further requires that '*the conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior Constitutional amendment.*' Therefore, in the case of a conflict between the constitution, and the Convention, the former would prevail. In

²⁹⁹ Mexican Government, 'Mexican Constitutional Amendment Process' <http://www.diputados.gob.mx/LeyesBiblio/proceso/lxi/117_DOF_10jun11.pdf> accessed 13th December 2017.

³⁰⁰ Article 59 Abs. 2 S. 1 GG, Beschluss vom 15.12.2015 - 2 BvL 1/12; Volker Epping and Christian Hillgruber, *Beck'scher Online-Kommentar zum Grundgesetz* (33th edn, C.H. Beck 2017), Art 59 para 41 with further references.

³⁰¹ *Ibid*, Art 79 para 13-14; Michael Sachs, *Grundgesetz* (7th edn, C.H. Beck 2014), Art 79 para 27 et seqq.

France treaties rank higher than statutes but lower than the Constitution.³⁰² Thus, in both cases, a burdensome constitutional change would be required too.

2.2.2. Summary: Prohibition of a Right to Self-help Repossession

Overall, it can be seen that the implementation of self-help possession into national law faces a number of legal challenges. The main obstacle in this area is the nature of the legal prohibition. Three cases can be distinguished.

Firstly, the prohibition against self-help possession may only be a matter of ordinary law such as, for example, in the exceptional case of Louisiana. More frequent, however, is the second case that the prohibition is rooted not only in ordinary law rules but also in express or implied constitutional provisions, or in the third case, is a combination of both. It is almost superfluous to mention that it is inherently more difficult to amend the constitution than ordinary law through the legislative process. Thus, from a legal point of view, it seems rather unlikely that self-help possession will be available in civil law jurisdictions. Therefore, upon debtor's default, creditors have no choice other than to seek assistance from the courts and go through judicial enforcement proceedings to obtain possession of the aircraft. This is especially so because it also seems that civil law jurisdictions tend to assign international treaties such as the Convention a lower rank than the constitution.

2.3. Summary: Controversy on Self-Help Repossession between Civil Law and Common Law

These fundamentally opposing views to extra-judicial possession have been subject for many years to endless and controversial discussion amongst scholars, practitioners and lawmakers. The lack of a generally accepted definition of the legal concept, the various

³⁰² Article 55 of the French Constitution; Constitutional Council of the French Republic, 'English Translation of the French Constitution' <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html>> accessed 17th January 2017.

requirements under different domestic laws and legal traditions, and fundamentally different approaches to enforcement of security interests explain why the remedy of self-help possession is so difficult to approach, and why there is limited consensus in this respect.

The comparative analysis has shown that the remedy of extra-judicial possession is generally found in jurisdictions based on the common law tradition, although there are substantial differences even within the examined common-law-based legal systems. The general consensus is that self-help possession is an essential feature of a modern secured transaction law because it is the most effective, cost-efficient and expedient way to realise a security interest. Thus, it is more advantageous than judicial enforcement measures that have largely proven to be to the disadvantage of both debtors and creditors due to delays, costs and unsatisfying outcomes. In sum, the right of possession without court intervention is well recognised in common law jurisdictions and perceived as a legitimate method to realise a security interest.

On the contrary, extra-judicial possession is usually not available in jurisdictions based on the civil law tradition as evidenced by those examined. Rather the rule seems to be that private possession actions by creditors are prohibited and accordingly, they must seek assistance of the courts to possess the collateral. Thus it remains to be seen whether self-help possession may emerge as the international standard for both civil and common law under the Convention. The implementation of this remedy seems to be a difficult if not impossible task for states based on the civil law tradition due to significant public policy – and more importantly, constitutional – obstacles. Thus, it is clear that one of the main rationales behind Article 54(2) was to bridge the differences between civil and common-law systems in relation to extra-judicial possession and not other remedies, for example, extra-judicial termination.

2.4. Right to Realisation

This section examines the availability of self-help enforcement remedies in the national law of the selected jurisdictions, in order to reinforce the point that most legal systems of the civil and common law tradition recognise at least to some extent the enforcement remedies provided for in Article 8 and 9 of the Convention without judicial intervention, although not necessarily for all forms of security interests and subject to important limitations. Thus, whereas the right to self-help possession is only available in common law jurisdictions and typically prohibited in civil law jurisdictions, the same is not necessarily true with regards to other extra-judicial enforcement remedies. It is critical to understand that some of the extra-judicial enforcement remedies provided by the Convention, especially a right to a private sale, should and could be equally implemented in both civil and common-law jurisdictions alike. This, of course, should be reflected in the declaration practice under Article 54(2).

2.4.2. *United States*

Clearly, the most prominent example for a creditor-friendly approach towards enforcement of security interest is the United States. Its UCC provides for an extensive array of remedies that may be exercised either through judicial process or self-help.³⁰³ A closer examination of the UCC reveals why the United States have lodged a declaration under Article 54(2) providing for the availability of self-help remedies: the UCC fully embraces, if not even mirrors, the extensive enforcement remedies upon the occurrence of a default provided by the Convention.

First of all, Section 9-610(a) UCC provides that a secured party may sell (by a public or private sale), lease, license, or otherwise dispose the collateral without judicial

³⁰³ John P. McCahey, 'Commentary on the Enforcement of Security Interests under UCC Revised Article 9' <http://www.hahnessen.com/uploads/39/doc/2001_01_jpm_commentaryarticle9.pdf> accessed 15th October 2016; Kathy Cabral and Teresa Wilton Harmon, 'Remedies Outside the Box: Enforcing Security Interests Under Article 9 of the Uniform Commercial Code' <<http://apps.americanbar.org/buslaw/blt/content/2012/08/article-03-cabral.shtml>> accessed 15th October 2016.

intervention (and apply the proceeds towards satisfaction of the secured obligations) provided that the creditor accomplishes every aspect of the disposition in a commercially reasonable manner in conformity with Section 9-610(b) UCC.³⁰⁴ There is no requirement that the secured party must be in possession of the collateral. It should be noted that the right to disposition of the collateral is subject to significant procedural requirements. First – unless the collateral is of perishable nature, its value is rapidly deteriorating or is typically sold on a recognised market³⁰⁵ – the secured party is obliged to sufficiently³⁰⁶ notify the debtor and certain other persons within a reasonable time about the in accordance with Section 9-611 UCC. Notably, according to Section 9-615(d), the secured creditor is required to account to the debtor for any surplus and the debtor remains liable to the secured party for any deficiency.

Secondly, the secured creditor is entitled in accordance with Section 9-620 UCC to retain the collateral in full or partial satisfaction of the secure obligation, generally known in the United States as '*strict foreclosure*'. Again, there is no requirement of possession for the exercise of this right. However, the right to strict foreclosure is subject to significant limitation. Most importantly, in case of partial satisfaction the debtor's explicit consent in the form of an authenticated record after default to accept the collateral towards satisfaction of the secured obligation is required.³⁰⁷ In case of full satisfaction, the debtor's consent after default is assumed, if the debtor fails to object to the secured creditor's notice to accept collateral in full satisfaction of the obligation within 20 days after the proposal is sent.³⁰⁸ Pursuant to Section 9-622(a) UCC, full or partial foreclosure

³⁰⁴ *Bank of New York v. Montana Board of Investments*, [2008] EWHC 1584 (Ch).

³⁰⁵ Section 9-611(b) and (d) UCC requires a '*reasonable authenticated notification of disposition*'.

³⁰⁶ Section 9-611(c) UCC outlines the required contents of the notice of disposition.

³⁰⁷ Section 9-620(a)(1) and (c)(1) UCC.

³⁰⁸ Section 9-620(a)(1) and 9-620(c)(2) UCC.

discharges the obligation to the extent consented to by the debtor and transfers to the secured party all of a debtor's rights in the collateral.

Thirdly, the secured creditor is also entitled to enforce the security interest through judicial process. This requires a two-step process: first, obtaining a judgment on the secured debt, and, secondly, executing the judgment upon the collateral. The relevant provision of Section 9-601(a) UCC states that a secured creditor '*may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure*'.

Fourthly, Section 9-607(a) together with Section 9-607(c) UCC entitles the secured creditor to collect in a commercially reasonable manner from account debtors and other persons obligated to make payment to the debtor.

2.4.2. England

In a similar way to the law of the United States, English law takes a creditor-friendly approach towards the enforcement of mortgages. Indeed, the mortgagee steps into the shoes of the owner following the occurrence of an event of default. Therefore, under the English legal system, a mortgagee may rely on a variety of other rights, including taking possession and control of the object³⁰⁹, selling³¹⁰ or granting a lease³¹¹ of any such object, or collecting or receiving any income or profits arising from the management or use of any such object³¹² without judicial assistance.³¹³

³⁰⁹ Malcolm Waters, Elizabeth Ovey and Mark Fell, *Retail Mortgages* (Sweet & Maxwell 2013), para 17-02 et seqq; Lightman and others, (n 252) para 13-011; *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 WLR 931..

³¹⁰ Beale and others, (n 244) para 18.41 et seqq.

³¹¹ *Berkshire Capital Funding Ltd v Street* [1999] 25 EG 191; Farrand and Clarke, (n 244) 25.037.

³¹² Beale and others, (n 244) para 18.39; *White v City of London Brewery* (1889) 42 Ch D 237 (CA); *Cockburn v Edwards* (1881) 18 Ch D 449 at 457; Waters, Ovey and Fell, (n 309) para 18-05.

³¹³ Norton Rose Fulbright; Evans; Wood, (n 267) para 20.014 et seq; Nath and Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, (n 241); Beale and others, (n 244) para 18.19.

It must be noted that in case of a sale, a mortgagee has a duty to obtain the best price reasonably obtainable³¹⁴, and to act in good faith³¹⁵ and for proper purposes,³¹⁶ although he may decide the method³¹⁷ – meaning public or private – and timing³¹⁸ of the sale, if he decides to sell³¹⁹ at all. Of course, as already mentioned, a mortgagee may also appoint a receiver to do this to shield himself from civil liability. The right to redemption provided by Article 9(1) of the Convention is, however, more problematic. Under English law, a mortgagee only has a right to foreclosure that must be sought through the English courts.³²⁰ In this scenario, the secured creditor takes the secured assets in fulfilment of the underlying obligation.

2.4.2. Spain

In comparison to England and the United States, the enforcement remedies to realise collateral are limited. As a general rule under Spanish law, after default, a security interest can be realised through judicial process in accordance with the Civil Procedural Act 1/2000 (*Ley de Enjuiciamiento Civil*) or without intervention of the court through a public sale supervised by a notary. Only in exceptional circumstances may a secured creditor rely on other extra-judicial enforcement remedies. Further, it must be pointed out that a *pactum commissorium*, that is an agreement providing for the automatic appropriation by the creditor of the secured collateral upon debtor's default is not recognised in Spain. For the purpose of this analysis, this section will focus on the extra-

³¹⁴ *PK Airfinance SARL v Alpstream AG* [2015] EWCA Civ 1318.

³¹⁵ *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295; Lightman and others, (n 252) para 13-005; Farrand and Clarke, para 25.091.

³¹⁶ *PK Airfinance SARL v Alpstream AG* [2015] EWCA Civ 1318; Neil Campbell, 'Court of Appeal clarifies mortgagee's duties in aircraft finance case' <<http://blogs.lexisnexis.co.uk/loanranger/court-of-appeal-clarifies-mortgagees-duties-in-aircraft-finance-case/>> accessed 15th December 2016.

³¹⁷ *Michael v Miller* [2004] EWCA Civ 282.

³¹⁸ *Silven Properties Ltd v Royal Bank of Scotland Plc* [2003] EWCA Civ 1409, [2004] 1 WLR 997.

³¹⁹ Beale and others, (n 244) para 18.49; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 WLR 1207; *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349.

³²⁰ *Ibid*, para 18.19; McGhee, (n 244) 39-001 et seqq.

judicial enforcement options for a pledge (*'prenda'*)³²¹, a chattel mortgage (*'hipoteca mobiliaria'*) and a hire-purchase agreement (*'Venta a Plazos de Bienes Muebles'*).³²²

Firstly, under Article 1872 of the Spanish Civil Code, a secured party has the right to notarial enforcement of pledges. A pledge does require the transfer of possession of the moveable assets in favour of the secured creditors. This will usually be carried out through a public auction. Interestingly, the precise procedure and requirements for the public auction are not set forth in the Spanish Civil Code. Therefore, the notary will typically set a time, place and date for a public auction to take place unless the parties have agreed upon the terms and conditions in the relevant security agreement. As a general rule, any surplus of the sale will be returned to the owner of the asset. If the first and second auction is not successful, in particular when the secured collateral is not sold or when the auction does not achieve the minimum bid, the creditor may become the owner of the collateral and the debtor shall be released from his debt.³²³

Secondly, in case of a chattel mortgage, for example for an aircraft, the enforcement procedure is regulated in the Non-Possessory Pledge and Movable Mortgage Act of 1954 (*'Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento'*).³²⁴ There is no requirement of possession by the secured creditor for chattel mortgages. However, they must be established by a public deed (*'escritura pública'*) before a notary and registered in a special registry (*'Registro de Bienes Muebles'*).³²⁵ The extra-judicial enforcement (*'procedimiento extrajudicial'*) of a chattel mortgage must take place in conformity with

³²¹ Article 1863-1873 Spanish Civil Code.

³²² For a more detailed overview over Spanish Secured Transactions Law see: Rodríguez de las Heras Ballell and Feliu Rey.

³²³ Miguel Lamo De Espinosa Abarca and Alejandro Alemany, 'Spanish security law issues for UK (and other foreign) lenders: practical aspects of structuring, negotiating and closing transactions' (2010) 4 Law and Financial Markets Review 571; DLA Piper, 'Novedades en las Subastas Notariales y Judiciales' <<https://www.dlapiper.com/~media/files/insights/publications/2015/11/novedades%20en%20las%20subastas%20notariales%20y%20judiciales.pdf>> accessed 15th November 2017.

³²⁴ Ley sobre Hipoteca Mobiliaria y prenda sin desplazamiento de posesion, of 16 December 1954, BOE 18 December 1954.

³²⁵ See for example, <http://www.registradores.org/registro-de-bienes-muebles/> and <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/registros/registro-bienes-mueble>.

the provisions set forth in Articles 86-88 and 95-96 of the Chattel Mortgage and Non-Possessory Pledge Act. These rules essentially reflect the outlined enforcement procedure of Article 1872 of the Spanish Civil Code, which require a public sale supervised by a notary. Finally, it should be noted that a similar extra-judicial regime through a notary-supervised public sale is available for hire-purchase agreements under Article 16 of the Spanish Hire-Purchase Agreements Act.³²⁶

2.4.2. Germany

At first glance, Germany takes the most restrictive approach towards the enforcement of security interests with regards to aircraft. The reason is that the German legal system specifically sets forth a mandatory enforcement regime for registered liens in aircraft ('*Registerpfandrecht*') which is regulated in the Act Governing Rights in Aircraft ('*Gesetz über Rechte an Luftfahrzeugen*').³²⁷ Interestingly, the Act stipulates in Section 47(1) together with Section 99(1) that registered liens in aircraft must be enforced through the judicial enforcement proceedings for security interests in real estate provided for in the German Code of Civil Procedure. Thus, enforcement remedies without judicial intervention are specifically prohibited. Rather, secured creditors must realise the aircraft lien through a public auction supervised by the court.³²⁸

In case of a security agreement ('*Sicherungsvereinbarung*') under German law however, the terms and conditions for the realisation of a security interest primarily depend on the agreement of the parties.³²⁹ Thus, the parties are generally free to determine in the security agreement itself whether the secured collateral may be realised

³²⁶ Ley de Venta a Plazos de Bienes Muebles, BOE, 14 July 1998.

³²⁷ For an overview see: Marcus Schladebach and Julia Kraft, 'Das Registerpfandrecht an Luftfahrzeugen' [2012] *Zeitschrift für Bank- und Kapitalmarktrecht* 270; Josef Zintl and Thomas Grädler, 'Das Registerpfandrecht an Luftfahrzeugen als Sicherungsmittel der Kreditwirtschaft' *Recht der Transportwirtschaft* 261; Anna Recker, 'Luftverkehrsgesellschaften in der Insolvenz' *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 428.

³²⁸ Sections 171c ZPO et seqq.

³²⁹ Alexander Fridgen, Arndt Geiwitz and Burkard Göpfert, *Beck'scher Online-Kommentar Insolvenzordnung* (6th edn, C.H. Beck 2017), 173 InsO para 2.

through a private or public sale. Without an express agreement, the German Federal Court held that the most important consideration of the chargee must be to realise the security in the most considerate and profitable manner.³³⁰ Therefore, preference has typically to be given to a private sale of the secured collateral unless the parties have specifically agreed to apply a different enforcement regime, such as for example, the more time-consuming and costly one for pledgees that takes the form of a public auction that requires burdensome notice and announcement requirements, and a one month waiting-period.³³¹ Other enforcement rights than a public or private sale, such as for example, a right of use or a right to collect the incoming arising from the management or use of the collateral – that is already expressly recognised for a pledge pursuant to Section 1213 BGB – must be specifically agreed upon the parties in the security agreement.³³²

More difficult is the relationship between the chargee's right to grant a lease of a secured collateral under Article 8(1)(b) of the Convention and the right of appropriation under Article 9(1) of the Convention with the German legal system, which shall now be discussed.

At first glance, there is an argument that the right of appropriation would be in direct conflict with Section 1229 BGB, that stipulates that a *pactum commissorium* clause under which upon the debtor's default ownership to the pledged collateral would automatically pass to the pledgee is void unless it has been agreed after the debt has become due. Interestingly, German courts have, however, held that this rule may not be applied analogously to other forms of securities.³³³ The reasons for this is the rationale

³³⁰ Ibid, 173 InsO para 2; BGH NJW 2000, 352: 'Aufgrund seiner Pflicht zur bestmöglichen Verwertung ist der Sicherungsnehmer zwar gehalten, eine vom Sicherungsgeber nachgewiesene günstige Verwertungsmöglichkeit sorgfältig zu prüfen und diese auszunutzen.'

³³¹ Sections 1233-1240 BGB.

³³² BGH NJW 2007, 216: 'Ein Sicherungseigentümer, dem nach der Sicherungsabrede mit dem Sicherungsgeber kein Nutzungsrecht zusteht, kann von einem Dritten die durch Vermietung des Sicherungsguts gezogenen Nutzungen nicht gem. § 812 I 1 Alt. 2 BGB (Eingriffskondiktion) herausverlangen.'; See also BGH NJW 1980, 227.

³³³ BGH DB 1995, 2109.

behind Section 1259 BGB that expressly allows sophisticated parties – that are commercial parties and public legal entities – to disregard the prohibition against a *pactum commissorium*.³³⁴ For these reasons *Benjamin van Bodungen* among others³³⁵ considers Section 1229 BGB, at least in the context of a security agreement between commercial parties, as not applicable. Thus, it seems more conceivable than not that the German legal systems recognise the chargee's right to appropriation upon the debtor's default if so provided in the agreement.

Equally, problematic is the chargee's right to grant a lease of a secured collateral without intervention of the court. Broadly speaking, such a right is not recognised in the German legal order. The closest comparable legal institution may be the right to administration ('*Zwangsverwaltung*') pursuant to Section 152 ZVG ('*Zwangsversteigerungsgesetz*') that allows the secured creditor to procure the appointment of an administrator. The primary task of an administrator is to maintain and manage the value of the secured object.³³⁶ Income arising from the adequate use of the secured object may be used towards satisfying the secured obligation.³³⁷ It is important to point out, however, that administrators are generally appointed by the court on the basis of a judicial decision and their application is limited to real property.³³⁸ For this reason, the chargee's right to grant a lease in the secured object upon debtor's default seems doubtful, even if so provided in the agreement.

³³⁴ Säcker and others, (n 229) 1229 BGB para 9.

³³⁵ von Bodungen, (n 230) 138 et seq with further references.

³³⁶ Section 152(1) ZVG.

³³⁷ Roland Böttcher and Ulrich Ketter, *Gesetz über die Zwangsversteigerung und Zwangsverwaltung* (6th edn, C.H. Beck 2016), 152 ZVG 38.

³³⁸ *Ibid.*, 152 ZVG para 5-6.

2.4.2. France

Under French law, according to Article L 122-1 of the Code of Civil Aviation (*'Code de l'aviation civile'*), the only security interest that may be granted in an aircraft is a contractual mortgage. As a principle under French law, after default, this type of security interest may only be realised through a public sale with supervision of the court (*'saisie et vente forcee des aeronefs'*).³³⁹ This enforcement procedure is subject to a number of formal requirements and may consist of several steps. Firstly, it should be noted that the secured creditor is generally entitled to apply for a court order to attach the aircraft (*'saisie conservatoire'*) in order to enable its realisation. The sale will then take place under the supervision of the court subject to the requirements set forth in Articles R 122-2 to R 122-4. These provisions require for example, a prior formal and substantiated notification of the creditor's intention to realise the aircraft mortgage through a public sale to the debtor and other interested parties. To reinforce the publicity of the public auction, according to Article R 122-4 the notification must also be registered in the respective registry.

Another example of an extra-judicial remedy in French Law can be found in relation to the enforcement of pledges. They can either be enforced by selling the secured object under supervision of the court or, more importantly for this legal analysis, by its appropriation without court intervention. The appropriation must take place in accordance with Articles 2347, 2348 of the Civil Code together with Article L 622-7 of the Commercial Code. In particular, Article 2348 of the Civil Code provides that the parties may at the time of the creation of the pledge or afterwards agree to a *pactum commissorium*. The only limitation to such a clause is found in Articles L 622-7 of the

³³⁹ Articles R 123-1 to R 123-9 Code of Civil Aviation.

Commercial Code that provides that it must not be agreed after the opening of insolvency proceedings.

2.4.2. Summary: Recognition of a Right to Self-help Realisation

A review of these civil and common-law jurisdictions reveals that all of them recognise enforcement remedies without judicial intervention though by no means always to the same extent or the same solution.

The most significant example is the legal system of the United States. Interestingly, before the United States ratified the Convention and implemented it into its domestic law, all the extra-judicial remedies provided by the Convention could already be found in domestic law provisions of the UCC, so no legislative actions were necessary. The situation is slightly different with English law. With the exception of an extra-judicial right to redemption, all other enforcement remedies already existed for secured creditors before the Convention entered into force. This strongly confirms the general picture painted by legal experts who highlight the creditor-friendly approach towards enforcement in common-law legal systems. It also explains why all common-law based Contracting States declared pursuant to Article 54(2) not to require court involvement.

Things get a bit more complicated, however, when one takes a glance at the examined legal systems based on the civil law tradition. In Spain, for example, extra-judicial enforcement of various security interests may only be sought through a public sale supervised by a notary. In France and Germany, the enforcement of aircraft mortgage is regulated in a separate law that requires a public sale with supervision of the court. Still, there are various non-judicial rights for other types of securities. Notably, Germany and France recognise a right to appropriation without court intervention subject to the outlined limitations of a *pactum commissorium*. Furthermore, under German law, parties to a security agreement are free to agree on additional enforcement rights, including a

right to a private sale, a right of use or a right to collect the incoming arising from the management or use of the collateral.

It can be seen that various extra-judicial remedies are found in civil-law systems. Typically, they are confined exclusively to certain types of securities that may be a result of the *numerus clausus* principle in these jurisdictions. Clearly, then, there is a strong argument for treating the extra-judicial remedies provided by the Convention in the same way and for having them integrated in a separate law for international security interests relating to aircraft mortgages to resolve potential conflicts between national, state, and the Convention's policies to the enforcement of security interests. In order to overcome these obstacles legislators should not be afraid to reconsider their position regarding self-help remedies. The main issue is the right to extra-judicial possession, and not necessarily other enforcement remedies. It is therefore suggested that a solution to the question of the implementation of the Convention's extra-judicial remedies in common- and civil law jurisdiction could and should be found within the national laws of states themselves.

D. Conclusion: The Necessity of a Pick-and-Choose Approach to Self-Help Remedies

The argument made in this chapter is as follows:

First, non-judicial remedies are a critical factor for the efficient implementation of the Convention and the Protocol in both civil and common-law jurisdictions, and thus, should be implemented to the widest extent possible bolstering creditors' confidence in their ability to defend their legal rights effectively at all stages of proceedings. Common-law systems fully recognise the extra-judicial remedies provided by the Convention as a matter of substantive law, while their peers in civil law systems recognise them only to some extent. Indeed, many extra-judicial remedies, such as for example, the right to extra-judicial termination and private sale, can be found in jurisdictions based on both the common and civil law. The core of the problem is not therefore, self-help remedies in general as is usually perceived, but in particular the right to extra-judicial possession in civil-law jurisdictions.

Secondly, however, this fact is not reflected in the declaration practice in the context of Article 54(2) of the Convention that requires Contracting States to declare whether the Convention's remedies may be exercised with or without leave of the court. With the exception of Brazil, all Contracting States have taken an all-or-nothing approach to self-help remedies under the Convention instead of a pick-and-choose approach. The point is that Article 54(2) of the Convention has been inadvertently misapplied and misinterpreted by at least one authoritative scholar and likely a number of experienced practitioners and state officials to the disadvantage of a wide and successful implementation of the Convention.

Thirdly and consequently, the interpretation of Article 54(2) of the Convention has to be clarified, if not corrected. The first important point is to highlight that Article 54(2)

provides Contracting States with the possibility to pick and choose which of the various Convention's remedies may be exercised with or without leave of the court. It follows that for most civil law jurisdictions it would be enough to make a declaration under Article 54(2) prohibiting extra-judicial remedies only in terms of (re-) possession actions. The second, and arguably, more important point, is that if Article 54(2) is interpreted in accordance with the overarching purpose of the Convention, a blocking effect of Article 54(2) on non-judicial remedies provided by the national legal system as suggested by one scholar is neither tenable nor feasible.

Chapter 5 Insolvency Remedies under the Convention

A. Introduction

This part of the thesis is devoted to the insolvency-related provisions of the Convention and the Protocol. It is generally accepted that, in order to create a rapid and efficient enforcement regime for the creation, registration, and protection of security interests, it is insufficient to merely create and enact a strong framework of creditor's rights outside insolvency proceedings, because if *'the security interest is not effective in the debtor's insolvency proceedings then much of the utility of the security interest vanishes'*, a phenomenon also known as the bankruptcy law enforcement principle.³⁴⁰ Put simply, deficiencies in the legal framework of the Convention and the Protocol in both in- and out insolvency proceedings are a threat to their very goal of increasing the availability and reducing the cost of credit for mobile equipment in the aircraft sector.

It is therefore even more surprising that despite better understanding in the early stages of the Cape Town project, the plan was to leave these crucial insolvency questions to domestic law, because an effective interplay between an international legal convention and national insolvency law was considered not an easy endeavour: *'While bankruptcy law cannot be ignored, it is completely unrealistic to attempt to influence national bankruptcy law in any significant way through a Convention (or rules) dealing with the international recognition of security interests in mobile equipment.'*³⁴¹ The Convention's historical materials demonstrate that lengthy discussions took place on this topic of excluding or including insolvency related matters into the Convention's scope of

³⁴⁰ Charles W. Mooney, 'Insolvency Law as Credit Enhancement: The Insolvency-Related Provisions of the Cape Town Convention and the Aircraft Protocol' (2004) 13 *International Insolvency Review* 27, 35; Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 5.56.

³⁴¹ UNIDROIT, 'Cumming Report (Study LXXII - Doc. 4)' <<http://www.unidroit.org/english/documents/1992/study72/s-72-04-e.pdf>> accessed 7th August 2017, 9 et seq.

applicability, arguably mainly because previous regional harmonisation attempts within the European Union in the field of insolvency laws have failed.³⁴²

However, the viewpoint, in favour of a complete exclusion of insolvency-related provisions in the Convention, was rejected. The delegations were also not able to compromise on the subsequent suggestion: to include just one substantive provision providing for the recognition of one of the Convention's security interest as a security interest in national insolvency proceedings. Due to the continuous efforts of the AWG and other international experts, a perspective taking a much more ambitious approach to insolvency ultimately prevailed. This was mainly because of the argument made that, considering the economic effects envisaged by the Convention, and further that *'insolvency laws have a direct and significant impact on the availability and cost of credit'*, a minimalistic approach would be in sharp contrast to a commercially oriented and legally sound Convention.³⁴³ Thus, in the end, the drafters were able to introduce a number of provisions that impact the treatment of international security interests under domestic insolvency legislation to a remarkable extent. The following section provides an examination of the most relevant insolvency-related provisions of the Convention and the Protocol, before exploring their practical application in various jurisdictions. This includes an analysis of the underlying rationale and economic effect of the insolvency provisions.

Most importantly, this chapter will examine the Contracting States options when deciding which insolvency regime relating to aircraft objects shall apply. Article XI(1) together with Article XXX(3) of the Protocol gives ratifying states a choice of three insolvency regimes relating to aircraft objects – Alternative A, Alternative B or apply the

³⁴² For a detailed analysis of the drafting history of the insolvency provisions, see van Zwieten, (n 18) 54-58.


³⁴³ UNIDROIT, 'AWG Memorandum (Study LXXII - Doc. 16)' <<http://www.unidroit.org/english/documents/1995/study72/s-72-16-e.pdf>> accessed 7th August 2017, 27.

Contracting State's insolvency laws. These options were primarily included in the Protocol in an effort to reach a political compromise between the civil and common law on the highly sensitive topic of insolvency. Under Alternative A, the insolvency administrator or the debtor is obliged to give possession of the aircraft object to the secured creditor following the lapse of the waiting period specified by a Contracting State unless the debtor cures all defaults and agrees to perform all future obligations under the agreement within this period. Alternative B is structurally similar to Alternative A but with one key difference: courts determine the terms and conditions for the creditor's repossession.

This part seeks to establish that Alternative A of the Protocol has a significant advantage over Alternative B (and largely the application of a Contracting State's insolvency laws) in terms of predictability, speediness and economic benefits. This is crucial because any delay between a debtor's default and repossession in insolvency is significant in terms of availability and cost of credit in aircraft finance. Thus, it follows that Alternative B runs counter this very rationale and the Convention's underlying bankruptcy enforcement principle. To underline the point that Alternative A is essential to achieve the purpose of the Convention, this section examines the legal history of this provision to determine its legal and economic purpose. This shall be done to show that Alternative A is superior to Section 1110 of the United States Bankruptcy Code on many counts and will consequently be at least as (if not more) beneficial in terms of economic benefits as its predecessor. To illustrate this, this part of the thesis proceeds as follows.

First, Section 2 provides a legal analysis of the insolvency provisions of the Convention and the Protocol. It is devoted to the crucial questions of which remedy is the most beneficial of the insolvency remedies and why? In doing this, the section will engage in a critical evaluation of the insolvency provisions, with special focus given to

Alternatives A and B. This examination will help to contextualise why Alternative B cannot be regarded as a real option for Contracting States when ratifying the Convention given its questionable legal and economic policy. Rather, to reap the economic benefits of the Convention, Contracting States should rely on Alternative A, that is not only in line with the underlying rationale of the Cape Town Convention but also carries significant improvements from the US experience under the United States Bankruptcy Code.



Based on such, Section 3 continues with a more specific examination of various insolvency proceedings under national law and the basic requirements for their commencement. The examination illustrates the following substantive points. The first one is that there is a closely intertwined relationship between the Convention's remedies, Alternative A under the Protocol and the requirements for the commencement of insolvency laws under domestic law which differ remarkably. Specifically, the strength of creditor protection under the Convention in insolvency is dependent on the type of insolvency proceeding, the test to determine insolvency but also the persons who may file for the commencement of insolvency proceedings. Second, it will be shown that Contracting States may choose Alternative A, while still pursuing domestic insolvency policy objectives and choices due to the Convention's sophisticated declaration system generally and in particular, Article 39 and Article 40 of the Convention.

In completing the analysis, Section 4 resolves the question of how Alternative A can be effectively interpreted and applied, given its particular characteristics, to ensure its successful implementation in civil and common law jurisdictions alike. It thereby ultimately clarifies the relationship between the insolvency remedies under the Convention and national law.

B. Insolvency Provision of the Convention

The starting point, then, is to examine the insolvency regime created by the Convention and the Protocol.

1. Recognition Rule

The single most important provision in ensuring the protection of creditor rights is the recognition rule established under Article 30(1) of the Convention. It aims to override domestic insolvency legislation that might invalidate one of the Convention's security interests due to non-compliance with domestic perfection requirements. It is important to note that the recognition rule pursuant to Article 30(2) does not invalidate security interests in insolvency proceedings that would be effective pursuant to the applicable law. From a practical point of view, this is also why practitioners usually aim, in the interest of their clients, to comply with both the Convention's and domestic laws' requirements. The relevant part of Article 30 reads as follows:

Article 30 — Effects of insolvency

1. In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

2. Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.

1.1. Commencement of Insolvency Proceedings

Two points require further clarification — one regarding the scope of applicability, the other concerning the meaning of 'effective'. On the first point, Article 30(1) depends on the commencement of insolvency proceedings. As the Convention points out, '*insolvency proceedings*' in Article 1(1) for this purpose, '*means bankruptcy, liquidation or other*

collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation'. Consequently, any other form of private agreement that is effected without control or supervision by a court is excluded from this definition.³⁴⁴

Further, it is important to note that the substantive question of when statutory insolvency proceedings are to be opened is left to the applicable insolvency laws, where jurisdictions differ remarkably. The requirements for the commencement of insolvency proceedings under domestic laws will be explored in more detail at the end of the chapter.³⁴⁵

1.2. Meaning of Effective

On the second point, the Official Commentary explains that 'effective' means that '*the international interest will be recognised as proprietary in nature and therefore in principle rank ahead of the claims of unsecured creditors*'.³⁴⁶ At first glance, the obligations of Contracting States under the recognition rule appear unambiguous, but, on closer examination, difficult questions of utmost economic importance arise. In Germany, for example, a holder of a security interest is required to contribute four per cent of the proceeds to cover the expenses incurred for the determination of the security interests and five per cent for the enforcement of the security interest.³⁴⁷ Undoubtedly, a total of nine per cent of the proceeds constitutes a substantial sum in relation to aircraft vessels and equipment. Thus, the interpretation of the '*effective*' criterion appears to become

³⁴⁴ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.18.

³⁴⁵ See page 209.

³⁴⁶ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.210.

³⁴⁷ Sections 170 and 171 IO; This does apply to creditors with a right to separate satisfaction ('*Absonderungsrecht*') but not to creditors with a right to separation ('*Aussonderungsrecht*') from the estate: see further footnote 515.

significant, since it may put a considerable financial burden on secured creditors. Even more so, if one considers that a number of legal systems impose legal duties to contribute to the costs of insolvency on secured creditors.

1.3. Exceptions to the Recognition Rule

1.3.1. Preference or Transfer in Fraud

Notably, there are two significant exceptions to the recognition rule set forth in Article 30(3). The first one points out that the recognition rule doesn't affect domestic rules in insolvency law relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors. The terms '*preference*' or a '*transfer in fraud*' of creditors are not defined in the Convention, and are therefore governed by the applicable insolvency law.

1.3.1. Stay of Enforcement

The second exception clarifies that Article 30 also does not affect any domestic procedural rules relating to the enforcement of proprietary rights, which are under the control or supervision of the insolvency administrator. A typical example of this in many jurisdictions is an automatic stay of enforcement proceedings against the debtor and his assets upon the initiation of insolvency proceedings. Indeed, all our sample jurisdictions provide for a stay of enforcement upon the opening of insolvency proceedings.

1.3.1.3. Germany

For example, in Germany the court approves the commencement of insolvency proceedings in the form of a court order.³⁴⁸ The opening of judicial insolvency proceedings has the effect of an automatic stay on individual enforcement by creditors against the estate.³⁴⁹ At this stage, creditors are required to resort to the collective

³⁴⁸ Section 27 IO.

³⁴⁹ Section 89 IO.

enforcement regime provided by the insolvency laws.³⁵⁰ Furthermore, the debtor's power of disposal is transferred to a court-appointed insolvency administrator.³⁵¹ German law provides for a few exceptions to the automatic stay, especially with regard to secured creditors, including conditional sellers, lessors, and security interest holders.³⁵²

1.3.1.3. *England*

Similarly, under English law the opening of insolvency proceedings (administration or liquidation) generally requires creditors to pursue their claims through the prescribed insolvency procedures, but there are some significant differences. In liquidation proceedings, the effect of a stay on enforcement is stipulated in Section 130(2) of the Insolvency Act 1986. It provides that: '*... no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.*'³⁵³ On top of this, Section 127 provides that any property dispositions after the commencement of proceedings are void unless approved by the court.³⁵⁴ Notwithstanding this, secured creditors are entitled to satisfy their claims out of their secured collateral in liquidation proceedings; similarly, a moratorium is also imposed upon all creditors in administration proceedings. Secured creditors are, however, generally not exempted from the moratorium. Rather, Paragraph 43 of Schedule B1 to the Insolvency Act of 1986 requires secured creditors to seek consent of the insolvency administrator or permission of the court before enforcing or realising the secured collateral.

³⁵⁰ Section 87 IO.

³⁵¹ Sections 27(1) and 80(1) IO.

³⁵² For a German perspective on the possible implementation of the Convention: Eva-Maria Kieninger, 'Effects in insolvency of the international interest in mobile equipment: a German perspective' (1999) 4 Uniform Law Review 397, 401-405; von Bodungen, (n 230) 361-365.

³⁵³ *Nordic Trustee ASA & Anor v Oxx Petróleo E Gás SA (Em Recuperação Judicial) & Anor* [2016] EWHC 25 (Ch): '*It can therefore be seen that the purpose of the automatic stay under section 130(2) is to preserve the pari passu ranking of unsecured creditors in a winding up and to prevent any individual unsecured creditor from obtaining an illegitimate advantage over other unsecured creditors in the collective process of winding up.*'

³⁵⁴ *Officeserve Technologies Ltd (In Liquidation) v Anthony-Mike* [2017] EWHC 1920 (Ch).

1.3.1.3. France

Also in France upon the opening of judicial insolvency proceedings, there is a stay on enforcement that applies equally to secured and unsecured creditors.³⁵⁵ The judge *ex officio* upon the opening of judicial insolvency proceedings applies this effect. All types of creditors are required to follow the procedure prescribed by the French rules on insolvency. The mandatory procedure involves filing proofs of claim against the debtor at the competent court.³⁵⁶ The period for filing is generally two months after notice of the commencement of insolvency proceedings unless the creditor resides outside France (in which case it is four months). Once the claim has been filed, the judge verifies the claim and then decides whether to recognise or reject its admission to the insolvency proceeding. In the case of a failure to file, the creditor faces serious legal consequences.³⁵⁷ In particular, a valid security interest loses its priority over an unsecured claim until after the insolvency proceedings.³⁵⁸ Further and more severely, secured creditors are excluded from participating in the distribution of proceeds during the insolvency proceedings unless the judge grants an exception, i.e. *force majeure* resulting in late filing. This procedure is, however, as a general rule not applicable to creditors with certain property rights.³⁵⁹ For example, a conditional seller or financial lessor is entitled to take possession of the collateral from the debtor's estate despite the automatic stay. The same is true for creditors who hold ownership rights by way of security. To furthermore balance the interests of debtors and creditors, the judge may prevent creditors with property rights from exercising their right to possession, by paying the amount due provided that secured assets is essential for the continuation of the debtor's business.

³⁵⁵ Articles L 622-21, L 631-14, L 641-3,.

³⁵⁶ Articles L 622-24, L 622-27, L 631-14, L 641-3.

³⁵⁷ Dennis Faber and others (eds), *Ranking and Priority of Creditors* (Oxford University Press 2016), para 9.14 and 9.17.

³⁵⁸ Article L 622-26.

³⁵⁹ Article L 624-16.

1.3.1.3. *United States*

Likewise, in the United States the opening of insolvency proceedings has the effect of an automatic and expansive stay on individual enforcement against the debtor's estate.³⁶⁰ It applies equally to unsecured and secured creditors.³⁶¹ The automatic stay further requires that any party in possession of property that belongs to the debtor's estate must return it.³⁶² This even applies to secured creditors who may have taken the secured collateral in possession as a precautionary measure due to the debtor's default. As will have become clear, the broad automatic stay aims to enable the debtor to rearrange his business affairs. If a creditor wilfully³⁶³ violates the automatic stay, the court has several measures at its discretion. First, a creditor who is in breach of the terms of an injunction may be held in contempt of the court.³⁶⁴ Secondly, the injured debtor is entitled to recover damages, including costs and attorneys' fees³⁶⁵, and in some cases even punitive³⁶⁶ damages.³⁶⁷ Thirdly, other creditors affected by the breach may be entitled to damages as well.³⁶⁸ It is important to note that courts have been very strict in enforcing the automatic stay, even for trivial infringements. United States law provides several exceptions to the automatic stay in, for example, the railway, aircraft and shipping industries, among others.

³⁶⁰ 11 USC Section 362; *In re Germansen Decorating, Inc.*, Bkrcty.N.D.Ill.1992, 149 B.R. 517; *Franklin Sav. Ass'n v. Office of Thrift Supervision*, C.A.10 (Kan.) 1994, 31 F.3d 1020.

³⁶¹ 11 USC Section 362(a).

³⁶² *In Matter of Powell*, Bkrcty.S.D.Ga.2016, 555 B.R. 907: '*Secured creditor 'wilfully' violated automatic stay when, with knowledge of debtor's Chapter 13 filing, it decided not to return motor vehicle that it had repossessed prepetition unless debtor paid all past due sums owing on motor vehicle loan.*'; *In re Castillo*, Bkrcty.N.D.Ga.2011, 456 B.R. 719; *Nissan Motor Acceptance Corp. v. Baker*, N.D.Tex.1999, 239 B.R. 484.

³⁶³ *In re Matthews*, Bkrcty.S.D.Ala.1995, 184 B.R. 594; *In re Sculky*, Bkrcty.E.D.Pa.1995, 182 B.R. 706: '*Willful violation of stay occurs when creditor has adequate notice of bankruptcy and intentionally commits act that violates stay.*'

³⁶⁴ *Borg-Warner Acceptance Corp. v. Hall*, C.A.11 (Ala.) 1982, 685 F.2d 1306; *In re Ionosphere Clubs, Inc.*, S.D.N.Y.1994, 171 B.R. 18.

³⁶⁵ *In re Schwartz-Tallard*, C.A.9 2015, 803 F.3d 1095.

³⁶⁶ *In re Crysen/Montenay Energy Co.*, C.A.2 (N.Y.) 1990, 902 F.2d 1098: '*Any deliberate act taken in violation of automatic stay, which violator knows to be in existence, justifies award of actual sanctions; additional finding of maliciousness or bad faith on part of offender warrants further imposition of punitive damages.*'

³⁶⁷ 11 USC Section 362(h).

³⁶⁸ *Lodge v. Kondaur Capital Corp.*, C.A.11 (Ga.) 2014, 750 F.3d 1263: '*Damages may be recovered by any individual injured by willful violation of automatic stay.*'

2. Remedies on Insolvency under the Convention

It is of utmost importance to read Article 30(3)(b) together with Article XI and Article XXX(3) of the Protocol. Taken together, these provisions constitute the real innovation of the Convention and the Protocol. It may be useful to take a closer look at these provisions. Article XXX(3) of the Protocol constitutes one of the most important opt-in declarations of the Convention, thus it will have no effect unless a Contracting State has lodged an appropriate declaration. Contracting States may decide which type of insolvency proceedings — which set of remedies provided by Article XI of the Protocol — shall be applicable when the state is the primary insolvency jurisdiction.³⁶⁹ It provides the following:

Article XXX — Declarations relating to certain provisions

3. A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, or the entirety of Alternative B of Article XI and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article XI.

It can be seen, pursuant to Article XI(1) in conjunction with Article XXX(3) of the Protocol, that Contracting States have three options when decided with insolvency regime shall apply in relation to aircraft objects. It is, however, important to note that EU Member States may not make a declaration under Article XI, although they may enact domestic legislation to similar effect. The reason for this is that on 28 April 2009 the

³⁶⁹ According to Article 1(n) of the Convention 'primary insolvency jurisdiction' means: '*the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise;*'.

European Community acceded to the Convention and the Aircraft Protocol, and that this accession covers certain matters of the Convention and Protocol - in particular provision of substantive insolvency law - on which count the European Community has legal competence.³⁷⁰ This said, the declaration specifically provides that EU Member States retain competence concerning the rules of substantive law as regards insolvency.³⁷¹

2.1. Application of Domestic Insolvency Law

First, Contracting States may, contrary to the goals of uniformity, predictability, and legal certainty, decide not to lodge a declaration, resulting in the application of their own domestic insolvency laws. If this is the case, the strength of the Convention's enforcement systems depends on the debtor or creditor friendliness of the applicable insolvency regime in terms of secured credit. Again, the various insolvency regime provided by domestic laws will be explored a bit later.³⁷² The two remaining options in relation to the insolvency remedies provided by Article XXX together with Article XI of the Protocol, are the hard rule, 'Alternative A', and the soft one, 'Alternative B'. Both options establish obligations for the insolvency administrator, the debtor and national courts. Because of Alternative A in particular, Article XI of the Aircraft Protocol has been described as the single most significant provision economically.³⁷³

2.2. Alternative A

Alternative A is the most creditor-friendly enforcement solution, and has a significant impact on domestic insolvency laws. This is also why it is referred to as the 'hard' rule. It reads as follows:

³⁷⁰ Berend Crans, 'The Implications of the EU Accession to the Cape Town Convention' (2010) 35 Air and Space Law 1.

³⁷¹ The declaration having been made by what was then the EC reads as follows: '*At the time of accession to the Aircraft Protocol, the Community will not make a declaration pursuant to Article XXX(1) concerning the application of Article VIII nor will it make any of the declarations permitted under Article XXX(2) and (3). The Member States keep their competence concerning the rules of substantive law as regards insolvency.*'

³⁷² See page 207.

³⁷³ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 5.56; van Zwieten, (n 18) 62.

Alternative A

2. *Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:*

(a) the end of the waiting period; and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3. *For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.*

4. *References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.*

5. *Unless and until the creditor is given the opportunity to take possession under paragraph 2:*

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. *Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.*

7. *The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to*

perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8. With regard to the remedies in Article IX(1):

(a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and

(b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

12. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

13. The Convention as modified by Article IX of this Protocol shall apply to the exercise of any remedies under this Article.

Under Alternative A, upon occurrence of an insolvency-related event³⁷⁴ the insolvency administrator or the debtor is obliged to give possession of the aircraft object to the secured creditor following the lapse of the waiting period specified by a Contracting State unless the debtor cures all defaults and agrees to perform all future obligations under the agreement within this period.³⁷⁵ In the absence of an automatic stay under the applicable law, the secured creditor becomes immediately entitled to possession of the aircraft. During the waiting period, the insolvency administrator or the debtor in possession of the aircraft object is obliged to preserve the aircraft object, and maintain it and its value in accordance with the agreement. This does not limit the creditor's right to apply for other forms of interim relief available under the applicable law. Notably, after the expiration of the waiting period no exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed. In other words, the creditor is then, entitled to exercise all default remedies, most importantly his right to possession, without restrictions imposed by the applicable law.

2.2.2. Legislative History of Alternative A

It must be pointed out that Alternative A closely resembles Section 1110 of the US Bankruptcy Code. This is no coincidence. In fact the drafter's intention was the creation of an improved version of Section 1110 in an effort to draw on positive economic experiences in the United States finance market.³⁷⁶ Thus, consideration of the function and legal purpose of Section 1110 is useful in understanding, interpreting, and applying Alternative A under the Convention and the Protocol. Accordingly, the next section is

³⁷⁴ As the Protocol points out, '*insolvency-related event*' in Article I(m) for this purpose, means either the commencement of the insolvency proceedings *or* the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action.

³⁷⁵ The overwhelming majority of Contracting States have declared that the waiting period under Article XI shall not exceed sixty (60) calendar days, the remaining Contracting States thirty (30) calendar days.

³⁷⁶ Mooney, (n 340) 37, Jeffrey Wool, 'Next Generation of International Aviation Finance Law: An Overview of the Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applied to Aircraft Equipment' (1999) 20 University of Pennsylvania Journal of International Law 499, 533; Wool, 'The Case for a Commercial Orientation to the Proposed UNIDROIT Convention as applied to Aircraft Equipment', (n 10) 298.

thus devoted to the crucial question: what is the purpose and rationale behind Section 1110? In order to answer this question, we have to briefly consider the legal situation under United States law to better understand the significance of Section 1110 for aircraft finance.

2.2.2. Origin of Alternative A: Chapter 11 U.S. Code Section 1110

Under United States law, upon the commencement of insolvency proceedings, there is an automatic, immediate and expansive stay on individual enforcement against the debtor or against the property of the debtor's estate by secured and unsecured creditors.³⁷⁷ However, Section 1110 of the US Bankruptcy Code explicitly provides for a significant exception to the automatic stay for aircraft equipment and vessels. The current version of Section 1110 of the United States Bankruptcy Code reads as follows:

11 U.S. Code § 1110 - Aircraft equipment and vessels

(a)

(1) Except as provided in paragraph (2) and subject to subsection (b), the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies, under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court.

(2) The right to take possession and to enforce the other rights and remedies described in paragraph (1) shall be subject to section 362 if—

³⁷⁷ 11 USC Section 362.

(A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the approval of the court, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of the order is cured before the expiration of such 60-day period;

(ii) that occurs after the date of the order and before the expiration of such 60-day period is cured before the later of—

(I) the date that is 30 days after the date of the default; or

(II) the expiration of such 60-day period; and

(iii) that occurs on or after the expiration of such 60-day period is cured in compliance with the terms of such security agreement, lease, or conditional sale contract, if a cure is permitted under that agreement, lease, or contract.

(3) The equipment described in this paragraph—

(A) is—

(i) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that, at the time such transaction is entered into, holds an air carrier operating certificate issued pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo; or

(ii) a vessel documented under chapter 121 of title 46 that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that, at the

time such transaction is entered into, holds a certificate of public convenience and necessity or permit issued by the Department of Transportation; and

(B) includes all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.

(4) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the approval of the court, to extend the 60-day period specified in subsection (a)(1).

(c)

(1) In any case under this chapter, the trustee shall immediately surrender and return to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(3), if at any time after the date of the order for relief under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession to the trustee.

(2) At such time as the trustee is required under paragraph (1) to surrender and return equipment described in subsection (a)(3), any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, shall be deemed rejected.

(d) With respect to equipment first placed in service on or before October 22, 1994, for

purposes of this section—

(1) the term “lease” includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term “security interest” means a purchase-money equipment security interest.

Put simply, Section 1110 stipulates that the rights of a security interest holder, a lessor, or a conditional seller to take possession and enforce the security interest in aircraft equipment and vessels, e.g. to sell, lease, or otherwise retain or dispose of such equipment, are not affected. Rather, secured creditors are entitled to exercise their legal rights with regard to the secured aircraft asset despite the automatic stay, if following the commencement of insolvency proceedings, the debtor-in-possession fails to cure all pre-bankruptcy payment defaults in a period of 60 days, and further does not agree to perform all future obligations of the debtor under the relevant security agreement, lease, or conditional sales agreement to the secured creditor.³⁷⁸ In other words, Section 1110 requires a debtor to make a crucial decision at a very early stage in the reorganisation process of the business: pay the secured creditor or lose the most important asset for the continuation of the business. Clearly, then, Section 1110 fulfils an important function in minimising credit risk. It does this by protecting the substantive right of the secured creditor, through expeditious and effective court remedies in bankruptcy, and more accurately reorganisation proceedings under Chapter 11. To reinforce this point, it is useful to briefly examine the legal history of Section 1110.

³⁷⁸ Donal Patrick Hanley, *Aircraft Operating Leasing* (Kluwer Law International 2012), 136; Mooney, (n 340) 37 et seq.

2.2.2. *Legislative History of Section 1110*³⁷⁹

Interestingly, this provision finds its roots in the Bankruptcy Act of 1898, which did not initially contain a special treatment for the aircraft industry. Rather, the exception in Section 77(j) was tailored towards the railway industry. It read as follows: *The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.*

However, due the provision's beneficial effect of widening access to more affordable credit for the railway industry, the same protection was extended in 1957 to the aircraft industry by introducing Section 116(5) to the Bankruptcy Act. The underlying rationale was that the railway and aircraft industry share at least two major characteristics: both industries are capital-intensive, largely dependent on external long-term financing and consequently bear tremendous investment risks for creditors. Further, both sectors have a reputation of being susceptible to insolvency.³⁸⁰ This was also reflected in the legislative history that states that *'smaller lines are presently unable to attract the capital necessary for their current reequipment requirements'*. Moreover, it was thought that the extension of the special protection in insolvency to aircraft carriers *'would result in an increased availability of capital and at a lower interest rate than would be demanded under present conditions'* and lead to the *'extensive use of equipment trust financing as the financial basis for a major reequipment program.'*³⁸¹

³⁷⁹ For a more detailed history of Section 1110 see: Gregory P. Ripple, 'Special Protection in the Air[Line Industry]: The Historical Development of Section 1110 of the Bankruptcy Code' (2002) 78 Notre Dame Law Review 281; Glenn S. Gerstell and Kathryn Hoff-Patrinis, 'Aviation Financing Problems Under Section 1110 of the Bankruptcy Code' (1987) 61 The American Bankruptcy Law Journal 1; Sandor E. Schick, 'When Airlines Crash: Section 1110 Revisited' (1992) 48 The Business Lawyer 277; Jason Kilborn, 'Thou Canst Not Fly High With Borrowed Wings: Airline Finance and Bankruptcy Code Section 1110' (1999) 8 George Mason Law Review 41.

³⁸⁰ Ripple, (n 379) 281 et seq.

³⁸¹ In re Continental Airlines, Inc., 932 F.2d 282 (3d Cir. 1991), 290 quoting H.R.Rep. No. 944, 85th Cong., 1st Sess., reprinted in 1957 U.S.Code Cong. Admin.News 1926, 1926.

Section 116(5) provided as follows:

The title of any owner, whether as trustee or otherwise, to aircraft ... leased, subleased, or conditionally sold to any air carrier ... and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

Introducing Section 516(6) to the Bankruptcy Act finally granted the same protection, a decade later in 1968, to the shipping industry, following the same rationale of increasing the availability of capital and lowering the costs of credit. In sum, there were three exceptions to the automatic stay in reorganisation proceedings for high-value and mobile transportation equipment.

On June 29, 1984, Congress subsequently passed the new federal Bankruptcy Code, which carried over the special protections for the railroad, aircraft and shipping industries. The legislative history reveals that the special protection in insolvency for transportation equipment was not uncontested at the time. In fact, it was a highly debated issue during the drafting process. For example, it has been said that the right to retake possession of the transportation equipment in insolvency without regard to the reorganisation process is *'harsh in [its] application'*. Again others argued that *'whether or not there was an initial need for these provisions, their existence has become largely addicting to the financing industry, and now the industry claims it would simply cease financing of the relevant equipment if the protection were removed.'*¹³⁸² To achieve a fair balance between the interests of debtors and creditors, the viewpoint that the creditor's absolute right to repossession had to be adjusted finally prevailed. This is why today Section 1110 provides the trustee or debtor-in-possession with an essential choice early in

³⁸² House of Representatives Report 95-595, H.R. REP. 95-595 (1977), 239 et seqq.

the process of reorganisation: to accept the terms of such a security agreement, lease, or conditional sale contract, or to allow the creditor to take possession of the secured aircraft collateral. However, it must be stressed that since its enactment, Section 1110 has undergone several legislative amendments so as to improve its impact, efficiency, and clarity. They shall now be discussed in more detail.

In 1994, Congress made three significant changes to the provision.³⁸³ First, it was clarified that the application of Section 1110 is not limited to purchase-money security interest or conditional sale agreements. Rather, it applies to any type of security interest in accordance with the substantive approach taken under the UCC. Second, the scope of covered aircraft carriers was expanded. Most importantly, the certification requirement at the time when the aircraft entered into financing was removed. This was necessary to address the outcome of the *Pan Am* litigation³⁸⁴ in which the court held that financing agreements entered into before the carrier obtained the certificate were not eligible for protection under Section 1110. Further, the protection of Section 1110 was extended to include commuter airlines. Third, the interplay between Sections 1110 and 1129 was clarified. This was seen as particularly important because the *Continental Airlines* litigation³⁸⁵ raised the crucial question of whether the secured creditor's right to take possession of the aircraft is affected by Section 1129, which entitles a debtor to propose a reorganisation plan that overrides creditor objections subject to the court's approval.

The case can be summarised as follows. Continental Airlines did conclude several agreements with its secured creditors pursuant to avoid the consequences under Section 1110, but subsequently submitted a reorganisation plan pursuant to Section 1129 which

³⁸³ Kathryn Hoff-Patrinis, 'Aviation Finance Revisited: The 1994 Amendments to Section 1110 of the Bankruptcy Code' (1995) 69 *The American Bankruptcy Law Journal* 167.

³⁸⁴ *In re Pan Am Corp.*, 124 B.R. 960, 971 (Bankr. S.D.N.Y. 1991), affirmed in part, 125 B.R. 372 (S.D.N.Y. 1991), affirmed, 929 F.2d 109 (2d Cir. 1991).

³⁸⁵ *In re Continental Airlines, Inc.*, 125 BR. 399 (D. Del. 1991), affirmed, 932 F.2d 282 (3d Cir. 1991).

sought to modify exactly these prior agreements. Ultimately, the issue was resolved by legislation instead of jurisprudence. Congress amended Section 1110 to make it clear that the creditor's right to take possession is not affected, limited or otherwise affected by any other provision of the Bankruptcy Code or by any power of the court.³⁸⁶

In 2000, another legislative amendment took place to counteract the decision of the district court in the *Western Pacific* litigation.³⁸⁷ The essential question for the bankruptcy court to answer regarded the interpretation of Section 1110 in the case where the debtor agrees to perform under the lease and cured pre- and post-petition defaults within the statute's 60/90 days period but then subsequently defaults again. The airline's legal position was that Section 1110 ceases to apply or in other words, that it is entitled to cure post-petition defaults that occurred thereafter. Taking the opposing position, the aircraft financiers interpreted Section 1110 to preclude a continuing 30-day right to cure each post-petition default under the financing agreements, thus allowing for an unqualified and immediate right to repossession under Section 1110(a). In the first instance proceedings, the court followed the interpretation of the aircraft financiers, but this success was only short-lived. In March of the same year the decision was overturned on appeal and the debtor's interpretation was ultimately legitimised. Apparently, Congress did not favour the final outcome of the litigation, which significantly undermined the special protection granted to aircraft financiers. The ultimate result of this were the 2000 amendments to Section 1110 that rectified the situation to the benefit of the aircraft finance sector.³⁸⁸

The conclusions which can be drawn from the examination of the legal history are two-fold: first, the drafting of Section 1110 has not been sufficiently clear from its

³⁸⁶ Hoff-Patrinis, (n 383) 194 et seq; Ripple, (n 379) 294.

³⁸⁷ *In re Western Pacific Airlines, Inc.*, 219 B.R. 305 (D.Colo. 1998), affirmed, 221 B.R. 1 (D.Colo. 1998), appeal dismissed, 181 F.3d 1191.

³⁸⁸ Ripple, (n 379) 297.

wording and could perhaps have been better expressed so as to maximise legal certainty and predictability for the purpose of avoiding future litigation. In fact, there may be still some outstanding matters to be decided by the courts. Secondly, since its enactment in 1984, legislators and judges have steadily been improving Section 1110 in an effort to reach its full potential and for the purpose of bolstering aircraft creditors' confidence in their ability to effectively defend their legal rights in insolvency proceedings. Today, there is less room for interpretation that limits or hinders the effective protection of aircraft creditors under Section 1110.

2.2.2. Economic Benefits of Section 1110 (and Alternative A)

In the previous section, the thesis examined how Section 1110 applies to bankruptcy proceedings in the United States, with special regard to its legal history and policy. While the legal purpose and policy is crucial to the understanding, interpretation, and application of Section 1110, and to some extent for Alternative A, it also raises some other questions. The following section shall briefly assess the economic evidence supporting the rationale behind this provision to answer the essential question of whether or not Section 1110 has facilitated aircraft finance since its enactment. In other words, has the rationale held true? This is a crucial debate, because, as already mentioned, Section 1110 was used as a template for Alternative A in an effort to provide the same, if not better, economic benefits to the whole aviation industry. For this reason, the relevant literature shall be reviewed to determine their respective relevance and impact on the development of the Convention. It will be shown that the Convention's policy decision can be based on a number of empirical studies in the field of secured transaction law in general but also in particular with regards to the Convention.

The starting point, then, is to look at initial ex-ante assessment of the expected economic impact of the Convention, which uses the costs savings by US airlines resulting

from the enactment of 1994 Bankruptcy Reform Act with its revised Section 1110 to support the implementation of the bankruptcy enforcement principle embedded in Alternative A.³⁸⁹ The study assumes that the Bankruptcy Reform Act's clarification with regard to Section 1110 directly affected the market pricing and returns on U.S. airline stocks because of the resulting lower credit risk and liquidity risk. Specifically, the study compares the stock market value of four publicly traded airlines—American, Delta, Southwest and U.S. Air—before and after the passage of the reform, and conclude that the reform resulted in an increase in stock value of 442.8 million US dollars.³⁹⁰ Interestingly, the study further notes that the prediction of the economic gain is rather conservative since *'the U.S. airlines in question were already rated investment-grade or close to investment-grade (i.e., BBB or BB) at the time clarifications of Section 1110 came into force, and their financing costs reflect no sovereign risk premiums.'*³⁹¹ The positive effect of the right of repossession after the sixty-day period granted to financiers of aircraft under Section 1110 of Chapter 11 of the U.S. Bankruptcy Code (and thus presumably under Alternative A) is further reinforced by additional research. For example, in 2006, Anthony Saunders, Anand Srinivasan, and Ingo Walter published a research paper that draws on the original economic impact study and confirms its original outcome. They conclude that the enactment of the Convention and Protocol is likely to result in a significant reduction in cost of credit, especially for developing countries that do not offer protection comparable to United States law.³⁹² Assuming a maturity of 12 years, they firstly find that adoption of the Cape Town framework is likely to result in a reduction in the cost of credit from 5% to 33%, and secondly, assuming its global ratification, they estimate cost savings between \$371 billion to \$524 billion US dollars

³⁸⁹ Saunders and Walter, (n 6).

³⁹⁰ Ibid, 365.

³⁹¹ Ibid, 365-366.

³⁹² Saunders, Srinivasan and Walter, (n 6) 9.

over a period of 20 years.³⁹³ Similarly, a dissertation exploring the implication of Section 1110 on aircraft finance is consistent with Saunders and Walter's original economic assessment study and reaches the conclusion that the '*cost of all forms of capital (i.e., weighted average cost of capital, debt and equity) decrease in the reliance of airlines on §1110 financing.*'³⁹⁴ Finally, the research done by Vadim Linetsky has to be mentioned in two respects. First, with regard to the UK ratification of the Convention and Protocol, he concludes that '*UK based airlines are expected to save between 538 million pounds and 2.705 billion pounds in funding costs' resulting from the gateway role of the Convention 'in opening up UK airlines access to capital markets, similar to the pivotal role of Section 1110 in opening up the US EETC market.*'³⁹⁵ Second and more generally, he notes that due to the reduction in repossession delay under Alternative A (with a maximum period of sixty days), airlines will not only benefit from an enhancement of airline credit ratings but also from the resulting cost savings, which he estimates to be about \$161 billion US dollars in the period of 2009 to 2030.³⁹⁶

The conclusion that can be drawn from this analysis is that lack of any delay between a debtor's default and repossession in insolvency is essential in terms of availability and cost of credit in aircraft finance. This is also suggested by empirical evidence.³⁹⁷ Clearly, then, there is an argument for having a strong right to repossession

³⁹³ Ibid, 20.

³⁹⁴ Jeremy Ari Day, 'The repoman cometh: The implications of U.S. airline experience under Section 1110 of the Bankruptcy Code for the Convention on International Interests in Mobile Equipment' (DPhil thesis, The Fletcher School of Law and Diplomacy 2009), 154.

³⁹⁵ Linetsky, 'Accession to the Cape Town Convention by the UK: An Economic Impact Assessment Study', (n 6) 2.

³⁹⁶ Linetsky, 'Economic Benefits of the Cape Town Treaty', (n 6) 2.

³⁹⁷ See for example: John Armour and others, 'How do creditor rights matter for debt finance? A review of empirical evidence' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar Publishing 2015) or Sergei A. Davydenko and Julian R. Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K.' (2008) LXIII *The Journal Of Finance* 565.

that empowers the international enforcement of creditor rights in insolvency, such as that provided by Section 1110³⁹⁸ or Alternative A.

2.2.2. Contrasting Alternative A and Section 1110³⁹⁹

Based on the foregoing analysis, one can now look at Alternative A and compare it with Section 1110. It will be shown that Alternative A contains several improvements that stand out, and which will ultimately enhance the legal position of secured creditors in aircraft finance. Interestingly, some of Alternative A's improvements are directly connected to the US experience under Section 1110. There is an argument that a more effective, speedy, and clear version of Section 1110, such as that provided by Alternative A, might further increase creditors' confidence, with the effect of lowering credit costs and widening access to capital.

2.2.2.2. Scope of Application

The first fundamental point to consider is the divergent substantive scope of application. Thus, questions arise regarding what types of transactions, assets, debtors, and proceedings these legal rules apply to. It will be shown that the scope of application of Alternative A is much wider than Section 1110, resulting in a higher availability in litigation.

(i) Types of Transactions

First and foremost, the application of Alternative A relies on the existence of an international interest.⁴⁰⁰ It must be recognised that the concept of an international interest

³⁹⁸ Standard & Poor's, 'The Rating Process for Aircraft Financings' <<http://www.as777.com/data/business/data/Rating%20Process%20for%20Aircraft%20Financings.pdf>> accessed 19th June 2017', 7: 'In the case of U.S. financings that qualify for protection under Section 1110 of the U.S. Bankruptcy Code, a one- or two-notch rating elevation is based also on slightly reduced default risk.'; See also Wool, 'The Case for a Commercial Orientation to the Proposed UNIDROIT Convention as applied to Aircraft Equipment', (n 10) 298; Wool, 'Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit - a Framework as Applied to the Cape Town Convention', 2-3; Anthony Saunders and others, 'The Economic Implications of International Secured Transactions Law Reform: A Case Study' (1999) 20 University of Pennsylvania Journal of International Law 309, 329-334.

³⁹⁹ This is partially based on the research done by: Donald G. Gray, Dean N. Gerber and Jeffrey Wool, 'The Cape Town Convention aircraft protocol's substantive insolvency regime: a case study of Alternative A' (2016) 5 Cape Town Convention Journal 115.

is precisely defined under the Convention. The crucial reference can be found in Article 1 of the Convention, in the provision laying down a rather comprehensive list of defined terms and their specific meanings in the context of the Convention's legal framework. Paragraph (o) defines the concept of 'international interest' under the Convention *as an interest held by a creditor to which Article 2 applies*'. Article 2 is important in two respects. First, the second paragraph of Article 2 mentions the three main types of transactions governed by the Convention, which are a security agreement, a title reservation agreement or a leasing agreement. Once again, the specific meaning of each type of agreement in the context of the Convention is specifically defined in Article 1 to ensure a uniform and autonomous meaning in all Contracting States. Second, Article 2 also contains an essential reference to Article 7, laying down the formal requirements of what constitutes an agreement under the Convention. The provision requires an agreement (a) in writing that (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose; (c) enables identification of the object in conformity with the Protocol; and (d) in the case of a security agreement, allows for determination of the secured obligations.

A similar range of types of transaction is protected under Section 1110. Its wording explicitly stipulates that secured creditors with a security interest under a security agreement, lease, or conditional sale contract are protected.⁴⁰¹ Thus, any lease or security interest in aircraft, whether it is a true lease or not, e.g. sale-and-leaseback agreement, is now covered by Section 1110.⁴⁰² In comparison, it can be seen that Alternative A and Section 1110 cover more or less the same ground in terms of transactions. The main difference lies in the fact that the Convention provides a specific

⁴⁰⁰ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 5.63.

⁴⁰¹ 11 USC Section 1110(1)(a) stipulates: '... the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment...'

⁴⁰² Gray, Gerber and Wool, (n 399) 128 et seq; Hoff-Patrinou, (383) 169.

definition for each type of transaction. This leads us to the next question: what types of assets do Alternative A and Section 1110 govern?

2.2.2.2. *Types of Assets*

Alternative A substantively applies to aircraft objects. The term is further refined in Article I(2)(c) to cover airframes, aircraft engines and helicopters—and where applicable, *'all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto'*. It should also be noted that only aircraft capable of carrying at least eight persons including crew or goods in excess of 2750 kilograms are eligible for protection. A similar restriction applies for aircraft engines. Only propulsion aircraft engines that have at least 1750 lb of thrust, or turbine-powered or piston-powered aircraft engines that have at least 550 rated take-off shaft horsepower are eligible for protection under Alternative A.⁴⁰³ Section 1110 takes a very similar approach. On the one hand, its scope of application is wider as it covers aircraft, aircraft engines, propellers, appliances, or spare parts. On the other, it is narrower as it substantively applies solely to *'all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.'*

In comparison, it appears that one defining improvement of Alternative A is its inclusive and expansive approach to records. By stating that literally all data, manuals and records belonging to the secured collateral must be handed over after the expiration of the waiting period, it avoids any potential dispute as to whether certain documents belong to the secured collateral or not. To the contrary, under Section 1110, there is a legal requirement to list all records and documents covered by the security agreement. In its

⁴⁰³ Article I(2)(e) of the Protocol.

relevant part, it states that equipment: '*includes all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.*'⁴⁰⁴ It can be seen that the absence of such a requirement under Alternative A substantially eases and accelerates the creditor's ability to remarket the aircraft. The next step is then to answer the question: what types of debtors do Alternative A and Section 1110 govern?

2.2.2.2. *Types of Debtors*

Indeed, the crucial difference between Section 1110 and Alternative A is the type of debtor in relation to which the creditor has the protection given by the provision. In particular, the application of Section 1110 is dependent on two formal requirements.⁴⁰⁵ First, the aircraft carrier must be in possession of an air carrier operating certificate by the Secretary of Transportation that authorises it to provide air transportation service.⁴⁰⁶ Second, it requires the debtor to be a citizen of the United States.⁴⁰⁷ In other words, Section 1110 only provides protection for financiers in cases where the debtor is an air carrier based in the United States. By contrast, the territorial scope of Alternative A is much broader. These insolvency remedies are available to the creditor in *every Contracting State* of the Convention if the debtor's primary insolvency jurisdiction made a declaration under Article XXX(3) of the Protocol, undertaking to apply Alternative A. Article 1 paragraph (n) of the Convention defines the concept of primary insolvency jurisdiction under the Convention as '*the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place*

⁴⁰⁴ 11 USC Section 1110(3)(b); Gray, Gerber and Wool, (n 399) 125 et seq.

⁴⁰⁵ *Ibid.*, (n 399) 126 et seq.

⁴⁰⁶ 11 USC Section 1110(a)(3)(A)(i).

⁴⁰⁷ 49 USC Section 40102(a)(2) defines air carrier as '*a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.*'

of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise'.

2.2.2.2. *Types of Proceedings*

Another characteristic difference between Alternative A and Section 1110 is the scope of application with regard to the type of insolvency proceedings. It must be pointed out that the benefit of Section 1110 is only available to creditors if the debtor is reorganising his business pursuant to Chapter 11 of the US Bankruptcy Code.⁴⁰⁸ Chapter 11 proceedings are generally referred to as *rehabilitation bankruptcy*. However, this also means that Section 1110 is not available for creditors if the debtor is subject to a *liquidation bankruptcy* proceeding pursuant to Chapter 7 of the US Bankruptcy Code.

The main differences between Chapter 7 and Chapter 11 bankruptcies can be briefly summarised as follows. Chapter 7 bankruptcies' ultimate goal is the termination and liquidation of the debtor's business. For this purpose, the court appoints a trustee for the purpose of selling the debtor's assets and distributing the proceeds to creditors on a pro-rata basis. This is also why Chapter 7 is generally referred to as liquidation bankruptcy. On the contrary, Chapter 11 bankruptcies objective is to give debtors additional time and protection from creditors, allowing for reorganisation — rather than liquidation — of the company. This is also why it is generally referred to as reorganisation bankruptcy. In such proceedings, the debtor remains in possession and control of his assets but he has a duty to act in the best interests of the creditors. Chapter 11 proceedings provide the debtor with special powers, such as, for example, the right to propose a plan for reorganisation that might even reschedule or reduce existing

⁴⁰⁸ Gray, Gerber and Wool, (n 399) 127 et seq; Gerstell and Hoff-Patrinis, (n 379) 3.

obligations. Typically, a failure to reorganise under Chapter 11 results in Chapter 7 bankruptcy.⁴⁰⁹

In contrast, the scope of Alternative A is again much wider. Arguably, it constitutes the most significant enhancement over Section 1110. According to Article XI of the Protocol, Alternative A substantially applies upon the occurrence of an *insolvency-related event*. The concept of an insolvency-related event is once again defined under the Convention, and can be found in Article I(m) of the Protocol. It defines it as (a) *either the commencement of the insolvency proceedings* or (b) *the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action*. This definition is exceptional in its expansive approach. First, as already explained earlier, it includes any bankruptcy, liquidation or other collective judicial or administrative proceedings.⁴¹⁰ Second and most interestingly, the second part of the definition seeks to prevent any attempt of a Contracting State to circumvent the application of the Convention's insolvency remedies by stating that any intent or actual suspension of payments — whether officially declared as insolvency proceedings or not under the applicable law, e.g. by governmental or judicial intervention — avails the creditor to the benefits of Alternative A.⁴¹¹

2.2.2.2. *Summary: Wider Scope of Application for Alternative A*

From what has been said thus far with regards to the scope of application, Alternative A can be considered as a significant development by comparison to Section 1110. As already discussed, this is because Alternative A draws on the previous experiences and difficulties of financiers under Section 1110 of the US Bankruptcy Code, and accordingly

⁴⁰⁹ Dennis Faber and others (eds), *Commencement of Insolvency Proceedings* (Oxford University Press 2012), para 20.3.

⁴¹⁰ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) 4.18.

⁴¹¹ Gray, Gerber and Wool, (n 399) 127 et seq.

provides creditors with maximum protection in terms of the types of transactions, assets, debtor and insolvency proceedings covered. Having clarified the differences in the substantive scope of application, the focus now turns to the divergent substantive features in the application of Alternative A and Section 1110. It will be demonstrated that there are some profound differences, most of which make Alternative A the preferable solution in terms of legal certainty, predictability, and efficiency.

(i) *Length of Waiting Period*

First, with regards to the waiting period under Section 1110 and Alternative A respectively, there is at least one significant difference. As already mentioned, Section 1110 stipulates a fixed waiting period of *sixty days* (60) in which the debtor-in-possession is required to cure all pre-bankruptcy payment defaults and perform all future obligations under the relevant security agreement, otherwise the secured creditor is entitled to exercise all his remedies despite the automatic stay.⁴¹² This is not true for Alternative A. On the contrary, the waiting period under Alternative A is not defined by the provision itself. Rather, Article XI(3), together with Article XXX(3) of the Protocol, requires Contracting States to specify by declaration the time-period within which the debtor is obliged to give possession of the aircraft object to the secured creditor unless the debtor cures all defaults and agrees to perform all future obligations under the agreement.⁴¹³ Indeed, the overwhelming majority of Contracting States declared a similar time frame of sixty (60) days, as in Section 1110. Interestingly, however, a number of Contracting States specified a waiting period of thirty (30) days, allowing for a more rapid repossession of the aircraft by the creditor in the case of insolvency.⁴¹⁴

⁴¹² 11 USC Section 1110(a)(2)(A).

⁴¹³ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 5.60 and 5.117.

⁴¹⁴ UNIDROIT, 'Status of the Aircraft Protocol with regards to insolvency provisions.' (<http://www.unidroit.org/depositary-2001capetown-aircraft?id=454>) accessed 30th January 2017.

2.2.2.2. *Perfection Requirement*

Second, another profound difference between Alternative A and Section 1110 can be found in relation to the formal steps that must be taken to be eligible for protection in the insolvency proceedings. When compared, Section 1110 appears to be more rigid in this regard. Interestingly, at first glance there is no registration requirement under Section 1110.⁴¹⁵ The provision expressly stipulates that the secured creditor's right to take possession is not limited or otherwise affected by any other provision of the Bankruptcy Code or by any power of the court.⁴¹⁶ But it is important to note that Section 1110 presupposes that the creditor's interest is valid. The validity of the security interest depends on whether it has been perfected under state law. If it has not, the security interest is subject to the avoidance powers of a trustee or debtor-in-possession under Section 544.⁴¹⁷ In contrast, Article A has the benefit of Article 30 of the Convention which gives a way of making the international interest valid against the insolvency officer that is an alternative to perfection under national law, i.e. registration in the International Registry prior to the commencement of the insolvency proceedings.⁴¹⁸

2.2.2.2. *Duty to Deliver*

Third, Section 1110 and Alternative A differ in the debtor's obligation during insolvency. For example, in Section 1110, the first sentence of paragraph one broadly defines the creditor's right to *take possession* of such equipment in compliance with the security

⁴¹⁵ 11 USC Section 1110(a)(1); Gray, Gerber and Wool, (n 399) 129; In re Air Vermont, Inc., C.A.2 (Vt.) 1985, 761 F.2d 130: '*From our perspective, however, we think it more significant that § 1110 makes no mention whatsoever that a conditional sales contract must be recorded in order for § 1110 to apply. Rather, § 1110, on its face, empowers a vendor of aircraft pursuant to a conditional sales contract to repossess the aircraft provided only that elements of the section are satisfied.*'

⁴¹⁶ Vanguard Airlines, Inc. v. Int'l Aero Components, Inc., 295 B.R. 908 (Bankr. W.D. Mo. 2003): '*Section 1110(a)(1) also states that the rights of a creditor are not limited or otherwise affected by any other provision of this title or by any power of the court. 11 U.S.C. § 1110(a)(1). Thus, § 1110 would constitute an avoidance of the Debtor's counterclaim that IAC's unperfected security interest was usurped by the Debtor's hypothetical lien under § 544(a)(1).*'

⁴¹⁷ 11 USC Section 544(a)(1).

⁴¹⁸ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 5.63.

agreement, lease, or conditional sale contract.⁴¹⁹ It does, however, leave open the question of the debtor's obligations of cooperation in the process of repossession. This raises an important question: is or should the debtor be required to deliver the aircraft to a location requested by the creditor? Or should the debtor only be required to provide the secured creditor with information about its current location for retrieval? By its terms, Section 1110 solely stipulates that the equipment has to be *surrendered* or *returned* by the debtor.⁴²⁰ Put otherwise, it provides only a relief from the automatic stay. Thus, if this question is not addressed in the respective security agreement, it may give rise to uncertainty, especially because this question has not yet been addressed in case law.⁴²¹ This question of the debtor's obligation in the process of repossession does not, however, arise under Alternative A. The wording of Alternative A is very clear in this regard. It mandates that the debtor shall *give possession* of the aircraft object to the creditor.⁴²² Accordingly, under the Convention and the Protocol, the debtor is required to deliver the aircraft to the creditor unless the parties to the security agreement agree otherwise.

2.2.2.2. *Duty to Preserve and Maintain the Aircraft*

Fourth, with regard to the debtor's obligation under Section 1110 and Alternative A, there seems to be another crucial difference. In Alternative A, the wording of the provision makes clear that the insolvency administrator or the debtor is subject to an obligation to preserve the aircraft object, and maintain it and its value in accordance with the agreement.⁴²³ This does, however, not limit the insolvency administrators or debtors use of the aircraft object under the Convention provided that this preserves and maintains the

⁴¹⁹ 11 USC Section 1110(a)(1).

⁴²⁰ 11 USC Section 1110(a)(3)(B) and 1110(c)(1).

⁴²¹ Jeffrey W. Gettleman, 'Restructuring Aircraft Fleets Under Section 1110 of the Bankruptcy Code: Selected Issues' (2005) 19 *The Air & Space Lawyer* 13.

⁴²² Alternative A: Article XI(2) of the Protocol.

⁴²³ Alternative A: Article XI(5)(a) of the Protocol; Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 5.61.

value of the secured aircraft object.⁴²⁴ Section 1110 seems to adopt a different approach and leaves this question open, and thus to the agreement between the parties.

2.2.2.2. *Self-Help*

Fifth, another crucial difference between Section 1110 and Alternative A can be observed with regards to the availability of self-help remedies. With respect to Section 1110, it has already been discussed that the American UCC generally recognises the creditor's right to possess the collateral without judicial intervention upon the debtor's default as a legitimate enforcement remedy among many others.⁴²⁵

It is however far less certain whether under Alternative A the right to self-help is available in all Contracting States in insolvency. The wording under Alternative A requires that after the expiration of the waiting period no exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed. The effect of the latter obligation for Contracting States is, however, not clear. As rightfully pointed out by *Kristin van Zwieten*, the Convention leaves open the question of whether the Contracting State's obligation not to prevent or delay the exercise of any remedies permitted by the Convention after the waiting period has expired without remedying defaults or giving possession requires that judicial intervention is no longer required for exercise of the creditor's remedies.⁴²⁶ Furthermore, the Official Commentary does not answer this question in its entirety.⁴²⁷

Still, on the basis of the previous examination of self-help remedies under the Convention and under domestic laws, it is submitted that this provision cannot be interpreted in a manner which overrides a Contracting States' decisions under Article

⁴²⁴ Alternative A: Article XI(6) of the Protocol.

⁴²⁵ Section 9-609 UCC.

⁴²⁶ van Zwieten, (n 18) 67 footnote 100.

⁴²⁷ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.330 and 5.62.

54(2) to prohibit non-judicial remedies available under the Convention. Self-help remedies remain available only to the extent they are provided under the Convention pursuant to Article 54(2) or under domestic laws pursuant to Article 12 of the Convention, notwithstanding an opt-in for Alternative A. It makes no sense that Alternative A changes the underlying nature of the Convention's remedies, if one considers the mandate under Article 14 of the Convention to exercise all remedies in accordance with national procedural requirements. This is even more so if one recalls that some remedies, such as for example the remedy of self-help possession, raise severe constitutional concerns in civil law jurisdictions. The correct interpretation must be that Alternative A cannot be considered to remove the requirement of judicial intervention. Rather, the Contracting States' obligation must be interpreted as that of ensuring rapid and effective judicial relief after the expiration of the waiting period (without the insolvency administrator or debtor curing all defaults and agreeing to perform all future obligations under the agreement). This would require the creditor seeking repossession of the secured aircraft to file for relief well before the expiration of the waiting-period so that the court may grant the requested relief in a timely manner.

2.2.2.2. Contractual Exclusion of Alternative A

Finally, according to Article IV(3) of the Protocol, parties are free to, by agreement in writing, exclude the application of the insolvency remedies under Article XI in their relations with each other. In fact, parties are further free in their relations with each other to derogate from or vary the effect of Alternative A. Section 1110 does not provide for such party autonomy.

2.2.2. Summary: Superiority of Alternative A over Section 1110

With regard to Section 1110, there are still many unanswered questions facing the industry, partially due to a lack of case law interpreting the provision. Nevertheless, the

drafters of the Convention were able to benefit from the legislative history of Section 1110 and the relating case law, and introduced an even more beneficial provision in terms of clarity and predictability. It seems evident that the purpose of Alternative A is to avoid the shortcomings of Section 1110 and provide more, not less, protection to aircraft lessors to ensure that airlines have access to affordable financing.

2.3. Alternative B

In the previous section it was established that Alternative A is in line with the overall purpose of the Convention and the Protocol. Thus, the next question to be addressed is whether the same holds true for Alternative B, and if so, to what extent this rule is more or less favourable than Alternative A. In particular, the following sections seek to establish that the application of Alternative B in the context of the Convention and the Protocol is inadequate, given the remedy's lack of efficacy and effectiveness in insolvency proceedings. The section argues that, in order to achieve the Convention's overarching goal — that is, facilitating credit in aircraft finance — one cannot resort to Alternative B. Rather, one must employ Alternative A or, failing this, the applicable insolvency law by virtue of the rules of private international law. Again, before turning to a more detailed comparison between Alternative A and B, it is imperative to examine Alternative B under the Convention and the Protocol. It reads as follows:

Alternative B

2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXX(3) whether it will:

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related

transaction documents; or

(b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law.

3. The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.

4. The creditor shall provide evidence of its claims and proof that its international interest has been registered.

5. If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.

6. The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.

Thus, Alternative B provides that the insolvency administrator or the debtor is obliged upon occurrence of an insolvency-related event *and* the request of the secured creditor to give notice, within the specified time, whether it will cure all defaults and agree to perform all future obligations under the agreement (a) or (b) give possession of the aircraft object to the secured creditor in accordance with the applicable law. If the insolvency administrator or the debtor fails to give notice, the court may then permit the creditor to take possession of the aircraft in accordance with the terms of the court. This means that the court may mandate additional safeguards such as an additional guarantee

before lifting the automatic stay. Alternative B also contains a prohibition on sale of the aircraft object during pending proceedings regarding the claim and the international interest.⁴²⁸ As described so far, the main characteristic of Alternative B is that it restrains a secured creditor from repossession or disposal of the secured assets on the debtor's default. From a more substantive legal point of view, this then begs the questions of what distinguishes Alternative A from Alternative B? What, if anything, is special about Alternative B? And finally, can Alternative B thus be regarded as a valid option for Contracting States for effectively implementing the Convention and the Protocol?

2.3.2. Contrasting Alternative A and B

The next section is devoted to establishing that Alternative B contains elements that are in contradiction with the objectives and underlining principles of the Convention. In order to do this, Alternative B must be contrasted with Alternative A.

2.3.2. Court Intervention and Judicial Discretion

The first difference of considerable practical importance is that Alternative B stipulates that after the expiration of the waiting period '*the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.*'⁴²⁹ This wording clearly shows that in contrast to Alternative A, enforcement restrictions on secured creditors are not automatically lifted. Rather, secured creditors seeking possession and its realisation of the aircraft must seek relief in court. Thus, in contrast to Alternative A, there is room for judicial discretion in two important respects: first, once the creditor has provided evidence of its claims and its registered international interest, the court has to decide, depending on the facts of the case, whether the creditor is able to

⁴²⁸ Ibid, (n 52) para 5.64 et seq.

⁴²⁹ Alternative B: Article XI(5) of the Protocol.

obtain possession of the secured aircraft collateral. Second, the court may impose additional requirements on the creditor as it considers necessary to protect the debtor's interest. It seems almost superfluous to mention that this will increase the delay and cost of realisation of the collateral in insolvency.

2.3.2.3. *Formal Trigger Event for Waiting Period*

The second crucial point is that Alternative B stipulates that a creditor's application to the insolvency administrator or the debtor is necessary to trigger the waiting period.⁴³⁰ Thus, contrary to Alternative A, the waiting period is not automatically triggered by the initiation of insolvency proceedings.⁴³¹ Again this formal requirement results in additional delay at the enforcement stage, resulting in a reduction of the value of the collateral to the disadvantage of both debtors and creditors.

2.3.2.3. *Interim Measures and other Remedies*

Third, Alternative B prohibits a sale pending a decision by a court regarding the claim and the international interest.⁴³² The prohibition against a sale pending a final decision can be explained by the strong civil law influence on the drafting of Alternative B. As already discussed, civil law systems usually consider the sale of an object a substantive remedy due to its perceived finality, which lies in sharp contrast to common law systems, that consider a sale as a form of interim relief. Under Alternative B, it follows that though a secured creditor may in principle resort to all procedural and substantives remedies available under the applicable insolvency law, he may not apply to the remedy of sale during pending proceedings. In contrast, under Alternative A, the creditor is entitled to apply to all forms of interim relief, which at least in theory would include the remedy of

⁴³⁰ Alternative B: Article XI(2) of the Protocol.

⁴³¹ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* *ibid*, para 5.64.

⁴³² Alternative B: Article XI(6) of the Protocol.

sale. As already discussed, the remedy of sale is essential in aircraft finance because aircraft are goods which deteriorate quickly, including during pending proceedings; thus, an explicit prohibition on this remedy seems contrary to the very purpose of the Convention.

2.3.2.3. *No Duty to Preserve and Maintain the Aircraft*

The fourth difference between Alternative A and B is the obligation to preserve and maintain the aircraft. Alternative A automatically requires the insolvency administrator or debtor to preserve the aircraft, and maintain it and its value in accordance with the agreement until the return of the aircraft object to the creditor. There is no comparable obligation with Alternative B. Consequently, the questions of whether there is such an obligation and what it includes are governed by the applicable insolvency law, provided that the parties do not address this in the security agreement. This divergence may endanger the Convention's ultimate goal; the creation of uniformity and predictability in insolvency for aircraft financiers.

2.3.2.3. *Cooperation with Registration Authority*

Fifth, Alternative B is also distinct from Alternative A in that it fails to provide protection for secured creditors in cases where cooperation of the responsible registry and administrative authority is of the essence. Put simply, under Alternative B the creditor's ability to de-register the aircraft is again governed by the applicable insolvency law. By comparison, Alternative A expressly requires the registry and administrative authority to cooperate and assist the debtor in the process of de-registration of the aircraft.⁴³³ More specifically, it provides that the registry and administrative authority shall de-register the aircraft *five working days* after receiving the notification from the creditor that he is entitled to do so in conformity with the Convention and the Protocol. As already

⁴³³ Alternative A: Article XI(8) of the Protocol.

mentioned, the legal capacity of a secured creditor to de-register (and subsequently re-register) the aircraft is of considerable practical importance for the process of remarketing of the aircraft as demonstrated by the *Kingfisher* and *SpiceJet* litigation.⁴³⁴ Failure to do so, for example due to cumbersome bureaucratic hurdles or non-cooperative authorities, effectively denies creditors the benefit of their security.

2.4. Summary: Superiority of Alternative A over Alternative B

From what has been said thus far, Alternative B appears far less favourable than Alternative A for secured creditors in terms of legal certainty, predictability, and speediness on several counts. First, Alternative B leaves many crucial questions such as the debtor's obligation to preserve the aircraft or the duties of the respective registration authorities to the applicable insolvency laws. Second, Alternative B contains several elements that purposefully delay the process of repossession of aircraft assets for secured creditors. Third — and in sum — it provides nothing more than a formal and rigid structure for obtaining possession of the secured aircraft object. Thus, it seems that the defining attribute of Alternative B is its rather hostile approach towards a rapid resolution of insolvency proceedings. In fact, it may be even less favourable than the applicable insolvency rules under domestic laws. Overall, it appears that Alternative B is designed towards the aim of restructuring instead of liquidation. Creditors will face additional delays and costs in enforcement due to prior mandatory court involvement, which significantly increase the risk that the economic value of the aircraft will deteriorate. Thus, creditors experience great difficulty in maintaining the value of their investment. Clearly, then, there is a strong argument that Contracting States should disregard Alternative B because it cannot be regarded as a viable insolvency regime choice for the Contracting State given the highly deteriorable nature of aircraft assets.

⁴³⁴ See page 21.

This runs counter to the very principles of the Convention, that secured creditors of capital-intensive and high-risk sections such as the aviation industry should receive preferential treatment over unsecured creditors in insolvency proceedings, which in turn will provide wider access to capital for all debtors involved, and on more favourable credit terms. Put differently, there is a strong argument that Alternative A is the better choice for Contracting States, since it is the only option which is in conformity with the underlying purposes and principles of the Convention. It is further no coincidence that the usefulness of Alternative B has been severely questioned in practice and scholarship for the aforementioned reasons.⁴³⁵ This is also why *Charles W. Mooney*, in his article, suggests that Alternative B has solely been added to the treaty to address the concerns of civil-law representatives during the drafting process that the Convention, and in particular Alternative A of the Protocol and the substantive remedies of the Convention, are based on the United States insolvency and commercial laws.⁴³⁶ Considering this, it is further not surprising that only one Contracting State — Mexico⁴³⁷ — has chosen to opt for Alternative B. It reads the following:

*2. In accordance with Article XI, the United Mexican States will apply Alternative B in its entirety to all types of insolvency proceeding and that the time-period for the purposes of Article XI subparagraph 2) shall be **the time-period expressly indicated by the Parties in the corresponding contract** consistent with the applicable law, and shall commence not earlier than the time when the insolvency administrator or the debtor receives the creditor's request under Article XI subparagraph 2) of that Alternative. (emphasis added).*

⁴³⁵ Mooney, (n 340) 38: 'Alternative B establishes little more than a procedural structure under which a creditor may beg and plead for a court's mercy'.

⁴³⁶ Ibid, footnote 106.

⁴³⁷ UNIDROIT, 'Status of the Cape Town Convention', (n 39).

A closer look shows that Mexico's declaration adds an interesting aspect to the discussion, as, from its wording, the declaration specifically allows the parties to determine the length of the waiting period in their agreement. Thus, it seems that Mexico seeks to counterbalance one of Alternative B's shortcomings by providing more party autonomy with regard to the delay in the process of repossession. It appears that parties may contractually waive the requirement of a mandatory waiting period under Alternative B allowing creditors to instantly apply for judicial relief. This does, however, not address Alternative B's essential drawback: the decision whether, when and on what terms and conditions a creditor can take possession of the aircraft is a matter of court discretion creating uncertainty in the timing of aircraft repossession for financiers.

C. Alternative A's Interaction with Domestic Insolvency Laws

It was established in the previous section, on grounds of legal comparison, that Alternative A is clearly superior to Alternative B in the context of aircraft finance. However, even if this would be the optimal solution, one must nevertheless consider whether the Convention's insolvency regime — including the most efficient insolvency option, Alternative A — could be equally and effectively implemented in both civil and common-law jurisdictions. It is important to note that the main issue here would be that jurisdictions differ globally with regard to their approach to insolvency laws.

As a general rule, some legal systems tend to consider insolvency laws primarily a tool for restructuring, with the ultimate goal of the continuation of the business's operations, the maintenance of employment and the settlement of its liabilities. The French insolvency laws for example, express this perspective.⁴³⁸ Other legal systems such as the English one tend to consider insolvency laws to a large extent as a tool to liquidate the debtor's business and distribute its proceeds to creditors, rather than seeking rehabilitation. Lord Hoffmann describes the purpose of English insolvency proceedings in *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors* as follows: *'The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established.'*⁴³⁹ But it has to be noted that the English Enterprise Act 2002 introduced administration as a rescue procedure. Again others, such as the American, and German one, regard insolvency laws as both a means to liquidate the debtor's business in an effort to satisfy the debtor's creditors and also a means to restructure the debtor's business on the basis of an insolvency plan. To give an example, the overall objective of German law

⁴³⁸ Article L 631-1.

⁴³⁹ *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)*, [2006] UKPC 26, [2006] 3 WLR 689.

is defined by Section 1 of the Insolvency Code as the '*collective satisfaction of a debtor's creditors by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan, particularly in order to maintain the enterprise.*' It can be seen that an effective interplay between the Convention, Alternative A and national insolvency law is not an easy endeavour.

To demonstrate the point, this section firstly investigates the various insolvency proceedings under national law, the basic requirements for their commencement, and their effect on the legal position of the debtor and the creditor. This examination is important for two reasons. The first one is that the remedies available to the creditor differ remarkably inside and outside insolvency proceedings, especially because many jurisdictions provide for an automatic stay of enforcement upon the opening of insolvency proceedings during which a creditor is typically prevented from exercising any remedies. This is true for both the remedies under the Convention and domestic law. The second reason is that a debtor will be required give possession of the aircraft to the creditor only at the end of the waiting period specified by a Contracting States in a declaration under Article XI(3) of the Protocol. During the waiting period, the creditor may only apply for other forms of interim relief available under applicable law. As already mentioned, the waiting period must be triggered by an insolvency-related event. As the Protocol points out, '*insolvency-related event*' in Article I(m) for this purpose, means either the commencement of the insolvency proceedings or the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action. Of critical importance in this context is Article 1(d) of the Convention. It expressly stipulates that the significant question of when the insolvency proceedings are deemed to be opened is left to the applicable insolvency law.

The second part of this section is devoted to examining the relationship between the Convention and the Protocol, Alternative A and national rules dealing with the ranking and priority of creditors in insolvency. It will be shown that although national legal systems take very different approaches to the treatment of secured and unsecured creditors in insolvency, the Convention's provisions on ranking and priority, in particular Article 39 ('Rights having priority without registration') and Article 40 ('Registrable non-consensual rights or interests'), provides Contracting States with the capability to pursue domestic insolvency policies. Consequently, Contracting States may adopt Alternative A without sacrificing domestic policy choices due to the Convention's declaration system.

1. Requirements for the opening of insolvency proceedings

The thesis shall now turn to the examination of the (pre-) insolvency proceedings and their requirements in the sample jurisdictions in more detail.

1.1. Germany

Under German law, the Insolvency Code (*Insolvenzordnung*) governs insolvency proceedings. It follows a unitary approach to insolvency proceedings; thus, unlike in the United States, there is no separate legal framework for liquidation or restructuring proceedings although special rules may apply, for example, in case of the insolvency of a bank or insurance company.⁴⁴⁰ Insolvency proceedings are further also applicable to all types of debtors irrespective of whether the debtor is a legal entity or natural person.⁴⁴¹ Both the debtor and his creditors may file an application for insolvency.⁴⁴²

An applicant seeking the commencement of insolvency proceedings, primarily has to demonstrate that the debtor is illiquid (*Zahlungsunfähigkeit*), for example, that he is

⁴⁴⁰ Section 1 IO; Faber and others, (n 357) para 10.12.

⁴⁴¹ Section 11(1) IO; Karsten Schmidt, *Insolvenzordnung* (19th edn, C.H. Beck 2016), para 6-24.

⁴⁴² Section 13(1) IO; Hans-Peter Kirchhof, Horst Eidenmüller and Rolf Stürmer, *Münchener Kommentar Insolvenzordnung* (3rd edn, C.H. Beck 2013), 13 IO para 14 and 25.

unable to pay its debts as they come due (which is generally referred to as the cash flow test)⁴⁴³, or secondarily his overindebtedness ('*Überschuldung*')⁴⁴⁴, meaning that debtor's companies' liabilities exceed its assets (which is generally referred to as the balance sheet test). When a debtor ceases to pay, insolvency is generally presumed⁴⁴⁵ — although German courts have held that a temporary liquidity shortfall ('*Zahlungsstockung*') is not sufficient.⁴⁴⁶ A debtor may also file for insolvency in the case of an overwhelming likelihood that he will not be able to meet his future payment obligations when they become due ('*drohende Zahlungsunfähigkeit*').⁴⁴⁷ German courts determine whether the aforementioned requirements are fulfilled and then, admit —provided that the debtor's assets may at least cover the costs of the insolvency proceedings⁴⁴⁸— or deny the motion. The thesis shall now turn to the examination of the legal situation under United States law.

1.2. United States

In the United States, the Bankruptcy Code (together with the Federal Bankruptcy Procedure) governs insolvency proceedings. It follows in principle a dualistic approach to insolvency proceedings; unlike Germany, there is a separate legal framework for liquidation and restructuring proceedings.⁴⁴⁹ The former are regulated in Chapter 7, and latter in Chapter 11, of the Bankruptcy Code. Liquidation and rehabilitation proceedings are, at least from a legal point of view, available to both natural and legal persons. However, the significant costs associated with Chapter 11 proceedings practically confine

⁴⁴³ Section 17(1) IO.

⁴⁴⁴ Section 19(1) IO.

⁴⁴⁵ BGH NZI 2012, 416: '*Lag eine Zahlungseinstellung vor, wird gem. § 17 II 2 InsO gesetzlich vermutet, dass nicht lediglich Zahlungsunwilligkeit, sondern Zahlungsunfähigkeit vorliegt. Die Zahlungsunfähigkeit kann vom Prozessgegner widerlegt werden.*'

⁴⁴⁶ BGH NJW 2005, 3062: '*Eine bloße Zahlungsstockung ist anzunehmen, wenn der Zeitraum nicht überschritten wird, den eine kreditwürdige Person benötigt, um sich die benötigten Mittel zu leihen.*'; Kirchhof, Eidenmüller and Stürner, (n 442) 18 IO para 60 with further references.

⁴⁴⁷ Section 18 IO.

⁴⁴⁸ Section 26 IO; Schmidt, 27 IO para 8.

⁴⁴⁹ Faber and others, (n 409) para 20.3.

it to businesses. Furthermore, there are special proceedings available, for example, for public entities, banks, or insurance companies, among others. Thus, the overall objective of United States insolvency law is similar to German law. This is not surprising considering that German insolvency law is at least partially based on United States insolvency law.⁴⁵⁰

Both debtors and creditors may file an application for insolvency. For example, a debtor *voluntarily* seeking the commencement of insolvency proceedings — whether liquidation or reorganisation — has only to file the application and pay the respective court fee.⁴⁵¹ By operation of law, the application results in the opening of an insolvency case, which in turn constitutes an order for relief.⁴⁵² A creditor seeking the commencement of insolvency proceedings against the debtor's will is, however, more constrained. First, an *involuntary* application may only be filed jointly by at least three creditors that hold together claims of at least \$10,000 of non-contingent and undisputed claims against the debtor.⁴⁵³ Second, the creditor has to demonstrate the debtor's *failure* to pay undisputed debts. United States courts determine whether the aforementioned requirements are fulfilled and then grant or deny an order for relief. Unlike in Germany, there is no strict requirement that the debtor is *unable* to pay its debts as they come due on a cash flow sheet test or the debtor's over indebtedness based on a balance sheet test. Rather, it is sufficient that the debtor is not paying such debts as they come due.⁴⁵⁴ This is however, difficult to prove, which is why involuntary applications rarely occur in

⁴⁵⁰ Rolf Stürmer, 'Enforcement of Security interests in U.S.-American and German Insolvency Procedures' in Rolf Stürmer and Masanori Kawano (eds), *Comparative Studies on Enforcement and Provisional Measures* (Mohr Siebeck 2011), 175.

⁴⁵¹ Robert J. Stearn, 'Proving Solvency: Defending Preference and Fraudulent Transfer Litigation' (2007) 62 *The Business Lawyer* 359.

⁴⁵² Section 11 USC 301(b).

⁴⁵³ Section 11 USC 303(b).

⁴⁵⁴ Section 11 USC 303(h)(1).

practice.⁴⁵⁵ The next step is, then, to examine the French legal system with regard the requirements of the commencement of insolvency proceedings.

1.3. France

Under French law, the Commercial Code governs insolvency proceedings. It follows a very distinct approach to insolvency. There are a number of options for a debtor that is experiencing financial problems. Broadly speaking, three situations can be distinguished.

The first are court-assisted pre-insolvency proceedings that include the *mandate ad hoc* and *conciliation* proceedings.⁴⁵⁶ Mandate ad hoc proceedings seek to find an amicable solution for the financially distressed debtor and his main creditors by the process of mediation. These proceedings are confidential⁴⁵⁷, informal, and may only be voluntarily initiated by a debtor who has acute or foreseeable legal, economic, or financial difficulties.⁴⁵⁸ It involves the appointment of a mediator ('*mandataire ad hoc*') who is responsible for assisting the debtor in negotiating a plan with his primary creditors while the debtor remains in charge of his business. The debtor has discretion in two respects: first, the court appoints the mediator only upon the request of the debtor and second, the debtor has absolute discretion in choosing which creditors shall take part in the mediation. Further, it must be noted that the Mandate ad hoc proceeding generally has no time limit for completion and does not involve an automatic stay.⁴⁵⁹

A conciliation proceeding usually follows the Mandate ad hoc. It shares several major characteristics with Mandate ad hoc proceedings. First, it is confidential, informal, and may only be initiated by the debtor on a voluntary basis (if he is facing actual or

⁴⁵⁵ Faber and others, (n 409) para 20.5.

⁴⁵⁶ Ibid, para 9.3.

⁴⁵⁷ Article L 611-15.

⁴⁵⁸ Article L 611-3.

⁴⁵⁹ Faber and others, (n 409) para 9.3; Alexandra Kastrinou, 'Comparative Analysis of the Informal Pre-Insolvency Procedures of the UK and France' (2016) 25 International Insolvency Review 99, 101 et seqq.

foreseeable legal, economic or financial difficulty⁴⁶⁰). Similarly, the debtor will suggest a person ('*conciliateur*') to be appointed by the court who holds a responsibility to '*promote the conclusion of an amicable agreement between the debtor and its main creditors as well as, if applicable, its usual contracting partners, which is intended to put an end to the difficulties faced by the business.*'⁴⁶¹ Again, the debtor generally remains in charge of the business and there is no automatic stay on enforcement. Despite these general similarities, however, there are important differences in the law. For example, a cash flow insolvent company may initiate conciliation proceedings provided that the insolvency status has not lasted longer than forty-five days before the application.⁴⁶² Further, the proceeding is bound by a deadline of four months with the possibility of a one-month extension. Thirdly, the final agreement may, if confirmed by the court, have a substantial effect on third parties rights.⁴⁶³

The second set of situations is *court-controlled* pre-insolvency proceedings ('*procédure de sauvegarde*'). The purpose of safeguarding proceedings is to facilitate the reorganisation of the business in order to allow: (1) the continuation of the economic activity (2) the maintenance of employment and (3) the settlement of liabilities.⁴⁶⁴ This is expressly defined by L620-1 of the French Commercial Code. The *sauvegarde* proceeding is a public proceeding available only to cash flow solvent companies facing difficulties that they are not able to overcome. Safeguarding proceedings may only be opened upon the request of a cash flow solvent debtor who is in financial difficulties, which results in a six-month observation period that is renewable for up to 18 months. The observation period involves, in principle, an automatic stay from secured and

⁴⁶⁰ Article L 611-4.

⁴⁶¹ Article L 611-7.

⁴⁶² Article L 611-4.

⁴⁶³ *Kastrinou*, (n 459) 103 et seqq.

⁴⁶⁴ Legifrance, 'English Translation of the French Commercial Code' <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> accessed 17th January 2017.

unsecured creditors. This period is intended to prevent debtors from becoming insolvent at an early stage by allowing them to remain in charge of their business and by proposition, under the supervision or with the assistance of a court-appointed administrator, of a safeguarding plan, subject to the creditor's approval, with the capabilities of '*turning the business around on the basis of the operational possibilities and methods, market conditions and the means of finance available*'.⁴⁶⁵ In the event of failure, the Court will open judicial insolvency proceedings *stricto sensu* ('*redressement judiciaire*' and '*liquidation judiciaire*').⁴⁶⁶ These are the third set of situations.

The purpose of redressement proceedings '*is to allow the continuation of the business's operations, the maintenance of employment and the settlement of its liabilities*.'⁴⁶⁷ The debtor, his creditors, the Commercial Court, or the public prosecutor may seek the opening of *redressement* proceedings.⁴⁶⁸ Second, the requirement for their commencement is that the debtor is in a state of cessation of payments.⁴⁶⁹ It is defined as the impossibility for a business to meet current liabilities with the available assets (which is generally referred to as the cashflow insolvency test). Ultimately, the court will decide whether a reorganisation is feasible, whether the debtor's assets must be partially or fully sold or whether the debtor's company should be liquidated. If there are no more options left for the reorganisation of the business, the court will commence liquidation proceedings.

Liquidation proceedings may be commenced if the debtor is in a state of cessation of payments and restructuring is manifestly impossible.⁴⁷⁰ The debtor, his creditors, the

⁴⁶⁵ Article L 626-2.

⁴⁶⁶ Faber and others, (n 409) para 9.3; Kastrinou, (n 459) 106 et seq.

⁴⁶⁷ Article L 631-1.

⁴⁶⁸ Articles L 631-4, L 631-5.

⁴⁶⁹ Article L 631-1; Paul Omar, 'Defining insolvency: the evolution of the concept of "cessation de paiements" in French law' (2005) 16 *European Business Law Review* 311.

⁴⁷⁰ Article L 640-1.

Commercial Court, and the public prosecutor are all entitled to file an application for commencement of liquidation proceedings. For the purpose of liquidation, the court appoints a liquidator who is responsible for managing the debtor's company and proceeding with the sale of the business; the debtor is no longer in charge of his company.⁴⁷¹

1.4. England

Under English law, the Insolvency Act 1986 (and the Company Act 2006) primarily governs insolvency proceedings. Like France, the English legal system provides for a plurality of options for debtors with financial difficulties that shall now be discussed in more detail.⁴⁷²

The first option is pre-insolvency proceedings. One example is the *London approach*.⁴⁷³ Its purpose is to find a formal agreement in private negotiations between the financially distressed debtor and his main creditors. There is no court involvement. The main difficulty of the London approach is that debtors may experience great difficulty in reaching an agreement with all their creditors; this is especially true for larger companies.⁴⁷⁴

Consequently and alternatively, debtors may wish to rely on a more structured and guided approach with judicial assistance, the English Scheme of Arrangement.⁴⁷⁵ Unlike the London approach, a scheme does not require to find agreement among all creditors. It

⁴⁷¹ Article L 641-1.

⁴⁷² For an overview see: Jennifer Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform' (2014) 130 *Law Quarterly Review* 282; Jennifer Payne, 'The future of UK debt restructuring' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848160> accessed 11th July 2017; Faber and others, (n 409) para 8.3.

⁴⁷³ John Armour and Simon Deakin, 'Norms In Private Insolvency Procedures: The 'London Approach' To The Resolution Of Financial Distress' <https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp173.pdf> accessed 22th June 2017.

⁴⁷⁴ Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform', (n 472) 285 et seq.

⁴⁷⁵ For a more detailed discussion see: Jennifer Payne, 'Schemes of Arrangement, Takeovers and Minority Shareholder Protection' (2011) 11 *Journal of Corporate Law Studies* 67; Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2014), Faber and others, (n 409) 236, Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform', (n 472) 290 et seqq; Kastrinou, (n 459) 115 et seqq.

is technically not an insolvency process, its purpose is a consensual restructuring of the business, insolvent or not. Its availability is dependent on two conditions set out in Section 899(1) of the 2006 Companies Act. The provision requires firstly that a majority in number of the class of members present and voting must agree to it and secondly, that 75% in value of the class of members present and voting must agree to it. These requirements are cumulative. If both of the aforementioned prerequisites are fulfilled, the court will upon application sanction the compromise or arrangement with the effect that it is binding on all interested parties, including approving and dissenting creditors.⁴⁷⁶

Another rather informal pre-insolvency procedure for financially distressed debtors is the Company Voluntary Arrangement. This is a compromise between the debtor and some of his creditors to receive less than the amount due. Again, it is strictly speaking not an insolvency procedure since there is no requirement that the debtor is unable to pay its debt. Generally speaking, there are two types of Company Voluntary Arrangements. The first one does not involve a moratorium and is governed by Part I of the Insolvency Act 1986. The second one involves a moratorium and is regulated by Schedule A1 to the Insolvency Act 1986 as introduced by the Insolvency Act 2000.⁴⁷⁷ The benefit of a moratorium is, however, only available to small companies as defined by Section 382(3) of the Companies Act 2006.⁴⁷⁸ Generally, a company qualifies as small if two or more of the following conditions are met: turnover no greater than £6.5m; balance sheet assets no greater than £3.26m; no more than 50 employees.

The general procedure for Company Voluntary Arrangements – whether with or without a moratorium – is that the directors of the financially distressed company propose with the help of an insolvency practitioner the adoption of a Company Voluntary

⁴⁷⁶ Section 899(3) Companies Act 2006 .

⁴⁷⁷ Faber and others, (n 409) para 8.3; Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform', (n 472) 287 et seq; Kastrinou, (n 459) 111 et seqq.

⁴⁷⁸ Ian F. Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017), para 15-007 and 15-054.

Arrangement. The law requires the proposal to contain crucial information that enables all stakeholders to accurately assess the debtor's financial situation. The mandatory contents of the proposal include an explanation why a Company Voluntary Arrangement is desirable, the company's assets, their respective values and the amount to which the assets are charged in favour of creditors, the proposed duration of the voluntary arrangement, and the nature and amount of the company's liabilities.⁴⁷⁹ The creditors must then approve the proposal by the requisite majorities at the creditors' meeting: a majority of 75 per cent in value of the creditors present⁴⁸⁰ (including more than 50 per cent of creditors unconnected with the company⁴⁸¹). The proposal must then further be approved by a majority of 50 per cent in value of the members present at the members' meeting.⁴⁸² Contrary to the Scheme of Arrangement procedure, the creditors are not divided into classes for voting purposes.⁴⁸³ The Company Voluntary Arrangement is effective for all approving and dissenting creditors that were entitled to vote at the meeting (whether they were present or not). It is further binding on those creditors who did not have notice of the creditor's meeting, such as for example, creditors that were unknown at the time of the creditors meeting.⁴⁸⁴

The third set of situations is insolvency proceedings *stricto sensu* (administration and liquidation proceedings). The Enterprise Act 2002 reinvented the administration procedure⁴⁸⁵ of the Insolvency Act of 1986 with the purpose of reinforcing rescue culture in English law.⁴⁸⁶ The overall objective of this insolvency proceeding is clearly defined

⁴⁷⁹ Sections 2(2) and 2(3) Insolvency Act 1986.

⁴⁸⁰ Rule 15.34(3) Insolvency Rules 2016.

⁴⁸¹ Rule 15.34(4) Insolvency Rules 2016.

⁴⁸² Rule 2.36(1) Insolvency Rules 2016.

⁴⁸³ Fletcher, para 15-024; Rule 15.28(5) Insolvency Rules 2016.

⁴⁸⁴ Section 5(2) Insolvency Act 1986.

⁴⁸⁵ Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform', (n 472) 293 et seqq.

⁴⁸⁶ Schedule B1 to Insolvency Act 1986, para 1-116.

by paragraph 3 of the Schedule B1 to Insolvency Act 1986 as ‘(a) *rescuing the company as a going concern, or (b) achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors.*’ For this purpose, an administrator with the aforementioned responsibilities is appointed who must act in the interest of all creditors for the period of 12 months that is extendable for 6 months.⁴⁸⁷ An applicant seeking the commencement of administration proceedings must demonstrate both that the company is or is likely to become unable to pay its debt (cash-flow test) and also that administration may achieve its purpose.⁴⁸⁸ The commencement of administration is relevant in two respects. First, it has the effect of moratorium; thus, individual enforcement against the debtor's estate for secured and unsecured creditors is no longer possible.⁴⁸⁹ Second, the debtor will no longer remain in charge; the administrator takes over the management of the business.⁴⁹⁰ The administrator’s powers include ‘*anything necessary or expedient for the management of the affairs, business and property of the company.*’⁴⁹¹

There are now several ways in which a company can go into administration. First, the holder of a qualifying floating charge may appoint an administrator out of court.⁴⁹² There is no requirement to give any notice to the company about the intention to appoint an administrator. Thus, an administrator may be appointed against the will of the company. Second, the company or its directors are also entitled to appoint an administrator out of court.⁴⁹³ They are required to give at least five business days' written

⁴⁸⁷ Schedule B1 to Insolvency Act 1986, para 76.

⁴⁸⁸ Schedule B1 to Insolvency Act 1986, para 11 and 27(2) .

⁴⁸⁹ Schedule B1 to Insolvency Act 1986, para 40-45.

⁴⁹⁰ Schedule B1 to Insolvency Act 1986, para 64.

⁴⁹¹ Schedule B1 to Insolvency Act 1986, para 59.

⁴⁹² Schedule B1 to Insolvency Act 1986, para 14.

⁴⁹³ Schedule B1 to Insolvency Act 1986, para 22.

notice that identifies the proposed administrator to floating chargeholders.⁴⁹⁴ Otherwise, an application can be made to the court for an appointment by a variety of people: one or more creditors of the company, the company itself, its directors, a liquidator, a supervisor of a company voluntary arrangement, the Financial Conduct Authority or the designated officer in the exercise of the power conferred by Section 87A of the Magistrates' Courts Act 1980.⁴⁹⁵ It is important to note that an administrator is an officer of the court (whether or not he is appointed by the court).⁴⁹⁶

In English law, the alternative to administration is the winding up procedure.⁴⁹⁷ Broadly speaking, two types of liquidation proceedings must be distinguished.⁴⁹⁸ The first one is the voluntary liquidation⁴⁹⁹ that is commenced by a 75 per cent majority resolution of the shareholders.⁵⁰⁰ The second one is the compulsory liquidation⁵⁰¹ that is opened by a court order.⁵⁰² In both scenarios, a liquidator is appointed who takes control of the company for the purpose of its liquidation and distribution of the proceeds among all creditors.⁵⁰³ Both proceedings conclude with the dissolution of the company and its deletion in the company registry.⁵⁰⁴

With regard to voluntary liquidation, there are two types which must further be distinguished: members' voluntary winding up and creditors' voluntary winding up.⁵⁰⁵

⁴⁹⁴ Schedule B1 to Insolvency Act 1986, para 26.

⁴⁹⁵ Schedule B1 to Insolvency Act 1986, para 10. and 12.

⁴⁹⁶ Schedule B1 to Insolvency Act 1986, para 5.

⁴⁹⁷ Sections 73-229 Insolvency Act 1986 ('Winding Up of Companies Registered under the Companies Acts').

⁴⁹⁸ Fletcher, para 17-007.

⁴⁹⁹ Sections 84-116 Insolvency Act 1986 ('Voluntary Winding Up').

⁵⁰⁰ Sections 86 and 84(1)(b) Insolvency Act 1986 together with Section 283(1) Companies Act 2006.

⁵⁰¹ Sections 117-162 Insolvency Act 1986 ('Winding Up by the Court').

⁵⁰² Section 129 Insolvency Act 1986.

⁵⁰³ Sections 91, 100, and 139 Insolvency Act 1986.

⁵⁰⁴ Sections 201–205 Insolvency Act 1986.

⁵⁰⁵ Sections 91-96 ('Member's Voluntary Winding Up') and 97-106 ('Creditor's Voluntary Winding Up') Insolvency Act 1986 ('Winding Up by the Court').

The main characteristic of a members' voluntary winding up is that there is a requirement of solvency. In fact, the directors have to make a statutory declaration that they have fully investigated the affairs of the company and, accordingly, concluded that the company will be able to pay its debts in full.⁵⁰⁶ If, despite the director's statutory declaration, the company is not able to pay its debts in full, the aforementioned proceeding is usually followed by a creditor's winding up.⁵⁰⁷ Thus, one key difference is that there is a requirement of insolvency. Furthermore, in the case of a creditor's winding up, creditors are generally left in charge; for example, unlike in a voluntary member's liquidation⁵⁰⁸, the creditors may appoint a liquidator.⁵⁰⁹

Contrary to voluntary liquidation, creditors may — in addition to the debtor, a shareholder, any administrator or administrative receiver or the relevant Secretary of State — file for the commencement of compulsory liquidation proceedings.⁵¹⁰ An applicant seeking liquidation usually has to demonstrate the debtor's inability to pay his debts— for example, if the debtor is unable to pay a sum exceeding £750 for a period of twenty-one days, or if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due (cash flow test), or if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities (balance sheet test).⁵¹¹ English courts determine whether the aforementioned requirements are fulfilled and then admit or deny the application for the opening of mandatory liquidation proceedings.⁵¹²

⁵⁰⁶ Section 89 Insolvency Act 1986.

⁵⁰⁷ Section 90 Insolvency Act 1986; Fletcher, para 18-009.

⁵⁰⁸ Section 87 Insolvency Act 1986.

⁵⁰⁹ Sections 100 and 103 Insolvency Act 1986.

⁵¹⁰ Section 124 Insolvency Act 1986.

⁵¹¹ Section 123 Insolvency Act 1986; *BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL PLC* [2013] UKSC 28, [2013] 1 WLR 1408.

⁵¹² Section 125 Insolvency Act 1986.

1.4.1. Summary: Differences in Core Areas of Insolvency Law

A review of the two jurisdictions reveals that there are several distinct differences in core areas of insolvency law. To start with, it must be noted that the extent to which pre-insolvency or private insolvency proceedings are available in the jurisdictions differ remarkably. Most interestingly, French insolvency law provides a number of pre-insolvency proceedings that favour reorganisation of the debtor's business instead of liquidation. To a certain extent this is also true for England. It is important to note that the Convention's restricted definition of insolvency proceedings leaves many of these pre-insolvency proceedings unaffected.⁵¹³ Accordingly, creditors may not generally rely on the Convention's remedies in this scenario. For example, the French ad hoc and conciliation proceedings are clearly outside the scope of the Convention due to the lack of judicial control in relation to the assets and affairs of the debtor. Similarly, the London's Approach under English law is beyond the Convention's definition of insolvency proceedings. To the contrary, it appears that French safeguarding, redressement and liquidation proceedings fall within the Convention's scope. This is of course also true for the English administration and liquidation proceedings. Whether this is true for the English Scheme of Arrangement and the Company Voluntary Arrangement is less clear. Due to the absence of a requirement of insolvency and the fact that neither is technically an insolvency proceeding, it would appear that they are not governed by the definition of the Convention.

The examination further shows that the jurisdictions use a number of tests to determine insolvency: the balance sheet test, the cash flow test or a simple failure to pay test. It is important to note that there are substantial differences even within the examined tests. Broadly speaking, Germany and England both follow a combination of a balance

⁵¹³ The Convention defines insolvency proceedings as bankruptcy, liquidation or other collective **judicial** or **administrative** proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to **control or supervision** by a court **for the purposes of reorganisation or liquidation**.

and cash flow test. To the contrary, France relies in principle on a cash flow test to determine a cessation of payment. Interestingly, the United States takes a very different approach by requiring just a failure to pay due debts.

On top of this, there are important differences in terms of who may file for insolvency. For example, under the German and United States' law, the right to file for insolvency rests at least in theory with both debtors and creditors. Yet for practical reasons, primarily debtors are entitled to file for insolvency in the United States. As discussed, this is because of the difficulty for creditors of proving the debtor's failure to pay undisputed debts. French law follows a more liberal approach. It provides all interested parties to file an application for commencement of liquidation proceed, including debtors, creditors, the court and the public prosecutor. Similarly, English law provides several parties with a right to file for insolvency. These include debtors, creditors, shareholders, the court, administrators, the Secretary of State among others.

The conclusion which can be drawn from the previous analysis: there is a closely closely-intertwined relationship between the Convention's recognition rule, its substantive and insolvency remedies, and the requirements for the commencement of insolvency laws under domestic law. Specifically, the strength of creditor protection under the Cape Town regime is dependent on the type of insolvency proceeding, the test to determine insolvency but also the persons who may file for the commencement of insolvency proceedings. Thus, to a large extent, states remain in control of domestic insolvency policies.

2. Priority of Creditors

This is further reinforced by an examination of the relationship between Alternative A and national rules dealing with the ranking and priority of creditors in insolvency. Although it is widely accepted that secured creditors should be afforded priority in

insolvency proceedings, this is, of course, not an easy task, since there is considerable nuance to be navigated in the application of this principle. For example, one might ask whether certain limitations may be justified. Indeed, the precise determination of the ranking of competing interests appears anything but straightforward due to significant political choices of a very sensitive nature. To illustrate this, the thesis now turns to the examination of the priority rules of the sample jurisdictions. It will be shown that the sample jurisdictions take very different approaches in terms of the treatment of secured and unsecured creditors.

2.1. Germany

In Germany to determine priority in insolvency it is important to distinguish between several types of creditors: creditors of the estate, secured creditors and unsecured creditors.⁵¹⁴ The first priority is given to secured creditors. This is because they are entitled to separate secured assets from the estate, and have the right to satisfaction separate from the secured collateral.⁵¹⁵ The second priority belongs to creditors of the estate.⁵¹⁶ These include, for example, administrative expenses for the insolvency proceeding, the remuneration earned and the expenses incurred by the administrator, and other administrative expenses created by activities of the insolvency administrator.⁵¹⁷ Interestingly, tax claims enjoy — in principle — no priority.⁵¹⁸ Unsecured creditors follow creditors of the estate.⁵¹⁹ Finally,

⁵¹⁴ Section 209 IO; Faber and others, (n 357) para 10.01-10.07; Horst Eidenmüller, 'Comparative Corporate Insolvency Law' in Jeffrey Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press 2014), 17 et seq; Wood, , (n 267) 253 et seq; Nath and Crans, *Aircraft Repossession and Enforcement: Practical Aspects*, (n 271) 79.

⁵¹⁵ German law provides a conditional seller under a title reservation agreement and a lessor with the right to separate the secured collateral from the debtor's estate (Section 47 IO, 'Aussonderungsrecht') despite the automatic stay pursuant to Section 47 of the Insolvency Code. A holder of a security interest is entitled to demand satisfaction separate from the secured collateral from the insolvency estate (Section 51 IO, 'Absonderungsrecht'). The primary difference between the Aussonderungsrecht and the Absonderungsrecht for the secured creditor lies in the fact that the latter right possesses the disadvantage of a certain percentage of the proceeds of the sale being retained for the benefit of the estate as a contribution towards the cost of the insolvency proceedings. Under Sections 170 and 171 IO, four per cent of the proceeds are deducted to cover the expenses incurred for the determination of the security interests and five per cent for their enforcement.

⁵¹⁶ Section 53 IO.

⁵¹⁷ Section 54 IO; Kirchhof, Eidenmüller and Stürmer, (n 442) 53 IO para 19 et seqq.

⁵¹⁸ Section 54(4) IO.

⁵¹⁹ For a detailed examination of the priorities in insolvency see Faber and others, (n 357) para 10.44 et seqq.

there are also subordinated creditors.⁵²⁰ Subordinated claims refer, for example, to claims to interests, fines, or repayment of a shareholder loans, to name but a few. This entire class is practically irrelevant since there are rarely funds left to cover them.⁵²¹

2.2. United States

The United States follow a creditor-friendly approach with regard to the priority of secured creditors. First priority is granted to secured creditors. They are generally entitled to separate satisfaction out from the proceeds from the sale of the collateral.⁵²² For the purpose of this thesis, the relevant Section 1110 for secured creditors in aircraft has already been discussed in great detail. Administrative expenses generally rank second and rank equally against each other.⁵²³ The Bankruptcy Code provides the following examples, although all actual necessary costs and expenses for preserving the estate are covered⁵²⁴: wages and salaries⁵²⁵, taxes⁵²⁶, fines, reasonable compensation for professional services⁵²⁷ rendered by an attorney or an accountant. Unsecured creditors that also have a *pari passu* ranking against each other follow administrative expenses in priority.⁵²⁸

2.3. France

Generally speaking, France follows a more debtor-protective approach than Germany and the United States. The ranking of distribution among creditors in safeguarding or reorganisation proceedings is set forth in Article L 622-17 of the Commercial Code, and the ranking of distribution in in liquidation proceedings is set forth in Article L 622-17.

⁵²⁰ Section 39 IO.

⁵²¹ Kirchhof, Eidenmüller and Stürmer, (n 442) 39 IO para 4.

⁵²² See, for example, for Chapter 11 proceedings: Section 11 USC 1129(b)(2)(A); In re A.J. Lane & Co., Inc., Bkrcty.D.Mass.1990, 113 B.R. 821; In re Darnell, C.A.6 (Ky.) 1987, 834 F.2d 1263.

⁵²³ Section 11 USC 507(2); In re Johnson, C.A.6 (Ohio) 1990, 901 F.2d 513: '*Administrative expense claims are first priority unsecured claims and are paid before all other unsecured creditors.*' Faber and others, (n 357) para 19.54 and 19.55.

⁵²⁴ Section 11 USC 503; U.S. ex rel. Harrison v. Estate of Deutscher, M.D.Tenn.1990, 115 B.R. 592.

⁵²⁵ In re Wang Laboratories, Inc., Bkrcty.D.Mass.1993, 154 B.R. 389; Matter of Thomas, Bkrcty.M.D.Ga.1984, 43 B.R. 201.

⁵²⁶ In re Williams, Bkrcty.E.D.N.Y.1994, 173 B.R. 459, affirmed 188 B.R.; In re Palmer, N.D.Tex.1986, 88 B.R. 101.

⁵²⁷ In re Conner, Bkrcty.D.N.M.2016, 559 B.R. 526; In re Palombo, Bkrcty.D.Colo.1992, 144 B.R. 516.

⁵²⁸ Section 11 USC 507(a).

Although the priority rules differ slightly with respect to restructuring or liquidation proceedings, they may in principle be summarised as follows. First priority is assigned to claims of outstanding wages and salaries of employees. Second priority is given to costs of insolvency proceedings. They are followed by so-called 'new money claims' that were granted for the purpose of the continuation of the debtor's business during the observation period. Priority is then granted to secured creditors, followed by unsecured creditors.⁵²⁹

2.4. England

To the contrary, England follows a more creditor-friendly approach with regard to the priority of secured creditors than France. With regard to the administration and liquidation proceedings, Lord Neuberger summarises in the decision *Bloom v Pensions Regulator*⁵³⁰ at paragraph 39, the ranking and priority for creditors under English law as follows: '(1) *fixed charge creditors*; (2) *expenses of the insolvency proceedings*; (3) *preferential creditors*; (4) *floating charge creditors*; (5) *unsecured provable debts*; (6) *statutory interest*; (7) *non-provable liabilities*; and *shareholders*.' It can be seen that the English legal system significantly differentiates between the various types of secured and unsecured creditors. These rules for a winding up by the court shall now be considered in more detail.

A fixed charge or creditors with a proprietary interest in assets have priority over all unsecured claims, preferential or otherwise since such assets do not belong to the insolvent estate.⁵³¹ Second priority is assigned to expenses of the insolvency proceedings. According to Rule 14.27 of the Insolvency Rules 2016, the liquidator is entitled to retain

⁵²⁹ Faber and others, (n 357) para 9.25 et seqq.

⁵³⁰ *Re Nortel GmbH (Bloom v Pensions Regulator)* [2013] UKSC 52, [2014] AC 209.

⁵³¹ *The Commissioners for Her Majesty's Revenue and Customs v The Football League Ltd v The Football Association Premier League Ltd* [2012] EWHC 1372 (Ch): The first principle in issue is the *pari passu* principle, which requires the assets of an insolvent person to be distributed among the creditors on a *pari passu* basis, subject only to such exceptions as the general law may permit. The *pari passu* basis of distribution means that all creditors will receive the same percentage of their debts out of the available assets. **Parties are not free to contract out of the operation of this principle, except by the creation and, when required, registration of security over the debtor's assets.** It is not suggested that security is created by the provisions in issue in these proceedings.'

‘such sums as may be necessary for the expenses of the winding up’, including the liquidator’s own remuneration, before any of the other insolvency claims are to be paid. Notably, there is a precise order in which the respective expenses of the bankruptcy are to be paid.⁵³² The third class in order of priority is that of preferential creditors.⁵³³ These include, for example, contributions to occupational and state pension schemes, and remuneration and wages, or other benefits of employees. The fourth class in order of priority is that of floating charge creditors.⁵³⁴ The fifth class in order of priority is that of ordinary creditors. In principle, they have a *pari passu* ranking against each other.⁵³⁵ Sixth priority is assigned to claims of payment of interest on debts proved in a winding-up.⁵³⁶ Last priority is then granted to non-provable liabilities⁵³⁷, followed by shareholders.⁵³⁸

2.5. Summary: Different Approaches to Ranking of Creditors

The brief examination reveals that these jurisdictions use different legal strategies when it comes to ranking of claims in general and the position of secured creditors in particular. However, it is important to point out, that Contracting States may adopt Alternative A without sacrificing these domestic policy choices in relation to the ranking and priority of creditors. Indeed, the Convention provides Contracting States with the possibility to decide on the legal, economic and political question of how secured creditors of an international interest should be treated in insolvency proceedings. To illustrate this, it is necessary to briefly examine the priority rules of the Convention.⁵³⁹

⁵³² Rule 7.108(4) together with Rules 7.112-7.116 Insolvency Rules 2016.

⁵³³ Sections 175 and 386 Insolvency Act 1986.

⁵³⁴ Section 176ZA Insolvency Act 1986.

⁵³⁵ Rule 14.12 Insolvency Rules 2016; See also *Whitaker v Palmer* [1901] 1 Ch 9: ‘In bankruptcy, once given a provable debt, all the debts proved were entitled to payment of dividend *pari passu*.’

⁵³⁶ Section 189 Insolvency Act 1986.

⁵³⁷ Section 189(2) Insolvency Act 1986 and Rule 14.2(4) Insolvency Rules 2016.

⁵³⁸ Section 154 Insolvency Act 1986.

⁵³⁹ Michael Deschamps, ‘The perfection and priority rules of the Cape Town Convention and the Aircraft Protocol A comparative law analysis’ 2013 Cape Town Convention Journal 51; John Pritchard and David Lloyd, ‘Analysis of Non-Consensual Rights and Interests

2.6. Priority Rules under the Convention

2.6.2. Article 29 – Priority Rule

In essence there are only a few provisions in the Convention that expressly govern priority rules, and they shall now be discussed. To start with, Article 29(1) of the Convention establishes the fundamental principle that a '*registered interest has priority over any other interest subsequently registered and over an unregistered interest.*' This rule extends to the proceeds of the secured asset.⁵⁴⁰ The priority rule applies to *any* interest whether international or national. While there are several specified exceptions to the rule,⁵⁴¹ for the purpose of this legal analysis, the focus will be on Article 39 and 40, dealing with non-consensual rights or interests.

2.6.2. Article 39 – Rights Having Priority Without Registration

Article 39 provides a significant exception to the priority rule. By making a declaration under Article 39(1), Contracting States may specify generally or specifically the categories of unregistered non-consensual right or interest (other than a right or interest to which Article 40 applies) that will have priority over registered international interests whether in or outside insolvency proceedings. The purpose of this rule is to give way to the public interest. The Official Commentary provides several examples, including non-consensual liens for unpaid wages resulting from insolvent employers, non-consensual liens in favour of a repairer or warehouseman, or non-consensual liens for unpaid taxes.⁵⁴² Other examples are judgments or orders of attachments, in favour, for example,

under Article 39 of the Cape Town Convention' (2013) 2 Cape Town Convention Journal 3; Roy Goode, 'The priority rules under the Cape Town Convention and Protocols' 2012 Cape Town Convention Journal 95.

⁵⁴⁰ Article 5(2) of the Convention.

⁵⁴¹ For a complete analysis see: Goode, 'The priority rules under the Cape Town Convention and Protocols', (n 539).

⁵⁴² Roy Goode, 'The Cape Town Convention on International Interests in Mobile Equipment: a Driving Force for International Asset-Based Financing' (1999) 7 Uniform Law Review 1, 6; Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.271.

of airport and navigation charges or outstanding payments to public service providers.⁵⁴³ It is important to note that only non-consensual rights or interest rights that are existent under the domestic law of the respective Contracting State may be listed in the declaration. This is because the Convention expressly defines under Article 1(s) a non-consensual right or interest as '*a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organization.*' This having been said, it might be useful to examine the declarations made by the United States and England:

United States

(A) all categories of non-consensual rights or interests which under United States law have and will in the future have priority over an interest in an object equivalent to that of the holder of a registered international interest shall to that extent have priority over a registered international interest, whether in or outside insolvency proceedings; and

England

(a) all categories of non-consensual rights or interests which under the law of the United Kingdom of Great Britain and Northern Ireland, the law of Gibraltar, the law of the Cayman Islands or the law of the Island of Guernsey at the date of this declaration, or created after that date, have priority over an interest in an object equivalent to that of the holder of a registered international interest and shall to that extent have priority over a registered international interest, whether in or outside insolvency proceedings; and

⁵⁴³ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.272; Pritchard and Lloyd, (n 539) 10.

A closer look shows, that both states lodged similar declarations under Article 39(1)(a) of the Convention stipulating that all categories of non-consensual rights or interests under domestic law without registration have priority over registered international interests whether in or outside insolvency proceedings.

2.6.2. Article 40 – Registrable Non-consensual Rights or Interests

Similarly, Article 40 of the Convention requires Contracting States to specify the categories of non-consensual rights or interests that shall be registrable in the International Registry and to be treated as they were an international interest. Again, it is important to note that only non-consensual rights or interest rights that are existent under the domestic law of the respective Contracting State may be specified. The Official Commentary provides the lien of a judgment creditor as an example.⁵⁴⁴ Both the United States and England did not lodge a declaration pursuant to Article 40 of the Convention. This is because a non-consensual right or interest may be the subject of a declaration in relation to either Article 39 of the Convention or under Article 40 of the Convention but not both.

2.7. Summary: Convention’s Recognition of Domestic Insolvency Priority Choices

In conclusion, Contracting States may adopt Alternative A without sacrificing domestic policy choices in relation to the ranking and priority of creditors under domestic law. For example and most importantly, by making a declaration under Article 39 Contracting States may determine which unregistered non-consensual right or interest will have priority over registered international interests whether in or outside insolvency proceedings. The sole requirement is that the declared unregistered non-consensual right already exists under domestic insolvency laws.

⁵⁴⁴ Goode, *Official Commentary: Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment*, (n 52) para 4.36

D. Conclusion: Superiority of Alternative A's and its Dependency on Domestic Insolvency Laws

The argument made in this chapter is as follows:

First, Alternative A is a significantly improved version of Section 1110 of Chapter 11 of the United States Bankruptcy Code. By avoiding its shortcomings and difficulties, Alternative A is able to draw on and increase its proven economic and legal advantages for aircraft finance. Accordingly, in the author's opinion, Alternative A is a key factor for the efficient implementation of the Convention and the Protocol in both civil and common-law jurisdictions, and thus should be implemented to the widest extent possible. Still, it is important to note that, despite its origin, Alternative A must be interpreted autonomously, as is dictated by Article 5(1) of the Convention.

Second, Contracting States should disregard Alternative B when ratifying the Convention and the Protocol. Alternative A is clearly superior to Alternative B. This is because Alternative A is not only in conformity with the underlying rationale of the Convention and the Protocol — bolstering creditors' confidence in their ability to defend their legal rights effectively in insolvency proceedings — but also provides the most convincing solution in terms of legal certainty and predictability.

Third, this chapter illustrates that when implementing Alternative A, Contracting States should consider various issues with regard to their insolvency laws. This is because the effectiveness of the Convention's remedies in general and in particular of Alternative under the Protocol is dependent on the type of insolvency proceeding, the test to determine insolvency but also the persons who may file for the commencement of insolvency proceedings. Further, it is important to point out that the Convention provides Contracting States with the capability to pursue national insolvency policies by relying on its sophisticated declaration system, such as, for example, under Article 39 ('Rights

having priority without registration') of the Convention. Accordingly, Contracting States might adopt Alternative A without sacrificing domestic policy choices due to the Convention's declaration system.

Chapter 6 Conclusion of the Thesis

A. Introduction

This thesis identified a number of key principles for the implementation of the Convention's remedies in states based on the civil and common law tradition. These principles are intended to support legislators, academics, lawyers, and other institutional officials and individuals involved in implementing and interpreting the Convention's remedial framework as drafted and intended. These principles will be particularly useful to Contracting States in informing them to some of the practical issues they will need to consider as they begin the process of adopting the Convention and the Aircraft Protocol into national law. Some of the key principles make some general and methodological points what Contracting States have to consider when implementing the treaty for the purpose of creating and transition to the new legal regime. Other key principles are more concrete. They have to do with substantive and procedural choices of Contracting States. They may require Contracting States to make a number of declarations with specific parameters, when ratifying or acceding to the treaty. Following is a summary of the key principles established in the thesis. These key principles overlap to some extent, but are separated for clarity of exposition.

B. Substantive, Procedural and Interpretative Principles of Implementation

1. Methodological Principles of Implementation

The primary question of Contracting States when ratifying the Convention is typically what they have to do for the purpose of reaping the economic benefits of the Convention and Protocol? In order to answer this question, one must be aware of the fact that the vast majority of economic benefits can be attributed to the Convention's uniform legal rules for the creation, registration, and protection of international interests in aircraft that seeks to protect financiers against the enforcement risk relating to different states. The uniformity will further lower the costs of writing contracts and negotiating over the legal regime (and the default terms) for parties to international transactions in aircraft finance. Accordingly, it is important to stress that the adoption and effective implementation of the Convention and Aircraft Protocol would already produce most of the estimated economic gains of several billion annually.⁵⁴⁵ Contracting States must be advised that the economic benefits of the qualifying declarations are rather marginal in comparison to the global economic benefits that flow from the Convention. Contracting States must further be advised that making the required qualifying declarations is solely a formal condition to be eligible for the Cape Town Discount but it does not guarantee entitlement to the discount and by extension the creation of economic benefits of the Convention as often stated in academic writings. As a result, the qualifying declarations should only play a limited role in the process of implementation, even more so if the legal obstacles raised by the qualifying declarations may discourage some states from ratifying the Convention at all. Clearly, then the focus of Contracting States should be on the effective implementation of the Convention and Protocol.

⁵⁴⁵ Saunders and others, (n 6) 351.

Effective implementation means, however, more than that the treaty has the force of national law with priority over conflicting national law, as reinforced by the Indian *SpiceJet* and *Kingfisher* litigations. These cases emphasise that Contracting States must ensure that legislative, judicial, executive, and administrative branches apply the Convention and the Protocol as drafted and intended. Put otherwise, the best system of remedies under the Convention exercisable in the event of the debtor's default or insolvency can be of no avail if its practical application is not uniform and predictable. Considerable difficulties lie ahead in achieving the desired uniformity, in particular the difficulty of getting legal practitioners to interpret the Convention's remedies autonomously, and not through the lens of national law. Consequently, it seems of the essence that lawyers and judges have to be sufficiently prepared, as part of the implementation process to avoid that the Convention's system of remedies is not undermined on the basis of national substantive or procedural laws. In particular, a few methodological principles have to be followed.

Equally Authentic Language Versions First, the Convention 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. One should, however, be aware that this interpretative principle does not necessarily allow national courts to fully rely on one translation they are most familiar with. The reason is simple: if all these translations are equally authentic, this at the same time means that no single version can be relied upon for an authentic interpretation of the Convention. In particular, the examination of Article 13 has shown that errors arising in translation of international conventions, such as the Convention, constitute a significant obstacle to their certain, predictable and uniform interpretation and application. It has further shown the tendency of translators to resort to legal terms and concepts they were familiar with. Consequently, both lawyers and judges should be alert to the dangers of linguistic deficiencies in the

Convention, and they should always confirm the outcome of the linguistic legal analysis with additional material having regard to the context and the purpose of the provision.

Autonomous Interpretation Second, legal practitioners interpreting the Convention must be aware that our legal education shapes our legal research skills implicitly in such a way that we are many times not even aware of it. It is incredibly difficult for a lawyer educated in only one system to really free himself from the concepts, thinking attitudes and reasoning of his own system. 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. 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 it has a specific meaning that is autonomous and different from any domestic concept of the civil or common law. Again, the examination of Article 13 is a good example of this.

Gap Filling Third, applying the Convention as intended and drafted requires jurists to acknowledge the fact that the Convention is not a comprehensive codification of commercial law. Like many other private international law treaties, the Convention's scope of application, is limited, as can easily be derived from a number of provisions. First, 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. Second, Article 14 of the Convention stipulates the generally accepted principle that procedural matters of the Convention's remedies are governed by the law of the place where the remedy is to be exercised, the *lex fori*. Thus, one can observe that 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. 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, which is clearly not the case. The lack of clarity leaves the courts with considerable room for discretion. There is a significant risk that national courts favor interpretations in line with their domestic law, which may ultimately undermine the uniform application of the Convention's remedies. But the effective interplay between the Convention's remedies and national procedural law is crucial. Procedural rules determines the efficacy of judicial remedies under the Convention and the Protocol, and should not be underestimated as a purely supporting or secondary law. The thesis has shown that it seems necessary to fill both 'substantive' and to some extent 'procedural' gaps in relation to the Convention's remedies primarily by resorting to the general principles on which the Convention is based, especially because legal systems around the world differ significantly in this respect. Despite this wider approach to gap filling, one has to acknowledge that there is a continuing necessity to resort to non-harmonised procedural law to define the procedural framework of advance relief. Thus, Contracting States are advised to carefully examine their domestic rules of procedure when implementing the Convention. National procedural rules that are manifestly against the stated purpose of the Convention's remedies should be revised or disappplied.

Intertwinement of the Convention's remedies Before looking at the various remedies individually, it is important to note that Contracting States should recognise the equal importance of each single remedy for the effectiveness of the Convention's remedial framework, and consequently, take an integrative approach to implementation. The thesis has shown that although the various remedies under the Convention may be

technically independent from each other, they are closely intertwined with each other in legal practice.

2. Relief Pending Final Determination

Contracting States must be informed that advance relief is an integral part of the Convention's remedial system at an early stage of proceedings. It addresses two principal concerns of creditors in aircraft finance, namely: providing preservation of the economic value and use of the aircraft object until final determination of the merits of their claim. It does this not only by guaranteeing the protection of substantive rights but also by providing early enforcement for secured creditors of aircraft. The point is that advance relief is an extraordinary, *sui generis* remedy, which goes well beyond traditional interim remedies in terms of efficacy, effectiveness and speediness. Consequently, to fulfil its stated purpose, Contracting States are advised to consider several points with regard to implementation.

Time Frame First, Contracting States must be prepared to declare, in accordance with Article X(2) of the Protocol, 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). The relevant declaration may look like this: *Pursuant to Article XXX(2) of the Protocol, Contracting State declares that Article X of the Protocol shall apply within its territory, and that the time period referred to in Article X(2) of the Protocol shall be 10 working days for the purposes of Article 13(1)(a) to (c) of the Convention and 30 working days for the purposes of Article 13(1)(d) and (e) of the Convention.*

Procedure Second, meeting these time limits for completion of the proceedings poses a number of challenges for national legal systems. This is because advance relief is highly dependent on the establishment of efficient, clear and rapid rules of procedure. The main

problem in this area appears to be the close connection with the efficiency of general procedural law that is largely left to divergent domestic law. One way to partially overcome this problem is to fill both substantive and to some extent procedural gaps in relation to advance relief by resorting to the general principles on which the Convention is based. Indeed, many procedural matters with regard to advance relief can be treated as an internal gap and closed by resorting to the general principles on which the Convention is based. The thesis has shown that the requirement to adduce evidence of default must be interpreted as a requirement to provide *prima facie* proof of the alleged default. It has further shown that admissible evidence must be limited to evidence in written format presented in due course. Finally, it must be noted that an autonomous interpretation of advance relief demands that national legal standards, which apply to interim relief remedies, are not *per se* applicable but must be examined whether they are adequate in the context of advance relief.

3. Self-Help Remedies

Given the significant risk of deterioration of aircraft, Contracting States should ideally provide for as many self-help remedies as possible under their Article 54(2) declaration of the Convention and the Protocol. To enable self-help remedies under the Convention, Contracting States must consider a number of key principles that are outlined in the following paragraphs. A universal recognition of the self-help remedies given by the Convention, will not always be possible in practice, since some legal systems view non-judicial remedies with a great deal of scepticism due to their potential risk of abuse, general policy reasons, and legal concerns. Thus, it is acknowledged that this point is unlikely to be adopted in full in the real world. But it is hoped that the discussion will inform debate in relation to the significance of non-judicial remedies for secured transactions law in general and in particular under the Convention.

Assessment of Domestic Legal System The first one is that states must thoroughly assess to what extent non-judicial remedies given by the Convention and the Protocol, are found in their domestic legal system. This requires careful review of the domestic legal system, taking into account legislative and judicial developments. If specific non-judicial remedies are not available under national law, states must then determine the legal matters – whether ordinary law, express or implied constitutional provisions, or a combination of both – that may have to be changed or overwritten. One might assert from the standpoint of international law theory that international law is superior to national law; accordingly, the Convention as an international treaty is at least in theory superior to, not only, ordinary laws, but also the constitution. However, this assertion is only of limited practical validity. The reason is that one simply cannot assume that every constitution prescribes that international treaties ratified by a state have an authority superior to its laws; this seems to be rather the exception than the rule. One has to recognise that the question of the rank of treaties in the national legal hierarchy is a complex topic, and must be answered from the perspective of domestic law where states remarkably differ. Thus, it follows that an Article 54(2) declaration in favour of non-judicial remedies may not necessarily be superior to a prohibition of self-help remedies under domestic laws.

Wording The second fundamental pillar for the implementation of the self-help remedies system is to set out, in the wording of the Article 54(2) declaration, *precisely which specific remedies may be exercised with or without leave of the court*. Without a declaration that accurately reflects the judicial remedies and non-judicial remedies available under domestic law, Contracting States are inadvertently at risk of being wrongly assessed by financiers with regard to enforcement risk of secured credit. Such problems unnecessarily damage the reputation of Contracting States resulting in increased borrowing costs and reduced availability of credit in the aircraft market. They also pose a

significant obstacle to the efficacy of the Convention's remedial framework in practice. This point seems particularly relevant for states that have lodged a declaration providing for the general non-availability of extra-judicial remedies, notwithstanding their at least partial availability under national law. The reason is that a more specific and comprehensive Article 54(2) declaration provides greater legal certainty and predictability for industry.

A Contracting States' Article 54(2) declaration should not only be legally accurate under the standards of domestic law, but must further be compliant with the legal requirements set out in the Convention. It is of the essence that both Contracting States and UNIDROIT as Depositary of the Convention should pay close attention to the wording of Article 54(2) declarations, taking into account Article 56 which stipulates that reservations are not allowed in the context of the Convention and hence, have no effect. Therefore, Contracting States technically may *only declare* whether the Convention's remedies may be exercised with or without leave of the court and are *not authorised* to specify additional requirements under the Convention. An example of this tension would be a situation in which a Contracting State chooses to ratify the Convention, accepting the exercise of self-help remedies only *if in accordance with domestic law*. Such an excessive wording poses difficult issues of interpretation. This is because, firstly, Article 54(2) is a *mandatory* declaration – meaning that UNIDROIT ought not have accepted any state's deposit of a binding instrument of ratification or accession without such a declaration – and secondly, that UNIDROIT has no power under the Convention to refuse or modify a declaration made by a Contracting State.

Thus, if the extension to the declaration cannot be reconciled with the text of the Convention, such as for example as a procedural matter governed by Article 14 of the Convention or as a matter clearly outside the scope of the Convention such as, for

example, criminal law, the declaration may be considered invalid due to a blatant violation of Article 54(2) and Article 56 of the Convention. Arguably, this would mean that the state in question had not, in fact, acceded to the Convention since Article 54(2) constitutes a mandatory declaration for accession. While this tension could potentially be reconciled through a reductive interpretation of the declaration, doing so may jeopardise the original and clear intent of the state in question, making them signatory to remedies, which may be problematic under domestic legislation. Thus, this tension remains a significant challenge but more importantly, it highlights the significance of a correctly phrased declaration under Article 54(2). Based on the aforementioned points a correct and appropriate Article 54(2) declaration, for example, may look like this:

Contracting State declares that all remedies available to the creditor under any provision of this Convention and the Protocol which are not expressed under the relevant provision thereof to require application to the court, may be exercised without judicial authorisation, with the exception of the remedies of possession and control provided for in Article 8 and 10 of the Convention, and the remedies provided for in Article XI and Article XIII of the Protocol.

4. Insolvency Remedies: Alternative A

The most fundamental principle for implementation of the treaty system in the insolvency context is to provide creditors with a certain and predictable legal framework for repossession of their aircraft.

In this regard, Alternative A is a significantly improved version of Section 1110 of Chapter 11 of the United States Bankruptcy Code. By avoiding its shortcomings and difficulties, Alternative A is able to draw on and increase its proven economic and legal advantages for aircraft finance. Accordingly, in the author's opinion, Alternative A is a key factor for the efficient implementation of the Convention and the Protocol in both

civil and common-law jurisdictions, and thus should be implemented to the widest extent possible. Still, it is important to note that, despite its origin, Alternative A must be interpreted autonomously, as is dictated by Article 5(1) of the Convention. It follows that Contracting States should declare to apply Alternative A of Article XI of the Protocol and specify a maximum waiting period of sixty (60) calendar days to minimise the significant risk of deterioration. This declaration may look like this: *Contracting State declares that it will apply Article XI, Alternative A in its entirety to all types of insolvency proceeding and the “waiting period” for the purposes of Article XI(3) shall be 60 calendar days.* If states are not prepared to apply Alternative A, there are good arguments for states to apply domestic insolvency law and disregard Alternative B when ratifying the Convention and the Protocol.

In this context, it is critical to note that opting for Alternative A, does not require Contracting States to disregard domestic policy choices. Rather, Contracting States retain the vast amount of regulatory power over insolvency policies. In particular, the examination has shown that the critical question when insolvency proceedings are to be opened is still governed by the applicable law. Thus, Contracting States ultimately determine when insolvency proceedings are to be opened, and consequently, under what circumstances Alternative A will be available to the secured creditor. It should also be noted that due to Convention’s restricted definition of insolvency proceedings, many pre-insolvency proceedings found in domestic laws that favour restructuring of the debtor’s business instead of liquidation are not affected. Further, by making a declaration under Article 39 and/or Article 40, Contracting States remain in charge with regard to the significant question, which type of creditors get priority when it comes to paying off debt inside and outside insolvency. The only requirement is that only non-consensual rights or interest rights that are existent under the domestic law of the respective Contracting State may be listed.

An example of a declaration under Article 40 may look like this:

Contracting State declares, in accordance with Article 40 of the Convention, that the following categories of non-consensual right or interest have priority under its laws over an interest in an aircraft object equivalent to that of the holder of a registered international interest and shall have priority over a registered international interest, whether in or outside insolvency proceedings:

(a) liens in favour of airline employees for unpaid wages arising since the time of a declared default by that airline under a contract to finance or lease and aircraft object;

(b) liens or other rights of a state entity relating to taxes or other unpaid charges

(c) liens in favour of repairers of an aircraft object in their possession to the extent of service or services performed on and value added to that aircraft object

(d) rights of a person obtaining a court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment.

An example of a Declaration under Article 39 may look like this:

Contracting State declares, in accordance with Article 39(1) of the Convention, all categories of non-consensual rights or interests which under the law of the Contracting State at the date of this declaration, or created after that date, have priority over an interest in an object equivalent to that of the holder of a registered international interest and shall to that extent have priority over a registered international interest, whether in or outside insolvency proceedings.

C. Conclusion

It is hoped that these principles will provide states official, legislators, academics, lawyers, and other institutional officials and individuals involved, with a better understanding of the underlying rationale and remedial framework of the Convention and Protocol. The desired outcome is that states based on the civil and common law tradition will be able to have regard to these principles in deciding how they respond to the challenge of providing effective and affordable finance to the aviation industry. These principles are more difficult than they may appear at first sight. It is the author's hope that the examination of these principles proceeds in future both to refine and to deepen the principles.

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