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Advance relief under the Cape Town Convention

Gilles Cuniberti*

This article analyses the nature of the relief pending final determination that is provided for by Article 13 of the Cape Town Convention. It contends that the language and legislative history of Article 13 do not allow a final conclusion on the nature of Article 13 relief to be reached. Article 13 can be characterised as a hybrid between a final remedies provision and one that addresses interim relief. It does not fit with any of the remedies commonly found in national legal systems. It is argued that the lack of clarity of the purpose of the provision not only makes it difficult to give any guidance to future Convention interpreters, but also reduces its usefulness, as transactional lawyers and their clients will want to know what they are actually establishing through an Article 13 clause. The article therefore proposes two models for Article 13: interim relief and an advance enforcement remedy. The rationale for each is a particular goal that parties might want to pursue when availing themselves of the possibility of stipulating for Article 13 remedies in their contract.

1. Introduction

Article 13 of the Cape Town Convention on International Interests in Mobile Equipment (hereafter the 'Convention') has provided for Relief Pending Final Determination ('Article 13 relief'). Article 13 relief will allow creditors to obtain speedy relief from a court in various forms listed in Article 13(1) and in supplementing provisions of the protocols to the Convention. Article 13 only mentions two requirements for obtaining such relief, namely that the creditor adduce evidence of default by the debtor, and that the debtor has agreed to its availability. Article 13(1) reads:

Article 13 – Relief pending final determination

(1) Subject to any declaration that it may make under Article 55, a Contracting State

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

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

Article 13 will undoubtedly puzzle users of the Convention. Article 13 relief does not seem to correspond to any relief traditionally found in national legal systems. Stakeholders will therefore wonder whether Article 13 ought to be understood as establishing a completely novel form of relief or whether, by contrast, the goal of the drafters was to build on national legal systems and to import into the Convention remedies which have long been available in domestic laws and have shown their usefulness.

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The answer to this question will be critical to decide how to interpret Article 13. If Article 13 relief is to be understood as a transplant of particular relief commonly found in national legal systems, it will be natural to turn to the comparative law of remedies for that purpose. The Official Commentary on the Convention states that Article 13 was meant to build on relief commonly available in national legal systems, though without indicating which one.¹ If, on the contrary, the Relief is understood to be a novel remedy, it will be important to appreciate the goal pursued by the drafters in order to interpret Article 13 in accordance with that goal.

None of these views is in contradiction with the fundamental goal of the drafters to achieve uniformity by creating autonomous remedies. There is no doubt that this is the main purpose of the Convention. Article 5 of the Convention, which governs its interpretation, provides that 'regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application'. Such uniformity would only be achieved if remedies of the Convention in general, and Article 13 remedies in particular, were considered as autonomous remedies, and not as remedies governed by national law.² This obvious proposition, however, is not helpful to define positively which remedies Article 13 actually establishes. As will be explained below, the Convention leaves unsettled many issues with regard to the legal regime of Article 13 remedies. These issues can be addressed in two ways. The first is to define a novel and innovative legal regime for Article 13, and to create a *sui generis* remedy. The second is to build on the comparative law of remedies for the purpose of supplementing Article 13 and therefore for defining an equally autonomous legal

regime. It is perfectly conceivable to create an autonomous remedy inspired by national laws. Of course, one should not forget that Article 5(2) of the Convention calls for interpreting matters governed by the Convention but not expressly settled by it in conformity with the principles on which the Convention is based, and concludes that national laws should be consulted only in the absence of such principles. Article 13, however, establishes a judicial remedy. The issues of interpretation that it will raise will essentially be procedural in character. It is highly unlikely that the principles of the Convention will be useful for determining rules of procedure.

A related question is whether, in any case, one could realistically hope to fully harmonize a procedural remedy. It is a virtually universal rule that procedure is governed by the law of the forum, and no international convention has ever tried to provide for a different rule. Unsurprisingly, Article 14 of the Convention expressly provides that the law of the forum³ will determine procedural requirements for exercising remedies afforded by the Convention. The civil procedure of Contracting States, however, will often offer many forms of relief which will be governed by different procedural rules. It will therefore be necessary to characterize Article 13 relief for the purpose of determining which procedural rules apply. Despite the repeated exhortations of the Official Commentary on the Convention that Article 13 'is to be interpreted in accordance with the Convention, not by reference to national law',⁴ reference to national law simply seems unavoidable, at least for defining part of

¹ Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (revised edn, UNIDROIT 2008) para 4.108.

² Ibid para 2.60 fn 16, para 4.108.

³ It seems that the purpose of Article 14 is merely to confirm the traditional rule that the law of the forum controls procedure, and that the reference to 'the law of the place where the remedy is to be exercised' is to be understood as a reference to the law of the place where the action will be initiated. If the goal of the provision is to include in the equation the law of the place where the remedy will produce its effect, the matter is entirely different.

⁴ Official Commentary, Goode (n 1) para 2.60 fn 16, para 4.108.

the procedural regime of Article 13. The autonomy of the remedies established by Article 13 can only be partial.

This article is structured as follows. In Part 2, I explore what the rationale behind Article 13 might be. I find that the purpose of the provision is unclear. In Part 3, I argue that this lack of clarity is unlikely to be welcomed by users of the Convention who will only be interested in providing for remedies with a clear aim and legal regime. I therefore propose two models for Article 13 which users of the Convention might want to adopt. In Part 4, I discuss how these choices will affect availability of similar remedies under national law. Finally, in Part 5, I discuss jurisdiction to grant Article 13 relief.

2. Assessing the purpose of relief pending final determination

(a) *Interim relief*

Article 13 could first be understood as establishing a form of interim relief. Several provisions of the Convention characterize Article 13 relief as such. Article 13(4) implicitly provides that the relief is only one of the possible ‘forms of interim relief’ that could be made available to creditors. Article 43(2) provides a jurisdictional rule for granting relief under Article 13(1)(d) or ‘other interim relief by virtue of Article 13(4)’. Finally, in most versions of the Convention, the title of Article 13 refers to provisional measures. In the French version, the title of Article 13 is simply ‘provisory measures’.⁵ The Spanish and Russian versions employ longer titles, which include the term ‘provisional’⁶ or ‘temporary’⁷ measures. Interestingly, however, the English version does not.⁸ It seems that the English drafters consciously avoided those

words.⁹ They may have wanted to use instead more neutral terms which simply describe the remedy. At the same time, the description is precisely that the relief afforded by Article 13 aims at benefiting the creditor for a certain period of time (the final determination of the claim) and might thus be provisional.

The question which arises is whether these references to the interim or provisional character of Article 13 relief should be considered as an indication that the intention of the drafters was essentially to design a remedy for the purpose of meeting the needs which are typically met by interim remedies in national legal systems. If that were the case, the provisions of Article 13 should be consistent with the rules typically found in national legal systems. Another logical consequence would be that such rules could be used to supplement Article 13 when needed, that is when Article 13 would not address a given issue. This, of course, would only be possible if the national laws of interim relief were not too diverse, and it happens to be that many aspects of the regime of certain kinds of interim remedies are remarkably similar in most jurisdictions.

(i) *The concept of interim relief*

If the drafters had in mind a concept of interim relief, what might it be? It is unlikely that it could have been a general concept, as it is doubtful that there is any. Interim relief is, in most legal systems, a remarkably diverse category. It encompasses a variety of remedies which serve many different purposes. There exists interim relief designed to freeze assets, to search premises, to order payment, to prevent given parties from doing a particular act, etc. The only commonality between these hugely diverse remedies seems to be that ‘they are not designed to provide a final resolution of the matter in dispute’.¹⁰ They are not even all pro-

⁵ ‘Article 13 – Mesures Provisoires’.

⁶ Spanish: ‘Artículo 13 – Medidas provisionales sujetas a la decisión definitiva’.

⁷ Russian: ‘Статья 13. Временные меры по защите прав’.

⁸ It states ‘Relief Pending Final Determination’.

⁹ Official Commentary, Goode (n 1) para 2.60 fn 16.

¹⁰ Adrian Zuckerman, *Zuckerman on Civil Procedure – Principles of Practice* (2nd edn, Sweet & Maxwell 2006) para 9.1.

visional: disclosure orders, for instance, are final insofar as the information provided cannot be returned after the dispute has been settled on the merits.¹¹

While it is clear that there is very little conceptual unity among all existing interim remedies, the situation is very different if one focuses on particular kinds of interim remedies. For present purposes, it is necessary to distinguish sharply between two categories. The first is composed of process orders, which aim at regulating the litigation process, for instance by ensuring that evidence remains available, or documents are disclosed. The second is composed of remedies designed to protect substantive rights. In the context of Article 13 of the Convention, we are clearly concerned with this second category of interim remedies. Article 13 is not concerned with the regulation of litigation before a competent adjudicator, but with the substantive rights of the creditor in the object, that is, the international interest.

The category of interim remedies aimed at protecting substantive rights is conceptually much more homogenous than the general category of interim relief. The reason why is that the goal that remedies of this kind pursue largely dictates their legal regime and, in particular, their conditions. The context is typically the following one. A plaintiff claims that a defendant is violating his substantive rights. If he wants to enforce these rights, however, a competent adjudicator must recognize them and order that they be enforced. The plaintiff must therefore bring proceedings before this adjudicator. In the meantime, however, the defendant might be violating them. An interim remedy should thus be available pending final determination of the rights to avoid injustice. But as long as no competent adjudicator has recognised that the rights do exist, there is no compelling reason to enforce them, because

the adjudicator may eventually rule that they do not exist. This is the reason why English courts would not issue freezing orders pending final determination of the pecuniary rights of plaintiffs¹² until 1975 and the creation of the *Mareva* injunction.¹³

Fortunately, the laws of most jurisdictions afforded a remedy in such situations long before 1975. Today, they resolve the intractable problem of the protection of rights which are only alleged by the plaintiff in a remarkably similar way. First, the plaintiff is given a chance to show at an early stage of the proceedings that the rights that he alleges are likely to exist. Second, he is requested to demonstrate that there is a good reason to interfere in the business of the defendant immediately, before it is confirmed that the plaintiff is entitled to enforce his likely rights. Two requirements are thus found in virtually all legal systems. The first is that the plaintiff should demonstrate that there is a significant chance that he will win on the merits, and therefore that the rights the existence of which he alleges exist (*fumus in boni juri*). In the United Kingdom, courts will issue freezing orders only if satisfied that the applicant has a good arguable case (on the merits).¹⁴ In France, creditors seeking to attach provisionally the assets of their alleged debtors must show that their rights exist 'in principle'.¹⁵ In Germany, all provisional measures aiming at protecting substantive rights are subject to the common requirement of the applicant demonstrating that his rights are at least 'credible'.¹⁶ In all these jurisdictions, however, it is not enough for the alleged creditor to show that the existence of

¹² See eg *Mills v Northern Railway of Buenos Ayres Co* (1870) LR 5 Ch App 621, 628 (Lord Hatherley LC): 'the only remedy in that case for a creditor is to obtain his judgment and to take out execution'.

¹³ The *Mareva* injunction was renamed freezing order when English civil procedure was reformed in 1998.

¹⁴ *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412 (CA).

¹⁵ French Law no 91-650 du 9 July 1991, Article 67.

¹⁶ See eg Reinhold Greger in Richard Zöller and others, *Zivilprozessordnung* (29th edn, Schmidt 2012) §294 no 6.

¹¹ The same is true of many interim remedies aiming at preserving or establishing evidence: if successful, the evidence will be available permanently: Marie-Laure Niboyet and Géraud de Geouffre de La Pradelle, *Droit international privé* (LGDJ 2007) para 603.

his rights is likely. He must also demonstrate that there is a good reason for interfering in the business of the defendant immediately. A second requirement is therefore that there should be a danger that the judgment which will eventually recognize the rights of the applicant might not be enforced (*periculum in mora*). In the United Kingdom, creditors applying for freezing orders must demonstrate that there is a real risk that the final judgment will go unsatisfied.¹⁷ In France, creditors applying for provisional attachment orders must demonstrate that payment of the judgment would otherwise be threatened.¹⁸ In Germany, the applicant must show that in the absence of the requested relief, the enforcement of the final judgment would either be prevented or made significantly more difficult.¹⁹

It is worthy of note that lawmakers have sometimes explored ways to avoid relying on the first requirement, as assessing even roughly the merits of the case at an early stage of the proceedings, and often in haste, may prove difficult. Until 1974, English courts would issue interim injunction only if the applicant could show a *prima facie* case on the merits.²⁰ In *American Cyanamid*,²¹ the House of Lords reconsidered the *prima facie* test and established the general rule that the court should not consider a case's merits. Instead it should strive to balance the hardship to the applicant caused by refusal of relief against the hardship to the other party if he is temporarily bound by an injunction. This suggests that, at least in theory,²² an

alternative model could be to focus exclusively on the potential hardships of the parties, that is, to design a more sophisticated *periculum in mora* test.

It should also be underlined that none of these jurisdictions make the issuance of interim relief conditional upon a prior agreement of the parties to that effect. Any person alleging that he is the creditor of another person may freely apply for interim relief. His right to do so is in no way conditional upon the acceptance of the alleged debtor. This is perfectly understandable, because the right to apply for an interim remedy is a mere consequence of the existence of the substantive rights of the creditor. If the right of the creditor exists, it necessarily entails a right to be paid in the general sense, that is, a right to demand and secure enforcement. That is what rights are about: they are binding, and enforceable. There is no need to secure the agreement of debtors to that effect. Indeed, substantive rights are not necessarily contractual, and it might not even be possible to agree on anything with the debtor. But even contracts need not provide expressly that creditors will have the option of applying for interim relief. This is a remedy available to all creditors,²³ just as the right to seek damages for non-performance is, in principle, available to all creditors.

(ii) *Is relief pending final determination interim relief?*

Although the relief pending final determination established by Article 13 of the Cape Town

¹⁷ *The Niedersachsen* [1983] 1 WLR 1412 (CA).

¹⁸ French Law no 91-650 du 9 July 1991, Article 67.

¹⁹ German Code of Civil Procedure (ZPO) § 917 and 935.

²⁰ *JT Stratford & Son Ltd v Lindley* [1965] AC 269 (HL) 338–39 (Lord Upjohn).

²¹ *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 396 (HL).

²² The fact of the matter is that *American Cyanamid* did not entirely exclude consideration of the strengths of the parties' case. The court held that, first, the claim of the applicant should be serious, and second that, if the court would discover no real difference in weight between the parties' respective potential hardships, it

would consider the merits of their case as a tie-breaking factor.

²³ The German constitutional court went as far as ruling that the right to interim protection is a fundamental right (see German Constitutional Court, ruling of 19 October 1977, BVerfGE 46, 166 (177 f); NJW 1978, 693). The European Court of Human Rights, has not yet ruled so, but it has ruled that the right to enforcement is one aspect of the fundamental right to a fair trial afforded by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Hornsby v Greece* (1997) 24 EHRR 250).

Convention may seem to have some common features with traditional interim relief, it is different in many ways.

At first sight, the purpose of Article 13 might appear to be clearly the mere protection of the substantive right of the creditor.²⁴ This right is the 'international interest' established by the Convention. The effect of this right is to grant to its beneficiary the 'Default Remedies' afforded by Chapter III of the Convention, which are essentially rights to use the object (managing it and collecting any income arising out of such management,²⁵ taking possession of the object²⁶) and rights to its value for the purpose of using it towards satisfaction of the secured obligations (selling it²⁷ or vesting it in satisfaction²⁸). If Article 13 were establishing interim remedies, it would be solely concerned with the preservation of the meaningfulness of those remedies. Article 13 provides for four remedies which all seem to aim at ensuring that the right either to the use or to the value of the object is preserved pending final determination of the existence of that right. It should be underscored, however, that, in certain circumstances, some of these remedies may not only preserve the right of the creditor, but actually give him full satisfaction. This would be the case, for instance, of a conditional seller being allowed to take possession of the object.²⁹ Moreover, the Convention will always be applied in combination with a Protocol. Both the Aircraft and the Luxembourg Protocols allow contracting states to add to the remedies

of Article 13 the sale of the object.³⁰ Although many states have declared that they would not avail themselves of this possibility,³¹ this new remedy sheds a new light on Article 13. Selling the object is not an interim measure. It cannot be undone, and gives satisfaction to the creditor. It does not preserve any right to enforce the international interest. It actually enforces the interest, and it is final.³²

There are other differences, which are arguably even more fundamental. The most remarkable one is that Article 13 does not include any of the two requirements commonly found in national laws. First, Article 13 does not provide that the creditor ought to demonstrate that he is only likely to succeed on the merits. Quite to the contrary, Article 13 merely states that the creditor should provide evidence of default. In the French, Spanish and Russian versions of the Convention, there is no indication on the standard of proof, and thus no indication, either express or implicit, that it might be low or lower in any way.³³ The final

³⁰ Aircraft Protocol, Article X(3); Luxembourg Protocol, Article VIII.

³¹ The United States, the European Union and Russia, for instance, have declared that they would not apply Article X(3) of the Aircraft Protocol.

³² It is worthy of note that the drafters had initially included the sale of the object in the remedies set out in Article 13. Several delegations objected, however, as they considered that the sale of the object had an element of finality which was not normally associated with interim relief (Diplomatic Conference, Commission of the Whole, 10th meeting, 6 November 2001, 823). The delegation of the United Kingdom replied that 'common law systems generally regarded a sale as a form of interim relief, particularly in cases where the subject matter of the dispute might be deteriorating or was otherwise at risk and it would be in the interests of both parties to allow for it to be sold and for the dispute to attach the proceeds of the sale' (ibid 824). A compromise was eventually found: by putting the sale of the object in the protocols rather than in the Convention, states could decide whether they wanted to opt in the protocol provision and make the sale of the object a Relief Pending Final Determination.

³³ The French text provides that 'le créancier apporte la preuve de l'inexécution des obligations'. The use of 'la' clearly means that *all* evidence should be adduced.

²⁴ The Russian version of the title of Article 13 is 'temporary measures to protect rights'.

²⁵ Convention, Article 8(1)(c).

²⁶ Article 8(1)(a).

²⁷ Article 8(1)(b).

²⁸ Article 9.

²⁹ This is indeed the final remedy afforded by Article 10 of the Convention. Article 10 also provides, however, that the agreement should be terminated. In practice, one would think that the agreement would often provide that default would automatically result in termination of the agreement, and thus in an obligation to return the object.

text certainly does not say that the creditor should only adduce 'some evidence' of default, or evidence of a 'likely default'. One could argue differently for the English version, which provides that the creditor should 'adduce' evidence of default. The use of this verb could be understood as an implicit reference to a lower standard of proof. But if that had actually been the goal of the drafters, it could have been said much more clearly, and as it was not, the use of the verb 'adduce' could also be interpreted as being neutral in this respect. The Official Commentary states that the creditor must 'show' of evidence of default,³⁴ which suggests that the use of the verb 'adduce' should not be overemphasised. In any case, given that most, if not all other equally authoritative versions of the Convention do not include any such implicit indication, it seems clear that the correct interpretation must be that Article 13 does not provide for a lower standard of proof, and that creditors should therefore actually demonstrate that a default occurred. Legislative history supports this conclusion. At an early stage of the negotiation, the text actually provided that the creditor should 'adduce *prima facie* evidence of default'. However, during the third Plenary Session of the Joint Session of the UNIDROIT Committee of Governmental Experts and the Sub-Committee of the ICAO Legal Committee held in Rome in March 2000, 'it was felt that the reference to *prima facie* evidence in the chapeau of the Article was not a sufficiently high standard considering the effects of the remedies envisaged'.³⁵ It was proposed instead to replace it with the word 'clear' (evidence), which would have considerably strengthened the standard of proof. A number

of delegations did not have a strong opinion about this proposal, as they 'indicated that the word "clear" which had been put in [the place of the words *prima facie*] was acceptable, but that they could also consider not including it at all'.³⁶ This last opinion prevailed, and the final wording was adopted. It seems clear therefore that Article 13 should not be considered as setting a lower standard of proof. It is not enough to show that the creditor has a good chance of convincing the court in the main proceedings that a default has occurred. Second, Article 13 does not mention the traditional requirement that there should be a risk that the final judgment will go unsatisfied. One might be tempted to argue that there is always such risk when the substantive rights are to the use or the value of mobile equipment because mobile equipment is especially easy to move. If the equipment were moved to the territory of another Contracting state, however, the courts of that state would have jurisdiction to grant most of Article 13 remedies.³⁷ The risk justifying immediate interference in the business of the defendant would then not be obvious. One possible interpretation is thus that Article 13 does not mention this requirement because it is not relevant given the nature of the relief that it affords.

Another fundamental difference between Article 13 and traditional interim relief is that Article 13 relief is only available 'to the extent that the debtor has at any time so agreed'. The consequence is that Article 13 relief will have to be stipulated in the agreement creating or providing for the international interest, or in any other agreement of the parties. In the absence of such a clause, Article 13 relief will be unavailable. As already noted, this is not only unknown in comparative civil procedure, but it is against the essence and the purpose of traditional interim relief. Nowadays, interim

Both the Spanish and the Russian texts do not include any indication of a lower standard of proof either (Spanish: 'adduce prueba', Russian: 'Представляет доказательство').

³⁴ Official Commentary, Goode (n 1) para 4.108.

³⁵ UNIDROIT, *Report of Third Joint Session* (Rome, 20–31 March 2000) UNIDROIT CGE/Int Int/3-Report, para 106, www.unidroit.org/english/documents/2000/study72/s-72-jointsession3-report-e.pdf, accessed 26 July 2012.

³⁶ Ibid para 113.

³⁷ Convention, Article 43(1). The local court would not have jurisdiction to grant a lease or management of the object, on the ground that this would not be an *in rem*, but rather an *in personam* remedy.

protection is not a favour granted by debtors to creditors. It is a direct consequence of the binding character of the substantive rights of the parties, and in particular of their contractual undertakings. Creditors have certain minimum procedural rights which come with their substantive rights. One is the right to seek enforcement of their rights, whether by way of specific performance or through an award of damages. Another is the right to obtain interim protection of these expectations. Agreement, by contrast, is the basis for more advanced and sophisticated remedies that debtors will not grant to all their creditors. Debtors, for instance, grant security to some of their creditors only, who become secured creditors.

To say the least, the relief established by Article 13 does not fit neatly in the model of interim relief commonly found in national legal systems. One could easily be tempted to conclude that, despite the use of the term interim relief by the Convention, Article 13 establishes a very different kind of remedy.

(b) Advance enforcement remedy

The essential differences between traditional interim remedies and Article 13 relief suggest that the intent of the drafters might have been to establish an advance enforcement remedy.

The international interest established by the Convention is a contractual security. As such, it has logically been designed to secure satisfaction of the obligations of the debtor by granting default remedies to the creditor. Default remedies are thus an essential part of the substantive right of the creditor, and pretty much define it. They are the substance of the international interest. The only chapter of the Convention which defines the content of the international interest is Chapter III, which is dedicated to Default Remedies.

Article 13 is located in Chapter III of the Convention. This suggests that Article 13 relief is merely one of the contractual remedies established by the Convention to enforce the substantive right that it creates, that is, the international interest. Article 13 relief has indeed

many common features with the other default remedies found in Chapter III. First, it is only available if the debtor has so agreed. All default remedies of Chapter III are also contractual remedies which must be granted by the agreement of the parties.³⁸ Second, a requirement common to all default remedies of Chapter III is the existence of an event of default. This is only logical, as the goal of any security is precisely to afford remedies in such a case. Article 13 also provides that relief pending final determination should only be available to creditors adducing evidence of default. Third, the actual remedies afforded by Article 13(1) are the same as those afforded by other provisions of Chapter III. More specifically, the remedies available under Article 13(1) and the remedies that the chargee may exercise pursuant to Article 8(1) are very similar: virtually all remedies available under Article 8(1) are available under Article 13(1). In both cases, the creditor may request possession, control or custody of the object,³⁹ management of the income of the object,⁴⁰ and lease of the object.⁴¹ One could object that Article 8(1) also includes the sale of the object and that Article 13(1) does not, but it was already seen that both the Aircraft Protocol and the Luxembourg Protocol allow Contracting states to add to the list of Article 13(1) remedies the sale of the aircraft.

The relief established by Article 13 does not appear to be essentially different from the other Default Remedies afforded by Chapter III to enforce the international interest. If one views Relief Pending Final Termination as merely one Default Remedy among many others, it is easy to explain why Article 13 lacks so many of the features of traditional interim relief.

Article 13 is, however, different from other remedies of Chapter III in one important respect. Article 13 provides that creditors shall obtain from a court 'speedy' relief. Article X(2)

³⁸ See Articles 8 and 9. See also Article 15, providing that the parties are free to derogate from any provisions of Chapter III, subject to a few exceptions.

³⁹ Compare Articles 13(1)(b) and 8(1)(a).

⁴⁰ Compare Articles 13(1)(d) and 8(1)(c).

⁴¹ Compare Articles 13(1)(d) and 8(1)(b).

of the Aircraft Protocol encourages Contracting states to specify the number of days in which their courts will grant the remedy, and many states have indeed committed to a surprisingly short time, 10 days for *in rem* remedies and 30 days for *in personam* remedies.⁴²

One possible interpretation could therefore be that speed would be the essential feature of Article 13. Its purpose would not be to offer special remedies which would otherwise be unavailable. It would be to ensure that basic enforcement remedies would be available very quickly. Article 13 would increase the efficacy of the international interest by making it virtually immediately enforceable in case of default. The essence of Article 13 would be speed, and the most accurate way to refer to it would be to call it 'advance relief', as the Official Commentary does.⁴³

Is relief pending final determination provisional?

If this analysis were accepted, it would raise the issue of whether Article 13 remedies should be considered as provisional in character.

This matter is not clearly settled by the Convention. In the French and Spanish versions, the title of Article 13 characterizes the remedies as 'provisional', or 'provisory'. In the English version, the title is Relief Pending Final Determination, which implies that such relief is only available until final determination, and may well lapse afterwards. Neither Article 13, nor any other provision of the Convention, however, expressly mentions that Article 13 remedies might lapse at any given time. The reason why provisional measures are not final is that they are granted without full judicial determination of the dispute. They are therefore meant to last only until such determination is made. Article 13 relief, however, is only available after full judicial determination of the dispute. The creditor must provide

evidence of default. If he satisfies a court that an event of default has occurred, one cannot see why he could not get a final decision, and a final remedy. Certainly, even if the remedy he had obtained was labelled 'provisional', he would have no particular incentive to continue to litigate for the purpose of obtaining the exact same remedy a year later. The debtor would have an incentive to try to obtain a different decision, but after failing once to demonstrate that there had not been an event of default, he may conclude that his chances of doing so would be lower, and give up.

In this respect, an interesting comparison is with the remedy of interim payment afforded by some European jurisdictions. Under French civil procedure, for instance, creditors may petition a special division of the court to obtain an order for provisional payment for up to 100% of the claim at an early stage of the proceedings.⁴⁴ The requirement is that the creditor demonstrates that the existence of the claim cannot be seriously disputed. In theory, the payment is only provisional. Another court should rule on the merits and issue a final ruling on the claim. In practice, however, proceedings very often end after the provisional payment has been granted. The creditor is satisfied and has no incentive to pursue the main proceedings. In particular, he would not be sanctioned for not doing so, for instance by being asked to refund the payment. The debtor realizes that he has at best a weak case, is reluctant to incur additional costs for pursuing a most unlikely outcome, and has lost the incentive of delaying payment. A remedy labelled 'provisional' is most often, in effect, final.

Such could be the fate of Article 13. There is no indication in the Convention or the Protocols that the remedies issued provisionally by an Article 13 court would lapse if no court issues

⁴² So have China, India, the United Arab Emirates, Indonesia, Malaysia, Pakistan, South Africa, Nigeria, and Luxembourg.

⁴³ Official Commentary, Goode (n 1) para 4.108.

⁴⁴ 'Référé provision': French Code of Civil Procedure, Article 809.

a final ruling on the claim.⁴⁵ It could therefore be that creditors satisfied by Article 13 relief, for instance conditional sellers who would have been granted possession of the object, would simply abandon the proceedings on the merits, and that debtors would understand that their chances of obtaining any other outcome would be very low. The only instances where creditors would have an incentive to obtain a final determination would be where different relief would then be available, for instance the sale of the aircraft in jurisdictions which did not agree to add it to the list in Article 13(1).

3. Two models for Article 13

The language of Article 13 and other relevant provisions of the Convention and the Protocols does not allow a final conclusion on the nature of Article 13 relief to be reached. It simply does not fit with any of the remedies commonly found in national legal systems. As the delegation of the United States of America stated in the negotiations of the Convention, Article 13 has established 'a hybrid between a final remedies provision and one that addresses interim relief'.⁴⁶ One could conclude that this shows that Article 13 should be considered as establishing an autonomous *sui generis* remedy. This conclusion, however, would not be very helpful. First, it would not give any guidance to future Convention interpreters as to how to supplement Article 13, which is manifestly incomplete. Second, it would overlook that if Article 13 is to be useful to any party, it has to have a clear purpose. It will only apply if commercial parties provide for its application, and they will only do so for reaching a particular goal. Furthermore, they will want to know

what they are actually establishing through an Article 13 clause.

This is the reason why I propose below two models for Article 13. The rationale for each of them is a particular goal that parties might want to pursue when availing themselves of the possibility of stipulating for Article 13 remedies in their contract. The models will then consist of a set of rules and interpretation consistent with the particular goal that the parties have chosen to pursue.

None of these regimes will be exactly in accordance with the language of Article 13 and other relevant provisions of the Convention and the Protocols. But Article 13 is essentially a default or facilitative regime. Parties are free to vary or amend the vast majority of its provisions.⁴⁷ If parties were interested in resorting to Article 13 for achieving one particular purpose, they should make it clear by providing so, and by stipulating a legal regime consistent with this purpose.

If the parties have provided for the application of Article 13 in a very short provision, courts might want to assess the will of the parties and to interpret Article 13 accordingly.

(a) *Interim relief*

A first possible analysis of Article 13 would be that its goal is to preserve the substantive rights of the creditors pending the final determination of their claim. On this view, Article 13 would offer merely protective remedies aiming exclusively at ensuring that the substantive right of the creditor could be meaningfully enforced when finally recognized by a competent adjudicator.

⁴⁵ Article 43(3) of the Convention provides that 'final determination ... will or may take place in a court of another Contracting State or by arbitration', which suggests that petitioning this adjudicator is not an obligation.

⁴⁶ UNIDROIT CGE/Int Int/3-WP/25.

⁴⁷ Convention, Article 15. The only exception is Article 13(2). But both the Aircraft Protocol and the Luxembourg Protocol offer the possibility to Contracting States to turn Article 13(2) into a default rule. Moreover, Article 13(2) gives power to courts to impose certain terms, but does not force them to do so. If a court was satisfied that Article 13(2)(b) was inconsistent with the goal pursued by the parties when providing for the application of Article 13, one would hope that it would refrain from using its power.

Such analysis would logically entail the following consequences. First, it would make sense to require the creditor to show that there is a need for protecting his rights. Second, the procedure for obtaining such a remedy should be designed in such a way that it could efficiently fulfil its goal. It would be necessary, for instance, to allow the creditor to petition the court *ex parte* and to obtain the Article 13 relief without giving prior notice to the debtor. It would also be necessary to adapt the features of the procedure to its accelerated nature, for instance by allowing the creditor to meet only a lower standard of proof. Third, as the purpose of the remedies would be to protect substantive rights, the effect of the remedies should be conditional upon the creditor actually seeking to enforce them, and being successful. If the creditor actually did not seek final determination of his claims, or if he lost on the merits, his interim relief should lapse.

As was already noted, many of the features of the legal regime established by Article 13 do not correspond to this model. It would therefore be necessary to adapt some of them. First, it would be necessary to interpret loosely the requirement that the creditor should adduce evidence of default, and to accept instead that the creditor adduce credible evidence of default. Second, the question would arise whether the creditor should show that there is a risk that a ruling finally determining his claim would go unsatisfied. Article 13 does not mention it, and it is hard to believe that the requirement was not omitted on purpose. One way forward could be to consider that given that the substantive rights to be protected are rights over mobile equipment, it would be presumed that the threat to the creditor's rights exists. The creditor would not need to demonstrate its existence when applying for the remedy. However, at a later stage, the debtor would be entitled to rebut the presumption, and to show that there is no real danger that he would dispose of the object during the time of main proceedings.

Understanding Article 13 as establishing an interim remedy would also be helpful to give

guidance to courts on important procedural issues on which the provision says very little. First, Article 13 offers limited guidance as to whether the court may issue Article 13 relief *ex parte*.⁴⁸ In an interim relief model, the goal would be to preserve rights against the risk of dissipation of the object. The power of the court to issue *ex parte* Article 13 relief would be essential. The debtor would of course be offered a chance to challenge the order immediately after implementation, and to try to demonstrate that the requirements were not met. Second, Article 13 does not say much regarding the relationship between the main proceedings and Article 13 proceedings.⁴⁹ In an interim relief model, it would be logical to make the grant of the Article 13 relief conditional upon the creditor initiating the main proceedings within a fix period of time. If the creditor were to fail to do so, the interim relief could lapse automatically. Similarly, it would be logical to consider that the interim relief would lapse if the creditor lost on the merits. Article 13(2) envisages the possibility of the court imposing terms necessary to protect the debtor in the event that the creditor 'fails to establish its claim ... on the final determination of that claim.'⁵⁰

(b) Advance enforcement remedy

A second possible analysis of Article 13 would be that it establishes an additional contractual remedy designed to provide the creditor with a special enforcement remedy of his right in the object. On this view, the goal of the Relief would not be essentially to preserve the right of the creditor, but rather and more directly to enforce it. Article 13 would provide the creditor with early satisfaction of his substantive right.

⁴⁸ Article 13(3) could be interpreted as granting discretion to courts in this respect.

⁴⁹ In the Spanish version of the Convention, the title of Article 13 is 'provisional measure subject to final determination'.

⁵⁰ Article 13(2)(b).

Such analysis would entail the following consequences. First, as the goal would not be merely to protect the rights of the creditor, but to enforce them, the latter should demonstrate that the rights he is seeking to enforce exist. The requirement that he adduces evidence of default should be interpreted as a requirement to provide full evidence of default. Second, the contractual character of the relief would become essential. This is because there is no right to early satisfaction. While interim protection should always be available to protect substantive rights, enforcement is typically available in due course, after a court has finally recognized the existence of the rights. Debtors are free, however, to grant to certain creditors special remedies which will enable early enforcement and satisfaction of the rights. Third, as a remedy which would not be designed to preserve the rights of the creditor, it would be unnecessary to require that the creditor shows that there is a need to protect his rights, and there would be no reason to allow *ex parte* proceedings. Fourth, as a remedy designed to provide early satisfaction, there would be no particular reason for it to be provisional. The remedy should therefore last until repealed and it should not lapse for the sole reason that both parties neglected to seek final determination of their claims.⁵¹

4. Availability of national relief

Article 13 relief is not exclusive. Article 13(4) expressly provides that Article 13 does not limit the availability of forms of interim relief other than those set out in Article 13(1). The Official Commentary explains that 'the creditor remains entitled to invoke any other form of

interim relief that may be available under the *lex fori*'⁵² and goes on to give an example: 'an order for interim payment by the debtor'.⁵³

The purpose of Article 13(4) is clearly to allow courts to supplement Article 13(1) by granting forms of remedies which are not among the four remedies listed in Article 13(1). The example given by the Official Commentary is telling. Article 13(1) does not mention orders for interim payment. This silence should not be interpreted as excluding the power of the competent court to grant such remedy under national law.

(a) Scope

The scope of Article 13(4), however, is unclear. The first question which arises is whether Article 13(4) only allows courts to grant other forms of remedies, or whether it also allows courts to grant the same remedies under different conditions. For instance, while Article 13 demands that the creditor adduce evidence of default, many courts will have the power under national law to allow provisional attachment of the object if satisfied that the creditor only has a good arguable case on the merits. Does Article 13(4) allow creditors to apply for such remedy?

This question is difficult to answer because of the unclear nature of the relief established by Article 13. If Article 13 was understood as establishing a set of remedies specifically designed to meet a particular goal, it would be tempting to argue that Article 13 should exclusively govern remedies sought to meet that particular goal, and would not govern at all remedies sought for other purposes. But the purpose of Article 13 is unclear, and so is consequently its subject matter scope. The subject matter scope of Article 13 could be clarified by the parties, however, by stipulating that their purpose is either to design an interim remedy, or an advance enforcement remedy.⁵⁴

⁵¹ Indeed, final determination would already have been made by the court granting the Article 13 relief, and it could be argued that this decision would be *res judicata* and would therefore prevent any subsequent court from ruling again on the existence of the substantive right. The rationale for the power of the court to impose terms necessary to protect the debtor should the creditor fail to establish his claim in the main proceedings under Article 13(2) would disappear.

⁵² Official Commentary, Goode (n 1) para 4.112.

⁵³ Ibid.

⁵⁴ See Section 3 'Two Models for Article 13'.

The logical consequence would be to apply the stipulated legal regime, and to prevent them from shopping around and trying to obtain a similar remedy available under different conditions in the national laws of the competent courts.

The second question that the scope of Article 13(4) raises is whether Article 13(4) only applies in cases where the parties have not reached an express agreement on the availability of the remedy in question. It seems clear that Article 13(4) was drafted precisely for cases where parties would have remained silent on the availability of a particular remedy, and more specifically a remedy other than those listed in Article 13(1). In such cases, national law controls, and the said remedy will be available if national laws so provide. But what about cases where the parties have stipulated that another form of relief would be available? Article 15 of the Convention allows them to derogate from any provision of Chapter III, and thus to add remedies which do not appear in Article 13(1). Would the provision of another form of relief in the contract exclude the power of courts to grant similar remedies under national law?

To answer this question, it is useful to distinguish between remedies established by the Convention and other remedies. The four remedies listed in Article 13(1) are remedies established by the Convention. Their legal regime is thus largely defined by the Convention.⁵⁵ Although Article 15 of the Convention enables the parties to derogate from Article 13, including Article 13(1), it is doubtful that it empowers them to create novel Convention remedies. If the parties provide for the availability of a form of interim relief other than as set out in Article 13(1), they necessarily refer to remedies existing and established by the applicable national law. Their legal regime is thus defined by national law. Whether the stipulation that another form of remedy will be available would influence the power of courts

to grant that same remedy will be a question for the applicable national law, not the Convention.

(b) *Applicable Law*

Remedies other than those set out in Article 13(1) will only be available if the applicable law so provides. The Official Commentary suggests that the applicable law is the law of the forum.⁵⁶ The view is consistent with their characterization as interim relief, as it is almost universally accepted that procedure is governed by the law of the forum.

Despite this express characterization, I have showed that the nature of the relief established by Article 13 is far from clear. In any case, the parties must provide for its application, and are free to derogate from Article 13 and to design relief that fits their needs. A possible characterization of Article 13 is thus that it offers an advance enforcement remedy. An important consequence of this alternative characterization would be that the application of the law of the forum would not be as obvious. Contractual remedies are essentially, though not necessarily exclusively, governed by the law of the contract. The law of the forum only remains relevant for determining the extent of the powers of the court. For instance, Article 12(1)(c) of the Rome I Regulation on the law applicable to contractual obligations⁵⁷ provides that the law of the contract governs 'within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations', which in all likelihood includes the availability of final remedies.⁵⁸

It should also be underscored that the remedy sought under national law might have an *in rem* effect.⁵⁹ In such a case, under

⁵⁶ Ibid para 4.112.

⁵⁷ Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177.

⁵⁸ See Dicey, *Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell 2006) para 32-203.

⁵⁹ Official Commentary, Goode (n 1) para 4.288.

⁵⁵ Official Commentary, Goode (n 1) para 4.108. Article 14, however, provides that such remedies are exercised in conformity with national civil procedure.

the private international law rules of many jurisdictions, the law of the place of the object would apply, often both to the creation of the *in rem* right and to its effect.

5. Jurisdiction to grant Article 13 relief

Contrary to other international conventions unifying rules of commercial law, the Cape Town treaty does not neglect jurisdictional issues. Chapter XII of the Convention lays down three rules of jurisdiction to entertain claims under the Convention. The first is a general rule of jurisdiction: Article 42 provides that choice of court agreements should be enforced. The drafters deliberately chose not to include any subsidiary rule for cases where the parties remained silent on jurisdiction.⁶⁰ The second rule is specifically dedicated to claims under Article 13 of the Convention: Article 43 gives jurisdiction to grant Article 13 relief both to courts chosen by the parties pursuant to Article 42 and to either the court of the territory in which the object is situated or the court of the territory in which the debtor is situated.⁶¹

The existence of a special rule of jurisdiction for granting relief under Article 13 will be perceived by many interpreters as clear indication (if not confirmation) that such relief is interim relief. It is very common in international conventions on international civil procedure to distinguish between jurisdiction on the merits and jurisdiction to grant interim relief. The most famous example is certainly Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I Regulation'), which provides for, on the one hand, numerous rules of jurisdiction to entertain the merits of the dispute and, on the other hand, a special rule of juris-

diction for Provisional, including Protective, Measures.⁶² Furthermore, this special rule of jurisdiction, like Article 43, does not supersede, but rather supplements the rules of jurisdiction on the merits. The model of the Brussels I Regulation is followed by a variety of other European regulations⁶³ and conventions⁶⁴. It is thus unsurprising that the European Union has declared that it would only apply Article 13 of the Convention in accordance with Article 31 of the Brussels I Regulation, which is the provision of that Regulation dealing with provisional measures.⁶⁵

Article 43 distinguishes between two kinds of Article 13 remedies. Orders to preserve the object and its value, to transfer possession control of custody of the object or to immobilise it are seen as remedies acting *in rem*.⁶⁶ Article 43(1) grants jurisdiction to issue such orders both to the court of the contracting state on the territory of which the object is situated and to the court chosen by parties (if any). *In rem* remedies will have to be eventually enforced in the state of the location of the object, and it is thus logical to grant jurisdiction to the court of this state to allow creditors to obtain immediately enforceable remedies and to fully benefit from the speedy nature of Article 13 relief. Orders to lease or to manage the object

⁶² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L012, Article 31.

⁶³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338, Article 20; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OL L7/1, Article 14.

⁶⁴ Lugano Convention of 30 October 2007 on jurisdiction and enforcement of judgments in civil and commercial matters [2007] OJ L339, Article 31.

⁶⁵ Declaration by the European Community pursuant to Article 55 of the Convention on International Interests in Mobile Equipment (n 65) annex II, para I.

⁶⁶ Official Commentary, Goode (n 1) para 4.287.

⁶⁰ Official Commentary, Goode (n 1) para 2.156.

⁶¹ Chapter XII of the Convention contains two other provisions on jurisdiction which are not relevant for the purposes of this article.

are conceived as *in personam* remedies.⁶⁷ There is thus no need to give jurisdiction to the court of the location of the object. Article 43(2) gives jurisdiction to the chosen court, but also to the court of the state on the territory of which the debtor is situated if the creditor only wants to enforce his order in this last state.

(a) European Union

The European Union has declared that the member states of the European Union 'will apply Articles 13 and 43 of the Cape Town Convention for interim relief only in accordance with Article 31 of Council Regulation (EC) No 44/2001 as interpreted by the Court of Justice of the European Communities'.⁶⁸ As already noted, Article 31 of the Brussels I Regulation is a special provision dealing with Provisional, including Protective, Measures. The Declaration suggests that European officials have interpreted Article 13 of the Convention as establishing a provisional measure in the meaning of Article 31 of the Regulation. The Brussels I Regulation does not define this concept, but the European Court of Justice has done so in its *Reichert* decision.⁶⁹ The concept of Provisional, including Protective, Measures 'must be understood as referring to measures which, in matters within the scope of the [Brussels I Regulation] are intended to preserve a factual and legal situation so as to safeguard rights, the recognition of which is sought elsewhere from the courts having jurisdiction as to the substance of the matter'.⁷⁰ In accordance with the traditional concept

of interim relief, the purpose of Article 31 is clearly to safeguard rights. Measures designed to provide satisfaction to the plaintiff, by contrast, do not correspond to this model. The European Court of Justice has indeed excluded from the scope of Article 31 measures which, though provisional in theory, might in effect be final and thus preempt the main decision, unless the applicant was ready to offer a guarantee that the measure would be undone if he were to lose in the main proceedings. As a consequence, the Court held that an order for interim payment would only qualify if the creditor offered a guarantee of repayment to the defendant should he lose on the merits.⁷¹ It seems clear, therefore, that Article 31 would only apply to Article 13 relief if the latter was understood, or designed, as a genuine interim remedy. By contrast, it would not apply to Article 13 relief understood, or designed, as an advance enforcement remedy.

Yet, if Article 31 were found to be inapplicable, this would not mean that courts of the member states would lack jurisdiction to grant Article 13 relief. As was made clear by the European Court of Justice in its *Van Uden* decision, Article 31 only defines the ancillary jurisdiction of the courts of member states to grant provisional measures.⁷² Courts having jurisdiction on the merits of the claim have general and unlimited jurisdiction to grant provisional measures, and indeed any measure available under their national law, whether provisional or not. All courts having jurisdiction as to the substance of the claim under the Brussels I Regulation would also have jurisdiction to grant Article 13 relief. In this respect, the form of Article 13 relief, and indeed the definition laid down by the Court of Justice for the purpose of Article 31 of the Brussels I Regulation, would be irrelevant.

⁶⁷ Ibid.

⁶⁸ Council Decision 2009/370/EC of 6 April 2009 on the accession of the European Community to the Convention on international interests in mobile equipment and its Protocol on matters specific to aircraft equipment [2009] OJ L121, Annex II, para I.

⁶⁹ Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149.

⁷⁰ *Reichert and Kockler*, para 34. The Court has repeatedly referred to this definition since then: see Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-07091, para 37;

Case C-104/03 *St Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I-03481, para 13.

⁷¹ *Van Uden*, para 47; C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I 2277, para 43.

⁷² *Van Uden*, para 19.

Finally, it must be underscored that the Brussels I Regulation is not of general application. It only applies as between certain member states, and when the defendant is domiciled within the territory of one of these member states.⁷³ As the European Union made clear in its Declaration, it has only reserved the application of the Brussels I Regulation to cases where it applies, that is, 'where the debtor is domiciled in the territory of a Member State of the Community', and as 'between Member states bound [by the Brussels I Regulation]'. Denmark is not bound by the Brussels I Regulation.⁷⁴ The Declaration will therefore only constrain member states when the defendant is domiciled in the European Union, excluding Denmark. With respect to defendants domiciled outside of the European Union, courts of the member states will apply their national law regarding international jurisdiction, and will thus be free to apply Article 43 of the Convention.

In summary, the impact of the Declaration of the European Union is as follows. When the defendant is not domiciled in the European Union, the Brussels I Regulation would not apply. Article 43 of the Convention would be left untouched. When the defendant is domiciled in the European Union, courts having jurisdiction on the merits would have jurisdiction to grant Article 13 relief. If the parties have included a jurisdiction agreement, only the chosen court will have jurisdiction on the merits. Other courts of the member states will have jurisdiction under Article 31 of the Brussels I Regulation to grant provisional measures

if their national law allows. If Article 13 relief was designed as an interim remedy, Article 43 of the Convention could apply through Article 31 of the Brussels I Regulation. If Article 13 relief was designed as an advance enforcement remedy, Article 43 of the Convention could not apply. But courts of the member states could still be petitioned to grant interim relief as available under their national laws.

6. Conclusion

In an effort to determine the legal effect of Article 13 of the Convention, I have tried to assess the purpose of this provision. I have found that neither the language nor the legislative history of Article 13 allow a final conclusion to be reached in this respect. This is unfortunate as Article 13 is far from being a complete provision, and will need to be supplemented, in one way or another, to address the issues that it does not expressly settle.

There is hope, however, for two reasons. First, in contrast with other commercial law treaties, the Cape Town Convention will be used by sophisticated actors who will be able to define their needs and to assess how best to meet them. Second, Article 13 is essentially a default regime that can be varied by the parties. This feature gives them and their lawyers the necessary legal tool to stipulate advance remedies which will meet their needs.

This is why it appeared to me that the best way forward is to clarify which needs Article 13 may be used to satisfy, and to design different models aimed at satisfying those particular needs. I have identified two of them, and thus offer two models for Article 13. These models, of course, do not appear in the language of Article 13. They do not purport, however, to re-write the text of the Convention. They simply rely on the freedom of contract enjoyed by commercial parties, and the belief that they will always know best what their needs are, and how best to meet them. ■

⁷³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L012, Article 2.

⁷⁴ The Declaration of the European Union made pursuant to Article 48(2) specifically states that it does not apply to Denmark: (n 65), annex I, para I(3). The Declaration made pursuant to Article 55 does not (n 65) annex II, para I. Denmark is not bound by the Brussels I Regulation. But it has entered into a separate agreement in 2005 with the European Union to extend the application of the Regulation to its territory [2005] OJ L299/62.