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# Advance relief under the Cape Town Convention and its Aircraft Protocol: A comment on Gilles Cuniberti's interpretative proposal

Anna Veneziano\*

*In the inaugural issue of this journal Gilles Cuniberti addressed the question of the nature of the relief pending final determination under the Cape Town Convention. One of his contentions is that the Convention leaves open the question of the nature of the relief provided in Article 13, which has to be seen as a 'hybrid' between an interim relief and a final remedy. In the present paper a different approach to the interpretation of Article 13 is presented. It is suggested that the qualification as a speedy enforcement remedy to obtain the anticipated satisfaction of creditors' claims is more convincing than the alternative of focusing on the interim nature of the relief. This suggestion is based on the specific conditions set forth for the exercise of the relief in the Convention, as well as the changes to Article 13 introduced in the Protocols to the Convention (and in particular the Aircraft Protocol). Advance relief in the Convention and its Protocols should be seen as a sui generis remedy the regime of which is dictated by the treaties themselves and should be interpreted autonomously from any existing domestic counterpart.*

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## 1. Introduction

In the inaugural issue of this journal Gilles Cuniberti addressed the question of the nature of the relief pending final determination under the Cape Town Convention.<sup>1</sup> He contended that the Convention leaves open the question of the nature of the relief provided in Article 13, which has to be seen as a 'hybrid' between an interim relief and a final remedy. On the strength of this conclusion he suggested that parties would be free to choose in their contract between different interpretative models of Article 13 according to the specific goals of their transaction and to decide, in particular, whether they prefer an interim relief

or an advance enforcement remedy. Should parties fail to do so, courts would be left with the problem of determining the exact nature of the remedy in question and would therefore be justified in resorting to domestic law to fill in the gaps.

I am particularly grateful for the opportunity to comment on Gilles Cuniberti's paper not only because it is a thorough and interesting analysis of a difficult topic concerning the Cape Town Convention system, but also in view of the practical importance of the remedy of relief pending final determination provided in Article 13 in conjunction with the corresponding provisions in the Protocols, and in particular, Article X of the Aircraft Protocol.<sup>2</sup>

Whilst Cuniberti's argument is of value, in this article I support a different approach to the interpretation of Article 13. My contention is that the qualification as a speedy enforcement remedy to obtain the anticipated satisfaction of creditors' claims is more convincing than the al-

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<sup>1</sup> Gilles Cuniberti, 'Advance relief under the Cape Town Convention' (2012) 1 *Cape Town Convention Journal* 79.

<sup>2</sup> See also Luxembourg Protocol (Rail Protocol), Article VIII; Space Protocol, Article XX.

ternative of focusing on the interim nature of the relief. This is based on the specific conditions set forth for the exercise of the relief in the Convention, as well as the changes to Article 13 introduced in the Protocols to the Convention (and in particular, as stated, the Aircraft Protocol). More to the point, it is debatable in my view that the provisional or definitive nature of the remedy truly represents the defining element of the new measure introduced by the Cape Town uniform regime. Parties should not be encouraged to consider the conventional remedy as necessarily akin to one or the other category already present in national laws and to think of Article 13 relief in terms of an interim measure in a traditional sense. Nor should courts feel free to resort to domestic law to fill in the gaps in the uniform rules. Advance relief in the Convention and its Protocols is a *sui generis* remedy the regime of which is dictated by the treaties themselves and should be interpreted autonomously from any existing domestic counterpart.<sup>3</sup>

## 2. Advance relief under the Convention as a speedy enforcement remedy

According to Article 13(1) of the Convention Contracting States should ensure that, under specific objective circumstances,<sup>4</sup> a creditor under the Convention may obtain from the competent national court speedy relief pending final determination of the creditor's claim, in the form of one or more of the orders listed in Article 13 (1) (a) to (d)<sup>5</sup> and as requested by the creditor.<sup>6</sup>

<sup>3</sup> See on this point, expressly, the Official Commentary: Roy Goode, *Official Commentary, Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (3rd edn UNIDROIT 2013) 70 and 292.

<sup>4</sup> The creditor should adduce evidence of default; the debtor has to have agreed to the relief at any time: Convention, Article 13 (1).

<sup>5</sup> Article 13 lists the following orders: (a) preservation of the object and its value; possession, control or custody of the object; (c) immobilisation of the object; (d) lease or, except when covered by (a) to (c), management of the object and the income therefrom.

<sup>6</sup> By virtue of Article 55 of the Convention a Contracting State may exclude wholly or in part the

In his paper Gilles Cuniberti underlines a series of reasons why the exact nature of the relief pending final determination may be considered contentious within the system of the Cape Town Convention. According to him it is not possible to univocally determine the purpose of the relief in question, since both the language and the substantive content of Article 13 give rise to uncertainty.

It is difficult to deny that, from a purely linguistic point of view, there are elements in the Convention pointing to the temporary character of the relief. Article 13(4) states that 'nothing in this Article affects the application of Article 8(3) or limits the availability of *forms of interim relief other than those set out in paragraph 1*' (emphasis added). On its part, Article 55 of the Convention, concerning the contracting States' declarations regarding relief pending final determination, provides that a declaration excluding the application of Article 13 shall specify which *other forms of interim relief* will be otherwise applied (emphasis added). Moreover, both the French and the Spanish official translations of the Convention use respectively the term 'mesures provisoires' or 'medidas provisionales sujetas a la decisión definitiva' in the title of Article 13.<sup>7</sup> Its English counterpart, though not explicitly referring to the provisional nature of the remedy, does qualify the relief as 'pending *final determination*' (emphasis added).

These elements, however, are not sufficient, in my view, to challenge the nature of the relief in question as a special speedy advance enforcement remedy.

First of all, keeping the reasoning on a purely linguistic level, Article 13(1), by referring to 'speedy relief', suggests that the decisive element of the remedy should be its promptness rather than its provisional character.<sup>8</sup>

application of Article 13 through a declaration. On this and on the different approach taken in the Protocol(s) (opt-in rather than opt-out), n 26 and accompanying text.

<sup>7</sup> For further linguistic references see Cuniberti (n 1) 84.

<sup>8</sup> The Official Commentary itself uses the term 'advance relief': Official Commentary, Goode (n 3) 292.

More convincing, in my view, is the analysis of the substantive legal regime set out in Article 13. It is indeed difficult to reconcile many of its features with the discipline traditionally associated with classic interim measures (in particular of the type that Gilles Cuniberti describes as ‘remedies designed to protect substantive rights’).<sup>9</sup> When addressing the issue of the evidence to be brought by the creditor, for example, Article 13 is completely silent on the need to provide proof of ‘immediate danger’ (or otherwise indicated impending detriment) to the creditor’s interests. This would be rather surprising were the remedy interpreted as a traditional interim relief. One could argue that a danger of loss is inherent in any situation where creditors have to wait for final determination of their claim. What is missing, however, is the need for the creditor to provide evidence of such a concrete detriment which is then to be evaluated by the court before discretionarily admitting an interim order in the creditor’s favor.<sup>10</sup> As I will argue in the final part of this article, it does not seem possible under the rules of the Convention to read in Article 13 an implied condition in this respect.

Again with reference to the standard of proof, the provision does not add any qualification, as it would ordinarily be the case for an interim measure,<sup>11</sup> neither a minimal ‘prima facie’ requirement nor expressions referring to the plaintiff’s strong likelihood of success on the merits nor anything in-between. This being advance relief, courts will have to act promptly and before any final outcome of the dispute is reached. If they had to fully evaluate all elements, a final conclusion on the matter would be unnecessary. On the strength of this reasoning the Official Commentary now clarifies that a judge may be satisfied by

a lesser degree of evidence than that needed to prove the merits at the final hearing.<sup>12</sup> It is however left to the court to determine what constitutes sufficient evidence in the light of the specific circumstances of the case and according to the type of order sought by the creditor.<sup>13</sup> Again, my contention is that national judges should interpret the rules on evidence in Article 13 autonomously, by taking its overarching purpose as a speedy remedy into account, without referring to any regime based on domestic law.

Another atypical element is that the speedy relief is conditioned upon the agreement of the debtor, either in the original contract or at any later time. This feature seems to fulfill two purposes. Firstly, it inscribes Article 13 within the provisions of the Convention aimed at recognizing a greater role to the parties’ autonomy in managing the debtor’s default.<sup>14</sup> Secondly, it introduces a safeguard for the debtor, who has to give its consent to the availability of such remedy. Interestingly,

<sup>12</sup> See Official Commentary, Goode (n 3) 292–3, para. 4.110.

<sup>13</sup> For useful guidance in this respect see now Official Commentary, Goode (n 3) 71–72.

<sup>14</sup> See Chapter III on default remedies in the Convention and Official Commentary, Goode (n 3) 58–67. The trend towards enlarging the role of parties’ autonomy during enforcement of a security right is to be found in other modern uniform law instruments on general secured transactions law, see for example the UNCITRAL Legislative Guide on Secured Transactions (2010), at [http://www.uncitral.org/pdf/english/texts/security-1g/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](http://www.uncitral.org/pdf/english/texts/security-1g/e/09-82670_Ebook-Guide_09-04-10English.pdf), 21, 275 et seq. and 310 et seq.; Book IX on Proprietary security in movable assets of the Draft Common Frame of Reference for a European Private Law (DCFR), see von Bar and Clive (eds), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, Vol 6 (Sellier 2009), 5613 et seq. See among others Eric Dirix, ‘Remedies of Secured Creditors outside Insolvency’ in: Eidenmüller and Kieninger (Eds), *The Future of Secured Credit in Europe* (De Gruyter Recht 2008), 221 et seq.; Anna Veneziano, ‘A Secured Transactions’ Regime for Europe: Treatment of Acquisition Finance Devices and Creditor’s Enforcement Rights’, (2008) XIV *Juridica International* 89, 93, also available at <http://www.juridicainternational.eu/?id=12732>.

<sup>9</sup> Cuniberti (n 1) 82.

<sup>10</sup> Cuniberti himself suggests that an immediate danger of loss may not always be present in cases where a creditor under the Convention seeks an order under Article 13, see Cuniberti (n 1) 85.

<sup>11</sup> Ibid.

this corresponds to the analogous protection contained in Article 8(1) on the self-help remedies of the chargee, which are definitive remedies and not temporary ones. Traditional interim relief by court order does not usually depend on the existence of a contractual clause;<sup>15</sup> the debtor's protection is of a procedural nature and is fundamentally based on the right to raise opposition in order to obtain a more thorough appraisal of the evidence. Thus, the emphasis seems to be again on allowing a quick fulfillment of the creditor's claims.

The Convention takes into account the debtor's interests not just by requiring its agreement, but by allowing courts to impose protective measures in favour of the debtor and other interested persons, should the creditor not comply with its obligations under the Convention in implementing the order or fail to establish its claim on the final determination of it (Article 13(2)). Thus, courts may exercise a degree of discretion in establishing the likelihood of the creditor's non-compliance or its chances of success, but in doing so they should bear in mind that Article 13 was specifically designed for the protection of the creditor in urgent situations.<sup>16</sup> Additionally, the court may require notice of the creditor's request to be given to interested third parties before making the order (Article 13(3)). The protective measures need not be restricted to the traditional ones that are issued by courts as interim relief; according to the Official Commentary they could, for example, take the form of an undertaking to pay damages to the interested parties for loss resulting from the order should the creditor find itself in the situation envisaged in Article 13(2).<sup>17</sup> Once again, the provision has to be interpreted autonomously, taking into account its prevailing aim to ensure a speedy recovery by the creditor.

### 3. Advance relief in the Aircraft Protocol

Even limiting our analysis to Article 13 it appears that there are more elements pointing

to the innovative character of the conventional relief pending final determination than to its qualification as an interim measure. The special character of the relief granted in Article 13 becomes however much clearer when we move to the Protocols to the Convention, and in particular to Article X of the Aircraft Protocol. It is important to note in this regard that the Convention cannot achieve effectiveness by itself, but only in conjunction with a specific Protocol; the former must be read together with any additions or modifications introduced by the latter.<sup>18</sup> Thus, even if we believed that Article 13 left open the question of the main purpose of the relief, we would still have to look at the provisions of the Protocol for guidance.

In this respect, the Protocol leaves little uncertainty, in my opinion, as to the innovative character of the remedy in question. Article X contains two elements which are particularly relevant to the issue at hand.

First of all, in listing the orders available to the court, the possibility of selling the collateral and applying its proceeds to the creditor's satisfaction is added to the original list in Article 13 (Art X(3) of the Aircraft Protocol). The orders contained in Article 13 aim at preserving the value of the collateral and/or allowing the creditor to receive income from it before final determination of the claim and would therefore be compatible with the qualification of the relief as a provisional measure only. It is difficult, however, to reconcile the sale of the collateral with a temporary remedy. Its *in rem* effects are, at least from a practical point of view, not necessarily provisional. Should the creditor lose on the merits, the debtor's remedy will usually have to be damages.

Secondly, Article X(2) of the Aircraft Protocol allows contracting States not only to indicate by declaration that such provision (or part of it) will apply,<sup>19</sup> but also to specify

<sup>15</sup> Cuniberti (n 1) 83.

<sup>16</sup> Official Commentary, Goode (n 3) 71.

<sup>17</sup> *Ibid* 293.

<sup>18</sup> On the two-tiered approach of the Cape Town Convention and its Protocols as a means to enhance its usefulness in the specific industry sectors involved see Official Commentary, Goode (n 3) 20–21.

<sup>19</sup> It is an 'opt-in' provision, see below para. 4.

the number of days within which a remedy under Article 13 will be granted, as a more precise and more predictable definition of 'speedy' under the Convention. The choice by many Contracting States of a short period of time seems to reinforce the view that a rapid enforcement is the main aim of the advance relief in Article 13.

Thirdly, Article X(5) of the Aircraft Protocol allows parties to exclude, in writing, the application of Article 13(2), which gives the court the power to impose 'such terms as it considers necessary to protect the interested persons' for the contingency that the creditor breaches its obligations or fails to eventually establish its claim. When such an exclusion is agreed, it necessarily follows that the court cannot provide any measure to counteract, at least in practice, the effects of the speedy relief in the event of a contrary final determination. Again, the emphasis is on obtaining anticipated satisfaction in those situations where recourse to a judicial decision is had (either by choice or mandatorily when a contracting State has issued a declaration to this effect under Article 54(2) of the Convention).

#### 4. Interpretation of the Convention and recourse to national law

The Convention itself justifies the claim that Article 13 should be interpreted autonomously from any specific national legal system. Reasserting, though with some important adjustments, a rule which has by now become standard practice in international instruments,<sup>20</sup> Article 5(1) states that the Convention should be interpreted by taking into account its purposes as set forth in the Preamble, its

international character as well as the need to promote uniformity and predictability in its application. As to the way to fill in the so-called 'internal' gaps of the Convention, Article 5(2) echoes without modifications the language found in the previous uniform law instruments<sup>21</sup> by establishing that the matters governed by the Convention but not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

Gilles Cuniberti does not deny the primary importance of interpreting the Convention with the goal of ensuring its uniform application and in filling in its gaps autonomously. According to him, however, uniformity can be achieved either by creating a *sui generis* remedy, or by building 'on the comparative law of remedies (...) for defining an equally autonomous legal regime (...) inspired by national laws'. Moreover, with reference to Article 5(2) he expresses the view that 'it is highly unlikely that the principles of the Convention will be useful for determining rules of procedure'.<sup>22</sup>

With respect to the first contention, the prevailing interpretation of the analogous provision contained in other international instruments suggests that recourse to comparative evaluations of national law is a difficult task which should, at the very least, be used with caution, in order to avoid the risk of falling back on national law.<sup>23</sup> When the text of the Convention – as it is submitted here – contains sufficient indications towards a *sui generis* remedy, the use of comparative law should not be necessary.

Turning to the gap-filling provision in Article 5(1), according to the Official

<sup>20</sup> Starting from the well-known Article 7(1) of the UN Convention on Contracts for the International Sale of Goods (CISG); for a list of hard law as well as soft law international instruments which reproduce Article 7(1) CISG see Schwenzler/Hachem, 'Art. 7', in Ingeborg Schwenzler (ed), *Schlechtriem & Schwenzler Commentary on the UN Convention on the International Sale of Goods (CISG)* (3<sup>rd</sup> edn Oxford University Press 2010) 122.

<sup>21</sup> For the parallel provision in CISG and in other international instruments see Schwenzler/Hachem (n 20) 133.

<sup>22</sup> Cuniberti (n 1) 80.

<sup>23</sup> Even the scholars who are in principle favorable to a comparative law approach to the interpretation of the CISG underline the difficulties in its application and its 'inherent danger[s]', see in particular Schwenzler/Hachem (n 20) 132 where further references appear.



Commentary the ‘general principles’ contained in the Preamble are ‘the first and primary source for gap-filling’.<sup>24</sup> Among them, the principle of prompt enforcement<sup>25</sup> as well as the need to ensure predictability are mentioned. The advance relief in Article 13 and in the corresponding provisions of the Protocols satisfies both principles if interpreted as a speedy enforcement remedy. As to the contention that Article 13 will raise issues which are essentially procedural in nature, and thus not governed by the general principles of the Convention, suffice it to mention that questions regarding evidence and burden of proof, among others, are not necessarily considered ‘procedural’ in all jurisdictions.

Such an advance relief may certainly raise policy issues. This is why the Convention gives Contracting States the possibility to exclude the application of Article 13 by declaration; as to Article X of the Aircraft Protocol, it is an ‘opt-in’ provision, i.e. Contracting States have to issue a declaration to render Article X or parts of it effective as regards their own legal system. It is important to note, however, that Contracting States have so far felt at ease with it since all but one did not make any declaration under Article 55 of the Convention.<sup>26</sup> On the other hand, most Contracting States to the Aircraft Protocol opted for the application of the provision of Article X of the Aircraft

Protocol, which – as I have contended above – cannot but be interpreted as regulating a speedy enforcement remedy.

## 5. Conclusions

By highlighting the *sui generis* nature of the relief pending final determination provided for in Article 13 of the Convention (and corresponding provisions of the Aircraft Protocol) I do not mean to dispute Gilles Cuniberti’s conclusion that commercial parties, and especially the sophisticated actors who stipulate a Cape Town Convention security right, will be in the best position to gauge how far the default rules of the Convention and the Protocol(s) meet their purposes and to introduce, if necessary, a derogatory regime in their contract. Nor do I wish to deny the role played by national law in the operation of the Cape Town Convention and its Protocols. It is indeed the case that Article 13 does not preclude the creditor from seeking interim relief through remedies provided in national law (Article 13(4)). My contention is limited to the interpretation of the default rules contained in Article 13 of the Convention and Article X of the Aircraft Protocol. The conventional texts are, in my opinion, less open to conflicting interpretations than suggested. The purpose of enhancing the ready enforceability of the security through a speedy remedy seems to be overriding, and should guide courts’ interpretation according to the general rules of the Convention.

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<sup>24</sup> Official Commentary, Goode (n 3) 272, par.a 4.63.

<sup>25</sup> For the principle of ‘broad and speedy enforcement’ as a general principle underlying the most recent international instruments in the field of secured transactions: Roy Goode, Herbert Kronke, Ewan McKendrick, Jeffrey Wool, *Transnational Commercial Law* (2<sup>nd</sup> edn Oxford University Press 2012) 490; on prompt enforcement and the classification of ‘expedited relief’ under Article 13 within the application of this principle see also Iwan Davies, ‘The new *lex mercatoria*: international interests in mobile equipment’ (2003) 52 *International & Comparative Law Quarterly Review* 171.

<sup>26</sup> Of the 57 Contracting States, the Article 55 declaration regarding Article 13 was rendered only by New Zealand. The European Union issued a declaration for the specific question of determining jurisdiction to ensure application of the Brussels I Regulation.