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Article 13 of the Cape Town Convention and Article 31 of Regulation No. 44/2001 – An EU Law Perspective

Alan McCarthy and Marie O'Brien*

This article considers Article 13 of the Convention on International Interests in Mobile Equipment ('Convention') and the Protocol thereto on Matters Specific to Aircraft Equipment ('Aircraft Protocol') in the context of Article 31 of EU Regulation 44/2001 (the 'Brussels Regulation')¹ from an EU law perspective. In particular, the focus of this article is on the effect of EU accession to the Convention and the EU law interpretation of Article 31 of the Brussels Regulation (which allows provisional, including protective, measures granted by a Member State to be enforced by any other Member State) in the context of seeking to enforce a remedy under Article 13 of the Convention in the EU. This article is divided into the following parts: (i) an analysis of Articles 13 and 43 of the Convention; (ii) accession of the EU to the Convention and the Brussels Regulation; (iii) Article 31 of the Brussels Regulation and key aspects of its interpretation by the European Court of Justice ('Court of Justice'); (iv) the relationship between Article 13 of the Convention and Article 31 of the Brussels Regulation; and (v) possible application of Article 13 of the Convention in the context of Article 31 of the Brussels Regulation in Member States (Contracting States and non-Contracting States).

I. Articles 13 and 43 of the Convention and the Aircraft Protocol

The Convention

The Convention came into effect on 1 March 2006 and approximately 60 States have ratified the Convention to date. The Convention is not asset specific. States are required to ratify both the Convention and at least one of the three Protocols (space, rail or aircraft) in order for the Convention to apply in such States with regard to the relevant asset class. For the purposes of this Article, which relates to aircraft equipment, any reference to a Contracting State is to a State that has ratified the Convention. Many States have signed the Convention (and the Aircraft Protocol) but States only become Contracting States to the Convention three months after ratification. When ratified, the Convention supersedes the national law of a Contracting State.

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The Convention reduces the cost of raising aircraft finance for airlines and leasing companies by reducing the level of risk to the financiers involved in such transactions. In this regard, the Convention seeks to harmonise private laws in respect of the financing, lease and sale of mobile equipment and a fundamental purpose of the Convention is to give entities involved in those transactions predictability through a

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¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 012, 16/01/2001 P). On 12 December 2012, the European Parliament and the Council adopted Regulation (EC) 1215/2012 ("Recast Regulation") which replaces the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and shall apply from 10 January 2015. This article does not assess whether the Recast Regulation may affect the provisions of the Brussels Regulation which are analysed in the article.

uniform set of rules guiding the constitution, protection, prioritization, and enforcement of certain rights in aircraft and aircraft engines.

The Convention facilitates asset-based aircraft finance transactions by creating an international framework to govern the creation and registration of international interests (similar to mortgages and leases) in helicopters, airframes and aircraft engines over a certain size and engine capacity. It also creates a framework to deal with disputes such as the ability of creditors to recover an item of aircraft equipment should there be a default on repayment.

The system of declarations under the Convention

The Convention and Aircraft Protocol are structured such that in addition to ratifying the Convention, a State must make a number of declarations to opt in or opt out of certain aspects of the Convention. The system of declarations was introduced to add flexibility to the Convention and cater for internal policies and rules of Contracting States. Certain of these declarations are given special significance and are referred to as the ‘*qualifying declarations*’ which require to be made in order to qualify for benefits under the Aircraft Sector Understanding.²

For the purposes of this Article, the declarations being considered are Article 13 and Article 43 of the Convention. Article 55 of the Convention permits a Contracting State to make a declaration to exclude the provisions of Article 13 or Article 43 of the Convention either in whole or in part.

Article 13 of the Convention

Article 13 of the Convention provides that:

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.

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.

Article 8(3) of the Convention

Article 8(3) of the Convention requires that a remedy is exercised in a commercially reasonable manner and provides that:

a remedy shall be deemed to be exercised in a commercially reasonable manner where it is exercised in conformity with a provision of the security agreement except where such a provision is manifestly unreasonable.

Article X of the Aircraft Protocol

Article 13 of the Convention is supplemented and modified by Article X of the Aircraft Protocol (which applies only where a Contracting State has made a declaration under Article XXX(2) of the Aircraft Protocol and to the extent stated in such declaration). In the context of Article 13, the Protocol makes the following modifications:

- (a) Article X defines ‘speedy’ as the number of days from the date of filing of the application for relief as is specified in the declaration made by the Contracting State in which the application is made.

² <http://www.oecd.org/tad/exportcredits/ctc.htm>, accessed 30 September 2014.

- (b) Article X adds a further remedy of sale and application of proceeds to Article 13(1) of the Convention if at any time the debtor and the creditor specifically agree.
- (c) Article X(5) permits the creditor and the debtor or any other interested person to agree in writing to exclude the application of Article 13(2) of the Convention.
- (d) Article X(6) adds provisions relating to the exercise of an IDERA. The requirement to provide such relief is subject to any applicable aviation safety laws and regulations. This has been interpreted by at least one aviation authority to mean that in certain circumstances the exercise of an IDERA is dependent on the creditor first having possession of the aircraft.

Relevant parties are free to derogate by agreement to exclude or restrict all or any of the forms of relief provided for in Article 13(1) of the Convention. A court has no discretion to refuse the order for which the creditor has applied or to suspend the order for a period to allow the default to be cured if the creditor can adduce evidence of a default by the debtor. Article 13 of the Convention does not address the standard of proof required in respect of such evidence.

Article 43 of the Convention

Jurisdiction to make an order under Article 13 of the Convention and grant other forms of interim relief is governed by Article 43 of the Convention. Provided a Contracting State has not disapplied Article 43 of the Convention then relief under Article 13 of the Convention may be granted by any court having jurisdiction pursuant to Article 43 of the Convention.

Article 43 of the Convention gives jurisdiction to grant relief under Article 13 of the Convention to the courts of a Contracting State: (a) chosen by the parties; (b) on the territory of which the object is situated; (c) which is the State of registry of an aircraft (through Article XXI of the Aircraft Protocol)³;

³ The European Union did not apply Article XXI in its accession.

- (d) (and in respect of Article 13(d) of the Convention), on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.

Specifically, Article 43 of the Convention provides that:

1. The courts of a Contracting State chosen by the parties and the courts of the Contracting State on the territory of which the object is situated have jurisdiction to grant relief under Article 13(1)(a), (b), (c) and Article 13(4) in respect of that object.
2. Jurisdiction to grant relief under Article 13(1) (d) or other interim relief by virtue of Article 13(4) may be exercised either:
 - (a) by the courts chosen by the parties; or
 - (b) by the courts of a Contracting State on the territory of which the debtor is situated, being relief which, by the terms of the order granting it, is enforceable only in the territory of that Contracting State.
3. A court has jurisdiction under the preceding paragraphs even if the final determination of the claim referred to in Article 13(1) will or may take place in a court of another Contracting State or by arbitration.

Relevant Member States

The following Member States are Contracting States under the Convention: (a) Ireland; (b) Luxembourg; (c) Malta; and (d) Netherlands (though only with respect to certain offshore territories). By way of an example in Ireland, the International Interests in Mobile Equipment (Cape Town Convention) Act 2005 (the 'Act') implemented the Convention into Irish law and provides that the provisions of the Convention prevail over national law. Article 13 and Article 43 of the Convention apply in full in each of the above Member States as no declaration was made to exclude them wholly or in part under Article 55 of the Convention.

What relief is available under Article 13 of the Convention?

The form of relief provided for in Article 13 of the Convention is intended to be of its own kind (i.e. *sui generis*) and therefore is not intended to be characterised or restrained

by reference to concepts of the national law of the Contracting State. The relief must be given only to the extent that the debtor has at any time so agreed and includes sale and the application of proceeds as a form of interim relief as amended by the Protocol. Article 13(4) of the Convention does not exclude other forms of interim relief being available.

Article 13(1) of the Convention does envisage the following characteristics of interim relief granted under the Convention: (a) it is granted pending final determination of the dispute; (b) the granting of the relief does not prejudice the final outcome of the dispute; and (c) relief may be granted by a court other than the court determining the final outcome of the dispute. Relief under Article 13 of the Convention does not purport to preserve the status quo and protection of the debtor is intended to be provided by way of compensation following final judgment.

I. EU law, accession of the EU to the Convention and the Brussels Regulation

EU law background

To outline the overall context of the declarations that the European Union ('EU') made acceding to the Convention in 2009 and within which Member States implement the Convention, we set-out below some key aspects of EU law.⁴

The EU is based on the Treaty on the Functioning of the European Union ('TFEU'), the Treaty on the European Union ('TEU') and the Treaty of Lisbon. These treaties elaborate the objectives of the EU, the relationship between the 28 Member States and the rules for the institutions of the EU. The main EU institutions are the European Commission (which drafts legislative proposals), the European Parliament (which is the legislative

branch of the EU), the Council of the EU (which comprises representatives of the Member States and is the key decision-making institution) and the Court of Justice. The EU has separate legal personality (Article 47 of the TEU). The conferral of legal personality on the EU means that it can conclude and negotiate international agreements in accordance with its external commitments, become a member of international organisations and join international conventions.

An EU objective set out in the Treaty of Lisbon is to maintain and develop an area of freedom, security and justice. The EU seeks to achieve this by adopting measures relating to judicial co-operation in civil matters to harmonise differing legal and administrative systems between the Member States.

In terms of EU legislation, Article 288 of the TFEU provides that Regulations have general application, are binding in their entirety and are directly applicable in each Member State. The EU is permitted to act only within the limits of the competences conferred upon it by its Member States in specified areas. The TFEU distinguishes between three types of competence and draws up a non-exhaustive list of the fields concerned with in each case:

- exclusive competences (Article 3 of the TFEU): the EU alone is able to legislate and adopt binding acts in these fields. The Member States' role is therefore limited to applying these acts, unless the EU authorises them to adopt certain acts themselves;
- shared competences (Article 4 of the TFEU): the EU and Member States are authorised to adopt binding acts in these fields. However, Member States may exercise their competence only in so far as the EU has not exercised, or has decided not to exercise, its own competence; and
- supporting competences (Article 6 of the TFEU): the EU can only intervene to support, coordinate or complement the action of Member States. Consequently, it has no legislative power in these fields and may not interfere in the exercise of these competences reserved for Member States.

⁴ Recently, the UK government published revised draft legislation designating the Convention as an EU Treaty allowing the UK to pass legislation to implement it into national law. <https://www.gov.uk/government/consultations/international-interests-in-mobile-equipment-convention-aircraft>, accessed 30 September 2014.

Judicial co-operation in civil matters is designated as an area of shared competence and there is legislation aimed at unifying the rules between Member States in this area, including the Brussels Regulation. As a result, the Brussels Regulation must be applied in its entirety across the EU.

Accession of the European Union to the Convention

The Convention contains a number of optional provisions for adoption in the form of declarations. Some of these optional provisions fall within the competence of the EU. On 28 April 2009, the European Union deposited an instrument of accession to the Convention with the depositary of the Convention. Under Article 49 of the Convention, it entered into force for the European Union on 1 August 2009 ('EU Decision').⁵

The EU acceded to the Convention as a regional economic integration organisation ('REIO') and it covers those aspects of the Convention in respect of which the EU has legal competence. The EU is not a Contracting State per se. However, it will have the rights and obligations of a Contracting State to the extent that it has competence over matters governed by the Convention. Accession by the EU does not mean that all EU Member States automatically become Contracting States but each Member State is permitted to ratify the Convention and Protocol to become a Contracting State.

As required under the Convention, the EU made a declaration under Article 48 of the Convention declaring the areas under the Convention over which it has jurisdiction. The declaration by the EU notes that the Member States have transferred their competence to the EU as regards matters which affect: (i) the Brussels Regulation; (ii) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; and (iii) Regulation

(EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (i.e. 'Rome I'). Member States retain their competence concerning the rules of substantive law as regards insolvency. As part of this accession by the EU, a restriction was placed on EU Member States so that a Member State is not permitted to make a declaration relating to the insolvency alternatives (Alternative A or Alternative B) but can amend its national law to comply with such a declaration. Ireland is currently in the process of amending its domestic law to comply with Alternative A.⁶

As mentioned above, Article 55 of the Convention provides that a Contracting State may declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. Article 55 of the Convention was the result of discussions with the European Union during the Diplomatic Conference held in Cape Town from 29 October to 16 November 2001. The EU wanted to ensure that Member States would adopt a common position in the event that there were deviations from the Brussels Regulation.

The EU has competence over jurisdiction and enforcement of judgments by virtue of the Brussels Regulation and pursuant to Article 55 of the Convention the EU made a declaration that where the debtor is domiciled in an EU Member State, that Member State will apply Articles 13 and 43 of the Convention only in accordance with Article 31 of the Brussels Regulation as interpreted by the Court of Justice (in the context of Article 24 of the Brussels Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters ('Brussels Convention')).

A declaration was also made by the EU pursuant to Article XXX(5) of the Aircraft Protocol which provides that Article XXI will not apply within the European Union and the Brussels Regulation will apply to this matter for the Member States bound by that regulation or by any other agreement designed to extend its

⁵ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2009.121.01.0003.01.ENG and <http://www.unidroit.org/status-2001cape-town?id=1658>, accessed 30 September 2014.

⁶ State Airports (Shannon Group) Act 2014.

effects. Article XXI extends the jurisdiction to make orders under Article 13 to courts of the State of registry of a helicopter or an airframe.

The Brussels Regulation

The Brussels Regulation replaced the Brussels Convention⁷. The Brussels Regulation lays down rules of private international law concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Many of the rules under the Brussels Regulation reproduce the rules which were already in force in accordance with the repealed Brussels Convention. The case law developed by the Court of Justice, as well as by the national courts on the Brussels Convention, is of relevance.

A key aim of the Brussels Regulation (as that of the Brussels Convention) is to establish a:

a unified system for the determination of jurisdiction, accompanied by a simplified mechanism for the recognition and enforcement of judgments given by the courts of the Contracting States within the scope of the matters covered by the Convention.

The Brussels Regulation covers civil and commercial matters and, according to the second sentence of Article 1, does not extend to revenue, customs or administrative matters. Notwithstanding the title covering civil and commercial matters, the Brussels Regulation does not apply to: (i) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (ii) bankruptcy; (iii) social security; or (iv) arbitration.

Apart from Article 22 of the Brussels Regulation (dealing with exclusive jurisdiction and which is of universal application) and Article 23 of the Brussels Regulation (dealing with prorogation of jurisdiction and having application whether one or more parties are domiciled in a Member State), the Brussels Regulation only applies to defendants

domiciled in a Member State. Otherwise, the jurisdiction of the courts in each Member State is to be determined by that Member State's own law.

Article 31 of the Brussels Regulation - Provisional (including protective) measures

As regards provisional measures, Article 31 of the Brussels Regulation (very similar to Article 24 of the Brussels Convention) provides that:

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Article 31 of the Brussels Regulation applies where a claim for provisional, including protective, measures is brought before a court other than the court which has jurisdiction as to the substance. The Court of Justice has held that, because the Brussels Regulation retains the structure and basic principles of the Brussels Convention, provisions of the Brussels Regulation are to be interpreted in accordance with its case-law on the Convention.⁸ Provisions of the Brussels Regulation going to the substance of the case (e.g. Article 22 of the Brussels Regulation) must be interpreted as not precluding the application of Article 31 of the Brussels Regulation.⁹ The Court of Justice has opted for a 'Community' definition of the concept of provisional measures under Article 31 of the Brussels Regulation but only to define those measures which may be recognised in another Member State.

Enforcement of judgments under the Brussels Regulation

Importantly for the enforcement of judgments under the Brussels Regulation, Article 32 of the Brussels Regulation provides that a 'judgment' is:

⁸ Case C-533/07 *Falco Privatstiftung v Weller-Lindhorst* [2009] ECR I-3327, [49]-[51].

⁹ Case C-616/10 *Solvay SA v Honeywell Fluorine Products Europe BV and Others* [2012] ECR I-00000.

⁷ <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>, accessed 30 September 2014.

Any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

In that regard, Article 33 of the Brussels Regulation provides that

A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

Provisional and interim measures

In general terms, ‘provisional measures’ may be regarded as judicial measures characterised by efficiency and speed, and aimed at protecting the future enforcement of a judgment. ‘Interim relief’ is intended to maintain the status quo or to safeguard certain rights, so that the parties may proceed to test the substance of the matter. The structure of provisional remedies is based upon the existence of at least an apparent existence of the right, and the risk of an imminent infringement of the right. If these conditions are met, the national court can grant an order to provide an interim relief or protection of the right, or to provide for some anticipatory effects of the judgment. These characteristics suggest that interim measures are not *res iudicata*, and that their effects should be regarded as limited to the relief given in the main hearing of the case.

The Court of Justice considers interim relief to be an aspect of the right to effective judicial remedies and to a fair trial for the protection of freedoms and rights guaranteed by EU Law. According to the Court of Justice, the expression ‘provisional, including protective, measures’ must be understood to refer to measures which, in matters within the scope of the Brussels Regulation, are intended to preserve a factual or legal situation, so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.¹⁰

Comments on Jurisdiction under Article 31 of the Brussels Regulation and Provisional and Protective Measures

Article 31 of the Brussels Regulation provides a specific and additional ground of jurisdiction based on national rules required for provisional and protective measures. Even where proceedings have been (or may be) commenced on the substance of a case before a court of a Member State, another Member State cannot be deprived of its jurisdiction under Article 31 of the Brussels Regulation if the conditions established by law of that Member State are met.

There are differences between a Member State court which has jurisdiction in relation to the substance of the case and those of the Member State court which possesses jurisdiction by way of national rules and Article 31 of the Brussels Regulation. The Member State court which possesses jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Brussels Regulation also has jurisdiction to order the provisional or protective measures which may prove necessary in that case.

To avoid ‘forum shopping’ for provisional measures, and the risk of abuse of the rights deriving from the Brussels Regulation, the Court of Justice found in the *Van Uden* case¹¹ (discussed below) that the granting of provisional or protective measures on the basis of Article 31 of the Brussels Regulation [then Article 24 of the Brussels Convention] is conditional on the existence of a ‘*real connecting link*’ between the subject-matter of the measures sought and the territorial jurisdiction of the Member State court before which those measures are sought. The special ground of jurisdiction is justified by the fact that the courts of the place where the assets (subject to the measures sought) are located are those best able to consider the circumstances which may lead to the grant or refusal of the protective or provisional measures (or to the laying down of conditions which the

¹⁰ Case C-261/90 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG*. [1992] ECR I-02149.

¹¹ Case C-391/95. *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091.

plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised).

The effect of the declaration by the EU with regard to Article 31 is that a court will have jurisdiction under Article 31 of the Brussels Regulation, and its decision on provisional measures will qualify for mutual recognition by other Member States under Article 33 and enforcement under Article 38 of the Brussels Regulation, only if:

- (a) the decision makes it clear that it is founded on jurisdiction under Article 31 of the Brussels Regulation, not under its national law (e.g. see *Hans Herman Mietz v Intership Yachting Sneek*¹²) and
- (b) either the court has jurisdiction as to the substance of the case or the relief that is granted constitutes provisional including protective, measures within the meaning of Article 31.¹³

III. Article 31 of the Brussels Regulation and key aspects of its interpretation by the Court of Justice

The key question is therefore whether the interim relief permitted to be granted under Article 13 of the Convention would fall within the concept of 'provisional, including protective measure' for the purposes of Article 31.

In many ways, Article 24 of the Brussels Convention (and therefore Article 31 of the Brussels Regulation) is a notable innovation providing for the ability of Member State Courts to recognise provisionally enforceable judgments and provisional measures. However, due to the varied protective remedies in each of the Member States, the Court of Justice has cautiously tried to find common characteristics of provisional remedies to define the scope of application of the Brussels Convention.

The enforcement of measures founded upon Article 31 of the Brussels Regulation going

beyond the limits of that jurisdiction does not circumvent rules on jurisdiction as to the substance set out in the Brussels Regulation. The question arising for the court to which application for enforcement is made, does not relate to the jurisdiction of the court of origin, but to the extent to which it is possible to seek enforcement of a judgment (as defined by Article 32 of the Brussels Regulation) delivered within the scope of the special regime recognised by Article 31 of the Brussels Regulation.

The Court of Justice has provided guidance on the scope and application of Article 31 of the Brussels Regulation in the following key cases:

Italian Leather SpA¹⁴

The Bundesgerichtshof (Federal Court of Justice) referred questions to the Court of Justice for a preliminary ruling on the interpretation of the Brussels Convention. The questions were raised in proceedings between Italian Leather SpA and WECO Polstermöbel GmbH & Co. concerning the conditions of use of a brand name under a contract for the exclusive distribution of leather-upholstered furniture.

The Court of Justice stated that it was unimportant whether the judgments at issue were delivered in proceedings for interim measures or in proceedings on the substance. Decisions on interim measures were subject to the rules laid down by the Brussels Convention concerning irreconcilability in the same way as the other 'judgments' covered by Article 25 of the Brussels Convention. It was immaterial that national procedural rules as to interim measures were liable to vary from one Contracting State to another to a greater degree than rules governing proceedings on the substance.

The object of the Brussels Convention was not to unify the procedural rules of the Contracting States but to determine which court had jurisdiction in disputes concerning civil and commercial matters in intra-Community

¹² Case C-99/96 *Hans Herman Mietz v Intership Yachting Sneek* (1999) ECR I-2277.

¹³ Roy Goode, *Official Commentary to the Cape Town Convention* (3rd edn UNIDROIT 2013) para 2.232

¹⁴ Case C-80/00 *Italian Leather SpA V Weco Polstermöbel GMBH & Co.* [2002] ECR I-4495.

relations and to facilitate the enforcement of judgments.¹⁵ Irreconcilability lies in the effects of judgments – it does not concern the requirements governing admissibility and procedure which determine whether judgment can be given and which may vary from one Contracting State to another.

Denilauler v Couchet¹⁶

In this case, a French plaintiff sued a German defendant in France for breach of contract. In the course of the proceedings, he asked the court to freeze the defendant's bank account in Germany. An order to this effect was made *ex parte* and the plaintiff then asked the German courts to enforce it under the Convention. The latter made a reference to the Court of Justice, which ruled that judicial decisions authorizing *provisional* or *protective measures* which are made *ex parte* and which are intended to be enforced without prior service are not covered by the Brussels Convention. It did, however, say that Article 24 of the Brussels Convention does not preclude the enforcement of such measures if they are given pursuant to adversary proceedings. The Court held that:¹⁷

The courts of the place or, in any event, of the contracting state, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered. The convention has taken account of these requirements by providing in article 24 that application may be made to the courts of a contracting state for such provisional, including protective, measures as may be available under the law of that state, even if, under the convention, the courts of another contracting state have jurisdiction as to the substance of the matter.

¹⁵ See Case C-365/88 *Hagen* [1990] ECR I-1845, [17], and Case C-68/93 *Shevill and Others* [1995] ECR I-415, [35].

¹⁶ Case C-125/79 *Denilauler v Couchet Frères* [1980] ECR 1553.

¹⁷ *Ibid.*, [16].

Reichert v. Dresdner Bank (No. 2)¹⁸

The Court of Justice defined the expression '*provisional, including protective, measures*' in Article 24 of the Brussels Convention as referring to:

measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.

The case concerned a German couple, who owned land in France, which they gave to their son by notarial act. The bank brought an '*action paulienne*' in France to have the transfer set aside. This is a procedure under which a creditor can have a transfer of property by his debtor set aside if the transfer was made in fraud of the creditor's rights. It was argued that the French court had jurisdiction under Article 24 of the Brussels Convention, but the Court of Justice ruled that an *action paulienne* is more than a provisional or protective measure as understood by Article 24 of the Brussels Convention.

Van Uden¹⁹

This case involved a reference to the Court of Justice for a preliminary ruling by Hoge Raad in the Netherlands. The Brussels Convention questions were raised in the context of a dispute between Van Uden Maritime and Deco-Line of Hamburg concerning an application for interim relief (in *kort geding* proceedings) relating to the payment of debts arising under a contract containing an arbitration clause.

The Court of Justice confirmed that Article 24 of the Brussels Convention applies even if a court of another Contracting State has jurisdiction as to the substance of the case, provided that the subject-matter of the dispute falls within the scope *ratione materiae*

¹⁸ Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149.

¹⁹ Case C-391/95. *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7091.

of the Brussels Convention, which covers civil and commercial matters. The mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a Contracting State does not deprive a court of another Contracting State of its jurisdiction under Article 24 of the Brussels Convention.

Article 24 of the Brussels Convention cannot be relied on to bring within the scope of the Brussels Convention provisional or protective measures relating to matters which are excluded.²⁰ Under Article 1 of the Brussels Convention, arbitration was excluded. By that provision, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts. Provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Brussels Convention is therefore determined not by their own nature but by the nature of the rights which they protect.²¹ Therefore where, as in the case in the main proceedings, the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Brussels Convention, the Brussels Convention is applicable and Article 24 of the Brussels Convention may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

The Court of Justice excluded from the scope of Article 31 of the Brussels Regulation measures which, though provisional in theory, might affect the final decision – in the *Van Uden* case 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 merits. The Court of Justice further provided that these limits on the exercise of jurisdiction set out in Article 24 of the Brussels Convention did not apply where the Court had jurisdiction as to the substance of the matter. This means that a court seized of substantive proceedings has jurisdiction to grant, in the context of those proceedings, whatever provisional measures are available under its procedural law and that Article 31 of the Brussels Regulation (ex-Article 24 of the Brussels Convention) is irrelevant.

In the *Van Uden* case, the Court of Justice distinguished between the jurisdiction of a court to order provisional measures based upon its national law governing interim measures and the jurisdiction of the court to order provisional measures further to the Brussels Convention that would be recognised and enforced under the Brussels Convention. The Court of Justice ruled that Article 24 of the Brussels Convention only defines the ancillary jurisdiction of the courts of Member States to grant provisional measures. 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.

The granting of this type of measure required particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. In that regard, the Court of Justice held in the *Denilauler* case that the courts of the place or, in any event, of the Contracting State where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.

The granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter

²⁰ Case 143/78 *De Cavel v De Cavel* [1979] ECR 1055, [9].

²¹ Case C-261/90 *Reichert and Kockler v Dresdner Bank* [1992] ECR I-2149, [32].

of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. A court ordering measures on the basis of Article 24 of the Brussels Convention must take into consideration the need to impose conditions or stipulations such as to guarantee their provisional or protective character.

St. Paul Dairy Industries B.V.²²

The case law of the Court of Justice has placed limits on the measures that may be ordered in a Member State and recognised that not all measures available under national legislation could be considered as provisional or protective measures capable of being granted under Article 24 of the Brussels Convention and recognised in another Member State under the same Convention.

In the *St Paul Dairy* case, a request for a preliminary ruling was made by the Rechtbank te Haarlem (Netherlands). The questions posed by the national court asked essentially whether an application for a witness to be heard before the proceedings on the substance are initiated, with the aim of enabling the applicant to decide whether to bring a case, fell within the scope of application of the Convention as being a provisional or protective measure as provided for in Article 24 of the Brussels Convention. Article 24 could be relied on to bring within the scope of the Brussels Convention only those provisional, including protective, measures in areas which fall within its scope as defined in Article 1 of the Brussels Convention²³ It was therefore for the national judge to verify whether that is the case in the main proceedings.

Article 24 of the Brussels Convention authorised a court of a Contracting State to rule on an application for a provisional or protective measure even though it did not have jurisdiction to hear the substance of the case.

That provision thus lays down an exception to the system of jurisdiction set up by the Convention and must therefore be interpreted strictly. The jurisdiction laid down by way of derogation by Article 24 of the Convention was intended to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings. In accordance with that aim, the expression ‘*provisional, including protective, measures*’ within the meaning of Article 24 of the Brussels Convention was to be understood as referring to measures which, in matters within the scope of the Brussels Convention, were intended to preserve a factual or legal situation so as to safeguard rights. The granting of this type of measure required on the part of the court detailed knowledge of the actual circumstances in which the measures were to take effect. Generally, the national court must be able to make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered.²⁴ The Court of Justice decided that Article 24 of the Brussels Convention does not provide national courts with the freedom to assume jurisdiction for any provisional measures they may choose.

Hans-Hermann Mietz v Intership Yachting Sneek BV²⁵

This case identified important limitations as to the scope of provisional measures to which Article 31 of the Brussels Regulation applies. The Court of Justice considered the question of whether the ‘*kort geding*’ procedure (a procedure for ordering payment of contractual consideration through application for an immediate interim relief by way of an abbreviated procedure) constituted a provisional measure within the meaning of Article 24 of the Convention.

The Court of Justice, applying the *Van Uden* decision, found that there was no need

²² Case C-104/03, *St. Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I-03481.

²³ See Case 143/78 *De Cavel* [1979] ECR 1055, [9]; Case 25/81 *C.H.W.* [1982] ECR 1189, [12]; and Case C-391/95 *Van Uden* [1998] ECR I-7091, [30].

²⁴ See Case 125/79 *Denilauler* [1980] ECR 1553, [15], and Case C-391/95 *Van Uden* [1998] ECR I-7091, [38].

²⁵ Case C-99/96, *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR I-02277.

to have recourse to Article 24 of the Brussels Convention when the court has jurisdiction as to the substance of the dispute. The Court of Justice found that *kort geding* is a procedure of the type envisaged in Article 24 of the Brussels Convention, under which a court is authorised, by the law of its State, to order provisional or protective measures even if, under the Brussels Convention, it does not have jurisdiction as to the substance of the matter.

In the case of a judgment delivered solely by virtue of the jurisdiction provided for under Article 24 of the Brussels Convention and ordering interim payment of contractual consideration, the Court of Justice ruled that such a judgment does not constitute a provisional measure within the meaning of Article 24 of the Brussels Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure ordered relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

IV. The relationship between Article 13 of the Convention and Article 31 of the Brussels Regulation

Drawing together the EU law principles from these Court of Justice cases, we suggest that the following practical features apply to the relationship between Article 13 of the Convention and Article 31 of the Brussels Regulation.

A key issue in relation to the relationship between Article 13 of the Convention and Article 31 of the Brussels Regulation is how the claims of secured parties, owners, lessors and operators of aircraft will be assessed in EU Member State Courts particularly in light of the accession of the EU to the Convention.

The EU interaction with the Convention is relevant in this regard where the debtor is domiciled in an EU Member State and where the court granting provisional measures is

different from the court with jurisdiction over the substance of the case. Where Article 31 of the Brussels Regulation is not applicable, a Member State court can apply its own rules governing provisional measures.

As a result of the interaction in certain circumstances of provisions of the Convention and the interpretation of the Brussels Regulation, there continues to be a degree of uncertainty as to how interim measures will be dealt with when both the Convention and Article 31 of the Brussels Regulation apply to issues coming within the jurisdiction of Member State courts.

For example, an aircraft which has been leased to an operator and for which lease payments or airport charges are due may be the subject of proceedings for those debts in a Member State which has not acceded to the Convention and where an order may be made granting relief to the aggrieved party. The aircraft may then be flown to a Member State which is a Contracting State under the Convention whose Courts hear proceedings in relation to such aircraft and that Court issues relief under Article 13 of the Convention.

- The accession and declaration made by the EU in effect means that, by reference to Articles 13 and 43 of the Convention, a Member State Court: can make an order granting relief which is not within the remit of Article 31 of the Brussels Regulation;
- unless the Court also has jurisdiction as to the substance of the case, such an order will qualify for recognition and enforcement in another Member State *only* to the extent that such other Member State's national law provides independently of the Brussels Regulation that such an order must be recognised and enforced in that Member State.

Enforcement of Protective Measures granted in another Member State

The issue of whether provisional and protective measures include measures sought and granted

under Article 13 of the Convention is linked to the question of enforcement. Article 32 of the Brussels Regulation provides that a ‘judgment’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. Enforcement is governed by Chapter III of the Brussels Regulation and there are restrictions on enforcement in certain circumstances.

V. Application of Article 13 of the Convention in the context of Article 31 of the Brussels Regulation in Member States (Contracting States and non-Contracting States)

Illustrative Scenarios

Below we propose illustrative scenarios regarding the possible practical application of relief under Article 13 of the Convention by reference to Article 31 of the Brussels Regulation.

Example 1: *An aircraft lessor from Italy (a non-Contracting State under the Convention) obtains an Italian court order for provisional relief in respect of an aircraft located in Malta (a Contracting State). Will a Maltese court enforce this order without reference to Article 13 of the Convention?*

Likely – Article 13 of the Convention does not prohibit other forms of relief being granted. Italy is not a Contracting State under the Convention and therefore Article 31 of the Brussels Regulation will apply to the enforcement of the Italian court order.

Example 2: *An aircraft lessor from Ireland obtains an Irish court order for a remedy under Article 13 of the Convention in respect of an aircraft located in Italy. Will an Italian court enforce this order?*

Pursuant to the terms of the EU accession to the Convention the Italian court will be bound to look at the terms of the order to determine whether it fits within the scope of provisional

relief which can be granted pursuant to Article 31 of the Brussels Regulation.

Essentially the scope of Article 13 of the Convention may be extended beyond Contracting States to non-Contracting States which are EU Member States only to the extent permitted within Article 31 of the Brussels Regulation. When acceding to the Convention the EU declared that *where the debtor is domiciled in an EU Member State*, such Member State will apply Articles 13 and Articles 43 of the Convention only in accordance with Article 31 of the Brussels Regulation.

Example 3: *An aircraft lessor from Ireland obtains an Irish court order for a remedy under Article 13 of the Convention in respect of an aircraft located in Malta. Will a Maltese court enforce this order?*

The issue is whether the full scope of Article 13 Convention remedies which are available under the national law of Malta by virtue of its ratification of the Convention fall with the EU concept of ‘provisional, including protective measures’ for the purposes of enforcement under Article 31 of the Brussels Regulation.

Pursuant to the terms of the EU accession to the Convention, the Maltese court will be bound to look at the terms of the order to determine whether it fits within the scope of provisional relief which can be granted pursuant to Article 31 of the Brussels Regulation. In such circumstances it may be preferable to seek the Article 13 Convention relief directly in Malta. This is because where Article 31 of the Brussels Regulation is not relevant; the Member State court can apply its own rules governing provisional measures.

To illustrate further the relationship between Article 13 of the Convention and Article 31 of the Brussels Regulation, we have set out below, in tabular form, a suggested interaction between these provisions.

| | Article 13 of the Convention | Features In Common | Article 31 of the Brussels Regulation |
|----------------------------------|---|--|---|
| Applicability | Contracting State | Malta, Ireland, Luxembourg | EU Member State |
| Jurisdiction | <ul style="list-style-type: none"> • Court granting interim relief does not have to be different from court hearing substantive case. • Jurisdiction chosen by the parties. • Where the object is situated. • State of Registry of the Aircraft.²⁶ • Where debtor is situated.²⁷ | <ul style="list-style-type: none"> • Relief may be granted by court other than the court hearing the substantive case. | <ul style="list-style-type: none"> • Only applicable where jurisdiction granting provisional relief is different from jurisdiction hearing substantive case. • Jurisdiction based on national law. • Existence of a real connecting link between the subject-matter of the measure demanded and the jurisdiction.²⁸ |
| Characteristics/ Criteria | <ul style="list-style-type: none"> • Evidence of default sufficient to trigger relief.²⁹ • Can disrupt the status quo. • Sui generis relief.³⁰ • Debtor is protected through compensation following final judgment | <ul style="list-style-type: none"> • Interim relief. • A right or apparent right must exist. • Granted pending final determination and does not prejudice final judgment. | <ul style="list-style-type: none"> • Provisional, including protective measures as defined in EU law which may be available under the law of the relevant State. • Seeks to preserve the status quo. • Proof of imminent infringement of a right is required. |
| Relief Available | <ul style="list-style-type: none"> • To the extent agreed by the parties. • Possession, control or custody of the object. • Immobilisation of the object. • Lease or management of the object. • Sale of the object.³¹ • Remedy must be exercised in a commercially reasonable manner (Article 8(3) of the Convention) | <ul style="list-style-type: none"> • Preservation of the object and its value. • Speedy and Efficient relief. | <ul style="list-style-type: none"> • Relief must preserve the factual or legal situation so as to safeguard rights relating to the substantive case. |

²⁶ Article XXI of the Protocol.

²⁷ Being relief, which by the terms of the order granting it, is enforceable only in the territory of that Contracting State.

²⁸ Case C-391/95 Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another [1998] ECR I-7091.

²⁹ Standard of proof not addressed by the Convention

³⁰ Not intended to be characterised by reference to concepts of local procedural law of a Contracting State.

³¹ Subject to agreement of the parties.

Conclusions

The Convention is viewed by many as one of the most successful international conventions in effect however given the dearth of practical enforcement precedents there remain many interesting questions on how it will impact enforcement of rights over relevant aircraft objects. The success and profile of the Convention has no doubt assisted in deterring or assisting in the resolution of defaults which may otherwise have occurred outside the spotlight of a State-ratified international convention. Where a default occurs and judicial enforcement is necessary judicial precedent under the Convention is evolving. The interaction between the Convention and the interrelationship with EU law creates a very interesting dynamic which, based on the foregoing analysis, appears to provide the Convention with significant jurisdictional reach.

It appears that in certain circumstances remedies under Article 13 of the Convention will have application through enforcement in non-Contracting Member States to the extent that such remedies fall within the EU interpretation of provisional or protective measures through the mechanism provided under Regulation 31 of the Brussels Convention. However, the precise extent of such application of Article 13 of the Convention will need to be made by reference to the common characteristics of provisional remedies as set-out by the Court of Justice in defining the scope of application of the Brussels Convention in this regard. This still remains very significant in the context of giving the Convention still greater value with regard to enforcement actions within the EU and fulfilling one of the primary objectives of the Convention to overcome obstacles to enforcement due to the mobile nature of assets.