Cape Town Convention Journal, 2017
Vol. 6

Of Swords and Shields: The Role and Limits of Courts in the Enforcement of the Cape Town Convention's Substantive Repossession Remedies

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Abstract

The Cape Town Convention and its Aircraft Protocol (the 'CTC') create a system whereby courts having jurisdiction over the territory where an object is located can be used as a 'sword' to obtain speedy repossession of mobile assets, but cannot be used as a 'shield' to delay or frustrate such repossession activity, especially on the basis of national law principles that are inconsistent with the CTC. Improper shielding actions can arise in particular from (1) a failure by courts to enforce the Convention's substantive remedies (including the issuance of blocking or injunctive orders contrary to the Convention) or (2) the improper application of the Convention's jurisdictional rules. This is not to say that the CTC overrides all national laws (although it does override national law on matters within its scope), or that the CTC does not contain any debtor protections (which it does; see, for example, the obligation to exercise remedies in a commercially reasonable manner as will be discussed below). Nor does this mean that a creditor should always win in any repossession case brought under the CTC. Instead, we are deploying this formulation to emphasize that the CTC creates a state responsibility (applicable through the relevant state's judiciary) to adjudicate matters consistent with CTC jurisdictional rules and to provide creditors with the substantive remedies and protections intended by the treaty text, state declarations and party agreements.

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I. Introduction

The Cape Town Convention on International Interests in Mobile Equipment (the 'Convention') and its related Aircraft Protocol (the 'Aircraft Protocol') signed on 16 November 2001 (together, the 'CTC')[1] form an international treaty designed to promote the cross-border financing of aircraft. The CTC mitigates jurisdictional risk around the ability to immobilize, recover and redeploy aircraft speedily in a default situation, including on insolvency, with a framework that centers on the 'international interest'. Following contractual default, the CTC offers creditors[2] holding an international interest two key substantive repossession remedies: non-judicial remedies (also known as 'self-help')[3] and advance judicial relief pending final determination.[4] These rights and remedies are *sui generis* in that they arise from the CTC and are ontologically independent of national law.

Implementation of the CTC at the executive and legislative levels has been relatively successful to date,[5] and we are entering a period of judicial implementation of the treaty's substantive remedies, which are now being tested in national courts. This is because the CTC system, like other private commercial law treaties, does not contain an independent dispute resolution mechanism.[6] Instead, creditors must rely on national courts for the practical realization of the CTC benefits. This can lead to an inconsistent application of the CTC's principles in different jurisdictions.

Because the treaty is not an all-encompassing commercial code, the relationship between its international substantive law provisions and otherwise applicable national law remains critical.[7] Where a matter is not expressly addressed by the CTC, the treaty itself resorts to gap-filling through 'general principles,' both explicit and implicit – on which the CTC is based – before turning to domestic law.[8] The CTC also contains jurisdictional rules, which are intended to override the private international law principles that a court seized of a matter normally would apply to determine which national courts have jurisdiction to hear CTC cases and enforce the substantive rights created by the CTC. CTC gap-filling and jurisdictional rules are essential to the core purpose of the treaty: to allow for speedy and predictable repossession of mobile assets following default.

Early cases have shown that some courts are either not sufficiently aware of the CTC and its applicability (sometimes from omissions in the pleadings submitted) or otherwise suffer from institutional bias in favor of pre-CTC national law. These instances are, in the best case, inconsistent with

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1 Convention on International Interests in Mobile Equipment and Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, each adopted in Cape Town, 16 November 2001.

2 For purposes of this article, 'creditor' refers to a chargee, conditional seller or lessor as the context requires.

3 These may be remedies of a chargee under Article 8(1)(a) or of a lessor or conditional seller under Article 10(a).

4 Article 13(1)(a)-(c) and Aircraft Protocol, Article X.

5 Since 2006, 84 countries and the European Union have signed the treaty and 73 countries and the European Union have ratified the treaty. The number of registered international interests has been increasing steadily every year, with over 30,000 international interests (including prospective international interests) registered annually since 2013. Because of the declaration system, not all ratifications are equal. The OECD keeps a list of countries that have made the qualifying declarations, and have implemented the CTC, thus entitling them to a discount on export credit financing.

6 Needless to say the establishment of an international commercial court would have gone far beyond the original intent of the treaty and have been highly impractical in every sense.

7 See Karl F Kreuzer, 'Jurisdiction and Choice of Law Under the Cape Town Convention and the Protocols Thereto' (2013) 2(1) CTCJ 149 on complementarity of CTC system with certain national substantive and procedural rules. However, this is always subject to the absence of conflict with the terms of the CTC.

8 See Article 5 of the Convention, which mandates reference to the general principles on which the CTC is based, in order to promote uniformity and predictability in the application of the CTC, as well as its international character; Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment* (3rd edn, UNIDROIT 2013) (the 'Official Commentary'); Jeffrey Wool and Andrej Jonovic, 'The Relationship Between Transnational Commercial Law Treaties and National Law – A Framework as Applied to the Cape Town Convention' (2013) 2(1) CTCJ 65, 74-75 (articulating general principles).

the core notion that the CTC takes precedence over national law[9] and often place contracting states in violation of international law.[10] In order to help elucidate and avoid the pitfalls of misapplication, this article examines ways in which courts may erroneously thwart CTC remedies by reference to national conflicts rules or national substantive law. In defining the proper role and limits of courts by reference to specific examples, we hope to contribute to better and more uniform enforcement of CTC rights. Nevertheless, much work remains in promoting uniform CTC analysis and creating precedent.

While this article focuses on CTC repossession rights, the principles herein apply more generally to court proceedings involving other substantive CTC rights, including those relating to de-registration, export or sale of aircraft equipment.

II. Thesis and Outline

This paper seeks to explore the proper role and limits of courts in the context of the CTC's substantive repossession remedies. We will argue that the CTC, where supported by contracting state declarations and party intent in their contractual agreements, creates a system whereby courts having jurisdiction over the territory in which an object is located can be used as a 'sword' to obtain speedy possession of that object, but cannot be used as a 'shield' to delay that repossession activity.

While courts will be more likely to err in their application of the CTC if it has not been properly implemented under national law, the proper legislative and regulatory implementation of the CTC is beyond the scope of this paper. We instead focus on the actions that a court can take (or refuse to take) that would improperly shield a debtor from otherwise enforceable CTC remedies, effectively putting a country in violation of its international legal obligations. Such shielding actions typically arise from either (1) a failure by courts to enforce the CTC's substantive remedies (including the issuance of blocking or injunctive orders contrary to the CTC) or (2) the improper application of the CTC's jurisdictional rules. Examples of a failure to enforce treaty remedies might include: ignoring express treaty remedies that require time-bound and/or non-discretionary court action, or adding restrictions to these based on national law; construing the substantive elements of the treaty in an unintended narrow manner; or turning to local substantive or procedural provisions in a manner that undermines the intent of the CTC. Examples of improper application of jurisdictional rules might include: claiming jurisdiction over a dispute contrary to treaty provisions or refusing to accept jurisdiction on the basis of national conflict-of-laws rules contrary to treaty provisions.

We will first describe our proposed sword/shield theory followed by an overview of the CTC's judicial and non-judicial repossession remedies. Next, we will examine the key jurisdictional CTC provisions applicable to these remedies, focusing on the manner in which these are intended to

[9] See Wool and Jonovic (n 8) 70-80 on penumbra theory; Brian F. Havel and John Q. Mulligan, 'The Cape Town Convention and The Risk of Renationalization: A Comment in Reply to Jeffrey Wool and Andrej Jonovic' (2014) 3(1) CTCJ 81. Havel and Mulligan describe 'renationalization' as the process by which domestic institutions – including judges, administrative agencies, and regulatory bodies – erode the uniformity of transnational commercial treaties by reverting to local law when interpreting and enforcing such treaties. According to the authors, the CTC presents a particular risk of renationalization because it touches on areas of law that are typically the subject of elaborate and well-established domestic legal and regulatory regimes (eg registration, insolvency). Moreover, it does not provide for a dedicated international tribunal with authority to adjudicate disputes, but rather leaves interpretation and enforcement to local institutions that might be unfamiliar with the tenets of the CTC.

[10] See Havel (n 9) on risk of renationalization, referencing Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in J Dunoff and M Pollack (eds) *International Law and International Relations: Taking Stock* (CUP 2013) 447 on the default reliance of some treaties on national judicial systems or regulatory agencies. The issue of general non-compliance with treaty terms and the consequences under public international law are beyond the scope of this article.

override certain aspects of national law and analyzing a recent case that we believe to be inconsistent with the CTC. We will then explore the role and limits of courts in the context of substantive enforcement, emphasizing the main areas in which a court having jurisdiction over the territory in which an object is located may improperly seek to shield a debtor from the exercise of CTC repossession remedies. Our discussion will elucidate various instances of implicit and explicit non-compliance with a particular focus on the inherent limits placed by the CTC on the granting of preliminary injunctions barring CTC remedies on the basis of local law principles that are otherwise inconsistent with the CTC.

Finally, we will use a multi-jurisdictional case study to illustrate the dynamics and tensions in the enforcement of the CTC repossession remedies, including the proper use of courts as a 'sword' and the potential misuse of courts as a 'shield'. This will involve a Mexican airline operating a Mexican registered aircraft under a New York law-governed finance lease where the lessor is a Delaware special purpose trust that, as borrower, has granted a New York law mortgage to a commercial lender.

III. Of Swords and Shields

The English case of *Combe v Combe*[11] stands, *inter alia*, for the proposition that promissory estoppel is 'to be used as a shield and not as a sword'. In that case, Lord Denning explained that the doctrine of promissory estoppel 'does not create new causes of action … It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties.'[12] The idea is that detrimental reliance, as applied in the specific context of promissory estoppel, cannot be expanded so far as to create a contractual cause of action in the absence of consideration, which itself is an essential part of any contractual cause of action.

The authors would propose their own sword/shield theory in the context of the CTC's repossession remedies: that the CTC system allows courts having jurisdiction over the territory where an object is located to be used as a sword to obtain speedy repossession of that object, but not as a shield to block such repossession action, especially on the basis of national law principles that are inconsistent with the CTC. This is not to say that the CTC overrides all national laws (although it does override national law on matters within its scope), or that the CTC does not contain any debtor protections (which it does; see, for example, the obligation to exercise remedies in a commercially reasonable manner as will be discussed below). Nor does this mean that a creditor should always win in any repossession case brought under the CTC. Instead, we are deploying this formulation to emphasize that the CTC creates a state responsibility (applicable through the relevant state's judiciary) to adjudicate matters consistent with CTC jurisdictional rules and to provide creditors with the substantive remedies and protections intended by the treaty text, state declarations and party agreements.

The CTC is a sword in that it is designed for the very purpose of allowing the speedy and predictable recovery of expensive mobile assets in default situations. When we say that courts cannot be used as a shield in CTC repossession actions, we mean that the CTC does not permit domestic courts to block or enjoin applicable CTC remedies in reliance upon otherwise inconsistent local principles.

IV. Overview of Repossession Remedies

The substantive repossession remedies contained in Article 8 and Article 10 of the Convention are an important, if not ground-breaking, construct in transnational private law. They hinge upon the

[11] [1951] 2 KB 215 (KB).
[12] ibid.

international interest and allow for the exercise of repossession remedies either without the leave of courts (within the bounds of commercial reasonableness) or with the sanction of courts (where the claimant has adduced evidence of a default by the debtor), notwithstanding any local law to the contrary.

A. Article 8 and Article 10: Non-Judicial Repossession Remedies

Article 8 of the Convention allows a chargee, in the event of default, to take possession or control of an object, sell or grant a lease of it and collect or receive any income arising from the management or use of that object. Article 10 allows a conditional seller or lessor, in the event of default, to terminate a lease or conditional sale agreement and take possession or control of any object to which the agreement relates (it also allows the conditional seller or lessor to apply for a court order authorizing or directing either of these acts). Article 11 specifies the meaning of default, allowing the debtor and creditor to define the events that constitute a default or otherwise give rise to CTC remedies, failing which, definition of a 'default' is taken to mean any failure on the part of the debtor which substantially deprives the creditor of what it is entitled to expect under the agreement. In addition, in the case of Article 8, any non-judicial remedies must specifically be agreed to in writing by the debtor in the relevant security instrument.[13]

Given the sensitivity of 'self-help' remedies in many jurisdictions, these remedies are only applicable without leave of the court where non-judicial remedies are specifically declared by the relevant contracting state pursuant to Article 54(2). This is the only state declaration under the CTC system that is mandatory, meaning that there is no default 'opt-in' or 'opt-out' application for a failure to declare. A contracting state's instrument of ratification will not be accepted by UNIDROIT unless it has declared whether or not remedies under the CTC require leave of the court. Accordingly, a declaration that remedies do not require leave of the court is an affirmative state action that (in addition to constituting a binding, legal rule) serves as *ipso facto* evidence that, in the context of the CTC, non-judicial remedies reflect the law and policy of the contracting state making such declaration.[14] The availability of non-judicial remedies does not however preclude a creditor from applying to a court for permission to exercise these repossession remedies.[15]

B. Article 13: Judicial Repossession Remedies

Recognizing that non-judicial remedies may not be compatible with some judicial systems, the framers of the CTC included a special judicial remedy allowing for 'speedy' relief by a creditor following an event of default. Article 13 of the Convention allows a creditor to request speedy return of collateral from a court pending final determination of any dispute when, for example, a debtor is disputing the creditor's right to exercise a repossession remedy under the CTC, or the creditor

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[13] In the case of a lease, consistent with principles of international commercial finance, the CTC does not require that the agreement specifically allow the owner to repossess after default an object which does not belong to the debtor, though in practice such right will always be contained in any well-drafted lease.

[14] The CTC declaration system allows contracting states to opt in and out of certain Articles of the CTC and the Aircraft Protocol, thus providing them with the opportunity to adopt the CTC and the Aircraft Protocol in a manner that suits their policy preferences and needs. The declaration system is designed to allow states to determine mandatory law or public policy, in the context of the CTC, on non-judicial remedies, rights of detention and similar matters. The international law-based requirement is that courts will act in a manner which carries out, and is consistent with, the declarations made by their governments (or where not made, the CTC itself).

[15] See Article 8(2) and Article 10(b) of the Convention.

cannot gain access to its collateral. The contemplated judicial relief takes the form of an order for the preservation of an object and its value, the possession, control or custody of the object and/or its immobilization.

As with non-judicial remedies, the CTC expressly allows a contracting state date-of-ratification optionality with respect to the application of Article 13 remedies. In this case, a contracting state may at that time opt-out of this provision (and the related jurisdictional provision in Article 43, discussed in more detail below) in whole or in part.[16] In addition, Article 13 conditions such remedies upon the debtor having agreed to the availability of this relief. While the CTC does not elaborate on the meaning of 'speedy', Article X of the Aircraft Protocol requires that contracting states specify in their declarations the number of working days from filing of the petition that will constitute speedy relief (which has typically been between 3 and 10 calendar days).

V. Role and Limits of Courts: Giving Precedence to the Provisions and Principles of the CTC over Conflicting National Rules

The proper role and limits of courts are determined first by the intended scope and application of the CTC and its relationship with national law.[17] Where appropriately seized of a matter, courts in contracting states have a responsibility to enforce CTC remedies in a manner consistent with the CTC and international law. But courts are not always equipped to interpret and apply *sui generis* international legal norms, especially when based on principles that differ from the domestic law typically applied by these courts. This makes it difficult for less experienced courts to fulfill their principal role in a repossession scenario – giving effect to CTC provisions and principles as a matter of priority over national laws.

That the CTC framework exists independently of, and takes precedence over, domestic law is fundamental to the practical realization of the benefits of the CTC.[18] The principle of autonomous interpretation enshrined in the CTC requires a court to interpret the CTC by reference to its terms and principles instead of by reference to analogous principles of domestic law.[19] Article 5(1) of the Convention provides:

> In the interpretation of this Convention, 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.

The 'general principles' described in the Preamble of the Convention and reinforced in Article 5(1) are the primary source for gap-filling.[20] These include the principles of prompt enforcement,

[16] Article 55 of the Convention; although of vital importance to the realization of the CTC's benefits, it is acknowledged that a contracting state has the right to opt-out of the provision in whole or in part where inconsistent with some issue of national or public policy. Where there is no opt-out, one must conclude that the article is consistent with public policy of the contracting state.

[17] While Article 5 of the Convention does contain some general conflict of laws rules (see Article 5(3) in particular, which defaults to the law of the state whose law otherwise applies under private international law where matters are not settled by the express terms of the CTC or the principles on which it is based), this article deals with the application of substantive treaty law by domestic courts. Accordingly, we will not address choice of law generally in this article.

[18] This assumes the CTC has been properly implemented under national law. Legislative implementation of the CTC and related constitutional law issues are beyond the scope of this article.

[19] See Goode (n 8) para 2.18: 'This is clear from Article 5(1) and (2) and reflects the general rule of interpretation laid down in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.'

[20] Goode (n 8) para 4.63.

uniformity and predictability, as well as party autonomy, which have been articulated by Wool and Jonovic as follows:[21]

> (I) There should be a strong presumption of the enforceability of contract provisions even when the CTC is silent on a topic (the 'party autonomy principle');[22]
>
> (II) Terms should be implied, when needed, that enhance transactional predictability and reflect international best practices in asset-based financing and leasing (the 'asset-based financing and leasing principle');
>
> (III) Terms should be implied from the treaty and international legal sources, as opposed to national law, when needed to preserve the intent, internal logic and uniformity of *sui generis* concepts and their legal implications (the 'sui generis concept principle');[23] and
>
> (IV) Governments (including courts) may not impose conditions on basic CTC rights and remedies, or take action that would adversely affect or render them ineffective, including in cases where the CTC is silent on a particular matter (the 'no adverse effect principle').

It is only where the foregoing does not yield a legal principle allowing a case to be decided that resort may be had to the applicable substantive national law.[24]

Without a doubt, the CTC extends into many important areas of commercial and secured transactions law that have previously been examined and adjudicated by courts in accordance with domestic principles. This creates a risk of conflict that courts may be inclined to resolve through a domestic legal lens.[25] But such inclination may not be followed, where treaty compliance is sought. There are many more and less explicit ways for a court to either exceed its limits or otherwise fail to fulfill its role in adjudicating CTC remedies. In the most obvious instance, a court may simply disregard express treaty remedies, which generally require time-bound and non-discretionary action, or it may seek to impose restrictions to the exercise of these remedies based on national laws that otherwise conflict with the express terms of the CTC. While resort may be had to national legal sources where the CTC does not otherwise provide an answer, the result cannot be inconsistent with the express terms and principles of the CTC. For example, a court may not construe the substantive elements of the treaty so narrowly as to denude a party from any remedy for the enforcement of the rights created under the CTC.[26] Similarly, a court may not turn to local substantive or procedural provisions in a manner that undermines the intent of the CTC.

VI. Role and Limits of Courts: Jurisdiction in the Enforcement of the CTC's Substantive Repossession Remedies

Predictability is crucial in the area of secured transactions and leasing. A financier who extends secured credit needs to ensure that its security will be recognized in the state of the main location of the debtor and in other states where its security may have to be enforced. Traditionally, courts seized of a

21 See Wool and Jonovic (n 8) 74-75.
22 Goode (n 8) para 2.9(9).
23 As discussed above, the CTC's repossession remedies constitute *sui generis* relief.
24 Article 5(2) of the Convention.
25 Havel (n 9) 83, 85.
26 See Goode (n 8) para 2.20.

matter apply their own conflict of laws rules to determine the jurisdiction whose substantive law will apply to a particular legal issue. Each state has its own conflict of laws rules, which may differ from one state to another, many of which provide that the substantive law applicable to a security interest in any kind of asset will be the law where the asset is situated. With mobile assets such as aircraft, this would require a creditor to obtain a valid and perfected security interest in all states where the asset may land.

The Geneva Convention on the International Recognition of Rights in Aircraft (1948) (the 'Geneva Convention') was an attempt to harmonize conflict rules on property interests in or leases of aircraft. It provides that the applicable substantive law is the law of the state of nationality of the aircraft. The Geneva Convention is however outdated in many respects, including in the manner it addresses leases and extra-judicial enforcement. More importantly, the Geneva Convention is based on a conflict rule approach, referring most issues to the law of the nationality of the aircraft. This approach is insufficient to achieve the desired uniformity and predictability as outcomes could be different depending on the national regime designated by the conflict rule. By creating an overriding international substantive legal regime, the CTC 'intends to elude as far as possible the need to have recourse to conflict of laws provisions'.[27]

Similarly, with respect to choice of forum, the *lex fori* of each state provides for different criteria with respect to access to their courts or the recognition of a choice of forum clause in a contract. To reinforce the predictability of the CTC system, the CTC contains two uniform rules mandating jurisdiction for the adjudication of claims brought under the CTC, including claims related to the CTC's substantive repossession remedies. The first is prorogated jurisdiction under Article 42, governing all possible claims or actions that are covered by the CTC ('CTC Claims'). This enables the parties to determine, on an exclusive or non-exclusive basis, which court is best suited to settle their disputes. The second is the jurisdiction under Article 43 to hear petitions for speedy relief pending final determination under Article 13. Courts of contracting states have a responsibility to cede or assume jurisdiction where required under Article 43 of the Convention, notwithstanding anything to the contrary under their own national choice of forum rules.

A. Article 42 Jurisdiction: Giving Effect to the Principle of Party Autonomy

Article 42 is a general jurisdictional rule allowing the parties to an agreement creating an international interest to choose specific courts to adjudicate CTC Claims.

It expressly overrides domestic conflict of laws rules with respect to CTC Claims insofar as contracting states are involved,[28] so long as the choice of forum is concluded in writing or otherwise in accordance with the formal requirements of the law of the chosen forum.[29] Importantly, the relevant forum need not have a connection to the parties or otherwise satisfy any formal requirements of private international law. While the requirements as to formal validity of a forum selection are governed by the law of the forum chosen by the parties, the material validity of the forum selection is governed by the applicable substantive law[30]:

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27 Kreuzer (n 7) 149.

28 See Kreuzer (n 7) 152. However, 'prorogation agreements selecting the courts of a State which is not a party to the CTC regime does not bind the courts of [contracting states]. Whether and to what extent such a choice of jurisdiction clause is valid has to be determined by the lex fori'.

29 Article 42(2) of the Convention. This was inserted in order to ensure conformity with Article 23 of the European Community Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters which replaces the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and binds all Member States of the European Union.

30 Goode (n 8) para 4.287.

> The determination of the forum by the parties has to be seen in connection with the general reference in Article 5(2) and (3) to the rules of private international law of the forum State for the designation of the applicable substantive law. Thus, by choosing the (exclusively) competent courts of a State Party the parties determine, at the moment of the conclusion of a transaction, the applicable conflict rules and in that way indirectly or, by virtue of a choice of law agreement, even directly the governing substantive law.[31]

The selected jurisdiction is assumed to be exclusive unless it is stated by the parties to be non-exclusive. An exclusive choice of court agreement under the CTC precludes a court in a different contracting state from claiming jurisdiction (exclusive or otherwise) in a claim or action under the CTC.[32] However, it does not necessarily guarantee that the forum chosen under Article 42 will hear all cases involving CTC Claims, as the application of substantive or procedural conflict rules of that forum (such as the *forum non conveniens* rule) could result in a finding there is some other available forum which has jurisdiction and is the appropriate forum for trial of the action.[33] Where the Article 42 agreement is non-exclusive, the debtor may be in a position to commence an action in its home or other territory unless the non-exclusivity runs in favor of the creditor only. If, and only if, action is taken by a debtor in a non-contracting state in a manner that is not precluded under an Article 42 agreement, the CTC would not apply.[34]

If Article 42 jurisdiction is limited to CTC Claims, such jurisdiction could conceivably be challenged by alleging that a claim is outside the scope of the CTC, or alternatively in an injunction or similar proceeding advanced by a debtor, by failing to inform the court seized of a matter that the CTC applies or even exists. Claims and counter-claims by the debtor that are not within the scope of the CTC include claims for civil liability (including lender liability), and criminal matters. CTC Claims or actions within the scope of the CTC must however, and clearly do, include the claims and actions that are the subject of this article, namely those related to the exercise by a creditor of the CTC's substantive repossession remedies. Article 42 must therefore determine the forum for any attempt by a debtor to block an Article 8 or Article 10 extra-judicial repossession, to the exclusion of any other forum (including the home forum of the debtor).

B. Article 43 Jurisdiction: Giving Effect to the Principle of Predictability and Universal Protection of Security in Mobile Equipment

Article 43 grants concurrent jurisdiction to courts of the state where an object is situated in connection with an exercise of Article 13 repossession remedies.[35] Such jurisdiction extends to orders for *in rem* relief, such as the preservation of an object and its value, the possession, control or custody of

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31 Kreuzer (n 7) 151.

32 See Goode (n 8) para 4.285.

33 The CTC does not exclude this principle of private international law.

34 When it comes to advance relief under Article 13, Article 43 of the Convention confers mandatory concurrent jurisdiction on the courts of the contracting state on the territory of which the object or debtor is situated, which raises the question of whether non-exclusive clauses remain desirable for creditor parties. One-way non-exclusivity in forum selection in favor of the creditor (but mandating an exclusive jurisdiction (within a contracting state) for proceedings initiated by the debtor) may be a preferable route and would be enforceable under Article 42. See *Aersale 25362 Aviation Ltd v Med-View Airline plc* (Com Ct, 15 September 2017) (enforcing non-exclusive New York forum selection clause that granted creditor the right to initiate proceedings in jurisdiction of its choosing, and rejecting debtor's application to stay claim based on *forum non conveniens* argument).

35 Under Article XXI of the Aircraft Protocol, a court of a contracting state also has jurisdiction under Article 43 where it is the state of registry for a helicopter or airframe pertaining to an aircraft.

the object and its immobilization.[36] Under the express language of the CTC,[37] Article 43 jurisdiction is mandatory and overrides the *lex fori*. The mandatory nature of this jurisdiction is inherent to the very exercise of Article 13 repossession rights, which cannot be exercised if the court having jurisdiction over the territory where the object is located refuses to accept jurisdiction.[38] This is the case notwithstanding any contrary national conflicts rules that may allow the court to refuse jurisdiction in the instance where another jurisdiction has a closer connection to the dispute. However, Article 43 only applies if the contracting state has made the relevant declaration under Article 55 (noting that a contracting state may not apply Articles 13 or 43 in whole or in part).[39]

Article 43 jurisdiction is not exclusive in relation to CTC Claims and is in fact concurrent with any other applicable jurisdiction, including Article 42 jurisdiction as chosen by the parties. Concurrent jurisdiction means that the choice as to whether an Article 13 claim should be filed in the contractual forum to which the parties agreed or in the forum where the object is located is entirely at the option of the creditor.[40] The jurisdiction of courts in the state where the object is located cannot be excluded by agreement of the parties under Article 42 or displaced by national conflicts rules. That a court is seized does not prevent application by that court of its regular rules and procedures; however, such rules (including conflicts rules) may not be applied if inconsistent with CTC, which, as noted, affirmatively provides without qualification in Article 43 that such courts 'have' jurisdiction to hear Article 13 claims. This is because the specific intent and effect of the CTC is to remove cases of urgency from the regime of private international law that governs enforcement of judgments.

The CTC does not give any court general jurisdiction to enjoin repossession remedies on the basis of local law principles or allow a debtor to initiate preemptive injunctive action to block an Article 13 petition prior to any action by a creditor. For one, under the terms of the Convention, any such preemptive action is not 'a claim for relief under Article 13' as required for the application of jurisdiction under Article 43. Any such claim by the debtor must therefore be brought in the forum specified by the parties in their agreement under Article 42 (unless the election is non-exclusive in favor of the debtor). More crucially, even if the parties had expressly selected the jurisdiction where the object is situated as prorogation jurisdiction under Article 42, any effort to block Article 13 remedies on the basis of local law would be inconsistent with each of the general principles elevated above national law by Article 5 of the Convention. For example, enjoining Article 13 remedies is inconsistent with the party autonomy principle, since Article 13 remedies only apply where agreed by the parties in the relevant agreement. It is also inconsistent with the asset-based financing and leasing principle, since predictable application of rules and speedy access to collateral following default are essential to the proper functioning of cross-border finance, as well as the *sui generis* concept principle, since Article 13 remedies are a creature of the CTC and not of national advance relief law. Finally, the no adverse effect principle would preclude a court from importing national concepts surrounding injunctive relief to block Article 13 remedies, since this amounts to imposing additional conditions on the exercise of otherwise available CTC remedies.

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36 Article 13(1)(a)-(c) of the Convention.

37 Article 43(1) states: '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.' (emphasis added). Article 13(1)(a), (b), and (c) encompass the CTC's *sui generis* repossession remedies.

38 Unlike the *in rem* repossession remedies of Article 13(1)(a)-(c), relief under Article 13(d) is viewed as operating *in personam*, and therefore the debtor must be situated in the territory of the forum state where enforcement is sought (as opposed to where the object is located). See Goode (n 8) para 4.287.

39 Article X of the Aircraft Protocol extends Article 13 remedies to sale; it also substantially modifies Article 13, for example, by preventing the imposition by a court of a bond requirement if the parties have excluded application of Article 13(2) in their contract.

40 Goode (n 8) para 4.294.

C. First Nation Airways Case

In *First Nation Airways (SS) Limited*,[41] the courts of Nigeria claimed jurisdiction over a repossession action covered by the CTC in a manner that was inconsistent with the principles of Article 42, notwithstanding that the parties had designated the courts of England as their exclusive forum to hear CTC claims. Having taken jurisdiction, the court then proceeded to enjoin the exercise of applicable CTC repossession remedies based on domestic legal principles.

The lessee airline had entered into leases for three aircraft with an international lessor. Following payment defaults under the leases, the lessor sought to take possession of the aircraft (located in Nigeria) in accordance with Article 8(1)(a) of the Convention without recourse to the court, on the basis that Nigeria, in acceding to the CTC, had made a declaration under Article 54 pursuant to which the remedies provided by Article 8 can be exercised without leave of the court. Just when the lessor was about to commence proceedings before the High Court of London in accordance with the forum selection clause of the leases, the lessee petitioned the Federal High Court of Lagos to prevent the lessor from pursuing its action in England. The Nigerian court claimed full jurisdiction over the matter.

In its motion to dismiss, the lessor referred the court to Article VIII of the Aircraft Protocol, which provides that the parties' choice of law to govern their contractual rights and obligations must be respected in all Contracting States which have made a declaration to that effect under Article XXX(1), as Nigeria did. The lessor's argument to oust the Nigerian court rested on this provision as well as Article 42. The lessee, on the other hand, argued the Nigerian court must have the power to rule over the matter as a result of a series of connections between the transaction and the local forum, namely the location of the aircraft, the airline, the witnesses and the lawyers in the case. The airline claimed that the forum selection clause of the lease agreement should be considered null and void to the extent that such clause sought to oust the local jurisdiction of Nigerian courts and conflicted with Nigerian domestic mandatory law.

In considering the matter, the court acknowledged that 'recognition must be given to the principles of international law' and to 'the concept of autonomy of the parties to international commercial contracts' to select a forum of their choice, as provided under Article 42. However, the court questioned 'whether domestic rules and laws shall be subservient to international rules and principle' and went on to conclude:

> where a domestic forum is asked to stay proceedings because parties in their contract chose a foreign court and a foreign law to apply, it should be very clearly understood by our courts that the power to stay proceedings is not mandatory. Rather it is discretionary power which in the ordinary way, and in the absence of strong reasons to the contrary will be exercised both judicially and judiciously bearing in mind each party's right to justice.[42]

Having considered the arguments raised by the lessee to support its requests, the Court found that the Nigerian restrictions on foreign exchange (which prevent the lessee from paying for its representation before the English courts) constituted 'strong cause' for the court to take jurisdiction over the matter and reject the lessor's motion to dismiss. The court also ruled that its decision to adjudicate the matter pre-empted the jurisdiction of the English court.

These judicial actions were inconsistent with the jurisdictional rules and intent of the CTC, which overrides pre-CTC law (including national conflicts rules). The Court did not enforce the choice of

[41] *First Nation Airways (SS) Limited v Castle 2003-1A LLC & others* [2016] FHC/L/CS/1343 1.
[42] ibid.

forum set by the parties in the leases despite recognizing that the CTC and Aircraft Protocol were effective and enforceable in Nigeria. This ruling is particularly troubling since in the present case, the Court could have decided that Article 42 did not apply because the United Kingdom had not acceded to the CTC at the time the courts of England were designated as the exclusive forum for CTC claims.[43] Instead, the court peremptorily applied national doctrines (such as the 'strong cause' exemption) notwithstanding that the parties' exclusive choice of forum was deemed to have been validly made. No matter how critical the connections to Nigeria are to determining jurisdiction under Nigerian conflicts rules, these are not relevant under a CTC analysis. As stated by Professor Goode, 'where exclusive, [Article 42] precludes courts of other Contracting States from accepting or asserting jurisdiction' over a case.[44]

VII. Role and Limits of Courts: Enforcement of the CTC's Substantive Repossession Remedies

We will now turn to the process and dynamics surrounding the substantive exercise of repossession remedies, focusing on the key ways that the CTC provisions, principles and framework might be contorted to use courts in the jurisdiction where the object is located as a shield against an otherwise legitimate exercise of CTC remedies.

A. Improperly Shielding the Exercise of the CTC's Non-Judicial Repossession Remedies

The Convention contains two key provisions that can impact the exercise of Article 8 and Article 10 repossession remedies: the general requirement in Article 14 that remedies be exercised in accordance with the procedures prescribed by the law of the place where the remedy is to be exercised; and the principle in Article 8 (as supplemented by the Aircraft Protocol with respect to aircraft objects) that remedies must be exercised in a 'commercially reasonable' manner. If it is the role of courts to ensure that CTC principles are faithfully applied, under which circumstances then, if any, can a court exercising jurisdiction over the territory where the object is located legitimately block or enjoin the exercise of CTC non-judicial repossession remedies?

Article 14 of the Convention provides that, subject to Article 54(2), substantive repossession remedies will be exercised in accordance with the procedural laws of the *lex loci* (ie the law of the jurisdiction where the remedy is exercised). This will often be the law of the jurisdiction of a debtor, which may create some institutional bias. However, Article 14 cannot be relied upon by courts to impose any requirement for a court order (even a derivative requirement) where a contracting state has declared that remedies are available without leave of the court under Article 54(2). Other procedural laws that conflict with the existence and availability of non-judicial remedies are also problematic. For example, the imposition of undue administrative delays for access to airport facilities, ferry flight permits or air traffic control permissions would all render the effectiveness of declared remedies moot. The intention of the CTC is that the foregoing be effected on a swift basis.

Implementation issues may arise where a system that did not previously allow non-judicial remedies makes an affirmative Article 54(2) declaration. A recent article[45] published in this Journal examined these issues in detail in the case of Québec, which made a deliberate attempt in its legislative implementation to bring the applicable commercial and procedural law into line with CTC

[43] As discussed above, only the courts of Contracting States may be designated pursuant to Article 42 of the Convention.

[44] Goode (n 8) para 4.285.

[45] Donald Gray, Jason MacIntyre and Jeffrey Wool, 'The Interaction Between Cape Town Convention Repossession Remedies and Local Procedural Law: A Civil Law Case Study' (2015) 4(1) CTCJ 17.

principles.[46] The article concludes that even in the absence of any specific enabling changes to the rules of civil procedure or any jurisprudence from domestic sources:

> the Lessor and the Bailiff must be able to take reasonable measures to physically repossess the aircraft in the face of airline opposition. Such reasonable measures would need to be exercised in good faith with prudence and diligence; the Lessor and the Bailiff are not entitled to apply force to an individual. The key conclusion, however, is that the lack of existing procedural rules cannot be used to deprive a creditor of the remedy specifically given to it by the Governments of Canada and Québec to exercise non-judicial remedies.[47]

Accordingly, even if the contracting state at issue has an entire body of jurisprudence stating that non-judicial remedies were against pre-CTC public policy in such a state (which was changed by the permitting declaration), a court could not grant an injunction to a defaulting debtor prohibiting non-judicial repossession on that basis where the contracting state has made an affirmative Article 54(2) declaration, since Article 5 does not allow resort to local principles where a matter is expressly addressed in the CTC. In other words, mere repossession of the asset cannot be deemed to create irreparable harm or prejudice where the availability of this remedy has been declared by a contracting state and agreed to in writing by the debtor.

Accepting that the CTC allows for extra-judicial remedies does not permit a creditor to breach the peace or otherwise engage in abusive behavior. This is because Article 8(3) requires that a secured party exercise remedies in a 'commercially reasonable' manner.[48] Specified remedies under the relevant agreement, including notice periods, are deemed to be commercially reasonable except where such provision is 'manifestly unreasonable'. This wording 'embodies a strong presumption in favour of the reasonableness of a contractual provision as to the mode of exercise of a remedy and is designed to encourage reliance on contract wording, particularly where the wording is customary in international aircraft financing and leasing contracts.'[49] Article 8(3) is mandatory and cannot be derogated from by agreement of the parties.[50]

Since the term 'commercially reasonable' is not expressly defined under the CTC, courts must first look to general principles, as discussed above, when applying the concept. These principles include party autonomy, which is expressly embodied in the presumption as to the reasonableness of agreed remedies, but, critically, also the 'international character' of the CTC and the 'need to promote uniformity and predictability in its application' as expressly stated in Article 5(1). Accordingly, in determining what is 'commercially reasonable', a court should always look at established commercial and international practices, along with industry standards and customary practices within the cross-border equipment financing and leasing industry, prior to resorting to domestic law. Established commercial practice in the international aircraft financing space hinges upon the rapid repossession and redeployment of assets following an event of default.[51] A full comparative legal analysis as to

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[46] The Québec CTC Regulation specifically provides that 'any remedy available to the creditor under any provision of the CTC which is not there expressed to require application to the court may be exercised without leave of the court'.

[47] Gray, MacIntyre and Wool (n 45) 37.

[48] Under the CTC itself, the 'commercially reasonable' requirement only applies to Article 8 remedies. Article IX(3) of the Aircraft Protocol, however, extends this limitation to all remedies for aircraft objects, including those available under Article 10. It is important to note that Article 8(3) is focused on the commercial reasonableness of CTC repossession remedies (ie dispossession) and not on the commercial reasonableness of sales of collateral in the exercise of remedies (ie foreclosure).

[49] Goode (n 8) para 5.51.

[50] Article IV(3) of the Aircraft Protocol.

[51] Gray, MacIntyre and Wool (n 45).

what constitutes commercial reasonableness in international commerce is beyond the scope of this article, but in matters relating to the exercise of repossession remedies, the essence is that creditors should avoid violence or breach of the peace and use reasonable efforts to preserve the value of the recovered property and to mitigate the creditor's losses resulting from the default. These principles are emphasized in various international law texts, sources and guidelines,[52] including the UNCITRAL Legislative Guide on Secured Transactions.

References to commercial reasonableness in international legal instruments have largely been inspired by Article 9 of the United States Uniform Commercial Code, which has, since its enactment in the 1960s, influenced many different national and international personal property security regimes in need of a 'device to control, on an ex-post basis, the creditor's behavior'.[53] The 'ex post' nature of this device is critical to the framework of the CTC. This is because the CTC allows debtors to pursue claims for lender liability separate and apart from the repossession action of the creditor. The exercise of these rights is typically subject to contractual jurisdiction as agreed by the parties, rather than the jurisdiction where the object happens to be located, and the creditor liability claims themselves are not secured by the relevant object. In fact, the CTC itself does not even purport to govern these claims, something which is reinforced in the Aircraft Protocol which expressly provides that '[n]othing in the Convention or [this] Protocol affects the liability of [a] creditor for any breach of the agreement under the applicable law in so far as that agreement relates to an aircraft object'.[54] Therefore, the CTC does not permit a court to block an impending non-judicial repossession pending a determination by the court as to whether or not the action is commercially reasonable. To impose any ex ante judicial standard of review as to the commercial reasonableness of a proposed extra-judicial action would undermine the very essence of the CTC's non-judicial repossession remedies. This would be inconsistent with the general principles that take precedence over applicable law, in particular the *sui generis* concept principle and the no adverse effect principle.

Other matters outside the scope of the CTC include criminal law, regulatory public law and torts/civil liability, all of which are similarly independent from the right of the creditor to obtain possession of an object and are not secured by the object. The existence of these types of claim or counterclaim cannot be used in the courts to block non-judicial remedies where the requirements of the CTC have otherwise been met.

B. Improperly Shielding the Exercise of the CTC's Judicial Repossession Remedies

Where a contracting state has declared that CTC remedies may only be exercised with leave of the court, or in certain instances where the exercise of non-judicial remedies is not possible without breaching the peace given the facts on the ground (eg security in place at large international airports), gaining access to the relevant object may require a prejudgment order from a court having jurisdiction over the territory where the object is located. To standardize the approach courts take in these cases, the CTC contains a specific judicial procedure in Article 13 designed to ensure that speedy relief is available with very limited opportunity for *ex ante* judicial control. Article 13 is a substantive CTC remedy intended to provide a rapid, cost-effective process that is separate from any interim or other remedies available under domestic law. Its essence is that courts are required

[52] See Anna Veneziano, 'The Role of Party Autonomy in the Enforcement of Secured Creditor's Rights: International Developments' (2015) 4 Penn St J L & Int'l Aff 333.

[53] Laura M. Franciosi, 'Commercial Reasonableness in Financial Collateral Contracts: A Comparative Overview' [2012] 17(3) Uniform Law Journal <*https://doi.org/10.1093/ulr/17.3.483*> accessed 5 January 2018. Examples include, among others, the personal property security acts of various countries, the United Nations Convention on Contracts for the International Sale of Goods, and the United Nations Convention on the Assignment of Receivables in International Trade.

[54] See Wool and Jonovic (n 8) 77.

to provide the creditor who adduces evidence of default with speedy relief pending final determination of its claim. In the context of repossession remedies, the contemplated judicial relief takes the form of an order for the preservation of an object and its value, the possession, control or custody of the object and/or its immobilization. It only applies where it has not been excluded by a contracting state declaration under Article 55 and where agreed to by a debtor in the relevant agreement.

There has been some limited debate in the international legal community over the nature of the 'relief pending final determination' in the Convention text. In the inaugural issue of this Journal, Gilles Cuniberti suggested that Article 13 could be seen as a hybrid between interim relief and a final remedy,[55] a theory that could lead courts and debtors to leverage local pre-CTC interim relief procedures in and around injunctions and standards of proof by, for example, reference to Article 14 and the gap-filling rules of Article 5. The result would be an inconsistent application of Article 13 remedies and, in the worst case, the potential dismantling of this CTC remedy in contravention of general principles which require that remedies be interpreted in a manner that renders them effective. This would have been accentuated by the wide berth given to many judges in weighing issues of fairness or equity in determining access to interim remedies under national systems. Since the Cuniberti paper[56] was published, the international legal community and courts generally have become more comfortable with the overriding *sui generis* nature of Article 13 remedies.[57] Indeed, notwithstanding the views expressed by Cuniberti, the specificity of the Convention text, as back-stopped by the application of its general principles, requires that Article 13 be interpreted and applied on its own terms, autonomously from any existing or analogous domestic law concepts.[58]

Notably, the CTC does not provide courts with any discretion to refuse an Article 13 order or to suspend the effectiveness of an order for a period to allow the default to be cured. The only factual predicate is that the creditor 'adduce' evidence of a default in the forum where the Article 13 petition is filed. The Oxford Dictionary defines the verb as to 'cite in evidence', as in to provide reasons as opposed to proving the incontrovertible existence of a default. Accordingly, there is no resort to local procedural standards of proof; the creditor merely needs to provide prima facie evidence that the default exists, which can, for example, be in the form of an affidavit of non-payment.

That Article 13 relief is granted 'pending' final determination of the creditor's claim simply means that the proceedings for recovery of the object are ancillary to, or undertaken in parallel with foreign, the main proceedings, which may be commenced either by the creditor or the debtor, presumably in the forum identified in the relevant agreement and having jurisdiction under Article 42. Article 13 does not require that a hearing take place, or that any pending claims be finally determined. In addition, nothing in Article 13 specifically militates for the preservation of the status quo as between the parties. This is because protection of the debtor is intended primarily to be provided by way of compensation following final judgment (which in certain circumstances may be secured by a bond as discussed below).

This makes sense given that Article 13(2) allows courts to impose terms to protect the debtor or other interested persons in the event that the creditor fails to perform its obligations under the CTC or otherwise fails to establish its claim on final determination. This protection can take

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55 Gilles Cuniberti, 'Advance Relief Under the Cape Town Convention' (2012) 1(1) CTCJ 79.

56 ibid.

57 Anna Veneziano, 'Advance Relief Under the Cape Town Convention and its Aircraft Protocol: A Comment on Gilles Cuniberti's Interpretative Proposal' (2013) 2(1) CTCJ 185, 186.

58 See Goode (n 8) para 2.98 ('While Article 13(4) refers to "interim relief" this description was intentionally avoided in the heading to Article 13 and in Article 13(1) so as to make it clear that the relief is a CTC relief and should not be characterised by reference to concepts of municipal procedural law.'); Goode (n 8) para 4.109; Veneziano (n 57).

various forms, including an undertaking to pay damages to the debtor or other interested party, or the provision of a bond or demand guarantee covering potential liability for breach of a CTC obligation (including the obligation to act in a commercially reasonable manner).[59] For aircraft objects, following the 'ex post' theory of commercial reasonableness noted above, this requirement can be waived in writing by the parties under Article X(5) of the Aircraft Protocol. The courts may also require notice to interested parties under Article 13(3). Under Article 13(4), the creditor remains entitled to other forms of relief, including interim relief, under local law (such as interim payment orders).

Once an Article 13 action is commenced, only the terms of the CTC apply. Article 13(2) therefore must be interpreted on the basis of the Convention text and the above-described gap-filling provisions before resorting to local principles. Article 13(2), if not excluded (see above), gives a court fairly wide discretion with respect to protective measures against a breach by a creditor of its CTC obligations. Some of these measures, including the requirement to post a bond or demand guarantee covering potential creditor liability for a breach of the CTC, can be waived by the debtor in writing under the Aircraft Protocol.[60] Such judicial discretion, however, is limited to two specific circumstances: protection against a creditor's breach of its obligations under the CTC; and failure of the creditor to adduce evidence of its claim, as where the court concludes that the debtor was not in fact in default. The court has no general power to deny an Article 13 petition or to enjoin any repossession pending a trial on the merits, both of which situations would be inconsistent with the text and principles of the CTC.[61] Similarly, the statement in Article 13(4) that '[n]othing in [Article 13] … limits the availability of forms of interim relief other than those set out in paragraph 1' is not a signal that a debtor may counter an Article 13 petition with a request for injunctive relief under national legal principles. Article 13(4) is entirely related to the 'relief' available to a creditor and not the defenses available to a debtor. This is a very concrete example of why the CTC empowers courts to be used as a sword and not as a shield.

VIII. Role and Limits of Courts: A Case Study

This article concludes with a case study intended to illustrate many of the principles that we have reviewed. It involves a fictitious Mexican airline operating a Mexican-registered aircraft under a New York law-governed finance lease, where the lessor is a Delaware special purpose trust that has granted a New York law mortgage to a commercial lender. We will examine a hypothetical non-judicial repossession scenario while the aircraft is located in Miami, Florida and an Article 13 petition for repossession and control of the aircraft while it is located in Mexico. The below scenario is entirely hypothetical and posited for illustrative purposes only. The authors do not purport to take a definitive position as to how a court would rule in such case, only as to how a court should rule in light of CTC principles.

A. Factual Background

A Delaware owner-trustee (the 'Lessor') leased a Boeing 757 (the 'Aircraft') to an airline (the 'Lessee'), incorporated and located in Mexico for purposes of the CTC. The Aircraft was leased pursuant to a finance lease (the 'Lease') that was executed in January 2008 (the 'Lease'), after the Convention

[59] Goode (n 8) para 4.111.

[60] Article X of the Aircraft Protocol extends Article 13 remedies to sale; it also substantially modifies Article 13 by, for example, preventing a court from imposing a bond requirement if the parties' contract excludes application of Article 13(2).

[61] Goode (n 8) para 4.109.

entered into force in Mexico on November 11, 2007. A New York law mortgage (the 'Mortgage') was granted by the Lessor in favor of a security trustee for the benefit of a commercial bank (the 'Security Trustee'). The Mortgage was the first registration made on the International Registry, followed by the Lease. Both the Lease and the Mortgage were translated into Spanish and registered with the Mexican civil aviation authority.

The parties agreed in the Lease and the Mortgage that these documents would be governed by New York law and submitted to the exclusive jurisdiction of the courts of the State of New York. The Lease was assigned to the Security Trustee and was, by its terms, subject and subordinate to the Mortgage, meaning that in the event of a loan default the Security Trustee was contractually permitted to terminate and avoid the Lease. The parties further agreed that each of the events of default specified in the Lease, including a payment default by the Lessee, were capable of giving rise to the remedies set forth in the CTC and that any default under the Lease would also constitute an event of default under the Mortgage. Remedies under both the Lease and the Mortgage were deemed to be exercised in a 'commercially reasonable manner' if carried out in a manner consistent with the New York Uniform Commercial Code ('NY UCC'). The Lease and the Mortgage also provided that upon a continuing event of default by the Lessee or Lessor, as applicable, the Security Trustee would have the right to terminate the Lease and enter upon the premises where the Aircraft or any part thereof was located and take immediate possession of and remove the same to the fullest extent permitted by applicable law.

B. Default and Attempted Self-Help

Upon the occurrence and continuation of multiple events of default by Lessee, including failure to pay basic rent for several months and failure to maintain the insurances required under the Lease, the Lessor first served a notice of default on the Lessee, and then on May 2, 2017, a notice of termination of the Lease. Notwithstanding the notices, the Lessee continued to operate the Aircraft. On June 5, 2017, after becoming aware that the Aircraft was stored outdoors at Miami International Airport for some routine checks, the Lessor decided to initiate the procedure to repossess the Aircraft by exercising self-help remedies under the CTC.

The Declarations lodged by the United States of America under the Convention at the time of the deposit of its instrument of ratification provide that pursuant to Article 54 of the Convention, 'all remedies available to the creditor under the Convention or Protocol which are not expressed under the relevant provision thereof to require application to the court may be exercised, in accordance with United States law, without leave of the court.' New York Courts treat a finance lease as a security agreement for purposes of the CTC and, therefore, in proceedings involving the law of New York, a finance lease falls under the scope of Article 8 of the CTC (as opposed to Article 10). Article 8(3) of the Convention (and Article IX(3) of the Aircraft Protocol) requires that a secured party exercise remedies in a 'commercially reasonable' manner. Specified remedies under the relevant agreement, including notice periods, are deemed to be commercially reasonable except where such provision is 'manifestly unreasonable'. In this case, the agreement provides that remedies exercised in accordance with the standards of the New York Uniform Commercial Code will be deemed commercially reasonable.

A repossession agent was hired who, with the aid of a ground handler, sought to access the Aircraft, attach a notice of repossession from the Lessor to the first front door of the Aircraft, get the aircraft certificates and logbooks stored in the cabin and move the Aircraft to one of the handler's hangars. The Aircraft, however, was stored in a hangar belonging to a third party. When the repossession agent arrived at the site, security guards were patrolling the hangar. Unfortunately, the repossession could not occur without breaching the peace.

C. Lessee Claim for Injunctive Relief; Resort by Security Trustee to Article 13 Remedies

With self-help unavailable, the Security Trustee and the Lessor (acting at the direction of the Security Trustee as part of its exercise of remedies under the New York Uniform Commercial Code as assignee of the lease and beneficial interest in the lessor) filed a claim in the Supreme Court of the State of New York for breach of contract demanding return of the aircraft. Before the process had been served on the Lessee, the Aircraft was flown away to Cancun. Self-help remedies are not available in Mexico and in acceding to the CTC, Mexico declared that all remedies available to a creditor under the CTC which are not expressed under the relevant provision thereof to require application to the court (including the remedies provided by Article 8 of the Convention) shall not be exercised without leave of the court.

The Lessee then initiated proceedings before the Mexican Federal Court in Cancun seeking preemptively to enjoin the Security Trustee or Lessor from exercising remedies on the grounds that the non-consensual repossession of a commercial airliner that is in service is by definition commercially unreasonable, since it would result in passenger disruptions that were not in the public interest. A few days later, the Security Trustee and Lessor filed a counter-claim in the Mexican Federal Court requesting to take possession of the Aircraft pending final determination of the New York case under Article 13(1)(b) of the Convention.

As a legal basis for the counter-claim, the Security Trustee and Lessor sought to establish (1) the applicability of the CTC with connecting factors, (2) the location of the Aircraft in Cancun, (3) the commencement of a case on the merits in New York courts and (4) the wording in the loan and lease documentation where the parties specifically agreed that CTC remedies (including Article 13 remedies) applied following a default. The Security Trustee and Lessor submitted invoices and bank records as evidence of the existence of a payment default. In objecting to the motion for an injunction, the Security Trustee and Lessor argued that (1) Mexican courts did not have jurisdiction to grant preliminary relief in respect of a matter governed by the CTC, including the creditors' right to possession of the Aircraft, since the Lessee agreed to submit to New York courts under Article 42; (2) that the Security Trustee and Lessor's Article 13 claim for speedy relief needed to be evaluated strictly on the basis of the CTC and not on the basis of Mexican legal principles; (3) that any claim that the Security Trustee or Lessor did not act in a commercially reasonable manner had to be assessed separate and apart from the right of the creditor parties to obtain possession under Article 13; and (4) finally, that in any event passenger disruptions were not a sufficient basis under the CTC to preclude Article 13 remedies or for a finding that their actions were not commercially reasonable.

The Lessee in turn asked the court to dismiss the Article 13 counter-claim asserting, *inter alia*, that the Lessor and the Security Trustee failed to provide evidence of default, that the parties' choice of law in the Lease and in the Mortgage was invalid under Mexican law, and that the order requested by the Lessor and the Security Trustee, if granted, would violate Mexican law which had to be considered supreme.

D. Findings of Mexican Court

In first instance, the Fifth District Judge of the State of Quintana Roo dismissed Lessee's request for a preliminary injunction on the basis that the Security Trustee and Lessor were seeking judicial relief under Article 13 and therefore there was no danger that the Lessee's rights would be impaired since it would continue to have possession of the Aircraft during pendency of the Article 13 hearing. In doing so, the Mexican court accepted jurisdiction to hear the motion for preliminary injunction, though the basis for that might be argued.

On the matter of the Article 13 counter-claim, the court correctly evaluated the claim on the basis of CTC principles, without resort to the rules on interim attachment orders contained in the Commercial Code ('Codigo de Comercio'). The court agreed to grant the requested relief subject to requiring a surety to be put in guarantee by the claimants for $250,000 USD pursuant to Article 1182 of the Commercial Code to secure the remaining obligations of the creditor parties to act in a commercially reasonable manner. The court refused to rule as to whether any actions or proposed actions of the creditor parties were commercially reasonable or not, indicating that such an analysis was beyond the scope of the Article 13 procedure and should be assessed as part of the New York proceedings. While the relief granted was generally consistent with Article 13 of the Convention and allowed the creditor parties to recover physical possession of the Aircraft within a few days of filing their claim, the basis for this protective measure should have been Article 13(2) of the Convention as opposed to Mexican law.

IX. Conclusion

The CTC, where supported by contracting state declarations and party intent in their contractual agreements, creates a system whereby courts having jurisdiction over the territory in which an object is located can be used as a 'sword' to obtain speedy possession of that object, but cannot be used as a 'shield' to delay that repossession activity. Improper shielding actions typically arise from either (1) a failure by courts to enforce the Convention's substantive remedies (including the issuance of blocking or injunctive orders contrary to the Convention) or (2) the improper application of the Convention's jurisdictional rules. The principle of autonomous interpretation enshrined in the Convention requires a court to interpret the Convention by reference to its terms and principles instead of by reference to analogous principles of domestic law. The Convention does not give any court general jurisdiction to enjoin repossession remedies on the basis of local law principles or allow a debtor to initiate preemptive injunctive action to block an Article 13 petition prior to any action by a creditor.