
**TRANSNATIONAL CIVIL PROCEDURE -
FORMULATION OF REGIONAL RULES
ELI – UNIDROIT Rules of Transnational Civil
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WORKING GROUP ON PROVISIONAL AND PROTECTIVE MEASURES

First Report November 2014

ELI-UNIDROIT Project on Civil Procedure

Working Group on Provisional and Protective Measures

Working Paper no 1: Identifying the Subject-Matter

I – Summary and Background

Summary: Scope and Feasibility.

This is a transnational project of great importance.

The Working Group has met (17 September 2014, University of Luxembourg). During that concentrated discussion, it made great progress in clarifying the choices to be made and by suggesting a coherent and practicable approach.

Our aim in this first Working Paper is to offer a tentative structure. Building on UNIDROIT/American Law Institute's *Principles of Transnational Civil Procedure*, notably Principle 8, we will suggest a framework of safeguards and constraining factors which must regulate judicial orders made in this field. Then we will develop common regimes for particular measures.

There are many types of ostensibly 'protective' and/or 'provisional' measures. Such judicial remedies have these (i) distinguishing and (ii) shared characteristics:

- (i) they are issued without purporting to be final and complete adjudicatory decisions; and
- (ii) these measures are granted:
 - (a) for reasons of urgency (including recognition of the customary delay of the civil process), pending the final outcome;
 - (b) the purpose is (1) to preserve the opportunity for an eventually complete and satisfactory judicial resolution and enforcement of the claim or (2) to provide provisional protection of a party's interest in that final outcome; and
 - (c) in the interests of justice and fairness, there are special constraints on the exercise of the judicial power to grant such remedies and to ensure protection of both parties.

But there is a myriad of manifestations within various legal systems of the very abstract features (1) and (2) mentioned at (b) above ('the purpose is (1) to preserve the opportunity for an eventually complete and satisfactory judicial resolution and enforcement of the claim or (2) to provide provisional protection of a party's interest in that final outcome'). And there is endless opportunity to become bogged down in fruitless taxonomical and terminological debates.

But this is not a ten year or even five year project. Time is of the essence. And so it has been decided that the prudent course is to identify the important and obvious types of measure. They are 'important' in the sense that they are regularly invoked within court systems. And they are 'obvious' in the sense that they lie clearly within the core meaning of 'protective or provisional measures'.

Selection has been made by reference to the underlying function of various measures. By adopting this functional perspective, a list of important and obvious items can be drawn up (see the items 1 to 7 presented in the boxed text below).

By concentrating on those types of relief, it will be possible to devise a coherent framework of leading rules in this field. Such a perspective provides opportunity for a project which will be useful and illuminating. The contemplated time-table for this project is tight. But it is believed that a Report concerning items 1 to 7 can be achieved within that period.

Background. Until 2014, efforts of harmonization of civil procedure had always approached the topic of provisional and protective measures as a unitary one. It was considered as appropriate to propose rules which would apply to the general category of provisional/protective measures, and would thus be common to all of them.

The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters included a single provision, Article 24, which afforded a single rule of jurisdiction to grant "Provisional, including protective, measures". This provision has never been amended and was kept in the Brussels I Regulation and in the Brussels Ibis Regulation. It is also found in the mirror Lugano Conventions (1988, then 2007), and in most other European Regulations on jurisdiction.¹ The only variation appears in the Brussels II bis Regulation,² but the

¹ See Article 14 of Regulation No [4/2009](#) of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations and Article 19 of Regulation No [650/2012](#) of the European Parliament and of the Council of

provision is still general and applies to all provisional, including protective, measures.

The Storme Code adopted the same approach. It included a series of provisions (Articles 10.1 to 10.8) related to “provisional measures”. Again, the provisions were general. Indeed, their purpose was to create a single measure which would afford general interim protection and would thus supplement national laws which only afforded such protection in defined cases.

The ALI-UNIDROIT Principles, finally, have also followed the same approach. Article 8 helpfully identifies various principles and leading rules which will govern all types of “provisional and protective measures”.³ This is certainly a helpful platform for our project. Other ALI-UNIDROIT Principles principles are relevant.⁴

In 2014, the European lawmaker adopted Regulation (EU) 655/2014 establishing a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (‘the EAPO Regulation’). Contrary to all previous harmonization efforts, this instrument focuses (in very considerable detail) on a

4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

² See Article 20 of Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

³ UNIDROIT/American Law Institute’s *Principles of Transnational Civil Procedure*:

8. *Provisional and Protective Measures*

8.1 *The court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.*

8.2 *A court may order provisional relief without notice only upon urgent necessity and preponderance of considerations of fairness. The applicant must fully disclose facts and legal issues of which the court properly should be aware. A person against whom ex parte relief is directed must have the opportunity at the earliest practicable time to respond concerning the appropriateness of the relief.*

8.3 *An applicant for provisional relief should ordinarily be liable for compensation of a person against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant for provisional relief to post a bond or formally to assume a duty of compensation.*

⁴ Other relevant principles, UNIDROIT/American Law Institute’s *Principles of Transnational Civil Procedure*: 1.4, 1.5, 3.1 to 3.4, 4.1, 5.8, 11.1, 11.2, 11.5, 16.1, 16.2, 16.5, 17.1, 17.2, 18.1 to 18.3, 29 to 31.

single provisional measure which is intended to serve one single function and afford interim protection in a clearly defined case.

II – The Recent European Shift from a General to a Particular Approach

The EAPO Regulation represents a major shift towards a specific approach. For decades, harmonization efforts have attempted to work at an unreasonable level of generality. It is submitted that this largely explains why the results of these efforts have often been disappointing.

Provisional measures are very diverse. They are diverse in the different national legal orders, where they serve different functions, and thus logically have different requirements and produce different effects. A consequence of this diversity is that in many legal systems there are very few rules common to all provisional measures. At best, certain legal systems (Spain, the Netherlands) offer common rules to certain aspects of the regime of a number of provisional measures.⁵

Provisional measures vary also considerably from one national legal order to another.

It is therefore submitted that a new approach focusing on particular measures should be adopted, and that it should reveal more fruitful. In this respect, the comparison between previous efforts of harmonization and the EAPO Regulation is enlightening. Previous efforts resulted in a limited number of principles which were highly general. The EAPO Regulation offers a detailed legal regime governing one particular provisional and protective measure.

III - Identification of Particular Measures

If an approach focusing on particular measures is adopted, it is necessary to identify the particular measures on which the Working Group will concentrate its efforts.

A) Functional Approach:

The laws of the various member States include a variety of provisional measures. As was already pointed out, they have different legal regimes (requirements, effects, etc.). But they are also structured differently. In some European states, for example,

⁵ For instance with respect to jurisdiction, liability of applicants or appeals.

England or Spain, the category of 'interim remedies' embraces a large number of measures serving various purposes.⁶ In other European states, courts receive general power to grant protective measures for the purpose of avoiding imminent harm or stopping illegal harm.⁷ Yet in other European states, the power to grant provisional measures is organized conceptually, and distinguishes between provisional measures according to their purpose (i.e. the right they aim to protect).⁸

The diversity of structure of the laws of European states hides the fact that those laws pursue similar goals, and that provisional measures often serve similar purposes. It is therefore submitted that the Working Group should go beyond the structure of the civil procedure of the different European states and focus on the purposes served by these laws. The particular measures should be identified not by looking at the measures existing formally in the laws of the different European states, but rather at the purposes/functions that they serve. A particular measure should be considered to exist for each different purpose/function served in a given legal system, irrespective of whether the measure is defined autonomously in all, or even most, European states.⁹

Once these different purposes have been identified, their legal regime in the different European states will be ascertained and compared so that a common legal regime for each measure serving a particular purpose can be crafted.

B) Proposed Subject-Matter

At its first meeting in September 2014, the Working Group discussed the particular purposes /measures that it should focus on.

It was suggested by this Group that the following matters might form the basis of our intended study:

⁶ e.g., CPR Rule 25.1 listing 16 different interim remedies (England), or Article 727 of the Spanish Civil Procedural Act listing 10 different interim remedies and a *numerus apertus* clause.

⁷ e.g., Article 809 of the French Code of Civil Procedure, Article 933 of the Luxembourg New Code of Civil Procedure, Article 254 of the Dutch Code of Civil Procedure.

⁸ e.g., Sections 916 and 935 of the German Code of Civil Procedure (ZPO).

⁹ Use of a functional method is advocated by comparative law scholars: e.g., R. Michaels, The functional method of comparative law, in M. Reimann & R. Zimmermann, *Oxford Handbook of Comparative Law* (OUP, 2006); M. Graziadei, 'The Functionalist Heritage' in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, 2003) 101.

Function	Measure	Examples
<i>Protect rights vindicated in proceedings on the merits</i>		
1. Protect pecuniary interests	<ul style="list-style-type: none"> a. Freezing assets of debtor b. Granting in rem right in assets of debtor 	<p>Freezing order (England and Wales)</p> <p>Provisional attachment (continent)</p> <p>Provisional in rem rights (France, Spain)</p>
2. Protect non-pecuniary interests	<ul style="list-style-type: none"> c. Injunction ordering a particular act or abstention d. Interim declaration e. Order making continuation of alleged infringement subject to the lodging of guarantees 	<p>Interim injunction/declaration (England and Wales)</p> <p>Interim injunction (Germany, Spain)</p> <p>Order in intellectual property proceedings prohibiting the continuation of an alleged infringement (France, Spain, Netherlands)</p> <p>Order in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees (England and Wales)</p>
3. Protect the subject matter of the dispute which both parties are seeking	f. Order to put the subject matter into the custody of a third party	Sequestre (France, Netherlands), deposit of moveable assets (Spain)

<p>to obtain</p>	<p>g. Order to put the subject matter into the custody of one of the parties after payment of a security.</p> <p>h. Order to ensure that subject matter generates income during proceedings</p>	<p>Intervention or court-ordered receivership of productive assets (Spain)</p> <p>Order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund (England and Wales)</p> <p>Order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him (England and Wales)</p> <p>Order for the payment of income from relevant property until a claim is decided (England and Wales, Spain)</p>
<p>4. Protect value of rights</p>	<p>i. Order sale of perishable goods</p>	<p>Order for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly (England and Wales)</p>
<p>5. Prevent further loss caused by</p>	<p>j. Order to seize publication</p>	<p>Référé urgence (France, Netherlands)</p>

infringement of litigated rights		
<i>Protect evidence</i>		
6. Protect evidence to be used during trial	<p>k. Gather evidence which may disappear before trial</p> <p>l. Hear a witness who may not be available at a later stage</p>	<p>Search order (England and Wales, Spain)</p> <p>Depositions in emergency situations (England and Wales)</p>
<i>Prepare enforcement</i>		
7. Find information on assets of the debtor	m. Order to disclose assets	Disclosure order (England and Wales)

The Working Group also concluded that it should not plan to work on measures serving the following functions, at least at the beginning of the project:

Function	Measure	Examples
<i>Grant early satisfaction to the creditor</i>		
8. Grant early satisfaction for obvious rights	n. Order provisional payment of a non disputable debt	<p>Référé provision (France, Luxembourg, Belgium)</p> <p>Order for interim payment (England and Wales)</p>
9. Grant early satisfaction which is essential for the creditor	o. Order provisional payment of a debt to meet an urgent need of the creditor	Leistungsverfügung (Germany, Netherlands)
<i>Prepare trial</i>		
10. Gather evidence	<p>p. Appoint an expert of fact</p> <p>q. Hear witnesses who will be available at a later stage</p>	Référé probatoire (France, Lux, Belgium)

<i>Assess desirability of initiating proceedings</i>		
11. Gather information	<p>r. Order to disclose information/files/accounts before initiation of proceedings on the merits</p> <p>s. Hear a witness before initiation of proceedings on the merits</p>	<p>Order for disclosure of documents or inspection of property before a claim has been made (England and Wales, Spain)</p> <p>Hear a witness before initiating proceedings (Netherlands)</p>

IV - Concluding remarks

It is believed that concentration upon items 1 to 7 will provide a coherent framework for a Report containing leading rules in this field.¹⁰

¹⁰ It is likely that the final text will comprise both (i) overarching norms applicable to all provisional and protective measures (as in the spirit of Principle 8, UNIDROIT/American Law Institute's *Principles of Transnational Civil Procedure*) and (ii) general rules applicable to each particular 'measure' (i.e. serving a particular function).

UNIDROIT/American Law Institute's *Principles of Transnational Civil Procedure*:

8. Provisional and Protective Measures

8.1 *The court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.*

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Furthermore, such a perspective provides the opportunity for a project which will be useful and illuminating.

Finally, the relatively short time-span for this project will make this a very demanding collective task. However, it is believed that treatment of items 1 to 7 can be achieved within the contemplated duration of this project.

NHA

GC

and Working Group colleagues

NOV 17, 2014