

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Ireland]

2020



TABLE OF CONTENTS

	Page
I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES	1
1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?	1
2. Is it mandatory to pay court fees for this type of application?	1
3. What is the ordinary/average length of time for this kind of procedure?	1
II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES	2
1. For which types of interim measures are the parties allowed to apply? (e.g. injunction, freezing orders, caveat, restraining order, etc.)	2
III. PROCEDURE	2
1. Competent court	2
2. When can the application for interim and precautionary measures be submitted?	2
3. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g. deadline to submit the lawsuit)	3
4. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?	3
5. Criteria used by the court for granting these measures	4
6. Procedure	4
7. Opposition of the defendant	5
8. Appeal	5
IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES ..	6
1. Is it possible to enforce the interim measure when the other party obstructs it? ...	6
2. Is it possible to modify a previous interim measure?	6
3. When is it possible to raise an interim measure?	6
4. Are there any rules concerning the costs (e.g. lawyers' fees, etc.) related to the application?	6

V. ARBITRATION.....	7
1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of an Arbitration Award in your country? If YES: what is the enforcement procedure?.....	7
2. Are the arbitrators, entitled to order an interim measure?	7
VI. FOREIGN PROCEDURE & ARBITRATION.....	8
1. Is it possible to apply for an interim measure before your country’s courts in order to ensure the effective enforcement of a foreign Court Decision or Arbitration Award? If YES: how is this procedure executed?	8
VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.	8
1. Please state/provide any other issues of interest in your jurisdiction.....	8

I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?

Answer: Yes.

Brussels I Regulation and Brussels I Recast Regulation

Pursuant to Article 35 of the Brussels I Recast Regulation (and Article 31 of the Brussels I Regulation in the case of judgments in legal proceedings instituted prior to 10 January 2015), an application may be made to the court for provisional, including protective, measures as provided for under the laws of the State.

The procedural rules governing such applications are now provided for in Ireland by Order 42A Rule 4 of the Rules of the Superior Court. The old Order 42A Rule 3 sets out the procedure for the purposes of the Brussels I Regulation. These rules state that the court may make *ex parte* any interim order for relevant provisional measures pursuant to Article 35 of the Brussels I Recast Regulation or section 13 of the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (“1998 Act”) regarding costs or otherwise or subject to an undertaking, if any, as deemed fit by the court. Any party affected by such order may move to set it aside. Such an application is to be brought by notice of motion.

EFTA Countries/Lugano Convention:

The Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012 extends the application of the above rules to the countries provided for in the Lugano Convention. Under this Act, an application may be made to the High Court for the grant of provisional measures, including protective measures that the court has power to grant.

2. Is it mandatory to pay court fees for this type of application?

Answer: There is no fixed scale of costs for obtaining any of the interim or precautionary orders. The administrative court fees charged in relation to such applications are €190.00 for the *ex parte* application itself and €20.00 for the affidavit grounding the application.

3. What is the ordinary/average length of time for this kind of procedure?

Answer: There is no hard and fast rule as to the length of time that these procedures will take as it will depend on the court that such an application is brought before and the availability of a judge to hear the proposed application. The length of time often depends on the nature of the case and the severity of the offence.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES.

1. For which types of interim measures are the parties allowed to apply? (e.g. injunction, freezing orders, caveat, restraining order, etc.)

Answer:

Section 13(3) of 1998 Act provides that the High Court may grant any of the protective measures which the High Court has the power to grant in proceedings that are within its jurisdiction. These include:

1. **Mareva Injunction (freezing injunction)** - An order preventing a defendant from removing or disposing of his assets to make judgment for damages unenforceable. The purpose of this order is to prevent the defendant from dissipating assets or moving assets from the jurisdiction in such a manner that would frustrate the plaintiff's claim.
2. **Anton Pillar Order (search order)** - This order authorises a plaintiff, his solicitor or other responsible agent to seize items without advance warning to the defendant in cases where there is a substantial risk that the defendant will destroy evidence. As this order is effectively akin to a search warrant, it is used only in cases where the plaintiff is able to demonstrate a strong case for the necessity of such an order. These procedures are often held *in camera* as secrecy will be of the essence if the order is to have the required effect.
3. **Quia timet injunction:** In the same way as the previous measures, the *quia timet* injunction is intended to preserve the status quo by preventing a threatened action (by others). It is used where the defendant has not committed a wrong but the plaintiff can demonstrate to the court that there is a strong possibility that a wrong is about to occur. As this type of injunction is pre-emptive, it is rarely granted.

III. PROCEDURE

1. **Competent court**
 - a) **Which court has jurisdiction to grant these interim and precautionary measures?**

Answer: Order 42A Rules 2 and 3 of the Rules of the Superior Courts provides that an application for any interim or precautionary measure must be made to the High Court on an ex parte basis.

2. **When can the application for interim and precautionary measures be submitted?**

- a) **Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?**

Answer: Yes.

Under section 13 of the 1998 Act, an application for protective measures can be grounded at the same time as the original lodging of the case upon the filing of the affidavit specifying the said measures. Under Order 42A Rule 3 of the Rules of the Superior Courts, the affidavit grounding the application must:

- state the nature of the proceedings or intended proceedings and exhibit a certified true copy of the document or documents used or proposed to be used to institute the proceedings;
- specify where the proceedings have been commenced or are to be commenced; and
- state the particular provisions of the relevant European Union instrument by which the court of the Member State of the European Union (or, in the case of an application under the Lugano Convention, of the Contracting State of the Lugano Convention) has assumed jurisdiction or, in the case of intended proceedings, would be entitled to assume jurisdiction.

3. **Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g. deadline to submit the lawsuit)**

Answer: Yes.

Section 13 of the Jurisdiction of the 1998 Act provides that it is possible to apply for interim precautionary measures where proceedings have been or are to be commenced in another State. There must however be a *prima facie* case to answer for and it must be in the best interest of the parties to do so. The measure must therefore be necessary and urgent.

4. **Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?**

Answer: Yes

Section 13 of the 1998 Act provides that it is possible to apply for interim precautionary measures where proceedings have been or are to be commenced in another State.

5. Criteria used by the court for granting these measures

- a) **What requirements must be fulfilled in order to apply for an interim measure? (e.g. *periculum in mora*, *fumus boni iuris*, security, etc.)**

Answer: Interim measures such as injunctions may be granted in respect of a wide range of torts. In deciding whether to grant an interim measure, the court will first consider whether there is an extremely strong *prima facie* case against the defendant. These actions must then raise a “serious question to be tried” (rather than being “frivolous or vexatious”). If it does not, the interim measure will be refused.

If there is a serious question to be tried, the court will then consider whether the “balance of convenience” favours granting the interim relief. This test involves asking whether the plaintiff or defendant would suffer a greater detriment by the grant of the interim measure, in the event that they were to succeed in the trial of the action.

In relation to a search order, it may be made for the purpose of securing the preservation of evidence or property relevant to legal proceedings. The conditions for obtaining a search order are stricter than for other types of injunctions. In the case of an Anton Pillar injunction an extremely strong *prima facie* case must be established by the plaintiff and there must also be clear evidence that the defendant has incriminating documents or articles in its possession and there must be a real possibility that they will be destroyed.

6. Procedure

- a) **What are the main steps of the procedure after filing the interim measure application? (e.g. holding a hearing, presenting evidence, etc.)**

Answer: Applications for interim measures are made *ex parte*, which means that only one side presents its case to achieve the interim measure. After the filing of the application of the measure, a hearing is convened before the courts, enabling both sides to put forward their case. The evidence heard will be a deciding factor for the court in adjudicating whether or not to grant the final precautionary measure.

- b) **Is it possible for the court to order an interim measure without hearing the other party? (*in audita parte debitoris*). If YES, under what circumstances can the parties apply for it?**

Answer: Yes.

Applications are usually made on an *ex parte* basis, however, all of the remedies described in this section are discretionary and the court will not grant them if it considers that they would be inappropriate or disproportionate in the circumstances. The courts tend to exercise

greater caution in relation to search orders and freezing injunctions because they are particularly severe measures.

The circumstances in which an application can be made “ex parte” without the service of a notice or summons on the person against whom it is sought include the following:

- i. By convention, for example, applications before proceedings have been commenced are usually made ex parte (Order 42A, Rules of the Superior Court)
- ii. If statute or court rules authorise or direct it (Orders 40 and 50, Rules of the Superior Court).

c) What are the main steps of the procedure in this case?

Answer: The party seeking an interim relief must file an application notice with the court, supported by written evidence, set out in a grounding affidavit. In making the application, the applicant must make full and frank disclosure of all material facts of which the court should be made aware. A draft order should also be provided, specifying precisely the steps which are required.

7. Opposition of the defendant

a) Is it possible for the defendant to oppose interim and precautionary measures?

Answer: Yes.

The defendant can oppose an interim and precautionary measure. However, failure to comply with an interim injunction is a contempt of court for which the defendant can be imprisoned (Order 44, Rule 1, Rules of the Superior Court) or have assets sequestered (Order 43, Rule 2, Rules of the Superior Court).

b) Is it possible for the defendant to ask the court for the substitution of the interim measure for a guarantee?

Answer: Yes, an interim measure may be substituted at the request of any party. In the case of the opposing party, valid justification must be given for the substitution of the order. The new measure must give sufficient protection to the parties.

8. Appeal

- a) **Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?**

Answer: Yes. Under Order 86A Rule 7 of the Rules of the Superior Courts, an appeal against the making or refusal of an interlocutory order may be expedited.

- b) **Is it possible to enforce the interim measure once an appeal is filed?**

Answer: Yes.

The appeal does not affect the implications of the interim and precautionary measure.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

1. **Is it possible to enforce the interim measure when the other party obstructs it?**

Answer: Yes.

Once an injunction is granted, the other party is obliged to comply with the court order. Failure to do so constitutes a contempt of court. It is for the applicant to apply to have the order enforced by bringing a motion for non-compliance. The applicant may apply for an order of attachment or other reliefs as outlined above.

2. **Is it possible to modify a previous interim measure?**

Answer: Yes.

The court has a wide discretion to vary or alter interlocutory orders, even when these orders are originally made on consent. This may only be permitted in instances where circumstances have changed, or the interests of the party or justice so requires (*Lismore Homes Ltd v Bank of Ireland Finance Ltd*).

3. **When is it possible to raise an interim measure?**

Answer: An interim measure will usually be limited to apply for a short period. On expiry of this period, the applicant may seek a continuation of the interim order pending the full trial.

4. **Are there any rules concerning the costs (e.g. lawyers' fees, etc.) related to the application?**

Answer: A defendant may face the risk that, even if the claim is dismissed and the claimant is ordered to pay costs, it may be difficult to enforce the costs order. To protect the defendant, the court may in certain circumstances order

the claimant to provide security for costs, usually by paying a sum of money into court. This is provided for in Order 29 of the Rules of the Superior Courts.

V. ARBITRATION

- 1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of an Arbitration Award in your country? If YES: what is the enforcement procedure?**

Answer: Ireland has legislated for the arbitration process by the passing of the Arbitration Act 2010 (“2010 Act”) which became operative on 8 June 2010. Under section 9 of the 2010 Act, the High Court is the competent court to adjudicate on matters falling within the scope of this Act. Unless otherwise agreed, the High Court has its usual powers as regards interim measures in relation to arbitration cases and the taking of evidence, but it should not order security for costs or discovery unless the parties agree. There is no appeal from the High Court’s decision on any matter including a stay application, an application to set aside or an application for recognition or enforcement.

- 2. Are the arbitrators, entitled to order an interim measure?**

Answer: Unless the parties have agreed otherwise, the UNICITRAL Model Law on International Commercial Arbitration as annexed in the 2010 Act provides that an arbitrator can grant interim measures if he or she is satisfied that harm is not adequately reparable by damages and that such harm outweighs that which might be done to the other party if the measure is granted and that there is a reasonable possibility that the party will succeed with the claim. Interim measures will be recognised and enforced by the courts.

VI. FOREIGN PROCEDURE & ARBITRATION

- 1. Is it possible to apply for an interim measure before your country's courts in order to ensure the effective enforcement of a foreign Court Decision or Arbitration Award? If YES: how is this procedure executed?**

Answer: Yes, applications for interim injunctions in support of foreign proceedings must be made in the High Court (Order 56, Rules of the Superior Courts).

VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.

- 1. Please state/provide any other issues of interest in your jurisdiction.**

Answer: It is worth noting that the granting of interim measures in public procurement is only available during the award procedure: once the contract in question has been entered into, interim measures will no longer be available (Directive 2007/66/EC).

The Competition Authority in Ireland may seek interim relief via injunctions for breaches of the Competition Acts. This is not specifically mentioned in the Acts but Order 50 of the Rules of the Superior Courts set out the circumstances where a party may seek an interlocutory order pending the commencement of trial.

Ireland

Submitted by
Claire Wallace
Philip Lee
cwallace@Philiplee.ie
Tel: +353 (0)1 237 3700
[*www.philiplee.ie*](http://www.philiplee.ie)