

# Enforcement of Foreign Judgments

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Interim and Precautionary Measures [Monaco]

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## **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, interim measures may be granted by Monegasque Courts in order to ensure the effective enforcement of a court decision.

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

**Answer:** The party seeking the interim measure needs to advance the costs associated with this measure (typically, the bailiff's fees). However, if the claimant succeeds in obtaining the final confirmation of the interim measure at the merits stage (see below), such judicial costs (called "*dépens*") will then usually need to be covered by the losing party.

Please note that such "*dépens*" do not cover lawyer's fees paid by the parties respectively to their lawyer. However, in addition to such legal fees (which remain borne by each party notwithstanding the outcome the case) a fraction of the "*dépens*" may correspond to an additional amount of fees paid to the adverse lawyer by the losing party.

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

**Answer:** It depends on the measure sought. An attachment order on a bank account may be obtained 5 or 6 days after the filing of the application (see below on the specific measure of "temporary unavailability" which may be sought to freeze the funds between the filing of the application and the interim order).

## **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:** The first main type of interim measure is the attachment order (*saisie-arrêt*):

This is a freezing order of a (or several) asset(s) of the debtor. It cannot be general and apply to all of the debtor's assets, and its scope is necessarily limited to the territory of the Principality.

The claimant needs to specifically target, in the application, the debtor's assets that he wishes to freeze and such assets need to be located in Monaco.

The freezing may happen either while the assets are in the custody of the debtor himself, or of a third party (for instance a bank or a corporate entity), depending on which ground the measure is sought (see below).

The attachment order does not enable the petitioner to claim the transfer of property of the targeted assets to him but merely to freeze them until the court rules on the merits of the claim.

Such attachment orders may relate to bank account, earnings, shares, other movable assets.

Our Code of the Sea also provides for the possibility to freeze a ship (Article L 315-5 to L315-9 of the Code of the sea).

### **III. PROCEDURE**

#### **1. Competent Court**

##### **a) Which court has jurisdiction to grant these interim and precautionary measures?**

**Answer:** The President of the First Instance Court of Monaco.

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

**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:** Such an application can be submitted at any time whether or not proceedings on the merits are launched in parallel or afterwards.

Yes, it is possible. The same requirements apply as in the case of an interim measure sought outside of the framework of proceedings on the merits (on these requirements, see below).

**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:** Depending on the interim measure, a specific deadline to file a claim on the merits may result from the law or from the court order granting the interim measure (see below).

**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, it is possible as long as there are circumstances justifying the application.

**5. Criteria used by the court for granting these measures**

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

**Answer:** This depends on the interim measure sought:

**-Attachment order (*saisie-arrêt*) on bank accounts or other movable assets** (Articles 490 and following of the Monegasque Code of Civil Procedure):

The party seeking the attachment order shall establish that he has a claim against the debtor that is grounded in its principle and presents a self-evident character.

In practice, the petitioner has to establish the content of the rights he wants to secure with a strong degree of obviousness.

The assets to be frozen in Monaco have to be registered in the name of the debtor (e.g. : funds on a bank account under the debtor's name), not in the name of any third party like a trustee, a foundation, a company etc.

To rely on these provisions, the assets need to be in the custody of a third party (for instance a bank or a corporate entity).

The fact that the collection of the claim is threatened by the debtor's behaviour was not *per se* a requirement to obtain an interim attachment order according to Monegasque law. However, there seems to be a new trend in the judicial practice of the First Instance Court to add this requirement.

**-Attachment order (*saisie-arrêt*) on movable assets** (Articles 759 to 761 of the Code of Civil procedure):

This interim attachment order of the debtor's assets is different from the measure set forth in articles 490 and following of the Code of Civil procedure.

First of all, unlike the above mentioned measure, an attachment order grounded on Articles 750 to 761 of the Code of Civil procedure may relate to assets which are in the hands of the debtor himself. The assets may also (but do not need to) be in the custody of a third party.

The requirements to obtain such an attachment order also differ.

There are two alternative requirements:

- The risk that the debtor escapes; or
- The risk that the debtor hides his assets.

**- Attachment of shares** (Articles 507 to 510 of the Monegasque Code of Civil Procedure):

This interim measure aims at freezing the shares in the hands of directors, managers or others legal representatives of the company or the legal entity having issued them, i.e. preventing any transfers of such shares.

The same substantive requirements mentioned above for an attachment order on a bank account or another movable asset apply to an attachment of shares.

Specific formalities need to be complied with.

**- Attachment of earnings** (Articles 502 and following of the Monegasque Code of Civil Procedure and Law N° 741 of 25 March 1963 on the assignment and attachment of earnings).

This measure is usually made on the basis of an enforceable judicial title. It is therefore used as an enforcement measure rather than an interim measure.

Please note that before an attachment of earnings may be ordered, there needs to be an attempt of reconciliation of the parties before the Justice of the Peace.

**-Freezing of a ship** (Articles L 315-5 to L315-9 of the Monegasque Code of the sea)

A freezing of a ship may be authorized by an order issued by the President of the First Instance Court where it is justified by a claim which appears sustainable in principle.

The freezing shall simply prevent the departure of the ship. It shall have no effect on the rights of the owner.

Besides, please note that, despite the freezing order, The President of the First Instance Court may exceptionally authorize the ship to navigate for specific trips and under specific conditions.

The applicant creditor may be required to provide prior proof of his sufficient solvency, or a security, since his liability may afterwards be triggered for damages caused by the freezing or for the costs of the security required to withdraw the freezing.

The freezing order shall impose on the applicant a time limit of not more than one month, within which he must file a claim seeking the final confirmation of the validity of the interim freezing order or lodge a claim on the merits; the freezing shall otherwise be void.

The President of the First Instance court may revoke a freezing order subject to the deposit with a custodian designated by the court of sufficient funds to cover the claims in dispute, including any interests and costs, with a specific assignment of such funds to the applicant's claim.

When a ship has been frozen and a security has been provided to obtain the withdrawal of the freezing order or to prevent the freezing, no new freezing proceedings with respect to the same ship or to any other ships belonging to the same owner shall succeed in respect of the same claim and the same creditor, and no new security shall be required.

The applicant must deliver to the owner, within a time limit of three days, a copy of the minutes of the freezing; the freezing shall otherwise be void.

The minutes of the freezing shall be served on the Director of Maritime Affairs and on the Consul of the State whose flag the ship flies.

- **Interim registration of a business pledge** ( "*nantissement de fonds de commerce*"). Article 762 bis of the Code of Civil Procedure :



The President of the First Instance Court may, under exceptional circumstances, authorize the claimant to register an interim business pledge regarding a business incorporated in Monaco.

Two requirements must be met :

- The claimant needs to establish that he has a claim against the debtor, and that such claim is in jeopardy;
- The claimant needs to provide an extract from the Monaco Trade and Companies Registry regarding the business for which the pledge registration is sought.

The registration must be handled within 15 days from the order of the President of the First Instance Court.

Within 3 months from the interim registration, the claimant must file a claim on the merits.

The final registration will be made within 3 months from the day the court ruling on the merits has become final. It will substitute retroactively the interim registration.

**-Interim mortgage on real property** (Article 762 of the Code of Civil Procedure)

The President of the First Instance Court may allow the claimant to take an interim mortgage on the debtor's real property located on Monegasque territory.

The requirements and procedure are similar to those which are required for an interim registration of a pledge of business.

## **6. Procedure**

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

**Answer:** The above mentioned interim measures all imply ex parte proceedings before the President of the Monaco First Instance Court.

Subject to some specificities depending on the measure sought, the proceedings usually unfold as follows:

They start with the filing with the court of an *ex parte* application by the creditor who wishes to secure his claim. This *ex parte* application needs to be duly substantiated with all the relevant exhibits translated into French.

No hearing takes place before the President of the First Instance Court who rules *ex parte* in the face of the application and supporting exhibits.

When the assets are in the hands of a third party, the *ex parte* order is served by the bailiff on the third party in which custody the assets are and, only afterwards, at the confirmation stage, on the debtor himself (see below).

In case of an attachment order on bank accounts for instance, on the very day the order is served to the bank, the bank accounts of the debtor targeted by the attachment are frozen, except for current operations.

Upon service of this order, the bank is bound to disclose to the bailiff the status and provisory position of all the bank accounts opened in the name of the debtor as well as the breakdown of the nature of the assets held on the accounts (such as money, in which currency, investment portfolio etc.).

Then, the bailiff serves the attachment order to the debtor, together with a summons to appear at a hearing before the First Instance Court which will rule on whether or not to confirm the attachment order in the light of the merits of the underlying claim. If the Court rules that the claim is valid and that the attachment should be confirmed, it will allow the creditor to collect his claim.

**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, those are *ex parte* proceedings (see above).

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

**Answer:** See question 6 above.

## **7. Opposition of the defendant**

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

**Answer:** Yes. Until the hearing on the final confirmation of the interim order, it is possible for the defendant to ask that the measure be withdrawn by the president of the First Instance Court (for attachment orders: see article 492 of the Monegasque Code of Civil Procedure; for other interim measures: the requirements of article 852 of the Monegasque Code of Civil Procedure must be met).

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

**Answer:** In case of an attachment order, Article 500-2 of the Monegasque Code of Civil Procedure allows the debtor to seek the withdrawal of the order before the President of the First Instance Court on the basis that he has deposited a sum corresponding to the amount of the claim.

**8. Appeal**

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

**Answer:** Yes. The interim order granting or denying the measure may be appealed within fifteen days of the order or service of the order, depending on whether or not the appealing party was present at the hearing (articles 420 and 850 of the Monegasque Code of Civil Procedure). This appeal is made before the Chamber of the Court of Appeal (*Chambre du Conseil*).

In practice, when the President of the First Instance court rejects the debtor's request that the interim measure be withdrawn, rather than appealing such ruling, the defendant will take another shot at challenging the interim order at the confirmation stage (see above).

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

**Answer:** Yes, the appeal does not affect the enforcement of the interim measure in the meantime, given interim orders are immediately enforceable, that is to say that their enforcement is not suspended despite the filing of an appeal.

#### **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. Under Article 415 of the Code of Civil Procedure, the claimant may file a further petition before the President of the First Instance Court when he is facing an obstruction from the debtor, so that the President rules on such difficulty of enforcement.

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

**Answer:** Yes. A further application will need to be made to the court.

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

**Answer:** At any time, especially as circumstances or evidence change.

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

**Answer:** See question 1.2 above.

#### **V. ARBITRATION**

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

**Answer:** Yes. Same as described here above.

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

**Answer:** The extent of the arbitrator's power, if any, to order interim measures will depend on the extent of the powers given to the arbitrator by the arbitration agreement or the particular institutional arbitration rules that apply.

#### **VI. FOREIGN PROCEDURE & ARBITRATION**

1. **Is it possible to apply for an interim measure before your country's courts in order to assure the effective enforcement of a foreign court decision or arbitration award? If YES: how is this procedure executed?**

**Answer:** Yes, the procedure follows the same rules as for an interim measure sought in a domestic context. Often, the foreign court decision or the arbitration award is used as a basis to establish the principle of a self-evident grounded claim.

Monaco

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