

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Spain]

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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 assure 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, restrain order, etc.)	2
III. PROCEDURE	3
1. Competent Court.....	3
2. When can the application for interim and precautionary measures be submitted?	4
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)	4
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?	4
5. Criteria used by the court for granting these measures	5
6. Procedure	6

7.	Opposition of the defendant.....	7
8.	Appeal.....	7
IV.	EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.	8
1.	When is it possible to raise an interim measure?.....	9
2.	Are there any rules concerning the costs (e.g., lawyers fees, etc.) related to the application?	9
V.	ARBITRATION	9
VI.	FOREIGN PROCEDURE & ARBITRATION	10
VII.	OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.	10

I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

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

Answer: Yes.

The purpose of adopting a precautionary measure is to prevent the defendant from carrying out acts aimed at preventing a judgment holder from gaining access to the defendant's property, assets or rights. This includes a defendant causing or permitting damage to the defendant's assets or failing or refusing to surrender assets, thereby creating situations of insolvency in order to prevent the effectiveness of a possible judgment.

Legislation on civil proceedings (essentially the Code of Civil Procedure) is the main source for precautionary measures, but some measures are laid down in special substantive laws.

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

Answer: In Spain the service provided by the Court is usually free, except in the case of corporate persons, which have to pay a fee, collected by the Board of Inland Revenue, if their turnover [the net amount of money taken by a business in a year] is significant (more than ten million euro).

So, when the application for the precautionary measure is filed with the main claim, the applicant must pay Court fees, if its turnover is superior to ten million euro. When the application is filed before the main claim, the applicant will have to pay the court fees when filling the main claim.

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

Answer: Depending on the court, the precautionary measure could be first adopted in one day or one month, if it is asked in *audita parte debitoris*. In these cases the opposition of the defendant could be decided within four to six months.

If it is necessary to hold a prior hearing the Courts will adopt the precautionary measure within one and four months.

The Appeal in these procedures may be decided within four and six months.

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, restrain order, etc.)

The measures laid down in the Code of Civil Procedure include the following:

- a) **Attachment of assets** to ensure the enforcement of judgments involving an order to hand over amounts of money or outcomes, revenue and fungible objects that can be estimated in terms of cash by applying certain prices;
- b) **Judicial administration or receivership of capital goods** when it is hoped to obtain a judgment ordering that they be surrendered in terms of ownership, usufruct or any other capacity involving a legitimate interest in maintaining or improving productivity, or when the guarantee of productivity is of vital interest for the effectiveness of the judgment that may be handed down;
- c) **The impounding of movable property** when the application is aimed at obtaining an order to have property in the possession of the defendant turned over;
- d) **The taking of inventories of assets** under the conditions laid down by the court;
- e) **Provisional notation of claims** when they refer to assets or rights likely to be entered in public registers;
- f) **Other entries in registers** in cases in which publication in a register is useful for successful enforcement;
- g) **Court orders to halt an activity provisionally** or to refrain temporarily from engaging in a particular type of behavior, or a temporary prohibition on interrupting or halting the provision of a service that is being performed;
- h) **Seizure and confiscation of revenue** obtained from an activity regarded as illegal, the banning or cessation of which is demanded in the application, with the consigning or confiscation of the amounts, which are being demanded as a remuneration of intellectual property;
- i) **Temporary confiscation of copies of works or objects** which are deemed to have been produced in breach of

intellectual and industrial property rules, plus confiscation of the equipment used to produce them;

- j) **Suspension of corporate decisions** that have been challenged, when the plaintiff or plaintiffs represent at least 1% or 5% of the company capital, depending on whether the defendant company has or has not issued securities which, at the time of the challenge, were listed on a regulated secondary market.
- k) **Other measures** which, for the protection of certain rights, are expressly provided for by law or are regarded as necessary to ensure the effectiveness of the judicial protection that may be granted in the judgment (for the applicant) to be handed down in the main proceedings.

In addition to these measures, the Code of Civil Procedure allows courts to grant other measures not included among those mentioned above. The list is therefore not exhaustive or *numerus clausus*;

In addition to this general system, there are other legal provisions relating to precautionary measures, including the following:

- a) Proceedings concerning the **capacity of persons**.
- b) Proceedings concerning **filiation, paternity and maternity**.
- c) Protection of the **assets of the deceased**.
- d) The Final Provisions of the Code of Civil Procedure contain measures applicable to specific cases regulated by special laws such as seizure of equipment, devices and materials in proceedings relating to **intellectual property** (Second Final Provision) and **patents** (Fifth Final Provision).

III. PROCEDURE

1. Competent Court

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

The measures are granted by whichever judge is competent given the subject matter and territory: the judge who will hear the case or, if the proceedings have not yet been initiated, the judge who is competent to do so.

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?

As a general rule, such measures shall be requested at the same time as the main lawsuit is filed, in which case the judge or court orders the establishment of separate proceedings which are processed simultaneously with the main case and during which evidence may be put forward and heard to prove that the requirements needed to obtain the precautionary measure are met.

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)

Yes.

Precautionary measures may be requested before submitting an application, provided that it is not impossible to grant them because of their nature (for instance in the case of the provisional notation of the lawsuit in a Public Registry cannot be asked before the underlying lawsuit is filed, because at that previous moment there is no lawsuit), or provided that the law does not require that they be requested together with the main lawsuit (as in the cessation of prohibited activities).

Because of their exceptional nature (since the normal thing is to include measures in the application itself), it is required to prove the urgency and necessity, simultaneously, of the interim measures, although they will be released if, within twenty working days after being granted, the corresponding main lawsuit is not submitted. In these cases the applicant will be condemned to pay judicial expenses and will be declared responsible for damages, if any.

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?

Yes. Measures may also be requested subsequent to the application or during the appeal phase, although such a petition must be based on (new) facts and circumstances that justify submitting it at this time.

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.)

For a Court to grant any of the measures mentioned above, all/each of the following requirements must be met:

1. Risk of harm through the lapse of time or *periculum in mora*. This involves the risk of damage that the plaintiff may suffer because of a delay in the proceedings, which may thwart the enforcement of what is laid down in the judgment or decision concluding the proceedings. The party who asks for the measure must prove that, in the case in question, if the measures requested are not granted, situations could arise during the course of the proceedings that would prevent or undermine the effectiveness of the protection that could be granted in the judgment (for the applicant). In any case, the measure should not be granted if the situation causing the risk has been borne by the plaintiff for a long time, except where sufficient reasons are given to explain why the measure was not requested earlier;

2. *Prima facie* case or *fumus boni iuris*. The applicant must provide the Court with reasons that lead the latter to formulate a preliminary opinion that the application complies with the law. This requirement means that the applicant has to submit details, arguments and supporting documents that lead the Court, without prejudging the merits of the case (since in Spain precautionary measures are adopted by the same court which will later judge the case), to reach a provisional or indicative opinion in favor of the fundamental points in the claim. In addition to documentary evidence, other kinds of evidence are admitted (e.g., witnesses, experts, statements by the parties, etc.);

3. Security. Except where expressly stated otherwise, the applicant asking for the measure must offer in the application and, once the measure is granted, deposit sufficient security to cover the damages that the precautionary measure could cause to the defendant's assets. The amount is determined by the court, having due regard to: (a) the nature and content of the claim; (b) the assessment it makes of the fundamental points in the application for the measure; and (c) reasons or grounds of suitability or sufficiency in relation to the amount of the damages that could be caused by the measures;

4. Proportionality. This requirement is not explicitly stated in the Code of Civil Procedure, but legal commentators usually consider it as complementary to the above requirements since

courts will not grant a measure unless it is strictly necessary to achieve the purpose of the proceedings for which the precautionary protection is requested. It is derived from democratic principles and the principle of minimum intervention in the liberty of individuals, both of which governs the entire legal system and are laid down in the Constitution.

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.)

The general rule is that, before precautionary measures are granted, the parties are convened to a hearing before the court during which the arguments are put forward and the evidence is heard. The evidence is regarded as relevant to the decision on whether or not to adopt a precautionary measure, regardless of the measure in question, or, where appropriate, the decision to require a guarantee from the party requesting the precautionary measure in the event that the application is subsequently dismissed.

After the hearing the Courts renders its decision.

- b) Is it possible for the Court to order an interim measure without hearing the other party? (*in audita parte debitoris*).

Yes. Precautionary measures may be adopted without hearing the person who is the responding party in the subsequent proceedings (without prejudice to the right of that party to object to these measures once they are granted).

OR - If YES:

- c) Under what circumstances can the parties apply for it?

The party requesting the measure may ask that it be granted without hearing the other party when this is justified on grounds of urgency or if a hearing could compromise the purpose of the measure (if, for instance, there is a risk of concealment or of dissipation of the debtor's assets). In this case, once the measure is adopted, the injured party may contest it.

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

The party, against whom the precautionary measure is taken, may oppose it within twenty working days; if this is the case, the

parties will convene at a hearing which follows the procedures mentioned above.

Following the hearing the Court will decide whether to maintain or to raise the precautionary measure.

7. Opposition of the defendant

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

Yes. The defendant can oppose the precautionary measure:

Before it is granted, during the previous hearing, and after its adoption (when it is adopted without hearing the defendant) by writing; afterwards the parties are summoned to a hearing.

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

Yes. The defendant may ask the court to replace the decreed precautionary measure by sufficient security which guarantees effective compliance with the judgment. The judge who adopted the measure is competent to do this.

The Court must take into account the grounds of the application, the nature and contents of the claim and the positive appearance of the defendant's grounds. It will also take into account if the precautionary measure could difficult the economic activity of the defendant up to an important and disproportionate level in comparison with the efficiency of the measure for the applicant.

The law establishes the security which may be provided in terms of actual money or of a guarantee.

8. Appeal

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

Yes.

Procedural rules provide for the ability to appeal to a higher court. An appeal may be made from the decision which granted the measure, but this does not have a suspensory effect. An appeal can also be made from a decision which rejected the measure.

Together with this possibility of appeal, the applicant may in any case reintroduce his request if the circumstances which existed at the time of his initial petition should change.

No appeal may be made from a decision granting a precautionary measure which was issued without hearing the defendant, since in this case, the procedure to be followed is an opposition procedure. Opposition procedures are handled by the judge who adopted the precautionary measure. The defendant may initiate appeal proceedings, without a suspensory effect, against a decision dismissing his opposition. The applicant has the same right of appeal where the opposition is fully or partly upheld.

Unlike the above, no appeal can be made when security is accepted or rejected instead of the precautionary measure.

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

Yes. The appeal does not suspend the enforceability of the precautionary measure.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

a) Is it possible to enforce the interim measure when the other party obstructs it?

Yes. The general enforcement rules are applicable to the enforcement of precautionary measure.

b) Is it possible to modify a previous interim measure?

Precautionary measures are generally adopted after hearing the defendant.

If the applicant claims and provides evidence that the matter is urgent, the judge may grant it within five days, without further procedures and without hearing the defendant.

Once the measures have been adopted, they may be modified if facts and circumstances are put forward and proven which were not taken into account when the measures were adopted or within the period laid down for opposing the measure.

Another case in which precautionary measures may be altered is when the measure is requested prior to the application and is adopted without hearing the defendant. In this case, if the

applicant does not comply with the legally established deadline of twenty days for submitting the application, the measure must be immediately lifted and the defendant paid damages, with any legal costs being paid by the applicant.

1. When is it possible to raise an interim measure?

Should a judgment be handed down that is not in favor of the applicant, the judge must immediately order the lifting of the measure, unless otherwise requested given the circumstances of the case, and with an increase in the deposited guarantee.

In the event of a judgment that is partly in favor of the applicant, the judge will hear the other party and decide whether to lift or to maintain the measure.

If dismissal of the claim is confirmed once a final decision has been issued, the measure will be automatically lifted and the party affected by it may initiate an action for the damage caused; the same happens if the plaintiff abandons the action or the application.

Also, a measure cannot be maintained if the proceedings are suspended for more than six months because of a reason imputable to the applicant.

When provisional enforcement of a judgment is issued, any measures that may have been granted relating to the initial enforcement are abolished and replaced by enforcement measures so that the nature of the measures originally adopted as precautionary measures changes.

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

When the opposition to precautionary measures is allowed by the Court, the applicant must pay fees and expenses; if the opposition is rejected the defendant must pay the fees and expenses.

V. ARBITRATION

a) Is it possible to apply for an interim measure in order to assure the effective enforcement of an Arbitration Award in your country?

Yes.

If YES: what is the enforcement procedure?

In the cases of judicial formalization of the Arbitration Procedure or Institutional Arbitration, the applicant must only take the necessary steps to initiate the Arbitration Procedure, without any of temporary requirements needed in the cases of interim precautionary measures adopted before filing the underlying lawsuit.

The competent Court will be the court that is competent to enforce the Arbitration Award or the Court which is in the place of enforcement.

b) Are the arbitrators, entitled to order an interim measure?

Yes, according to article 23 of the Spanish Arbitration Law, Arbitrators can adopt a precautionary measure; it is also mandatory for the applicant to provide security.

These decisions are subject to the same regulation of cancellation and enforcement of Arbitration Awards.

VI. FOREIGN PROCEDURE & ARBITRATION

a) Is it possible to apply for an interim measure before your country Courts in order to assure the effective enforcement of a foreign Court Decision or Arbitration Award?

Yes.

Article 35 of the REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, is applicable for EU countries.

And article 722 of the Code of Civil Procedure is also applicable for the rest of the countries.

If YES: how is this procedure executed?

Outside of the special regulations for International Treaties, the procedure to grant a precautionary measure will be the one stated in the Code of Civil Procedure.

The competent Court will be the Court which is in the place of enforcement of the precautionary measure.

VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.

a) Please state/provide any other issues of interest in your jurisdiction.

It is normal that the Courts do not comply with the temporary requirements of the procedure, which makes the adoption of precautionary measures slower that is stated in the Code of Civil Procedure.

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