



# Transnational civil litigation and International commercial arbitration

*Provisional and protective measures*

Prof. Marco Farina



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UNIVERSITÀ DI MACERATA

INTERNATIONAL EUROPEAN COMPARATIVE  
LEGAL STUDIES

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## PROVISIONAL AND PROTECTIVE MEASURES

### *Introductory remarks*

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- A great variety of terms, including ‘interim measures’, ‘conservatory measures’, ‘provisional measures’, ‘protective measures’, are used to describe the issue we will be discussing.
  - All these terms, however, describes a situation where there is a need for an urgent protection and/or enforcement of the parties’ rights as, during the time needed for the final decision of the case by the competent court, they might be subject to irreparable harm.
  - Cross-borders commercial disputes frequently take a very long time to resolve. There might be long delays between the commencement of the dispute and its resolution. Provisional and protective measures are instruments to protect the rights of the parties while the final decision on the merits is pending

## PROVISIONAL AND PROTECTIVE MEASURES

### *Main characteristics of Interim Measures*

- Interim measures include a wide range of remedies that differ widely from one country to another. Even if interim protection of rights is a critical part of transnational commercial disputes, there is no international instrument that defines the types, substantive requirements and effects of interim measures
- However, adopting a transnational approach that encompasses many remedies deemed as provisional and protective in most legal systems, interim measures can be defined as orders issued by courts **without *res judicata* effect** which have the purpose of (i) preserving a factual situation pending (or in the light of) the final resolution of the dispute or (ii) enforcing without delay rights of a party to the dispute.
- The first order is protective (or **conservatory**) as it maintains the *status quo* until a final decision is rendered and the winning party will obtain satisfaction of his right only then. The second order is anticipatory (or **provisional**) as it anticipates in whole (or just in part) the future final judgment on the merits making the winning party to obtain immediate satisfaction of its right before or during the judicial proceedings.
- In both cases the fundamental and common element of such orders is their **temporary effects** and **lack of finality**, as they may be revoked, modified and will be in any case superseded by the final judgment on the merits (even if the latter is just possible)

## PROVISIONAL AND PROTECTIVE MEASURES

### *Main characteristics of Interim Measures – Periculum in mora and Fumus boni iuris*

- For granting interim measures, courts must be convinced that (i) the applicant has a good arguable case and it is likely that it may succeed on the merits (*fumus boni iuris*), (ii) a risk of substantial and/or irreparable harm exists if and to the extent that the order is not granted (*periculum in mora*).
- Assessment of the existence of a good arguable case (*fumus boni iuris*) does not affect the merits of the case, as it is conducted on a *prima facie* basis: therefore, it is a purely provisional assessment based upon incomplete submissions and evidence, without preclusive effects. A grant of provisional or protective measure does not preclude competent courts from finally deciding the case after the parties have submitted their case.
- Furthermore, the applicant is required to demonstrate that his/her claim is in urgent need of judicial protection as its actual satisfaction may be impeded or made substantially more difficult if the order was not granted. For conservatory measures aimed at protecting the actual enforcement of a future monetary judgment, applicant must show that there is a real risk that, by the time the creditor is able to have the future judgment enforced, the debtor may have dissipated, concealed or destroyed his assets. For anticipatory measures, the applicant is required to demonstrate that his claim, if not enforced immediately on urgent and provisional basis, risks substantial harm which cannot be adequately repaired by damages.

## PROVISIONAL AND PROTECTIVE MEASURES

### *Types of Interim Measures*

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- **Provisional measures that ensure the enforcement of the judgment**
    - ✓ Freezing injunctions (*in personam*) - Attachment Orders (*in rem*)
  - **Provisional measures that anticipate final relief**
    - ✓ Interim payment orders, injunction to do or not to do something
  - **Provisional measures that ensure the preservation of evidence**
    - ✓ Inspection of perishable goods, orders to disclose documents, examining witnesses of advanced age

## PROVISIONAL AND PROTECTIVE MEASURES

### *Which court has jurisdiction for granting provisional and protective measures*

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- Courts with jurisdiction on the merits

- ✓ It is widely accepted that where a legal system is the forum for the trial of the claim on the merits, its courts also have the authority to grant interim relief with respect to the substantive proceedings.
- ✓ Within the EU, since *Van Uden* case (17 November 1988, C-391/95), it is established case law that a court having jurisdiction as to the substance of a case in accordance with Brussels I-bis provisions also has jurisdiction to order any provisional or protective measures.
- ✓ When Brussels I-bis does not apply, national provisions shall apply and almost all European systems recognise that jurisdiction to render interim relief lies with the courts having jurisdiction on the merits

## PROVISIONAL AND PROTECTIVE MEASURES

### *Which court has jurisdiction for granting provisional and protective measures*

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- Courts without jurisdiction on the merits

- ✓ Jurisdiction of national courts to grant interim measures in support of foreign litigation proceedings has not been as well established as the scenario previously discussed. However, the so-called ancillary jurisdiction has expanded over the years in national and international sources of law.
- ✓ Article 35 of the Brussels I-bis (“*Application may be made to the courts of a Member State for provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter*”) has been interpreted as meaning that Courts without jurisdiction on the merits can grant provisional and protective measures only to the extent that a real and strict connecting link between the subject-matter of the measure sought and the territory of the member State of the court before which those measures are sought exists
- ✓ In general terms, courts with no jurisdiction on the merits are permitted to grant provisional and protective measures when they must be enforced in that State (art. 10 Italian PIL) as, for example, the assets to be attached are located in the territory of the State concerned

## PROVISIONAL AND PROTECTIVE MEASURES

### European Account Preservation Order – Regulation EU n. 655/2014

- Regulation EU n. 655/2014 introduced a uniform European cross-border procedure for obtaining a protective measure in the form of an attachment order, the European Account Preservation Order (EAPO). The Regulation allows courts of Member States (other than Danish courts) to freeze assets held by a debtor in a bank account of another Member State.
- The procedure may be used in cross-border cases only, whereby the court carrying out the procedure or the country of domicile of the creditor must be in a different Member State than the one in which the debtor's account is maintained
- The EAPO is an *ex parte* remedy that may enjoy free circulation in all Member States without any special procedure as to recognition or declaration of enforceability. The preservation of funds held in the debtor's account should prevent the risk that, without such a measure, the subsequent enforcement of a claim against the debtor will be impeded or made substantially more difficult. As an *ex parte* remedy, debtors will not be informed of creditors' applications, or be notified prior to the issue of the EAPO or its implementation
- Jurisdiction to render a preservation order before an action has been filed or while the proceedings on the merits are pending lies with the court with jurisdiction over the substance of the matter. The Regulation confers also authority to render post-judgment EAPO to the courts of the State where the judgment is issued



## PROVISIONAL AND PROTECTIVE MEASURES

### *European Account Preservation Order – Regulation EU n. 655/2014*

- The creditor must prove that there is an urgent need for obtaining the EAPO in order to prevent the risk that without it the debt collection may be impeded or made substantially more difficult.
- The creditor must also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor.
- Where the creditor has already obtained a judgment, court settlement or authentic instrument, these elements are proven by the decision he obtained itself.