PROVISIONAL REMEDIES IN SPANISH CIVIL PROCEDURE

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SUMMARY

Under the heading of provisional remedies, arts. 721-747 of Law 1/2000, of January 7th, of civil procedure (Ley de Enjuiciamiento Civil or LEC) are a systematic and unitary regulation of the general forms of provisional protection in Spain. The most distinctive characteristics of this regulation are:

- A uniform treatment of all provisional remedies, regardless of their specific scope (securing, conservation, satisfaction, etc.).
- A single procedure for all types of provisional protection.
- A regulation that allows for measures that anticipate the enforcement of the judgment, not merely conservative measures.
- The possibility to issue any provisional remedy that is deemed necessary to ensure the efficiency of the judicial protection, and not merely those expressly typified in the law.
- A rule of proportionality that encompasses the principle of minimum interference with the rights of the adverse party and the possibility to substitute the provisional remedy by a bond.
- The possibility to seek provisional remedies before the complaint is filed.
- The applicant for a provisional remedy must be a party to a parallel or immediately subsequent proceeding on the merits.
- The possibility to seek provisional remedies as regards arbitral proceedings.
- It is not mandatory to present documentary evidence to prove the existence of the fumus boni iuris.
- Objective configuration of the periculum in mora.
- It is not mandatory to post a bond for the issuance of a provisional remedy.
- The general rule is to hold a prior hearing with the defendant before a provisional remedy is ordered, but the rule is flexible and allows for the contrary when this may frustrate the remedy.
- When the provisional remedy is issued without a prior hearing, opposition is possible.
- A regulation of the liquidation of damages derived from the issuance of a provisional remedy.
1. Provisional Protection in Spanish Law

Since the present contribution is part of a collective work on “provisional remedies and summary proceedings” in countries members of the European Union, it is convenient to make several introductory considerations that will facilitate the comparative study in relation to Spanish law.

Spanish law also uses the terminology of “summary proceedings” and “provisional remedies”, as common terms of the procedural tradition. It would not be very difficult to construct unitary concepts of those terms fit to those of other legal systems. However, the perception of the Spanish jurist follows a different path that it will be useful to summarize. This perception is consistent with the Spanish legislative tradition, that has been compiled in the Law 1/2000, of January 7\textsuperscript{th}, of Civil Procedure (\textit{Ley de Enjuiciamiento Civil or LEC})\textsuperscript{1}. This new code of civil procedure replaces the old law of 1881 and is applicable since January 8\textsuperscript{th}, 2001.

In general, and at the risk of oversimplification, the logic of the Spanish legal system as regards the use of the terms “summary proceedings” and “provisional remedies” can be summarized as follows:

Spanish law knows the mechanism of “summary proceeding”. However, even if this mechanism can render results similar to those of “provisional remedies”, the Spanish system does not use them in the same way. The LEC uses the “summary proceedings” mechanism in some type of matters specifically regulated such as the “summary protection of possession”, the “ejectment for non-payment of rents”, etc. They are configured as autonomous and simplified procedures, that are theoretically faster, with a reduced scope, in contrast to “plenary proceedings” which have no limits as to the object. This configuration leads also to a limited \textit{res judicata}. They do not require a parallel proceeding on the merits, nor is there, in practice, a subsequent plenary proceeding, although this is possible. Furthermore, there is doctrinal consensus on that some points of claim decided in “summary proceedings” are covered by limited \textit{res judicata} in accordance to the scope of this mechanism. They are not always compulsory and, in most cases, it is possible to obviate them and directly start a “plenary proceeding”.

As a general rule, any provisional protection in the broad sense (securing, conservation, satisfaction, anticipation, innovation, etc.) is

\textsuperscript{1} Hereinafter, numbers in brackets refer to articles in the LEC 2000.
channeled through the mechanism of “provisional remedies”. This option is now encouraged by the new LEC (721-747). On the one hand, the law unifies the system of provisional remedies, including those that were considered “typical measures” (i.e. provisional seizure, judicial administration, deposit, etc.) and those that used to be called “innominate measures” (i.e. orders, prohibitions, injunctions, etc.). On the other hand, the law establishes a single simplified –summary–procedure to seek provisional relief. Still, this proceeding is ancillary and necessarily related to a parallel or subsequent proceeding on the merits.

The object of this contribution is to explain the new unified system of provisional remedies introduced by the LEC 2000. It allows for the incorporation of any possible activity of enforcement into the system of provisional remedies. How? Simply put, by allowing the anticipation of some or all acts of enforcement. This also simplifies the answer to the question of the range of cases for which provisional relief is possible and the measures that are appropriate. The answer today is open and without any specific legal restriction: all cases and with the measures that are best fit given the circumstances.

To complete this basic framework of Spanish law on the matter, it should be taken into account that there are two other relevant institutions. First, there is a typical institution of the Spanish procedural tradition that allows for the direct enforcement of some written documents: the “juicio ejecutivo”. The documents that are amendable to this mechanism are established by the law (517, 2) and only some defenses can be opposed. In these cases, the protection granted is not in fact provisional, although several limits to the objective scope of the res judicata are applicable (564). Second, the new LEC has introduced the “juicio monitorio” (812-818), with similar characteristics to the German “Manhverfahren”, the French “procédure d’injonction de payer” or the Italian “procedimento d’ingiunzione”.

2. Provisional Remedies

The judicial process has a temporal dimension. Due to the limitations of human judgment, it is necessary to spend time to reach a final decision: the creation of law in the judicial process is not instantaneous but is rather performed through what we graphically call the processus iudicii. Still, the judicial process has an inherent aspiration to efficiency. This goal is not limited to the production of a judgment, but encompasses also its enforcement. To palliate the risks attached to the delay in obtaining a final decision, which may render the judicial process illusory, it is necessary to establish a system of provisional protection. Thus of provisional remedies.
The operative criterion of the judicial process is relatively simple: it is efficient if it grants complete satisfaction to the parties. It requires that the judgment be completely implemented. As this goal stands relatively afar at the beginning of the process, the way to achieve it at an earlier stage is to anticipate the enforcement or to secure it. A provisional remedy temporarily anticipates the enforcement or secures its success from the very beginning of the judicial process.

3. General Characteristics of Provisional Remedies

Provisional remedies in the strict sense have some general characteristics that the law describes (726):

1. The court may grant as a provisional remedy in relation to the rights of the defendant, any act direct or indirect that meets the following requirements:
   1.1. Tends exclusively to the efficiency of the judicial protection that an eventually favorable judgment to the plaintiff may grant, so that it may not be hindered by situations that arise during the duration of the corresponding process.
   1.2. Cannot be substituted by any other measure equally effective as regards the goals set in the previous paragraph, but less burdensome or harmful for the defendant.

2. With a temporary, provisional and conditional character and subject to modification as established in this law, the court shall issue as provisional remedies those that entail orders or prohibitions similar to those sought in the main proceedings, without prejudice to the final judgment.

According to this provision, a provisional remedy is:

3.1. Ancillary

A provisional remedy is always related to a pending process to which it is instrumentally subordinated (730). Moreover, its ultimate basis is not the pendency of another process, but rather the relief sought in this other process. It is instrumental by anticipating or securing this relief. This ancillary character renders aloof any attempt to construct a “provisional judicial process”, as a tertium genus between the declarative and executive stages of the judicial process.

3.2. Temporary

A provisional remedy has a limited duration, this is, it is temporary. It is intended to last for the time that it takes for the judgment to be rendered and it cannot last longer than the main proceedings (744-
745). This characteristic is also the basis for subsequent modifications of previously issued orders when circumstances change (736, 2; 743). This means that a provisional remedy does not intend to be a final solution, but rather a temporary regulation of the relations between the parties while the judgment is being formed.

3.3. Anticipatory of the Enforcement

This characteristic defines the concept of provisional remedies in the strict sense.

Provisional relief anticipates to some extent the effects of a future enforcement of the judgment. The acts of execution are moved to the initial stages of the judicial process.

In fact, a provisional remedy anticipates the enforcement as if it was granted by a final judgment. Pedagogically we have been disguising this effect as if we considered it an unintended consequence. We used to admit without difficulty that a provisional remedy could have a preventive and conservative nature, and only exceptionally that it could truly anticipate the enforcement. This is all a fallacy and a rhetoric inherited from the dualist procedural tradition.

There are some cases in which we clearly acknowledge that a provisional remedy anticipates the enforcement as if it was granted by a final judgment, because it is the only way to protect some types of future relief: injunctions and temporary restraining orders. There is no middle ground here. If provisional relief is granted, it is necessary to anticipate -sometimes more, sometimes less- a series of executive acts. The result is the same as before, only that there is not linguistic way of getting around the fact. In both cases the essence is the same: provisional protection is and should be a mechanism to anticipate the enforcement of the final judgment (726, 2).

However, a provisional remedy and a writ of execution are not conflated: they respond to clearly different requirements and objectives. A writ of execution is based on an executive title; A provisional remedy only on the *fumus boni iuris*; A writ of execution is taken as a typical act to enforce a judgment; a provisional remedy is issued in attention to the *periculum in mora*; A writ of execution does not require a bond; a provisional remedy normally does.

The regulation of the implementation of provisional remedies that the LEC effectuates confirms their anticipatory nature of the enforcement. The acts of enforcement of a provisional remedy are exactly the same as those of judgments.
3.4. Proportional

Given that provisional remedies anticipate in large part the enforcement of a judgment, the principle of proportionality that governs any executive measure also applies here. When the objectives of protection are not affected, the less onerous alternative for the adverse party should be preferred (726, 1, §2). This also justifies that, as a general matter, provisional relief can be substituted by a security bond posted by the adverse party (746).

4. Legal Requirements of Provisional Remedies

In general, the applicant is entitled to a provisional remedy if the court finds that the following legal requirements are met:

4.1. Fumus Boni Iuris

A provisional remedy is granted not because the plaintiff has an unambiguous right, but rather because prima facie the complaint appears to deserve some protection through a provisional remedy.

There is no general criterion as to the definition of the fumus boni iuris. It is certainly not based on a probabilistic estimation of a future decision, although this is one of the conventional formulations. The fumus boni iuris results from the evaluation of the position of both parties as regards the merits of the case at the beginning of the process, this is, it is merely a decision according to the evidence that is available at that stage. Normally, the fumus must be accredited through a written document. But the law is much more generous and accepts any evidence regardless of the format (728, 2).

4.2. Periculum in Mora

This legal requirement is a reference to the rationale for the existence of provisional remedies. They try to mitigate the risks of the temporal dimension of the judicial process.

The classical perspective on the matter is that a provisional remedy must be granted if those risks exist or can be foreseen. Since the final judgment must not be illusory, if there are reasons to believe that its efficiency is imperiled, a provisional remedy must be issued. The traditional risks are the frustration of the enforcement of the judgment, fraudulent bankruptcies, etc.

This standpoint is clearly insufficient nowadays. The fight against the duration of lawsuits is lost beforehand, as it has always been to the dissatisfaction of all parties. Cases take time and final judgments come late. The stability of cases over land characteristic of a
predominantly agricultural economy or of family disputes that were transmitted from parents to heirs has been replaced with a different type of litigation in radically transformed sociological circumstances. There is, primarily, the perception that litigation must pay off: one is not likely to venture into litigation if there are no prospects of a successful enforcement. Moreover, the conditions under which lawsuits develop are not the same, either: victims expect some relief, corporations may disappear, the economy spins at a vertiginous pace, technological innovations can render any judgment obsolete, etc. In front of these situations, to require evidence of a subjective nature would dissolve the possibility of a provisional remedy altogether. The evidence for a provisional remedy would often be conflated with the damage it is trying to prevent, when any measure would already be useless.

It is thus reasonable to start thinking of the *periculum in mora* as an objective element that derives from the inherent characteristics of the judicial process, in particular, in that it cannot be instantaneous. Any subjective reference to the personal circumstances of the defendant is unnecessary. As solid as those may be, they are as mutable as the weather on a mountain. Although we would not bear to live only with an expeditious judicial process, this seems the reasonable regime when it comes to provisional remedies. After all, measures here are only temporary and reversible.

The law is on the right track when it configures the *periculum* objectively, suppressing all subjective requirements that were historically necessary to issue a provisional remedy. The plaintiff must now focus on the explanation of the effects of the duration of the judicial process on the object of the dispute in the circumstances of the case (728, 1):

1. Provisional remedies shall be issued only if their applicant justifies that, in the case at hand, during the pendency of the judicial process, if measures are not issued, situations may arise which hinder the effectiveness of the judicial protection that may be granted by an eventually favorable judgment. Provisional remedies shall not be issued if their objective is to change situations of fact consented by the applicant for a long period of time, except if the applicant justifies the reasons why those measures have not been requested before.

4.3. Security Bond
The concession of a provisional remedy is a big initial advantage. The plaintiff obtains at the beginning of the lawsuit an anticipation of the enforcement.

To counterbalance this, the adverse party must also receive some protection against possible abuses and an assurance of compensation if ultimately the provisional remedy is unjustified.

For this reason, in the majority of cases, the issuance of a provisional remedy must be conditional on the applicant giving some security. This equilibrates the positions of the plaintiff and the defendant when the periculum is objective and must be adequately moderated. The adverse party should be able to recover its damages and costs without further complications. As an aside, this should not be in practice mere rhetoric when damages have effectively occurred.

The law recognizes the need for this requirement as a general matter, but does not overstate it (728, 3). It leaves the door open to the court as to whether the bond should be posted in the particular case. The amount of the bond will have to be sufficient to cover the damages that may result from an unjust provisional remedy. The code offers some very broad criteria to the court to evaluate those, such as the contents of the request and the grounds for the measure.

If a provisional remedy is granted conditionally on the posting of a bond, the later must be posted before any acts of enforcement can take place (737). The court decides on any issue that arises here.

4.4. Simultaneous or Subsequent Pendency of a Principal Proceeding

I have already said that a provisional remedy is not autonomous but rather is instrumentally subordinated to a pending judicial process. In some cases, a provisional remedy may be requested before a complaint is filed, but the later should then ensue in a short period of time. This instrumentalization distinguishes a provisional remedy from other autonomous measures and procedural activities that have similar ends. The law requires that the party that requests a provisional remedy initiate the principal proceedings (728, 1 and 730).

In any case, the process to which the measure must be subordinated does not necessarily have to take place in front of a Spanish court. Moreover, a provisional remedy can also be issued as regards arbitral proceedings. The law homologates both possibilities, the only exception being cases for which Spanish courts are exclusively competent (722).
At the other end, the request for a provisional remedy does not grant jurisdiction as to the merits of the case to the court in front of which it is requested.

5. List of Provisional Remedies

Following an established tradition, the law has made an effort to compile the types of provisional remedies that can be requested. This is a technical tradition, but it was certainly not necessary. Nor is the particular purpose of each measure that the law seems to pedagogically enunciate binding. Nothing compares to the adversarial exchange of arguments between the parties in the particular case to identify the type of measure needed and the purposes it has to fulfill.

In fact, by looking at the catalogue (727), it is easy to see that provisional remedies refer to executive activities of which they are instruments. As a matter of coherence, the law could have merely referred to the general characteristics of provisional remedies that it enunciates: if they basically anticipate the enforcement of a final judgment, then any act that could be taken as part of this enforcement should be amendable to a provisional remedy. This would have lead to a general clause, which would have avoided the redundancies that we now observe. This clause is nonetheless present in the three final lines of the existing legislative provision: can be issued as provisional remedies “those measures that are deemed necessary to secure the efficiency of the judicial protection that a favorable judgment may grant” (727, 11º). Thus, the catalogue does not bar other possibilities.

In the list, one can find the typical provisional remedies. The detailed regulation of each measure is not here. In most cases, it can be found in the chapter on the enforcement of judgments. The following measures are listed in the law (727):

1. Provisional seizure of goods to secure the enforcement of judgments that order the payment of money, rents or other fungibles. A provisional seizure may also be issued if it is the most appropriate remedy and cannot be substituted by another measure of equal or superior efficacy and less burdensome for the adverse party;
2. Judicial intervention or administration of productive goods when the complaint seeks to obtain its property or usufruct or any other title that entails a legitimate interest in maintaining or ameliorating the productivity or when securing the productivity is of the utmost interest for the efficiency of the judgment that may ensue;
3. Deposit of a movable good when the complaint seeks to obtain the good and it is in the possession of the adverse party;
4. Formation of inventories of goods;
5. Registration of a complaint in Public Registries when it refers to goods or rights that can be annotated in those;
6. Other annotations in registries, in cases in which the publicity of the registry can be useful to the future enforcement of the judgment;
7. Judicial injunction to cease an activity, to abstain from a conduct or to prohibit to cease in an activity;
8. The intervention or deposit of the income resulting from an activity that is considered illegal and whose prohibition or cessation is sought in the complaint, as well as the deposit of the amounts that are sought as a remuneration of intellectual property rights;
9. The temporary deposit of copies of works of art or other objects that are allegedly reproduced under violation of intellectual and industrial property rights, as well as the deposit of the material used for its reproduction;
10. The suspension of corporate resolutions, when the plaintiff or plaintiffs represent at least 1 or 5% of the social capital, depending on whether the defendant corporation’s stock is tradable in an official stock market or not;
11. Other measures that are established in other laws for the protection of rights or those that are deemed necessary to secure the efficiency of the judicial protection that could be obtained in a favorable final judgment.

Other provisions of the LEC complete this general framework of provisional remedies or refer to common rules. Among the most relevant, there are measures in proceedings over the capacity of persons (762), parental rights (768), marriage and divorce (771-773), etc.

One can also find provisions on provisional remedies outside the LEC, for example in patent litigation (Arts. 133-139 of Law 11/1986, of March 20th).

6. Procedure

It is on matters of procedure to request and issue provisional remedies that the academic spirit of the new law is excessive. It pretended to establish a single procedure for all measures, which was not necessarily a bad ideal. But we should not be mislead. When it comes to the enforcement of a particular measure, one cannot obviate the use of the procedure that accords to its nature. For this reason, the aspiration to a unified proceeding has to be limited to the organization of criteria for the request and concession of provisional remedies. On this point, the law has established an elephantine and burdensome procedure that may convert the issuance of a provisional remedy into
a sort of parallel process with the same solemnity as the main proceeding. It is obvious to see that this is not what the system requires. Rather the contrary: one needed here prompt responses, in accord to the nature of provisional remedies. Still, there is no doubt that this objective can be met if a practical insight is taken.

### 6.1. Initiation

The principle, natural in the context of civil procedure, is that the initiative to seek provisional remedies lies in the parties. The law says that any actor that formulates a claim may request the issuance of provisional remedies that he deems necessary to secure the efficiency of the judicial protection (721). The court cannot order provisional remedies ex officio, the exception being some special proceedings. In any case, the court cannot order measures more burdensome than those requested by the party.

### 6.2. Jurisdiction

The jurisdiction to entertain requests for provisional remedies is vested in the court that hears the case in the first instance or, if a complaint has not yet been filed, in the court that has jurisdiction to hear the principal complaint. On appeal or cassation proceedings, jurisdiction corresponds to the court that is hearing the case in the second instance or cassation (723).

Arbitral proceedings and proceedings in foreign tribunals receive a specific mention (724): the jurisdiction is vested in the court where the judgment or award will have to be enforced or, as a default, where measures will have their effects, except if otherwise established in a Treaty.

Most important of all is the possibility to seek provisional remedies before the complaint is filed. This was in fact the only necessary rule. But looking at the present regulation, the results are troublesome. There is an overstated concern to ensure that we are in front of the right court with casuistic rules that most of the time are superfluous. The flexibility of the institution requires that measures be taken where it is easier to implement them and where the judicial response is going to be prompter. If the present provision is interpreted academically, it may lead to the frustration of the institution: The court will examine ex officio its jurisdiction and venue (725, 1). There is no possibility to file a motion to dismiss for lack of venue. If the court considers that it lacks jurisdiction or venue, it has to hear the Public Prosecutor and the applicant before abstaining. Still, even if the court lacks venue, it may still order provisional remedies that are urgent, if the circumstances of the case so require, and subsequently remand the case to the proper court (725, 2).
6.3. Time To Request

The three classical alternatives remain: before, with or after the complaint. There is an attempt in the law to rank each alternative: the most preferred option would be to request provisional remedies with the complaint (730, 1). From a practical perspective, this is a mistake, for it may evaporate many of the benefits of the institution, especially if combined with a prior hearing of the adverse party. Next, a request before the complaint has to be justified on specific urgency (730, 2). In this case, the complaint must be filed in the following 20 days, otherwise the court will vacate the measures issued and declare the applicant liable of any damages. Finally, requesting a provisional remedy after the complaint is penalized for it is subject to provisional remedies being necessary “at that moment” in particular (730, 4). An intelligent practice shall be to obviate those dogmatic rules and to follow the criterion dictated by the idea that a provisional remedy has to be efficient, which is the general operative limit incorporated in the law.

6.4. Request

Where the procedure becomes unnecessarily burdensome is in the formalities that, as a general rule, the request for a provisional remedy has to meet. The request has to be grounded -justify the concurrence of the legal requirements for a measure with “clarity and precision” (732, 1)-, documented -put forward evidence that supports the request and propose other evidence (732, 2)-, offer a security bond -determine the type of bond and justify the amount proposed (732, 3)- and justify whether or not a prior hearing with the defendant shall take place (733, 2). This type of regulation may be necessary when the request precedes the complaint but it is overabundant when it is coetaneous.

6.5. Decision Without A Prior Hearing

Everybody knows that the secret of a successful provisional remedy is to surprise the defendant, to make it impossible to organize an insolvency or to frustrate the objectives of a lawsuit. For this reason, the general rule, homologated by the Spanish Constitutional Court, must be to decide on the request and eventually grant provisional relief without a prior hearing. If this is common sense, the law turns it into the exception. The default rule in the law on this point is that the decision on a provisional remedy will be taken with a prior hearing of the defendant (733, 1). Sometimes it seems as if we, jurists, were trying to stray further away from the standards dictated by common sense and the rules of logic.
It is certainly true that the law quickly amends itself to go in the right
direction and allows for measures to be issued without a prior hearing
(733, 2). But, it requires extra justifications from the applicant that
are obvious by elementary logic and a “separate” reasoning by the
court in its resolution. The court has five days to decide after the
request. There is no appeal to this decision.

One only hopes that the practical functioning of the system will
equilibrate the adequate protection of the defendant with the efficiency
of the judicial process.

6.6. Prior Hearing

Whenever catching the adverse party by surprise or the essence of the
measure do not require the contrary, the opportunity of the defendant
to contradict the plaintiff is respected in all circumstances. The law
establishes that within five days after giving notice of the request to
the adverse party the court will order that a full hearing take place
within the next ten days (734, 1). In this hearing, it is possible to
discuss each and every legal requirement of the provisional remedy
and put forward the necessary evidence, including a judicial
inspection in the following five days, and discuss the type and the
amount of the bond that the applicant has to post (734, 2). There is
no appeal to the decisions of the court during the prior hearing as
regards the hearing and its contents. But it is possible to protest those
decisions and to formulate an appeal to the final decision on
provisional remedies (734, 3).

6.7. Decision

The court must resolve whether provisional relief is granted or denied
in the five days following the hearing (735, 1). It will have to be
exhaustive in its discussion of the issues –basically the concurrence of
the general legal requirements for a measure- and, in some cases, will
have to specify the exact regime of the provisional remedy (735, 2). In
this case, this last legal requirement is not redundant. Some
provisional remedies, such as a judicial administration, may have a
multitude of variants and a clear regulation by the court will save lots
of problems in its practical implementation.

6.8. Appeals

The decision to grant provisional relief can be appealed. For obvious
reasons, the appeal does not suspend the implementation of the
measure ordered (735, 2).
The denial of a provisional remedy can also be appealed (736, 1). It is also possible to reproduce the request if the circumstances existent at the time of the initial request change (736, 2).

6.9. Opposition When Provisional Remedy is Issued Without a Prior Hearing

The issuance of a provisional remedy without a prior hearing is not done without some further safeguards. Nobody denies that the defendant’s position deserves its appropriate and just attention. The decision that grants provisional relief without a prior hearing cannot be appealed (733, 2). However, in exchange, the defendant may move to oppose the measure in a full-blown procedure, in twenty days upon receiving notice of the decision (739).

Initially, the opposition has to be articulated in writing and must expose the facts and reasons that assist the defendant in challenging the existence of the legal requirements, scope, type and other circumstances of the measure “without limits” (740). The defendant may even offer to substitute the measure by a bond.

Subsequently, the motion is served to the applicant of the measure and the debate is then channeled through an oral hearing (741, 1). After the hearing, the court will give a reasoned opinion in the following five days (741, 2). If the provisional remedy is upheld, the defendant will bear the costs of the opposition. If it is vacated, the applicant will bear those costs and be liable for the damages that ensue.

This decision on the opposition can be appealed, but the appeal does not suspend its enforcement (741, 3).

6.10. Enforcement

The crucial moment for a provisional remedy is, by far, its effective implementation. Here, save the mention to the security that the applicant may have to give before a measure is implemented (737), the law should have referred to the general rules of enforcement, the obvious solution. It tries to do something like that, but spends more ink than necessary: first, it announces that the court will enforce its decision on provisional remedies ex officio by using “all necessary means”, even those that the law establishes for the enforcement of judgments (738, 1); then, it reiterates the general rule for some specific cases such as provisional seizures, judicial administration and notices in Public Registries (738, 2); finally, as if it were a legal innovation, it reminds us that depositors and judicial administrators can only sell the rights and goods subject to a provisional remedy by authorization of the court (738, 3).
7. Substitution, Modification and Cessation of Provisional Remedies

Provisional remedies are a flexible institution, something like gloves. They vary and differ depending on the circumstances of the case or the matter of the dispute. Independently of the fact that they do not have a permanent nature -by definition-, their life is subject to dynamic expectations. The most relevant are treated below.

7.1. Substitution of Provisional Remedies by a Bond

One of the principles that grounds the institution is a respect for the equilibrium between the positions of the plaintiff and the defendant. A provisional remedy, as much as it is necessary to mitigate the risks derived from the duration of the judicial process, must not burden the defendant more than necessary. The law correctly establishes that principle (726, 1, 2). One of the most important consequences of this is the possibility for the adverse party to ask the court to substitute the provisional remedy by a security (746, 1). This security bond will have to be sufficient to cover the effective implementation of a judgment eventually favorable to the plaintiff. The option, though, is not automatic since the range of possible measures is not limited to those with an economic scope, like, for example, when the complaint seeks an injunction. For this reason, the law establishes that the request of the defendant will be subject to scrutiny (746, 2). For this, the court will take into account the grounds for a provisional remedy, the nature and contents of the complaint, the fumus boni iuris of the defendant’s position and the proportionality of the measure in relation to the demands of the plaintiff.

The particular time and procedure to request this alternative bond are also regulated in the law, which is conveniently flexible: The request can be formulated during the prior hearing for the issuance of provisional relief, after it has been issued without a hearing in the oral hearing to oppose it or even in writing at any time (747, 1). The defendant can bring into play all necessary documents as regards its solvency, the consequences of the measures and the dangers that may derive from the duration of the judicial process. When the request is in writing, the court will serve it to the applicant, order a hearing and resolve the issue in the following five days. There is no appeal against this decision (747, 2).

7.2. Modification of Provisional Remedies

Since the existence of the legal requirements for a provisional remedy may vary or disappear, the law contemplates the modification of those that were previously issued. In particular, the law regulates the
revision of provisional remedies when a party puts forward facts and documents that could not be taken into account at the time of their issuance or in the period of time in which opposition was possible (743).

Modifications are substantiated through the general proceeding for the issuance of provisional remedies, this is, a hearing.

7.3. Cessation of Provisional Remedies

7.3.1. Hypothesis

There are several ways that lead to the cessation of a provisional remedy.

In general, a provisional remedy does not aspire to last indefinitely. One of its fundamental characteristics is its temporality. The possibility to execute the judgment is one of the limits that gives rise to the option to transform a provisional remedy into an executive measure.

The law establishes that provisional remedies will be cancelled when the main proceeding is terminated, except if it ends by a condemnatory judgment, in which case the measures will be maintained for the following twenty days, a period that the law establishes in which the judgment cannot be executed yet. If the party that has prevailed on the merits does not request the enforcement of the judgment after this time, the court will revoke the provisional remedy (731, 1). When the judgment is provisionally executed, provisional remedies are also cancelled (731, 2).

The possibility to end provisional remedies also exists when the judgment, even if not final, dismisses the complaint. The law says that when the defendant is absolved in the first or second instance, the court will revoke the provisional remedies immediately, except if the appellant requests that measures be maintained (744, 1). The court will hear the adverse party and decide, taking into account the circumstances of the case. In any event, to maintain the measure, the amount of the bond will be raised. If the complaint has been partially dismissed, the court will decide on the matter after hearing the defendant (744, 2).

Provisional remedies will be cancelled ex officio when the judgment becomes final and the complaint is dismissed and also in cases of renunciation, withdrawal (745) or even suspension of proceedings for more than six months for reasons that can be attributed to the applicant of provisional remedies (731, 1, 2).
7.3.2. Liquidation of Damages

A provisional remedy is granted in an anticipatory context that is advantageous to the plaintiff. In general, the equilibrium is established through the bond that must be posted before the measure is implemented. After this long path, it is time to gauge the results. Now the defendant regains its importance with the opportunity to claim damages resulting from the issuance of a provisional remedy.

The option exists for all types of provisional remedies (742 and 745) and rules are even redundant. The common opinion is that it is a case of strict liability. Liquidation of damages is channeled through the general proceeding for the enforcement of money damages (712) and constraints (742).

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