NEIL H. ANDREWS

UNIVERSITY OF CAMBRIDGE

THE EUROPEAN LAW INSTITUTE/UNIDROIT CIVIL PROCEDURE PROJECTS: REFLECTIONS AND EXAMPLES

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Main Points

- The (continuing) UNIDROIT/EUROPEAN LAW INSTITUTE civil procedure project comprises a coherent set of soft-law Rules.
- For the last couple of years, working groups have been drafting European civil procedure Rules within the flexible framework of the *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006), which was a collaboration between UNIDROIT (Rome) and the American Law Institute.
- The UNIDROIT/EUROPEAN LAW INSTITUTE civil procedure project will be the most comprehensive and up-to-date reflection of European civil procedural practice and aspiration.
- These new Rules will be influential in Europe and elsewhere.

1. INTRODUCTION

This paper concerns the **European Law Institute/UNIDROIT project**, expertly steered by an eminent group. This is a rolling programme of Rules, with Comment, designed to produce **soft-law**, drawing on the talents of a group of procedural experts. A balance has been struck between academicians and practitioners.

A few topics were chosen by the steering committee at the start of the project. These included service of documents and process, provisional and protective relief (including summary final relief), and evidence. A later wave of topics includes the responsibilities of the courts and of lawyers, *res judicata* and *lis pendens*. The project will encompass the main features of civil procedure and so will embrace in due course costs (and remuneration of parties' lawyers) and structures of recourse or appeal.

The inspiration has been the *Principles of Transnational Civil Procedure*[1] which were published under the joint auspices of UNIDROIT (based in Rome) and the American Law Institute (Philadelphia). There is an official French parallel version of those *Principles.*[2] There have been many translations, including into Spanish, Arabic, Chinese, Russian, and Japanese. It should be noted that this project was concerned with principles rather than rules. An unofficial treatment of rules, within the framework of the UNIDROIT/ALI *Principles*, was appended to the same 2006 publication. But those *Rules* were not presented as an official document.

The current European Law Institute/UNIDROIT series of Rules have two main aims: first, to produce a set of commonly acceptable rules, pitched at a level where they provide practical guidance, but avoiding the familiar tendency for procedural rules to contain over-detailed prescription of every imaginable eventuality; secondly, to do so within the context of Europe.

The European dimension is important in four ways:

[1] ALI/UNIDROIT, *Principles of Transnational Civil Procedure* Cambridge University Press, 2006

[2] La procédure civile mondiale modélisée : Le projet d'American Law Institute et d'Unidroit de Principes et Règles de procédure civile transnationale, Actes du colloque de Lyon du 12 juin 2003, Frédérique Ferrand, Lyon

(i) the various working groups are drawn from Europe;
(ii) the national legal systems which underpin the project are all European;
(iii) the project is being prepared both in English and in some other European languages;
(iv) the working groups are sensitive to the European *acquis*, although not constrained by that body of law, because this is a set of soft-law Rules.

The drafts which have so far been produced are succinct. This places them at the `rules' end of the spectrum of norms rather than at the `broad principle' end. This is not to deny, however, that the rules include many principles which are clearly identifiable as drawn from the UNIDROIT/ALI inheritance.

In fact the preliminary methodology of the working groups has been to identify UNIDROIT/ALI principles which demanded inclusion within the relevant topic. For example, the Evidence project found an abundance of such principles (which will be acknowledged in the final product but which is omitted here, for reasons of economy). By contrast, the Provisional and Protective Relief and *Res Judicata/Lis Pendens* projects have found only one or two `foundational' principles.

The European Law Institute/UNIDROIT topics are being drafted and elaborated against a tight deadline. Reference has been made above to the fact that some projects were instituted earlier. However, recent reports to the sponsoring authorities at a meeting held in Rome indicate that there has been very significant progress made.

The various working groups have been drafting in a free spirit within the flexible framework of the UNIDROIT/ALI *Principles.* Because of their high quality, these principles have proved to be helpful and reliable.

All of this explains why the various topics within this overarching project are proceeding in a co-operative manner, freed from national specificity, drafting members being excited by the challenge of finding the most attractive and at the same time realistic modern approach.

The Rules are shorter than national procedural codes. This will render them more accessible and increase their influence.

The author would like to express thanks to all members of the working groups in which he is participating. These comments are the fruit of

collective effort. Opinions expressed, however, are those of the author himself and might not be shared by all colleagues.

The colleagues with whom I have been working on three of these topics ((i) Evidence, (ii) Provisional Relief etc, and (iii) *Res judicata* and *Lis pendens*) are:

Torbjörn Andersson (Sweden), topic (ii); Alexander Arabadjiev (ECJ), topic (iii); Remo Caponi (Italy), topic (iii); Marco de Cristofaro (Italy), topic (iii); Gilles Cuniberti (Luxembourg), topic (ii); Tanja Domej (Austria, Switzerland), topic (iii); Laura Ervo (Finland), topic (i); Frédérique Ferrand (France), topics (i) and (iii); Burkhard Hess (Germany and Luxembourg), topic (iii); Fernando Gascón Inchausti (Spain), topics (i) and (iii); Viktória Harsági (Hungary), topic (i); Xandra Kramer (Netherlands), topic (ii); Kalliopi Makridou (Greece), topic (iii); Jarrko Männistö (Finland), topic (iii); Federico de la Mata (Spain), topic (ii); Michael Stürner (Germany), topic (i); Alan Uzelac (Croatia), topic (ii); Karol Weitz (Poland), topic (iii).

2. REFLECTIONS ON THE UNIDROIT/ELI PROJECTS

It is not the author's purpose in this paper to add to the mountainous literature on the nature of soft-law, or cross-border co-operative law-making, or harmonization, or the distinctiveness of legal `families', etc.

Language and National Legal Jargon

The terminological and technical `baggage' of legal systems has been reduced by endeavouring to use language which is not peculiar to a particular legal system or `family' of systems.

Deep-set Institutional Differences

From time to time, deep-set institutional differences have been encountered. It has been necessary on some of those occasions for the relevant working party to concede that there is a fundamental difference of approach within various European legal systems, rather than jettisoning one approach, or trying to produce a compromise which would be unfamiliar to all and would please and be useful to none.

Judiciaries

A court composed of judges who are young and inexperienced cannot be expected to apply complex rules with unerring precision and measure. A

much more experienced court can be expected to get it right nearly all of the time.

We must bear in mind that any set of rules adopted across Europe will fall to be used by courts in different Member States where the judges are educated, trained, appointed, paid, supervised, esteemed or valued, feared or respected, promoted, supported or neglected, and pensioned or finally released, in quite different ways.

Of course, it would be attractive to raise the standard of judicial administration across all relevant legal systems.

But the rules must be tailored to reflect the state of play amongst the European judicaries. It is suggested that the project should be conducted in a realistic manner, at the same time avoiding the depressing effect of the lowest common denominator.

3. RULES ON EVIDENCE: STRUCTURE

The full title of this project is `evidence and access to information'. This is work-in-progress.

These Rules are structured and arranged as follows:

PART I

GENERAL ISSUES OF EVIDENCE

SECTION A

FUNDAMENTAL ELEMENTS OF EVIDENCE

Rule 1: Scope of the Dispute
Rule 2: Burden of Proof
Rule 3: Standard of Proof
Rule 4: Matters Not Requiring Positive Evidence
Rule 5: Relevance
Rule 6: Illegally Obtained Evidence
Rule 7: Equality, Fairness and Proportionality

SECTION B

PARTIES' RESPONSIBILITIES AND RIGHTS CONCERNING EVIDENCE AND ACCESS TO INFORMATION

SECTION C

THE COURT'S POWERS AND RESPONSIBILITIES CONCERNING EVIDENCE

PART II

ACCESS TO EVIDENCE

PART III

TYPES OF EVIDENCE

Concerning this Part III of the project, the following are the broad lines the Working Group has in mind*:*

4. EVIDENCE PROJECT: SAMPLES OF THE DRAFT

Not all the rules so far drafted are included in this section (otherwise this document would become too bulky). Instead the following selection of rules is designed to enable the reader to see the type of rule which this Working Group has in mind. It should be appreciated that each rule will have a Comment. But, again for reasons of economy, those Comments are omitted here.

…

RULE 2

BURDEN OF PROOF

In general, each party has the burden to prove all the material facts which form the basis of that party's case.

Applicable substantive law determines the burden of proof.

RULE 3

STANDARD OF PROOF

A contested fact is proven when the court is reasonably convinced of its truth.

RULE 5

RELEVANCE

(i) In general, any relevant evidence is admissible. The court, whether of its own motion or on application by a party, shall exclude evidence which is irrelevant.

(ii) Matters alleged in the parties' pleadings determine relevance.

RULE 8

PRESENTATION AND CONTRADICTION OF EVIDENCE

(i) Each party has the right to offer relevant evidence supporting their contentions of fact and law.

(ii) Each party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party.

RULE 10

EARLY PARTY IDENTIFICATION OF EVIDENCE TO BE RECEIVED BY THE COURT

In an initial phase of pleading the parties must identify the evidence which they propose to produce to support their respective factual allegations.

RULE 12

ADDITIONAL EVIDENCE FOLLOWING AMENDMENT OF THE CONTENTIONS

The court may, while affording the parties opportunity to respond, permit or invite a party to clarify or amend his contentions of fact and to offer additional evidence accordingly.

RULE 15

THE COURT'S MANAGEMENT OF EVIDENCE

(i) During the early stages of the procedure the court, after discussion with the parties, should address the admissibility, production and exchange of evidence. When necessary, the court will order the taking of evidence.

(ii) The court, after discussion with the parties, may make decisions concerning the sequence and timing of producing evidence, as well as, where appropriate, the form in which evidence will be produced.

RULE 18

EVALUATION OF EVIDENCE AND JUDGMENT

(i) The court shall take into account all relevant facts and evidence when making its final decision.

(ii) The court should make free evaluation of the evidence.

(iii) The court may, while affording the parties opportunity to respond, rely upon an interpretation of the facts or of the evidence that has not been advanced by a party.

(iv) Final judgment should be accompanied, whether immediately or within a reasonable time, by a reasoned explanation of the essential evidential, factual, and legal basis of the decision.

RULE 19

SANCTIONS CONCERNING EVIDENCE

(i) The court, whether on its own motion or on application by a party, may impose sanctions in these circumstances:

> **(a) a person has unjustifiably failed to attend to give evidence or to answer proper questions, or to produce a document or other item of evidence;**
>
> **(b) a person has otherwise obstructed the fair application of the rules concerning evidence.**
>
> **....**

(v) In any particular case, the court should ensure that sanctions are reasonable and proportionate to the seriousness of the default or non-compliance, the harm caused, the extent of participation and the degree to which the conduct was deliberate.

PART II

ACCESS TO EVIDENCE

RULE 20

GENERAL FRAMEWORK

When making orders under the Rules in this Part the court will give effect to the following principles:

(i) in general, the court and each party should have access to all forms of relevant and non-privileged evidence;
(ii) in response to a party's application, the court should order disclosure of relevant, non-privileged, and reasonably identified evidence held or controlled by another party or, if necessary, by a non-party, even if such disclosure might be adverse to that person.

RULE 21

ORDERS FOR ACCESS TO EVIDENCE

(i) Subject to the considerations and procedure contained in Rules 22 to 27, any claimant or defendant, or any prospective claimant who intends to sue, can request the court to make an order for access to evidence held or controlled by the other party or by non-parties.
(ii) An order under (i) shall not be granted ex officio by the court, without prejudice to the provisions laid down in special rules.
(iii) Material gathered under these rules only becomes evidence when it is formally introduced as such into the proceedings.

RULE 22

FACTORS JUSTIFYING AN ORDER FOR ACCESS TO EVIDENCE

(i) The party or prospective party seeking an order for access to evidence must satisfy the court:

(a) that the requested evidence is necessary for the development or proposed development of issues in dispute in pending proceedings or in proceedings which are contemplated; and

(b) that the applicant cannot otherwise gain access to this evidence without the court's assistance.

(ii) Furthermore, the party or prospective party making a request under Rule 21 must submit with its request prima facie evidence of the merits of its claim or defence. If the order is requested prior to the initiation of proceedings, the applicant must indicate with sufficient precision all elements which are necessary to allow the court to identify the claim which the applicant intends to make.

5. RULES ON PROVISIONAL AND PROTECTIVE RELIEF AND SUMMARY FINAL ORDERS: STRUCTURE

This is work-in-progress and is presented here in draft form. Because these Rules are shorter than those concerning Evidence (see the preceding section 4.), some of the samples presented here include the draft Comment on the relevant rules.

It is instructive to consider the sequence of topics within Part II. The relevant orders are (a) asset preservation orders (Rule 9(1) provides a sub-division of these); (b) evidence preservation orders; (c) custodianship orders; (d) interim injunctions concerning the main relief sought by the claimant; (e) interim payment orders where the main relief sought by the claimant is monetary.

Problems of terminology have been tackled by using (as far as is possible) language which reflects the underlying nature or function of each order.

Problems arising because of deep-set national practices and procedural habits have been addressed, notably, with respect to types of asset preservation order to be offered and their implementation and enforcement (Rules 8, 9(1)(b), 9(2), 9(3), 17(4)2). On such occasions it has been considered expedient to permit the relevant court to apply the system with which it feels comfortable.

PROVISIONAL OR PROTECTIVE MEASURES

CONTENTS

PART I GENERAL PART

PART II PROTECTIVE OR PROVISIONAL MEASURES: SPECIAL PART

ASSET PRESERVATION ORDERS

Rule 9: Types of Asset Preservation Order
Rule 10: Criteria for Awarding Asset Preservation Orders
Rule 11: Financial Scope of Asset Preservation Orders
Rule 12: Asset Preservation Orders; Respondent's Allowances
Rule 13: Notification of Asset Preservation Orders to Respondents
Rule 14: Notification of Asset Preservation Orders to Non-Parties
Rule 15: Effect of Asset Restraining Orders on Respondents and Non-Parties

EVIDENCE PRESERVATION ORDERS

Rule 16: Nature of Evidence Preservation Orders
Rule 17: Effect of Evidence Preservation Orders on Respondents and Non-Parties

CUSTODIANSHIP ORDERS

Rule 18: Nature of a Custodianship Order
Rule 19: Criteria for Awarding Custodianship Orders
Rule 20: Responsibility and Rights of the Custodian

INTERIM INJUNCTIONS TO PERFORM OR ABSTAIN

Rule 21: Nature of Interim Injunctions
Rule 22: Criteria for Awarding Interim Injunctions

INTERIM PAYMENT ORDERS

Rule 23: Interim Payment Orders
Rule 24: Repayment of Interim Payments

PART III SUMMARY FINAL ORDERS

Rule 25: Nature of Summary Final Orders
Rule 26: Summary Final Orders in Favour of Claimants
Rule 27: Summary Final Orders in Favour of Defendants

6. PROVISIONAL RELIEF, ETC: SAMPLES OF THE DRAFT RULES

Some of the following selected rules are accompanied by draft Comment (Rules 21 *et seq*). This is to give the reader a better feel for the intended final product. All of this remains work-in-progress.

PART I GENERAL PART

RULE 1

`PROVISIONAL OR PROTECTIVE MEASURES' AND `SUMMARY FINAL ORDERS'

(1) Whether or not proceedings on the substance of the dispute have commenced, a `provisional or protective measure' in these Rules is a judicial order issued without purporting to be a final decision (see Rules 1(2) and 25 to 27 for `summary final orders'). A `provisional or protective measure' operates:

(i) to preserve the opportunity for a complete and satisfactory determination of the claim, including securing evidence relevant to the merits or preventing its destruction or concealment; or

(ii) to ensure or promote effective enforcement of final decisions concerning the substance of the case, whether or not the underlying claim is pecuniary, including securing assets and obtaining or preserving information concerning a debtor and his assets; or

(iii) to preserve the existence and value of goods or other assets which form or will form the subject-matter of civil proceedings (pending or otherwise) on the merits (for example, orders to secure safe custody of assets, ensure that income is generated from assets, or to require sale of perishable goods)

(iv) to prevent harm from being suffered or to prevent or further harm (notably, by granting interim injunctions on the substance or by making interim payment orders);

(v) to regulate the disputed matters, pending final determination of the issues (for example, by granting interim injunctions on the substance or by making interim payment orders).

(2) Part III of these Rules concerns summary final orders.

RULE 2

TRANSNATIONAL JURISDICTION

(1) A court has jurisdiction to grant a provisional or protective measure under Part II of these Rules only if:

(a) the court has jurisdiction concerning the substance of the dispute; or

(b) it is expedient for the court to assist a court in another jurisdiction which will decide the substance of the dispute (whether or not the proceedings on the substance are pending);

(c) paragraph (a) will not apply if it is clear that the court is unlikely to remain seised with the substance of the case; but in that situation it might still be appropriate for the court to grant relief under paragraph (b).

(2) In accordance with the duty of full disclosure provided by Rule 4(3), an applicant for a provisional or protective order must inform the court whether it has made, or is about to make, applications before other courts (notably in other jurisdictions) for the same or similar relief against the same party.

...

RULE 4

EX PARTE PROCEDURE

(1) A court may order a provisional or protective measure under Part II of these Rules without notice (`*ex parte*') only if, in the circumstances, proceedings with notice (`*inter partes*') would most likely destroy the chances of the applicant receiving effective protection of his interests.

(2) When granting an order without notice, the court should specify an early return date for an *inter partes* hearing, this date to be no later than [x] days from the grant of the order. At the *inter partes* hearing the respondent will have the opportunity to contest the order, or its continuation, or its effects.

(3) When making its application, the applicant and his lawyer(s) must fully disclose to the court all facts and legal issues, including obvious or probable defences or counter-arguments known to the applicant or his lawyer(s), which are relevant to the court's decision whether to grant relief and, if so, on which terms.
(4) As soon as practicable, the respondent should be given notice of the order and of all matters relied upon to support it.
(5) The respondent has the right to full reconsideration by the court at the return date (Rule 4(2)). For this purpose the respondent can draw upon the material considered by the court at the *ex parte* stage of the proceeding, as well as presenting additional or fresh material not already considered by the court.
(6) Upon application by the respondent, and where the court considers it practicable, such a hearing might be re-arranged so as to occur before the originally prescribed return date (Rule 4(2)).
(7) The court must make a prompt decision concerning any objection to the granting of the provisional or protective measure.

...

RULE 7

POTENTIAL LIABILITY OF APPLICANT

(1) The applicant will be liable to indemnify the respondent for any loss or damage caused by a provisional or protective measure made under Part II of these Rules if (a) that order is set aside, or (b) if the applicant discontinues his claim in the main proceedings, or (c) that claim in the main proceedings is dismissed or not upheld by the court, or (d) the court decides under Rule 5(3) that the applicant should indemnify the respondent. The sum payable under the indemnity to the respondent is not limited to the amount of any security provided under Rule 7(3).
(2) The applicant is liable to indemnify a non-party for any expense incurred in implementing the provisional or protective measure.
(3) The court will normally require the applicant to make a formal undertaking to the court that it has assumed a duty to indemnify the respondent and any relevant non-parties (see Rule 7(1) and 7(2)). The court can also require the applicant to provide security in respect of that duty.

(4) A person should not be required to provide security for costs, or security for possible liability for pursuing provisional or protective measures, solely because the person is not a national or resident of the forum state.

RULE 8

SANCTIONS FOLLOWING NON-COMPLIANCE WITH INJUNCTIONS

(1) For the purpose of enforcing an injunction awarded under Rules 9(1)(b), 16, or 21 the court can adopt sanction regime A(i), A(ii), or B, as provided below:

Sanction Regime A (i) and A (ii):

the court can order that the respondent should be ordered to make payment by way of penalty if he fails to comply with the injunction; the court will determine the amount of payment due for each period of default; but the court may reserve the power to reduce the total amount to be paid in respect of such default; and, in accordance with national practice, the court will order the final payment, or part thereof, to be made either (i) to the applicant personally or (ii) or the Treasury of the forum;

Sanction Regime B:

the court can order that a respondent who fails to comply with an injunction will be subject to such administrative or punitive sanctions (or other adverse consequences) prescribed under the law of the forum in respect of non-compliance with such injunctions.

(2) As mentioned at Rule 3, sanctions imposed under these Rules in respect of non-compliance with judicial orders should be selected and implemented in a manner which is consistent with the principle of proportionality.

PART II

PROTECTIVE OR PROVISIONAL MEASURES: SPECIAL PART

Asset Preservation Orders

RULE 9

TYPES OF ASSET PRESERVATION ORDER

(1) A court has power to grant, on application, any of the following orders for the purpose of protecting a pecuniary claim:

(a) an order authorising provisional attachment of the respondent's assets (`attachment order'); such an order operates in accordance with the law of the place where the assets are situated; or

(b) an interim injunction preventing the respondent from disposing of, or dealing with, his assets (`asset restraining order': see also Rule 15); or

(c) an order that the respondent's assets should be controlled by a custodian (`custodianship order': Rules 18 to 20).

(2) An order made under this Rule will be implemented and enforced in accordance with the rules and practice of the jurisdiction where the relevant order is made.

RULE 10

CRITERIA FOR AWARDING ASSET PRESERVATION ORDERS

A party seeking an order under Rule 9 must show to the court's satisfaction that:

(a) there is a reasonable possibility that the applicant will succeed on the substantive merits of the dispute if the claim is finally adjudicated, and

(b) there is a real risk that, without such a remedy, enforcement of the applicant's claim against the respondent will be stultified or substantially impeded.

Interim Injunctions Concerning the Substance: Orders to Perform or Abstain

RULE 21

NATURE OF INTERIM INJUNCTIONS CONCERNING THE SUBSTANCE

The court can grant an applicant, whose substantive claim is for non-pecuniary relief, an interim injunction requiring the

respondent to abstain from doing something or to perform a specified act or course of conduct.

COMMENT

The present Rule prevents the respondent from acting inconsistently with the substantive rights alleged by the applicant, pending final adjudication. The successful applicant under this Rule receives temporary protection. This can be crucial because it might prove too late to undo the respondent's misconduct if an interim injunction is not granted. And so the present Rule preserves the possibility that the applicant might eventually obtain full satisfaction of his alleged rights, by obtaining a final injunction against the respondent.

Furthermore, it is quite common for the parties to settle the substantive claim on the basis of the outcome of an application for an interim injunction of this type.
Interim injunctions obtained under the present Rule are to be distinguished from asset restraining orders issued under Rule 9(1)(b). The latter are injunctions of a special nature: they function to prevent the respondent from disposing of, or dealing with, his assets. By contrast, interim injunctions under the present Rule look forward to the final determination of the claim and thus provide provisional relief concerning substance of the applicant's claim.

The same contrast can be made between evidence preservation orders issued under Rule 16 and interim injunctions concerning the applicant's substantive rights granted under the present Rule.

As mentioned in the Comment at Rule 2(1)(b), it will not normally be appropriate for an interim injunction under the present Rule to be granted when the main proceedings on the substance have yet to be commenced. But, quite exceptionally, there might be a need for such anticipatory relief under the present Rule, including where the main proceedings are to be brought in a foreign (not necessarily European) jurisdiction (Rule 2(1)(b)). By contrast, other types of order will often be granted under these Rules even if the main proceedings have yet to commence: asset preservation orders (Rule 9), including custodianship orders (Rule 18(2)), and evidence preservation orders (Rule 16(2)).

Rule 22
Criteria for Awarding Interim Injunctions

(1) An applicant for an interim injunction under Rule 21 must satisfy the court that either requirement (a) or (b) is met:

(a) (i) there is a reasonable possibility that the applicant will eventually succeed on the substantive merits when the claim is finally adjudicated; and (ii), if it turns out, at that final stage, that the injunction should not have been granted, any harm suffered by the respondent will be capable of being adequately compensated;

or

(b) (i) there is a very strong possibility that the applicant will eventually succeed on the substantive merits when the claim is finally adjudicated; and (ii) if it turns out, at that final stage, that the injunction should not have been granted, any uncompensatable harm which might be suffered by the respondent is significantly exceeded by the irreparable harm which the applicant will suffer if the injunction is not awarded.

(2) The court should also assess whether a final remedy consistent with the injunction sought would be available before a court having jurisdiction on the merits.

COMMENT

Basic Structure of the Rule.

The criteria here are founded on two main considerations: (1) whether the applicant can satisfy the court that he has a *prima facie* case on the merits of the substance of the claim and (2) the danger that respondent might suffer harm if the relief is granted.

As for (1), the rule distinguishes between (a) an ordinary level of likely eventual victory (`reasonable possibility') and (b) a higher degree of likelihood (`a very strong possibility'). A *prima facie* case at level (a) is enough unless there is a danger of uncompensatable harm to the respondent (see (2)(b) in the next paragraph).

As for (2), the rule differentiates between (a) harm which is capable of being compensated and (b) that which cannot be adequately compensated.

In short, the presence of (2)(b) (uncompensatable harm) requires a *prima facie* case of the higher sort mentioned at (1)(b) (`a very strong possibility').

Further Detail on the Tests.
The tests at Rule 22(1)(a) and (b) concern two different situations.

In situation (a) the applicant can at least demonstrate `a reasonable possibility that the applicant will eventually succeed on the substantive merits' (element (a)(i)) and there is no prospect of the respondent suffering uncompensatable loss if the injunction is granted (element (a)(ii)). In this situation the applicant should be granted the injunction because the respondent's countervailing interest is adequately protected by the availability of compensation if it turns out that the injunction should not have been granted.

In situation (b) the applicant is able to satisfy the court that he has a `very strong possibility' of eventual success on the substantive merits (element (b)(i)). This level of evidential assurance is higher than the standard of proof applicable in situation (a) (in (a) the court must be satisfied that there is `*a reasonable possibility that the applicant will eventually succeed on the substantive merits*'). An interim injunction under (b) can be considered even though it might inflict uncompensatable loss on the respondent (element (b)(ii)). The court must then proceed to consider whether, if the injunction is withheld, the harm to the applicant's interest would significantly exceed the potential uncompensatable loss inflicted on the respondent if the injunction is granted.

The provision at Rule 22(2) is concerned with a special situation: the court in which an interim injunction is sought (requiring the respondent to refrain from certain conduct) does not have jurisdiction (under its national arrangements) to issue a final negative declaration in favour of the claimant.

Interim Payment Orders
RULE 23

INTERIM PAYMENT ORDERS

(1) A court may make an interim payment order in respect of a monetary claim, either wholly or in part, if is satisfied that:

(i) the applicant is (a) indisputably entitled to a sum of money owed by the respondent and (b) possible repayment to the applicant is assured (Rule 24); or

(ii) although the respondent's liability to make payment to the applicant remains disputable, the applicant is highly likely to be able to substantiate his entitlement to such a sum, and the payment is (a) urgently needed by the applicant or (b) the court considers that it is otherwise just and appropriate to make the order without further delay.

(2) The court may grant an interim payment order subject to any requirement that appears just under the circumstances.
(3) There is no requirement that security be provided, but Rule 7(3) enables the court, where appropriate, to make this a condition for the grant of any order, including an order under Rule 23(1).
(4) The court can refuse to make an interim payment order, or reduce the amount requested by the applicant, if the respondent would otherwise suffer irreparable harm.

COMMENT

Rule 23(1)(i) and (ii): Common Features.
The order is interim or provisional: it does not finally determine the matter.

The jurisdiction operates with respect to all classes of claimant, including non-natural persons, such as companies.

As noted in mentioned in the Comment at Rule 2(1)(b), it will not normally be appropriate for an interim payment order under Rule 23 to be granted when the main proceedings on the substance have yet to be commenced. But, quite exceptionally, there might be a need for such anticipatory relief under Rule 23, where (i) the main proceedings are to be brought in a foreign (not necessarily European) jurisdiction (Rule 2(1)(b)); or even (ii) where the main proceedings are to be brought in the same jurisdiction in which the application for interim payment is made. Situation (i) is a well-

established feature of cross-border provisional or protective relief. Situation (ii) is a feature of some legal systems, although in other legal systems this would not be possible.

By contrast, other types of order will often be granted under these Rules even if the main proceedings have yet to commence: Rule 9 (asset preservation orders, including custodianship orders, Rule 18(2)), and 16(2) (evidence preservation orders).

There is no need for the applicant to show that the respondent is likely to try to evade payment (compare Rule 10(b) for that requirement in the distinct context of asset preservation orders).

Some jurisdictions provide that the fact and amount of an interim payment should not be revealed to the court which subsequently makes the final determination until it has reached its final decision. Other legal systems are less queasy or fastidious. Because of this lack of common ground, these Rules do not make provision on this point. But on balance it is considered that the safer option is not to reveal the interim payment to the first-instance final court or judge until a decision on the merits has been reached.

Indisputable claims under Rule 23(1)(i). The purpose of interim payment orders under Rule 23(1)(i) is to speed up payment of indisputable claims, that is, where the respondent has admitted liability or judgment has been given in favour of the applicant but for a sum which has yet to be admitted or determined.

The applicant’s ability and willingness to make repayment should be assured. Where appropriate, the court might require provision of security. But often the court will not require this because it is reasonably sure that the applicant will remain solvent and will not abscond or default.

An order for interim payment under Rule 23(1)(i) can be for payment in full. Alternatively the order might be for a part payment. A partial order might be justified if the court is not convinced that the remainder of the claim is indisputably owed to the applicant. A partial order might also be justified if the amount owed is uncertain and the applicant cannot provide security against the danger of default in repayment.

Disputable claims under Rule 23(1)(ii). In this context, unlike Rule 23(1)(i), the respondent's duty to pay a sum has not been shown to be indisputable. And so there is an element of uncertainty concerning the respondent's liability to pay. There might also be uncertainty concerning the extent of that liability.

The purpose of an interim payment order under Rule 23(1)(ii) is to provide financial support to the applicant (and indirectly to enable him to support relatives and associated companies connected with the applicant or to discharge his liabilities to non-parties). Although the court will be more inclined to make an order in a situation of clearly demonstrated urgency (Rule 23(1)(ii)(a)), the jurisdiction extends to situations covered by Rule 23(1)(ii)(b), the aim of which is to provide accelerated, although provisional, vindication of the applicant's probable entitlement to be paid.

It is also notorious that in some jurisdictions the threshold criterion of `urgency' has become encrusted with procedural complexity. And so Rule 23(1)(ii)(b) in the present Rule enables the court, where appropriate, to cut though such artificial and obstructive inquiries.

And so Rule 23(1)(ii)(b) provides the court with a discretion to make interim payment orders even though the claim is neither indisputable (Rule 23(1)(i)), nor is the applicant able to, or willing to, present an application founded upon `urgency' (Rule 23(1)(ii)(a)). For example, it might be that the relevant jurisdiction is in turmoil and that waiting times to receive final judgment are unacceptably long. In those circumstances, the applicant can invoke Rule 23(1)(ii)(b), otherwise he will be kept unduly and unfairly out of his money.

Under Rule 23(1)(ii) the interim payment order can be for the whole claim or part. If part payment is ordered, the best practice is that the court should not be parsimonious but should instead award a substantial proportion of the claim.
Rule 23(2) empowers the court to make orders conditional upon specified requirements.
Rule 23(3) makes clear that it is not a standard requirement in this context that the applicant be asked to provide security.

Rule 23(4) is a safety-valve provision which should seldom be successfully invoked by the respondent. It enables the court to weigh the interests of

both parties and, as the case may be, refuse to order payment where the harm caused to the respondent by granting it would be higher than the harm suffered by the applicant in the absence of the remedy. The court should lean in favour of the applicant, however.

RULE 24

REPAYMENT OF INTERIM PAYMENTS

(1) An applicant is obliged to repay all (or, as the case might be, part) of an interim payment if the claim is (a) dismissed or the final determination is that the respondent is not liable for the claim (in whole or in part), or (b) the applicant discontinues the proceedings on the substance, or (c) he fails after a reasonable interval (or after a period specified by a court) to commence such proceedings, or (d) in other circumstances when it becomes unfair for the payment to be retained.
(2) In the event of further proceedings being brought, such as an appeal or review, the court might order a stay of the duty of repayment arising under Rule 24(1).

COMMENT

Rule 24(1) covers all situations in which the applicant might be required to repay the interim payment.

The court under Rule 24(2) might be either the first-instance court or a higher court, depending on the relevant national legal system.

7. CONCLUDING REMARKS

- The Rules presented here are samples of work-in-progress, drawn from two of the series of inter-locking projects.
- If such Rules are to have impact and influence, they must combine practicality, originality, and accessibility.
- Assessed against these three criteria, the topics of Evidence and Provisional and Protective Relief might well become important contributions to European procedural culture.
- Shared ideas, carefully formulated, can have a substantial influence, even if they do not immediately regulate people’s lives.

Neil Andrews, Cambridge,
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DISCLAIMER

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