

# PRECAUTIONARY AND PROVISIONAL MEASURES IN CIVIL PROCEEDINGS

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## Abstract

*In this article, we deal with issues related to precautionary and provisional measures in civil proceedings, such as: notion, classification, conditions to be met cumulatively in order to instate such measures, the court competent to resolve a set-up request, the settlement procedure, the enforcement of measures, the annulment of measures under the law, as a penalty for failing to fulfil an obligation, lifting the measures, capitalising on the seized goods, special provisions on the distraint imposable on civilian ships, designation and role of a distraint trustee/provisional trustee, the scope of provisional measures in matters of intellectual property rights regulated as a novelty in the Code of Civil Procedure.*

**Keywords:** *precautionary and provisional measures in civil proceedings, distraint, garnishment, judicial lien, distraint instated on civilian ships, provisional measures in matters of intellectual property rights.*

## 1. Introduction

„A civil proceeding can be defined as the activity carried out by a Court of Law, the parties involved, other persons or bodies taking part in the trial, for the purpose of obtaining or recognising the subjective rights or other legal situations brought before the Court, as well as for the purpose of a mandated enforcement of Court Rulings or other titles, in accordance with the procedures set forth by the law.”<sup>1</sup>

The principles of a civil proceeding make up the basic rules for the entire civil proceeding, both during its trial stage and during its mandated enforcement stage.

The fundamental principles of a trial are: the principle of free access to justice, the right to a fair trial, which must be resolved within an optimal and predictable

deadline, the legality principle, the equality principle, the disposability principle, the principle of good faith, the right of defence principle, the contradiction principle, the orality principle, the immediacy principle, the publicity principle, the continuity principle, the principle of conducting the civil proceeding in Romanian and the judge's active role in uncovering the truth.

Our aim, in this article, is to discuss certain aspects related to the precautionary and provisional measures that can be ordered during a civil proceeding, in observance of the legal provisions in place and the principles governing such civil proceedings, aspects related to notion, classification, the instatement conditions, the instatement procedure, capitalising on the seized assets, lifting and annulling the precautionary measures imposed, special

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<sup>1</sup>Gabriel Boroi, Mirela Stancu, *Civil Trial Law*, 2<sup>nd</sup> Edition, revised and supplemented, Hamangiu Publishing House, Bucharest 2015, p. 3.

provisions on the distraint imposable on civilian ships and provisional measures in matters of intellectual property, analysing, for this purpose, the legal provisions, the doctrine and the relevant jurisprudence in this field.

## 2. Content

According to the General Law Theory, „the law system is the result of unifying all law branches and institutions.”<sup>2</sup>

When it comes to the notion of *law branch*, the specialised doctrine has defined this concept as „the bulk of all judicial norms regulating the social relationships in a certain social life domain, based on a specific regulation method and on certain common principles.”<sup>3</sup>

In the Romanian legal system, the positive law is divided into public and private law. The Public Law includes law branches such as Constitutional Law, Criminal Law, Administrative Law, Financial Law, Procedural Law, Labour and Social Security Law, while the Private Law sphere includes Civil and Commercial Law.

With regards to the topic chosen to be developed in this paper, we’ve mentioned above, that the Procedural Law falls within the scope of Public Law, without specifying if we refer to Criminal Procedural Law, Civil Procedural Law or both.

Placing the Civil Procedural Law in the public or in the private law sphere has generated various controversies and opinions, as „the civil procedure contains legal norms that bring it closer to the public law side (those concerning the organisation and functioning of courts), but also legal norms that bring it closer to private law

(those related to legal actions, the right to plead). ”<sup>4</sup>

Besides, we want to point out that, the rules established by civil procedural law are applicable not only to litigations related to subjective civil rights, pure private law litigations, but they represent the common law in procedural matters as well and, as such, they are also applicable to administrative law cases, to financial and criminal law matters, the latter being law branches that fall exclusively within the scope of public law.

With this regard, art. 2 of the Code of Civil Procedure stipulates: (1) The provisions of this Code make up the common law procedure in civil matters. (2) Besides, the provisions of this Code shall also apply to other matters, insofar as the laws regulating such matters, do not stipulated anything to the contrary.

Moreover, the Contentious Administrative Law no. 554/2004, stipulates, in its transitional and final provisions, in art. 28, paragraph (1), the following: the provisions of this law shall be supplemented by the provisions of the Civil Code and by those of the Code of Civil Procedure, to the extent that such provisions are not incompatible with the specific power relations existing between the public authorities, on the one hand and the persons whose rights or legitimate interests had been prejudiced, on the other hand.

Similarly, Law no. 207/2015, on the Code of Fiscal Procedure stipulates, in its art. 3, paragraph (2), the following: in matters not regulated by the provisions of this Code, the provisions of the Civil Code and those of the Code of Civil Procedure, republished

<sup>2</sup> Nicolae Popa, *General Law Theory*, 6<sup>th</sup> Edition, C.H. Beck Publishing House, Bucharest, 2020, p. 87.

<sup>3</sup> Nicolae Popa (coordinator.), Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *General Law Theory, Seminary Notebook*, 3<sup>rd</sup> Edition, C.H. Beck Publishing House, Bucharest, 2017, p.44.

<sup>4</sup> *Idem*, p. 45.

shall apply, insofar as they may be applicable to the relations existing between public authorities and taxpayers/ payers.

Moreover, the provisions of the Code of Civil Procedure represent the common law in terms of procedure, in case of insolvency as well; thus, Law no. 85/2014 on insolvency prevention procedures and insolvency procedures stipulates, in its art. 342 paragraph (1) the following: the provisions of this law shall be supplemented, insofar as they do not stipulate anything to the contrary, by those of the Code of Civil Procedure and by those of the Civil Code.

By *Civil Procedural Law* we understand the set that includes „the judicial norms regulating the organisation and development of the activity of solving cases related to subjective civil rights and legal situations protected by law, as well as the enforcement of enforceable titles.”<sup>5</sup>

A civil action is the bulk of all procedural means stipulated by law, for the protection of the subjective right claimed by one of the parties or for the protection of another legal situation, as well as to insure the parties’ defence in a trial.

By *subjective right* we understand „a subject’s capacity to claim or defend a certain right, that is legally protected, against third parties.”<sup>6</sup>

The Code of Civil Procedure regulates, in its 4<sup>th</sup> Book, named *Special Procedures*, the 4<sup>th</sup> Title – *Precautionary and Provisional Measures*, some aspects related to distraint – general provisions and special provisions for the distraint of civil ships, garnishment, judicial lien and provisional measures in matters of intellectual property rights.

Thus, the Code of Civil Procedure regulates three precautionary measures, namely distraint, garnishment and judicial lien. At the same time, the provisional measures in the matter of intellectual property rights are also regulated, provisional measures that are not precautionary measures, but specific measures for the protection of the above-mentioned rights, regardless of their patrimonial or non-patrimonial content.

„Precautionary measures are procedural means meant to render unavailable, a debtor’s seizable assets (in the case of distraint and garnishment) or the assets making up the subject matter of a procedure (in the case of judicial lien) to prevent their debasement or their disappearance (in case of real assets) or the reduction of the debtor’s patrimonial assets (in case of personal assets).”<sup>7</sup>

## 2.1. Distraint

A distraint measure consists of rendering unavailable the debtor’s movable and/or immovable seizable assets, that are still in his/her possession or in the possession of a third party, for the purpose of capitalising on them when the creditor of a certain amount of money obtains an enforceable title, according to art. 952 - 959 of the Code of Civil Procedure.

The conditions that must be met in order to instate a distraint measure are stipulated in art. 953 of the Code of Civil Procedure, where we can identify three situations in which a distraint measure can be ordered; therefore, we can also identify

<sup>5</sup> Andreea Tabacu, *Civil Procedural Law – national and international legislation*, doctrine and jurisprudence, Universul juridic Publishing House, Bucharest, 2015, p. 8.

<sup>6</sup> Nicolae Popa, *op.cit.*, 2012, p. 30.

<sup>7</sup> Gabriela Răducan, Mădălina Dinu, *Civil Procedure Sheets for the admission to Magistracy or Lawyering Activities*, 4<sup>th</sup> Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2016, p. 327.

specific conditions to be met for each of these situations.

Thus, the first such situation is presented in art. 953, paragraph (1), namely: A creditor that does not have an enforceable title, but whose receivable is confirmed in writing and exigible, may ask for the instatement of a distraint over the debtor's movable and immovable assets, if they can prove that they have filed a Suing Petition in Court. They can be ordered to pay a bail set forth by the Court.

Consequently, when it comes to the first situation, the following conditions must be cumulatively met for the instatement of a distraint:

1. The receivable must be confirmed by a written document, which would not represent an enforceable title under the law;
2. The receivable must be exigible;
3. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case, having, as subject matter, the payment of the money for which the distraint measure is requested;
4. The Creditor may be ordered to pay a bail, with the posting of that bail being optional and the amount of such bail being set forth by the Court;
5. The distraint can only be instated over the debtor's movable and/or immovable seizable assets, which are still in his/her possession or in the possession of a third party.

The second situation in which a distraint measure can be ordered, is presented in art. 953, paragraph (2) of the Code of Civil Procedure, namely: A creditor whose receivable is not confirmed by a written document, shall also have the same right, if they can prove that they have filed a Suing Petition in Court and they submit,

along with the distraint request, a bail amounting to half of the claimed sum.

If we read the above-mentioned text, we realise that, for to the second situation in which a distraint can be instated, the following conditions must be cumulatively met:

1. The creditor's receivable must not be confirmed by a written document;
2. The creditor's receivable must be exigible;
3. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case, having, as subject matter, the payment of the money for which the distraint measure is requested;
4. The creditor must also prove that they have posted a bail equal to half of the receivable claimed in the litigation; in this case, both the posting and the amount of the bail shall be mandatorily determined by lawmakers;
5. The distraint can only be instated over the debtor's movable and/or immovable seizable assets, which are still in his/her possession or in the possession of a third party. The seizable nature of an asset shall be determined in accordance with the exiting provisions in place in the filed of mandatory attachment – art. 727 of the Code of Civil procedure.

The third situation is stipulated in art. 953, paragraph (3) of the Code of Civil Procedure, which states: The Court may order a distraint measure even if the receivable is not exigible yet, if the debtor has reduced, via their actions, the guarantees provided to the creditor or if they have failed to provide the guarantees promised or, when there is a risk that the debtor would avoid the seizing measures or they would conceal or scatter their wealth. In such cases, the creditor must prove the fulfilment of the other conditions stipulated in paragraph (1)

– the first situation – and they must post a bail in the amount set forth by the Court.

Thus, the necessary conditions that must be cumulatively met to institute a distraint measure in the third situation, are the following:

1. The creditor's receivable must be confirmed by a written document, which would not represent an enforceable title under the law;
2. The creditor's receivable must be exigible;
3. The creditor must prove that the debtor has reduced, via their actions, the guarantees provided to the creditor or that they have failed to provide the guarantees promised or that there is a risk that the debtor would avoid the seizing measures or they would conceal or scatter their wealth;
4. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case;
5. The creditor must post a bail, in the amount set forth by the Court; in this case, the posting of the bail is mandatory, but its amount shall be left at the Court's discretion;

We consider it useful to underline the provision of art. 1.417 paragraph (1) of the Civil Code, according to which: the Debtor shall forfeit the benefit of making the payments upon the deadlines agreed upon if they are in default or in insolvency declared under the law and if they reduce, via their actions, either on purpose or due to gross negligence, the guarantees set up in favour of the Creditor, or when they fail to institute the guarantees promised.

When it comes to the procedure of instating a distraint measure, the application for such measure must meet the general conditions stipulated in art. 148 of the Code of Civil Procedure, as well as the conditions presented in art. 194 of the Code of Civil Procedure.

„A request to instate a precautionary or a provisional measure may be formulated both directly and incidentally, within an ongoing trial [art. 30, paragraph (6) of the New Code of Civil Procedure] or as an accessory application [art. 30, paragraph (4) of the New Code of Civil procedure], if it is requested via the very Suing Petition filed on the merits of the case.”<sup>8</sup>

The Court competent to resolve such a request, for the instatement of a distraint measure, shall be the Court competent to try the case on its merits. If the request to instate a distraint measure is submitted via the Suing Petition filed on the case merits, it shall be entrusted to the Court charged with the settlement of the case merits, but the distraint request shall be resolved before the first hearing of the merits litigation, according to art. 203, paragraph (2) of the Code of Civil Procedure.

The Court shall urgently decide on such matter, in Council Chambers, without subpoenaing the parties, by way of an enforceable ruling, setting forth the maximum amount for which the distraint measure is approved, as well as the amount of the bail and the deadline for its posting, if applicable.

Failure to post the bail within the set deadline, shall lead to the annulment of the distraint under the law. Such annulment shall be confirmed by a final court ruling, issued without subpoenaing the parties. The

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<sup>8</sup> Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negrilă, Veronica Dănăilă, Delia Narcisa Teohari, Gabriela Răducan, Dumitru Marcel Gavriș, Flavius George Păncescu, Marius Eftimie, *The New Code of Civil procedure. Comments by article*, Vol. II. Art. 527-1133, Hamangiu Publishing House, Bucharest, 2013, p. 490.

judicial bail concept is regulated by the provisions of art. 1.057-1.064 of the Code of Civil Procedure.

The Ruling issued on the restraint request shall be communicated by the Court to the creditor, right away and it shall be communicated by the bailiff to the debtor, when the measure is enforced. The issuance of such ruling may be postponed by maximum twenty-four hours, and the substantiation of the decision made, must be provided within maximum 48 hours of its issuance.

„The bailiff shall only communicate the enforceable ruling to the debtor if the above-mentioned ruling orders the instatement of a distraint measure; if the Court rejects the creditor's request for the instatement of such measure, the ruling shall not be communicated.”<sup>9</sup>

Such ruling may only be challenged by appeal, within five days of its communication, before the Court hierarchically superior to the one that issued it. Such an appeal shall be tried urgently, most likely by quickly subpoenaing the parties.

In all cases when the competent first instance court is the Court of Appeal, the remedy method shall be a recourse.

A distraint measure shall be enforced by the bailiff, in accordance with the rules applicable to mandatory enforcements, which shall be applied appropriately, without any other authorisation or consent being needed with this regard.

In case of immovable assets, the bailiff shall travel, as quickly as possible, to the place where such assets are located. The bailiff shall place the seizable assets under restraint, only to the extent that this is necessary to recover the receivable. In all cases, the distraint measure shall be enforced

without any prior writ or notification to the debtor.

A distraint measure applied to an asset subject to any publicity formalities, shall immediately be registered in the Land Book, in the Trade Registry, in the *National Movable Publicity Registry* (Electronic Archive of Security Interests) or in any other public records, as the case may be. Such registration shall render the distraint legally binding to anyone who gains any rights over the property in question, after the registration.

The interested party shall have the right to contest the enforcement method of any distraint measure.

The Court may order a distraint measure lifted, upon the debtor's request, if such debtor provides, in all cases, a sufficient (personal or real) security. Such request shall be resolved in the Council Chambers, with a quick subpoenaing of the parties, by way of a ruling that can only be challenged by way of appeal, within five days of its issuance, before the court hierarchically superior to the one that issued it. Such appeal shall be tried urgently.

Besides, if the main application, based on which the precautionary measure was ordered, is later annulled, rejected or declared outdated, by a final court decision, or its author no longer requests its judgement, the debtor may ask for such precautionary measure to be lifted by the same court that instated it. The court shall rule on such a request via a final ruling, issued without subpoenaing the parties.

The seized assets shall only be capitalised on, once the creditor obtains an enforceable title, represented by a final Court Decision ordering the debtor to pay the money claimed by the creditor.

<sup>9</sup> Gabriela Răducan, Mădălina Dinu, *op.cit.*, p. 329.

## 2.2. Special provisions on the distraint imposable on civil ships

The creditor may ask for a distraint to be instated on civilian ships, under the conditions described above and in observance of the international conventions applicable to the distraint of ships, that Romania is part of.

With this regard, we mention the International Convention for the Unification of Certain Rules on the Arrest of Sea-going Ships signed in Brussels on May 10, 1952, that Romania adhered to, under Decree no. 40/1991 on Romania's accession to the International Convention for the Unification of Certain Rules on the Arrest of Sea-going ships, signed in Brussels on May 10, 1952, respectively, under Law no. 91/1995 on Romania's accession to the International Convention for the Unification of Certain Rules on Arrest of Sea-going ships, signed in Brussels on May 10, 1952.

According to art. 1, point 1 of the International Convention for the Unification of Certain Rules on the Arrest of Sea-going Ships, a „maritime claim” means a claim or a receivable arising out of one or more of the following: (a) damage caused by any ship either in collision or otherwise; (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship; (c) salvage; (d) agreements related to the use or hire of any ship whether by charterparty or otherwise; (e) agreements related to the carriage of goods in any ship whether by charterparty, under a bill of lading or otherwise; (f) loss of or damage to goods including baggage carried in any ship; (g) general average; (h) bottomry; (i) towage; (j) pilotage; (k) goods or materials wherever supplied to a ship for her operation or maintenance; (l) construction, repair or equipment of any ship or dock charges and dues; (m) wages of Masters, Officers, or crew; (n) Master's disbursements, including

disbursements made by shippers, charterers or agent on behalf of a ship or her owner; (o) disputes as to the title to or ownership of any ship; (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship; (q) the maritime mortgage or security.

On the same time, according to art. 1, point 2 of the same Convention, „arrest” means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

The procedure to instate a distraint measure on civilian ships requires, in urgent cases, the possibility to formulate the instatement request, even before a Suing Petition is submitted to a Court, on the case merits. In this case, the creditor for whom the distraint measure is granted, shall have the obligation to submit the above-mentioned suing petition before the competent court or to take the necessary steps to convene an arbitration court within maximum twenty days of the precautionary measure's approval. A distraint request shall be triad urgently, in the council chambers, with the Court subpoenaing the parties. The Ruling of the Court is enforceable and it can only be appealed within five days of its issuance.

Failure to submit the Suing Petition, on the case merits, within the above-mentioned 20-day deadline, shall lead to the annulment of the distraint. Such an annulment shall be confirmed by a final Court Ruling, issued with the Court subpoenaing the parties.

The Court competent to resolve a request for the instatement of a distraint measure over a civilian ship shall be the tribunal of the region where the ship is located (the Constanta Tribunal or the Galati Tribunal), regardless of the court where the Suing Petition has been or is about to be submitted on the case merits.

No distraint measures can be instated over a civilian ship that is on the verge of leaving. A ship is considered to be on the verge of leaving, once the commander of that ship has, onboard, all the certificates, the ship's documents, as well as the departure permit, handed to him/her by the Harbour Master, according to art. 963 of the New Code of Civil Procedure.

A voyage authorisation may be issued by the same Court that ordered the distraint measure, upon the request of the creditor holding a claim over that ship, upon the request of a co-owner of the ship or even upon the debtor's request, while also setting forth all the pre-emptive measures that might be necessary, depending on the circumstances. Such a request shall be tried urgently, in the Council Chambers, with the court subpoenaing the parties. The Ruling shall be enforceable and it shall only be appealed within five days of its issuance.

The ship shall only be allowed to leave, once the approval ruling is transcribed in the records kept by the relevant maritime authority and an adequate observation is inserted in the ship's nationality document.

The expenses incurred with such a voyage shall be borne by the party that requested its approval.

The ship lease for a court-mandated voyage, may be added to the sale price, after all the voyage expenses are deducted.

A transfer of the distraint may be approved for justified reasons, upon the debtor's or the creditor's request, as the case may be; the court that ordered the distraint shall have the right to swap one seized ship for another.

The creditor, who is the legitimate owner of the Bill of Lading, may seize the merchandise on the ship, listed in such Bill of Lading. If the ship's distraint is not requested, the creditor shall have to ask for the vessel to be unloaded as well.

A precautionary distraint measure shall be enforced by the Harbour Master of the port where that ship is located, who shall arrest the vessel in question. In this case, the Harbour Master shall not issue the documents needed for the ship's navigation and it shall not allow the vessel to leave the port or the berth. The interested party shall have the right to challenge the way the distraint is enforced, by contesting such enforcement before the tribunal serving the place where the ship is located, according to art. 967 of the Code of Civil Procedure.

In order to guarantee the port traffic and the civil security while the ship is arrested, the tribunal serving the place where the vessel is located (the Constanta or the Galati Tribunal), may issue a Presidential Order, to instate emergency measures; in this case, the provisions of art. 997 and the following, of the Code of Civil Procedure shall apply accordingly.

A temporary halt of the ship, in the absence of a Court Decision, may also be ordered by the Harbour Master, under the conditions of the special law.

Thus, according to art. 132 of Government Decree no. 42/1997, on sea transport and on the transportation carried out on interior navigable ways, as modified under Emergency Government Decree no. 74/2006, Harbour Masters may prevent any ship from leaving a port or another place of stoppage located on the national navigable waters, upon a request coming from the Romanian Naval Authority, the Port Administrations and/or the Navigable Ways Administrations, from other public state authorities or from certain economic agents, if the ship's owner or operator or the owner of the merchandise transported by the ship, has debts towards the above-mentioned authorities or economic agents. Such a departure interdiction cannot last for more than twenty-four hours counted from submission of the ship's departure approval



request. Once this period expires, the ship shall only be detained if the claimant provides the Harbour Master with an enforceable ruling with this regard, issued by a Court of Law. Such detention can cease if the ship's owner or the owner of the merchandise transported on the ship, as the case may be, proves that they have set-up sufficient guarantees to cover the receivable claimed and such guarantees have been accepted by the person who requested the ship's detention.

### 2.3. Garnishment

According to art. 970 of the Code of Civil Procedure, a precautionary garnishment can be instated over amounts of money, securities or other movable intangible seizable assets owed to the debtor by third parties or set to be owed in the future based on certain existing legal relationships, under the conditions set forth, for the instatement of precautionary distraint, in art. 953 of the Code of Civil procedure – the three situations presented above.

As we've said before, the provisions regulating the instatement of precautionary distraint, as well as those related to the settlement of such request, the enforcement of the measure, the annulment and lifting of a distraint, shall apply, accordingly, to garnishment as well.

„A specification must be made, in relation to the content of a Garnishment request. Thus, art. 971, paragraph (2) stipulates the following: in case of a bank garnishment request, the creditor must not necessarily identify, in its content, the third parties targeted by such request. *Per a contrario*, we can conclude that, when a garnishment request is submitted against third parties other than a bank, it is

mandatory to indicate the garnished third party, in the garnishment request.”<sup>10</sup>

### 2.4. Judicial lien

A judicial lien consists of rendering unavailable the assets that are the subject-matter of a litigation or other assets under the law, by entrusting them for protection to a lien trustee, until the trial is resolved by an enforceable judgment.

As a rule, a lien is instated over assets making up the subject matter of a merits litigation, and the measure may be instated over the totality of such assets or over a part of them, over tangible and/or intangible assets, such as shares in limited liability or in share companies. As an exception, a lien may also be instated over goods that do not make up the subject matter of a merits litigation, in the situations and under the conditions stipulated by law.

Thus, as a rule, whenever there is a litigation over the ownership or over another main real right, over the possession of a movable or an immovable asset, or over the use or administration of a jointly-owned good, the Court may approve the instatement of a judicial lien, upon the interest party's request, if such a measure is necessary to preserve the respective right.

By “*the interested party*” we understand either one of the litigating parties or a third party, such as a creditor of the litigating parties, who asks for a judicial lien to be instated, via the oblique action regulated in the Code of Civil Procedure, in art. 1.560-1.561.

As an exception, a judicial lien may be approved, even without a trial:

1. Over an asset that the debtor offers for their release;
2. Over an asset in relation to which, the interest party has serious reasons to fear

<sup>10</sup> Gabriel Boroi, Mirela Stancu, *op.cit.*, p. 379 - 380.

that it would be stolen, destroyed or altered by its current holder;

3. Over certain movable assets making up the creditor's guarantee, when the creditor reveals the debtor's default or when they have serious reasons to suspect that the debtor would avoid a mandatory enforcement or that the said assets would be stolen or deteriorated.

In the exceptional cases mentioned above, the party that obtained the instatement of a judicial lien shall have the obligation to file a Suing Petition with the competent court, to take the necessary steps to convene an arbitration court or to ask for the enforcement of the enforceable title, within maximum twenty days of the precautionary measure's approval; otherwise, the judicial lien shall be annulled under the law. Such an annulment shall be confirmed by a final Court Ruling, issued without subpoenaing the parties.

The court competent to rule on a request related to the instatement of a judicial lien, shall be the court charged with trying the case on its merits (when there is a trial pending – the rule) and the court serving the region where the assets is located (when there is no trial pending – the exception).

When it comes to the procedure employed to instate a judicial lien, the request for such a lien shall be tried urgently, with the court subpoenaing the parties.

If the request is upheld, the court shall be able to force the plaintiff to pay a bail – setting forth the amount and the posting deadline of such bail – other the penalty of having the precautionary measure annulled under the law.

The Judicial lien shall be registered in the Land Book, in the Trade Registry, in the National Movable Publicity Registry (*formerly known as the Electronic Archive of Security Interests*) or in any other public records, as the case may be. The Court ruling resolving the request to instate a judicial lien

can only be challenged by appeal, within five days of its issuance, before the court hierarchically superior to the one that issued it. Its issuance may be delayed by maximum twenty-four hours, and the substantiation of the decision made, must be provided within maximum forty-eight hours of its issuance.

In all cases when the competent first instance court is the Court of Appeal, the remedy method shall be a recourse.

If the lien request is upheld, the asset shall be entrusted, for protection, to a lien trustee – namely, to a person jointly appointed by the parties and, if the parties cannot come to an agreement with this regard, to a person appointed by the court, who might be the very holder of the asset in question. For this purpose, the bailiff notified by the interested party, shall travel to where the location of the asset set to be placed under lien, to handed over to the lien-trustee, based on a handover report. A copy of this report shall be provided to the court that approved this lien measure.

The lien-trustee shall be entitled to carry out all preservation and administration activities, to cash in any incomes or amounts owed and to pay any current debts, as well as any debts certified by an enforceable title. Besides, with the prior authorisation of the Court that appointed him/her, the lien trustee shall be entitled to alienate the asset, if it cannot be preserved or if the alienation is obviously necessary for other reasons; besides, he/she shall be allowed to participate in trials related to the asset placed under lien, on behalf of the litigating parties, if he/she has been previously authorised to do so.

If a person other than the holder of the asset is appointed lien -trustee, the court shall determine an amount as remuneration for the activity performed, while also setting forth the payment methods; thus, the provisions of Title V of the Civil Code – having the marginal designation of

„Administering other people’s assets” shall be come applicable.

„Once the trial is completed, the lien-trustee shall must hand over the asset, along with its fruits, including any income collected, to the party to whom the property was assigned by Court Decision, and if the lien - trustee was himself/ herself a party to the proceedings, and he won the case, then he/she shall keep the assets and its fruits.”<sup>11</sup>

In urgent cases, the court will be able to appoint, by final ruling issued without subpoenaing the parties, a provisional trustee, until the judicial lien request is resolved.

## **2.5. Provisional measures in matters of intellectual property rights**

The provisions of art. 978 – 979 of the Code of Civil Procedure regulate the provisions measures needed to protect one’s intellectual property rights, regardless of their patrimonial or non-patrimonial content and regardless of their origin. The provisional measures needed to protect other non-patrimonial rights are regulated by art. 255 of the Civil Code.

If the owner of an intellectual property right or any other person who uses such intellectual property right with the owner’s consent can credibly prove that their intellectual property rights are the target of a current or an imminent illicit action, that threatens to cause them a prejudice that would be hard to repair, they can ask the Court to order certain provisional measures.

When it comes to the admissibility of a request to instate provisional measures in matters of intellectual property rights, a reading of the legal provisions in place

reveal the following: a) the plaintiff must be the owner of the intellectual property right in question; these measures may also be requested by any other person exercising the intellectual property right, with the owner’s consent; b) the intellectual property right must be the target of a current or an imminent illicit breaching action; c) there is a risk that a prejudice might be caused, that would be difficult to repair, d) the measures ordered must be provisional in nature; the case merits must not be pore-judged.”<sup>12</sup>

The Court may specially forbid the breach or it may order the provisional cessation of such breach or, it may order the implementation of the necessary measures to preserve the evidence

Thus, Law no. 8/1996 on copyright and its related rights, stipulates, in its art. 188: (1) The holders of the rights recognised and protected under this law may ask the courts or other competent bodies, as the case may be, to recognise their rights and to confirm their violation and they may claim compensations for the reparation of the prejudices caused. The same requests may also be made for and on behalf of the holders of these rights, by management bodies, by anti-piracy associations or by other persons authorised to use the rights protected under this law, in accordance with the mandate granted to them for this purpose. When an action has been initiated by the rights holder, the persons authorised to use the rights protected under this law may intervene in the trial, requesting the reparation of the prejudice caused to them; (2). In determining the compensations due, the court shall take into account: a) either criteria such as the negative economic consequences suffered, particularly lost

<sup>11</sup> Gabriel Boroi, Mirela Stancu, *op.cit.*, p. 382.

<sup>12</sup> Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negrilă, Veronica Dănăilă, Delia Narcisa Teohari, Gabriela Răducan, Dumitru Marcel Gavriș, Flavius George Păncescu, Marius Eftimie, *op.cit.*, pp. 533 – 534.

gains, benefits unjustly obtained by the perpetrator and, where appropriate, elements other than economic factors, such as the moral damages caused to the right's holder; b) or the granting of compensations equal to three times the amounts that would have been legally due for the type of use that made-up the object of the illicit action, if the criteria provided under letter a) are not applicable; (3) If the copyright holder or one of the persons mentioned in paragraph (1) can credibly prove that their copyright is the target of a current or an imminent unlawful action, and that such action is likely to cause them a prejudice that would be difficult to repair, they may ask the court to take certain provisional measures. The court may order in particular: a) the prohibition of the violation or its temporary cessation; b) the necessary measures to ensure the preservation of evidence; c) the necessary measures to ensure the repair of the prejudice; To this end, the court may order precautionary measures against the movable and immovable assets of the person alleged to have breached the rights recognised under this law, including a freeze of their bank accounts and other assets. For this purpose, the competent authorities may order the communication of bank, financial or commercial documents or they may provide for appropriate access to pertinent information; d) Collecting or handing-over, to the competent authorities, all the goods in respect of which there are suspicions regarding the breach of a right protected under this law, in order to prevent them from being placed on the market; (4) The applicable procedural provisions are contained in the dispositions of the Code of Civil Procedure, related to the provisional measures in matters of intellectual property rights.

Besides, Law no. 64/1991 regarding the patents for invention, stipulates, in its art. 66, as follows: (1) If the holder of a patent

for invention held between March 6, 1945 and December 22, 1989 or the persons holding an industrial property right protected by a patent granted by the Romanian state and the legal successors of such persons, whose patrimonial rights conferred by the patent have been infringed by the abusive exploitation of the invention in question, without the consent of the proprietor or by any other act of infringement of such rights, or any other person exercising the industrial property right with the consent of the proprietor, can credibly prove that their industrial property right, protected by such patent is the target of a current or an imminent unlawful action, and that such action is likely to cause them a prejudice that would be difficult to repair, they may ask the court to take provisional measures; (2) The court may order in particular: a) the prohibition of the infringement or its temporary cessation; b) the necessary measures to ensure the preservation of evidence. The provisions of Government Emergency Decree no. 100/2005 on ensuring the observance of industrial property rights, approved with amendments by Law no. 280/2005, with its subsequent amendments and supplements are also applicable here; (3) The applicable procedural provisions are contained in the dispositions of the Code of Civil Procedure related to provisional measures in matters of intellectual property rights; (4) Such provisional measures may also be ordered against an intermediary whose services are used by a third party to infringe a right protected by this law.

In case of prejudices caused by the written or the audio-visual media, the court may not order a temporary cessation of the prejudicial action unless the prejudices caused to the plaintiff are serious, if the action is not obviously justified, according to art. 75 of the Civil Code, and if the measure ordered by the court does not

appear to be disproportionate in relation to the prejudices caused. The provisions of art. 253 paragraph (2) of the Civil Code shall remain applicable.

The court shall resolve the request according to the provisions related to presidential orders, which shall apply accordingly, namely art. 997 and the following of the Code of Civil Procedure.

If the request is made before the Suing Petition is filed on the case merits, the decision ordering the provisional measure shall also set the time limit for the said Petition to be filed, under the penalty of having the measure ordered terminated under the law.

The measures taken prior to initiating a court action for the protection of an infringed right shall cease under the law, if the applicant fails to notify the court within the above-mentioned time limit, but not later than 30 days after their instatement.

If these measures can cause a prejudice to the opposite party, the Court may order the plaintiff to post a bail, in the amount set by the court; otherwise, the measure ordered shall cease under the law.

Upon the interested party's request, the plaintiff shall have the obligation to repair the prejudice caused by the precautionary measures taken, if the court action initiated on the merits of the case, is dismissed as unfounded. However, if the plaintiff is not at fault or the blame can be put on him only to a minor extent, taking into account the concrete circumstances of the case, he/she may refuse to pay the compensations ordered or he/she may ask for their reduction.

If the opposite party does not ask for liquidated damages, the court shall order the release of the bail, at the plaintiff's request, by decision issued after subpoenaing the parties. Such a request shall be tried in accordance with the provisions related to

Presidential Orders, which shall apply accordingly.

If the defendant opposes the release of the bail, the court shall set a deadline for initiating the court action on the merits of the case, which may not be longer than thirty days counted from the date the Court Decision was issued, under penalty of having the measure that rendered the bail amount unavailable, lifted.

### 3. Conclusions

The Code of Civil Procedure regulates, in its 4<sup>th</sup> Book, named *Special Procedures*, the 4<sup>th</sup> Title – *Precautionary and Provisional Measures*, some aspects related to distraint – general provisions and special provisions for the distraint of civilian ships, garnishment, judicial lien and provisional measures in matters of intellectual property rights.

At the same time, the provisional measures in the matter of intellectual property rights are also regulated, provisional measures that are not precautionary measures, but specific measures for the protection of the above-mentioned rights, regardless of their patrimonial or non-patrimonial content.

A distraint measure consists of rendering unavailable the debtor's movable and/or immovable seizable assets, that are still in his/her possession or in the possession of a third party, for the purpose of capitalising on them when the creditor of a certain amount of money obtains an enforceable title, according to art. 952 - 959 of the Code of Civil Procedure.

A precautionary garnishment can be instated over amounts of money, securities or other movable intangible seizable assets owed to the debtor by third parties or set to be owed in the future based on certain existing legal relationships, under the conditions set forth, for the instatement of

precautionary distraint, in art. 953 of the Code of Civil Procedure.

A judicial lien consists of rendering unavailable the assets that are the subject-matter of a litigation or other assets under the law, by entrusting them for protection to a lien trustee, until the trial is resolved by an enforceable Court Decision.

*The provisions of art. 978 – 979 of the Code of Civil Procedure regulate the provisions measures needed to protect one's intellectual property rights, regardless of their patrimonial or non-patrimonial content and regardless of their origin. The provisional measures needed to protect other non-patrimonial rights are regulated by art. 255 of the Civil Code.*

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