1. Definition

1.1 In line with the European Court of Justice’s decision in Reichert it is the role of provisional measures under VO 44/01/EG to “preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter”.

What provisional measures under your domestic laws come within this definition?

According to section 27 of the Civil Jurisdiction and Judgments Act following provisional and protective measures come within the scope of Brussels/Lugano Conventions and Brussels Regulation:

1. grant a warrant for the arrestment of any assets of moveable property situated in Scotland
2. grant a warrant of inhibition over any property situated in Scotland which applies to heritable property; and
3. grant interim interdict, i.e. prohibition to do something.

1.2 Does your national legal system provide for the following (functional) subdivision (classification) of provisional measures:

1.2.1 measures to secure assets of which an ultimate judgment may be satisfied (such as an “Arrest”, section 916 et seq. German ZPO);

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1 ECJ 26 March 1992, Case C - 261/90, Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG. Case C-261/90, ("Reichert") at paragraph 34.

Yes, warrant for arrestment freezes the funds or moveable property of the debtor in the hands of the third party until the decision has been finalised.

1.2.2. measures to maintain the status quo pending determination of the issues at trial (such as an injunction in competition / antitrust disputes);

Using interim interdict it is possible to prevent the defendant to acting in a certain manner until the final judgment.

1.2.3. measures to ensure interim payments or interim performance (such as kort geding, référed provision);

No, with the provisional measures the funds or property is frozen until litigation, or the defendant only prevented from acting in a certain manner.

1.3. For each of the provisional measures addressed in question 1.1 please state to which of the subdivisions set out under 1.2 it belongs;

1.3 Does the legal literature / doctrine in your State favour an alternate or different classification to that set out under 1.2 above;

No.

1.5. To what extent do measures for the preservation of evidence (search orders) come within the scope of provisional protection of rights (mesure provisoire / conservatoire)?

2. Measures securing the enforcement of judgment (attachment orders)

2.1 What provisional measures does your national law provide for the enforcement of claims for payment;

This is arrestment on dependence, arrestment, and to realise the assets or property the creditor needs to apply for an action on forthcoming.

Furthermore, it provides for arrestment of earnings and pensions. However, according to Article 27 of the 1982 Civil Jurisdiction and Judgments Act, this type of arrestment is not available for cross-border purposes.

2.2 What provisional measures (injunctions) currently ensure the performance or failures/omissions to act?

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3 Please answer this question with regard to the questionnaire concerning the transparency of a debtor's assets.
Interim interdict is allowed, however, this does not ensure the performance of the defendant but rather prevents the defendant acting in a certain manner which would defeat the purpose of the case, or for example destroy the object.

2.2.1 Measures ensuring the performance of entitlements to services

No.

2.2.2 Restraining orders

This is interim interdict.

2.3 The pre-conditions for the obtaining of provisional measures

2.3.1 With regard to the claim that is to be secured:

2.3.1.1 does the claim have to be due;

In arrestment in execution the claim need to be due as it is required that the there is a decree from a court.

2.3.1.2 can a future claim be secured;

Future claim can be secured by using an arrestment on dependence in special circumstances, such as where there are averments that the defender is *vergens ad inopiam* or *in meditatione fugae*, i.e. that the defendant is in a significant risk of insolvency or contemplating flight from the country (*Gillanders v. Gillanders* (1966) SC 54; *Brash v. Brash* (1966) SC 56; *Costain Building and Civil Engineering Ltd. V. Scottish Rugby Union* (1993) SC 650).

2.3.1.3 must the creditor present an enforceable title\(^4\);

For arrestment in execution an enforceable title or judgment is required.

For arrestment on dependence it is only necessary that an action has been taken to the courts, or action will be taken in future within 20 days of execution of arrestment for the Court of Session (Debtors (Scotland) Act 1838 section 17) or for summary causes in the sheriff court the period is 42 days (Summary Cause Rules, rule 47).

Pursuers in foreign actions, which have been commenced but not concluded, may apply by petition to the Court of Session for warrant to arrest assets situated in Scotland, or inhibition or interim interdict (Civil Jurisdiction and Judgments Act 1982, section 27(2)(a)).

\(^4\) If yes, please comment at question 6 following on the delineation of provisional enforcement.
2.3.1.4 if you answered yes to 2.3.1.3 above, please state which titles must be presented (judgment, notarial act settlement or something else)

To the petition to the Court of Session the creditor needs to use prescribed form which requires to be produced following documents (Rules of Court, rule 62.28):

(1) certified copy of the judgment to be registered;

(2) a document which establishes that, according to the law of the country in which the judgment has been given, the judgment is enforceable and has been served;

(3) where judgment has been given in default of appearance, the original or a certified copy of the document which establishes that the party against whom the judgment was given was served with the document initiating the proceedings or with an equivalent document;

(4) where appropriate, a document showing that the applicant is in receipt of legal aid

And an affidavit stating-

(i) whether the judgment provides for the payment of a sum of money;

(ii) whether interest is recoverable on the judgment under the law of the country in which judgment was given, and if so, the rate of interest, the date from which interest is due and the date on which interest ceases to accrue;

(iii) an address within the jurisdiction of the court for service on or intimation to the petitioner;

(iv) the usual or last known place of residence or business of the person against whom the judgment was given;

(v) the grounds on which the petitioner is entitled to enforce the judgment; and

(vi) the part of the judgment which is unsatisfied.

Or where the petitioner does not produce a document required under paragraph (2)(a) to (d), such as applying for arrestment on dependence or interim interdict where there is no judgment is available, the court may-
(a) fix a period within which that document is to be lodged;
(b) accept an equivalent document (such as proof of service); or
(c) dispense with the requirement to produce the document.

2.3.2. With regard to the potential injury to the plaintiff

With regard to arrestment or inhibition on dependence it is not necessary to show potential injury for the pursuer – only that there is a conclusion for the payment of money (Stafford v. Laurin (1875) 3 R. 148; Ellison v. Ellison (1901) 4 F. 274; Fisher v. Weir (1964) SLT (Notes) 99).

Whereas in relation to interim interdict, the court will look at the relevant circumstances, whether there is potential harm for the pursuer. For example in Haden Young Ltd. v. Dinsmore (2003) SLT 695, interim interdict was refused by the Court of Session because the pursuer failed show reasons for the interdict. This case law is factually based and therefore it is difficult to set out those situations exhaustively where the court will or will not grant an interim interdict.

2.3.2.1. urgency

This can be one of the grounds for the interim interdict – provided that the pursuer can establish the urgent need for the protection.

2.3.2.2. imminent frustration of enforcement of a judgment on the merits

Yes.

2.3.2.3. imminent competition from other creditors

No, this does not apply to interim interdict. Neither it is a ground for arrestment or inhibition on dependence.

2.3.2.4. other reasons for urgency

2.3.3. Additional pre-conditions

To show that harm might occur.

2.4. Proceedings to obtain an order for provisional measures
2.4.1. which court has jurisdiction:
For the foreign judgments only the Court of Session has a jurisdiction.

2.4.1.1 the court hearing the main proceedings:
No, petition needs to be made separately for Court of Session in Scotland.

2.4.1.2 the court at the place of enforcement measures:
Yes, this is the Court of Session.

2.4.1.3 other court(s):

2.4.1.4. who determines on the application:
The petition is to be made to Lord Ordinary in Outer House of the Court of Session.

2.4.1.4.1. in relation to 2.4.1.1: is the decision maker a single judge, another judge, other persons (eg. registrar)
Lord Ordinary is a lower Court of Session judge and he/she sits alone to make the decision.

2.4.1.4.2 in relation to 2.4.1.2: is it the competent court or another organ (eg. registrar, bailiff, law enforcement authority)
It is the court.

2.4.2 What evidence must the creditor present when applying for a provisional measure?

2.4.2.1. in relation to the claim
see 2.3.1 above

2.4.2.2. in relation to the basis for the preservation (urgency) (see 2.3.2 above)
In relation to interim interdict the pursuer needs to show factual evidence of the harm which might result if the court will not grant interim interdict.

2.4.2.3. in relation to further pre-conditions (see 2.3.3 above)

5 In relation to international jurisdiction, compare under question 5.1 following.

6 Is there a difference if the provisional measure is sought prior to, or during the main proceedings?

7 Compare in particular ECJ, 17.11.1998, C-391/95, Van Uden, para 19.
2.4.3. Defences available to the debtor in the application/proceedings:

2.4.3.1. does the court decide ex parte or does the debtor have a right to be heard (adversary proceedings)

The decisions for arrestment or inhibition on dependence are made ex parte. Interim interdict can be requested as ex parte.

Whereas arrestment in execution, inhibition can be requested with the main action. Similarly interim interdict can be requested along with the main action. In these cases the hearing is made with both parties present.

2.4.3.2. are the proceedings oral or written

Proceedings for the arrestment on dependence and inhibition on dependence are written, there are forms which the petitioner can use to ask for the court to grant a warrant.

Whereas if the pleadings are made in context of full proceedings, then the proceedings are oral.

2.4.3.3. can the debtor address to the court a protective writing

No, the debtor is not heard at the first instance.

2.4.4 What standard of proof applies in the proceedings

In relation to arrest or inhibition on dependence the pursuer needs to show that the debt is monetary in nature.

Whereas any evidence can be used for interim interdict.

2.4.4.1. in relation to the claim to be secured (see 2.3.1 above)
2.4.4.2. in relation to the urgency (see 2.3.2 above)
2.4.4.3. in relation to other pre-conditions (see 2.3.3 above)
2.4.4.4. is the applicable law determined according to the principles of conflict of laws or does the court (simply) apply the lex fori

The court uses lex situs of the assets/funds/property.

2.5. Content and effect of the provisional measure

2.5.1. is its content determined by legislation? If yes, please attach a copy of the relevant legislation in the annex of your national report.
No, the court can declare the content on each individual case. However, often in relation to arrestment or arrestment on dependence of bank accounts the result is that all the debtor’s funds which are available will be frozen.

2.5.2. does a court determine each case on its individual particularities (at its discretion)

Yes. Even though arrestment on dependence resembles more of an administrative procedure and until recently these decisions were taken by the court clerks. Now this has been changed due to the European Convention on Human Rights, see for example Karl Construction Ltd v. Palisade Properties (2002) SLT 312 and Advocate General for Scotland v. Taylor (2003) SLT 1340. Therefore now the new Rules of the Court state that only a Lord Ordinary can grant the arrestment in the Court of Session (Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Diligence on Dependence) 2003, Rule 13.6A).

2.5.3. what is the content of the provisional measure?\(^9\):

2.5.3.1. blocking of assets

Yes, it prevents the use of seized goods or money.

2.5.3.2 prohibition on disposition of the seized goods against debtor / third party debtor

Yes, the property or money will be held by the arrestee, a third party, and arrestee is not authorised to release the property or money unless the debtor authorises him/her to release the funds or property for the benefit of the arrester creditor.

Whereas in interim interdict the defendant is prevented from destroying or using the property, e.g. in trademark disputes the defendant is prevented from using the trademark (see for example Pebble Beach Co. v. Lombard Brands (2002) SLT 1312 where the petition was refused because the pursuer could not show that the trademarks were similar enough to cause confusion) in a manner prescribed by the court.

2.5.3.2. does it operate in personam against the debtor (see s. 919 ZPO: custody)

Yes. However, it is a greater right than other ordinary rights in personam. For example in cases of liquidation of the debtor’s assets the prior arrestment or inhibition will remain still valid and the creditor retains priority over the assets

\(^9\) Please consider this with regard to question 2.5.3.4.
or property and is not equated with other creditors in the liquidation action (Commissioners of Customs and Excise v. John Reid Joinery Ltd (2001) SLT 588).

2.5.3.3. does the creditor get a lien on the seized assets

No, the assets remain in the hands of the third party until such time that action for forthcoming has been claimed and granted by the courts.

2.5.3.4.1 if yes, does the priority principle apply

2.5.3.4.2. if yes, what effect does a lien have in insolvency proceedings

2.5.3.4.3. if yes, what is the effect of a lien in relation to a competing creditor

2.5.4. In what form is the provisional measure drafted (eg. as a judgment, an order or as something else)\(^{10}\)

If it is ex parte, then it is an order of the court. If both party, a judgment.

In relation to ex parte request for arrestment on dependence or inhibition on dependence, a form needs to be filled out by the applicant and the court will grant it, for example:

Form 59.1-D

**Form of letters of inhibition on dependence of action in sheriff court**

IN THE COURT OF SESSION

Application of *(applicant’s name)* for Letters of Inhibition

My Lords of Council and Session-

1. *(Applicant’s name, designation and address)*, the applicant, has raised an action in *(name of sheriff court)* Sheriff Court against *(defender’s name, designation and address)*. The initial writ in the action was warranted on *(date)* and served on *(date)*. In the action, the applicant requests the court to order *(defender’s name)* to pay to the applicant (1) *(amount of principal sum in words and figures)*, (2) interest on that amount at *(rate)* from *(date)* until payment, and (3) the expenses of the action.

2. The initial writ with the warrant and execution is produced with this application.

3. The applicant, therefore, requests your Lordships to grant warrant to inhibit *(defender’s name)*.

\(^{10}\) Please attach an example of a common order to your answer.
According to Justice etc.

(Signed)

Solicitor [or Agent] for applicant
(Address)

Warrant to inhibit granted in accordance with the above application.

Date:

(Signed)

Lord

Whereas for interim interdict, an example of one order is here:

OUTER HOUSE, COURT OF SESSION

P1337/03

OPINION OF LORD JOHNSTON

in Petition of

WILLIAM BEGGS

Petitioner:

for

Judicial Review

Petitioner: O'Neill, Q.C.; Balfour & Manson (Taylor & Kelly, Solicitors, Coatbridge)
23 September 2003

[1] This petition called before me for a first order and for *interim* interdict in terms of paragraph 3(c) of the petition which is in the following terms:

"An order interdicting the Scottish Ministers and the Governor of H.M. Prison Peterhead from requiring the petitioner, during his present period of detention in the said prison, to open or have opened in the presence of a prison officer or prison officers except on due cause shown, all and any privileged correspondence sent to him while detained in H. M. Prison Peterhead; and for interdict *ad interim*, which failing, an order declaratory of the right of the petitioner to such an order, but for the terms of Section 21 of the Crown Proceedings Act 1947".

[2] At this stage the petitioner sought only *interim* interdict and not a declaratory order.

[3] I refused interdict for three reasons.

[4] In the first place the case raises the general question of competency already focused in the recent petitions of Scott and Davidson which I heard at first instance and issued a judgement on 26 October 2001. Inter alia I determined that I was bound on the question of competency in respect of an interdict against the Crown or now Scottish Ministers by the terms of section 21 of the Crown Proceedings 1947 and by a decision of the Second Division in the Macdonald v Secretary of State for Scotland 1994 S.C. 234. I refer to my reasoning in that opinion.

[5] Davidson is on appeal but has not yet resolved the issue of competency for various reasons. In my view therefore the position I took in Davidson was one I required to take again at this stage in this case. I therefore ruled for the reasons given in that case that the application is incompetent.
[6] In the second place I do not consider a *prima facie* case has been made out. Despite the length and complexity of the pleadings the only issue that was focused before me claiming to raise an interdict question was the fact that the prison governor in the various announcements has required that legal correspondence to avoid being opened must be marked as such on the outside of the envelope. This, Mr O'Neill maintained went beyond the rules applying to prisoner's correspondence and in turn amount to a breach of his client's human rights in terms of the European Convention on Human Rights.

[7] I am quite unable to accept this submission. It seems to me that even if the rules do not expressly deal with it, the requirement amounts to no more than common sense. If the complainer wishes his legal correspondence to be protected as such, it should be identified. The imposition of the burden so called by adding the words "legal correspondence" to the relevant envelope cannot be regarded as substantial. So far from prejudicing the rights of the petitioner it seems to me to enhance them. I therefore regard the application based on this ground as a technicality bordering upon absurdity.

[8] Thirdly, if I am wrong in the second place it seems to me that the balance of convenience does not favour the granting of interdict. Counsel for the Scottish Ministers tendered at the bar an undertaking which makes it clear that it provided the correspondence in question is so marked, the Governor himself would ensure that it is not opened and is passed directly to the prisoner. Here again, accordingly, the adding of the two relevant words provides an alternative remedy making *interim* interdict unnecessary. Mr O'Neill vaguely suggested that the interdict was actually to stop mistakes but if a mistake is genuinely such, it would not be stopped by a court order since it would not be an intentional breach of the rules. Insofar as an interdict would enforce the present position, it therefore seems to me to be quite unnecessary.

[9] For these reasons I refused the motion.
[10] If the only issues before me had related to the second and the third matters, I would not have granted leave to reclaim. However, the unresolved matter which I focused on the first place is an important issue and because of that I granted leave to reclaim in respect of the whole application.

2.5.6. Is the decision to be motivated

Interim interdict is a motion, whereas warrant of arrestment or inhibition are requested from the court.

2.5.7. What remedies are open for challenging the granting / rejection of provisional measures

In relation to arrestment on dependence or inhibition on dependence the debtor can challenge the provisional measure on basis that the pursuer’s case has no “colourable case” or no “intelligible and discernible cause of action”. It is not necessary for the pursuer to satisfy the standard of a prima facie case; or if the action is nimious and oppressive, i.e. the diligence is excessive, in the sense that the property attached is worth more than the pursuer’s claim, or alternatively if the sums sued for in the appeal appear extravagant (but it is not easy to estimate the true value of the pursuer’s claim as this depends on the costs etc., especially breaches of contract are a difficult area) and thirdly if the defender’s financial position is sufficiently strong (Karl Construction Ltd v. Palisade Properties (2002) SLT 312, at p. 322 as per Lord Drummond Young). In the last case it is possible for the defender to offer other forms of security which the court will thus consider whether they are sufficient (Marie Brizzard et Roger International v. William Grant & Sons Ltd (2002) SLT 1359). It is wholly for the court’s discretion to consider whether the measures provided by the defender are enough or the claim on the part of the pursuers disproportionate.

Whereas for the interim interdict it is possible for the defender to show that the interdict is not necessary.

2.5.8. Is the provisional measure valid for a specific limited time

Arrestment and inhibition on dependence are valid until a court decree on the debt has been established. In this case either the arrestment or inhibition falls

11 Insofar as an amendment is only possible in the main proceedings, please describe further particulars under question 2.8.
as the pursuer was not able to prove the debt or is converted directly into arrestment in execution or full inhibition if the pursuer’s action succeeds. After being granted arrestment or inhibition on dependence the pursuers needs to start the action though within 20 days in case of a Court of Session (or if it is a summary cause, within 48 days in the sheriff court), see above point ???. If the pursuer does not start an action, the arrestment or inhibition on dependence falls.

Interim interdicts are granted for a specific time but after the time period it is open for the pursuer to apply for another interim interdict (see for example *St. Andrews Bay Development v. HBG Management* (2003) SLT 740, here the time period was elapsed and the court found no justification for a permanent interdict, however, the pursuers were advised to apply for another interim interdict).

2.6 Provisional measures and security

2.6.1. Is the provisional measure subject to a security of the creditor

No.

2.7. Execution / Enforcement of the protective measure

2.7.1. Who is responsible for enforcement: the court or a different enforcement organ?

The arrestment or inhibition are executed by the messengers-at-arms for the Court of Session (Rules of Court, rule 16.12), except in cases where there are no messengers-at-arms in the sheriff court jurisdiction, a sheriff officer duly authorised can execute the diligence (Execution of Diligence (Scotland) Act 1926, section 1)

2.7.2. Is the execution of the provisional measure subject to the general law of enforcement?

No, diligence has a separate system of enforcement because the property or assets remain in the hands of the third party and they are not gathered by the court. The messenger-at-arms or sheriff officer merely serves the arrestee a schedule of arrestment or inhibition which the arrestee needs to respect. The

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12 This question can be answered with regard to question 4.2 of the questionnaire concerning provisional enforcement, insofar as there are no differences.

13 Insofar as there are particular features, please explain these briefly.
property or assets which is in the hands of the debtor is not subject to arrestment.

2.7.3. Are further sanctions available, in the event that the debtor does not comply to the order

If the arrestee, the third party holding the property, does not respect the arrestment in knowledge of the arrestment itself, he/she is liable for the value of the funds or subject arrested up to the limit of the amount secured by the arrestment, or, if the value of funds or subject arrested cannot be ascertained, for payment of the amount of debt owed by the original debtor, for the breach of arrestment (Steward, Diligence; High Flex (Scotland) v. Kentallan Mechanical Services Co. (1977) SLT (Sh. Ct.) 91)

Whereas in interim interdict, the defender is subject to contempt of the court.

2.7.4. Please describe the pre-conditions which must be presented for the enforcement of a provisional measure14:

2.7.4.1 Service of the order on the debtor / third party debtor

Yes, messenger-at-arms needs to serve the arrestment schedule for the arrestee but not for the debtor.

2.7.4.2. Proof of performance of the security

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2.7.4.3. Other pre-conditions

2.7.4. Is the effect of the provisional measure subject to execution of the order by the applicant / a court within a set period of time?

Yes, see also above point 2.3.1.3 in relation to arrestment and inhibition on dependence.

2.7.5.1. If yes, what period of time does apply15

20 days for the Court of Session (and 48 days for the sheriff court in summary causes)

2.7.5.2. If yes, what sanctions are applied in the event of non-performance?

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2.8. Provisional Measures and main proceedings

14 Please have regard to the Questionnaire concerning garnishment when answering this.

15 Does this period of time also apply by executions in other Member States (compare question 5)
2.8.1. Can main proceedings be required/initiated or ordered by: \(^{16}\)

2.8.1.1. the debtor

No.

2.8.1.2. the court that issued the order

No.

2.8.2. Can the court in which the main proceedings are carried on change or overrule the order?

If it is a different court, no.

2.8.3. Can the court in which the main proceedings are carried on order the return/release of the seized items

No, only a judgment in favour of the debtor can release the funds.

2.8.4. Does the debtor have any further basis for claiming damages?

No.

2.9. Please describe the relationship of interim proceedings to provisional enforcement?

Provisional enforcement, such as arrestment on dependence or inhibition on dependence, are dependent on the court proceedings. Whereas for interim proceedings, such as interim interdict, the court grants a time limit how long the interim order will apply.

2.9.1. Are there any differences between provisional enforceability and protective measures?

No, these are only provisional and protective measures under Scots law. Other measures such as security, are voluntary on the part of the debtor and therefore do not count as provisional or protective measures.

2.9.2. Are the remedies aimed at different targets or do the remedies have a complementary function?

They are aimed at different targets.

3. Temporary injunction (measures maintaining the status quo pending determination of the issues at trial)

\(^{16}\) This question relates to the hypothesis that the provisional measure will be made outside of the main proceeding.
3.1. What temporary injunction (destined to maintain a legal or factual situation) does your national legal system provide? Please provide examples.

Interim interdict. Examples of interim interdict are prevention of using another person’s trademark (Bonnier Media Ltd v. Smith (2003) SC 36); prevention of payment of money under contractual obligations (Va Tech Wabag UK Ltd v. Morgan Est (Scotland) Ltd (2002) SLT 1290); order for suspending a decree of sequestration (Sutherland v. Campbell (2003) SLT 1138); or order for prevention of fulfilment of an arbitration decree (Haden Young Ltd v. Dinsmore (2003) SLT 695).

3.2. The pre-conditions that need to be satisfied for obtaining temporary injunctioń

- 3.2.1. With regard to the claim that is to be secured:
  3.2.1.1. does the claim have to be due?
  3.2.1.2. can a future claim be secured?
  3.2.1.3. Must the creditor present an enforceable title

3.2.2. With regard to the basis for the claim:
  3.2.2.1. urgency
  3.2.2.2. threatened frustration of enforcement of a judgment on the merits
  3.2.2.3. other reasons for urgency

3.3. Which Court has jurisdiction?

The court for the place where it is alleged that the wrong is likely to be committed (Civil Jurisdiction and Judgments Act 1982, section 20(1)), i.e. the alleged wrong needs to be committed in Scotland for Scottish courts to have jurisdiction.

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17 Please answer this question only insofar as it shows differences question 3.
18 If yes, please comment at question 6 following on the delineation of provisional enforcement.
19 In relation to international jurisdiction, compare under question 5.1 following.
3.3.1. The court hearing the main proceedings (exercising jurisdiction over the substance of the matter)\textsuperscript{20}

Interim interdict needs to be granted by the Scottish court.

3.3.2. the court at the place of enforcement measures\textsuperscript{21}?

Yes, this would be Scotland.

3.3.3. Other court(s)

No.

3.3.4. Who determines on the application?

Lord Ordinary of the Court of Session.

3.3.4.1. In relation to 3.3.1.: is the decision maker a single judge, another judge, other persons (eg. registrar)

Single judge.

3.3.4.2. In relation to 3.3.2.: is it the competent court or another organ (registrar, bailiff, law enforcement authority)

Only a court.

3.4. The proceedings as a mean to achieving interim measures (application proceedings)

3.4.1. What evidence must the creditor present when applying for a temporary injunction?

Factual evidence that the wrong will be committed. This will be judged on merits by the court.

3.4.1.1. In relation to the claim (above 3.3.1.)

3.4.1.2. In relation to the basis for the preservation (urgency) (above: 3.3.2.)

3.4.1.3. In relation to further pre-conditions (above 3.3.3.)

3.4.2. Defences available to the debtor in the application proceedings:

3.4.2.1. does the court decide ex parte or does the debtor have a right to be heard (adversary proceedings)?

\footnote{Is there a difference if the provisional order is sought prior to, or during the main proceedings?}

\footnote{Compare in particular ECJ, 17.11.1998, C-391/95, \textit{Van Uden}, para 19.}
Both, see point 2.4.3.1

3.4.2.3. are the proceedings oral or written?
See point 2.4.3.2 above.

3.4.2.4 can the debtor address to the court a protective writing
Yes, however, it is the discretion of the court to deem whether it is sufficient.

3.4.3 what standard of proof applies in the proceedings
For all civil cases the standard of proof in Scotland is on the balance of probabilities. This means that if the pursuer can establish a case which on the balance of probabilities is correct for the court, the pursuer wins the argument.

3.4.3.1. in relation to the claim to be secured (above 3.3.1.)
3.4.3.2. In relation to the urgency (above 3.3.2.)
3.4.3.3. In relation to further pre-conditions (above 3.3.3.)

3.5. Content and Effect of the temporary injunction
3.5.1. is its the content determined by the legislation?\(^{22}\)
No.

3.5.2. Does a court determine each case on its individual particularities (at its discretion)?
Yes, see the examples above at point 3.1

3.5.3. what is the content of the temporary injunction?
It prevents the defender on acting in certain manner.

3.5.3.1. Blocking of assets
3.5.3.2. Prohibition on disposition of the seized goods against the debtor/third party debtor (in personam)
3.5.3.3. does it operate in personam against the debtor / third party (see eg.. § 919 ZPO - custody)

Yes.

3.5.4. In what form is the temporary injunction drafted (as a judgment, an order or as something else)?\(^{23}\)

\(^{22}\) If yes, please attach a copy of the relevant legislation.
See above point 2.5.4

3.5.5. are reasons provided for the ruling?
Yes, see the order that has been pasted as an example, point 2.5.4

3.5.6. what remedies are open for challenging the granting / rejection of the order
The defender can appeal for the court and establish the case on the balance of probabilities that the interim interdict is not necessary.

3.5.7. Is the provisional measure valid for a specific limited time
Yes, as long as the court orders.

3.6. Temporary injunction and the security

3.6.1. Is the temporary injunction subject to a surety/security of the creditor
No.

3.6.2 Do any differences exist with regard to the security referred to in 2.6.2 above?

3.7. Execution/Enforcement of the temporary injunction

3.7.1. Who is responsible for enforcement: the court or a different enforcement organ
The debtor.

3.7.2. Is the execution of the temporary injunction subject to the general law of enforcement?
No. Here again are no court authorities taking the property or assets from the debtor. Rather the debtor keeps hold of the property and takes care of the property as the court has ordered.

3.7.3. If not, what law does apply
If the debtor breaches this duty, it is a contempt of the court.

3.8. Temporary injunction and main proceedings:

23 Please attach an example of a common order to your answer.

24 This question can be answered with regard to question 4.2 of the questionnaire concerning provisional enforcement insofar as there are no differences.

25 Insofar as there are particular features, please explain these briefly.
Please briefly explain the differences in this to that in relation to the protective measure

Where the interim interdict aims to protect the property or assets that are in the hands of the debtor, protective measures aim to protect the property or assets in the hands of a third party in favour of the creditor.

While both can be plead in conjunction with the main proceedings (and often arrestment or inhibition is automatically included in the writ), both can also be plead separately from the main proceedings.

4. Provisional measures allowing the satisfaction of the claim (interim payment/interim performance) (above 1.2.3.)

4.1. Does your national law permit remedies for interim payments and interim performance for the creditor? Please briefly outline the different remedies (compare also to 4.2.).

No. The funds are to be kept by the arrestee until such time as there is a decree of forthcoming.

4.2. To which constellation do these measures apply?

4.2.1. claims for payment (such as maintenance, advance payment of legal costs)

Yes, all payments of money are included. For arrestment or inhibition the claim needs to be in the form of a payment.

4.2.2. other claims for performance

No.

4.3. The pre-conditions of a protective measure for satisfaction

4.3.1. With regard to the claim that is to be secured:

4.3.2.1. does the claim have to be due?

Usually the claim needs to be due.

4.3.2.2. can a future claim be secured?

Yes, in exceptional circumstances, see above point 2.3.1.2

4.3.2. With regard to the potential injury to plaintiff

There are no other conditions.

4.3.2.1. urgency
4.3.2.2. Imminent frustration of the enforcement of the judgment

4.3.2.3. Other reasons for urgency

4.3.3.4. additional pre-conditions

4.4. Which court has jurisdiction\textsuperscript{26}:

4.4.1. the court deciding on the merits?\textsuperscript{27}

No, unless the assets are located in the territory of the court.

4.4.2. the court where seized assets are located\textsuperscript{28}?

Yes.

4.4.3. other court(s)

No.

4.4.4. who determines on the application

4.4.4.1. in relation to 4.4.1.: is the decision maker, a single judge, another judge, other persons (eg. registrar)

Appeal is made to the Lord Ordinary of the Court of Session (or to the sheriff when the main proceedings are in Scotland).

4.4.4.2. in relation to 4.4.2.: is it the competent court or another person (eg. registrar, bailiff, law enforcement authority)

Court.

4.5. The proceedings to obtain the protective order for satisfaction

4.5.1. What evidence must the creditor present when applying for a provisional measure?

Proof that there are “pecuniary conclusions”.

4.5.1.1. in relation to the claim (see 4.3.1. above)

4.5.1.2. in relation to the basis for the preservation (see 4.3.2. above)

4.5.1.3. in relation to further pre-conditions (see 2.3.3 above)

\textsuperscript{26} In relation to international jurisdiction, compare under question 5.1 following.

\textsuperscript{27} Is there a difference if the provisional order is sought prior to, or during the main proceedings?

\textsuperscript{28} Compare in particular ECJ, 17.11.1998, C-391/95, Van Uden, para 19.
4.5.2. Defences available to the debtor in the application proceedings:

4.5.2.1. does the court decide ex parte or does the debtor have a right to be heard (adversary proceedings)?

Ex parte on application by the creditor.

4.5.2.3. are the proceedings oral or written?

Written, see above point 2.5.4 where the form is included.

4.5.2.4. can the debtor address to the court a protective writing

No.

4.5.3 what standard of proof applies in the proceedings

These proceedings are closer to administrative proceedings than court proceedings. Therefore the creditor needs to show only that there are pecuniary conclusions and fill in the forms correctly. The standard of proof for pecuniary conclusions is lower than that in the main proceedings.

4.5.3.1. in relation to the claim to be secured (above 2.3.1.)

4.5.3.2. in relation to the urgency (above 2.3.2.)

4.5.3.3. in relation to other pre-conditions (above 2.3.3.)

4.6. Content and effect of the provisional measure

4.6.1. is its content determined by legislation?29

The grant of the warrant is virtually automatic.

4.6.2. does a court determine each case on its individual particularities (at its discretion)?

No.

4.6.3. what is the content of the provisional measure?30

4.6.3.1. blocking of assets

Yes, the assets remain frozen in the hands of a third party.

4.6.3.2. prohibition on disposition of the seized goods against debtor / third party debtor

29 If yes, please attach a copy of the relevant legislation.

30 Please consider this with regard to question 2.5.3.4.
Yes, the property remains frozen in the hands of a third party.

4.6.3.3 does it operate in personam against the debtor (see s. 919 ZPO)

Yes, it is a right in personam, see also above point 2.5.3.2.

4.6.5. In what form is the temporary injunction drafted (as judgment, an order or something else)\textsuperscript{31}

It is an order of the court, see above point 2.5.4 where a model form is included.

4.6.6. are reasons provided for the ruling regarding the measure?

No.

4.6.7. what remedies are open for challenging the granting / rejection of the order\textsuperscript{32}

See above point 2.5.7

4.6.8. is the provisional measure valid for a specific limited time

No, in the event of an unsuccessful challenge by the debtor it is valid until the debtor has either been released from the debt by the court or until a decree is pronounced against the debtor. In the latter case the order will automatically convert into arrestment in execution or full order of inhibition.

4.7. Provisional measures and security\textsuperscript{33}

4.7.1. is the provisional measure subject to a surety (security / guarantee)

No, the debtor can voluntarily try to provide other means of security, however, this is in discretion of the court. See above point 2.5.7

4.7.2. How is the order of the security measure regulated?

Through Rules of Court.

4.8. Enforcement / execution of the order

4.8.1. Who is responsible for enforcement: the court or a different enforcement organ

In the case of the Court of Session messengers-at-arms (see above point 2.7.1)

\textsuperscript{31} Please attach an example of a common order to your answer.

\textsuperscript{32} Insofar as an amendment is only possible in the main proceedings, please provide further particulars under question 2.8.

\textsuperscript{33} This question can be answered with regard to 4.2 of the questionnaire concerning provisional enforcement, insofar as there are no differences.
4.8.2. Is the enforcement of the order subject to the general regulations governing execution?34

No, see above point 2.7.2

4.8.3. Are further sanctions available, in the event that the debtor does not comply to the order (such as contempt of court)

This is the case of arrestee liability, see above point 2.7.3

4.8.4. Please describe the pre-conditions which must be presented for the enforcement/execution of a provisional measure35:

4.8.4.1. Service of order on the debtor / third party debtor

4.8.4.2. Security of the creditor

4.8.4.3. Other pre-conditions

4.8.4. Is the effect of the provisional measure subject to enforcement by the creditor by the court within a certain period of time?

No. The creditor cannot enforce the realisation of the assets or property until such time as there is a positive decree in his/her favour and a decree of forthcoming has been obtained.

4.8.5.1. If yes, what period of time does apply36

4.8.5.2. If yes, what sanctions do apply in the event of non-performance?

4.9. Amendment of the provisional measure by the court having jurisdiction for during the main proceedings

4.9.1. What remedies are opened against a provisional measure for satisfaction?37

4.9.1.1. for the debtor

The grounds are very limited for the debtor to challenge arrestment or inhibition on dependence, see above point 2.5.7

4.9.1.2. by the court

34 Insofar as there are particular features, please explain these briefly.

35 Please refer to the Questionnaire concerning when answering this.

36 Does this period of time also apply to executions in other Member States (compare question 6.3).

37 This question relates to the hypothesis that the provisional measure will be made outside of the main proceeding.
The court cannot declare any changes, it needs to be plead by the parties.

4.9.2. can the court hearing the main proceeding revoke or amend the order?
No.

4.9.3. can the court hearing the main proceeding order the return of the seized items / the release of the seized claim?
No.

4.9.4. Do claims for damages incurred by the debtor exist?

There is no right for compensation for the wrongful use of diligence unless it can be proved by the defender that the pursuer acted maliciously, or that there was an irregularity in procedure. The fact that the claim was ill-founded, even if very clearly so, gives no right to compensation (Karl Construction Ltd v. Palisade Properties (2002) SLT 312).

5. Practical information

5.1. In so far as available, please provide statistic information showing the number of cases dealing with interim payments (also in relation to main proceedings)

There are no statistics available.

5.2. Please detail (possible) politico-legal critique concerning the existing situation in your country.

The provisions in relation to arrestment and inhibition are currently under review by the Scottish Executive and the Scottish Law Commission. There are several issues which have been raised and where amendments are required. These issues concern: the non-protection of the debtor’s assets while in the bank account, the whole account is frozen if there are funds and no consideration is paid for the livelihood of the debtor (contrary to the earnings arrestment). Secondly, limitations for the automatic grant of warrants are being considered. While this is a speedy and effective procedure, the remedies for the debtor are almost non-existent in a case of non-warranted diligence. The grounds for liability for wrongful diligence are very difficult to establish for the debtor and therefore any creditor can use diligence as means of securing debt very easily. Thirdly the duty of disclosure of assets does not exist (see transparency of assets for further).

The Scottish Law Commission and the Scottish Executive have drafted reports and proposals for the change of law, however, no definite proposal
has been presented by either of the bodies. Rather the matter is currently under discussion and options and alternatives are being considered.

6. Provisional measures and European Civil procedural law

6.1. Jurisdiction for cross-border provisional measures

6.1.1. What domestic jurisdictional reasons apply to provisional measures under Art. 31 VO/44/0138

6.1.1.1. in relation to measures securing future enforcement

The creditor can apply for arrestment on dependence or in the case of heritable property inhibition on dependence.

6.1.1.2. in relation to measures maintaining the status quo

Interim interdict.

6.1.1.3. in relation to interim payments and similar measures

There are no measures concerning interim payments.

6.2. The assistance of foreign (on the merits) main proceedings by domestic courts

6.2.1. Are there decisions in your State in support of assistance to foreign main proceedings abroad by provisional measures

The two leading cases are Clipper Shipping Co Ltd v. San Vincente Partners (1989) SLT 204 and Stancroft Securities Ltd, Petitioners (1990) SCLR 448

6.2.2. If yes, please provide particulars of the main cases

In Clipper Shipping Co ship charterers raised an action against shipowners in Denmark. The ship owners petitioned to the Court of Session on basis of section 27 of the Civil Jurisdiction and Judgments Act of 1982 for arrestment and vessel San Vincente was arrested in Scotland. This was appealed by the defenders to the main action. The Court of Session held that the charterers had established a colourable case as the pleadings were supplemented by a sworn affidavit from a Danish lawyer that they had a cause for action in Denmark. Furthermore, even though normally warrant could only be granted when main proceedings are held in Scotland, section 27 of the Civil Jurisdiction and Judgments Act allows provisional and protective measures to

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38 Please state the name of the applicable legislation and attach copies thereof.
39 Please attach the relevant judgments (to the extent possible in English or French).
be brought in Scotland even when the main proceedings are in another Contracting State (now including Member State).

In *Stancroft Securities* the pursuer first petitioned for the Outer House of the Court of Session for the Lord Ordinary to grant a warrant of arrestment and inhibition when the main proceedings were held in England. The Lord Ordinary refused the application and the pursuers appealed to the Inner House. The Inner House decided that the Lord Ordinary had erred in application of the law in that using section 27 of the Civil Jurisdiction and Judgments Act provided for a possibility for an action in Scotland – the Lord Ordinary had erroneously attached weight to the fact that it was an ex parte proceedings, whereas this is not a condition for granting a warrant. The Inner House held that if anyone was dissatisfied with the order, they can motion an appeal and thus normal procedure of granting a warrant applies. Secondly, the company did not have to institute main proceedings in Scotland as section 27 applied.

6.2.3. Did practical problems arise in connection with these?

At first, as pointed out in relation to *Stancroft Securities*, the application of section 27 of the Civil Jurisdiction and Judgments Act was not clear for the Lord Ordinary. However, the Inner House judgment solved this confusion and the procedure is now available for any person starting main proceedings in another Brussels Regulation or Brussels/Lugano Convention State.

6.2.4. Are such orders granted ex parte or after a hearing of the debtor?

As *Stancroft Securities* shows, they are granted ex parte.

6.2.5. Does your national law permit provisional measures with the effect of a world wide Mareva injunction (that is to say a comprehensive seizure of the debtor’s assets around the world)?

No, they only apply in relation to assets in territory of Scotland. For example in *Steward v. The Royal Bank of Scotland (1994) SLT (Sh. Ct.) 27* it was ruled by the sheriff court that it had no authority to seize the debtor’s bank account where it was held in another branch in England.

6.3. Do particular rules apply in relation to provisional measures affecting assets located abroad?

No.

6.3.1. Please describe the pre-conditions of such provisional measures

6.3.2. How is the defendant informed about the proceeding?
The arrestee is informed with a schedule of arrestment. Thereafter debtor is informed by the arrestee.

6.3.3. Are specific provisions applicable with regard to the drafting of the order

Yes, see the form above point 2.5.4

6.3.4. Do these provisions also apply in the area of application of Art. 31 VO 44/01/EG?

Yes.

6.3.5. Have the ECJ’s decisions in Cases C-391/95 und C-99/96 (Van Uden and Mietz, respectively) brought about a change in your country?

No.

6.4. Recognition and enforcement of a foreign provisional measure (Art. 32 VO 44/01/EG)

6.4.1. Are provisional measures available in your country if a foreign provisional decision is recognized (Art. 32 Reg. 44/01/EG, Art. 25 Brussels’ Convention)?

The same petition needs to be made to the Court of Session.

6.4.1.1. If yes, please detail the most important cases40

6.4.1.2. Have problems been experienced in practice?

6.4.2. Are there any additional conditions that apply to the recognition of interim payments and similar remedies

No.

6.4.3. Have the ECJ’s decisions in Cases C-391/95 und C-99/96 (Van Uden and Mietz, respectively) brought about a change of the legal situation in your country?

No.

7. Policy recommendation

What law-making acts of the EU could improve provisional measures currently in place

7.1. With regard to the obtaining of such measures

40 Please attach the relevant judgments to your report (to the extent possible in English or French).
7.1.1. Possibly: creation of a standard form to obtain provisional measures.
Yes, this would be helpful, especially as it could prove that the action has been raised in another Member State and therefore provide for a standardised evidence of the action.

7.1.2. Further informal measures in connection with the European judicial network
This is helpful too, as then the practitioners and courts will be aware of the format of foreign judgments.

7.2. With regard to recognition of the order
7.2.1. In particular: do you consider it appropriate to pursue the recognition of provisional measures ex parte (that is those which have been ordered without hearing of the debtor)?
Yes, there are instances when the creditors need to be able to protect their interests and freeze the assets of the debtor without the debtor's prior knowledge. However, this needs to be complemented with a proper appeal procedure which is both speedy and efficient and provides the debtor with appropriate remedy.

7.2.2. If yes, what precautions must be observed for the protection of the debtors rights?
7.2.2.1. examination of the claim by the court of first instance to ensure that all elements of the cause of action are met
Yes, the first instance should be able to look at whether the case has prima facie merit as in any other action which is raised in the courts.

7.2.2.2. Requirement of a security by the creditor
No.

7.2.2.3. Where should the debtor object to the provisional measure: to the court which ordered the measure; to the courts where the enforcement takes place
The court which orders the measure. This is the right court to consider the merits of the provisional measure itself.

7.2.2.4. Compensation by the creditor (strict liability)
The creditor should be made liable for compensation when the appeal for a provisional measure has been negligent or intentionally malicious. Strict liability is too heavy burden for the creditor.
7.2.3. How should cross-border service of the relevant order be performed?

7.2.4.1. In line with Reg. 1348/00/EG (having regard to the service requirements contained in Art. 14 and 15 of the regulation)

7.2.3.2. In line with Art. 11 of the Commission’s Proposal for a European Enforcement Order (COM (2002) 159final)\(^{41}\)

This adds only the possibility of a personal service to the debtor and would be a preferable solution. The creditor thus can serve the document without the need to confer to authorities in another State. However, the proceedings themselves should be kept separate, see below.

7.2.4. How should the debtor be informed?

7.2.4.1. By way of a standard form communication, as per the rule in Articles 16-18 in the Commission’s suggestion for a European Enforcement Order for Uncontested Claims.

Yes, standard communication solves problems of format.

7.2.4.2. By way of oral explanation by the bailiff when performing the service of the order

Not necessary.

7.3. Do you consider the introduction of a “European freezing injunction” as worthwhile?

No. This would need a carefully codified substance for the legislation as there are many issues arising out of debtor’s protection versus creditor’s right for the claim. Furthermore, issues do arise whether the creditor can actually execute the order or have interim execution. It is unlikely that there will be consensus for these matters at this point of time.

7.3.1. If yes, how should the rights of the debtor be protected

\(^{41}\) COM 2002/159 (final).