

Enforcement of Foreign Judgments

Interim and Precautionary Measures [England & Wales]

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I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?

Answer: It is possible to obtain a freezing order to prevent the defendant from putting his assets out of reach to stop the claimant enforcing judgment against him. Evidence of a risk of / intention to dissipate assets is required. The procedure is very expensive and there is a substantial evidential burden on the applicant / claimant. It is possible to get worldwide freezing orders, and to obtain orders extremely quickly in cases of urgency.

No interim priority is available unless the claimant has an ownership claim.

General rules about applications for court orders are found in Part 23 of the Civil Procedure Rules (CPR):

<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part23>

The rules on interim remedies are found in Part 25 of the CPR:

<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25>

2. Is it mandatory to pay court fees for this type of application?

Answer: Yes – fees vary.

3. What is the ordinary/average length of time for this kind of procedure?

Answer: Again, this varies. It is possible to seek interim relief very quickly without notice to the other party if necessary, in days or even hours. Where the application is contested, the proceedings can last for several months.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES

1. For which types of interim measures are the parties allowed to apply? (e.g. injunction, freezing orders, caveat, restraining order, etc)

Answer:

- a. Freezing injunctions
- b. Other interim injunctions to prevent the defendant from putting assets out of the reach of creditors
- c. Security for costs orders
- d. Summary judgment
- e. Disclosure orders
- f. Search and seize orders
- g. Appointment of a receiver (but rare and only in complex cases)
- h. Potentially other types of order

III. PROCEDURE

1. Competent court

- a) Which court has jurisdiction to grant these interim and precautionary measures?

Answer: The High Court

2. When can the application for interim and precautionary measures be submitted?

Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?

Answer: Usually at the same time that proceedings are issued or steps taken / the application made for enforcement of the foreign judgment. Particular requirements will depend on the type of interim / precautionary measure being sought, and the specific

rules in the CPR in relation to the type of relief sought should be considered (see answer to I.1 above).

3. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g. deadline to submit the lawsuit)

Answer: Yes, in exceptional circumstances where an urgent need can be shown to protect the applicant's position, an injunction application could be made before the proceedings are issued. The applicant must show that it has a real claim against the respondent, and particulars of claim must be filed at court shortly thereafter. If the applicant is applying for a freezing injunction, it must show that there is a real risk that the respondent will dissipate its assets if the court does not make the order.

If an interim without notice injunction is granted and it is later determined that the injunction should not have been granted, the applicant will be liable to pay the respondent's expenses incurred as a result of the injunction.

4. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?

Answer: Yes, so long as there are circumstances justifying the application, an application can be made at any time in the proceedings.

5. Criteria used by the court for granting these measures

What requirements must be fulfilled in order to apply for an interim measure? (e.g. *periculum in mora*, *fumus boni iuris*, security, etc.)

Answer: There must be a valid cause of action. Damages must not be an adequate remedy. It must be demonstrated that unless the court makes the requested order, the respondent could take steps to undermine the effectiveness of the foreign judgment which the applicant is seeking to enforce. In the case of a freezing injunction, there must be a real risk that the respondent will dispose of his assets.

An application for an injunction should be made quickly – delay can be a reason for the court refusing to grant an injunction. If the application is being made without notice, then the applicant is under a strict duty of full and frank disclosure – i.e. as the

respondent is being deprived of the opportunity to oppose the application, the applicant must disclose all material facts to the court, even those which are in the respondent's rather than the applicant's favour.

6. Procedure

a) What are the main steps of the procedure after filing the interim measure application? (e.g. holding a hearing, presenting evidence, etc.)

Answer: If the application is made on notice to the respondent, the respondent may file evidence in response. A court hearing will usually take place at which the judge will hear from the applicant's (and possibly the respondent's) lawyers and decide the application. The sealed order made by the court will be served upon the respondent.

In the case of an interim injunction made without notice, there will be a return hearing, at which the court will decide whether the interim measure should continue. If the order is made in the absence of a party then a prompt *inter partes* return hearing will take place. There can be multiple hearings.

b) Is it possible for the court to order an interim measure without hearing the other party? (*in audita parte debitoris*). If YES, under what circumstances can the parties apply for it?

Answer: Yes. Where the application is of an urgent nature or where giving notice of the application to the respondent would defeat its purpose.

c) What are the main steps of the procedure in this case?

Answer: Filing with the court an application notice, supporting witness statement, draft order and court fee. Lawyers for the applicant then attend a hearing at which the application will be decided by a judge. If the order is made, it will be sealed by the court and promptly served upon the respondent. There may be a return hearing, attended by the respondent, at which the court will decide whether to continue the interim measure.

7. Opposition of the defendant

a) Is it possible for the defendant to oppose interim and precautionary measures?

Answer: Yes. Either at the time of the application being made, if it is made on notice, or otherwise at the return hearing. If the application is made and granted without notice, then the applicant will need to give a cross-undertaking as to costs.

b) Is it possible for the defendant to ask the court for the substitution of the interim measure for a guarantee?

Answer: Yes. In fact, if it is not necessary to make the application without notice, then it is good practice, before making the application, to ask the defendant/respondent to voluntarily give as undertakings the measures to be requested in the application. If the respondent then reneges on those undertakings, they can be enforced in court in the usual way as though an application had been made to court and allowed.

8. Appeal

a) Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?

Answer: Yes

b) Is it possible to enforce the interim measure once an appeal is filed?

Answer: Yes, this does not affect the enforcement of the interim measure in the meantime.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

1. Is it possible to enforce the interim measure when the other party obstructs it?

Answer: Yes.

If a defendant / respondent disobeys an injunction then they will be held in contempt of court and may be imprisoned, be fined or have their assets seized. If they disobey some other court order, they may be ordered to pay additional costs on the indemnity basis (the "indemnity basis" is where the amount of costs one party must pay to the other is assessed by the court

with any doubts as to whether the costs were reasonable in amount being resolved in favour of the receiving party. There is also no requirement for the costs to be proportionate to the value of the claim, as there would normally be were the costs not assessed on the indemnity basis. The effect is that the receiving party is likely to receive more of their costs from the paying party if costs are ordered on the indemnity basis).

2. Is it possible to modify a previous interim measure?

Answer: Yes. A further application will need to be made to the court.

3. When is it possible to raise an interim measure?

Answer: At any time. Particularly as circumstances or evidence change.

Upon a judgment being handed down in favour of the defendant.

Upon the claim being stayed (i.e. paused, frozen).

Upon both parties consenting to the lifting of the order (which may be as part of the settlement of the wider proceedings) and the court approving the same.

If the claimant's claim is struck out (in which case an interim injunction will cease to have effect 14 days thereafter).

4. Are there any rules concerning the costs (e.g., lawyers' fees, etc.) related to the application?

Answer: The loser will generally pay the winner's costs. For example, if the defendant / respondent successfully opposes the application then the claimant / applicant will be ordered to pay the defendant's costs in doing so.

V. ARBITRATION

1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of an arbitration award in your country? If YES: what is the enforcement procedure?

Answer: Yes, under the Arbitration Act 1996 – either through the arbitrator or through the court in arbitration proceedings.

Under section 44 of the Arbitration Act 1996, the court can order protective measures such as, for example, the

preservation of evidence, the granting of interim injunctions and the appointment of a receiver. The court will only act to the extent that the arbitrator does not have the power to do so. If the arbitrator has the power to act then the court will not intervene, unless the matter is urgent and the arbitrator is for the time being, unable to act effectively.

Once the arbitration award is registered it becomes enforceable as a judgment in the usual way.

A New York Convention arbitration award may, with the leave of the court, be enforced in the same manner as a judgment.

2. Are the arbitrators, entitled to order an interim measure?

Answer: The extent of the arbitrator's power, if any, to order interim measures will depend on the extent of the powers given to the arbitrator by the arbitration agreement or the particular institutional arbitration rules that apply.

VI. FOREIGN PROCEDURE & ARBITRATION

1. Is it possible to apply for an interim measure before your country's courts in order to assure the effective enforcement of a foreign court decision or arbitration award? If YES: how is this procedure executed?

Answer: Yes. Procedure as above.

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