

# Enforcement of Foreign Judgments

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Interim and Precautionary Measures [Malaysia]

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## **I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES**

- 1. Is it possible to apply for an interim measure in order to assure the effective enforcement of a Court decision?**

**Answer:** Yes. Interim measures include interlocutory injunctions, *mareva* injunctions, interim payments, interim orders in respect of property (eg: detention, preservation etc. and Anton Piller Orders), and appointment of receivers. The list is not exhaustive.

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

**Answer:** Yes.

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

**Answer:** Ordinarily, between a day to a week for an *ex parte* application and between 1-2 months for an *inter parte* application.

## **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:** In Malaysia, there are several interim measures available in order to ensure effective enforcement of judgments, which include:

- (a) Injunctions**

Injunctions can either be temporary or perpetual, and it is in the form of a court order addressed to a specified person forbidding or commanding him to do a certain act. An injunction performs a preventive function.

**(b) Mareva Injunction**

Courts have developed the principle that they have power to restrain a defendant from removing assets, whether money or goods, from the jurisdiction pending trial of an action whenever it is just or convenient to do so. The effect of a Mareva Injunction is to freeze the assets of the defendant until conclusion of trial and can also be used as a tool to compel the defendant to provide security for the plaintiff's claim.

**(c) Interim Payments**

In relation to a defendant, interim payments mean payments on account of any damages, debt or other sum, excluding costs, which he may be held liable to pay to or for the benefit of the plaintiff. The object of an interim award is to alleviate hardship or prejudice to the plaintiff during the period from the institution of proceedings up to the date of trial.

**(d) Interim Orders in respect of Property**

This may include detention, preservation and Anton Piller Orders. On an application of any party to a cause or matter, the court may make an order, on such terms as it thinks just, for the detention, custody or preservation of any property which is the subject matter of the action or as to which any question may arise in it, or for the inspection of any such property in the possession of a party to the cause or matter.

**(e) Appointment of Receivers**

The High Court has the power to provide for the interim preservation of property the subject matter of any cause or action by the appointment of a receiver.

**III. PROCEDURE**

**1. Competent Court**

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

**Answer:** In general, the High Court and Sessions Court have the power to grant interim measures.

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

a) **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:** Yes. It is possible to apply at the time the lawsuit is filed. In this situation, typically an applicant will file an application, affidavit in support and a certificate of urgency for the application to be heard.

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. Although generally applications for interim precautionary measures are made after filing of the lawsuit, there are instances where this requirement may be dispensed with.

For example, in emergency cases, an *ex parte* application for injunction can be made to the High Court and can be granted as the High Court thinks fit, including filing a writ and cause papers within a stipulated deadline and fixing the matter for *inter partes* on an urgent basis.

- 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. Order 29 r 1(1) of the Rules of Court 2012 states –

*“1. Application for injunction.*

*(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party’s originating process, counterclaim or third party notice, as the case may be.”*

- 5. Criteria used by the court for granting these measures**

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

**Answer:** Generally, Court will provide interim measures when it considers, in the circumstances of the case, granting of interim measures are just and convenient, subject to settled principles.

In particular, in determining whether or not to grant an interlocutory injunction, the applicant has to show that:

- (a) there is a serious question to be tried; and**



- (b) the balance of convenience lies in favour of granting the injunction (which party would suffer greater hardship from the granting or non-granting of the injunction).

The Court also requires the plaintiff to give an undertaking as to damages when any interlocutory injunction is granted.

## **6. Procedure**

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

### **Answer:**

For non-urgent cases, an application is made by way of *inter partes* notice of application supported by affidavit. The Court will direct parties to exchange affidavits and fix a hearing date. This process can take between 2 to 4 months for the matter to be disposed.

Where on the hearing of an application it appears to Court that the matter in dispute can be better dealt with by an early trial rather than by considering the whole merits of the matter for the purposes of the application, the Court may make an order accordingly, and may also make such order with respect the period before trial as the justice of the case requires, and may determine the place and mode of trial. As an alternative in cases where the material facts are not in dispute, the Court may, with the consent of the parties, treat an application for an interlocutory injunction as the trial of the action and make a final order accordingly.

For urgent cases, an application is made by way of *ex parte* notice of application supported by affidavit. The *ex parte* injunction order granted is valid for only 21 days unless earlier revoked or set aside. The *ex parte* order must be served on the defendant within one week from the date of the order. The Court, when granting the *ex parte* order, must forthwith fix a date for *inter partes* hearing within 14 days, that is, before the expiry of the 21 days from the date of the *ex parte* order.

**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. As stated above, the applicant may apply for an *ex parte* injunction in cases of real emergency and urgency. This is especially so in cases which require urgent action or secrecy of action, for example in cases involving property, where there is real danger of the property being

lost or destroyed.

The Court generally has the discretion to decide whether to grant an interlocutory injunction and will consider various matters to prevent the abuse of process of the Court.

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

**Answer:** The steps are as follows:

- (a) Plaintiff's solicitor must certify that the case is urgent;
  
- (b) Application is to be made by *ex parte* notice of application supported by an affidavit (Order 29 rule 1(2) of the Rules of Court 2012). The affidavit must contain a clear and concise statement of –
  - (i) facts giving rise to the claim against the defendant;
  
  - (ii) facts giving rise to the application for the interlocutory relief;
  
  - (iii) facts relied on to justify the application *ex parte*, including details of any notice given to defendant or, if notice has not been given, the reason for not giving notice;
  
  - (iv) any answers or likely answers by defendant to plaintiff's claim or interlocutory relief,

- (v) any facts known to the applicant which might lead the Court not to grant relief *ex parte*;
- (vi) any previous similar *ex parte* application has been made and if, any order given; and
- (vii) the precise relief sought.

This is to ensure that *ex parte* injunctions are granted only in very urgent matters.

## **7. Opposition of the defendant**

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

**Answer:** Yes. The defendant can apply to set aside the *ex parte* injunction on possible grounds of:

- (a) No serious question to be tried; or
- (b) Balance of hardship is in defendant's favor; or
- (c) Assessment of damages: damages can be assessed, or plaintiff cannot pay damages if defendant wins; or
- (d) Suppression of material facts.

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

**Answer:** Possible if the defendant gives an undertaking on terms agreed by parties.

**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:** Possible.

**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:** Disobedience to an injunction may give rise to committal proceedings on grounds of civil contempt. As an alternative to committal, if a Court order (including an injunction) is not complied with, the Court may direct the act to be done by some person appointed for that purpose (Order 45 rule 8, Rules of Court 2012).

As an alternative to committal, the Court may impose a fine or require the contemnor to give security for his good behaviour, or grant an injunction against the repetition of the contempt by the contemnor or his abettors. The Court may also penalise a party in contempt by ordering him to pay the costs of the application.

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

**Answer:** Yes. The applicant has a right to apply. The defendant is also at liberty to apply for modification, unless otherwise agreed by parties. However, in doing so, the Court will exercise its jurisdiction cautiously.

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

**Answer:** The High Court has the power to grant interim measure by order, for instance an injunction order, where it appears to the Court to be just and convenient to do so. The grant of such interim measures is discretionary, and its overriding object is to protect and preserve legal rights and interests and to prevent the commission or continuation of a legal wrong.

For example, interlocutory injunctions are granted to an applicant who claims that his right are being infringed and he seeks to stop the offender from continuing his activity. The Court relies on certain principles in determining whether to grant an interlocutory injunction. The applicant has to show that:

- (a) there is a serious question to be tried; and
- (b) the balance of convenience lies in favor of granting the injunction.

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

**Answer:** The Court may order the following costs in interlocutory proceedings:

- (a) reserved costs;
- (b) costs in the cause or plaintiff's costs in the cause or plaintiff's costs in any event or plaintiff's costs;
- (c) defendant's costs in the cause, or defendant's costs in any event, or defendant's costs;
- (d) costs thrown away; and
- (e) costs of the day.

**V. ARBITRATION**

- 1. Is it possible to apply for an interim measure in order to assure the effective enforcement of an Arbitration Award in your country? If YES: what is the enforcement procedure?**

**Answer:** Section 11 of the Arbitration Act 2005 provides that:

A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to:

- (a) maintain or restore the status quo pending the determination of dispute;
- (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
- (e) provide security for the costs of the dispute.

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

**Answer:** Yes.

As provided by section 19(1) of the Arbitration Act 2005, unless otherwise



agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

Section 19(2) of the Arbitration Act 2005 further provides that an interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to –

- (a) maintain or restore the status quo pending the determination of the dispute;
- (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or

- (e) provide security for the costs of the dispute.

## **VI. FOREIGN PROCEDURE & ARBITRATION**

- 1. Is it possible to apply for an interim measure before your country 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 (as explained in QA, Part V, above).

This is by virtue of section 10(4) of the Arbitration Act 2005, which states:

*“This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.”*

As such, parties may apply for interim measures even where it involves foreign Arbitration Awards. The procedure would accordingly be similar to that explained as above.

## **VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.**

- 1. Please state/provide any other issues of interest in your jurisdiction.**

**Answer:** No

Malaysia

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