

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Sri Lanka]

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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: Yes, Chapter XLIX of the Civil Procedure Code of Sri Lanka provides for interim orders to ensure the effective enforcement of court decisions. These includes (i) orders for sale of perishable property, and (ii) orders for detention, preservation, or inspection of property. Further, the Civil Procedure Code also provides for other forms of interim measures to ensure the effective enforcement of a court decision.

In addition, Section 54 of the Judicature Act, No. 2 of 1978, provides for the granting of injunctions and enjoining orders in favour of the plaintiff or any other person who appears by way of affidavit. Accordingly, where sufficient grounds exist therefor, the court may grant an injunction restraining a defendant from (i) committing or continuing an act or nuisance, (ii) doing or committing any act or nuisance, or (iii) removing or disposing of property, in any of the following circumstances:

- a. the commission or continuance of an act or nuisance which would produce injury to the plaintiff; or
- b. during the pendency of an action, any act or nuisance by the defendant in violation of the plaintiffs rights in respect of the subject-matter of the action and tending to render the judgment ineffectual, or
- c. during the pendency of an action, where the defendant threatens or is about to remove or dispose of his property with intent to defraud the plaintiff.

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

Answer: Yes.

Court fees and stamp duties are payable in respect of any application for interim orders or injunctions. The amounts of the fees, etc., payable are variable depending on the subject matter and the value of the action.

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

Answer: The length of time required for obtaining an interim order or an injunction varies with subject matter, the level of evidence adduced by the parties, the balance of convenience, and requirements of the case. As a rule of thumb, the decision of the court on the question of granting an interim measure can be expected anywhere from four months to a year. Courts in Sri Lanka do not generally grant interim orders and / or injunctions on the same day.

However, in the interim to prevent any undue mischief, enjoining orders may be obtained *ex parte* on the same day by the court, where sufficiently strong *prima facie* evidence is adduced in support thereof by the applicant, and the court is

satisfied on the balance of convenience that it warrants the granting of an enjoining order. Such enjoining orders are granted by courts for periods not exceeding fourteen days at a time until the hearing and decision of the application for an injunction.

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: As per the Civil Procedure Code, a court in an appropriate situation may grant any one or more of the following interim measures on the balance of convenience:

- a. search and seizer orders;
- b. appointment of a receiver;
- c. ordering of arrests;
- d. sequestration orders;
- e. security for costs;
- f. prohibiting a defendant from receiving payment of a debt and the debtor from making payment of that debt until further ordered by the court;
- g. prohibiting a defendant from transferring its shares or receiving dividends;
- h. prohibiting any person in possession of movable property from giving it to the defendant;
- i. orders for sale of perishable property;
- j. orders for detention, preservation, or inspection of property; and / or
- k. injunctions and enjoining orders.

III. PROCEDURE

1. Competent Court

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

Answer: The District Courts, the High Court of Sri Lanka, and / or the Provincial High Courts of Sri Lanka.

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: In relation to interim orders, Section 670 of the Civil Procedure Code provides that every application for an interim order shall be made by petition and affidavit in the way of summary procedure and such an application may be made by a plaintiff after service of summons, or by a defendant after he has appeared in the action.

In terms of Section 54 of the Judicature Act, No. 2 of 1978, injunctions may be granted at any time after the commencement of the action and before the delivery of the final judgment after noticing the defendant. Further, where the defendant in any action sets up any claim in reconvention, such defendant shall have the same right to an injunction as he would have in an action brought by him against the plaintiff for the cause of action stated in the claim in reconvention, and the plaintiff shall be deemed the defendant and the claim in reconvention the plaint.

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: No, however, an application can be filed as at the same time as filing of the underlying lawsuit.

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 before the delivery of the final judgment. Please also see our response under III (2).

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. The relief sought must not be undervalued and the claim must not be barred by law. The application shall be accompanied by an affidavit of the applicant or some other person having knowledge of all the necessary facts on which the application is based. An interim injunction shall be granted *ex parte* only if it is supported by strong evidence and disclosure of all the necessary facts based on the principals of *uberrima fide*.

Generally, an injunction is granted on a case by case basis by the court (i) where any irreparable loss or damage will be caused to the applicant, or (ii) the finale relief would be rendered nugatory, if the injunction is not granted by the court. Further, the court in granting an injunction or enjoining order will also consider whether (i) there exists strong *prima facie* case of infringement or imminent infringement of a legal right, (ii) where the balance of convenience lies in respect of the evidence, and (iii) the conduct and relationship of the parties thereto.

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: The Civil Procedure Code provides that every application for an interim measure shall be made by way of petition and affidavit in the way of summary procedure; and every party who is sought to be affected by the order must be named a respondent in the petition. The petition is required to be supported by a sworn affidavit tendered by the applicant along with the petition. Further, every action is required to be instituted upon a duly stamped written petition presented to court by the applicant.

The following constitute the principal steps in summary procedure in an application for an interim measure:

- The applicant should file the petition together with his affidavit by way of a motion seeking an immediate hearing on the matter;
- Generally, after filing of the motion, depending on the circumstances, the matter can be supported on the same day by the applicant. The applicant is required to come with clean hands and should submit all evidence necessary to procure the enjoining order;
- The court may on its discretion grant an immediate enjoining order for a period within fourteen days. Thereafter, irrespective of whether the enjoining order was granted, the defendants will be noticed by court, and the applicant will have to send a copy of the petition and affidavit along with such notice to every defendant therein.
- On the notice returnable date, the defendant or defendants may file their statement of objections against the granting of the interim measures requested for by the applicant. Where the court fails, due to circumstances beyond its control to serve notice on the defendant, the court may at its discretion extend the period fixed for the return of notice to another date, such date being a day not later than three (3) months from the date on which the defendant was first required to file his objections.
- The court will consider the statement of objections filed by the defendants; and before coming to its decision, may request the parties for further oral submissions and / or written submissions to clarify any issues in respect of the interim measures.

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: Generally, the respondent must be notified of the application for an interim injunction (Section 664(1), Civil Procedure Code). However, if the court considers that the object of granting an injunction would be defeated by any delay, it can,

until the hearing and the final decision on the application, enjoin the defendant for a period of fourteen (14) days, which can be extended for a period not exceeding fourteen (14) days (Section 664(2), Civil Procedure Code).

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

Answer: Please also see our response under III (6) (a).

7. Opposition of the defendant

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

Answer: In terms of the Civil Procedure Code, the defendant to an application for an interim measure may on the notice returnable date, file their statement of objections against the granting of the interim measures requested for by the applicant. Further, the defendant is also entitled upon the submission of appropriate counter evidence on the balance of convenience to request the vacation of an enjoining order already granted.

Where the defendant is absent on the notice returnable date without reasonable cause, the matter will be decided ex parte by the court.

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

Answer: The enjoining order can be made conditional so that there is no alteration in the status quo. Enjoining orders are granted before the merits of granting an interim measure can be properly gone into by the court.

8. Appeal

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

Answer: While one cannot proffer an appeal from the decision of the court in granting or refusing to grant an interim measure, the affected party may request for a revision of the said order from an appropriate appellate court.

Section 753 of the Civil Procedure Code states that the Court of Appeal may, of its own motion or any application made, call for and examine the record of any case, whether already tried or pending trial, in any court, tribunal or other institution for the purpose of satisfying itself as to the legality or propriety of any judgement or order passed therein, and may upon revision of the case brought before it pass any judgement or make any order, as the interests of justice may require. This jurisdiction of the Court of Appeal has been transferred to the respective Provincial High Courts in terms of High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

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

Answer: As noted above, the decision to grant an interim measure is not subject to appeal. The affected party may invoke the revisionary jurisdiction of the appropriate court. Upon the matter being taken up for revision, any interim measures already granted can be stayed by the appellate court, and / or may become unenforceable.

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. Section 663 of the Civil Procedure Code states that an injunction or enjoining order injunction granted by the court on any such application may, in case of disobedience, be enforced, however, the offender will be held to be in contempt of court.

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

Answer: Yes, it is possible to modify a previous interim measure by application to the same court.

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

Answer: An interim measure can be raised at any time, particularly as circumstances or evidence of the case change, including:

- Upon an order or judgement being handed down in favour of the defendant.
- Upon the claim being stayed.
- Upon both parties consenting to the lifting of the order.

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

Answer: Court fees and costs, including payment of stamp duty, are stipulated by rules made by the Supreme Court of Sri Lanka. However, while lawyers' fees are unregulated in Sri Lanka, only a certain portion thereof can be recovered through courts.

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: Yes, under Part IV, Section 13 (1) of the Arbitration Act, No. 11 of 1995, "*an arbitral tribunal may, at the request of a party, order any other party to take such interim measures as it may consider necessary to protect or to secure the claim which forms the subject matter of the dispute. The arbitral tribunal may also order*

the party making such request to provide the party ordered to take such interim measures, with security for any expense, loss or damage that may be caused in taking such interim measures.” The court will only make such an order after hearing the other parties unless it is an exceptional case.

Under Section 13(2) of the aforesaid Act, *“an order of an arbitral tribunal requiring the taking of interim measures may be enforced by the High Court, on an application made therefore, by the party requesting the taking of such interim measures.”*

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

Answer: Yes, please see above under V (1) hereto.

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: No, interim measures cannot be obtained in order to assure the effective enforcement of a foreign court decision (before the registration of such foreign judgment) or a foreign arbitration award (before applying to enforce such foreign arbitration award).

Submitted by

	Contact 1	Contact 2 (optional)	Contact 3 (optional)
Contact Name:	Krishanth Rajasooriyar		
Firm Name:	Varners		
Email:	rajasooriyar@varners.lk		
Phone #:	+9411 239 4350 (-1) / +9411 554 4711		
Website:	www.varners.lk		