

Enforcement of Foreign Judgments

Interim and Precautionary Measures [USA - Federal]

2020



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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:

The Uniform Foreign-Country Money Judgments Recognition Act (“UFCMJRA”), a version of which has been adopted by 33 U.S. States, does not have any provision for interim measures or relief. Individual State law may permit some form of interim relief under certain circumstances.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. It is common in the United States that a party seeking interim relief (in the form of a preliminary injunction, pre-judgment attachment of property, replevin action, and the like) must post a bond with the court.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. The most immediate form of interim relief is a Temporary Restraining Order (“TRO”), which can be issued on the same day on which it is sought. A TRO is generally not valid for longer than 10 days, within which time a court will hold a hearing on whether or not to grant a Preliminary Injunction, which can remain in place until final judgment is rendered in the case. A party need not first seek a “TRO” before seeking a Preliminary Injunction. A party that seeks a Preliminary Injunction without first seeking a TRO will typically be afforded a hearing (and ruling) within a few days of the filing of Preliminary Injunction motion papers.

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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. Common forms of preliminary relief in the U.S. legal system include:

1. Temporary Restraining Orders
2. Preliminary Injunctions
3. Prejudgment attachment
4. Replevin

III. PROCEDURE

1. Competent Court

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, any State or Federal court that has personal jurisdiction over the defendant and subject matter jurisdiction over the claims raised in the case can issue preliminary relief.

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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, courts in the U.S. legal system permit a party to file a Complaint and a motion for preliminary relief at the same time.

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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, courts in the U.S. legal system do not permit a party to obtain preliminary relief against a defendant prior to filing a Complaint initiating an action against the defendant.

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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, courts in the U.S. legal system will permit a party to seek preliminary relief after filing the main claim, however a request for such relief will be denied if the party seeking it has unduly delayed in requesting it.

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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, a party seeking a TRO or Preliminary Injunction will have to demonstrate: (1) that they will suffer irreparable harm if the relief is not granted (that is, harm that cannot be compensated by money), (2) that greater injury will be done if the relief is not granted than will be done if the relief is granted, (3) a likelihood of success on the merits of the underlying claims, (4) the granting of relief under the circumstances will not adversely affect the public interest. In some instances, the party must also post a bond with the court in order to obtain preliminary relief, though a court typically has the authority to waive the bond requirement if the circumstances justify doing so.

A number of States permit Prejudgment Attachment of property under certain circumstances, which vary by State. This form of prejudgment relief is typically available only in disputes involving real estate. Prejudgment Attachment can be useful where a party seeking prejudgment relief will have difficulty making the showing of irreparable harm necessary to obtain a TRO or Preliminary Injunction.

Another form of prejudgment relief available in many States is Replevin. The availability of Replevin is determined by State law and varies by State. As a general matter, Replevin is a form of relief that is available to recover specific property that is in the possession of another party. Replevin is not generally available to recover a money debt. Like Prejudgment Attachment, Replevin can be a useful form

of prejudgment relief to a party who will have difficulty making the showing of irreparable harm necessary to obtain a TRO or Preliminary Injunction.

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 UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, a party seeking a TRO will be afforded a summary hearing before a judge (which may be ex parte if the party sought to notify the defendant but was unable to do so in good faith) before issuance of the relief, which typically will expire within 10 days.

A party seeking a preliminary injunction will be afforded a hearing within a few days of filing an injunction motion, at which that party must present evidence supporting its claim for relief. The hearing will be before a judge (there is no jury).

In at least some jurisdictions, the remedies of prejudgment attachment and replevin can be granted on motion without a hearing, if the court determines a hearing is unnecessary.

- 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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, a court can issue a TRO without hearing from the other party, provided that the party seeking the relief has made a good faith effort to notify the opposing party of the TRO hearing. Courts in the U.S. will not grant a preliminary injunction, prejudgment attachment, or replevin without giving the defendant an opportunity to be heard.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, a party seeking a TRO would file, at the same time, a Complaint and Motion for TRO, together with a Memorandum of Law in support of the TRO motion and a proposed form of Order. Counsel for the filing party would notify the court judge assigned to “emergency duty” of the fact that a TRO was being filed and request a hearing time for that same day. Counsel for the filing party would also serve a copy of the papers that were being filed with the court on counsel for the opposing party (if known), usually by personal delivery or via email or facsimile. If counsel for the opposing party is not known, counsel for the filing party would serve a copy of the papers on the opposing party by personal delivery, or via email or facsimile.

A party seeking a Preliminary Injunction would file, at the same time, a Complaint and Motion for Preliminary Injunction, together with a Memorandum of Law in support of the Preliminary Injunction motion and a proposed form of Order. Counsel for the filing party would notify the court judge assigned to “emergency duty” of the fact that a Preliminary Injunction motion was being filed. Counsel for the filing party would also serve a copy of the papers that were being filed with the court on counsel for the opposing party (if known), usually by personal delivery or via email or facsimile, and try to contact opposing counsel to arrange a hearing time to propose to the court. If counsel for the opposing party is not known, counsel for the filing party would serve a copy of the papers on the opposing party by personal delivery, or via email or facsimile, together with a request that counsel for the opposing party contact counsel for the moving party immediately to arrange for a hearing time for the motion.

7. Opposition of the defendant

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, yes.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, yes.

8. Appeal

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, an emergency appeal can be taken from the denial of a motion for a TRO or Preliminary Injunction. It is much less common for a party against which prejudgment relief has been awarded to be permitted to take an appeal of the grant of that preliminary relief.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, as noted above, appeals by a party against whom preliminary relief has been granted are rare. To the extent that a court were to permit such an appeal, it is virtually inconceivable that a court would suspend the preliminary relief pending the appeal.

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:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, yes. A party who refuses to comply with a court order awarding preliminary relief is in contempt of court. The party in whose favor the relief was granted can go back to court to request additional sanctions or punishment be awarded against the non-complying defendant.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, yes. A court can modify an award of prejudgment relief upon a motion by either party, or sua sponte.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, see the response to Question III.5.a. above.

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

Answer:

The UFCMJRA does not address this issue, so it will be governed by State substantive law, and/or State or Federal court procedure. As a general matter, in the U.S. legal system each party bears its own costs and fees (although contract-based fee-shifting provisions between parties of relatively equal bargaining power will typically be enforced).

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:

The enforcement of a foreign arbitration award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq. Some court decisions under that Act have determined that permitting prejudgment attachment—a type of interim measure—is “not inconsistent” with the purpose of that Act.

The general procedure for enforcement of an arbitration award in a Federal court is to file a Petition to Enforce the Award.

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

Answer:

In the United States, the answer to this question depends on whether the parties to the arbitration empowered (either explicitly or implicitly) the

arbitrator to grant interim relief. If the parties did so authorize the arbitrator then the arbitrator can award such relief, as a general matter.

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:

See the response to Question V.1.

VII. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION.

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

Answer:

Nothing to add.

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