

PREJUDGMENT REMEDIES AND INTERIM MEASURES OF PROTECTION FOR ARBITRATIONS: WHO, WHAT, WHERE, WHEN AND HOW?

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I. Did you notice no one asks "why"?

The two most voracious creditors rarely sit at the table and are not parties to the arbitration agreement:

- A. Taxing authorities.
- B. Bankruptcy trustee.

II. What are you seeking to do?

- A. Preservation of property or evidence held by a party.
- B. Turnover property to a custodian (sequestration/attachment).
- C. Turnover property to the requesting party who posts a bond (replevin).
- D. Orders of inspection (in the nature of discovery).
- E. Obtain certain information to allow work to be continued or completed (such as a computer password).
- F. Sale of perishable goods with the proceeds to be held by a third party.
- G. Appointment of a receiver.
- H. Require continued performance of a contract in dispute.
- I. Avoid the loss of a right, such as extending a software license.
- J. Confidentiality orders.

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III. What kinds of remedies are available?

- A. The Tribunal: it depends upon your arbitration rules and what was agreed upon.
1. American Arbitration Association Commercial rule R-36 Interim Measures
 - (a) The arbitrator may take **whatever interim measures he or she deems necessary**, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. [emphasis added]
 - (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
 - (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
 2. American Arbitration Association's Optional Rules for Emergency Measures of Protection.

O-1 Applicability

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2 Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3 Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4 Interim Award

If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that ***immediate and irreparable loss or damage will result in the absence of emergency relief***, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore. [emphasis added]

O-5 Constitution of the Panel

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall

have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6 Security

Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7 Special Master

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8 Costs

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.

3. International Chamber of Commerce.

Article 23 - Conservatory and Interim Measures

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, **order any interim or conservatory measure it deems appropriate**. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving

reasons, or of an Award, as the Arbitral Tribunal considers appropriate. [emphasis added]

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

4. UNCITRAL rules, Article 26

1. At the request of either party, the arbitral tribunal may take **any interim measures it deems necessary in respect of the subject-matter of the dispute**, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. [emphasis added]

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

B. The Court: It depends upon the court.

1. Connecticut - existing law²

² Connecticut General Statutes §52-422. Order pendente lite

- A. Possible:
 - i. *Koeck v. Harris* 2000 WL 1770063 (October 27, 2000).
 - ii. *Yellin v. Premier Development* 1994 WL 24770 (April 25, 1994).
 - iii. *Spicer v. Spicer* 1992 WL 394390 (December 29, 1992).

- B. Not possible
 - i. *Brown & Welsh v. Negro* 1996 WL 502480 (August 29, 1996).
 - ii. *Carty v. DC Retail 1* 1999 WL 1013123 (October 23, 1999)

- C. Only if the arbitration is already pending.
 - i. *Building Technologies v. Harley-Davidson of Danbury* 1997 WL 280236 (May 16, 1997).

2. Uniform Arbitration Act, Section 8.
Provisional Remedies.

- (a) Before an arbitrator is appointed and is authorized and able to act, the court, upon [motion] of a party to an arbitration proceeding and for good cause shown, may enter an order for **provisional remedies to protect the effectiveness of the arbitration proceeding** to the same extent and under the same conditions as if the controversy were the subject of a civil action. [emphasis added]

At any time before an award is rendered pursuant to an arbitration under this chapter, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when said court is not in session, any judge thereof, upon application of any party to the arbitration, may make forthwith such order or decree, issue such process and direct such proceedings as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue such orders for **provisional remedies**, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, **to the same extent and under the same conditions as if the controversy were the subject of a civil action** and [emphasis added]

(2) A party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely **or the arbitrator cannot provide an adequate remedy**. [emphasis added]

(c) A party does not waive a right of arbitration by making a [motion] under subsection (a) or (b).

5. UNCITRAL Model Law on International Commercial Arbitration

Connecticut General Statutes §50a-109. Arbitration agreement and interim measures by court.

Unless otherwise provided in the arbitration agreement, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, **an interim measure of protection** and for a court to grant such measure.

Connecticut General Statutes §50a-117. Power of arbitral tribunal to order interim measures.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such **interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute**. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

- C. The difference between injunctive relief and a PJR - does it affect the rights of third parties? This consideration affects everything.

IV. Going to court.

A. Reasons to go to court.

- 1. Local procedures are well defined.
- 2. The rights of third parties are clearly affected.

B. Reasons not to go to court

- 1. You need to repeat the application for each jurisdiction.
- 2. The standards will differ markedly between jurisdictions.
- 3. There is no full faith and credit for proceedings before judgment.
- 4. The Uniform Arbitration Act may require you to go to the tribunal first.

C. Open Issues.

- 1. Does going to court constitute a waiver of the arbitration clause?

IV. Going to the arbitral tribunal

A. Reasons to go

- 1. There is one tribunal and one hearing.

B. Reasons not to go

- 1. The arbitrators may not entertain your application.
- 2. Uncertainly about the standard of proof.

C. Open issues

- 1. Will a court enforce an order for interim measures? How?
- 2. What effect will an order for interim measures have on the rest of the arbitral proceedings?