

# Interim Measures

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## Speakers

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# Who We Are

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# Who We Are

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Founded in 1999 and headquartered in Dubai, we are one of the UAE's leading multidisciplinary law firms. Our 60+ staff have handled cases and legal matters throughout the Middle East for over two decades. Our firm has a one team approach and our professionals assist each other to make sure the client's interests are fully protected.

Our team of lawyers, comprised of partners, legal consultants, barristers and associates, from a number of different common-law and civil law jurisdictions, are well versed in the laws of the UAE and the surrounding Middle East Region. Our practice areas include:

- Arbitration
- Banking and Finance
- Civil and Commercial Litigation
- Construction
- Corporate and Commercial
- Criminal
- Employment
- Investment
- Real Estate & Infrastructure



# What Are Interim Measures?

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# What Are Interim Measures?

- Interim measures are urgent measures which apply only where there is an imminent risk of irreparable harm.
- Such measures are decided in connection with proceedings before the court, without prejudging any subsequent decisions on the admissibility or merits of the case in question.
- The interim measure judge (sometimes referred to as urgent status matters judge) is able to grant interim measure judgments on an exceptional basis, when the applicant would otherwise face a real risk of serious and irreversible harm.

# Most Common Types of Interim Measures

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# Most Common Types of Interim Measures In The UAE

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- Precautionary attachments
- Travel bans
- Security for costs
- Preservation of evidence

# Interim Measures in Arbitration

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# Interim Measures in Arbitration

Interim Measures under Arbitral Institutional Rules:

- DIAC 2007 Arbitration Rules (Article 31)
- DIFC-LCIA 2016 Arbitration Rules (Article 25)
- ICC 2017 Arbitration Rules (Article 28)

# Interim Measures in Arbitration

## Onshore Arbitration: the Federal Arbitration Law

- Federal Law No. 6 of 2018 (“**Federal Arbitration Law**”): UAE’s first ‘stand alone’ arbitration law.
- Based broadly on the UNCITRAL Model Law (with some notable differences).
- Designed to address limitations in domestic arbitration, including limitations on arbitral tribunals to manage arbitrations:
  - e.g., power to issue interim or conservatory measures (see Articles 18 and 21).
- Under the previous governing provisions (i.e., Articles 203-218 of the UAE Civil Code), neither arbitral tribunals nor courts had the express power to order interim measures in support of arbitral proceedings.

# Interim Measures in Arbitration

Article 18 (“General Jurisdiction to Consider Arbitral Measures”):

- The Chief Justice of the Court may order interim / conservatory measures as considered necessary in arbitral proceedings;
- Such relief may be ordered either before the arbitration has commenced or during the proceedings;
- Such relief may be requested by a party or by the arbitrators;
- Court intervention will not stay the arbitral proceedings nor amount to a waiver of the Arbitration Agreement.

# Interim Measures in Arbitration

Article 21 (“Interim Measures or Conservatory Measures”):

*“1. Subject to the provisions of Article 18 of this Law, and unless otherwise agreed by the Parties, the Arbitral Tribunal may, **at the request of a party or on its own motion**, order any party to take such interim or conservatory measure **as the Arbitral Tribunal may consider necessary given the nature of the dispute**, including, in particular:*

- A. An order to preserve evidence that may be relevant and material to the resolution of the dispute.*
- B. Taking necessary measures to preserve goods which constitute part of the subject-matter of the dispute such as an order to deposit goods with a third party or to sell goods which are susceptible to damage.*
- C. **Preserving** assets and **funds** out of which a subsequent award may be satisfied.*
- D. **Maintaining or restoring the status quo pending determination of the dispute.***
- E. An order to take action that would prevent, **or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration process itself**”.*

# Interim Measures in Arbitration

Article 21 (“Interim Measures or Conservatory Measures”)(continued):

- The party seeking relief may be ordered to post security and pay damages arising from the interim/conservatory measure if ultimately deemed unwarranted.
- If an interim measure has been awarded, the party may ask for the arbitrators’ written permission to have the competent court enforce the measure within 15 days of making the request.

# Interim Measures in Arbitration

Notable differences between the Federal Arbitration Law and the UNCITRAL Model Law (Article 17):

- Article 21(b) of the Federal Arbitration Law provides a ground for interim measures not foreseen under Article 17 of the UNCITRAL Model Law: i.e., the safeguarding of goods that are the subject matter of dispute.
- Article 21 of the Federal Arbitration Law does not provide for *ex-parte* orders for interim measures (unlike Article 17(b)).
- The conditions that the applicant will need to satisfy to obtain the interim measure are different:
  - Article 17 A of the UNCITRAL Model Law provides a two-part test: “(a) ***Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted;*** and (b) there is a ***reasonable possibility that the requesting party will succeed on the merits of the claim***”.
  - Article 21(1) of the Federal Arbitration Law states only that the Arbitral Tribunal “*may, at the request of a party or on its own motion, order any party to take such interim or conservatory measure as the Arbitral Tribunal ***may consider necessary given the nature of the dispute*** [...]*”.

# Interim Measures in Arbitration

Offshore Arbitration: DIFC Law No. 1 of 2008

Article 24 (“Power of Arbitral Tribunal to order interim measures”):

- Arbitrators can issue interim measures (unless agreed otherwise by the parties), as well as the DIFC Courts.
- The party seeking relief may need to post security (deposit / bank guarantee).
- Relief is given *“in the form of an award or in another form”*.
- The purposes of the measure are similar to those in the Federal Arbitration Act.
- Two prong test:
  - The harm faced by the requesting party would *“not be **adequately reparable by an award of damages**”*, it would be likely to result if the interim measure is not ordered, and that harm will *“**substantially outweigh the harm**, if any, that is likely to result to the party opposing the interim measure if the measure is ordered”*: **and**
  - *“there is a **reasonable possibility** that the requesting party will succeed on the merits of the claim”*.
- A party seeking enforcement by the DIFC Court must first obtain written permission from the Arbitral Tribunal.
- The party in whose favour an interim measure is granted who asks the DIFC Court to enforce the order must simultaneously notify all the other parties.

# Interim Measures Before The Domestic Courts

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# Interim Measures Before The Domestic Courts

- The most frequent form of interim relief sought in the local courts in connection with construction disputes is a precautionary attachment on the bond.
- A bank guarantee is independent from the underlying contract or transaction between the principal debtor and the beneficiary.
- There is a two types of bond:
  1. Unconditional
  2. Conditional
- Unconditional Bond: The trend is that a performance bond issued by the contractor are payable to the employer without any condition, the bank is obligated to pay a beneficiary when the performance bond is called upon, absent certain circumstances.
- Conditional Bond: If the bank guarantee is subject to conditions or submission of any documents by the beneficiary, the beneficiary shall not be able to invoke the bank guarantee unless such conditions are met or the required documents are submitted. It is the responsibility of the guarantor to prove that the bank guarantee is subject to such conditions.
- As per Article 417(1) of the UAE Commercial Code, “the bank shall not be entitled to refuse payment to the beneficiary for reasons relating to the bank’s relation with the client or the client’s relation with the beneficiary”.
- In order to prevent a bank from paying out on a performance guarantee, the contractor/sub-contractor must therefore obtain a court order prohibiting the bank from making payment.

# Interim Measures Before The Domestic Courts

What must the applicant submit to obtain a precautionary attachment order?

- Article 417 of the Commercial Transactions Law provides that “In exceptional cases, the court may at the request of the ordering person levy seizure on the guarantee amount with the bank, provided that the ordering person relies for his claim on serious and solid grounds.”
- The court don't rely on Article 111 of Resolution of the Cabinet No. (57) of 2018 in order to impose a precautionary attachment, which states that the judge of urgent matters, to temporarily impose precautionary attachment in each case where the creditor has serious concerns that he is likely to lose the guarantee of his right, such as the following cases:
  - a) If the debtor has no fixed place of residence in the State;
  - b) If the creditor has serious evidences to fear that the debtor will flee or smuggle or conceal his assets;
  - c) If the debt guarantees are at risk of being lost.
- The application for a precautionary attachment is presented to the judge for ruling without a prior notice to the defendant. The judge will consider the application within 48 hours.
- Judicial standard for review: The judge will not impose the precautionary attachment unless it finds that such relief is warranted following a prima facie review of the documentation submitted with the petition for attachment.

# Interim Measures Before The Domestic Courts

Filing of a substantive claim

- Article 114 of the Resolution of the Cabinet No. (33) of 2020 Amending Certain Provisions of Resolution of the Cabinet No. (57) of 2018 upon obtaining a precautionary attachment order, the petitioner must commence litigation within 8 days from the issuance of the order.

# Interim Measures Before The Domestic Courts

## Filing of a grievance against order

- Grievance is an action in order to lift an attachment order, it requires an independent application as challenging the precautionary attachment, pursuant to Article 60 of the Resolution of the Cabinet No. (33) of 2020 Amending Certain Provisions of Resolution of the Cabinet No. (57) of 2018.
- The Applicant, whoever the application is issued against and the concerned parties, may file grievance to the delivering competent court or judge, as the case may be to challenge the order, unless otherwise is provided by the Law or these Regulations. If the original claim is filed before the court, the entertainment of grievance shall not be prevented.
- The grievance shall be filed independently or collaterally with the original claim through the procedures whereby the incidental motions are filed.
- The grievance shall be decided either by affirmation, amendment or cancellation of order. This judgment may be contested by appeal only, unless the judgment delivered in the grievance is delivered by the Court of Appeal.
- There is no time limit to file the grievance, while the grievance judgment may only be challenged by way of appeal:
  - within 30 days of the issuance date of the grievance judgment in Dubai

# Q&A

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