This Practice Note outlines interim measures available in arbitration and provides guidance on where, when and how to apply for these measures.

**SCOPE OF THIS NOTE**

Interim, provisional and conservatory measures are remedies that can be granted before the arbitrators hear the merits and render their final award. They are designed to protect a litigant during the course of an arbitration to insure a meaningful final adjudication on the merits. These are extraordinary remedies that are usually granted only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without interim relief. If the remedy is granted, the applicant may be required to post security to make the other party whole for any injury it sustains as a result of the remedy if it is determined that the applicant was not entitled to the remedy. Before advising a client to seek an interim remedy, counsel should consider the likelihood of obtaining relief and the value of that relief if obtained.

This Note addresses remedies that parties may seek before arbitrators and courts to preserve the status quo so that the final award rendered by the arbitrators will be meaningful. Depending on the applicable law or institutional rules, the remedy may be referred to as “provisional,” “preliminary,” “interim,” “conservatory” or “temporary.” Regardless of the term, the effect is the same. Under the rules of most of the arbitral institutions, the arbitral tribunal can grant interim remedies, which include the ability to grant preliminary injunctive relief and orders of attachment in an appropriate case. A party may, for example, need to restrain an employee in possession of sensitive trade secrets from working for a competitor or may need to attach assets that would otherwise leave the jurisdiction.

This Note explains the:

- Relevant sources of law.
- Power of arbitrators.
- Role of the courts.

**US LEGAL FRAMEWORK FOR ARBITRATION**

Federal courts, state courts and arbitrators can grant interim relief such as preliminary injunctions and pre-judgment attachments in aid of arbitration. Most interim measures are granted at an early stage in the proceedings to preserve the status quo or prevent the dissipation of assets or evidence that could render an award ineffectual.

Arbitration in the US is governed by both federal and state law. The main source of US arbitration law is the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16, 201-208, 301-307), which applies in the state and federal courts of all US jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract “involving commerce,” which is defined broadly (see *Citizens Bank v. Alafabco, Inc.* 123 S. Ct. 2037, 2040 (2003)). This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the US.

The FAA does not cover “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” (9 U.S.C. § 1). Therefore, employees “actually engaged in the movement of goods in interstate commerce” are not covered by the FAA (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001), quoting *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). The FAA’s exemption for seaman’s employment contracts, however, does not apply to international voyages, which are covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958 (New York Convention) (see *Dumitru v. Princess Cruise Lines, Ltd.*, 732 F. Supp. 2d 328, 338 (S.D.N.Y. 2010)). In the areas the FAA covers, the courts have stated that it generally pre-empts any state law that conflicts either with its express provisions or its intent of promoting arbitration.

The FAA permits parties to specify in their agreement state arbitration rules to govern their arbitration (see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008)). All 50 US states and the District of Columbia have enacted arbitration laws of their own to address issues on which the FAA is inapplicable or silent.

- Factors to consider when deciding to seek interim relief before arbitrators or a US state or federal court.
- Best ways to resist interim relief.
Federal courts are courts of limited jurisdiction and can hear only certain types of cases. In controversies touching on arbitration, however, the FAA is “something of an anomaly” in the realm of federal legislation, in that it does not independently bestow federal litigation, instead requiring independent jurisdictional basis. (Hall St., 552 U.S. at 581-582 (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983)). Where the claims in the underlying arbitration are based on federal law, as long as the federal cause of action is not facially insubstantial, the district court may properly exercise subject matter jurisdiction over the application for provisional remedies (see Fairfield Cty. Med. Ass’n v. United Healthcare of New England, Inc., 557 F. App’x 53, 55 (2d Cir. 2014)).

An action or proceeding falling under the New York Convention is deemed to arise under US laws and treaties, giving the federal district courts subject matter jurisdiction (9 U.S.C. § 203). Similarly, if the state court relates to an arbitration agreement or award falling under the New York Convention, the defendants may, at any time before the trial, remove the action or proceeding to the federal district court embracing the place where the action or proceeding is pending (9 U.S.C. § 205).

For more information on the scope of the FAA, see Practice Note, Understanding the Federal Arbitration Act (0-500-9284).

SEEKING INTERIM RELIEF BEFORE COURTS AND ARBITRATORS

Arbitration governed by institutional rules such as the American Arbitration Association (AAA) Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence or on or after October 1, 2013) (AAA Rules) and the International Centre for Dispute Resolution (ICDR) International Arbitration Rules as amended and effective June 1, 2014 (ICDR Rules) specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted (see AAA Rules 37 and 38 and Articles 6 and 24, ICDR Rules).

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale is often granted in this case.

WHO MAY PROVIDE RELIEF

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal.
- An “emergency arbitrator” appointed by an administering body.
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement.
- Applicable arbitration rules.
- Applicable federal and state law.

COURT-IMPOSED LIMITS

Some US courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention (see, for example, McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037-38 (3d Cir. 1974) and I.T.A.O. Assoc., Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981)). In Merrill Lynch, Pierce, Fenner & Smith v. Hovey, the Eighth Circuit held that a preliminary injunction was inappropriate in an arbitrable controversy where the parties did not specifically provide for it in their agreement (726 F.2d 1286, 1292 (8th Cir. 1984); see also see Manion v. Naging, 255 F.3d 535, 538-39 (8th Cir. 2001); RDF-TV, LLC v. MCC Magazines, LLC, 2010 WL 749732, at *3-4 (D. Neb. March 1, 2010)).

The prevailing view, however, is that under the FAA, a court may grant interim relief pending arbitration (see Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 376 (4th Cir. 2012), Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 365 (5th Cir. 2003); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214-15 (7th Cir. 1993); Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1051-54 (2d Cir.1990); Borden, Inc. v. Meiji Milk Prods. Co., 919 F.2d 822, 826 (2d Cir. 1990); Rhone Mediterranean Compagnia Francaise Di Assicurazioni E Riassicurazioni v. Lauro, 712 F.2d 50, 54-55 (3d Cir. 1983); and Sojitz Corp. v. Prithivi Info. Solutions Ltd., 921 N.Y.S.2d 14, 17 (1st Dep’t 2011)). In Sojitz, for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

The question of whether a federal court should grant preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered (see AIM Int’l Trading LLC v. Valcucine SpA, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002)). For more information on seeking preliminary injunctive relief in federal court, see Practice Note, Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal) (3-520-9724).

The standard for an injunction pending arbitration is the same as for preliminary injunctions generally (see Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 895 (2d Cir. 2015)). The standard for granting preliminary injunctions, however, vary slightly by circuit. Some circuits apply a balancing test, allowing a weaker showing in one factor to be offset by a stronger showing in another. Other circuits apply the traditional factors sequentially, requiring sufficient demonstration of all four before granting preliminary injunctive relief. For more information on the standards used in each circuit, see Standard for Preliminary Injunctive Relief by Circuit Chart (8-524-0128).

The likelihood of success on the merits that a court considers when considering whether to grant a preliminary injunction is measured in
terms of the likelihood of success in arbitration. Because arbitration is frequently marked by great flexibility in procedure, choice of law, legal and equitable analysis, evidence, and remedy, success on the merits in arbitration cannot be predicted with the confidence a court would have in predicting the merits of a dispute that it will determine on the merits. The court’s assessment of the merits therefore has reduced influence. (SG Cowen Sec. Corp. v. Messiah, 224 F.3d 79, 84 (2d Cir. 2000).)

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see Fairfield Cnty. Med. Ass’n, 557 F. App’x at 56; Next Step Med. Co. v. Johnson & Johnson Int’l, 619 F.3d 67, 70 (1st Cir. 2010); and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d at 215). In effect, restraints issued by courts often serve the same function as a temporary restraining order (TRO). Other courts allow provisional remedies to remain in place until the arbitral panel renders an award (see Bailey Shipping Ltd. v. Am. Bureau of Shipping, 2013 WL 5312540, at *18 (S.D.N.Y. Sept. 23, 2013) and Amegy Bank Nat’l Ass’n v. Monarch Flight II, LLC, 870 F. Supp. 2d 441, 452-53 (S.D. Tex. 2012) (collecting cases and noting the split of authority regarding how long the court-imposed relief should last)). Where the arbitrators make permanent the provisional relief ordered by the court, the court will enter permanent relief when determining the award (see Benihana, Inc. v. Benihana of Tokyo, LLC, 2016 WL 3913599, at *1, *5 (S.D.N.Y. July 15, 2016)).

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets (see Result Shipping Co. v. Ferruzzi Trading USA Inc., 56 F.3d 394, 399 (2d Cir. 1995)). In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award. For more information on provisional relief in maritime cases, see Practice Note, Maritime Attachment and Vessel Arrest in the US (w-001-8160).

The court will likely require the movant to post security, typically by bond. Judges set the bond in the amount they believe sufficient to pay any costs and damages sustained by the wrongly restrained respondent (FRCP 65(c)). The court may entertain an application for attorneys’ fees and costs in connection with the judicial provisional remedy proceedings, notwithstanding the parties’ agreement to have all disputes resolved by arbitration (see Benihana Inc. v. Benihana of Tokyo, LLC, 2016 WL 3647638, at *3 (S.D.N.Y. June 29, 2016)).

For a sample application to a federal court for preliminary injunctive relief, with integrated drafting notes, see Standard Document, Petition for Preliminary Injunction in Aid of Arbitration (Federal) (w-003-3155).

PROCEDURE UNDER STATE LAW

Outside of admiralty, Federal Rules of Civil Procedure (FRCP) 64 dictates that state law governs the availability of attachment in federal court (“At the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment”). For more information on applying for attachments under state law, see, for example, Practice Note, Provisional Remedies in New York: Attachment (6-545-4846).

In state courts, most state laws authorize provisional remedies in aid of arbitration. Section 7502(c) of the New York Civil Practice Law and Rules (CPLR), for example, provides that to obtain provisional relief, the movant must demonstrate that “the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.” CPLR 7502(c) provides that a showing of an ineffectual award is the “sole ground for the granting of the remedy” (compare JetBlue Airways v. Stephenson, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), aff’d, 931 N.Y.S.2d 284 (1st Dept’ 2011) (denying motion for injunctive relief under CPLR 7502(c) because, although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the “ineffectual award” requirement) with Winter v. Brown, 853 N.Y.S.2d 361 (2d Dept’ 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief)). CPLR 7502(c) also provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys’ fees, are awardable to the respondent.

State court decisions have also recognized that interim orders should last not only until the arbitrators are appointed where the applicable arbitral rules permit the arbitrators to entertain applications for provisional remedies (see TIBCO Software, Inc. v. Zephyr Health, Inc., 32 Mass.L.Rptr. 637 (Super. 2015)).

Some state have adopted the UNCITRAL Model Law that expressly allows for applications for interim measures of protection in aid of an arbitration (see, for example, Bahr Telecomms. Co. v. DiscoveryTel, Inc., 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment) and Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co., 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA)). States that have adopted this rule include Colorado, Florida, Minnesota and Washington.

For a sample application to a state court for preliminary injunctive relief, with integrated drafting notes, see, for example, Standard Document, Petition for Preliminary Injunction in Aid of Arbitration (NY) (w-003-6424).

WHETHER TO APPLY TO THE ARBITRAL TRIBUNAL OR THE COURT

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted, and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties. For more information on the effect of preliminary injunctions on non-parties, see Practice Note, Preliminary Injunctive Relief: Initial Considerations (Federal): Circumstances When Courts Have Found Non-parties Bound by an Injunction or Restraining Order (9-521-5760).
The party needs ex parte relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties (see AAA Rule 38(b) and Article 6, ICDR Rules). Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (for example, California and New York) permit an applicant to proceed without notice in urgent cases. This usually happens where an attachment of assets is sought.

The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy (see section 8 of the RUAA). Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized to act.

The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver (compare Stone v. Theatrical Inv. Corp., 64 F. Supp. 3d 527, 540 (S.D.N.Y. 2014), reconsideration denied, 80 F. Supp. 3d 505 (S.D.N.Y. 2015) (arbitrator has the power to appoint receiver as part of a final award) with Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and Pursuit Capital Mgmt., LLC v. Clardige Asocs., LLC, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (arbitrators may not appoint a receiver as a provisional remedy)).

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice.
- The applicant is satisfied that the other party will respect orders of the Tribunal.
- The arbitrator has been constituted and is available on short notice.
- The parties’ agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court (see, for example, CE Int’l Res. Holdings LLC v. S.A. Minerals Ltd. Pship, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012) (asset freeze) and Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 263 (2d Cir. 2003) (pre-award security)).

**INTERIM RELIEF FROM THE ARBITRAL TRIBUNAL**

**INSTITUTIONAL RULES**

This section summarizes the interim relief available under the:

- **AAA Rules.**
- **ICDR Rules.**
- **JAMS Arbitration Rules (effective July 1, 2014).**
- **The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).**

**AAA Rules**

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.

(AAA Rule 37)

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an “emergency arbitrator.” The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case (AAA Rule 38(f)). The authority of the emergency arbitrator ceases once the tribunal has been constituted (AAA Rule 38(f)).

The rules also provide for parties to seek temporary relief in court, stating that:

“A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate.” (AAA Rule 38(h)).

**ICDR Rules**

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.

(Article 24, ICDR Rules.)

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award (Article 24.4, ICDR Rules). In many cases it is preferable for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an “emergency arbitrator” (Article 6(2), ICDR Rules). The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case (Article 6(4), ICDR Rules). The authority of the emergency arbitrator ceases once the tribunal has been constituted (Article 6(5), ICDR Rules).

The rules also provide for parties to seek temporary relief in court, stating that:

“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.” (Article 24(3), ICDR Rules.)
The parties have agreed to arbitrate under the 2013 UNCITRAL Arbitration Rules. Under those rules, the tribunal may:

- maintain or restore the status quo pending determination of the dispute;
- 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;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Apart from any arbitral rules, the arbitration agreement itself may confer power on the tribunal to grant interim relief. If so, the orders available depend on the scope of the arbitration agreement.

The law that applies at the seat of the arbitration may itself confer powers on the arbitral tribunal to grant interim relief. For example, in states that have adopted the RUAA, the arbitrator may issue 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 (RUAA § 8).

For more information on ad hoc arbitration in the US, see Standard Clause, US: ad hoc Arbitration Clause (5-519-2015).

WHEN TO APPLY

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

HOW TO APPLY

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. For example, an application under the AAA Rules for emergency relief must be made in writing to the AAA (preferably by electronic means), with a copy of the request or response delivered to all the other parties (AAA Rule 38(b)). However, the following points are generally applicable to arbitration under any institution’s rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.

- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer’s business interest in enforcing the non-compete and the potential harm to the employer if the tribunal does not issue an order preserving the status quo. The applicant should also draft the applicable law regarding its entitlement to the relief sought.

- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

EX PARTE APPLICATIONS TO ARBITRATORS

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding
before an arbitrator on an ex parte basis would be ill-advised because:
- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. Ex parte evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties’ rights and is grounds for vacatur of an arbitration award (see Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1025 (9th Cir. 1991)).

![NO POWER OF EMERGENCY ARBITRATOR TO BIND FULLY CONSTITUTED ARBITRAL TRIBUNAL](https://www.thomsonreuters.com/)

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

![ENFORCING PRELIMINARY RELIEF AWARDED BY ARBITRATORS IN COURT](https://www.thomsonreuters.com/)

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel (see Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980))). Courts have relaxed this rule, however, when parties seek confirmation of provisional remedies awarded by arbitrators (see Sperry Int’l Trade v. Gov’t of Isr., 532 F. Supp. 901, 909 (S.D.N.Y. 1982), aff’d, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator’s order to place a disputed $15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator’s power if the order were not enforced); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046, 1059 (6th Cir. 1984) (upholding the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it) and S. Seas Navigation Ltd. v. Petroleos Mexicanos, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if “an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made”)).

Relying on Sperry and Petroleos Mexicanos, the court in Yahoo! Inc. v. Microsoft Corp. confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief “until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery” (983 F. Supp. 2d 310 (S.D.N.Y. 2013)). The Yahoo! case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, Yahoo! moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in just 25 days, the Yahoo! case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties’ agreement to keep proceedings confidential. The motion papers were filed under seal and the only part of the proceeding that was made public was the judge’s decision.

In Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc., the arbitrators issued an interim award requiring the respondent to post security (2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014)). When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court’s power to confirm interim awards of security and noted that “[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration.” Having concluded that it had the power to confirm the interim award, the court noted that it should confirm as long as there is a “barely colorable justification.” On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations. See also Zurich Am. Ins. Co. v. Trendsetter HR, LLC, 2016 WL 4453694 (N.D. Ill. Aug. 24, 2016) (confirming interim award requiring insured to post security for insurance carrier’s claims) and Ecopetrol S.A. v. Offshore Exploration & Prod. LLC, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).

Once the award is confirmed, it becomes a judgment of the district court and violation of the judgment may be punishable as a contempt of court under FRCP 70(e) (see Cardell Fin. Corp. v. Suchodolksi Associates, Inc., 896 F. Supp. 2d 320, 328 (S.D.N.Y. 2012)). Where a party is found to be in contempt of court, the court has broad discretion in ordering a remedy to coerce future compliance and compensate the injured party for losses resulting from the contumacious conduct (see Haru Holding Corp. v. Haru Hana Sushi, Inc., 2016 WL 1070849, at *2 (S.D.N.Y. Mar. 15, 2016)). Coercive measures include civil commitment and escalating financial sanctions (see CE Int’l Res. Holdings LLC v. S.A. Minerals Ltd. P’ship, 2013 WL 324061, at *3 (S.D.N.Y. Jan. 24, 2013)).

Where a court is asked to vacate an interim award issued by arbitrators, however, the court will not necessarily entertain the application. At least one US court has refused a request to vacate an emergency arbitrator’s interim order for conservatory measures under the ICDR Rules (Chinmax Med. Sys. Inc. v. Alere San Diego, Inc., 2011 WL 2135350 (S.D. Cal. May 27, 2011)). In Chinmax, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate. (See also Great E. Sec., Inc. v. Goldendale Investments, Ltd., 2006 WL 3851159 (S.D.N.Y. Dec. 20, 2006) (denying a petition to vacate and granting a cross-motion to confirm an interim order of the arbitral tribunal requiring petitioner to place funds in escrow pending conclusion of the arbitration).)

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to grant relief, a court must consider:
■ The likelihood that the harm alleged by the party will ever come to pass.
■ The hardship to the parties if judicial relief is denied at this stage in the proceedings.
■ Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.

(See Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc., 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011)). In Draeger, the court confirmed the interim relief awarded by the emergency arbitrator regarding the turnover of the plaintiff’s property but ruled that the emergency arbitrator’s award of attorneys’ fees should not be confirmed because it was subject to adjustment by the merits arbitrator (see also Bowers v. N. Two Cayes Co. Ltd., 2016 WL 3647339, at *3 (W.D.N.C. July 7, 2016) (confirming arbitrator’s grant of injunctive relief ordering a percentage of the sale of certain real estate to be placed in an escrow account pending the outcome of the arbitration but denying confirmation of arbitrator’s ruling that that the arbitration is binding on the parties)).

RESISTING INTERIM RELIEF
In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be conditioned on the applicant providing adequate security. The respondent should specify both the amount and the form of the security (see, for example, FRCP 65(c) and CPLR 6312(b)). Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

BEFORE AN EMERGENCY ARBITRATOR
The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:
■ Jurisdiction of the emergency arbitrator.
■ Application on these grounds, among others:
  ■ the emergency arbitrator provision of the relevant rules do not apply;
  ■ the applicant is unlikely to succeed on the merits;
  ■ there is no urgent need for the interim relief to be granted;
  ■ irreparable harm would be suffered by the respondent if the emergency relief were granted; or
  ■ greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

BEFORE THE ARBITRAL TRIBUNAL
The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:
■ The applicant is unlikely to succeed on the merits.
■ There is no urgent need for the interim relief to be granted.
■ Irreparable harm would be suffered by the respondent if the emergency relief were granted.
■ Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

BEFORE A COURT
The respondent should consider whether:
■ Federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested (see, for example, McCreary Tire, 501 F.2d at 1037-38).
■ The application can be opposed on the ground that courts should intervene only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see, for example, Next Step Med., 619 F.3d 67 at 70). Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, some courts hold that it is inappropriate for the district court to do so (see, for example, Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir. 1999)).
■ The applicant is unlikely to succeed on the merits (see, for example, Discover Growth Fund v. 6D Glob. Techs. Inc., 2015 WL 6619971 (S.D.N.Y. Oct. 30, 2015)).
■ There is no urgent need for the interim relief to be granted.
■ Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.