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# INTERIM MEASURES IN THE US: OPTIONS, OPPORTUNITIES, RECENT DEVELOPMENTS

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# US Legal System

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- 50 State Laws and 13 Federal Circuits
  - State laws and federal courts' interpretation of federal laws may differ
- Jurisdiction
  - In personam – based on person's presence in the forum
  - In rem/quasi in rem – based on property's presence in the forum
  - Constitutional due process (minimum contacts)
    - Presence of property could be sufficient for action against property and when used to obtain security pending arbitration

# Procedural Devices in Federal Courts

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- Federal Rules of Civil Procedure (FRCP) Rule 65
  - Preliminary Injunction
  - TRO
- FRCP Rule 64 preserves state law remedies
  - Attachment
  - Garnishment

## – Preliminary Injunction

- Notice required
- Likelihood of success on the merits
- Failure to grant the injunction will result in irreparable injury
- Potential injury outweighs damage to the opposing party
- Will not disserve public interests

## – Temporary Restraining Order (TRO)

- No notice
- Clear showing of irreparable harm
- Certification of attempt to give notice or why notice is not required
- Maximum 14 days
- Otherwise similar to preliminary injunction

## FRCP Rule 65 (Cont.)

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- Limitation: FRCP Rule 65 asset freeze requires a bona fide equitable claim
  - Prevent liquidation of specific assets
  - Unjust enrichment
  - Constructive trust
  - Uniform Fraudulent Transfers Act

- FRCP Rule 64 preserves state law remedies
  - Attachment
    - property in the hands of the debtor
  - Garnishment
    - Property in the hands of the a third party (bank, contractual party, etc.)
- Limitation: generally considered to be in rem; hence, cannot be used to reach property outside of the court's jurisdiction

# FRCP 64 Examples of Use

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- NY: statutory attachment or preliminary injunction in aid of arbitration. NY CPLR 7502.
  - There is a cause of action
  - Probable that the petitioner in the cause of action will succeed on the merits
  - Statutory grounds for attachment exist (usually that defendant is outside of the state)
  - The amount demanded from the respondent exceeds all counterclaims known to the petitioner.
- GA: International Commercial Arbitration Code based on the UNCITRAL Model Law – allows for interim measures
- Other states that adopted UNCITRAL Model Law: California, Connecticut, North Carolina, Oregon and Texas

# Recognition of Interim Measures

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- Issued by the arbitration tribunal – possibly under NY Convention
- Issued by foreign court -- based on the principles of comity



# Hot Off The Press

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- Uniform Asset-Freezing Orders Act (US import of Mareva Injunction)
- Criteria are similar to grounds for injunction
- Applies to both debtor and third parties
- Provides for reciprocity as may be required by some courts outside of the United States
- Allows for enforcement of asset-freezing orders issued by courts outside of the United States



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