

Commentary on Agreement on provisional measures

This agreement provides for provisional measures that one or more parties to the agreement will have to take during a specific period of time. This agreement does not intend to change the existing legal relationship of the parties, except for the provisional measures (and, depending on your choices, certain specific issues). If you want to change the existing legal relationship then you should conclude a settlement agreement that sets out the new legal relationship or specifically addresses the amendments.

The agreement on provisional measures is intended to be used in situations where the parties are not able (yet) to change their legal relationship or to reach a final settlement of their commercial dispute. It is therefore a temporary arrangement.

The agreement does not specify who will eventually bear the financial consequences of the provisional measures. The idea is that the already existing legal relationship will at the end of the day be decisive for the financial settlement, unless the parties agree on a settlement at some point of time.

The provisional measures could be put in place in situations where the legal basis for the performance thereof has been disputed. The provisional measures could entail everything a judge or arbitral tribunal could decide in summary proceedings. In general, the provisional measures will entail certain actions or a prohibition of such actions. Examples of provisional measures are:

- a. a delivery of goods;
- b. the suspension of a delivery of goods;
- c. a continuation of works;
- d. a discontinuation of works;
- e. a suspension of payments;
- f. provisional payments; and
- g. advance payments on damages claims.

If the legal basis for the performance of the provisional measures has not been disputed, you do not need to use the agreement on provisional measures.

In the event a party does not comply with its obligations under the agreement on provisional measures, the other party could file a claim in summary proceedings.

If a court or an arbitral tribunal orders provisional measures, these measures are combined with penalties to ensure the performance. Parties are free to also agree on penalties themselves. However, such penalties are not required. In the template penalties are therefore optional.

Below we provide you with a further explanation of the clauses of the agreement on provisional measures.

Parties

The agreement is made for two parties. If there are more parties involved in the dispute, specific amendments will have to be made.

Whereas

'Whereas A' is the place to describe the legal relationship that exists between the parties and the background to the dispute. We provide several options. If the parties cannot agree on the description of the legal relationship, they could specify that in whereas A.

‘Whereas B’ is the place to describe the dispute. If the parties cannot agree on such description, they could each give their own account of the dispute.

‘Whereas C’ and ‘Whereas D’ set out the main reasons for the parties to conclude this agreement: they are not willing or able to settle the dispute at this point in time. However, they do understand the need for provisional measures and in view of the Coronavirus disease 2019 (COVID-19), they agree these provisional measures themselves.

Article 1: the provisional measures

Article 1 sets out the mechanism of the provisional measures. The provisional measures are to be described in article 1.1.

Article 1.2 specifies the period of time during which the provisional measures need to be put in place. It also specifies that an explicit agreement (in writing or by the exchange of emails) is necessary to extend the agreed period of time. It should be clear when the period ends and disputes about the end date should as much as possible be avoided.

Article 1.3 specifies that the existing legal relationship is not amended by the agreement on provisional measures (apart from certain specific issues, depending on your choices). The idea is that the existing legal relationship will at the end of the day be decisive for the financial settlement of the provisional measures taken on the basis of this agreement. In the event a party performed under the provisional measures without a legal obligation to do so on the basis the existing legal relationship, this performance shall be undone. We have chosen to use the existing legal regime of title IV, part two of book 6 of the Dutch Civil Code (undue payment) for this.

If a party does not perform under the provisional measures, the other party can go to court and file suit against the non-performing party. Article 1.4 is a reference to this already existing legal possibility.

Our template gives the parties the option to also agree on penalties for the non-performance under the provisional measures. The provisional measures will end with retro-active effect at the end date, but once forfeited, penalties will remain due and payable.

Article 1.5 emphasizes that the agreement is not a settlement agreement. However, the agreement could be a settlement agreement in part, if the parties wish to suspend statutory prescription and expiry periods. Under Dutch law, this is not possible other than in a settlement agreement.

Article 2: standstill or not?

An important point for the parties to consider is whether or not they want to agree on a standstill of the dispute, i.e. an interruption and suspension of legal and arbitral proceedings and/or contractual and statutory prescription and expiry periods. We provide several options.

Article IIB.7 provides for a freeze of legal and arbitral proceedings. As the parties can in most cases not freeze such proceedings themselves we have provided for an obligation to request the court or, if applicable, the arbitral tribunal to stay the proceedings during the provisional measures period.

Article IIB.8/9 deals with the interruption and suspension of statutory prescription and expiry periods. Obviously, the parties do not need to agree on all these items. They could choose to interrupt and suspend only certain periods. In order to suspend and interrupt statutory prescription and expiry periods it is important that the specific agreement is qualified as a settlement agreement. Article IIB.9 provides for such qualification.

Article 3: miscellaneous

Article 3 provides for miscellaneous provisions.

An important point to consider is whether or not the parties would like to allow the possibility to terminate or rescind the agreement. The template therefore provides for a non-termination/non-rescission clause. If the parties would like to allow the possibility to rescind or terminate the agreement in accordance with Dutch law, they should delete article III.11. We note that in that situation a party is free to rescind the agreement if the other party does not perform under the agreed provisional measures after having been summoned to do so within a specific period of time. This may lead to further disputes. The template provides for specific performance as a remedy.

The agreement is governed by Dutch law. This template should not be used if the law of another country is chosen. The template will then need to be adjusted to the specific requirements of that legal system.

It is also important to agree which court or arbitral tribunal is competent to hear claims in relation to the (non)performance of the agreement, and that that will be the same court or arbitral tribunal that is competent to hear claims in relation to the already existing legal relationship.