

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Austria]

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I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?

Answer: According to Article 35 EuGVVO (Brussels Ia, Regulation (EU) No 1215/2012), national interim and precautionary measures are applicable if the courts of another member state have jurisdiction as to the substance of a matter.

§ 378 et seq EO (*Exekutionsordnung* – Austrian Enforcement Act) sets out the procedure and the types of injunctions (*einstweilige Verfügungen*) available under Austrian law.

2. Is it mandatory to pay court fees for this type of application?

Answer: Yes.

3. What is the ordinary/average length of time for this kind of procedure?

Answer: Usually, it is possible to obtain an injunction very quickly, i.e. within days of the application. In certain cases, it is even possible to obtain an injunction without hearing the other party.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES

1. For which types of interim measures are the parties allowed to apply? (e.g., injunction, freezing orders, caveat, restraining order, etc)

Answer: The following injunctions can be obtained to secure monetary claims (*Geldforderungen*):

- the deposit and administration of movable property belonging to the opponent of the applicant, including the deposit of money;
- an order prohibiting the sale or pledging of movable property with the effect that a sale or pledging contrary to the prohibition is invalid (unless the purchaser is protected by certain provisions);
- an order granted by the court prohibiting the opponent of the applicant from disposing of or collecting any claims against third parties. This prohibition is enforced by ordering the third party not to pay any debts owed to the opponent and not to deliver any items due to them until further notice from the court;

- the administration of the property of the opponent;
- an order prohibiting the sale and encumbrance of real property or accounting rights of the opponent.

The following injunctions can be obtained to secure other claims (i.e. non-monetary claims):

- the judicial deposit of movable property in the custody of the opponent;
- the administration of movable or immovable property or rights to which the claim asserted by the party at risk relates;
- the authorisation of the applicant to retain property in their custody which belongs to the opponent (and which relates to a claim they have asserted) until such time as a final decision has been reached on that claim;
- an order addressed to the opponent to take a certain action which appears necessary for the preservation of property or for the preservation of the present circumstances;
- the prohibition of certain actions;
- a judicial prohibition on the sale, encumbrance or pledging of real estate or rights registered in a public register;
- a court order prohibiting third parties from disposing of property if the opponent of the applicant has a claim against a third party for the performance or surrender of property to which the claim asserted by the applicant relates. This prohibition is enforced by prohibiting the opponent from disposing of their claim against a third party and thus obtaining the property.

III. PROCEDURE

1. Competent Court

a) Which court has jurisdiction to grant these interim and precautionary measures?

Answer: According to article 35 EuGVVO, an application may be made to the courts of a member state for such provisional and protective measures as may be available

under the law of that member state, even if the courts of another member state have jurisdiction as to the substance of the matter.

Under Austrian law (§ 387 EO), as a general rule, the court before which the proceedings regarding the substance of the matter or the enforcement proceedings are pending is competent. In case no such proceeding is pending, the local court (*Bezirksgericht*) at which the opponent of the applicant (*Gegner der gefährdeten Partei*) has his general place of jurisdiction at the time of the application is competent. If there is no such place in Austria, the Austrian local court (*Bezirksgericht*) where the object or the third-party debtor is located or where the injunction will be performed is competent. In certain cases, the EO sets out special places of jurisdiction.

2. When can the application for interim and precautionary measures be submitted?

Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?

Answer: Yes; there are no special requirements with regard to the timing of such applications as long as there are circumstances justifying the application (see the conditions under question 5).

3. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g., deadline to submit the lawsuit)

Answer: Yes; there are no special requirements with regard to the timing of such applications as long as there are circumstances justifying the application (see the conditions under question 5).

4. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?

Answer: Yes; there are no special requirements with regard to the timing of such applications, as long as there are circumstances justifying the application (see the conditions under question 5).

5. Criteria used by the court for granting these measures

What requirements must be fulfilled in order to apply for an interim measure? (e.g. *periculum in mora*, *fumus boni iuris*, security, etc)

Answer: Injunctions may be obtained in order to secure monetary claims:

- if it is probable that without an injunction the opponent of the applicant would thwart or considerably complicate the collection of a pecuniary claim by damaging, destroying, concealing, transferring, selling or otherwise disposing of property, in particular by agreements made with third parties;
- if the judgment would have to be enforced in a state where the enforcement of the claim is not secured by either international treaties or the law of the European Union.

Other (than monetary) claims may be secured by injunctions:

- if the judicial prosecution or realisation of the claim in question would be frustrated or considerably impeded (for instance, by a change in the existing circumstances). Reference to impediment includes circumstances where the decision would have to be enforced in a state in which the enforcement of the claim would not be secured either by international treaties or by the law of the European Union;
- if such orders appear necessary to prevent imminent violence or to avert imminent irretrievable damage.

6. Procedure

a) Which are the main steps of the procedure after filing the interim measure application? (e.g. holding a hearing, presenting evidence, etc.)

Answer: The applicant has to certify (*bescheinigen*, i.e. verification with documents, no proper evidentiary procedure) his claim (either by providing a court judgement or by providing documents certifying the claim) and name the requested injunction.

b) Is it possible for the Court to order an interim measure without hearing the other party? (*in audita parte debitoris*). If YES, under what circumstances can the parties apply for it?

Answer: Yes; it lies in the discretion of the court whether it hears the opponent or not (taking into consideration Article 6 of the European Convention on Human Rights. The court will only proceed without hearing the opponent in very urgent cases, for instance, where the effectiveness of the injunction depends on a quick decision etc.).

c) What are the main steps of the procedure in this case?

Answer: See a) above.

7. Opposition of the defendant

- a) **Is it possible for the defendant to oppose interim and precautionary measures?**

Answer: If the opponent was not heard before the injunction was granted, he has the right to file an objection (§ 397 EO).

- b) **Is it possible for the defendant to ask the court for the substitution of the interim measure for a guarantee?**

Answer: The court may confirm, amend or revoke a decision taken, conditional on the provision of a security (to be determined at its own discretion) (§ 398 para 2 EO).

8. Appeal

- a) **Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?**

Answer: Yes.

- b) **Is it possible to enforce the interim measure once an appeal is filed?**

Answer: Yes, unless the court decides that the injunction may not be enforced yet (§ 524 para 2 ZPO (*Zivilprozessordnung* – Austrian Civil Procedure Act)); this is only possible if there are no disproportionate disadvantages (*unverhältnismäßige Nachteile*) for the applicant.

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

1. **Is it possible to enforce the interim measure when the other party obstructs it?**

Answer: Yes, by enforcement according to general procedures.

2. **Is it possible to modify a previous interim measure?**

Answer: No. A new application will need to be made to the court.

3. When is it possible to raise an interim measure?

Answer: See III. 2., III. 3. and III. 4 above.

4. Are there any rules concerning the costs (e.g., lawyers' fees, etc.) related to the application?

Answer: In principle, injunctions are always made at the expense of the applicant, without prejudice to any claim they may have for reimbursement of such costs in the main proceedings (§ 393 EO). If the claim of the applicant (in the main proceedings) turns out to be unjustified, they have to compensate the opponent for all damages caused by the injunction (§ 394 EO).

V. ARBITRATION

1. Is it possible to apply for an interim measure in order to assure the effective enforcement of an arbitration award in your country? If YES: what is the enforcement procedure?

Answer: An arbitration agreement shall not preclude a party from requesting a provisional or protective measure from a court before or during the arbitral proceedings and the court from ordering such a measure (§ 585 ZPO).

Procedure - see above.

2. Are the arbitrators, entitled to order an interim measure?

Answer: Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of either party and after hearing the other party's case, order such provisional or protective measures against the other party as it deems necessary (in relation to the subject matter of the dispute) if otherwise the enforcement of the claim would be frustrated or substantially impeded or irretrievably prejudiced. The arbitral tribunal may require reasonable security from either party in connection with such action (§ 593 ZPO). The procedure is set out in detail in § 593 ZPO.

VI. FOREIGN PROCEDURE & ARBITRATION

1. Is it possible to apply for an interim measure before your country's courts in order to assure the effective enforcement of a foreign court decision or arbitration award? If YES: how is this procedure executed?

Answer: It is possible to apply for an injunction if an Austrian court is competent (§ 387 EO, see III. 1. above).

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