

# Enforcement of Foreign Judgments

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Interim and Precautionary Measures [Germany]

2020



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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 national law is applicable for interim and precautionary measures. I

In Germany it is possible to obtain a freezing order to prevent the defendant from putting his assets out of reach according to §§ 916 ff. ZPO (civil procedure law) and to stop the claimant enforcing judgment against him according to § 707 ZPO. Therefore, prima facie evidence is required according to § 294 ZPO. It is possible to obtain orders extremely quickly in cases of urgency.

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:** This varies. It is possible to seek interim relief very quickly without notice to the other party if necessary, in days or even hours.

## II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES

1. For which types of interim measures are the parties allowed to apply?

**Answer:**

In Germany there are in general two types of interim measures. There is the so called "Arrest" (for monetary claims) and the "einstweilige Verfügung" (for all other claims). The "einstweilige Verfügung" as interim measure can secure ("Sicherungsverfügung"), regulate ("Regelungsverfügung") or also – in exceptional cases – already accomplish ("Leistungsverfügung") the requested measure. In the German civil code you find codified, e.g.

- seizure of movable property, § 930 ZPO
- attachment of rights, § 930 ZPO
- collateral mortgage on property 932 ZPO,
- appointment of a receiver

### III. PROCEDURE

#### 1. Competent Court

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

**Answer:** According to article 35 EuGVVO, the application may be made to the courts of a member state for such provisional, including 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. In Germany the local court in the district of which the object to be detained or the person to be restricted in his or her personal freedom is located is competent, according to §§ 919, 937, 942, 943 ZPO.

#### 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:** The application for interim and precautionary measures can be submitted - independently of the main proceedings - in cases of urgency until the judgement of the main proceedings becomes legally binding. Application after one month after having knowledge about the case can indicate a lack of urgency according to German jurisdiction, so that it is advisable to do this quickly – within a month time frame.

#### 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?

**Answer:** Yes, but if the measure is later proved to be unjustified, the claimant must pay damages to the defendant according to § 945 ZPO.

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, as long as there are circumstances justifying the application. An application can be made at any time in the proceedings (subject to the restrictions in time under 2.).

5. **Criteria used by the court for granting these measures**

**What requirements must be fulfilled in order to apply for an interim measure?**

**Answer:** There must be a valid cause of action, i.e. urgency and a potential claim to secure. Damages must not be an adequate remedy. It must be demonstrated that unless the court makes the requested order, the respondent could take steps to undermine the effectiveness of the foreign judgment which the applicant is seeking to enforce. In the case of a freezing injunction, there must be a real risk that the respondent will dispose of his assets.

An application for an injunction should be made quickly advisable within a month time frame (see above) – delay can be a reason for the court refusing to grant an injunction.

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:** According to § 922 ZPO a decision with prior oral hearing is possible but not obligatory. In cases of special urgency there is no oral hearing but just a decision by the chairman according to § 944 ZPO. However, the defendant must be granted a right to be heard (if not orally then in writing), unless this would endanger the purpose of the proceedings.

**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. Where the application is of an urgent nature or where giving notice of the application to the respondent would defeat its purpose.

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

**Answer:** An application must be filed with the court. The court will examine whether the application is conclusive and whether the ground for the interim measure and the claim for the interim measure have been sufficiently substantiated. If an oral hearing takes place or not will be at the discretion of the court.

The oral hearing however obligatory if the defendant has filed a protective letter ("*Schutzschrift*") which justifies a prior hearing. Without a prior oral hearing, a decision may be issued, otherwise a judgment is issued. According to § 945 a ZPO the State Justice Administration of Hessen maintains a central, cross-state electronic register for protective letters ("*Schutzschriftenregister*") for the federal states. Once having such a protective letter registered, it is valid for six month in all federal states of Germany.

**7. Opposition of the defendant**

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

**Answer:** Yes, as a precautionary measure he can file a protective letter with the court that no action will be taken or only after oral proceedings (see 6.b).

After issuing a judgment or order, he may raise an objection or lodge an appeal, § 924 ZPO. In addition, the defendant may - if the main issue is not yet pending - request a time limit for the applicant to be obliged to start the main claim (§ 926 ZPO). Finally, the defendant may, by reason of changed circumstances (in particular after a victory in the main proceedings) apply for the suspension of the injunction (§ 927 ZPO).

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

**Answer:** In order to avoid an acknowledgement, it is necessary to request the defendant to pay before filing a request. If the defendant refuses and the application is required, the defendant can, however, deposit money according to § 923 ZPO in order to inhibit enforcement.

#### **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, this does not affect the enforcement of the interim measure in the meantime, except an application according to §§ 719, 707 ZPO is made to suspend the enforcement.

#### **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, § 928 ff. ZPO, within one month after the announcement of the interim measure. The defendant may be imprisoned § 933 ZPO or have his assets seized §§ 930 ff. ZPO.

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

**Answer:** Yes. A further application will need to be made to the court.

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

**Answer:** Usually at any time till the main proceedings become legally binding – advisable within one month time frame (see above).

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



**Answer:** The loser will generally pay the winner's costs, 91 ff. ZPO.

## 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:** Yes, an arbitration agreement shall not preclude a court, before or after the commencement of the arbitral proceedings, from ordering, at the request of either party, a provisional or protective measure with respect to the subject matter of the arbitral proceedings according to § 1033 ZPO. The enforcement procedure doesn't differ from the general rules in §§ 916 ff. ZPO.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such provisional or protective measures as it deems necessary in relation to the subject-matter of the dispute, according to § 1041 ZPO.

§ 1033 ZPO on the one hand and § 1041 ZPO on the other hand lead to a coexistence of state court and arbitral tribunal as far as provisional and protective measures are concerned.

**Are the arbitrators, entitled to order an interim measure?**

**Answer:** Yes, see above.

## 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:** Yes. Procedure see above.