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German

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Securing assets during a claim in EU countries

Germany

1 What are the different types of measures?

These measures aim to protect a creditor by means of the provisional seizure of a debtor's assets or by means of an interim ruling on the legal situation; the measures do not in themselves satisfy the debt.

The measures available are as follows.

1.1 Pre-judgment seizure and personal arrest (*dinglicher und persönlicher Arrest*, Sections 916 et seq. of the Code of Civil Procedure (*Zivilprozessordnung*))

Pre-judgment seizure is enforced against the assets of the debtor (Section 928 of the Code of Civil Procedure); personal arrest may involve taking the debtor into custody or other restrictions on his or her personal freedom specifically ordered by the court (Section 933 of the Code).

1.2 Interim injunction (*einstweilige Verfügung*, Sections 935 et seq.)

This is a provisional court order to protect a claim or secure peace under the law.

1.3 Notice of imminent attachment of a debt (*Vorpfändung*, Section 845)

This notice constitutes a private means of enforcement on the part of the creditor.

1.4 Enforcement of provisionally enforceable judgments (Sections 708 et seq.).

This relates to the enforcement of judgments that are still open to appeal.

2 What are the conditions under which such measures may be issued?

2.1 The procedure

Each of the measures listed above requires an appropriate application to court. The only case in which the creditor (or a bailiff (*Gerichtsvollzieher*) acting on his or her behalf) can act without prior application to the court is the notice of imminent attachment of a debt. However, where such a notice is served, a court order for attachment (*Pfändung*) must be obtained within one month if the attachment is to be treated as effective from the time of service (Section 845(2) of the Code of Civil Procedure).

The other measures — pre-judgment seizure and personal arrest and interim injunctions — are valid only with a prior court ruling: depending on whether the court's decision was preceded by oral proceedings or not, such rulings will be judgments (*Urteile*) or orders (*Beschlüsse*).

The notice of imminent attachment of a debt (for details see above) is not made by court order. In this instance, the creditor takes the initiative himself or herself (usually by appointing a bailiff to act on his or her behalf). The creditor seeks to enforce the claim by attachment of receivables or other rights, on the strength of an enforceable legal document, by serving a written declaration on a third-party debtor or on the main debtor, indicating that attachment of the right or receivable is imminent (Section 845(1) of the Code of Civil Procedure). Notice to the third-party debtor operates as an attachment under Section 930 of the Code of Civil Procedure only in so far as the debt is actually attached within one month (Section 845(2) of the Code).

The provisional enforceability of a judgment will, on application, be expressly stated by the court in the judgment itself. It allows enforcement while the judgment is still open to appeal. Enforcement of a judgment that is only provisionally enforceable can be made dependent upon the provision of security (Sections 708 and 709 of the Code).

Jurisdiction for issuing a seizure or arrest order or an interim injunction lies with both the court handling the main action and the local court (*Amtsgericht*) in the district where the property to be seized or the person to be restricted in their personal freedom is located.

There is no requirement to be legally represented when applying for a seizure or arrest order or an interim injunction, unless there is a hearing.

Enforcement of provisional security measures is primarily a matter for the bailiff.

The Court Fees Act (*Gerichtskostengesetz*) provides for a full fee to be payable in proceedings applying for seizure or arrest or an interim injunction. The amount of the fee is determined by the value in dispute. The court estimates the value in dispute on a case-by-case basis, according to the applicant's interest in the realisation of the debtor's assets. A fee table for sums in dispute up to €500 000 is attached to this guidance, in Annex -1- (KB 47.7 pdf). If the application is the subject of oral proceedings, and if the case is not ended by withdrawal of the application before the conclusion of the oral proceedings, or by an acknowledgement of debt, a waiver or a settlement, a higher fee is payable, equal to 300 %. The costs are borne in the first place by the party against whom the court awards costs in its ruling — additionally, the applicant, as the instigator of the case, is also liable for costs.

Enforcement of the court order through the instruments of the state is conducted in accordance with the regulations currently in force for the enforcement of court judgments.

The bailiff charges a fee of €2.50 for each postal service of an imminent attachment of a debt on a debtor or a thirdparty debtor named in the notice. In addition, there are postal charges and expenses chargeable for any certifications that may be necessary. The fee for service in person by the bailiff is €7.50, in which case the bailiff's travel expenses are also payable. Depending on the distance travelled to the addressee's premises, these will be between €2.50 and €10.00. The bailiff's fee for preparing the enforcement notice himself or herself on behalf of the creditor (Section 845(1), second sentence, of the Code) is €12.50, for performing an official act.

The enforcement of a provisionally enforceable judgment is not essentially different from the enforcement of a final decision. However, the law lays down different methods of enforcement depending on the nature of the claim.

If payment of a fixed sum of money is due, the creditor frequently uses a bailiff to enforce the court's ruling. A fee of €20.00 is chargeable for enforcement by the bailiff against movable property. If the bailiff's working time is greater than three hours, a further charge of €15.00 is payable for each additional hour or part of an hour. In addition, any necessary expenses incurred by the bailiff will also be charged. A payment order can also give the creditor the right to apply for judicial attachment of the debtor's receivables (e.g. the entitlement to payment of wages, Section 829 of the Code of Civil Procedure). A fee of €10.00 is levied for proceedings concerning the application itself, and incidental expenses (especially the costs of serving a court order) are charged separately.

If execution is to be levied against immovable property of the debtor, a mortgage may be registered to secure the debt, or the property may be subjected to forced sale by auction or to forced administration. The legislation governing costs in cases involving noncontentious jurisdiction (the *Kostenordnung*) provides that a full fee commensurate with the value of the debt to be secured is payable for registering a mortgage to secure the debt in the Land Register. A fee table for sums up to €1 million is attached to this guidance, as Annex – 2 – (KB 53.4 pdf). A fee of €51.00 is chargeable for an application for an order imposing forced sale by auction or forced administration of real estate.

Where the judgment holds that the debtor must deliver up movable property, the bailiff will enforce the court's decision upon application by the creditor. A charge of €20.00 is payable for the official act involved. Where the judgment holds that the debtor must deliver up immovable property or a dwelling, work in connection with vacating the property attracts a charge of €75.00. In addition, the bailiff's incidental expenses are chargeable, in particular those for the work of third parties (e.g. removal costs, locksmith's charges etc.). Again, if the bailiff's working time is more than three hours, a further charge of €15.00 is payable for each additional hour or part of an hour.

2.2 The main conditions

The issue of an order for seizure of property or arrest of a person presupposes that there is a debt and that there are grounds for seizure or arrest. In the case of seizure of all the debtor's assets that are capable of being seized, grounds for the seizure exist if it is feared that the debtor will by dishonest actions either frustrate or substantially obstruct execution of the judgment by, for example, removing or concealing assets.

Personal arrest, i.e. arrest of the debtor himself or herself, is also intended to prevent the debtor from removing any of the available assets that might be seized. However, personal arrest may be ordered only if the required level of security for the creditor cannot be achieved by means of seizure of property. An interim injunction has the effect of defining and maintaining a temporary legal situation. Its purpose is to prevent the current situation from changing and thereby frustrating or substantially obstructing the realisation of a party's rights. The injunction governs a claim requiring the addressee to deliver something up or to take or to refrain from taking a particular action (Sections 935, 938 and 940 of the Code of Civil Procedure). The rules applying to interim injunctions are essentially the same as those applying to seizure and arrest (Section 936).

The grounds for, and entitlement to, seizure and arrest do not have to be proved; only a prima facie case needs to be shown (Section 920(2) of the Code of Civil Procedure). The same applies to the issue of an interim injunction (Section 936).

A crucial issue for granting such precautionary measures is urgency. The creditor must satisfy the court that rapid action is the only means of safeguarding his or her position because there is an immediate risk of violation of his or her rights.

A hearing of the parties is not absolutely necessary in proceedings for seizure or arrest (Section 922 of the Code of Civil Procedure). There must be a hearing if the debtor opposes the application (Section 924). A hearing is generally required in interim injunction proceedings; it may be dispensed with only in urgent cases or if the application is rejected (Section 937(2)). There are no time limits for a hearing of the parties.

3 Object and nature of such measures?

3.1 What types of assets can be subject to such measures?

The precautionary measures extend to all assets that are subject to enforcement.

3.2 What are the effects of such measures?

Seizure has the effect of detaining the assets; both the main debtor and third party debtors lose their rights of disposal over the seized assets.

The seizure is safeguarded by Section 136 of the Criminal Code (*Strafgesetzbuch*), which concerns the destruction of objects under seizure. Breaches can also give rise to claims for damages under civil law.

In instances of seizure or arrest, Section 945 of the Code of Civil Procedure also requires the party that obtained the order to pay damages if the seizure or arrest or an interim injunction proves to have been unjustified from the outset, or if the measures are reversed under Section 926(2) or Section 942(3) of the Code.

The creditor may, within one month, apply for enforcement of the order for seizure or arrest or of the interim injunction. In essence, the general regulations concerning enforcement apply here (Sections 928 and 936 of the Code of Civil Procedure). A seizure order is enforced by attachment (Section 930); personal arrest of the debtor is generally by issue of a warrant for arrest (Section 933).

The following applies to interim injunctions. The bailiff carries out the order to remove property in accordance with Section 883 of the Code of Civil Procedure. The court can enforce the requirement or prohibition of certain acts under Section 887 (authorisation by the court for the creditor to undertake reasonable action) or under Sections 888 and 890 (imposition of penalty payments/detention or fines/custody to prevent unreasonable actions or omissions and acquiescence).

Special provisions apply to the attachment of bank balances under Section 835(3) of the Code of Civil Procedure. Money from the account of a debtor who is a natural person cannot be paid to the creditor until four weeks have elapsed after service of the transfer order on a thirdparty debtor. This procedure gives the debtor the opportunity to make an application for protection from the attachment before the balance is paid out to the execution creditor.

3.3 What is the validity of such measures?

A seizure or arrest order or an interim injunction must be enforced within one month of the date on which the ruling was pronounced or served.

The measures are valid for as long as grounds justifying the security or precautionary measures persist or until a decision is given in the main action.

4 Is there a possibility of appeal against the measure?

A court can order seizure or arrest and an interim injunction by means of a full judgment (*Urteil*, following a hearing) or by an order (*Beschluss*, Sections 922 and 936 of the Code of Civil Procedure).

The parties can appeal against a judgment if they are made liable for more than €600.

The following applies if an order is issued:

The debtor can lodge an appeal against a seizure or arrest order or interim injunction (Section 924 of the Code). An oral hearing is then called with a view to arriving at a full judgment on the legitimacy of the measure.

If the application is dismissed, the creditor can lodge an immediate objection (*sofortige Beschwerde*) within two weeks of service of the dismissal. The same applies if an order is made for seizure or arrest or if an interim injunction is issued, but in that case the creditor must to give security.

In addition, the debtor can apply for the seizure or arrest or interim injunction to be set aside if the creditor has failed to assert their claim within the prescribed time limit (Section 926 of the Code of Civil Procedure) or because circumstances have changed (Section 927).

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