Securing assets during a claim in EU countries

Saksa

1 What are the different types of measures?

Measures that aim to secure compulsory enforcement by means of the provisional seizure of a debtor's assets or by means of a provisional ruling on the situation do not in themselves usually satisfy the creditor's claim.

The possible measures 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* – ZPO))

Seizure serves to secure compulsory enforcement against the debtor's movable or immovable property for a monetary claim. A distinction must be made between pre-judgment seizure and personal arrest. Pre-judgment seizure takes place if there is reason to fear that, in the absence of this measure, the enforcement of the judgment will be frustrated or substantially obstructed. Personal arrest is ordered if compulsory enforcement is considered to be at risk and taking such action is necessary to secure it. Seizure is ordered, on application, by the competent court. The seizure can be enforced, for example, by means of attachment (*Pfändung*) (movable property), seizure lien (*Arresthypothek*) (immovable property) or arrest (*Haft*) (personal arrest).

1.2 Interim injunction (*einstweilige Verfügung*) (Sections 935 *et seq.* of the Code of Civil Procedure)

The interim injunction serves provisionally to secure a non-monetary claim. It is ordered if there is reason to fear that a change to the current situation will frustrate or substantially obstruct the realisation of the right in question. The interim injunction in the form of securing the future enforcement of non-monetary claims (*Sicherungsverfügung*) (Section 935 of the Code of Civil Procedure) or of temporary court regulation of a legal relationship (*Regelungsverfügung*) (Section 940 of the Code of Civil Procedure) is ordered, on application, by the competent court. The provisions of compulsory enforcement in turn apply in principle for the subsequent enforcement (Section 936 in conjunction with Section 928 of the Code of Civil Procedure).

1.3 Account preservation order under EU law

Sections 946 *et seq.* of the Code of Civil Procedure contain provisions in connection with Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ L 189 of 27 June 2014, p. 59). The account preservation order is a special form of interim relief.

1.4 Notice of imminent attachment of a debt (*Vorpfändung*) (§ 845 of the Code of Civil Procedure)

Notice of imminent attachment of a debt is used to secure a claim of the debtor against a third-party debtor for the benefit of the creditor. It involves ordering the third-party debtor not to make any payments to the debtor and ordering the debtor to refrain from any disposal over the claim, in particular its collection. Notice to the third-party debtor operates as an attachment (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).

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

2.1 The procedure

Pre-judgment seizure, personal arrest and interim injunctions (points 1.1 and 1.2) are issued by order of the competent court on application by the party seeking justice. The application must contain information on the claim to be secured and the urgency of the order or the risk of frustration of enforcement. Both must be demonstrated to the satisfaction of the court, for example by means of an affidavit.

The application can be made in writing or recorded orally with the registry for the files of the court. The competent court is the court having jurisdiction for an action on the substance of the case or the local court (*Amtsgericht*), in the district of which the object to be secured, the object of the litigation or the person to be detained is located. In the case of an oral hearing, the court ruling is in the form of a judgment and otherwise in the form of an order.

Representation by a lawyer in interim proceedings is necessary only in the case of an oral hearing before the regional court (*Landgericht*).

The account preservation order (point 1.3) is governed by Regulation (EU) No 655/2014. Sections 946 *et seq.* of the Code of Civil Procedure contain the necessary provisions on lodging the application and the procedure, enforcement of the order and any legal remedies.

The notice of imminent attachment of a debt (point 1.4) is not issued by the court. On the strength of an enforceable legal document, the creditor can appoint a bailiff to serve notice on the third-party debtor and the main debtor, indicating that the attachment of the debt or another pecuniary right 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 Court Fees Act (*Gerichtskostengesetz*, GKG) provides for 150% of the 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 casebycase 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 shown below:

Court Fees Act (GKG) Annex 2 (relating to Section 34(1), third sentence)

Sum in dispute up to €…	Fee €…	Sum in dispute up to €…	Fee €…
500	38.00	**50 000**	601.00
1 000	58.00	**65 000**	733.00
1 500	78.00	**80 000**	865.00
2 000	98.00	**95 000**	997.00
3 000	119.00	**110 000**	1 129.00
4 000	140.00	**125 000**	1 261.00
5 000	161.00	**140 000**	1 393.00
6 000	182.00	**155 000**	1 525.00

7 000	203.00	**170 000**	1 657.00
8 000	224.00	**185 000**	1 789.00
9 000	245.00	**200 000**	1 921.00
10 000	266.00	**230 000**	2 119.00
13 000	295.00	**260 000**	2 317.00
16 000	324.00	**290 000**	2 515.00
19 000	353.00	**320 000**	2 713.00
22 000	382.00	**350 000**	2 911.00
25 000	411.00	**380 000**	3 109.00
30 000	449.00	**410 000**	3 307.00
35 000	487.00	**440 000**	3 505.00
40 000	525.00	**470 000**	3 703.00
45 000	563.00	**500 000**	3 901.00

If the application is the subject of oral proceedings, and if the case is not ended by withdrawal of the application for protection before the conclusion of the oral proceedings, or by an acknowledgement of debt, a waiver or a settlement (in these cases the fee is reduced by 50%), 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 as overall debtor.

The bailiff charges a fee of €3.30 for each service of an imminent attachment of a debt on a debtor or a third-party 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 €11, 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 €3.25 and €16.25. 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 €17.60, for performing an official act.

Execution of the court order is reserved primarily to the bailiff and is conducted through the instruments of State (enforcement). It takes place in accordance with the regulations currently in force for the enforcement of court judgments.

Digression: 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 €28.60 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 €22.00 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 €22.00 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 Act on costs for non-contentious jurisdiction for courts and notaries (Court and Notary Costs Act, GNotKG) (*Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare* (*Gerichts- und Notarkostengesetz*, GNotKG)) 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 €3 million is shown below:

Act on costs for non-contentious jurisdiction for courts and notaries (Court and Notary Costs Act, GNotKG)

Annex 2 (relating to Section 34(3))

Trans-action value up to €…	Fee **Table A** €…	Fee **Table B** €…	Transaction value up to €…	Fee **Table A** €…	Fee **Table B** €…	Transaction value up to €…	Fee **Table A** €…	Fee **Table B** €…
500	38.00	15.00	**200 000**	1 921.00	435.00	**1 550 000**	8 059.00	2 615.00
1 000	58.00	19.00	**230 000**	2 119.00	485.00	**1 600 000**	8 257.00	2 695.00
1 500	78.00	23.00	**260 000**	2 317.00	535.00	**1 650 000**	8 455.00	2 775.00
2 000	98.00	27.00	**290 000**	2 515.00	585.00	**1 700 000**	8 653.00	2 855.00
3 000	119.00	33.00	**320 000**	2 713.00	635.00	**1 750 000**	8 851.00	2 935.00
4 000	140.00	39.00	**350 000**	2 911.00	685.00	**1 800 000**	9 049.00	3 015.00
5 000	161.00	45.00	**380 000**	3 109.00	735.00	**1 850 000**	9 247.00	3 095.00
6 000	182.00	51.00	**410 000**	3 307.00	785.00	**1 900 000**	9 445.00	3 175.00
7 000	203.00	57.00	**440 000**	3 505.00	835.00	**1 950 000**	9 643.00	3 255.00
8 000	224.00	63.00	**470 000**	3 703.00	885.00	**2 000 000**	9 841.00	3 335.00
9 000	245.00	69.00	**500 000**	3 901.00	935.00	**2 050 000**	10 039.00	3 415.00
10 000	266.00	75.00	**550 000**	4 099.00	1 015.00	**2 100 000**	10 237.00	3 495.00
13 000	295.00	83.00	**600 000**	4 297.00	1 095.00	**2 150 000**	10 435.00	3 575.00
16 000	324.00	91.00	**650 000**	4 495.00	1 175.00	**2 200 000**	10 633.00	3 655.00
19 000	353.00	99.00	**700 000**	4 693.00	1 255.00	**2 250 000**	10 831.00	3 735.00
22 000	382.00	107.00	**750 000**	4 891.00	1 335.00	**2 300 000**	11 029.00	3 815.00
25 000	411.00	115.00	**800 000**	5 089.00	1 415.00	**2 350 000**	11 227.00	3 895.00
30 000	449.00	125.00	**850 000**	5 287.00	1 495.00	**2 400 000**	11 425.00	3 975.00
35 000	487.00	135.00	**900 000**	5 485.00	1 575.00	**2 450 000**	11 623.00	4 055.00
40 000	525.00	145.00	**950 000**	5 683.00	1 655.00	**2 500 000**	11 821.00	4 135.00
45 000	563.00	155.00	**1 000 000**	5 881.00	1 735.00	**2 550 000**	12 019.00	4 215.00
50 000	601.00	165.00	**1 050 000**	6 079.00	1 815.00	**2 600 000**	12 217.00	4 295.00

65 000	733.00	192.00	**1 100 000**	6 277.00	1 895.00	**2 650 000**	12 415.00	4 375.00
80 000	865.00	219.00	**1 150 000**	6 475.00	1 975.00	**2 700 000**	12 613.00	4 455.00
95 000	997.00	246.00	**1 200 000**	6 673.00	2 055.00	**2 750 000**	12 811.00	4 535.00
110 000	1 129.00	273.00	**1 250 000**	6 871.00	2 135.00	**2 800 000**	13 009.00	4 615.00
125 000	1 261.00	300.00	**1 300 000**	7 069.00	2 215.00	**2 850 000**	13 207.00	4 695.00
140 000	1 393.00	327.00	**1 350 000**	7 267.00	2 295.00	**2 900 000**	13 405.00	4 775.00
155 000	1 525.00	354.00	**1 400 000**	7 465.00	2 375.00	**2 950 000**	13 603.00	4 855.00
170 000	1 657.00	381.00	**1 450 000**	7 663.00	2 455.00	**3 000 000**	13 801.00	4 935.00
185 000	1 789.00	408.00	**1 500 000**	7 861.00	2 535.00			

A fee of €110.00 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 €28.60 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 €150.00. 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 €22.00 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 the future execution of a court decision 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 under the enforcement. However, personal arrest may be ordered only if the required level of security cannot be achieved by means of seizure of property.

An interim injunction (in any form) is meant to prevent the current situation from changing and thereby frustrating or substantially obstructing the realisation of a party's rights or a legal relationship. The object of an injunction may be claims requiring the (provisional) delivery of objects or (provisional) acquiescing to or 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). In exceptional circumstances, the court may also order that a provisional payment be made. The claim and the grounds for a writ of seizure to be issued are to be demonstrated to the satisfaction of the court, for example by means of an affidavit or the submission of documents (Section 920(2) of the Code of Civil Procedure). In this respect, it is a matter of the court being able to assess the claim and the urgency as 'extremely likely' from the presentation. The same applies for the order of an injunction (Section 936 ZPO).

A prior hearing of the parties is possible, but not required in proceedings for seizure or arrest (Section 922 of the Code of Civil Procedure). There must be a subsequent hearing if the debtor, on whom the seizure or arrest must be served no later than one week after the enforcement, opposes the order of a seizure or arrest (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 can 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* StGB), which concerns the destruction of objects under seizure. In addition, breaches can also give rise to claims for damages under civil law.

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).

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. If a foreign court order imposing measures to secure assets can be enforced in Germany without a prior declaration of enforceability, the time limit is two months (Section 929(2) of the Code of Civil Procedure).

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

4 Is there a possibility of appeal against the measure?

As already described, a court can order seizure or arrest and an interim injunction by means of a final 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 the value of the subject matter of the appeal is greater than €600.

The following applies if an order is issued:

The debtor can lodge an appeal against a seizure or arrest order or an interim injunction order (Section 924 of the Code). An oral hearing is then called with a view to arriving at a final judgment on the legitimacy of the measure. An appeal may be lodged in turn against the judgment under the circumstances described.

If the application is dismissed by order, the creditor can lodge an immediate objection (*sofortige Beschwerde*) within two weeks of service. 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 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).

For Regulation (EU) No 655/2014, Section 953 *et seq.* of the Code of Civil Procedure contain remedies against judgments in connection with an account preservation order.

Finally, Section 945 of the Code of Civil Procedure provides for an obligation for the party that obtained an interim order to compensate for damages, if the order of a seizure or an interim injunction proves to have been unfounded from the outset or if the measure directed is repealed pursuant to Section 926(2) or Section 942(3) of the Code.

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