

German Law Series

Introduction to German Civil Procedure 5: How Interim Relief in German Civil Litigation Works

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This series of short and to-the-point chapters is intended for international legal practitioners who have a nexus to Germany without being fully trained in German law. It is meant to provide a general overview of the structures, functioning, and general principles of German civil procedure. New chapters will be published on a regular basis.¹ The previous chapter can be found [here](#).

In our previous chapters, we looked at how a regular German civil litigation works, from its [initiation](#) to the [court hearing](#). However, if a party needs urgent legal protection, a regular litigation does not help. It simply takes too long. In this chapter, we explain ways to obtain interim relief from the German civil courts.

Key takeaways on interim relief in Germany:

- Asset freezes may be obtained for payment claims. The threshold is generally high and requires evidence that the future enforcement of a money judgment is in jeopardy due to unforeseen developments.
- Preliminary injunctions are frequently granted where the plaintiff seeks to make the defendant refrain from doing something, i.e., to preserve the status quo. Obtaining a preliminary injunction to make the defendant take action is reserved for extraordinary cases only.
- The standard of proof in interim proceedings is reduced. Written affidavits, including from the plaintiff, are admissible evidence.

¹ Prior chapters will not be updated. There are exceptions to and deviations from many of the rules and practices discussed in this chapter that are not individually flagged.

A. Overview

German civil courts can grant two types of interim legal protection: arrest (*Arrest*) and preliminary injunction (*einstweilige Verfügung*). In addition, European law provides for effective bank account freezes in cross-border cases. There is also a separate procedure to preserve evidence that is at risk of being destroyed or altered.

B. Arrests Secure Monetary Claims

1. Scope and Types of Arrests

An arrest aims to secure the future enforcement of a money judgment. It protects the plaintiff during or before the pendency of a regular litigation while the plaintiff is trying to secure a final judgment. If there are reasons to assume that the defendant will take actions that would diminish the possibilities to enforce that final judgment, a plaintiff may apply for two types of arrest: an asset freeze of the defendant's movable or immovable property (*dinglicher Arrest*) or, in extreme cases, the arrest of the defendant in person (*persönlicher Arrest*).

2. Legal requirements

To obtain an arrest order, a plaintiff must show the existence of a claim (*Arrestanspruch*) and a reason for the arrest (*Arrestgrund*).

The claim is the same claim that the plaintiff pursues in the main litigation and that it seeks to secure for purposes of future enforcement. The claim must be either a claim for a payment of money or a claim that may be converted into a monetary claim, e.g., a damages claim in case of future non-performance. Conditional and future claims may also qualify as an arrest claim provided that the due date is fixed or can be fixed by notice of termination.

The more difficult part, in practice, is that the plaintiff needs to demonstrate a reason for the arrest. That is, the plaintiff must convince the court that there is a viable concern that the future enforcement of a domestic or foreign court judgment on the merits of the claim would be impossible or much more difficult without the arrest. The defendant's poor financial condition or its inability to pay a debt typically does not constitute a sufficient reason for an arrest. To be successful, the plaintiff needs to show more, i.e., that the defendant is doing something to reduce the plaintiff's chances to successfully enforce a final judgment. This may include: the defendant is hiding or squandering assets or intentionally providing false or misleading information about its financial condition. Acts of third parties or natural disasters and the like may also constitute reasons for an arrest if these events lead to an unexpected and sudden decrease of the defendant's assets so that future enforcement of a victorious judgment is endangered.

The plaintiff needs to provide no further reasons for the arrest (i.e., the mere existence of the claim is sufficient), if the plaintiff can show that the future judgment would need to be enforced in a jurisdiction that does not recognize German judgments.

If absolutely necessary to protect its future enforcement opportunity, a plaintiff may also ask that the defendant be taken into custody or otherwise limited in its personal freedom (e.g., house arrest, surrender of passport, etc.). These types of arrest are very rare.

C. Preliminary Injunctions Secure Non-Monetary Claims

1. Scope and Types of Preliminary Injunctions

A preliminary injunction aims to secure a plaintiff's legal position (**protective order** – *Sicherungsverfügung*), temporarily regulate a legal relationship (**regulatory order** – *Regelungsverfügung*), or—exceptionally—provisionally satisfy the plaintiff's claim (**performance order** – *Leistungsverfügung*).

A protective order preserves the status quo. Its most common form is a temporary cease-and-desist order, e.g., an order to stop certain infringing conduct, to stop poaching a competitor's employees, or to stop making disparaging statements.

The scope of a regulatory order goes beyond a protective order. It has the effect of provisionally determining the legal relationship between the parties. For example, a regulatory order may be sought if the plaintiff company needs an urgent declaration that a former manager no longer has the power to act on behalf of the company.

The performance order serves to grant a plaintiff immediate performance by the defendant when a delay of performance (until after the regular court proceedings) would cause extraordinary hardship. Performance orders are rarely granted because they come with the risk that once the defendant has performed, the outcome of the regular court proceedings is preempted because the defendant's performance can hardly be undone if the defendant wins on the merits.

2. Legal Requirements

In order to obtain a preliminary injunction, a plaintiff must demonstrate an underlying claim (*Verfügungsanspruch*) and a reason justifying the preliminary injunction (*Verfügungsgrund*).

The reason for a **protective order** is the concern that the realization of the plaintiff's claim could be frustrated or substantially impeded by an imminent change to the existing situation. Thus, there must be urgency which makes a protective order necessary. Typical examples are continuous or impending infringements of the plaintiff's rights (including IP rights) or violations of the law against unfair competition.

The **regulatory order** requires that a legal relationship is in dispute (e.g., is Ms. A still a managing director of company B? Is Mr. C allowed to make binding declarations for a group of shareholders?) and an interim determination of the parties' relationship appears necessary. When assessing the necessity element, German courts apply a proportionality test.

Performance orders are exceptional and difficult to obtain. They will only be granted if the plaintiff can show that: (1) immediate performance by the defendant is necessary, (2) plaintiff cannot be expected to wait for the performance until the plaintiff has obtained a judgment in regular court proceedings, and (3) the prejudice that the plaintiff would suffer if the defendant is not ordered to perform immediately is serious and outweighs the prejudice of the defendant if the defendant is ordered to perform immediately and it later turns out that the plaintiff had no right to such performance. Typically, the plaintiff's mere financial interests are insufficient to justify a performance order. For example, if the plaintiff purchased shares from the defendant but the defendant refuses to timely transfer the shares to the plaintiff, the plaintiff will not be able to secure a performance order on the argument that the plaintiff has a good opportunity to sell on the shares at a profit and that the opportunity may vanish if plaintiff has to wait until it has obtained a final judgment against the defendant. The German courts would take the view that the plaintiff is sufficiently served its right to seek damages from the defendant for the lost opportunity in the regular litigation proceedings.

D. How to Obtain Interim Relief – Points of Procedure

1. Jurisdiction

For an arrest, the plaintiff has the choice between two courts: It may call on the same court that also has jurisdiction in the regular court proceedings over the plaintiff's claim. This court has jurisdiction regardless of whether the regular court proceeding is already pending. The plaintiff may alternatively submit its application to the local court in the district where the asset to be seized or the person to be arrested is located.

An application for an interim injunction generally has to be filed with the same court that also has jurisdiction in the regular court proceedings over the claim. As an exception in urgent cases, the plaintiff may call on the local court in the district where the subject of the dispute is located.

2. Contents of the Application and Course of the Proceeding

The application needs to describe the underlying claim and the justification of why interim relief is needed. If the application is filed with a regional court, the plaintiff needs to file the application through an attorney. The plaintiff may withdraw its application before the end of the proceedings without requiring the defendant's consent, including after a court hearing and during appeal proceedings.

Upon receipt of the application, the court has discretion on how to proceed. In particularly urgent cases, the court may issue an ex parte order without first hearing the defendant. Some judges continue to regularly grant ex parte orders even though, in recent years, the German Federal Constitutional Court has discouraged courts from doing so. The courts are supposed to grant the defendant its right to be heard, with short deadlines if necessary, and many courts have become more restrictive in their practice of issuing ex parte orders.

Defendants expecting an application for interim relief have the option of filing a protective defense brief with a central register. The protective defense brief is essentially a statement of defense written against a hypothetical application that the defendant believes may be filed by a plaintiff sometime in the future. The aim of the protective brief is to make the defendant's position known to the court before the court issues an ex parte order. The central register is an electronic database that all German courts have access to. When an application for interim relief is received by a court, it checks the central register to see whether a protective brief has been filed. Therefore, when filing the protective brief, the defendant should list all potential plaintiffs by name in order to increase the likelihood that the court will find the protective brief and match it to the application.

The court has the option to decide the application for interim relief on the basis of written proceedings only. If the arrest or preliminary injunction is granted in written proceedings, the defendant may object to it and force a decision by way of judgment after a hearing. The decision following a hearing can be appealed.

3. Standard of Proof

Compared to regular proceedings, the standard of proof is lower in interim relief proceedings. The plaintiff must credibly demonstrate (*Glaubhaftmachung*) the existence of its claim and the reasons that justify interim relief. This means that the applicant must convince the court that the existence of the underlying facts is more probable than not.

In case the plaintiff is unable to credibly show its claim and justification for interim relief, the court may nevertheless issue an arrest order in certain cases, provided that the applicant posts security for the prejudice that the defendant might suffer. This possibility exists only for asset freezes, not for personal arrests and preliminary injunctions.

While the courts do not need to form a full conviction of the facts stated by the plaintiff, the court ought to undertake a full legal assessment, even if the case is difficult. However, if there is real urgency, the court will decide speedily and form as best a legal view as it can in the given timeframe. The court will not refer legal questions to other courts as is possible in regular civil proceedings (i.e., to the German Federal Constitutional Court or the Court of Justice of the European Union).

E. Enforcement of Arrests and Preliminary Injunctions

Orders granting preliminary relief must be served upon the defendant by the applicant within one month.

Enforcement of an arrest or a preliminary injunction largely follows the standard enforcement regime, i.e., the plaintiff may have property and bank accounts of the defendant attached. However, because interim relief is meant to be provisional and cover only the period until a final judgment can be obtained, enforcement measures that would give the plaintiff permanent satisfaction, and thus create a *fait accompli*, are not available. This means, for example, that generally there is no money transfer to the plaintiff or a foreclosure sale of the defendant's assets. Limited exceptions to this rule exist.

An arrest of movable property is carried out by creating an attachment lien. Real estate is secured by registering a security mortgage. A personal arrest is enforced by detaining the person.

If it turns out in the regular proceedings that the underlying claim does not exist, the plaintiff is liable for the damages arising in connection with enforcing the interim relief order.

F. European Account Preservation Order

The European Account Preservation Order is a lesser known, but effective, tool to temporarily freeze bank accounts within the European Union in cross-border cases. It is applicable if the bank account is maintained in an EU member state that is different from the EU member state of the court that has jurisdiction over the subject matter or to the member state in which the plaintiff is domiciled.

This procedure allows a plaintiff to obtain a preservation order if there is a risk that, without such a measure, the subsequent enforcement of its claim against the defendant will be impossible or substantially more difficult. Courts are encouraged to decide quickly on the basis of documents only in an *ex parte* proceeding (within five working days if there is already a judgment, otherwise 10 working days).

If the plaintiff does not yet have a judgment for the claims, it will likely be ordered to provide security in an amount set by the court that is sufficient to prevent abuse and ensure compensation for damages to the defendant. If the plaintiff has not yet initiated regular proceedings at the time it seeks the account preservation order, it must do so within 30 days of the application or within 14 days after the order has been issued, whichever date is later.

The banks are obligated to implement the preservation order, i.e., freeze the account(s), without delay. The preservation order is served on the defendant after it was sent to the bank. The defendant may appeal the order.

G. Independent Procedure for Taking Evidence

German civil procedure also makes available an independent procedure for taking evidence (*selbstständiges Beweisverfahren*) as a form of interim legal protection. This procedure may be used to preserve evidence either during litigation that is already pending or before litigation. It may be used as a tool to prevent full-on litigation, in particular where the parties' dispute is only about facts (e.g., whether a product meets the agreed specifications).

The result of the independent procedure for taking evidence—in practice often a report written by a court-appointed expert—is binding in subsequent litigation. Absent exceptional circumstances, the parties and the court may not re-examine the factual issues.

Stay tuned for the next chapter, forthcoming in October 2023. In the meantime, your Willkie Global Litigation & Arbitration Team is happy to provide you with further information and advice on these issues.