

PRELIMINARY PROCEEDINGS IN THE AUSTRIAN LEGAL SYSTEM

George E. KODEK

SUMMARY: I. *Introduction*. II. *Constitutional Framework*. III. *Types of Preliminary Proceedings*. IV. *Relation between Preliminary Measures and Principal Proceeding*. V. *Recognition and Enforcement of Foreign Preliminary Measures in Austria*. VI. *Summary*.

I. INTRODUCTION

Like all modern systems of civil procedure, the Austrian law¹ provides for preliminary measures, although the term “preliminary measures” as such is unknown to Austrian law.² From a functional perspective, these encompass all provisions which are intended either to make the subsequent enforcement of certain rights in a separate (principal) proceeding easier,³ or

¹ This paper is primarily dealing with Austrian domestic law. For sake of completeness, however, it should be pointed out that Austria is a party to several *international conventions* which also bear on the law of provisional measures. The most important instrument is the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) which in its article 50 contains rules for preliminary measures. See Kodek in *Burgstaller/Deixler-Hübner*, EO Vor § 387 Rz 7. A detailed discussion of these rules is outside the scope of this paper. Suffice it to say that the relevant provisions of Austrian law are in conformity with article 50 TRIPS, so the question of whether this agreement is directly applicable or requires transformation by the national legislature is irrelevant in this context.

² This is also a problem in interpreting the term “provisional measures” in article 31 of the European Regulation (num. 44/2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This provision has to be interpreted autonomously, which of course often requires a comparative analysis of the laws of the various member states. The fact that the term “including protective [measures]” is added in article 31 of the said regulation is of little help since this clearly is only one of several possible applications of preliminary measures.

to provide for a preliminary regulation of the relationship between the parties until a final determination is possible.

On first glance it may be tempting to understand “preliminary proceedings” only as preliminary injunctions (“Einstweilige Verfügungen”) as specified in sections 378 *et seq.* of the Austrian Enforcement Act (Exekutionsordnung-EO).⁴ Such an interpretation, however, would be too narrow: Even a cursory analysis shows that other laws contain provisions which likewise are of a preliminary nature. Thus, *e. g.*, the Act on non-contentious proceedings (Außerstreitgesetz-AußStrG), also provides for preliminary measures.⁵ Furthermore, sometimes precautionary enforcement of judgments and the proceedings for the preservation of evidence (“Beweissicherung”) are included under preliminary measures.⁶

This report focuses primarily on preliminary injunctions since they are by far the most important instrument of provisional protection under Austrian law. Other preliminary proceedings such as provisional measures for the protection of possession, preliminary measures in non-contentious cases and in bankruptcy cases can only be treated summarily. I will not discuss questions of purely academic interest at great length; rather the focus of this paper will be a discussion of preliminary measures as they work out in practice. This is due to the fact that the Austrian courts—in spite of the fact that sometimes preliminary measures are viewed quite skeptically by judges—⁷ have not only managed effectively to use the tools provided

³ This is apparently the position taken by the European Court of Justice in the judgment of March 26, 1992, Rs C-261/90 *Reichert/Dresdner Bank II*.

⁴ See *Eilers*, Maßnahmen des einstweiligen Rechtsschutzes im europäischen Zivilrechtsverkehr (1991), 61 *et seq.*

⁵ § 2 paragraph 1, § 2 paragraph 2 Z 7, § 12 paragraph 2 AußStrG.

⁶ *Fasching*, Lehrbuch² Rz 922; *Konecny*, Anwendungsbereich der einstweiligen Verfügung, 240. There is an important difference, though, in that precautionary enforcement proceedings require that there is already a decision rendered after an ordinary proceeding, albeit not fully enforceable (for exceptions to this rule see *Rechberger*, JBl 1981, 181; *Schimik*, Exekution zur Sicherstellung, 123). Of course both precautionary enforcement and preliminary injunction have the purpose of protecting the creditor. The preservation of evidence, on the other hand, primarily aims at preserving an adequate basis for a later decision, and thus is intended to protect the completeness, accuracy and ultimately the correctness of the later decision in the principal proceeding. Only in a very broad sense it can be said to also protect a claim itself.

⁷ This is evidenced by an old Austrian lawyers' joke which, due to a pun used, is hard to translate but roughly reads as follows: “What is a preliminary measure? Something that is not to be granted”.

by the Austrian legislature, but in important areas have shaped and developed the law of preliminary measures, which led a recent analysis even to speak of “judge made law” in this area.⁸

While the purpose of the congress is specifically to discuss measures which—like the *tutela anticipata*—lead to a satisfaction of the creditor, it has to be pointed out that such measures are largely unknown to Austrian law. This is due to a number of reasons. Apart from limitations because of constitutional restrictions to be discussed *infra*, the main reasons why preliminary or summary measures leading to a satisfaction of the creditor are extremely rare in Austrian law is probably the general speed and effectiveness of the principal proceedings which in large measure reduces, if not eliminates the need to resort to preliminary measures to ensure the satisfaction of the creditor. Consequently, most preliminary measures in Austria are protective in nature, thus intended to ensure the subsequent enforcement of the judgment in the principal proceeding, but not to lead to a satisfaction of the creditor. Yet there are several measures in Austrian law, some (like the proceedings for protection of possession) dating back to Roman law and others of quite recent origin, which at least in part may lead to a temporary or even permanent satisfaction of the creditor. This paper intends to portray these measures in their context of the Austrian system of preliminary measures in its entirety, since an evaluation of the adequacy of a protection of creditors cannot be limited to the discussion of certain isolated measures, but has to be based on a broader picture taking into account other preliminary measures as well as the rules on preliminary enforcement of judgments.

II. CONSTITUTIONAL FRAMEWORK

Pursuant to article 6 of the European Convention on Human Rights,⁹ in the determination of its civil rights and obligations everybody is entitled to a fair and public hearing within a reasonable time. This provision at first

⁸ *Kininger*, *Einstweilige Verfügungen* (1991) V.

⁹ The Convention has been enacted as a constitutional law in Austria.

appears only to be aimed at the principal proceeding.¹⁰ It is clear, however, that an effective remedy requires that the law provides for a practical way of actual enforcement if necessary. This is why in recent decisions the European Court of Human Rights, for purposes of article 6 of the Convention, views the enforcement of a court decision as integral part of the proceeding.¹¹ A similar position is taken by the Austrian Constitutional Court. This court has held that the constitutional principle of rule of law (Rechtsstaatsprinzip) requires that, due to their very purpose, remedies available have a certain degree of minimum effectiveness for the applicant.¹² This doctrine, admittedly, was developed in an entirely different context, namely concerning the question whether under constitutional law an appeal in tax proceedings has to have suspensive effect. However, the underlying principle that legal protection has to include the—timely—preservation of a factual position equally applies to preliminary measures. In order for court proceedings to be effective, preliminary measures have to be available if it is impossible to obtain a final decision in time.

Plaintiff's interest in quickly enforcing his claim, however, has to be balanced against defendant's interest to be protected against unjustified claims. In this context the Austrian Constitutional Court emphasizes that it would be unconstitutional to have one party unilaterally to bear all consequences of a potentially wrong decision.¹³ The factual effectiveness of an appeal or similar remedy provided by the law can only be limited for compelling reasons. The same is true, of course, for the protection afforded by ordinary (as opposed to preliminary) proceedings. The legislature has to

¹⁰ This is supported by the term "hearing" in the English version of the convention. Indeed, this is the view taken by several decisions of the European Court of Human Rights. See *Erkner and Hofhaur versus Austria*, judgment of april 23, 1987, and *Poiss versus Austria*, judgment april 23, 1987.

¹¹ See *Martins Moreira vs. Portugal* (26 October 1988); *Silva Pontes vs. Portugal* (23 March 1994); *Di Pede vs. Italy* (26 september 1996), *Zappia versus Italy* (26 september 1996); *Hornsby versus Greece* (19 march 1997); *Robins vs. United Kingdom* (23 september 1997). The reason for this is that "it would be inconceivable that Article 6 should describe in detail procedural guarantees afforded to litigants, proceedings that are fair, public and expeditious, without protecting the implementation of judicial decisions" (*Hornsby vs. Greece*, 19 march 1997).

¹² VfSlg 11.196 (1986).

¹³ See again VfSlg 11.196 (1986).

take into account the position of the parties, purpose and contents of the provision, the interests of third parties and public interests. Thus, the provisions on preliminary measures —like the provisions on enforcement of judgements in general and on preliminary enforcement in particular— have to be understood as the result of a balancing of interests by the legislature. From this it is already apparent that any preliminary measure, and even more so a preliminary measure leading to a satisfaction of the creditor with all the risks such a measure entails for defendant has to be justified by special circumstances.

Even though to a certain extent the availability of preliminary measures is required under constitutional law, it is well established case law that in preliminary proceedings not all constitutional guarantees of article 6 of the Convention on Human Rights apply.¹⁴ This is particularly true for the opponent's right to be heard and for the right to a public hearing.¹⁵

Several recommendations of the Council of Europe also deal with preliminary remedies. According to a recommendation from 1981, consumer agencies should be able “to obtain urgent relief to prevent or stop suppliers from acting in any way contrary to the law”.¹⁶ A recommendation of 1984¹⁷ asks for the introduction of special provisions for “urgent cases”. In 1991 a recommendation on the introduction of emergency proceedings in family matters was adopted.¹⁸ Another recommendation recommends that in order to minimize frivolous appeals, member states should consider to provide for the preliminary enforcement of judgments.¹⁹

¹⁴ *Peukert* in *Frowein/Peukert*, EMRK-Komm 190, particularly FN 212; *ÖJZ* 1994, 599 (citing further authority). Therefore, failure to provide to the opponent an opportunity to be heard in a preliminary proceeding does not violate article 6 (*ÖBl* 1990, 32 = *RZ* 1990/26, 73; the contrary view is only held by *Frauenberger*, *Einstweiliger Rechtsschutz im Besitzstörungsverfahren* 113).

¹⁵ See *infra* 3.3.3.2.

¹⁶ Recommendation num. R (81) 2 On the Legal Protection of the Collective Interests of Consumers by Consumer Agencies of 23 January 1981, Principle IV.

¹⁷ Recommendation num. R (84) 5. On the Principles of Civil Procedure Designed to Improve the Functioning of Justice of 28 February 1984, Principle 8 paragraph 1 lit a.

¹⁸ Recommendation num. R (91) 9. On Emergency Measures in Family Matters of 9 September 1991.

¹⁹ Recommendation num. R (81) 7. On Measures Facilitating Access to Justice of 14 May 1981 Principle C 9.

III. TYPES OF PRELIMINARY PROCEEDINGS

1. *Preliminary Proceedings in the Austrian Legal System*

The rules of the Code of Civil Procedure (Zivilprozeßordnung-ZPO) and the Enforcement Act (Exekutionsordnung-EO) on the enforcement of judgments and the rules of the Enforcement Act on preliminary enforcement and preliminary injunction are the result of a balancing of plaintiff's interest to enforce his claim as quickly and effectively as possible, and defendant's interest not to be required to pay without foundation. The importance the Austrian Constitution attributes to the right to be heard and to appeals is reflected in the fact that generally it is a requirement for enforcement of a decision that it is final, *i. e.* that there are no more remedies available. The interests of a creditor while a proceeding is pending are protected—unlike under German law—not by preliminary enforcement of the decision of the trial court, but by *cautionary enforcement* (“Sicherstellungsexekution”). Thus, in certain exceptional cases, *e. g.* if a claim is established in a certain way (*e. g.* by a bill of exchange), in case of certain negligent acts of defendant (objection against a default judgment) or if the actual enforcement of a decision would be endangered, enforcement proceedings can be initiated for the purpose of securing the claim.²⁰ This, however, does not lead to a satisfaction of the creditor, but only to his claim being secured. Only if such an enforcement procedure is not available, the law, as *ultima ratio*, provides for preliminary injunctions.

The availability of preliminary measures, as one aspect of the right to a fair trial as guaranteed by article 6 of the Convention on Human Rights, fulfills the important function of supplementing the ordinary proceeding. The underlying rationale is that in certain cases the applicant cannot be required to wait until the (final) determination of the main proceeding. From this it follows that the importance of provisional measures is in large measure influenced by the duration of the principal proceeding. The shorter

²⁰ In certain cases non final decisions can provide the basis for full enforcement proceedings (not just cautionary enforcement). Thus, an extraordinary revision to the Supreme Court only suspends finality, but not the enforceability of the decision (§ 505 paragraph 3 ZPO). Furthermore, there are special provisions for labor law cases (see § 61 ASGG). Court orders other than judgments (“Beschlüsse”) are generally immediately enforceable (§ 524 ZPO).

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the principal proceeding is, the less need will arise for preliminary measures. The relatively short duration of proceedings in Austria²¹ is the reason why, compared to other countries, preliminary measures are sought relatively rarely and why there have been no demands for a reform of the law on preliminary measures even though it is quite restrictive particularly as far as monetary claims are concerned.²²

Preliminary measures serve two purposes, although these cannot always clearly be distinguished: On the one hand preliminary measures serve to *secure the subsequent enforcement* of the decision rendered in the principal proceeding. In addition to this traditional purpose preliminary measures in recent years there is a tendency to use provisional remedies for a *preliminary determination of the parties rights and obligations* in cases where a final determination cannot be obtained in time. Particularly in cases where the law does not require the showing of *periculum in mora*, the focus tends to shift from the principal proceedings to the preliminary proceeding. Furthermore, in recent legislation there is a growing tendency to loosen the connection between preliminary measures and principal proceeding, which leads to the preliminary proceeding playing a more important and increasingly independent role. Thus, preliminary measures are increasingly not only provided to assist in the effective enforcement of a claim to be determined in the principal proceeding, but rather are employed as a means of final summary determination.²³ Examples for this tendency include a preliminary injunction requiring an employer to permit a member of the works council to take part in training programs²⁴ or even a dissolution of a company by a preliminary injunction.²⁵

The equivalent to preliminary injunction in non-contentious cases is the judge's power to render preliminary decisions. The draft of the new Code of Non-contentious Proceedings contains separate rules for preliminary measures although they are closely modeled after the respective rules of

²¹ See *Schneider/Roth*, Eine Leistungsschau des österreichischen Zivilprozesses, *BMJ/Lewisch/Rechberger* (Hrsg), 100 Jahre ZPO. Ökonomische Analyse des Zivilprozesses (1998), 7.

²² A reform in 2000 widened the measures available for securing money claims (see *infra* 3.3.1 a). Still, the measures available are more restrictive than those for securing other claims.

²³ *Konecny*, Anwendungsbereich der einstweiligen Verfügung 2 *et seq.*

²⁴ KG Steyr infas 1990/1, 13 = ARD 4149/226/90.

²⁵ This is considered possible by some scholars (*Holzhammer*, GedS Schönherr 303 *et seq.*, *Kininger*, Einstweilige Verfügungen, 44).

the Enforcement Act. In certain specialized areas of the law, particularly in bankruptcy law, there are specialized rules.

2. *Practical Importance*

Providing exact statistical information is difficult since there is no official statistics on preliminary measures as such. Thus, information can only be given on certain aspects. Still, the most recent published report is from 1996.²⁶ In this year, in 174 cases there were applications for a preliminary injunction without a principal proceeding being pending. There is no exact information as to the number of applications for preliminary injunctions during a pending lawsuit; however the figure, due to the fact that in unfair trade practices cases (426 cases per year) routinely a preliminary injunction is sought, appears to be much higher. In the same year 6,224 actions for protection of possession were brought, 2,356 of which related to landlord-tenant disputes.

The only other area where there is statistical information is on protective orders in family cases. From May 1997 to the end of October 1998, there were 460 injunctions ordering the opponent to leave the house or apartment due to domestic violence.²⁷

3. *Preliminary Injunction*

A. *Types of Injunctions and Requirements*

The procedure for issuing preliminary injunctions is regulated in sections 378 *et seq.* Austrian Enforcement Act (Exekutionsordnung-EO). In spite of this, it is undisputed that this is not only a kind of enforcement procedure, but a proceeding to obtain a title for subsequent enforcement. The preliminary injunction is then enforced like an ordinary judgment. The

²⁶ *Schneider/Roth*, Eine Leistungsschau des österreichischen Zivilprozesses, in *BMJ/Lewis/Rechberger* (Hrsg), 100 Jahre ZPO. Ökonomische Analyse des Zivilprozesses (1998), 7.

²⁷ More statistical information is provided by *Rangger*, Das österreichische Gewaltschutzgesetz (2002), 259 *et seq.*, although this author focuses primarily on police activity in this context.

preliminary injunction is, as its name suggests, a preliminary remedy which generally requires a subsequent principal proceeding. This is why in practice the proceeding relating to preliminary injunction is also called “provisional proceeding” (“Provisorialverfahren”). The law distinguishes between three types of preliminary injunctions.

Preliminary injunctions for the protection of money claims (§ 379 EO). These can be issued if there is *periculum in mora* which in § 379 EO is defined as that it is likely that the opponent, by damaging, destroying, concealing or disposal of things or in other ways will make the enforcement of the money claim impossible or substantially more difficult, or if the judgement would have to be enforced in a country not a member to the Brussels or Lugano Conventions.²⁸

Only the measures for the protection of money claims are listed exhaustively in the Enforcement Act. These include the seizure of property and its sequestration, a court-imposed prohibition to sell or encumber moveable property, a preliminary garnishment order, a preliminary administration of real estate and the prohibition to sell or encumber real estate. It should be pointed out that all these measures are protective only; they, in and by themselves, do not lead to a satisfaction of the creditor but are intended only to secure later enforcement of the judgment rendered in the principal proceeding. The practical importance of these injunctions is relatively small, which is due to the stringent requirements, the typically short duration of the principal proceeding and the possibility of preliminary enforcement non-final decisions.

Only in extreme cases, *e. g.* in cases concerning claims for pain and suffering, certain scholars have suggested that the courts should be able to order the debtor to pay.²⁹ In this case the preliminary remedy would lead to an actual, albeit preliminary (*i. e.* subject to the outcome of the principal proceeding) satisfaction of the creditor. Courts have not followed these suggestions, though.³⁰ There are, however, special rules for maintenance payments. See *infra*. Scope of application.

²⁸ § 379 EO.

²⁹ *König*, Einstweilige Verfügungen, 2a. ed., Rz 2/119; *Holzhammer*, Zwangsvollstreckungsrecht, 4a. ed., 434, 435; *Konecny*, Anwendungsbereich der einstweiligen Verfügung, 69.

³⁰ OLG Innsbruck ZVR 1993, 230.

Preliminary injunctions for the protections of other claims (§ 381 subparagraph 1 EO). The purpose of these injunctions is to protect the future enforcement of claims for performing, or refraining from, certain acts by way of preserving the object in dispute (e.g. the object of a sales contract which opponent then refuses to turn over to the applicant). They apply only to other than money claims. These require a showing that otherwise the enforcement of fulfillment of the claim would be made impossible or substantially more difficult³¹ or that the judgement would have to be enforced in a country which is not a member to the Brussels or Lugano Conventions (*periculum in mora*).

Special preliminary injunctions for the protection of other rights (§ 381 subparagraph 2 EO). The purpose of this kind of injunctions goes far beyond the purpose of other preliminary injunctions. The court can issue preliminary injunctions if this appears to be necessary to *protect against violence or to protect from an imminent irreparable damage*. The possible scope of application is rather broad. The function of the preliminary injunction in these cases can be regulatory in nature, i.e. regulating the relationship between the parties, but it can also lead to a *temporary satisfaction of the applicant*. By way of such a preliminary injunction the court can regulate ad interim disputes relating to property or other rights such as patent and copyrights, business practices, landlord-tenant relations, company relations and family relations. Yet it should be pointed out that also in these cases, even if the court order the applicant's claims to be fulfilled *ad interim*, this decision does not constitute a permanent award; rather it is subject to review in the principal proceeding.

While it is well settled that the court can order the opponent to perform, or refrain from, certain acts, it is disputed whether in case of money claims the court can also order the opponent to satisfy the claim.³²

B. Scope of Application

The following chapter provides an overview of important areas where preliminary injunctions are frequently used.

³¹ Note that in this case, unlike in case of money claims, it is not necessary that the difficulties of later enforcement of a judgment are due to opponent's *conduct*.

³² See *supra* a).

Family law. Preliminary injunctions can be issued in connection with divorce proceedings or with proceedings for the division of property following a divorce. Measures available include preliminary rules on the use of property and savings, or measures securing claims to such items.

Furthermore protective orders are available to prevent violence. The Domestic Violence Protection Act (*Gewaltschutzgesetz*),³³ provides for a preliminary injunction ordering a person to leave a house or apartment, to avoid certain areas and to refrain from seeking contact with a family member. Such measures are not restricted to spouses, but can also issued against relatives and other people living in the same household. If because of an act of violence or dangerous threats the applicant cannot be reasonably expected to continue to live with the aggressor,³⁴ also the police can order the aggressor to leave and forbid him to return. Such a police order is preliminary and only valid for up to seven days. Within this period, the applicant has to seek a court order. The court can order such a measure for three months, or, in case a divorce proceeding is pending, also for a longer time.

Maintenance. In connection with a divorce or maintenance proceeding the court can award preliminary maintenance.³⁵ This serves not only to secure the later enforcement of maintenance payments, but constitutes an independent, if only preliminary determination of the amount to be paid.³⁶ It is also possible to order maintenance in the same amount as is sought in the principal case.³⁷ “Preliminary” in this context means only that the determination is valid for a certain time period only. Whether the payments can be recovered if ultimately in the principal proceeding it is determined that there is no right to maintenance or not in the amount determined in the preliminary proceeding, is subject to dispute. According to several older

³³ § 382b EO. This statute is discussed in depth by *Rangger*, *Das österreichische Gewaltschutzgesetz* (2002). For the relationship to the principal proceeding and the possibility of pre-emptive injunctions see *infra* 4.

³⁴ For this, generally already “two unmotivated slaps on the face” are sufficient (1 Ob 90/98m; in this case nonetheless the Supreme Court denied the injunction because the woman applying for the injunction apparently had forgiven her husband and did not want a divorce).

³⁵ § 382 paragraph 1 Z 8 EO.

³⁶ SZ 52/121; SZ 60/60; SZ 60/97 = EFSIlg 70.032 = EvBl 1987/174, 652; EvBl 1994/60, 280.

³⁷ EFSIlg 36.921, 41.901.

decisions the preliminary awards cannot be recovered later³⁸ and thus have not to be paid back in case the applicant loses the principal proceeding.³⁹ In recent years, however, courts tend to allow recovery if the preliminary injunction later turns out to be unfounded.⁴⁰ This view is also supported by recent literature.⁴¹

The applicant has to assert and establish by preponderance of probability that he or she is entitled to maintenance and that this right was violated.⁴² The amount of maintenance is generally determined at a certain percentage of the opponent's income.⁴³ As to the amount awarded, there is no difference between provisional and preliminary proceedings. Only one decision holds that the amount to be awarded should be lower than the final amount awarded in the principal proceeding and should only cover "adequate needs" ("anständigen Lebensbedarf").⁴⁴ The court can also order the opponent to advance litigation costs, particularly for divorce⁴⁵ or maintenance proceedings.⁴⁶

There are special rules for *minors*. Pursuant to section 382a EO a minor has to be awarded preliminary maintenance, if he does not already have a title for maintenance, a maintenance proceeding is pending or is brought at the same time with the application for preliminary maintenance. The minor's assertions have to be taken as proven unless the contrary appears from the court files. Thus, there is no investigation or hearing of any kind. Rather, the court has to decide without awarding the opponent an opportunity to be heard. An objection against this decision is not allowed.⁴⁷ However, the opponent can file for a lifting or reduction of the order.⁴⁸ The court has also discretion to order the applicant to pay back all or part of the payments received if it later turns out that the order was unwarranted.⁴⁹ The issuing

³⁸ SZ 8/243; SZ 43/182; SZ 49/69; SZ 52/121 *et al.*

³⁹ OLG Wien EFSIlg 39.363.

⁴⁰ *See, e. g.*, EvBl 2001/114. Further references cited by Kodek in *Burgstaller/Deixler-Hübner, EO § 394 Rz 46*.

⁴¹ Kodek in *Burgstaller/Deixler-Hübner, EO § 394 Rz 47 et seq.*

⁴² SZ 23/73; SZ 43/77; EFSIlg 41.912; OLG Wien EFSIlg 52.373 *et al.*

⁴³ EFSIlg 70.059 = ÖA 1992, 160.

⁴⁴ OLG Wien EFSIlg 46.799.

⁴⁵ EvBl 1968/338, 544; OLG Innsbruck EvBl 1985/142.

⁴⁶ EFSIlg 46.307.

⁴⁷ § 397 paragraph 1, second sentence EO.

⁴⁸ § 399a EO.

⁴⁹ § 399b EO.

of the injunction must not depend on the posting of security.⁵⁰ The appeal is *ex-parte*; there is no right for the other side to be heard⁵¹ and it does not have to be signed by a lawyer.⁵² The injunction does not have to be issued by a judge, but can be issued by a *Rechtspfleger*, a court official who has some legal training, but not a full legal education.⁵³ It has to be pointed out that this somewhat drastic measure⁵⁴ is only available to ensure *the absolute minimum maintenance*. The amount to be imposed is linked to the monthly government family allowance, currently roughly 100 Eur per month. For higher amounts, a normal preliminary injunction pursuant to § 382 Abs 1 Z 8 lit a EO is available which requires proof of the underlying basis and also in other respects affords more rights to the opponent.

Other money claims. These is the only case where the statute contains an exhaustive list of available preliminary measures.⁵⁵ These include the seizure of property and its sequestration, a court-imposed prohibition to sell or encumber moveable property, a preliminary garnishment order, a preliminary administration of real estate and the prohibition to sell or encumber real estate. Again it has to be pointed out that all these measures are protective only; they, in and by themselves, do not lead to a satisfaction of the creditor but are intended only to secure later enforcement of the judgment rendered in the principal proceeding.

Claims in kind. For the protection of claims for the turn over of certain things the court can order defendant to depose the object at the court or to perform certain maintenance actions or to refrain from damaging or altering the object.⁵⁶ The mere fact, however, that defendant makes ordinary use of the object does not warrant a preliminary injunction.⁵⁷ In the case of

⁵⁰ § 390 paragraph 4 EO.

⁵¹ EvBl 1994/28 = JBl 1994, 481 *et al.*, contrary EFSIlg 70.110 = RZ 1990/119, 284.

⁵² AnWB1 1989, 372 (critical note by *A. Schmidt*) = JBl 1989, 118 = ÖA 1989, 46 (critical note by *Gamerith*); EFSIlg 70.112; LGZ Wien EFSIlg 61.168; contrary only LGZ Wien WR 348.

⁵³ § 19 paragraph 1 Z 3, paragraph 2 Z 5 RpfLG.

⁵⁴ König, *Einstweilige Verfügungen*, 2a. ed., Rz 2/147 calls it “Super-EV”.

⁵⁵ § 379 paragraph 3 EO.

⁵⁶ See § 382 paragraph 1 Z 1, 4 and 5 EO.

⁵⁷ SZ 23/177; ZVR 1957/82, 95 *et al.*; contrary OLG Wien EvBl 1947/258, 196, according to which the attrition a vehicle suffers in the course of normal use is sufficient for granting a preliminary injunction.

immovables, the court can impose a prohibition against sale, disposal and encumbrance which is also registered in the land register.

Bank guarantees. Sometimes it is attempted to prevent the drawing of a bank guarantee by applying for a preliminary injunction. Courts have taken a very restrictive view here in order not to deprive the instrument of bank guarantee of its use. Thus, an injunction prohibiting the bank from paying the guaranteed amount will only be issued if the beneficiary uses the guarantee frivolously or fraudulently and the applicant can show this clearly and unequivocally.⁵⁸

If the claim to be protected is governed by foreign law, according to recent court decisions preliminary measures can be issued on the basis of the application of Austrian law if the applicable foreign law cannot be determined in time.⁵⁹

Company law. In order to secure a claim for dissolution of a business partnership and the claims connected therewith the court can enjoin a partner from representing the company or can appoint an administrator for the company.⁶⁰ It is also possible to revoke a partner's authority to represent the company and authorize the other partner, who was previously only entitled to act together with the opponent, to represent the company alone.⁶¹ It is also possible to prohibit ad interim the performance of certain acts⁶² or the making of certain statements.⁶³ The court can also prohibit the opponent from entering the business premises.⁶⁴ Certain authors have argued

⁵⁸ SZ 54/189 = EvBl 1982/57, 209; SZ 59/128 = IPRax 1988, 33 (with note by Moschner) = JBl 1987, 115 = ÖBA 1986, 486 (critical note by Koziol) = RdW 1986, 341; RdW 1988, 134 = JBl 1990, 328.

⁵⁹ SZ 61/39 = ÖBA 1988, 609 (supplemental note by *Paul Doralt*) = RdW 1988, 320 (Malaysian law). Older decisions have held that the governing foreign law has to be proven by the applicant. See SZ 59/128 = IPRax 1988, 33 (erg *Moschner*) = JBl 1987, 115 = ÖBA 1986, 486 = RdW 1986, 341 (Iraqi law).

⁶⁰ JBl 1948, 65; EvBl 1965/293, 443. The prohibition can be registered in the company register (ZBl 1922/353).

⁶¹ SZ 21/47; JBl 1983, 262.

⁶² E.g. taking the salary from the company's fund (EvBl 1983/144, 522).

⁶³ SZ 55/8; see also SZ 55/78 (prohibition of untrue detracting statements about a partner vis-a-vis employees of the business).

⁶⁴ See SZ 26/184 for the full partner; for the limited partner see SZ 51/20; GesRZ 1978, 124.

that by way of a preliminary injunction the court could even dissolve a business partnership.⁶⁵

Unfair trade practices and patent law. Particularly in unfair trade practices cases preliminary injunctions are of considerable importance. Cases where preliminary injunctions are employed frequently include the prohibition ad interim of certain business practices, such as, *e. g.*, a certain advertising campaign. The issuing of preliminary injunctions in this context is made easier by the law since there is no need to establish a *periculum in mora*.⁶⁶ In practice often the relevant questions of law are finally determined in the proceeding concerning the provisional measure,⁶⁷ so that the principal proceeding is not continued by the parties once the decision on the preliminary injunction has become final.

Also in patent cases and certain other cases the showing of *periculum in mora* is not a requirement for the issuing of a preliminary injunction.⁶⁸ Yet courts take a rather restrictive attitude towards preliminary injunctions in patent cases and stress that difficult technical questions which require the use of experts should generally not be decided in proceedings concerning provisional measures even if the parties submit expert declarations from privately obtained experts.⁶⁹

Other cases. Apart from the cases discussed *supra*, there is a wide range of other cases where preliminary injunctions can be issued, some of which are based on special statutory provisions,⁷⁰ some of which were created by judicial precedent. This includes, to name but a few, the separation of an estate and measures for the protection of the creditors of an estate,⁷¹ the

⁶⁵ Holzhammer, *GedS Schönherr 303 f*; Kininger, *Einstweilige Verfügungen zur Sicherung von Rechtsverhältnissen* (1991) 44; critical Konecny, *Der Anwendungsbereich der einstweiligen Verfügung* (1992) 3.

⁶⁶ § 24 Unfair Trade Practices Act (Gesetz gegen den unlauteren Wettbewerb-UWG).

⁶⁷ This was the reason for the reform of the appeal to the Supreme court in cases of preliminary measures by article II Z 4 BG BGBl 1992/756. See *infra* 4.

⁶⁸ § 81 paragraph 2 UrhG, § 147 paragraph 1 PatG, § 21 paragraph 2 HSchG and § 30 DSG. This also applies to actions brought by consumer agencies and similar bodies (§ 30 paragraph 1 KSchG iVm § 24 UWG).

⁶⁹ ÖBl 1962, 84; ÖBl 1971, 98; ÖBl 1971, 145; similarly MR 1993, 221 (critical note by Korn).

⁷⁰ A list is provided by *Angst/Jakusch/Pimmer*, MGA EO, 14a. ed., 1168 f.

⁷¹ §§ 812, 822 ABGB, § 75 3. TN.

assertion of the landlord's lien on the tenant's moveable property (*in- vecta et illata*),⁷² the ordering of the sale of an animal and deposit of the purchase price in warranty actions concerning an alleged disease of an animal purchased,⁷³ prohibition against a cartel,⁷⁴ etcetera. Even in criminal proceedings preliminary injunctions are possible in order to freeze the defendant's assets, thus laying the ground for a forfeiture of the gains of his illicit activity in case of a later conviction⁷⁵ and in tax evasion proceedings for securing payment of the fine and government claims arising out of the forfeiture of property or substitute payments in case the forfeiture cannot be effected.⁷⁶

C. Procedure

a. Jurisdiction, Venue and Composition of the Court

Applications for the issuance of preliminary injunctions, if a principal proceeding is already pending in Austria, fall under the jurisdiction of the court where the principal proceeding is pending. If there is no such proceeding pending or the principal proceeding is already concluded and an enforcement of the decision rendered in the principal proceeding is not yet possible, the application has been made to the district court in the district of which the opponent is domiciled. If opponent is domiciled abroad, jurisdiction lies with the district court of the district where the object of the dispute, for which the preliminary injunction is sought, is located or where the third party debtor is domiciled or where actions in the course of enforcing the preliminary injunction have to be performed.

In cases concerning maintenance, unfair trade practices and copyright law and in actions brought by consumer agencies⁷⁷ jurisdiction for the issuance of a preliminary injunction always lies with the court having jurisdiction for the principal proceeding, regardless of whether a principal proceeding is already pending.

⁷² § 1101 ABGB.

⁷³ § 932a ABGB.

⁷⁴ § 25.

⁷⁵ § 144a StPO.

⁷⁶ § 233 FinStrG.

⁷⁷ See sections 28-30 Consumer Protection Act (Konsumentenschutzgesetz-KSchG).

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At the district court level, all applications are decided upon by a *single judge*. At the superior court level, if the matter is to be decided by a panel of judges, the *presiding judge* alone decides on applications for preliminary injunctions.⁷⁸ This also applies in labor law cases.⁷⁹ Only in unfair trade practices cases, copyright cases and consumer protection cases pursuant to sections 28-30 Consumer Protection Act, the court decides in form of a panel which is composed in the same way as in the principal proceeding, *i. e.* two professional judges and one lay judge who is an experienced businessman. This applies only, if the principal proceeding is decided by a panel which is only the case if the amount in controversy exceeds Eur 50,000 and one of the parties expressly asks for it. In practice, most cases are decided by a single judge. Only patent law cases are always decided by a panel.

Appeals are decided by a panel of three professional judges. In unfair trade practices, copyright and consumer protection cases pursuant to sections 28-30 Consumer Protection Act also at the appellate level there is a panel composed of two professional judges and one lay judge. In labor law cases there are three professional judges and two lay judges. The Supreme Court generally decides in panels of five justices. Only in labor law cases decisions are rendered by three justices and two lay judges.

b. Procedure at First Instance

Preliminary injunctions are only issued upon application,⁸⁰ not *ex officio*. Only in proceedings for the protection of possession (Besitzstörungsverfahren) the court can issue injunctions *ex officio*.⁸¹

Applications for the issuing of preliminary injunctions are decided in a simplified and expedited procedure, which however is achieved at a loss

⁷⁸ § 388 paragraph 1 EO.

⁷⁹ This is a result of an amendment in 2001 (section 11a Labor Proceedings Act, Arbeits und Sozialgerichtsgesetz, ASGG). For the law before this reform see *Kodek* in Burgstaller/Deixler-Hübner, EO, § 388 Rz 3.

⁸⁰ One note on terminology: The Enforcement Act generally speaks of the applicant as the “endangered” party (“gefährdete Partei”) and the opponent as the “endangered party’s opponent” (“Gegner der gefährdeten Partei”). In practice the parties are often referred to as applicant (“Antragsteller”) and opponent (“Antragsgegner”).

⁸¹ See SZ 21/30; SZ 15/62; JBl 1949, 17 *et al.*; *Kodek*, Besitzstörung (2002) 967; *Rechberger/Simotta*, Exekutionsverfahren² Rz 929; contrary *Frauenberger*, Einstweiliger Rechtsschutz in Besitzstörungenstreitigkeiten 87.

of accuracy.⁸² Due to the urgent nature of preliminary measures, the opponent does not have to be heard before the injunction is issued.⁸³ His right to be heard is safeguarded by the opportunity to raise an objection if the preliminary injunction was issued *inaudita altera parte*⁸⁴ which leads to a hearing being held where the court determines whether the preliminary measure should be upheld, modified or lifted entirely. If defendant is awarded an opportunity to be heard, namely to file an answer to the application for a preliminary injunction, but fails to make use of this right, he is considered to consent to the measure sought.⁸⁵ Nonetheless the court has to examine *ex officio* whether the requirements for the issuing of an injunction are met.⁸⁶ Unlike in Germany, in Austria there is no possibility to file a “preemptive answer” (“Schutzschrift”) as a protective measure in case someone fears, typically in unfair trade practices, that an opponent might seek a preliminary injunction against him.⁸⁷

The *standard of proof* is reduced. A prima-facie showing is sufficient whereas in the principal proceeding generally full proof, *i.e.* a conviction of the judge that a certain fact is true, is required. It is only necessary to establish that the facts are *probable* (as opposed to certain as required in the principal proceeding). Also the types of evidence admissible are restricted. Generally only evidence which is readily available is allowed.⁸⁸ This includes —always provided that it is possible immediately— an examination of the parties without an oath, the examination of witnesses brought to the court by the parties⁸⁹ or obeying a summons on short notice,

⁸² This is in part compensated by the possibility to issue an injunction on the condition that the applicant post a bond or security. Moreover, there is a strict liability of the applicant if the preliminary injunction turns out to be unfounded (see *infra* 3.3.3.5).

⁸³ ÖBl 1990, 32 = RZ 1990/26, 73; OLG Wien MR 1989, 58.

⁸⁴ SZ 24/11 = EvBl 1951/178, 229; SZ 25/251; ÖBl 1975, 109; EFSIlg 25.490, 27.955; EvBl 1986/100, 368 = ÖBl 1986, 45. For details on the objection see *infra* 3.3.3 b).

⁸⁵ § 56 paragraphs 2 and 3 EO and the references cited in the previous footnote.

⁸⁶ SZ 24/11 = EvBl 1951/178, 229; SZ 25/251; ÖBl 1975, 109; EFSIlg 25.490, 27.955; EvBl 1986/100, 368 = ÖBl 1986, 45.

⁸⁷ OLG Wien 1 R 15/96. See also ÖBl 1996, 256 (also on the question as to whether an order rejecting a precautionary answer can be appealed).

⁸⁸ The rule that only readily available evidence is admissible only is intended to expedite proceedings, but does not bar the use of other evidence if the court has admitted it even though it was not readily available: OLG Wien EFSIlg 46.905; 52.440; SZ 10/171; SZ 25/18 = JBl 1953, 462 = ÖBl 1952, 7.

⁸⁹ SZ 25/51 = ÖBl 1952, 15 (summons of witnesses not permissible).

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documents (including uncertified copies),⁹⁰ written affidavits of witnesses⁹¹ (other than the applicant⁹²) and experts.⁹³ It is not permissible that the court has to acquire documents *ex officio*⁹⁴ or obtains written information from third parties.⁹⁵ Likewise the appointment of an expert by the court,⁹⁶ obtaining files from other courts or government agencies⁹⁷ and the taking of evidence by way of judicial assistance is not permitted.

The court can decide on the basis of documentary evidence without hearing witnesses etc. If the need arises to hear witnesses, they have to be brought to the court by the applicant. There is an informal examination in camera which is closed to the public. The Enforcement Act does not give the parties or their attorneys a right to be present during the examination.⁹⁸

The preliminary injunction can be conditioned on the applicant posting a *bond* or other security, the amount of which is in the discretion of the court, if the applicant has not made a sufficient showing of his claim and the disadvantages for the opponent resulting from the preliminary injunctions can be compensated in money.⁹⁹ Also, the court has to determine *how long* the preliminary injunction is *valid*.¹⁰⁰ This can be done by setting a certain date when the preliminary injunction expires, or, more often, by linking the duration of the preliminary measure to the duration of the principal proceeding. If a preliminary injunction is issued without a principal

⁹⁰ SZ 61/39 = JUS 1988 H 42, 22 = ÖBA 1988, 609 = RdW 1988, 320.

⁹¹ ÖBI 1972, 92.

⁹² SZ 50/25 = EvBl 1977/203, 458 = JBl 1977, 646 = QuHGZ 1978, 623; EFSIlg 34.747 = JBl 1979, 548 = RZ 1979/77, 253.

⁹³ SZ 41/111; ÖBI 1972, 92; ÖBI 1980, 121.

⁹⁴ EFSIlg 37.057.

⁹⁵ LGZ Wien EFSIlg 52.444; OLG Wien EFSIlg 34.758 (written enquiry with foreign employer); in proceedings concerning preliminary maintenance, however, inquiries with the employer about the opponent's income are permissible: OLG Wien EFSIlg 34.757; OLG Wien EFSIlg 42.030.

⁹⁶ ÖBI 1973, 34; SZ 61/9 = EFSIlg 64.397.

⁹⁷ LGZ Wien EFSIlg 37.059; OLG Wien EFSIlg 42.031, 46.906.

⁹⁸ EFSIlg 42.024; OLG Innsbruck MR 1993, 23.

⁹⁹ See § 389 paragraphs 1 and 2 EO. Only the lack of (complete) proof of the claim can be compensated by posting a bond or security. This is only possible if the applicant has brought at least some (albeit insufficient) proof of his claim. If the applicant fails to establish his claim altogether, his application will be dismissed.

¹⁰⁰ The preliminary injunction does not expire automatically after the date set by the court, but has to be lifted by an express court order (SZ 25/1; EvBl 1968/180; SZ 53/175; ÖBI 1988, 15 *et al.*).

proceeding being pending, the court also has to set the applicant a reasonable date for initiating the principal proceeding (so called “justification period”, “Rechtfertigungsfrist”, see § 391 paragraph 1 EO). If applicable, the court has also to indicate a certain amount (“Befreiungsbetrag”) upon payment of which the opponent can succeed in having the preliminary measure being lifted.

The *decision* ordering or denying a preliminary measure has to be *motivated*. The court has to state the facts on which it based its decision and also the reasons why it thinks the required standard of proof is met. The court has also to describe the legal basis of the decision. Case law stresses that in preliminary measures questions of law and fact do not receive the same scrutiny as in ordinary proceedings. Given the urgency of the measure, there is often no time for a detailed examination of the complex questions of law. On the other hand, in less urgent cases, particularly in unfair trade practices cases, in practice decisions often contain an elaborate discussion of the law which also, particularly in the case of appellate decisions, serves as an important guideline for similar cases.

Generally a preliminary injunction is *enforced* by the court *ex officio*. Important exceptions are preliminary injunctions ordering defendant ad interim to perform certain actions or to abstain from a certain conduct and the determination of preliminary maintenance payments. In these cases the preliminary injunction is the basis for separate enforcement proceedings which can be initiated upon application.

c. Remedies

Appeal (Rekurs). Against a preliminary injunction or an order denying the issuing of a preliminary injunction there is an appeal which has to be filed within 14 days. The appeal has to be signed by an attorney. Generally the other party has a right to be heard and can file an answer to the appeal within 14 days after service of the appeal.¹⁰¹ The appeal does not have suspensive effect; in exceptional circumstances, however, the trial court or the appellate court can on application grant a suspensive effect.¹⁰² This is

¹⁰¹ The only exception is if the application for the issuance of a preliminary injunction was denied in an *ex parte* proceeding, *i.e.* without the defendant being given an opportunity to be heard: § 402 paragraph 2 EO.

¹⁰² § 524 ZPO iVm § 78 EO.

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extremely rare in practice. The appellate court decides in a written proceeding based on the contents of the file. New facts or evidence cannot be raised in the appeal. It is also not possible to review the fact-finding of the trial court if the decision is based on the personal questioning of parties and/or witnesses before the trial court.¹⁰³ The reason for this is that in a purely written proceeding the appellate court does not have the opportunity to assess the witnesses' credibility.

Against the decision of the appellate court within 14 days a further appeal to the Supreme Court can be lodged. This requires that there is a fundamental question of law pursuant to section § 528 ZPO. Also the other requirements of section 528 ZPO (particularly the minimum amount in controversy of more than 4.000 Eur) apply. From a comparative point of view the admissibility of an appeal to the Supreme Court in a preliminary matter is remarkable; in many countries such an appeal, due to the urgency and the preliminary nature of the matter, is not allowed. The Austrian legislature, however, has even increased the possibilities to appeal in preliminary proceedings. Thus, since 1992 an appeal to the Supreme Court is also possible if the appellate court has affirmed the trial court's decision.¹⁰⁴ This is an exception from the general rule that —apart from judgments on the merits— there is no appeal to the Supreme Court against decisions affirming the trial court. The reason for this exception was that particularly in unfair trade practices cases the decision in the preliminary proceeding serves as an important guideline for the parties often making initiation or continuation of the principal proceeding superfluous.

Objection. If the defendant before issuance of the injunction was not provided an opportunity to be heard, he can —except in proceedings for the protection of possession¹⁰⁵— file an objection in addition to or in lieu

¹⁰³ EvBl 1994/53 = ecolex 1994, 159 = NRsp 1994/72.

¹⁰⁴ § 402 paragraph 2 EO idF Art II Z 4 BG BGBl 1992/756. See *infra* 4.

¹⁰⁵ Until the 1983 reform this followed from the old version of § 460 ZPO which excluded all remedies. Since 1983 the unavailability of an objection can be deduced from the character and purpose of the proceeding, particularly since the proceeding provides for a special *ex-officio*-reconsideration of preliminary measures after conclusion of the trial in the main proceeding (section 525 ZPO, see *Kodek*, Besitzstörung 975; aA *Frauenberger*, Einstweiliger Rechtsschutz bei Besitzstörung 113). Moreover, due to the expedited nature of the principal proceeding there is less need for awarding the defendant an opportunity to be heard already in the preliminary proceeding.

of an appeal. This is a non-suspensive remedy which is decided on by the trial court rather than by an appellate court.

The objection can be based on the same grounds that could also be raised in an appeal,¹⁰⁶ thus in effect asking the trial court to reconsider its ruling. Moreover, defendant can also raise new facts and new evidence which would not be permitted in an appeal. If defendant files both an appeal and an objection, generally the appeal has to be considered first,¹⁰⁷ unless defendant expressly raised an objection under the condition that his appeal fails.¹⁰⁸

The objection does not deprive the injunction of its force; it only leads to a new decision by the trial court on the basis of the arguments raised in the objection.¹⁰⁹ The objection does not hinder the enforcement of the injunction.¹¹⁰ As indicated above, it is always the trial court that decides on the objection¹¹¹ after a hearing. Evidence which is not immediately available is not permitted.¹¹² Thus, the parties have to bring their evidence to the hearing or have to file proper applications in advance so that the court can summon the witnesses or produce other evidence in time.¹¹³

The court can keep the injunction in force, alter or lift it; it can also condition any of these measures on the posting of security the amount of which lies in the discretion of the court.¹¹⁴ Against the decision of the trial court, there is an appeal. As to the admissibility of a further appeal to the supreme court, see *supra* Appeal (*Rekurs*).

Motion to lift or limit the injunction. The preliminary injunction can, on application, be limited or lifted later. This is possible, *e.g.*, if the injunction was granted more widely than necessary for the protection of the applicant, the circumstances have changed so that the preliminary injunction is

¹⁰⁶ Kodek in Burgstaller/Deixler-Hübner, EO § 397 Rz 9; E. Kodek in Angst, EO § 398 Rz 4); an older theory sought to limit the objection to arguments which could not be raised on appeal (OLG Innsbruck JBI 1973, 322).

¹⁰⁷ SZ 43/81 = EvBl 1970/350, 581 = ÖBl 1971, 31 = RZ 1970, 223; JBI 1973, 322.

¹⁰⁸ EFSlg 30.160; RZ 1994/47, 140.

¹⁰⁹ JBI 1955, 453.

¹¹⁰ SZ 27/136; MietSlg 8.458.

¹¹¹ This is true also if the preliminary injunction was issued by the appellate court.

¹¹² GIUNF 3350; JBI 1959, 214 = RZ 1959, 36 = ZVR 1959, 74; JBI 1974, 529 = ÖBl 1973, 139; ÖBl 1974, 89.

¹¹³ ÖBl 1974, 89.

¹¹⁴ § 398 EO.

not necessary any more. The court decides on an application to lift or limit an injunction after holding a hearing. The decision is subject to appeal. See *supra* Appeal (*Rekurs*).

d. Costs

If the preliminary measure sought is granted, the applicant nonetheless has preliminarily to pay his own costs (section 393 paragraph 1 EO). He can, however, provided he wins the principal proceeding, later get a refund of these costs from defendant.¹¹⁵ This includes the attorney's fee for the application and any briefs in the course of an appellate proceeding, court fees, expert fees for a privately obtained expert,¹¹⁶ and in exceptional cases also the attorney's fee for participating in the questioning of witnesses.¹¹⁷ If, on the other hand, the application for a preliminary measure is denied, the applicant has to refund defendant the costs he incurred in the course of the preliminary proceeding.¹¹⁸

e. Damages for Unwarranted Injunctions

As a sort of compensation for the dangers connected with the issuance of an injunction, section 394 EO provides for a no-fault liability if the claim for which the preliminary injunction was granted, later is dismissed or the application otherwise turns out to be unjustified or if the applicant fails to initiate the principal proceeding in time. Section 304 EO imposes a strict liability.¹¹⁹ Applicant has to refund all damages including the loss of

¹¹⁵ LGZ Wien EFSlg 34.782, 42.059, 52.460, 61.171 *et al.* Recent case law suggests that under certain circumstances the application can be awarded costs in the preliminary proceeding also. See NRsp 1993/134.

¹¹⁶ OLG Wien ÖBI 1969, 104.

¹¹⁷ LGZ Wien AnwBl 1981, 369 (krit Strigl) = EFSlg 39.517 (if the parties were summoned by the court and actually took part); contrary OLG Wien EvBl 1938/148 (no award of costs under any circumstances).

¹¹⁸ In this case the provisional proceeding is seen as an incidental dispute determined independently from the principal proceeding: OLG Wien EvBl 1953/515; LGZ Graz RpfSlgE 1972/99; OLG Linz EFSlg 30.358; LGZ Wien EFSlg 32.375, OLG Wien EFSlg 42.062, LGZ Wien EFSlg 52.463.

¹¹⁹ SZ 6/245; SZ 12/66; SZ 26/201; JBl 1957, 564; EvBl 1966/245, 298; SZ 62/66 = JBl 1990, 44 = ÖBI 1990, 278.

earnings which resulted from the preliminary injunction.¹²⁰ The court has to decide based on its discretion¹²¹ by way of an order (“Beschluss”).¹²² In order to award the applicant his constitutional right to be heard, he has to be given a chance to answer to the request for damages and to allege facts and bring evidence in defense of the claim.¹²³

If the application for the preliminary injunction was manifestly frivolous, the court can, on application of the defendant, also impose a fine the amount of which depends on the circumstances of the case.¹²⁴ Currently the statutory maximum is Eur 2,900 (§ 220 paragraph 1 ZPO).

4. *Proceedings for Protection of Possession*

In Austria there is a specialized proceeding for the protection of possession (Besitzstörungsverfahren)¹²⁵ which goes back to the possessory *interdicta* of Roman law. Unlike many other legal systems, the proceeding is an independent principal, albeit expedited and somewhat summary proceeding, not just a preliminary measure. Thus it does not fall under the term “provisional measures” in article 31 of the European regulation on jurisdiction or article 24 of the Brussels and Lugano conventions.¹²⁶

¹²⁰ SZ 26/201; SZ 50/104 = EvBl 1978/55, 156 = ÖBl 1978, 52; JBl 1993, 733 = RdW 1993, 245.

¹²¹ Courts should readily make use of their authority to determine damages according to their discretion pursuant to section 273 Code of Civil Procedure if it is established that the opponent suffered at least some damage because of the preliminary injunction: SZ 23/224; ÖBl 1966, 46; SZ 51/119 = ÖBl 1979, 28. The exercise of discretion is subject to review on appeal: SZ 19/285; EvBl 1951/425, 520; SZ 31/80 = EvBl 1958/335, 576; ÖBl 1959, 13.

¹²² *Heller/Berger/Stix*, Kommentar zur Exekutionsordnung⁴ 2866; *Kininger*, *Einstweilige Verfügungen* (1991) 121. Damages which, like extra damages for destruction of an object of personal preference pursuant to section 1331 Civil Code, have to be claimed in a separate proceeding.

¹²³ JBl 1993, 733 = JUS Z 1340 = RdW 1993, 245.

¹²⁴ § 394 paragraph 2 EO.

¹²⁵ §§ 454 *et seq.* ZPO. See *Kodek*, *Besitzstörung* (2002).

¹²⁶ *Kodek*, *Besitzstörung* 714 *et seq.* The contrary view expressed by *Rechberger/Kodek*, *Einstweiliger Rechtsschutz – eine autonome Form der Justizgewährung*, *Landesbericht Österreich*, in: *Klamaris* (ed.), *Einstweiliger Rechtsschutz* (forthcoming) on a conference in 1998 could not yet take into account the more the decisions of the European Court of Justice in *Van Uden Maritime BV/Deco Line* and *Mietz/Intership Yachting* rendered in 1998 and 1999, respectively, where the Court adopted a more restrictive notion of the concept of preliminary measure.

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The proceeding is limited to an examination of the last (factual) state of possession and the disturbance committed by defendant. All allegations as to the underlying right to possession, title, *bona fides* of the possessor or damages are expressly excluded. Plaintiff can only ask for a declaratory judgment concerning the disturbance, a restitution into the previous state and an injunction against future similar disturbances. The court decides by way of a so-called final order (“Endbeschluss”), which according to the concept of the law is only preliminary in the sense that the parties can raise their rights in a separate proceeding, the so-called *petitorium*. In spite of this it has to be pointed out that the possessory proceeding is an independent principal proceeding, not just a preliminary measure.

The scope of application is quite far, since Austrian law recognizes not only possession of tangible objects, but also of rights. Thus, unlawful entry or driving on land, obstruction of driveways by parked cars, distribution of advertising material against objection, discontinuing of supply with electricity, gas or telephone (usually in the connection with a quarrel between spouses) all can constitute disturbances of possession. Also the action to prevent one’s neighbor from building a house (sections 340 *et seq.* Austrian Civil Code-Allgemeines Bürgerliches Gesetzbuch, ABGB) belongs to this category.

During a possessory proceeding the court can also—as provisional remedy of “second order”—¹²⁷ issue preliminary injunctions. Unlike in other cases, the court can here act *ex officio* to protect peace and public order, although this opportunity is only rarely used by the courts. From the panoply of measures available the order for restitution of the previous state, a preliminary order to abstain from certain actions, an order to both parties to use the object of the dispute deserve special mention. Generally the provisions of the Enforcement Act (sections 378 *et seq.* EO) apply. There is, however, no separate appeal against preliminary measures in a possessory proceeding. Rather, preliminary measures can only be challenged together with the decision in the principal proceeding. Also there is also no objection. Rather, there is a special safeguard provided for to protect the opponent’s rights. After determination of the principal case at trial level, the court has to reconsider *ex officio* whether and to what extent the preliminary measures should be upheld.

¹²⁷ *Schey/Klang* in *Klang*, II 122.

5. *Non-contentious Proceedings*

In non-contentious proceedings the court can order preliminary measures.¹²⁸ Unlike in contentious cases the court can here also act *ex officio*.¹²⁹ To the extent preliminary measures can be issued according to the Act on Non-contentious Proceedings, an application for a preliminary injunction does not lie.¹³⁰ Thus, the custody court can, *e.g.*, order preliminary measures for the protection of the best interest of the child, including awarding custody preliminarily to the Juvenile Authority or to preliminarily suspend or revoke a right to visit.¹³¹

Claims that have to be pursued in non-contentious proceedings, but the enforcement of which is governed by the Enforcement Act, such as a spouse's claim for compensation for assisting his/her spouse in the course of his business, the claim for a dowry and claim of a tenant against the landlord for the performance of certain reconstruction or maintenance measures can also be the subject of a preliminary injunction pursuant to section 378 *et seq.* EO.

6. *Bankruptcy Proceedings*

While an application for opening of bankruptcy proceedings is pending, the court can order preliminary measures designed to preserve the debtor's property (§ 73 Bankruptcy Act, "Konkursordnung"). The court can order, *inter alia*, the debtor from refraining from any transactions not belonging to the ordinary course of business, from selling, disposing of or encumbering his property.

¹²⁸ § 2 paragraph 1, § 2 paragraph 2 Z 7, § 12 paragraph 2 AußStrG.

¹²⁹ EvBl 1959/211, 353.

¹³⁰ SZ 8/255; EFSlg 49.501 *et al.*

¹³¹ JBl 1960, 302; EvBl 1971/107, 180; MietSlg 19.036/28; EFSlg 39358 = EvBl 1981/171, 494 *et al.*; for the duty of the tenant to consent to certain maintenance measures pursuant to § 9 MRG see ImmZ 1987, 456 = JBl 1988, 112 (also if there is still a proceeding pending before the city settlement authority).

IV. RELATION BETWEEN PRELIMINARY MEASURES AND PRINCIPAL PROCEEDING

Preliminary measures generally have to have a *connection with the principal claim*.¹³² While a preliminary injunction cannot only be issued within the framework of a pending proceeding, but also before the initiation of the principal proceeding, in the latter case the preliminary injunction has to be “justified” by initiating the principal proceeding within a time limit set by the court. Because of the different objects of the proceeding a pending application for a preliminary injunction does not constitute *lis pendens*, *i. e.* a bar to the filing of the principal claim and vice versa.¹³³ The preliminary injunction always has to stay within the frame and scope of the principal claim; a party may not be granted measures by way of a preliminary injunctions which he or she were not entitled to even after prevailing in the principal lawsuit.¹³⁴ While this is certainly true for protective (cautionary) injunctions, this rule probably has to be qualified in case of regulatory preliminary injunctions. The prevailing view is that in this case the court may order measures which go beyond the potential effects of a decision in the principal proceeding.

The *possessory proceeding* which in Austrian law constitutes a separate principal proceeding, can exist without a principal proceeding concerning the underlying substantive right (*petitorium*). In this case, the initiation of a *petitorium* is only necessary if one of the parties intend to raise arguments which, because they relate not only to (factual) possession, but to the underlying right, are not admissible in possessory proceedings. In practice, a *petitorium* is initiated only rarely. The reason for this is probably that normally in possessory cases the plaintiff possessor also is entitled to possession, but uses the possessory procedure simply because it is easier and quicker.

Since the preliminary injunction generally has only the purpose of protecting a principal claim, it *must not pre-empt the decision in the principal*

¹³² The required connection with the principal claim must not be understood too narrowly (SZ 42/80; EvBl 1992/141, 590 *et al.*). Thus, also claims for a declaratory judgment can be protected by a preliminary injunction if conditional or future monetary claims lie behind the action for declaratory relief (ecolex 1994, 161 = RdW 1994, 77).

¹³³ LGZ Wien EFSlg 41.690.

¹³⁴ SZ 27/329; SZ 42/80; SZ 47/109; JBl 1987, 728 *et al.*

proceeding. Furthermore, the court *must not create a situation* which in case the claim turns out to be unjustified in the principal proceeding, *could not be reversed*.¹³⁵ Both restrictions, however, do not apply if the preliminary injunction is necessary in order to prevent the use of force or imminent irreparable damage (section 381 subparagraph 2 EO).¹³⁶ In this case a preliminary injunction can also be granted which is identical to the claim pursued in the principal proceeding. Courts are sometimes very generous in this respect and permit preliminary injunctions even if they lead to an irreversible situation.¹³⁷ In this way the courts close a gap that otherwise might exist in the applicant's legal protection if it is impossible to obtain a final decision in the principal proceeding time. In certain respects this development results in a *shift of the function of preliminary measures* from a mere instrument of protection of claims to a final determination in a summary proceeding.¹³⁸ However, given the generally satisfactory protection of the parties' interests in ordinary proceedings, it is unlikely that preliminary proceedings will play a more important role in the foreseeable future. Significantly, the most recent reform of Austrian civil procedure which will enter into force on January 2003, was intended to further expedite the ordinary proceeding and did not change the rules on preliminary measures.

The decision on provisional measures is *not binding on the principal case*; thus in theory the question of law could also be decided differently in the principal proceeding even if the underlying facts remained the same.¹³⁹ In practice, however, decisions, particularly appellate decisions, rendered in the course of preliminary proceedings provide an important guideline for the principal proceeding. This is particularly true in unfair trade practices cases. This observation was the reason why the Austrian legislature in 1992 per-

¹³⁵ SZ 27/317; JBl 1955, 252; EvBl 1971/141, 241; JBl 1988, 112; EvBl 1994/115, 555 = MR 1994, 78.

¹³⁶ SZ 47/109; SZ 55/78; EvBl 1994/115, 555 = MR 1994, 78 *et al.*

¹³⁷ See, e.g., KG Steyr INFAS 1990/1, 13 = ARD 4149/26/90 (preliminary order requiring employer to permit member of works council to take part in training activity) and JBl 1985, 423 (pre-emptive preliminary injunction because of imminent expiry of the hunting ground lease agreement in dispute).

¹³⁸ See *Konecny*, Anwendungsbereich der einstweiligen Verfügung (1992) 2 *et seq.*

¹³⁹ This possibility is, in large measure, a purely theoretical one. However, in new areas where the law is not yet settled, but still in development, occasionally courts in the principal proceeding departed from their legal reasoning in the preliminary decision. This was particularly true in the early "domain grabbing" cases.

mitted an appeal to the Supreme Court in preliminary measures even if the appellate court had affirmed the trial court.¹⁴⁰ This makes it possible to decide on the underlying questions of law beforehand in the preliminary proceeding which results in a shift of focus of the proceeding from the principal to the preliminary proceeding. In practice often in unfair trade practices cases the principal proceeding is not continued after finality of the preliminary injunction; some judges in such cases only set a hearing in the principal proceeding only on express motion of one of the parties.

V. RECOGNITION AND ENFORCEMENT OF FOREIGN PRELIMINARY MEASURES IN AUSTRIA

So far Austrian courts only rarely had to deal with questions of recognition and enforcement of foreign preliminary measures in Austria. Before Austria's accession to the Lugano Convention¹⁴¹ the Austrian Supreme Court held that the enforcement of foreign foreign injunctions in Austria is only possible if reciprocity is guaranteed by way of international treaties or separate regulations.¹⁴² Since the entry into force of the Lugano and later Brussels Convention there appear to be no decisions dealing with the questions. It has to be pointed out, however, that according to the European Court of Justice provisional measures cannot be recognized and enforced pursuant to Title III of the Brussels Convention if the defendant was not heard or if the enforcement of the decision is sought before it is served to defendant.¹⁴³ Certain international treaties contain more generous rules of recognition. Thus, according to the German-Austrian treaty on recognition and enforcement of judgments also provisional measures for maintenance payments are recognized regardless of whether the opponent was awarded an opportunity to be heard.¹⁴⁴ The continuing validity of such bi-lateral treaties after the entry into force of the Brussels and Lugano

¹⁴⁰ § 402 paragraph 2 EO idF Art II Z 4 BG BGBl 1992/756.

¹⁴¹ The Lugano Convention entered into force in Austria on September 1, 1997.

¹⁴² SZ 4/101.

¹⁴³ European Court of Justice May 21, 1980, Rs 125/79 *Denilauler/ Couchet Frères*, Slg 1980, 1553.

¹⁴⁴ Article 14 paragraph 2 BGBl 1960/105 provides that such decisions are enforced "like final decisions".

Conventions and, more recently, the European regulation on recognition and enforcement of judgments, however, is doubtful. The majority view is that, within its scope of application, the said European instruments replace bi-lateral treaties even if they provide for more generous rules of recognition. If, however, preliminary measures issued *inaudita altera parte* fall completely outside the scope of application of the Brussels Convention (and nowadays the European regulation on jurisdiction), as the European Court of Justice has suggested, this would not bar the application of bi-lateral treaties in this respect.

From the question of recognition and enforcement of foreign preliminary measures in Austria, the question has to be distinguished as to whether the lack of recognition of an Austrian preliminary injunction in a foreign country has effects on the permissibility of issuing such an injunction in Austria. Some courts have taken the view that if the preliminary injunction would have to be enforced in a foreign country there is no legal interest for issuing an injunction in Austria because it cannot be guaranteed that the preliminary injunction will be enforced by the competent foreign officials.¹⁴⁵ The only exception would be if enforcement of the Austrian decision abroad is guaranteed by international treaties.¹⁴⁶ Another line of decisions takes the contrary position, arguing that the issuing of a preliminary injunction in Austria is not completely useless in such cases since it had to be assumed that defendant voluntarily complies with the order.¹⁴⁷ It has to be pointed out, however, that regardless of what view one takes on this question, it is certainly possible for Austrian courts to prohibit *ad interim* a person residing in a foreign country to perform certain acts or omissions *within Austria*. In this case compliance with the order can be enforced by imposition of contempt sanctions even against foreign persons.¹⁴⁸

¹⁴⁵ SZ 59/128 = HS 17.095 = IPRax 1988, 33 (with note by *Moschner*) = JBl 1987, 115 = ÖBA 1986, 486 = RdW 1986, 341.

¹⁴⁶ EvBl 1962/328, 404; SZ 59/128 = HS 17.095 = IPRax 1988, 33 (with note by *Moschner*) = JBl 1987, 115 = ÖBA 1986, 486 = RdW 1986, 341.

¹⁴⁷ SZ 52/100 = ÖBl 1980, 124; ÖBl 1983, 70; SZ 57/169 = ÖBl 1985, 94; JBl 1990, 328 = ÖBA 1990, 304 (with note by *Konecny*) = RdW 1990, 44; ZfRV 1994/65.

¹⁴⁸ See *Zeiler*, Internationales Sicherungsverfahren 118 *et seq.*

VI. SUMMARY

Like many foreign legal systems Austrian law, as part of the guarantee of effective legal protection, provides for provisional measures under certain circumstances. These include preliminary injunctions which are intended to protect later enforcement of a claim following its determination in the principal proceeding, but also injunctions regulating the relationship between the parties *ad interim* if a determination in an ordinary proceeding cannot be obtained in time. In the latter case it is also possible to pre-empt the decision of the principal proceeding. Preliminary injunctions are always connected with a main claim. They can be issued outside the framework of a pending lawsuit. In this case, however, the applicant has to timely initiate the principal proceeding and thereby “justify” the issuance of the preliminary injunction.

The procedure for the issuing of preliminary injunctions is characterized by simplification and expedition. There is no right of opponent to be heard before the issuance of the injunction; there is no right of the parties to be present during the taking of the evidence. Remedies available against a preliminary injunction are appeal to a higher court and, if the injunction was issued *inaudita altera parte*, an objection which is decided by the trial court after a hearing. Generally an appeal or objection do not have suspensive effect and thus do not hinder the enforcement of the preliminary injunction.

Apart from contentious civil proceedings there is a wide range of measures available in certain other areas of the law. In non-contentious cases the court can order preliminary measures *ex officio*. The same is true in proceedings for the protection of possession. Provisional measures are also available in bankruptcy and cartel proceedings.