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Preliminary judicial protection

Urs Feller and **Bernhard C Lauterburg** of **Prager Dreifuss** discuss interim relief in recent cases, highlighting areas where it pays to be prudent

In a globalised, highly interdependent economic environment, effective enforcement of legal rights is a key business factor. One aspect of effective enforcement – at least as important as obtaining a final and enforceable decision in reasonable time – is interim relief.

The need for interim relief may arise in various areas of law. For instance, when: (i) parties to an outsourcing agreement are in dispute and the outsourcing provider fails to perform certain services related to the termination of the agreement; (ii) bankruptcy proceedings necessitate avoidance actions which must be secured by an order prohibiting disposition to be successful; (iii) a company importing pharmaceutical products markets a product which infringes the patent rights of another company; or (iv) a company with supposed market dominance ceases to supply products to a particular buyer.

Civil procedure

Under article 261 of the Swiss Civil Procedure Code (CPC), the court will impose a preliminary measure if the applicant shows credibly that a substantive right to which he is entitled has been or is anticipated to be violated. The violation must threaten to cause harm to the applicant which cannot not easily be repaired. Ex parte motions are possible in urgent cases, such as where there is a risk that the enforcement of the measure will be frustrated. If the court is satisfied with the application, it will grant the measure provisionally and summon the parties to a hearing. Only at the hearing will the court decide whether to grant the application for preliminary measures. There is no appeal against an ex parte order on granting or rejecting preliminary measures. Ordinary preliminary measures are granted in a contradictory proceeding and may be appealed.

> **Preliminary measures are aimed at creating a temporary order until the matter is decided on substance**

A party seeking a preliminary measure in domestic matters may do so either with the court that is competent to hear the action on substance or with the court at the place where the measure is to be enforced (even if the matter is already pending before another court). Similarly, the Private International Law Act (PILA) provides two judicial *fora* for international disputes to bring an application for preliminary measures: either the court that is competent to hear the action on substance, or the court where the measure will be enforced (article 10 PILA). Further, the convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) provides that preliminary measures may be sought from a court located in a state other than that of the court with competence to hear the matter on substance (article 31). Therefore, Swiss state courts may have jurisdiction to hear an application for preliminary measures, even if they are not competent to hear the substantive claim.

Preliminary measures may take various forms, such as an injunction, an order to remedy an unlawful situation, an order to a register authority (for instance to prohibit registration of new board members or registration of a property transfer) or to a third party, performance in kind or the payment of a sum of money in the cases provided by the law. Procedurally, they are aimed at creating a temporary order until the matter is decided on substance, temporarily enforcing a disputed claim or preserving an existing state. The aim of the preliminary measures sought is relevant for the standard of evidence. The former two aims require a higher standard of justification and a balance of the interests of the parties involved, while the standard of justification is lower for the latter aim.

Preliminary measures may be sought before filing the main action, in which case the court will set a deadline within which the applicant must file the action. Failing to do so results in the preliminary measure becoming automatically ineffective (article 263 CPC).

A final note on procedure: creditors seeking an attachment order to secure monetary claims before a trial, or debt enforcement proceedings, must use the procedure provided for in the Federal Debt Enforcement and Bankruptcy Act (DEBA). Creditors must show to the court: (i) that they have outstanding debts against the debtor; (ii) the existence of a statutory ground for attachment; and (iii) the existence of assets and their location. DEBA provides for six grounds based on which the attachment of assets may be sought: (a) the debtor has no permanent residence in Switzerland; (b) the debtor is attempting to conceal assets or is planning to leave Switzerland to evade the fulfilment of its obligations; (c) the debtor is travelling through Switzerland or conducts business on trade fairs, provided that the claim must be settled immediately; (d) the debtor does not reside in Switzerland and no other ground for attachment is available, provided that the claim has sufficient connection with Switzerland or is based on recognition of debt; (e) the debtor holds a provisional or definitive certificate of shortfall against the creditor; or (f) the creditor holds a definitely enforceable title permitting him to have any objection by the debtor set aside (*definitiver Rechtsöffnungstitel*). Place of jurisdiction for such asset-freezing requests is the place where the assets are located or the place where debt collection proceedings must be initiated.

International commercial arbitration

In international commercial arbitration, the competence of state courts to order preliminary measures derives from article 10 of PILA, while an arbitral tribunal may issue such orders 'unless the parties have agreed otherwise' (article 183(1) PILA). Only if the parties validly exclude jurisdiction of the state courts to order preliminary measures will the state court deny jurisdiction. Parties should be aware, however, that urgent, ex parte, applications for preliminary measures may require that a state court be seized. Parallel application for interim relief to both the state court and the arbitral tribunal is not possible and will result in the instance that was later seized rejecting jurisdiction.

The Swiss Rules on International Arbitration (SRIA) expressly state in article 26(5), that it 'shall not be deemed to be incompatible with the agreement to arbitrate' to seek an order for preliminary measures before a state court. While the SRIA expressly permit an application to a state court, the ICC Rules, for instance, only provide that before the constitution of the tribunal, and in subsequent 'appropriate circumstances', the parties may apply to a national court for interim relief (article 28(2) ICC Rules).

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Administrative procedure

Unlike the CPC, the Federal Act on Administrative Procedure (APA) lacks any provision on preliminary measures in first instance proceedings (that is, proceedings that aim to issue an appealable order such as proceedings before ComCo, the Swiss Competition Commission). The APA expressly provides only that an order for preliminary measures may be issued once an appeal has been filed. It is, however, recognised that preliminary measures may be sought before filing an appeal as well as during first instance proceedings. Federal administrative law contains various provisions on preliminary measures. As in civil law, where the law itself lacks any provision on preliminary measures, such measures may be ordered directly on a substantive provision whose enforcement warrants protection.

In competition law, neither the applicable procedural statute, the APA, nor the Law on Cartels (LCart), contain a rule on preliminary measures. It is recognised, however, that ComCo may order, during a formal investigation, preliminary measures by virtue of its competence to issue procedural rulings (for instance, the order of the Competition Commission of June 6 2011, preliminary measures against the Swatch Group).

Case law review

Preliminary measures applications

The Supreme Court of Zurich was recently seized with an extensive application for preliminary measures concerning an IT-outsourcing agreement. Various disputes arose under the agreement. The applicant withheld certain payments due under the agreement, and the other party rejected the performance of certain works, in particular those relating to the scheduled termination of the agreement. On January 24 2014, the applicant requested the court to order – ex parte – various acts of specific performance, such as adaptations of the firewall to enable migration works or the change of active directory elements. Overall, the applicant requested the order of 23 different measures, each containing a set of works which the other party should perform.

The court stated that the requests were written in highly technical language and that the requests and the documents supplied were not self-explanatory so as to permit the court to draw a logical and conceivable connection to the requested measures. Therefore, the court could not make a determination as to the necessity, reasonableness and appropriateness of the requests. The court concluded that the technical nature of the subject matter would not release the applicant from giving explanations. Therefore, the request lacked conclusiveness, and the court rejected it instantly on January 27 2014.

Payment under performance guarantee

The applicant filed an ex parte motion for preliminary measures and requested the court to prevent the other party from claiming payment under a performance guarantee and to instruct the insurer to make payment under the guarantee. It argued that payment of the sum by the insurer would require it to repay the insurer. Moreover, it would have to file suit against the other party for having wrongfully claimed payment under the guarantee. Given its experience with the other party, lengthy proceedings could be expected, during which time the applicant would be deprived of more than SFr3.6 million ($3.8 million) in assets and limited in its ability to act.

The sole judge at the Commercial Court in Zurich held that one of the largest construction enterprises in Switzerland could not reasonably claim that the temporary lack of disposition over an amount of SFr3.6 million would limit its ability to act. Moreover, the possible necessity to seize a court on substance would not per se constitute not easily reparable harm; the judge considered it likely that the parties would have their dispute decided by a court, so court proceedings were inevitable. Finally, perhaps the applicant's strongest argument, that the other party may not have sufficient liquidity in a few years, remained unsubstantiated. Thus, the court rejected the application.

Applicants need to be careful in estimating whether harm they may suffer from another party's violation of the law would constitute not easily reparable harm. Under the given circumstances, the economic strength of the applicant may be detrimental for the application.

Preliminary measures in bankruptcy proceedings

The Federal Supreme Court recently handed down a judgment relating to preliminary measures in avoidance actions (decision 5A_853/2013 of May 23 2014). In this case, an individual owned various companies. Following the financial collapse of these companies, the individual declared bankruptcy on himself. However, before doing so, he transferred all of the shares in one company, which owned various real estate properties, to his minor sons. Subsequently, various creditors filed an avoidance action against the sons, claimed revocation of the share transfer and requested the court to order preliminary measures until issuance of a decision on the lawfulness of the share transfer. The district court granted the measures and laid various restrictions (on selling the properties, and on registration in the land register) on several properties belonging to the company, despite the fact that the main proceedings aimed at a revocation of a share transaction and not at a transfer of the properties.

The Federal Supreme Court held that not only the respondents but also third parties may be the subject of a preliminary measure

The Federal Supreme Court held that not only the respondents but also third parties may be the subject of a preliminary measure. Since the company that owned the properties was controlled by the individual's family, the court did not deny a certain risk that the company would sell the properties and as a result become virtually worthless. As the court noted, the value of a real estate company mainly consists of the value of the properties it owns. A sale or encumbrance of the properties would negatively affect the value of the shares at issue in the main proceeding. Therefore, the restrictions on the properties were justified.

Preliminary measures in intellectual property law

On January 1 2012, the Federal Patent Court commenced operations. It adjudicates civil-law disputes concerning patents, with exclusive competence in patent infringement and validity matters and is competent to order preliminary measures. Other civil actions relating to patents can also be brought before the Federal Patent Court, such as disputes pertaining to patent licence agreements or the rights to a patent. All other matters concerning intellectual property rights must be brought before the ordinary civil courts.

Ex parte orders from the Federal Patent Court are rare. This is mainly due to the fact that in cases which require understanding of a technical matter – which will generally be the case – decisions must be made by a panel of three judges (article 23(3) of the Federal Act on the Federal Patent Court). In terms of ex parte preliminary measures, the Federal Patent Court refers to the jurisprudence of the European Court of Justice in the matter *Bernard Denilauler v SNC Couchet Frères* (case C-125/79) and declines jurisdiction if the measure is not to be enforced in Switzerland (decision of July 11 2014, case S2013_011).

In terms of timing, applicants should know that the Federal Patent Court will likely deny an ex parte application for provisional measures if the application is not filed promptly within one to two weeks (decision of June 12 2012, case S2012_009).

No declaratory relief from the Federal Patent Court

Under article 262 CPC, the court may order any interim measure suitable to prevent imminent harm. In an application to the Federal Patent Court, the applicant requested the court to declare that it was the lawful owner of a patent EP 111. The applicant was a company active in the purchase, administration and sale of patents. While earlier doctrine tended towards accepting interim

declaratory relief, the prevailing doctrine in Switzerland no longer permits orders for declaratory relief as a preliminary measure. It states that a judge may not make any interim declarations on a legal situation, as such measure would take on the character of a final disposition. Referring to the existing doctrine, the Federal Patent Court rejected the application (decision of June 13 2012, case S2012_005). It remains to be seen, however, whether the Federal Patent Court's holding will also apply to other areas of law (which the authors consider likely).

Preliminary measures in competition law

Preliminary measures are not frequently sought in civil antitrust cases. They are more frequently seen in administrative proceedings before ComCo. This is due to the overall weakness of private enforcement of competition law in Switzerland. The reasons therefore are manifold. Firstly, it seems more appealing for an aggrieved party to file a complaint with the competition authorities, rather than bearing the burden of proof in a civil proceeding. Unlike claimants in civil proceedings who regularly face evidentiary difficulties, the competition authorities may compel the production of evidence. Also, an aggrieved party filing a complaint with the competition authority is not normally subject to costs, unlike in a civil proceeding. Finally, as is shown below, ComCo – upon initiating formal proceedings – may order preliminary measures.

A litigant seeking preliminary measures from a state court will be granted a certain time limit for filing suit. However, proving causality between a violation of competition law, damage and fault is particularly difficult given often complex economic correlations. In such cases, courts must then refer the matter to ComCo for an expert report, which may cause additional costs for the litigant.

As of January 1 2003, ETA Manufacture Horlogère Suisse (ETA), a subsidiary of Swatch, was to reduce the supply for so-called *ébauches* to third parties not belonging to the Swatch group and to terminate the supply from 2006. In this context, ComCo commenced proceedings against ETA, which were eventually terminated with an amicable settlement under article 29 LCart. Under the settlement, ETA was subject to a supply obligation until 2010. On December 18 2009, Swatch informed the public that it would cease supplying watch movement components to customers not belonging to the group. Because ComCo had already launched a preliminary investigation against ETA which found indications of ETA's dominant position, Swatch approached the competition authorities to discuss its intentions.

On June 6 2011, ComCo opened an investigation against Swatch, ordering preliminary measures for the duration of the investigation. Although ordered authoritatively, the preliminary measures were the result of negotiations between Swatch and ComCo, which eventually resulted in an undertaking by Swatch to continue supplying movements and other parts for watches, although reducing the supply in annual increments. Swatch consented to submit any dispute arising out of its obligations under this order in relation to its customers to an arbitral tribunal established under SRIA and the supplemental rules on the application of the Swiss Rules of International Arbitration in domestic arbitration (existing SRIA expressly apply to domestic arbitrations while the previous version did not so). The measures were eventually terminated as a result of ComCo's decision of October 21 2013 – which found the Swatch Group to have a dominant position with respect to Swiss made movements and *ébauches* – and converted into an ordinary supply obligation.

A word of caution

Preliminary measures may take various forms. They can be issued directly against the respondent or – in certain cases – against a third party. Applicants must be careful in formulating their request; courts will likely not consider applications which appear unclear – namely, if they contain a large portion of technical terms and documents which are not self-explanatory. Ex parte applications for provisional measures will be rejected if the application is not filed promptly (within one to two weeks). The harm an applicant may sustain if the measure is not granted by the court must be material – the avoidance of certain payments which appear minor compared to a company's economic strength will generally not suffice to obtain a preliminary order.

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