

THE REQUIREMENTS FOR THE ISSUANCE OF AN INTERIM ORDER – A COMPARISON OF THE SLOVENIAN, CROATIAN, AUSTRIAN, AND GERMAN REGULATIONS

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Interim orders are important means to secure claims. Their value in practise depends on the statutory regulation of the requirements for their issuance and their interpretation in case law. The most important condition for an interim order to be granted is the existence of a monetary or non-monetary claim – the object that is to be secured. The other requirement varies depending on the nature of the claim and in some countries also the aim of the interim order – the securing of future enforcement or a temporary regulation of the legal relation in dispute. The article presents different systems of the provisional securing of claims in Slovenia, Croatia, Austria, and Germany and compares the relevant requirements, the existence of which has to be demonstrated by the petitioner in order to succeed in securing the claim against the debtor.

Keywords: interim order, claim, subjective or objective risk, damage difficult to repair, use of force

1. INTRODUCTION

Interim orders are a means of securing claims. They secure a claimant's claim, either by providing for successful enforcement of a final judgment, with a standard of probability confirming the existence of the claim, or temporarily regulate, usually until the end of the court proceedings or until the enforcement procedure, the legal relation in dispute. Most countries have some form of temporary protection, but the individual measures among them differ as to

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the name, the requirements for their issuance, and their power and effects. At first sight, they might seem to be difficult to compare, but detailed research of the Slovenian, Croatian, Austrian and German regulations reveals that they have a great deal in common.

2. CLAIM

In Slovenia interim orders (in Slovenian: *začasne odredbe*) are generally regulated by the Enforcement and Securing of Civil Claims Act (in Slovenian: *Zakon o izvršbi in zavarovanju*, “ZIZ”).¹ Special acts² envisage the application of these temporary measures in specific fields, but none of them includes a complete regulation. They usually only deal with aspects specific to a field and for the rest refer to the general regulation. The regulation in the ZIZ is therefore very important and, in addition to the procedure for issuing an interim order and its effects, it also covers the requirements for such issuance.

The ZIZ differentiates between interim orders to secure monetary claims and those to secure non-monetary claims. Other requirements for these two groups are different, but one is the same for both. The first and most important requirement for an interim order to be issued is the existence of a claim against the defendant. Without a claim there is nothing to secure and the proposal for interim relief is unfounded. That requirement was already determined in the predecessor of the ZIZ, the Yugoslavian *Zakon o izvršilnem postopku* (The Enforcement Procedure Act – ZIP)³ (Articles 265 and 267), but the ZIZ broadened its scope and made the petitioner’s position easier. Now he or she⁴ must demonstrate the existence of the claim or that the claim does not yet exist, but will soon arise (Articles 270/I and 272/I). The claim can therefore be secured even before it arises. The main reason for this statutory change lay in situations in which the claimant started proceedings for a declaratory claim (a claim requesting the finding of the existence of a right or legal relation) or a claim requesting the formation, modification or cessation of a right or legal

¹ Official Gazette of the Republic of Slovenia, No. 3/07 *et seq.* I will use acronyms deriving from the original names of the Acts, as those deriving from their English translations would be hard to distinguish one from the other.

² I.e. The Marriage and Family Relations Act, Official Gazette of the Republic of Yugoslavia, No. 15/76 *et seq.*, The Non-Litigious Civil Procedure Act, Official Gazette of the Republic of Yugoslavia, No. 30/86 *et seq.*

³ Official Gazette of the SFRY, No. 20/78 *et seq.*

⁴ Hereinafter I will only use the form “he”.

relation and the resulting successfully concluded court proceedings provided a condemnatory claim (a claim requesting payment, performance, or a cease and desist order).⁵ The latter could possibly also be cumulated in the first lawsuit in the event of the claimant's success of the first claim. But because it was well established that the purpose of interim orders is to secure future enforcement, the claimant could only achieve the securing of a claim that could be an object of enforcement – a condemnatory claim. As a consequence, an interim order could not be issued for either a declaratory claim or a claim requesting the formation, modification, or cessation of a right or legal relation, because these cannot be objects of enforcement, nor of a condemnatory claim, considering that (before the declaratory claim or a claim requesting the formation, modification, or cessation of a right or legal relation has been successful) it has not yet arisen.⁶ The debtor, realising that the claimant has filed or plans to file a lawsuit for a declaratory claim or a claim requesting the formation, modification, or cessation of a right or legal relation, could carry out certain actions to worsen the claimant's prospects of effective enforcement of the condemnatory claim when it arises. The legislature has thus increased the possibility of securing the claimant's claim as soon as he succeeds in demonstrating the future existence of the claim that is to be enforced.⁷

At roughly the same time as when the ZIZ replaced the ZIP, the Constitutional Court of the Republic of Slovenia went beyond the former standpoint and decided that interim orders could not only secure future enforcement of a claim (security interim orders), but also regulate the legal relation in dispute and even regulate it in the same way as the petitioner would want to achieve with a lawsuit (regulatory interim orders), adding an important requirement of reversibility, i.e. whether it is possible to restore the earlier situation for the defendant if an interim order is issued and enforced, despite the petitioner's claim being subsequently rejected.⁸

As a result of both changes, i.e. the decision of the Constitutional Court and the ZIZ, it is now possible to issue an interim order even to secure a declaratory claim or a claim requesting the formation, modification, or cessation of a right or legal relation which has not yet arisen if the claimant demonstrates

⁵ Rijavec, V., *Civilno izvršilno pravo*, GV Založba, Ljubljana, 2003, pp. 263 and 264.

⁶ See also Šorli, N., *Ugotovitvena tožba – ni podlaga za začasno odredbo*, Pravna praksa, Vol. 13, No. 16, 1994, pp. 8 and 9.

⁷ See also Rijavec, *op. cit.* (fn. 5), p. 263.

⁸ Decision No. US RS Up-275/97 of 16 July 1997.

that it probably will. The main purpose is to regulate the legal relation in dispute and prevent a negative situation that would interfere with the claimant's right to judicial protection or its effectiveness.

The requirements for the issuance of an interim order differ to some extent in Austrian law. These reliefs (in German: *Einstweilige Verfügungen*) are regulated in the *Exekutionsordnung* (Enforcement Code – EO)⁹, in different ways for monetary (Articles 379 and 380) and non-monetary (Article 381 *et seq.*) claims. The Act does not explicitly require a demonstration of the existence of the claim in order for an interim order to be issued, nor to secure a monetary or other claim (Articles 379/II and 381). But the necessity of the existence of the basis, *i.e.* the claim that is the object of the temporary securing, derives from Article 389. The petitioner must define the claim and the nature and scope of the desired securing of a claim in the proposal for an interim order as thoroughly as in the main proceedings.¹⁰ König affirms this¹¹ when saying that the purpose of interim orders is not to deter risk in general, but to protect a concrete legal situation. However, the requirement in the Austrian EO is not as wide as in the Slovenian ZIZ. An interim order cannot be issued to secure a claim which has not yet arisen¹², even if it is possible or is expected to arise.¹³

In Germany the system of interim orders is formed differently, which is the reason why a comparison of the requirements regarding the existence of the claim is more difficult. Monetary claims can be secured with an *Arrest* (this is an original term which I will not translate to facilitate the understanding of the different measures), for the issuance of which demonstration of the existence of a claim is not needed. Article 916/I of the *Zivilprozessordnung* (Code of Civil Procedure – ZPO)¹⁴, which governs it, refers to enforcement of a monetary

⁹ Official Gazette, No. 79/1896 *et seq.*

¹⁰ Kodek in Angst, P.; Jakusch, W.; Klicka, T.; Kodek, E.; Mohr, F.; Oberhammer, P.; Schütz, W., *Kommentar zur Exekutionsordnung*, 2nd edition, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2008, p. 1789, paras. 4 and 4a.

¹¹ König, B., *Einstweilige Verfügungen im Zivilverfahren*, 4th edition, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2012, p. 21, para. 2/16.

¹² Oberhammer, P., Domej, T., *National Report Austria* (source: <http://www.ipr.uni-heidelberg.de/studie/National%20Reports/Austria/Report%20Austria%20Vorlaeufige%20Massnahmen.pdf>, 23 July 2013), the report of the whole study is available at <http://www.ipr.uni-heidelberg.de/studie/> (23 July 2013), answer 2.3.1.2, the same Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1728, para. 32.

¹³ Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1728, para. 32.

¹⁴ Unlike in Slovenia, Austria, and Croatia, where interim orders are regulated in the law regulating enforcement, in Germany they are regulated in the Civil Procedure Code – *Zivilprozessordnung*, Official Gazette, No. 83/1877 *et seq.*

claim or a claim that may evolve to become a monetary claim (*Sicherung der Zwangsvollstreckung*). Therefore, according to legal theory the existence of the (not yet due, conditional, and maybe also future) claim is necessary for the issuance of this measure.¹⁵ The requirement of the existence of a claim also cannot be found in Article 935 ZPO, which governs interim orders to secure non-monetary claims (i.e. classical security interim orders, in German: *Einstweilige Verfügung bezüglich Streitgegenstand*). The object secured by those interim orders is enforcement of the party's right (*die Verwirklichung des Rechts einer Partei*), where the term "right" is interpreted as a right that enables the claimant to require a non-monetary fulfilment, including the delivery of another object, the performance of an act, or forbearance from an act.¹⁶ The object of temporary protection in those cases is enforcement of a non-monetary claim.

In order to regulate the legal relation in dispute, the ZPO, unlike in Slovenia and Austria, determines regulatory interim orders separately, but Article 940 mentions only the legal relation in dispute (*streitiges Rechtsverhältnis*), not the claim that derives therefrom. With a grammatical understanding of the legal norm it could be possible to conclude (the same as in Croatia, as explained below) that in order to issue an interim order, a demonstration of the legal relation in dispute is sufficient, while the existence of the claim need not be proved. Some theorists interpret the requirement broadly, considering it fulfilled also when the existence of the claim is proved.¹⁷ In my opinion, this is reasonable because demonstration of the claim indirectly proves the legal relation from which it derived. On the other hand, there are opinions rejecting the grammatical interpretation of the legal norm.¹⁸ In accordance therewith, the petitioner must always demonstrate his claim, which must either be related to or derive from, or there must be a high probability that it will derive from, the legal relation in dispute. Brox and Walker¹⁹ argue that it would be uncertain

¹⁵ Brox, H.; Walker, W.-D., *Zwangsvollstreckungsrecht*, 8th edition, Carl Heymanns Verlag, Cologne, Munich, 2008, p. 680, para. 1494, and Zöller, R., *Zivilprozessordnung mit FamFG und Gerichtsverfassungsgesetz, den Einführungsgesetzen, mit internationalem Zivilprozessrecht, EG-Verordnungen, Kostenanmerkungen: Kommentar*, 28th edition, Verlag dr. Otto Schmidt, Cologne, 2010, p. 2143, para. 8.

¹⁶ Rosenberg, L. (ed.), *Zwangsvollstreckungsrecht*, 12th edition, Verlag C.H. Beck, Munich, 2010, p. 1223, para. 3, states that Article 935 ZPO could be the basis for securing claims that can be enforced. Similar also Brox, Walker, *op. cit.* (fn. 15), p. 721, para. 1581.

¹⁷ Rosenberg, *op. cit.* (fn. 16), p. 1226, para. 11.

¹⁸ Brox, Walker, *op. cit.* (fn. 15), p. 726, para. 1591.

¹⁹ *Ibid.*

what kind of lawsuit the claimant would have to file and what the content of the main procedure would be if in a procedure for securing a claim only the probable existence of a legal relation was proved, and not the concrete claim. On the other hand, the Slovenian ZIZ does not distinguish between regulatory and security interim orders and therefore lays down the same “first” requirement for the issuance of both sorts of measures. In order to obtain an interim order a claimant always has to demonstrate the existence of the claim – even when proposing the issuance of a regulatory interim order whose aim is not to secure a future fulfilment of the claim.

Like the Austrian EO, the German ZPO does not determine that a measure can be issued to protect future claims either, but it is possible to find theoretical opinions that defend these standpoints.²⁰ The Slovenian regulation is therefore broader than the Austrian EO and the German ZPO, but the petitioner’s burden of proving the fulfilment of the requirement is also easier in those countries. The EO (Article 378/II) and the ZPO (Article 916/II for the securing of monetary claims with an *Arrest* and Article 936 in relation to Article 916/II for the securing of non-monetary claims with an interim order²¹) include explicit provisions determining that interim orders can secure claims with a fixed maturity date that has not yet expired.

The same rule can be found in the Croatian *Ovršni zakon* (the Enforcement Act – OZ)²² (Article 343/I), which governs this temporary measure (in Croatian: *privremene mjere*). It distinguishes between the issuance of security interim orders for monetary or non-monetary claims, on the one hand, and regulatory interim orders, on the other. In order for the former to be issued, the applicant must demonstrate that the claim probably exists (Articles 344 and 346). However, there is no such requirement for the issuance of regulatory interim orders (Article 347/II).²³ In legal theory there are opinions that these interim orders can be issued irrespective of the existence of a concrete claim, which entails the securing of the legal relation (and not the claim).²⁴ In Dika’s opinion, the applicant must demonstrate the probable existence of the legal relation in

²⁰ Rosenberg, *op. cit.* (fn. 16), p. 1223, para. 3.

²¹ Rosenberg, *ibid.*, despite the legal vacuum, states, that a claim not yet due can be secured with an interim order (if the statutory requirements are fulfilled).

²² Official Gazette of the Republic of Croatia, No. 112/12 *et seq.*

²³ The OZ does not use this particular term, but it can be clearly derived from the content of the paragraph that it regulates regulatory interim orders. The same term is also used in Croatian legal theory.

²⁴ See Dika, M., *Gradansko ovršno pravo*, Book I, *Opće gradansko ovršno pravo*, Narodne novine, Zagreb, 2007, p. 850.

dispute or also the existence of the legal relation between the parties and its contentiousness.²⁵

The OZ also determines the securing of claims that are not yet due. In Dika's opinion²⁶, this is a result of the provision (which can also be found in the Slovenian *Zakon o pravnem postopku* (The Civil Procedure Act – ZPP)²⁷ enabling the court to impose on a party the performance of an obligation only if such obligation has fallen due by the conclusion of the main hearing. If this is determined in special regulations²⁸ or if a party has a justifiable interest in obtaining judicial resolution of the question, an action on the question of whether a certain right or a legal relation exists, or whether a certain document is authentic, may be brought even before the claim arising out of such relation falls due (Article 181/II ZPP). In those cases the issuance of an interim order would not be possible unless the securing of such claims is expressly provided. In Slovenia this purpose is achieved by the expressly provided possibility to issue interim orders for claims that have yet to arise (and are therefore not yet past due). If it is possible to secure a claim that has not yet arisen, it is *a maiori ad minus* possible to secure a claim that has arisen but is not yet past due.²⁹ On the other hand, the Croatian, Austrian, and German acts provide the same effect with an explicit statutory provision.

In their general provisions both the EO (Article 378/II) and the OZ (Article 343/I) explicitly provide for interim orders to secure conditional claims. The German ZPO does so only for the *Arrest* (Article 916/II), but legal theory³⁰ also acknowledges it for interim orders.³¹ The Slovenian ZIZ does not explic-

²⁵ Dika, *op. cit.* (fn. 24), pp. 889, 890, and Dika, M., *Vrste privremenih mjera prema Ovršnom zakonu*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 19, 1998, p. 781.

²⁶ Dika, *op. cit.* (fn. 24), pp. 852, 853.

²⁷ Official Gazette of the Republic of Slovenia, No. 26/1999 *et seq.*

²⁸ I.e. child support (Article 311/II ZPP and the same in Article 326/II Croatian Civil Procedure Act, Official Gazette, No. 53/91 *et seq.*).

²⁹ The same standpoint can be found in case law, i.e. the Decision VSKI Cp 710/2007 of 6 November 2007. Unless otherwise stated, the case law cited is the case law of Slovenian Higher Courts.

³⁰ Brox, Walker, *op. cit.* (fn. 15), p. 721, para. 1581, the same in Rosenberg, *op. cit.* (fn. 16), p. 1223, para. 3.

³¹ Due to the lack of normative regulation, it would be divisive were it possible to secure conditional claims, future claims, and claims not yet due with a measure called *Leistungsverfügung* (this is an original term that I will not translate to facilitate the clarity and understanding of the different measures), which means the “imposition” of the partial or complete fulfilment of monetary or non-monetary obliga-

itly state whether an interim order is possible in order to secure a conditional claim, but in my opinion this could be done. If a claimant demonstrates that the condition will possibly be fulfilled, the future emergence of a claim is possible and the first requirement for an interim order is fulfilled.

2.1 Monetary and non-monetary claims

One of the most important factors when securing a claim and assessing the fulfilment of the statutory requirements is the nature of the claim. Due to the legal division of interim orders and the pertinent different statutory requirements, it is very important whether the claim is defined as monetary or non-monetary. The ZIZ (Article 16/I) defines a claim as a right to the payment of a sum of money (a monetary claim), or a right to the delivery of another object, to the performance of an act, or to forbearance from an act (a non-monetary claim). According to Article 270 ZIZ, the scope of the requirements for securing a monetary claim is not as broad as for securing a non-monetary claim and the primary requirement (that there is a risk that the enforcement of the claim is likely to be rendered impossible or considerably impeded) is formulated more narrowly (as a consequence of the debtor's conduct, while on the other hand an objective risk suffices for non-monetary claims). That entails more rigorous requirements for the creditor and less chance of an interim order to be issued.³² But the smaller number of such measures for monetary claims is also a consequence of the primacy of preliminary orders (in Slovenian: *predhodne odredbe*) over provisional ones in the period after the issuance of a judgment until the end of its enforcement (in which the issuance of interim orders is otherwise determined³³). Interim orders for monetary claims are therefore more of an exception, whereas the issuance of interim orders for non-monetary claims has virtually become the rule.³⁴

tions. That would enable a claimant whose claim is subject to some conditions or has a fixed maturity date to receive the fulfilment thereof in advance. That would be especially dangerous when restitution to the state before the issuance of the interim order is impossible. Because of the limited scope of this article, the *Leistungsverfügung* measure will not be discussed further herein. See Brox, Walker, *op. cit.* (fn. 15), p. 735, para. 1610.

³² The situation is similar in Austria. See Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1738, para. 1.

³³ Articles 267 and 269 ZIZ.

³⁴ For example, in disputes regarding copyright infringements.

In practice, defining a claim as monetary does not result in special difficulties. The creditor must state and prove that the debtor owes him a certain payment, where a rough estimate of the claim suffices and there is no need to set out in detail what the basis is regarding the amount claimed.³⁵ But in some cases there are problems concerning the nature of concrete claims. One of those is the claim for child support in family disputes. The Austrian EO explicitly regulates interim orders for such cases in the Article that covers the securing of non-monetary claims (Article 382/VIII). The claim for child support is therefore considered to be non-monetary, but only under the condition that the main proceedings regarding such claim have already started. If not, the claim is considered to be monetary, and the interim order to secure it is issued on the basis of Article 379/II EO. The Croatian legal theorist Dika is of the opinion that a child's claim for child support is non-monetary, which – when the debtor is ordered to pay – becomes monetary, which can at that moment already be secured with a preliminary order.³⁶ The situation is the same in Austria. A claim for child support regarding which the main proceeding has been finished can no longer be secured with an interim order under Article 382/VIII EO, but can, as a monetary claim, be secured with a preliminary order (Article 372 EO). Claims for child support in family matters are also considered to be non-monetary in Slovenian legal theory and case law.³⁷ According to their content (a creditor requires from a debtor a certain amount of money) such claims should, in my opinion, be considered as monetary and consequently secured on the basis of Article 270 ZIZ.

But a claim is only the first requirement for an interim order. In addition, the petitioner also has to demonstrate the fulfilment of another requirement. The ZIZ differentiates between them depending on the nature of the claim. When securing a monetary claim, the requirement is a subjective risk – a risk that the enforcement of the claim is likely to be rendered impossible or considerably impeded due to alienation, concealment, or some other manner of disposal of property by the debtor (Article 270), while when securing a non-monetary claim the claimant must demonstrate the existence of one of the alternatively determined legal requirements: an objective risk, damage difficult to repair, the use of force, or the weighing of adverse consequences (Article 272). Because proceedings for securing a claim have already finished when the

³⁵ Decision VSL II Cp 1570/2012 of 6 June 2012.

³⁶ Dika, *op. cit.* (fn. 24), p. 852.

³⁷ See Ude, L.; Galič, A. (eds.) *et al.*, *Pravdni postopek, zakon s komentarjem*, Book 3, GV Založba, Ljubljana, 2009, p. 629, and the case law, i.e. Decision VSL IV Cp 1199/2010 of 22 April 2010, Decision VSK I Cp 1764/2006 of 9 January 2007.

main proceedings are still in progress, the ZIZ, like in Croatian, Austrian, and German legislation, lowered the standard of proof to probability – when more arguments in favour of the fulfilment of the requirements than those against are presented. This enables the claimant to demonstrate the fulfilment of the requirements more easily and the court to conclude the procedure quickly.

3. SUBJECTIVE RISK

For the existence of a subjective risk (in Slovenian: *subjektivna nevarnost*) the creditor must state and, with the standard of probability, prove three things:³⁸ the risk of the debtor disposing of the property, the effect of such conduct on the enforcement of the claim, and that the enforcement of the claim might be rendered impossible or considerably impeded. The requirement regarding the debtor's acts of disposal in relation to his property results in the risk regarding the monetary claim being "subjective" in comparison to the risk required to secure a non-monetary claim. As a consequence, one of the most important questions in every case is whether the debtor's concrete conduct can be subsumed under the legal term disposal of property, as that would cause a decrease in his property and therefore a decrease in the possibility of the creditor's successful enforcement of his monetary claim. In Šipec's opinion³⁹, a source of subjective risk could be merely a change in the legal state of property. The legislation provides the examples of alienation and burdening (Article 270/II ZIZ), which are legal disposals, but the range of such disposals is not closed. In my opinion, such disposal can be legal or factual (i.e. destroying or damaging things) and limiting this matter to only the first one would be too strict. A merely illustrative statutory list of possible acts is appropriate, because the legislature could never envisage all the different actions of debtors. A similar legal provision can be found in Article 379/II(1) of the Austrian EO, which lists several possible forms of disposing acts, but also leaves the catalogue open⁴⁰, as well as in Article 344/I of the Croatian OZ⁴¹, for which Dika⁴² agrees that the debtor's acts can be factual or legal.

³⁸ Similar Dika, *op. cit.* (fn. 24), p. 866, and Dika, *op. cit.* (fn. 25), p. 762.

³⁹ Šipec in Šipec, M.; Plavšak, N.; Klampfer, M.; Jerovšek, T.; Čebulj, J., *Začasne odredbe v civilnih sodnih postopkih, postopkih pred delovnimi in socialnimi sodišči, upravnimi sodišči, ustavnim sodiščem ter v upravnem postopku*, GV Založba, Ljubljana, 2001, p. 95.

⁴⁰ In German: "... durch Beschädigen, Zerstören, Verheimlichen oder Verbringen von Vermögensstücken, durch Veräußerung oder andere Verfügungen über Gegenstände seines Vermögens, insbesondere durch darüber mit dritten Personen getroffene Vereinbarungen."

⁴¹ In Croatian: "... time što će svoju imovinu otuđiti, prikriti ili na drugi način njome raspolagati."

⁴² Dika, *op. cit.* (fn. 24), p. 866.

There is another important question regarding the debtor's conduct. Must a debtor's *intent* to influence the enforcement of the claim by certain conduct exist?

In 1988 the Slovenian Supreme Court issued a legal opinion⁴³ stating that for the issuance of an interim order for a monetary claim the debtor's *attempts* to significantly impede the enforcement by concrete active or passive conduct are needed. This could be interpreted as an obligation of the court to determine whether the debtor's *intent* to influence the enforcement existed when acting in a certain manner, and that without the debtor's damaging intent the subjective risk does not exist. Case law followed this opinion⁴⁴, but the Supreme Court subsequently altered it.⁴⁵ It described such an interpretation of the requirement (that a risk must derive from the debtor's conscious conduct aimed at disabling or impeding the enforcement) as contrary to law. It emphasised that the risk required for an interim order is expressed in every act of the debtor that could result in preventing or impeding the enforcement, regardless of the debtor's aim. The requirement is fulfilled if the debtor's conduct has such a consequence, even if he did not act with the intent to cause it. This perspective is also accepted in legal theory.⁴⁶ The debtor's inner intention with regard to specific content is not required. It is enough that he performs property-related acts with a negative effect on the enforcement of the claim. Some opinions on this question can also be seen in decisions of the Slovenian Constitutional Court, which, however, has never explicitly decided on the requirement of the debtor's intent. Despite other earlier decisions from which different conclusion can be made⁴⁷, the latest one⁴⁸ is quite clear, i.e. that there is no need to demonstrate a debtor's (harmful) intent, and that contrary interpretation of the term subjective risk could be disputable, also from the constitutional point of view. The confusing case law of the Supreme and Constitutional Courts was followed by the case law of first and second instance

⁴³ Report of the Supreme Court RS, No. 1–2, 1988, p. 7.

⁴⁴ For example, Decision VSL 549/96 of 23 April 1996, Decision VSM Cpg 186/96 of 5 December 1996, and Decision VSM Cpg 251/96 of 2 July 1996.

⁴⁵ Decision of the Supreme Court RS III Ips 78/99 of 10 June 1999.

⁴⁶ See Grilc, A., "Subjektivna nevarnost" po 270. členu ZIZ, *Pravna praksa*, Vol. 23, No. 13, 2004, pp. 8 and 9. The agreement with this opinion can be seen also in Rijavec, *op. cit.* (fn. 5), p. 267.

⁴⁷ Up-147/01 of 21 January 2002 and Up-10/99 of 25 May 1999.

⁴⁸ Up-648/02 of 15 December 2003.

courts, where in some cases the debtor's intent is required for establishing a subjective risk⁴⁹, while in others it is not.⁵⁰

Both contradictory standpoints can also be found in Croatian legal theory. Triva⁵¹ defends the opinion that a pure risk to enforcement is not enough for a subjective risk to exist, but finds that the debtor's intent in his conduct is not relevant. On the contrary, Crnić⁵² is of the opinion that the debtor's intent to render enforcement impossible must be demonstrated for the subjective risk to be established. More recent is Dika's opinion⁵³ in which he emphasises the irrelevancy of a debtor's subjective relation to the damaging consequences and emphasises as the only important factor the fact that the debtor's conduct is the source of the risk to enforcement. The same view can also be found in Austrian legal theory.⁵⁴

In my opinion, proving the inner intention of the debtor that led to acts specifically harmful to enforcement would entail an excessive burden on the creditor. The purpose of the interim order is to promptly and legally secure a claim, to which also a simplified procedure with a lower burden of proof is adjusted. Claiming and proving a debtor's harmful intent to act in a certain manner would lead to even more failures in creditors' attempts to secure their monetary claims. In the majority of cases where the petitioner proves the debtor's conduct and the decreased possibility of successful enforcement, it is possible to assume that the debtor acted with the intent to cause such a consequence anyway, but requiring proof of this would be too strict. The difference could only be seen in cases where enforcement would be impeded by the debtor's conduct for which there is clear and provable intent of some other kind (and not to harm creditors). In my opinion, for the requirement of subjective risk in accordance with Article 270/II ZIZ it is enough that the

⁴⁹ I.e. Decision VSK Cp 602/99 of 26 October 1999, Decision VSL II Cp 2103/2011 of 22 June 2011, Decision VSL I Cpg 11/2004 of 15 January 2004, Decision VSL I Cpg 119/2012 of 5 March 2012.

⁵⁰ I.e. Decision VSL I Cpg 1277/2010 of 9 November 2010, Decision VSL I Cp 1946/2012 of 9 July 2012, Decision VSL I Cpg 741/2001 of 27 June 2001.

⁵¹ Triva, S.; Belajec, V.; Dika, M., *Sudsko izvršno pravo: Opći dio*, Informator, Zagreb, 1980, p. 347, point 11 and Triva, S.; Belajec, V.; Dika, M., *Sudsko izvršno pravo*, 2nd edition, Informator, Zagreb, 1984, pp. 394 and 395, para. 11.

⁵² Crnić, I., *Izvršni postupak u praksi*, Informator, Zagreb, 1989, p. 199.

⁵³ Dika, *op. cit.* (fn. 24), p. 868.

⁵⁴ Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1731, para. 8. Also König, *op. cit.* (fn. 11), p. 41, para. 3/7, emphasises that for a subjective risk to be established intentional harmful conduct or the guilt of the counterparty are not required and that a subjective risk could exist also due to serious negligence and the omission of acts needed against third persons.

creditor demonstrates the existence of the debtor's conduct having a probable negative influence on enforcement. König⁵⁵ in Austria expands the source of risk even to third persons under the debtor's influence.

3.1 The debtor's weak financial situation

Creditors often have concerns regarding the enforcement of their claims when they learn of the debtor's over-indebtedness, frozen bank accounts, or negative financial situation. All of these are clear signs that the enforcement of the judgment might be later rendered impossible, which is the reason for the creditor's desire to temporarily secure the claim. But the debtor's weak financial situation does not represent a subjective risk.⁵⁶ That is the opinion of the Slovenian Supreme Court⁵⁷, which can also be found in Slovenian legal theory⁵⁸, newer⁵⁹ and older⁶⁰ case law, as well as in Croatian⁶¹ and Austrian⁶² legal theory.

It is also uniformly accepted that the following situations do not satisfy the requirement of subjective risk: the debtor is at risk of becoming insolvent⁶³, a bankruptcy procedure has been initiated⁶⁴, the debtor's bank account

⁵⁵ The same König, *op. cit.* (fn. 11), p. 41, para. 3/7.

⁵⁶ See Šorli, N., *Insolventnost dolžnika ni razlog za začasno odredbo*, Pravna praksa, Vol. 14, No. 337, 1995, p. 10.

⁵⁷ VS RS III Ips 15/92 of 12 March 1992 in relation to Decision VSL Cpg 1465/91 of 15 October 1991.

⁵⁸ Šipec in Šipec *et al.*, *op. cit.* (fn. 39), pp. 37, 38, and 41.

⁵⁹ Decision VSL I Ip 224/2008 of 1 February 2008, Decision VSL II Cp 4943/2010 of 12 January 2011, Decision VSL I Cpg 439/2012 of 24 May 2012, Decision VDSS Pdp 1045/2012 of 8 November 2012, Decision VSL I Cp 2357/2012 of 19 September 2012, Decision VDS Pdp 1096/2011 of 6 December 2011, Decision VDSS Pdp 1372/2010 of 9 December 2010, Decision VSL III Cpg 516/2010 of 12 May 2010, Decision VDSS Pdp 952/2011 of 12 October 2011, Decision VDSS Pdp 970/2011 of 19 October 2011.

⁶⁰ VSL I Cp 81/99 of 27 January 1999, Decision VSL Cpg 1012/96 of 26 July 1996 (in Šipec *et al.*, *op. cit.* (fn. 39), pp. 38, 65), Decision VSM Cpg 251/96 of 2 July 1996, Decision VSL I Cpg 960/99 of 7 October 1999, Decision VSL I Cpg 153/2001 of 7 February 2001.

⁶¹ Dika, *op. cit.* (fn. 24), p. 868, and Crnić, *op. cit.* (fn. 52), p. 199.

⁶² König, *op. cit.* (fn. 11), p. 42, and Angst *et al.*, *op. cit.* (fn. 10), p. 1732, para. 10.

⁶³ Decision VSM Cpg 251/96 of 2 July 1996, the same Dika, *op. cit.* (fn. 24), p. 868. In Austrian legal theory, Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1732, para. 10, emphasises that the requirement of a subjective risk is fulfilled if the debtor, when paying his debts, privileges one of the creditors.

⁶⁴ Decision VSL Cpg 432/94 of 14 July 1994.

is blocked⁶⁵, or the debtor is in a liquidation procedure.⁶⁶ Caution is, however, needed. A weak financial situation of itself does not suffice to fulfil the requirement of subjective risk, but the situation is different if the court also discovers that the debtor is in the process of disposing of or has disposed of his property – i.e. transferred all his business to newly established entities, leading to the debtor's business ceasing and the beginning of insolvency proceeding.⁶⁷ This could suffice as regards satisfying the requirement of a subjective risk.

In the case of a weak financial situation, in which the requirement of a subjective risk is not fulfilled, a creditor who demonstrates the existence of a claim against the debtor and that he is more than two months in default can file a proposal for an insolvency procedure.⁶⁸ This way, the creditor's goal is achieved, as the debtor is thereafter unable to further dispose of his property; however, the creditor's advance payment is required for the initiation of the procedure.⁶⁹ In addition, there exists a risk that the creditor's claim will only be paid partly, together with the rest of the debtor's creditors – in line with the principle of equal treatment.⁷⁰ If a creditor nevertheless files a proposal for an interim order, the procedure for securing the claim is stopped if an insolvency procedure subsequently begins⁷¹, or is stayed due to the beginning of a compulsory settlement procedure.⁷²

4. OBJECTIVE RISK

Because of the defendant's possibility of disposing with the thing that is the object of a claim, the risk to successful enforcement is even higher when proposing the securing of non-monetary claims. The claimant must demonstrate the existence of the risk that the enforcement of a judgment that might be is-

⁶⁵ Decision VDS Pdp 223/2005 of 10 February 2005.

⁶⁶ See Decision VSL II Cp 1299/2012 of 16 May 2012.

⁶⁷ Decision VSL I Cpg 1157/2002 of 11 December 2002, Decision VSL I Cpg 1277/2010 of 9 November 2010.

⁶⁸ Article 231 Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (FOIPCDA), Official Gazette of the Republic of Slovenia, No. 126/07 *et seq.*

⁶⁹ Article 233 FOIPCDA.

⁷⁰ Article 46 FOIPCDA .

⁷¹ Article 132/III(1) FOIPCDA. The beginning of an insolvency procedure also influences an already issued interim order, i.e. Decision VSL II Cp 2017/2013 of 18 July 2013.

⁷² Article 132/I.

sued subsequently is likely to be rendered impossible or considerably impeded. The possibility of enforcement must be deemed to be at least considerably impeded, but no specific reason for such consequence is needed.⁷³ The existence of a risk to the enforcement of the claim itself is enough, regardless whether its source is the debtor, a third person, or *force majeure*. The petitioner's burden regarding this requirement therefore covers one-third of the requirement of there being a subjective risk in order for monetary claims to be secured, for which the petitioner must also show the source of the risk and the causal link between both. Common to both requirements is the burden of claiming and proving circumstances making the enforcement of the judgment impossible or considerably impeded.⁷⁴

The ZIZ uses the same terminology for both requirements. Specifically the objective risk (in Slovenian: *objektivna nevarnost*) referred to in Article 272/II(1) is expressly stipulated in Article 270/II ZIZ. An objective risk is part of a subjective⁷⁵ one and every time the petitioner demonstrates the existence of the latter, the existence of the former is indirectly demonstrated. It can also be said that the risk referred to in Article 270/II ZIZ consists of "objective" (that the enforcement of a judgment is likely to be rendered impossible or considerably impeded) and "subjective" (the alienation, concealment, or some other manner of disposal of property by the debtor) parts.

While the securing of monetary claims requires some manner of disposal of property by the debtor, the scope of possibilities for impeding enforcement, which are the grounds for the securing of a non-monetary claim, is unlimited. But for the existence of an objective risk the petitioner must demonstrate more than just a pure possibility that the debtor might dispose of his property⁷⁶, as this is a daily possibility of every owner. While grounds for objective risk are completely undefined in the ZIZ, the Austrian legislation, on the other hand, is more thorough. In order to secure "other" claims (as non-monetary claims are referred to), the EO, like the ZIZ, requires that there exists an ob-

⁷³ This view can also be found in case law, i.e. Decision VSL II Cp 4330/2009 of 2 December 2009, Decision VSK I Cpg 124/2005 of 8 September 2005.

⁷⁴ In Austria the petitioner also bears the burden of stating and proving the existence of the risk, but according to König, *op. cit.* (fn. 11), p. 32, para. 2/41, in recent times this burden has become even more onerous than previously, when even the abstract, theoretical possibility of a risk sufficed.

⁷⁵ The same also Decision VSL I Cpg 52/97 of 28 January 1997.

⁷⁶ Galič, A., *Učinki začasnih odredb*, Gradivo za seminar Učinkovito uveljavljanje terjatev – izkušnje ZIZ, Nebra, Ljubljana, 2007, p. 3.

jective risk. As an example of a source of such risk, it determines an alteration in the existing state of the property (in German: *Veränderung des bestehenden Zustandes*)⁷⁷, but at the same time it does not define the content and scope of this alteration required for the issuance of an interim order.

In Croatia, until 1996 objective risk was required in order for an interim order to be issued for securing a non-monetary claim (Article 267/I ZIP).⁷⁸ The *Ovršni zakon* adopted in 1996⁷⁹, changed it into subjective risk.⁸⁰ This remained the same in the new OZ, for securing both monetary and non-monetary claims⁸¹, with a slight difference in the description of the debtor's conduct that may cause the danger. For monetary claims the OZ has kept the regulation from the ZIP and as examples of the debtor's conduct determines alienation, concealment, or some other manner of disposal of property. On the other hand, as an example of the debtor's conduct representing a subjective risk to the securing of non-monetary claims it only includes the alteration of the existing state of the property, which might be of a legal (e.g. the disposal or encumbering of a part of the property, negligent business practices) or factual (e.g. concealing or transferring things, destroying, damaging, or changing a part of the property or not maintaining it) nature.⁸² This wording was taken from the Austrian EO, which in Article 381/I as possible grounds for risk includes an alteration in the existing state of the property, but at the same time does not require that it be caused by the debtor, and therefore for the securing of non-monetary claims, the same as the ZIZ, it requires an objective risk.

For the securing of both monetary and non-monetary claims the ZIZ provides that the claimant shall not be required to prove the risk if he proves presumptively that the order for which he is applying will not result in any considerable damage to the debtor (Articles 270/III and 272/III).

⁷⁷ Article 381/I OZ.

⁷⁸ Triva *et al.*, *op. cit.* (fn. 51), p. 400, para. 15, stated that the risk exists regardless of its source and regardless of whether the debtor caused it with his acts or not.

⁷⁹ Official Gazette of the Republic of Croatia, No. 57/1996 *et seq.*

⁸⁰ Dika, *op. cit.* (fn. 25), p. 771, grounds the change with the return to such regulation in the Yugoslav *Zakon o izvršbi in zavarovanju* of 9 July 1930 (No. 68.508 SI. Nov. 23 July 1930, No. 165 LXII/364), which required subjective risk for the securing of non-monetary claims.

⁸¹ Compare Article 344/I and Article 346/I(1) OZ.

⁸² Dika, *op. cit.* (fn. 24), p. 876.

5. DAMAGE DIFFICULT TO REPAIR

In order to secure a non-monetary claim, the petitioner can also demonstrate the existence of the claim and the need for an interim order that will prevent damage difficult to repair (in Slovenian: *težko nadomestljiva škoda*) (Article 272/II(2) ZIZ). Because the ZIZ does not differentiate between the requirements needed for security and regulatory interim orders, this can be the basis for both. In the above mentioned Decision No. Up-275/97, the Slovenian Constitutional Court stated that regulatory interim orders can be issued under the condition that there is a risk of occurrence of irreparable damage⁸³, but did not explicitly limit this requirement to this type of measure. This is understandable as the prevention of damage was already determined to be a purpose of a (security) interim order in the ZIP (Article 267/II) and the ZIZ (Article 272/II(2)), even before the Constitutional Court confirmed the existence of regulatory interim orders. Therefore, security interim orders could be issued on the grounds of all the requirements stipulated in Article 272 ZIZ⁸⁴, however, it is true that the majority of proposals founded on the risk of damage difficult to repair are proposals for regulatory interim orders. On the contrary, the Austrian Article 381/II EO, which regulates the issuance of interim orders on the same basis – if needed to prevent impending use of force or the occurrence of irreparable damage – is limited only to the issuance of regulatory interim orders.⁸⁵

Imminent damage as a reason for issuing an interim order can also be found within Article 940 of the German ZPO, but the requirement is grammatically different than the one in Slovenia, Austria, or Croatia, where damage difficult to repair or irreparable damage is explicitly required. In Germany an interim order is granted to the claimant if it is necessary to avert every type of obstacle (significant disadvantages (in German: *Abwendung wesentlicher Nachteile*), use of

⁸³ In the former ZIP the requirement was formulated as the risk of irreparable damage, but the standard was lowered with the ZIZ to damage difficult to repair. The burden of demonstrating and reaching the statutory standard is therefore now easier for the claimant than previously.

⁸⁴ For example, Decision VSK Cp 166/2012 of 27 March 2012.

⁸⁵ The article itself says nothing about that, but that is a well-accepted standpoint in legal theory – König, *op. cit.* (fn. 11), p. 75, para. 3/78, and also Oberhammer, Domej, *op. cit.* (fn. 12). Holzhammer, R., *Österreichisches Zwangsvollstreckungsrecht*, Springer-Verlag, Vienna, New York, 1989, p. 341, emphasises that the object of security is a right or legal relation, in comparison to those stated in the first paragraph of the same article, in which the object of the security is future enforcement of a concrete claim.

force, or others – also imminent damage?). Therefore, the main requirement for the issuance of an interim order can be defined as necessity (in German: *nötig erscheint*). The significant disadvantages and impending force referred to in Article 940 ZPO are therefore only listed as examples thereof.⁸⁶ But this Article is limited, as in the EO, only to regulatory interim orders. In comparison to Austria, where Article 381/II EO is reserved for those measures based on opinions in legal theory, in Germany Article 940 ZPO itself is entitled in a manner indicating that it is a measure that temporarily regulates the situation (in German: *Einstweilige Verfügung zur Regelung eines einstweiligen Zustandes*), whereas the requirements for a security interim order to secure non-monetary claims are listed in Article 935 ZPO.

The Croatian regulation of regulatory interim orders is taken from the German ZPO. These measures are explicitly regulated in Article 347/II OZ, and previously in Article 299/II OZ from 1996. In addition to other reasons, they are to be issued if it is necessary to prevent the occurrence of irreparable damage or damage difficult to repair (in Croatian: *nužno radi sprječavanja nastanka nenadoknadive ili teško nadoknadive štete*).⁸⁷ As a situation in which it is possible to temporarily regulate the legal relation in dispute, the OZ alternatively determines both standards of damage. At first sight this seems illogical. Irreparable damage is a higher standard and therefore includes the lesser one – damage difficult to repair. But on the other hand, as can be understood upon considering the matter, irreparable damage is not repairable and therefore not difficult to repair.

The Croatian OZ also stipulates impending irreparable damage (but at the same time, not damage difficult to repair⁸⁸) as a requirement for the issuance of security interim orders in order to secure non-monetary claims. Not only the previous (Article 298/I(2)), but also the current (Article 346/I(2)) OZ assumed that requirement from the Yugoslavian ZIP, which required impending irreparable damage. Because the damage has not yet occurred, Dika⁸⁹ is of the

⁸⁶ Zöller, *op. cit.* (fn. 15), p. 2198, para. 4.

⁸⁷ Like the German ZPO, the OZ also includes the possibility of issuing regulatory interim orders if needed for other important reasons, in order to protect the legal order.

⁸⁸ From this it is possible to conclude that the requirements for the issuance of regulatory interim orders are fully open and unlimited (as long as the issuance thereof is necessary), while the requirements for security interim orders are, as traditionally, limited and exhaustively listed.

⁸⁹ Dika, *op. cit.* (fn. 24), p. 878.

opinion that the claimant has to demonstrate a probable risk of future damage, and not existing damage. In his opinion, an interim order issued on the basis of this requirement has a repressive, preventive (preventing future damage), and preservative (it preserves the state of affairs and therefore enables future enforcement) function.

5.1 Disturbance of possession of immovable property

Deciding which factual circumstances represent a risk of damage difficult to repair is left to the court in each individual case. But the temporary securing of a claim is often proposed in cases involving a disturbance of possession of immovable property (eviction or milder forms of disturbance), which, as the claimant may claim, threatens to cause damage difficult to repair. Because the Slovenian Civil Procedure Act in the chapter on possession disputes does not (any longer) provide special rules for the issuance of interim orders, the general provisions of the *ZIZ* are relevant.

Interpretation of the statutory requirements is especially interesting in cases involving disturbance of possession of the immovable property in which the claimant lives. Some courts classify such conduct of the debtor, without hesitation, as an act that could cause damage difficult to repair.⁹⁰ They justify it with the claimant's inability to access personal belongings, to fulfil basic human needs, and the like. Other courts are more cautious and do not conclude that a disturbance of possession of such immovable property automatically entails a risk of the required level of damage.⁹¹ When assessing the fulfilment of the statutory requirement, they also take into consideration the specific circumstances of the case, i.e. whether the petitioner has the possibility to live anywhere else; whether the petitioner really lived in the property the possession of which was disturbed⁹² and to which of the petitioner's personal belongings access is limited?⁹³ Cost of rent and purchase of items left at the

⁹⁰ Decision VSL I Cp 223/2012 of 16 May 2012, Decision VSL II Cp 4417/2009 of 6 January 2010, Decision VSK I Cp 156/2006 of 8 March 2006.

⁹¹ I.e. Decision VSL I Cp 1853/2011 of 8 June 2011, Decision VSL I Cp 848/2011 of 23 March 2011.

⁹² I.e. Decision VSL I Cp 912/97 of 24 September 1997, Decision VSL I Cp 795/2013 of 4 April 2013.

⁹³ In Decision VSL I Cp 2977/2012 of 7 November 2012 the Court concluded that prevention of access to material things, such as jewellery and money, does not entail sufficient damage. On the contrary, prevention of access to medicine could

property are also not deemed to be difficult to repair. Therefore, it is possible to find case law in which disturbance of possession of an immovable property is not assessed as possibly causing damage difficult to repair.⁹⁴

In my opinion, it is not possible to claim without a doubt that a party proposing a measure always suffers damage difficult to repair if the counterparty has prevented access to the property. If the claimant had lived at the property up to the moment of disturbance, all his belongings are there, and he has no other place to stay (i.e. with relatives), this constitutes, in my opinion, at least damage difficult to repair, if not irreparable damage. On the other hand, if there are no essential personal items at the property the possession of which is disturbed, or if the claimant had stayed there only from time to time, it is impossible to talk about damage of such magnitude. The merits of a proposal for an interim order therefore depend on the circumstances of a specific case. At the same time, it is important that the court decides such matter quickly, as a long procedure necessarily prevents the claimant from accessing the property for even longer, which might even enhance the damage. When proposing an interim order, the claimant must therefore thoroughly define the consequences of the disturbance and show why such consequences could be subsumed under the legal standard of damage.

Apart from disturbance of possession of a “home”, interim orders are often proposed to prevent further disturbance of possession of other immovable property – i.e. not the property in which the claimant lives. Opinions as to whether that can cause damage difficult to repair are conflicting. Šipec⁹⁵ thinks that in those cases the petitioner will have difficulty demonstrating the existence of such damage. On the other hand, Frantar⁹⁶ emphasises that the damage caused by disturbance of possession is not necessarily material, and that it is even more difficult or even impossible to compensate for damage that cannot be materially assessed.

In different cases of disturbance of possessions the courts have concluded that the risk of damage difficult to repair was caused by the placement⁹⁷ or de-

be sufficient, but the petitioner should specify the medicine and why it cannot be accessed. The requirement probably would not be fulfilled if the medicine can be freely bought on the market.

⁹⁴ I.e. Decision VSL I Cp 4227/2011 of 9 January 2012.

⁹⁵ Šipec *et al.*, *op. cit.* (fn. 39), p. 100.

⁹⁶ Frantar, T., *Stvarno pravo*, Gospodarski vestnik, Ljubljana, 1993, p. 313.

⁹⁷ I.e. VSL Decision I Cp 3450/2009 of 28 October 2009, Decision VSL I Cp 997/2010 of 17 March 2010.

struction of a fence, the placement of a roadblock⁹⁸, construction works⁹⁹, and some other interventions.¹⁰⁰ On the other hand, court decisions can be found in which similar acts were not deemed to be the cause of damage difficult to repair: the placement or destruction of a fence¹⁰¹ or a wall¹⁰², the placement of a roadblock¹⁰³, interruption in the water supply¹⁰⁴, renovation of the property the possession of which was disturbed¹⁰⁵ or a different disturbance.¹⁰⁶

In my opinion, the circumstances of each individual case must be assessed and it is impossible to draw uniform general conclusions.

6. FORCE

The other reason to issue an interim order under Article 272/II(2) ZIZ is the risk of an impending use of force (in Slovenian: *uporaba sile*). A similar requirement can be found in Croatian, German, and Austrian legislations, which demonstrates the well-established opinion that damage and force are such intense interventions into the claimant's sphere that the temporary securing of a claim in such cases is necessary.

The ZIZ provides for the issuance of interim orders if "the measure is necessary to prevent the use of force". The force itself is therefore not yet present, but there is a threat of its (probable) use. The petitioner must state and prove the threat of the use of force and the ability of an interim order to prevent it. If force has already been applied, the claimant must demonstrate that there is

⁹⁸ I.e. Decision VSK I Cp 846/2006 of 17 October 2006.

⁹⁹ I.e. Decision VSK I Cp 626/2006 of 9 June 2010, Decision VSL I Cp 1676/2011 of 25 May 2011.

¹⁰⁰ I.e. Decision VSL II Cp 1690/99 of 27 October 1999, Decision VSK Cp 827/2007 of 11 September 2007.

¹⁰¹ I.e. Decision VSL II Cp 211/2012 of 1 February 2012, Decision VSK I Cp 895/2006 of 11 October 2006.

¹⁰² I.e. Decision VSK I Cp 895/2006 of 11 October 2006, Decision VSK I Cp 1390/2006 of 17 October 2006.

¹⁰³ I.e. Decision VSL I Cp 1569/2010 of 12 May 2010.

¹⁰⁴ I.e. Decision VSL II Cp 2386/2012 of 29 September 2012.

¹⁰⁵ I.e. Decision VSL I Cp 2910/2010 of 15 September 2010, Decision VSL II Cp 4330/2009 of 2 December 2009.

¹⁰⁶ I.e. Decision VSL I Cp 1560/2012 of 6 June 2012, Decision VSL II Cp 86/2012 of 8 January 2012, Decision VSL I Cp 2896/2011 of 5 October 2011, Decision VSL I Cp 1783/2012 of 27 June 2012.

also a threat of its use in the future¹⁰⁷ and that therefore an interim order will achieve its goal and prevent it.

A similar provision can be found in Article 346/I(2) OZ, which governs the issuance of interim orders to secure non-monetary claims.¹⁰⁸ In Dika's opinion¹⁰⁹, with the use of the grammatical method of interpretation, the requirement regarding force can be better explained as present violence and its accompanying threat in the future. In such a case, the petitioner proves the existence of present violence and at the same time the interim order achieves its goal by preventing its continuation in the future.¹¹⁰ But the requirement is also fulfilled if there has not yet been any violence, but only a threat thereof exists. In such a situation an interim order will prevent it¹¹¹, but the claimant's demonstration of the requirements will not suit the legal norm in accordance with the grammatical interpretation, as there is no force yet present. A requirement with the same legal standard can also be found in Article 347/II OZ governing regulatory interim orders.¹¹² Even if the same term, i.e. "violence", is used, the requirement is formulated differently. The claimant must state and prove that the issuance of an interim order is necessary to prevent violence. The same as in Article 940 ZPO, the primary requirement is the necessity of the issuance of an interim order, which can occur due to a threat of the use of force.

As a reason for the necessity of the issuance of a (regulatory) interim order, both Article 381/II of the Austrian EO¹¹³ (listed exhaustively) and Article 940 of the German ZPO¹¹⁴ (listed as an example¹¹⁵) state the prevention of

¹⁰⁷ Opinions regarding the preventive nature of interim orders can also be found in case law, i.e. Decision VSL I Cp 912/97 of 24 September 1997, Decision VSK Cp 145/2009 of 18 March 2009, Decision VSC Cp 222/2008 of 20 March 2008.

¹⁰⁸ In Croatian it reads: "*ako učini vjerojatnim da je mjera potrebna da bi se spriječilo nasilje ...*". Grammatically, the same provision can be found in its predecessor in Article 298/I(2).

¹⁰⁹ Dika, *op. cit.* (fn. 24), p. 877.

¹¹⁰ In Dika's opinion, the functions of these interim orders are preventive and repressive.

¹¹¹ In Dika's opinion, the function of interim orders in this case is only preventive.

¹¹² In Croatian: "*Ako je to nužno radi sprječavanja ... nasilja ... sud može odrediti mjeru kojom će privremeno urediti sporni odnos među strankama.*"

¹¹³ In German: "*... wenn derartige Verfügungen zur Verhütung drohender Gewalt ... nötig erscheinen.*"

¹¹⁴ In German: "*... zur Verhinderung drohender Gewalt ... nötig erscheint.*"

¹¹⁵ Rosenberg, *op. cit.* (fn. 16), pp. 1226, 1227, para. 12, is of the opinion that this requirement is not of major importance, due to all the other possibilities to issue an interim order.

the threat of force. In Austrian legal theory, impending use of force is interpreted as a violent act directed at the petitioner¹¹⁶, which is able to beat the petitioner's defence, or a real threat of it.¹¹⁷ Such force also exists in the case of an existing violent intervention due to which the petitioner requests the remediation of the consequences and restoration to the previous state¹¹⁸, or in the case of a risk of recurrence.¹¹⁹ Austrian legal theorists emphasise that not every illegal or excessive form of self-help allowed under the law of obligations¹²⁰ or every illegal act¹²¹ represents the required force. On the contrary, Zöller¹²² is of the opinion that every act committed against the petitioner, especially if it is a criminal one, must be interpreted as impending force.

The ZIZ does not define the term impending force. That is the duty of the court in each individual case, but Article 45 of the Slovenian Code of Obligations¹²³ could provide some help. It regulates threat in the process of concluding a contract and defines it as a situation in which a party or a third person, by means of an inadmissible threat, causes the other party to have a well-founded fear that leads him to conclude a contract. In the opinion of Dolenc¹²⁴, a well-founded fear exists if it is possible to conclude from the circumstances that a serious threat to life, body, or (other) important belonging to the contractual party or anyone else exists. All this can aid a judge in deciding about the existence of the risk of the use of force.

7. THE WEIGHING OF ADVERSE CONSEQUENCES

One of the alternative requirements for the issuance of an interim order for securing a non-monetary claim predicted in Slovenian ZIZ is the weighing of adverse consequences (in Slovenian: *tehtanje neugodnih posledic*). This is fulfilled

¹¹⁶ Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1739, para. 8.

¹¹⁷ König, *op. cit.* (fn. 11), p. 76, para. 3/80, and Rechberger, W. H.; Oberhammer, P., *Exekutionsrecht*, 5th edition, facultas.wuv, Vienna, 2009, pp. 251, 252, para. 499.

¹¹⁸ Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1740, para. 10.

¹¹⁹ König, *op. cit.* (fn. 11), p. 76, para. 3/80.

¹²⁰ Kodek in Angst *et al.*, *op. cit.* (fn. 10), p. 1739, para. 8.

¹²¹ König, *op. cit.* (fn. 11), p. 76, para. 3/81, and Rechberger, Oberhammer, *op. cit.* (fn. 117), pp. 251, 252, para. 499.

¹²² Zöller, *op. cit.* (fn. 15), p. 2198, para. 4.

¹²³ Official Gazette of the Republic of Slovenia, No. 83/01 *et seq.*

¹²⁴ Plavšak, N., Juhart, M. (eds.), *Obligacijski zakonik s komentarjem*, Book I, GV Založba, Ljubljana, 2003, p. 339.

if the consequences for the debtor, in the event the issued interim orders subsequently prove to be without foundation, are not more adverse than those for the claimant if the measure were not issued (Article 272/II(3) ZIZ). This concerns the weighing of two intangible categories difficult to prove that do not yet exist, and of which only one will occur. If the measure is not issued, the claimant will incur adverse consequences. On the other hand, the debtor will incur unfounded adverse consequences if the issued interim order subsequently turns out to be ungrounded. Only adverse consequences are to be considered and those that will be incurred by the petitioner and the counterparty, and not any third persons affected by the interim order. The requirement is rarely used in practice, as it is difficult to prove both groups of consequences and claimants prefer to ground the need for an interim order on the objective risk to successful enforcement, the risk of damage difficult to repair, or the risk of the use of force. Perhaps this is also the reason why this requirement cannot be found in the Croatian, German, or Austrian legislation on the temporary securing of a claim.

8. CONCLUSION

Interim orders are an important means of securing claims. The importance of their role in practise depends on the statutory regulation of the requirements that need to be fulfilled for their issuance, and their interpretation in case law. This comparison of four different national regulations of this matter demonstrates that the requirements for issuing an interim order do not differ significantly and parallels among them can easily be drawn. The most serious difference between the Slovenian and Austrian regulations, on the one hand, and the German and Croatian, on the other, is the normative governance of regulatory interim orders. In my opinion, the complete absence of any mention of such measure in legislation is an enormous disadvantage. Slovenian courts in practise sometimes have some reservations with regard to using the same statutory regulation for all the measures, relying only on the now already old decision of the Constitutional Court as regards regulatory interim orders. Possibilities for further improvement of the legal regulation therefore still exist.

Sažetak

Neža Pogorelčnik Vogrinc *

**PRETPOSTAVKE ZA ODREĐIVANJE PRIVREMENE MJERE –
USPOREDBA SLOVENSKEG, HRVATSKOG, AUSTRIJSKOG I
NJEMAČKOG UREĐENJA**

Privremene mjere su važno sredstvo osiguranja tražbina. Njima se s jedne strane može osigurati uspješno namirenje sporne tražbine koja će naknadno biti potvrđena pravomoćnom sudskom presudom. S druge strane, njima se može i privremeno urediti određeni pravni odnos – u pravilu dok traje sudski postupak ili dok ne bude okončan ovršni postupak. Uloga privremenih mjera u pravnom sustavu ovisi o zakonskom uređenju pretpostavaka za njihovo određivanje te o njihovu tumačenju u sudskoj praksi. Najvažnija pretpostavka za određivanje privremenih mjera jest postojanje novčane ili nenovčane tražbine koja treba biti osigurana. Međutim, potrebno je da budu ispunjene i druge pretpostavke. U slovenskom Zakonu o ovrši i osiguranju (Zakon o izvršbi in zavarovanju) one ovise o naravi osigurane tražbine. Kada je riječ o osiguranju novčane tražbine predlagatelj osiguranja mora učiniti vjerojatnim postojanje subjektivne opasnosti – opasnosti da će namirenje tražbine biti onemogućeno ili znatno otežano zbog otuđenja, prikrivanja ili kojeg drugog načina raspolaganja imovinom od strane dužnika. Krug pretpostavaka je nešto širi kod nenovčanih tražbina. Predlagatelj mora tako učiniti vjerojatnim postojanje jedne od sljedećih pretpostavaka: a) postojanje objektivne opasnosti, tj. opasnosti da će namirenje tražbine postati nemoguće ili znatno otežano, b) postojanje opasnosti od nastanka nenadoknadive štete, c) postojanje opasnosti od nasilja, d) privremena mjera može biti zatražena odvažujući težinu nepovoljnih okolnosti za dužnika i vjerovnika zbog određivanja, odnosno neodređivanja mjere.

Među nacionalnim pravnim sustavima, uz pretpostavke za određivanje privremenih mjera, razlikuju se i vrste mjera, njihova moć i učinci. Na prvi pogled čini se da je vrlo teško usporediti sustave privremenih mjera u pojedinim zemljama, no detaljnijom analizom slovenskog, hrvatskog, austrijskog i njemačkog uređenja uočava se da oni imaju mnogo toga zajedničkog. U radu su tako obrađeni sustavi privremenog osiguranja tražbina prema slovenskom Zakonu o izvršbi in zavarovanju, hrvatskom Ovršnom zakonu, austrijskom Exekutionsordnungu te njemačkom Zivilprozessordnungu, usredotočujući se pri tome na usporedbu pretpostavaka za određivanje privremenih mjera.

Ključne riječi: privremena mjera, tražbina, subjektivna ili objektivna opasnost, teško nadoknadiva šteta, uporaba sile

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