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Interim Legal Protection in Corporate Practice

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I Introduction

1 Dealing with interim measures poses particular challenges for companies and attorneys. Advisers must be briefed, information must be gathered, and decisions must be made, all under significant time pressure. A structured approach can result in a crucial advantage relative to the opposing party.

2 Experience shows that practical aspects are just as important as legal analysis in preparing for and defending against interim measures. These practical aspects will be the focus of the following discussion: Should a warning be issued? Where and when should action be brought? Is the necessary evidence available? Can missing evidence be obtained in a timely fashion? Should an expert opinion be prepared? Are the documents available in the required language?

3 The following discussion, which focuses on practical aspects, includes many tips and examples. It is followed by checklists containing points to be considered in the preparation or defence of interim measures. This guideline will provide you with support in the event that you wish to obtain interim measures in the future, or must defend against them.

4 This publication first appeared in 2007 and was prepared in cooperation with lic. iur. Karin Graf. This updated second edition, reflects in particular the changes that have resulted from the enactment of the Swiss Code of Civil Procedure, which applies to all of Switzerland and supersedes the previous cantonal codes of procedure.

II Situations and measures

A

Why interim legal protection?

5 Regular civil litigation takes years and is expensive. Sometimes, the outcome achieved by the victorious party is worthless because, in the meantime, the business situation has changed and the assets that were to be secured through legal action have been irreversibly destroyed or rendered obsolete by advances in technology and services.

6 Interim legal protection counteracts this. Steps are taken at the outset as if the claimant has already prevailed. This is done on the basis of a summary review by the court that is only provisional, i. e., interim, in nature. Issues of substance are only clarified by the court at a later date. Eventually, the substantive proceeding will reveal whether or not the interim court order issued at the outset was justified.

7 This situation is not unproblematic. At the outset, no one knows with any certainty whether the claimant will ultimately prevail in the substantive proceeding. If he loses, then the interim measures obtained at the start will have been wrongly granted. A wrongly imposed measure can inflict substantial harm on the defendant.

8 Courts do not like to expose themselves with interim measures that later prove to be unjustified. Accordingly, the hurdles for the obtainment of interim legal protection are high.

9 However, it is also possible to achieve a great deal with interim measures. A proceeding for interim measures has strong precedential effect, which means that its success or failure could have a critical influence on the outcome of the main proceeding.

B

The prerequisites for granting interim legal protection

10 The following legal prerequisites must be satisfied in order for interim legal protection to be granted:

a) The claimant has a right that has been violated or is jeopardised.
b) The claimant could suffer severe detriment as a result of this situation.
c) If the detriment were to occur, it would be irreversible or irreparable. It could not simply be made good with money.
d) The threat of detriment is immediate. Judicial protection is urgent.

11 In a nutshell, therefore, the purpose of interim legal protection is *to avert an imminent, severe, and irreparable detriment as a matter of urgency.*

12 In order for an application for interim legal protection to succeed, the following things are important in de facto terms from the perspective of the claimant – who is known as the "applicant" in such proceedings for measures:

- It must be a reasonably *clear case;* i. e., it must be possible for the applicant to easily and plausibly explain his own legal position with reference to the facts of the case and in terms of the law.
- It must be possible to depict the interim order applied for as being relatively innocuous or harmless. This means that the court must be shown that the interim order would not result in improper detriment for the defendant and would not inflict significant harm should the measure later be found unjustified.

- At the same time, it must be shown that the harm to the applicant would be dramatic if the interim measure is *not* granted.
- The relationship between the potential harm suffered by the defendant through an unjustified measure and that suffered by the applicant if the measure is not approved must clearly show that the applicant has a great deal to lose, whereas the defendant has little to lose.

13 Only if these things can be plausibly presented to the court is there a reasonable chance of the application being granted. Due to the court's reticence toward interim measures, any attorney approaching a court to obtain an interim measure should be prepared to encounter a sceptical and generally negative attitude on the part of the court.

14 In practice, the terms temporary *(einstweilig),* interim *(vorsorglich),* and provisional *(provisorisch)* legal protection are used as synonyms. For simplicity's sake, we will use the term "interim measure" *(vorsorgliche Massnahme)* in this guideline.

C

What situations demand interim measures?

1 Overview

15 In corporate practice, there are many situations in which interim measures must be considered. Of course, it is impossible to provide an exhaustive list of such situations, but the following examples should illustrate some instances in which interim legal protection can be helpful.

2 Preserving an existing condition

16 Interim measures can be used to preserve an existing condition, the existence of which is jeopardised, for the duration of the regular court proceeding. The following situations illustrate when such a safeguarding measure can be appropriate:

A The Labour Pension Fund Foundation purchases business property at a prime location in Basel from Immo-Future AG. Before the purchase is recorded in the land register, the pension fund learns of contract negotiations pertaining to the same property between Immo-Future AG and an American real estate investor.

▶ The Labour Pension Fund Foundation wants to ensure that, for the duration of the proceeding to assert its claim to the transfer of ownership, Immo-Future AG cannot transfer the property to a third party.

B Matterhorn Management AG has obtained an award from a Paris arbitral tribunal against Indebito Srl., with registered office in Rome, for payment of EUR 2.5 million. It happens to learn from a business partner that Indebito Srl. has accounts at a bank in Zurich.

▶ Matterhorn Management AG wants to safeguard execution of the arbitral award in its favour by blocking the Indebito Srl. accounts in Switzerland.

C The art dealer Pacisso has sold a painting to the Papadurakis gallery in Athens. Despite repeated reminders, the purchase price has not yet been paid. Now Pacisso has learned that Papadurakis intends to put several significant works of art up for sale at the Basel Art fair.

▶ Pacisso wants to secure his purchase price claim by having works of art owned by the Papadurakis gallery seized.

D The Cologne-based publisher Urs Gala entrusts a significant share of his private assets to the asset manager Bühlmann. After two months of futile attempts to contact Bühlmann, he is forced to conclude that a large share of his assets is no longer in Switzerland. Bühlmann has disappeared without a trace. Gala is aware that Bühlmann owns a villa in Zurich and several sports cars.

▶ Gala wants to ensure that Bühlmann's assets will still be accessible if he eventually enforces a judgment against him.

E Medizina AG is the exclusive supplier of pharmaceuticals to Apotheka AG. Medizina AG terminates the exclusive distribution agreement, effective immediately. Apotheka AG takes the position that there are no grounds for termination and it has no short-term option for sourcing the pharmaceuticals it sells from another supplier.

▶ Apotheka AG wants to keep Medizina AG from stopping its deliveries until it has established another supply source.

3 Abstaining from a harmful action

17 If a harmful action is imminent, it might be possible to prevent it through an interim measure. This is illustrated by the following examples:

F Mr Bühler, the former head of the Sales Division at the financial services company Moneta AG, is now working for a competitor. Moneta AG clients have reported that Mr Bühler has attempted to lure them to his new employer as clients, even though he is prohibited from doing so under a post-contractual non-compete agreement.

- ▶ Moneta AG wants to bar Mr Bühler from contacting its clients.

G Xavier Ditavola is a famous designer. He markets designer furniture in Europe and the United States under his own name. Sergio Ditavola, a carpenter living in Locarno, sells wood furniture in Switzerland bearing the brand name Ditavola.

- ▶ Xavier Ditavola wants to bar Sergio Ditavola from marketing his furniture under the Ditavola name.

H Food Discount AG alleges in its advertising that it is always less expensive than its competitor Price & Quality AG. Based on random sampling, the latter has determined that this statement is inaccurate.

- ▶ Price & Quality AG wants to bar Food Discount AG from alleging in its advertising that it is always less expensive.

I The television show "10 to 10" plans to air a report that is extremely detrimental to Clean AG's business. In the report, it is alleged that Clean AG detergent routinely causes allergic reactions. Based on scientific tests, Clean AG can prove that this allegation is untrue.

- ▶ Clean AG wants to prevent the report from being aired.

J The company Steel & Co. supplies steel girders to the company Upwardly Mobile GmbH for the construction of a high-rise building. To cover any claims arising from construction defects, it provides a bank guarantee of CHF 2 million. When contractual disputes arise, Upwardly Mobile GmbH threatens to draw on the guarantee even though there is no evidence of any connection with construction defects.

- ▶ Steel & Co. wants to prevent any unjustified drawing on the bank guarantee.

K Fizzy Pop AG, which markets a well-known product under the brand name "Sonilka," learns from press reports of the imminent founding (and registration under commercial law) of a competitor that intends to do business as "Sanilca GmbH."

- ▶ Fizzy Pop AG wants to keep the competing company from being recorded in the commercial register under the name "Sanilca GmbH."

4 Preservation of evidence

18 A critical factor in achieving success before a court is whether one can prove one's own representation of the facts. One potential aim of interim measures is to preserve or document evidence relating to the main proceeding or negotiations with the opposing party. This is illustrated by the following situations:

L During a Saturday shopping excursion to Zurich, the sales director of B-Watch AG discovers imitations of his latest big seller in a watch dealer's display window. The vendor refuses to tell him where he acquired the watches.

- ▶ B-Watch AG wants the vendor to be ordered to disclose his supply sources.

M The licensing agreement between XCM AG and All-Software GmbH recently expired and was not renewed. XCM AG discovers that All-Software GmbH is still marketing the previously licensed software on its website.

- ▶ In anticipation of possible legal proceedings, XCM AG wants to preserve proof that All-Software GmbH was still marketing its software after the licensing agreement had been dissolved.

N Construction Machinery AG sold a used crane with 3,000 operating hours to the German company UsedButGoes GmbH. The latter is now alleging that the used crane has in reality been used for 7,000 hours. It demands a reduction of the purchase price. Shortly thereafter, Construction Machinery AG discovers that UsedButGoes GmbH is offering the used crane for sale on its website, indicating there that it has 3,000 operating hours.

- Construction Machinery AG wants to preserve the sales offer on the UsedButGoes GmbH website as evidence before it is deleted.

D

Provisional and ex parte injunctions

19 The surprise effect can be of critical importance in determining whether an interim measure is successful. If such a situation is present, the applicant requests what is known as an ex parte injunction *(superprovisorische Verfügung).* In this case, the court considers the request without first hearing the defendant. The element of surprise is key here. Thus, "ex parte" means "without hearing the opposing party."

20 At the same time that it hands down the ex parte injunction, the court also summons the parties to a confirmation hearing, which is to be held without delay, or it establishes a deadline for the defendant to present a written statement. After the defendant is heard, it makes a final decision about the requested measure. If, through the hearing or the statement, the defendant succeeds in causing the court to have significant doubts concerning the justification of the measure, the granted ex parte measure is rescinded.

21 In cases where the element of surprise plays no role, a *provisional* measure can be requested instead of an *ex parte* one. With provisional measures, the defendant is usually first given the opportunity to present a written opinion. The parties are then typically called to a hearing, after which the court decides whether to grant the injunction.

E

What interim measures can be applied for?

1 Introduction

22 What the situations described in sections 15 et seq. have in common, is that it is necessary to at least consider whether an application for interim measures should be filed. The types of measure available will be of critical importance in assessing that question.

23 Any court order that could possibly avert a specific imminent detriment can be the subject of an interim measure. Examples include not only prohibitions, but also orders to eliminate an unlawful situation, instructions issued to a register authority or a third party, payments in kind, or (in very rare and limited cases) the provision of cash payments.

24 Due to this flexibility, a complete listing of possible measures is impossible. Instead, the following are several examples of interim measures that can typically be applied for before Swiss courts.

2 Attachment

25 The attachment of assets is an ex parte sequestration measure to protect jeopardised creditor rights. Claims for monetary payment or for provision of collateral that are due and enforceable by way of debt collection proceedings can be secured by attaching realisable assets held by the debtor. Examples of this are situations in which the debtor has no permanent residence, is behaving in bad faith (example D), is abroad (examples B and C), or has been declared insolvent. Other possible grounds for attachment are when the creditor has already obtained an enforceable court decision against the debtor for his claim.

26 The request for attachment is made in writing – or orally in exceptional circumstances – to the court in the debt collection venue or in the place where the assets are situated. The assets to be attached must be identified at least in terms of type and location and their caretaker must also be indicated. The assets must belong to the debtor or at least be attributable to him. Attachment deprives the debtor of his power of disposal over the attached assets.

Example: Attachment can be used to impose a restriction on the disposal of a debtor's assets held at a Swiss bank. In addition, any other assets are eligible for attachment –e.g., valuable items or claims held by the debtor against third parties.

27 Furthermore, the creditor must be able to make a prima facie case for the existence of his claim against the attached party. Finally, he must show that grounds for attachment are present.

§§ *Under art. 271 of the Swiss Debt Enforcement and Bankruptcy Act, grounds for attachment are: No permanent domicile of the debtor, secretion of assets, flight, debtor in transit, debtor with domicile abroad (only if the claim has an adequate connection to Switzerland and is based on an acknowledgment of debt), certificate of loss against the debtor, or presence of an enforceable court decision (Swiss or foreign) against the debtor.*

28 Attachment does not give the creditor a prior claim to satisfaction from the attached assets. After attachment is imposed, he must procedurally enforce the attachment claim against the debtor (so-called validation) if he has not already done so prior to the imposition of attachment.

3 Orders and prohibitions

29 Through orders or prohibitions, third parties can be ordered to engage in specific conduct (example E) or be prohibited from doing so (examples F-J) for the sake of protecting or enforcing one's legal position.

§§ *Interim injunctions can take the form of court orders and prohibitions against specific persons under threat of legal detriment.*

30 In addition to orders and prohibitions, which are intended to bring about specific conduct, injunctions to prevent the disposal of specific assets can be used as interim legal protection. Such orders and prohibitions can, depending on the factual situation, also be directed at third parties who are not identical to the parties in the proceedings.

Example 1: Non-compete clause in an employment contract (see also example F)
Mr Meier is prohibited, under threat of criminal prosecution, from contacting his former employer's clients for competitive purposes or from competing with the applicant in any other way.

Example 2: Order to prevent the disbursement of a guarantee (see example J)
Z AG is ordered to retract its request to Bank W for payment of guarantee no. ZW 0.000.000.

Example 3: Prohibition after end of licensing agreement (see also example M)
The defendant is barred, under threat that its executive bodies will be punished, from selling the software produced by the applicant or from distributing it in any other way.

Example 4: Prohibition of payment
Prohibition of payment to a third-party debtor in a dispute over the question of who is entitled to a claim (claimant dispute).

31 The enforcement of injunctive relief is afforded great significance in intellectual property law as well. Intellectual property rights grant a monopoly on use, and for that reason the holder of such rights can prohibit third parties from infringing on them. Various special provisions of law (e. g., trademark or patent law) expressly provide for such injunctive relief. The illegality of the infringement is a prerequisite for injunctive relief. The purpose of the application must be to prohibit precisely described conduct (see example H).

4 Disclosure

32 Securing claims and avoiding future harm may necessitate obtaining information from a third party. In particular in intellectual property law it may be important, in order to avoid (further) harm, that information be disclosed concerning the origin of goods that violate proprietary rights (see example L).

33 Swiss law does not recognise a general right to disclosure. However, such a right can be deduced from specific provisions of law or situations. If the general prerequisites for granting interim legal protection are satisfied, such a right can also be enforced on an interim basis.

§§ *Art. 59 MSchG (Swiss Trademark Protection Act)*
Interim measures
[1] If a person requests the ordering of interim measures, he or she can demand specifically that the court order measures
a) to preserve evidence;
b) to determine the origin of items illegally bearing the trademark or indication of origin;
c) to preserve the existing condition; or
d) to effect provisional enforcement of injunction and removal claims.

34 If the facts of the case are *undisputed or immediately provable ("liquid")* and the legal situation is clear, there is another way of enforcing a claim for disclosure, namely through an application for legal protection in clear cases (art. 257 ZPO (Swiss Code of Civil Procedure)). As with proceedings on measures, this involves a summary proceeding which if the prerequisites are satisfied, allows for rapid enforcement of the claim.

35 The facts of the case are liquid if the opposing party presents no pleas or objections or only such as require no extensive clarification. The legal situation is clear if it has been established which provisions of law apply and the legal consequences are clearly indicated by established doctrine and case law. A relatively clear case can usually be assumed with claims for disclosure, which is why an application for legal protection in clear cases constitutes an alternative to the application for interim legal protection, especially in cases where a detriment is not yet imminent.

5 Seizure

36 Movable or immovable items or assets can be secured through seizure. Such seizure can be based on criminal or civil law (e.g., trademark or patent protection). Individual items of evidence, items that constitute an offense (e.g., the stolen money), or the actual item in dispute may all be seized. The investigative authorities in criminal proceedings or the civil court are responsible for a seizure.

37 Through seizure, the applicant gains access to the seized items, assets, or documents, which can in some cases result in him also gaining access to valuable information.

§§ *Seizure is established as an interim measure in federal law with regard to patent, trademark, design, and copyright law, for example (art. 77 (1) b PatG (Swiss Patent Act), art. 59 MSchG, art. 38 DesG (Swiss Design Act), art. 65 URG (Swiss Copyright Act)): The holder of the right can demand that the court order seizure in order to preserve evidence or determine the origin of items.*

38 Seizure is not an option if the applicant's claim concerns monetary payment or the provision of security; in such cases, the provisions concerning attachment apply.

6 Legal rights of lien

39 Legal rights of lien give creditors the right to have a lien recorded on real estate in relation to claims arising from certain legal relationships. This includes the right of lien for building contractors, condominium owners, and sellers of real estate. The building contractor right of lien, which is the most common type of legal right of lien in practice, makes it possible for tradesmen and contractors who have supplied materials and labour, or labour only, for construction or other works, for demolition work, for scaffolding work, for excavation support, or for similar activities to record a right of lien on the respective property (art. 837 (1) no. 3 ZGB (Swiss Civil Code)). This secures their claim and gives them a prior claim in the event of a debt recovery action.

40 The claim for a building contractor right of lien is always brought against the owner of the property, even if he is not the actual debtor. The contractor or tradesman cannot have direct recourse to the land register office, but must instead apply to the court at the location of the property in question for an order instructing the land register office to record a building contractor right of lien. The lien must be recorded no later than four months following completion of the work (art. 839 (2) ZGB), which is dated from the last functionally relevant work, not the time at which the construction site is cleared by the contractor.

Example: A tradesman is entitled to record a building contractor right of lien against the property owner even if the owner had a contractual relationship with a general contractor and has already paid that contractor the full contractual amount for his services. The property owner runs the risk of a double payment obligation unless he guards against that possibility by way of corresponding contractual clauses or by involving a third-party fiduciary or bank in his relations with the general contractor.

7 Prohibition of recording in the land register

41 The authority to dispose of real estate can be restricted in order to preserve the existing condition through a note to that effect in the land register. Restrictions on disposal can be recorded as priority notices in the land register in order to secure dis-

puted or enforceable claims for real estate. Because of the priority notice in the land register, a secured claim is effective against any subsequently acquired right to the affected property, and a restriction on disposal is also operative in foreclosure proceedings (example A).

§§ *Priority notices concerning restrictions on disposal can be established on the basis of an official order made to secure disputed or enforceable claims for individual properties. The restrictions on disposal established through the priority notice are effective against all subsequently acquired rights (art. 960 ZGB).*

42 The claims on which the prohibition of recording in the land register is based must relate to the affected real estate itself, must be due from or denied by the debtor and a corresponding order must be applied for with the court at the location of the real property. After it is entered in the land register, the prohibition of recording in the land register is assumed to be public knowledge, and third parties acting in good faith enjoy no protections as to acquisition.

Example 1: A prohibition of recording in the land register can be applied for as an interim measure in fulfilment of a real estate purchase if ownership has not been transferred despite payment of the purchase price. The prohibition of recording in the land register protects the buyer's legal position relative to third parties (example A).

Example 2: In the case of bankruptcy of a debtor, the court can use a prohibition of recording in the land register to safeguard the rights of the creditors.

8 Prohibition of recording in the commercial register

43 It is possible by filing an objection under private law to prevent, at least temporarily, the recording of a fact in the commercial register for which recording is mandatory (example K).

§§ *Under art. 162 of the Commercial Register Ordinance (HRegV), anyone apart from the registrant himself can file an objection to recordings in the commercial register that have not yet been effected.*

44 The objection must be submitted in writing to the commercial register office responsible for the recording in question. Grounds do not have to be stated. The commercial registrar may reject the objection only in the event of it being obviously abusive. The objection automatically causes a prohibition of recording in the commercial register. The commercial register office grants the objecting party a period of ten days to show that he has filed an application for the issuance of an interim measure with the competent court. Recording in the register is prohibited during that period.

§§ *If the objecting party is unable to show this, or if the court denies the application for issuance of an interim measure with res judicata effect, the commercial register office executes the recording (art. 162 HRegV).*

45 The court will order that the prohibition of recording in the commercial register remain in place if the objecting party makes a prima facie case for an imminent detriment that would not be easy to remedy; if his prayer for relief in the main case appears to have probable merit; and if the matter is urgent. Given the very short deadline of ten days, in most cases the matter is indeed urgent. The court decides after hearing the opposing party and provides a copy of its decision to the commercial register office.

Example 1: Objection to a merger that is to be recorded
"To the Commercial Registrar:
On behalf of Y., address, (power of attorney attached), I hereby file objection to the recording of the following event, which will be reported to you in the near future or has already been reported: Merger of Z. AG, address (company number CH-0000000-0) as the acquiring company, with W. AG, address (company number CH-0000000-0) as the target company."

Example 2: Objection to the recording of a new company (example G)
The trademark owner files an objection with the competent commercial register office against the recording of a newly formed company with a name that violates its right of exclusivity.

9 Institution of proceedings on money laundering

46 If criminal activity is suspected, a procedure pursuant to the Swiss Money Laundering Act (GwG) can be a very effective means of denying the suspected person access to the assets resulting from the criminal activity. This can be used to prevent transfers of assets, for example. In addition to the reporting obligation for financial intermediaries in the event of knowledge or grounds for suspicion, all persons who, as part of their profession, accept, hold in custody, invest, or help transfer outside assets have a right to report to the authorities if they suspect that the assets in question could have their origins in a crime (example D).

§§ *A financial intermediary must report to the Money Laundering Reporting Office pursuant to art. 23 (Reporting Office) without delay (art. 9 (1) GwG) if they know, or have grounds to suspect, that the assets involved in the business relationship are connected to a criminal activity pursuant to article 305bis StGB (Swiss Criminal Code), that the assets have their origins in a crime, or that they are at the disposal of a criminal organisation (art. 260ter (1) StGB).*

§§ *Any person who as part of his profession accepts, holds in custody, invests, or helps transfer outside assets and fails to ascertain the identity of the beneficial owner of the assets with the care appropriate to the circumstances shall be liable to imprisonment not to exceed one year or to a monetary penalty. The affected persons are entitled to report to the internal criminal justice authorities or the federal authorities designated by law any observations that indicate that assets have their origins in a crime (art. 305ter StGB).*

47 Reporting on the basis of a reporting obligation must be done to the Money Laundering Reporting Office without delay, and thus preferably by either fax or express mail. Reporting pursuant to the reporting obligation in art. 9 GwG must contain the same substantive information as reporting in accordance with the reporting right under art. 305ter StGB. Failure to report is subject to prosecution, but reporting a suspicion to the criminal justice authorities instead of to the Money Laundering Reporting Office constitutes satisfaction of the obligation. In addition, reporting can be done simultaneously to the Reporting Office and to the criminal justice authorities. The Reporting Office reviews the report, and if it considers it substantiated, it forwards it to the competent criminal justice authorities.

!!! To simplify reporting, the Federal Office of Police has published a form for reporting to the Reporting Office, which is available on the Internet at *www.fedpol.admin.ch.*

48 After reporting, the financial intermediary must freeze the affected assets immediately and maintain the freeze for five business days. If the criminal justice authorities do not issue an order to maintain the freeze within that period, the financial intermediary may execute any transactions requested by the client. However, he remains bound by his obligation to document all actions in writing (documentation obligation).

§§ *A financial intermediary must immediately freeze any assets entrusted to him that are connected with the report. He must maintain the freeze on the assets until he receives an order from the competent criminal justice authority, but, in any event, for no longer than five business days from the time that he filed the report with the Reporting Office (art. 10 (1) and (2) GwG).*

49 For the duration of the freeze on the assets, the financial intermediary is subject to a prohibition of information, which means that he may not provide information in connection with the report to his affected clients or to third parties. It is only with respect to financial intermediaries that the prohibition of information is partly inapplicable.

§§ *For as long as assets are frozen by his decision, the financial intermediary is prohibited from informing the persons affected or third parties of the report. If he himself is unable to freeze the assets, he may inform the financial intermediary that is able to do so. He also is permitted, if necessary, to inform another financial intermediary if they are contractually bound together to cooperate in providing joint asset management services for one client or form part of the same corporate group (art. 10a GwG).*

III Preparing for interim measures

A

Strategy and tactics

1 Overview

50 Strategy and tactics are key factors in successful litigation. Thus, particular importance is attached to strategy and tactics in preparing for interim measures. Should a formal warning be issued concerning a breach of contract? Would that mean sacrificing the element of surprise? At what point does one achieve the maximum effect with a measure? Which court offers the best prospects of success? Can the court strike quickly? Is it appropriate to involve the criminal justice authorities? These and other questions are discussed below.

2 Warning

51 Before a dispute is taken to court, it is usually appropriate to try to find a solution out of court. This is especially true if the aim is to compel the opposing party to take, or desist from, some action and it is not merely about securing assets or preserving evidence. In such cases, a warning letter is issued to the opposing party asking them to do whatever is demanded or to desist from the undesired actions.

!!! Warning letters are generally not useful in situations where an interim measure will only have the desired effect if it comes as a surprise to the opposing party.

52 The first warning letter is often not sufficient to induce a change of behaviour in the opposing party. In that case, the next question is whether one should follow up or go ahead and take the matter to court. Dedicated follow-up, perhaps repeatedly, can definitely achieve results; with the opposing party either giving in or with a settlement being reached.

Example: In disputes relating to the use of names, company names, trademarks, and other marks, it is quite often possible to reach what are known as delimitation agreements, which address the future use of the disputed marks by the contracting parties. Judicial proceedings can be averted in this way. However, such an agreement is not often reached after a single warning, but instead requires lengthy exchanges of correspondence or even actual negotiations.

53 Even in areas where fast legal protection is possible, it can make sense to try to reach a solution out of court and to allow enough time for that. This is especially true if the court has a great deal of discretion in deciding the matter, and it is thus difficult to estimate the risks and opportunities of an application for measures.

54 In terms of procedural law, however, such action can entail negative consequences that must be taken into account. Specifically, the issuance of an interim measure is possible only in cases of urgency. The issuance of an ex parte measure without granting a hearing to the opposing party demands there to be particular urgency (see section 56 et seq.).

55 If a party seeking the issuance of an ex parte injunction has previously spent a long time trying to reach an out-of-court settlement by repeatedly (and futilely) asking the opposing party to do or desist from doing something, or has even entered into actual settlement negotiations, then the court might not consider the particular urgency requirement to (any longer) be met.

!!! As a rule, only one warning should be issued in cases where the actual intention is to file an application for interim measures and where the time factor is relevant.

3 Timing

56 On one hand, if an application is filed too early, this might lead to an unnecessary entrenchment of the parties in their respective positions, making theoretically possible settlements impossible. On the other, if the application is filed too late, one runs of the risk of no longer being able to achieve the desired effect, or it being rejected by the court because of the decision to wait. Therefore, the timing of an application for measures is of central importance.

57 Except in the case of attachment, all measures of interim legal protection presuppose a certain urgency. This is true to an even greater extent with ex parte injunctions. Just as in labour law, where dismissal without notice must be declared within a few hours or days of the incident prompting it, an ex parte measure must be applied for very quickly after an infringing action.

§§ *Under art. 265 ZPO, the court may order the interim measure immediately and without hearing the opposing party "in cases of particular urgency, especially if there is a risk of frustration."*

58 Otherwise there is a threat that the application for measures will be dismissed or that an exchange of submissions will be ordered before a decision is made on the application. During an exchange of submissions, the party opposed to the measure is given the opportunity to present his position. The associated delay in issuance of the measure also allows him the opportunity to alter the matter in dispute.

§§ *There are time limits even with an application for the issuance of (only) a provisional injunction. Many courts observe (informal, i.e., established in practice) "forfeiture deadlines" after which measures of interim legal protection can no longer be obtained.*

§§ *In terms of federal law, a different situation applies in the areas of intellectual property law and the law on unfair competition: Under the case law of the Swiss Federal Supreme Court, "relative urgency" is sufficient to order an interim measure. This is requirement is considered satisfied if the proceeding on measures results in the (interim) goal more quickly than a regular proceeding on the merits.*

59 If only relative urgency is required for the issuance of a measure, this makes it possible, before applying for an interim measure, to wait and see whether the infringing action was a one-off occurrence. A formal warning is recommended in most such cases, since the absence of the need to satisfy the regular urgency criterion means that there is no legal disadvantage to such a warning (see section 51 et seq.).

4 Involvement of the criminal justice authorities

60 The aim pursued through interim measures can in some cases be promoted through the involvement of criminal justice authorities. This is especially true of sequestration measures. The securing of movable and immovable items and assets is a measure governed by criminal procedure. Through this, the criminal justice authorities remove items or assets from a person's free disposal. Examples of items subject to seizure are individual items of evidence (e.g., business correspondence, computers, etc.), items that constitute an offence (e.g., business books, forged documents), or assets acquired by way of an offense (e.g., proceeds of fraud or embezzled assets). As a rule, it is the criminal investigation authorities at the place of the offence who are responsible for a seizure. Moreover, if a criminal offense is suspected, moreover, the criminal justice authorities can order a house search, during which they can seize items or assets.

61 The procedures of a criminal action can serve the purpose of obtaining information. For example, if the applicant is also the injured party, he is allowed to see the files of the criminal proceeding. In this way, he gains access to valuable information that he may be able to use for further proceedings. He does not, however, gain possession of the seized assets.

62 The involvement of criminal justice authorities should be considered particularly in cases where it is difficult to secure assets or obtain necessary information by means of civil law. One aspect to consider in this regard is that one does not have sovereignty – i.e., control – over the criminal procedure meaning that once a criminal proceeding has been instituted, one's ability to influence its course is very limited. This is especially true of the speed of

the procedure, but also of the overall handling of the criminal investigation by the criminal justice authorities. Moreover, it is not possible to retract a criminal complaint and thus end a proceeding if offences requiring public prosecution are involved. Therefore, the advantages and drawbacks of a criminal complaint should be weighed carefully in each case. Ultimately, the criminal justice authorities do not consider it their duty – least of all their principal duty – to lend support to civil-law disputes, nor is their focus on the recovery of money obtained through tortious means. Therefore, the advantages and drawbacks of a criminal complaint should be weighed carefully in each case, and restraint is called for when it comes to involving the criminal justice authorities.

5 Venue

a) Introduction

63 It is often the case that multiple venues are available for the issuance of interim measures. Interim measures can always be applied for from the court with competency to judge the main proceeding. In addition, other special venues are available.

b) Venue for the main proceeding

64 The principle that interim measures can be applied for from the court that has jurisdiction in the main proceeding holds true both domestically and internationally.

65 As a general rule, the court at the registered office/domicile of the sued party has jurisdiction in the main proceeding. In the absence of peremptory provisions to the contrary, all actions under civil law can be brought there.

§§ *The right to venue at one's domicile is protected in the Swiss Federal Constitution. Thus, any other venue constitutes a restriction of a constitutional right. Accordingly, there are very few actions in which judgment by the court at the registered office/domicile of the defendant is not possible.*

Example: In the case of the rental and leasing of immovable property, peremptory provisions exist that provide for an exclusive venue that is not situated at the defendant's domicile or registered office.

66 Contracts usually stipulate what court is to decide disputes arising from, or in connection with, the respective contract. Unless stipulated otherwise, this chosen jurisdiction is exclusive – i. e., the main proceeding cannot be conducted before any other court. In the international context, however, it bears noting that the stipulated Swiss court can, under some circumstances, decline its jurisdiction.

§§ *Under art. 5 IPRG (Swiss Private International Law Act), Swiss courts may decline their jurisdiction if Swiss law is not applicable to the dispute and if none of the parties has its domicile, place of habitual residence, or place of business in the canton of the stipulated court. Such a right to decline jurisdiction does not exist in the area of applicability of the Lugano Convention (LugÜ).*

67 In the international context, in the case of contractual claims if the sued party does not have its domicile or registered office in Switzerland then the venue is deemed to be at the Swiss place of performance. The place of performance is the place where the contractual obligation that is the subject of the action is to be performed.

68 For tortious or quasi-tortious claims, in addition to the venue of the domicile, the place of the tortious act is available as venue. This means the place or places where the tortious act was carried out or where the effect of the tortious act occurred. Therefore, there are at least multiple venues available for the assertion of such claims.

Example: Claims arising from a trademark infringement can be entered at any place in Switzerland where the trademark-infringing products were sold.

69 If the disputed claims are subject to an arbitration agreement, the arbitral tribunal can also issue interim measures. However, the (competing) jurisdiction of the public courts continues to apply with regard to the issuance of interim measures. This is certainly true as long as the arbitral tribunal has not yet been constituted.

c) Special venues for interim measures

70 Besides the court that is hearing the main proceeding, the court at the location where the measure is to be executed is also competent to issue interim measures (art. 13 ZPO; art. 10 IPRG). The same holds true in the euro-international context, because the respective jurisdiction provision (art. 31

LugÜ) refers to the rules on jurisdiction set forth in the national law.

71 In the international context, there exists what is known as 'emergency jurisdiction': Swiss courts may issue interim measures even if they themselves do not have jurisdiction to decide the case.

d) Choosing the proper venue

72 Various aspects must be considered in choosing the venue where the application for interim measures is to be filed:

a) Where is the measure to be executed? Ideally, the measure should be issued by the court in the location where it is also to be executed.

b) Among the competent courts, is there one that, based on experience, is more likely than others to grant the desired measures? As an example, practices concerning attachment differ significantly among courts.
   - !!! To obtain attachment of accounts at UBS AG, which has two head offices (Basel and Zurich), it is usually recommended that the application for attachment be filed in Basel.
   - !!! If the debtor's assets are situated in different locations (e.g., bank accounts in different cantons), it is recommended that the application for attachment be filed at the place of debt collection (debtor's domicile/registered office). In this way, the court at the place of debt collection can simultaneously issue the attachment order for all assets to be attached.

c) How is the application process set up? In some cases, it is advantageous if the application can be presented or explained to the court orally.

d) What is the official language of the court? The language in which the procedure will be conducted may depend on the choice of court.

73 Interim measures must be validated. This means that action must be brought in the main proceeding within the deadline established by law or set by the court (see section 82 et seq.). Through what is known as an action for negative declaratory judgment, the presumptive defendant can specify the venue for continuation of the proceeding. The issuance of an interim measure can cause the presumptive defendant to very quickly file such an action with a court that is acceptable to him. In some cases, therefore, it is recommended that the main proceeding be made pending simultaneously with the application for issuance of an interim measure. If that is the case, then all the aspects relevant to choosing a venue for the main proceeding should also be considered when deciding with which court the application will be filed.

B

Coordination and Communication

1 Overview

74 Multiple interim measures imposed at the same time can create added value. However, this succeeds only if the various measures are coordinated and the synergies are utilised. At the same time, it is necessary to ensure that the approval or rejection of one measure does not undermine the effect of another.

75 Customers and employees can also be affected by the circumstances under which the issuance of interim measures is considered. Good communication with the opposing party and any third parties can aid in the success of an interim measure. In contrast, poor communication can endanger it. To avoid uncertainty and misinformation, proper communication should be planned and ensured.

2 Coordination of different venues in Switzerland

76 In practice, the applicant can be confronted with a situation in which he must apply for measures simultaneously at multiple locations.

77 In such cases, it is necessary to carefully plan the coordination of the various measures. If such coordination is lacking or does not work, the success of the various measures could be jeopardised.

78 A wide variety of aspects must be considered, such as the practices of the various courts with regard to the type of procedure (oral/written) and the specific configuration of interim measures, but also the significance of the individual measures in the specific case. Therefore, the coordination of the measures must be planned in accordance with the specifics of each individual case.

!!! The coordination of multiple applications for measures can be planned only in cooperation with the retained attorney. Therefore, the question of whether multiple measures are necessary or reasonable must be addressed as early as possible.

3 International coordination

79 The international movement of goods and services can make coordinated action in different countries necessary for effective interim legal protection to require coordinated action in different countries. As a rule, each court will issue measures only for its own national territory. A (rare) exception exists in the case of English courts, for example, which can issue sequestration measures against the defendant personally *(in personam),* with worldwide effect (known as worldwide freezing orders; see section 129 et seq.). Upon issuance, and after the defendant has been granted a hearing, these measures under English law can be executed internationally.

Example 1: In connection with an attempt to enforce a claim against a Canadian company it may be necessary to attach assets situated in North America or Asia in parallel with an attachment of bank accounts in Switzerland.

Example 2: Acting against the worldwide marketing of a software product in violation of license necessitates legal action in multiple countries.

Example 3: The worldwide freezing order of an English court must be declared enforceable separately in each of Switzerland, Germany, and France.

80 If the circumstances of a case necessitate recourse to the courts or factual clarification in multiple countries, careful coordination of the various proceedings and of the law firms and other advisers involved in each location is important. Depending on the specific scenario, this coordination can be directed from the location where the most comprehensive factual information is present or where the first or the most substantively powerful measure is to take effect. The question of having a lead counsel coordinate the various advisers should be addressed and clarified in advance of a measure. Clear responsibilities must be defined. The lead counsel is the client's first contact person.

!!! It must be agreed with the lead counsel that he will update and distribute a list containing the contact information of all persons and parties (name, position, e-mail, phone and fax numbers, addresses, time zone information) who are informed about a specific case and must be included in the correspondence.

!!! The lead counsel must be instructed to distribute the assignments and monitor scheduling after consultation with the client.

!!! Attention must be paid to time zone differences so as to ensure the availability of key contacts.

81 Particular attention must be given to the exposition of facts, which must be identical or at least consistent before the different (judicial) authorities in the various countries. The opposing party is all too happy to use inconsistencies in the exposition of the same factual circumstances to discredit a party's factual submission, and thus ultimately the party himself. The legal arguments should also be harmonised and contradictions should be absolutely avoided.

4 Validation

82 Interim measures are issued for a limited time only. They lapse if they are not validated within a specific time period.

§§ In some cases, the deadline for validation is prescribed by law (e. g., with attachment), whereas in other cases it is set by the court. Only deadlines set by the court may be extended.

83 Because of the – in some cases – very short deadlines, validation must be kept in mind when planning and preparing for interim measures, and the necessary preparatory actions must be taken. In particular, (supplemental) evidence (e. g., information on witnesses and informants, certified versions of documents, etc.) should be gathered at the outset.

!!! In the case of monetary claims, validation can be effected through the debt collection process. In the case of attachment, where the validation deadline is only ten days, a place of debt collection exists at the place of attachment for foreign debtors as well. It is important to note that the ten-day deadline must also be observed for all other proce-

dural steps (petition for dismissal of objection or action following objection, action to obtain recognition of judgment following negative decision on dismissal of objection).

84 Moreover, the applicant must be clear about what objectives he hopes to achieve through validation. These are generally the same ones that he already wants to achieve with the interim measure, e. g., that the opposing party desist from a specific infringing activity. It is often the case, however, that this is joined by other claims, such as a claim for payment. If the thrust of the validation is different from that of the interim measure, discussion might arise about whether the measure was validated properly and within deadline. This carries the risk of its rescission.

§§ *Measures can often also be validated at the place where they are granted, but that is certainly not always the case. In the euro-international context, for example, the Lugano Convention prohibits use of the place of attachment to bring a validation action for payment. In addition, there may be a venue or arbitration agreement in force between the parties. If so, validation must take place at the stipulated forum, regardless of the jurisdiction of the court issuing the measure.*

85 This can mean that the validation proceeding has to be conducted abroad and/or in a different language than the proceeding on measures. The necessary precautions in this regard must be made at an early stage. For example, correspondent attorneys must be engaged, validation actions must be prepared at least in draft form, documents must be translated into other languages as required, etc.

86 Because of the extremely short validation deadlines (e. g., the ten-day deadline for validating an attachment), this work must be undertaken at an early stage. Interim measures are only efficient as long as they are in force!

5 Communication

a) Introduction

87 Measures of interim legal protection usually require precautions with regard to communication. This concerns both the applicant and the defendant in equal measure.

!!! Communication should be given due attention at an early stage. If necessary, a communications specialist should be engaged in addition to the legal counsel so that the two of them can work together. VISCHER routinely cooperates with various internal and external communication experts.

88 By way of exception, a communications strategy can also consist of no information whatsoever being exchanged. For example, a company can use its annual vacation closing to buy time and thoroughly review the impact of an interim measure. Nevertheless, the decision to refuse to communicate should be examined carefully and should always be made deliberately, and not as a result of chance. Otherwise an information vacuum will almost inevitably be regarded, both internally and externally, as a leadership vacuum.

b) Internal communication

89 If interim measures are obtained, it must be ensured that this is appropriately communicated internally. Often, the right approach is to inform the entire staff in general terms, especially if media coverage of the matter is anticipated.

90 On the other hand, the affected departments must be instructed on what communication policy applies. The persons responsible for communication must be designated, and supplemental instructions must be issued to the affected employees. This could include, for example, instructions on the handling of inquiries by clients, third parties, or the press, the compilation and central evaluation of documents, or the possibility of suspending the routine deletion or destruction of documents or e-mail correspondence.

91 In many cases, it will be necessary to impose a ban on communication. If so, the employees must be instructed to refer all questions to the person responsible for communication.

c) Communication with the defendant

92 As a rule, an applicant – except in the case of a warning (see section 51 et seq.) – will do what he can to avoid giving the defendant advance notice of his intention to apply for measures of interim legal protection. He will not want to forewarn him.

93 If there is no danger of the defendant altering the object of the proceeding, then communicating that

intention – or even sending a draft of the pleading – can be used to exert pressure on the defendant.

Example: This was the tactic used by the Swissair legal counsel when the former airline Crossair planned to use the name "Swiss".

94 However, providing a draft of the pleading allows the defendant to prepare a direct or indirect defence (pre-emptive brief) geared to the application for measures, which may have indeed been critical in the aforementioned "Swiss" case.

95 Under some circumstances, it may also be appropriate to instruct the defendant not to destroy certain categories of documents, but instead to keep them available. Such an instruction will ruin the defendant's good faith, which also affects routine deletion and destruction activities.

§§ *In procedural terms, there can be a reversal of the burden of proof if one party makes a prima facie case for the existence of and for specific content of documents not available to him, and the defendant is unable to prove that the opposite is true by submitting such documents.*

96 After the issuance of a measure, the communication channels must be opened with the defendant, e. g., to discuss the possibility of a settlement.

!!! As a rule, communication with the defendant should be handled by the attorneys.

d) Public information

97 Applicants might also be confronted with public information needs. Especially in situations where the legal department and possibly other departments as well – e. g., production or marketing – are involved in preparing for, defending against, or implementing an interim injunction and are absorbed in those activities, the wires can run hot and journalists might want to know what is going on. In such cases, a "standby communiqué" should be drawn up at an early stage, which must be continually adapted to new developments and conditions with the passage of time.

§§ *Special duties to inform the public may exist in the case of listed companies based on the "ad hoc publicity requirement" (art. 53 of the SIX Listing Rules).*

98 In some cases, press reporting may not only elicit public interest, but also affect the arguments or conduct of the defendant or even influence the decision by the court deciding on the measures.

!!! Communication measures aimed at the public should therefore be coordinated with the attorneys or even, if necessary, be formulated in cooperation with them.

e) Advance information for third parties (e. g., banks in the case of attachment)

99 The applicant may have an interest in informing third parties prior to, in parallel with, or after events. The purpose of this might be to cause the respective third parties to question their involvement in infringing activities or to place in bad faith any support of such activities. It can also serve the purpose of keeping third parties from directly engaging in infringing activities or participating in actions to circumvent the prohibition. Moreover, it demonstrates the applicant's determination to enforce his rights.

Example: If at least a prima facie case can be made for the applicability of the Money Laundering Act, a report of money laundering to banks (section 46 et seq.) results in an interim freezing of assets and – if an application for attachment is granted – to a "second level" of seizure measures applied to the assets.

!!! When assets held by a third party (e. g., bank accounts) are frozen, informing the third party in advance can be a very effective measure. The third-party debtor will take care to avoid running the risk of double payment and thus freeze the assets in de facto terms until the situation is clarified.

C

Evidence

1 Overview

100 Ultimately, it is on the basis of the available evidence that the court decides whether it grants or denies an application for measures. There are judges who believe that the pleadings should be

disregarded and that only the parties' documentary evidence should be studied in detail. This illustrates the importance and value of the available evidence, but also of how it is presented. Therefore, any opportunity to obtain relevant evidence must be utilised.

2 Gathering evidence

101 Although formulating and submitting the actual application for the issuance of interim measures is an important element of the preparatory work, the focus should not be exclusively on the legal requirements. At least equally as important as the question of whether a right – that is potentially enforceable as an interim measure – to demand that the defendant take or desist from some action exists, is the question of the available evidence. This can concern proof of infringing actions on the one hand, but also references to objects of execution (e. g., bank accounts) on the other hand.

102 The international and local jurisdiction of the court ruling on measures is usually linked to the location of objects of execution, such as assets. Indeed, interim measures serve no purpose if they are issued in a country in which they cannot be executed or where their execution proves futile.

§§ *It is true that under art. 31 of the Lugano Convention, interim measures are just as enforceable in the euro-international area as final judgments, under certain conditions specified by the European Court of Justice. However, that requires the court ruling on the measures to be more than a purely territorial decision which is invariably the case with Swiss interim measures.*

103 The broader and more far-reaching the impact of an interim measure (e. g., an attachment), the more likely it is that the respondent will be forced to agree to an amicable settlement. Thus, the applicant should also clarify the facts of the case carefully and at an early stage. In the case of a business relationship of many years' standing, this might necessitate going through extensive files looking for specific information – banking details, for example – within a short period of time.

!!! The earlier such work is begun, the fewer resources will be committed to it during the "hot phase."

104 Third-party confidentiality obligations could result in an inability to produce evidence. In such cases, a supplemental "fact finding" must take place, possibly involving private investigators or experts.

§§ *Evidence obtained through illegal methods could be disallowed. As a result, evidence produced in that way is of no avail.*

105 It is true that the defendant is completely unable in the ex parte stage, and often unable in the provisional stage, to successfully assert that evidence was obtained impermissibly. The moment of truth arrives, however, by no later than the validation stage. The applicant can end up in a worse overall position if an ex parte or provisionally approved measure is subsequently overturned than would have been the case if no measure had been applied for or approved. In this case, after all, the defendant has now been alerted and can take corresponding precautions (withdrawing his assets, for example). Therefore, an applicant must always give thought to how he will counter the possible disallowance of evidence over the course of the proceeding. More evidence is permissible in a later stage of the proceeding than at the provisional stage, and there are prospects – in some cases, good ones – for obtaining further evidence over the course of the proceeding.

§§ *The procedure for obtaining interim legal protection is always summary. It is characterised by restrictions concerning evidentiary rigor, but also by restrictions on types of evidence.*

§§ *The restriction on evidentiary rigor means that only a prima facie case for the submission is required, not strict evidence. Under the established case law of the Swiss Federal Supreme Court, making a prima facie case means more than alleging but less than proving. In practice, however, making a prima facie case comes very close to strict evidence.*

§§ *One particular consequence of the restriction on types of evidence is that, in summary proceedings, personal evidence from witnesses, informants, and party examinations is not allowed. In addition, no visual inspections are performed and no expert reports are obtained. This means that in de facto terms the possible and reasonable evidence is reduced to documents.*

!!! Good documents and thus good evidence, are those that come from the defendant himself or from third parties that are not linked

to the applicant or dependent on his instructions.

!!! In the event of complex cases and/or references to foreign law, it might be necessary to submit factual or legal expert opinions (see section 109 et seq.).

3 Interim securing of evidence

106 Evidence for an interim measure must be obtained and secured in a suitable form at an early stage. There might be justification for taking evidence before the matter in dispute has been taken before the court, so as to weigh one's own prospects of success.

§§ *The interim securing of evidence is a special form of interim legal protection. The general prerequisites for the issuance of interim measures (see section 10) do not apply to the interim securing of evidence. It is applied especially if evidence is in jeopardy. If there is a risk of a witness dying or emigrating, or if there is an urgent need to repair or dismantle an item in which a defect is to be ascertained, then the interim taking of evidence can take place without a main proceeding being pending and without the need for detailed substantiation. As an alternative to evidence being in jeopardy, another sufficient prerequisite for the interim securing of evidence under the Swiss Code of Civil Procedure is that the applicant has made a prima facie case for his having a legitimate interest. In practice, the requirements set forth for the legitimate interest are kept low. Although the hurdle for instituting the proceeding for the interim taking of evidence is relatively low, it is nonetheless necessary to adequately identify the evidence so that the defendant is not forced to conduct an "internal investigation." Accordingly, a fishing expedition conducted against the defendant is not possible.*

107 An interim securing of evidence serves the purposes of procedural economy, since in some cases it can result in complete avoidance of the main proceeding, once the existence of a defect, the presence of an infringing action, etc., has been established.

!!! The interim securing of evidence before a court can forewarn the defendant. Therefore, if the evidence to be taken is used for an application for measures, the proceedings in question must be coordinated (see section 76 et seq.).

108 The interim securing of evidence can be of particular significance in connection with infringing actions that are committed via the Internet. Websites can be modified in mere seconds, in such a way that it may no longer be possible to prove their content after the fact. Although illegal Internet content can sometimes be perpetuated through the cache memory of search engines, even that does not document the entire content of a website.

!!! A more formal alternative to merely printing out website content is the ascertainment of the content of a website by a notary or court. For this purpose, in analogy to the interim securing of evidence, a log can be recorded of the content of a website. The interim securing of evidence is possible both within and outside a main proceeding.

4 Private expert opinion

a) Purpose, requirements, and content of an expert opinion

109 Expert opinions can support an application for interim measures. Their purpose is to support the court in its decision-making with expert legal or factual knowledge. A distinction is made between expert opinions on points of law (see section 117) and expert opinions on points of fact (see section 118).

110 Because of the restriction on types of evidence (see section 105) and the time pressure, the expert opinions commissioned by the parties are relevant to interim legal protection. Thus, the following remarks are focused on what are known as private expert opinions *(Parteigutachten).* It bears noting here that under the uniform case law a private expert opinion is not afforded the status of evidence, only that of a party submission.

111 In order to fulfil its purpose, an expert opinion must satisfy two key requirements: It must be authored by a specialist or expert, and it must be as independent, impartial, and unbiased as possible. The latter point is especially crucial in the case of expert opinions commissioned by the parties themselves. This is the only way to ensure that an expert opinion has influence over the court's decision-making.

112 Therefore, a great deal of attention must be paid to the selection of a specialist or expert, and in practice the standard approach is to prepare a list of possible candidates and contact them at an early stage. Prior involvement of the candidate with the same case or with one similar to it, especially personal relationships, contractual or dependency situations, prior activity as expert, or on-going business relationships can be an obstacle to a candidate's independence, impartiality, or unbiased status.

!!! Potential candidates should be contacted as soon as a conflict emerges that could necessitate the involvement of an expert. The primary consideration here is clarifying and ensuring their availability. The best candidates usually have limited availability and are under time pressure.

!!! In this way, the opposing party is also deprived of one's own dream candidate, who is also blocked from other expert activities in the same case.

113 If a suitable expert has been found, he must be instructed as to the layout and content of the desired expert opinion. This can prevent a situation in which the expert opinion does not deal with the actual topic or extensive rewriting is needed. One particular issue to clarify in this regard is whether the expert opinion is addressed to a specialised court that already possesses expertise or to a regular court.

!!! An expert opinion must be adapted to the specific knowledge of its target audience.

114 An expert opinion should have the following content:

a) Identification of the parties, the principal, and the target audience;
b) Brief description of the facts of the case and of the expert's mandate;
c) Complete list of the files made available to the expert and of his own research and sources;
d) Description of the factual foundations;
e) Description of the expert's own deliberations, analyses, and research concerning the expert question, which are to be documented fully and cleanly and for which sources are to be cited;
f) Substantiation of a specific finding and conclusion (centrepiece);
g) Answer to the question asked at the start or to the expert's mandate;
h) Any attachments (list of literature, expert's curriculum vitae, etc.).

115 Whenever possible, it should be stipulated with the expert that he will provide an advance draft of his expert opinion. That draft should be reviewed carefully. Statements at odds with one's own position should be identified. If possible, arrangements should be made with the expert for such statements to be removed. In addition, any unobjective polemics and harshly worded criticism should be removed, since that detracts from the credibility of an expert opinion. On the whole, however, it is important in any review to ensure that the expert opinion does not lose its objectivity, because otherwise it will inherently have little probative value.

!!! It is recommended that the final expert opinion be reviewed very critically so as to identify any weak points before the opposing party does so.

b) Expert opinions on points of law and on points of fact

116 Expert opinions can be commissioned to examine both legal issues and factual issues.

117 The subject matter of an expert opinion on points of law can be a concrete or abstract legal issue that merits particular attention. For example, expert opinions on points of law can be helpful if a specific question has not yet been addressed by the Federal Supreme Court, if an unsecured practice exists, or if a judicial practice is to be questioned.

Example: (concrete legal question): Who is the owner of the airplane attached in Germany with the Swiss registration number "IUB" and the aircraft type "BD-900-2B20 (IAA)"?

Example: (abstract legal question): What effects does a country's express waiver of immunity have on it and its assets with respect to the attachment of its assets in Switzerland?

!!! The question of whether an expert is to be presented with an abstract or concrete legal question must be considered carefully.

118 Special questions – e. g., technical or medical questions – can be answered through an expert opinion on points of fact.

Example: Why have cracks formed in the main façade? Which tradesman bears responsibility for this defect?

5 Locating assets

119 As long as the requirements of law are satisfied, attachment can be used to freeze assets of the debtor situated in Switzerland. This option exists in particular in the case of foreign debtors who hold assets in Switzerland. Attached assets can later be used to settle an acknowledged or judicially ascertained monetary claim against the debtor.

120 An application for attachment can succeed only if the creditor knows that the debtor has assets in Switzerland and where they are located. Ideally, the value of the attached assets is sufficient to cover the entirety of the attaching creditor's claim.

121 It is possible that the creditor is only aware of assets in an insufficient amount. This does not necessarily mean that the debtor does not have other assets in Switzerland. If some of the debtor's assets are attached in Switzerland, he will try to move his remaining assets in order to protect them. Thus, the attaching creditor has an interest in obtaining as full a record as possible of the attached debtor's assets in Switzerland.

122 To achieve this, an attempt should be made to uncover as many records or clues as possible concerning the attached debtor's assets before the application for attachment is filed. The available files are the starting point in this process. They must be searched systematically for any references to assets in Switzerland.

Example: Items to be searched for include references to bank accounts and stock portfolios, real estate holdings, valuable movable property (e. g., assets at trade fairs or in storage), or claims against third parties domiciled in Switzerland.

123 If the creditor has a substantial claim, it might be worthwhile to engage a private investigator to track down such assets, if the debtor's known assets in Switzerland are not enough to cover the claim and he is presumed to have additional assets in the country. Private investigators are usually able to exhaustively clear up such situations in short order.

!!! A private investigator's work is made much easier if clues about possible assets already exist. In this connection too, internal research can be worthwhile.

6 Document management

124 Although the subject of document management does not quicken the heart of the litigating party and his legal counsel, the systematic storage and maintenance of critical procedural documents plays an important role. In view of the very short deadlines that apply to interim measures as well as the fact that a substantial quantity of more or less relevant documents is often present, the ability to quickly access information can be a critical factor in the success of an application.

125 A dispute in which interim legal protection is necessary rarely arises overnight. Most such cases have backstories that may extend back over several years. It is critical that the attorney conducting the case be fully and completely informed by his client about the relevant facts and that he be furnished with all relevant documentation. Since clients are rarely prepared to the extent of being able to hand over to their attorney a complete, printed file, the first stage of preparing for a measure usually entails nothing short of an inundation of documents or information.

126 To ensure that the incoming information is stored and managed cleanly, a filing system should be agreed to at the start and then be adhered to by the entire litigating team. This system can be arranged by subject matter or in chronological order, and it can also be kept electronically and/or in print form.

!!! How to maintain the files and ensure that they are complete must be decided in conjunction with the attorneys conducting the procedure. As a rule, it is recommended that a responsible person (generally a paralegal) be appointed to be responsible for the clean, complete, and systematic filing of all documents.

!!! The files should be arranged by subject matter or in chronological order in such a way that information can be accessed at any time. This aspect should be considered even during the preparatory stage.

D

International aspects

1 Overview

127 Many cases have an international dimension, either because a party lives abroad, because foreign law is applicable, assets are situated abroad, or documents are written in a language other than that of the court. The international dimension can open up additional opportunities that should be exploited. However, internationality also means additional effort, e. g., because the content of foreign law must be proved or translations of documents must be produced. In order to keep the success of a measure from being endangered by deficient coordination, the respective preparations must be made in a timely fashion.

2 Use of foreign legal remedies in support of proceedings in Switzerland

a) Introduction

128 Legal institutions of our foreign trading partners can be used to support or prepare for interim measures in Switzerland. This is illustrated by several foreign examples.

b) Examples of measures by English civil courts

(i) *Freezing order* ("Prohibition of disposal")

129 The freezing order (previously known as a "Mareva injunction") is an interim measure under English law. It effectively comprises a ban on the disposal of assets by the defendant up to a specified amount. The freezing order is usually handed down without granting the defendant a hearing. A defendant who violates a freezing order is liable to contempt of court charges. However, the applicant does not gain prior rights to the assets of the accused.

130 Since 1989, the English courts have also issued "worldwide freezing orders" under certain conditions. This interim measure has proved to be very powerful and far-reaching and can also be effective in Switzerland if it is declared enforceable here. If the case is clear and there is good documentation, a freezing order can be obtained within one day.

Example: Excerpt from a freezing order (source: Civil Procedure Rules (UK), Practice Direction 25a):

"IT IS ORDERED that until further Order of the Court:-

1 The Respondent must not:-

(1) remove from England and Wales or in any way dispose of or deal with or diminish the value of any of his assets which are in England and Wales whether in his own name or not and whether solely or jointly owned up to the value of £ [amount], or

(2) in any way dispose of or deal with or diminish the value of any of his assets whether they are in or outside England or Wales whether in his own name or not and whether solely or jointly owned up to the same value. This prohibition includes the following assets in particular:

(a) the property known as [title/address] or the net sale money after payment of any mortgages if it has been sold;

(b) the property and assets of the Respondent's business known as (or carried on at [address]) or the sale money if any of them have been sold; and

(c) any money in the account numbered [a/c number] at [title/address].

2 (1) If the total unencumbered value of the Respondent's assets in England and Wales exceeds £ [amount], the Respondent may remove any of those assets from England and Wales or may dispose of or deal with them so long as the total unencumbered value of his assets still in England and Wales remains above £ [amount].

(2) If the total unencumbered value of the Respondent's assets in England and Wales does not exceed £ [amount], the Respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them, but if he has other assets outside

England and Wales the Respondent may dispose of or deal with those assets so long as the total unencumbered value of all his assets whether in or outside England and Wales remains above £ [amount].

[...]

PENAL NOTICE:
IF YOU THE WITHIN NAMED [name] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND LIABLE TO IMPRISONMENT OR FINED OR YOUR ASSETS SEIZED."

(see also THOMAS WEIBEL, Enforcement of English Freezing Orders ("Mareva Injunctions") in Switzerland, Basel/Geneva/Munich and Brussels 2005, 133 et seq.).

§§ The English freezing order can be enforced in Switzerland to impose restrictions on the disposal of a party's assets.

(ii) Disclosure Order

131 The freezing order is usually coupled with a disclosure order (previously known as an "Anton Piller order"). The defendant who is subject to the freezing order is obligated to disclose and affirm under oath information concerning the existence, nature, and whereabouts of his assets and to provide other information. The disclosure order can help ascertain whether the accused has assets and where they are. This can also result in the discovery of assets situated in Switzerland (bank accounts).

132 Besides the defendant, third parties can also be directly affected by disclosure orders. For example, banks can be ordered by the court to provide information concerning the whereabouts or the transfer point of specific assets.

Example: Excerpt from a disclosure order by the High Court of Justice, Queen's Bench Division, dated March 5, 2007:
"The Third Parties shall by 4.30 pm on 6 March 2007 provide to Claimant's solicitors the information identified in paragraph 1 of Schedule B [lifting date of cargo, seller, shipper, buyer, price, arrangements for payment, prepayment, if any, description of third parties involved, ...] (...) and copies of the documents identified in paragraph 2 of Schedule B (...)."

!!! A disclosure order can be used to obtain valuable information concerning the nature, location, scope, etc., of an opposing party's assets.

(iii) Gagging Order ("Information blockage")

133 The gagging order provides further support for the disclosure order. The court bars a third party that has a disclosure obligation from informing anyone – especially the affected party – of the issuance of a disclosure order. In this way, the applicant gains an informational advantage with regard to the whereabouts and movements of an adversary's assets. It is not until his assets are frozen that the adversary learns that his bank or business partner was ordered by the court to disclose sensitive information.

Example: Excerpt from a gagging order of the High Court of Justice, Queen's Bench Division, dated March 5, 2007:
"Until 4.30 pm on 19 March 2007 or such further time as the Court may determine and except for the purposes of obtaining legal advice and/or of preventing payment being made, the Third Parties must not directly or indirectly and whether by their servants or agents or otherwise howsoever inform anyone of the application pursuant to which this order was made, or of this Order, or of the nature, substance, or contents of the application or Order, or of the evidence or other material in support of this application and Order."

!!! A gagging order prevents an opposing party from learning of the informational advantage achieved through a disclosure order and from taking evasive measures.

c) Example of a support measure under US law

134 Under US procedural provisions, information must be provided to the opposing side on a large scale through the institution known as "pre-trial discovery." The information obtained in this way can be used, among other things, to gain information about events and/or assets in Switzerland. Pre-trial discovery is of relevance to all companies that are active in the US either directly or by way of a subsidiary.

Example: Section 26(b)(1) Federal Rules of Civil Procedure ("FRCP")
"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action (...), including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible thing and the identity and location of persons having knowledge of any discoverable matter. (...)"

135 The possible instruments for obtaining information are "interrogatories" (written questions posed to the opposing side), "depositions" (sworn witness statements made out-of-court), and "requests for production of documents" (written requests made of the opposing side to submit certain categories of documents). Because pre-trial discovery can be applied even when an unsubstantiated action is brought, this procedure, which often assumes the characteristics of a fishing expedition, can be used to obtain valuable information concerning the facts of the case. Such information can also be used for the purposes of a different proceeding, e. g., one in Switzerland.

136 The starting point for a pre-trial discovery is the jurisdiction of a US court and an accessible opposing party that is itself economically active in the US. In some cases it is even possible to use the US procedure to obtain documents from a foreign group company (that is not involved in the proceeding). A company's refusal to cooperate with pre-trial discovery and to turn over documents can have draconian consequences (e. g., evidentiary disadvantages, granting of the action, significant monetary fines).

3 Proof of foreign law

137 Foreign law can also be relevant upon the issuance of interim measures that are applied for from a Swiss court. In particular, the legal relationship from which the claim in the main action is derived could be governed by foreign law. However, foreign law can also be relevant to issues of capacity to sue or be sued and of the representation of foreign companies. Finally, foreign procedural rules can be of critical importance to the probative value of documents that were drafted by third parties specifically with regard to the judicial proceeding.

§§ *Under art. 16 (1) IPRG, the court must make an ex officio ascertainment of the content of the applicable foreign law. To that end, however, it can demand the cooperation of the parties and even require them to prove the foreign law in the case of claims involving an economic interest.*

138 Despite its duty to apply the foreign law ex officio, the Swiss court is usually familiar only with Swiss law. Thus, if foreign law is relevant to the issuance of an interim injunction, it must be made accessible to the court.

§§ *If the content of the applicable foreign law cannot be ascertained, then Swiss law is applicable (art. 16 (2) IPRG).*

139 In urgent cases, there is a danger that the court will apply this exemption clause if it cannot immediately ascertain the foreign law. Thus, if the foreign law is afforded critical importance, it is absolutely essential that the relevant proof be presented.

Example: The applicant wants to prove by way of an investigative report prepared by a (foreign) audit firm that the managing director of a foreign subsidiary has committed embezzlement and is thus liable for damages. Under Swiss procedural law, the investigative report is purely a party submission with no probative value. Under the law of the country in which the subsidiary is situated, the audit firm acts not only on behalf of the applicant, but is also accountable to the court and is thus obligated to maintain objectivity. By proving the respective provisions of foreign law, it may be possible to arrive at a situation in which the Swiss court ruling on measures attaches probative force to the investigative report.

140 The text of the relevant law must be submitted in the official language of the invoked court. If no official or unofficially published translations are available, translations must be prepared.

!!! Bilateral chambers of commerce are rich sources of unofficial published translations of statutes.

141 If possible, the interpretation of the law must be documented with extracts from commentaries, textbooks, and court decisions. These documents, or at least the factually relevant passages, must also be made available in the official language of

the court concerned with the application for measures.

142 In the absence of suitable commentaries, textbooks, and court decisions, consideration should be given to whether an expert opinion on points of law should be prepared (see section 109 et seq.). This too must be written in the respective official language or else be translated.

4 Translations

143 The official languages of Switzerland are German, French, Italian, and Romansh. Each canton can decide individually in what language citizens can communicate with their authorities. In judicial proceedings, the official language usually applies to documentary evidence as well. If such documents are not written in the official language, they must subsequently be translated, either in full or as excerpts.

!!! Even if courts accept pleadings and evidence in certain languages other than the official one(s), it cannot be assumed that the judges understand them adequately. This is also true of documents in English and French. Thus, it is always worthwhile to (additionally) submit translations to the court.

144 The translation must be of flawless quality. The choice of a translation institution is of critical importance, as the following example shows.

Example: The original text: "Die Vorinstanz hat die Beschwerdelegitimation von Fraudulent AG zu Unrecht bejaht."
The translation by an initial professional translation agency means the opposite of the original: *"The court of lower instance upheld that the appeal legitimation of Fraudulent AG was unjust."*
Translation by a reliable translation agency: *"The lower court wrongly affirmed Fraudulent AG's right of action in respect of appeal."*

145 When translating legal documents, the translator must possess specialised knowledge of law. It is worthwhile to identify certain key passages and terms in the documents to be translated at an early stage and to specify to the translation agency how they are to be translated in the context of the specific document. The same applies *mutatis mutandis* to terms that in some cases might be considered synonymous, but that in the context of the specific document deliberately convey a difference in meaning: In this case too, it could be of critical importance to the legal argument that the differentiation made in the foreign language also be incorporated into the translation. In such cases, it can be worthwhile to engage the outside attorney and cooperate with his preferred translation agency at an early stage.

Example: The legal term of art "Durchgriff" (disregarding the legal autonomy of an entity and asserting rights against the controlling person behind it) is not easily translated into English. In the English-speaking world, "Durchgriff" is translated *"piercing of the corporate veil"* (piercing the corporate veil). The correct translation of this key concept is ensured only if the translation agency has been instructed accordingly.

146 Translations must be commissioned in a timely fashion. As a rule (depending on the size of the document), at least ten business days must be allowed for. It must be ensured that the translation agency has the necessary capacity to deliver the translation on time.

!!! The translation can be done much more quickly if the translator can overwrite the document in the source language and does not need to worry about formatting. If possible, therefore, documents to be translated should be provided as Word documents, but in any event in electronic form.

147 Translations should be reviewed for accuracy before being submitted to the court. It is a good idea to include the attorney conducting the proceeding in this so that he can make sure that the correct terms are being used in the translations. This review can be time-consuming. Adequate time must be allowed for this as well. If the timing is too tight, at least random samples should be checked.

!!! In the case of lengthy translations, it might be worthwhile to have the completed parts of translations delivered on a rolling basis so that systematic errors can be identified as early as possible and corrected in the remaining parts.

148 It is necessary to be clear on whether, under the applicable procedural law, the translator must have special qualifications or whether the translation must be in a special form (e.g., authentication).

§§ *The Swiss Code of Civil Procedure – unlike the German Code of Civil Procedure, for example – contains no special requirements pertaining to translations and translators. In general, a private translation is adequate if it is not contested.*

§§ *If the interim injunction or the final decision is to be executed abroad, the requirements of the foreign legal system pertaining to translations of documentary evidence must be clarified so that problems with execution and duplication can be avoided.*

IV Defending against interim measures

A

Strategy and tactics

1 Overview

149 A well thought-out strategy and the right tactics are also critical factors for success in defending against interim measures. For example, procedural law provides instruments that can be used on the basis of strategic and tactical considerations, thus making an important contribution to a successful defence against measures. In order to utilise one's full potential at the right moment, corresponding preparations should in any event be begun at an early stage.

2 Pre-emptive Brief

150 In cases of particular urgency, a court can issue an interim measure without granting the defendant a hearing prior to the decision (see section 19 et seq.). The court is guided solely by the applicant's arguments. It is true that the justification for such ex parte issued measures is re-examined after the defendant has also been granted a hearing. However, ex parte measures can have extremely far-reaching effects.

Example: In the case of an intellectual property right infringement (example G), a prohibition can be issued on the sale of the illegally produced or used products. The applicant does not have to prove the infringement of his property right; only make a prima facie case for it.

151 The defending party can improve his position with what is known as a pre-emptive brief *(Schutzschrift).* This is a written submission in which the defending party presents its argument for why any application for the issuance of an ex parte measure should not be granted. This can prompt a court confronted with an application for ex parte measures to base its decision not only on the applicant's arguments, but also to incorporate the defendant's position into its decision. Also, the party submitting the pre-emptive brief can offer to be available to the court within hours for a hearing on any measure applied for. In this way, the opposing party's argument of urgency as a prerequisite for ordering an ex parte measure can be directly refuted.

152 The pre-emptive brief is submitted to the courts with which the opposing party might file an application for the issuance of an ex parte measure. It is submitted before the application is actually filed.

Example: The prayers in a protective letter could be something like the following (the defending party is designated the applicant in the pre-emptive brief; the party that might be applying for interim measures is the defendant):

"1. That the present pre-emptive brief be accepted as a preliminary opinion regarding any application by the defendant for the ordering of a provisional injunction without granting the applicant a hearing.

2. That the present pre-emptive brief be returned to the applicant if no application for the ordering of provisional injunctions is submitted within the statutory retention period of six months.

3. That any application by the defendant for the ordering of provisional injunctions without granting the applicant a hearing be rejected.

4. That the applicant be given the opportunity prior to the issuance of provisional injunctions to present an oral or written opinion as a supplement to the present pre-emptive brief."

153 In order to fulfil its purpose, a pre-emptive brief must, in terms of content, address the points that are relevant to a decision on an application for measures. If there is a risk that differences with an opposing party will cause the latter to apply for interim measures, it is recommended that all arguments put forward by the opposing party be suitably documented. The purpose of such records is to properly instruct the attorney in due course so that he can present the necessary counterarguments in the pre-emptive brief.

!!! If meetings, phone conversations, or even negotiations take place with an opposing party, it might make sense for one participant to concentrate on keeping a record of the arguments put forward by the opposing party.

154 It is also important that the right moment for submitting a pre-emptive brief not be missed. In any contacts with the opposing party, therefore, attention must be paid to indications of when he might file an application for measures or how far along he is in preparing for a possible application. If necessary, the attorney should be consulted about whether the submission of a pre-emptive brief is appropriate (already) in view of the available information.

!!! In order to allow for quick reaction as needed, it could make sense to prepare the pre-emptive brief at a relatively early stage, but to hold off with submitting it.

155 In order to have the full effect, the pre-emptive brief must be filed with all courts that potentially have jurisdiction for any application for measures. There is no central pre-emptive brief register in Switzerland that all courts could or would be required to consult. Thus, it is necessary to determine which courts have jurisdiction for the sort of application for measures anticipated by the opposing party.

§§ *The Swiss Code of Civil Procedure contains an express provision relating to pre-emptive briefs; thus, the previous differences in how pre-emptive briefs are handled by the individual cantons, and even by the individual courts (specifically, acceptance, service to the opposing party, retention period, duty or merely right to heed the pre-emptive brief), are now (largely) a thing of the past. The pre-emptive brief is communicated to the opposing party only if he actually files an application for measures. It is retained for six months from submission.*

156 The question of the possible venues for an application for measures by the opposing party must be clarified as early as possible. It is only if that situation is clear that the decision can be made about whether a pre-emptive brief should be prepared or submitted.

157 If the clarification of possible venues for the application for measures shows that the pre-emptive brief should be filed with numerous courts, the associated effort could lead to a decision to entirely forgo the filing of a pre-emptive brief. An alternative approach is to file with the courts that are the most likely targets of an application.

158 If the decision is made to forgo a pre-emptive brief, consideration should be given to addressing an "indirect pre-emptive brief" to the opposing party with the response to a warning notice. In that document, the opposing party's known arguments, or those presented in a warning notice, are contested with substantiation or even refuted if possible. Through this one's own arguments are disclosed to the opposing party. However, if the opposing side files an application for measures, he will not be able to avoid submitting the "indirect pre-emptive brief" as an attachment to his application for measures and addressing the arguments presented therein. The indirect effect of this is that a court will have knowledge of one's own arguments when deciding on the application for measures.

3 Security

159 Interim measures can have a far-reaching impact on the affected party and cause substantial harm. Therefore, the court can make the issuance and maintenance of interim measures dependent on the lodging of security. It orders security if the defendant succeeds in making a case for the potential harm that it could suffer if an unjustified interim injunction is issued.

160 A security can be prohibitive for the applicant. Its amount can exert financial and time pressure on the applicant. In that case, the applicant must for-

go interim legal protection. In addition, applicants are reluctant to lodge security because experience shows that security tends to be collected. Claimants are more likely to demand damages, and courts are more likely to award them, if security has been lodged for the loss.

161 Consequently, selectively preparing to substantiate a security application can be a promising strategy for defending against interim measures. Records and calculations of the probable amount of loss should be prepared.

!!! The court enjoys a great deal of discretion in setting the amount of the security. Thus, the potential loss must be described in such a way that the court is convinced of the security amount applied for.

4 Venue

162 Only a competent court can issue a valid interim measure. The arguments needed to contest territorial jurisdiction (and jurisdiction as to subject matter, if applicable) should be compiled in a timely fashion so that they can be submitted as needed. If the examination of which courts could possibly be approached by the opposing party with an application for an interim measure has not already been performed as part of considering whether a pre-emptive brief should be submitted, then it makes sense to clarify that question with regard to a possible challenge of territorial jurisdiction. Reference is made to section 63 et seq. regarding the question of which courts have jurisdiction.

5 Contesting urgency

163 Urgency is a prerequisite for any interim measure (see section 10 et seq.). Thus, it is strategically correct to devote a great deal of attention to the question of whether the required urgency is present.

164 The best argument against urgency is previous waiting on the part of the applicant. Specifically, if he has for weeks or even months tolerated the alleged risk that he now suddenly wishes to avert, then haste is called for and urgency must be denied. Rather, the applicant can be reasonably expected to first pursue the regular procedure.

165 If a prospective measure relates not to an on-going condition, but rather to a one-time event, then the defending party should attempt to create temporal distance, because urgency is undermined with the further passage of time. This can happen, for example, if the opposing party is forced to follow up because of open-ended answers to warnings or if a hand is held out for settlement negotiations, even if one's own willingness to reach a settlement is minimal (though not non-existent).

B

Coordination and Communication

1 Overview

166 Interim measures can be defended against successfully only if approached from all angles.

2 Coordination

167 If there is a threat of applications for measures before multiple courts, or if the application for measures in Switzerland is connected to other applications for measures abroad, the defence must be coordinated. Overall, reference is made to the remarks in sections 76 et seq. and 79 et seq. However, coordination can be much more difficult for the defending party, because the very act of clarifying the need for coordination takes time. If possible steps by the opposing side can be anticipated, and then it is necessary to retain local attorneys.

3 Validation

168 As a rule, interim measures are declared only for a limited period. The applicant must continue ("prosecute") the proceeding within that period by instituting a main proceeding (see section 82 et seq.). The usual rules apply to that proceeding, e. g., with regard to venue.

!!! Through what is known as an action for negative declaratory judgment, the defending party can establish the venue for the main proceeding. For example, he asks the court to declare that he is not violating the rights of the opposing party or owes that party nothing.

Example: The prayer in an action for negative declaratory judgment could read as follows:

"That it be declared that the claimant can in no way be held liable for the claims asserted by the defendant or for any other claims by the defendant."

169 If the defending party considers the venue of the main proceeding to be of critical importance, preparations should be made for such an action for negative declaratory judgment before the court that is acceptable to him so that action can be taken immediately after the opposing party applies for an interim measure or gains approval of such a measure.

4 Communication

170 It goes without saying that communication – both internal and external – is just as important in defending against interim measures as in preparing for them.

171 Besides attending to implementation of the court's prohibition or order, defendants affected by an interim measure should, in particular, not neglect internal communication. Unsettled employees want to know what is going on, what action their employer intends to take, and whether their jobs are at risk. It must also be clarified who in the company is exclusively responsible for external communication, as well as how and what things are to be communicated.

172 It is also necessary to inform unsettled contractual partners – in the area of sales, for example – not only of the existence and impact of an interim measure, but also, as needed, of the defendant's further legal and factual strategy. Otherwise the defendant might be dropped as an unreliable contractual partner, with almost irreparable consequences.

173 Otherwise, reference is made to the remarks in section 87 et seq.

C

Evidence

1 Overview

174 Interim measures rarely come out of the blue. A dispute has been brewing for some time, threats have been made, and positions have been taken. Instead of looking idly on, the proper approach is to anticipate the opposing party's actions whenever possible. This means, in particular, that the necessary evidence should be gathered and made available in an appropriate way.

2 Gathering evidence, preparing documentary evidence

175 In defending against an interim measure, the principle that "time is of the essence" applies every bit as much as it does in applying for such a measure. Urgency is not only a prerequisite for an interim measure; from the affected party's perspective as well; urgency is called for no later than upon the granting of an application for measures. The affected party wants to be free of the measure limiting his actions as quickly as possible.

176 To achieve this goal, evidence that is as clear, unmistakable, and credible as possible must be maintained or, if not yet present, obtained. Because testimonial evidence is not permitted for interim measures and evidence must be furnished primarily in the form of documents (see section 105), written documentation should be undertaken as much as possible.

§§ Under the Swiss Code of Civil Procedure (art. 254 (1) ZPO), evidence in summary proceedings must be provided in the form of physical records. Other evidence is admissible only to a limited extent, if that does not substantially delay the proceedings.

177 There are various ways to prepare for this documentary evidence requirement. For example, involved persons who have made observations relevant to the dispute can be asked to write out the facts that they have ascertained in an e-mail or letter to the affected party. Clients who have been competitively contacted by former employees (example F) should be asked to present their remarks (in as much detail as possible) in a written complaint addressed to management. In this way, liquid documentary evidence can be created for use in court. Witness testimony is thus replaced by documentary evidence in the form of written documents. However, care should always be taken to keep potential witnesses for the subsequent main proceeding from being disqualified through written statements that are specially prepared for a proceeding on measures.

178 The question of whether the defendant company is legally incorporated abroad and has liquidity must be clarified with the foreign register authorities in a timely fashion. Documents to that effect must be

requested. Depending on what the problem is, written investigative reports by private investigators can also provide valuable documentary evidence.

!!! Often the richest reservoir of potential documentary evidence is internal and external e-mail correspondence. Because of its considerable scope, relevant correspondence may sometimes be forgotten. Thus, a systematic review of e-mail correspondence can uncover true pearls of evidence.

!!! Another equally meaningful form of documentary evidence is a dated printout of a website on which the respondent is offering his trademark-infringing products for sale.

3 Private Expert Opinion

179 If an interim measure is imminent, it is usually possible to determine what legal questions will be relevant. In some cases it makes sense to prepare expert opinions concerning the relevant questions. Reference is made to the remarks in section 109 et seq. in this regard.

4 Document management

180 In significant matters where there is financial justification for extensive and comprehensive preparation of the defensive measures, numerous documents will quickly make their way into the hands of the defending party. If worse comes to worst, those documents must be readily accessible. It is also necessary to keep track of what documents are already present, which ones still need to be obtained, who is handling that, and when the documents can be expected. The remarks in section 124 et seq. apply by analogy.

D

International aspects

1 Proof of foreign law

181 The applicable foreign law can provide the critical arguments in successfully defending against a measure. Therefore, the defending party too should ensure that the relevant provisions of law can be made accessible to the court in a suitable way. Reference is made to section 137 et seq.

2 Translations

182 As a rule, the defending party too must submit his documentary evidence in the court's official language. Translations of foreign-language documents must be prepared in a timely fashion. The remarks in section 143 et seq. apply by analogy.

V Checklist for preparing for interim measures

Warning

- No warning if the intended effect can, from the outset, only be achieved with the surprise effect of an ex parte measure.
- The warning must clearly state what action the addressee is being asked to perform or desist from.
- A short and reasonable deadline should be set in the warning.
- In the event of time-critical measures, no follow-up and no settlement negotiations.

Timing

- Make the decision about procedural action carefully.
- Clarify what time horizon is available for obtaining a measure.
- Taking into account the available time, begin preparations in a timely fashion.

Involvement of the criminal justice authorities

- Can an effect be achieved by involving the criminal justice authorities that cannot be achieved by civil means, or that can be achieved only with difficulty?
- Is there a risk that the lack of control over a criminal proceeding, once it has started, will become a problem over the course of the dispute (e. g., because it makes a settlement impossible)?

Venue

- Is there a mandatory venue that rules out the possibility of an application at the opposing side's domicile or registered office?
- With contractual claims: Is there a choice of venue clause? Can the chosen court decline its jurisdiction?
- With non-contractual claims: Where are the places where the act was committed and had its effects?
- In the international context: If the opposing party does not have its domicile or registered office in Switzerland, is the disputed performance nevertheless to be rendered in Switzerland?
- Is there a special jurisdiction for interim measures?
- Which is the most suitable venue?

Coordination of different venues

- Should multiple measures be applied for before different courts?
- Do not submit an application for measures before the coordination of all measures has been ensured.

International coordination

- Is it necessary or possible to simultaneously apply for measures abroad?
- No application for measures before the coordination of all measures has been ensured.

Validation

- Plan measure and validation in parallel.
- Carry out clarifications and apply precautions with regard to validation.
- Institute any main proceeding simultaneously with the application for measures (securing the venue).

Communication

- Define responsibilities.
- Formulate a statement ("standby communiqué") and keep it updated.
- Do not forget about internal communication

Gathering evidence

- Determine at an early stage all legally relevant factual elements and the evidence necessary to prove them.
- Undertake the time-consuming gathering and processing of evidence in a timely fashion.

Interim preservation of evidence
- Secure evidence in a suitable format.
- If necessary, apply to the court for the interim preservation of evidence.

Private expert opinion
- Identify and contact potential experts at an early stage.
- Be sure of the expert's technical knowledge and independence.
- Carefully define (abstractly or concretely) the question to be answered by the expert.
- Give the expert exact instructions about the layout and content of the expert opinion.
- Carefully review the final expert opinion and the expert's answer to the question.

Locating assets
- Examine the existing documents for references to assets in Switzerland.
- If the references are not specific enough, or if it is suspected that further assets are present, look into engaging a private investigator.

Document management
- Establish a document filing system.
- Designate a responsible person.

Use of foreign legal remedies
- Can foreign legal remedies be used to supplement or support the measure in Switzerland?
- If applicable, ensure coordination.

Proof of foreign law
- Is foreign law relevant to the issuance of the measure to be applied for?
- Are the texts of the relevant laws available in the court's official language?
- Are commentaries, textbooks, and court decisions available that support the interpretation of the provisions of law?
- Is it necessary to prepare an expert opinion on the foreign law?
- Preparation of translations of all essential foreign-language documents.

Translations
- Ensure translation quality.
- Clarify the time needed.
- Clarify whether the translations must be in a special form (e. g., authentication).
- Commission translations in a timely fashion.
- Instructions for the translators (key terms, formatting, etc.).
- Organise (over-writable) electronic versions of the documents to be translated.
- Check translations.

VI Checklist for defending against interim measures

Pre-emptive Brief
- Document the opposing side's arguments.
- Focus attention on the time of a possible application.
- Prepare the pre-emptive brief at an early stage so that quick reaction is possible.
- Clarify the possible venues for an application for measures by the opposing side.
- Submit the pre-emptive brief to all the courts to which the opposing side might address its application for interim measures.
- If there are too many potential venues, look into an indirect pre-emptive brief.

Security
- Quantify the loss that could be caused by a measure.
- Compile records that support the possible loss.

Venue
- Clarify which courts would have jurisdiction for an application for measures.
- Compile arguments for contesting territorial jurisdiction.

Contesting urgency
- Create temporal distance between the relevant event and the application for measures.
- Cause the opposing party to follow up.
- Even in the case of minimal willingness to reach a settlement, agree to settlement negotiations.

Coordination
- Try to anticipate possible steps by the opposing party: Is the opposing party applying for measures at different locations, including abroad?
- Clarify whether the engagement of local attorneys will be necessary.
- If applicable, establish contacts that can be quickly activated if needed.

Validation
- Check whether the venue for the main proceeding can and should be set by way of an action for negative declaratory judgment.
- If applicable, prepare the action for negative declaratory judgment in a timely fashion so that it can be submitted immediately after the opposing party applies for measures.

Communication
- Define responsibilities.
- Formulate a statement ("standby communiqué") and keep it updated.
- Do not forget about internal communication

Gathering evidence, preparing documentary evidence
- Determine at an early stage all legally relevant factual elements and the evidence necessary to prove them.
- Undertake the time-consuming gathering and processing of evidence in a timely fashion.
- Prepare written evidence if possible.

Private expert opinion
- Identify and contact potential experts at an early stage.
- Be sure of the expert's technical knowledge and independence.
- Carefully define (abstractly or concretely) the question to be answered by the expert.
- Give the expert exact instructions about the layout and content of the expert opinion.
- Carefully review the final expert opinion and the expert's answer to the question.

Document management
- Establish a document filing system.
- Designate a responsible person.

Use of foreign legal remedies

- Can foreign legal remedies help defend against an application for measures in Switzerland?
- If applicable, ensure coordination.

Proof of foreign law

- Is foreign law relevant to the issuance of the measure to be applied for?
- Are the texts of the relevant laws available in the court's official language?
- Are commentaries, textbooks, and court decisions available that support the interpretation of the provisions of law?
- Is it necessary to prepare an expert opinion on the foreign law?
- Preparation of translations of all essential foreign-language documents.

Translations

- Ensure translation quality.
- Clarify the time needed. Commission translations in a timely fashion.
- Instructions for the translators (key terms, formatting, etc.).
- Check translations.
- Organise (over-writable) electronic versions of the documents to be translated.
- Clarify whether the translations must be in a special form (e. g., authentication).

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