

January 10 2023

Protective letters: a way to avoid securing claims?

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- › **Ex-parte proceedings**
- › **Prevention is better than cure**
- › **Non-uniform practice**
- › **Proposed changes**
- › **Comment**

Unlike other jurisdictions, Polish civil procedure does not contain separate provisions on the subject of protective letters. Recently, however, there has been increasing debate around the need to regulate this institution, particularly in connection with securing claims in cases relating to intellectual property.

Ex-parte proceedings

As a matter of principle, the court's decision to secure a claim is based solely on the assertions of the party interested in being granted security. The court should act expeditiously in such proceedings. Therefore, the application should be examined without delay, but no later than a week from receipt. The main assumptions of a security procedure are both its speed and the ability to conduct it without participation of the obligated party – at least until the court grants the security requested by the opponent. This often leads to a situation where the institution of security is abused, and protection is granted based on the claims of the party requesting security which may be unilateral and incompatible with the actual circumstances of the case.

On the other hand, granting security in this situation often significantly complicates the obligated party's situation, particularly when the security consists of the obligation to refrain from certain activities (eg,

a prohibition against trading in certain goods for the duration of the court proceedings). Suspending the execution or revoking the security, even if it is granted on the basis of unreliably and selectively presented information by the other party, often takes a very long time. From the point of view of the obligated party's interests, this situation may, in extreme cases, even lead to the necessity to stop the business activity altogether. The consequences of such actions are borne, not only by the obligated party itself, but also by other parties, particularly its employees, contractors, or customers.

Filing a protective letter with the court may be a solution to avoid or minimise the adverse consequences of such situations.

Prevention is better than cure

The primary purpose of a protective letter is to prevent the court from unjustifiably granting security when an opponent is expected to apply for it.

The content of a protective letter is tailored to the specific circumstances of the case. It includes a statement of the circumstances relating to the expected request for security and an explanation of the reason why interim protection should not be granted in the case. In particular, a protective letter:

- identifies the entity or entities that may request interim protection;
- indicates the reason why there has been no infringement that would justify the grant of interim protection; and
- indicates how the interim protection will prejudice the interests of the potential obligor (eg, by causing damage).

Therefore, filing a protective letter makes it possible to pre-empt the opponent's actions and defend against the other party's expected actions before the court decides whether to grant the requested security. It allows the potential obligor's position to be presented to court and thus reduces the risk interim protection being granted unjustifiably and the consequences thereof, which are often irreversible. This is a key advantage of this tool.

Non-uniform practice

In the absence of regulation of this institution in civil procedure rules, the approach of Polish courts to protective letters varies greatly.

Submitting a protective letter does not initiate separate court proceedings. Doubts concerning the treatment of protective letters arise at their filing with the court. This is because there is no uniform solution concerning their registration or inclusion in the file of a subsequently initiated case for granting security.

Similarly, the issue of providing access to the protection letter to the entity interested in obtaining security - in particular prior to the filing of a request for interim protection, or even the mere requirement for the court to read the content of the protective letter (for this reason, one practice is to return filed protective letters without the courts reading them) is not regulated anywhere.

In the practice of the 22nd Intellectual Property Division of the Warsaw Regional Court (one of five regional courts in Poland that hear intellectual property cases), a protective letter is registered in the log of correspondence received by the Division. At the same time, the Division president orders that all judges adjudicating in the Division be informed of receiving the protective letter. The information sent out includes the:

- fact of receipt of the letter;
- entity that lodged the letter;
- entity that will request interim protection; and
- claims to be covered by the interim protection request expected by the entity submitting the letter.

If an interim protection request is received, the judge who examines the request takes further action concerning the protective letter. In this respect, one of the following solutions is possible:

- The judge may disregard the prohibitive letter on the ground that it was filed before the commencement of the proceedings.
- The judge may take note of the content of the protective letter without including the letter in the file and without disclosing the fact of taking note of the content of the letter to the entitled party.
- The judge may take note of the content of the protective letter with an order to include the letter in the file and may disclose the fact of taking note of the content of the letter to the entitled party.

However, this is not the exclusive practice of the courts in handling protective letters.

Proposed changes

At the end of 2021, the Confederation Lewiatan, a nationwide organisation of employers, submitted an initiative to introduce the institution of protective letters into the legal order to the president of the public prosecutor's office.⁽²⁾ The proposed solution predicted the introduction of new provisions in the Code of Civil Proceedings regulating security proceedings and referred directly to protective letters filed in intellectual property cases (including cases for the protection of industrial property rights and the protection of other intangible property rights).

The solution proposed that:

- the protective letter be attached to the file, and that a copy of the protective letter be made available to the entity that requests security before the request is examined;
- the duration of effects of protective letters be specified (for six months, extendable by another six months); and
- a central repository for electronic protective letters be created.

This is not the only proposal for a statutory regulation of this institution. According to another initiative expressed in the literature,⁽³⁾ it has also been proposed to add a new provision to the Civil Procedure Code providing for the possibility of filing a protective letter containing the position of a potential obligor before applying to secure a claim in intellectual property cases.

The proposed solution assumes that the protective letter would be attached to the file of the case in which a request for security has been filed and, if a request has not been filed within six months, the protective letter would be returned. The protective letter would be delivered to the party who requested security together with a copy of the court's decision regarding security. According to this initiative, the protective letter relating to a request for the preservation of evidence in intellectual property cases would also be regulated separately.

Comment

So far, the proposals for regulating the institution of protective letters have not been reflected in regulations. However, the statutory regulation of protective letters would undoubtedly contribute to the unification of the practice of applying this measure and would increase its use, possibly also in cases other than industrial property.

At the same time, this tool's introduction and application should be postulated in a manner that would not oppose the implementation of legitimate objectives of security proceedings – thwarting such proceedings in cases when a quick granting of security is justified and necessary.

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Endnotes

(1) See A Gołaszewska, Postępowanie zabezpieczające w sprawach własności intelektualnej, *Palestra* No. 6/2022, p 56-57.

(2) See (Accessed: 19 November 2022):

- A letter of protection will reduce the risk of issuing unjustified security claims.
- Proposal of the Lewiatan Confederation to introduce the institution of letters of protection into the Polish legal system.

(3) See J R Antoniuk, Pismo zaporowe w postępowaniach o udzielenie zabezpieczenia roszczenia i zabezpieczenie środka dowodowego, *MOP* year 2022 No. 6, p 296.