

## **Poland | security of claims (temporary injunction) - an important creditor protection instrument**

A motion for security is an invaluable tool designed to ensure that civil proceedings achieve their purpose, however long they last. Yet, it is crucial to prepare the motion thoroughly, as an ill-prepared motion may worsen the situation of the entitled party.

### **SECURITY OF CLAIMS (TEMPORARY INJUNCTION) - AN IMPORTANT CREDITOR PROTECTION INSTRUMENT**

#### **INTRODUCTION**

Several years usually elapse between the start of a dispute between the parties and a final judgment in a civil case. It is often the case that, even before a statement of claim has been filed, there is a justified fear that obtaining a favourable judgment will not be equivalent to a successful conclusion of the case. This is because it is not possible to enforce the judgment at that time, or the lack of security will otherwise prevent or seriously impede the achievement of the purpose of the proceedings – whether due to the debtor divesting their assets or for other reasons.

The legislator allows the court to grant injunctive relief both before and during the proceedings in which a party asserts a claim to prevent the negative consequences of waiting for a final decision.

#### **WHO CAN APPLY FOR SECURITY?**

Any party or participant in the proceedings may apply security if they can make two things plausible: the claim and the legal interest in granting security. These two elements must be made plausible in the motion. The parties to the security proceedings are the obligee (the applicant) and the obligor.

The requirement of plausibility is a more lenient requirement than the requirement of proof. The point is to make a given circumstance credible, to show that it is probable. Theoretically, the claimant, therefore, faces an easier task than in the course of the proceedings in which the claim is asserted. However, our practice shows that some courts equate the requirement of plausibility with the requirement of proof. Adopting such far-reaching requirements by the court for the entitled party results in the dismissal of the motion for security. This is because, at the stage before the commencement of the main proceedings or at their beginning (before the evidence is taken), it is usually impossible to prove the claim.

A legal interest in granting security exists when the lack of security will prevent or seriously impede the enforcement of the decision made in the case or otherwise prevent or seriously impede the achievement of the purpose of the proceedings in the case. The claimant most often substantiates this premise by pointing to the fact that the obligor is disposing of assets or that their financial situation is systematically deteriorating and does not portend improvement.

To make their claim plausible, the obligee indicates facts from which they derive their position on the legitimacy of the claim and provide legal substantiation. To strengthen the argumentation, the obligee, most often already in the motion, presents evidence (documents), making the existence of the claim plausible, i.e. confirming the facts indicated by them.

## **MANNER OF SECURITY**

The obligee must also indicate the manner of security in the motion for security. The legislator has defined a closed catalogue of ways of securing monetary claims. In such cases, the entitled party must, therefore, indicate at least one of these methods in the motion and cannot effectively indicate a method not listed in the statutory catalogue.

In the case of non-monetary claims, the legislator provided for greater freedom. The Code of Civil Procedure provides an exemplary catalogue of ways of securing claims. However, there are no obstacles to requesting a different manner of security, provided it is adequate to the circumstances of the case. For example, it may be a prohibition to dispose of the real estate or temporary use of the real estate within the scope of the easement of the necessary road, the establishment of which is requested by the requesting party.

In motions for security, entitled parties often indicate more than one manner of security to give the court more leeway in ruling. However, it should be remembered that when indicating the manner of security, one should be guided by such directives as the court will be guided by when considering the motion. The interests of the obligated parties should, therefore, be taken into account in order not to overburden them.

## **AMOUNT OF SECURITY**

Indicating the amount of security is another mandatory element in the motion to secure monetary claims. This sum may include the claimed amount, the amount of interest on that amount up to the date of the order granting security, and the costs of enforcement of the security or the anticipated costs of proceedings.

The anticipated costs of proceedings are the potential amount that may be awarded to the claimant from the unsuccessful party in the proceedings in which the claim covered by the request for security is asserted. In contrast, the costs of enforcing the security vary depending on the manner of security. These may be either the court enforcement officer's costs or the costs of an application for entry into the land and mortgage register.

Subsequently, the amount of security specified by the obligee will be binding for the court. It means that the court cannot grant security for a sum higher than that indicated by the entitled party.

## **FEE FOR A MOTION FOR SECURITY**

Motions for security are subject to a fee, which varies depending on when the motion is filed. As indicated in the introduction, the motion for security may be filed:

- 1) prior to the commencement of the proceedings in which the claimant is pursuing the claim,
- 2) as well as during the proceedings, in which case the motion constitutes a separate procedural letter. In the former case, if the court grants security, it sets the claimant a deadline of no more than two weeks to file the letter initiating the proceedings.

If a party requests to secure a claim during the proceedings or in a letter initiating the proceedings (e.g. a statement of claim), then an application fee of PLN 100 is charged. If a request to secure a claim is submitted before proceedings begin, the fee equals one-fourth of the fee for a statement of claim. This fee is counted towards the fee for the statement of claim if it is paid within the time limit specified in the order to secure the claim. If the motion is dismissed, the fee is counted towards the fee for the

statement of claim within two weeks from the date of service of the order of dismissal or, if the order was made at a public hearing, from the date of its announcement.

### **EXAMINATION OF THE MOTION BY THE COURT**

The motion shall be dealt with by the court that is competent to hear the case in the first instance. If the motion is made in the course of proceedings, the court competent to consider the motion shall be the court of that instance in which the proceedings are pending, except where that court is the Supreme Court. In that case, the court of first instance shall decide on security. The motion should be examined within a week of its submission, but this is only an instructional deadline.

In the vast majority of cases, the court examines the motion for security of the claim *in camera*, without hearing the parties and without taking evidence. Therefore, it is of the utmost importance to formulate the motion in a duly convincing manner. This is because it is the letter that will form the basis of the ruling, and it is this letter that the court will rely on when deciding whether the prerequisites for granting security are met. If the motion is filed at a later stage of the case, the court must consider all the evidence gathered so far.

It is standard practice for the motion to be considered without the knowledge of the obligor. This is not the case in intellectual property cases, where hearing the obligor is a rule. It is a justified approach, as being aware of the pending security case, the obligor could take steps to obstruct the intended effect of the security order. Such a pre-emptive step could be the sale of the real estate on which the entitled party demands a compulsory mortgage.

If the decision to grant security is enforceable by the enforcement authority or stipulates the encumbrance of the real estate with a compulsory mortgage, it is only served on the obligor when the actions necessary for the enforcement of the security are taken. At this stage, it is the entitled party who, having been served with the order on security, must take the appropriate steps to initiate the actions either of the enforcement authority or of the land and mortgage court.

However, neither the decision refusing to grant security nor the complaint of the entitled party and the decision of the court of second instance ruling on the complaint are served on the obligor.

The decision of the court of first instance on security may be appealed against by both the entitled party and the obligor. If the motion for security was examined by the court of second instance (when the motion was filed at the appeal stage), the parties also have the right to appeal.

### **REPEAL, MODIFICATION, AND LAPSE OF A SECURITY**

The security granted may be revoked or modified at the request of the obligor. Such a modification will occur if the reason for the security falls away or changes.

The security may also lapse. A lapse of the security occurs, among other things, if the obligor deposits the sum of the security into the deposit account of the Minister of Finance, if the claim is returned or dismissed, or in connection with the substantive termination of the main proceedings. Furthermore, the security will lapse if the obligee has applied for security before the proceedings commenced and has not initiated the main proceedings for the entire claim within the time limit set by the court or has applied for a claim other than the one secured.

## **SUMMARY**

A motion for securing a claim is a useful way of protecting one's rights against disloyal actions by the other party which may result in not achieving the purpose of the civil proceedings. However, it is important to prepare properly for the filing of a motion for security. An ill-prepared motion will not only be disregarded by the court, but it may also worsen the litigation position of the obligee in the main proceedings, especially if the other party learns about the security proceedings. It is, therefore, crucial to prepare a strategy for the entire civil proceedings at this stage. When filing a motion not in the course of the case, it is also necessary to take into account the need to initiate the main proceedings quickly.

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