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# PRETHODNE MERE - SPREČAVANJE ZLOUPOTREBE KOD POZIVA NA PLAĆANJE PO GARANCIJAMA

*Prenosimo u celosti izlaganje dr Zeiler-a sa MTK Austrija, Druge globalne konferencije o bankarskim garancijama, održane u Beču, 29. i 30 maja 2007. godine.*

Tema izlaganja: "Prethodne mere - sprečavanje zloupotrebe kod poziva na plaćanje po garancijama" imala je za cilj da obradi izuzetke od principa: "prvo plati - posle se spori". Dr Zeiler se suočio sa izuzetno širokom temom koja je mogla da ispuni ukupan program ove Konferencije te je u svom izlaganju pokušao da ukaže na neke od problema u radu sa garancijama.

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# INTERIM INJUNCTIONS - PREVENTION OF UNFAIR CALLING UNDER GUARANTEES

We present the integral speech of Dr. Zeiler delivered at the ICC Austria 2<sup>nd</sup> Global Conference on Bank Guarantees held in Vienna, 29 and 30 May 2007.

The topic of the speech, “Interim Injunctions – Prevention of Unfair Calling under Guarantees” aimed at presenting the exceptions to the principle “pay first - argue later”. Having faced with the fact that the scope of the topic that could have easily fill a full Conference program, Dr. Zeiler attempted to cover some of the challenges in handling the guarantees.

*banking practices*

## A. Uvod

1. Za bankarske garancije kaže se da čine krvotok međunarodne trgovine<sup>1</sup>. Činjenica da korisnik bankarske garancije može da dobije plaćanje od banke bez ulaženja u duge procedure bilo sa bankom bilo sa nalogodavcem bez sumnje je od velikog značaja. To se često naziva "prvo plati - posle se spori".

2. Međutim, kao i kod svakog pravila, ima izuzetaka od principa "prvo plati - posle se spori". Zatraženo je da u svom prilogu obradim ove izuzetke. Ubrzo pošto sam prihvatio ovaj predlog, otkrio sam naravno da bi tema lako mogla da ispunji ukupan program Konferencije i da čak ni tada ne bi bilo moguće obraditi ga iscrpno. Na žalost po mene, a na vašu radost, organizatori Konferencije nisu mi dozvolili da govorim ceo dan, već samo narednih 20 minuta što me nagoni da budem kratak, precizan i direktn. Pokušaću da odgovorim ovim očekivanjima ali se unapred izvinjavam ako zbog toga budem suviše kratak, idem prečicama i ostanem na površini nekih pitanja. Više ću postavljati pitanja nego što ću dati odgovore. Bar će se na taj način pokazati gde su problemi.

3. Očigledno će biti situacija u kojima princip "prvo plati - posle se spori" neće biti prikladan. Biće situacija u kojima korisnik bankarske garancije nesumnjivo nema pravo na plaćanje iz bankarske garancije. U nekim situacijama, nepostojanje ovog prava može da bude toliko očigledno i prenaglašeno da će interes nalogodavca da nadjača i opšti interes za jednostavnošću u spoljnoj trgovini i princip "prvo plati - posle se spori". Takvi izuzeci mogu se naći u jurisdikcijama građanskog prava kao i u jurisdikcijama anglosaksonskog prava.

4. Dogmatske konstrukcije odnosnih izuzetaka su različite u jurisdikcijama građanskog prava i anglosaksonskog prava.

5. U jurisdikcijama građanskog prava, kao što su Nemačka i Austrija, doktrina zloupotrebe prava ("Rechtsmissbrauch")

konstituiše izuzetak od pravila.

6. Jurisdikcije anglosaksonskog prava bave se problemom nefer poziva po bankarskoj garanciji primenom doktrine prevare. Tako, osnovna ideja je u tome da postoji izuzetak od obaveze banke garanta da honoriše bankarsku garanciju ako poziv za plaćanje bude upućen prevarno.

7. Koristiću svoje vreme da pokušam da identifikujem najznačajnije probleme u međunarodnom kontekstu.



8. Kao austrijski advokat svakako da ću odabrati za oslonac austrijsko pravo. Međunarodno pravo i Evropska regulativa imaju izvesnu ulogu. I u međunarodnom kontekstu, neizbežne su reference na druge jurisdikcije. Obećavam da ću se koliko je moguće uzdržati od osvrta na pravo drugih zemalja gde je moje znanje u najboljem slučaju površno na amaterski način.

## B. Austrijsko pravo

9. Počeću sa situacijom u Austriji.

10. Moja tema se odnosi na privremene mere. Po austrijskom zakonu, da bi se dobila privremena mera, mora da postoji znatan zahtev prema drugoj strani. U našem slučaju, to bi bio zahtev da se korisnik uzdrži od poziva baci po osnovu garancije ili da odustane od

<sup>1</sup> United City Merchants (Investments) Ltd. And Glas Fibres and Equipment Ltd. v. Royal Bank of Canada, Vitrórefuerzos S.A. and Banco Continental S.A., 31.03.1981, 1 Lloyds Rep. 1984, 604, 612.

## A. Introduction

1. The functioning of bank guarantees has been described as the lifeblood of international commerce.<sup>1</sup> The fact that the beneficiary of a bank guarantee can obtain payment from the bank without having to engage in lengthy proceedings with either the bank or the account party is undoubtedly of great significance. This is often referred to as “pay first - argue later”.

2. However, as with every good rule, there are exceptions to the “pay first - argue later” principle. I have been asked to deal with these exceptions in my contribution. Shortly after having accepted this proposal, I discovered of course that the topic could easily fill a full conference program and that even then it might not be possible to deal with it exhaustively. Unfortunately for me, and luckily for you, the organisers of this conference did not allow me to speak about my topic a whole day but rather the following 20 minutes which forces me to be short, precise and to the point. I will try to live up to these expectations but apologize in advance if, as a result, I will sometimes be too short, take shortcuts and remain on the surface of some issues. I will rather pose questions than provide answers. But at least this will show where the problems are.

3. There will obviously be situations where the “pay first - argue later” principle will appear to be inappropriate. There will be situations where the beneficiary of the bank guarantee undoubtedly is materially not entitled to payment from the bank guarantee. In some situations, the lack of this entitlement may be so apparent and blatant that the interest of the account party will override the general interest in the fluency of international commerce and the principle of “pay first - argue later”. Such exceptions can be found in civil law as well as in common law jurisdictions.

4. The dogmatic constructions of the respective exceptions are different in civil and common law jurisdictions.

5. In civil law jurisdictions, such as Germany and Austria, the doctrine of abuse of rights (“*Rechtsmissbrauch*”) constitutes the exception to

the rule.

6. Common law jurisdictions deal with the problem of the unfair calling of bank guarantees by applying the doctrine of fraud. Thus, so the basic idea, there is an exception from the guaranteeing bank’s obligation to honour the bank guarantee if the claim for payment is made fraudulently.

7. I will use my time in order to try and identify the most significant problems - in particular in an international context.

8. As an Austrian lawyer, I will of course choose Austrian law as my starting point. We will see that international law and European regulations play a certain role. And in the international context, references to other jurisdictions will of course be unavoidable. I promise however that I will refrain as much as possible from discussing the law of other countries where my knowledge is at best superficial in an amateurish kind of way.

## B. Austrian law

9. Let me now start with the situation in Austria.

10. My topic is interim injunctions. Under Austrian law, in order to get an interim injunction, one must have a substantive claim against another party. In our case, that would be a claim against the beneficiary to refrain from calling a bank guarantee respectively to revoke an already made call - or it could also be a claim against the bank not to pay the guarantee although the latter had been called.

11. Our first question is therefore the following: Is there a basis for such claims in Austrian substantive law?

12. Of course, the answer is yes. Austrian law, similar to other civil law jurisdictions like Germany<sup>2</sup>, qualifies the unfair calling of a bank guarantee as an abusive exercise of a right (*mißbräuchliche Rechtsausübung*).

13. The legal basis for a remedy against such an abuse can be found in s. 1295(2) Austrian Civil Code (“ACC” - *Allgemeines Bürgerliches Gesetzbuch* - ABGB), which very generally stipulates that anyone who intentionally inflicts damage *contra bonos mores*

<sup>1</sup> *United City Merchants (Investments) Ltd. and Glass Fibres and Equipments Ltd. v. Royal Bank of Canada, Vitrorefuerzos S.A. and Banco Continental S.A.*, 31.3.1981, 1 Lloyds Rep. 1984, 604, 612.

<sup>2</sup> German law allows preventing the calling of bank guarantees in the case of an abuse of rights as well („*Rechtsmissbrauch*“). This exception is based on § 242 of the German Civil Code (“GCC”) which generally prescribes that a debtor must fulfil his obligations in the manner required by good faith.

već učinjenog poziva - ili to može biti zahtev protiv banke da ne plati po garanciji mada je učinjen poziv.

11. Naše prvo pitanje je sledeće: da li postoji u austrijskom materijalnom pravu osnov za takav zahtev?

12. Naravno, odgovor je potvrđan. Austrijski zakon, slično drugim jurisdikcijama građanskog prava, kao što je Nemačka<sup>2</sup>, kvalifikuju nefer poziv po bankarskoj garanciji kao zloupotrebu korišćenja prava (missbrauchliche Rechtsausubung).

13. Pravni osnov za lek protiv takve zloupotrebe može se naći u s. 1295 (2) Austrijskog građanskog zakonika ("ACC" - Allgemeines Bürgerliches Gesetzbuch - ABGB), koji vrlo uopšteno stipuliše da onaj ko namerno nanosi štetu *contra bonos mores* odgovara za to.

14. Po ovoj doktrini, austrijsko pravo priznaje zahtev nalogodavca protiv korisnika kao i protiv banke. Ali, mora se činiti jasna razlika između ova dva zahteva.

#### a. Zahtevi protiv korisnika

15. Počinjemo sa zahtevom nalogodavca protiv korisnika.

16. Ako je bankarska garancija pozvana nefer ili postoji rizik da će to biti slučaj, nalogodavac može da zahteva od korisnika da se uzdrži od poziva garancije ili da povuče već podnet zahtev po bankarskoj garanciji.<sup>3</sup>

17. Na taj način postoje preduslovi za zahtev protiv korisnika.

18. Prvo, garancija mora da je već bila

pozvana ili mora da postoji neposredna opasnost od toga da korisnik zaista pozove bankarsku garanciju.<sup>4</sup>

19. Drugo, zloupotreba prava mora da bude očigledna. Najmanje, mora biti moguće da se bez napora dokaže ta zloupotreba.<sup>5</sup> Ovo drugo je naročito značajno kada korisnik ne zna za ovo nepostojanje osnova. U takvom slučaju, ako nalogodavac može bez napora dokazati da korisniku da on nema prava i ako korisnik uprkos tome zahteva plaćanje, ovo se kvalifikuje kao zloupotreba njegovih prava.<sup>6</sup>

20. Primeri su da činenice slučaja nisu sporne ili da dokumenti pokazuju nedostatak prava bez daljeg ispitivanja, tako da nalogodavac zahteva nešto što bi morao da vrati odmah u slučaju da ide na sud.<sup>7</sup>

21. Sa druge strane, sva sporna pitanja pravne ili činenične prirode na koja se ne može odgovoriti bez oklevanja moraju da se reše zahtevom koji će nalogodavac podneti protiv korisnika. Na primer, sudovi su zauzeli stav da se na pitanje da li je zahtev vremenski ograničen ne može odgovoriti olako, jer postoje brojni zakonski osnovi za prekid zastarelosti.<sup>8</sup> Dalje, ako prodavac može podneti dokumenta kao dokaz isporuke, ta dokumenta nisu smatrana dovoljnim jer nisu bila podneta u formi stipulisanoj ugovorom.<sup>9</sup>

22. Ako nalogodavac ima osnovan zahtev prema korisniku, sledeće pitanje je da li taj zahtev može biti zaštićen privremenom merom.

23. Ponovo je odgovor - da, pod uslovom,

<sup>2</sup> Nemački zakon takođe dozvoljava da se spreči poziv po bankarskoj garanciji u slučaju zloupotrebe prava ("Rechtsmissbruch"). Ovaj izuzetak se zasniva na (paragraf) 242 Nemačkog Građanskog Zakonika ("GCC") koji generalno propisuje da dužnik mora da izvrši svoje obaveze na način koji zahteva dobra vera.

<sup>3</sup> Ovaj zahtev proizilazi iz sporazuma između nalogodavca i korisnika u vezi sa obezbeđivanjem bankarske garancije ("Guarantiebeschaffungsvereinbarung" - BGH 11.12.1987, WM 13, 367, 369; Canaris, Bankvertragsrecht, marg. No. 1152; Konecny, Grundlagen der Einstweiligen Verfungung gegen den Missbrauch von Bankgarantien, OBA 1989, 775, 784).

<sup>4</sup> Jud/Spitzy in Graf von Westphalen, Die Bankgarantie im internationalen Handelsverkehr, 405 (hereinafter Jud/Spitzz).

<sup>5</sup> Jud/Spitzy, 405; OGH 16.12.1981, 1 Ob 789/81, SZ 54/189. Takođe po nemačkom pravu, nalogodavac mora da bez napora dokaže da njegov zahtev protiv korisnika postoji. Standardni dokaz zato nije preduslov za izdavanje privremene mere, već za dokazivanje zahteva kao takvog (OLG Frankfurt, 27.4.1987, WM 1988, 1480, 1482). Nemački sudovi su utvrdili da zahtev korisnika, koji je zasnovan samo na svojoj formalnoj poziciji kao korisnik po garanciji, može biti osporen, ako zahtev korisnika nema osnova u ugovornom odnosu sa nalogodavcem i ako je ovaj nedostatak osnova očigledan ili se može dokazati bez napora (BGH 17.10.1996, NJW 1997, 255, 256; BGH 12.03.1984, BGHZ 90, 287, 292).

<sup>6</sup> Koziol u Avancini/Iro/Koziol, Österreichisches Bankvertragsrecht II, 3/105 (u daljem tekstu Koziol).

<sup>7</sup> BGH NJW 2001, 1857.

<sup>8</sup> OLG Dusseldorf, WM 2001, 2294, 2295.

<sup>9</sup> OLG Köln, WM 1988, 21, 22

shall be liable for it.

14. Under this doctrine, Austrian jurisprudence recognizes claims of the account party against both the beneficiary as well as the bank. We have to clearly distinguish between these two claims though.

#### a. Claims against the beneficiary

15. Let me start with the claim of the account party against the beneficiary.

16. If a bank guarantee has been called unfairly or if there is the risk that this will be the case, the account party can demand from the beneficiary to refrain from calling the guarantee or to revoke an already made call of the bank guarantee.<sup>3</sup>

17. Thus, there are prerequisites for a claim against the beneficiary:

18. First, the guarantee must already have been called or there must be an imminent danger of the beneficiary actually calling the bank guarantee.<sup>4</sup>

19. Secondly, the abuse of rights must be evident. At least, it must be possible to effortlessly prove this abuse.<sup>5</sup> The latter is particularly important where the beneficiary is ignorant of his lack of entitlement. In that case, if the account party can effortlessly prove to the beneficiary that it is not entitled and if the beneficiary still demands payment, this qualifies as an abuse of its rights.<sup>6</sup>

20. Examples are that the facts of the case are undisputed or that documents show the lack of entitlement without further investigation, so that the beneficiary is claiming something it would have to return immediately if the case went to court.<sup>7</sup>

21. On the other hand, all disputed questions of a legal or factual nature which cannot be answered off hand are to be settled by a claim which the account party will assert against the beneficiary. For example, courts have held that the question whether a claim is time-barred cannot be answered off hand, because numerous legal grounds for an interruption of the time limit exist.<sup>8</sup> Further, if the seller could present documents as evidence of the delivery, such documents were not considered sufficient since they had not been presented in the contractually stipulated form.<sup>9</sup>

22. If the account party has a substantive claim against the beneficiary, the next question is whether this claim can be secured by interim measures.

23. The answer, again, is yes - provided, however, that the usual preconditions for the issuance of an injunction are fulfilled.

24. Generally, in order to be granted an interim injunction, a person must provide evidence that without the injunction the substantive claim would be frustrated (s. 381(1) EA)<sup>10</sup> or that the injunction is necessary in order to prevent imminent danger of irrecoverable damage (s. 381(2) EA).

25. There is no dispute in that respect.

26. It is widely accepted now that to fulfil the prerequisites of § 381 (1) EA it is sufficient to show that, without an interim injunction, the guarantee would be paid before the courts could decide the case and the claim to refrain from the calling of the guarantee would therefore be frustrated.<sup>11</sup>

<sup>3</sup> This claim derives from the agreement between the account party and the beneficiary concerning the procurement of the bank guarantee ("Garantiebeschaffungsvereinbarung" - BGH 11.12.1987, WM 13, 367, 369; Canaris, Bankvertragsrecht, marg. no. 1152; Konecny, Grundlagen der einstweiligen Verfügung gegen den Missbrauch von Bankgarantien, ÖBA 1989, 775, 784).

<sup>4</sup> Jud/Spitz in Graf von Westphalen, Die Bankgarantie im internationalen Handelsverkehr<sup>3</sup>, 405 (hereinafter Jud/Spitz).

<sup>5</sup> Jud/Spitz, 405; OGH 16.12.1981, 1 Ob 789/81, SZ 54/189. Also under German law, the account party must prove effortlessly that its claim against the beneficiary exists. The standard of proof is therefore not a prerequisite for the issue of an interim measure, but for the assertion of the claim as such (OLG Frankfurt, 27.4.1987, WM 1988, 1480, 1482). German courts have established that a beneficiary's claim, which is based only on his formal position as the beneficiary of a guarantee, can be countered, if the beneficiary's claim lacks a basis in the contractual relationship to the account party and this lack is obvious or can be proven effortlessly (BGH 17.10.1996, NJW 1997, 255, 256; BGH 12.03.1984, BGHZ 90, 287, 292).

<sup>6</sup> Koziol in Avancini/Iro/Koziol, Österreichisches Bankvertragsrecht II, 3/105 [hereinafter Koziol].

<sup>7</sup> BGH NJW 2001, 1857.

<sup>8</sup> OLG Düsseldorf, WM 2001, 2294, 2295.

<sup>9</sup> OLG Köln, WM 1988, 21,22.

<sup>10</sup> The enforcement of judgments in countries other than those which are members of the EU or party to the Lugano Convention constitutes such danger.

<sup>11</sup> Jud/Spitz, 411; Konecny, Grundlagen der einstweiligen Verfügung gegen den Mißbrauch von Bankgarantien, ÖBA 1989, 755, 780, 784, 785. Imminent danger according to § 381 (2) EA has been accepted by courts in the case that the account party would go bankrupt if case the guarantee were paid, while the apprehension of the claimant that he may go bankrupt or that payment of the guarantee would put him in a difficult situation regarding evidence has not (Schuhmacher, 331).

međutim, da su ispunjeni uobičajeni preduslovi za izdavanje privremene mera.

24. Generalno, u cilju izdavanja privremene mera, lice mora da pruži dokaz da bez privremene mera osnovani zahtev može da bude osuđen (s. 381 (1) EA)<sup>10</sup> ili da je privremena mera neophodna da bi se sprečila neposredna opasnost ili nepopravljiva šteta (s. 381 (2) EA).

25. Nema spora u tom pogledu.

26. Široko je prihvaćeno sada da je za ispunjenje preduslova iz (paragrafa) 381 (1) EA dovoljno pokazati da će, bez privremene mera, garancija biti plaćena pre nego što sudovi mogu da odluče po predmetu i da zahtev za odustajanje od poziva po garanciji može biti osuđen.<sup>11</sup>

#### b. Zahtevi protiv banke garant

27. Nalogodavac može takođe da traži pravne lekove protiv banke garant. To može da učini pored ili umesto postupanja protiv korisnika.

28. U Austriji je nesporno da nalogodavac takođe ima zahtev protiv banke garant. Ovaj zahtev proizilazi iz ugovornog odnosa između nalogodavca i banke garant.

29. U slučaju zahteva koji predstavlja zloupotrebu bankarske garancije, banka nije u obavezi da honoriše garanciju. Ona ima ograničeno pravo da ispita zahtev korisnika.<sup>12</sup>

30. Čak i više, banka garant duguje minimum standarda due diligencenalogodavcu. Ako je poziv po garanciji očigledno zloupotreba ili ako tu zloupotrebu nalogodavac može bez napora da dokaže, banci nije dozvoljeno da plati. Nalogodavac ima odgovarajući zahtev protiv banke garant da ne plati. Ovaj zahtev može da se ostvari putem privremene mere.<sup>13</sup>

31. Otuda je relevantna jasnoća dokaza. Ako banka samo sumnja da će doći do zloupotrebe kod zahteva korisnika, ona ima pravo da ne izvrši plaćanje na svoj sopstveni rizik. Ako je, međutim, zloupotreba očigledna ili ako korisnik može jasnim dokazom pokazati da zahtev korisnika predstavlja zloupotrebu, nalogodavac će imati pravo da zahteva od banke garanta da se uzdrži od plaćanja.<sup>14</sup>

32. Obratite pažnju da priroda zahteva protiv banke garantu nije u potpunosti neosporna.

33. Ima zagovornika da nalogodavac ne može da zahteva od banke da se uzdrži od plaćanja u potpunosti već samo od plaćanja na teret nalogodavca, jer banka ne može ostvariti regres prema nalogodavcu ako je platila mada zahtev nije bio legitim.<sup>15</sup> Drugi odbacuju ovaj pristup i tvrde da, ako banka plati jer, na pr. pogreši u vezi sa legitimnošću zahteva, ona ipak može da ostvari regres prema nalogodavcu.<sup>16</sup>

### C. Međunarodna arena

34. Stvarni problemi mogu da se nađu u međunarodnom okruženju.

35. Zamislite situaciju u kojoj nalogodavac ima sedište u Austriji, ali korisnik i banka ili jedan od njih su strane kompanije.

#### a. Jurisdikcija

36. Kao što je napomenuto napred, predlog za privremenu meru u Austriji mora uvek da se zasniva na suštinskom zahtevu da se obezbedi privremenom merom. U našem slučaju to je zahtev protiv korisnika da obustavi podnošenje poziva da se plati po bankarskoj garanciji, ili je to zahtev protiv banke da obustavi plaćanje po osnovu garancije.

<sup>10</sup> Izvršnost presuda u zemljama koje nisu članice EU ili članice Luganske konvencije predstavlja takvu opasnost.

<sup>11</sup> Jud/Spitz, 411; Konecny, Grundlagen der einstweiligen Verfugung gegen den Missbrauch von Bankgarantien, OBA 1989, 755, 780, 784, 785. neposredna opasnost prema (paragraf) 381 (2) EA prihvaćena je kod sudova u slučaju da nalogodavac odlazi u stečaj u slučaju da se plati po garanciji, dok gledište podnosioca zahteva da može otići u stečaj ili da bi ga plaćanje po garanciji dovelo u tešku situaciju što se tiče dokaza nije (Schumaher, 331).

<sup>12</sup> BGH 17.10.1996, NJW 1997, 255; BGH 21.04.1988, NJW 1988, 2610.

<sup>13</sup> Koziol, 3/43

<sup>14</sup> Jud/Spitz. 407. Schuhmacher, Sperre der Bankgarrantie durch einstweilige Vrfugung. RdW 1986, 329, 331 [u daljem tekstu Schuhmacher].

<sup>15</sup> Konecny, Grundlagen der einstweiligen Verfugung gegen den Missbrauch von Bankgarantien, OBA, 1989, 755, 785, Jud/ Spitz, 413.

<sup>16</sup> Koziol, 3/144

## b. Claims against the guaranteeing bank

27. The account party may also seek legal remedies against the guaranteeing bank. It may do so in addition to or instead of going against the beneficiary.

28. It is undisputed in Austria that the account party has also a claim against the guaranteeing bank. This claim derives from the contractual relationship between the account party and the guaranteeing bank.

29. In case of an abusive calling of a bank guarantee, the bank is not obliged to honour the guarantee. It has a limited right to examine the claim of the beneficiary.<sup>12</sup>

30. Even more, the guaranteeing bank owes a minimum standard of due diligence to the account party. If the calling of the guaranteee is obviously abusive or if that abuse can be effortlessly proven by the account party, the bank is not allowed to pay. The account party has a respective claim against the guaranteeing bank not to pay. It is this claim which can be secured by an interim measure.<sup>13</sup>

31. Therefore, the liquidity of evidence is relevant. If the bank only suspects an abusive claim by the beneficiary, it may choose to deny payment at its own risk. If, however, the abuse is evident or if the account party can establish by liquid evidence that the claim of the beneficiary is abusive, the account party will have a claim against the guaranteeing bank to refrain from paying.<sup>14</sup>

32. Note that the nature of the claim against the guarantor is not completely undisputed:

33. Some argue that the account party cannot demand the bank to refrain from paying altogether but only from paying at the expense of the account party, as the bank could not take recourse against the account party anyway if it had paid although the claim was not legitimate.<sup>15</sup> Others reject this approach and argue that, if the bank pays because, e.g. it errs about the legitimacy of the claim, it could still take recourse against the account party.<sup>16</sup>

## C. The international arena

34. The real problems can be found in an international environment.

35. Imagine a situation where the account party is located in Austria but the beneficiary and the bank, or only one of these, are foreign companies.

### a. Jurisdiction

36. As already mentioned before, an application for an interim injunction in Austria must always be based on a substantive claim to be secured by the injunction. In our case this is the claim against the beneficiary to cease and desist from drawing the bank guarantee, or it is the claim against the bank to desist from paying out that guarantee.

37. Usually it is the court at the beneficiary's or the bank's seat that has jurisdiction for the substantive claim.

38. This court has also jurisdiction to issue the preliminary injunction. Principally, it is therefore the court competent for the subject-matter which has also jurisdiction to issue the injunction.

39. Besides that, the application to issue an injunction can also be raised at certain courts where the injunction has to be enforced (see s.387 EA).

40. This is where the problem starts: If the beneficiary or the bank is a foreign company, a claim to cease and desist can frequently not be brought before an Austrian court.

41. Also, the injunction will not be enforceable by Austrian courts.

42. Consequently, Austrian courts will frequently not have jurisdiction for the issuance of an interim measure against the foreign beneficiary or the foreign bank.

### b. Cross border enforcement of injunctions

43. Even if they had, this would not necessarily be the solution to the problem.

44. In many cases, injunctions of Austrian

<sup>12</sup> BGH 17.10.1996, NJW 1997, 255; BGH 21.04.1988, NJW 1988, 2610.

<sup>13</sup> Koziol, 3/143.

<sup>14</sup> Jud/Spitz, 407; Schuhmacher, Sperre der Bankgarantie durch einstweilige Verfügung, RdW 1986, 329, 331 [hereinafter Schuhmacher].

<sup>15</sup> Konecny, Grundlagen der einstweiligen Verfügung gegen den Mißbrauch von Bankgarantien, ÖBA 1989, 755, 785; Jud/Spitz, 413.

<sup>16</sup> Koziol , 3/144.

37. Obično je sud u sedištu korisnika ili banke nadležan za osnovani zahtev.

38. Ovaj sud je takođe nadležan da izda privremenu meru. U principu, to je stvarno nadležan sud po materiji koji je takođe nadležan da izda privremenu meru.

39. Pored toga, predlog za izdavanje privremene mere može takođe da se podnese nekim sudovima kod kojih se privremena mera izvršava (videti s. 387 EA).

40. Ovde nastaje problem. Ako su korisnik ili banka strane kompanije, zahtev za obustavu često ne može da dođe na austrijski sud.

41. Takođe, privremena mera ne može biti izvršna pred austrijskim sudovima.

42. Otuda, austrijski sudovi često neće biti nadležni za izdavanje privremene mere protiv estranog korisnika ili strane banke.

#### **b. Prekogranično izvršenje privremenih mera**

43. Čak i kad bi bili, to ne bi nužno bilo rešenje problema.

44. U mnogim slučajevima, privremene mere u austrijskim sudovima neće biti priznate i izvršne u inostranstvu.

45. Situacija je relativno jednostavna kada strane imaju sedište unutar granica Evropske Unije. U tom slučaju, primenjuju se Briselska pravila (Brussels Regulation).

46. Luganska konvencija proširuje ove principe dalje i takođe uključuje države kao što je na primer Norveška.

47. Tamo gde se ovi propisi primenjuju, prekogranične privremene mere se priznaju i izvršavaju pod uslovom da nisu izdate *ex parte*. Drugim rečima, obe strane moraju da se čuju pre nego što se izda privremena mera. *Ex parte* privremene mere se ne priznaju niti se izvršavaju.

48. Za sve prektične svrhe, ovo znači da zahtev za privremenu meru mora da bude uručen drugoj strani i druga strana mora da ima priliku da odgovori i iznese svoje argumente u razumnom roku.

S obzirom na to da ovo mora da se

izvede preko granice, možete zamisliti da to nije izvodljivo tokom nekoliko dana ili čak nedelja.

49. Otuda, kada je vreme od značaja, ovo nije rešenje.

50. Nalogodavac će zato morati da traži pravne lekove u jurisdikcijama korisnika i banke.

51. Ovo ne izgleda toliko loše. Može postati gore ako su korisnik i banka locirani u različitim državama. U tom slučaju, moraće da se obrati sudovima različitih država.

#### **c. Primena zakona**

52. U ovom drugom slučaju, nalogodavac ne samo da će morati da se obrati sudovima različitih država, već će različiti sudovi primeniti različita prava.

53. Tako, odnos između nalogodavca i banke može da budu regulisan zakonima jedne države a odnos između nalogodavca i korisnika zakonima druge države.

54. Ovo može da bude pogubno za jednu od strana. Takođe, to otvara pitanja izbora suda.

55. Gde su onda rešenja za ove probleme?

### **D. Rešenja**

56. Moguća rešenja su dvostruka. Mogu se naći u zakonu ali mogu češće da se nađu u odgovarajućem pisanju sprorazuma između strana.

#### **a. Zakonodavstvo**

57. Što se tiče zakonodavstva, od značaja je UNCITRALOVA Konvencija o nezavisnim garancijama i stand-by akreditivima.<sup>17</sup>

58. Član 19. predviđa izuzetke od obaveze garanta da plati. Prema tome, banka garant može da obustavi plaćanje ako je očigledno i jasno da:

(a) neki dokument nije pravi ili je falsifikovan;

(b) nijedno plaćanje nije dospelo na osnovu tvrdnje u zahtevu i dokumenata koji to

<sup>17</sup> Obratite pažnju na to da je ovu Konvenciju ratifikovalo tek nekoliko zemalja do sada, uključujući Belorusiju, Ekvador, El Salvador, Gabon, Kuvajt, Liberiju, Panamu i Tunis. Na snazi je od 1. januara 2000. godine. SAD su potpisale ali još nisu ratifikovale Konvenciju.

courts will not be recognized and enforced abroad.

45. The situation is relatively simple as long as the parties have their seats within the borders of the European Union. In that case, the Brussels Regulation applies.

46. The Lugano Convention stretches these principles a bit further and includes also States such as, for example, Norway.

47. Where these regulations apply, cross border interim injunctions are recognized and enforced as long as they are not issued *ex parte*. In other words, both parties must have been heard before the injunction will be issued. *Ex parte* injunctions will neither be recognized nor enforced.

48. For all practical purposes, this means that the application for the injunction will have to be served on the other party and the other party will have to have a chance to respond and to bring its arguments within a reasonable period of time. Since all this has to be done across borders, you can imagine that it cannot be handled within a few days or even weeks.

49. Consequently, where time is of the essence, this is not a solution.

50. The account party will therefore be forced to seek legal remedies in the jurisdictions of the beneficiary and bank.

51. This seems not that bad. It can get even worse though if the beneficiary and the bank are located in different States. In that case, the courts of different states will have to be addressed.

### c. Applicable law

52. In the latter case, not only will the account party have to act before courts of different states, different courts may apply different laws.

53. Thus, the relationship between the account party and the bank may be governed by the laws of one State, and the relationship between the account



party and the beneficiary may be governed by the laws of another State.

54. This may be detrimental to any of the parties. Also, it certainly raises questions of forum shopping.

55. So where are the solutions to all these problems?

## D. Solutions

56. The possible solutions are twofold. They can be found in legislation but more often they can be found in the proper drafting of the agreement between the parties.

### a. Legislation

57. As far as the legislation is concerned, the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit is of particular interest.<sup>17</sup>

58. Its Art. 19 provides exceptions to the guarantor's payment obligation. Accordingly, the guaranteeing bank may withhold payment if it is manifest and clear that:

(a) Any document is not genuine or has been falsified;

(b) No payment is due on the basis asserted in the demand and the supporting documents; or

(c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,

59. Art. 19 (2) seeks to further define the

<sup>17</sup> Note however that this Convention has only been ratified by a few States yet, including Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama and Tunisia. It has been in force since 1 January 2000; the U.S. has signed but not yet ratified the Convention.

potvrđuju;

(c) prema vrsti i svrsi obaveze, zahtev nema razumnu osnovu.

59. U Članu 19 (2) dalje se definiše neodređena sintagma iz Člana 19 (1) (c), naime "nema razumnu osnovu". Data je lista situacija u kojima plaćanje može biti zaustavljeno po Članu 19 (1) (c). To su:

(a) neizvesnost ili rizik u odnosu na koji je obaveza stvorena da se zaštitи korisnik nije se materijalizovalo;

(b) osnovna obaveza principala/nalogodavca proglašena je nevažećom na sudu ili na arbitraži, ukoliko obaveza ne pokazuje da takav uslov spada u rizik koji se pokriva obavezom;

(c) osnovna obaveza je nesumnjivo ispunjena na zadovoljstvo korisnika;

(d) ispunjenje osnovne obaveze je jasno sprečeno voljnim kršenjem korisnika;

(e) u slučaju zahteva po kontra-garanciji, korisnik kontra-garancije je platio u rđavoj veri kao garant/izdavalac obaveze na koju se odnosi kontra-garancija.

60. Ipak, Član 19. daje veliki prostor sudovima da pronađu nefer poziv za plaćanje.

61. Član 20 predviđa mogućnost da se izdaju privremene mere. Po ovoj odredbi, sudovi mogu da izdaju privremenu mjeru ili "sa ciljem da korisnik ne primi plaćanje, uključujući nalog da garant/izdavalac zadrži iznos obaveze" ili "sa ciljem da sredstva obaveze plaćena korisniku budu blokirana, uzimajući u obzir da li bi u nedostatku takvog naloga principal/podnositelj zahteva pretrpeo ozbiljnu štetu". Izdavanje takvih mera zahteva "visoku verovatnoću" da jedna od

okolnosti iz Člana 19 (1) bude ispunjena i da postoji "odmah raspoloživ jak dokaz" o tome.

62. Član 20 odražava principe nacionalnih sistema datih napred, naime visoka verovatnoća da korisnik ima zahtev i da ga može dokazati odmah raspoloživim jakim dokazom. Ova odredba, međutim, koristi nejasne termine, kao što su "visoka verovatnoća" i "jak dokaz". Zato je na nacionalnim sudovima da ove pojmove definisu na precizniji način, što ne doprinosi prvobitnoj ideji unificiranja prava u ovoj oblasti na međunarodnom planu.

### b. Ugovor

63. Ima međutim takođe mnogo onog što strane mogu da učine. Naročito, one mogu da uključe u ugovor klauzule o izboru zakona kao i klauzule o rešavanju sporova.

64. Ako tako postupe, važno je da te klauzule idu zajedno jedna sa drugom. Idealno, klauzula o rešavanju sporova u ugovoru između nalogodavca i banke odgovara klauzuli u ugovoru između nalogodaca i korisnika.

65. Verovatno još važnije, klauzule o izboru zakona treba da se odnose na primenu istog zakona.

66. Ne mogu se svi problemi rešavati na ovaj način. Ali biće mnogo lakše ako isti sud ili tribunal arbitraže imaju nadležnost za zahteve protiv korisnika i protiv banke. Takođe je korisno ako se, u što većoj mogućoj meri, primenjuje isti domaći zakon na odnose između različitih strana.

### Skraćenice

1. Ob - deo broja dosjeda. Bez samostalnog značenja.
2. OLG - Oberlandesgericht - Viši sud.
3. BGH - Bundesgerichtshof - Vrhovni sud Nemačke.
4. BGHZ - naziv zbirke odluka Vrhovnog suda Nemačke.
5. EA - Exekutionsordnung - Zakon o izvršnom postupku.
6. RdW - Recht der Wirtschaft - Službeni list Austrije.

indeterminate phrase contained in Art. 19 (1)(c), namely “*no conceivable basis*”. It contains an enumerative list of situations in which payment could be withheld under Art. 19 (1)(c). These are

- (a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;
- (b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;
- (c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;
- (d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;
- (e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

60. Still, Art. 19 leaves a large leeway to courts to find unfair calling.

61. Art. 20 provides for the possibility to issue provisional measures. Under this provision, courts may issue an interim measure either “*to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking*” or “*to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious*

*harm*”. The issue of such measures requires “*high probability*” that one of the circumstances of Art. 19 (1) is fulfilled and there is “*immediately available strong evidence*” for this.

62. Art. 20 reflects the principles of the national systems examined above, namely high probability that the beneficiary has a claim and can support this with immediately available strong evidence. This provision, however, uses rather vague terms, such as “*high probability*” and “*strong evidence*”. It will therefore be for the national courts to define these terms more precisely, which does not aid the original idea of unifying the law in this area on an international surface.

## b. Contract

63. There is however also a lot which the parties can do. In particular, the may include choice of law clauses as well as dispute resolution clauses in their contracts.

64. If they do so, it is important that these clauses go hand in hand with each other. Ideally, the dispute resolution clause in the contract between the account party and the bank corresponds to the clause in the contract between the account party and the beneficiary.

65. Probably even more importantly, the choice of law clauses should refer to the same applicable law.

66. Not all problems can be resolved that way. But it will be much easier if the same court or arbitral tribunal has jurisdiction for claims against both the beneficiary as well as the bank. And it will also be advantageous if, as much as possible, the same domestic law applies for the relationships between the different parties.

## Abbreviations

1. Ob - part of the file number. It has no meaning of its own.
2. OLG - Oberlandesgericht - Higher Court.
3. BGH - Bundesgerichtshof - German Supreme Court.
4. BGHZ - title of collection of the decisions of the German Supreme Court.
5. EA - Exekutionsordnung - Enforcement Act.
6. RdW - Recht der Wirtschaft - Austrian Legal Journal.