

Preliminary Injunctions

Germany, England/Wales, Italy and France

93

Torsten Frank Koschinka
& Piero Leanza

EUROPEAN MONOGRAPHS

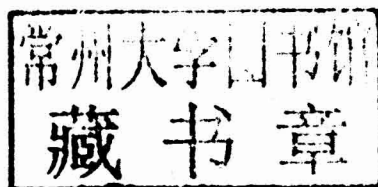


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European Monographs Series Set

VOLUME 93

Editor

Prof. Andrea Biondi is Professor of European Law and Direction of the Centre of European Law at King's College London

Introduction & Contents/Subjects

As the process of European integration assumes an increasingly complex character, the EU legal system continues to undergo sweeping changes. The European Monographs series offers a voice to thoughtful, knowledgeable, cutting edge legal commentary on the now unlimited field of European law. Its emphasis on focal and topical issues makes the series an invaluable tool for scholars, practitioners, and policymakers specializing or simply interested in EU law.

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About the Authors

Torsten Frank Koschinka, judge at the District Court of Görlitz, is currently working in the field of criminal law as a member of the panels on capital crimes and economic crimes. After having studied Public International Law at the University of Bochum and taken his second state examination – with an emphasis on the Law of the European Union and Comparative Law – at the Higher Regional Court in Düsseldorf, he was appointed as full time judge in 1996, serving, *inter alia*, at the labour court, the district court in civil, commercial and criminal matters, at the Higher Regional Court of Dresden, at the Disciplinary Court for Judges in Leipzig and from 2008 to 2011 as member of the appellate panel and as Vice-President of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters in Prishtina/Priština, Territory of Kosovo, under the auspices of the United Nations with the European Union Rule of Law Mission in Kosovo.

Piero Leanza is currently working in the field of criminal law in the District Court of Trieste. After having graduated in Law (*dottore in giurisprudenza*) at the University of Messina (Italy) and taken the state examination as practising lawyer at the Court of Appeal of Messina, he was appointed as full time judge in 1996 and served in several district courts in Italy, in the field of civil, commercial and labour law. From 2009 to 2013, he has served as international judge at the *Special Chamber of the Supreme Court of Kosovo*, within the European Union Rule of Law Mission in Kosovo. He published numerous monographs in civil procedure and labour law with major Italian law publishers and, recently, a monograph on the right to a fair trial with Kluwer Law International.

Foreword

Enforcing a claim against a travelling merchant in the Middle Ages could be a tricky issue: In the absence of proper land and business registers, of registered mail, and of Google Search, one could not be sure if the other party would ever appear before a court. Having the merchant enchained, or having his vessel seized and its cargo impounded before it could set sail again, was then normal procedure. Regularly, such preliminary relief was the only option.

The observation of ‘justice delayed is justice denied’ is as old as litigation, even before courts themselves. Or, by using the example of clause 40 of the Magna Carta 1215: *‘Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam’* (‘to no one will we sell, to no one will we refuse or delay, right or justice’).

Also today, preliminary injunctions can be a powerful means of bringing immediate relief when a judgement as handed down in regular proceedings would come too late. They do not only play a crucial role in enforcing intellectual and industrial property rights, where they regularly anticipate the results of the main proceedings, but can take on a wide variety of forms such as to break strikes, prohibit public demonstrations, prevent buildings from demolition, and intrepid neighbours from excessive piano playing, or restraining orders for violent family members. By means of preliminary injunctions, disputes can usually be settled in a swift manner, at comparably low cost, and frequently for good.

Torsten Frank Koschinka and Piero Leanza, two experienced professionals with different national backgrounds, have teamed up to throw light on the theory and practice of preliminary injunctions in some of the most important jurisdictions in the European Union: Italy, France, Germany and England/Wales. In total, these cover an area containing roughly one half of the Union’s population.

The authors outline the full ‘cycle’ of preliminary injunctions, from pre-filing considerations and potential remedies, to execution, providing in-depth insights into their litigation. For practitioners and students alike, this book answers many a practical question, such as the competent court for filing the motion for a preliminary injunction, the substantial and procedural conditions for it being granted, or the obligation to pay damages. An appendix, a bibliography and a detailed index all ease swift access.

The launch of this invaluable edition is a timely initiative, as the European Union becomes an ever closer area of freedom, security and justice, and with justice cooperation a vital element. Facilitating this judicial cooperation relies, to a large extent, on improving mutual knowledge of the legal and judicial systems throughout Europe. Initiatives like this are urgently needed to deepen mutual understanding, and to cope with the many challenges faced by the Union. On the eve of the unitary patent, with preliminary injunctions a crucial instrument of patent litigation, this is the more true.

I can but wish this book the reception it deserves so well, and I am looking forward to seeing a continued fruitful cooperation of the authors materialise.

Richard Winkelhofer

*Judge of the Higher Court of Appeals Vienna, currently Rule of Law Advisor
at the European External Action Service; former President of the Special Chamber
of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters*

List of Abbreviations

AD	Administrative Direction
ArbGG	Arbeitsgerichtsgesetz (Labour Court Procedure Code)
BBergG	Bundesberggesetz (Federal Mining Statute)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGH	Bundesgerichtshof (Federal Court of Justice)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
CPR	Civil Procedure Rules for England and Wales
DM	Deutsche Mark (German Mark)
ECHR	European Convention on Human Rights
EU	European Union
EULEX Kosovo	European Union Rule of Law Mission in Kosovo
FamRZ	Zeitschrift für Familienrecht (Periodical: Journal of Family Law)
FCPC	Code de procedure civile (French Civil Procedure Code)
GG	Grundgesetz für die Bundesrepublik Deutschland (German Constitution)
GVG	Gerichtsverfassungsgesetz (Courts Constitution Act)
ICC	Codice civile (Italian Civil Code)
ICPC	Codice di procedura civile (Italian Civil Procedure Code)
JURA	Juristische Ausbildung (Periodical: Juridical Education)
JURIS	Juristisches Informationssystem
JuS	Juristische Schulung (Periodical: Juridical Teaching)
JW	Juristische Wochenschrift (Periodical: Weekly Juridical Journal)
MDR	Monatszeitschrift für Deutsches Recht (Periodical: Monthly Review on German Law)

NJW	Neue Juristische Wochenschrift (Periodical: New Weekly Juridical Journal)
PD	Practice Direction
Pret.	Pretura (Italian minor District Court - until 1999)
RGBL.	Reichsgesetzblatt (Imperial Official Gazette)
SchRG	Gesetz über Rechte an eingetragenen Schiffen und Schiffbauwerken (statute on rights concerning registered ships and registered ships under construction)
SCSC	Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters
StPO	Strafprozeßordnung (Code of Criminal Procedure)
Trib.	Tribunale (Italian District Court)
UNMIK	United Nations Mission In Kosovo
UrhG	Urheberrechtsgesetz (Statute on Copyrights)
ZPO	Zivilprozeßordnung (Civil Procedure Code)

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Part I
Germany and England/Wales

Introduction to the First Part

Torsten Frank Koschinka

The idea for this book arose first during the time the authors spent together on the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (SCSC). In the daily work of the court, it turned out that the International Judges of the Court, coming from different European Judicial Systems and Turkey, did not have a common understanding of the principles that had to be applied with regard to preliminary injunctions as foreseen by section 55 of UNMIK Administrative Direction NO. 2008/6,¹ which reads:

Preliminary Injunctions

55.1 Upon application by a party, the Special Chamber may issue a preliminary injunction provided the applicant gives credible evidence that immediate and irreparable injury, loss, or damage will result to the party if no preliminary injunction is granted. The request for a preliminary injunction is to be submitted together with a claim, or if submitted subsequent to a claim that has been filed, shall refer to that claim.

55.2 The Special Chamber may decide on an application for a preliminary injunctive relief without a hearing after the other party has had an opportunity to file opposing arguments in writing. In exceptional circumstances the Special Chamber may decide on the application for a preliminary injunction without serving the application to the other party. Preliminary injunctions shall only be granted for a limited period of time and may be extended upon application.

55.3 Preliminary injunction decisions shall be in writing and shall:

- (a) Summarise the factual and procedural background of the proceedings, as far as they relate to the preliminary injunction;*
- (b) State the injury or damages the applicant party is likely to suffer if the preliminary injunction is not granted and why it will be irreparable;*

1. Cf., as accessed on 30th of April 2015: http://www.eulex-kosovo.eu/docs/justice/assembly/rules/presentation%20and%20relevant%20laws/UNMIK%20REG%202008-4%20and%202008-6/AD_2008_06_English.pdf.

- (c) Indicate the findings of fact and reasons in law upon which the preliminary injunction is granted; and
- (d) Indicate the time when the preliminary injunction will expire.

55.4 The Special Chamber before issuing a preliminary injunction may require the applicant to deposit with the Special Chamber a security, in such sum as the Special Chamber deems appropriate for the reimbursement of such costs and damages as may be incurred or suffered by any party subject to the preliminary injunction who may be subsequently found to have been wrongfully subjected to the injunction.

55.5 A decision granting injunctive relief to a party shall be binding upon all parties involved. If a Trial Panel issues such decision, it may be appealed.

Although the wording of the section seemed to be quite clear for the Kosovan judges² as well as for the authors of this book, in practice it turned out that the Trial Panels had serious difficulties – depending on the legal background of some of the International Judges – to accept and apply those standards, especially concerning the necessity of ‘credible evidence’ in the sense of section 55.1 sentence 1. It turned out that there was and – as this book will show – still is no common European concept of ‘preliminary injunctions’ and that the use of the English legal language, as it was the official language of communication within EULEX Kosovo as well as the official language of the Special Chamber,³ was not at all helpful for legal discussions between judges from different European civil law countries, from the United Kingdom, from the United States and even from Turkey. The legal concepts behind the English terminology are simply not identical with the legal concepts behind continental European legal education.⁴ Therefore, we developed – as far as the different educational systems and requirements of legal education of the Member States allowed it – the habit of going back to our common⁵ roots: Roman Law⁶ and Latin terminology. But even so it turned out that the, e.g., Romanian, Bulgarian, German, Austrian and Italian ‘idea’ of the meaning of the Latin phrases was partly and inevitably blurred by the different

2. Educated in a civil law system! Cf. *infra* n. 8.

3. Cf. also section 25.7 of UNMIK AD 2008/6: ‘Pleadings and supporting documents may be submitted in Albanian or Serbian, an English translation of all pleadings and supporting documents shall be provided together with the pleadings. Such translation shall be at the party’s expense.’

4. In addition, the language skills of the non-native-speaking judges were, to say the least, far from being homogenous. For an interesting example cf., as accessed on 19th of May 2015: [http://www.eulex-kosovo.eu/eul/repository/docs/\(2013.12.27\)_-_SCC-08-0226_-_Decani_Monastery_-_EN_G.pdf](http://www.eulex-kosovo.eu/eul/repository/docs/(2013.12.27)_-_SCC-08-0226_-_Decani_Monastery_-_EN_G.pdf).

5. Back then there were no judges from Anglo-Saxon (Common Law) systems at the SCSC, but only at some of the other courts.

6. Though especially the legal instruments of German Law for preliminary injunctions (as defined below) are considered to be based on Langobardian Law and the Germanic Common Law before the reception of Roman Law; cf. Christian Berger in: Berger et al., *Einstweiliger Rechtsschutz im Zivilprozeß*, Part 1, Chapter 1, VII, annotation 23. This is, from my point of view, extremely interesting, as at least the Italian Law, and especially the law of northern Italy, has been heavily influenced by Langobardian Law, cf. Gerhardt Kegel, *Internationales Privatrecht*, Seventh Edition, pp. 129–131. I guess also vice versa, so that the German Law on preliminary injunctions might be closer even by roots to the Roman Law than one might usually believe.