

## Statement of Claim under Kosovo Legislation

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### Abstract

“*Statement of Claim*” represents a topic of special importance for civil proceedings law in the Republic of Kosovo, especially now that this institution is regulated by the provisions of the Law on Contested Procedure (LCP). In this regard, the role of the court (both in the contested and the execution procedure) is emphasized in the implementation of this institution during the procedure of realization of subjective civil rights of the parties in the proceedings, or contesting them by the other party, as well as the implementation of the measures through which statement of claim is provided in the execution procedure. Statement of claim may arise if the claimant makes the existence of his claim or his subjective right credible, and if there is a risk that without the statement of claim or the imposition of the preliminary injunction, respondent (opponent of the statement of claim or the opposing party) would significantly impede or hamper the realization of the claim in various forms. LCP has provided the conditions under which the statement of claim can be made in the contested procedure, the types of measures, the manner of imposing, as well as legal remedies against the decisions by which the proposed measures for statement of claim may be imposed or rejected. The court may impose a preliminary injunction only in the circumstances when the claimant (stating the claim) within the time limit set by the court pays the imposed guarantee amount.

**Keywords:** claimant (stating the claim), respondent (opponent of the statement of claim), provisional measure, preliminary injunction, guarantee.

### Introduction

In practice, it is often the case that due to various reasons a court proceeding from filing a lawsuit to the court until a meritorious decision from the latter, the proceedings last for years. Consequently, the claimant who claims to realize a right through the claim can have obvious difficulties in the execution of the court decision. In this regard, the lawmaker has foreseen by law the possibility of submitting a proposal for the imposition of statement of claim measure by litigants, which as sole purpose has providing the statement of claim of the claimant or in certain cases also of the respondent, as well as providing the opportunity that at a later stage the relevant decision be executed.

Therefore, in the paper “*Statement of Claim*” will be elaborated the institution of statement of claim, the conditions for statement of claim, the consequences of not respecting the measures of statement of claim, preliminary injunctions and their imposing procedures. The paper will also address the issue of execution of preliminary injunctions, authorities that have legal power to enforce such measures, damages that may incur as a consequence of execution, and who shall compensate such damages caused. In addition to the aforementioned, this paper will also discuss about legal remedies against the decision for imposing the measure and the decision for

imposing of the preliminary injunction, the legal deadlines for filing these remedies, the competent court for settlement etc. Finally, through relevant conclusions made, recommendations that are considered appropriate and necessary for implementation by the competent authorities, which relate to the legal changes referred to the statement of claim institution and the relevant procedure for its implementation in practice by the competent court and the execution body will be given.

### Statement of Claim

Statement of claim institution is provided for in the Law on Contested Procedure (LCP), respectively articles 296-318.

Statement of claims of creditors is carried out in special procedures which in principle are summary (expedited) procedures. These procedures are provisionally imposed to impose one or more measures. By their very nature, these measures in principle have the character of preliminary injunctions and last until the actual realization of the claims of the creditor or the claimant. It should be noted that in most countries in the region, almost without exception, various legal institutions for statement of claim are provided, with a difference that in most of these countries the procedure of statement of claim is regulated in the execution procedure where is stated that in this procedure the provisions relating to the execution procedure will apply *mutatis mutandis*.

Article 296 of the LCP provides for a time when the request for lodging of the claim can be filed. According to this article, this statement of claim can be made before the lawsuit has been filed for the initiation of the contested procedure, but also during such proceedings. Pursuant to this Article, the court is also competent to determine the preliminary injunctions, which appears to be the competent court for the examination of the lawsuit and of the claim, namely the court which acts on the lawsuit. Finally, according to this Article, it is regulated the manner and form of imposing regarding the statement of claim. Thus, regarding the permission to state the claim, or the rejection of the proposal, the court decides by a ruling. This ruling may also be imposed by the highest court, but only in cases when the proposal for statement of claim is filed after the case according to complaint has been passed for review to that court.<sup>1</sup> It is worth mentioning that in cases when it is a final judgment, competent to decide on the proposal for imposing the preliminary injunction is the court that would be competent for deciding on the claim would be first instance court or the court competent to review the lawsuit. However, this has to do only with cases where the execution procedure has not started yet, since after the execution procedure commences, competent to decide on the respective measure for statement of claim, is the execution court.

### Conditions for imposing preliminary injunction

Preliminary injunction may be imposed:

a) *if the proposer of the preliminary injunction makes the existence of the claim or his subjective right credible, and*

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<sup>1</sup> See Article 296 of LCP.

b) if there is a risk that without the imposition of such a measure the opposing party would significantly impede or hamper the performance of the claim, in particular with the alienation of its property, concealment, lien or otherwise which would change the existing status of items, or in some other way would negatively affect the rights of the preliminary injunction proposer. Regarding the first condition, it is thought that the proposer of the preliminary injunction must prove it through an earlier decision of the court or any administrative body, testament, contract, execution document, or any other legal title. As for the second condition, it is understood that this condition will be fulfilled in cases where there is a risk that the opposing party might transfer its property, hide it, lien it or put it under mortgage, etc.

Unless otherwise provided for by law, it is foreseen that the court may impose the preliminary injunction only in the circumstances when the proposer of the measure, within the time limit set by the court, pays the amount of the guarantee in the amount and type determined by the court for the damage that can be caused to the opposing party by the imposition and execution of that measure.<sup>2</sup> In these cases, the guarantee is paid in cash, but the court in accordance with the provisions of the LCP may allow the provision of the guarantee in the form of securities; precious items, or even bank guarantees. The opposing party acquires the right to legal lien on thus deposited guarantee.<sup>3</sup> However, it is foreseen by legal provisions that at the request of the proposer the court may release it from the obligation to give the guarantee if it is found that he has no financial possibility for such a thing. If the proposer fails to pay the guarantee in the amount and deadline set by the court, the latter will reject the proposal for determining the proposed preliminary injunction. Local government units, i.e. all legal entities of public law are exempt from the obligation to pay the guarantee. This is also the case with the provisions of the new PPL<sup>4</sup>. The amount of money paid for the guarantee under Article 297 of the LCP is returned to the person who has paid within 7 days from the day when the preliminary injunction ceases. If, in the meantime, the measure proposer lodges a lawsuit against the respondent also for the compensation of the damages, the court competent for adjudicating on the lawsuit will decide on the rescission of the respective preliminary injunction.<sup>5</sup>

With the legal provisions of the LCP, it is envisaged the guarantee of: money claim, guarantee of claim directed towards a particular item or part of it, as well as guarantee of other rights or safeguarding the existing status of the circumstances. Thus, the case of imposing any of this group of measures to guarantee a claim, relates to situations where the subject of the guarantee is neither cash claim nor other claims directed by the object or property of the measure opponent, but are other rights or when it is required to maintain the existing state of the circumstances. The thing that distinguishes these types of measures from the other two groups mentioned above is that while the first two types are numbered in a taxation manner, this third type of measure for securing the claim is not enclosed in a taxation manner in Article 301 of the LCP, so in this case there is room for the court to impose other measures if

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<sup>2</sup> See Article 297 of LCP.

<sup>3</sup> See Article 14 of new LEP.

<sup>4</sup> See Article 297.4 of LCP, and Article 14.2 of new LEP.

<sup>5</sup> See Article 298 of LCP.

the latter deems it required and necessary to secure the claim of the proposer of the respective preliminary injunction.<sup>6</sup>

### **Consequences of not respecting the measures by which the claim is guaranteed**

The measure opponent who acts in contradiction with the decision to prohibit the alienation, concealment, lien or disposition of the property, responds to the rules of civil law. The measure proposer is entitled under the general rules of the property rights to be compensated for the damage caused to him by failing to comply with the decision on the determination of the preliminary injunction. Given the nature of the preliminary injunctions, it appears that they generally oblige the measure opponent to undertake a particular action, or to fail to perform a certain action in relation to the particular item.

In case of causing damage due to non-compliance with the preliminary injunction, the measure proposer has the right, under the rules prescribed by the Law on Obligational Relationships (LOR), to seek compensation for the simple damage as well as compensation of lost profit. In fact, the measure opponent would initially be obliged to restore the previous condition that existed before the damage was caused and if the restoration of the previous condition does not completely eliminate the damage, then for the rest of the damage one may be required cash compensation. Compensation in cash would also be reflected in cases when it is not possible to return the previous situation or when the court considers that restitution to a previous state is not indispensable.<sup>7</sup>

With the legal provisions of the LCP, the right to compensation of damage is guaranteed also for the opponent of the preliminary injunction for the damage caused to him as a result of the execution of the preliminary injunction which was established without grounds, or which has been unjustified. Even in this case, it is foreseen that the general rules of the property rights, respectively the rules and legal provisions foreseen by the LOR, will apply to the compensation of damage.

The proposal for determining the preliminary injunction may be presented in written form, or even in verbal form, if the judicial process is underway.<sup>8</sup> In the proposal for the establishment of preliminary injunctions, the proposer of measure shall state: the claim for measure of which he makes a proposal, the preliminary injunction he proposes, the means and the object of the preliminary injunction.

The legal provisions stipulate that the proposal should indicate the facts on which the claim is based, as well as suggest the means by which the claims set forth in the proposal can be proved and which means the proposer must attach to the proposal for determining the preliminary injunction.

The motion for the determination of the preliminary injunction, the court together with the documents attached to it, sends to the measure opponent with the notice that he/she can submit written responses within 7 days.<sup>9</sup> Failure to give the opportunity to the

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<sup>6</sup> See Article 301 item (d) of LCP.

<sup>7</sup> See Article 185 and further of LOR.

<sup>8</sup> See Article 304 of LCP.

<sup>9</sup> See Article 305 of LCP.

measure opponent to declare on the proposal for the determination of the preliminary injunction may only occur exceptionally in cases that the law itself provides for such an opportunity. Such a case may be for example where the measure proposer makes the allegation that the preliminary injunction is grounded, by submitting for this decision or the relevant legal title, and by presenting the urgency of the case, which is required in respect of that case, and that otherwise would lose the purpose of securing the claim. Thus, it is about the so-called "preliminary injunction", foreseen by Article 306 of the LCP. But even in these cases, the measure opponent does not lose the right to challenge or oppose a certain (provisional) preliminary injunction, under the foreseen procedure for objecting to the preliminary injunction.

### **Preliminary injunctions**

In fact, the new LCP does not make any essential difference between preliminary injunctions and provisional measures, but the provisions of Article 306 of the LCP only provide for certain circumstances which may determine a so-called "preliminary injunction". In this sense, the "provisional" preliminary injunction is characterized by three essential elements: the rapid procedure, the risk presented and the causes upon which it is imposed (Morina, Nikqi, 2012, 540). These factors make this measure distinct from other preliminary injunctions.

The swift decision procedure regarding this measure means that the court may impose a preliminary injunction without prior notice and prior hearing of the measure opponent. The risk of deciding on this measure implies that if no preliminary injunction is imposed, it would lose its purpose. While the causes and claims on which preliminary injunctions are imposed imply that they should be reliable and grounded. Generally regarding preliminary injunctions can be said they can be imposed when the submitter provides reliable evidence that if the preliminary injunction is not set, it will have immediate and irreparable damage.

Once a court decision has been reached for the imposition of a preliminary injunction, and after the same decision is notified to the measure opponent, the latter can within 3 days of his response contest the reasons for the designation of the preliminary injunction. If the measure opponent in this case justifies his objections, then the court will be obliged to appoint a hearing within the next 3 days. If, after the hearing is held, the court finds that the objections of the opposing party (the respondent) are grounded, then it may by a special decision annul the earlier ruling on the imposition of the provisional measure or the same shall be replaced by another decision on the determination of the preliminary injunction and in accordance with Article 307 of this Law. Against this new ruling on the determination of the preliminary injunction is now allowed a complaint. It is clear from this that although in the case of the imposition of a preliminary injunction, the measure opponent is not given the opportunity to declare the same or to oppose it he has the right within three days to express the positions regarding a given measure by a written response.<sup>10</sup>

In the ruling on the determination of the preliminary injunction, the court determines the type of preliminary injunction, the means by which it will be enforced and the

<sup>10</sup> See Article 306 of LCP.

object of the preliminary injunction, applying respectively the rules of the execution procedure. The type of preliminary injunction depends on the type of claims for which the measure is required.

The court *ex officio* sends a ruling on the determination of the preliminary injunction to the competent execution court for the purpose of its enforced execution and the public register for the purpose of registration therein.

The decision on the determination of the preliminary injunction must also determine the **means** by which the requested claim and the **object** of the preliminary injunction are enforced in execution. When it comes to the means by which executed claims will be enforced with regard to the object of the preliminary injunction, the rules of the execution procedure which also apply for the application of enforcement means and measures in cases where the persons obliged by court decisions refuse to carry out the foreseen actions with those decisions. If, for the purpose of executing a particular order or prohibition, assets or objects under measure must be changed, the proposer of the measure may propose such a change in the same procedure and on the basis of the existing order or prohibition. The enforcement means envisaged could be implied as certain actions through "enforcement", "force", and "fines".

The decision by which the preliminary injunction is imposed has the effect of the ruling on enforcement by the Law on Execution Procedure. The decision should also have its own reasoning part.<sup>11</sup> The effects of the ruling on the determination of the relevant preliminary injunction do not only involve the parties involved in the proceedings but also the third parties who may have liaison with the parties to the proceedings or the case, provided that the parties to the proceedings or even the third parties be familiar with the content of such ruling.

With the legal provisions of the LCP, it is foreseen the possibility that the preliminary injunction be determined even before the lawsuit has been filed.<sup>12</sup> In such a situation, especially in cases where there is an objective and serious risk to the impossibility of carrying out the claimant's claim. But in this case, the decision imposing the preliminary injunction should be set a deadline of not less than 30 days, within which time the measure proposer must file the claim. In these cases, the proposer of the preliminary injunction must submit the evidence to the court showing that he has acted in accordance with the foregoing.

The preliminary injunction determined by a court decision remains in effect until the court has taken any other decision on the preliminary injunction. In this case, we have to do with a court decision on the preliminary injunction, which reverses and consequently replaces the previous decision on the preliminary injunction. Even in case of non-approval of the claim, the court may, by a judgment rejecting the claim of the claimant, decide to leave the measure in force until the first instance verdict becomes final.<sup>13</sup> This is due to the fact that despite the judgment given by the court of first instance, the parties have been guaranteed the right of appeal within the statutory time limit of 15 days from the day of its receipt, and consequently this affects the judgment not taking the final form within this deadline.

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<sup>11</sup> See Article 307.4 of LCP.

<sup>12</sup> See Article 296, 304 and 308 of LCP.

<sup>13</sup> See Article 309 of LCP.

## Execution of preliminary injunctions

The measure proposer is entitled under the general rules of property law to request compensation for the damage caused to him due to the failure to comply with the decision on the specific preliminary injunction.<sup>14</sup> Based on the nature of the measures by which the claim is provided, it appears that in general they oblige the opponent of the measure to undertake a certain action, i.e. in action, or failure to perform any action, that is, even in inaction. Although in this it is about a little more specific damage, because this damage is caused as a result of failure to comply with the respective measure, again in this case will apply the general rules of the property rights, respectively those of civil law. In fact, in these cases, the rules or legal provisions of the law governing the institution of damage are being applied, which is regulated by the legal provisions of the Law on Obligational Relationships (LOR). According to these provisions it is foreseen that in case of causing damage, the proposer of measure has the right both for compensation of the simple damage, as well as for the compensation of lost profits. Normally, first the measure opponent would be obliged to restore the previous condition that existed before the damage was caused and if the reinstatement of the previous condition does not completely eliminate the damage then the rest of the damage may be claimed be given the amount of cash compensation. Cash compensation also occurs when the court finds that it is not possible to return the previous situation, but also when the court finds that the reinstatement of this situation is not indispensable. It is worth noting that the amount of damage simply required is set at prices at the time of issuance of a court decision, unless the law provides otherwise.

On the other hand, the measure opponent is entitled under the general rules of the property right to ask the measure proposer to compensate for the damage caused by the particular measure of measure of the claim, and to what extent it has been proved that it was ungrounded or that the measure was not justified by the measure proposer.

### **Remedies against the ruling on the imposition of the preliminary injunction and the decision for the imposition of the preliminary injunction**

A first instance decision on the determination of the preliminary injunction may be filed within 7 days from the day of its filing. However, the claim must also be sent to the measure opponent, who within three days of its delivery has the right to file a response to the complaint. A second instance court shall decide on the appeal within 15 days from the day on which the second instance court reaches the appeal or the expiration of the time limit for filing its appeal. It should also be noted that the complaint in this case does not postpone the execution of the decision for determining the preliminary injunction.<sup>15</sup>

No appeal is allowed against the ruling on the imposition of a preliminary injunction.<sup>16</sup>

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<sup>14</sup> See Article 315 of LCP.

<sup>15</sup> See Article 310 of LCP.

<sup>16</sup> See Article 310.5 of LCP.

## Conclusions

Unlike the old LCP in which the procedure for statement of claim was not regulated, but the same procedure was regulated by the old Law on Execution Procedure (LPP) as outlined above, the new LCP foresees in its own chapter the institute of statement of the claim, as well as the procedure for determining the measures for statement of the claim.

With the new LCP, the nature of the measures by which the claim is provided is not clearly defined, because in fact all the preliminary injunctions that the court may impose are of interim nature but which paradoxically may be valid until the full completion of the court proceedings (including the execution procedure).

Based on the provisions of the new LCP, we can say that in principle and taking into account the manner of their imposition, we have two types of measures to ensure the claim: preliminary injunctions and preliminary injunctions.

The new LCP uses the terms of the measure proposer and the measure proposal opponent, which in fact in the contested procedure are equivalent to the claimant and the respondent. Also, unlike the old LCP, with the new LCP, it is foreseen that through the preliminary injunction through which the claim is stated, the right of lien cannot be established, except for a case provided by Article 299 par. 1 item (d) of the LCP.

## Recommendations

LCP generally refers sometimes to the term "decision", but based on different comments and court practice, it appears that we have to do with decisions given in court and administrative proceedings. In this regard, it should be considered the possibility that in case of any eventual amendment of the LCP, a clear harmonization of the terminology and the terms used in it should be made.

With the legal provisions of the LCP, it is foreseen the possibility that the preliminary injunction is set before the lawsuit has been filed. However, the LCP does not foresee the possibility of imposing preliminary injunction before the lawsuit has been filed. This is because according to the provisions of Articles 296, 304 and 308 of the LCP, it is foreseen the possibility of imposing only the preliminary injunction, not the preliminary injunction. With eventual changes to the LCP, to be checked the possibility of a clear explanation of whether a preliminary injunction is also allowed before the lawsuit is filed.

With the new LCP, the legal nature of the measures by which the claim is provided is not clearly defined, because in fact all the preliminary injunctions that the court may impose are of interim nature but which paradoxically may be valid until the full completion of the court proceedings (including the execution procedure). In this regard, there is a need for a fuller explanation of the nature and types of measures through which the claim is stated.

By Article 310.5 of the LCP, it is foreseen that the appeal against the decision on the imposition of a preliminary injunction is not allowed. However, the provision of Article 310.5 of the LCP leaves room for different interpretation, because if the

complaint in this case would not be allowed in any way, then the violation of the party's hearing principle and the violation of the principle and the provision in question may also be in breach of Article 206.2 of the LCP, which provides that if the law expressly provides that a separate appeal is not permitted, the first instance verdict may be affected only by the appeal filed against the decision with which the proceedings in the court of first instance terminate.<sup>17</sup>

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<sup>17</sup> See Article 206 of LCP.