Arbitration or Court Proceedings in Emergencies: Tipping the Scale from a German Perspective

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Introduction

An emergency by definition is a "*sudden serious and dangerous event*" that requires "*immediate action*". For instance, shareholder A needs to prevent shareholder B from publicizing confidential information that will negatively affect the share price. Shareholder A finds herself in an emergency situation and needs to act immediately. According to a recent decision of the Bavarian Higher Regional Court arbitral emergency measures are enforceable in Germany. If the shareholder agreement contains an arbitration clause, shareholder A therefore has to choose whether to commence emergency arbitration or proceedings for preliminary relief in a national court.

This post provides a German perspective on some of the aspects an emergency-afflicted party may want to consider before applying for preliminary measures from a court or at an arbitration institution.

Step 1: Do You Have a Choice?

The first step for the emergency-afflicted party will be to find out whether the rules applicable according to the arbitration agreement foresee the possibility of commencing emergency arbitration proceedings. So far, almost all institutions have established rules for emergency arbitration. The German Arbitration Institute (DIS) along with the Vienna International Arbitral Centre (VIAC), however, decided against the introduction of rules for emergency arbitration. Even though the DIS reform commission thoroughly discussed the inclusion of emergency provisions in the 2018 revision of the DIS Rules they eventually decided against it, because – at the time – there were discussions in the German legislature to include such provisions in statutory arbitration law, which the commission did not want to anticipate.[fn]Ramona Schardt, Neue Regelungen der DIS-Schiedsgerichtsordnung zur Steigerung der Verfahrenseffizienz, SchiedsVZ 2019, 28, 34.[/fn] In cases where the rules of these institutions are applicable, an emergency application exclusively can be filed in national courts.

Another aspect shareholder A should consider before choosing between emergency arbitration and national court proceedings is the question of enforceability. An emergency order of an emergency arbitrator will be of limited use if the courts at the opposing party's place of jurisdiction (usually where the opposing party's assets can be located) do not enforce emergency orders of an arbitrator. For instance, courts in Russia, Sweden, Finland, or France will not recognize an emergency order as an arbitral "award" and therefore would deny enforceability.[fn]For further references: Philippe Cavalieros, Janet Kim, Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations, Journal of International Arbitration (June 2018), 275, 291 et seq. (pointing out, however, that jurisprudence is scarce and that in France provisional measures could be enforceable, if they were "finally ordered").[/fn]

In Germany, on 18 August 2020, the Bavarian Higher Regional Court (*Bayrisches Oberlandesgericht*, docket no. 1 Sch 93/20) decided on the enforceability of an arbitral interim order in an arbitration between shareholders of a German limited liability company (*GmbH*). The Bavarian Higher Regional Court emphasized that it was not the national court's task to perform a full review of the arbitral tribunal's decision on preliminary measures, and confirmed the emergency order as enforceable, because it complied with the following prerequisites:[fn]see also Matthias Goumas, SchiedsVZ 2020, 315, 318 commenting on the Bavarian Higher Regional Court's order.[/fn]

- The emergency order was "plausible" and provided comprehensible reasoning regarding the ordered measure and its prerequisites;
- The arbitral tribunal confirmed the order as appropriate and necessary without abusing its discretionary power;
- The purpose of the emergency order and the ordered measure were proportional, in particular, the ordered measure did not prejudge the main arbitration on the merits;
- The arbitral tribunal ordered an emergency measure that stayed within the limits of what a German national court could have ordered as emergency relief in a corporate dispute.

In any case, even if courts categorically refused to enforce emergency arbitration orders, the opposing party usually will comply with an emergency order in order to prevent a negative effect on the tribunal deciding in the subsequent main arbitration. The main tribunal may revise, vacate or reconfirm the emergency arbitrator's order and grant its own interim order. The main tribunal may also render a final interim award, which would be enforceable in most jurisdictions in application of the New York Convention.[fn]In recent decisions the German Federal Court (*Bundesgerichtshof*, *BGH*) dismissed applications to set aside partial awards, BGH, 25 June 2020, I ZB 108/19, and BGH, 11 October 2018, I ZB 9/18, with comments of Maximilian Pika SchiedsVZ 2019, 150.[/fn]

Finally, before making a choice between emergency arbitration and court proceedings, the relevant contracts should be checked in detail. Some contracts provide specific language on emergency arbitration that can narrow or widen the available options. Even if an arbitration agreement specifically provides the option to apply for emergency measures, this does not mean, however, that the applicant cannot apply for emergency measures in national courts. In Germany, the Higher Regional Court Frankfurt am Main (*Oberlandesgericht*) confirmed on various occasions that an application for emergency measures in German courts is always available even if the parties agreed on an arbitration clause. In one decision of 13 June 2013, (docket no. 26 SchH 6/13), the Court decided on a football club's application for a court order to be re-admitted to the DFB-Pokal, a football tournament, after the club had been excluded due to heavy crowd disturbances. The Court held that even if an arbitration agreement explicitly provided for the possibility to receive emergency relief from the arbitral tribunal, the club could apply for interim relief in national courts*, "because such a provision hardly can be*

interpreted as an agreement to block access to national courts for emergency measures." The football club's application still was dismissed, as an arbitral tribunal had already decided that the ban from the tournament was valid (prohibition of a *révision au fond*). On 20 May 2020, the Higher Regional Court Frankfurt am Main reconfirmed this decision (docket no. 19 W 22/20). After the rest of the season was cancelled due to the outbreak of the Covid-19 pandemic, a table tennis club was relegated to a lower league. The Court confirmed that the club may apply for emergency measures against the relegation in national courts notwithstanding an arbitral agreement, but ultimately denied the club's application on the merits due to lack of urgency.

Step 2: Where Do You Go?

Once shareholder A knows that she has at least two options in her emergency situation, she will be asked the question that pop band *No Mercy* contemplated in their 1996 song: *Where do you go, my lovely*? Should she apply for emergency arbitration or apply for relief in a national court? Pursuing both options unnecessarily will consume additional resources.

Unfortunately, the answer is not simple. The following table gives an overview of elements to be balanced. Every line shows a factor that could be considered, such as neutrality of the decision-maker, venue, costs, etc. The left column describes how each individual factor plays out in arbitration, the right column in national courts.

	Emergency Arbitration	**Preliminary Relief in National Court**
Decision maker	· one emergency arbitrator · usually with neutral nationality	· one judge · national of his jurisdiction
Venue	· place of arbitration at neutral venue (depending on arbitration agreement)	· usually at defendant's venue (home advantage)

Language	· language chosen by parties	· in official language of the court's jurisdiction (translation of documents, perhaps interpretation necessary)
Institutional experience	· administered by institution staff specialized in international commercial disputes · arbitrator usually experienced in the subject-matter	· administered by local court staff
Procedural costs	· usually flat rate (no consideration for amount in dispute) · e.g. US$ 40,000 for ICC proceedings · e.g. S$ 35,000 for SIAC proceedings	· depend on law applicable for court fees · usually depend on amount in dispute · often lower than in arbitration
Costs for legal representation	· reimbursable at the discretion of the arbitrator · usually lawyers' fees calculated on an hourly basis	· rules applying to domestic litigation usually more restrictive than rules applying to arbitration · in many jurisdictions courts apply tariffs to costs · in many jurisdictions capped depending on amount in dispute

Enforceability	· emergency order enforceable in various jurisdictions · some jurisdictions deny enforceability · non-compliance may have negative effect on the opinion of the tribunal hearing the case	· enforcement through the ordering court · generally enforceable only in the deciding court's jurisdiction · perhaps enforceable in other jurisdictions (e.g. Brussels I regulation for EU member states)

Correlation with main proceeding	· only possible before the full tribunal or sole arbitrator have been appointed and received the arbitration file (addressee for interim relief application would be tribunal in main arbitration) · main arbitration has to commence shortly after (or concurrent with) the application for emergency proceeding (e.g. request for arbitration to filed 10 days after application in ICC proceedings; tribunal to be constituted 90 days after order in SIAC proceedings) · emergency arbitrator excluded from acting as arbitrator in main proceeding · tribunal in main proceeding may review, modify or vacate emergency order	· possible before or after the main proceeding has commenced · court may order applicant to commence main proceeding (e.g. s. 926 of the German Code of Civil Procedure, which allows a court to order the applicant to commence a main proceeding upon request of the opposing party) · risk that court does not find urgency if main proceeding has not commenced yet · tribunal in main proceeding cannot formally modify or vacate emergency order; still, tribunal in main proceeding formally is not bound by court order when deciding on merits of the case

Conclusion

In Germany, the decision of an emergency arbitrator would probably be enforceable and access to German courts is also available for emergency measures if the parties concluded an arbitration agreement. In order to choose between emergency arbitration and preliminary court relief, the emergency-afflicted party should carefully weigh the pros and cons of both options and they will surely find the desired relief.