

ZURICH: Emergency arbitration and state court interim measures

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A panel co-organised by the Zurich Bar Association's arbitration and litigation practice groups compared emergency arbitration and interim measures granted by state courts. **Michael Feit**, managing associate at Walder Wyss in Zurich, reports



Zurich

In light of the concurrent jurisdiction between arbitral tribunals and state courts to issue interim measures, the choice between these two options is of high practical relevance in Swiss arbitration practice and thus it did not come as a surprise that the event attracted dozens of Swiss practitioners. The event was moderated by the head of the bar association's arbitration practice group, **Felix Dasser** of Homburger, and the head of the litigation practice group, **Dieter Hofmann** of Walder Wyss.

Andrea Meier of Wartmann & Merker began by providing a brief overview of the characteristics of emergency arbitration. Emergency arbitrators are not limited to granting interim measures available to Swiss state courts. An emergency arbitrator can essentially render such interim measures as he or she considers necessary and appropriate to protect a party's rights. In other ways, however, the emergency arbitrator's authority is more limited than that of a state court judge. The emergency arbitrator can only grant interim measures against parties bound by the arbitration agreement. Emergency arbitrators also do not have the power to enforce their own orders and thus cannot combine their orders with threats of criminal sanctions in case of non-compliance.

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Emergency arbitrations are completed within a very short time. Under the Swiss Rules of International Arbitration, emergency arbitrators must as a general rule decide on the application within 15 days of receiving the file from the secretariat. The Swiss Rules are unique insofar as they are the only widely used arbitration rules that foresee the possibility of obtaining a preliminary order from an emergency arbitrator on an ex parte basis. The Swiss Rules also allow parties to submit the emergency arbitrator application before the notice of arbitration.

Justice Peter Helm, president of the Commercial Court of the Canton of Zurich, provided valuable insights into the practice of the court. Noteworthy were the differences to emergency arbitration. State courts' interim measures may be directed to third parties such as banks or the commercial registry. As a general rule, interim measures proceedings before state courts are based on documentary evidence only. Exhibits in English are accepted, but the application itself needs to be in German. The Zurich Commercial Court may grant interim measures ex parte and does so very quickly. An ex parte order is generally issued within the same day or the next working day. Inter partes proceedings may however take substantially longer than in emergency arbitration. The time limit for the counterparty to respond to the application is commonly 20 days, which is already longer than the time limit of 15 days for the whole emergency arbitration under the Swiss Rules of International Arbitration.

The panellists discussed when it was appropriate to turn to an emergency arbitrator and when to turn to a state court. Relevant factors included the need for a binding effect on third parties, the prospects for voluntary compliance and thus the need to enforce the order, the urgency of the application, and the reliability of a potentially competent foreign state court.

Given the parallel competence of emergency arbitrators and state courts, the panellists asked whether a party that failed to obtain an order from one forum might file an identical or similar application before the other available forum. There were different views on the extent to which the second forum would be bound by the decision of the first forum.

The discussion turned to practical experiences with emergency arbitration. Relying on the ICC's recent arbitration bulletin, Meier reported that there have been 10 applications under the ICC Rules between 2012 and May 2014. In eight of 10 cases under the ICC Rules, an order was issued. Of these eight cases, four applications were rejected, and four were granted at least in part. Of the four cases in which the application was granted in whole or in part, in two cases the parties complied with the order; in one case, the applicant reportedly sought to enforce the order in state courts because of the respondent's refusal to comply. As to the conduct of the procedure, there was no case management conference in any of the ICC cases, but in five cases, hearings (either in person or by telephone) took

place.

From the audience, Lalive partner [Philipp Habegger](#), chairman of the Arbitration Court of the Swiss Chambers' Arbitration Institution, described the four emergency arbitrator applications that have been brought under the Swiss Rules since the introduction of the procedure in June 2012. The first application was completed within 15 days and included two rounds of written submissions, a hearing and the submission of statements of costs; the second application was immediately suspended and subsequently settled; the third application was initially suspended but then resolved within the time limit of 15 days; and the fourth application had just been submitted and was still ongoing.

The panellists also addressed the strict timetable applicable to emergency arbitration. **Daniel Hochstrasser** of Bär & Karrer noted that, from an arbitrator's perspective, emergency arbitration is particularly challenging because it demanded the immediate and full attention of the arbitrator within a very short time. **Martin Burkhardt** of Lenz & Staehelin argued that a respondent may be taken by surprise and that it might in certain circumstances be difficult for an unprepared respondent to comment on the application within a few days. He added that overly strict timetables may give respondents an excuse not to comply with an order.

The panellists further addressed the extent to which a state court judge who is asked to assist in enforcing the emergency arbitrator's order is permitted to review the application substantively. Meier said the prevailing view was that the substantive review of the state court judge should be limited to whether the order is consistent with Swiss public policy. Justice Helm, however, did not exclude that state courts might conduct a broader review. He noted in this context that the requested order must be specific enough to allow for an enforcement. Hochstrasser weighed in that from the perspective of an arbitrator, enforcement is in principle a risk borne by the applicant and it is therefore the applicant's decision to accept potential enforcement difficulties when filing the application.

An audience member asked whether, in practice, emergency arbitrators and state courts ask the applicant to provide security against potential claims for damages caused by an unjustified interim measures order. Meier confirmed that requiring such security is within the authority of the emergency arbitrator. Justice Helm replied that the Zurich Commercial Court regularly asks for such a security if the circumstances so demand.

Burkhardt raised the issue of whether a party may proactively file a submission to the arbitral institution if it has reason to believe that the counterparty is planning to file an emergency arbitrator application against it on an ex parte basis. He argued that the right to be heard would entitle a party to do so. Habegger reported that the Zurich Chamber of Commerce had been approached by a party with that question and confirmed in

principle that it would accept such a submission. He added, however, that eventually the party did not file that submission and that there is not yet an established practice on this question in the Swiss Chambers' Arbitration Institution.

The panellists agreed that emergency arbitration does not and is not intended to replace state court interim measures; instead, emergency arbitration should be regarded as a valuable supplement to the traditional state court remedy.

The conversation continued with apéro riche at the premises of Walder Wyss in Zurich.

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