

# Coronavirus and civil procedure – Emergency judicial relief in times of COVID-19 in Germany

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Emergency and interim judicial relief has come sharply into focus amid the COVID-19 pandemic. Questions arise, such as: Can the courts quickly provide support to maintain supply chains? How does one conduct emergency proceedings in practice these days? Is the coronavirus reason enough to argue urgency? This article is part of our series "Coronavirus and civil procedure" and provides an overview.

## **Overview: emergency judicial relief by way of an asset freeze and preliminary injunction**

Both before and during pending court proceedings, situations can arise that make it substantially more difficult or even impossible for creditors to eventually enforce their claims. To avoid obtaining an enforceable judgment that ends up being worthless, creditors can protect the future enforceability of their claims by seeking interim relief pursuant to secs. 916 ff., 935 ff. *ZPO*. In the case of monetary claims, this is achieved by way of freezing assets through an attachment *in rem*. Where other claims are at stake, e.g. a claim for delivery, a preliminary injunction can be considered.

Creditors must provide evidence of an attachment and/or injunction *claim* and *grounds* for an attachment and/or injunction:

- The attachment and/or injunction *claim* is the claim under substantive law for payment, delivery etc.
- *Grounds* for an attachment or an injunction exist if the preliminary protection of the claim is a matter of particular **urgency**, and especially if waiting for proceedings in the main action is not an option.
- Evidence may include written witness statements.

## **Cases for emergency judicial relief in the COVID-19 pandemic**

The fast-moving nature of the COVID-19 pandemic means that a need for emergency judicial relief can arise very suddenly. It is, therefore, vital to constantly monitor how the situation is

developing. We set out below **three exemplary scenarios** in which emergency judicial relief could be considered.

In all cases, it is important to act quickly: where one waits too long with an emergency application, there is a risk to be precluded from arguing urgency.

### **Impending insolvency plus X**

As a result of the ongoing pandemic, creditors will encounter debtors that are facing insolvency. The German federal government has responded to the impending wave of insolvencies by partially suspending the rules regarding the filing of insolvency applications until September 2020. Rules governing a managing directors' liability for payments made despite insolvency have also been modified.

Consequently, there seems to be a strong need for creditors to protect their claims against debtors facing looming insolvency. However, not all impending insolvencies constitute grounds for emergency relief. On the contrary: in the event of insolvency, the instrument of emergency relief is not intended to improve the position of one creditor over another. At the same time, not all debtors are the same: grounds for freezing assets may exist where there is a risk that a debtor in a poor financial situation will further reduce their assets, in particular through asset shifting. It is, therefore, vital to keep a close eye on developments regarding the debtor. If the crisis is being used to move assets out of the company, applying for emergency relief should be considered.

### **Supply chain disruptions**

Where suppliers stop delivery on the back of the COVID-19 pandemic, customers may need to consider a preliminary injunction if delivery of certain parts is vital and urgently required for production.

A careful assessment is needed: if the supplier can validly argue that they cannot deliver or, in view of the changed circumstances, cannot be expected to deliver, the customer's claim will not succeed. Likewise emergency relief will not be granted (*see [this article with regard to the effects of the COVID-19 pandemic on the defence of force majeure in the supply chain](#)*). However, if, despite all adversity, the obligation to deliver remains and the goods in question are critical, the option of a preliminary injunction should be examined. In an emergency, a supplier could then be ordered by a court to resume delivery within a short period.

### **Double sale of urgently required goods**

In the medical sector in particular, the limited supply of certain products is currently colliding with hugely increased demand. More and more reports are emerging of sellers taking advantage of this situation by selling their goods a second time to the highest bidder, despite existing agreements with the original purchaser.

When faced with this scenario, original purchasers should examine possible ways of seeking emergency relief: the risk of the transfer of title to the second purchaser could constitute grounds for an injunction. This injunction would then take the form of a court order forbidding and preventing the seller from transferring the goods to the second purchaser.

## **Effects of the COVID-19 pandemic on emergency proceedings**

Emergency judicial relief offers an option that appears particularly attractive in times of the COVID-19 pandemic: the court can render a decision without the opposing party being heard, and thus without an oral hearing. Yet there are strict criteria for such *ex parte* decisions, such as

the requirement that hearing the opposing party would endanger the purpose of the emergency relief. Therefore, we should not expect that courts will restrict the right to be heard "merely" so as to avoid an oral hearing and the resulting presence of all parties in a potentially crowded courtroom.

However, anyone who is expecting an emergency decision against them is nevertheless well advised to submit a protective brief in good time. This can be done electronically using the special electronic mailbox for lawyers (*beA*) via the central protective brief register. This could prevent an *ex parte* decision.

In matters involving emergency judicial relief in particular, the right to be heard can also, initially, be granted by telephone or by requesting written statements, if necessary. If the court holds an oral hearing, it could also use video technology pursuant to sec. 128a *ZPO* (*with regard to the possibilities for digital hearings in a national context, see [this article](#). With regard to the same topic in an international context, see [this article](#)*).

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