
Bart Krans & Anna Nylund (Eds.)
CIVIL COURTS COPING WITH COVID-19
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The unforeseen Covid-19 pandemic has propelled, and continues to propel, unprecedented transformations to civil proceedings and the landscape in which they operate. Courts have proven to be creative and innovative in their responses to the pandemic, and in their ability to implement digitisation of paperwork and remote hearings. This book contains a comparative study of how courts in 23 countries have coped with the pandemic, addressing selected innovations and adaptations to court proceedings, factors facilitating and impeding the digital leap, and new concerns that new technology and the pandemic engenders. The authors discuss the implications of digitisation, such as ensuring equal access to courts, novel issues concerning fair trial rights in remote proceedings, the role of alternative dispute resolution during the pandemic, and the roots of resistance to digitisation. Several contributions also address whether and how innovations during the pandemic may transform civil litigation in the future.

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ISBN 978-94-6236-204-8

9 789462 362048 >

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eleven
international publishing

Published, sold and distributed by Eleven International Publishing
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
email: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
Independent Publishers Group
814 N. Franklin Street
Chicago, IL 60610, USA
Order Placement: +1 800 888 4741
Fax: +1 312 337 5985
orders@ipgbook.com
www.ipgbook.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-204-8
NUR 822

Preface

In September 2020, we asked selected colleagues whether they would be interested in participating in a study on how civil courts have responded to the Covid-19 pandemic by writing a short text on the situation in their own jurisdiction. Their immediate and positive response was heart-warming, and by the end of the year, we had received all contributions. This excellent response and the swift delivery of the individual chapters are especially remarkable since the pandemic has not only had adverse consequences on civil proceedings. University teaching staff have also come under great pressure. They faced the sudden need for a new way of teaching in line with Covid-19 measures, having to switch to online teaching in addition to, or in lieu of, face-to-face teaching. We are immensely grateful that so many colleagues decided to join this book project at such short notice and despite the challenges of life during the pandemic. It has been a most enjoyable and rewarding experience.

We would also like to express our gratitude to Leiden University students Emma Stekelenburg and Julie Reynders for assisting us during the final stages of this project. Without doubt, their fast and fabulous work ensured a smooth process in finalizing the manuscript. Finally, a word of thanks to publisher Eleven. It is not a given that a publisher agrees to make an online publication available online and open access – and make a 'real book' at the same time. We greatly appreciate their willingness to meet our needs in this regard. The publication charges for this book have been partially funded by a grant from the publication fund of the University Library of UiT The Arctic University of Norway and by the Department of Private Law of Leiden University.

Leiden/Tromsø, 15 February 2021
Bart Krans and Anna Nylund

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Exceptional Times, Normal Times, New Times?

Bart Krans and Anna Nylund[*]

1 Unforeseen and Unprecedented

The unforeseen Covid-19 pandemic has propelled, and continues to propel, unprecedented transformations to civil proceedings and the landscape in which they operate. Numerous countries across the globe have faced and continue to face the question of how to enable courts to cope with civil cases despite numerous restrictions to the operation of societal functions. After the initial almost full stop in the machinery of civil justice at the onset of the pandemic during the first six months of 2020, courts needed to resume delivering justice. However, many pre-pandemic practices, rules and standards were clearly inappropriate for the new reality, and since the end of the pandemic was not imminent, the civil justice system had to adapt to the exceptional, labile societal circumstances. In late April 2020, we published a study on the initial reactions of civil justice to the pandemic. The study gave a snapshot of the initial reactions of 15 civil justice systems. Courts in all 15 countries were in the process of making a digital leap, but there were still considerable differences among the countries. While we could already see the contours of strategies for coping with the exceptional situation in April 2020, many issues were only emerging at that time. By the time of the present writing, February 2021, some of these issues have become salient. Hence, we attempt to explore how civil courts across the globe are coping with the effects of the pandemic. What have been the most pressing problems, and how have these problems been resolved? What kinds of factors have facilitated or hindered courts pivoting from paper-based and face-to-face hearings to paperless proceedings and remote hearings? What issues does the technological leap engender? What mechanisms other than digitisation help courts continue to operate during 'the state of exception'? Has the pandemic produced a shift in the role of courts? These and many other questions have emerged.[1]

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1 In November 2020, the report 'The functioning of courts in the Covid-19 pandemic' was published by the Organization for Security and Co-operation, www.osce.org/odihr/469170. See also European Law Institute,

2 Different Circumstances, Different Responses to the Pandemic

Every single day since February 2020, we have been faced with data on how the number of Covid-19 infections, hospitalisations and deaths have surged and declined at different tempos in each country and region. In parallel, we have experienced measures to contain the spread of the virus: social distancing, curfews, lockdowns and so forth. Since both the spread of the virus and the measures vary across countries – and even states and regions within countries – the impact of the pandemic on civil justice also varies. That variation, combined with pre-pandemic differences among the civil justice systems around the world, renders it quite challenging to make firm statements on the impact of the virus and the measures taken to address it on civil justice systems globally.

The pan-European courts serve as an example of how institutions in fairly similar settings opt for different approaches to deal with the same challenges. The Court of Justice of the European Union (CJEU) permits parties who are unable to travel to Luxembourg, under certain conditions, to attend a hearing by videoconference. Furthermore, the CJEU might have replaced some hearings with questions to the parties for a written response owing to the difficulties caused by Covid-19.[2] A livestream for the hearings seems not to be available.[3]

Another tone can be heard on the website of the European Court of Human Rights (ECtHR). The ECtHR states that, while it is complying with the public health measures adopted by the host state France, notably by prioritising teleworking and electronic communications, it is continuing all its activities in accordance with the usual rules. Unlike during the previous lockdown periods, the court has not made special arrangements with respect to procedures and time limits.[4] Since the hearings of ECtHR have been recorded and made freely available (including English and French interpretation) since 2007, pivoting to remote hearings did not necessitate special measures.[5]

ELI Principles for the COVID-19 Crisis, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf, and European Commission for the Efficiency of Justice (CEPEJ), CEPEJ Declaration: Lessons Learned and Challenges Faced by the Judiciary during and after the Covid-19 Pandemic. Ad hoc virtual CEPEJ plenary meeting Wednesday 10 June 2020, CEPEJ (2020), 8 rev.

2 As stated by the Court on its website (www.curia.europe.eu), under the heading Covid-19 Information – Parties before the Court of Justice.

3 Another example: the CJEU strongly encourages the courts of the Member States and the parties' representatives who do not yet have an e-curia account to become familiar with e-curia, which is a secure application and allows for procedural documents to be filed and served electronically in cases brought before the Court, https://curia.europa.eu/jcms/jcms/p1_3012064/en/ (consulted February 2021).

4 www.echr.coe.int/Pages/home.aspx?p=home (consulted February 2021).

5 *Ibid.* The ECtHR site also makes clear that hearings held in the morning can be viewed from 2.30 p.m. onwards, while those held in the afternoon are available during the evening.

The EFTA Court has assumed a third approach by shifting to remote hearings using videoconferences. Hearings have been streamed live on the Court's website to ensure accessibility and transparency.[6]

These three supranational courts, which are similar in many ways, selected three different approaches as to, inter alia, how to ensure openness of the proceedings, which is a basic tenet of the rule of law and a fair trial. Although this book neither deals with supranational courts nor is limited to Europe, the example of these three courts illustrates the variation in responses to the pandemic, as well as how small differences in practices related to interpretation of hearings can contribute to producing palpable differences in practices during the pandemic.

3 Resilience, Resistance and Reorientation

In a way, this study can be considered a follow-up to an earlier study, completed in a very short time, on the initial responses of civil courts during the first few months of the pandemic.[7] Still, there are several differences between the two studies. First, the earlier study, conducted in April 2020, was intended as a snapshot of emergency reactions to an incomprehensible situation and a tentative attempt to map what was going on, whereas the present study has been conducted at a stage wherein the pandemic has become the 'new normal'. Second, in this book, more countries are included.[8] Third, this book aims not only at providing more topical information per country but also at providing critical perspectives on current practices and a discussion of how the pandemic-related adaptations will influence the future of civil justice.

The handling and deciding of civil cases has not come to a full stop as a result of the outbreak of the Covid-19 virus in any of the civil justice systems covered in this book, nor hopefully in any other such systems in the world. However, it can certainly be assumed that the virus outbreak, at least in many countries, has forced civil courts to adjust their working methods. What types of cases have courts continued processing and adjudicating, and, conversely, what types of cases have been problematic? Can differences be identified during the respective stages of the pandemic? One of the core topics seems to be the resilience of the civil justice systems or, more precisely, the identification of some factors and solutions that have enabled courts to be resilient.

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6 Press release dated 11 December 2020, https://eftacourt.int/press-publications/press-release-1120/ (consulted February 2021).

7 The report of the study on the initial stages of the pandemic was published online, in the second half of April 2020, by Septentrio: https://doi.org/10.7557/sr.2020.5. It cannot be ruled out that minor parts of certain chapters in this book are partially based on the Septentrio report.

8 The Septentrio report includes 15 countries; this book covers 23 countries.

It seems likely that not all the adjustments have been taken for granted by all the participants in the game of civil proceedings. Resistance may be based on technological issues, financial issues or difficulty embracing new developments. One might ask whether it has been easy to adjust or whether it has been necessary to overcome some form – or, probably more precisely, some level – of resistance.

When the battle against the pandemic has finally been conquered, new questions will arise for civil courts. What can we learn from the experiences during the pandemic? Although the pandemic is unquestionably a global tragedy, it may still be possible to identify options to make the well-known motto 'never waste a good crisis' applicable to civil courts after the Covid-19 crisis. Can the innovations produced to face the current situation be highly valuable in the post-pandemic period? In other words, has a reorientation taken place, and, if so, what are the new horizons and novel ideas and practices that result?

These questions can be approached in several ways, including studying how courts have solved these problems in practice; asking how courts have coped with civil cases during the pandemic in a given country or jurisdiction; discussing the merits and faults of the shifts in civil proceedings induced by the exceptional situation; and attempting to identify how these could and should influence post-pandemic regulations, practices and thinking.

For example, how should the ways in which courts in different countries are dealing with the impact of the virus, and the resulting government measures, be evaluated? How should courts' choices be weighed, considering these choices always take place in a specific societal and legal-cultural context? Have civil justice systems that, pre-pandemic, already functioned on the basis of more or less good functioning technology reacted in a similar way to civil justice systems with a less developed pre-pandemic technology in court? It seems very likely that the world will search for equilibrium after the pandemic. What will post-pandemic civil justice be like? For instance, some of the original measures might still be in place, either in their original forms or with some modifications, while some will have been lifted, and some new measures might have been introduced. Also, more permanent changes to the rules regarding court proceedings might have been made or be in progress. The caseload or the composition of cases might have changed, or the restrictions or innovations introduced might have been taken to a different level, induced discussion or both.

4 The 23 Countries in This Study

To enable us to study the impact of the pandemic on civil justice on a global level, we invited colleagues from countries across the globe to provide insights on developments in their country. We did not provide our colleagues with a table of questions or a specific list

of topics to be covered. We simply asked them to write a short piece about their observations on the impact of Covid-19 on the civil courts in their country, zooming in on one or a few selected aspects they consider interesting. The contributions concern the situation during the pandemic, shed light on 'civil litigation after the pandemic' or both. Considering that many scholars have been faced with having to pivot their teaching to online channels, home office and stay-at-home orders, and other challenges, we deliberately asked for short texts.

The oscillations in the rate of infections and hospitalisations have been accompanied by various types of incessantly changing measures to restrain the spread of the virus. Hence, the consequences for the civil judiciary fluctuate over time. What seems appropriate today may be considered outdated next week, depending on the societal impact of the virus and measures to restrain its spread. As a result, we can identify both convergence and divergence among the countries studied.

The 23 individual chapters hereinafter are in alphabetical order, by country. The continuously changing societal situation of the pandemic era underlines the fact that the respective contributions are snapshots of a country, or parts of a federal state, fixed at a certain point in time. Most of the contributions in this book were finished in January 2021. It is quite possible that the situation may have changed since the chapters were submitted to us, or it may do so on short notice in the near future.

In the Conclusion, we will try to shed some light on several main findings of this study.

Responding to Covid-19

Australian Civil Courts in 2020

David Bamford[*]

Australia has, to date, escaped the worst of the Covid-19 pandemic. A combination of geography, closed borders, a well-developed national health system, the deliberate de-politicisation of the Covid-19 responses and general confidence in governmental systems has enabled Australia to virtually eliminate community transmission of the virus. In a population of 27 million, as of late December 2020, Australia has only had 23,000 cases with just over 900 deaths. Ninety percent of these cases and deaths were the result of the virus escaping from a quarantine hotel in Melbourne in July 2020. After 3 months of a city-wide complete lockdown, the virus was eliminated. However, smaller scale outbreaks from quarantine continue to occur from time to time and are met with widespread testing and tracing along with lockdowns of varying severity until the virus is eliminated.

Despite this success, Australian courts have had to adapt and respond to the challenges of operating during the Covid-19 pandemic. This chapter outlines how courts exercising civil jurisdiction have responded to the challenge of Covid-19 and considers what may well be the permanent legacy of the Covid-19 experience – the significant acceleration in the adoption of digital tools to deliver civil justice.

1 Responding to Covid-19: Australian Courts

The six Australian states and two territories each have their own civil court systems along with the federal court system that has a more limited civil jurisdiction. The federal nature of the Australian polity has meant that the responses by civil courts to Covid-19 have not been uniform.

The first Covid-19 case to be identified in Australia was in late January 2020 but it was not until mid-March that the Australian government began introducing widespread emergency measures to prevent the spread of the virus. By the end of March the national, state and territory governments agreed on a complete lockdown with people only able to leave home for limited specified reasons.

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During the last fortnight in March 2020 Australian civil courts shut down normal operations, virtually overnight. Two examples that are typical of what occurred across Australian civil courts illustrate the dramatic nature of these responses.

The Federal Court of Australia, for example, announced on 17 March that all matters listed before it up until 30 June were vacated and that parties would be contacted by the Court to explore the possibility of proceeding electronically. In a *Special Measures Information Note* issued on 23 March, the Chief Justice informed lawyers that the Federal Court would proceed with cases but with new procedures: electronic filing of all court documents; waiving the need to personally sign documents; and hearings were to proceed using video links or similar technology where possible, and if not possible, those cases would be adjourned.[1]

In Victoria, the Victorian Supreme Court announced on Friday 20 March that as of Monday 23 March, all matters were to proceed by way of video link, telephone or Skype with personal attendances limited to exceptional circumstances. Trials proceeding before a jury were now to be heard by a judge alone. This was not supported by any changes to legislation or court rules but simply was an announcement by the Court.[2]

In some other Australian jurisdictions, the civil courts decided to move to electronic means for pre-trial work and to continue to hold trials through the pandemic but with new procedures to minimise spread of Covid-19. So, in South Australia, where all civil trials are heard by a single judge, Supreme Court civil trials continued with all documents to be produced in electronic form; social distancing; lawyers were to provide their own water containers and use plastic cups; and parties were asked to do all they could to limit the length of trials.[3] Directions hearings, mediations and other pre-trial work were to be done remotely by email, telephone or other electronic means.[4] Court registries closed and all claims or other court documents were to be filed electronically.

Virtually overnight the Australian civil courts had accomplished what court reformers had been attempting to achieve for the preceding twenty years – to move civil litigation into the digital age. As McIntyre et al noted:

1 Federal Court of Australia, *Special Measures Information Note*, 23 March 2020 (www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf.).

2 Supreme Court of Victoria, *Supreme Court Changes in Response to Covid-19*, 20 March 2020 (www.supremecourt.vic.gov.au/news/supreme-court-changes-in-response-to-covid-19).

3 Supreme Court of South Australia, *Practice Changes – Covid-19*, General News Release, 24 March 2020 (www.courts.sa.gov.au/Information/Pages/Coronavirus-Information.aspx).

4 In June 2020 following elimination of Covid-19 in South Australia, procedural hearings reverted to their traditional face-to-face format.

> All of this makes the breakneck transition to 'virtual courts' in response to COVID-19 at once terrifying, thrilling, concerning and exciting.[5]

2 How Will This Affect Australian Civil Procedure Long Term?

The first and most important residue of the Covid-19 pandemic for civil courts is the accelerated move to digital justice. This is most likely to affect pre-trial processes but there are also implications for how trials will be conducted in the future.

2.1 Pre-trial

The moves to electronic filing of documents in court, the creation of electronic court files and the development of electronic case management systems were all well underway before Covid-19. Some Australian jurisdictions already had fully developed digital systems for undertaking pre-trial work,[6] but in many civil courts, hard copy documents continued to be the norm. In the latter jurisdictions, Covid-19 forced their civil courts to introduce electronic filing overnight to minimise people having to attend court facilities. In Tasmania, one of the slower jurisdictions in the move to digital justice, the Supreme Court allowed all lawyers to file documents by email although the court had no capacity to accept court fees online. Given the court files are still paper based, the court staff would have to convert those documents to hard copy and lawyers would be issued invoices for the court fees.[7]

The slow pace of digitalisation of court processes has not been due to any major policy concerns about digitalisation but rather the expense involved in developing these systems. Not only is the technology expensive but the numerous examples of cost overruns, delays and, at times, a total failure of the technology to deliver promised outcomes have led courts and government treasuries to be very cautious. Two examples illustrate this – in New South Wales, the introduction of the integrated case management system was four years late and cost almost double the $30 million budget;[8] in Victoria, the Department of Justice

5 J McIntyre et al, "Civil Courts and Covid-19: Challenges and Opportunities in Australia", (2020) 45 *Alternative Law Journal* 195.

6 The Federal Court of Australia had begun its e-court strategy in 2000 which took almost fifteen years to move to integrated electronic filing, document and case management. By 2017, 95% of all court documents were filed electronically. D Bamford, "Litigation in the Digital Age" in D Bamford & M Rankin, *Principles of Civil Litigation*, 4th ed, Thomson Reuter, 2021.

7 Supreme Court of Tasmania, *e-filing in the Supreme Court,* Circular to Practitioners No 2, 25 March 2020 (www.supremecourt.tas.gov.au/wp-content/uploads/2020/03/E-filing-in-the-Supreme-Court-of-Tasmania.pdf).

8 L Tay, "NSW sees value in slow, costly IT", *IT News*, 2 December 2010 (www.itnews.com.au/news/nsw-sees-value-in-slow-costly-it-projects-240450).

abandoned its attempt to introduce a fine management system after it was six years late and the government had spent just under $60 million in the process – double the original budget.[9]

To a lesser extent, the lack of expertise amongst judges and court officials has also meant a lesser capacity to drive the necessary changes. The inherent conservatism that derives from the natural desire to stay with the familiar is particularly strong amongst the leaders of the legal profession and judiciary who have not grown up as digital 'natives'.

The second aspect of pre-trial process that underwent fundamental change during the Covid-19 pandemic was the move to end face-to-face pre-trial procedural hearings. Australian case management regimes schedule some form of case conference to keep the progress of a case under constant supervision. Along with this there are often specified settlement processes to be undertaken, for example, settlement conferences, mediations, early neutral evaluations. Then there are the procedural hearings to determine applications for specific procedural orders by the parties. These interlocutory hearings are heard by procedural judges or court officials in their chambers; any evidence needed is usually non-contentious and so provided by written affidavit.

In some Australian jurisdictions, where the procedural order being sought is not being opposed, the civil courts had been willing, pre-Covid-19, to determine the matter on the 'papers', that is, without the need for a hearing. Where a hearing is needed, the procedural judge could conduct the hearing by way of telephone or video link. It was thus very easy for many civil courts to move to having all procedural matters dealt with online in response to Covid-19. This was very popular with lawyers as often time spent travelling to the court and then waiting for a procedural hearing is far longer than the time taken by the procedural hearing.[10]

While some courts have reverted to face-to-face procedural hearings as their jurisdictions managed to control or eliminate the virus, the benefits and efficiencies gained from having procedural hearings conducted remotely is likely to lead to this becoming a permanent part of Australian civil procedure.

Having experienced the benefits of electronic filing, remote pre-trial hearings and with the increased investment in digital justice that accompanied the Covid-19 pandemic, the move to digital justice in the pre-trial stage is only going to be accelerated.

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9 D Donaldson, "A 'Bad Track Record in ICT Projects: Learn from Victoria's Mistakes", *The Mandarin*, 15 March 2016 (www.themandarin.com.au/61749-auditor-blasts-ict-project-budget-blowouts/).

10 A Tsalamandris, "Paperless Litigation: Adaption during Covid-19", (2020) 160 *Precedent* 4, 6.

2.2 Trial

The need to respond to the Covid-19 emergency meant some courts decided to proceed with online trials. Many Australian courts did not have the technology to enable quick transition to virtual trials but the Federal Court of Australia did and is perhaps the best Australian example of this change.

The Federal Court of Australia is a national court exercising a civil jurisdiction based on federal laws. As a national court it has been an early adopter of technology to address the 'tyranny of distance' that is a feature of Australian life.[11] While it had adopted digital technology for the pre-trial stages,[12] its use of such technology for trials was more limited. Its national jurisdiction meant that video links were increasingly being used to facilitate taking of evidence from witnesses in distant locations, but local witnesses, the lawyers and the judge were required to be physically present in the courtroom.

One of the main reasons for this requirement is the common law's long cherished belief that the direct observation of the confrontation between parties and witnesses, particularly through the vehicle of cross-examination, was often the best means of establishing the reliability of witnesses. There was also significant concern at the effects that technology would have on the trial process – could the quality of the video link affect outcomes? Could the fact the witness was physically remote from the court affect the outcomes? How could the court ensure that the witness was not being coached, advised or otherwise influenced by happenings outside the camera's view? These beliefs and concerns have long been a barrier to the use of technology to allow remote hearings.

The Federal Court, an early mover to virtual trials, was quickly faced with applications by lawyers to adjourn their virtual trial. In one early case now widely cited,[13] the lawyers argued, on many grounds, the trial should not proceed as a virtual trial. They argued that it would be unfair if they were not given the opportunity to undertake a cross-examination of the witnesses with the witness physically present in the courtroom before the judge; it would be difficult to manage a six-day trial with possibly 50 witnesses; they would not be able to confer with each other or with expert witnesses; and the witnesses may not have the necessary technology to allow them to participate.

The trial judge, Perram J, rejected all these arguments. His decision took into account Covid-19 public health requirements that meant the court would not be able to operate as normal for an indefinite period and the fact that the case had had a tortuous procedural history including having missed two trial dates. The judge went on to address all the arguments against the virtual trial indicating they were not insurmountable (e.g. the lawyers

11 The oldest national court, the High Court of Australia, is Australia's highest court and final court of appeal. It began using video links in 1987 to hear certain cases from the more distant Australian states.

12 Above note 6.

13 Capic v. Ford Motors Ltd [2020] FCA 486.

could talk to each other by WhatsApp or other communication app during the hearing; the two months to the trial gave the lawyers plenty of time to sort out access to technology and reliability issues). On the key point of the disadvantage parties would have not being able to cross-examine witnesses in person, the judge suggested earlier decisions opposing use of video links for cross-examination did not enjoy the benefits of the recent developments in technology like Microsoft Teams or Zoom. Perram J said that his experience was that he could get a better close-up view of witnesses on a screen than he did in a courtroom and thus there was no real disadvantage in proceeding by way of virtual cross-examination.[14]

The move to electronic filing of court documents has been outlined in the analysis of changes at the pre-trial stage of litigation. This has also had implications for trials where the need for paper documents has been dispensed with. Even where courts did not have electronic document systems when the pandemic started, off-the-shelf solutions like DropBox provided a temporary solution. As a result, the costs and inefficiencies associated with preparing and using voluminous court books containing copies of documents are avoided. Some courts are trialling the provision of iPads to jurors containing all the necessary documents so they can more easily follow, annotate and refer to the documents used in the case.[15]

Perhaps the greatest impact of these changes has been the change in mindset of judges and court administrators that has come with use of digital technology to conduct trials. While there are clearly cases which may not be amenable to a virtual trial, the anecdotal evidence available so far shows the concerns about the disadvantages of using video links to conduct virtual trials have been diminished.

> [I]f I was presently satisfied that the arrangements that could be put in place to hear this matter would mean the trial was 'second-rate' or substandard, then I would not proceed. Central to my analysis is the accumulating experience of the Court in the use of the Microsoft Teams technology to hear cases. Currently, a native title case is proceeding before Justice Jagot using that technology, which I am informed involves some 33 witnesses giving oral evidence. For my own part, I have now conducted a number of interlocutory hearings, and a complex defamation trial involving extensive cross examination and reference to documents. The hearings were successful (at least from my perspective). Indeed, as someone who was quite sceptical about how the trial could be conducted in the present circumstances, I was pleasantly surprised. Speaking generally (and this case does have particular aspects to which I will make more reference

14 *Ibid.*, [13]-[20].
15 Above note 8, 7.

> below), the process of receiving both evidence, including evidence adduced in cross examination, and submissions, although sub-optimal, was not impaired to such an extent that I considered that there was anything second-rate about the experiences that I have had with the Microsoft Teams technology.[16]

3 Systemic Issues

The responses by Australian civil courts to Covid-19 have also had implications for the broader public, beyond those involved in the cases before the courts. The first and most obvious one has been the challenge of ensuring 'open' justice. With the move to virtual hearings, how do courts remain open to the public? Various strategies were adopted including allowing anyone wanting to observe hearings to contact the court by email before the hearing and they would be provided a link to the relevant virtual hearing. This solution removes the opportunity the public currently have to observe courts anonymously but it does make watching proceedings more convenient. McIntyre et al suggest that one solution to the open justice challenge posed by virtual courts is to move to more live streaming of court proceedings.[17]

The Covid-19 experience may also encourage judges and court administrators to be more willing to adopt off-the-shelf technology solutions. Much of the history of the development of digital justice in courts over the last twenty years reveals projects that experienced significant cost-overruns and long delays as courts struggled to develop bespoke software to accommodate the way litigation has been traditionally conducted.

> I think the legal and judiciary sector, in all its complexities, has focused for so long on building bespoke technology and bespoke business application. When you opt in for an off-the-shelf product, it forces you to take a step back, to re-evaluate some of your practices – and you may find that some of them are archaic.[18]

A final implication for the civil justice system arising from the Covid-19 experience is that there will be demands for a greater and accelerated investment in digital technology within courts. When the Covid-19 pandemic comes to an end, and with 12-24 months operational experience, courts will not be able to simply return to old paper-based procedural systems and the presumption that hearings will be in person. This year has demonstrated that civil

16 Australian Securities and Investment Commission v. Get Swift Ltd [2020] FCA 504 [25].
17 Above note 5, 199.
18 C Bowie, "Finding the Silver Linings", (2020) 73 *Law Society Journal* 38, 40.

courts can operate in a digital world and still maintain its fundamental values of independence, transparency, fairness, accuracy and access.

The Impact of Covid-19 on Civil Procedure in Belgium

Piet Taelman[*]

1 A Brief Outline of the Development of the Pandemic

In early March 2020, the number of coronavirus infections in Belgium was increasing exponentially. As of 13 March 2020, Belgium went into a quasi-lockdown during the first wave of the pandemic. It was several weeks before the effect of the emergency measures became clear. From the beginning of April onwards, the figures of infections, hospitalisations and deaths started to fall gradually. By 4 May 2020, the number of infections had fallen sufficiently to allow a gradual easing of the measures.

At the end of July, virologists announced a second wave of the pandemic. The government reintroduced more stringent sanitary measures. From 19 October 2020, pubs, bars and restaurants were again closed, and teleworking in non-essential companies and services was again compulsory. A few days later a curfew was introduced. At the end of October, the measures were further tightened. On the date of the closure of this contribution,[1] this second wave has not yet run its course, although the number of infections and hospitalisations is decreasing considerably.

Belgium has been hit quite hard by Covid-19 as the total death toll stood close to 20,000 on 31 December 2020, or almost 1,700 deaths per million inhabitants. These numbers cannot be easily compared with those of other countries as Belgium counts not only confirmed Covid-19 deaths but also probable deaths. Analysis shows that the excess deaths that occurred in Belgium during both waves of the pandemic can be explained entirely by the Covid-19 deaths, unlike in many other countries.[2]

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1 31 December 2020.

2 https://multimedia.tijd.be/oversterfte/ (December 2020).

2 First There Was Chaos

Belgian courts reacted in scattered order during the first wave of the pandemic. As adequate protection material and software tools to organise videoconferences were not available, every president decided what measures to implement in his or her own court. The result was a jumble of widely divergent measures and instructions. Some court presidents even decided to – temporarily – completely shut down their courts.[3] A local bar president confided to me that during this first wave, communications to attorneys concerning the functioning of the courts (inter alia in relation to the initiation and/or handling of cases) needed to be updated almost daily.

3 The Management Committee Tried to Create Some Order in the Chaos

The Management Committee of the Courts and Tribunals[4] (the 'Management Committee') created a framework within which to deal with the pandemic in the judiciary. Unfortunately, the courts did not apply this framework uniformly.

The first attempt was the non-binding recommendations the Management Committee issued on 13 March 2020.[5] These recommendations aimed to ensure both the continuity of access to justice and protection of the health of all people involved. In practice, most recommendations laid the emphasis on protecting the health of magistrates and court staff. It only called for the continuation of urgent cases while advising review of timetables taking into account the urgency of the matters and the availability of magistrates, court staff and courtrooms adapted to the health crisis. The Management Committee also recommended flexibility in dealing with requests to postpone hearing of cases to a later date and to allow parties, even in disputes where they are legally required to appear in person,[6] to be represented by their attorneys.

3 For example, all Justice of the Peace Courts in Brussels remained closed during the first wave of the pandemic, while their court registries were only irregularly accessible by telephone.

4 This new managerial body was created in 2014 – together with the Management Committee of the Public Prosecutor – with a view to giving the Belgian judiciary greater managerial autonomy. It is responsible for the good overall functioning of adjudicating judges (the 'sitting magistrates') through the use of measures that ensure an accessible, independent, timely and high-quality administration of justice (Art. 181 Judicial Code).

5 https://legalnews.be/gerechtelijk-recht/aanbevelingen-ingevolge-corona-college-van-hoven-en-rechtbanken/ (December 2020).

6 Such as some family law cases (Arts. 1253*ter*/2 and 1253*ter*/4 Judicial Code).

On 16 March 2020, the Management Committee issued its first binding directives, which overruled any earlier contradictory decisions of court presidents.[7] As a general rule, the Management Committee stated that only urgent civil matters would be deliberated by judges on the basis of the written pleadings and supporting documents of the parties and that all hearings before the courts should be postponed until 19 April 2020. The initiation of new court proceedings, except for urgent matters, was postponed until the aforementioned date. The Committee stated that, as far as possible, a minimum level of service at court registries[8] should be ensured.

A ministerial decree of 18 March 2020 on emergency measures to limit the spread of the coronavirus Covid-19[9] enumerated all so-called 'companies in the critical sectors and essential services' that should remain open during the health crisis and that were not obliged to switch to teleworking. It came as no surprise that 'the institutions of Justice and related professions' qualified as such an essential service.[10]

In line with this ministerial decree, the Management Committee amended its binding directives with the requirement that courthouses remain accessible.[11] From that moment onwards, filing of written pleadings and supporting documents needed to be done electronically. In order to limit physical contact at the court registries as much as possible, it even became temporarily possible to electronically initiate proceedings (e.g. writs of summons, petitions) via an online platform. Alternatively, 'regular' email could be used for the same purpose.[12] The bar associations, however, strongly discouraged the use of regular email in communication with the court registries as unsafe and probably not GDPR compliant.

In the implementation of these directives almost all courts issued special corona orders, in which parties were exhorted to replace the hearing by 'written proceedings'.[13] This implies that parties or their counsel mutually agree to a purely written procedure whereby the judge will decide the case on the basis of the written pleadings and supporting documents. However, the judge may summon the parties to clarify their position on certain

7 www.rechtbanken-tribunaux.be/sites/default/files/nieuwsartikels/commu-coronavirus-iii-dirco-nl-20200316.pdf (December 2020). These directives have been regularly updated in the course of the health crisis, inter alia, in the light of the updated legal framework, especially the Royal Decree No. 2 (see *infra* and www.rechtbanken-tribunaux.be/nl/nieuws/dwingende-richtlijnen-ingevolge-corona; www.rechtbanken-tribunaux.be/nl/nieuws/corona-update-1-november-2020 (December 2020)).

8 Preferably by electronic means, telephone or letter, in order to avoid any physical contact.

9 *Belgian Official Gazette* 18 March 2020 (ed. 3).

10 This qualification has been reaffirmed in the Ministerial Decree of 28 October 2020 on urgent measures to reduce the spread of the coronavirus (*Belgian Official Gazette* 28 October 2020 (ed. 3)).

11 Update of the mandatory directives by the Management Committee of 18 March 2020, www.rechtbanken-tribunaux.be/nl/nieuws (December 2020).

12 Update of the mandatory directives by the Management Committee of 18 March 2020, www.rechtbanken-tribunaux.be/nl/nieuws (December 2020).

13 Art. 755 Judicial Code.

issues orally. Some orders even provided for the automatic application of this written procedure unless one of the parties objected timely to it.[14]

Scholars severely criticised the Management Committee's decision to require the treatment of only urgent civil matters during the pandemic as unjustifiable because it puts de facto 'Justice on hold'.[15] The pandemic required the Management Committee to find a balance between two fundamental principles: access to justice and protection of the health of its actors. Undeniably, the Management Committee – despite paying lip service to the principle of access to justice – was concerned mainly with the protection of the health of the judges and the court staff. Its directives led to a suspension of almost all civil proceedings except for urgent cases. In my view a finer balance could have been struck between both principles, e.g. by continuing to allow new cases as the first steps in civil proceedings are mainly in writing.

4 Emergency Legislation

On 27 March 2020, an Act adopted by Parliament authorised the government to take measures in various areas, including the administration of justice, to combat the spread of the Covid-19.[16] On the basis of this Act the government issued the Royal Decree No. 2 of 9 April 2020.[17]

In its Article 1, it provided for an automatic extension of several procedural time limits, such as the statute of limitations, deadlines in the framework of pending proceedings (e.g. for the filing of written pleadings), as well as the time limits for the lodging of appellate remedies (e.g. appeal, opposition).

The most contentious rules were set out in its Article 2, which stated, as a general principle, that all cases where the hearing was scheduled between 11 April and 17 June 2020, and for which all parties had submitted written pleadings, would be automatically taken under deliberation on the basis of the written documents submitted, without oral

14 M. Segers, "De schriftelijke rechtspleging, renaissance in coronatijden?", *De Juristenkrant* No. 407 (8 April 2020), 7.

15 *See, e.g.* J. Englebert, *Service nécessaire à la Nation, la Justice ne pouvait pas être confinée*, Limal, Anthemis 2020, 8 p., https://v3.globalcube.net/clients/englebert/content/medias/j_-englebert_la-justice-ne-pouvait-pas-e__tre-confine__e_def.pdf (December 2020).

16 *Belgian Official Gazette* 30 March 2020, with entry into force on that day.

17 *Belgian Official Gazette*, 9 April 2020, with entry into force on that day. Such a 'numbered Royal Decree' has the same force of law as a formal Act. With a Royal Decree of 28 April 2020 (*Belgian Official Gazette*, 28 April 2020, with entry into force on that day), some of the measures adopted by the Decree No. 2 of 9 April 2020, were extended from 3 May till 17 June 2020. The relevance of some of these measures was questioned by the president of the Dutch-speaking Bar of Brussels as they came into being after almost four weeks of lockdown (Newsletter No. 20, 9 April 2020). *See* for a critical analysis of these rules: J. Englebert, *Service nécessaire à la Nation, la Justice ne pouvait pas être confinée*, Limal, Anthemis 2020, 57 p.

hearings.[18] Two exceptions were created. First, if all parties objected to the written procedure, the case was postponed to a later date. Secondly, if at least one but not all parties objected to the written procedure, it was within the discretion of the court to decide to either (*i*) allow a hearing (possibly by video conference), (*ii*) postpone the case or (*iii*) take the case into consideration without oral pleadings.

This emergency legislation was followed by the Acts of 30 April and 20 May 2020 concerning various measures regarding the judiciary in the fight against the spread of the Covid-19.[19] These gave, inter alia, a legal basis to the aforementioned directive of the Managing Committee of Courts and Tribunals temporarily allowing the initiation of proceedings via an online platform.[20] Furthermore, they also provided for the limitation of certain seizures of assets against individuals,[21] a temporary exemption on the requirement for all judges who rendered the judgment as well as the assisting court registrar to sign the original of the verdict,[22] the appointment and swearing in of new members of the judiciary (judges, legal secretaries, court registrars) in writing,[23] the extension of time limits to submit documents for those seeking legal assistance, and so on.[24]

5 Periods of Crisis Can Give Rise to New Ideas, Which Should Not Be at Odds with the Prevailing Legal Culture

In 2015, in an attempt to ease the backlog of cases, the previous Minister of Justice, Koen Geens, announced, in his plan for justice, entitled 'More Efficiency for More Justice',[25] a

18 By way of derogation, the special rules on the hearing of minors (Art. 1004/1 Judicial Code) must always be respected.

19 *Belgian Official Gazette* 4 and 29 May 2020.

20 Art. 4 Act of 20 May 2020, which entered into force on 18 March 2020 (till 30 June 2020). The period of validity of this provision has been extended three times, most recently to 31 March 2021 (Art. 49 Act of 20 December 2020, *Belgian Official Gazette* 24 December 2020 (ed.1)).

21 Art. 9 Act of 20 May 2020.

22 The signature of the president and the assisting court registrar suffices (Art. 11 Act of 4 May 2020).

23 Art. 4 Act of 30 April 2020. By Art. 2 Act of 20 December 2020 (*Belgian Official Gazette* 24 December 2020 (ed.1)) this became a definite, structural measure that originated in the social distancing rules but that will continue to exist in a post-corona world.

24 Other legislation provided for a temporary increase in the thresholds applicable in case of seizure of income from employment or other revenues, the temporary deferment of certain forms of enforcement against companies that were legally forced to close during the pandemic, the temporary extension of time limits for judicial sales of immovable property and voluntary sales in judicial form. The validity of all these provisions has been extended recently by Act of 20 December 2020, containing various temporary and structural provisions on justice in the context of the fight against the spread of the coronavirus (*Belgian Official Gazette* 24 December 2020 (ed.1)).

25 K. Geens, *Plan justice – Une plus grande efficience pour une meilleure justice – Justitieplan – Een efficiëntere justitie voor meer rechtvaardigheid*, 2015, https://cdn.nimbu.io/s/1jn2gqe/assets/Plan_Justice_18mars_

series of measures aimed at improving the proper administration and functioning of the judiciary, as well as the efficiency of the procedural rules, without making any concessions in terms of quality. It was the minister's ambition to reduce the number of cases on appeal and to stimulate the proper treatment of cases at the first instance level. Within this framework he had been toying with the idea of effecting a thorough change in the course of civil proceedings. In particular, the minister proposed to set up a pilot project within the Business Courts, whereby, in principle, purely written proceedings would be used, without any oral hearing. However, each party would be able to lodge a request to be heard.[26] This proposal was not retained in the final version of the draft Act. A critical advisory opinion of the Council of State delivered during the lawmaking process led the minister to withdraw it because 'it required further consideration and consultation'.[27]

In the wake of the first wave of the Covid-19 crisis, his idea of a purely 'written civil procedure' resurfaced. The then outgoing Minister for Justice, Geens, stated that the emergency measures had resulted in significant efficiency gains for the judiciary because they had led to an increased use of the written proceedings.[28] His assertions were, however, never substantiated with data. The proposal to generalise the written procedure, after it had been adjusted to take account of a few technical imperfections, met with fierce opposition from, among others, the bar associations and the High Council of Justice.[29] They felt that oral hearings should remain the standard to ensure the continued confidence of litigants in the rule of law and accused the minister of using the pandemic as a lever for fundamental changes. The proposal was again withdrawn and was not put to the vote in Parliament.

Since 1 October 2020, Vincent Van Quickenborne assumed office as Minister of Justice in the government of Prime Minister Alexander De Croo. In a draft statutory text[30] the idea of a mandatory written procedure as a general rule cropped up again as Belgium is

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FR.pdf (French) – http://justitie.belgium.be/sites/default/files/downloads/Plan%20justitie_18maart_NL.pdf (Dutch) (November 2020).

26 Draft Act of 15 July 2016 amending the legal status of the detainees and the supervision of prisons and containing various provisions on justice, *Parliamentary Acts* 2015-16, No. 54-1986/1, www.dekamer.be/FLWB/PDF/54/1986/54K1986001.pdf (December 2020). It was the minister's intention to subsequently roll out this revised course of civil proceedings over the other courts. *See also*: K. Geens, *Court of the Future*, 25 October 2017, 31, No. 68, www.koengeens.be/fr/policy/court-of-the-future (December 2020).

27 *Parliamentary Acts* 2015-16, No. 54-1986/1, 6; www.dekamer.be/FLWB/PDF/54/1986/54K1986001.pdf (December 2020).

28 B. Slegers and S. Verherstraeten, "Legislative proposal of 27 May 2020 containing various provisions on justice, *inter alia* in the context of the fight against the spread of the coronavirus", *Parliamentary Acts* 2019-20, No. 55K1295/1, 34, www.dekamer.be/FLWB/PDF/55/1295/55K1295001.pdf (November 2020).

29 *De Standaard* 23 June 2020, "Ultieme hervormingsplannen Geens stuiten op verzet"; www.standaard.be/cnt/dmf20200623_04998979 (January 2021).

30 Draft Act of 25 November 2020 concerning various temporary and structural measures regarding justice in the fight against the spread of the coronavirus, *Parliamentary Acts* 2019-20, No. 55K1668/1, www.dekamer.be/FLWB/PDF/55/1668/55K1668001.pdf (November 2020).

going through the second wave of the pandemic. Once again, the bar associations opposed a revival of the written procedure beyond 17 June 2020, the date of expiry of the emergency rule. The Legislative Section of the Council of State and the Data Protection Authority also issued negative opinions on the proposal.[31] Again, the minister dropped this part of his proposal but stressed that he would return to this issue at a later date.[32]

For now, a repeated attempt to carry out a structural and fundamental reform of civil proceedings seems to have been thwarted successfully. A clear majority of attorneys are of the opinion that a hearing is valuable in sensitive[33] or – factually or legally – complex civil cases,[34] although there is significant variation in the duration of hearings between the different Belgian courts. Attorneys argue that the added value of a hearing consists of the possibility of interaction between the court, the parties and their counsel – often providing additional insights but also clarification and redress for litigants.[35] However, the Achilles' heel of this argument is that interaction requires thorough preparation of the case on the part of both the judge(s) and the attorneys. Unfortunately, not all judges prepare their cases exhaustively, and often – especially in lower value cases – the attorneys who plead were not involved in the drafting of the written pleadings and are thus unable to answer any questions beyond the arguments set out in the pleadings.

6 Situation on the Ground – The Reflection of the Pandemic on the Practice of Civil Proceedings

Official figures on the impact of the Covid-19 crisis on the number of new court cases initiated in 2020 are not yet available. I learnt from a survey that I conducted among a limited number of magistrates and lawyers that, fairly generally, this number has decreased significantly since 2019. The first president of the Labour Court of Appeal of Ghent

31 The latter was concerned about the absence of guarantees of the confidentiality of hearings organised by videoconference. This seems to be a strange argument as the essence of a public hearing is, of course, that anyone is free to attend and that there can be no expectation of confidentiality whatsoever.

32 Report 10 December 2020 on a draft Act concerning various temporary and structural measures regarding justice in the fight against the spread of the coronavirus, *Parliamentary Acts* 2019-20, No. 55K1668/7, 14, www.dekamer.be/FLWB/PDF/55/1668/55K1668007.pdf (December 2020).

33 For example, in family matters.

34 A survey conducted by the Ghent Bar under its members learned that 44% of the attorneys were in favour of reintroducing the oral pleadings, while 33% opted for maintaining the written procedure (Report 19 May 2020).

35 M. Segers, "De schriftelijke rechtspleging, renaissance in coronatijden?", *De Juristenkrant* No. 407 (8 April 2020), 7.

reported[36] a decrease of 16% in new cases.[37] The civil sections of the Antwerp Court of Appeal (which deal with civil, family, commercial and tax disputes) announced a drop of 8.83%.[38] The number of disputes closed per judge in that court also dropped in 2020 to 129.55 compared with 139.46 in 2019. The civil sections of the Ghent Court of Appeal reported similar figures: the number of judgments dropped by 10.1% in 2020 since the previous year and by almost 14% since 2018. However, its structural backlog did not grow in the course of 2020 owing to a decreased number of new cases.

Some Brussels law firms saw a fall of between 23% and 27% in the number of cases, especially among private clients. An Antwerp law firm, specialised in business and insolvency law, reported a decrease of 9.8% in new cases in 2020. The latter pointed to the protective measures taken by the government to counter the economic impact of the pandemic as the main cause of this decline.[39] The Ghent Business Court announced over 2020 a drop of almost 30% in insolvency proceedings in the province of East Flanders in comparison with 2019. A survey conducted by the Ghent Bar in May 2020 learned that at the time more than 90% of the attorneys were confronted with a slump in the number of new cases: 60% of them reported a reduction of at least 50%! This downward trend was confirmed by the declining input figures of several courts. The Ghent Business Court reported over 2020 for its two largest sections a decrease of approximately 10,5 % in new cases compared with 2019.

Courts and attorneys reported an increase in the backlog of cases owing to the quasi automatic deferment of almost all cases during the first wave. The Ghent Court of Appeal reported a clear drop in the number of judgments in this period (except in construction disputes, in which, owing to their technical nature, written proceedings are quite commonly used). Often one of the parties or attorneys opposed the use of a 'written procedure' or refused to treat the case orally via videoconferencing. Sometimes a tool for videoconferencing was lacking, unreliable or incompatible with the IT system of one of the attorneys. A significant portion of these cases, in particular when they are pending before courts struggling with a structural backlog, have not yet received a new trial date. Even for those cases a new trial date was fixed, court clerks often announce shortly before the hearing that the duration of oral arguments is strictly limited and still urge the use of a written procedure.

36 State of affairs on 7 December 2020.

37 Broken down according to the nature of the cases, a decrease of 13% was observed in social security law and individual labour law cases. Particularly noteworthy is the strong decrease, by 26%, in the number of disputes related to the collective debt settlement procedure.

38 This downward trend has continued since 2015. The number of new cases in 2020 has decreased by 28% since then, mainly because of legislative reforms between 2015 and 2018.

39 In particular, the possibility of extension of repayment of credits, social security contributions and taxes, as well as the moratoria to proceed to the attachments for sale and to institute bankruptcy proceedings.

Adjusting work processes required, in addition to a great deal of creativity, important efforts of both magistrates and court staff, which resulted in considerably more workload in 2020 (e.g. a lot of preliminary hearings). The pandemic also led – near the end of 2020 – to additional family disputes (e.g. a clear increase in the number of divorce proceedings), albeit without an increase in the structural backlog in family courts.

The caseload in 2021 is expected to grow, inter alia, owing to corona-related disputes (in which concepts such as 'force majeure' and 'abuse of rights' will play a central role, as a result of the health crisis and the sanitary measures taken to fight the spread of the virus) and the ending of a lot of (temporarily) supportive and protective measures by the government (which will likely result in additional bankruptcies).

7 To Conclude

The Belgian government has failed, over the past two decades, to achieve the digital transformation of the judiciary. This lack of digital tools and knowledge exacerbated the impact of Covid-19 as the judiciary was unable to easily switch to telework. In addition, the legal profession (judges and attorneys) has always been distrustful of change and has often resisted modernisation efforts. Furthermore, the different legal cultures in Belgium are an additional impediment to digitalisation as this requires a uniform approach. This stands in stark contrast to alternative forms of dispute resolution, e.g. arbitration, in which the use of digital tools has become the norm during the pandemic.

One can only hope that the Covid-19 crisis has created the momentum for actual digitalisation of the judiciary. At least, the current Minister of Justice is a strong proponent of further digitalisation. According to his General Policy Statement on Justice of 4 November 2020,[40] one of the key focus points for the coming years will be the digitalisation of the judiciary.

Making any further reliable predictions on the aftermath of this health crisis on the administration of law is essentially impossible, as its ultimate effects are still unforeseeable.

40 General Policy Statement of the Ministry of Justice, *Parliamentary Acts* 2019-20, No. 55K1580/16, www.dekamer.be/FLWB/PDF/55/1580/55K1580016.pdf (November 2020).

Brazilian Precedents in Covid-19

Supreme Court Matters?

Fredie Didier Jr., Hermes Zaneti Jr. and Ravi Peixoto[*]

1 Unprecedented Crisis[**]

Brazil is immersed in the Covid-19 crisis, which is equivalent to a war effort. Moments of crisis generate effects in law demanding action, creating internal tensions and exerting pressure on legislative, executive and judicial powers.

This article deals with the Supreme Court precedents in times of Covid-19. All branches of power need to follow the precedents of the Supreme Court, which has broad judicial review powers to interpret the Constitution. So far, the Court has been able to maintain the *stability and the unity of law and build the appropriate legal solutions for the emergency* issuing decisions as binding precedents. Can these precedents be valid for the future?

2 The Reaction of Brazilian Civil Justice to the Pandemic

The general reaction of the judiciary and the justice system in Brazil was self-restraint. Although powers of judicial intervention in public policies are recognised in Brazil, only in extreme cases and when the government adopted contradictory attitudes have judges intervened in pandemic-related policies.

The contribution of the National Council of Justice (CNJ)[1] was particularly important, especially in the national suspension of deadlines and in stimulating processes and court hearings conducted electronically.

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** This text is the result of the research groups 'Transformations in theories about process and procedural law', based at UFBA, and 'Fundamentals of Contemporary Civil Procedure', based at UFES, members of 'ProcNet – International Research Network – Civil Justice and Contemporary Procedural Law' (http://laprocon.ufes.br/rede-de-pesquisa).

1 CNJ is a federal public body that aims at reformulating the performance of the judiciary, especially with regard to control and administrative and procedural transparency. Its objective is coordinating and promoting administrative control and improving public service in the provision of justice by means of planning actions.

Brazil was already at an advanced stage of digitalisation of processes and of the electronic practice of procedural acts; the pandemic made this trend inevitable, leading to a proposal that judgments be performed 100% digitally. Resolution n. 345/2020 of the CNJ authorises, with information technology resources, the needlessness of the parties to be physically present at forums or other justice facilities, and conflicts to be resolved online, by means of video hearings and apps, for instance.

In 2004, the general data of the judiciary was made available by the Justice in Numbers Report.[2] Nowadays, there is a policy that allows all citizens to access online current data so that it can be analysed by researchers and the general public alike. During the pandemic, productivity increased in those courts that had already gone digital.[3] In fact, specific data on cases related to the judicialisation of Covid-19 is also available.[4]

The need to preserve stability and provide emergency solutions is a characteristic of Disaster Law, a new and specific field that deals with human or natural events affecting countless people and groups in an irradiated way, having human or social impacts that go beyond the individual dimension.[5] The need for emergency judicial protection also gives rise to a Procedural Law of Disasters. Procedural law of disasters can be understood as a branch of law that involves complex litigation caused by disasters. Its objective is to manage risks and maintain the unity and stability of law, while developing solutions for conflicts that arise, since these solutions were hardly expressly foreseen.[6]

These conditions, which cannot be considered 'standard conditions', need to be the object of reflection within the legal literature. For this reason, the theme of judicial precedents formed in this exceptional period gains relevance.

Precedents must be understood as rules capable of guaranteeing the rationality and the unity of law, avoiding or minimising the emergence of legal crises. Precedents, however, may lead to the opposite situation, generating insecurity owing to the difficulty of understanding the law; hence the importance of analysing its extent and functions in times of crisis.

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2 *See* 'Justice in Numbers', a website in Portuguese showing business intelligence panels. Available at www.cnj.jus.br/pesquisas-judiciarias/justica-em-numeros/, access on 04 January 2020.

3 Resolution N. 314/2020 of the CNJ recommends the digitalisation of the processes and the passage to the e-process whenever possible. The productivity of the judiciary can be checked here www.cnj.jus.br/programas-e-acoes/priorizacao-do-1o-grau/dados-estatisticos-priorizacao/indicadores-produtividade-magistrados/, access on 28 January 2020.

4 *See*, for instance, https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html, access on 22 December 2020.

5 Farber, Daniel; Chen, Jim; Verchick, Robert. R. M.; Sun, Lisa Grow. *Disaster law and policy*. New York: Aspen Publishers, 2010; Carvalho, Délton Winter; Damacena, Fernanda. *Direito dos Desastres*. Porto Alegre: Livraria do Advogado, 2013.

6 Zaneti Jr., Hermes. Collective Redress in Brazil: Success or Disappointment. In: Uzelac, Alan et al. *Class Actions in Europe. A Holy Grail or Wrong Trail?* Cham: Springer 2021.

First, not every decision is a precedent, although many decisions have the potential to become one. Decisions that are initially in the lower courts may reach the Superior Court of Justice and the Brazilian Supreme Court (STF, courts with national competence in Brazil) by means of appeals, just as many issues can be initiated originally in these courts or reach them by means of challenge other than appeals.

Evidently, there are folklore and tragic cases of judicial error, but they are exceptions to the general trend of institutional self-restraint and balance that has been incorporated by the Brazilian judiciary.

3 The Fulfilment of Law by Judging Bodies during the Pandemic

There are several examples of decisions made throughout this period that can provoke important reflections when conditions return to be somewhat close to what they were before.

The judicial environment in the first degree and in the courts presents a diverse context. Several decisions have been determining the suspension of the payment of debts, preventing the execution of online seizure orders,[7] suspending the payment of taxes,[8] reducing rentals paid by restaurants,[9] owing to the alterations of the schedule by the Public Administration, and even decreeing total or partial lockdowns.[10] In another case, the Court of Appeal of the State of Espírito Santo suspended the effects of judges' decisions that had determined the use of hospital beds for non-urgent surgeries, maintaining the public policy of reserving ICU beds for the sole purpose of treating Covid-19, except in case of urgency and life risk.[11]

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7 Magistrate suspends online seizure orders due to the Covid-19 crisis. Available at www.migalhas.com.br/quentes/323133/magistrada-suspende-penhora-online-por-crise-do-coronavirus; TJSP, Agravo Interno Cível nº 2121653-37.2020.8.26.0000, Relator Des. Rodrigues de Aguiar, 15ª Câmara de Direito Público, j. 16 June 2020.

8 TJSP, Agravo de Instrumento nº 2067266-72.2020.8.26.0000, Relatora Mônica Serrano, Despacho, j. 17 April 2020.

9 TJSP determined that rents should be reduced by 50%, partially reforming the first-degree decision. Available at www.conjur.com.br/2020-abr-06/liminar-permite-reducao-aluguel-pago-restaurante-epidemia, access on 6 January 2020. There are several other examples within the scope of TJSP. Available at www.conjur.com.br/2020-abr-30/reducao-aluguel-durante-epidemia-divide-desembargadores-sp, access on 6 January 2020.

10 Judge orders lockdown across the state of Maranhão. Available at www.conjur.com.br/2020-abr-30/juiz-ordena-lockdown-todo-maranhao, access on 22 December 2020. In other states the judiciary did not allow this type of interference in this decision. In Pernambuco, justice denied the request of lockdown. Available at www.conjur.com.br/2020-mai-07/justica-nega-pedido-mp-decretacao-lockdown-pe, access on 22 December 2020.

11 Madureira, Claudio; Zaneti Jr., Hermes. "Covid-19 e Tutela Jurisdicional: A Doutrina dos Processos Estruturais como Método e o Dever Processual de Diálogo como Limite". *Direitos Fundamentais e Justiça*, Belo Horizonte, ano 14, pp. 555-576, January/June 2020.

The broad revision of judicial decisions, guaranteed by Brazilian law, also allows decisions taken at the federal level to be adjusted to the reality of each state or municipality. The federal government, classified, among other activities, churches and lotteries[12] as essential activities, allowing them to be open in times of crisis; but judicial decisions controlling this act determined the closure of these places, directly altering the public policy.[13] These are examples of the broad judicial review that all judges can perform in Brazil. Some of the cases can arrive in the Supreme Court.

The logic of law requires the application of decisions capable of forming precedents to all cases alike; the logic of Disaster Law applicable to the pandemic requires the judiciary to act primarily in self-restraint, observing an existing rule that disciplines the concrete problem; only when necessary – and appropriate – can it intervene in public policies, aiming at guaranteeing fundamental rights.

This text is not a critical analysis of such decisions, but an attempt to understand them as arising from a critical moment that is probably unique in the country's history.

4 The Brazilian Context

There is an interesting discussion in the United States about the effectiveness of precedents during times of war.[14]

The pressure of the executive and the general sensation of panic impact the North American Supreme Court, which end up allowing exceptions to due process, which would be granted in peacetime. The situation in Brazil is different but still raises several questions: a) *do decisions made in times of crisis have precedent effectiveness*? b) *how to interpret the lessons of the war/emergency period?*

There is no reason to follow past mistakes, especially when they threaten fundamental rights. On the other hand, precedents will sometimes ensure fundamental rights.

What possible lessons can be applied to the current situation of Brazilian law?

Three dimensions of judicial precedents can be analysed:

a. *precedents with lasting characteristics for maintaining the stability of law*, which should also serve as a lesson to avoid problems in future crises but, also, which serve to better understand the mechanisms of our legal system, transcending the crisis;

12 Commercial lotteries sell federal lotteries and similar products and provide some banking services.

13 Judge suspends Bolsonaro decree exempting churches and lottery from quarantine. Available at www.conjur.com.br/2020-mar-27/juiz-suspende-decreto-tira-igrejas-loterica-quarentena, access on 22 December 2020.

14 Cohen, Harlan G. "Undead" wartime cases: stare decisis and the lessons of history. *Tulane Law Review*, v. 84, 2010. Legal literature does not provide a uniform lesson on how to proceed.

b. *precedents for regulating legislative gaps for moments of crisis*, showing a potential to be used as a norm of ultra-active effectiveness to resolve issues arising from possible future disasters;[15]
c. *precedents without reflection*, cases that have been decided only on account of emergencies and that can be considered as wrong decisions in the future. These cases must be well understood in their context and can be simply wrong decisions, taken without due reflection. An analysis of this third dimension, however, is beyond the scope of this article.

The differentiation between precedents that serve to deal with legislative gaps and with emergency content is tenuous and will depend on a subsequent analysis of the decision. The problem is aggravated by the fact that judicial power in Brazil does not bear political responsibility for its decisions. This differentiation, in fact, is one of the main challenges to the theory of precedents generated in times of crisis.

Perhaps a first guideline is understanding that precedents that arise during the pandemic, in which the contextual foundation is the moment of unprecedented crisis, cannot be effective for moments of 'normality'.

5 The Brazilian Supreme Court (STF) and Covid-19

The STF is involved in several crucial cases in the analysis of the confrontation of Covid-19, owing to its position in the Brazilian civil justice system, and its wide competence, which is quite peculiar. As an apex court, the interpretation of the Constitution rests with the STF, which has the last word in reviewing acts of the other branches of power and provides binding precedents for similar cases arising in future, following the principle of 'treating cases alike'.[16] It combines *civil law* features – abstract and direct constitutional judicial review court, originally interpreting the Constitution (Kelsen model) – and *common law* features – appeals court, interpreting the Constitution from the bottom (North American model). The decisions taken by the Supreme Court in constitutional matters have a binding effect on all other judges and courts.

15 The case of the advertising campaign entitled "Brazil cannot stop", contrary to the programme proposed by the Ministry of Health. Available at https://g1.globo.com/politica/noticia/2020/03/28/juiza-do-rio-proibe-governo-federal-de-veicular-campanha-publicitaria-o-brasil-nao-pode-parar.ghtml, access on 22 December 2020.

16 Zaneti Jr., Hermes. *O Valor Vinculante dos Precedentes*. 5ª ed. Salvador: Juspodivm, 2021. The Civil Procedure Code (CPC) of 2015 regulated the fundamental core of this precedent system (Arts. 489, § 1, V and VI; 926 and 927), expanding the binding precedents to other courts.

There are countless examples of decisions capable of overcoming the period of crisis and that may shape the conception of several sectors of law in the future. We will group them in the following categories: a) maintaining the stability of law; b) necessary regulation of the crisis; c) decisions taken without further reflection, which can, at most, serve as examples, which we cannot be sure of at the moment.

5.1 Precedents for Maintaining the Stability of Law

The STF is based on cooperative federalism, which enables states and municipalities to adopt stricter measures depending on the situation and on what is considered feasible at the local level. States and municipalities were thus guaranteed the possibility of adopting restrictive measures, without discarding the necessary and due action of the union.[17]

The decision may be important to enact in the restructuring of the Brazilian federal model, which has always tended to concentrate power in the union. It is still not possible to say whether the decisions represent a rearrangement of the Brazilian federation or result from an observation of the specific position of the union, which tried to adopt policies aimed at preventing other entities from adopting important restrictive measures and were approved by organisations like the World Health Organization.[18] But from all indications this balanced distribution of power is here to stay.

It was also possible to observe a control of the fundamental right to the protection of personal data, which, in Brazil, received even greater prominence with the recent enactment of the General Data Protection Law. The Supreme Court held as unconstitutional the president of the Republic's normative act ('Provisional Measure', a type of executive order),[19] which allowed the sharing of data from telephone companies with the Brazilian Institute of Geography and Statistics (IBGE, federal public entity) for statistical purposes during the Covid-19 period, for violation of the protection of personal data, since there was no guarantee of the anonymity of this information and no precise indication of how that information would be used.[20]

In a decision made by Justice Roberto Barroso, an advertising campaign by the federal government that encouraged the return of the population to their normal activities

17 STF, Tribunal Pleno, ADI 6.341 MC-Ref, Rel. Min. Marco Aurélio, Relator(a) p/ Acórdão: Edson Fachin, Tribunal Pleno, j. 15 April 2020, DJe 13 November 2020; STF, Tribunal Pleno, ADI 6.343 MC-Ref, Rel. Min. Marco Aurélio, Relator(a) p/ Acórdão: Alexandre De Moraes, j. 6 May 2020, DJe 17 November 2020.

18 This is Justice Alexandre de Moraes' vote (STF, Tribunal Pleno, ADI 6.343 MC-Ref, Rel. Min. Marco Aurélio, Relator(a) p/ Acórdão: Alexandre De Moraes, j. 6 May 2020, DJe 17 November 2020).

19 An instrument with force of law, used by the president in cases of relevance and urgency, capable of producing immediate effects, but depending on the approval of the House of Representatives and the Senate so that it can be definitively transformed into law.

20 STF, Tribunal Pleno, ADI 6387 MC-Ref, Rel. Min. Rosa Weber, j. 7 May 2020, DJe 12 November 2020.

– contradicting the main recommendations of health entities – was suspended.[21] In another decision, in view of the change in the form of disclosure of epidemiological data on Covid-19, the STF obliged the federal district to maintain the previous methodology, as the new form could suppress and omit data relevant to the control of the pandemic.[22]

The STF analysed the urgency measure in the direct action of unconstitutionality against the act of the president of the Republic (Provisional Presidential Decree n. 966) and used the interpretation according to the constitutional text to affirm that

> the administrative act that leads to violation of the right to life, health, environment or to adverse impacts on the economy, due to failure to comply with: (i) scientific and technical standards and criteria; or (ii) the constitutional principles of precaution and prevention. (…) The authority responsible for deciding must demand that the technical opinions on which it will base its decision expressly address: (i) the scientific and technical standards and criteria applicable to the matter, as established by internationally and nationally recognized organizations and entities; and (ii) observance of the constitutional principles of precaution and prevention, under penalty of becoming co-responsible for possible violations of rights.[23]

The decision sought to address the health crisis generated by Covid-19. It presents some criteria to limit the interpretation of the normative act, which stated that public agents could be held responsible in the civil and administrative sphere only if they acted or omitted to act with intent or gross error. The term 'gross error' is indeterminate, and the constitutional jurisdiction was activated precisely to prevent negligent conduct in that period from being exempt from liability. The normative act, however, was terminated by time, resulting in the loss of the object and the lack of stability of the precedent, but the case is a good example of densification of an indeterminate legal concept to affirm which facts should be considered relevant for the purpose of blaming behaviours carried out with gross error by public officials during the pandemic. It also seems to have come to stay, helping to understand how decision makers, including judges, must deal with scientific evidence.

The tendency is that eventual political decisions can be controlled by the judiciary when they violate scientific criteria shared by the international community, i.e. evidence-based consensus. Prevention and precaution need to be respected. *It is an important parameter for the future and one that goes beyond moments of crisis.*

21 STF, ADPF 669, Rel. Min. Roberto Barroso, j. 31 March 2020, Dj de 3 April 2020.
22 STF, ADPF 690, Rel. Min. Alexandre de Moraes, DJ de 10 June 2020.
23 STF, Tribunal Pleno, ADI 6427 MC, Rel. Min. Roberto Barroso, j. 21 May 2020, DJe 13 November 2020.

5.2 Precedents for Crisis Regulation

Some limits for political decisions in contexts of crisis were also defined, especially other health crises. Although, in general, STF has approved restrictive measures for certain rights in the fight against Covid-19, some state decisions were considered excessively restrictive of fundamental rights.

In a Court decision, the decree of the city of Teresina was reviewed, which imposed the stoppage of alcoholic beverages in bars and restaurants, which would further restrict the measures taken in the state of Piauí, owing to the lack of technical grounds for the political choice. Furthermore, it would disorganise the control of the pandemic in the state as a whole, with different measures for each municipality, that too without any plausible justification.[24] In the case of the city of São Bernardo do Campo, the Supreme Court decided that the 'technical and well-founded ANVISA recommendation'[25] prevailed over the injunction of the São Paulo State Court of Appeal (TJSP) that denied the effects of a decree restricting the circulation of people over 60 years old.[26]

There was also a request to suspend the deadlines for choosing and registering candidates for the 2020 municipal elections owing to the pandemic, but that was rejected by the STF, not only because there was no relationship between these situations but also because it would represent a risk to the Brazilian political system itself, facilitating eventual frauds to the electoral system.[27]

An important decision in the context of the crisis was the recognition that there would be a failure on the part of the union to protect the right to life and health of indigenous peoples in the context of the Covid-19 pandemic. Indigenous people, who showed a mortality rate that was higher than the national average, were protected by structural injunctions, such as establishing sanitary barriers, determining a situation room and a mixed monitoring committee, which must be held accountable by informing the judiciary of measures adopted.[28]

Another important decision taken by the STF relates to spending limits for public entities, which, in Brazil, must comply with the Fiscal Responsibility Law (Complementary Law No. 101/2000). The Court acknowledged the exceptional and absolutely unpredictable situation, generating the declaration of a state of public calamity, which causes

24 STF, Tribunal Pleno, SS 5.362 AgR, Rel. Min. Dias Toffoli, j. 5 August 2020, DJe 29 September 2020.

25 The National Agency of Sanitary Surveillance (Anvisa) is a legal entity governed by public law, whose institutional purpose is to promote the protection of the population's health, by means of sanitary control of the production and consumption of products and services subject to health surveillance, including environments, processes, inputs and related technologies, as well as the control of ports, airports, borders and custom areas.

26 STF, SL 1.309/SP, Min. Dias Toffoli, j. 2 April 2020, DJ de 6 April 2020.

27 STF, Tribunal Pleno, ADI 6.359 MC-Ref, Rel. Min. Rosa Weber, j. 14 May 2020, DJe 10 November 2020.

28 STF, Tribunal Pleno, ADPF 709 MC-Ref, Rel. Min. Roberto Barroso, j. 5 August 2020, DJe 07/10/2020.

disorganisation in the previously planned budget execution, making it impossible to comply with certain legal requirements compatible with normal times. Thus, the limits of the law could be exceptionally exceeded, as long as they are aimed at fully fighting the Covid-19 pandemic.[29] On the grounds that resources needed to be allocated to combat the pandemic, the STF also granted the suspension of states' debts to the union for a period of 180 days.[30] These decisions can mean a risk to the fiscal balance; although necessary, one must analyse the extent to which they were proper, which will be known only in the future. These decisions are strong candidates for the third dimension.

6 Techniques of Precedents

The cases highlight the importance of understanding that moments of crisis tend to have a rationality of their own, driven by the tension generated by economic uncertainties and even the policies to be adopted. It is not by mere chance that Disaster Law exists.

That is why one must understand how the techniques of 'distinguishing' and 'overruling' should be used with regard to the precedents that emerged in this exceptional moment.

'Distinguishing' must be analysed in relation to not only the facts discussed in the case, but also the context involved in decision making. Otherwise, it would be enough to claim that one is going through a tough financial crisis to prevent an online seizure order from happening, which was already confirmed during the Covid-19 crisis.[31]

Once formed, however, the refusal to apply the crisis precedents when 'normality' returns would not consist of overcoming the precedent, for the historical context would be different; therefore, the legality and the *pacta sunt servanda* principles would be valid. There is more distinction than overruling, factual circumstances that are distinguished by the context.

Should a crisis of similar proportions recur, the eventual overruling would be discussed when, in a new crisis, exceptional measures such as those being taken during the present period would be discussed and expressly disallowed by the judiciary. There would be the possibility of assessing the success or otherwise of the decision, based on which, the precedent would either be retained or discarded.

29 STF, Tribunal Pleno, ADI 6.357 MC-Ref, Rel. Min. Alexandre De Moraes, j. 13 May 2020, DJe 20 November 2020.

30 STF, ACO 3378, Rel. Min. Alexandre de Moraes, j. 6 April 2020, DJ 13 April 2020.

31 CNJ, for instance, in its resolution n. 318, of 7 May 2020, in Art. 5º does not insert any prohibition against online seizure orders during the Covid-19 period, merely emphasising that there should be no seizure of the amounts received as emergency aid owing to its alimentary nature.

On the other hand, precedents with lasting characteristics, to which the pandemic was only a historical pretext for the development of law, must and can be maintained in the future, for these are not *exceptional precedents, although set in times of crisis.*

Times of crisis impose a *rationality of crisis*: decision on relevant issues – e.g. economics, politics and public health – need to be taken in a short time, based on little information. Legal scholarship, thus, must pay due attention to the reflections of this time of abnormality regarding law and, in this specific case, the theory of precedents and the possible effectiveness of such decisions for a future period of normality.

The 'New Normal' of Civil Procedure in Canada

Technological Efficiency over Proportionality and Accuracy of Outcomes

Catherine Piché[*]

1 From 'State of Emergency' to 'New Normal'

In early- to mid-March 2020, with the state of emergency declared as a result of the Covid-19 pandemic, Canadian provincial governments across the country responded to the crisis by imposing emergency measures in each jurisdiction, specifically impacting their judiciary and judicial systems. Courthouses suspended all their activities as the civil justice system locked down along with the rest of the provinces' services. Virtual adjudication became the new way of administering justice, and virtual hearings were held, by video conference, in writing, or by telephone. This reality has been referred to as the 'new normal', meaning that it is here to stay. At the time of writing this piece, the pandemic is still very much alive and the state of crisis still overwhelmingly felt.

Around the globe, the pandemic has had an unprecedented impact on civil justice and its procedural landscape. Many questions have arisen as a result: how must courts be equipped to cope with the backlog of civil cases? Must courts proceed as usual? If not, which cases must be dealt with first and by what sort of process? Will the changes made in response to the pandemic become permanent? How have new technologies changed our understanding of the core values underlying the civil litigation process? Have they helped us find ways to make the litigation process more efficient, faster, and economical? Have they made civil justice more accessible and fair to all users of the system? Will those changes be sufficient to address the problems of cost and delay that plague the civil justice system?

2 Achieving Proportionality through the Use of Technologies

In this short article, I address the extent to which the pandemic has been conducive to not only efficiency but also proportionality of civil justice. The principle of proportionality

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has gained prominence throughout North American civil justice frameworks and across Europe, notably, in Rules 5, 7, and 8 of the ELI-UNIDROIT *Model Rules on Civil Procedure*. It is a cornerstone principle in Canada, especially in the provinces of Ontario and Quebec.[1] Article 18 of the *Code of Civil Procedure* extends obligations to the parties, in regard to their actions, pleadings, and means of proof, and to the judge, in managing the proceedings they are assigned, regardless of the stage at which they intervene. Generally, proportionality requires a match between the extensiveness of the procedure and its magnitude, a balance between the right result and the expenditure of time and money needed to achieve it.[2] To achieve proportionality, "an optimal level of accuracy in the application of legal rules" is required.[3]

Proportionality does not, however, require more process and procedure. On occasion, 'less is more', as fairer processes will lead to just outcomes. For instance, on many occasions, Quebec courts have imposed virtual examinations, remarking that virtual depositions are as credible as physical ones.[4] The Supreme Court of Canada has stated in *Hryniak v. Mauldin* that a 'culture shift' is indispensable for proportionality to take place:

> A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[5]

The innovative process driven by new technologies has brought extremely promising changes to how and which hearings are conducted and thereby greatly impacts the civil litigation process. The popular ZOOM and TEAMS videoconferencing platforms have indeed in many ways revolutionized decision-making processes in Canada. The use of these platforms comes at an insignificant cost per case, as travels are no longer required and tremendous gains in time and geographic logistics lead to additional economies. Best practices and etiquette for remote hearings have been adopted, notably in the province of Ontario, to facilitate the administration of those new kinds of hearings and to support the

1 *See* Rule 1.04(1.1) of the Ontario *Rules of Civil Procedure*; Art. 18 Québec *Code of Civil Procedure*. Also *see* Catherine Piché, "Figures, Spaces and Procedural Proportionality", (2012) 2:1 Int. J. Procedural L. 145; Catherine Piché, "La proportionnalité procédurale: une perspective comparative", (2009-10) Revue de droit de l'Université de Sherbrooke.

2 Lord Wolf, Access to Justice, *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996), Ch. 2, Paras. 17 and 27.

3 A. Ogus, "Some Reflections on the Woolf Interim Report" (1996) Web J. Current Leg. Issues 1 at 2.

4 *See* notably: *Van Lierop c. Fortin*, 2020 QCCS 1782 (CanLII), Paras. 7-9; *Office municipal d'habitation Kativik c. WSP Canada Inc.*, 2020 QCCS 2809 (CanLII).

5 *Hryniak v. Mauldin*, 2014 SCC 7 at Para. 28.

change in rituals.[6] Nonetheless, issues remain with regard to how the solemnity and authority of the courtroom experience are to be preserved during remote hearings. Some biases can be caused by equipment quality, the zoom and angle chosen for diffusion and eye contact, or by almost imperceptible impressions of the visible surroundings.

In Ontario, a judicial working group was created to examine which rules of civil procedure might require a revision to facilitate reforms of the justice system,[7] and it recommended a shift away from in-person oral hearings and toward written advocacy and virtual hearings, using videoconferences and teleconferences. It argued that, in accordance with the principle of proportionality, oral presentation of evidence and argument in open court no longer be considered the default or even a superior mode and that instead "[t]he default should be the mode that is most expeditious and affordable, having regard to the nature of the case."[8] In fact, several broader systemic suggestions were made to enhance the efficiency of the civil process, generally, that the pandemic has brought forward. Among them is a recommendation to set up a central registry of court files, which would avoid the need to have such a registry in every municipality across the province. Another recommendation was to require that applications instead of actions become the default way of commencing proceedings, so as to force parties to think about the theory of their case, collect their evidence at the front end of the case, and show reason for their dispute to be litigated by an action. Document inspection is further recommended to become altogether electronic, with the use of portals becoming more prevalent. The Ontario judiciary believes that evidence should be provided in writing and that for all steps of the proceedings except trial, parties should seek leave for an in-person hearing, based on the need for a fair, expeditious, and affordable adjudication of their dispute.

Producing documents and written evidence technologically certainly enhances the potentialities for document review and accessibility, provided that judicial users possess the required skills to consult those, but can the same be said about oral testimony?[9] Producing written testimony and evidence is efficient and no doubt fair if all judicial guarantees are respected, but oral testimony perhaps belongs to another category of evidence altogether, for all the obvious reasons.

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6 Suzanne Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (15 July 2020), Osgoode Legal Studies Research Paper, unpublished, and available on SSRN: https://ssrn.com/abstract=3686181.

7 Justice Fred Myers & Stephen Cavanagh, List of Rules Potentially Affected by Reforms to Civil Justice System, Including E-Filing and Virtual Hearings (ONSC Judicial Working Group, 22 May 2020), accessible online at www.drla.ca/covid19/scjreforms.pdf.

8 Chiodo, *supra*, p. 10.

9 Frederic Lederer, "The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High-Technology Courtrooms" (1999) 50 S. Car. L. Rev. 799, 819 (discussing four experiments where jurors felt to perceive remote witnesses just as they perceive in-court witnesses).

3 Technologies, Fairness, and Types of Cases

In Canada, there is a legal fiction that procedural rules are transsubstantive, meaning that the same rules apply to all matters regardless of the substantive law involved, and that those same rules apply regardless of the size of the case or the stakes involved.[10] In the pandemic world, as was the case before the crisis, the same rules – and *Code of Civil Procedure*, in the case of Quebec – generally apply to all types of cases, regardless of the underlying substantive law, and regardless of the complexity or size of the case. During the pandemic, the Ontario Commercial List held 181 audio hearings, 41 video hearings, and 131 hearings in writing between March 17, 2020, and April 28, 2020, in that province.[11] No distinction was then made as to the type of case held remotely (except for sensitive matters such as family and adoption cases, etc.), the amount at stake, or sensibility of the matter involved. The Ontario rules directed the parties to proceed virtually during that period, and so they did. Thus, at least during the pandemic, and *since* the pandemic, efficiency has been prioritized over proportionality in the Canadian provinces.

One may wonder whether this transsubstantive approach leads to accurate and fair outcomes. Indeed, what kinds of cases or issues are better suited to in-person, audio, video, or paper hearings? As Richard Susskind explains, family disputes that involve domestic abuse, adoption, or custody issues should be heard in person, if possible, and other kinds of disputes are much better suited to remote handling, such as interim, procedural, and interlocutory hearings, routine family issues, small claims, commercial or administrative disputes, and civil appeals.[12] According to Susskind,

> [c]ontrary to early thinking about online dispute resolution, it is mistaken to believe that remote hearings are ideally suited to high-volume, low-margin cases, while traditional physical courts are the places in which to argue and settle the lower volumes of high-value cases. There is no direct mapping between the value of a case and its suitability for remote treatment. A low-value case can raise highly sensitive personal issues that might best be handled in person. A low-value case can also raise very challenging legal questions.[13]

10 *See* Stephen N. Subrin, "The Limitations of Transsubstantive Procedure: An Essay on Adjusting the 'One Size Fits All' Assumption" (2009) 87 Denver U. L. Rev. 377, 384; David Marcus, "The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure" (2010) 59 DePaul L. Rev. 371, 385.

11 Chiodo, *supra*, p. 8.

12 Richard Susskind, "The Future of Courts" (July-August 2020) 6:5 Remote Courts, online at https://thepractice.law.harvard.edu/article/the-future-of-courts/.

13 *Ibid.*

What Susskind suggests in this extract is that sensible or challenging issues should be heard in person, rather than remotely. The argument begs the question as to whether quality of outcomes is more challenging to guarantee in such instances. With testimonies being more emotional, complex law and facts, and protracted evidence, physical appreciation of the evidence leads to more accurate and fairer outcomes.

4 Prioritizing Efficiency over Accuracy

Ultimately, perhaps the pandemic has taught us to reevaluate our goals for civil justice and to prioritize efficiency over proportionality and accuracy of outcomes in times of crisis. In a world of scarce resources, an objective of adjudication organized around remote hearings, virtual examinations, and tighter deadlines and streamlined procedures imposed by stricter court managers makes sense in an *efficient* way, leading to – hopefully – proportional outcomes.

Interestingly, in June 2020, the Federal Court of Appeal took a new and modern approach to granting interventions, thereby commenting on the modernization of the legal system following the Covid-19 pandemic. In determining whether six separately represented intervening parties met the requirements for intervention, the Court held that the pandemic had accelerated the rate at which the courts have had to fashion new procedures and took the unusual step of separating the six interveners into three distinct groups.[14] In doing so, it embraced the need to change culture to create a more efficient, faster, and less expensive justice system. Allowing all six interveners to intervene separately would have resulted in 'lack of economy and duplication';[15] instead, the court streamlined the process, permitting only one memorandum for each of the three groups, noting that "[t]he collaboration of the related parties in each group is likely to create useful synergies and a more compact submission, which invariably happens to be a more persuasive submission."[16]

By consolidating and simplifying procedures, and providing less process altogether, this decision highlights a judicial trend of prioritizing efficiency over proportionality and accuracy of outcomes and recognizes that not all improvements in civil justice will be technological. As Professor Rabeea Assy rightly explains, the time of crisis has brought new priorities in our civil justice system:

14 *Teksavvy Solutions Inc. v. Bell Media Inc*. 2020 FCA 108.
15 *Ibid*, Para. 17.
16 *Ibid*, Para. 18.

> Rather than remaining strongly committed to the application of the correct law on the correct facts at all times, and accordingly perceiving all reform as aiming to minimize transactional costs, our conception of justice should be redefined in terms of costs, time and accuracy. At least in times of crisis, a degree of compromise over the court's ability to arrive at correct judgments, in exchange for faster and less costly proceedings, is a legitimate trade-off.[17]

When procedure is made more efficient, it becomes more accessible by decreasing the time and cost involved. In times of crisis such as that of Covid-19, where judicial backlogs are more prominent than ever, and a considerable number of Covid-related new cases have been and are filed, efficiency assumes center stage in providing Canadians with access to justice, behind its sister principles of proportionality and accuracy of outcomes. Let us only hope that this state of increased efficiency does not come at the cost of quality decision-making in fairness and equity to all Canadians.

17 Rabeea Assy, "Briggs's Online Court and the Need for a Paradigm Shift" (2017) 36:1 Civil J. Quart. 93, 108.

Civil Justice in China in the Covid-19 Period

Yulin Fu[*]

1 Introduction

23 January 2020 witnessed a blockade imposed by the Chinese government on Wuhan City, where the first wave of Covid-19 cases broke out. Since then, China has entered a unique period and led the global trend of responding to the Covid-19 pandemic. In the context of China's civil justice system, since the blockade in the first two weeks in Wuhan occurred during the Chinese Lunar New Year (Spring Festival) holiday, the first work day of the Covid-19 period was actually 3 February 2020. Since then the work pattern of Chinese courts and judges has varied according to the severity and extent of the local spread of Covid-19. Today, it remains unknown when the Covid-19 pandemic will come to an end. Even though several vaccines have been produced to contain the violent outbreak and further spread of the pandemic, its impact on human society across the globe has been profound. In the field of civil justice, the effects of the pandemic have resulted in a 'new normal' situation, featuring changes in many aspects of both national and international civil litigation cases, including numbers and types of cases, judicial policies, mode of judiciary, procedure rules, and so on. As a timely response to the new normal situation, the bold attempt to shift to online proceedings in Chinese courts can offer a meaningful sample as a pilot experience, together with some lessons and reflections.

In 2020, the number of online hearings in China increased 9-fold compared with that in the previous year. From 3 February to 20 November, 6.51 million cases were filed online, 778,000 hearings were held online; and there were 3.23 million instances of online mediation, 18.15 million instances of electronic service, and 1.415 million instances of online evidence exchange in China.[1] As a result of this shift to online proceedings, during the worst months of the pandemic in the country, from January to July 2020, courts across the country received 16.51 million new cases and resolved 13.08 million cases, and the ratio of closed cases remained stable year-on-year. Nothing illustrates Chinese courts'

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1 Jiang Peishan, Sun Yating, *Exploring the New Development of International Commercial Dispute Resolution Mechanism in the Epidemic Period*, People's Court Daily, December 15(01), 2020.

determination to overcome the challenge of the pandemic better than the number of cases heard and settled on schedule during this difficult period.[2]

Moreover, after mid-April, as the national outbreak of Covid-19 began to come under control and most of the work of the courts was able to get back on track, online docketing and mediation remained common practices, whereas the frequency of online hearings declined compared with the first few months of the outbreak (mainly because the litigants did not agree to be heard online or the cases were deemed to be unsuited to public trial or online hearing).The immediate reaction of Chinese courts to the sudden outbreak and the smooth transition to online proceedings lay in the Supreme Court's former exploration and abundant investment in the construction of online proceedings and a 'smart court' system in the preceding decade. While some changes represented direct emergency countermeasures, others (though emphasized during the pandemic) had been effected as part of the ongoing reforms in China since 2013. For this reason, it is difficult to distinguish between the measures that will be in temporary use and those that will become the 'new normal'. This article only provides some objective information and the context of the shape of the system as a reference for readers and a resource for further studies.

2 Infrastructure Construction of Online Proceedings in China before Covid-19[3]

To promote the two important goals of the judicial reform since 2013, namely judicial transparency and access to justice, Chinese courts have constructed four official websites: China Judicial Process Information Online, China Judgment Online, China Trial Live Broadcast, and China Executive Information Online.[4] China Judicial Process Information Online provides parties and their representatives with access to the trial process information of all the courts within China with which they are involved, enables them to sign and receive the litigation documents of the Supreme Court, and allows them to send messages to the judge handling the case in the Supreme Court in which they are concerned. According to a survey made by the Supreme Court, by 31 October 2019, China Judicial Process Information Online had disclosed more than 22 million cases, more than 1.1 billion instances of case information, and more than 50,000 litigation documents by electronic service. China Judgment Online has disclosed 80.3 million different types of judicial

2 Dong Fanchao, Liu Ziyang, *How to Make Fairness and Justice Visible and Palpable?* Legal Daily, November 14(01), 2020. www.chinapeace.gov.cn/chinapeace/c100007/2020-11/14/content_12414284.shtml, accessed 1 April 2021.

3 *Cf.*, www.cac.gov.cn/2019-12/04/c_1576994193495518.htm, accessed 4 January 2021.

4 *See* https://splcgk.court.gov.cn/gzfwww/; https://wenshu.court.gov.cn; http://tingshen.court.gov.cn/; http://zxgk.court.gov.cn.

documents, including civil, criminal, administrative, compensation, enforcement, and other documents, with a website visit volume of more than 370 million. China Trial Live Broadcast has broadcast 5.5 million court trials, with a click-through rate of more than 20 billion.[5]

Meanwhile, a model of 'one-stop online dispute resolution service'[6] has been established and optimized, covering the whole process of online judicial activities, including mediation, case-filing, payment of fees, hearings, electronic service, and so on, where the entire proceedings are conducted online and every step can be taken online (filing, payment of fees, delivery, hearings, mediation, etc.). In 2016, 'Smart Court' construction became part of the national development strategy, and the level of digitalization in the judiciary has advanced rapidly since then.

By June 2019, the national 'Smart Court' system was offering a complete process of transparent and intelligent online services to the public where access to the trial process, judgment documents, and execution information was assured,[7] enabling litigants and their lawyers to check all cases relevant to them and the specific situation of the case by entering their names and ID on the national judicial Internet. Moreover, the connection between the internal judicial work systems and external litigation service systems had been set up, enabling government agencies, industry organizations, legal firms, and Internet companies to share information on a big-data platform, which collects real-time trial and execution data, data on personnel and government affairs, and research information on more than 3,507 courts across the country; moreover, it automatically updates this information every five minutes. By 31 October 2019, data pertaining to 193 million cases of courts throughout the country had been collected, more than 700 special analysis reports had been completed, and 38 special reports had been released to the public.[8] With the assistance of Internet technologies, judicial activities have profoundly shifted from the traditional format to an online-and-offline integration format in the courts nationwide. By introducing new technologies such as big data, cloud computing, blockchain, and artificial intelligence, the application of modules such as voice recognition in hearings, digitalized evidence presentation, automatic document verification, and simultaneous generation of e-files, intelligence-assisted case handling, and case management are all included in the toolkits of the judiciary.

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5 Supreme People's Court, Chinese Courts and Internet Judiciary, The People's Court Press, 2019, p. 14.

6 *Ibid.*, p. 9.

7 Here I prefer to delete this content because it might not be new and might mean nothing to you. But it represents a dramatic advance to Chinese people because, under Chinese traditional judicial management, the litigants and lawyers have no way to trace and update the state of their cases except by inquiring of the trial judge and her/his clerks, who are always too busy to serve them.

8 Supreme People's Court, *Chinese Courts and Internet Judiciary*, The People's Court Press, 2019, p. 25.

Although it was not until the extensive spread of the Covid-19 epidemic that online hearings were widely conducted in China, the live online broadcast of personal hearings in the courtroom had already occurred frequently, and judges, lawyers, and the public had become accustomed to the hearings being publicly monitored online. Since 2016, when the Supreme Court established China Trial Live Broadcast, more than 3,500 courts across the country have been connected to the network, and nearly 300,000 judges have conducted online live trials. By December 2020, the total number of public court trials on this network had exceeded 10 million, and the highest number of hits for a single hearing had exceeded 90 million.[9] At the same time, local courts at all levels have also established their own live trial websites, and courts across the country have formed a general judicial practice of 'live trial as a principle, not an exception.' Courts nationwide innovated the 'Internet + judiciary' mechanism according to local conditions. In order to explore this new mechanism under the legal system, with the approval of the Standing Committee of National Congress, three Internet courts were set up in Hangzhou, Beijing, and Guangzhou in 2017 and 2018. These were designed as primary courts with centralized jurisdiction over Internet-related cases, to implement the new trial mechanism following the approach of 'online disputes tried online'. The Internet courts have acquired experience in practice and have become the benchmark in the fields of online dispute resolution, online platform construction, litigation guidelines and rules, technology application, Internet governance, and so on. The case proceedings were conducted online throughout the process, each case taking 45 minutes in an online hearing and 38 days to be settled, saving about 1/2 to 3/5 of the time required for ordinary first-instance proceedings. Moreover, 98% of the parties have accepted the judgments and waived appeals. This experience of the Internet courts demonstrated that the judicial quality, efficiency, and legitimacy of online trials could be satisfied in civil proceedings. Meanwhile, the practice of Internet courts also expedited the establishment of procedural provisions before online proceedings suddenly became necessary for all the courts owing to Covid-19.

3 Provisions on Online Proceedings

The fundamental procedural rules of online proceedings were established by two opinions issued by the Supreme Court. The first of these was the Regulations on Several Issues Concerning the Trial of Cases by Internet Courts, which came into effect on 7 September 2018, to regulate the online litigation of Internet courts in the acceptance of filing, service, mediation, evidence exchange, pretrial preparation, court trial, and judgment

9 Su Hang, *China's Judicature has Once Again Achieved "Unprecedented" Achievements Belonging to All Mankind*, People's Court Daily, December 24(01), 2020.

pronouncement. The other was the Implementation Measures on the Pilot Reform of Splitting Simplification of Civil Procedure, which went into effect on 18 January 2020, aiming to actively optimize the judicial confirmation procedure, small claims procedure, and summary procedure; improve the organization and application model of trials; and explore the implementation of the electronic litigation and online trial mechanism. The two opinions laid the foundation for the following two opinions to respond to the Covid-19 epidemic. On 14 February 2020, the Supreme Court issued a Notice for Strengthening and Regulating the Work of Online Litigation, which aimed to provide clear guidance for online trials, service, identity authentication, and document submission so as to guarantee litigation facilitation on the basis of the principle of due process. In September 2020, the Supreme Court issued the Guiding Opinions on Further Expanding the Opening Up of the People's Courts' Services, proposing to promote the in-depth integration of foreign-related trials and the construction of smart courts, build a litigation service platform for parties outside Mainland China, and improve the level of informatization of foreign-related trials and foreign-related litigation services.

In contrast to the common issues that have surfaced in the Internet courts, ordinary courts are confronted with complicated technical problems and legal issues for the diverse types of cases under their jurisdiction. The Internet courts may legally collect electronic evidence via blockchain technology under the audit judgment rules of electronic data authenticity, while the general courts must obtain the consent of the litigants first, even though none of the participants in the proceedings have any technical barriers at all.[10] Under the recent opinion drafted by the Supreme Court, it is still prudent for ordinary courts not to 'require' but to propose that the litigants use new technology for their express approval, while the litigants' procedural rights are strongly emphasized under Civil Procedure Law and Administrative Procedure Law so as to prevent the local courts from going too far under the pressure of their caseload.[11]

In contrast to domestic justice, which has already set up a mode of trial deeply integrated with Internet technology, the international commercial dispute resolution mechanism faces a tougher challenge owing to the wide divergence between procedural rules and commercial law, especially with data becoming an increasingly important asset for civil and commercial subjects and the protection of data under the foreign litigants' national laws. In the future, international commercial dispute resolution may also involve data in cross-border hearings, trials, and investigations in various countries, making data protection regulation an urgent need. In terms of international cooperation in civil and commercial judiciary and mediation, international treaties such as the New York Convention, the

10 www.cac.gov.cn/2019-12/04/c_1576994193495518.htm, accessed 4 January 2021.

11 Provisions of the Supreme Courts on the Issues of the People's Courts Dealing with Cases Online (Draft for the Public Comment), www.court.gov.cn/zixun-xiangqing-285071.html, accessed 29 January 2021.

Hague Convention on Judgment and the Singapore Convention on Mediation have been established in the field of dispute settlement, but they focus mainly on jurisdiction and enforcement issues, as well as some basic procedural problems, while online cross-border trials still want a support system by some shared Internet platform. Compared with technical problems, data sharing issues may be more difficult to address owing to the sensitivity of 'state safety'.

Croatian Civil Justice v. Covid-19

The Empire Strikes Back

Alan Uzelac[*]

1 Introduction: The Old Normal

Everyday debates on life before and during the pandemic often contrast the idyllic old normal and the dull, dangerous and depressing new normal. It is rarely questioned whether the pre-pandemic life was really so good. We all love our past.

However, in the context of Croatian civil justice and its encounter with the Covid-19, we need to revise our starting point. One can hardly escape the fact that for several years before the outbreak of the novel coronavirus, courts and judges have not enjoyed a very high level of public trust. Within the EU, the level of confidence in the independence of the courts and judges has been continually at the very bottom of the trust scale. According to European Judicial Scoreboard and several other sources, less than a quarter of Croatian citizens perceive the independence of Croatian courts as 'good' or 'fairly good', while over three-quarters consider that it is 'very' or 'fairly bad'.[1]

The low score of the Croatian pre-pandemic judiciary is an accurate reflection of its current state. Emerging from socialist legal tradition, the national justice system has been subject to haphazard reforms since the early 1990s.[2] The period of bolder reform attempts conditioned by the country's EU accession ceased in 2013 when Croatia became a full EU member, resulting in many half-baked, half-hearted reforms. The remarkable resilience and capacity of the Croatian justice system to oppose adaptation to the challenges of modern times has been put to the test with the emergence of a new threat to the accustomed old normal. In this contribution I deal with the impact of Covid-19 on Croatian civil justice, seeking to establish whether the coronavirus outbreak achieved what many reformists failed to achieve in the past three decades: to modernize civil courts and civil justice.

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1 European Judicial Scoreboard (EJS) 2020, p. 41 (Figures 44, 46 and 48), https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. The EJS data includes information provided by the European Commission for the Efficiency of Justice (CEPEJ), Eurobarometer and the World Economic Forum.

2 *See* A. Uzelac, 'Survival of the Third Legal Tradition', *Supreme Court Law Review,* Vol. 49, 2010, pp. 377-396.

2 Stage One of the New Normal: Has Anyone Noticed the Courts' Paralysis?

In Croatia, the outbreak of Covid-19 began, as in many other European states, in early March 2020. At the outset, the number of infected people was low, almost negligible, in comparison with that in many other states.

Apparently, in the first several months the lockdown measures were very efficient. In March and April, there were rarely more than 50 to 60 new infections daily. At the beginning of May 2020 there were hardly any new cases.[3]

On the other side, according to Frontex data, Croatia had in place some of the toughest restrictions to life and travel in March and April 2020, despite its coronavirus rates being among the lowest in Europe.[4] Naturally, such restrictions also had their effect on the operation of national civil justice.

Since the Covid-19 epidemic was officially declared[5] the courts have generally closed their doors to the public. In March and April 2020, all court hearings were postponed, and the scope of the courts' work was, in principle, reduced to a bare minimum. On the basis of a recommendation issued by the Supreme Court president, the judges were urged to limit their activity to completing paperwork for future activities and writing judgments and other decisions in cases that had already concluded. Only in urgent cases, and with all sanitary precautions, were judges allowed to hold judicial proceedings.[6]

Another disaster came on the heels of the Covid-19 outbreak. During the strictest lockdown, at 6:24 on the morning of 22 March 2020, a devastating earthquake struck Zagreb, leaving many buildings in the historical centre badly damaged. Damage was also caused to the Supreme Court headquarters as well as to the buildings of the county and commercial courts. This gave the biggest and most important civil courts in the country additional reason to suspend their activities.

The Covid-19 lockdown and the catastrophic earthquake did indeed shake the whole country. The public media was full of bad news, covering potentially deadly disease, financial losses incurred by many businesses and a significant drop in national GDP, as well as damage to historical sites and personal property that would need years to undo.

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3 Compare Worldometer data, www.worldometers.info/coronavirus/country/croatia/; also John Hopkins University data, https://github.com/CSSEGISandData/COVID-19. The cumulative death toll from Covid-19 exceeded 100 only on 25 May 2020.

4 European Border and Coast Guard Agency, https://frontex.europa.eu/media-centre/news-release/covid-19-restrictions-4IdY3J.

5 SARS-COV2 epidemic was declared in Croatia by the decision of the Minister of Health, 011-02/20-01/143, no. 534-02-01-2/6-20-01 of 11 March 2020.

6 *See* Recommendation from the Supreme Court president of 20 March 2020, www.vsrh.hr/CustomPages/Static/HRV/Files/2020dok/Priopcenja/Preporuke%20za%20rad%202020.pdf.

Yet surprisingly little public attention was devoted to lack of access to courts and the paralysis of civil justice. It seems that, amidst other disasters, people least experienced the harm caused by the delays in the court system, which was even otherwise known to be slow and tardy, and in which postponements of several months were quite normal. In fact, many people considered the inaction of the civil courts more beneficial than their operation.

The government understood this and acted accordingly. In early 2020, the most important legislative act devoted to civil justice in the context of the Covid-19 outbreak was a statute that effectively reduced access to justice even further – the Act on Intervention Measures in Enforcement and Bankruptcy Proceedings.[7] Under this law, effective from 1 May 2020, all enforcement and bankruptcy proceedings have been suspended for a three-month period, extendable by another three months.[8] Consequently, barring very few cases,[9] two fundamental branches of civil justice – enforcement and bankruptcy – were legally prevented from operating for half a year.[10]

Throughout this period, there were very few critical remarks in public regarding formal suspension and factual inactivity of national civil justice. On the other hand, the resumption of enforcement proceedings later in the year received more critical media coverage. In short, the civil courts' paralysis did not capture much public attention.

Seemingly, the only ones that were really concerned by civil justice lockdown measures were the insiders – the lawyers. What they wished was, however, not less, but more inactivity.

From the very beginning of the epidemic, the Croatian Bar Association (CBA) actively lobbied for the enactment of measures that would be applicable not only in enforcement and bankruptcy, but also in litigation and other proceedings. In mid-March 2020, it submitted to the Ministry of Justice a draft act on intervention measures that would be applicable to all court and administrative proceedings. The CBA considered the suspension of civil proceedings imposed by the government insufficient and proposed measures that would suspend all deadlines and limitation periods in all proceedings, except for a few urgent proceedings.[11]

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7 *Zakon o interventnim mjerama u ovršnim i stečajnim postupcima za vrijeme trajanja posebnih okolnosti* (ZIMOS), Narodne novine 53/20; *see also* amendments to the Monetary Funds Enforcement Act (MFEA, *Zakon o provedbi ovrhe na novčanim sredstvima*, Narodne novine 47/2020), which inserted two new articles (25.a and 25.b) on suspension of enforcement on bank accounts in exceptional circumstances.

8 *See* Arts. 3 Para. 1 and Art. 8 of the MFEA.

9 Only child maintenance claims, claims related to payment of salaries and protective measures from criminal proceedings were exempt from the suspension.

10 As the government used its authority to extend the suspension period (*see* Decision on extension of exceptional circumstances, Narodne novine 83/20), the suspension lasted until 18 October 2020.

11 *See* http://www.hok-cba.hr/hr/obavijest-o-poduzetim-radnjama-hok-vezano-uz-covid-19-i-potres-u-zagrebu.

The initiative of the CBA was not accepted, as it was seemingly obsolete. The justice minister had already sent a recommendation to all judicial bodies suggesting the postponement of hearings and other actions in all non-urgent proceedings for two weeks.[12] Soon afterwards, the Supreme Court president also recommended to presidents of all courts that they adjourn all unnecessary activities.[13] And the courts were generally rather generous in postponing and adjourning actions, as they were aware of the travel ban and work-from-home rules.

However, as there was never any formal decision that would generally deal with interruption or suspension of time limits, the deadlines continued to run in many litigation proceedings. Different judges in different courts handled these situations in rather diverse ways. Consequently, there was a great deal of legal uncertainty for the parties and their representatives at that time,[14] causing quite some confusion. But, again, the troubled situation of national civil justice did not cause any major public excitement. In a justice system in which hearings are regularly adjourned for many months and delays of more than six months occur even in urgent cases,[15] judicial inactivity is hardly breaking news.

3 A Track of Hope: Digitalization Rediscovered

But the paralysis caused by the pandemic also had some positive collateral effects. For the first time, there was a chance that some rules, which had previously been only dead letter laws, would be taken more seriously. The lockdown had the potential to catalyse the use of modern technology.

Until the Covid-19 outbreak, digitalization in Croatian civil justice existed literally only on paper. In order to prove that the Croatian judiciary is improving, the Code of Civil Procedure (CCP) was amended in 2011 by new rules on audio recording of hearings. This looked appealing in the context of the impending 2013 EU accession, but the recording never took place in practice. Until 2015, some 120 courtrooms were equipped with appropriate gear, but it was never used. The CCP amendments of 2013 met with the same fate. Mandatory electronic communication for professional users was introduced in

12 See https://pravosudje.gov.hr/vijesti/preporuke-za-prevenciju-prenosenja-i-suzbijanje-epidemije-novim-koronavirusom-sars-cov-2-bolesti-covid-19/21707.

13 *See supra,* footnote 5.

14 On divergent court practices *see* A. Maganić, 'Utjecaj epidemije bolesti COVID-19 na sudske postupke', *Informator*, No. 6622, 10 April 2020, https:///informator.hr/strucni-clanci/utjecaj-epidemije-bolesti-covid-19-na-sudske-postupke.

15 An illustration of this is the recent initiative of the Supreme Court president triggered by a high-profile medical malpractice case in which long periods of inactivity resulted in expiration of the limitation period; the SC president requested the Attorney General's office to supply information about all cases in which no activity has been recorded for over six months.

litigation proceedings before commercial courts, but these rules were to come into force when the ministry enacted implementing regulation – such regulation was not enacted until 2018.

Finally, the 2019 CCP amendments extended to all civil and commercial litigations the obligation of lawyers, experts and legal persons to utilize electronic communication. This time, the legislative formulation of coming into force was even more innovative: the rule on mandatory e-communication was to take effect "when the Minister of Justice establishes that all necessary prerequisites for effectiveness of this provision are fulfilled".[16] Although the 2019 amendments generally came into force in July 2019, nothing was done until the pandemic broke out. As electronic communication was not mandatory, no electronic communication was in place except in a few commercial courts, where it hesitantly started at the beginning of 2019.

Once everything was in lockdown, all of a sudden there was a pressing need to change the usual practices of the inert court system. Already in his first recommendation to court presidents, the Supreme Court president also recommended courts "to use all technically available options for distant communication, as well as for intra-court communication".[17] And the unthinkable suddenly became thinkable: on 20 April 2020, Minister of Justice (MoJ) passed a decree establishing that all prerequisites for electronic communication at all civil courts had been met.[18]

At first the MoJ decision led to confusion, as it was published almost invisibly, on the MoJ's website, but not in the official gazette or on a wider information platform. It was also due to take effect instantly, and this caught almost every lawyer, attorney and corporate lawyer off guard. After almost 10 years of procrastination, everyone was forced, overnight, to communicate through an unfinished and bug-ridden electronic justice platform.

Yet in the prevailing emergency everyone had to suppress his or her surprise – and after a while it was amply clear that even an imperfect e-communication system is better than snail mail (especially when the postmen had difficulties distributing post owing to the lockdown, pervasive fear of infection and all imposed precautionary measures). Once the initial hiccups were overcome, at least the younger and more adaptable lawyers started to like the new system. The older ones still tried to circumvent it, but during that period their efforts did not jeopardize the effectiveness of the system as a whole.

Another rediscovered novelty was the provision on audiovisual remote hearings, also introduced by the CCP amendments in 2019. Although it had been in force since July 2019, until the coronavirus outbreak the provision that authorized the court "to arrange

16 *See* Art. 118 Para. 1 CCP. The mandatory electronic communication with the court encompassed lawyers, notaries, court-appointed experts and interpreters, insolvency administrators and commissioners, state attorneys, state bodies and all legal persons.

17 SCP recommendation, *see supra* note 5.

18 www.hok-cba.hr/hr/odluka-o-ispunjenju-uvjeta-za-elektronicku-komunikaciju-za-sudovima-u-rh.

court hearings or taking of evidence remotely, using appropriate audiovisual means"[19] was just another ornamental provision that was generally disregarded. Once the courts found themselves in a lockdown, this provision ceased to raise academic interest alone. A few younger and more proactive judges began to schedule hearings using online platforms such as Webex or Teams. As most of the others were still reposing in the paralysis of the national justice system, it was a small step for the court users. However, in terms of the attitude towards innovation, it was a giant leap. For the first time, it became clear that flexibility and innovation can find their place in the court system.

Paradoxically, during the pandemic many court services improved their accessibility for the public. For the first time, the court registries and similar court offices did not insist on queuing in order to submit paper documents, did not require paper signatures, answered the telephone calls and accepted email queries and scanned documents. While most of this was conditioned by fear of physical contact with the users, it was a breath of fresh air for court users long used to dealing with a tech-hostile judicial administration.

All in all, there was a ray of hope that Covid-19 would succeed where so many had failed – that it would modernize the modus operandi of Croatian civil justice. In a public debate on online court hearings, I voiced my opinion that the coronavirus was the best thing that could have happened to the Croatian judiciary.[20] However, on another occasion I expressed doubt about whether the momentum would be sufficient to prevent positive changes and whether the old normal would return as soon as the pandemic started to subside.[21] Unfortunately, the doubt was justified.

4 The Pendulum Has Swung: Stage Two or the Pandemic Neo-Darwinism

In May 2020, the priorities in Croatian society and politics started to change. The pandemic was still there, but it was old news. Two fresh challenges emerged on the horizon: the 2020 tourist season and the parliamentary elections scheduled for early July.

While the number of new coronavirus cases in May was very low, the national economy was suffering, in particular from travel restrictions. In Croatia, the share of income from tourism is 18% of national GDP, the highest in Europe.

19 Art. 115 Para. 3 CCP (as amended in 2019).

20 *See* Jutarnji list, Kavkaska čajanka, 11 September 2020, www.jutarnji.hr/globus/video/koronavirus-je-najbolja-stvar-koja-se-mogla-dogoditi-hrvatskom-pravosudu-15018469.

21 *See* discussions at the Zoom conference 'COVID + Civil Justice', University of Montreal, 15 May 2020, https://umontreal.zoom.us/rec/share/449rI6vrrFtJHK_D0mXiYJ4fOpzMeaa8hnIf8_AMn0qV2wdv3jZgyUHdbmjnsJ9k.

At the end of May 2020, preparing for the approaching parliamentary elections, Prime Minister Plenković declared that his government won the battle with the coronavirus.[22]

> Croatia has won the COVID-19, this Government has won the COVID-19, we have defeated the epidemics. What would have been the atmosphere in Croatia had we had 3,000 [corona] deaths?[23]

Apparently, the PM's victory declaration helped him in the elections, which he won. But soon thereafter, we realized that the victory over the Covid-19- was temporary and that the war on Covid-19 was far from over. Summer of 2020 marked the start of the second stage of the pandemic, which has been dramatically different from the first stage in almost every detail. I will call it the stage of 'epidemiological neo-Darwinism'.

In short, in the second stage economic well-being turned out to be more important than saving human lives. The state undertook the 'calculated risk' of reopening. The state borders were opened to foreign tourists, and businesses – especially in the hospitality industry – resumed their operations, subject to only loosely enforced public safety recommendations.

Initially, this seemed to be a good formula, as the 2020 tourist season was much more profitable than expected,[24] but, while the spread of the infection was still tolerable in the summer months, the number of new coronavirus cases started to rise at the end of August. From October to December, it skyrocketed. Once known to be the best in fighting the spread of the infection, in December 2020 Croatia was one of the worst, with up to 4,600 new cases and a toll of up to 90 deaths daily.

In December 2020 the PM's rhetorical question voiced in May became reality. The cumulative toll of Covid-19 deaths reached 3,000 on 18 December; until mid-January, it surpassed 4,500, placing Croatia on a par with the EU countries that have the highest number of casualties per capita.[25] In November 2020, Croatia was the antipode of what it was in March: a country with the strictest restrictions and the lowest infection rates became a country with the loosest restrictions and the highest infection outbreak. Stricter restrictions were reintroduced only at the beginning of December, but have not so far reached the

22 'Plenković: Ova vlada je pobijedila koronavirus', Indeks, www.index.hr/vijesti/clanak/plenkovic-ova-vlada-je-pobijedila-koronavirus/2185893.aspx.

23 *Ibid.*

24 In August, the top-season tourist month, tourism cashed in about 60% of the revenue in the same period of the previous year (*see* www.slobodnaevropa.org/a/hrvatska-ljeto-turizam-sezona-corona/30813304.html).

25 At the moment of writing this contribution (17 January 2021), Croatia had 1,128 deaths per 1 million population – more than France (1,073) and only a bit less than Spain (1,140) and Italy (1,354). The figures could be even worse, as the number of unregistered casualties may be significant.

severity of those that were in place in Spring: economic survival still takes precedence over real human tragedy.

For the national justice system, it was also clear that the pendulum had swung to the other extreme. As one would expect, the reopening of courts proceeded at a slower pace than elsewhere. As already mentioned, cessation of enforcement and bankruptcy proceedings continued until mid-October, but court hearings in litigation cases gradually resumed since May. The proceedings were (and still are) subject to the general recommendations of the national Civil Protection Headquarters with regard to mandatory wearing of face masks and restrictions on the maximum number of people that may gather in the closed space. But for everything else, it was business as usual. And, almost as in the proverbial expression that history can only teach us about our inability to learn, many of the promising innovations in the judicial process started to fade away.

5 Old Normal Returning *Aka* Fighting the Wake-Up Call

Some difficulties in the adoption of modern technology occurred from the very beginning. They were not fatal, but they depict the essence of the problem – the portrait of civil justice, which is not far from the plastic expression used by J.H. Merryman, who once described judges in the civil law tradition as 'faceless bureaucrats'.

For instance, the newly introduced mandatory electronic communication for the judicial system's insiders turned out to be not so mandatory after all. Some lawyers simply continued to file their submission by post, facing no sanctions for their disobedience. On the contrary, the rules on electronic communication opened new opportunities for abuse of procedural rights.[26] The court work has not become much faster as the benefits of electronic communication have been offset by several setbacks. Electronic communication is not matched by an integral e-justice platform, and therefore all electronically received files must be printed out and inserted into paper files, causing additional delays and costs. In some cases, the court is overwhelmed, as lawyers submit voluminous electronic documents, bringing the capacity of the judicial system to its edge. Needless to say, Croatian courts are otherwise unaccustomed to dealing with filing, printing and studying thousands of pages in complex litigations. To make things worse, judges were spending a lot of time dealing with an unstable e-filing system that was crashing every few days.

26 For instance, Art. 106.a Para. 6 CCP (as amended in 2019) provided that if lawyers and other participants in mandatory electronic communication fail to file their submissions electronically (*i.e.* file a paper submission), they will be informed and requested to file their submission again electronically. Only if they do not file it again electronically, the submission will be deemed withdrawn. Filing a few submissions by post and waiting for the court reaction before filing again electronically may be a chance for a lawyer or an expert to protract the procedure and significantly extend procedural time limits.

All these practical problems have not led to abandoning the e-communication rules but have had an impact on the atmosphere: again, the judicial structures have been able to reinforce their conservativism, adducing proof that all these 'novelties' only make their life more difficult.

Consequently, since the start of the second stage of the pandemic, the attempts to innovate the way civil justice works started to dwindle. Adjusting civil litigation to the demands of modern life using the epidemiological crisis as a facilitative moment was no longer a priority. Online hearings, although legally permitted and possible, again became a rarity. According to a brief survey, since January 2021[27] in the Municipal Court in Zagreb (the biggest court of general jurisdiction) virtually no remote hearings have taken place, while in the Commercial Court in Zagreb (the biggest commercial court) they do take place, but only about one-fifth of judges have had one or more remote hearings.

The signals from the top of the judicial hierarchy certainly do not encourage audio and videoconferencing. The same Supreme Court president who, in March 2020, recommended the use of all technically available options for remote communication, suggests, in January 2021, that the use of judicial information platforms and the holding of remote hearings encroach on the right to a fair trial.[28] The reasons for the change in tune are that, allegedly, the legislative provision that authorizes courts to conduct hearing remotely is insufficient. According to the SC president, it does not specifically elaborate on how publicity of remote hearings is secured, nor does it specify whether courts can order such hearings without parties' permission. In short, as in similar situations where the conservative judicial system wishes to obstruct progressive changes, the message is that law needs to be amended to be 'more precise' – and, of course, until that time the present 'imprecise' provisions on remote hearings need to be avoided.

6 *Post Festum*: How Many Catastrophes Will Be Enough for a Second Chance?

Predicting the course of future development is a difficult and thankless task. The second Covid-19 wave in Croatia peaked at the beginning of December 2020, but until January 2021 the number of infections was falling again. Another catastrophe struck the country, on 29 December 2020. It was another devastating earthquake, this time 30 to 60 times as strong as the previous one. However, the affected region was not the capital but the poorest part of the country around the cities of Petrinja, Sisak and Glina. Everyday life is obstructed

27 For the purpose of this text, I have collected information from judges of the two largest courts in Zagreb.

28 Đ.Sessa, 'Sudovi u uvjetima pandemije i pravo na pošteno suđenje', Okrugli stol HAZU o primjeni prava za vrijeme pandemije bolesti Covid-19, 21 January 2021 (speech).

again; more than 10 thousand houses are either completely destroyed or badly damaged; and many schools, hospitals and state institutions in that region had to interrupt their operations.

Of course, some courts also had to stop their operations. Hearings in municipal courts in Sisak and local court seats in Petrinja, Glina and Kostajnica have been adjourned sine die.[29] Indeed, this would seem like another situation in which flexible and innovative solutions could mitigate the consequences of catastrophic events. But this is hardly going to happen, just as it is not very probable that many user-friendly practices created in the new normal will survive in the post-Covid-19 civil justice. Or maybe this is too pessimistic an assessment?

It is indicative that all 2020 catastrophes brought a host of changes in many spheres of life, including some brilliant examples of innovation, bravery and quick adjustment to the worst challenges – but mainly in the areas outside of the national justice system. The reshuffling of health services and the selfless work of doctors, nurses, teachers, emergency services and many others demonstrated that really essential public services in Croatia have a capacity to adapt. Their efforts and transformations were eagerly followed in the public media. For all these essential services it is likely that life after Covid-19 will never be the same. Will it be the same for Croatian civil justice? As things stand, the craving for a return to the old normal has survived several catastrophes. The opportunity for a fundamental change has been missed. How many new catastrophes would be needed to provide a second chance for a profound transformation of national civil justice? New catastrophes will, hopefully, not happen soon, but if a second chance does not come soon, for our civil justice it would be a catastrophe in itself. Because, if another chance is missed, it will be unmistakably clear that civil justice in its present form is not a really essential public service.

29 https://sudovi.hr/hr/ossk/priopcenja/obavijest-o-privremenom-smjestaju-izdavanje-uvjerenja-i-odgoda-rasprava-do-daljnjeg.

Digitalization of Danish Civil Justice

Perspectives from the Pandemic

Clement Salung Petersen[*]

The Covid-19 pandemic has significantly affected the Danish civil justice system since its discovery in Denmark in February 2020. On 11 March 2020, the Danish government declared a comprehensive 'lockdown' of most of the Danish public sector (excluding its 'critical functions') as well as significant parts of the private sector. The 'lockdown' also affected the Danish courts. From 13 March 2020 to 26 April 2020, the courts were thus to some extent 'closed', but since most judges and administrative staff were able to work from their private homes, the courts succeeded in upholding many of their core functions. On 27 April 2020, the courts 'reopened' for all activities with certain limitations and restrictions.[1] Subsequent 'lockdowns' in 2020 have not included the courts.

This article discusses how digitalization of Danish society at large, including its civil justice system, has generally enabled the Danish courts to uphold 'business as usual' in civil proceedings during the pandemic, with one important exception, which has significantly increased the number of pending cases and the length of proceedings. It then goes on to discuss how the pandemic arguably adds a new dimension to considerations about further digitalization of the Danish civil justice system, which has hitherto focused mainly on reducing costs and increasing effectiveness and quality.[2]

1 Digitalization of Danish Civil Justice

In 2017, the Danish courts introduced a new online case management portal, 'minretssag.dk' (literally, 'mycivilproceeding.dk') and made it mandatory to use it to bring a civil lawsuit and, once a civil law suit is pending, to exchange pleadings and other documents. Danish law also enables digital service of documents in the most common situations in civil proceedings. Furthermore, under the Danish Administration of Justice Act, the parties, lawyers, witnesses and experts can attend court hearings in civil proceedings using

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1 For an overview (in Danish), *see* Danmarks Domstole – Nyheder om håndtering af corona.

2 *See e.g.* Danmarks Domstole: Danmarks Domstoles Digitaliseringsstrategi 2019-2022, p. 7. digitaliseringsstrategi-2019_2022_lav.pdf (domstol.dk).

telecommunication equipment, subject to certain conditions. For many years, Danish courts have routinely held *preparatory court hearings* as telephone conferences, with the judge and the parties or lawyers attending by telephone.[3]

During the aforementioned 'lockdown' of the Danish courts, it was only a few days before Danish judges and administrative staff were able to work from their homes to uphold the preparatory stages of civil proceedings, including conducting preparatory court hearings as telephone conferences. Consequently, the pandemic has not significantly influenced either the filing or the preparation of pending civil lawsuits before Danish courts. In these respects, the significant investments in digitalization of the civil justice system have proved to be very beneficial for upholding the operation of the civil justice system during a pandemic.

This brings us to the exception, where digitalization has not made the Danish civil justice system resistant to the pandemic, namely the *main hearings*. In principle, the Danish Administration of Justice Act enables the parties, lawyers, witnesses and experts to participate in main hearings using telecommunication equipment under certain circumstances. More specifically, the court may allow parties and/or their representatives to attend the main hearing using telecommunication equipment 'where such participation is expedient for special reasons'[4] and may also direct that a party, witness or expert is to give evidence by use of telecommunication equipment with or without video 'if deemed appropriate and adequate'.[5] Before the pandemic, Danish courts used these options only in (very) limited and specific circumstances, in particular for witness testimony when the witness was living abroad.[6] Data about the use of these options before and during the pandemic is currently unavailable. Reported case law appears to include only one example of Danish courts using these options to address Covid-19. Thus, in an appeal case, the High Court of Eastern Denmark directed that a witness who was vulnerable to Covid-19 should give evidence using telecommunication with video, even though one of the parties objected to this, since (in the assessment of the court) there were no circumstances speaking against this.[7] This decision shows that Covid-19 can be a reason for using telecommunication for witness testimony.

In another case (unreported), as a result of a local 'lockdown' of a part of Denmark, a representative of the plaintiff could not participate in person in the main hearing (which took place in another part of Denmark that was not part of the local 'lockdown'). Even though the defendant argued that the representative could participate in the main hearing

3 Such preparatory court hearings are normally not public in Denmark. For details, *see* Section 339 a of the Danish Administration of Justice Act.

4 *See* Section 365(5) of the Danish Administration of Justice Act.

5 For details, *see* Sections 174 and 207 of the Danish Administration of Justice Act.

6 *See* Katja Høegh: Om videoafhøring af vidner, skønsmænd og parter i udlandet, U.2019B.168.

7 Fuldmægtigen (FM) 2020.190 Ø.

using telecommunication equipment, the court decided to postpone the main hearing because a representative of the plaintiff should be able to take part in the main hearing in person.[8] This decision appears to reflect the view that a party (or party representative), as opposed to a witness, should not, because of Covid-19, be forced to participate in the main hearing through telecommunication equipment, even though this resulted in a 7-month postponement of the main hearing.

2 A New Perspective on Digitalization of the (Civil) Justice System

Before the pandemic, the need to postpone a main hearing in a civil case would usually result in a delay of a few months. The pandemic has significantly prolonged this time frame. In the case just mentioned, the court postponed the main hearing for 7 months, and several Danish district courts have reportedly now filled their court calendars for 2021, i.e. parties will have to wait approximately 12 months (or more) for a main hearing.[9] This is a result of the 'lockdown' in the spring of 2020, during which courts generally postponed all main hearings (in both civil and criminal proceedings). Interestingly, this impact of the pandemic has not triggered any public debate about the feasibility of increasing the use of telecommunication equipment in main hearings in civil cases as an alternative to postponing such hearings. In a recent report, the Association of Danish judges has criticized the lack of administrative support for using video equipment in criminal cases, which has resulted in judges having to operate the video equipment themselves during witness testimony in criminal cases, negatively affecting their ability to assess the evidence.[10] Therefore, it seems unlikely that Danish judges will increase by themselves the use of telecommunication equipment within the current legislative framework, unless the circumstances change significantly (e.g. a future lockdown of a longer duration). Among lawyers, there has also been no general debate about increasing the use of telecommunication equipment during main hearings in civil proceedings. Interestingly, the situation is somewhat different before the two Danish arbitral institutions, where the use of telecommunication equipment even for main hearings has increased during the pandemic.[11]

In my view, the pandemic has shown that digitalization of the civil justice system is important not only in order to improve its effectiveness and quality or reduce costs, but

8 District court of Hillerød, decision of 6 November 2020 (BS-42736/2019).

9 *See e.g.* Susanne Schou Wied, Christian Schou and Jørgen Lougart: Dommere: Flere byretter kan først afse tid til nye sager i 2022 – der er brug for akut indgreb, Berlingske Tidende (4 December 2020).

10 Den Danske Dommerforening: Dommernes arbejdsforhold – Rapport fra Arbejdsgruppen om dommernes arbejdsforhold (June 2020). Dommernes arbejdsforhold – Rapport fra Arbejdsgruppen om dommernes arbejdsforhold, juni 2020 – Dommerforeningen.dk.

11 Information provided by the managers of the Danish Institute of Arbitration and the Danish Building and Construction Arbitration Board.

also, fundamentally, to uphold its operation – and thus its crucial societal functions – in times of a pandemic. In this respect, the pandemic has contributed new important considerations to discussions about the advantages and the disadvantages of increasing the use of telecommunication technology in civil proceedings. This added focus on handling disasters such as a pandemic is in line with general developments in the emerging discipline of 'disaster law'.[12]

The many postponements of main hearings noted previously entail that civil proceedings in Denmark are currently subject to significant prolongation. This is obviously critical for the availability of access to court, but a recent public debate in Denmark during the pandemic shows that it can also increase the privatization of civil justice through the use of ADR as well as challenge the rule of law. The debate started with a feature in a leading Danish newspaper in June 2020 in which the Danish Chamber of Commerce, the Danish Confederation of Industries and the Danish Mediation Institute promoted out-of-court mediation as an attractive and effective alternative to the overloaded Danish courts. In particular, they argued that Danish municipalities and public institutions should use mediation to solve the many Covid-19 related disputes that were likely to emerge.[13] This feature triggered an interesting debate about the advantages and disadvantages of using mediation as an alternative to courts, including such questions as whether due process and the rule of law are relevant in this context or not and whether it is important to maintain public courts as a primary forum for solving civil disputes.[14] In my view, this debate was a reminder that private actors are forced to look for alternatives to the public civil justice system if it does not 'deliver' access to court and justice. In this context, a public civil justice system based on due process and the rule of law suddenly becomes less important than meeting the practical needs of business to have civil disputes resolved quickly and efficiently.

In sum, the pandemic has added valuable new perspectives to discussions about (further) digitalization of the Danish (civil) justice system. Arguably, the pandemic makes it pertinent to diligently explore the feasibility of a digital alternative to postponement of main hearings, i.e. a form of virtual main hearings. In this context, it is already part of the IT strategy of the Danish courts to prepare technically for such a development.[15] In my view, it is recommendable to conduct a thorough review of the current legislative framework for the use of telecommunication equipment in the Danish (civil) justice system in light of relevant requirements (including due process) and practical experiences (e.g. from arbitral

12 For an overview, *see* Kristian Cedervall Lauta, Disaster Law (Routledge 2016).

13 Weekendavisen (18 June 2020.)

14 *See e.g.* Weekendavisen (14 August 2020), Advokaten 04/2020, pp. 54-57, and an article on the website of the Danish Bar and Law Society of 17 December 2020 (Advokatsamfundet). I took part in the debate.

15 Danmarks Domstole: Danmarks Domstoles Digitaliseringsstrategi 2019-2022, p. 21. digitaliseringsstrategi-2019_2022_lav.pdf (domstol.dk).

institutions where virtual hearings appear to have been used for main hearings to some extent during the pandemic).

Developing the New Normal for English Civil Procedure Post Covid-19

John Sorabji[*]

1 Introduction

On 23 March 2020, the courts and tribunals in England and Wales embarked 'at great speed'[1] on the 'biggest pilot project'[2] they had ever seen. Its cause was the Covid-19 pandemic. It entailed, almost overnight, a shift from holding physical hearings in courtrooms to virtual or remote hearings conducted via a range of online video platforms, such as Zoom and Skype for Business. In one instance it resulted in a first instance hearing being livestreamed to the world via the Internet.[3] The traditional court-based hearing became the exception, the default position being that they would be "conducted with one, more than one or all participants attending remotely".[4] This shift in approach was effected by a combination of emergency legislation and judicial directions;[5] the latter of which included both formal practice directions issued to supplement the rules of court, general management directions issued by the senior judiciary,[6] and informal guidance documents.[7]

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1 H. Genn, *Evidence to House of Lords' Constitution Select Committee*, 3 June 2020, at (4).

2 Lord Burnett CJ, Evidence to House of Lords' Constitution Select Committee, 13 May 2020, at (8).

3 *National Bank of Kazakhstan the Republic of Kazakhstan v The Bank of New York Mellon SA/NV London & Ors* [2020] EWHC 916 (Comm) at [6]. The livestreaming took place on 26 and 27 March 2020, *see* www.stewartslaw.com/news/the-first-virtual-trial-in-the-commercial-court-stewarts-secures-continuation-of-trial-despite-covid-19/.

4 Lord Burnett CJ, Coronavirus (Covid-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts, 19 March 2020, www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/.

5 Coronavirus Act, section 34, schedule 25; CPR PD 51Y – Video or Audio Hearings during Coronavirus Pandemic; CPR PD 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus; Coronavirus (Covid-19): *ibid.*; Civil Justice In England and Wales Protocol Regarding Remote Hearings (www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf).

6 As acknowledged in the context of criminal proceedings in *R (McKenzie) v The Lord Chancellor* [2020] EWHC 1867 (Admin) at [21]-[26].

7 For instance, the Civil Courts Guidance on Remote Hearings, 26 March 2020, www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1-1-1.pdf; *see* further G. Vos (ed), *Civil Procedure 2020* 3rd Supplement, Section AA.

The rapid shift to an online environment for conducting civil proceedings, whether case management hearings, interim applications, trials or appeal hearings, was in one sense not entirely novel. Since 2016 the civil courts, as part of Her Majesty's Courts and Tribunals Service's (HMCTS) reform programme, had increased their reliance on and use of online technology to deliver civil justice. While the bulk of that programme had focused on the introduction of effective e-filing and e-case management systems, only tentative steps had been taken towards the conduct of hearings online.[8] In that respect a pilot scheme had, for instance, been in operation that permitted parties to choose to have applications to set aside default judgment heard via video link.[9] That pilot had, however, had limited success. Anecdotal evidence suggested it had been used twice from its inception, on 30 November 2018, until 23 March 2020. That litigants, and their lawyers, had simply not opted to use it might perhaps be taken as indicative of a reluctance to shift from a traditional physical court process to one where a hearing takes place remotely. The pandemic swept away any such reluctance. It could even be said that it effected greater and more significant change on the delivery of civil justice in a week than had previously been the case during the previous four years of the HMCTS reform programme. While that formal pilot scheme continues, it and the HMCTS reform programme, as a whole, have now been overtaken by events. What is already clear is that once the pandemic is over, the status quo ante will not return, nor will the HMCTS reform programme continue without being significantly recalibrated in the light of an evidence-based evaluation of the enforced mass online pilot.[10] As Lord Burnett CJ put it in giving evidence to the House of Lords' Select Committee on the Constitution, there will simply be 'no going back to February 2020' for the courts and the judiciary.[11] In this short article, I consider the likely consequences of this enforced pilot scheme on the approach to hearings in the English civil justice system. In particular, I consider how it may change the way hearings are conducted and what steps need to be taken to put such changes on a proper footing.

2 The New Normal – A Flexible Approach to Conducting Hearings

Hearings in England are traditionally conducted in court with all parties and their representatives present. Evidence is given orally by witnesses who are in court, subject to

8 *See* J. Sorabji, *Compliance Problems and Digitising Case Management in England and Wales* at 165, in A. Higgins & R. Assy (eds), *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (OUP, 2020).

9 CPR PD51V – The Video Hearings Pilot Scheme.

10 Lord Burnett CJ, FN 2 above, at (8).

11 *Ibid.*, at (7). A point he reiterated in *Bar and Young Bar Conference: Delivering Justice* in 2021 at 5, www.judiciary.uk/wp-content/uploads/2020/11/20201118_Bar-Council-Conference-2020-LCJ-address_FINAL-V2-1.pdf.

two exceptions: evidence-in-chief is given by written witness statement, and expert evidence is to be given by written report unless the court orders it to be given orally.[12] Members of the public, including the media, may attend any such hearing in person, unless it is held in private as an exception to the principle of open justice. Limited exceptions to this general account exist. Witnesses may, for instance, give their evidence via video-link, including from locations outside the jurisdiction.[13] Case management hearings can be conducted over the telephone or any other form of 'direct oral communication'.[14] In reality, this meant that case management hearings scheduled to last no more than an hour would be held via teleconference.[15] And, in terms of public access to hearings, in limited circumstances hearings could be livestreamed from one courtroom to another to enable members of the public to observe hearings, while in the Court of Appeal (Civil Division) important appeals could be livestreamed and recordings archived for viewing on the court's YouTube page.[16] Apart from such exceptions, the advance of technology had not affected court hearings to any significant degree.[17]

The pandemic meant that the traditional model could no longer be followed. Public health measures taken to prevent its spread by reducing travel and requiring social distancing meant that even though travel to court for hearings remained permissible, the architecture of court buildings and courtrooms made it, generally, unsafe to do so.[18] As a consequence, not only did online hearings become the norm, but also a variety of approaches to such hearings developed.

At the start of the pandemic, the approach generally taken was for hearings to take place with judges being physically present either in a court or in their chambers in court and the parties and their lawyers and witnesses[19] participating from a variety of locations

12 A. Zuckerman, *Zuckerman on Civil Procedure – Principles of Practice*, (Thomson Reuters, 2020), chapters 21 and 22.

13 CPR r.32.2; CPR PD32 Para.29 and Annex 3; *Polanski v Condé Nast Publications Ltd* [2005] 1 W.L.R. 637.

14 CPR r.3.1(2)(d); and *see* CPR r.1.4(2)(k).

15 CPR PD23 Paras. 6.2; and *see* CPR r.3.16(2), cost management hearings ordinarily to be heard on paper or via a telephone hearing.

16 *See,* for instance, the Court of Appeal (Civil Division) at www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/the-court-of-appeal-civil-division-live-streaming-of-court-hearings/. Such livestreaming was permissible under The Court of Appeal (Recording and Broadcasting) Order 2013 (SI 2013/2786).

17 *See* FN 9 above.

18 Cabinet Office, Guidance – Staying at home and away from others (social distancing) (23 March 2020); The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129); The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350), Reg. 6(2)(h).

19 Guidance on how to approach remote witness evidence was considered judicially in, for instance, *Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm) at [9]; *Re A (Children) (Remote Hearing: Care and Placement Orders*) [2020] EWCA Civ 583 at [7]-[9]; *Re C (Children) (COVID-19: Representation)* [2020] EWCA Civ 734.

via an online video platform, e.g. from their homes or lawyers' offices.[20] This was viewed by the judiciary to be the best option.[21] Alternatively, the judge would take part from their home or any other location. Arguably, although it is not known if this occurred, a judge could take part in a hearing from outside England and Wales on the same basis that a witness or a party could do so consistently with the approach taken in the *Polanski* case.[22] Another variation would be for some or all of the participants to take part via telephone.[23] The public and media could gain access to such hearings via the phone. Where they were held with none of the participants, including the judge, taking part from a physical court building, the public and media could take part either via the online video platform or by viewing a live broadcast on the Internet.[24] Public scrutiny of hearings that were not broadcast in this way but were nevertheless held purely by an online video platform could be accessed after the hearing took place with the court's permission. A member of the media or public could obtain such access on request.[25] Other variations that evolved during the course of the pandemic were for the judge and some participants to participate from a physical courtroom and for other participants to take part via an online video platform or via the telephone.[26] The traditional approach remained throughout as very much the exception to the new rule.

An analysis of the approach taken to hearings shows many variations,[27] which are likely to form the template for the long-term future:

1. **Wholly physical hearings**. The traditional courtroom-based approach;
2. **Partly physical, partly remote audio hearings**. Some participants in court, some, including the public and media, taking part via telephone;
3. **Partly physical, partly remote video hearings**. Some participants in court, some, including the public and media, taking part via an online video platform;

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20 *Re Blackfriars* [2020] EWHC 845 (Ch) at [23]-[24] and [37]; *Teesside Gas Transportation Ltd v Cats North Sea Ltd* [2020] EWCA Civ 503 at [93]-[96].

21 Lord Chief Justice, Master of the Rolls, President of the Family Division, *Message for Circuit and District Judges sitting in Civil and Family*, (9 April 2020), www.judiciary.uk/wp-content/uploads/2020/08/Message-to-CJJ-and-DJJ-9-April-2020.pdf.

22 *Polanski v Condé Nast Publications Ltd* [2005] 1 W.L.R. 637; *see* FN 13 above.

23 *Jankowski v Regional Court of Torun, Poland* [2020] EWHC 826 (Admin) at [2]-[3].

24 HMCTS, *Open Justice*, (Guidance); *Media Access to Hearings*, (Guidance), www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak.

25 Coronavirus Act 2020, schedule 25; CPR PD 51Y – Video or Audio Hearings during Coronavirus Pandemic; CPR PD 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus.

26 *Re C (Children) (COVID-19: Representation)* [2020] EWCA Civ 734.

27 N. Byrom, S. Beardon, A. Kendrick, *The Impact of Covid-19 Measures on the Civil Justice System*, (Civil Justice Council, 2020), www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f-1.pdf.

4. **Partly physical, partly remote audio, partly remote video hearings**. Some participants in court, some, including the public and media, taking part via audio and some taking part via an online video platform;
5. **Wholly audio hearings**. All participants take part via telephone;
6. **Partly remote audio hearing, partly remote video hearings**. Some participants, including the public and media, taking part via audio and some taking part via an online video platform;
7. **Wholly video hearings**. All participants, including the public and the media, taking part via online video technology.

What is also clear is that no claim is likely to adopt a single hearing approach throughout its pre-trial case management and trial phases. The early evidence suggests that shorter case management hearings, interim application hearings, uncontested applications, costs hearings and some appeals are likely to be either wholly audio or purely remote hearings. Depending on the nature of the trial, it too may be a wholly physical hearing or one of a variety of partially physical hearings or a wholly remote hearing.[28] As Lord Burnett CJ put it, "There are unlikely to be hard lines drawn."[29] The courts are likely to match the type of hearing with the needs of the dispute, the application or trial, including such matters as the interests of the parties and the need to take and test evidence.

3 Procedural Reforms in the Light of Covid-19

Not only will the enforced pilot project result in a hastening of the inevitable long-term movement towards the use of video and other online technology within the civil justice system, but it is also likely to ensure that that process will be one subjected to detailed empirical scrutiny. Empirical scrutiny of the need for reform and the nature of any reforms undertaken has historically been lacking in civil justice reforms in England, in general, a point noted by Genn,[30] and, specifically, in respect of digital reforms.[31] The first, and possibly most significant, impact of the Covid-19 pandemic is that there is now an avowed commitment to engage in empirical scrutiny of the effects it has had on the system, not least in terms of the operation of online video hearings.[32] In addition to that general point,

28 N. Byrom, S. Beardon, A. Kendrick, *ibid*.
29 Lord Burnett CJ, *Delivering Justice in 2021*, (18 November 2020) at 6, www.judiciary.uk/wp-content/uploads/2020/11/20201118_Bar-Council-Conference-2020-LCJ-address_FINAL-V2-1.pdf.
30 H. Genn, *Judging Civil Justice*, (Cambridge, 2010) at 62.
31 J. Tomlinson, *Justice in the Digital State*, (Bristol University Press, 2019) at 49.
32 Lord Burnett CJ, FN 2 above, at (8).

the pandemic has exposed many issues that will need to be taken account of in the justice system's future development.

3.1 *Wholly Remote Hearings – The Legislative Framework*

The first issue the pandemic has exposed is the inadequacy of the legislative framework within which online video hearings take place. While video and telephone technology was, as noted previously, capable of being used prior to the pandemic, the position with respect to wholly video hearings where none of the participants, including the judge, were in a court building was unclear. In 2017, the government had intended to introduce legislation as part of the HMCTS reform programme to facilitate the conduct of such hearings. The legislation was not intended to provide a legislative basis for such hearings. It is well established legislatively that court hearings can take place anywhere in England and Wales.[33] The legislation, the Prison and Courts Bill 2017, was rather intended to facilitate public participation in such hearings by making provision for their recording and broadcasting, while also making them subject to the same level of protection applicable to physical hearings as provided for by section 40 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981.[34] Those two provisions make it a criminal offence to photograph or video a physical court hearing and a contempt of court to take an audio recording of one, respectively. The 2017 legislation was not enacted owing to the general election that year.[35] In the light of the pandemic, its provisions were introduced as part of the Coronavirus Act 2020 in order to facilitate the holding of pure video hearings. The pandemic exposed a number of flaws in the provisions.

First, it became apparent that the application of the provisions was not readily understandable. They thus had to be supplemented by an emergency Practice Direction issued by the judiciary and the government.[36] Secondly, it was not necessarily clear how they interacted with the approach taken to other forms of hearing. It was clear that the use of video technology to provide access to hearings to the public and media who were outside a court building was not permitted under the 1925 Act and 1981 Act. If a broadcast was from one courtroom to another, however, the provisions of the 1925 Act would not be engaged.[37] It was also clear that such access was permissible where a wholly remote hearing took place applying the provisions of the 2020 Act. It was not, however, clear what the

33 Senior Courts Act 1981, ss.15(3), 57(1), 71(1) and CPR r.2.7.

34 Prison and Courts Bill 2017, Explanatory Notes, Paras. 34 and 81, https://publications.parliament.uk/pa/bills/cbill/2016-2017/0145/en/17145en.pdf.

35 Also see the Courts and Tribunals (Online Procedure) Bill 2019.

36 CPR PD 51Y – Video or Audio Hearings during Coronavirus Pandemic.

37 As held by the Divisional Court in *R (Spurrier) v Sec of State for Transport* [2019] EWHC 528 (Admin) [2019] EMLR 2016.

position was where a partially remote hearing took place. On the face of it, public and media access to such a hearing was prohibited as it would fall within the scope of the 1925 and 1981 Acts. That was because part of the hearing would take place from a physical courtroom. However, if the judge designated, as could be done,[38] the court to be sitting in all the places where the various participants, including the public and the media, were at the time of the hearing, video access to all the participants was arguably permissible for the same reason that it was permissible if a broadcast was made from one courtroom to another. The lack of clarity over the operation of the various provisions in one case resulted in solicitors unwittingly and wrongly permitting video access to a partially remote hearing for individuals who were outside the court building.[39] They were clearly not devised to, nor were they capable of, facilitating partially remote hearings, which the judiciary identified as the optimum approach to remote hearings.[40]

Thirdly, it was not clear that, as had been intended in the 2017 Bill, the wholly remote access provisions properly secured open justice. In 2017, the provisions were intended to facilitate open justice by enabling individuals to enter a court building and watch hearings on screens in the courts. It was, and is, however, questionable whether access to a wholly remote hearing either by requesting the court for permission to view or listen to a recording of a hearing meets the requirements of open justice. The same point can be said to apply to the alternative situation where a member of the media or public is required to ask the court to be given access to a wholly remote hearing. As ordinarily applicable, they provide that any member of the public can access a hearing as of right while it is taking place.[41] The 2017 Bill, and 2020 Act, provisions do not provide an equivalent level of access. They thus raise the question whether those provisions are compatible with the constitutional principle of open justice and the requirements of article 6 of the European Convention on Human Rights.

The pandemic can thus be said to have stress-tested the wholly remote hearing provisions of the 2017 Bill and 2020 Act and their interaction with other provisions aimed at protecting civil proceedings from unauthorised recording and broadcasting. A fair conclusion to draw from the fact that at least four separate legal regimes apply to this issue: one applicable to wholly physical hearings, one to partially physical hearings where a judge does not direct that where the participants are during the hearing is also part of the court, one where a judge makes such a direction and one applicable to wholly remote hearings. This is less than ideal and undoubtedly led to the problems in the *Gubarov* case. It also brought to light weaknesses concerning open justice and media and public access to video

38 *See R v Huntley & Carr*, cited in Arlidge, Eady & Smith on Contempt (5th Ed) at 10-213.
39 *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB); [2020] 4 W.L.R. 122.
40 *See* FN 21 above.
41 A. Zuckerman, *Zuckerman on Civil Procedure – Principles of Practice*, (Sweet & Maxwell, 2020), chapter 3.

proceedings, problems that were specifically highlighted by respondents to the Civil Justice Council's early study of the effect of the pandemic on civil proceedings.[42]

3.2 Procedural Rules

The pandemic has also provided some guidance on the role of the Civil Procedure Rule Committee, which devises the Civil Procedure Rules (CPR), the code that governs practice and procedure in the civil courts.

The CPR provides the court and parties with a broad range of discretion in terms of the nature and type of orders and directions that can be given in order to manage civil proceedings. It does not, however, provide a power to alter, vary or disapply specific rules where emergencies arise. It does not, for instance, provide a power to disapply mandatory procedural time limits except as already provided for in specific rules. For instance, CPR r.3.8(4) provides a power to extend certain procedural time limits for up to 28 days by party consent. No power exists to increase the 28-day time limit where, for instance as during the pandemic, that might have been both beneficial to parties and the administration of justice generally. Notwithstanding the absence of such a power in the rules to vary or disapply specific rules, the judiciary was able to take such steps. Relying on a power set out in CPR Pt 51, which permits Practice Directions to vary or disapply rules of the CPR for the purposes of 'pilot schemes' intended to test proposed new rules, the judiciary, with the government's consent, issued a series of such directions. Those 'pilot scheme' Practice Directions disapplied rules governing housing possession proceedings so as to impose a general stay on such proceedings,[43] varied CPR r.3.8(4)[44] and required courts to take account of the pandemic when considering, for instance, applications for relief from sanctions arising from procedural non-compliance.[45]

On one view the pilot scheme Practice Direction-making was not intended to be used to alter the CPR in emergencies. A challenge to that effect concerning the pilot scheme Practice Direction concerning possession proceedings was, however, rejected by the Court of Appeal in *Arkin v Marshall*.[46] However, it was apparent in the Court of Appeal's decision that such a Practice Direction was valid only in so far as it was intended to gather evidence and test new forms of procedure. If an emergency-related pilot scheme Practice Direction was in force for longer than necessary further to such an intention, as may be the case in a long-running emergency or one that, as with the Covid-19 pandemic, exists in a series

42 N. Byrom, S. Beardon, A. Kendrick, FN 27 above, at 69-72.
43 CPR PD 51Z: Stay Of Possession Proceedings, Coronavirus.
44 CPR PD 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus.
45 *Ibid.*
46 *Arkin v Marshall* [2020] EWCA Civ 620.

of waves of increasing and decreasing severity, it is likely that it would be held to be ultra vires the Practice Direction-making power. Equally, if such a Practice Direction could not properly be construed as a pilot scheme, as was argued albeit rejected in the *Arkin* case, then it would be likely to be held to be ultra vires.

What this pointed to was the need for the Civil Procedure Rule Committee to consider, in the light of evidence from the various pandemic-related pilot scheme Practice Directions, how best to revise the CPR in order to enable them to operate effectively in emergency situations. One possible approach to be taken could be for it to introduce a new and discrete rule that provided a further power to issue time and purpose-limited Practice Directions that could vary, modify and disapply specific rules within the CPR. Such a discrete rule might, for instance, provide that it can be used only where there is a national emergency that adversely affects the administration of justice in the civil courts. Care will need to be taken to specify when a national emergency is said to arise so that it cannot be misused. Exercise of the power may be contingent, for instance, on the government declaring such an emergency. It may be subject to parliamentary scrutiny. At the very least, it will, as all Practice Directions are, be subject to challenge via judicial review.[47]

4 Conclusion

The Covid-19 pandemic accelerated the use of online, and particularly video, technology in the English and Welsh civil justice system. It resulted in the almost overnight shift from physical hearings to either wholly or partially remote hearings carried out via online video platforms. This shift is likely to mark a long-term, permanent, reform. Proceedings, including those where witness evidence is given, in future are likely to be a blend of different forms of hearing, with some being online default. What is also apparent, however, is that the legislative framework that was introduced during the pandemic, and which was to all intents and purposes legislation that was to have been introduced three years earlier as part of a considered set of reforms in the context of the government's long-term digitisation programme for the civil justice system, is not fit for purpose. Its ability to secure open justice, which it was intended to do, has been called into question. Its relationship with other legislative provisions governing access to hearings and prohibiting recording and broadcasting of them has been shown to be unclear. Considered reform is needed. The same can be said for the CPR's ability to adapt in times of emergency. Steps were taken to adapt the rules relying on a power to vary them as part of pilot schemes. Reliance on such a power is, however, limited. The pandemic has exposed a need, hopefully one that will

47 Such an amendment was to be introduced, as a new CPR r.51.1, on 6 April 2021; such a modification was effected to the CPR by regulation 13 of Civil Procedure (Amendment) Rules 2021.

not need to be called upon at all, or, at the most, infrequently, to introduce a discrete power into the CPR to enable it to be adapted to the needs of emergencies.

Given the acceptance by the senior judiciary that evidence-based scrutiny of the effects of the pandemic on the justice system is needed, it is to be hoped that these two issues, no doubt among others, will be considered and acted on in the course of 2021.

Pandemic and Digitalization

The Situation in the Finnish Lower Courts

Laura Ervo[*]

1 Digitalization in Courts before Covid-19 Times

It was a redeeming stroke of luck for Finland when in 2019 the latest reform aimed at easing court proceedings came into force. Thanks to this reform, digital solutions for participation were adopted more widely than before and adopted in the normal daily workflow in the Finnish lower courts.[1] Both the Code of Judicial Procedure[2] and the Criminal Procedure Act[3] were amended.

For instance, it is now allowed to organize the oral preparation in civil cases by using phone calls or other technical or digital solutions, whereby the participants have voice contact with each other if the court finds it expedient.[4] The party concerned can participate by means of a technical solution in the main hearing too if he or she agrees and if the court finds it appropriate. An additional requirement in the main hearing is that the chosen technical solution include both a visual and an audio connection.[5] Moreover, the sessions using phone calls or similar technical solutions are public. This means that a general audience may be present and must have the possibility to listen to all the discussions.[6]

The rules concerning digital participation in criminal cases are found in the Criminal Procedure Act. This Act was amended at the same time in 2019, and the possibilities of

* Laura Ervo, Professor, Örebro University, Sweden; Laura.Ervo@oru.se. I wish to thank District Court Judge Anna-Liisa Autio, who took the time to discuss and had the interest in discussing the topic with me from a practical point of view. Because there are no empirical studies on this issue yet, it was very valuable to get the chance to check the outcomes with a professional in the field. She also directed my attention to the current situation, where even the prosecutor is attending proceedings remotely and often from his or her own home even if he or she functions as a state authority.

1 Even before the 2019 amendments, videoconferencing was quite commonly in use and working well at courts. https://oikeus.fi/fi/index/ajankohtaista/sahkoisenoikeudenkaynninmanuaali/videoneuvotte lulaitteidenkayttaminenoikeudenkaynnissa/kayttokokemukset.html. Visited 31 December 2020.

2 Finnish Code of Judicial Procedure 1.1.1734/4 (FCJP).

3 Finnish Criminal Procedure Act 11.7.1997/689 (FCPA).

4 Chapter 5, Section 15 d (FCJP).

5 Chapter 12, Section 8 (FCJP).

6 Government bill (32/2001). The Government's proposal to Parliament to amend the provisions of the Code of Judicial Procedure and certain other acts concerning the preparation of disputes, the main proceedings and the handling of non-contentious civil cases, p. 44.

participating digitally were expanded. The rule concerning the preparatory stage is identical and corresponds with the same rule in civil proceedings, i.e. the oral preparation in criminal cases also may be organized via the telephone or other technological solution, where participants have voice contact with each other, if the court finds it expedient.[7] The rule concerning the main hearing is also identical to the rule in civil proceedings: the party can participate by means of a technical solution also in the main hearing if he or she agrees and the court finds it appropriate. The additional requirement in the main hearing is that the technical solution chosen must cover both a visual and an audio connection.[8]

The hearing of witnesses in civil or criminal cases has – quite widely – already been made possible via video conference or phone since 2016, based on Chapter 17, Section 52 (FCJP).[9]

This is useful whenever a person about to be heard for probative purposes is ill owing to Covid-19 or in quarantine owing to exposure to the virus. This rule, however, ought not to be interpreted in a wider way simply because of the pandemic. In other words, the pandemic is not a sufficient or proper reason for widening its interpretation. Normally, if a party is unable to attend because of illness, the main hearing should instead be postponed. It must be noted that in both civil and criminal procedures if a party is being heard for probative purposes, the requirements for digital participation are stricter than otherwise and FCJP Chapter 17, Section 52, is followed.

To sum up, after the 2019 reform and prior to the onset of the coronavirus, the possibilities of organizing remote or hybrid hearings were already in widespread use under normal, daily life conditions. One might say that it was a blessing in disguise that these amendments came into force just a year before the real need for them became apparent. Because of these rules, it has arguably been much easier to tackle the pandemic than it would otherwise have been without the amendments.

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7 Chapter 5, Section 10 a (FCPA).

8 Chapter 8, Section 13 (FCPA).

9 According to Chapter 17, Section 52 (FCJP):
(1) A party being heard for probative purposes and a witness and expert witness may be heard in the main hearing without being present in person, through the use of a video conference or other suitable technical means of communication by which the persons participating in the hearing have audio and video contact with one another, if the court deems this appropriate and if:
(1) the person to be heard cannot arrive in person in the main hearing due to illness or another reason;
(2) the arrival in person of the person to be heard in the main hearing would, in comparison with the significance of the testimony, cause considerable expenses or inconvenience;
(3) the reliability of the statement of the person being heard can be assessed in a credible manner without his or her physical presence in the main hearing;
(2) In the cases referred to above in subsection 1, paragraphs 1-3, however, the hearing may also take place by telephone.
The section as a whole can be found in English here: www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf. Visited 8 January 2021.

2 Covid-19 Changes in Legislation

In Finland, Emergency Powers Act 29.12.2011/1552 was valid briefly in the spring of 2020 owing to the pandemic. It includes some rules on administration[10] but nothing about the judiciary. This is a good measure – because it ensures that the principle of a fair trial and other guarantees of the rule of law are followed, particularly in exceptional situations. Thus, the judiciary, in general, functions as normally as possible even in a crisis.

Furthermore, there have been no new, specific rules for proceedings in the current situation. This is because the possibilities of using technology are quite widely applied even under normal circumstances. It is also possible to use remote communication more extensively in the current situation by interpreting the current rules in a more permissive way. This practical approach to solving problems is typical of Finland and Finnish judges. Even under normal conditions, changes in interpretations are common if there are practical, societal needs or reasons to react differently from what previous tradition has prescribed. The aim is to produce well-working and fair decisions even when the legislation does not correspond with societal changes. The flexible attitude expressed in remote adjudication makes for quick solutions in situations where the legislature has not yet reacted through legislative changes.[11] In this respect, it is indeed surprising to note how much practicalities have changed daily life in the Finnish courts without any changes made to the legislation. Adjustments have been realized with the help of the recommendations made by the National Court Administration. For instance, the ways of realizing publicity during remote hearings have been rather creative and have partly tested the limits of legality.[12] See also Chapter 4.

3 Covid-19 Changes in Practice

As already noted, technology has been the main tool used to tackle exceptional situations in Finland. The remote trials and other possibilities of e-services are widely used to protect the health of the personnel and clients at courts. First, the primary modes of contacting the judicial authorities are the telephone, email and other electronic services.[13] Personal visits are not possible at all, or at least not desirable. For instance, the National Prosecution

10 The Emergency Powers Act 29.12.2011/1552, Chapter 15.

11 Ervo, Laura, "Comparative Analysis between East-Scandinavian Countries". *Scandinavian Studies in Law*, Stockholm: Stockholm Institute for Scandinavian Law, 2015, p. 145 and Sallila, Jussi, "Eurooppalainen oikeuskulttuuri, pohjoismainen perinne ja juristi-identiteetti". Oikeushistoria Suomen oikeustieteellisissä aikakauslehdissä n. 1945–1970, *Oikeus* 2011, p. 466.

12 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 5. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 31 December 2020.

13 https://oikeus.fi/fi/. Visited 31 December 2020.

Authority has closed its customer service points, and they can be contacted only by phone or email.[14]

The courts have informed the public about changes in their activities on their websites.[15] Persons summoned to a hearing are personally informed of any cancellations or changes to the hearing.[16] The National Courts Administration has recommended that urgent coercive cases and criminal cases involving remand prisoners must always take place at the court. In all other cases, the health of court staff and parties is put ahead of the fast-track time criterion. Therefore, a postponement is recommended in cases requiring an oral hearing, unless a hearing can be held remotely. It has been up to the courts to assess on a case-by-case basis whether the main hearings, preparatory sessions, court-annexed mediation, oral hearings and internal court hearings can be carried out remotely. This question should be discussed with the parties involved, and their views should be heard. It must be considered separately in each case whether the case can be heard via remote connections. Remote sessions, of course, require to be planned and prepared for with all participants in the hearing.[17] It is the chair of the trial who decides whether the conditions for a remote hearing are met.[18]

The hypothesis was that parties will now be more active in asking for remotely organized hearings owing to the pandemic,[19] and this is also what happened. The courts have moved exceptionally quickly to electronic case management. Operation via remote connections has been more successful than expected, and the courts are constantly seeking ways of developing their operations, so that, for example, the decision-making process and part of the oral proceedings could be held remotely.[20]

Alongside this partial success, there have also been challenges involved in using remote connections. Their use is limited by factors such as data protection and information security, as well as technical issues and the requirements of publicity.[21]

14 https://syyttajalaitos.fi/en/frontpage. Visited 31 December 2020.
15 https://oikeus.fi/fi/index/ajankohtaista/korona.html. Visited 31 December 2020.
16 https://oikeusministerio.fi/koronavirus. Visited 31 December 2020.
17 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 3. Available at: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 29 December 2020.
18 https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/2020/kullc6zb6.html. Visited 31 December 2020.
19 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 3. Available at: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 31 December 2020.
20 www.kho.fi/fi/index/ajankohtaista/tiedotteet/2020/khojakkovahvaoikeusvaltiokantaaylikriisiajan.html. Visited 31 December 2020.
21 https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/2020/kullc6zb6.html. Visited 31 December 2020.

4 Risking Legal Safety

Digitalization and remote hearings do not solve all the problems that the pandemic has caused at courts. Therefore, the pandemic has also caused delays. Delay is a natural consequence and sign that the pandemic is not over. Before the outbreak and between the waves of the pandemic, there has consequently been an urgent need to eliminate delays or queues, which, it has been estimated, will take at least two years. Additionally, extra resources are needed.[22]

The delays have been closely monitored through regular data, which shows how courts postponed oral hearings during the first wave of Covid-19 in the spring of 2020. Then, when Finland experienced the second wave, the digital solutions were used more often to avoid delays in adjudication.[23]

This is understandable from a practical point of view. However, the different interpretations are based on the same legislation, which is problematic. It seems quite clear that courts have used the pandemic and the backlog in cases/queues as one crucial argument when considering the expediency and appropriateness in either postponing face-to-face oral sessions or allowing digital participation. Still, the original, intended meaning of those rules and the boundary conditions of expediency or appropriateness were probably intended to relate to the context of the *single* case – and not to the economy, resources or societal conditions in general.[24]

The pandemic affects the functioning of the courts indirectly and in the longer term too. Extensive social impacts are inevitable. Strong restrictive measures always also have negative effects, which will materialize in due course in court cases. Certain types of cases will inevitably grow in number owing to exceptional circumstances. For example, an economic downturn would increase insolvency issues. Incidents related to child protection may also increase. Once the crisis has eased, the courts have an important role to play in supporting a return to normalcy and economic recovery by resolving cases as expeditiously and safely as possible.[25]

The delays, together with the estimated growth in the number of court cases, pose a threat to the expeditious and safe conduct of court services in future, which digital solutions alone cannot overcome. The human approach/human concerns need to be taken seriously, and more weightage should be given to facing the clients.

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22 https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/2020/osxn0egsy.html. Visited 31 December 2020.

23 https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/keskeytystilastot.html. Visited 8 January 2021.

24 Government bill 200/2017. The Government's proposal to Parliament to amend the Code of Judicial Procedure and some related laws.

25 www.kho.fi/fi/index/ajankohtaista/tiedotteet/2020/khojakkovahvaoikeusvaltiokantaaylikriisiajan.html. Visited 31 December 2020.

5 Risking Legality

The current recommendations and practices involved in resolving challenges faced by courts owing to the pandemic entail several risks seen from a legality perspective. First, a wide range of legal practices (from the general approach to individual solutions) appear to be based on recommendations and interpretations alone. In Finland there is no extra legislation on the subject. Fortunately, the legislation on digital participation was amended in 2019 and was thus up to date when the pandemic broke out. However, that regulation was made for normal, everyday life conditions and not for solving adjudication during crises. Consequently, the original meaning and goal of that legislation is different from the demands of the current, exceptional situation. This is why interpretations should not be changed merely for practical reasons. From a legal certainty perspective, the level of legal protection, predictability and transparency in a country should remain unchanged despite a pandemic. In other words, attention should always be paid de jure to the single case and its particular circumstances to determine whether digital participation is appropriate or not and not be determined on the basis of the societal situation in general. However, judging by the aforementioned data, expediency and the current societal crisis appear to have influenced legal practice, because the number of pending cases is lower this autumn (second wave) compared with last spring (first wave). This is so even though the Guide from the National Court Administration, which includes recommendations and guidelines on the matter, emphasizes that consideration *must* be made on the basis of the individual, single case.[26] Arguably, extra legislation on how to tackle the pandemic at courts would have been a better solution from the legality point of view.

The other problem is how to guarantee that a hearing is made public when it is being realized through remote sessions. It is, of course, possible to organize public hearings even if they are remotely conducted. There are several solutions to making hearings public in practice. However, the working procedures should be legally safe/certain and known in advance. Currently, the practice seems to be based primarily on the concrete need (for expediency) and only secondarily on individual/tailored solutions in the single, specific case.

If the chairperson is present in the courtroom, the audience can normally follow the hearing digitally in the other courtroom. However, according to the National Court Administration´s Guide for Remote Court Sessions, when the chairperson and the parties are all participating remotely, the list of cases must be published on a notice board at the court and, for example, on the court's website. When using remote court sessions, it is

26 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 3. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 31 December 2020.

recommended that the list of cases include the contact details of the chairperson or other contact person, as well as an invitation to the public to contact the chairperson, who will then decide how to make the trial public.[27] The lists of cases are unproblematic, but the invitation to contact the chairperson to get more information on the publicity aspect sounds problematic. It is not incumbent on the public themselves to contact anyone in order to get the opportunity to follow the public court sessions. There should, of course, be a protocol for that despite the remote sessions, and the public should ex officio, on the same list, be informed of how the publicity will be realized. The advice in the Guide also sounds like the chairperson will consider the publicity aspect only if someone is interested in the court session in question, and, if not, it will not be publicly accessible. This sounds extremely practical, and yet it jeopardizes key procedural principles that have traditionally been greatly valued.

Recording a trial to follow it retrospectively, for example by means of Skype's recording feature, and subsequently distributing this recording to the public is not recommended in the Guide published by the National Court Authority, although it does not clearly prohibit this, either. Implementing publicity through a Skype link arguably involves the risk of unauthorized recording of the trial.[28] Such an important aspect should not be covered (or not covered, as the case may be) merely by recommendations in the National Court Authority's Guide. In fact, the current legislation quite clearly does not provide a basis for realizing publicity through shared Skype links. A vague formulation like 'not recommended', then, sounds astonishing in this context, considering that it is well known how much harm publishing something on the Internet can cause for the rest of an individual's life. Such expansions – based on recommendations and practice and *not* on valid legislation – run counter to democracy. Instead, there should be legislation on how the public hearings should be realized during the pandemic. The constitutional issue here is when and how there are grounds to limit statutory rights. As a matter of fact, the Emergency Powers Act contains no rules on limitations but only stipulates that adjudication must work in a fair manner despite the crisis.

The third problem is that the prosecutor too is attending remotely and often from his or her own home even when assuming the role of a state authority. The current legislation does not explicitly prohibit this practice and has therefore been found legal even though the written rule on digital participation of prosecutors is missing in it. In fact, the recommendation according to which even prosecutors can now attend from home is based

27 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 5. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 29 December 2020.

28 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 5. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 29 December 2020.

on a decision by the deputy prosecutor general, dating from 23 March 2020.[29] Thus, a precedent may now be in place for prosecutors to attend from home – but without a textual basis in the legislation.

The fourth problematic proposal came from the Finnish bar association, which recommended that the plea-bargaining system be used more widely during the crisis.[30] This is, in fact, not possible as proceedings based on a plea of guilty may not be organized remotely at all.[31] The proposal, however, exemplifies the same legality problems that follow on from the extensive use of remote hearings due to the pandemic and current societal circumstances.[32] This type of exception should also have been legislated. And like the other preceding examples, expansions of this kind, brought about in response to a crisis in society, are not free from constitutional problems either. Fortunately, this proposal was not seized or acted on. Once again, it would also have made sense to look at the situation as a whole. New interpretations cannot be a solution in a context where a global crisis necessitates a change in the adjudication. Rather, it is the other way around: in a crisis, legality plays an even bigger role than in normal, daily life, when the threat to legal safety is minor.

6 Trends – Before and After

'Orality, immediacy and concentration' has been the procedural mantra in Finland since the 1990s when the procedural reforms started.[33] It has been emphasized that the Finnish civil procedure is based on cooperation, interaction and dialogue. Many more skills for handling human relations along with communicative skills are required today from judges and attorneys.[34] The role of conflict resolution is on the increase, and more emphasis is being placed on friendly settlements and mediation in courts. In addition, there is a stronger

29 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 6. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 29 December 2020.

30 https://asianajajaliitto.fi/2020/04/suomen-asianajajaliiton-ehdotukset-riita-ja-rikosasioiden-kasittelyn-jarjestamisesta-koronapandemian-aikana-ja-suositukset-etayhteyksien-kayttamisesta/. Visited 31 December 2020.

31 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 4. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html. Visited 31 December 2020.

32 *See also* Cannon, Ryan, "Sick Deal: Injustice and Plea Bargaining During COVID-19", 110 *Journal of Criminal Law & Criminology Online,* 2020, p. 91.

33 Ervo, Laura, "The Reform of Civil Procedure in Finland." *Civil Justice Quarterly*, 1995, pp. 56-64 and Ervo, Laura, "Swedish-Finnish Preparatory Proceedings: Filtering and Process Techniques." In: Ervo, Laura, Nylund, Anna (Eds.), *Current Trends in Preparatory Proceedings – A Comparative Study of Nordic and Former Communist Countries.* Springer, Cham 2016, pp. 19-56.

34 Ervasti, Kaijus, "Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa." Oikeuspoliittinen tutkimuslaitos, Helsinki, 2004, p. 511.

focus on the subjective experience of procedural justice.[35] The Finnish proceedings have been seen as more communicative than earlier, and the discursive nature of procedure has been strengthened and emphasized.[36]

Yet the state economy and the need to operate increasingly efficiently with ever fewer human resources has caused amendments to tend towards written procedures. Increasingly often the clear and simple cases are decided in written proceedings and as quickly as possible to save time and resources. Rapid developments in the field of technology have also meant the increased use of phone and videoconferences instead of face-to-face sessions even when organizing oral hearings.[37] Against this background, it is of relevance to ask what will happen (or rather, what is happening) to the primaeval procedural principles of orality, immediacy and concentration?[38]

Even under normal circumstances, Finnish legislation allows for wide-ranging use of remote connections. This trend seems to have become more extensive owing to the pandemic, as noted previously. The new ways of working will probably stay in place even after the pandemic is over, which will, hopefully, be soon. Today, even the court-annexed mediation and preparatory stages of court proceedings are organized via remote sessions, and they seem to be working well enough.[39] It is a matter of fact, however, that the functional level of conflict resolution becomes poorer under digital conditions.

The pandemic indeed seems to be a shortcut to more efficient, simple and economical court proceedings. And thus a new normal seems to have arrived in the courts. A return to the 'olden, golden times' now seems highly unlikely; instead, remote hearings are here to stay. And they seem to offer current practical solutions that perfectly match the legislature's recent inclination towards making procedures easier and more technological.

What will happen, then, to *orality, immediacy, conciliation and interactivity in participation and subjective experience of procedural justice*? Will these concepts be

35 *Ibid.*, p. 512.

36 Ervo, Laura, "Nordic Court Culture in Progress: Historical and Futuristic Perspectives." In: Ervo, Laura, Nylund Anna (Eds.), *The Future of Civil Litigation. Access to Court and Court-annexed Mediation in the Nordic Countries.* Springer, Cham, 2014, pp. 383-407.

37 Ervo, Laura, "Changing Civil Proceedings: Court Service or State Economy?" In: *Recent Trends in Economy and Efficiency of Civil Procedure.* Vilnius University Press, Vilnius, 2013, pp. 51-71.

38 *See* Bylander, Eric, "Processuella handlingsformer. Muntlighet, skriftlighet och ny teknik". Rhetorica Scandinavica. Tidsskrift för Skandinavisk Retorikforskning, 31, 2004, pp. 60-64. Bylander, Eric, "Muntlighetsprincipen vid domstol i Sverige". In: Bylander, Eric, Lindblom, Per Henrik (Eds.), *Muntlighet vid domstol i Norden. En rättsvetenskaplig, rättspsykologisk och rättsetnologisk studie av presentationsformernas betydelse i förfarandet vid domstol i Norden.* Iustus Förlag Uppsala, 2005, pp. 95-131. Bylander, Eric, Muntlighetsprincipen. Iustus Förlag, Uppsala, 2006, and Bylander, Eric, "En modernare rättegång och bättre?". *Svensk Juristtidning,* 2007, pp. 516-526.

39 Opas tuomioistuimille etäyhteyksien käyttöön oikeudenkäynnissä. Tuomioistuinvirasto 15 April 2020, p. 3. Available on the web: https://tuomioistuinvirasto.fi/fi/index/ajankohtaista/julkaisut.html and https://oikeus.fi/fi/index/ajankohtaista/sahkoisenoikeudenkaynninmanuaali/videoneuvottelulaitteidenkayt taminenoikeudenkaynnissa/kayttokokemukset.html. Both visited 31 December 2020.

eradicated together with the pandemic? Those catchwords, which have been discussed over the last 30 years among Finnish scholars in procedural law,[40] have slowly been crumbling away bit by bit. And quietly the trend has been turning in the opposite direction, determined by economic concerns, with the pandemic merely providing additional momentum to this development.

Probably, there is also a change in values in play here. People currently seem to prefer working remotely and participating digitally as parties or state authorities. To be located comfortably at home seems to be the newest trend. From this perspective, facing the opposite party or the decision maker is a secondary need, and digital solutions seem sufficient to fulfill the purpose. To take the path back to how things once were – before the pandemic – can be time-consuming or impossible. The world is no longer the same.

40 Ervo, Laura, "The Reform of Civil Procedure in Finland." *Civil Justice Quarterly*, 1995, pp. 56-64.

Covid-19 and French Civil Justice

What Future for Civil Hearings?

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For almost two decades, French civil justice has been subjected to numerous partial reforms by government decree that were not sufficiently well conceived and that have not helped stabilise this key public service. The Covid-19 pandemic struck at a time when French courts were already fragile, with a significant backlog of cases and an insufficient number of judges and clerks. The pandemic has led Parliament to delegate power to the government to take measures in matters normally handled by Parliament. Many exceptional rules were adopted. Some claimed that the public service of justice was not considered as an essential public service by the government during the first few months of the pandemic.[1] A new ordinance No 2020-1400 and a decree No 2020-1405 of 18 November 2020 revised the rules for the functioning of civil courts during this health emergency and partly took up the solutions adopted in March 2020.[2] This contribution focuses on court hearings in civil matters, since not only exceptional temporary law provisions linked to the health emergency statute (1), but also recent reforms of civil procedure (2) seem to consider the hearings as optional and, possibly, not essential for fair and effective proceedings. This raises the issue of the future of civil hearings in France (3),[3] especially when one is aware of the French court reality: when parties are represented or assisted by a lawyer, the oral argument hearing is very often brief in civil disputes. Witness statements consist mostly of written attestations.[4] The parties rarely appear in person. In oral proceedings without representation or assistance by a lawyer, parties mostly appear in person, and the judge has a more active role during the hearing.

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1 This is the opinion of the president of the French Court of Cassation, Chantal Arens, expressed in an interview, *L'Obs,* 16 September 2020. *See also Commission Nationale Consultative des Droits de l'Homme*, opinion of 28 September 2020, 'Une autre urgence: le rétablissement d'un fonctionnement normal de la justice'.

2 *See* F. Ferrand, 'French Civil Justice During Corona Times', *in Civil Justice and Covid-19*. Septentrio Reports 5. https://doi.org/10.7557/7.5473, pp. 23-28.

3 C. Bléry, 'Covid-10 et procédure civile: nouveau droit transitoire ou préfiguration du droit de demain ?', *Gazette du Palais* 1 December 2020, p. 14.

4 Although oral statements by witnesses are expressly regulated in the CPC (Art. 205 et seq.).

1 Civil Hearings under Exceptional Circumstances

The exceptional and provisional measures relate to the reduced publicity of the hearing (1.1), the possible ways and means of conducting the hearing (1.2) as well as its suppression (1.3). What can be criticised is that the legal provisions do not require a statement of reasons for the measures taken to ensure that they are strictly necessary and proportional. No hierarchy is established between the measures, e.g. no subsidiarity of the use of the procedure without a hearing as opposed to videoconferencing.[5]

1.1 Reduced Publicity of the Hearing

Ordinance No 2020-304 of 25 March 2020 allowed the court to deviate from the publicity principle during the emergency. The president of the court may decide before the hearing begins that publicity will be 'restricted';[6] the hearing shall not be made public but shall take place in the *chambre du conseil* (in camera) if it proves impossible to guarantee the necessary conditions to protect the health of the persons who are present at the hearing. These rules are also included in the new ordinance No 2020-1400 of 18 November 2020 (Art. 3) in order to 'enable compliance with the health rules in effect'. In addition, the president of the court may regulate access to court and courtrooms, in particular, according to their capacity to receive the public in compliance with barrier gestures. These conditions of access are made known to the public. Journalists, who embody the public's control over the trial, are subject to specific rules: they may attend the hearing even if it takes place in camera, under conditions specified by the president of the court. This, of course, applies only to cases in which the hearing would normally have been made public (not family matters, for example).

1.2 Possible Forms of the Hearing

The 'principle of presence' has been significantly restricted. The ordinance of 25 March 2020 allows the judge or the president of the court panel to decide that the hearing shall take place via a videoconference (Art. 7, Para. 1). If such technology is not available (some courts or some parties are not yet equipped), the court may decide that the parties and

5 S. Amrani-Mekki, 'Seconde vague d'ordonnances Covid – À l'exceptionnel nul n'est tenu !', *JCP G* No 49, 30 November 2020, 1335. One can even notice that the circular of the ministry of justice that presents the dispositions of the ordinance encourages judges to use, as a matter of principle, measures that should be limited to what is strictly necessary (Circ. min. Justice, 20 November 2020, NOR: JUSC2031844C).

6 The president of the court can, e.g., restrict the number of persons who can be physically present in the courtroom.

their lawyers shall be heard by any electronic means, including by phone.[7] When using such technologies, the judge shall conduct the proceedings and ensure that the rights of the defence and the adversarial character of the proceedings are safeguarded. This applies again until 16 March 2021 according to the new ordinance of 18 November 2020. Lawyers and judges warn that care must be taken to ensure that these derogations do not become permanent.[8]

In the context of this health emergency, these rules allowing videoconferencing could be considered acceptable if the computer and software equipment of the courts worked satisfactorily. This is not the case everywhere.[9] Some rightly refer to a 'digital emergency' in French courts; the situation is, however, improving.[10] What seemed to be (more or less) easily accepted in civil proceedings (videoconferencing)[11] was subjected to strong criticism in criminal trials. Ordinance No 2020-1401 of 18 November 2020 has revised the rules of criminal procedure in order to facilitate "the continuity of the criminal courts' activity" which is essential for the maintenance of public order. It allows all criminal courts to use videoconferencing without the parties' consent; it also allows the *cour d'assises*[12] to use videoconferencing at the end of the criminal investigations, at the hearing before the court during the prosecutor's closing arguments and the lawyers' pleadings. This is considered by many lawyers to be a serious infringement of the rights of the defence and the right to a fair trial.[13] In summary proceedings (*référé*), the highest administrative court (*Conseil d'État*)[14] held that the seriousness of the sanctions incurred and the role of the intimate conviction of the judges and jurors give a specific place to the oral nature of the debates.

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7 According to the circular (*see* footnote 4), the impossibility shall be understood broadly and 'briefly characterised' by the court. The phone is used, in particular, by juvenile judges and guardianship judges who often deal with vulnerable people.

8 *See, e.g.,* the positions taken by the National Bar Council (*Conseil National des Barreaux,* CNB, www.cnb.avocat.fr/fr/actualites/le-cnb-propose-un-etat-des-lieux-de-laudience-et-engage-des-reflexions-prospectives) and by the *Syndicat de la magistrature* (judges' trade union, www.syndicat-magistrature.org/Avenir-de-l-audience-nos-observations-devant-le-CNB.html).

9 In some courts, the videoconferencing system malfunctions when more than two people are connected, *see* F. Creux-Thomas, 'Crise sanitaire et urgence numérique: la justice judiciaire au défi', *JCP G* No 50, 7 December 2020, 1370.

10 F. Creux-Thomas, *JCP G* No 50, 1370. The situation has improved: all judges now do have laptops, but not all court clerks do. The goal is to equip 66% of court clerks with laptops in the short term.

11 But it did not always prove appropriate (*e.g.* in family disputes), *see* F. Creux-Thomas, *JCP G* No 50, 7 December 2020, 1370.

12 The *cour d'assises* has the jurisdiction to judge the most serious crimes.

13 As psychologists and linguists have shown, electronic hearings do have many deficits, such as asymmetry of perception and disparity in the direction in which the participants are looking; furthermore, the communication behaviour is influenced, in terms of both content and form, by the attention paid to conference technology. These deficits affect cognitive exchange and emotional understanding.

14 Conseil d'État (CE), référé, 27 November 2020, No 446712, *Recueil Dalloz (D.)* 2020. 2400. The court decision, however, did not suspend the provisions allowing the court to restrict public access to the hearing; nevertheless, it clarifies that the measure does not apply to journalists and that it is up to the judge to ensure that the measure is justified and proportionate to the health situation at the time of the hearing.

The court suspended this provision by emphasising the essential character, during the closing arguments and pleadings, of the physical presence of the civil parties and the defendant, in particular when the defendant speaks last. Even during health emergencies, the advantages of videoconferencing and the guarantees accompanying its use do not justify infringing the founding principles of the criminal trial and the rights of the natural persons involved in the trial.

1.3 Suppression of the Hearing

Ordinance No 2020-304 of 25 March 2020 contained derogations from the hearing principle in civil disputes. Some of them are confirmed in the new ordinance of 18 November 2020 (Art. 6):[15] where the parties must be represented by a lawyer or where they are assisted or represented by a lawyer although it is not mandatory, the judge or the president of the court panel may decide that the proceedings shall be exclusively written so that no hearing shall take place. Parties who are informed by 'any means' of this decision may object to it within two weeks. If none of them objects, the proceedings are purely written.[16] One can wonder whether this restriction is still necessary since litigants and lawyers as well as judges have the right to move to take part in court hearings.[17]

Article 9 of the Ordinance of 25 March contained a shocking derogating rule applying to proceedings for urgent interim relief in civil cases: it allowed the court to dismiss the claim *before the hearing* via a non-adversarial order if the claim is not admissible or if there is no need for urgent interim relief. This was a severe restriction of the access to court and to a trial. This most contested provision has disappeared in the new ordinance of 18 November 2020. The Court of Cassation referred it[18] to the constitutional council, which had previously held that the holding of a public hearing in civil matters is one of the means to ensure the right to a fair trial guaranteed by Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789.[19] The Court of Cassation, however, ruled that the challenged provision was in conformity with the Constitution, while insisting on the interest of the hearing as a legal guarantee of the constitutional requirements of the rights

15 This article applies to cases in which the hearing of the case is announced during the period ending 16 March 2021.

16 The judge or the president of the panel may always decide to hold a hearing if they deem it necessary, on their own initiative or at the request of the parties (Ord. n° 2020-1400, Art. 6, Para. 3). *See also* Ord., Art. 6, Para. 4: In the case of psychiatric care without consent, the hospitalised person may at any time request to be heard by the liberty and detention judge. This hearing may be carried out by any means that makes it possible to ascertain his or her identity and guarantees the quality of transmission and the confidentiality of exchanges.

17 There are no longer severe limitations to the freedom of movement.

18 Cass. civ. 2, 24 September 2020, No. 19-40.056.

19 Decision No. 2019-778 DC of 21 March 2019.

of the defence and the right to a fair trial (Decision No. 2020-866 QPC of 19 Nov. 2020, *Société Getzner France*).[20] According to the constitutional council, the challenged provision

> merely offer[s] an option to the judge, who is responsible, depending on the circumstances of each case, for ensuring that a hearing is not necessary in order to guarantee the fairness of the proceedings and the rights of the defence.[21]

In a detailed conclusion recalling the decisive nature of the contextual elements taken into consideration, the constitutional council noted that

> in view of the particular health context resulting from the covid-19 pandemic during the period of application of the challenged provisions, they do not deprive the constitutional requirements of the rights of the defence and the right to a fair trial of legal guarantees.[22]

From this decision, as from other decisions given under the ordinary law of civil procedure, it can be inferred that the constitutional council accepts fairly easily that the hearing can be dispensed within civil matters. Is that true only in exceptional emergency situations? And only when the parties have appointed a lawyer?

2 Civil Hearings in New Normal Times: The Recent Amendments to the Code of Civil Procedure and the Judicial Code

Irrespective of whether or not there is a state of health emergency, a recent Law act No 2019-222 of 23 March 2019 (*Loi de programmation 2018-2022 et de réforme pour la justice*)

20 The constitutional council justifies the compliance with the Constitution by mentioning the goal of health protection and the implementation of the constitutional principle of continuity in the functioning of justice. It points out that the measure is limited in time.

21 In addition, the challenged provisions "are only applicable when the parties must be represented by a lawyer or when they have chosen to be represented or assisted by a lawyer"; "this condition thus guarantees to the litigants the possibility of usefully defending their case within the framework of a written procedure" (CC, Decision 220-866 QPC, Para. 18).

22 Moreover, the principle of equality before the law has not been violated: "First, the challenged provisions do not introduce any difference in treatment between the parties to the same proceedings, since both the claimant and the defendant are placed in the position of being unable to decide on the proceedings without a hearing or to object to them. Second, far from conferring a discretionary power on the judge to decide whether or not to hold a hearing, these provisions allow him to resort to proceedings without a hearing only under the above-mentioned conditions, i.e. in urgent civil proceedings in which the fairness of the proceedings and respect for the rights of the defence can be ensured by exclusively written exchanges between lawyers." (Decision 220-866 QPC, Para. 21).

allows first instance proceedings before the *tribunal judiciaire*[23] without a hearing but requires the agreement of the parties. The rule is intended to save time and to restrict hearings to cases where at least one of the parties deems it necessary or useful.[24] The suppression of the hearing is possible in ordinary written proceedings as well as in oral ones, regardless of whether or not representation by a lawyer is mandatory.[25] But contrary to the exceptional provisions limited in time mentioned previously (under II 1.3), these new rules presuppose the agreement of all the parties to the proceedings, which makes a huge difference.

According to Article L. 212-5-1 of the French Judicial Code (*Code de l'organisation judiciaire, COJ),*

> Before the first instance civil court (*tribunal judiciaire)*, the *proceedings may, at the initiative of the parties where they expressly agree, take place without a hearing.*[26] In this case, they are exclusively in writing.
> However, the court may decide to hold a hearing if it considers that it is not possible to reach a decision on the basis of the written evidence or if one of the parties so requests.

Another legal provision (Art. L. 212-5-2, COJ) applies to the specific case where the defendant lodges a statement of opposition to an order for payment. It should come into force by 1 January 2022 at the latest.

> Statements of opposition to orders for payment ruling on an initial claim not exceeding an amount defined by decree and claims brought before the judicial court for payment of a sum not exceeding this amount may, *at the initiative of the parties where they expressly agree, be dealt with in a digital procedure. In this case, the proceedings are conducted without a hearing.*[27]
> However, the court may decide to hold a hearing if it considers that it is not possible to render a decision on the basis of the written evidence or if one of the parties so requests. The court may, by a specially reasoned decision, reject such a request if it considers that, having regard to the circumstances of the case, a hearing is not necessary to ensure the fair conduct of the proceedings.

23 The *tribunal judiciaire* is the first instance court in civil matters. There are also specific courts such as the commercial court and the labour court.

24 Before French civil courts, the number of cases heard on the same day is such that the duration of each hearing is extremely shortened.

25 Decree No 2019-1333 of 11 December 2019: CPC, Art. 752, 753, 757, 764, 778, 799, 828 and 829.

26 Emphasis mine.

27 Emphasis mine.

> The refusal to hold a hearing cannot be challenged independently of the judgment on the merits.

The constitutional council ruled[28] that these legal provisions are in compliance with the Constitution: it insisted that they can be applied only with the parties' consent. Articles L. 212-5-1 and L. 212-5-2 of the Code of Judicial Organisation disregard neither the principle of equal access to this public service nor any other constitutional requirement; they are in accordance with the Constitution.

Decree No. 2020-1452 of 27 November 2020 expressly extends the possible waiver of the hearing before the first instance civil court (*tribunal judiciaire)* to summary proceedings (Code of Civil Procedure, CPC, Art. 836-1), accelerated proceedings on the merits (CPC, Art. 839, Para. 2), fixed day proceedings (CPC, Art. 843, Para. 2) and proceedings before the family court outside divorce and after divorce regarding applications for review of compensatory benefits (CPC, Art. 1140, Para. 2).

The new decree also modifies Article 828, CPC, which now gives more details regarding the proceedings without hearing. At any time during the proceedings (not only when starting the proceedings),[29] the parties may expressly agree that the proceedings shall be conducted without a hearing. In this case, the judge shall organise written exchanges between the parties. The parties shall formulate their claims and pleas in writing. They shall communicate with each other by registered letter with acknowledgment of receipt or by notification between lawyers, and the judge shall be informed of the communications within the time limits he or she sets. The court sets the date before which the parties must communicate their claims, pleas and documents to the registry. On that date, the registry shall inform the parties of the date on which the judgment will be delivered. The judgment is '*contradictoire*' since the proceedings are adversarial, not ex parte. The court may, however, decide to hold a hearing if it considers that it is not possible to pass a judgment on the basis of the written evidence or if one of the parties so requests.

It can be deduced from this recent procedural reform that the French government's intention is to invite the parties to waive a hearing when this would not add value to the solution of the dispute. Proceedings become more flexible by making it possible to save time, thanks to the common will of the parties. Whether such a waiver will often be expressed or not remains to be seen. It is also clear that this new possibility offered to the parties is not almighty: the judge may disregard it in the interest of a sound administration

28 CC, 21 March 2019, No. 2019-778 DC. According to the authors of the referral, the new provisions would disregard the right to an effective judicial remedy, the right to a fair trial and the rights of the defence as well as the principle of the publicity of justice.

29 *See also* Art. 829, CPC, which gives details relating to the required contents of the declaration made in the course of the proceedings and delivered or addressed to the court registry, by which each of the parties consents to the conduct of the proceedings without a hearing.

of justice if he or she considers that in the concrete case it is not possible to reach a decision on the basis of the written evidence and therefore that a hearing must take place.

3 The Future of Civil Hearings in France

What will be the place of the hearing in the future civil lawsuit?

Videoconferencing will certainly continue to develop. It might be imposed by the court regardless of whether or not a state of emergency exists, provided that the parties are represented by a lawyer or, if not, that they have the necessary equipment. Otherwise, access to justice would be denied. A flexible approach towards electronic proceedings should be followed. First, with regard to the specific case, the physical presence of the parties or the witnesses will sometimes be necessary for a good solution, while at other times it may not. Second, with regard to the stage of the proceedings, at some stages of the proceedings such as case management, electronic devices are probably more acceptable.

French civil procedure is moving increasingly towards flexibility in terms of its adaptability to the case, at least in first instance.[30] Parties are allowed to take more procedural initiatives. Since 1 January 2020 parties may decide that the preparation of the case will be made between them, before the case is referred to the court, at the first orientation hearing or at any time during the proceedings (agreement on participatory procedure assisted by lawyers, *convention de procédure participative*).[31] This is a kind of externalised preparation of the case by the parties so that the *juge de la mise en état* (pre-trial judge) is only tasked with overseeing the preparation. With this option, the government intends to lighten the civil judge's workload; however, the reform seems to also be aimed at restoring an active role for the litigants in their case.

The possible consent of all parties to purely written proceedings (waiver of a hearing) can also be seen as a more significant role given to the initiative of the parties and to their ability to take control of the proceedings.[32] It is nevertheless clear that the main concern of the government is to save the judge's time. Will this managerial policy continue to develop to the detriment of proper administration of justice? A recent report of the *Conseil National des Barreaux* (CNB, National Bars Council)[33] emphasises that

30 On the contrary, appeal proceedings are characterised by short and strict time limits, non-compliance with which is very severely sanctioned (inadmissibility of appeal…).

31 Decree No. 2019-1333 of 11 December 2019, *see* Art. 1343, Para. 2 and Art. 1546-1 et seq., CPC.

32 *See* F. Laporte/Y. Garrigue, 'La mise en état conventionnelle par avocat et la procédure sans audience: renaissance du principe dispositif ?', www.village-justice.com.

33 CNB, resolution, 13 November 2020.

> the hearing in person is an unavoidable and indispensable moment in our judicial system which, by ensuring the effectiveness of the adversarial process, contributes to the respect of the rights of the defence and the guarantee of a fair trial, and which ensures the principle of public hearings that is consubstantial with the rule of law. The CNB is therefore opposed to any continuation of proceedings without a hearing that derogates from ordinary law, except in absolutely exceptional situations linked, for example, to a health crisis and subject, in such cases, to the agreement of the parties and their lawyers.

However, and even if the constitutional council expressly insisted on 'the particular health context resulting from the covid-19 pandemic during the period of application of the challenged provisions', one could imagine in the future not an obligation imposed by the court to use the purely written procedure but at least a favour given to this procedure: since there would be no hearing date to be set, the parties could possibly benefit from a quicker judgment. Such an advantage could be attractive to parties wishing to obtain an enforceable decision as soon as possible.

Covid-19, Civil Justice 2020 and German Courts 2021?

Wolfgang Hau[*]

1 Pandemic-Related Legislation

After it became clear in early 2020 that Germany would not be spared from the new disease, one of the very first measures enacted by the German federal legislature was the Act to Mitigate the Consequences of the Covid-19 Pandemic under Private, Insolvency and Criminal Procedure Law of 27 March 2020.[1] As the name suggests, its main focus is on matters of substantive law (in particular, in the areas of insolvency and company law, consumer protection law and tenancy law). As regards procedure, there was only one rather technical amendment for criminal cases, which allows for a longer suspension of the main hearing. Two months later, on 20 May 2020, another statute was enacted that relates to court proceedings in labour law and social security cases.[2] This makes it possible for lay judges involved in such cases to participate in the proceedings through video and audio transmission if it is not possible for them to appear in person owing to the pandemic.

It is remarkable that, as far as procedural law is concerned, the German legislature has been content with such very specific provisions. In particular, the Zivilprozessordnung (Civil Procedure Code – CPC) has remained untouched: the only amendment that was adopted in 2020 (and that will not come into force until the end of 2021) concerns enforcement law matters completely unrelated to the pandemic. This is astonishing when one considers that the German legislature has tried to come to grips with the consequences of the pandemic with a multitude of statutes and ordinances affecting many different areas of law.[3] Apparently, it is believed that the CPC is already sufficiently flexible: even in matters where an oral hearing is required, Section 128a CPC provides for the possibility of video and audio transmissions by allowing the remote participation of the parties, their attorneys and advisers, but also of witnesses and court experts.[4]

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1 Bundesgesetzblatt (Federal Law Gazette) 2020 I, 569.

2 *Ibid.*, 1055.

3 For a list of pandemic-related Federal legislation cf. https://dejure.org/corona-pandemie.

4 Section 128a CPC reads: (1) The court may permit the parties, their attorneys and advisers, upon their filing a corresponding application or ex officio, to stay at another location in the course of a hearing for oral

It is, however, worth mentioning another statute that, surprisingly enough, was passed not because of the pandemic but in spite of it, and that could have some impact on access to justice: in November 2020, at the height of the 'second wave', the Bundestag approved a significant increase in lawyers' fees.[5] Although it had been seven years since the last increase, many observers criticised the law being passed in the year of the coronavirus crisis. It seems even more problematic that court fees were also increased at the same time and that the possibility of obtaining legal aid was made more restrictive because the Länder (Federal States), whose approval was required for passing the statute, had insisted on these additional changes in order to preserve their budgets.

2 Pandemic-Related Cases and Case Management

2.1 New Issues

A search in legal databases for keywords such as 'Covid-19' or 'Corona Virus' reveals that the pandemic is occupying the German court system in its entirety. There are cases from all five branches of the judiciary (the so-called 'ordinary courts' dealing with civil, family and criminal cases; labour courts, social courts, fiscal courts and administrative courts) as well as the constitutional courts (of the Länder and the Karlsruhe Federal Constitutional Court). A closer look reveals that many of these cases are not very different from the conflicts that unfortunately always occur when an economy enters a downturn or crisis: many companies get into difficulties, resulting in an increase in defaults, disputes between contracting parties, unemployment, social indigence, and also family disputes. While this scenario in 2020 is undoubtedly a direct consequence of Covid-19, it should not be construed as a feature of a pandemic, at least in the context of a legal analysis.

argument, and to take actions in the proceedings from there. In this event, the images and sound of the hearing shall be broadcasted in real time to this location and to the courtroom. (2) The court may permit a witness, an expert, or a party to the dispute, upon a corresponding application having been filed, to stay at another location in the course of an examination. The images and sound of the examination shall be broadcasted in real time to this location and to the courtroom. Should permission have been granted, pursuant to subsection (1), first sentence, for parties, attorneys-in-fact and advisers to stay at a different location, the images and sound of the examination shall be broadcasted also to that location. (3) The broadcast images and sound will not be recorded. Decisions given pursuant to subsection (1), first sentence, and subsection (2), first sentence, are incontestable.

5 Bundesgesetzblatt (Federal Law Gazette) 2020 I, 3229. In Germany, the fees for legal representation in court proceedings are statutorily fixed in the Attorneys Remuneration Act (Rechtsanwaltsvergütungsgesetz), in principle depending on the amount at issue. Attorneys can agree on higher fees with their clients, but such additional costs will not be borne by the losing party.

There are, of course, also lawsuits that have a very special factual connection to Covid-19 and that would therefore not occur in an 'ordinary' crisis.[6] In Germany, this is particularly evident in many cases in which citizens and businesses are opposing statutes or administrative measures through which the authorities are trying to combat the pandemic. For example, there are disputes about the closure of shops, restaurants, hotels and leisure facilities, about curfews, about the reorganisation of school teaching, about the obligation to wear protective masks, whether to go into quarantine or take other protective measures. Official bans are particularly often challenged in court, especially bans on public demonstrations against the restrictions, but also on private parties with too many guests or on fireworks on New Year's Eve. While in many cases the plaintiffs demand that the courts set aside such measures, in other cases the question of state liability is at stake. Extremely irritating are reports that many German travellers, whom the Foreign Office transported back to Germany from abroad on special flights at their own request after the outbreak of the pandemic and the suspension of regular international flight operations, are now rejecting their obligation, as laid down in the German Consular Act, to pay a (very small) part of the costs incurred.[7]

While the disputes mentioned so far have been fought mainly in the administrative courts, there have also been cases in which, owing to Covid-19, the ordinary courts have had to deal with completely new issues. This is evident in the interpretation of the statutes intended to mitigate the effects of the pandemic in the context of private law relationships. So far, such lawsuits have not been a mass phenomenon but have nevertheless attracted a great deal of attention in both the legal and the general media. For example, the provision that if a cultural event has to be cancelled the organiser does not have to refund the ticket price to the guests but may instead give them a voucher is highly controversial: a local court in Frankfurt, which doubts the constitutionality of this new regulation, has submitted the question to the Federal Constitutional Court for a decision.[8] Repeatedly, courts have had to deal with the question of whether financial support granted by the state to a person affected by the pandemic can be attached by his or her creditors.[9] Family courts were asked to make clear that the parental right to contact a child must be granted notwithstanding a lockdown.[10] There are also a considerable number of lawsuits concerning the impact of the pandemic on the renting of commercial premises and on the reimbursement of costs

6 Since May 2020, most relevant decisions have been compiled by a new journal from the publishing house C.H. Beck, devoted to all legal issues of the pandemic (*COVID-19 und Recht – COVuR*), of which 16 issues, with over 900 pages, have already been published by the end of 2020.

7 *Frankfurter Allgemeine Zeitung*, 29 December 2020.

8 Amtsgericht Frankfurt/Main of 28 September 2020 – 31 C 2036/20 (17), *COVuR*, 2020, p. 874.

9 Landgericht Koblenz of 23 June 2020 – 2 T 357/20, *COVuR*, 2020, p. 469; Bundesfinanzhof of 9 July 2020 – VII S 23/20 (AdV), *COVuR*, 2020, p. 615.

10 Oberlandesgericht Frankfurt/Main of 8 July 2020 – 1 WF 102/20, *COVuR*, 2020, p. 697.

under the European Flight Compensation Regulation No. 261/2004[11] (an issue that, however, occupies the courts much too often even in normal times). Another much discussed group of cases deals with the obligation of insurance companies to compensate their policyholders for the economic consequences of business closures (such policies are surprisingly widespread in Germany, but had never led to serious problems in the past). In the field of civil law, too, cases are reported that one can only wonder about. For example, a local court had to decide that after a car accident not only was the repair of the damaged vehicle owed (which was undisputed), but also an additional € 60 for its disinfection after the repair.[12] Apparently, even in the crisis, people still have the energy to litigate over such trifles.

In principle, pandemic-related lawsuits should not be seen as an alarm signal, but rather as proof that the court system is functioning and that the rule of law is applied even in this extraordinary crisis. There is also no cause for concern when the courts, in response to a citizen's complaint, come to the conclusion that a statute or administrative measure is too far-reaching or otherwise not in accordance with the law. On the contrary, such court decisions provide important guidance to the legislature and the authorities and allow them to specify and improve their instruments. Therefore, not only in fact, but also in law, some lessons had already been learned from the experience of the spring, when it became clear in autumn 2020 that the second wave would require another lockdown and further restrictions.

2.2 Case Management

If the types of cases that are brought to the courts in the Covid-19 crisis is one question, another is whether judges manage to handle both their new and normal caseload. In this context, it is worth noting that the pandemic has hit the German civil justice system at a special moment: after many years of a steady decline in the number of cases filed in the civil courts, 2018-2019 saw the first increase.[13] The reasons for both the permanent drop

11 OJ 2004 L 46, p. 1.

12 Amtsgericht Heinsberg of 4 September 2020 – 18 C 161/20, *COVuR*, 2020, p. 699.

13 The number of new civil cases (excluding family cases) in local courts (Amtsgerichte, which have jurisdiction over amounts in dispute up to € 5,000) fell from 1.75 million in 1995 to 924 thousand in 2018 and rose to 927 thousand in 2019; the number of new first instance cases in regional courts (Landgerichte) fell from 440 thousand in 2004 to 308 thousand in 2017 and rose to 338 thousand in 2018 and 355 thousand in 2019. Source: Bundesamt für Justiz, *Geschäftsentwicklung der Zivilsachen in der Eingangs- und Rechtsmittelinstanz 1995–2019* (www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Geschaeftsentwicklung_Zivilsachen.html).

in the past and the sudden increase are only partially known so far.[14] However, obvious explanations for the recent turnaround are, on the one hand, the expansion of the use of legal technology by law firms (especially in the area of flight compensation lawsuits) and, on the other hand, the mass of lawsuits in connection with the Volkswagen diesel scandal.[15]

The German civil courts thus had a lot to do anyway when the crisis largely paralysed public life in the spring of 2020. Unlike in other countries, however, the administration of justice did not come to a complete standstill at any point. It can therefore be said that Germany met the minimum requirements as formulated by the European Law Institute in its 'Principles for the COVID-19 Crisis':[16] access to justice was always guaranteed,[17] and the courts did everything they could to conduct proceedings or at least maintain a minimum level of operations to deal with urgent matters, safeguard the rule of law and provide proper remedies to litigants.[18]

As far as can be seen, no use has been made of Section 245 CPC, according to which the proceedings shall be interrupted if the court ceases its activities as the consequence of war or any other event. While it is obvious that there have been more delays in proceedings (by an average of eight weeks, according to a survey of lawyers in September 2020[19]), this does not seem surprising or worrying given the scale of the crisis. During the first lockdown in spring 2020, it was considered problematic, yet acceptable in the interests of public health, that due to the curfew public access to oral hearings was limited.[20] Shortly after the end of the first lockdown, the courts had largely returned to normal mode, albeit subject to strict safety measures both in hearings and in the judges' deliberations.[21]

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14 For possible explanations, *see* S. Rebehn, 'Trendwende in der Ziviljustiz', *Deutsche Richterzeitung*, 2020, pp. 334-335; M. Dudek, 'Rückgang der Fallzahlen – Änderung der Konfliktkultur', *JuristenZeitung*, 2020, pp. 884-893.

15 So far, the model declaratory action (Musterfeststellungsklage, Sections 606-614 CPC), an instrument of collective redress that was introduced only in 2018 against the backdrop of the Volkswagen diesel scandal, has not had the desired effect of making such mass individual actions dispensable. After all, at the end of 2020, it appears that the vast majority of these lawsuits can be settled: 'VW-Dieselgate: Über 25.000 Einzelklagen mit Vergleich beendet', *Legal Tribute Online (www.lto.de)*, 30 December 2020.

16 The principles are published on the ELI homepage (www.europeanlawinstitute.eu) and in *Zeitschrift für Internationales Wirtschaftsrecht*, 2020, pp. 250-253.

17 Principle 1(3): "Fundamental principles relating to […] access to justice through the courts should be fully respected."

18 Principle 5(1): "The judiciary should do all that is reasonably practicable to continue to conduct proceedings and trials, particularly through the use of secure video and other remote links where available to the courts. In any case, the judicial system should maintain a minimum level of operations to deal with urgent matters, safeguard the rule of law and provide proper remedies to litigants, provided that the right to a fair trial, including the right to defence, is not infringed. The restrictions on the operation of the judiciary must be immediately removed when the COVID-19 emergency permits."

19 https://brak.de/die-brak/coronavirus/corona-umfrage. Cf. P. Lorenz, 'Zweite Corona-Umfrage unter Anwälten: Wie Corona die Justiz lähmt', *Legal Tribute Online* (www.lto.de), 20 October 2020.

20 *See* S. Deuring, 'Der Öffentlichkeitsgrundsatz in Zeiten der COVID-19 Pandemie', *Zeitschrift für das gesamte Verfahrensrecht*, 2020, p. 22.

21 S. Rebehn, 'Justiz fährt Betrieb wieder hoch', *Neue Juristische Wochenschrift aktuell*, 20/2020, p. 17.

It is noticeable from an analysis of the case law published so far that relatively few decisions deal specifically with procedural aspects of conducting civil lawsuits during the pandemic.[22] This seems particularly astonishing when one takes into account the many articles that have already been published on this issue in books[23] and periodicals.[24] However, many of these contributions address rather technical problems of how to apply the traditional rules of the CPC in these particular circumstances, such as those concerning compliance with and extension of time limits, interruption of proceedings and rescheduling of hearings.

Not surprisingly, the question has attracted particular attention in regard to the conditions under which an oral hearing in the presence of the judges, the lawyers and the parties, which is in principle required under the CPC, may be dispensable. Many articles provide helpful advice on the possibility of entirely written proceedings[25] but, above all, on how to conduct a more or less 'virtual hearing' pursuant to the aforementioned Section 128a CPC.[26] Considering that the practical relevance of this provision, which was

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22 Cf. Bundesgerichtshof of 4 November 2020 – XII ZB 220/20, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht*, 2021, p. 1 (on the statutory requirement of a personal hearing of the person concerned in guardianship proceedings); Kammergericht of 25 June 2020 – 17 WF 1028/20, *COVuR*, 2020, p. 377 (on the statutory requirement of expedited proceedings in a custody rights case); Oberlandesgericht Zweibrücken of 2 July 2020 – 3 W 41/20, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht*, 2020, p. 1325 (on the recusal of a judge for fear of bias after his refusal to adjourn an oral hearing although the lawyer suffers from a lung disease); Landgericht Frankfurt/Main of 5 November 2020 – 2-03 T 4/20, *beck-online.Rechtsprechung*, 2020, 30205 (on the authority of the presiding judge to enforce the wearing of protective masks during oral proceedings).

23 L. Kroiß, 'Zivilverfahren', *in* L. Kroiß (Ed.), *Rechtsprobleme durch COVID-19 in der anwaltlichen Praxis*, 3rd ed., Baden-Baden, Nomos, 2020, pp. 361-373; F. Zschieschack, 'Zivilverfahren in Zeiten des Coronavirus', *in* H. Schmidt (Ed.), *COVID-19 – Rechtsfragen zur Corona-Krise*, 2nd ed., Munich, Beck, 2020, pp. 423-456.

24 C. Auf der Heiden, 'Prozessrecht in Zeiten der Corona-Pandemie', *Neue Juristische Wochenschrift*, 2020, pp. 1023-1028; R. Bork, 'Reaktionen auf Corona im deutschen Zivilprozessrecht', *Anwaltsblatt*, 2021, pp. 30-35; M. Gehrlein, 'Zivilprozessrecht in Zeiten des Corona-Virus', *Familie und Recht*, 2020, pp. 264-270; R. Greger, 'Der Zivilprozess in Zeiten der Corona-Pandemie – und danach', *Monatsschrift für Deutsches Recht*, 2020, pp. 509-514; M. Huber, 'Zwischenruf: Zivilverfahren in Zeiten der COVID-19-Pandemie', *Juristische Schulung*, 2020, pp. 417-419; J. Metz, 'Die ordentliche Gerichtsbarkeit in der Corona-Krise', *Deutsche Richterzeitung*, 2020, pp. 256-259; A. Oswald, 'Auswirkungen der Corona/COVID-19-Pandemie auf den Zivilprozess', *Juristische Ausbildung*, 2020, pp. 1013-1018; T. Rauscher, 'COVID-19-Pandemie und Zivilprozess', *COVuR*, 2020, pp. 2-16.

25 *See* R. Mantz/J. Spoenle, 'Corona-Pandemie: Die Durchführung des schriftlichen Verfahrens gem. § 128 Abs. 2 ZPO als Alternative zur Präsenzverhandlung', *Monatsschrift für Deutsches Recht*, 2020, pp. 703-706; J. Metz, 'Die schriftliche Zeugenvernehmung im Zivilprozess', *Monatsschrift für Deutsches Recht*, 2020, pp. 1094-1100.

26 *See* M. Fries, 'Die vollvirtuelle Verhandlung – Quo vadis, § 128a ZPO?', *Zeitschrift für das gesamte Verfahrensrecht*, 2020, p. 27; R. Greger, 'Möglichkeiten und Grenzen der Videokommunikation im zivil-, familien- und arbeitsgerichtlichen Verfahren', *Monatsschrift für Deutsches Recht*, 2020, pp. 957-962; R. Mantz/J. Spoenle, 'Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung', *Monatsschrift für Deutsches Recht*, 2020, pp. 637-706; P. Reuß, 'Die digitale Verhandlung im deutschen Zivilprozessrecht', *JuristenZeitung*, 2020, pp. 1135-1141; J. Schmidt/D. Saam, 'Videokonferenzen im Zivilprozess', *Deutsche Richterzeitung*, 2020, pp. 216-219;

introduced in 2002, has been extremely low in the past, it is already a success that video and audio technology was applied at all during the pandemic. The Federal Supreme Court (Bundesgerichtshof) was certainly aware of its role model function when it made use of Section 128a CPO for the first time in May 2020. A decision of an appeal court confirming that judges are free to use their private laptops speaks for the commitment among at least some judges.[27]

As had been expected at the beginning of the pandemic, however, information technology (IT) has not triumphed in German procedural law in 2020.[28] Apparently, many judges mostly worked on their files in their home offices[29] and rather preferred to postpone hearings that were not considered extremely urgent than to accept a fundamental change of their procedural routine. However, opinion is divided over whether the reluctance to use available IT solutions comes more from the judges or from the lawyers, who do not seem to be any less conservative in this respect than the judiciary.[30] A survey by the German Federal Bar Association (Bundesrechtsanwaltskamer) in September 2020 showed that 90% of the lawyers had neither participated in video hearings themselves nor submitted any applications to do so;[31] nevertheless, two-thirds of the lawyers surveyed confirmed that they have become at least more involved with digitalisation as a result of the pandemic.

3 The Future: Towards a 'New Normal' in Civil Justice?

According to a well-known German bon mot, forecasts are difficult, especially when they refer to the future. Indeed, it seems daring to commit to statements even about the immediately next developments, considering that at the beginning of 2020 no one could even begin to estimate what the year would bring. The only thing that can be considered fairly certain, even without a crystal ball, is probably that things will never be exactly as they were before the pandemic: if it is said that the virus has come to stay, then this certainly

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B. Windau, 'Die Verhandlung im Wege der Bild- und Tonübertragung – Praxisorientierte Überlegungen zu Gegenwartsproblemen des Zivilprozessrechts', *Neue Juristische Wochenschrift*, 2020, pp. 2753-2757; B. Windau, 'Gerichtsverhandlung per Videokonferenz: Keine Angst vor § 128a ZPO', *Anwaltsblatt*, 2021, pp. 26-29.

27 Kammergericht of 12 May 2020 – 21 U 125/19, *Anwaltsblatt*, 2020, p. 494.

28 Cf. W. Hau, 'Litigation in the time of COVID-19 – some observations from Germany', *in* B. Krans & A. Nylund (Eds.), *Civil Justice and COVID-19*, Septentrio Reports 5, 2020, https://doi.org/10.7557/sr.2020.5, pp. 29-31.

29 On the open question of whether judges are allowed to use video or telephone conferences for their deliberations, see U. Berlit, 'Kollegialberatung und richterliche Entscheidungsfindung per Video?', *juris Monatsschrift*, 2020, pp. 310-316; D. Effer-Uhe, 'Beratung im Kollegialgericht per Video- oder Telefonkonferenz in Pandemiezeiten?', *Monatsschrift für Deutsches Recht*, 2020, pp. 773-777.

30 Cf. A. Kaufmann, 'Videoverhandlungen an den Zivilgerichten: Gerichte wollen, Anwälte nicht – oder andersrum?', *Legal Tribute Online (www.lto.de)*, 16 December 2020.

31 https://brak.de/die-brak/coronavirus/corona-umfrage.

also applies to the new factual parameters of civil litigation. In Germany, moreover, a generational change in the judiciary is imminent: in the next decade, 40% of all German judges and even 50% of all judges in the federal courts will retire, and the federal government plans to create 2000 additional positions.[32] New judges will take the 'new normal' for granted, if only because they are digital natives and have, fortunately, never experienced a judicial working place filled with dusty stacks of files. This is very important, because digitalisation obviously depends not only on political will, funding and technical equipment, but, above all, on the willingness of the actors to get involved and leave behind unnecessary restrictions of the analogue world.

As already mentioned at the beginning, German legislature has so far refrained from taking action in the area of civil procedure. The idea of creating a special 'Epidemic Court Act' (the German name *Epidemiegerichtsgesetz* does not make more sense either), which figured in the very early stages of the crisis,[33] was quickly shelved. However, lawyers, judges, the German ministries of justice and academic experts believe that digitalisation must be tackled immediately and with vigour.[34] In July 2020, an official working group of more than 40 judges from all instances presented a thesis paper on the 'Modernisation of Civil Procedure'. The main proposals include the following:[35] the creation of a new 'online court portal' for citizens and the further improvement of electronic communication between lawyers and courts; the introduction of an accelerated online procedure for consumer disputes of up to €5,000; a more intensive use of IT in the conduct of video hearings, the record of hearings, the determination of the relevant facts of the case and the taking of evidence; and even some experimental application of artificial intelligence as regards decisions on costs. At their last meeting at the end of November 2020, the Conference of German Justice Ministers (of the Länder and the Federation) took note of these proposals and decided to continue this work. In mid-December 2020, the first results already became visible, namely a draft law on the expansion of electronic communication with the courts.[36]

One has the impression that the digitalisation of litigation in Germany has been promoted only half-heartedly for many years because the traditional German civil process works quite well on the whole and there is widespread agreement that the courts usually

32 Source: *Frankfurter Allgemeine Zeitung*, 16 December 2020.

33 Cf. M. Sehl/T. Podolski, 'Neue Justiz-Regeln für Corona und danach: Kommt ein Epidemiegerichtsgesetz mit Videopflicht?', *Legal Tribute Online (www.lto.de)*, 7 May 2020.

34 Cf. S. Rebehn, 'Anwälte fordern mehr Tempo bei Digitalisierung der Justiz', *Deutsche Richterzeitung*, 2020, pp. 374-375; P. Scholz/S. Dörr, 'Digitalisierung der Justiz und Zugang zum Recht', *Neue Juristische Wochenschrift aktuell*, 34/2020, p. 15.

35 For details see a paper published by the head of this working group (the president of the Higher Regional Court of Nurnberg): T. Dickert, 'Thesen zur Modernisierung des Zivilprozesses', *Deutsche Richterzeitung*, 2020, pp. 296-299.

36 Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz: *Entwurf eines Gesetzes zum Ausbau des elektronischen Rechtsverkehrs mit den Gerichten*, 18 December 2020.

do a good job. But the outbreak of the pandemic suddenly made it unmistakably clear that the good old days are numbered. Even if the new projects currently being discussed could be implemented promptly, Germany would still be far from what pioneers like Richard Susskind envision for the future of civil procedure.[37] Nevertheless, it is certainly to be welcomed that German officials, meanwhile, are seeing the pandemic as a wake-up call and finally appear determined to devote energy and funds to the issues of digitalisation. However, another question remains: is it wise to try to solve these problems at the national level, or would it be much better to seek a European solution? Against the backdrop of what we have experienced in 2020, the European Commission points in the latter direction, which is underlined by its communication, published in December 2020, under the promising title 'Digitalisation of justice in the European Union – A toolbox of opportunities'.[38] A joint European initiative certainly makes sense, above all where it is not so much about procedural traditions but about uniform technical standards and compatibility, i.e. about ensuring uncomplicated cross-border cooperation in civil matters.

Finally, it is worth mentioning a proposal of the working group that, although presupposing a digitalisation of the proceedings, goes beyond what the pandemic has shown to be necessary: whereas up to now in Germany it has been a central task of the judge to filter out from the parties' submissions what is either undisputed or requires the taking of evidence, in future this could be the joint task of the parties and the court, who are to work out the factual basis of the decision with the help of an electronic basic document. This would be a courageous and sensible paradigm shift, but, presumably, this opportunity will not be seized during the pandemic and thus the potential of digitalisation for a profound reorientation of German civil procedure law will not be sufficiently exploited.

37 R. Susskind, *Online Courts and the Future of Justice*, Oxford University Press, 2019.
38 COM(2020) 710 final.

Covid-19 and Civil Justice

News from the Italian Front

Elisabetta Silvestri[*]

1 Introduction

The Covid-19 pandemic has hit Italy hard. At the time of this writing (December 2020), Italy holds the sad record of having the highest worldwide ratio of deaths per 100,000 people,[1] and the recent discovery of new strands of the virus makes the future even bleaker, despite the hopes pinned by the scientific community on the effectiveness of the vaccines that are expected to be available in the months to come. Needless to say, the unstoppable spread of the coronavirus has disrupted all of our lives, as well as the ordinary course of business in all activities, whether public or private. The administration of civil justice is no different.

The stratification of rules enacted by the government with a view to striking a balance between the management of existing cases and that of incoming cases and the urgent need to abide by the regulations aimed at reducing the risk of the worsening of an already critical situation in the courthouses make it difficult to describe with clarity the current state of affairs.[2] Suffice it to say that remote hearings and in camera hearings as well as strictly documentary proceedings are the norm, while enforcement procedures fall under different schemes of discontinuation. The rules form a complicated patchwork whose meaning and purpose are often hard to decipher, to the point that, according to widespread opinion, the right of access to justice, enshrined in the Italian Constitution,[3] is in danger.

Even before the Covid-19 pandemic broke out, the weaknesses of the Italian justice system at large and, in particular, of civil justice were there for all to see: overcrowded

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1 According to the Coronavirus Research Center at Johns Hopkins University, the ratio is 113.26. As of 20 December 2020, the pandemic has taken the lives of 68,447 Italians; for this data, *see* https://coronavirus.jhu.edu/data/mortality (last accessed 21 December 2020).

2 For a general overview, *see* E. Silvestri, 'COVID-19. Lessons Learned and New Challenges: A View from Italy', *International Journal of Procedural Law*, Vol. 10, No. 2, 2020, pp. 216-229.

3 According to Art. 24, sec. 1 of the Italian Constitution, "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law" (official translation of the Italian Constitution, available at www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last accessed 21 December 2020).

dockets pressing down on the courts and the unreasonable length of proceedings, attributable essentially to the lack of a filtering mechanism at the appellate level.[4] These enduring problems appear impervious to all attempts at solution, as demonstrated by the many reforms enacted from the 1990s onwards that have not brought about any noticeable improvements. This is why the state of the administration of justice in Italy has long been under scrutiny at the international level. As recently as September 2020, the European Commission emphasized that

> The [Italian] justice system continues to experience serious challenges relating to the length of proceedings. Despite a constant clearance rate above 100% in the civil sector, the estimated time needed to resolve civil and commercial litigious cases remains among the highest in the EU.[5]

New bills are pending before the Italian Parliament in an attempt to achieve

> efficiency gains through simplified procedures, speediness and enhanced digitalization. The proposal extends the use of simplified procedures and the range of cases where a single judge is competent to adjudicate. It also reduces the timeframes for procedures and obliges the judge to set up a calendar for the gathering of evidence, and for the parties to file electronically any relevant act and document.[6]

This being the situation, the Covid-19 pandemic could only make matters worse. While waiting for the Parliament to pass the umpteenth reform in recent years of the Code of

4 One must keep in mind that in Italy not only the first appeal is as of right, but also the second one, meaning the final appeal brought to the Court of Cassation on points of law. The rule allowing virtually all civil cases to reach the Court of Cassation is laid down in Art. 111, sec. 7 of the Constitution. A constitutional amendment to remove this burden would involve a complex procedure before both houses of the Parliament and require the amendment to be approved by an absolute majority in two separate votes. This is one of the reasons usually mentioned to justify the rule still being in place even though it has proved to be problematic for the Court of Cassation, which cannot be qualified as a true supreme court, since the number of judgments issued each year is between 30,000 and 40,000 (for instance, considering the time frame spanning 2016 to 2019). *See* E. Silvestri, 'The Italian Supreme Court of Cassation: Of Misnomers and Unaccomplished Missions', in R. van Rhee and Y. Fu (eds), *Supreme Courts in Transition in China and the West. Adjudication at the Service of Public Goals*, Cham: Springer, 2017, pp. 229-245.

5 Commission Staff Working Document, '2020 Rule of Law Report Country Chapter on the Rule of Law Situation in Italy' *Accompanying the document* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report The Rule of Law Situation in the European Union (Brussels, 30 September 2020, SWD(2020) 311 final), at https://ec.europa.eu/info/sites/info/files/it_rol_country_chapter.pdf (last accessed 21 December 2020), at p. 7.

6 *Ibid.,* at p. 8.

Civil Procedure – the allegedly conclusive reform of adjudication, aimed at simplifying and expediting it once and for all – and with only the hope that the new rules would work some magic, the spotlight shifted unavoidably onto alternative dispute resolution (ADR).

This article is devoted to two ADR schemes: mediation and the simplified arbitration of the Milan Chamber of Arbitration. Both have proven successful as means to provide access to justice under the emergency conditions imposed by the government while the coronavirus continues to undermine the functioning of formal justice.

2 Mediation

Italian legislators have enthusiastically embraced the cause of out-of-court mediation. While implementing EU Directive 2008/52/CE on certain aspects of mediation in civil and commercial matters, Italy chose to make an attempt at mediation mandatory before bringing to court disputes arising out of a wide variety of subject matters, such as division of assets, insurance and banking contracts, claims for damages caused by medical malpractice, inheritance disputes, lease disputes, and many other types of civil cases as well.[7] Truth be told, mandatory mediation has had its ups and downs but has held its ground and, undeniably, is here to stay. As it happens, the advent of the pandemic has persuaded the legislators to increase the range of disputes for which mediation is mandatory. In fact, mandatory mediation has been extended to cases concerning failure to comply with contractual terms (or delay in compliance) when the behavior of the defaulting debtor depended on the need to observe the rules aimed at containing the spread of the virus.[8]

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7 The main statutory instrument governing mediation is the one by which Directive 2008/52/CE was implemented, i.e., Legislative Decree no. 28 of 4 March 2010. An attempt at mediation, either voluntary or mandatory, is provided for as a preliminary step to be taken before bringing the dispute to the appropriate court via a variety of other normative sources. In the field of ADR, Legislative Decree no. 130 of 6 August 2015, by which Directive 2013/11/EU (Directive on consumer ADR) was implemented, is particularly relevant. *See* G. Matteucci, 'Mediation and Judiciary in Italy 2019', Revista Eletrônica De Direito Processual – REDP, Vol. 21, 2020, pp. 106-135, at www.e-publicacoes.uerj.br/index.php/redp/article/view/47582 (last accessed 4 January 2021); E. Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy', *Netherlands-Vlaams Tijschrift voor Mediation en Conflictmanagement*, Vol. 21, 2017, pp. 29-38; A. De Luca, 'Mediation in Italy: Feature and Trends', in C. Esplugues and L. Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives*, Cham: Springer, 2015, pp. 345-365; A. Colvin, 'Mediation in Italy: A Progress Report', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 78, 2018, pp. 340-347; A. Colvin, 'The New Mediation in Italy', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 76, 2010, pp. 739-744. A comprehensive overview of the different ADR schemes available in Italy not only in civil and commercial matters, but also regarding family law, banking law and securities services, and criminal law can be found in E. Silvestri (ed), *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*, Torino: G. Giappichelli Editore, 2020.

8 The extent to which the Covid-19 pandemic and its consequences can exonerate the defaulting party to a contract is a subject of intense debate at the scholarly level: *see*, for instance, E. del Prato, 'Covid-19, Act of

Considering the large number of future disputes anticipated to arise out of contracts that could not be honored either because of the periods of lockdown that at different times have halted industrial production and closed most businesses or because of extraordinary circumstances brought about by the pandemic and that prevent the party from performing his or her obligations, it seems wise to divert to mediation cases that would clog the court system and that, in terms of cost and time spent, would be likely to deliver a fatal blow to the key actors of an economy already in recession. Furthermore, if the parties can reach a mutually satisfactory agreement, there is another important side effect to be taken into account: as the case law shows, courts are inclined to offer different interpretations to the concepts of force majeure and supervening impossibility of performance as applied to the pandemic and its effects, which could bring about uncertainty and a worrying lack of consistency in the outcomes of cases, whether identical or similar. Therefore, according to the new rules, contract disputes cannot be brought to court unless the parties have previously attempted to negotiate a settlement agreement through an out-of-court mediation procedure, provided that the defaulting debtor can prove that his behavior was justified by required compliance with the health and safety rules issued for infection prevention and control. This also seems in line with one of the advantages of mediation over litigation, which is to preserve a valuable business relationship that could forever be disrupted by a court judgment.

After an initial suspension of both in-person mediations and the deadlines to be observed under normal circumstances, online mediation (otherwise known as remote mediation) has been allowed, provided that all the parties to the dispute at hand agree to resort to this form of mediation.[9] This new possibility has been received with mixed feelings. On the one hand, mediators were happy to be able to resume their work, overcoming the ban on in-person meetings owing to the rules on social distancing, whereas, on the other hand, a sense of disorientation was widespread, since nothing had been provided for the practical implementation of the new provisions. In Italy, online dispute resolution (ODR) schemes are neither well regulated nor very popular, since the relevant rules, often adopted strictly on the wave of European legislative instruments to be implemented by member states, do not constitute a uniform body of norms easily accessible: the rules are spread over different

God, Force Majeure, "Hardship Clauses", Performance and Nonperformance', *Nuova Girisprudenza Civile Commentata*, 2020 (supplemento al n. 3), pp. 64-67; P. Sirena, 'L'impossibilità ed eccessiva onerosità della prestazione debitoria a causa dell'epidemia di Covid-19', *Nuova Girisprudenza Civile Commentata*, 2020 (supplemento al n. 3), pp. 73-79; F. Piraino, 'La normativa emergenziale in materia di obbligazioni e di contratti', *I Contratti*, 2020, pp. 485-513; T. Dalla Massara, 'Gli effetti della pandemia sul regime dei pagamenti', *Giurisprudenza italiana*, 2020 (Agosto-Settembre), pp. 1884-1890; S. Guadagno, 'L'incidenza della difficoltà ad adempiere a causa del Covid-19 sui rapporti contrattuali in corso, tra emergenza e prospettive', *Il Corriere giuridico*, 2020 (8-9), pp. 1095-1106.

9 The information concerning online mediation has been kindly provided by Francesca Cuomo Ulloa, PhD, attorney and mediator. Her PowerPoint presentation (in Italian) is on file with this author.

regulatory sources and are understandable only by legal professionals versed in the field of IT. In particular, most entities providing for mediation services lacked specific rules governing remote mediation in their bylaws, even though the statutory instrument on out-of-court mediation (which dates back to 2010) made express reference to online mediation, provided that the specifications of the online procedures chosen by the provider were included in its bylaws and could guarantee the safety and confidentiality of both the communications exchanged and the data collected during the mediation sessions.

Eventually, the Ministry of Justice issued a communication allowing online mediation even though the bylaws of providers did not contemplate this form of mediation.[10] In general, providers have chosen to resort to the usual commercial digital platforms (such as Microsoft Teams or Zoom) that have been incorporated into our everyday 'life-support' tools in the time of Covid-19, as long as the features of the platform guarantee several standards deemed indispensable for a regular development of the procedure.[11] For instance, access to the platform must require exclusive credentials given to the parties and the mediator; the platform must make it possible to set up 'chat rooms' to allow the mediator to dialogue with both parties, or with each party separately, in order to safeguard fairness for the litigants, as well as privacy and confidentiality at every step of the procedure.

Documents exchanged by the parties and submitted to the mediator must be transmitted as PDF files through certified email. Documents that must be signed by the parties, their attorneys, or the mediator, and, in particular, the settlement agreement reached if mediation is successful, must carry digital signatures, in compliance with the requirements laid down by the Code of Digital Administrations, which are indispensable to certifying the authenticity and integrity of the documents themselves.

The preceding discussion is a summary of the main steps in online mediation. To go into further detail would require this author to embark on a discussion of the complex rules belonging to a field of knowledge unfamiliar to her. Suffice it to say that in a country in which the so-called digital divide still affects the lives of millions of people,[12] the success

10 *See* Ministero della giustizia, Avviso del 4 maggio 2020, according to which "mediation providers listed in the registry kept by this Ministry (*the Ministry of Justice*) are authorized to conduct online mediation, resorting to videoconferencing systems, even though their bylaws do not provide for online mediation. It should be kept in mind that mediation can take place online only if all the parties to a dispute have consented to it" (my translation), at www.giustizia.it/giustizia/it/mg_12_1_2_3.page (last accessed 4 January 2021).

11 For a general outline of Italian-style online mediation, *see* M. Marinaro, 'La mediazione (telematica) dell'emergenza: un'opportunità per la giustizia civile', *Judicium. Il processo civile in Italia e in Europa* (1 giugno 2020), at www.judicium.it/la-mediazione-telematica-dellemergenza-unopportunita-la-giustizia-civile/ (last accessed 4 January 2021); F. Diozzi, 'La mediazione online nella legislazione anti-COVID-19. Un'opportunità emergenziale e un'occasione perduta', at https://blog.ilcaso.it/news_943/09-05-20/La_mediazione_online_nella_legislazione_anti-COVID-19_Un%E2%80%99opportunita%E2%80%99_emergenziale_e_un%E2%80%99occasione_perduta (last accessed 4 January 2021).

12 In this regard, the data collected by the European Commission through the Digital Economy and Society Index (DESI) is eye-opening and shows that, despite the efforts made, most of all after the spread of the

of online mediation is hindered by practical problems whose solution is not at hand but would demand large-scale structural reforms aimed at providing the digital assets necessary for a much-needed modernization of both society and the national economy.

Leaving aside the problems resulting from Italy not being a country of tech-savvy citizens, online mediation raises a variety of issues. A few can be deemed not very important, because they are understood as certain to arise but do not seem to belong to the normal course of events. For instance, in general the mediator cannot control what happens in the space surrounding each of the parties, since the computer screen does not allow a view of the peripheral space beyond the screen. This means that the mediation session could be observed by third parties, in violation of the confidentiality that is one of the strengths of the mediation process. Other issues, which are indeed important, have to do with what has been called 'the rudeness of cyberspace',[13] or the assertion to be taken for granted that online mediation creates a more relaxed setting for the parties attending the sessions in the comfort of their own homes and who are therefore more willing to negotiate a solution to their dispute. On the contrary, communicating through a computer screen can be difficult and ineffective; there is almost no room for nonverbal communication and empathy, which are important features of a constructive mediation procedure.

Obviously, one may argue that the pros of online mediation outweigh the cons, most of all when social distancing prevents face-to-face mediation, making out-of-court mediation mandatory and therefore inescapable, as is the case in the Italian legal system for many disputes. When the pandemic is over, it will be interesting to see whether online mediation becomes a feature of the 'new normal' or whether, perhaps, Italians will simply return to the 'brick-and-mortar' world of in-person mediation.

Not being a certified mediator, this author is in no position to express a preference for either face-to-face mediation or online mediation. And, in any event, much ink has already been spilled in asserting that one is better than the other. At present, to list the pros and cons of both seems an unhelpful exercise, for, at least in Italy, the pandemic is still running rampant, and the argument that the parties to a dispute and their attorneys can repeatedly appear in person before a mediator is clearly unrealistic. Regardless of the preferences of litigants, attorneys, mediators, and, for that matter, academics, as of January 2021, and for the foreseeable future, mediation in Italy can be conducted exclusively online.

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pandemic with a view to improving digitalization throughout the whole country, there is still a long way to go. *See* European Commission, 'Digital Economy and Society Index (DESI) 2020 – Italy', at https://ec.europa.eu/digital-single-market/en/scoreboard/italy (last accessed 22 December 2020).

13 For this definition, *see* R.J. Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab', *Cardozo Journal of Dispute Resolution*, Vol. 18, 2017, pp. 717-758, at p. 751.

3 Arbitration

In Italy, arbitration has always been a niche method of dispute resolution. Arbitration is deemed suitable for large commercial disputes only, essentially because according to entrenched 'metropolitan legend' its costs are very high since arbitrators (the good ones) are a sort of aristocratic clique whose members can be called upon to perform their high-priced services solely if the amount at stake is large enough to justify the investment. Things might change because of the unprecedented challenges brought about by the Covid-19 pandemic for the proper functioning of the courts: litigants may indeed be more inclined to turn to arbitration, whose features can be adapted to the exceptional circumstances of the times much more swiftly than the rules governing adjudication.

An example of the evolution of the procedural features and practices adopted by arbitral institutions in response to the current climate is the procedure known as 'simplified arbitration', introduced by the Milan Chamber of Arbitration, the most important and reputable arbitral institution in Italy.[14] Proceedings that began after 1 July 2020, can follow the rules of simplified arbitration when the value of the claim does not exceed €250,000, as long as all the parties to the arbitration agreement concur in this choice. If one of the parties dissents, the dispute will be diverted to the regular arbitral procedure.[15] Despite the value of the claim, the rules of simplified arbitration can be applied if "the parties have agreed to opt-in in the arbitration agreement or thereafter, until the filing of the reply to the request for arbitration."[16] On the other hand, the simplified arbitration procedure can be excluded by the Arbitral Council on its own motion or on the request of the arbitrator if the dispute is deemed overly complex.

The Arbitration Rules (meaning the rules governing ordinary arbitration) constitute the default rules for the simplified arbitration, too, when no special provisions are laid down for the simplified procedure. A remarkable difference is that ordinarily a sole arbitrator oversees simplified arbitration, regardless of the arbitration agreement, while under normal circumstances it is up to the parties to decide the number of arbitrators. If the parties fail to do so, the Arbitral Tribunal operates with a sole arbitrator or with a panel of three arbitrators if, according to the Arbitral Council, the complexity of the dispute or its economic value makes a three-arbitrator panel option more suitable.

Other interesting differences are worth mentioning. For instance, in the request of arbitration filed by the claimant (as well as in the reply filed by the respondent) the evidence

14 The Arbitration Rules of the Milan Chamber of Arbitration are available in English at www.camera-arbitrale.it/upload/documenti/arbitrato/ARBITRATION%20RULES%202020.pdf (last accessed 22 December 2020). The rules governing simplified arbitration can be found in ANNEXE "D". All the Rules, which have been updated extensively, entered into force on 1 July 2020.

15 *See* ANNEXE "D", Art. 1 – Scope of the application, sec. 1.

16 *Ibid.,* sec. 2.

offered in support of the claim must be stated, but, additionally, it is mandatory that each piece of evidence expands on the factual circumstances to be proved by that very piece of evidence. Another notable difference concerns the sole arbitrator, who is appointed by the Arbitral Council and can be challenged within a short time limit (five days), which is half the time normally allowed for any challenges to arbitrators.

As far as the development of the proceeding is concerned, the relevant rule[17] emphasizes the broad case management powers bestowed on the sole arbitrator against the backdrop of the general principle according to which "the arbitrator, the parties and the counsels shall act in an expeditious manner." In particular, the sole arbitrator is free to mold the procedure in the way best suited to arriving at the decision in the case. Therefore, the arbitrator, having heard the parties, can set limits to the length and scope of the briefs and can also limit the number of the documents to be produced and exclude one or more witnesses.

The parties are allowed to submit only one supplementary brief in addition to the request for arbitration and the reply, but no new claims can be made during the procedure. The development of the case is highly concentrated. In fact, the sole arbitrator can decide (even on his or her own motion) that a single hearing will be held for the taking of evidence and the closing statements of the parties, keeping in mind that the hearing can be conducted remotely, via videoconferencing or telephone call.

The rule governing the conduct of the proceeding is meaningful since the powers of case management that the sole arbitrator can exercise can make a real difference. The development of the case can be expedited, and so can its decision. In this regard, simplified arbitration has another desirable feature. In fact, the arbitral award must be issued within three months (instead of the normal six months, which can also be extended, as the case may be). Needless to say, if lockdown restrictions are in place, electronic-only filing of submissions is allowed, and so too remote hearings.

With regard to fees, the Milan Chamber of Arbitration follows a system of calculating costs based on the value of the claim. For simplified arbitration procedures, fees are reduced by 30% on average, and this feature, in combination with the length of the whole proceeding being no more than three months, makes simplified arbitration very appealing, even to persons who would never have thought of arbitration as a viable alternative to court procedures.

As of the end of November 2020 (and recalling that the new arbitral procedure went into force on 1 July 2020), 15 simplified arbitrations have commenced out of a total of 47 requests of arbitration filed with the institution. The value of the claims is below the threshold of €250,000 set by the rules, except in two cases. The subject matters of the

17 ANNEXE "D", Art. 5 – The proceedings.

disputes referred to simplified arbitration are procurement and commercial contracts of various kinds.[18]

4 Final Remarks

The future is terra incognita even though the recent successful creation of Covid-19 vaccines allows the world to begin to see light at the end of the tunnel. Come what may, it will be a long time before the Italian court system can resume its normal functioning. This is why access to justice will have to rely heavily on more flexible ADR schemes, such as online mediation and simplified arbitration, for the foreseeable future.

18 The data mentioned here was kindly provided by Mr. Rinaldo Sali, Vice-Secretary General of the Milan Chamber of Arbitration.

Impact of Covid-19 on Japanese Civil Justice

Shusuke Kakiuchi[*]

1 Introduction

As in many other countries, the Covid-19 pandemic, especially in combination with the declaration of the state of emergency, has been affecting social life in Japan significantly, and court practice has been no exception.

In this article, I will explain the impact of the pandemic on civil justice in Japan. After a brief note on the background, I will explain, first, the reaction of court practice in Japan to the state of emergency. I will then discuss the digitalisation of proceedings as one of the major impacts of the pandemic on the practice and legislation concerning civil justice. This involves mainly court proceedings but also alternative dispute resolution (ADR) to a certain extent.

2 Background

2.1 Significance of Civil Litigation in Japan

As has been often said,[1] the litigation rate in Japan is considerably lower than that in other developed countries. In 2019, 144,260 cases were brought to district courts[2] and 488,378 cases to summary courts.[3] This means that only 3.9 civil cases per 1,000 persons are brought before the courts.[4]

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1 *See*, for example, Ch. Wollschläger, 'Historical Trends of Civil Litigation in Japan, Arizona, Sweden and Germany: Japanese Legal Culture in the Light of Judicial Statistics' in H Baum (ed.), *Japan: Economic Success and Legal System* (New York, Walter de Gruyter, 1997) 89 ff.

2 Source: Annual Report of Judicial Statistics (only the Japanese version is available at the website of the Supreme Court: www.courts.go.jp/search/jtsp0010?). District courts are the courts of general jurisdiction in civil matters. The number includes cases concerning personal status (*e.g.* divorce), over which family courts have had jurisdiction since 2004.

3 Summary courts have jurisdiction over cases with a claim value of up to 1,400,000 yen (ca. 1,500 US dollars).

4 The total number of civil cases peaked in 2009 at 905,588 per year (7.1 cases per 1,000 persons).

Although the importance of civil litigation in Japanese society cannot be underestimated,[5] it should be noted that its presence is small compared with that in other countries.

2.2 *Course of the Covid-19 Pandemic in Japan*

The first case of Covid-19 in Japan was confirmed on 16 January 2020, and the country is actually experiencing the third (and the biggest) wave of its outbreak. As of 21 January 2021, the total number of infected people was 348,586, 4,829 of whom lost their lives.[6] The spread of the Covid-19 has also had a major impact on the legal system, and, notably, the Law on Special Measures[7] for the Control of Infections was enacted on 13 March 2020.

In the context of civil justice, two dates are important: on 7 April 2020, a state of emergency was declared for Tokyo and six other prefectures and was withdrawn for most prefectures on 14 May 2020. In Tokyo and some other prefectures, however, it remained in force until 25 May 2020. This state of emergency had a profound impact on court proceedings, which I will report on in the next part.[8]

3 Reaction of Court Practice to the State of Emergency

3.1 *Necessity of a Reaction*

In order to prevent the spread of infection, the government strongly demanded that people refrain from going out and having any social contact. Hence, it would have been problematic if, during the state of emergency, a large number of people (parties, lawyers, judges and other court officials) had come to the courthouse by public transport and gathered in courtrooms to participate in proceedings. The Court was therefore obliged to respond to this situation.

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5 According to statistical data, litigation is the most commonly used procedure to resolve civil disputes. *See*, for example, S. Kakiuchi, 'Regulation of Dispute Resolution in Japan: Alternative Dispute Resolution and its Background' in F. Steffek and H. Unberath (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford, Hart Publishing, 2013), pp. 270-271.

6 Source: Ministry of Health, Labour and Welfare (available at: www.mhlw.go.jp/stf/covid-19/open-data_english.html).

7 Law No. 4 of 2021, which is an amendment to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases (Law No. 31 of 2012).

8 The state of emergency was declared for the second time for Tokyo and some other prefectures on 8 January 2021. Its effect is more limited than that of the first one, and so far it has not had a significant impact on the administration of civil justice.

3.2 Measures Taken by the Court

The courts' concrete reaction to the state of emergency was to cancel court hearings. In most courts, almost all court hearings in civil cases were cancelled during the state of emergency. All civil court hearings in Tokyo District Court were cancelled from 8 April to 31 May 2020.

In urgent matters, however, proceedings were exceptionally continued. These included (a) proceedings for domestic violence cases, (b) habeas corpus proceedings, (c) proceedings for provisional remedies of particular urgency, (d) enforcement proceedings of particular urgency and (e) insolvency proceedings of particular urgency.

In addition, it should be noted that the filing of actions (submission of complaints) and other petitions was processed as usual.

3.3 Legal Basis for the Measures

3.3.1 Court's Authority to Direct the Proceedings

As the legal basis for these measures, the traditionally accepted principle of official direction of the proceedings must be mentioned.

Under this principle, the court bears the responsibility for the conduct of the proceedings, including the setting of court hearings and their cancellation. Thus, dates for hearing are designated by the presiding judge (Art. 93(1) Code of Civil Procedure[9] (hereafter CPC)) and, according to the prevailing opinion, the postponement or cancellation of a hearing is also part of the trial court's discretion.

In this sense, it can be said that the courts reacted entirely within the scope of the power to direct proceedings granted by existing law.

3.3.2 Coordination within the Court

However, it would not have been possible to react adequately to this situation without additional measures.

Within the existing framework of the official operation of the proceedings, each judging body[10] has the discretion to decide whether to cancel a hearing or not. However, it would be problematic if, in the absence of uniform standards, each judging body assessed the necessity of setting aside differently.

9 Law No. 109 of 1996. English translation is available at: www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&ja=04&kana_x=13&kana_y=12&kn[]=%E3%81%BF&ky=&page=12.

10 In district courts, cases are handled, in principle, by a single judge but are exceptionally handled by a panel of judges. *See* Art. 26 Court Act (Law No. 59 of 1947).

Therefore, each court, as an administrative body (e.g. Tokyo District Court or Tokyo High Court), established a plan of action enabling all its judges to respond according to a uniform standard. Hence, each court defined its own standards, and thus there has been a certain measure of variation among the courts. As a result, court hearings were cancelled in most courts, but in areas where the infection was not very serious, some courts did not reduce the ongoing work drastically.

3.3.3 BCP (Business Continuity Plan)

It was found helpful to prepare a so-called business continuity plan to facilitate the establishment of such action plans and take the necessary measures.

This BCP had already been prepared for the first time by the Supreme Court on 1 July 2016. It is based on the 'Guidelines for Business Continuity of Central Ministries and Agencies Responding to Pandemic Influenza',[11] established by the government under the Act on Special Measures for Pandemic Influenza and New Infectious Diseases.

On 31 March, the Supreme Court issued a notice to all courts concerning the continuation of judicial work on the basis of the BCP.

The BCP mandated that in the event of a new influenza outbreak, the courts should (a) maintain a minimum level of functioning while (b) protecting the life and health of users and staff and (c) suspending, as much as possible, those tasks that may lead to the spread of infection.

Accordingly, the BCP divides the court's activities into two categories: (a) those that should be continued and (b) those that should be reduced or suspended. The cancellation of court hearings was based on this latter classification.

3.3.4 No Application of Articles 130 and 131 CPC (Suspension of the Proceedings)

The CPC provides for the suspension of proceedings due to the standstill of the administration of justice or the incapacity of a party. On the one hand, Article 130 CPC regulates the suspension due to a standstill in the administration of justice,[12] whereas, on the other hand, Article 131 CPC provides for a suspension due to the impediment of a party.[13]

However, these provisions were not applied on this occasion; in fact, historically, these rules have very rarely been applied, as, for example, in the courts in Tokyo following the

11 Available at: www.cas.go.jp/jp/seisaku/ful/keikaku/pdf/chuou_gl.pdf (only in Japanese).

12 Art. 130 If the court is unable to execute its duties owing to a natural disaster or any other cause, litigation proceedings are suspended until such cause ceases to exist.

13 Art. 131(1) If a party is unable to continue with litigation proceedings owing to an incapacitation of an uncertain duration, the court may order the suspension of litigation proceedings, in the form of a ruling.

attempted coup d'état of 26 February 1936 and in the courts in Niigata during the Niigata earthquake in 1964.

In contrast, no proceedings were suspended during the Kobe earthquake, in 1995, and the Great East Japan Earthquake, in 2011, although many hearings were rescheduled or cancelled. Thus, in these cases, courts did not respond in a formal way, i.e. by applying the legal rules on suspension, but rather in an informal way, as they did this time.

3.4 Court Proceedings after the Termination of the State of Emergency

Now that the state of emergency has been terminated, proceedings in ordinary civil matters have gradually resumed. However, court activity is not yet in full operation, and in Tokyo District Court, for example, judges are operating on a two-week cycle, i.e. court hearings are being held only every alternate week.

Hence, the number of hearings has not yet reached the normal level, and parties have to wait longer than usual for their turn.

In addition, the court asks visitors to cooperate in order to prevent the spread of infection.[14]

4 Digitalisation of Civil Proceedings

4.1 Delay of Civil Proceedings due to the Covid-19 Pandemic

As explained in 3.4, the spread of the Covid-19 has caused a serious delay in civil proceedings. This is mainly because court hearings could not be held as parties and other participants could not appear in court. However, if parties were allowed to attend court hearings via video conferencing, it would not have been necessary to cancel so many hearings.

Indeed, Japan has remained far behind other countries in digitalisation of the judiciary. However, the pandemic has reaffirmed the importance of digitalisation.

14 *See* the website of the Supreme Court: www.courts.go.jp/english/about/Topics/Notice_to_prevent_the_spread_of_COVID19/index.html.

4.2 Progress of the Reform Discussion

The discussion on digitalisation had, in fact, already begun before the pandemic broke out.

In October 2017, a discussion group on the digitalisation of the judicial process was established at the cabinet secretariat, and it submitted its report in March 2018,[15] proposing a three-stage reform, which will be referred to later.

To carry out a more detailed study on the digitalisation of civil procedure, another study group was established in July 2018,[16] and it published its report in December 2019.[17]

In February 2020, the pilot project of 'Phase 1' started, right before the state of emergency was imposed from April to May 2020.

Finally, in July 2020, deliberations in the Legislative Council of the Ministry of Justice on the amendment of the CPC were initiated.[18]

4.3 Three-Stage Reform

4.3.1 Overview

The 2018 Discussion Group Report, as just noted, proposed a three-stage reform for digitalisation.

'Phase 1' covers the implementation of measures that are already feasible under the current law through the procurement of IT equipment. This phase was scheduled to start before the end of the financial year 2019, i.e. in March 2020, and has, accordingly, already started.

'Phase 2' includes the use of web conferencing in court hearing for oral argument, which needs amendments to the CPC and other laws. This phase is to start before the end of the financial year 2022, i.e. in March 2023.

'Phase 3' consists of the e-filing of the complaint and other applications, which also requires amendments to the CPC and other laws.

4.3.2 Phase 1: Proceedings for Arranging Issues and Evidence by Way of Web Conference

We are currently in phase 1, and under the law a party is not permitted to appear at a court hearing for oral argument by means of a web conference.

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15 Available at: www.kantei.go.jp/jp/singi/keizaisaisei/saiban/pdf/report.pdf (only in Japanese).

16 The author was a member of this study group.

17 Available at: www.shojihomu.or.jp/kenkyuu/saiban-it (only in Japanese).

18 The minutes of the meetings are available at: www.moj.go.jp/shingi1/housei02_003005.html (only Japanese). The author is a member of the Council.

However, within the framework of the procedure for arranging the issues, which is to serve as preparation for the oral argument, there are already some legal provisions that allow the procedure to be conducted without the physical appearance of the parties in court.

The CPC provides for the following three types of procedures for arranging issues and evidence:

(a) Preparatory oral argument hearings (Article 164-167 CPC)
(b) Preparatory proceedings (Article 168-174 CPC)
(c) Written Preparatory Proceedings (Article 175-178 CPC)

While the first procedure (preparatory oral argument hearing) is a specialised part of the oral argument and both parties should therefore physically appear before the court, the CPC provides for much more flexible rules for the latter two procedures, which are not part of the oral argument proceedings.

First, in the preparatory proceedings, the court session may be held in the form of a telephone conference if one of the parties is domiciled at a considerable distance from the court (Art. 170 para. 3 CPC). However, the use of the telephone conference is permissible only in these proceedings if at least one party has physically appeared in the session (Art. 170 para. 3 sentence 2 CPC).

Secondly, the written preparatory proceedings are, as the name suggests, a written procedure that does not require the appearance of the parties. However, the court may discuss with both parties by way of a telephone conference the points necessary for the preparation of the oral argument if it considers this necessary (Art. 176 para. 3 CPC). Thus, in this case, neither party has to physically appear before the court.

These rules provide for the use of a telephone conference and do not directly mention the web conference. However, since the CPC defines a telephone conference as 'a facility that enables the court and the parties to communicate simultaneously through audio transmissions', a web conferencing system can also be understood to fall under this definition. This means that even under the current law, it is possible to use a web conferencing system for these proceedings, provided that the necessary equipment is available.

4.3.3 Launch of the Pilot Project

As mentioned earlier, the 2018 Report proposed the commencement of the pilot project under Phase 1 before the end of the 2019 financial year, i.e. March 2020.

In line with this proposal, the Supreme Court announced in June 2019 that pilot projects would start in February 2020 in some courts. Thus, on 3 February 2020, proceedings were initiated in seven district courts, including Tokyo and Osaka District Courts, and in the Intellectual Property High Court by way of web conferencing. By December 2020, the

project had been started in all the main offices of district courts.[19] The Supreme Court plans to extend the project further to district court branches by the end of March 2022.

As regards the scope of the pilot project in terms of the types of civil litigation, there are no particular restrictions. The web conference is thus generally used but only if both parties are represented by lawyers, as otherwise issues may arise with regard to identification, appropriateness of the location of the parties, prevention of secret recordings, etc.

Web conferences were held for 134 cases in February and 348 in March. These numbers decreased in April (83) and May (87), as a consequence of the cancellation of many sessions during the state of emergency.

However, following the termination of the state of emergency and the resumption of cases that were postponed, the web conference has gained wide recognition as an effective measure against the Covid-19, and more and more lawyers are now requesting it. This is why the number of cases has been increasing significantly since June and has reached 3,973.[20]

5 Digitalisation of Alternative Dispute Resolution

Finally, a few words should be added on the digitalisation of ADR because the pandemic can also promote the digitalisation of such out-of-court dispute resolution processes.

For instance, some private ADR centres, such as that of the Sendai Bar Association, have conducted online mediation procedures since April 2020. Thus, while physical participation had been normally required by many mediation centres, procedures using web conferencing services such as Zoom and GoogleMeet are becoming more common.

In fact, just as in the case of the digitalisation of the judicial process, the discussion on digitalisation of ADR, in other words online dispute resolution (ODR), had already started before the pandemic broke out. A discussion group on the activation of ODR was established at the cabinet secretariat in September 2019, and its report was submitted in March 2020.[21] On the basis of this report, the need for legislative changes is currently being

19 At present, there are 50 district court main offices and 203 branches.

20 K. Tomizawa et al., 'Current Status and Remaining Issues in the Operation of Proceedings for Arranging Issues Using IT Tools Including Web Conferences (Phase 1)' (*Web kaigi tô wo riyô shita sôten seiri no unyô (Phase 1) no genjô to kadai*), in *Jurist* 1553 (2021), p. 64.

21 Available at: www.kantei.go.jp/jp/singi/keizaisaisei/odrkasseika/pdf/report.pdf (only in Japanese). The author was a member of this discussion group.

discussed in a study group established by the Ministry of Justice in October 2020.[22] This discussion may lead to an amendment of the ADR Act[23] in the near future.

6 Concluding Remarks

So far, the pandemic has not had the direct consequence of bringing about any change in the text of laws in the area of civil procedure. It has, however, significantly affected court practice and changed people's attitudes towards online tools. Although the reforms for the digitalisation of civil justice or ADR are still at an early stage, the use of online tools in court proceedings such as attendance at court hearings via web conferencing systems is expected to be significantly more common than before. Such digitalisation of court proceedings is expected to significantly expand access to court and to contribute to a more efficient and speedy administration of justice. In retrospect, the pandemic will probably be said to have served as the driving force behind such a reform.

22 The minutes of the meetings are available at: www.moj.go.jp/shingi1/shingi04200001_00002.html (only in Japanese). The author is the chairman of this study group.

23 Act on Promotion of Use of Alternative Dispute Resolution (Law No. 151 of 2004). English translation is available at: www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=&ia=03&ja=04&kana_x=14&kana_y=20&kn[]=%E3%81%95&ky=&page=30.

Impact of Covid-19 Pandemic on Lithuanian Civil Justice

Vigita Vėbraitė[*]

All spheres of life, including the justice system, have been affected by the Covid-19 pandemic in Lithuania. The influence of the pandemic has been felt since March 2020 and perhaps will be felt throughout 2021. Lithuania has been affected much more during the second wave than during the first wave of the coronavirus in spring. The first quarantine was introduced[1] on 16 March 2020 and remained in effect up to 16 June 2020. The second quarantine was introduced on 7 November 2020, with much stricter rules[2] from 16 December and is still in effect as of January 2021. The Covid-19 pandemic has caused judges, lawyers and others involved in the justice system to reassess how they operate in a rapidly changing environment. This article describes the 'new normal' for the civil proceedings in Lithuania and discusses the lessons that can be learned from this crisis.

1 Changes to the Civil Proceedings during Pandemic

Before describing the changes to the civil proceedings during the Covid-19 pandemic, it may be noted that courts, especially those that hear civil cases, in Lithuania were quite modernised until the pandemic broke out. In 2004 a unified information system of Lithuanian courts, LITEKO, was launched and is always being updated. From 1 March 2013, Article 175 (2) of the Code of Civil Procedure[3] came into force and legitimised the use of information and communication technologies (videoconferencing, teleconferencing, etc.) during court hearings. It was believed that these technologies would be used mostly in questioning witnesses, experts, persons involved in the proceedings and other parties to the proceedings, as well as during site surveys and collection of evidence.[4] However, it

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1 Government resolution No. 207, 14 March 2020. It can be found online here: https://lrv.lt/uploads/main/documents/files/Nutarimas%20Nr_%20207%20su%20pakeitimais%2004_30_EN.pdf.

2 Government resolution No. 1407, 14 March 2020. It can be found online here (with all the amendments): https://e-seimas.lrs.lt/portal/legalActEditions/lt/TAD/a2b5da801f4a11eb9604df942ee8e443?faces-redirect=true.

3 Valstybės žinios, 2002, No. 85-4126 (with later amendments).

4 Aurimas Brazdeikis et al. Ways of Implementation of the Right to Civil Proceedings within a Reasonable Time, Vilnius, 2016, p. 181.

should be stressed that this option had not often been used for civil cases until the pandemic and that only in some cross-border civil cases had these technologies been tried.

In Lithuania there has been no special legislation for civil proceedings with regard to the pandemic. It has been believed that legal norms of the Code of Civil Procedure are sufficient to apply to quarantine. The Judicial Council introduced only recommendations concerning what court proceedings should look like during quarantine and later.[5] Also, on 28 December 2020, the Ministry of Health issued recommendations[6] for court proceedings as the spread of the coronavirus had not stopped and the situation had deteriorated in Lithuania. These recommendations will be in force until the end of the quarantine or the crisis in Lithuania.

Civil cases can be heard right now in such forms: if all parties to the dispute agree or if other criteria set in the Code of Civil Procedure are met (for instance, most civil cases in uncontentious proceedings), written procedure can be organised; oral remote court hearing can be conducted via online platforms; oral hearing can be conducted in a courtroom or in a mixed form as judges and some participants of the proceedings appear in a courtroom and others participate remotely.

In the latest recommendations it is advised that oral hearings be organised only in exceptional cases, where it is not possible to adjourn a hearing or to organise it remotely and where it is necessary to protect the main civil rights of the parties. I believe that such exceptional civil cases could be, for instance, those concerning the removal of a child from an unsafe environment or other family matters concerning child rights. Unfortunately, there has been no exact list of such exceptional cases. In urgent cases oral hearings must be organised in the manner and time prescribed, taking all precautionary measures relating to the prevention of the spread of Covid-19, while maintaining a maximum distance between the participants in the courtroom (a minimum of 2 metres).

The Judicial Council recommendations emphasise that most procedural formalities should be maintained during online court hearing. This means that the judge and lawyers should wear their robes, and the visual environment of the remote hearing via platforms should be formal. From 16 December, restrictions on movement between municipalities have been introduced, and the government has declared that travelling to the oral court hearing or to get acquainted with the material of the case (it may be noted that most civil cases are now electronic ones, and it is not necessary to go to court to get acquainted with it) is a justifiable reason for travelling between towns.

5 All recommendations can be found online here: www.teismai.lt/lt/naujienos/teismu-sistemos-naujienos/del-teismu-darbo-organizavimo-karantino-laikotarpiu/7444.

6 It can be found online here: www.teismai.lt/lt/naujienos/teismu-sistemos-naujienos/sam-atnaujino-rekomendacijas-teismu-darbo-organizavimui-karantino-metu/8316.

Statistics of national courts' administration show that during the first quarantine 32% fewer new cases were received in the first instance cases than in 2019 in that period. Also, courts of appeal instance received 40% fewer appeals than in 2019.[7] More than 1,100 court hearings have been organised through videoconferencing in three months. Most such cases were civil, especially concerning commercial matters.

Some mediation procedures, chiefly mandatory mediation sessions in family matters, have also been organised online, some of which were successful. At the beginning of 2020 mandatory mediation was launched in Lithuania as a prerequisite for contentious family legal actions in court. Enforcement procedure and communication between bailiffs and courts have been conducted electronically for several years.

2 Some Problematic Issues

When the first quarantine was introduced, all courts strived to work through different platforms (mostly via Zoom or Teams platforms), and every court decided independently which platform it would use. This means that there are no rigorous safety requirements concerning the platforms or a single system or how the remote court hearing should take place in Lithuania, although, as previously noted, the use of electronic technologies was allowed in civil proceedings in 2013.

Furthermore, not all judges, court secretaries or participants in proceedings are used to videoconferences, and interruptions in the conduct of the online court hearing sometimes occur, as when a court secretary forgets to record a hearing or parties suddenly leave the room to get some documents.[8]

One of the most problematic issues for courts during remote civil hearings arises when hearing testimonies of witnesses. There are no rules or recommendations, or established case law on that. Quite often it is not clear to the judges or the opposing party to the dispute whether a witness is being influenced or helped to answer questions or whether his or her identity has been established correctly.[9] In such cases courts quite often attempt to organise oral hearing or to adjourn the court hearing. Sometimes Art. 196 of the Code of Civil

7 More statistics about activities on courts during the first quarantine can be found online here: www.teismai.lt/lt/lietuvos-teismai-karantino-laikotarpiu-bylu-nagrinejimas-persikele-i-elektronine-erdve-organizuota-daugiau-nei-tukstantis-nuotoliniu-posedziu/7764.

8 Laura Augytė-Kamarauskienė, 'Teismai ir advokatai prisitaikė prie pandemijos iššūkių: klientų interesų atstovavimas ir teisių gynimas teisme per karantiną nesustoja – įsibėgėjo nuotoliniai teismų posėdžiai', Verslo žinios, 15 December 2020, p. 8.

9 Remigijus Merkevičius, 'Lietuvos baudžiamojo proceso diagnozė: COVID-19 pasitikome turėdami prastą savijautą, minorines emocijas ir nuslopintą imunitetą, o kokie išliksime po jo?', Legal news portal TeisėPro, 25 November 2020, www.teise.pro/index.php/2020/11/25/r-merkevicius-lietuvos-baudziamojo-proceso-diagnoze-covid-19-pasitikome-turedami-prasta-savijauta-minorines-emocijas-ir-nuslopinta-imuniteta-o-kokie-isliksime-po-jo/.

Procedure, which provides that if factual circumstances of a witness who was summoned are sufficiently identified, a court may, with the consent of the participants in the proceedings, decide to release a witness from examination.

Another problematic question concerning remote court hearings is the publicity of civil proceedings. Court hearing in most civil cases, contrary to arbitration, should take place in public. According to the recommendations of the Judicial Council, the implementation of the principle of publicity of court proceedings must be ensured by organisational measures, by forecasting and regulating in advance the flows of persons wishing to watch or listen to the court hearing, retransmitting the court hearing image and/or redelivering sound to another courtroom open to the public. In reality, courts usually only try to inform an interested person that a court hearing is remote and that it is not possible to participate in and hear or watch it. Nor is it possible in the open database for court hearings to see which court hearings are oral in a courtroom and which are remote. As most courtrooms are quite small there have also been complaints that in procedural joinder civil cases, judges have asked some participants in the disputes to decide which one of several plaintiffs or defendants will participate in a court hearing personally. Mixed ways of organising court hearings are rarely used. In order to avoid problems, perhaps it would be better to pass some amendments to the Code of Civil Procedure and, for instance, to make it obligatory for a court to organise remote court hearings when a lockdown is declared and to determine the exact rules regarding when oral hearings in a courtroom could be organised. Legal regulation in the laws, not only by recommendations, would improve conditions for judges to hear civil cases properly rather than to think that some procedural violations are being committed. Right now, all such decisions are left to judges themselves, some of whom organise only remote court hearings, while others prefer to organise oral hearings in a courtroom. It may be noted that there have been quite a few Covid-19 cases among judges, other court employees or lawyers and prosecutors.

3 Lessons for the Future

Owing to the continuation of the pandemic and the uncertainty as to how long it will last, it is believed that throughout 2021 some civil cases will be heard remotely, although the long-term effects that the current situation will have on civil proceedings are difficult to assess. What remains certain is that the pandemic will not change the main principles of civil procedure in Lithuania. Although the ongoing pandemic taught us that it is possible to have court hearings online, it must be emphasised that proper equipment is needed and that the national court administration should take steps to organise the purchase as quickly as possible. Furthermore, judges, other staff in courts, lawyers and litigants should get better acquainted with the use of digital tools and why these tools are safe. Investing in

new forms of dispute resolution should be a high priority for the government and the court system itself.

Such a 'hybrid' way of hearing cases could also shorten the duration of court proceedings in the future and make them even more approachable and flexible for the public. Perhaps nobody anticipated that online court hearings would become part of normal procedure so quickly. No legal technological inventions or initiatives of the private sector were needed to promote online court hearings. The pandemic became an incentive to introduce modern means of functioning of the courts. I believe that the Code of Civil Procedure will need to be amended to provide more rules on how remote civil court hearing should take place and how the rights of participants in civil proceedings would be safeguarded in such proceedings. Additionally, perhaps the pandemic could be a reason to somewhat standardise civil proceedings in many countries throughout the world as most countries are affected by the virus.

It can be agreed that some new types of cases could reach courts in the near future.[10] There are already several claims in Lithuania concerning the declaration of the first quarantine and the damages it caused to private businesses. Also, several plaintiffs have sued hospitals after contracting the Covid-19 virus there. In addition, there are labour disputes because employees refused to undergo Covid-19 tests, contending that they should not be forced to do so.

10 Opinion of Consultative Council of Judges (CCJE) on the functioning of courts in the aftermath of the Covid-19 pandemic. It can be found online here: www.coe.int/en/web/ccje/-/functioning-of-courts-in-the-aftermath-of-the-covid-19-pandemic.

The Aftermath of the Covid-19 Pandemic in the Netherlands

Seizing the Digital Gains

Bart Krans[*]

1 A Positive Aftermath of the Pandemic

Has the Covid-19 pandemic brought something that can be seen as an improvement compared to the pre-Covid-19 situation in civil justice in the Netherlands? Can the pandemic somehow pave the way for improvements in civil justice for life after the pandemic?

In an attempt to answer these questions, I will first consider how civil courts in the Netherlands functioned during the first months of the pandemic and how this has been perceived (Section 2). Subsequently (Section 3, *et seq.*), I will focus on digitization – an area in which serious gains can be made.

2 Learning on the Job

In non-pandemic times, i.e., the 'old normal', the starting point for civil proceedings in regular commercial cases in first instance was that after a first round of written documents (statement of claims and statement of defence), in principle a hearing (*mondelinge behandeling*) would then take place.[1]

Looking at civil courts in first instance during the pandemic, it would appear, at least at first glance, that it is business as usual.[2] This is partially true – new cases can be brought before the courts, parties can submit documents and courts are deciding cases. Written

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1 Art. 131 Dutch Code of Civil Procedure. Usually such a hearing takes place.

2 To handle civil cases during the pandemic, a Temporary Act Covid-19 Justice and Security was introduced: *Tijdelijke wet COVID-19 Justitie en Veiligheid Act* (*Stb.* 2020/124; amended in November 2020 *Stb.* 2020/413). In addition, for the situation from 7 April onwards, so-called 'General rules in the administration of justice' were established (*Algemene regeling zaaksbehandeling Rechtspraak*).

proceedings, or the written part of proceedings in civil cases, are moving forward more or less in the usual way.

Obviously, there were and are differences due to the pandemic. During the first two months of the pandemic, in principle no physical hearings were possible unless the case was considered to be a very urgent matter.[3] Some courts decided on their own motion for a second written round (the statements of reply and rejoinder) instead of scheduling a hearing, and ruled on the basis of only a written case file. Approximately 70% of the cases were dealt with.[4] The reduced number of hearings seemed to provide an opportunity for civil courts, at least some of them, to use the 'extra' time to concentrate on cases where a hearing was no longer needed or required. For example, cases in which a hearing had already taken place and the parties were waiting for a judgement or because the court decided at the request of the parties to deliver the judgement on the basis of a written case file. So, the fewer number of hearings allowed for speeding up decisions in other cases and reducing backlogs. Yet, at the same time, the amount of other cases, and so new backlogs, appeared to be mounting.

The role of the Dutch judiciary in the initial period of the pandemic has been criticized. The President of the Rotterdam District Court has said that the judiciary were absolutely not prepared to deal with the crisis in March 2020.[5] During the first months the courts learned a great deal, according to Hammerstein.[6] He refers *inter alia* to the organization of oral hearings and the use of video calls and communication by email.

3 Digital Hearings: The Pros

Throughout the pandemic, both the digital and physical hearings have been possible in Dutch civil courts. Hearings that take place remotely use Skype or a similar platform.[7] It is not entirely clear under what circumstances the courts schedule a physical hearing and

3 Three phases can be identified for temporary regulations during the pandemic. At the start of the pandemic, the first phase (17 March to 6 April 2020), cases were dealt with, but hearings only took place in very urgent matters, and only by Skype. In the second phase (from 7 April to 10 May 2020), hearings were also conducted in urgent matters (either by Skype or by phone). As of 11 May 2020, the Dutch judiciary are in the third phase when hearings with physical presence are possible again, in addition to online hearings.

4 According to R. de Lange, President of the District Court Rotterdam (interview in *Mr.* December 2020, p. 24).

5 De Lange (*see* footnote 4 above).

6 A. Hammerstein, 'Sneller procederen door de pandemie', *Letsel&Schade* 2020, no. 4, p. 44.

7 Some law firms, perhaps even many, have set up a room at their firm where their lawyers can attend the hearing online.

what the threshold is for permitting this. It appears that differences exist between the various district courts on how this is approached.[8]

Of course, digital hearings can offer several advantages. The first one is obvious: In times of a pandemic, the use of digital technology enables contact between the court and parties, and between the legal representations of the parties. It is even claimed that the use of these platforms can have a positive impact on contact between parties, stakeholders, and lawyers, compared to the situation before the pandemic.[9]

The use of a digital platform can facilitate communication better than voice-only contact via a phone call or a conference call. In some cases early in the pandemic, a court ordered an oral hearing to be held by phone. It has since been questioned whether the right to be heard orally by a judge was thus violated. Arguably, oral contact with the judge comes down to eye-to-eye contact and this relates to the principle of sufficient and equal access to the court.[10] I am not convinced, however, that a right to be heard necessarily includes a right to be seen under the provisions of the European Convention on Human Rights (ECHR).[11] Nevertheless, whether the right to be seen is a formal right or not, being actually seen by the judge may contribute to the feeling of at least certain litigating parties that they have sufficient opportunity to influence the decision face-to-face with the judge, albeit online.[12]

In cases with multiple litigants, the advantages of saving time and costs for travel reasons and planning become more prominent, especially when parties or experts from other countries are involved.[13] That the use of digital hearings in an international context is far from theoretical is also demonstrated by the work of the Netherlands Commercial Court (NCC).[14] Since the outbreak of the pandemic, several NCC hearings have taken place, which, according to the NCC, were 'successful – allowing interaction, dialogue and argument, just like a courtroom hearing'.[15]

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8 *See* J.C. Heuving, 'Corona, civiele rechtspleging en hoor en wederhoor', *TvPP* 2020-3, p. 63 (with further reference on this in footnote 8).

9 Hammerstein (*see* footnote 6 above), p. 44.

10 W.D.H. Asser, case note at HR 31 October 2014, *NJ* 2015/181 (*Verhoeven c.s./De Staat*). Heuving (*see* footnote 8 above, p. 64) concludes that hearing a party by phone does not fulfill the requirement of hearing a party in such a way that it can influence the courts in the decision in eye-to-eye contact with the court.

11 For the purpose of this chapter, I suffice with a reference to HR 25 September 2020, ECLI:NL:HR:2020:1509, sub 3.2.1-3.2.5; this decision does not concern a regular civil case.

12 This does not rule out the possibility that in certain cases a hearing by phone can have the same value as a hearing by videoconference, or can perhaps even be the preferred option.

13 S. Boersen has noted that courts have succeeded in conducting more or less flawless digital hearings in cases with an unusually high number of litigants ('Digitale zittingen, een blijvertje?', *TvPP* 2020-6, p. 231).

14 On its website, the NCC considers videoconferencing, *inter alia*, stating that ordinary courtroom rules do apply and that all participants must be visible on screen (www.rechtspraak.nl/English/NCC/news/Pages/COVID19-NCC-is-open-for-business-but-restrictions-apply.aspx).

15 *See* NCC notification dated 27 May 2020 (www.rechtspraak.nl/English/NCC/news/Pages/The-Netherlands-Commercial-Court-and-COVID19-case-management-videoconference-hearings-and-eNCC.aspx).

Digital hearings may also be beneficial in relation to the public nature and public access of dispensation of justice. Between 16 March and 17 August 2020, the public was not allowed to attend physical hearings.[16] This has led to questions about the public nature of justice. In general, an infringement on the public nature of hearings must be justified. There is much to be said for openness, but it does seem to make sense in these difficult times of a pandemic that physical access to court buildings is not allowed.[17] It cannot be ruled out that one result of the pandemic is that more openness has been created or will occur in cases where a digital hearing is held.[18] The use of a livestream in certain cases during the pandemic also contributes to this. It is very likely that the number of people who watched the livestream of the court case involving Shell Nigeria in October 2020 was much higher than the number of people who would otherwise have come to the courthouse.[19]

4 Digital Hearings: The Cons

Obviously, there are downsides to digital hearings as well.[20] First of all, while a digital hearing can be considered superior to a hearing by phone, at least usually, a physical hearing can easily be considered superior to a digital hearing. There are not only positive sounds about digital hearings. In one survey, the majority of lawyers who took part seem to prefer a physical hearing to a digital hearing[21] – something that is perhaps not surprising. Online contact with the court is better than no contact at all, but usually it does not match the 'real thing'. Compared to physical hearings, an important part of non-verbal communication somehow can get lost out in the digital world. It is likely that lawyers, judges and the parties to a case also share that feeling. If this turns out to be true, it would be a serious argument in many cases to return to physical hearings as soon as possible.[22]

16 As of 17 August 2020, public can be granted physical access after completing an application process.

17 In a decision on openness in criminal cases, the Dutch Supreme Court has ruled in brief that the requirement for openness in the rulings can be met in more ways than one (HR 15 December 2020, ECLI:NL:HR:2020:2008).

18 It is even stated that the public nature of digital hearings has improved as a result of the pandemic in cases that were already dealt with digitally pre-pandemic (Boersen, *see* footnote 13 above, p. 232).

19 The cases concern claims by *inter alia* four Nigerian farmers who claim to have suffered damage as a result of oil spills from underground pipelines and an oil well in Nigeria.

20 Just as the aforementioned pros (or at least some of them) may also have downsides, the cons may have upsides too.

21 As reported by S. Droogleever Fortuyn, 'Echt contact met rechter blijft onmisbaar', *Advocatenblad* 2020-8, pp. 11-16. *See* for an impression of the experiences of lawyers with digital hearings, S. Dunk and S. Droogleever Fortuyn, 'Virtuele zittingen', *Advocatenblad* 2020-4, pp. 20-24.

22 *See* J. van Breda, S. Jansen and M. Verhoeven, 'De 'coronazaaksbehandeling (CZB)', *NJB* 2020/1809, pp. 2042-2043.

There are other serious limits to digital hearings. Equality of arms, the right to a fair hearing, the right to be heard and the principle of openness of justice may be at stake if technology fails in some way. Large law firms have more and better equipment than smaller firms. It does not take much imagination to see that it makes a huge difference if you are listening to a lawyer who is clearly visible and has good sound or to a lawyer whose hairline is all that is visible and who is often unintelligible. Another issue in this respect is that some sections of the population might have less access to internet than others, which is particularly worth noting in cases where no legal representation is required. It is to be hoped that courts and complaints boards will deal with such issues appropriately.

An important and fundamental aspect concerns the principle of access to justice. The question can be raised whether a digital hearing fulfils the requirements of the right to an oral hearing, as protected by Article 6 ECHR.[23] It seems very likely that in times of Covid-19, the replacement of a physical hearing by a digital hearing will not constitute a violation of this Article as such.[24] Digital hearings are now widespread and apparently few serious objections exist to this in practice.

Digital hearings may also risk a loss of decorum because the expression of traditions, style and perhaps of judicial dignity and neutrality (or independence and impartiality) tend to be much less visible in digital hearings. It is conceivable that at least some participants in the legal system would regret this. On the other hand, other participants might perhaps consider this to be an advantage because less decorum might make them feel more at ease. However, if this were to lead to a loss of authority on the part of the court, this would be problematic.[25]

Finally, there is one very practical aspect related to digital hearings – the option to use the mute function in a digital hearing.[26] This function gives lawyers more opportunity to discuss and consult with their client during the hearing. At physical hearings, conversations with clients in front of the judge are usually more limited to suspensions of the hearing. The mute function may 'sound' like a detail, but perhaps it contributes to more adequate reactions by the parties, and therefore to better procedural justice. At the same time, it is possible that courts are less positive about this.

23 *See* the Guide on Art. 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb) of 31 August 2020, no. 141 and the case law referred to.

24 Compare HR 25 September 2020, ECLI:NL:2020:1509, sub 3.2.1-3.2.5 (although not concerning a regular civil case).

25 Another issue concerns costs. Digital hearings require a solid technical basis, also with a view to minimizing risks of unauthorized infringements.

26 There are more aspects to digital hearings than can be dealt with within the scope of this chapter.

5 Digital Hearings: More Blending Ahead?

The disadvantages of digital hearings could be viewed as serious arguments to return to physical hearings as soon as possible in many cases. However, after the unplanned option to introduce digital hearings – driven by external factors – the time seems right to start thinking about a more structural embedding of this digital mechanism.[27] Digital hearings do seem to have certain benefits, which, now they are here, might be better to retain in certain cases and under certain conditions. Several players on the litigating field could stand to benefit – the parties to a case, lawyers, the courts and probably the judiciary as an institute.

How to move forward? One path could be that digital hearings will only replace physical hearings if all parties involved explicitly give their consent.

Another option, perhaps combined with the consent path, is that the option for a digital hearing will only be used, or play a more prominent role, in certain types of procedures. For example, this could depend on the types of the parties or the nature of a case.[28] The option for a digital hearing to replace a physical hearing could in theory also be limited to certain cases with international aspects. It makes plain sense that in cases where parties from several countries are involved, the advantages of digital hearings will be even greater than in national cases.

If differentiation seems advisable, this could be based not only on the types of the parties or the nature of the case, but also on the content or the stage of the proceedings. For example, a first hearing before a district court may provide new and relevant facts rather easily, while opportunities to present such facts are considerably less during a hearing at the end of a trial in appeal. Differentiation by the nature of the case is another option. Perhaps personal injuries cases would require a different regime than cases concerning pure financial losses. The same can be said for cases on labour law and insolvency law, etc.

Pursuing this proposal will obviously require some work and answers to several questions. For courts that are part of the formal judiciary, the legal framework for replacing physical hearings by digital hearings would need to be expanded and enforced. Questions must be answered on the type of hearings this will concern. Does it apply to the *mondelinge behandeling*,[29] witness hearings, hearing of experts, formal plea sessions or other sessions, where courts and parties are in contact, or just some of them? And is it also applicable in appeal? And if so, does it make sense to introduce the option that digital hearings in appeal cannot take place if the hearing in first instance was digital? Also, is it sensible to consider hybrid hearings, in some form or other? Many questions therefore lie ahead.

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27 *See also* Boersen (*see* footnote 13 above), p. 232.

28 It may also be possible to distinguish between, for example, a witness examination and a plea hearing.

29 *See* the text above at footnote 1.

It is likely that a round of consultation with lawyers or the bar association must be part of the process. If it is clear that lawyers prefer physical sessions for all type of hearings and for all types of cases, this could be seen as an amber or red light. But there is much to be said for not 'wasting' this crisis and for exploring the option of whether digital hearings are here to stay in some form. Perhaps it is time to seriously consider taking this one step further and embedding the option of digital hearings more structurally in Dutch civil proceedings.

6 Complaints Boards

The prospect of a blended future does not have to be limited to formal courts. Since the outbreak of Covid-19, the *Geschillencommissie* – an important complaints board for consumers and small businesses – has switched to hearings by Zoom.[30] *Kifid* – an important complaints board for financial disputes where consumers and certain other parties can file a claim – states on its website that it will conduct its hearings during the pandemic as much as possible by phone or using videoconferencing.[31] If the experiences of these types of complaints boards turn out to be positive, or partially positive, it seems worth considering whether this option is here to stay in certain cases. That said, the entire replacement of physical hearings by digital hearings does not seem very likely in the case of complaints boards. It is conceivable that besides legal professionals, at least some consumers will still prefer eye-to-eye contact in a physical room instead of contact in a digital room. On the other hand, other consumers may put more emphasis on the benefits, including savings in time and costs related to travelling involved.

7 Digital: More than Hearings

The benefits of digitization during the pandemic are not only limited to court hearings. One rather specific but very practical 'quick win' is the option of secure email communication with the courts, something that became available at the start the pandemic. This should have been a possible option a long time ago and it is to be hoped that the fax

30 The *Geschillencommissie* is a foundation for consumer complaints boards that offers complainants, being consumers or business, alternative dispute schemes to help resolve their dispute out of court (*see*: www.degeschillencommissie.nl/english/). During the pandemic, they also offer the option of proceedings without a hearing.

31 *See* www.kifid.nl/kifidcorona-zittingen-zoveel-mogelijk-via-video-of-telefoon/ (last consulted in January 2021). *Kifid* is the Financial Services Complaints Board for financial disputes. *Kifid* offers access and expert advice to consumers, small businesses and self-employed persons without employees (*zzp-ers*) who have a complaint against a financial services provider (*see* www.kifid.nl/about/).

machine, still currently used in courts in the Netherlands, will at last now find its way to the bin.[32] It was recently argued that the use of digital tools in civil cases should be extended, especially for personal injury cases.[33] For example, Hammerstein argues that lawyers in personal injury cases should have the opportunity to put questions to each other via email, which can then be answered during a video call.

Whether you agree with the details or not, the core of the advice does seem to be wise: step up the use of digital tools in civil proceedings, and not only in digital hearings. By blending various mechanisms (physical and digital), several places at the table, so to speak, could be better served.

8 Resetting a Failed Digitization Project

Blending several mechanisms might also help to heal a procedural 'wound' in the Netherlands that is still open – the failure of the so-called KEI project. In recent years, an ambitious digitization project concerning, *inter alia*, civil proceedings was set up.[34] After extensive preparations, the Act to implement the new rules and options was approved by Parliament. Two district courts of first instance had already started using the system as a pilot. Nevertheless, in 2018 the project was put on hold due to technical issues.[35] The Act with new rules, already approved by Parliament and on the verge of being enforced, was overruled and the project was put under review. The two aforementioned district courts were forced to retreat and return to the 'old' way of working, including *inter alia* using the fax machine (though they did also introduce email).

When the Ministry of Justice and Security announced the withdrawal of this Act, it also announced that digitization was inevitable. The resetting of the KEI project resulted in a new project called *Digitale Toegankelijkheid* (DT) (digital accessibility). At the heart of this DT project lies the wish to fulfil the societal need for better digital access and to enable the electronic filing of documents and electronic access to case files.

The resetting of the KEI project and the resulting DT project had already been set in motion before the outbreak of the Covid-19 pandemic. With good reason, the *Raad voor de Rechtspraak* (Council for the Judiciary) has stated that this crisis further underlines the need and necessity for such a digital mechanism.[36] It is to be hoped that the project on

32 *See* Hammerstein, *JBPr* 2020/4.

33 *See* Hammerstein (*see* footnote 6 above), p. 45.

34 The project was called KEI (an abbreviation of the first letters of the Dutch words for quality and innovation).

35 Initially, the project cost was estimated at 7 million euros. When the plug was pulled on the project, around 220 million had been spent according to Dutch newspaper *NRC* (www.nrc.nl/nieuws/2018/04/10/digitalisering-rechtspraak-moet-opnieuw-a1598839).

36 Letter to the Minister, dated 16 October 2020 (with a reaction to the project on Digital Accessibility), p. 1.

digital accessibility will be more successful than its predecessor, and sooner rather than later. With a view to the previous paragraphs in this chapter, it is also hoped that the judiciary is close to taking the next step in the world of digitization, even though there are still several drawbacks to consider and overcome.

9 Seizing the Digital Gains

In January 2021, for the first time in history, the Netherlands participated in a digital hearing of the European Court of Justice (ECJ).[37] Looking at civil proceedings in the Netherlands, it is fair to say that the pandemic has accelerated the slow process of digitization. It is unclear what the aftermath of the pandemic will entail for the future of civil proceedings in the Netherlands. Due to the pandemic, procedural law was more open to innovation. Without an extensive preliminary process, things had to change at once. The experiences gained during the pandemic should not be lost, especially in view of the recent expensive and serious failure of a digitization project. The rapidly developed Covid-19 vaccines will not guard against inefficient and unjust proceedings, but they may contribute to the opportunity to pave the road towards more efficiency, and a blended future, or, to use a word that seems to have made a rapid 'career' since the outbreak – a hybrid future. It would be wise to seize this opportunity.

37 Hearing before the Grand Chamber in Case C-564/19.

Covid-19 and Norwegian Civil Justice

Anna Nylund[*]

1 Introduction

Norwegian courts have been digitised at an unprecedented pace during the Covid-19 pandemic. Because case management hearings were already conducted remotely and expert witnesses were often examined remotely, the transition to fully remote hearings has been fairly smooth in Norway, as will be explained in Section 2. However, the implementation of new technology has entailed some difficulties, in particular, regarding the application of the rules on remote hearings. These challenges will be discussed in Sections 3 and 4. Section 5 discusses whether paperless courts and remote hearings are overly modest advancements considering the potential that lies in digitisation.

2 A Successful Transition to Remote Hearings

Although Norway is a technologically advanced country where most people have access to computers, tablets and high-speed internet in their homes,[1] Norwegian courts have had only rudimentary electronic filing and case management systems.[2] Digitisation has been slow and gradual. Until recently, most courtrooms in Norway were not equipped with audio and video recording devices, and only courts in some parts of the country had access to the electronic filing system, due to insufficient funding of digitisation. This might be surprising considering that Norway has funded similar equipment for courts in Central

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1 In 2020, 94% of the Norwegian adult population (age 16-74 years) used the internet daily or almost daily, and 96% of households, including 88% of low-income households, had access to broadband internet according to Statistics Norway, www.ssb.no/statbank/table/10999/tableViewLayout1/ and www.ssb.no/statbank/table/11124/tableViewLayout1/ (accessed 11 November 2020).

2 Riksrevisjonen, Undersøkelse av saksbehandlingstid og effektivitet i tingrettene og lagmannsrettene. Dokument 3:3 (2019-2020), 22 October 2019 and NOU 2020: 11 Den tredje statsmakt. Domstolene i endring, p. 249 ff.

and Eastern European countries[3] and how technology permeates other domains of Norwegian society.

Norwegian courts have examined experts and expert witnesses remotely for a few decades, thus laying a fertile ground for rapid extension of the use of remote hearings. Although the Dispute Act (DA, the Norwegian Civil Procedure Act)[4] that entered into force in 2008 was drafted 20 years ago, it foresees the use of remote and hybrid hearings. Hence, most courts have routinely held case management hearings remotely (DA section 9-4 subsection 3), and experts and some witnesses have sometimes testified remotely via telephone (DA section 21-10). More recently, judges at some courts have experimented with conducting court-connected mediation sessions via telephone. Additionally, section 13-1 subsection 3 allows courts to hold remote hearings with the consent of the parties, and section 9-5 subsection 3 allows the court to have preparatory hearings remotely to rule on procedural issues.

During the early weeks of the initial lockdown, in March and April 2020, many Norwegian courts shifted to remote main hearings using off-the-shelf technology. Within a few weeks, the Norwegian Courts Administration had developed a platform for remote hearings and hybrid hearings (i.e., hearings where only one of the parties is present and witness and expert testimony is given remotely). The platform signified a leap from using a telephone to using a video link. Thus, in addition to enabling the participants to see each other, the platform also enables the participants to use visual aids, such as diagrams, pictures and excerpts from documents. Nevertheless, many judges still conduct case management hearings via telephone. A temporary act grants courts discretion to conduct remote main hearings when a remote hearing is 'necessary and unobjectionable'.[5] The audio-visual platform, presence of judges and court employees with solid technological knowledge and skills, lawyer's positive attitudes towards technology, access to high-speed internet and a pragmatic legal culture paved the way for the transition to remote hearings. Before courts had established common routines for remote hearings, journalists were the only vocal opponents to remote hearings, as they feared reduced access to main hearings. However, the platform for remote hearings also allows those interested in the case to gain access by

3 I. Arnstad, 'Opptak i alle rettssaler – i Litauen', Rett på sak, 2016(1), pp. 30-31. www.domstol.no/globalassets/upload/internett_fillister/da/publikasjoner/rett-pa-sak/2016/rps1-2016.pdf#page=30 (accessed 20 November 2020).

4 Lov om mekling og rettergang i sivile tvister (tvisteloven), 17 June 2005 no. 90. Act relating to mediation and procedure in civil disputes (Dispute Act), unofficial English translation available at https://lovdata.no/dokument/NLE/lov/2005-06-17-90.

5 Midlertidig forskrift om forenklinger og tiltak innenfor justissektoren for å avhjelpe konsekvenser av utbrudd av Covid-19 FOR-2020-03-27-459. Decree was later repealed and replaced by a temporary act, Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv. of 26 May 2020 no. 47, and extended until 1 June 2021, Lov om forlengelse av midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv. of 6 November 2020.

requesting an access code. The Supreme Court, a court of *de facto* precedent,[6] decided to broadcast all its hearings on its website,[7] and lower courts have broadcasted selected high-profile cases.[8] The previous scepticism towards broadcasting from courts seems to have disappeared in light of the pandemic.[9] The government has proposed a new rule to ensure that the public has access to remote hearings to the same extent as to face-to-face hearings.[10] The platform for remote hearings will likely continue to operate even after the pandemic, although the number of fully remote hearings will be far lower. Considering the importance of Supreme Court rulings in Norwegian legal culture, lawyers outside Oslo would prefer that broadcasting hearings in the Supreme Court will become the new normal.

3 Remote Hearings, Equal Access to Courts and Judicial Discretion

While the pragmatic legal culture in Norway allows courts to be flexible, it also results in unprincipled approaches to many issues. As mentioned above, remote and hybrid hearings are allowed when the court considers them to be 'necessary and unobjectionable'.[11] In the preparatory works of the temporary procedural rules, the government provided a list of general criteria for such hearings, such as the 'character of the case' and the presence of circumstances that hinder parties or witnesses from attending the hearing in person.[12] The rules are highly discretionary and give no guidance regarding whether courts would always have to offer parties to some cases the opportunity to appear in person. Some courts have interpreted the rules liberally, which allowed them to continue hearing up to 80% of the civil and criminal cases during the spring 2020 lockdown.[13] Other courts have interpreted the rules more narrowly and thus have opted to reschedule most hearings. Hence, in the absence of uniform guidelines for conducting remote and hybrid hearings, tangible

6 J. Ø. Sunde, 'From courts of appeal to courts of precedent – access to the highest courts in the Nordic countries', in C.H. van Rhee and Y. Fu (eds.), *Supreme Courts in Transition in China and the West,* Springer, Cham 2017, pp. 53-76.

7 https://www.domstol.no/en/Enkelt-domstol/supremecourt/attend-a-hearing/ (accessed 28 February 2021).

8 *See* A. Nylund, 'Civil procedure in Norway and Covid-19: some observations', in B. Krans and A. Nylund (eds.), *Civil Justice and Covid-19,* Septentrio Reports. No 5 (2020): DOI: https://doi.org/10.7557/7.5468.

9 The Courts of Justice Act (Lov om domstolene, of 13 August 1915 no. 5, section 131a) explicitly forbids any broadcasting and even taking of pictures in criminal cases. Although the act remains silent regarding civil cases, the rules have been applied *mutatis mutandis.*

10 Høringsnotat om forslag til endringer i tvisteloven mv. – Ankesiling, rettsmekling mv. Justis- og beredskapsdepartementet. 7 oktober 2020, pp. 59-62.

11 Lov om forlengelse av midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv. of 6 November 2020, section 3.

12 Prop. 94 L (2019-2020) Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv.

13 www.domstol.no/nyheter/digitale-rettsmoter-ble-losningen-pa-stengte-rettslokaler/ (accessed 11 November 2020).

divergences among courts in the number of postponements have emerged.[14] Differences in the level of local lockdown measures account for only a fraction of the variation in the rate of postponed hearings among courts.

In the early days of the pandemic, one could not expect detailed rules regarding postponement and remote hearings to be in place. However, the prolonged restrictions during the pandemic necessitate a uniform approach to remote hearings. Currently, the preferences of the chief judge and other judges at each individual court determine the extent to which remote hearings are used. Since hybrid and remote hearings will be the norm until the end of the pandemic, they are also likely to become part of the 'new normal'; thus, a principled discussion is urgently needed even if the temporary regulations were repealed.

The parties cannot appeal a decision to hold the main hearing remotely or in a hybrid format; the parties can only appeal a decision the court has made its final ruling in the case. Although the Supreme Court has struck down rulings to have remote hearings in pre-trial police detention, remote hearings in civil cases have not been subject to appeal to my knowledge.[15]

4 The Need for Research-Based Rules on Remote and Hybrid Hearings

Since hybrid hearings are likely to be far more common after than before the pandemic, regulation and practices should be informed by psychological and cognitive research, not merely by assumptions. According to several studies, judges believe that they are in a better position to assess the accuracy of a witness statement if the witness is present in the same room than if the witness testifies remotely, and that audio-visual communication is superior to audio-only (i.e., telephone) communication.[16] However, research suggests that detecting lies is actually *easier* when the witness is heard and not seen.[17] Thus, hearing witnesses via telephone could be preferable to using audio-visual communication.

14 *E.g.*, the Agder Court of Appeals heard virtually no cases in the period from 16 March to 4 May, although other courts heard relatively many cases. www.domstol.no/Enkelt-domstol/agder/koronaviruset---redusert-drift-i-domstolene/ (accessed 11 November 2020), www.domstol.no/nyheter/hva-skjer-med-rettsmotene-i-tingrettene-na/ (accessed 14 January 2021) and note 6, above.

15 HR-2020-972-U.

16 L. Schelin, *Bevisvärdering av utsagor i brottmål*, Stockholm, Norstedts juridik, 2007, pp. 215-216; S. Landström, R. Willén and E. Bylander, 'Rättspraktikers inställning till modern ljud- och bildteknik i rättssalen – en rättspsykologisk studie', *Svensk Juridisk Tidskrift,* No. 6, 2012, pp. 197-218.

17 Schelin, note 16, pp. 225-228, C.F. Bond Jr. and B.M. DePaulo, 'Accuracy of deception judgments', *Personality and Social Psychology Review*, Vol. 10, No. 3, 2006, pp. 214-234; S. Mann, A. Vrij and R. Bull, 'Detecting true lies: police officers' ability to detect suspects' lies', *Journal of Applied Psychology*, Vol. 89, 2004, pp. 137-149.

A Swedish study indicated that judges tend to evaluate more vivid statements more positively than less vivid statements. In this respect, the shorter the sensory, temporal and spatial distance between the judge and the witness, the more vivid the presentation is perceived to be, and, thus, the more the judge tend to trust the witness to tell the truth.[18] The camera angle, objects in the backgrounds of the witness and other factors might influence a judge's impressions of a witness and potentially lead judges to make erroneous conclusions about the credibility of witnesses.

Based on these studies, parties who attend a hearing remotely while the other party attends in person, and parties whose main witnesses are examined remotely while the other party's main witnesses are examined in person, risk being at a disadvantage. Moreover, it could be more demanding to provide sufficient proof for one's claim when all or most witnesses are examined remotely, since the judge might regard each witness as less credible than if the witnesses had appeared in person. Moreover, although examination via telephone could enhance detection of untruthful witness statements, judges could still assign less weight to those witnesses due to increased perceived distance. Educating judges on cognitive biases related to the use of technology is thus vital when remote hearings and remote witness examinations constitute the norm. Moreover, studies on how remote and hybrid hearings influence the perception of fairness among parties and the public are needed to understand whether such hearings reinforce or undermine trust in courts and the quality of justice. The omnipresence of digital communication during the pandemic might influence how we perceive others in a digital setting. Hence, pre-pandemic research findings might no longer be accurate post-pandemic.

5 Transition from Paper to Online Case Management: A Lost Opportunity for Courts?

The case management system in Norwegian courts has been digitised gradually and late compared to many other organisations. In October 2019, the Office of the Auditor General of Norway issued a report criticising the Norwegian courts for failing to introduce and make use of new technology, thus reducing the efficiency of courts.[19] The Norwegian courts are lagging behind in digitisation compared both to countries such as Denmark and to the rest of society.[20] The pandemic has signified a leap in this regard, in particular in the level

18 S. Landström, P.A. Granhag and M. Hartwig, 'Witnesses appearing live versus on video: effects on observers' perception, veracity assessments and memory', *Applied Cognitive Psychology*, Vol. 19, 2005, pp. 913-933.

19 Riksrevisjonen, note 2.

20 NOU 2020: 11, note 2, pp. 273-274.

of funding of new technology. The government intends to make the use of the electronic case management system mandatory for lawyers.[21]

Although lawyers applaud the jump in digitisation of courts, one should ask whether the act of turning paper into PDFs and in-person hearings into hybrid or remote hearings is, in fact, deprived of visionary, innovative qualities. Perhaps the courts are facing a 'Kodak moment',[22] which refers to the inability to adapt to a situation where the business is turned on its head, as was the case with the introduction of digital cameras. The expression pairs with the concept of disruptive technology. That is, instead of courts seizing the opportunity to rethink their 'business model' and taking full advantage of the possibilities that new technologies entails, they continue operating according to the old model, the only difference being digital documents.

The practices of filing pleadings have been largely unaltered despite the technological transition from typewriters and handwriting to electronic files. The plaintiff files a document, the defendant files a second document, the plaintiff files a reply or comment in a third document, the defendant files a reply in a fourth document and so forth. In almost any other context, a single, co-authored document is used, and amendments result in updated versions, not entirely new documents.[23] We could envisage, for example, a new, digital case management system where the parties would operate with a single, shared document. The defendant would insert comments to indicate disagreement with the contentions of the plaintiff and to identify the ground for disagreement by pinpointing disagreement related to factual circumstances (e.g., 'I did not do that'), application of norms to the situation (e.g., 'my behaviour cannot be classified as negligent') or interpretation of law (e.g., 'another legal norm applies or the interpretation of the rule is incorrect').[24] These disruptions to practices could enable us to overcome the problems associated with the identification of key disputed issues in separating disputed issues from undisputed issues and pinpointing the reason for disagreement. There are, of course, numerous other ways in which technological advancements could be, and should be, integrated into civil justice, with artificial intelligence as an obvious example.

The strict demarcation between oral and written communication in court proceedings that dominates Norwegian legal thinking should also be re-examined. Previously, written

21 Høringsnotat om forslag til endringer i tvisteloven mv., note 10, pp. 40-41.

22 Kodak moment refers to the inability to adapt to a situation where the business is turned on its head, as was the case with the introduction of digital cameras. The expression pairs with the concept of disruptive technology. *See e.g.*, D. Nunan, 'Reflections on the future of the market research industry: is market research having its "Kodak moment"?', *International Journal of Market Research,* Vol. 59, No. 5, pp. 553-555 and C.M. Christensen, M.E. Raynor and R. McDonald, 'What is disruptive innovation', *Harvard Business Review*, Vol. 93, No. 12, 2015, pp. 44-53.

23 I thank Professor Wolfgang Hau for sharing this idea.

24 *See* A. Krokan and R. Aarli, 'Den digitale dommer – Om endring av arbeidsprosesser i domstolene', *Lov og Rett*, Vol. 59, No. 3, 2020, pp. 149-166, at pp. 159-160.

communication was asynchronous and, until recently, associated with a significant delay in the transmission of the message, whereas oral communication was always synchronous. Modern technology has abolished the ties of timing and format of communication. Since oral statements can be, and are, recorded, and artificial intelligence enables their expedient transcription, some of the inherent differences between oral and written statements have disappeared in this regard, too.

In its recent report, the Norwegian Courts Commission (*Domstolkommisjonen*) – a government-appointed committee – has conducted extensive research on the quality and efficiency of Norwegian courts.[25] The Court Commission recommends that courts introduce new technology for simplifying existing processes and for assisting the judge in making correct decisions, specifically regarding the damages for bodily injury and other damages, where monetisation is complicated and where calculations will often rely on incomplete information. However, a revision of current procedural rules is a prerequisite for some of the technological innovations, and hence further investigations are required. The Courts Commission notes that practices and work processes must be modernised in order for courts to be able to reap the fruits of digitisation.[26] The pandemic has demonstrated that slow digitisation was a matter of lack of proper funding of courts, not the unwillingness or inability of Norwegian courts to implement new technology. Although the committee drafting the DA did foresee the use of novel technology 20 years ago, it was not possible for them to grasp fully the extent to which such technologies would be available today. Thus, the procedural rules need to be modernised.

At the time of this writing, it is unclear whether the pandemic will detain the much-needed reforms by diverting resources and attention to more immediate problems, such as pandemic-related backlogs and a potential surge in bankruptcies. The Covid-19 pandemic might distort the incorporation of novel technologies in several ways. The lockdowns have resulted in a hibernating mode, where the focus is on getting by, leaving little room for innovations more distantly related to resolving immediate problems. The lockdowns could also result in reduced resources for conducting ambitious research and development projects within courts. However, the pandemic is an opportunity to profoundly rethink and redesign Norwegian court proceedings. It could induce us to replace dogmas of the 20th century with ideas that correspond with contemporary society and technology. In doing so, we could utilise the period of disruption in Norwegian civil justice to propel constructive changes.

25 NOU 2020: 11, note 2, p. 249 ff.

26 *See* NOU 2019: 17 Domstolstruktur. Delutredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 1. oktober 2019; NOU 2020: 11, note 2; and Krokan and Aarli, note 24.

Peruvian Judicial System during the Covid-19 Pandemic

Christian Delgado Suárez[*]

1 Introduction

Peru is one of the countries most affected by the novel coronavirus, and despite all the efforts of the authorities to control the spread of the disease, the regrettable situation has not improved as desired.

In Peru, the Covid-19 pandemic has exacerbated a persistent gap in access to justice. We were not ready to experience such challenge. In March 2020, the then-president Martin Vizcarra mandated a general quarantine and announced a state of emergency, which led to a temporary ceasing of all judicial activity. Therefore, from March to April 2020, not only judicial processes were put on hold, but new claims could also not be filed or submitted before national courts.

The enactment of express regulations and restrictions – almost monthly – by the government to prevent the massive infection seemed to violate constitutional rights. Indeed, this situation has been constantly watched by the judges to avoid excesses as their responsibility to protect rights impose them to do.

Nevertheless, this situation led the Peruvian Judiciary to improve many technological and digital tools that at the time of Covid-19 spread were not yet available. Consequently, this was an opportunity to set an agenda against the time itself to grant access to justice and render it accessible to all citizens.

This essay aims to focus the attention on the general Peruvian experience, dealing with the technological change the Judiciary of Peru has undergone to continue granting access to justice. By means of a descriptive method, this essay will aim to expose the difficulties and challenges in Peru. Finally, the essay will present some scenarios that judiciary branches should expect from now on when dealing with the effects of Covid-19.

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2 The Impact of the Covid-19 on the Peruvian Judicial System

After the Supreme Court issued Administrative Decree N° 121-2020-CE-PJ on 24 April 2020, suspending all procedural deadlines and schedules nationwide and temporally closing all courts during the spread of the pandemic, the Peruvian Judiciary has adopted remote proceedings and home office as the main transformation of their work. The Supreme Court stated that suspension of deadlines was the most reasonable method to prevent an uncontrolled increase of the pandemic. From that moment, the Peruvian Judiciary have been continuously implementing different online platforms to promote continuity of more than one million claims and ensure the access to justice in the middle of the pandemic. Most of the courts in the country implemented the submission of documents or claims by the website '*mesa de partes virtual*' or institutional e-mails. Likewise, to allow judges to work from their homes, District Courts (or *Cortes Superiores*) ordered the transfer of case files to judges' houses. This measure has enabled the Peruvian Judiciary to fulfill the right to access to justice and the right to have one's cases and claims heard even during the spread of Covid-19.

After the nationwide general quarantine was declared, the Peruvian Judiciary issued several administrative decrees to establish digital techniques and set special calendars so that claims could be effectively managed by all judges. The Administrative Decree N° 000123-2020-CE-PJ,[1] issued on 23 April 2020 by the Peruvian Supreme Court Chief Justice, authorizes the use of the platform *Google Hangouts Meet* nationwide to continue running online judicial acts and proceedings.

Just before ending March 2020, Thomas Kurian, CEO of Google Cloud, acknowledged that in Peru the Judiciary branch was using *Google Meet* to continue operating during the nationwide quarantine.[2] In this context, national statistics showed, in general, a massive use of online applications that could allow judges and parties to synchronically act during online hearings and evidence-taking. These technologies embraced two new methods or ways to manage civil proceedings never used before. The first one was using online proceedings to permit parties and judges to interact and develop proceedings remotely (*i.e.*, by means of remote working, remote hearings, and remote evidence-taking). The second one was the implementation of online courts,[3] allowing electronic submission of claims and any procedural act, thus obviating the obligation to physically *be in* or *attend* to any court.

1 https://busquedas.elperuano.pe/normaslegales/autorizan-el-uso-de-google-hangouts-meet-para-las-comunica-resolucion-administrativa-no-000123-2020-ce-pj-1865887-3/.

2 https://cloud.google.com/blog/topics/inside-google-cloud/how-google-cloud-is-helping-during-covid-19.

3 Susskind, Richard. Online courts and the future of justice. London: Oxford Press University, 2019. *See also*, Susskind, Richard. The future of courts. Available on: https://thepractice.law.harvard.edu/article/the-future-of-courts/.

However, the gap in access to technology obstructs a proper implementation of this digitalization, jeopardizing in this way the continuity of the justice service. The digitization of courts and court proceedings could be difficult to achieve if the gap in access to technology is not taken into consideration. Peru, although rich in natural resources, is an extremely diverse and underdeveloped country in many economic fields or activities. The mountainous topology combined with poverty and an inefficient administration for its bureaucratic nature have hindered the spread of much needed technological infrastructure, such as high-speed internet access, digital servers, or platforms. Also, not all attorneys situated in remote locations have the appropriate technological skills or internet access. Though younger Peruvian attorneys were not educated on how to conduct remote hearings and represent clients remotely, they are required to engage with all the protocols and acts so they can learn how to perform the profession. Following a compared experience,[4] the Supreme Court of Peru, in July 2020, issued protocols on how to conduct remote hearings and procedural acts.[5] Despite these circumstances, such as the lack of instruction of lawyers on technological skills, an evident digital gap, as well as the absence of proper judicial policies, the Peruvian Judiciary quickly reacted to the legal community's lack of technologic development with an organized agenda, improving technological mechanisms and bringing new digital solutions in record time. To sort out this difficult situation, the Supreme Court of Peru also authorized that judges must assess each case's needs and the parties' technological capacities in determining whether to conduct the whole procedure remotely or to allow the parties and their lawyers to continue proceedings *in situ* with an obvious restricted access. Concretely, these measures led to the Supreme Court of Peru to: i) authorize remote proceedings and procedures; ii) issue several protocols and guides to assist with technological gaps; and iii) order lower courts to assess the appropriateness of remote proceedings on a case-by-case basis. As these policies are sensible to citizenship, some of these measures were successfully enforced.

Precisely, these pandemic conditions and its effects on society and judicial administration have spurred lawyers and judges to adapt quickly, especially by using videoconference technology or applications, as Dodson[6] *et al.* explain. Although these solutions were expected to ensure continuity of the judicial service, it is undeniable that

4 *E.g.,* during March of 2020, the Judiciary of England and Wales published a guide with procedural rules for lawyers to conduct and perform remote hearings during the Covid-19 pandemic. Published as *Protocol Regarding Remote Hearings,* this document contains important rules for judges, law clerks, and lawyers to perform in the most effective way judicial acts without being *in situ*.

5 *See* Administrative Resolution N° 173-2020-CE-PJ issued by the Supreme Court of Peru allowing the use of digital platforms for conducting remote hearings and proceedings.

6 Dodson, Scott; Rosenthal, Lee H.; Dodson, Christopher L. The zooming of federal civil litigation. Judicature. Bolch Judicial Institute. Vol. 104, number 3, 2020, p. 13.

digital solutions cannot entirely substitute presential activities, such as an effective cross-examination of complex evidence-taking.

3 Judicial Immediacy and Online Proceedings: *Contradictio in Terminis?*

Due to the confinement restrictions mandated by the government, it has been difficult to manage trials *in situ*. This is the main reason why the Peruvian Judiciary has, since April 2020, been relying on remote proceedings as a rule, only carrying *in situ* judicial acts exceptionally like specific evidence-taking. During just the first two months of general quarantine, as Justice Hector Lama declared, 13,000 online trials took place on the *Google Meets* platform. Both mechanisms – remote or virtual proceedings and hearings – set a hallmark of a new era in the Peruvian Judiciary.[7]

But Rule V of the preliminary chapter of the Peruvian Civil Procedure Code establishes that trials and the evidence examination must be performed in front of a judge; otherwise, the acts performed in this way could be null. Based on the immediacy principle,[8] the development of online trials between the parties and the judge are designed to ensure immediate and effective communication in real time. Remote proceedings and hearings can effectively meet the desired expectations of immediacy, as it should not be an obstacle to communication within a judicial process. Yet this has become a challenging task for judges, who have only been familiarized with classic presential or *in situ* proceedings, hearings, and evidence-taking. Now, should we ask why most of the judges did not embraced this change? As the very nature of Law belongs to humanities and social sciences, all legal operators – including judges – were instructed without dialoguing with other sciences or fields of knowledge. Technological changes confront an old model of judicial case management already persistent in this branch. Not only technology could be hard to use or unknown by most of the judges, but the Judiciary of Peru also did not set a clear agenda on how to conduct these procedures remotely before the pandemic. In contrary, in terms of technologic development within the Peruvian Judiciary, there always have been a lack

7 *See also*, Liñán, Luis Alberto. Hacia un proceso civil virtual. En: Justicia digital: Más allá de la COVID-19. Lima: Gaceta Jurídica, December 2020, p. 22; Prado Bringas, Rafael; Zegarra, Franciso. Debido proceso en tiempos de pandemia: En: Derecho de los desastres: Covid-19. Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2020.

8 It is not unfamiliar to witness in civil law procedure codes a set of procedure principles designed to empower judges by means of commanding the parties to perform specific acts. Immediacy principle allows judges to gather all information and evidence from the parties, to be performed or taken with all parties, *in situ* to promote a coordinated interaction. Peruvian civil procedure code regulates this principle in this way.
Rule V. All hearings and evidence taking must be performed before the judge, with no exception. The procedure must be conducted with the less quantity of acts.

of digital applications, software, and its respective instruction revealing all these factors a rigid structure of the procedural model. Curiously, it seemed necessary to be experiencing this pandemic to begin transforming justice into digital justice and therefore, granting access in times of confinement with something else than mere access to internet to search and follow proceedings and judicial acts.

Immediacy principle also implies a necessary shift from a synchronous to an asynchronous case management and development. If the Peruvian Judiciary decides to issue more legislation and promote virtual hearings and proceedings, it will stand as a new way to understand and develop the civil procedure. Even though the Judiciary rely on *in situ* acts, the new normality brought by this pandemic took civil litigation into a new dimension. Now we are talking in terms of online judgements and trials, being more affordable and accessible for the citizenship. The figure or idea of justice shall not be related anymore to a place. Instead, granting access to justice is not a place to be, but a service the Judiciary must offer.

4 Alternatives, Further Solutions and *New Normality* in Civil Justice

Before the pandemic, the access to alternative ways for solving disputes was focused on developing alternative dispute resolution systems (ADRs), such as mediation. The Ministry of Justice had a well-stated agenda to broaden the radius of action of the several mediation centers nationwide. However, the confinement policies implemented by the government seemed to jeopardize all ADR proceedings. A modification to the current regulation of mediation was presented by several mediation centers to promote the use of new technologies in pre-judicial mediation. The proposed amendment encourages mediation procedures to be held online so it can still guide the parties to settle the dispute in a very standard fashion before a court. Also, this modification project proposes the digitalization of all the files and the extension of deadlines for the citations and the designation of the mediator. However, this new mediation procedure is being heavily debated because of the unproven fear that online ADR proceedings could create space for biased thoughts bringing mistakes on the perception of the legal operator or on the eventual agreement between the parties.

The Peruvian Judiciary is running and managing all proceedings, giving priority to the virtual conduction of proceedings. Presential or *in situ* acts have become exceptional just for specific evidence-taking acts. It is undeniable, however, that we are facing a permanent conversion of physical trials into the online courts. Nevertheless, this situation does not seem to suit or satisfy an important branch of judges and attorneys, creating heavy resistances even in a post-pandemic judicial scenario.

In this context, relying on technology is the new path that Peruvian Judiciary will follow in the future. For example, the recently elected Chief Justice of Peruvian Supreme Court, Justice Barrios, stated that artificial intelligence will be the next technological tool to be used by the judiciary branch throughout the country.[9] However, various aspects regarding this instrument must be taken into consideration and we should ask ourselves whether the more technological the Judiciary becomes, the more developed or advanced it will be in a country where the digital gap has been always a problem.

5 Judicial Branch, Modernity and Artificial Intelligence after the Pandemic

Covid-19 served in Peru as a fortuitous opportunity for the administration and judiciary branch to promote artificial intelligence for specific problems related to justice administration.[10] Artificial intelligence serves many justice systems and jurisdictions by the application or conduction of several pre-settled proceedings and decision-making algorithms. Instead of inserting big data on systems and computers, now computer scientists are teaching machines to learn by themselves.

These systems have been used to create judicial decisions in the decision-making process.[11] The filter or criteria to execute these tasks walks toward data processing, like rules and judicial precedents, extracting some previsions or defined notions to solve a dispute. This could reveal that legal operators will try to teach an artificial intelligence system to think, reason, and, finally, to produce a decision by itself.

Software and algorithms may identify rules, precedents, repeated cases and facts, theories, and so on to produce decisions and leave them ready to be signed by the justices of a supreme court. However, this form or method of creating judicial decisions comes with a vast quantity of information that must be processed. It means that databases of laws and precedents should be put in these systems by humans leaving space to error and biased information, and, consequently, biased decisions.

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9 www.pj.gob.pe/wps/wcm/connect/cortesuprema/s_cortes_suprema_home/as_inicio/as_enlaces_destacados/as_imagen_prensa/as_notas_noticias/2020/cs_n-elvia-barrios-erradicar-la-violencia-contra-las-mujeres-05102020.

10 Delgado Suárez, Christian. Inteligencia artificial y el proceso de creación de decisiones judiciales: ¿Hacia un derecho automatizado? En: Justicia digital: Más allá de la COVID-19. Lima: Gaceta Jurídica, December 2020, pp. 31-35.

11 Rissland, Edwina. Artificial intelligence and law: stepping stones to a model of legal reasoning. The Yale Law Journal. Vol. 9, 1990. Available on: www.jstor.org/stable/796679?seq=1. For the Peruvian recent experience, *see also*: https://justiciatv.pj.gob.pe/senalan-que-poder-judicial-tiene-el-reto-de-utilizar-la-inteligencia-artificial-como-apoyo-para-los-procesos/, *see also*, for a *rationale* search engine: https://gestionsij.pj.gob.pe/sentidoFallo-web/?fbclid=IwAR1YoJ_U-f9YGD8hhgdwEAQAiiCdi13DUeNMcFJ8ed0P6JIKsuUPB8-OXKw.

It is hard to believe that artificial intelligence can reason or think even better than human beings (if the first can actually execute this). There is a huge risk of failure in uploading the data to feed the algorithms and systems, created and programmed by humans, by the way.

However, as the main subject of this item just pursues depicting a new scenario and technologies to be used by the Peruvian Judiciary, it can be affirmed that there is a real agenda of judicial policies aiming to introduce these new technologies in the judicial service.

The Covid-19 pandemic has brought several challenges to be faced by all the population and the administration and judiciary branch. Nevertheless, a pandemic like this and its devastating effects within the judiciary branch cannot be dealt with *populism* but with a well-settled agenda in order to expose a damage control, minimize side-effects, and improve possible solutions to permit the machinery of justice still properly operating.

To these ends, such as the use of new technologies brought by the pandemic, both artificial intelligence and data processing (search engines by fields or criteria) arise as the novel tool for judges and lawyers to search, select, and refine judicial decisions pursuing coherence and legal certainty. A recent application regarding a judicial criteria/opinion search engine has been available since 29 January 2021, and as stated by the Chief Justice Barrios, this application will grant the citizenry the access to transparency and certainty of the justification and predictability taking past judicial decisions issued by a specific court as a sample to analyze.

When it comes to search engines, it is well-known that artificial intelligence supports this mechanism by offering algorithmic techniques of search and selection after a massive amount of data have been inserted or uploaded. In fact, the Supreme Court of Peru implemented two years ago a general search engine for judicial decisions, called *Buscador de Jurispudencia Sistematizada*. In this context, besides the novel tool *modulo de sentido de decisiones* mentioned before, the first big step of the Peruvian Judiciary to embrace artificial intelligence began with search engines, data uploading, and algorithmic selection. Within this technology, it is important to notice that a first stage of data processing comes with search engines. These engines actually use artificial intelligence just to order and offer processed information, but not to assess and decide by itself.

However, national scholars seem reluctant to believe that artificial intelligence would substitute the entire process of the judicial decision-making. Supporting this argument, De Trazegnies[12] reveals that artificial intelligence is not meant to substitute the judicial task of justification and argumentation whenever a decision is produced, instead, artificial intelligence could easily be understood as one of other tools set to help, assist, and improve the efficiency in the judicial branch.

12 De Trazegnies, Fernando. ¿Seguirán existiendo jueces en el futuro? El razonamiento judicial y la inteligencia artificial. Ius et Veritas. Vol. 47, 2013, p. 18.

This might be one of the various reasons to avoid taking precipitated decisions or enact legislation involving the implementation or general use of artificial intelligence in the judicial branch.

6 Conclusions

Finally, it might be concluded that Covid-19 unveiled a shapeshifting nature on Peruvian civil procedure. The pandemic brought an important opportunity for judges, lawyers, and scholars to deconstruct, understand, and perform a new civil procedure. Nowadays, civil procedure in Peru can be characterized as a shapeshifting tool because of the duality it brings within. For some specific acts and proceedings, presential or *in situ* acts are necessary and cannot be excepted or acted in a different fashion. Depending on the very nature of some judicial acts, online conduction is mandatory if the public policies to prevent the spread of the pandemic still to be a goal to achieve.

Based on this situation, since March 2020 the Peruvian civil procedure has entered a fast track with two lanes that must properly match or coincide. On the one hand, presential or *in situ* proceedings will continue to be the standard in civil procedure. On the other hand, digitalization and remote conducting will continue to be a method to initiate, conduct, and conclude civil proceedings. Therefore, even though we embraced lately the technological change, the Peruvian Judiciary dealt properly with this new scenario, improving several policies and creating the conditions (or suiting the civil procedure rules) to ensure general access to justice.

As life itself, every single change within the Peruvian Judiciary will be balanced after several trial-and-error stages. As Kuhn stated, it is only in time of crisis when science reaches a peak where a paradigmatic shift in any given field of knowledge needs to be created to ensure a real development.[13]

13 Kuhn, Thomas. La estructura de las revoluciones científicas. México D.F. Fondo de Cultura Económica, 2006, p. 15.

Transformation of Polish Civil Procedure in Light of Covid-19

Piotr Rylski[*]

1 Introduction

Civil procedure in Poland has been subject to continuous transformation for quite some time now, which involves frequent changes to the Civil Procedure Code (CPC).[1] As a consequence, the statute has become less and less consistent, and there are numerous difficulties related to its application in practice due to problems with its interpretation.[2]

Recently, the Polish legislature undertook a major change of the Polish Procedural Code provisions by implementing the Act of 4 July 2019 that covered around 300 articles of the CPC. The Act has been generally in effect since 7 November 2019. It is a fundamental change for the course of the fact-finding proceedings both before first-instance courts and second-instance courts. Numerous critical comments have already been raised in the doctrine, particularly in regard to the possibility of breaching civil rights and freedoms in view of limiting the openness of the proceedings and the right to be heard. The outbreak of the Covid-19 pandemic in Poland in March 2020 put the new procedural solutions to the test, proving their advantages and exposing their faults. This creates the basis for discussion on the importance of procedural regulations in times of crisis as we have now. The purpose of this study is to present the issues that the Polish judiciary needed to tackle in relation to the pandemic and the importance of a well-prepared and well-thought-out procedural law during that process. The experience of other countries shows that the pandemic had a limited effect on the course of court proceedings if the procedural provisions were consistent and offered flexibility.[3] Therefore, the purpose of this study is to answer the following questions: did the Polish legislator create a procedural system that is resilient to shocks similar to the Covid-19 pandemic while reforming the CPC? And, what should be the direction of further changes? Even though the study focuses on the

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1 *See* Ereciński (T.), Grzegorczyk (P.), *On the Path Towards a New Codification of Civil Procedure in Poland*, [in:] Festschrift für Peter Gottwald zum 70. Geburtstag, München 2014, pp. 131-141.

2 *Cf.* Rylski (P.), *Polish Civil Procedure: Yesterday, Today and Tomorrow – Some Remarks about Recent Changes of Procedural Law in Poland*, Bratislava Law Review 2019, No 1, pp. 139-146.

3 *Cf.* Krans (B.), Nylund (A.), *Concluding Remarks on Covid-19 and Civil Justice*, [in:] Civil Justice and Covid-19, Septentrio Reports 2020, No 5, p. 55.

legal regulation and the situation in Poland, it may be of universal importance as the comments raised herein apply to other civil legal systems.

2 Amendments Implemented to the CPC in 2019

In accordance with the assumptions presented in the statement of grounds for the amendment to the CPC of 4 July 2019, the legislator intended to accelerate the court proceedings by limiting the activities performed in the court hearing, and by introducing an incentive to use amicable settlement solutions, negotiations and mediation.

The amendments to the civil proceedings that were implemented by way of the amendment of 4 July 2019 introduced many novel solutions, frequently drawing on the legislation of other countries. The most important specific issues include but are not limited to the following: implementing a mandatory response to the statement of claim (Art. 205^1 § 1 of the CPC), the possibility of entering a default judgement if the defendant fails to meet the deadline for responding to the statement of claim (Art. 339 § 1 of the CPC), a brand new preparatory hearing and the case plan (Arts. 205^4 – 205^{11} of the CPC), the possibility of notifying and summoning parties to the proceedings in a simplified form (Art. 149^1 of the CPC).

Many changes were related to limiting the openness of the court proceedings. First of all, the hearing (an open court session) has become an exception; as a rule, rulings are given *in camera* without participation of parties nor publicity. Second, appeals may be reviewed *in camera* (Art. 373 of the CPC) and an interlocutory appeal was implemented against certain decisions, which was reviewed by the same court rather than by the second-instance court. Key changes also include the introduction of a special proceeding to resolve disputes among entrepreneurs (a business proceeding), where the number of duties imposed on the parties to such proceedings is greater than in the case of ordinary proceedings.

The above changes were implemented a few months before the outbreak of Covid-19 pandemic and clearly, they could not have been dictated by the need to fight its consequences. However, they were implemented to speed up the civil procedure and to make it more flexible. Therefore, they may be evaluated in light of the challenges posed by the pandemic to the judiciary in civil cases.

3 Problems Faced by the Judiciary in Relation to Covid-19

Following the outbreak of the pandemic in Poland in March 2020, courts in Poland, and in other countries, were faced with many challenges that were of major importance for the functioning of the judiciary.

The first one was the actual court lockdown, that is, the restrictions on, or a complete actual discontinuation of, the operation of courts in March and April 2020. Even though, in legal terms, Polish courts never stopped their operations, in reality, many courts were unable to perform their activities during the period. As a consequence, it was impossible, during that time, to hold any hearings in civil cases, even in urgent ones; it also hindered communication with the participants of the proceedings.[4]

The other problem were the rather hasty and chaotic amendments to procedural regulations (see section 4) that were created without careful consideration. Most significantly, the legislator put all prescribed time limits in civil cases on hold between 31 March 2020 and 24 May 2020. Even though it was argued that the changes were dictated by the need to protect the parties, they created more legal concerns and uncertainty than could have been expected.

The third problem was a derivative of the first two problems; notably, there was a massive surge in the backlog in civil cases caused by the court lockdown and the suspension of the prescribed time limits. It needs to be kept in mind that even before the pandemic it took a relatively long time to review a case in Poland (it was frequently three to four years until a final and binding judgement was entered). There is a risk that it will be even longer now. In addition, there has been an increase in the number of certain cases caused by the crisis (including but not limited to staff-related cases and bankruptcy cases). The fourth problem is related to the fact that the Polish legislator failed to create systemic solutions that would allow for reviewing cases suspended during the pandemic, leaving the resolution of those problems to the courtroom practice.

4 Special Solutions Implemented to Fight the Pandemic Effects

With the Special Solutions to Prevent, Counteract and Combat Covid-19 Act of 2 March 2020, the legislator implemented several mechanisms to facilitate the review of court cases. The solutions contained in that Act are periodic (they are only applicable during the state of epidemic; some of the solutions have been extended and may be used for one year after the end of the state of epidemic). Three changes must be highlighted at this point. First,

4 Rylski (P.), *Covid-19 and the Civil Justice in Poland*, [in:] Civil Justice and Covid-19, Septentrio Reports, 2020, No 5, pp. 43-44.

the possibility of holding a hearing online, even when the parties and participants are not in another courthouse building. Second, the possibility of holding any sitting without the presence of the parties (*in camera*), unless either party objected to holding a sitting, within seven days from the notice delivery date. Third, the judges on the adjudicating panel, other than the presiding judge who must be present in the courthouse building, may participate in the proceedings on a remote basis (online).

5 Solutions Adopted under the 2019 Amendment That Make Resolution of Cases Easier during Pandemic

It goes without saying that some of the changes implemented in 2019 and 2020 made the handling of civil cases during the pandemic easier. The changes that may be considered as undoubtedly contributing to such an acceleration are discussed in more detail in the following sections. However, just because they facilitated the review, it does not follow that the changes are accepted in light of other values and rights of the parties.

5.1 Regulations That Limit the Openness of the Proceedings

Limiting the possibility of personal participation of the parties and participants of the civil proceedings during court activities makes the proceedings easier and faster. It is of key importance during the pandemic where direct contact of the court, the parties and the legal representatives should be limited. The courtroom practice shows that Polish courts quickly adopted the changes where all procedural decisions may be made without the participation of the parties. This applies not only to all technical activities, such as adjournment of proceedings, but also to those concerning the subject-related aspect of the case, such as the decision to admit or reject evidentiary motions. The trend to limit the openness of the proceedings has become even stronger during the pandemic when the provisions of the act of 2 March 2020 were implemented (see section 4). This leads to serious concerns that the trend will continue even after we have put the pandemic behind us and that it will become a permanent trend of the civil procedure development in Poland.[5]

5 The Polish CPC is based on the principle of openness and of the oral nature of the hearing, which was historically derived from the impact of codification of law in Russia and France in the 19th century. It differed in that respect from the written procedure under German law, *cf.* Rylski (P.), Weitz (K.), *The Impact of the Russian Civil Judicial Proceedings Act of 1864 on the Polish Civil Proceedings*, Russian Law Journal 2014, No 4, p. 85.

5.2 Combating Procedural Rights Abuse

Unlike in other countries,[6] with the Act of 2019 the Polish legislator implemented, in Article 4^1 of the CPC, an explicit ban on abusing procedural rights. According to that provision, parties to and participants of the proceedings must not use the right provided for in the procedural regulations for purposes contrary to the purpose for which it was intended. In addition to the general definition, the legislator also implemented two types of sanctions for abuse. The first type are financial sanctions imposed on the party abusing its rights (such as a fine – Art. 226^2 of the CPC). The other type is the possibility of limiting the court activities in respect to activities that are a manifestation of abuse.[7] The second sanction may prove particularly effective when reviewing cases during the pandemic and overload of courts. That is because the court is under no duty to respond to certain actions taken by the parties that are an abuse. Those include, among other things, numerous and groundless motions to recuse (Art. 53^1 of the CPC), repeated motions for exemption from the costs of court proceedings (Art. 117^2 § 2 of the CPC) or repeated interlocutory appeals concerning the same ruling (Art. 394^3 of the CPC). In such cases, the court may leave the party's pleadings in the case files without acting on them.

5.3 Written Testimony by Witness

As of 7 November 2019, the Polish legislator also implemented the possibility of taking written testimony from the witnesses (Art. 271^1 of the CPC). Under that regulation, the court may decide that a witness will give testimony in writing; in such a case, the witness must also sign an affidavit. This construct is a real novelty under Polish law as witnesses had only been permitted to give oral testimony before.

However, there are many concerns in practice about using that construct as there are no specific regulations as to what the activity should look like in practice. There was, however, a view expressed in the doctrine, whereby the court should receive a list of questions to the witness from the parties and their representatives; the questions, along with the decision on admission of such evidence, should be passed to the witness, who should respond to the questions asked by the court and by the parties. Using such a form of evidence taking may be useful during the pandemic, particularly in case of witnesses

6 *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness*, (ed.) Taruffo (M.), The Hague 1999, *passim*. *See also* Nekrošius (V.), Simaitis (R.), Vėbraitė (V.), Brazdeikis (A.), *Abuse of Procedure, Delay and Sanctions*, Polski Proces Cywilny 2016, No 2, pp. 203-222.

7 More on that topic in Gajda-Roszczynialska (K.), *Abuse of Procedural Rights in Polish and European Civil Procedure Law and the Notion of Private and Public Interest*, Access to Justice in Eastern Europe 2019, No 2, pp. 53-85.

who are unable to take part in a remote (online) court hearing. However, the legislator did not permit taking evidence by questioning the parties in writing and limited that possibility to witnesses only.

5.4 *Possibility of Interrogation of Parties in a Simplified Manner*

The legislator also enabled a simplified interrogation. According to the newly added Article 226^1 of the CPC, interrogation may take place by calling on the parties to make the relevant statements during a court session or by setting a deadline for presenting a statement in a pleading or using remote communication means provided that they provide security regarding the person who makes the statement.

However, an interrogation is not an evidentiary means under Polish law; rather, it is a means to clarify the standpoints of the parties and to make an opinion. Consequently, it replaces statements made during the court session. As open hearings have been limited, the possibility of examining parties in writing may help accelerate the proceedings.

5.5 *Possibility of Determining Facts without Need for Evidentiary Proceeding*

The amendment of 2019 expanded the number of cases in which the court may make decisions solely at its discretion, without being required to carry out an evidentiary proceeding. These cases are known as judge law (*ius moderandi*) and they are supposed to release the parties, in certain cases, from the effects of failing to discharge the burden of proof. Under the earlier language of Article 322 of the CPC, the court was able to award an appropriate amount in its ruling, at its discretion, upon considering all the circumstances of the case, if proving strictly the amount of the claim was impossible or overly difficult. Now the court is able to do so when proving it is clearly pointless. It applies to four categories of cases: to redress damage, regarding income, regarding the return of unjust enrichment or regarding performance under the life estate contract. Furthermore, in simplified proceedings (cases up to PLN 20,000), the court is now able to evaluate facts that require special knowledge without the need to appoint an expert witness. In such a case, the court may make an evaluation on its own, upon considering all circumstances of the case (Art. 505^7 § 1 of the CPC).[8]

8 Vėbraitė (V.), Flejszar (R.), Izarova (I.), *Access to Justice in Small Claims Procedure: Comparative Study of Civil Procedure in Lithuania, Poland and Ukraine*, International Journal of Procedural Law 2019, No 1, p. 109.

These solutions make it easier to assert claims, which may be of particular importance during the pandemic when access to specific means of evidence is impossible or hindered (e.g. to hear a witness or examine documents). It may be of importance particularly in labour law cases and cases for damages.

6 Solutions That Give Rise to Concerns as to Their Ability to Facilitate the Review of Cases during the Pandemic

One needs to point out at least several solutions that give rise to concerns, particularly in regard to the possibility of their application during extraordinary times, such as the Covid-19 pandemic. These reservations can also be raised in regard to their functioning in the 'normality' but the basic problems manifest themselves during difficult times, such as the pandemic.

6.1 Dismissing Clearly Unfounded Claims

The solution that needs to be pointed out first is the possibility of dismissing clearly unfounded claims during *in camera* and in a very simplified manner, which was implemented in 2019 (Art. 191^1 of the CPC). It is possible if, based on the language of the statement of claim and enclosures, the circumstances relating to the case, as well as publicly known or available facts or facts known to the court *ex officio*, the court finds that the claim is clearly unfounded. Before the amendment, as a rule, the doctrine understood a 'clearly unfounded claim' to be a situation where the evaluation is only to be made based on the assertions of the statement of claim, when the claim would have to be dismissed even if it were assumed that the assertions were true. It was considered to be an absolutely exceptional situation. The judgement is completely unusual because it is not being delivered to the defendant and the statement of reasons, even though it is made *ex officio*, is to be according to a boilerplate (Art. 191^1 §§3 and 4 of the CPC). Only the plaintiff has the right to appeal that judgement and the appeal is reviewed according to the simplified rules set out in Article 391^1 of the CPC. The application of the above regulation, even in 'normality' gives rise to concerns as to its compliance with the right to a fair trial and the right to be heard. It seems particularly dangerous now when access to the court is limited because of the pandemic. Therefore, the solution should not be relied on too frequently and it must not be treated as a remedy to cure the caseload of the courts.

6.2 *Obligatory Preparatory Hearing*

The Act of 2019 implemented a new way of preparing for and organising the proceedings.[9] A rather elaborate mechanism of case management by the presiding judge was implemented (Arts. 205^1-205^{11} of the CPC). The focal point of the new solutions is a preparatory hearing that is supposed to precede a trial. However, the proceedings may end during that hearing (e.g. when a settlement is reached, or following a withdrawal of the lawsuit). The presiding judge may resign from the preparatory hearing only if such a hearing will not help make the case review more effective (Art. 205^4 § 3 of the CPC).

The nature of the preparatory hearing gives rise to concerns. Pursuant to Article 205^5 of the CPC, the preparatory hearing is conducted according to the regulations governing sittings *in camera*. Adhering to the detailed provisions regarding the proceedings in the course of the preparatory hearing is unnecessary if it helps achieve the purposes of that hearing. However, the Act implemented mandatory participation of both parties and their representatives in that hearing. (Art. 205^5 § 3 of the CPC).

The formula of the preparatory hearing and the role of the presiding judge during the hearing give rise to numerous concerns. First, the proceedings are conducted by the presiding judge on his own, even when a panel of judges is required to hear a case. Second, with the mandatory participation of the parties during the meeting subject to sanctions, and the lack of the exact record of the hearing course, there is some uncertainty regarding the actual course of the hearing and it is impossible to check whether or not it was correct. It needs to be kept in mind that an attorney's presence during a case is not required under Polish law and in the majority of cases the parties represent themselves before the court. Third, under the Act, the proceeding may be carried out as a sitting *in camera*, and videoconferencing in a simplified form may only be used during open sessions. This gives rise to a concern as to whether or not the hearing may be held remotely (online) or whether it may only be held in the presence of the party.

7 Problems That Remain Unsolved

Unfortunately, neither the Act of 2019 nor the temporary changes implemented by the Act of 2020 solved the basic problems of the Polish administration of justice that manifested themselves during the pandemic. So far, there have been no systemic solutions in that

9 As to the origins of some of the solutions, *see* Piszcz (A.), *Polish Preparatory Proceedings in Civil Cases: Written or Oral? Lessons to be Learned from Some Other Jurisdictions*, Studies in Logic, Grammar and Rhetoric 2016, No 1, p. 199ff.

regard, or even proposed changes that could be discussed. Therefore, it is necessary to point to areas that have not been adapted yet and the changes required.

7.1 Parties' and Court's Activities Performed Electronically

Neither the parties nor the court are able to take actions on a wide scale via the IT system in Poland. Most significantly, there is no software that would make it possible for the parties to submit pleadings and for the court to give and deliver decisions electronically. Even though the regulations that enable such a system have existed since 2016, it has not been created yet.[10]

That serious failure has become one of the main reasons behind the court lockdown in 2020. Had it been possible for the parties to communicate with the courts in civil proceedings via a special software, in many cases, the pandemic would not have had such a significant impact and it would not have stopped the review of civil cases. It would have probably stopped only some cases that needed a trial; however, it would not have stopped cases that could have been examined on the basis of the parties' pleadings. The failure to implement a universal system for online service, even for the parties' lawyers, was another serious failure. As a result, the traditional post has remained the basic means of communication between courts and the litigants in Poland.

7.2 Online Hearings

Permissibility of videoconference (online) hearings is another issue that has not been solved in a systemic way yet. Currently, under Article 151 §2 of the CPC, the presiding judge may order an open hearing using technical means that allow for the hearing to be conducted remotely. In such a case, the participants of the proceedings may take part in a court session and may take procedural activities in a building of another courthouse. It was argued when the solution was implemented that there must the possibility of checking the parties' identity and of ensuring safe transmission. So far, the judicature excluded the possibility of using private communicators, including in situations where a party is in a place other than a courthouse building (e.g. when they are at home).[11]

Such a regulation is, however, highly impractical during the pandemic. That is why, the Act of 2020 permitted online hearings, also without requiring a party to be in a building of another court, only for the duration of the pandemic (and one year thereafter). It seems,

10 Described in detail in Rylski (P.), see above footnote 2, pp. 140-141. *See also* Karolczyk (B.), *Informatization of the Civil Justice System in Poland: An Overview of Recent Changes*, [in:] Transformation of Civil Justice. Unity and Diversity, (eds.) Uzelac (A.), Van Rhee (H. C.), pp. 99-117.

11 *Cf.* decision of the Supreme Court of 8 November 2019, III CZP 13/19.

however, that there is an urgent need to have a systemic solution and to enable parties to attend court hearings online from the comfort of their home not only during the Covid-19 pandemic, rather than requiring them to attend a hearing in a courthouse building. To enable that, it is necessary to create a special country-wide software that will enable identification of the participants and that will ensure safe connection and transmission of data. As it is, pursuant to the Act of 2020, courts now use various commercial communicators, probably all available on the market. This has led to an incredible chaos and it is an actual hindrance for the parties. The principles of conducting such hearings and the actual possibility of conducting them in each courthouse vary. In principle, there is no possibility of providing the public with the possibility to access such a hearing.

8 Conclusions

Moving on to the conclusions, it is necessary to point out a few key issues.

a. Shocks, such as the Covid-19 pandemic, even though hard to anticipate, may recur in the future. Consequently, it is of significant importance to create a consistent and flexible procedural regulation to combat the impact of such shocks on the proceedings. No chaotic and transitional changes will fill the need. It is certainly better to prepare a real reform of the civil procedure than to use make-shift solutions. The experience of countries that had well-prepared legal solutions in place, including but not limited to those concerning digitalisation of proceedings (such as Brazil, the Netherlands, the United Kingdom or Finland) shows that they coped better with the first wave of the Covid-19 pandemic than Poland.
b. Preparing such a reform is now easier than before the Covid-19 pandemic because there has been a mental change among the judges, legal representatives and parties to the proceedings. There is certainly more acceptance towards the implementation of new technologies and their application in civil procedure than before 2020. It seems that society has realised that there is no other way to ensure good communication between the court and the participants than the electronic way.
c. The transitional procedural regulations, such as the ones implemented in Poland by way of the Act of 2020, must be discontinued as soon as possible. There are serious concerns that those transitional provisions will remain in practice for much longer than needed to remove the effects of the pandemic. Those solutions are unpolished and they hit the basic rights and freedoms of citizens. They are not comprehensive and they do not account for the system of procedural law.
d. The experience of the pandemic should not result in permanent restriction of fundamental principles of the civil procedure, including the principle of openness, oral hearing and access to court. Even though such restrictions have been visible in legislative

changes in Poland for quite some time now, they must not be justified by the need to deal with the backlog of cases caused by the pandemic. It is during such difficult times, as the crisis caused by the Covid-19 pandemic, that adherence to fundamental procedural rights and guarantees is crucial so that the participants of court proceedings who have frequently been hit by the effects of the pandemic are not additionally hurt.

e. It needs to be kept in mind that procedural regulations alone and their shape will not be sufficient without investing in the organisation and equipment of the courts, and in particular in IT equipment and the right software for the courts. Employing adequately trained administrative staff is also important, in particular employing IT specialists, as the implementation of the assumed changes seems simply impossible without their help.

Singapore Civil Procedure and Covid-19

Jeffrey Pinsler[*]

1 Background and the Development of Technology for Court Proceedings

Singapore's procedural process was not as severely impacted as some other jurisdictions because of its pre-existing integrated electronic system of litigation ('electronic litigation'). In 2000, Singapore introduced electronic filing system for the purpose of resolving problems associated with the manual filing and service of documents including delays in filing and service, improper filing, the loss of documents, difficulties in storing information and the resulting delay in access to information sought by lawyers and parties. The new system enabled the electronic filing, extraction and service of court documents and provided an efficient electronic information service. In the course of the first decade of the 21st century, Singapore essentially became a 'paperless court system'. Virtually all documents (including official court documents, interlocutory applications, pleadings, documentary evidence and affidavits of witnesses) are now filed, served and communicated electronically. Litigants in person who do not have the ability or capacity to electronically file and serve documents are assisted by officials at various service bureaus.

As technology evolved, electronic litigation became more sophisticated to meet the demands of the administration of justice. In 2013, the electronic filing system was reconstituted as the Integrated Electronic Litigation System (iELS) or eLitigation. It is a process that leverages on content management systems and e-form technology to offer law firms and court users a single access point for commencement and active management of case files throughout the litigation process. Additionally, it provides functionalities and related services that streamline the litigation process, thereby helping to improve efficiency and enhance access to justice.[1] These advantages have come to the fore in addressing the challenges presented by Covid-19.

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1 For example, parties and their lawyers have access to all documents involved in a case throughout its duration. Dynamic electronic court forms replace PDF and other types of documents. Documents may be completed online or saved for subsequent submission. Proactive management of case files is possible through email, SMS and reminder alerts. More flexibility is provided for the purpose of selecting hearing dates through a calendaring and hearing management module.

2 Adaptation in Response to Covid-19

The need for safe distancing in the courts was substantially assured by the pre-existing electronic infrastructure, which enables lawyers, parties and judges to communicate from private spaces. However, as in other common law countries, the rules governing court hearings and trials require the parties, lawyers and witnesses to appear in court so that evidence is properly presented, and legal arguments are made directly to the judges and judicial officers. One of the first measures was to limit hearings and trials to essential and urgent matters (essentially cases that must be heard quickly in the interests of justice). Hearings for all other matters were adjourned. When assessing whether a matter was essential and urgent, the courts would consider whether the case was time-sensitive or if there were any legal requirements mandating that the matter had to be heard within a specified time frame. The Chief Justice stated,

> We will continue to take all measures to minimise the risk of transmission for judges, court staff, practitioners and court users, while balancing this against the need to maintain access to justice even in these challenging times.[2]

During the period of the 'circuit breaker' (a partial lockdown that commenced in April 2020 to contain the spread of Covid-19),[3] directions were given concerning the conduct of hearings by video conferencing or, where appropriate, telephone conferencing.[4] These measures meant that the traditional process of hearing oral submissions in the Court of Appeal was temporarily replaced by remote conferencing pursuant to the court's discretion to dispense with face-to-face hearings. A large majority of cases during this period was heard remotely.[5] Video conferencing was the default option for case management conferences in proceedings before the Court of Appeal. Alternative possibilities included telephone conferencing and the communication of the court's directions by correspondence. In all matters before the Court of Appeal, it was for that Court to issue directions for appropriate matters to be heard by video conferencing or telephone conferencing. Oral arguments could be dispensed with and directions could be issued through correspondence.

Similar measures applied to the High Court process. In the case of trials, the court could order that the entire trial or hearing, or part of a trial or hearing, be conducted by video conferencing (for example, where only certain witnesses will appear by video conferencing). Where an authorised recording was made using an approved remote

2 "Message from the Chief Justice: The Judiciary's response to the extension of the 'Circuit Breaker' period" (24 April 2020).

3 The Circuit Breaker was extended to 1st June.

4 Registrar's Circular No 3 of 2020.

5 Exact statistics are not available.

communication technology, it would constitute the official record of the hearing. In the case of general interlocutory proceedings before the High Court, video conferencing was also the default option subject to the Registrar's power to order telephone conferencing and to give directions by correspondence.[6] These measures also applied *mutatis mutandis* to the state courts and family justice courts.

The above measures necessitated the introduction of statutory provisions to permit the general use of remote conferencing for the presentation of evidence. Section 28 of the Covid-19 (Temporary Measures) Act 2020 achieved this objective by enabling a witness to give "evidence by means of a live video or live television link that is created using a remote communication technology approved by the Chief Justice."[7] Certain conditions apply. If the witness is a witness of fact (as opposed to being an expert witness), the parties to the proceedings must consent to the use of the remote communication technology. Furthermore, the court must be satisfied that

> sufficient administrative and technical facilities and arrangements are made at the place where the accused person or witness is to make an appearance or to give evidence; and it is in the interests of justice to do so.[8]

Section 28 also provides the court with the power to ensure the operability and integrity of the process of live video or live television link so that the evidence is presented clearly and without obstruction.

An important concern was the accessibility of unrepresented litigants to the necessary technology in remote hearings and the difficulties they might experience in participating through video and telephone conferencing. Therefore, court users in this predicament were encouraged to notify the relevant court registry in advance of the hearing so that arrangements might be made to assist them. For example, unrepresented litigants in family law matters who were unable to attend Zoom hearings from their homes could do so at the designated 'Zoom Rooms' located on premises of the family justice courts, which have Zoom connections to the relevant family judge.

6 Registrar's Circular No 3 of 2020.
7 S 28(1)(a) of the Covid-19 (Temporary Measures) Act 2020.
8 S 28(2)(b) and (c) of the Covid-19 (Temporary Measures) Act 2020.

3 Special Procedure for Obtaining Temporary Relief in Respect of Legal Proceedings Arising from Non-performance of a Contractual Obligation Caused by Covid-19

Quite apart from the hearing process in court, the Covid-19 (Temporary Measures) Act 2020 introduced a new procedure by which a person can obtain temporary relief in respect of legal proceedings if he/she is unable to perform a contractual obligation[9] and his non-performance is materially caused by circumstances arising from Covid-19. The process offers a temporary moratorium from legal proceedings. The matter is determined by an 'assessor' who is on a panel of assessors appointed by the Ministry of Law. Assessors are selected on the basis of their legal knowledge and experience including lawyers, academics and officials. Currently, the process is free of charge. Before the party engages in the procedure, he/she is required to attempt to settle the matter amicably with the other party or parties to the contract.

If the matter cannot be resolved between the parties, the person or entity seeking relief will then apply to the court registrar with a notification for relief accompanied by the relevant documents. The application is made electronically through digital gateways (SingPass and CorpPass) that are available to individuals (Singaporeans regularly use SingPass to access government digital services) and entities. If the court registrar decides that the case is within the scope of the legislation (for example, that the matter involves a scheduled contract), the applicant will be informed and sent a 'response form' or 'response link' for completion by the other contracting party ('the recipient'). The applicant then must electronically serve the relevant documents on the respondent. If the applicant does not have not have access to SingPass and CorpPass or is not aware of the recipient's email address, he may serve the documents by an internet-based messaging system (e.g. WhatsApp) or the messaging system on the website, blog, or social media or networking website owned or operated by the recipient, provided the applicant has corresponded with the recipient via that messaging system regarding the contract. If these methods are not possible, the documents may be served by prepaid registered post. Service must be proved by a declaration of service. The recipient then serves his response (the same measures apply).

Once the court registrar is satisfied that all the necessary steps have been taken, he or she will arrange the appointment of the assessor and the details of the hearing.[10] The hearing itself is conducted through email exchanges. The assessor may request clarifications or further documents by email. If the assessor is of the opinion that the interest of justice

9 In relation to any contract set out in Schedule A to the Covid-19 (Temporary Measures) Act 2020.

10 A hearing may be ordered even if the recipient (who has been served with the necessary documents) has not communicated a response.

would be better served by an online or physical hearing, this will be arranged.[11] If a party to a determination is absent from the hearing, the assessor may dismiss the application or make a determination on the case. If the party had a good reason for being absent, he/she may make an application to set aside the dismissal or determination made in his absence. There is no appeal against an assessor's determination.

4 Resumption of Hearings for Most Cases

On 19 May 2020, the Ministry of Health issued a press release entitled 'End of Circuit Breaker, Phased Approach to Resuming Activities Safely', announcing a controlled approach to resuming activities safely over three phases after the end of the circuit breaker period on 1 June 2020 (consecutively: 'Safe Reopening'; 'Safe Transition'; and 'Safe Nation'). Hearings for most cases resumed from 8 June 2020, although video and telephone conferencing continued to be used when appropriate. Matters that accumulated during the 'circuit breaker' were attended to. The safety and health protocols continued to operate.

Positive feedback was received concerning the use of video and telephone conferencing for the conduct of hearings during the 'circuit breaker' period. There was general consensus that remote hearings were convenient, cost- and time-efficient, and represented an important means by which the courts could sustain access to justice during the pandemic.[12]

5 Conclusion

In conclusion, it is appropriate to cite the following comments of Chief Justice[13] concerning the impact of Covid-19 in Singapore:

> Covid-19 has transformed, perhaps irreversibly, the ways in which we live, work, and interact. In courts around the world, it has accelerated the pace of the technology revolution, particularly in the use of remote communication technology to facilitate the conduct of hearings. Our experience during the pandemic has yielded many valuable lessons that we must now build on to improve our justice system and further enhance access to justice for all who require it. As Singapore exits the 'circuit breaker' period on 1 June 2020, the legal profession will likely be required to operate within a very different external

11 Online hearings are conducted via Webex.

12 Message from the Honourable Chief Justice, Sundaresh Menon ('The Judiciary's response to the exit of the "Circuit Breaker" period') dated 29 May 2020.

13 *Ibid.*

> environment. This may be marked by dampened consumption patterns, rising insolvencies and bankruptcies, realignments of supply chains, heightened concerns about debt and unemployment, and lingering uncertainty about the threat of the virus at least until a vaccine is found. This unfamiliar landscape will challenge conventional business models and methods of working, but it will also present new opportunities, expand several existing fields of work, and inspire innovation both within and beyond the profession. In the months ahead, all of us in the legal profession must do our part to restore and provide relief to a society in recovery. Our response to this challenge will represent the legacy of our profession in the post-pandemic era.

It is now December 2020. Over the preceding months, apart from several days, there have been no community cases of Covid-19 infection in Singapore. The courts have resumed normal operation subject to safeguards such as mask-wearing, ensuring safe distancing between persons and other measures.

Coping with an Outdated and Rigid Civil Procedure in the Era of Covid-19

The Experience of Slovenia

Aleš Galič[*]

1 Introduction

The outbreak of the Covid-19 pandemic in March 2020 caught Slovenia and its justice system by surprise. The unprecedented crisis showed deficiencies in the existing legal framework, both on the (macro) level of organization of courts and court management as well as on a (micro) level concerning tools, available to judges, in individual cases. Concerning the former, the practically total lockdown of courts proved to be sustainable only on a short term.[1] Concerning the latter, Slovenia lacked procedural rules that would enable it to move quickly to at least partial delivery of justice remotely and with the use of modern technologies and online platforms. Moreover, a rigid type of Slovenian civil procedure, which leaves practically no room for a judge to adapt procedure to the characteristics of each individual case and which is generally hostile to judicial discretion altogether, proved to be particularly ill-suited to deal with the new circumstances.

There was no shortage of discussion and initiatives concerning the above issues in Slovenia in the first wave of the pandemic, i.e., in spring 2020.[2] Yet, with the summer break, a (false) impression was formed that the pandemic is a matter of the past, that life was back to normal, and that dealing with civil cases should thus adhere to old, perhaps defective

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1 In the first wave of the pandemic, the lockdown of courts started on 13 March 2020 (*Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih. Su 315/2020 of 13 March 2020) and ended on 1 June 2020 (Sklep o ugotovitvi prenehanja razlogov za začasne ukrepe v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljive bolezni SARS-CoV-2 (COVID-19), Official Gazette, No. 74/20).*

2 *See e.g.* the initiatives and comments of the Slovenian Bar Association, sent to the Ministry of Justice: available at: www.odv-zb.si/koronavirus/prvi-val-objave-marec-oktober-2020 (last accessed 11 January 2021) and Plavšak N., Razumna presoja in razlaga interventnih predpisov covid-19 o poslovanju sodišč [*A Reasonable Application and Interpretation of COVID-19 Emergency Measures Concerning the Administration of Courts*], Podjetje in delo, 2020, No. 3-4, pp. 558-570.

but nevertheless well-trodden paths. Thus, proposals for a reform and modernization of civil procedure and of organization of courts, which were triggered by the negative experiences of the Covid-19 pandemic in spring, were quickly forgotten. This was so until the second wave of the Covid-19 pandemic hit Slovenia, even much harder than the first wave, in autumn 2020. And again, just like the first wave, it caught Slovenia and its justice system off guard and to a large extent unprepared.

2 The Legislative Response to the Covid-19 'First Wave' – The Amendment of the Courts Act in July 2020

As early as in March 2020, i.e., with the outbreak of the first wave of the pandemic, a total lockdown of courts (with very few exceptions for most urgent matters) was swiftly adopted. This brought regular civil litigation practically to a standstill. Yet, the courts' closedown and suspending court proceedings could only be sustainable for a short period of time. Such standstill seriously jeopardizes the individual parties' rights of access to court and to a trial within a reasonable time. Moreover, it also produced adverse effects on a general level as backlogs in the courts (which were, for a long time, a systemic problem in Slovenia) started to accumulate again,[3] whereas numerous law firms started facing problems of liquidity and jobs were lost in the legal industry. The existing legislative framework, which was in place for extraordinary circumstances, such as pandemics, was, and still is, inadequate. It is based on a rigid and 'all or nothing' approach. The urgent matters (as defined *in abstracto* already in the law, leaving no room for judicial discretion in each individual case) were allowed to proceed without any disruption, whereas all others were totally stopped. This was regardless of whether at least a part of proceedings could unfold in writing and thus without causing any health concerns or diminishing the parties' legitimate rights.

The legal basis in Slovenia concerning the operation of the courts in case of extraordinary circumstances such as natural catastrophes and large scale epidemics is set out in Article 83.a of the Courts Act (*Zakon o sodiščih*). Extraordinary measures may be ordered by the President of the Supreme Court, following a proposal by a minister of justice, and may be in place for two months at the most (but can be prolonged by a new decree).[4] The law

3 The Ombudsman's Office Report: SODNI ZAOSTANKI KOT EDEN OD NEGATIVNIH UČINKOV EPIDEMIJE COVID-19 (Backlogs in Courts as one of the negative consequences of the Covid-19 Epidemics), 28 December 2020, www.varuh-rs.si/sporocila-za-javnost/novica/sodni-zaostanki-kot-eden-od-negativnih-ucinkov-epidemije-covid-19/ (last accessed 4 January 2021).

4 *Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih. Su 315/2020 of 13 March 2020. Zakon o začasnih ukrepih v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljive bolezni SARS-CoV-2 (Covid-19)*, Official Gazette, No. 36/20. *See also*: Act Determining the Intervention Measures to Contain the Covid-19 Epidemic and Mitigate Its

provides that in such case, the courts cease operations, except in urgent matters, as defined in Art. 83 of the Act. Insofar as relevant for civil cases, urgent matters are considered to be applications for provisional/protective measures, securing evidence and adopting restraining orders, proceedings concerned with enforcement of child custody and maintenance matters, compulsory commitment of psychiatric patients, as well as insolvency proceedings. Except in urgent cases, oral hearings are not held, procedural deadlines are suspended and judicial documents are not served. In regard to ordinary civil litigation, this means that proceedings come to a complete halt; not only are there no oral hearings, but there is also no exchange of written documents and briefs, no preparatory measures may be adopted, regardless of whether they would concern only procedural acts in writing. Judicial documents are not served and if they (by mistake) are, procedural deadlines start running only after the extraordinary circumstances are proclaimed to have ceased to exist.

The measures that brought regular civil litigation practically to a standstill and were implemented during the first wave of the pandemic are adequate insofar as they prevented the chaos and undue harsh effects in the initial phase of the nation's lockdown. However, after some time already in the first wave of the pandemic, critical voices were increasingly raised, most importantly by the Bar Association (and some other professional associations, e.g. of insolvency administrators[5]). Understandably, a practically total standstill of courts had negatively affected professional operations of numerous law firms. On 10 April 2020, the Bar Association issued a document calling for a graduate opening of courts and for adoption of measures (such as videoconferences and e-service) that would enable a smooth unfolding of all proceedings, not just those which fall under the category of 'urgent'.[6] In view of the Bar, the almost total closure of courts and suspension of practically all of their operations (including such that would not require any in-person meetings) until 1 July 2020 disproportionately restricts the parties' right of access to court and the right to trial without undue delay.

In July 2020, following the criticism that the system is too rigid, Article 83 of the Courts Act was amended.[7] But the amendment is, in practical effect, extremely limited. The only practically relevant change is that the law now empowers the president of the Supreme Court to determine that for certain types of non-urgent matters, the pending proceedings may continue without interruption or suspension in spite of the proclaimed exceptional

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Consequences for Citizens and the Economy; *Zakon o interventnih ukrepih za zajezitev epidemije Covid-19 in omilitev njenih posledic za državljane in gospodarstvo*. Official Gazette, No. 49/20. *Odredba o posebnih ukrepih zaradi nastanka pogojev iz prvega odstavka 83.a člena Zakona o sodiščih. Su 315/2020 of 30 March 2020.*

5 *See* Plavšak N., op. cit., p. 558.

6 Lovšin P., Odvetniki pozivajo k odprtju sodišč [The Bar Calls for the Opening of Courts], Dnevnik, 10 April 2020, www.dnevnik.si/1042926869.

7 Zakon o spremembah Zakona o sodiščih (ZS-M), The Law of Amendment of the Courts Act (Courts Act-M), Official Gazette, No. 104/2020.

circumstances. While this is an improvement, it is insufficient. In particular, it still adheres to a 'one size fits all' approach, as the decision must be adopted by the president of the Supreme Court and then binds all judges in all cases (of a specified kind). This does not allow any measures – by means of case management or/and in agreement with the parties – to be adopted on a level of an individual case, duly reflecting its specific circumstances. Moreover, even the newly available possibilities were used only in a very narrow manner, once the second lockdown of courts was proclaimed on 13 November 2020, soon after the outbreak of the second wave of the epidemic.[8] Nothing much has changed comparing the measures adopted during the first wave, with certain exceptions. For example, labor law disputes concerning unlawful dismissal were put in the list of cases, which may proceed without suspension.

3 A Missed Opportunity to Move Toward e-Justice and Toward More Flexibility in Organizing Proceedings

The earlier discussion concerns the general functioning of courts. The question however is what can judiciary do to cope with the implications and consequences of the Covid-19 pandemic on the level of individual cases. This concerns the possible need for reform of civil procedure in the narrower sense. For example, questions relating to the use of means of modern technology in civil proceedings are put and reassessed in the light of the pandemic. Moreover, the issue of whether the procedural system in place allows for sufficient flexibility and judicial discretion is equally important.

The outbreak of the Covid-19 pandemic clearly showed that modernization, allowing for more e-justice, is urgently needed. For the time being, e-filing of parties' briefs and e-service of judicial documents is not possible in ordinary litigation, whereas the possibility to organize hearings by way of videoconferences is available only to a very limited extent.

E-service of judicial documents and e-filing has long been foreseen in the Civil Procedure Act, however subject to implementation of technical measures. These have not been adopted though. In light of the Lawyers' Associations recent pleas (see supra) however, it must be recalled that it was precisely numerous lawyers, who persistently lobbied against introduction of effective e-service of judicial documents and e-filing of their submissions in Slovenia. Probably, this is surprising for an outside observer, but not for those who know how beloved a tool it is for many lawyers in Slovenia to use avoidance of service of judicial documents as a dilatory tactic.[9] It is only in specific types of procedure that e-service

8 Odredba o posebnih ukrepih iz 83.a člena Zakona o sodiščih zaradi razglašene epidemije nalezljive bolezni COVID-19 na območju Republike Slovenije, Official Gazette, No. 165/2020.

9 For one such case, *see* the decision of the Ljubljana Court of Appeals, No. II Kp 8522/2013 of 12 August 2018. About a perception, which – in practical results – argues that an attorney's foremost duty of care is

and e-filing have already been successfully implemented (for example 'enforcement based on an authentic document', which is a kind of payment order procedure, land register proceedings and insolvency). Regrettably, the legislature has not upgraded such rules to a general standard of civil procedure. During the pandemic, the consequences of this failure were painful.

The legal basis for organizing hearings through videoconferences is provided for (Art. 114a Civil Procedure Act). It is sufficiently broad to include both non-evidentiary hearings (such as preparatory hearings) as well as evidentiary hearings. It is also sufficiently broad (although it has not been used in such a way before) to enable that the 'second limb' of the video-link does not necessarily need to be in a court building (in another court, under the supervision of another judge), but in any 'other place'. The practice has so far been restrictive and it was perceived to be necessary that a video-link can only be established between two courts of law. It has been argued that in particular where witness testimony is contemplated, there should be another judge present in the place where the witness is giving testimony (in order to prevent undue interference with the witness testimony). But this might – in the light of current needs – change.

Finally, the Covid-19 outbreak showed that a more flexible procedural system, which would allow the judge to adapt proceedings to the characteristics of every individual case, would be better suited to cope with the crisis. I am not suggesting that there should be no general measures, intended to be applied uniformly and with a general scope, adopted on the level of legislature or by the courts' administration. Yet, it is nevertheless beneficial if some measures are available to individual judges, who are best placed to determine what is best suited and possible in the circumstances of an individual case. An adequate response by the judiciary is much easier to achieve if the rules of civil procedure are flexible and allow a judge a broad discretion as to how to adapt the course of proceedings to the specific circumstances and characteristics of every case. One should think of rules that would enable the judge, ideally in agreement with the parties or at least after giving the parties the right to comment, to choose between, e.g. either more orality or more written procedure, or between written witness statements or oral testimony, either scheduling preparatory hearings or opting for a written preparatory procedure, more formal methods of service of documents or – in case of cooperative parties – informal delivery with a request to acknowledge receipt in an equally informal manner. All such instruments – if in place – enable a more effective civil procedure already in ordinary circumstances. However, it is inherent in the very concept of 'flexibility' that such rules also give better tools to a

only toward the client, not toward the justice system and sound administration of justice: Čeferin R., Ali pomeni vlaganje pravnih sredstev odvetnika z namenom zavlačevanja zlorabo procesnih pravic? [Does Filing of Appeals with a Purpose of Delaying Proceedings Constitute an Abuse of Rights?], Odvetnik 2010, No. 1, pp. 4-8.

judge, when circumstances suddenly change, even if by an extraordinary circumstance such as an outbreak of epidemics. Cases can differ greatly not only concerning their complexity, a need for oral argument and taking evidence, but also in regard to the attitude of parties' counsel who often participate in a mutually cooperative manner, yet sometimes in a rather hostile atmosphere, with occasional attempts to derail and/or delay proceedings. Hence, even in extraordinary circumstances such as an outbreak of the Covid-19 pandemic, there should be some, albeit limited, room for different treatment of cases, depending on their individual characteristics.

However, practically none of the above possibilities is available in the Slovenian civil procedure. For example, even in agreement with the parties, if there are any facts that are in dispute (regardless of whether these could be established on the basis of documentary evidence), the oral hearing may only exceptionally be waived and replaced by purely written procedure. Unfortunately, the Slovenian Civil Procedure Act still adheres to a rigid procedural regime. This is also the type of procedure that seems to be preferred by a large part of a legal community – judges, lawyers and even some leading academics who persistently portray the idea of procedural flexibility as a 'labyrinth'. The legal community in Slovenia has difficulties in embracing the idea of judicial flexibility and judicial discretion. The majority of judges and lawyers still prefers detailed rules and frowns upon the use of open-ended terms in procedural legislation.

It would exceed the scope of this article to elaborate on this point, but certainly one has to be aware of the inherent link between a general flexibility or rigidity of civil procedure rules on the one hand and the possibility for the courts to adapt to specific circumstances caused by the Covid-19 outbreak on the other. It is thus not surprising that arbitration – where all of the above is a typical feature of a flexibility of procedure – in general coped better with the Covid-19 crisis than the courts of law.

4 Conclusion

The Covid-19 pandemic, in spite of its disastrous toll and grave implications and consequences for the society, has a potential to trigger an improvement in the quality of the civil justice system in Slovenia. It could be an incentive for a much needed reform, modernizing civil procedure and steering it in the direction of more judicial discretion and, in general, toward more flexibility in organizing and conducting proceedings and enhanced cooperation between the judge and the parties. It has a potential to influence the attitude toward procedural flexibility, which is persistently negative in Slovenia. Yet, at least thus far, this opportunity remained unused and the precious time between the first and the second waves of the pandemic, i.e. between the spring and the autumn of 2020 was lost.

Civil Justice after the Covid-19 Pandemic in Taiwan

Kuan-Ling Shen[*]

1 Covid-19 in Taiwan and Its Effects on the Court

Until 31 December 2020, Taiwan had only 56 locally infected patients of Covid-19 and 743 imported ones, adding up to a total number of 799 cases. As local cases occupy a low ratio of the total number, civil courts in Taiwan are not greatly affected by Covid-19; hence, oral arguments are presented as usual, without the usage of online devices. Nevertheless, relevant participants are required to wear masks, the courtroom is installed with clear acrylic sheets, and the number and seats for bystanders are limited. However, considering the extensive worldwide growth of the pandemic, the civil/commercial court is accelerating the formation of a digital court and enhancing online dispute resolution. In addition, extensive labor disputes are prone to ensue during the pandemic period, as large-scale layoffs are taking place in the industries most affected by the disease, for example, travel, lodging and restaurants. The Labor Incident Act (hereinafter LIA), newly and timely enacted on 1 January 2020, can be provided for the situation, and is chanced to examine if its legislative purposes are properly exerted. This article aims for these two subjects, and to further analyze the post-Covid-19 civil judicial system in Taiwan.

2 Accelerated Development of e-Justice

2.1 Online Filing and Electronic Documents

Since 2000, Taiwan has been developing regulations for e-Justice. These regulations relate to two areas of the digitization of the civil procedure: on the one hand, the administration and the course of the proceedings, namely, to introduce the online filing mechanism, the service of electronic trial documents, videoconferencing, and the digital court record; on the other hand, the usage of technology, which includes inspecting electronic evidence

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and online information, to find the truth, and to establish just judgements. Moreover, a recent discussion is considering the possibility of using artificial intelligence to assist the judge in adjudication, hoping to reduce inconsistent judgments and replacing manual text analysis with big data analytics.[1]

Ever since 1 January 2007, financial institutions and the telecommunication industry may apply for a payment order or submit the filing fee for the payment order through the computer and the internet, whereas, after receiving the electronic documents, the court may issue a payment order. This method not only spares the labor cost of the creditor to submit, in person, application and filing fee at the court, but also accelerates the granting procedure of the payment order, as the court is now able to print out payment orders directly by adopting the payment order format and reproducing the contents of the creditor's application that is submitted through electronic documents.

Regarding the litigation proceedings, the court platform's online filing system was set up for the first time at the Intellectual Property (hereinafter IP) court on 20 July 2015. The reason for this is that in IP litigation, the parties are mostly represented by lawyers or patent attorneys, who are usually more willing to file lawsuits online. Attorneys, patent attorneys, and public authorities can file complaints to the IP court for claims in IP administrative disputes through the e-filing transmission system. On 8 August 2016, the Online Filing and Electronic Litigation Documents Service Platform' (hereinafter 'Online Filing Platform') started to expand its coverage of online filing service to civil actions in the courts of first and second instance, as well as the summary and small proceedings. The parties (including the advocates) may file the complaints and the answers with the platform.[2] Starting on 1 August 2018, the legal representative of a minor can file an online complaint for the minor as an authorized representative.

The current Online Filing Platform has not yet been used on certain types of litigation, such as family matters or incidental civil actions.[3] The Online Filing Platform enables the parties not only to sue and answer but also to exchange pleadings. At present, the scope of the pleadings that can be exchanged online includes the complaint from the party or the advocate, the preparatory pleading, the answer, the pleading of amendment or addition of claims, the pleading of initiation of counterclaims, the writ petition, instrument of appeal, reasons for appeal in writing, a notice of appeal, etc.[4] In addition, a written statement or an affidavit of the witness or expert witness can also be proposed through the

1 C.J. Wong, 'The Judicial Yuan endorses electronic documents for e-Justice while introducing AI for digital courts', *iThome*, 31 October 2019, retrieved from: www.ithome.com.tw/people/133854.

2 Address for Electronic Litigation Documents (including Online Filing) Service Platform: https://efiling.judicial.gov.tw/SOL/Login.do.

3 When a wrongful deed is both a crime and a tort, the victim may file a civil case attached to the criminal proceeding; such civil cases are incidental civil actions.

4 The Judicial Yuan of R.O.C., *Decree Yuan Tai Tzuyitzu No.1050017623*, 6 July 2016.

transmission system. However, the current system is not perfect and has not yet reached full digitalization. For example, if the plaintiff intends to initiate an action online, he/she still has to obtain the defendant's consent to use the online platform, whereas the defendant has to send the court a consent form in hard copy first, by which he/she agrees to use the Online Filing Platform.[5] And if the defendant refuses to use the electronic litigation system, the plaintiff is still bound to submit a number of transcripts or photocopies (paper copies) in accordance with the number of the defendants. Such documents shall be delivered to the defendant by the court,[6] or the plaintiff shall notify the defendant with such documents directly himself/herself.[7] This applies to all types of civil litigation, including consumer litigation. In addition, the court costs cannot be paid through the system at the same time.

The prerequisites for using the Online Filing Platform are that the plaintiff has previously applied for use of the court platform and has a user account with electronic signature. A natural person must use the official certificate IC card[8] to apply for an account and a password to use the legal platform. Government agencies, organizations, and legal entities may use a GCA,[9] XCA,[10] and MOEACA[11] certificate with qualified electronic signature.

While the aforementioned Online Filing Platform is not mandatory in civil cases as yet, a mandatory adoption of the online filing system and the online exchange of litigation documents for commercial cases will begin in July 2021. According to Article 14 of the Commercial Case Adjudication Act (hereinafter CCAA), when submitting a pleading to the Commercial Court, the parties, related parties, interveners, participants, or lawyers should transmit the documents via the Online Filing Platform; submissions that are not transmitted through the said system shall be invalid. The intention of this rule is to facilitate the process of commercial cases, expedite the delivery of documentation, improve the efficiency of the trial, and to preserve labor and court costs. Moreover, litigation documents shall also be transmitted via the Online Filing Platform instead of traditional hardcopy delivery, except for cases where such documents cannot be transmitted through the use of technology. However, due to the falsifiable nature of electronic documents, uploading of digital evidence directly through the Online Filing Platform is not allowed in order to avoid disputes regarding authenticity. Whether block chain technology can be used as a method of electronic evidence presentation is yet a question under discussion.

5 Consent forms available at: https://ipc.judicial.gov.tw/tw/cp-627-4089-92498-091.html.
6 Art. 119 (1) of the Civil Procedure Law.
7 Arts. 265 to 267 of the Civil Procedure Law.
8 A smart card: a plastic card containing a microchip that enables certain services for the holder. An official certificate IC card for natural persons is something (though not exactly) like a smart identity card.
9 Government Certificate Authority.
10 Mixed Organization Certificate Authority.
11 Ministry of Economic Affairs Certificate Authority.

2.2 Virtual Hearing

According to Article 305 (5) of the Taiwan Code of Civil Procedure (hereinafter CCP), the examination of witnesses via videoconferencing is permissible, if the court considers it appropriate, and technical audio/video equipment is available to simultaneously transmit the examination of witnesses in sound and image, directly between the location of the witness to be examined and the court concerned. The provision for the examination of witnesses applies accordingly to the examination of the expert (Art. 324 of the CCP) and the parties (Art. 367-3 of CCP). Other evidence (documents, inspection) is not admissible by videoconferencing.

Taiwan has, however, yet no stipulations regarding the civil litigation that could allow oral argument via videoconferencing. The current regulations on distance hearing are limited to the hearing of witnesses and expert witnesses. The parties or their representatives must appear before the court concerned to perform oral arguments; however, if a party is summoned as a witness, a virtual hearing is permitted. Till this day, videoconferencing for virtual hearing is only possible for family and IP matters (Art. 12 of the Family Act and Art. 3 of Intellectual Property Case Adjudication Act).

During 2019, prior to the outbreak of the Covid-19 epidemic, the Draft Amendment to the CCP had been introduced to allow videoconferencing for all civil matters. The pandemic accelerated the legislation and the preparations in court. Considering the possible expansion of the epidemic and the need to restrict the parties from attending court hearing sessions, on 30 December 2020, the Legislative Yuan passed the draft amendment to the CCP. If technological equipment is available for the court and the parties, legal representatives, lawyers, assistants, or other parties related to the proceedings to use for simultaneous transmission of audio and video, which enables a live hearing of a case, and is deemed appropriate by the court, the court may, on petition or on its own initiative, hear the case with such equipment (Art. 211-1, 272 of CCP). However, in order to protect the parties' right to a public trial, the court should give the parties an opportunity to express their opinions before ruling on the use of virtual hearings.

The videoconference for the oral proceedings will not violate the principle of publicity if the court does not hold the videoconference in a closed office room. However, while the court may use technological devices to hold oral arguments in the courtroom without the parties being physically present, this does not mean that live streaming to the general public is permitted. If the court in question could directly perceive and directly discuss the statements and lectures of the parties through the electronic transmission of images and sound, the principle of orality and immediacy would not be violated either. An even more complicated question relates to the admissibility of live television transmission of the oral proceedings before the Supreme Court and lower courts, which has recently been hotly debated in Taiwan.

3 Enhancing ADR and ODR

In Taiwan, there are three types of Alternative Dispute Resolution (hereinafter ADR) according to their operating entities. The first type is operated by the courts and is called 'judicial ADR'; the second type is operated by the executive branch and is called 'administrative ADR'; and the third type is operated by private individuals and is called 'private ADR'.

The 2017 National Conference on Judicial Reform came to the conclusion to strengthen the private ADR, to integrate it with the judicial ADR mechanism, and to establish a multitier dispute resolution so that the dispute may, in any point of the judicial proceeding, reach a certain level of settlement by the ADR mechanism, thus, enhancing the efficiency of the judicial system.[12]

As a result, the LIA set up the mechanism of pretrial (mandatory) mediation. As mentioned previously, a specific Labor Mediation Committee and mediation procedure are specially devised to increase the prospect of a successful mediational settlement and a smooth continuation to the litigation if the dispute could not be resolved by mediation (See IV for more information).[13] In addition, in order to handle commercial cases more effectively, the CCAA, coming into force in July 2021, also set down pretrial mediation by the court for commercial cases.[14] Moreover, CCAA stipulates that the court may, when appropriate, inquire of the parties about the possibility of settling, transferring the case to mediation, or submitting the case to arbitration to resolve disputes, therefore encouraging the parties to seek ADR mechanisms.[15] CCAA also provides a possible conversion between litigation and arbitration; if the parties enter into an arbitration agreement during litigation, the court shall, on petition or ex officio, stay the proceedings and order the plaintiff to submit the case to arbitration within a designated period of time.[16] It could be expected that such an ADR system can provide for the labor disputes and commercial disputes arising from the pandemic.

Before the outbreak of the pandemic, e-commerce was already a common practice. According to the *2019 Annual Statistical Report on Consumer Complaints*[17] issued by the

12 Presidential Office of R.O.C., *Report on the National Conference of Judicial Reform*, 8 September 2017, pp. 66, 102, 107, 124, retrieved from: www.president.gov.tw/File/Doc/1754f2f0-c60d-4de1-a2e3-4c967610bcaa.

13 K. Shen, 'Reconstructing labor mediation proceedings – multi-tier dispute resolution and procedural conversion – record of civil procedure seminar no. 139', *China Law Journal*, Vol. 64, No. 253, January 2019, pp. 147-204.

14 Arts. 20 (1), 66 (2) of CCAA.

15 Art. 61 (1) of CCAA.

16 Art. 61 (2) of CCAA.

17 Consumer Protection Committee, *2019 Annual Statistical Report on Consumer Complaints*, 1 July 2020, retrieved from: https://cpc.ey.gov.tw/Page/42F38F19BFB7AB5F/5544abfc-e4bb-47a6-a22a-cb6de2470f38.

Consumer Protection Committee of the Executive Yuan of Taiwan, the five most complained industries are, in sequence, telecommunication, real estate, recreation, mobile phone, and online shopping; besides, three of the top five complained enterprises are e-commerce platforms (Shopee, Momo, and Yahoo Buy), while two of the three rank the most and second most complained businesses. During the epidemic period, the e-commerce industry received a tremendous boost. As a consequence, e-commerce disputes are no longer limited between the business and the consumer (B2C); in fact, cross-border disputes, disputes between business and business (B2B), as well as disputes between consumer and consumer (C2C) are all likely to arise. The Executive Yuan of Taiwan amended the *Consumer Protection Framework for Ecommerce* in 2017, according to Point 9 Consumer Dispute Handling, "Consumers should have access to a fair, effective, timely, economical, transparent and convenient mechanism to resolve disputes arising from domestic and cross-border transactions." Moreover, Point 9 requires business operators to set up (a) internal complaint handling mechanism and (b) external dispute handling mechanism. Regarding the demand for internal complaint handling mechanism, some websites have already set up online complaint and customer service mechanisms for the consumers. By contrast, though it is stipulated by Paragraph (b) that "Business operators shall set up alternative dispute resolution mechanisms provided by impartial third parties to handle disputes between the business and the consumers", and that the mechanism 'should be independent', prior to the pandemic, there was no well-functioning Online Dispute Resolution (hereinafter: ODR) platform in Taiwan. However, as Taiwan is now facing a proliferation of potential disputes due to the rapid growth of e-commerce under the impact of the pandemic, the question of how to structure and accelerate the construction of a public ODR platform is currently hotly debated.

4 Labor Disputes and Collective Actions

Though the pandemic situation in Taiwan is relatively mild compared with the situation abroad, according to the Labor Ministry, the unemployment rate in Taiwan is nonetheless suffering an incessant upsurge. From February 2020 to May 2020, the rate rose from 3.7% (443,000 people unemployed) to 4.07% (486,000 people unemployed); at the end of June 2020, about 30,000 people were forced to take unpaid leave or time off. The tourism industry and aviation industry are especially stricken by the pandemic. As a result, a growth in the number of labor disputes is to be expected. Although the pandemic was not anticipated during the legislation of the LIA, the LIA was used to dealing with a large number of labor disputes arising from the pandemic. Such labor disputes were handled with speed through the help of pretrial mediation. So far, LIA has worked quite well.

4.1 Multitier Dispute Resolution for Labor Disputes

The LIA adopts the mechanism of multitier dispute resolution, and gives prominence to the pretrial mediation procedure. The mediation procedure is conducted by a Labor Mediation Committee consisting of one judge and two professional mediators who are equipped with expertise or experience in labor relations or employment affairs (Art. 21 of LIA). This formation is designed to include both legal perspectives and specialized knowledge in the relevant fields.

If the parties are unable to finalize the details of their agreement through mediation, then, with the consent of both parties, the Labor Mediation Committee may propose the terms of mediation, to which both parties would be bound, in order to avoid litigation. This is the so-called Med-Arb model. In addition, in cases where the parties cannot reach an agreement, the mediation committee may take all circumstances into consideration, balance the interests of the parties, and thereafter, on its own initiative, propose a resolution subject to the main intent expressed by the parties. In cases where neither party raised an objection within a 10-day time limit, the mediation shall be deemed successful in accordance with that proposed resolution. However, if one of the parties raises objection, the mediation proceeding will reach its end, and shall be continued with a litigation that is heard by the same judge as in the Labor Mediation Committee. By this means, labor disputes can attain efficient and effective resolutions. For example, after the EVA Air flight attendants' strike in June 2019, a labor dispute regarding unfair limitations on bonus and staff tickets arose. Regarding this dispute between the Flight Attendants Union and EVA Air, the Taoyuan District Court formed a Labor Mediation Committee, and through the assistance of labor experts, the dispute was quickly settled (under consideration of the impact of the epidemic on the aviation industry) through the mechanism of mediation within about 100 days. Owing to this expeditious resolution, labor relations were restored to harmony at the soonest possible time; hence the employer and the employee were able to address together the recent impact on the aviation industry that is caused by the Covid-19. In this instance, the legislative objectives of the LIA – professionalism, appropriateness, and promptness – are aptly realized.[18]

4.2 Collective Actions for Labor Disputes

In order to make the collective actions for labor disputes more effective, and to obviate the need for other victims, who have not joined the action in time, to sue separately, as

18 The Judicial Yuan of R.O.C., *Press Release: Labor Dispute between the Flight Attendant Union and EVA Air Reached A Successful Mediation Resolution*, available at: www.judicial.gov.tw/tw/cp-1888-196925-30730-1.html.

well as to avoid conflicting findings in the judgment of common issues, there are some novel regulations regarding labor collective actions according to the newly enacted LIA.

According to Article 41 of LIA, when the labor union is appointed to initiate an action for its members, pursuant to Article 44-1(1) of the CCP, the appointed plaintiff may file additional claims before the end of oral arguments in the first instance trial, and request a declaratory judgment to confirm the existence of the common prerequisite regarding the claim and legal relationship between the appointing persons and the defendant.

The court should give priority to such declaratory claim to conduct oral argument and adjudication; moreover, the court may stay the proceedings of the original litigation before the arrival of a judgment for such declaratory claim. The reason why the court may give priority to adjudicate common issues (such as whether the employer has violated labor laws) is that, when the appointed labor union litigates on its members' behalf, it is asserting the individual claims of its members in a collective manner. This design is inspired by the German Capital Markets Model Case Act (KapMuG)[19] as well as the Model Declaratory Action, which was implemented in 2018 in section 606 *et seg* of the German Code of Civil Procedure. Yet it differentiates itself from its inspirer in that the labor union may be the plaintiff and file an action for payment directly; in addition, during such action for payment, the plaintiff may press an additional claim to confirm the existence of common prerequisites, and shall be tried with priority. This way, the benefits of the workers are protected more thoroughly, as the workers can be saved from the troubles of bringing individual actions.[20]

Additionally, the LIA strengthens the public notice and adopts an opt-in system; the court may publish a notice allowing other employees who share common interests with the plaintiff to join the action within a designated period of time. However, unlike Article 44-1 of CCP, the appointing parties may not be a member of the appointed labor union in order to increase the possibility that all relevant disputes are resolved in one litigious proceeding. In addition, court costs are reduced for the worker. If a worker or a labor union initiates an action or files an appeal for the confirmation of the existence of employment relation, wages payment, pensions, or severance package, two-thirds of the court cost may be temporarily waived (Art. 12 of LIA). Moreover, in cases where a labor union initiates a collective action, and the price or value of the claim is more than one

19 Act on Model Case Proceedings in Disputes under Capital Markets Law, available at: www.gesetze-im-internet.de/englisch_kapmug/index.html.

20 With respect to the additional declaratory claim to confirm the existence of common prerequisites, see legislative reasons for Art. 41 of LIA, available at page 30 of: www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiPxrXEjNXtAhUSE6YKHWcrAVcQFjACegQIAhAC&url=http%3A%2F%2Fjirs.judicial.gov.tw%2FGNNWS%2Fdownload.asp%3FsdMsgId%3D66864&usg=AOvVaw36aVp95u2sdgdY7zykCqqq.

million New Taiwan Dollars (approximately 33,000 USD), the court costs of the excess portion of the claim shall temporarily be waived.

5 Conclusion

Covid-19 has changed the way people live their lives, and has affected the way disputes are handled, more specifically, it accelerates the digitization of dispute resolution. It is foreseeable that the number of disputes arising from the epidemic will increase. The trend of the future is how to use technology to reduce the burden of the court and the time as well as expense of the parties, and to deal with disputes more quickly, economically, and effectively. Nevertheless, besides advocating the mechanism of ADR or ODR, should the litigation system not be improved as a whole, therefore striking a balance between the public and private dispute resolution mechanisms?[21] Will the boundaries between judicial ADR and administrative or private ADR become blurred when there is no distinction being in or out of the substantial court, and the only difference is being online or offline? What role will the court play in resolving disputes in the future? These are all topics worth further consideration.

21 B. Hess, *Privatizing Dispute Resolution and Its Limit*, 1st Edition, Nomos Verlag, 2019, pp. 45-46.

The Impact of the Covid-19 Pandemic on the Civil Procedure in Uruguay

Santiago Pereira Campos[*]

1 The Uruguayan Civil Justice System in the Latin American Context

To understand the impact of the pandemic on the Uruguayan justice system, we make a brief reference to its characteristics in the Latin American context.

In 1989, Uruguay reformed its civil justice system completely. It went from a totally written non-transparent, slow system lacking immediacy to a system by hearings, with full immediacy and publicity. Uruguay was the first country to adopt the guidelines of the Model Civil Procedure Code for Ibero-America, elaborated by the Ibero-American Institute of Procedural Law. This reform meant a great advance and it positioned the country as a benchmark for the other civil justice reform processes that have been taking place in almost all Latin American countries in the last 30 years. The judiciary system in Uruguay has a remarkable reputation, having been ranked among the most independent and reliable both in Latin America and worldwide.[1]

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1 As an example, in the Rule of Law Index® 2020 of the World Justice Project international survey, Uruguay has been rated the world's 22nd in the Rule of Law Index ranking and is Latin America's highest-ranking country, followed by Costa Rica (25th) and Chile (26th). Specifically with regard to lack of corruption, Uruguay is first in the region and 22nd in the world. In Civil Justice, where impartiality, accessibility, and lack of unjustified delays are measured, Uruguay ranks first in Latin America and the Caribbean and 16th in the world (Report available online at: https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2020#:~:text=Featuring%20primary%20data%2C%20the%20WJP,Civil%20Justice%2C%20and%20Criminal%20Justice).
Similar conclusions may be drawn from the Global Competitiveness Report 2019 of the World Economic Forum, which ranks Uruguay 24th in judiciary independence among 141 countries of the world (The full report may be accessed online at www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf).In the Corruption Perception Index of Transparency International, Uruguay ranks 21st in the world, among 180 countries (Data available online at www.transparency.org/cpi2019?/news/feature/cpi-2019).

2 The Arrival of the Pandemic to Uruguay and the Supreme Court of Justice First Responses

On 13 March 2020, the first cases of Covid-19 were detected in our country, with the immediate declaration by the Executive Power of the status of sanitary emergency, with several measures to reduce the propagation of the virus. In view of the declaration of sanitary emergency, the Supreme Court of Justice issued a resolution establishing an extraordinary judicial recess starting 14 March 2020. Following that resolution, the Supreme Court declared as nonworking days (the procedural deadlines do not run, and the judicial offices are only open for extremely urgent cases) the period between 14 March 2020 and 18 May 2020, establishing the suspension of procedural deadlines and judicial actions, except for the jurisdictional activities that were extremely urgent.

In light of certain doubts raised about the computation of procedural deadlines and to give legal certainty to judges, lawyers, and litigants, the Legislative Power passed Act 19.879, declaring, on an interpretative matter, that all time periods (including expirations and prescription periods) were suspended during the judicial recess.

From mid-March 2020 to mid-May 2020, the courts in Uruguay only operated for cases of genuine urgency (for example: domestic violence, adoption, provisional measures, children's and adolescents' cases, criminal and adolescents' proceedings with persons deprived of liberty, etc.).

In May 2020, the Supreme Court announced that the judiciary was organizing itself in order to return to judicial activity, establishing the 'Agenda Web' (Digital Schedule). With this 'Agenda', all the activities that required face-to-face attendance in the court´s office had to be booked in advance by the interested parties. The aim of this measure was to avoid overcrowding in the offices and to be able to follow possible transmissions in case there was an outbreak in the judicial power.

On 14 May 2020, the end of the extraordinary judicial recess from 19 May was announced, bearing in mind that the attention to the public in the offices would only be carried out by appointment through the *Agenda*, and following the safety and hygiene protocol applicable to all offices of the judiciary (for example, social distancing, hand washing, or, when appropriate, hand sanitizer, facemasks, etc.)

On 19 May 2020, the 'new normal' began with the resumption of judicial services in all areas, with strict sanitary measures in place.

It is important to note that until November 2020, although in neighboring countries (Argentina and Brazil) the pandemic situation was especially serious, in Uruguay it was absolutely controlled, with a very low number of cases and deaths. Therefore, following the protocols and using the 'Agenda Web', Civil Justice was able to operate again in a fairly acceptable way in the new normal, with a large number of face-to-face hearings and a small number of virtual hearings, always following strict health protocols.

In December 2020, the pandemic situation worsened in Uruguay, with a substantial increase in cases, deaths, and people in ICU. Hence, the Supreme Court of Justice, as from 18 December 2020, declared non-working days the procedural deadlines, generating a substantial decrease in judicial activity.

From 24 December 2020 to 31 January 2021, the ordinary judicial recess was held. Every year, on those dates, the judiciary paralyzed its activity, except for especially urgent and serious cases. Given the significant increase in Covid-19 cases at the end of 2020, it is expected to increase much more in the first months of 2021. Therefore, the civil justice system must face enormous challenges.

3 The Use of Technologies by the Judicial Power

Our procedural rules have not been adapted specifically for the pandemic due to the fact that they generally allow the use of technologies in the procedures.

In recent years, electronic notifications have been developed, as well as the online follow-up of cases, and the holding of hearings for witness or expert declarations by videoconference in some extraordinary situations. The audio recording of the hearings is being implemented, through a system called 'Audire', with the aim of eliminating the record in writing. We have not implemented yet a full electronic record (that includes all written documents) nor do we have currently a system in the judiciary that allows filling of documents via web (as we do have in the public administration in general). Therefore, although Uruguay ranks second in Latin America in the ranking for government readiness for artificial intelligence (Oxford Insights International Development Research Center), this is not the situation in the judiciary. These are all measures that I believe grant better access to justice, but impose the need to train the court employees, as well as the judges and lawyers in the use of these technologies. The resistance to the use or implementation of these new technologies is mostly due to lack of proper training in their use. The deficiencies in the technological development of our civil procedural system become serious weaknesses in the context of the pandemic and require a strong commitment to strengthen the entire justice system with adequate management and introduction of higher levels of technology.

4 The Celebration of Hearings in 'the New Normal'

The videoconferencing systems that Uruguay had implemented before the Covid-19 pandemic were fundamentally aimed at solving special situations in which the declarant was far away from the judicial headquarters.

The health emergency brought up new challenges arising from the need for physical distancing. Taking a further step in the use of this telematic means of instantaneous transmission of audio and video, it was proposed to carry out the legal proceedings by computer applications for commercial or personal use, such as Skype, Zoom, Microsoft Teams, or similar applications. Accordingly, the Supreme Court of Justice through Circular No. 44/2020 dated 24 March 2020, by which judges are urged to comply with the telework measures arranged, hold the 'amparo'[2] hearings by the Zoom application, and postpone presence-based performance.

These applications have the advantage of avoiding travel, with the cost and time savings that this entails; however, they can also present disadvantages, such as the problem of how to prove the identity of the person who participates in the hearing, the quality of communication, and eventual weakening of the principle of immediacy. Within the framework of this situation, the first hearings were held under this new modality. Moreover, the Supreme Court established by Resolution No. 33/2020 dated 14 May 2020, the beginning of a pilot plan for videoconference hearings in Legal Courts in First Instance regarding Civil Matters, and Legal Courts in Administrative Dispute with its Offices stated in Montevideo. These institutions are allowed to summon telematic hearings, unless there is an objection by one of the parties.

The other matter taken into consideration on authorities' behalf was the collection of proof. In 2013, the Supreme Court has authorized[3] the collection of proof through videoconference. This resolution allowed the courts the possibility of collecting evidence through videoconference, such as party statement, testimonials, and expert's evidence, when relevant, especially in matters of social relevance.[4] Regarding the experience, taking into account all said, various scenarios had taken place:

a. Some hearings effectively took place virtually, with the explicit or implicit agreement of the parties and/or their lawyers;
b. Some judges argued that this virtual system infringes immediacy principle, and they ordered the holding of the hearing with the presence of the parties in court with strict sanitary measures;[5]

2 The 'amparo' procedures are those in which the urgent protection of a constitutional right is claimed.

3 Resolution No. 7784, dated 9 December 2013.

4 Refers to Arts. 152, 160.6 and 183 of the General Code of Procedure; as well as Arts. 135 and 198 of the Criminal Code of Procedure.

5 For example, Civil Judge of 9th Turn dictated Decree No. 902/2020 that stated, "Immediacy Principle (basic at processes taken under hearings), requires personal and direct contact between Judges, parties, witnesses and other auxiliaries; and even with objects of the process (documents, reports, etc.). (…) Immediacy assumes necessarily contact of the judge with every other protagonist of the hearing (party, attorneys, witnesses, experts). This becomes inevitable at the time of weighing up attitudes, gestures and reactions of every intervening human being. Of that, and nothing else is referred, when immediacy is spoken of."

c. The remaining hearings were also developed with the presence of the parties in court with strict sanitary measures, due to the lack of agreement between attorneys at the time of proceeding.

Without prejudice of what we have just mentioned, presence-based hearings are still taking place in Court Offices. However, they have been suited to the current context, with the aforesaid protocol including avoidance of agglomerations, social distance between the parties, the judicial clerk, and the judge in the Court Office, indicating the presence of only one lawyer, forbidding the entrance of people who are not part of the process (for example, family or public in general), scheduling witnesses so that they are allowed to testify at separate times, as well as the traditional and general actions that have been brought up of social distancing, hand sanitizing, room ventilation, and face masks.

Web scheduling also plays an important part at the time of organizing parties' presence, in order to encourage the control on the number of individuals set at Court Offices.[6] The great challenge as of February 2021 will be how to implement virtual hearings in a generalized way, with the appropriate controls and guarantees for the parties. This will require a new regulatory framework, preferably from a legal source. On 22 April 2020, The Uruguayan Bar Association presented a bill to Parliament, which is currently under consideration, to promote the use of technology in judicial procedures: presentation of online pleadings, advanced electronic signatures, hearings by videoconference, etc. Unfortunately, the bill has not yet been debated. Given the worsening of the pandemic, at the end of 2020, the Uruguayan Bar Association formally asked the Parliament for the urgent treatment of said bill. Likewise, the Committee on Procedural Law of the Legislative Modernization Program of the House of Representatives, which I have the honor to chair, is working in the same direction, promoting the legislative treatment of technological solutions.

5 The Future of the Civil Procedure Regarding the Implementation of Technologies

There is no doubt that in order to face the challenges of the coming months, measures must certainly be supported by the presence of technology. The mechanisms established – some of them dating back to almost 10 years – become especially relevant in the current context: implementation of virtual notifications, communications, and notices; remote file following (through Court's website and/or an application created for mobile

6 Every aspect of the new modality regarding hearings is settled in the referred Resolution 33/2020 of the Supreme Court, dated 14 May 2020.

devices, parties are able to trace the file's process as well as be informed of other facts of interest); videoconferences through various platforms (Zoom, GoogleMeet, Microsoft Teams, etc.); virtual scheduling (web scheduling plays an important role at the time of organizing parties' presence in order to encourage the control of the number of individuals set at Court Offices). These technological tools have reduced the physical presence at court of attorneys, parties, witnesses, and every other individual involved in the judicial process, however maintaining the main cornerstones of the Uruguayan system.

A second Covid-19 wave has broken out in Uruguay, resulting in a clear case increasing trend. Considering this scenery – and assuming numbers will still be rising in the months to come – all the measures mentioned should be strongly sustained, just as novel ones should be also considered. Judicial authorities have already announced the creation of a remote office to enter new files (presence based nowadays), which will allow the assigning of an identification number to each of them, as well as the specific competent court for each case. This mechanism will be done through a website, where parties will be authorized to upload several documents regarding the case, including certain evidence and the first brief with details of the case. The implementation of this matter – as well as avoiding individual presence, a relevant fact nowadays – will accelerate the process due to advanced connection with each court, saving time and further administrative management. It is expected that during 2021 the use of technological tools will be strengthened in the Uruguayan civil justice system. Especially the improvement of the telematic hearings and the electronic file would be essential. This requires a significant investment that is not foreseen in the budget of the judicial power, which is quite restrictive. After the pandemic, virtual court hearings are likely to coexist with face-to-face hearings. Hopefully, it can be inferred as a lesson learned from the pandemic that we need to provide adequate alternative mechanisms and training in skills and abilities so that, with the help of technology, litigation can be developed without the need for physical presence in court.

To conclude, the low number of Covid-19 cases that Uruguay had from March to November 2020, allowed civil justice to function again in the new normal, following strict necessary protocols. Those months, perhaps, were not sufficiently used to develop the technological tools that are needed now to face an exponential increase in cases. Hopefully, we can rise to the challenge.

Covid-19 and American Civil Litigation

Richard Marcus[*]

1 Introduction

As it has in the rest of the world, Covid-19 has had a marked impact on civil litigation in America. In March 2020, the American Congress passed legislation to address many aspects of the Covid-19 crisis, including provisions about court operations, and the American rulemakers have been looking carefully at the civil litigation rules for our federal courts since then.[1] The ultimate outcome remains uncertain, but the contours of possible change are emerging.

Our editors have asked us to consider whether there is a 'new normal' in prospect. Actually, some judges think that it has begun to arrive. For example, an American judge wrote in June 2020 that "[c]ourts are beginning to recognize that a 'new normal' has taken hold through the country in the wake of the COVID-19 pandemic."[2] Whether that proves true, it is surely true that "[t]he pandemic threw American legal practice into disarray almost overnight."[3] Some view this development as an opportunity. Thus, Judge Fogel, former Director of our Federal Judicial Center, has written "[i]t would be disappointing if these [emergency] measures were abandoned when the current circumstances have passed," adding that "crises can catalyze innovations that endure long after a crisis itself has ended."[4] Whether or not this crisis is a good thing, the Chief Justice of Texas has forecast: "We're going to be doing court business remotely forever."[5] And the title of

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1 I serve as Associate Reporter of the US Judicial Conference Advisory Committee on Civil Rules, which develops proposals for changes in procedure for civil litigation, and have been involved in this process.

2 In re Broiler Chicken Antitrust Litigation, 2020 WL 3469166 (N.D. Ill. 25 June 2020); *see also Faford v. Grand Trunk Western R. Co.*, 335 F.R.D. 503, 505 (E.D. Mich. 2020) (referring to video depositions as the 'new normal').

3 S. Dodson, L. Rosenthal, & C. Dodson, 'The Zooming of Federal Civil Litigation', *Judicature*, vol. 104, no. 3, 2021, p. 13.

4 J. Fogel, 'Expanding Electronic Access to the Federal Courts: the Pandemic's Unexpected Opportunity', *National Law Journal*, 21 April 2020, p. 1. In a similar vein, the Chief Justice of Michigan told Congress in July that "now we know that innovation is possible, we have a unique opportunity to create long-term and much-needed change for our justice system." A. Reed & M. Alder, 'Zoom Courts Will Stick Around as Virus Forces Seismic Change,' *Bloomberg Law News*, 30 July 2020.

5 A. Reed & M. Adler, 'Zoom Courts Will Stick Around as Virus Forces Seismic Change', *Bloomberg Law News*, 30 July 2020.

another recent article proclaims: "Despite Budget Cuts, Courts Can't Imagine Life Without Zoom".[6]

2 Action by Congress and the Criminal Case Contrast

A reality that Covid-19 has emphasized is that criminal justice and civil justice are very different things in America, even though they are handled in the same court system. For criminal cases, there are numerous constitutional and statutory directives that affect the way cases are adjudicated. The Confrontation Clause of our Constitution commands that the accused be permitted to confront the witnesses against him and cross-examine them.[7] The right to jury trial in our Sixth Amendment assures the accused of trial before a jury selected from a cross section of the community.[8] The Speedy Trial Act directs that the accused be brought to trial within a specified time.[9] Various Criminal Rules insist that important events in criminal proceedings occur in person and in court.

It was quickly apparent that due to the pandemic, many of these directives for criminal cases could not work in many courts. Given the weightiness of the issues, Congress included special provisions in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which it adopted on 27 March 2020.[10] The legislation relaxed the constitutional and statutory mandates mentioned above and also directed that all the federal rulemaking committees study the question whether special rules should be added to cope with 'emergency' conditions. Since early April, all the rules committees[11] have considered whether such rules should be adopted.

But the extent of change in criminal cases may be limited; very deep values are at stake. Nonetheless, in at least some courts remote adjudication has gone forward. In the Texas courts, there was a virtual criminal jury trial,[12] and in San Francisco, a three-week criminal

6 'Despite Budget Cuts, Courts Can't Imagine Life Without Zoom', *Legaltech News*, 20 October 2020.

7 *See* U.S. Const. Amend. VI ('in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him').

8 *See* U.S. Const. Amend VI (assuring the accused 'a public trial by an impartial jury of the State and district wherein the crime shall have been committed').

9 18 U.S.C. § 3161 *et seq*. (setting time limits for various stages in criminal prosecutions in the federal courts). Note that the Sixth Amendment also promises the accused a 'speedy' trial, but without the specific time limits in the statute.

10 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (27 March 2020).

11 Besides the Criminal Rules and the Civil Rules, this work also was done with regard to the Bankruptcy Rules and the Appellate Rules.

12 M. Alder, 'Virtual Criminal Jury Trial Getting Texas Test -- iPads Included', *Bloomberg Law News*, 11 August 2020.

jury trial proceeded with all participants wearing masks.[13] Even proceedings involving alleged terrorists held at Guantanamo Bay have been conducted via Zoom.[14]

3 Remaking Civil Litigation

The pressures on the American courts have not been as intense in civil cases as in criminal cases. Though it may be that some 'emergency' rule will be added to the Civil Rules, there was no need for Congress to act in an emergency manner to relieve the courts' pressures. To the contrary, the Civil Rules have considerable flexibility, particularly when confronted with the stresses of events like the pandemic. The rulemakers invited bench and bar to submit comments about whether the current rules were interfering with practice during the pandemic, and one recurrent theme of comments submitted by lawyers (mainly plaintiff-side lawyers) was that their opponents were using the pandemic as a tool to delay litigation, particularly discovery.

Separately, however, the experience has brought to light several areas in which a 'new normal' may emerge that may call for rule revisions that would apply to litigation during normal times, not just during an emergency. It is not possible to forecast confidently whether a 'new normal' will emerge regarding these topics, but it is useful to highlight them as areas that have drawn attention.

3.1 Service of Process

The traditional method of service remains customary under our Federal Rules – 'delivering a copy of the summons and the complaint to the individual personally'[15] – however, in a pandemic that is not only difficult, but also risky. For some time, some states have allowed service by mail in many instances.[16] After initial service of process, the Federal Rules provide for service of later documents by electronic means on consent.[17]

As we 'Zoom' for court, we might also become more receptive to digital means of initial service of process. Already our courts have authorized such service based on a showing that more conventional means were tried but did not work. Nearly 20 years ago, our Ninth

13 B. Egelko, 'Jury Reaches Verdicts in S.F.'s First Trial Since Outbreak, *San Francisco Chronicle*, 18 August 2020, at p. B1.

14 C. Rosenberg, 'Guantanamo Bay Trial Holds Its First "Zoom Court"', *New York Times*, 19 November 2020, at A24.

15 Fed. R. Civ. P. 4(e)(2)(A).

16 *See* Cal. Code Civ. Proc. § 415.40 (authorizing service on 'a person outside this state … by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt').

17 Fed. R. Civ. P. 5(b)(2)(E).

Circuit Court of Appeals approved of service by email.[18] Service via Twitter has also been authorized.[19] With the pandemic experience behind us, it may be time to explore authorizing service by digital means.

3.2 Remote Depositions

For several countries, the American practice of routine pretrial depositions without the need for any advance court authorization may be unfamiliar, and perhaps also unnerving. Early on in American procedure, testimony was gathered by an emissary of the court rather than by the lawyers.[20] But by the mid-19th century, the lawyers had taken over the questioning of witnesses. And then the 1938 Federal Rules greatly expanded the ability of lawyers to compel witnesses to answer their questions under oath, before trial and on the record. Without seeking advance judicial approval, they can notice the deposition of any party.[21] With nonparty witnesses, they may themselves issue subpoenas requiring the witness to report to a specific location (generally a law office) take an oath, and submit to examination.[22] The deposition could be a rigorous, almost confrontational event, and a special provision in the deposition rule authorizes an application to the court for protection if the questioning 'embarrasses' or 'oppresses' the witness.[23]

Though American deposition practice has remained remarkably traditional, technology has changed it in some ways. After much controversy by traditionalists who insisted that the long-standing method of recording testimony should be the only way, the rules were changed to permit the party noticing the deposition to choose video as the method of recording the deposition.[24] But that only went to the manner of recording. It remained true that the deposition was a face-to-face encounter. And it also remained true that the lawyer for the witness often spends much time and energy preparing the witness to

18 *Rio Properties, Inc. v. Rio International Interlink, Inc.*, 284 F.3d 1007 (9th Cir. 2002); *see also Lexmark Int'l, Inc. v. INK Technologies Printer Supplies, LLC*, 295 F.R.D. 259 (S.D. Ohio 2013) (authorizing service by email). Compare *Keck v. Alibaba.com, Inc.*, 330 F.R.D. 255 (N.D. Cal. 2018) (refusing to authorize service by electronic means because plaintiff had not tried to locate defendant's physical address or shown that service via the Hague Convention would not work).

19 *See St. Francis Assisi v. Kuwait Fin. House*, 2016 WL 5725002 (N.D. Cal., 30 September 2016); *see also* E. Silverstein, 'Serving via Social Media: California Suit Shows Possibilities, but Change Takes Time', *Legaltech News*, 15 January 2019.

20 *See* A. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Culture 1800-1877*, Yale University Press, New Haven and London, 2017.

21 *See* Fed. R. Civ. P. 30(b).

22 *See* Fed. R. Civ. P. 45(a)(1)(B).

23 Fed. R. Civ. P. 30(d)(3)(A).

24 Fed. R. Civ. P. 30(b)(3)(A).

testify – a process sometimes described as 'woodshedding the witness'.[25] This 'woodshedding' activity, like the deposition itself, would ordinarily involve an in-person session, often heavily focused on documents that might be offered as exhibits during the deposition.

The pandemic made this traditional method of deposing witnesses unworkable. It is no longer safe for numerous people to sit in a conference room for hours to complete a deposition. (The Federal Rules provide that a deposition 'is limited to 1 day of 7 hours'[26] – hardly a safe limitation during this pandemic.) Travel has long been an ordinary feature of deposition practice; lawyers may come from different cities, and witnesses may be located in a variety of states.

The rules had long acknowledged that depositions could be done by remote means – by telephone. But these have been disfavored because they do not permit 'face-to-face confrontation' between the examining lawyer and the witness.[27] In March 2020, however, this antagonism to remote depositions had to be reexamined, and fortunately a new means had arrived – Zoom depositions. That method was already permitted by the rules, on stipulation or court order.[28] But the antagonism toward telephone depositions had previously extended also to other forms of remote depositions.

All that changed dramatically in mid-March. According to a court reporting official, by May 'because of COVID, 100% of depositions are being conducted remotely'.[29] Some litigants – mainly defendants – argued that courts should postpone depositions until in-person interrogation again became possible. But courts have generally rejected those efforts.[30] Although defending such a deposition poses extra challenges, as one judge noted in denying a motion to postpone: "There are numerous resources and training opportunities available through the legal community to assist [defendant's] counsel in the operation and utilization of the new technology."[31]

Until the pandemic ends, however, it will remain uncertain whether there is indeed a 'new normal'. The value of in-person confrontation may be enough to justify a return to the normal method, at least for the most important witnesses. But given uneasiness about travel and likely client resistance to the considerable costs resulting from travel, it may

25 R. Marcus, M. Redish, E. Sherman & J. Pfander, *Civil Procedure: A Modern Approach*, 7th ed., West Academic Pub., St. Paul, 2018, p. 365.

26 Fed. R. Civ. P. 30(d)(1).

27 *Huddleston v. Bowling Green Inn of Pensacola*, 333 F.R.D. 581, 586 (N.D. Fla. 2019).

28 Fed. R. Civ. P. 30(b)(4).

29 S. Russell-Kraft, 'Depositions Go Virtual During Pandemic; May Remain That Way', *Bloomberg Law News*, 22 May 2020. *See, e.g.*, *Learning Resources, Inc. v. Playgo Toys Ent. Ltd.*, 335 F.R.D. 536, 538 (N.D. Ill. 2020) (ordering remote deposition despite plaintiff's argument that 'in-person depositions are the norm in American jurisprudence').

30 *See, e.g.*, *Faford v. Grand Trunk Western R. Co.*, 335 F.R.D. 503 (E.D. Mich. 2020).

31 *Grano v. Sodexo Manag., Inc.*, 335 F.R.D. 411, 415 (S.D. Cal. 2020).

well be that remote depositions are here to stay. For many lawyers, however, in-person confrontation during depositions has great value, at least with important witnesses, so the old way may return, at least for such witnesses.

3.3 Remote Testimony

The same technology that has facilitated remote depositions could provide a method for permitting witnesses to testify remotely in court. That would mean that there could be trials that were partly or (perhaps) entirely dependent on remote witness testimony. For many countries, such a possibility may not seem odd. But a US trial has (as dramatized by Hollywood movies) been an in-person affair. More than a decade ago, I asked whether the manner of trial could remain untouched by technological innovations.[32] A decade before that, Dean Carrington suggested that American courts shift to 'virtual civil litigation'.[33]

Even for court (nonjury) trials, however, that possibility had not become a frequent reality before the pandemic. True, the Federal Rules did permit testimony by 'contemporaneous transmission from a different location', but only 'in compelling circumstances and with appropriate safeguards'.[34] The Committee Note explaining this authority recognized, however, that "[t]he importance of presenting live testimony in court cannot be forgotten." That in-person setting "may exert a powerful force for truthtelling," and "[t]he opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."[35]

But things change under extreme circumstances. Even before the pandemic, remote testimony had been upheld for a witness who had been deported.[36] Suddenly, in Spring 2020, the idea of remote court trials for civil cases began to catch on.[37] Some noted that 'nothing resolves cases faster than a court date' as a reason for flexibility about this manner of trying cases.[38] But lawyers who handled such a trial warned that remote testimony 'shifts more control to the witness' and may facilitate 'improper witness and attorney interaction'

32 *See* R. Marcus, 'The Impact of Computers on the Legal Profession', *Northwestern University Law Review*, vol. 102, 2008, pp. 1839-1840.

33 P. Carrington, 'Virtual Civil Litigation: A Visit to John Bunyan's Celestial City', *Columbia Law Review*, vol. 98, 1998, p. 1516.

34 Fed. R. Civ. P. 43(a).

35 Fed. R. Civ. P. 43(a) Committee Note (1996).

36 *Rodriguez v. Gusman*, 974 F.3d 108 (2d Cir. 2020) (reversing dismissal of suit by deported plaintiff, where lower court justified dismissal on the ground plaintiff could not appear to testify in person at trial).

37 R. McDonald, 'Georgia Lawyers Largely Back Civil Video Trials, But Still Raise Red Flags', *Legaltech News*, 22 May 2020 (describing reactions to proposal for state courts in Georgia to begin video court trials).

38 C. Green & S. Fish, 'Weighing the Virtual Courtroom Option in Civil Cases', *Law 360*, 20 August 2020 (citing 'many experienced lawyers').

including 'what notes or other materials are within the reach and/or view of a remote witness'.[39]

When travel and other restrictions relax, it may be that willingness to experiment in this manner will abate, but it is also possible that the pandemic experience will usher in relaxation on the 'compelling circumstances' provision in the current rules. One possibility is that the rule itself might be softened. But in any event, if there are again circumstances like the present pandemic, making travel to the courthouse and personal presence in the courtroom risky, it is likely that remote testimony would often be upheld under the current rule.

3.4 Remote Jury Trials

The previous section addressed the possibility of remote court trials, but there is increasing discussion of even attempting remote jury trials. The rule on remote witness testimony could apply equally in a jury or court trial. But one might argue that the whole notion of a 'jury trial' under our Constitution[40] contemplates in-person interaction.

But by last Spring, there was at least talk of trying to resume jury trials.[41] Assuring prospective jurors that they could safely come to the courthouse presented numerous logistical challenges. Concerns about whether jurors would really represent a cross section of the community might arise. For example, could a jury with no jurors over the age of 60 be regarded as suitable? One possibility might be to hold trials out of doors where weather permits.[42] A federal court in Seattle, Washington, contemplated a jury trial in which "[t]he plaintiff will tune in from California and witnesses will log on from all over the world."[43] But with the rise in Covid-19 cases in November 2020, some have retrenched on these hopeful plans.[44] At much the same time, however, the leading plaintiff lawyers association was reporting that "[j]ury trials are happening all over the country' in advertising a webinar offered as part of its 'Back in the Courtroom: Practicing During the Pandemic Project."[45]

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39 D. McLane & M. Best, 'Avoid Losing Control of a Remote Witness: Some Suggestions', *Bloomberg Law News*, 9 November 2020.

40 *See* U.S. Const. Amend. VII ('In suits at common law, … the right of trial by jury shall be preserved').

41 *See* M. Bultman & M. Allsup, 'Judges Weigh Bigger Rooms, Cleaner Mics as Jury Trials Restart', *Bloomberg Law News*, 26 May 2020.

42 *See* M. Alder & H. Barker, 'Tents, Smoke Machine: Judges Get Creative on Jury Trial Restart,' *Bloomberg Law News*, 27 August 2020 (reporting that '[a] federal court in Dallas is considering an outdoor trial this fall in a law school courtyard').

43 M. Alder, 'Loaner Laptops, Dry Runs: Virtual Federal Civil Trials on Tap', *Bloomberg Law News*, 29 September 2020.

44 *See* M. Alder & A. Reed, 'U.S. Courts Close Doors, Cancel Juries as Virus Surges', *Bloomberg Law News*, 20 November 2020.

45 29 November 2020 online advertisement from American Association for Justice (on file with author).

It seems unlikely that remote jury trials will become a 'new normal'. For one thing, judges worry that jurors will not give appropriate attention to the evidence if they are watching from home instead of in court under supervision of the judge. Moreover, the importance of in-person deliberation of jurors cannot be overstated. Nevertheless, experience with the pandemic may relax some inhibitions about remote testimony for jurors who have an in-person experience with their fellow jurors.

3.5 'Open Court'

A last point is that the concept of 'open court' may be shifting. Until the pandemic, that meant proceedings in a public courtroom before a judge who was present on the bench and (generally[46]) relying on in-person presentations by the lawyers.

That has not been possible due to the pandemic, and the courts have shifted to online alternatives. That shift is consistent with the Federal Rules, except for trials 'on the merits', which are to occur 'in open court' and 'in a regular courtroom'.[47] In part, the current rules reflect the need for public access to judicial proceedings. But as telephonic arguments before our Supreme Court have shown, public access is furthered in some ways by holding proceedings online.[48]

At least for a variety of semi-administrative matters – scheduling conferences and the like[49] – the pandemic experience may introduce a 'new normal'. No longer will lawyers think it necessary to travel 5,000 kilometers across the country to appear at a 15-minute scheduling conference. Whether there is a similar inclination to forgo live participation in more significant matters – for example, a hearing on a motion for a preliminary injunction or summary judgment – is harder to predict.

46 For some time, lawyers have been permitted to participate by telephone, but until the pandemic, lawyers regarded telephonic depositions as vastly inferior to being present in person.

47 Fed. R. Civ. P. 77(b).

48 Reportedly the number of people how have listened to the live telephonic oral arguments before our Supreme Court vastly exceeds the capacity of the Court's courtroom.

49 *See* Fed. R. Civ. P. 16 (regarding scheduling and other pretrial conferences).

4 Conclusion

The main message in terms of the American procedure rules is that they have been found to be flexible enough to cope with the stresses the pandemic has brought in its wake. But the experience has introduced the prospect also that practice will be permanently altered in the ways mentioned above. Whether that actually happens, however, will not be known until the stresses imposed by the pandemic have ended and the American bench and bar are able to consider the long-lasting significance of what they have learned from the experience.

Conclusions on Civil Courts Coping with Covid-19

Anna Nylund and Bart Krans[*]

1 Differences and Resemblances

Civil courts have coped with Covid-19 mainly by digitising paperwork, severely restricting the presence of parties and witnesses and pivoting to remote hearings. Under normal circumstances, it would probably have taken decades to construct the infrastructure, implement the new work processes and complete the numerous other developments necessary for this manifest, inevitable and pervasive leap in digitisation. The pandemic has unleashed an unprecedented flow of creativity and innovativeness among courts, judges and lawyers. Simultaneously, the pandemic has exposed how courts have been slow to digitise, as well as some of the underlying reasons for resisting the concepts of paperless courts, remote hearings and online dispute resolution (ODR). While some of the reasons for this resistance are well justified and timely, some of the resistance seems to originate from the friction that a culture change inevitably entails.

This book contains reports from 23 countries. It is not easy to attribute differences in the way civil courts in these countries are coping with the outbreak to specific factors. Some of the variation could be attributed to the fact that the Covid-19 pandemic has hit countries with various levels of severity and 'waves' of infections and at different speeds and intervals. When the infection rate has been relatively low, courts have been able to conduct hearings in courthouses with rules imposing social distancing and sanitation, as well as careful planning of the conduct of the hearing to minimise the number of people present in the room by having witnesses testify remotely, scheduling breaks between witness testimonies or other necessary measures.[1] However, differences in the levels of infection are difficult to quantify, difficult to interpret and, above all, beyond the scope of this study. Correspondingly, access to high-speed internet and computers, as well as the general level of digitisation, are also likely to influence how courts respond in the state of exception. These differences, too, are difficult to quantify. Attributing differences to societal factors

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1 *E.g.*, Pereira Campos, this volume, Section 4.

rather than legal factors is, hence, problematic. Nevertheless, many similarities among the countries studied, beyond rapid digitisation and introduction of remote hearings, can be identified. Courts in all countries have been remarkably resilient in adapting to the new normal. However, for many reasons, the transition has not been entirely smooth. Finally, the technological leap and other advancements have opened up new horizons into the future of civil justice.

Moreover, we have asked the authors to discuss topical issues in their countries in fairly short chapters. Consequently, the chapters in the book are not exhaustive. Moreover, to some extent, debates in many countries are not always triggered by the most pressing issues. A single case might spark a long discussion. It is also important to remember that we are still in the middle of the pandemic, and unexpected turns may lie ahead.

The chapters in this book shed light on many different aspects of how Covid-19 has influenced courts, and there is certainly a plethora of issues that have not been raised within the scope of this study. Hence, in this concluding chapter, we identify and discuss the topics that we find the most interesting. Each of these topics addresses a different aspect of civil litigation during the present state of exception. First, we make some observations (Section 2) regarding the legal framework for handling cases during the pandemic. In Section 3, we explain some insights on justice without hearing. Section 4 deals with courts resolving pandemic-related issues. In Section 5, we analyse digitisation, which in many ways has been the main mechanism that has enabled courts to continue rendering justice during the pandemic. The approach in Section 5 is three-pronged: the first prong analyses technology as an essential prerequisite of courts remaining operational during the pandemic, the second prong examines different forms of scepticism to technology and the third prong concerns novel issues that the introduction of new technology has raised. Final observations on the 'new normal' are examined in Section 6.

2 Usual Rules of Civil Procedure or Pandemic Rules

A first observation of this study is that courts have largely been able to operate during the outbreak based on the regular rules of civil procedure. Some countries had technology-neutral rules: documents could be filed on paper or electronically, witness testimony could take place remotely and, at least, some hearings could be conducted remotely. Rules regarding disruptions to communications and other exceptional situations and rules allowing courts to introduce pilot schemes[2] and flexible, discretionary procedural rules rendered courts indispensable leeway in adapting to lockdowns and social distancing.[3]

2 Sorabji, this volume, Sections 3.2 and 4.

3 Hau, this volume, Section 1.

Japanese courts had already prepared business contingency plans in 2016 to enable them to continue functioning during a pandemic. These plans are based on the principles of balancing the need for keeping courts operational, at least at a minimum level, with the need to protect the judges, staff, parties and others from the disease.[4]

'Emergency' legislation enacted in the early months of the pandemic is remarkably limited, and many countries have partially repealed the emergency rules.[5] For instance, courts in some Australian jurisdictions have replaced the jury with a single judge to enable courts to continue hearing cases.[6] Some of the changes to civil proceedings can be regarded as innovations that will apply permanently, some as 'emergency' rules that could be applied in future states of exception and some as redundant or mistakes, and thus, are likely to be repealed. One could say that the usual rules of civil procedure, at least in certain countries, offer flexibility that has facilitated resilience.

3 Civil Justice without Hearings

While some courts have exploited the opportunities of new technology by pivoting to remote hearings, courts in other countries have resorted to hearings *in camera*, which are conducted without public scrutiny, or to increased use of written elements – sometimes even entirely written proceedings. The turn towards increased use of written proceedings was, at least in countries like Belgium, France and Poland, initiated *before* the pandemic,[7] but the pandemic seems to have accelerated the process.

The shift towards written proceedings should lead us to question the value of court hearings along several dimensions. It may be the case that some hearings have been redundant and only added to the cost and delay of justice, or that some arguments become clearer and more concise when presented in writing. Nonetheless, the increased use of written proceedings might also amount to a violation of the right to a fair trial, *inter alia* because a hearing enables the parties to see justice done and to cross-examine witnesses.[8] The partial displacement of final hearings challenges courts to rethink the concept of public hearings. Hearings *in camera,* which are closed to the public, could also propel a shift towards written proceedings, since the public has access to them through court records.[9]

In some countries, the pandemic has driven the use of alternative dispute resolution (ADR), particularly mediation, and other mechanisms that facilitate consensual outcomes.

4 Kakiuchi, this volume, Section 3.3.3.
5 Sorabji, this volume Section 1.
6 Bamford, this volume, Section 1.
7 Ferrand, this volume, Section 3; Rylski, this volume, Section 2; Taelman, this volume, Section 5.
8 Ferrand, this volume, Section 1.3; Silvestri, this volume, Section 1.
9 Rylski, this volume, Sections 2, 4 and 6.

The advantages of negotiated outcomes transpire when *force majeure* is omnipresent and creativity is the only way out. Closed courts and rescheduling of hearings push parties and courts to identify alternatives to regular court proceedings, both within and outside courts. In this regard, the pandemic could help overcome reluctance towards mediation and other forms of ADR.[10] Simplified arbitration proceedings have been introduced to make arbitration a more accessible and attractive alternative to litigation in commercial disputes,[11] and new rules have been introduced to enable the parties to shift from litigation to arbitration.[12] Obviously, ADR reduces the need for court hearings, but it may still entail a 'hearing' within the scope of the alternative process.

Encouraging the parties to settle within the framework of regular civil litigation is another option to forgo hearings, as is the introduction or increased use of simplified proceedings. Avoiding hearings could also be an incentive to attempt to resolve cases on procedural grounds, because hearings are mandatory only when the courts rule on the merits. Moreover, courts could attempt to reduce the scope of the hearing by employing these techniques or a combination of them, such as by dismissing part of the case on procedural grounds and inducing the parties to settle the remaining issues.

4 Courts Resolving Disputes Related to the Pandemic

In Brazil, courts have stepped in to contribute to an adequate response to the exceptional situation; in so doing, they needed to reconsider the doctrine of self-restraint and subsequently struck down political decisions that violated generally accepted scientific knowledge.[13] This illustrates the potentially pivotal role of courts in the pandemic. In regard to the case law induced by the pandemic, the paramount task for the legal community is to separate procedural innovations that should be retained as part of regular civil proceedings from those that need to be retained not as part of regular rules but as a body of the 'procedural law of disasters'.[14] Even though courts have overruled decisions of other state powers during the pandemic with good reason, it is not self-evident that they should continue doing so after the pandemic.[15]

Courts are also involved in managing life in the state of exception. Singapore enacted a special procedure for obtaining temporary relief in disputes arising from non-performance

10 *E.g.*, Delgado Suárez, this volume, Section 4; Kakiuchi, this volume, Section 5; Petersen, this volume, Section 2; Silvestri, this volume, Section 2; Shen, this volume, Section 3.
11 Petersen, this volume, Section 2; Silvestri, this volume, Section 3.
12 Shen, this volume, Section 3.
13 Didier, Zaneti and Peixoto et al., this volume, Section 5.1.
14 Didier, Zaneti and Peixoto et al., this volume, Sections 3-5.
15 Didier, Zaneti and Peixoto et al., this volume, Section 6.

of a contractual obligation due to the pandemic.[16] German courts have faced a tide of cases, wherein restrictions such as curfews have been challenged and claims for compensation due to these measures have been made, either between a private entity and the government or between two private entities, such as insurance companies and their clients claiming compensation for business closure.[17] Courts in Belgium and Lithuania have witnessed a drop in the number of certain types of cases, but the number is expected to grow in 2021.[18] Differences among countries in the number of cases filed should be analysed after the pandemic is over to uncover whether the differences are of a temporal nature (*i.e.*, the waves of pandemic-related cases hit countries at different times) or whether some underlying mechanisms result in a surge of cases in some countries but not in others.

5 Technological Innovations

5.1 Technology As an Integral Element of Resilience

The most prominent and common element among the many contributions in this book is a rather obvious one – the use of technology. For some countries, it took a pandemic to force courts to pivot to online hearings and to finally use the technology already installed in the courts.[19] All judiciaries studied have attempted to keep their courts operational. During the first wave of the pandemic, in the early months of 2020, courts had to halt cases, at least for a short period, and many hearings were discontinued. However, in many countries, citizens could reach courts via telephone or electronic communication, and courts soon put more technology into use for urgent cases (domestic violence, certain types of parental responsibility cases, interlocutory measures, etc.).

Soon after the outbreak, courts started experimenting with technological solutions that would enable them to operate, if not normally, at least with as little disruption as possible. The willingness and capability to innovate has been remarkable. Judiciaries that had implemented electronic case filing, case management, remote communication or other types of technology before the pandemic, such as China, Denmark, Finland, Singapore and Taiwan, had a tangible advantage vis-à-vis those judiciaries that had taken fewer such steps, since judges and lawyers had already acquired experience in (at least partly) paperless proceedings, remote hearings or both.[20] In these countries, the written elements of civil

16 Pinsler, this volume, Section 3.
17 Hau, this volume, Section 2.1.
18 Taelman, this volume, Section 6; Vėbraitė, this volume, Section 1.
19 Uzelac, this volume, Section 3; Vėbraitė, this volume, Sections 1 and 2.
20 *E.g.*, Ervo, this volume, Section 1; Fu, this volume, Sections 1 and 2; Pereira Campos, this volume, Section 3; Petersen, this volume, Section 1; Pinsler, this volume, Section 1; Shen, this volume, Section 2.

proceedings could be performed with only minor disruptions. Although online case management platforms are not perfect (e.g., it has not been possible to pay court fees on the Taiwanese platform), they have, nevertheless, been highly advantageous.[21] The better the technological infrastructure (as measured *inter alia* by the percentage of citizens having access to high-speed internet, laptop computers and tablets) in a country or region, the smoother the transition to online proceedings is likely to be. In some respects, courts in several countries have paradoxically become more accessible during the pandemic, because electronic communication is much more convenient than paper-based communication.[22]

Pivoting hearings with a limited scope (e.g., case management and settlement hearings) online is relatively easy, and lawyers appreciate that they do not have to spend time travelling across their town or country to attend a short hearing at court. On the other hand, hearings on the merits are more challenging to conduct remotely or in a hybrid format. However, courts in countries where case management and preparatory hearings were conducted remotely, and witnesses and experts were allowed to testify remotely, before the pandemic, had an advantage in being able to transfer the skills obtained in more limited settings to the final hearing or trial.[23] The pandemic has influenced the relation between telephone hearings and video hearings by improving the quality of remote hearings, since a hearing using video is superior to one using only telephone communication.[24] The stronger the tradition for a trial or main (final) hearing where witnesses are examined and parties argue their cases, the more difficult it is to replace the hearing with fully or partly written proceedings, and thus the more urgent the need for remote hearings will be.

Moreover, some countries were in the process of digitising courts and implementing online courts, and they were therefore in a position to expedite the process by expediting the enactment of draft versions of rules, widening the scope or duration of pilot projects and so forth.[25] The pre-pandemic idea of a remote hearing was based on at least the judge(s) and court staff being present at the court: conducting hearings with everyone participating from their respective homes was unimaginable. Remote participation of judges raises several questions. For example, can judges use their personal computers (rather than equipment provided by the court)?[26] What happens if the judge participates from abroad?[27]

In the absence of specific technologies at hand, courts put readily available technology into use: they allowed parties to serve documents by email and Twitter[28] and file briefs,

21 Shen, this volume, Section 2.1.
22 *See*, particularly Uzelac, this volume, Section 3; *see also* Fu, this volume, Section 2 on transparent online courts.
23 *E.g.*, Bamford, this volume, Section 2.1; Ervo, this volume, Section 3.
24 Sorabji, this volume, Section 3.1; Nylund, this volume, Section 2.
25 Sorabji, this volume Section 1.
26 Hau, this volume, Section 2.2.
27 Sorabji, this volume, Section 3.1.
28 Marcus, this volume, Section 3.1.

submissions and evidence via email;[29] held hearings using Zoom, Teams, Skype and similar software,[30] and broadcasted hearings on their websites, YouTube or other platforms.[31] Singapore implemented Zoom Rooms to enable self-represented litigants to attend hearings remotely.[32] Despite the variation in the level of digitisation before the pandemic and variation in the specific solutions chosen, courts across the world have demonstrated an astonishing flexibility and willingness to experiment to continue their operations. As a result, later lockdowns have had fewer tangible impacts on the operation of courts. Digitisation now seems omnipresent in the civil justice system, including ADR, since mediation services have also shifted online.[33] One could claim that ODR is finally experiencing a large-scale dawn.[34]

5.2 Resistance to Technological Innovations

Despite courts embracing new technology, resistance to remote hearings is still widespread and multifaceted. Virtually every contribution in this book describes some reluctance to engage in remote hearings, but resistance appears to be more pronounced and widespread in some countries.[35] Rigid procedural rules and practices are also relevant in this regard, because they encumber innovations and adaptations,[36] while change necessitates agility, and flexible procedural rules and judicial discretion expedite swift transitions and adaptation to new circumstances. The mindset of judges and lawyers is vital in this regard, as well:[37] innovation requires an open mind and willingness on the part of judges and lawyers to exploit the available opportunities and experiment with new methods. Reports on federal countries in this book, notably Australia,[38] illustrate tangible differences among states or territories within the same country in the level of digitisation before the pandemic. These differences have repercussions for the equal access to justice during the state of exception.

Moreover, the absence of appropriate technology is far from the only challenge for digitising courts. Many chapters in this book discuss how persistent efforts to digitise their courts and to facilitate the use of remote and hybrid hearings have largely failed or been postponed. The reasons for failure to implement paperless courts and remote hearings have often been mundane. Budget overruns, high estimated costs, diverging views of the

29 Bamford, this volume Section 2.
30 *E.g.*, Pereira Campos, this volume, Section 4.
31 *E.g.*, Krans, this volume, Section 3; Sorabji, this volume, Section 1.
32 Pinsler, this volume, Section 2.
33 Silvestri, this volume, Section 2.
34 *E.g.*, Kakiuchi, this volume, Section 5; Shen, this volume, Section 3.
35 Uzelac, this volume, Section 5.
36 Galič, this volume, Section 2.
37 Galič, this volume, Sections 2 and 3.
38 Bamford, this volume, Section 1.

technical solutions and functions of digital platforms, and lack of proper funding appears to be the dominant reason for delayed digitisation in many countries, including affluent, technologically advanced countries, such as Australia, Denmark and Japan.[39] Nevertheless, practically all countries in this study were in a process of digitisation of courts before the pandemic and had foreseen remote and hybrid hearings.

Digitisation raises many questions. For instance, several authors in this book describe how lawyers and judges are sceptical about the veracity of digital documents. They assume that digital filing is more vulnerable to abuse because false documents are easy to produce and difficult to detect. Chinese courts have implemented blockchain and other technologies to enable courts to verify documents.[40] Interestingly, digital documents do not seem to be a major concern in all countries, at least not based on the reports in this book. It would be interesting to investigate differences is attitudes among countries and, in the event that palpable differences are found, the sources of these differences: do they reflect differences in attitudes towards digitisation in general, differences in the level of digitisation in general or other factors (e.g., variation in the trust in state organs)? Moreover, we need to understand whether lawyers are suspicious of digital documents in court proceedings in general or mainly in some situations where verification of the document might be particularly important or problematic, such as uncontested cases.

Remote hearings also entail some inherent problems. For instance, how can the public gain access to remote hearings? How can courts mitigate the risks related to some of the built-in functions of these services, such as the possibility of making unauthorised recordings and 'Zoom bombing' (i.e., unauthorised disruptive access to meetings)?[41] Other problems are of a more practical nature. Jury trials are practically impossible to conduct online, since jurors could be distracted, hence risking the fairness of the trial.[42]

The digital divide – that is, the unequal access to high-speed internet, IT equipment and IT skills among people living in different parts of a country and people from different social strata – is also a significant hindrance to digitisation of court proceedings in many countries.[43] In cases where the digital divide could render justice less accessible for some groups of citizens, it is understandable that courts resist digitisation. The digital divide can be overcome, however, as the use of Zoom Rooms in Singapore demonstrates.

Attitudes towards digitisation and new technologies have been, and still are, a serious impediment to the shift to online and remote proceedings. One source of resistance is found in the inevitable initial efforts and additional work needed to implement technological

39 Bamford, this volume, Section 2.1; Kakiuchi, this volume, Section 4; Petersen, this volume, Sections 1 and 2.

40 Fu, this volume, Section 2.

41 *See* Marcus, this volume, Section 3.5.

42 Marcus, this volume, Section 3.4.

43 Delgado Suárez, this volume, Section 2.

shifts, including the time needed to learn to navigate new systems and the need to develop new routines. Incomplete or incompatible systems are a source of irritation and a consistent source of frustration: the advantages of digital filings are lost if the court must make paper copies of the files.[44] This kind of fragmentary digitisation understandably breeds resistance to digitisation. Similarly, unsystematic regulation of online processes also hampers the leap into digitisation.[45] Moreover, many judges and lawyers question, with good reason, whether the technology implemented complies with the standards of data protection.[46] Judges in some countries face the challenge of unreliable electronic case management platforms, and, thus, many of the advantages of digitisation disappear into thin air.[47] Nevertheless, the pandemic demonstrates the need for court proceedings to keep pace with technological advances; hence, it is likely to induce many judges and lawyers to reconsider their attitude towards online courts.[48]

5.3 *Several Unresolved Issues Related to the Use of Technology*

Several authors pose issues related to the quality of regulation for online courts, *inter alia* that the criteria for determining when a remote hearing is appropriate are too rudimentary.[49] A related issue concerns the criteria for replacing a hearing with written proceedings.[50] Should the court take into account that one or both parties, or the court itself, lack the equipment needed to participate in a videoconference and that the remote hearing must accordingly be organised via telephone? Even if some types of cases, such as small or commercial cases, were conducted fully or partly online, the rules and practices concerning these cases might not be appropriate for other types of cases.[51] For instance, litigants in commercial cases usually have far better access to technology than litigants in smaller cases, and managing a hearing in a legally and factually simple case is obviously different to managing a hearing in a complex case.

The 2019 reform of Polish civil proceedings has some elements that might endanger fair trial rights, such as the reduction in the public nature of the proceedings. The pandemic could impel courts to maximise the potential of the new rules regarding *in camera* hearings and dismissal of unfounded claims, although the rules minimise public scrutiny and other fair trial rights. Will Polish courts revert to old habits, keep their new habits or chart a new

44 *E.g.* Bamford, this volume, Section 2.2.
45 Silvestri, this volume, Section 2.
46 Taelman, this volume, Section 3.
47 Uzelac, this volume, Section 5.
48 Rylski, this volume, Section 8.
49 *E.g.*, Bamford, this volume, Section 2.2; Nylund, this volume, Section 3.
50 Ferrand, this volume, Section 1.
51 Fu, this volume, Section 3.

path after the pandemic?[52] In Croatia, 'emergency' procedural rules that brought court proceedings to a halt have had severe repercussions for access to justice.[53] Rules enacted with good intentions can have draconian consequences.

Remote and hybrid hearings raise a number of questions, relating to both practice and principle. Is it appropriate for courts to conduct cross-examination remotely? How can we ensure that the witness is not unduly distracted or instructed when we are not able to see what happens behind the camera?[54] How can we ensure equal access to justice if many citizens (and perhaps some lawyers as well) do not have access to high-speed internet and appropriate devices to attend hearings remotely? Is it possible to manage a remote hearing with many witnesses? The absence of uniform guidelines for courts results in divergent practices.

Remote hearings also result in question of a fundamental nature. Does remote attendance influences our perception of a witness or party, and if so, how? Is something essential lost if non-verbal language is reduced in remote hearings?[55] Do the background, angle of the camera, lightning and other factors influence whether we consider the witness trustworthy? What is the impact of a shaky internet connection?[56] Does remote attendance create additional distance between the court and the person attending remotely, or does it shorten the distance since the cameras provide a close-up view of the person speaking? Could a hybrid format entail a disadvantage when one party is physically present while the other attends remotely, or when the witnesses for one party testify at court while the witnesses for the other party testify remotely?[57] A strongly related matter is the relation between proportionality and the use of technologies.[58]

Conducting mediation sessions online raises several questions, such as how to ensure confidentiality when it is virtually impossible to verify that only the party (and the legal counsel) are present in the room, as well as how to create an atmosphere of trust and proximity online.[59] In some disputes, emotional distance is disadvantageous for the success of mediation, while in other disputes it might, in contrast, facilitate resolution.

Digitisation of civil proceedings will continue to be an important research area in civil procedure law.

52 Rylski, this volume, Sections 6 and 8.
53 Uzelac, this volume, Section 2.
54 *E.g.* Vėbraitė, this volume, Section 2.
55 Krans, this volume, Section 4.
56 Krans, this volume, Section 4.
57 Nylund, this volume, Section 3.
58 Piché, this volume, Section 2.
59 Silvestri, this volume, Section 2.

6 Resilience, Resistance and Reorientation

Since the outbreak of the pandemic, the R (regarding the infection ratio) has become infamous, because it plays an important role in many countries when governments determine the measures to combat the virus. In some respects, that appears to be the case in this study as well, albeit using different Rs – resilience, resistance and reorientation.

Although the pandemic is far from over at the time of this writing, and the future remains unknown, the contributions in this book almost unanimously argue that there is no way back to the old normal. It is too soon to tell exactly what the new normal for civil courts will be like, but it seems sensible not to 'waste the crisis'. Hopefully, reorientation is around the corner.

Digitisation of court proceedings is irreversible, particularly in regard to paperless courts (*i.e.*, digital filing, digital service and digital evidence). The pandemic has exposed outdated rules and practices in many countries, and the need to revise legislation and reimagine litigation (and dispute resolution) practices is more acute in some countries than in others.[60] One of the main questions to be addressed after the pandemic will be which innovations should be kept, refined and proliferated across the civil justice system. Moreover, which innovations should be kept as part of the domain of civil procedure for emergencies, and which of the adaptations are only disruptive, with no tangible advantages?[61]

Limited access to courts and hindrances to procedural steps have delayed the course of the proceedings, and time limits have been postponed, all of which have caused a backlog of cases.[62] Moreover, a flood of submerged disputes may resurface after the pandemic, and pandemic-related cases might surge as well. Courts clearly need a strategy to deal with the possible influx of new cases and deal with the pandemic-induced backlog at the same time. Simplified proceedings, joinder of cases and pilot cases are all possible solutions, as is the use of artificial intelligence.[63]

Remote and hybrid hearings will be part of the new normal in many countries. However, several authors raise questions related to psychological and cognitive aspects of remote and hybrid hearings. We need to understand whether and how the background, camera angle, other persons present and other factors influence the audience's perception of the

60 *E.g.*, Galič, this volume, criticises Slovenian law.

61 *See also*, European Commission for the Efficiency of Justice (CEPEJ), CEPEJ Declaration: Lessons Learned and Challenges Faced by the Judiciary during and after the Covid-19 pandemic. Ad hoc virtual CEPEJ plenary meeting Wednesday 10 June 2020, CEPEJ (2020) 8 rev, p. 4.

62 The Netherlands is an interesting case in this regard, since postponed hearings in some types of cases has enabled judges to work on cases that can be resolved without a hearing. As a result, the backlog of some types of cases has been reduced during the pandemic.

63 Delgado Suárez, this volume, Section 5; Fu, this volume, Section 2.

person giving testimony, as well as how to overcome problems relating to unstable connections and accessibility of technology. Are some types of cases generally more amenable to being conducted online or in hybrid hearings?[64] Research is needed to ensure the quality of remote hearings by adopting research-based policies regarding remote and hybrid hearings.

Technology challenges many of the foundational tenets of civil procedure and has exposed the rigidity of the 'old' paradigms, perhaps more palpably in some countries than in others.[65] The large-scale introduction of novel technology and shifts in the mode of 'hearing' cases blur the boundaries between oral and written proceedings. Traditionally, written communication is asynchronous and associated with a significant delay between sending and receiving information, as well as a markedly formal style, whereas oral communication requires the synchronous presence of all persons involved in the communication. However, these conceptions are challenged by case management platforms and emails, which allow for simultaneous written communication and can be informal; voice messages, which allow for asynchronous oral communication, and remote hearings. Perhaps the pre-pandemic structure of proceedings, with its clear division between written and oral elements, will dissolve or new patterns will be established. This would be the perfect opportunity to elevate cooperation to the core of proceedings by requiring judges and parties to use a single document as a basis for collaboration to pinpoint the core disputed issues.[66]

'Zoom fatigue' (*i.e.*, the tendency for video calls to drain personal energy levels) might be an impetus for making hearings more efficient and focused and might make us question whether some rituals are outdated. The concept of 'hearing' should also be reconsidered. Perhaps 'seeing' – that is, parties having the right to see and be seen by their judge – is more important than hearing and being heard by the judge.[67] In this regard, video communication might entail several advantages, *inter alia* with cameras enabling close-up images. The displacement of being heard by being seen and seeing could also be an impetus for rethinking whether and when a hearing should be scheduled and which parts of the case should be discussed.

New technology renders hearings much more affordable and, thus, also proportionate in small(er) cases.[68] Simultaneously, increased emphasis on proportionality and lower costs could spur a shift towards predominantly written proceedings, where hearings would

64 Krans, this volume, Sections 4-6; Nylund, this volume, Section 4; Piché, this volume, Section 2.
65 Delgado Suárez, this volume, Section 3.
66 Hau, this volume, Section 3.
67 Krans, this volume, Section 3.
68 Piché, this volume, Sections 2 and 4.

be the exception rather than part of the default process, or in other changes that may have repercussions for fair trial rights.[69]

Changes in the use of written and oral elements in court proceedings should be the result of careful deliberation, not an easy way out of dissatisfactory practices. Consequently, we should ask when, why and how hearings are superior to written proceedings, and we should not assume that small cases are most suitable for written proceedings, remote hearings or both.[70] Flexible, discretionary rules have clearly been advantageous in many countries. Countries with more rigid approaches to civil justice should reconsider their approach.

Since ADR has become a more attractive option as court proceedings have been less accessible, it will be interesting to observe whether familiarity with ADR during the pandemic breeds continued use of ADR processes after the pandemic. Will parties continue to prefer mediation and arbitration to litigation, and will mandatory mediation schemes introduced shortly before or during the pandemic be successful after the pandemic?[71] Finally, if parties continue to favour ADR processes over litigation, how will this influence the role of courts in society?

Before the pandemic, ODR was regarded some times as a set of obscure processes serving a small niche, such as platforms for trade on the internet. Today, courts across the globe have moved some of their functions online. The demarcation between 'regular' dispute resolution and ODR becomes less clear when electronic filing and case management is omnipresent and remote hearings are the new normal.

In regard to reorientation, a final question can be raised: what is the exit strategy of courts regarding the pandemic? How do courts envision the transition to life after the pandemic, when all the cancelled and postponed hearings will need to be dealt with, and when best practices of the digital leap will need to be preserved?[72] Since the countries have taken similar steps concurrently, international cooperation in drafting the map for the future of civil litigation could be more fruitful than ever.[73] A joint effort to identify best practices and to reimagine civil courts and court proceedings in civil cases could be beneficial. More collaborative research to guide courts in making a successful transition into post-pandemic times seems advisable.

69 Ervo, this volume, Sections 5 and 6.

70 Piché, this volume, Sections 2 and 3.

71 Shen, this volume, Section 5; Petersen, this volume, Section 2.

72 On exit strategy, *see also* European Law Institute, ELI Principles for the COVID-19 Crisis, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf, principle 15.

73 Hau, this volume, Section 3.