Digitisation and civil procedure in Germany

Professor Dr. Dr. h.c. Astrid STADLER

I. Introduction

Germany is a highly industrialized country, but – what has been know for a long time – became obvious during the COVID19 Pandemic: Germany is in many respects way behind international standards when it comes to digitisation and online communication between authorities, courts, public regulators and citiziens. In many parts of Germany there is no area-wide reliable and well-functioning Wifi available and the expansion is only progressing slowly. With respect to the courts one may still say: the judiciary is seeking to catch up with the digital age.[1]

When we are talking about digitisation of German civil procedure, a first observations must be that there has been a considerable gap between legal provisions and the situation in courts. Since a reform of the year 2002, the German Civil Procedure Code has provided several provisions on digital

[1] *Greger* NJW 2019, 3429.

communication between courts, lawyers and parties and on virtual court hearings. The use in courts, however, was not wide-spread because of the lack of electronic equipment and a certain resistance among judges. Although at least the big law firms were fully equipped and able to file pleadings in electronic form, courts often printed the documents and still used paper-based files. Despite the fact that our Civil Procedure Code has allowed virtual court hearings since 2002, courts did not have the equipment to do so and the situation changed only considerably during the pandemic. When it suddenly became clear that an orderly operation of the justice system could only be maintained by virtual hearings, the judicial administrations of the German Länder were ready to make the necessary investments.

The provisions one electronic communication in the Civil Procedure Code have been amended over the years in order to provide full digitisation of civil proceeings, but some of the rules on the electronic submission of pleadings have become mandatory only recently. Today many German courts use electronic file management, but not all of them.

During my presentation I will briefly decribe the situation of electronic communication between courts and lawyers and electronic file management. The focus of my presentation will then be on virtual court hearings and the latest reform of German civil procedural law in this respect.

II. Electronic communication between courts and lawyers, electronic file management

1. Step-by-step progress

New provisions on electronic communication were enacted in 2013. The rules came into force, however, in a step-by-step manner from 1.1.2014 to 2022 to ensure that the necessary infrastructure for courts and lawyers can be established. Since 1.1.2018, lawyers, notaries, tax advisors, bailiffs etc. should be accessible for electronic service. Electronic filing was initially still optional in addition to postal service and fax – and German lawyers loved to work with old-fashioned fax machines when they had to file application in the last minute. Only since 1.1.2022 the use of electronic transmission has been mandatory for lawyers, public authorities and legal persons.[2] Electronic filing has also been introduced in parallel to the civil procedure code in labour, financial, social and administrative court proceedings[3].

The development was slow for several reasons: in order to oblige lawyers to submit pleadings and documents electronically, a new and secure platform had to be established. The so-called "special electronic lawyer's mailbox" (*besonderes elektronisches Anwaltspostfach - beA*) had to be set up by the German Federal Bar Association for every lawyer[4]. It went into operation in September 2018 with considerable delay after a couple of safety issues and interruptions. Some lawyers had even tried to stop the system before the Constitutional Court. The Constitutional Court, however, held that the necessity for lawyers to maintain the corresponding technical facilities for the “special electronic mailbox” and to use it for service and submission of documents is unobjectionable under constitutional law and does not violate the freedom of legal profession.[5] From this you can see that the resistance to digitalisation was considerable, and not only in the judiciary. Particularly, small law

[2] Sec. 130d CPC.
[3] Sections 46c ArbGG, 65a SGG, 46c VwGO, 52a FGO)
[4] Section 31a BRAO (Bundesrechtsanwaltsordnung- Federal Lawyer’s Act), since 1 August 2022, section 31b BRAO also includes professional practice companies.
[5] BVerfG (1 BvR 2233/17) BeckRS 2017, 136094.

firms did not want to "jump into the digital age". They struggled considerably at the beginning with the technical requirements and courts apply strict standards when mistakes are made.

Since 1 January 2022 the electronic filing of pleadings, motions and declarations has been mandatory for lawyers.[6] Only then was the basis created for the courts to be able to work with completely electronic records and an electronic file management system without media discontinuity.

2. Electronic file management

In March 2023, the Bavarian Minister of Justice announced that all Bavarian courts now use exclusively electronic file management. This is worth being mentioned because the use of electronic file management which requires significant investment in each judge's workplace differs considerably over Germany. It depends on the financial strength of the Länder and Bavaria is one of the rich Länder, but nevertheless had only had one pilot project on electronic file management at the Court of Appeals in Munich since 2021.

According to the German CPC, court files will only have to be kept electronically everywhere from 1.1.2026.[7] With a change of generations in the judiciary, the acceptance of electronic record keeping has also increased. However, many complain that the judicial work is not facilitated by electronic file management, but causes additional burdens. However, these will be a transitional problem, partly due to technical reasons. Nevertheless, with electronic records, the digital possibilities for civil proceedings are far from being exhausted. The electronic file management system essentially aims to digitally map the familiar paper file and this is of course due to the fact that the ZPO originated in the paper world and was further developed in it.[8] It will take further steps to adequately take digital progress into account.

One suggestion which has lead to a pilot project in Bavaria is the following:[9] In the future, the parties should no longer file separate pleadings, but will draw up a joint document under judicial guidance via an online platform set up at the court. The so-called "basic document" will follow a fixed structure for facts, legal arguments etc. The basic document would allow cooperative working and a presentation of the litigation material that is concentrated on the essentials. The factual presentation contained in the basic document is intended to form the basis for the court's decision and thus take over the function of the facts in the judgment. It would make the courts work much easier.

There is, however, considerable resistance to this project in the legal profession, as there are fears that it will curtail the freedom of lawyers to present their work. Lawyers consider it their main task to present to the court facts and evidence in a way they think is the best way of representing their client's interest and of wining the case. This includes strategic action. Court and opponent are sometimes to be distracted from relevant facts. In major commercial disputes lawyers are currently complicating the work of the courts by constantly submitting pleadings of considerable length (100-150 pages), which are often repetitive in content. The lawyers' strategy may be in the individual interest of the party, but it does not serve an effective settlement of the dispute. Currently, German courts have no power to limit the length of pleadings. At some courts there are pilot projects which use AI to

[6] Sec. 130d CPC.

[7] Sec. 298a CPC.

[8] *Richter*, NJW-Editorial 28 Jan. 2021 (https://rsw.beck.de/aktuell/daily/magazin/detail/der-moderne-zivilprozess); also very critical in this respect *Greger* NJW 2019, 3429.

[9] The project is located at the University Regensburg: https://www.uni-regensburg.de/forschung/reallabor-parteivortrag-im-zivilprozess/das-vorprojekt/index.html; the proposal has been supported e.g. by *Greger* NJW 2019, 3429

systematically search and filter the parties' submissions. This allows to separate essential from non-essential submissions more quickly, but the software programms are still under development.

The pilot project on the "basic document" has started only recently and it will face vivid debates in the near future. It will indeed be necessary to avoid a too rigid structuring of the documents so that lawyers cannot claim a violation of their party's right to be heard. There is no uniform structure for all cases. Instead the document must be designed for each type of case. This will require some input from the court in the beginning of the proceedings, but that pays off. In any case, the "basic document" will limit the lawyers' possibilities of strategically presenting facts and evidence only in bits and pieces and of distracting the court with unnecessary and repetitive statements.

III. Virtual court hearings[10]

1. Situation during the pandemic

a) Legal basis for virtual court hearings

During the pandemic, there were numerous restrictions on contact and public trials were hardly possible. The vast majority of German civil courts first generously resorted to the instrument of postponing trials and hearings and, wherever possible with the consent of the parties[11], switched to purely written proceedings. However, as the pandemic progressed, it became clear that this was not a lasting solution.

The implementation of virtual court hearings not only required a legal basis, but also the necessary technical equipment for the courts and the legal profession. While the German Code of Civil Procedure has provided a legal basis for video conferencing in civil proceedings since 2001, the courts lacked sufficient technical equipment at the beginning of the pandemic. The provision of section 128a of the Code of Civil Procedure, which the legislator had included in the law very early and with foresight, only came to life during the pandemic. Although there had been numerous pilot projects for the introduction electronic case files, videoconferencing technology had not been a priority before the pandemic. This changed abruptly in the spring of 2020 and the judicial administration tried to equip their courts as quickly as possible so that the judiciary could at least conduct virtual court hearings in some specially equipped rooms. At the beginning, it was not uncommon for judges to bring their own laptops and work with software programmes they had procured themselves. There are no reliable studies to what extent German courts held virtual court hearings during the pandemic. A survey of the Association of German Judges exploring the practice in the district of the 24 Cour of Appeals in Germany came to the conclusion that in 2021, courts held more than 50.000 video conferences. In some courts in 50-75% of civil proceedings video conference technique was used.[12]

While other countries such as Austria or Switzerland had to create an ad hoc legal basis for virtual court hearings in the pandemic situation, Germany was able to fall back on Sec. 128a ZPO, which reads as follows:

> "*Court Hearing by way of video and audio transmission.*

[10] See also *Stadler*, Virtuelle Gerichtsverhandlungen im deutschen Zivilprozess, in: Koshiyama Takata/Teshigahara Shinzansha (Hrsg.), Liber Amicorum Yasunori Honma on the occaion of his 70th birthday, Tokio 2022 (translated into Japanese by Prof. Dr. Takada, Waseda University), p. 533-452

[11] Sec. 128 para 2 CPC.

[12] BRat Drs. 228/23, 26.5.2023, p. 21; DRiZ vol 4/2022.

(1) [1]The court may, on application or ex officio, allow the parties, their agents and assistants to be present at another place during a hearing and to perform procedural acts there. [2]The hearing shall be transmitted simultaneously in sound and vision to that place and to the courtroom.

(2) [1]The court may, on application, allow a witness, an expert or a party to be present at another place during a hearing. [2]The hearing shall be transmitted simultaneously in sound and vision to that place and to the courtroom. [3]If parties, authorised representatives and assistants have been permitted to be at another location in accordance with subsection 1 sentence 1, the hearing shall also be transmitted to that location.

b) Scope of application

Paragraph 1 of the provision regulates the performance of procedural acts by the parties from outside the courtroom and paragraph 2 provides the possibility of also taking evidence with witnesses, experts or in the form of party hearings by way of video conferencing. Since a reform in 2013, an order under paragraph 1 can be made ex officio and does not require the consent of the parties, while the virtual taking of evidence is still only possible at the request of a party or the person giving evidence concerned.

According to section 128a para 3 ZPO, the hearing may not be recorded. Moreover, the technical framework conditions of such a hearing must, of course, comply with the European data processing requirements according to the General Data Protection Regulation (DSGVO), i.e., among other things, only servers located in the European Union may be used and certain encryption techniques must be applied.[13]

At the end of 2020 and in 2021 many courts have already regularly conducted virtual court hearings. This was done mainly on the basis of section 128a para 1 of the Code of Civil Procedure when the court wanted to discuss with the parties the state of the dispute and the legal situation without the need for taking evidence. Video conferencing has proven to be useful for this purpose and is hardly inferior to a real court hearing.

On the other hand, the courts are still reluctant to hold hearings of evidence by video conference under section 128a para 2 of the Code of Civil Procedure. To the extent that this is done, it mostly concerns hearings of expert witnesses. Witness hearings are only carried out very sporadically and only in cases where the court has no doubt about the credibility of the witness from the outset. However, when it comes to assessing the truthfulness of a witness's testimony, the courts prefer a personal examination in which one gains a direct impression of the person of the witness, which is important for the assessment of evidence. There are also some practical issues: for example, if the witness is not in the courtroom, it is difficult to ensure that the testimony is not influenced, e.g. by reading from documents or by other people present in the room. It also takes further technical effort to ensure that the court cannot only see the witness him- or herself, but also the whole room in which he or she is located. Verifying the identity of the witness requires digitalised procedures for the authenticity of identification documents. In the future, deep fakes may also allow misrepresentations of the witness' identity. Many judges also fear that they are more likely to be lied to if the witness is not physically present in the court room. Indeed, psychologically, the assumption

[13] *Reuß* JZ 2020, 1135, 1139; *Rühl* JZ 2020, 809, 814.

may remain that witnesses are more likely to dare to lie if they only look into a camera and not into the face of the judge.[14]

c) Restrictions for virtual court hearings

Section 128a CPC requires that the court itself is in the courtroom. Only the other persons mentioned in the provision may be called in from outside. Section 128a CPC does not allow an exception to the priniciple that the oral proceedings take place at the "place of the court".[15] This means that parties, lawyers or persons providing evidence who do not agree to the proceedings being conducted as a video conference always have the option of going to the courtroom after all and acting from there.

On the other hand, this restriction has proved to be a hindrance in the pandemic situation. While otherwise authorities, courts, universities and many companies completely switched to home office work, judges had to be in court at least during a virtual trial. With panels of three judges, their simultaneous presence did not always comply with the restrictions from the Corona regulations.[16]

The fact that the virtual court hearing is controlled and conducted from the courtroom, so to speak, has an important legal background: this makes it possible to comply with the regulations on the publicity of the hearing from the German Courts Constitution Act and Art. 6 ECHR as well as Art. 47 of the European Charter of Fundamental Rights. Spectators have the possibility to enter the courtroom at any time - even during the pandemic - and follow the trial there. The technical implementation must be designed in such a way that the spectators can follow the actions of the persons connected from other places in picture and (at least in) sound via screens. In this way, the control function by the public is also maintained in such forms of court hearings.

Courts ordering a video conference will sometimes specify from where parties or lawyers are allowed to participate. If they do not specify the location, in particular lawyers may have more flexibility to join a virtual court hearing not only from their office, but maybe also in exceptional cases e.g. from their car (if he or she is in a traffic jam), from their home office etc. Courts should not impose too many restrictions. As long as the lawyer or party participates from a location where confidentiality of the communication is guaranteed, where he or she is not disturbed by other persons or too loud noice etc. the court should accept the participation.

2. The future of virtual court hearings

After the end of the pandemic, the German legislator is now trying to make the partially very good experiences fruitful for the future.[17] In particular, video conferencing is to change from the exception to the rule in many cases.

The increased use of video conferencing technology would not only save the lawyers time and travel, it would also give the courts a high degree of flexibility in scheduling and conducting hearings,

---

[14] Vgl. *Stadler*, Der Zivilprozeß und neue Formen der Informationstechnik, ZZP 115 (2002), 413 ff; for a detailed analysis see *Seigfried*, Die virtuelle Teilnahme an der Hauptverhandlung im Zivilprozess – quo vadis? Bestandsaufnahme und Zukunftsperspektiven der Verhandlung im Wege der Bild- und Tonübertragung, PhD thesis Konstanz, 2023 (forthcoming).

[15] Sec. 219 German CPC.

[16] The German legislator only spontaneously made a legal exception for lay judges in labour courts. For a limited period until the end of 2020, they could be connected from another location if they could not reasonably be expected to stay in the courtroom. The (individual) professional judge who participates in the labour courts, on the other hand, had to continue to be present in the courtroom.

[17] Many judges highly estimated the possibility and flexibility of virtual court hearings, see *Rebehn* DRiZ 2021, 90; *Schupp* DRiZ 2021, 66; *Fries* GVRZ 2020, 27.

because in the often very cramped German courthouses, there is regularly a need for very precise organisational coordination among the judges. European legislators are now also increasingly pushing for the use of modern communication technology in cases of cross-border taking of evidence.

a) Proposals for a reform of virtual court hearings November 2022

A reform proposal from the Federal Ministry of Justice from November 2022 wanted to expand the possibilities of using video conferencing technology in the CPC beyond the current legal situation. This included the following changes:

- The court should no longer only be able to permit a video hearing, but to order it. It would thus be mandatory for parties and lawyers to participate in the virtual hearing. This was intended to facilitate the scheduling of oral hearings and to contribute to accelerating the proceedings. The parties to the litigation should be able to apply within a time limit to be determined by the chairperson to exempt them from the ordering of a video hearing.

- Vice versa if both parties apply for a video hearing, it will no longer be in the court's decision-making discretion to grant the requests. On the contrary, it is suggested that in such a situation a video hearing must generally be ordered by the court. An exceptionally negative decision needed to be justified by the court and is subject to appeal. The legislator thus wants to overcome a certain hesitancy and convenience of the courts.

- Furthermore, the proposal suggested the possibility of conducting a fully virtual hearing, in which the court is no longer present in the courtroom. In order to ensure publicity in these cases as well, the video hearing was to be transmitted to a room in the court house that is accessible to the public at any time.

- With regard to the taking of evidence the proposal also allowes for an inspection by way of video evidence. In order to ensure that persons providing evidence cannot be influenced by third parties during a video examination, the court should be able to additionally order witnesses and parties to be present during their examination in a court room with court officers present. So a witness would not be required to travel to the court where the case is heard. He or she could go to the court house of his home town for a video conference, but he would not be allowed to participate from his private house or rooms.

- Finally, the prohibition of recording the video hearding will be deleted and the regulations on the preliminary recording of the minutes are to be expanded. An audio-visual recording could be used to draw up the minutes. However, recordings should only be possible for this purpose and only by the court. Any other recording is expressly prohibited in order to protect the personal rights of the participants. The recording would allow judges to refresh their memory of the hearing, but the draft does not allow that Court of Appeals may use, e.g. the recordings of a witness hearing instead of hearding again the witness themselves, if necessary.

Some parts of the proposal met with fierce resistance from the judiciary. The judges mainly resisted having to conduct a video conference if the parties agreed to do so and having to justify a negative decision.[18] They pointed out that the proposal reflected an unfounded distrust of judges for being technophobic, that there should be no obligation for courts to hold virtual trials and hearings. They

[18] The statements are published on the Website of the Federal Ministry of Justice: https://www.enorm.bund.de/SharedDocs/Gesetzgebungsverfahren/DE/Videokonferenztechnik.html

claim that the necessary facilities were still lacking at the courts and that the additional effort would be considerable. The Association of District Judges, e.g., pointed out:

> "The statement that video hearings and video evidence recordings made possible a faster, more cost-effective and resource-saving decision-making process in many cases, and resource-saving conduct of proceedings, currently misses the reality. In many cases, the equipment of the courts is characterised by under-performing hard and software, frequent system crashes and a cumbersome booking procedure for virtual rooms. The systems currently offered for use are unsuitable to ensure the smooth running of a hearing. Furthermore, the control effort of the technology is too high without technical assistance."[19]

b) Proposals for a reform of virtual court hearings May 2023

aa) Virtual court hearings as a rule?

In a revised draft of May 2023, the Ministry maintains that judicial discretion should be limited. In the case of joint requests by the parties, the court should as a rule have to order a video conference and may only refuse it in exceptional cases - for example, with reference to a lack of technical equipment. The proposal has not been discussed in the Parliament yet and this part will probably still meet a lot of criticism.

bb) Full virtual court hearings and the right to publicity

On another point, the Ministry withdrew its proposals. A fully virtual court hearing, in which none of the participants is in the courtroom, should only be able to be tested in pilot projects on the basis of an opening clause[20], but should not be the normal case.

Sec. 128 para 3 CPC is suggested to have the following wording:

> "The presiding judge conducts the video hearing from the courtroom. He may allow other members of the court to participate in the oral proceedings by video and audio transmission if there are substantial reasons for doing so."

The explanatory memorandum states:

> "As a rule, a panel of judges should act as a unit in the courtroom and also be perceived as a unit by the parties to the proceedings."[21]

What are the reasons behind the backdown of the Ministry?

One important consideration was that it would be difficult to guarantee the right to publicity in a fully virtually trial. There are only two options: (1) The video hearing can be made available as a live stream on the internet. (2) The video hearing will be transmitted to a special viewing room in the courthouse, to which spectators and media representatives will have access. Both options have their downsides.

(1) No public access to video conferences?

Another solution – to exclude the public completely from virtual court hearings – was not seriously considered, because it would violate the procedural guarantees under Article 6 of the European Convention on Human Rights and German constitutional law.[22] Public court hearings are an essential instrument of control in modern democracies. There are, of course, some exceptions to the right of

[19] Statement of the Association of District Judges, p. 3; in the same line lies the Statement of the German Judges' Association.
[20] Sec. 16 ZPOEG-E (Introductory Act to the CPC).
[21] BRat Drs. 228/23, 26.5.2023, p. 24.
[22] BVerfGE 70, 324, 358 = NJW 1986, 907; BVerfG NJW 2001, 1633, 1635.

public access to court hearings, but they are limited to situations in which a balancing of interests dictates that priority be given to the protection of the rights of the litigants. This is also in line with the case law of the European Court of Human Rights which struggeled in the past, especially in cases where a purely written procedure takes place, that exclusion of the public was well justified in the individual case and does not become the rule.[23]

(2) No live broadcast of video conferences on the internet

The option of a live transmission on the internet was also quickly discarded because it has weighty disadvantages:

There has been a general debate in Germany over the last decades of whether the court room should be opened to media broadcasting. Despite the general importance of media in modern society, the legislature has always been very reluctant to broadcasting court hearings in television or on the internet.

> Sec. 169 para 1 of the Judicial Act (2017) reads as follows:
> "Sound and television broadcast recordings as well as sound and film recordings for the purpose of public presentation or publication of their contents are prohibited. The transmission of sound into a working room for persons reporting for the press, radio, television or for other media may be permitted by the court. The transmission of sound may be partially prohibited in order to protect the interests of the parties or third parties or to ensure that the proceedings are conducted in an orderly manner."

The prohibition of media broadcasting goes back to a regulation of 1964 and was confirmed by the Federal Constitutional Court in 2001.[24] More than 20 years later moving images have become much more important for media reality, especially in the online age. In a democratic public, the judiciary should definitely be perceived more intensively. In reality there are not many spectators in the court room, very often not a single one. Nevertheless, the only progress made was that today the pronouncement of judgments at the Federal High Court can be filmed upon special order of the court. Against this background broadcasting of video conferences on the internet would have meant to fall from one extreme to the other. An unlimited number of viewers via the internet impairs the personal rights of all participants in the virtual court hearing. There is too much publicity here, so to say. The argument that anyone can go to the court room and listen what is happening there does not carry much weight, because the impairment of personal rights has a completely different quality if hearings are available on the internet compared to a public court hearing in a court room with a limited number of listeners.

Extensive measures would have to be taken to protect personal rights. In theory and from a technological point of view, it is possible to anonymise the parties, witnesses, etc. during such a hearing streamed on the internet. Faces can be made unrecognisable and, for example, the mention of names can be hidden.[25] This, however, requires to be technically controlled and monitored by an IT technician during the entire hearing. Without such a filter to protect personal rights, there would be a considerable danger that private recordings, on which the persons can be identified, would be made by way of screen recording and later misused. Technically, such screen recordings cannot be

[23] ECtHR, 15 October 2009, 17056/06 (*Micalle/Malta*); for details see *Morscher/Christ*, Grundrechte auf öffentliche Verhandlung gem. Art. 6 EMRK, EuGRZ 2010, 272 ff.
[24] Constitutional Court (BVerfG) BVerfGE 103, 44 = NJW 2001, 1633 = BeckRS 2001, 30157298.
[25] *Paschke*, Digitale Gerichtsöffentlichkeit, 2018, 264 ff.; *Reuß* JZ 2020, 1135, 1139.

prevented at present.[26] Compared to the situation in the court room there remains a considerable risk for the personal rights of all participants. Again: the situation in the court room is different: unauthorized film recordings from the auditorium with a mobile phone that are later posted on the internet can be prevented either by the court in the courtroom or, if a video conference is broadcasted to a special room for spectators by a supervisor.

Another argument against broadcasting video conferences on the internet is a psychologcial one: Many feared that there is the risk that lawyers and judges could act differently in the face of media publicity and that the objectivity of the proceedings could suffer. There is a danger that the court hearing will become an entertainment show. The Constitutional Court held in 2001 with respect to media broadcasting of court hearings:

> "Media publicity is an aliud compared to publicity in the courtroom. Many people change their behaviour in the presence of the media."

Despite today's ubiquitous media and the completely unbiased way many people deal with their personal data in the context of social media platforms, this statement is probably still essentially correct 20 years later. Nevertheless one has to be aware of the fact there is trend to the contrary in international courts. At the European Court of Human Rights in Strasbourg, at several international courts, for example the International Criminal Court in The Hague[27] the entire trial is recorded and put on the internet with a delay of 30 minutes. The cases heard before these courts are, however, of a general and global importance which may justify access via internet. This does not apply to a local traffic accident or a rental dispute.

(3) Broadcasting video conference to a special room in the court house?

For Germany, it therefore seems obvious to resort to the option according to which the video conference is transmitted to a publicly accessible room in the courthouse. It can be a good compromise between digitial progress and constitutional guarantees. Apparently the Ministry of Justice did not share that opinion: they wanted to have the panel of judges present in the court room in order to emphasize and support their authority which may be less powerful if the judges are reduced to a single pictures on the screen. Furthermore, doubts may have prevailed that it is not attractive for the public to go to the court house in order to watch only a video conference there. Today you will not find too many spectators in German court rooms because civil proceedings are sometimes too boring for the public who is not familiar with files. This number may even be reduced if there is no “live” court hearing.

There is, however, also a downside to the solution as it is now suggested. If the presiding judge conducts the hearing from the court room, parties and lawyers cannot be prohibited from also coming to the court room instead of participating virtually. We will therefore probably see a large number of hybrid videoconferences. Based on the experience of the pandemic there are several studies which clearly state that hybrid heardings or conferences have many disadvantages. There is always a tendency to focus on the persons physically present in the court room and to “forget” those who are only “a picture on the screen”. It requires much more attention for the presiding judge to treat all participants equally and there still is a risk that the remotely participating lawyers or parties will not be heard in the same way.

---

[26] *Reuß* JZ 2020, 1135, 1139. In England, the Corona Virus Act 2020 implemented sec. 29ZB and sec. 29ZC to the Tribunals, Courts and Enforcement Act 2007 and criminalised the unauthorised recording court proceedings.

[27] Regulations of the Court (ICC) as amended on 12 November 2018, Regulation 21, ICC-BD/01-05-16.

We will now probably see some pilot projects until 2030 and then the debate will continue.

c) Evidence taking by virtual court hearings?

Currently Sec. 128 CPC allows the use of video conferencing techniques for the taking of evidence only for the hearing of witnesses and expert witnesses. We have already discussed the disadvantages of the hearing of witnesses that are not physically present in the court room. A virtual hearing of expert witnesses, on the contrary, has many advantages. Experts may improve their presentations if they can easily use videos, animations, etc. to illustrate their findings. Expert witnesses are professionals and very often used to video conference techniques.

The reform proposal now suggests to also allow the visual inspection of things by video conference, but it still maintains a prohibition for documentary evidence during a video conference.[28] The main field of application of this new rule will probably be evidence by electronic documents. Electronic documents are not to be considered "documents", but have always been treated as evidenciary objects for a visual inspection by the court. I would even recommend to restrict visual inspections during video conferences in pratice to electronic documents. For the inspection of other things or, in particular, for the inspection of a property or an accident scene courts need to get a comprehensive impression in reality. To asses noise or odour immissions in a neighbour dispute there is no way to avoid a physical inspection in reality.

d) Virtual court hearings in a cross-border setting

The reform proposal does not address an issue which has been very controversially discussed in Germany for some while.[29] It is the question of whether a court may order a hearing of witnesses or parties who are located abroad by video conferencing without asking for legal assistance of the state in which the person is located during the virtual court hearing. It is settled under public international law that no court is allowed to become active beyond the national borders of its own country without the permission of the foreign state involved. There is therefore an international consensus that members of a court cannot simply travel to another country and hear a witness or inspect premises. Courts must instead take resort to the mechanism of international legal assistance. On a global scale there is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters that entered into force in 1972. Courts from one signatory state may ask for assistance by letters rogatory to another signatory state. As a matter of course the Convention could not take into account video conferences, because the technique was not widely used at that time. But the basic idea behind the Convention to protect national sovereignty also applies to video conferences: if conducting a trans-national video conference with participants from abroad must be considered as the exercise of the court's power abroad, it is illegal without the consent of the foreign state. The question is not easy to answer. Some argue that during the video conference the court does not leave its own country and therefore acts only on its own territory,[30] others emphasize that there is undoubtedly a transborder effect if the witness or party heard is located abroad. Courts should aopt a cautious attitude in this respect . Any official court hearing, albeit virtually, is the exercise of judicial power and must be restricted to the court's national territory. Transnational video conferences do have a cross-border effect that is not neglectable.

In the European context, the situation seems to be clear thanks to the European Regulation on Evidence Taking. The new version of the regulation came into force in 2022 and it has a strong focus

[28] Sec. 284 para 2 sentence 5 CPO (draft version).
[29] An overview is provided by *Knöfel* RIW 2021, 247.
[30] *Heck* ZIP 2022, 1529; *Sturm/Schulz* ZRP 2019, 71 (74); Administrative Court Freiburg NJW 2022, 7267 (for informal hearing of a party).

on video conferences because they are an easy and less expensive way for courts to communicate directly with a witness abroad. Nevertheless, even in Europe where sovereignty of the Member States is less important today, the Regulation maintains the principle that a video conference ordered by a court of one Member State requires the permission of another Member State if a witness or party is located in that state (Articles 12, 19). One may therefore conclude that courts must use the mechanisms provided by the Evidence Regulation in order to conduct a cross-border video conference. If this is the rule within the European Union with its close judicial co-operation of Member States, it applies a fortiori in relation to countries outside the EU. Recently, the Federal High Court has also referred to the Hague Evidence Convention for the video examination of a foreign witness and thus apparently excludes a directly ordered video conference for this purpose.[31]

For these reasons, the prevailing opinion in German literature is cautious and rejects cross-border video hearings and recordings of evidence, even if a person from another EU country is to participate.[32] According to some authors, it should at least be allowed to connect only parties and their lawyers for a mere informal hearing. This is also provided for in Article 7 of a proposed EU Regulation COM (2021) 759 for parties (not for their legal representatives). However, this distinction is not convincing. The gathering of information through the hearing of parties is also part of sovereign judicial activity and highly problematic across borders. Lawyers who participate in video conferences make procedual declarations and applications that are important for the litigation – there is no "informal" interaction between the court and the lawyers. It therefore does not seem reasonable to differentiate under international law between video hearings for the taking of evidence and for "informal" consultation of a party or interaction with a lawyer.

IV. Conclusions

Germany civil courts are still struggeling to find their way into the digital age. The possibilities of electronic file management are not yet fully exploited and where they collide with the professional freedom of lawyers we will see fierce debates in the future. With respect to virtual court hearings there is some progress based on the experience made during the pandemic, but the legislature is rightly wary of sacrificing the rights of litigants in favour of the curiosity of an unlimited internet community. Courts must also currently resist the temptation to use videoconferencing technology too hastily in cross-border situations.

A completely digitalised or virtual conduct of civil proceedings is not in sight. There are such proposal for small consumer disputes, but so far the legislature has not taken them up so far.

[31] Federal High Court (*Bundesgerichtshof*) MDR 2021, 1406 n. 23.

[32] *Stein/Jonas/Kern*, ZPO, Commentary 23rd edition, Sec. 128a, n. 35; BeckOK ZPO/*Selle*, online commentary, Sec. 128a n. 16, *Zöller/Greger*, ZPO commentary, 34th ed. n. 10; *Musielak/Voit/Stadler*, ZPO commentary, 20th ed. 2023, Sec. 128a n. 8; *Reuß* JZ 2020, 1135 (1136); *Windau/Irskens* BJ 2020, 281 (282); *Lorenz* MDR 2016, 956 (957); for a differentiated view see *Windau* jM 2021, 178, NJW 2020, 2753 (2754).

Handout

Present version of § 128a CPC (since 2013)

Section 128a Hearing by means of video and audio transmission

(1) The court may allow the parties, their representatives and assistants, on application or ex officio, to be present at another place during oral proceedings and to perform procedural acts there. The hearing shall be transmitted simultaneously in sound and vision to that place and to the courtroom.
(2) The Court may, on application, allow a witness, an expert or a party to be present in another place during a hearing. The hearing shall be transmitted simultaneously in sound and vision to that place and to the courtroom. If parties, authorised representatives and assistants have been permitted to be at another location in accordance with subsection 1 sentence 1, the hearing shall also be transmitted to that location.
(3) The transmission shall not be recorded. Decisions under subsection (1) sentence 1 and subsection (2) sentence 1 shall be final.

Draft proposal May 2023

§ 128a Video hearing

(1) The oral proceedings may be held as a video hearing. An hearing shall be held as a video hearing if at least one party or at least one member of the party to the proceedings or at least one member of the court participates by video and audio transmission. Parties to the proceedings under this provision are the parties and intervening parties, their agents as well as representatives and advisers.

(2) At the request of a party to the proceedings or ex officio, the chairman may allow or order that during the oral proceedings by video and audio transmission one party, several or all of the parties to the proceedings participate in the video hearing. If all parties to the proceedings request their participation by audio-visual transmission, the chairman shall order it. In case of a refusal of a request reasons shall be given.

(3) The presiding judge shall conduct the video hearing from the courtroom. He may, if there are substantial reasons, allow other members of the court to participate in the participate in the oral proceedings by video and audio transmission.

(4) The parties to the proceedings and third parties shall be prohibited from recording the video hearing. This shall be pointed out to them at the beginning of the hearing. The video hearing may be recorded in whole or in part for the purposes of section 160a. The parties to the proceedings shall be informed of the beginning and end of the recording.

(5) The addressee may lodge an objection against an order pursuant to paragraph 2 within a period of two weeks. The chairman shall point this out with the order. If the objection is lodged in due time, the chairman shall revoke the order for all parties to the proceedings. In all other respects, decisions under this section shall be incontestable.

Sec. 284 Taking of Evidence

Para 2 & 3:

(2) The court may permit or order the taking of evidence by video and audio transmission in accordance with section 128a. Section 128a (2) sentence 2 shall not apply. The right of application under section 128a(2) sentence 1 also applies to witnesses and experts. The objection under section 128a(5), first sentence, is only available to the parties and witnesses to be parties to be heard and witnesses. Sentence 1 does not apply to evidence by documents.

(3) In respect of parties to be heard, witnesses and experts may additionally be ordered in the case of a taking of evidence pursuant to paragraph 2, that they remain at a court location to be specified by the court during the hearing.

Sec. 16 Introductory Act to Civil Procedure Code

(1) The Federal Government and the governments of the Länder shall be empowered to authorise, by ordinance, fully virtual video for the purpose of testing them. A video hearing (section 128a of the Civil Procedure shall take place as a fully virtual video hearing if all parties to the proceedings and all members of the court participate in the hearing and the presiding judge conducts the video hearing from a place other than the court. …

2) The admission of fully virtual video hearings may be limited to individual courts or proceedings. ..