

# Coronavirus & civil procedure – Video conference hearings in civil proceedings in Germany

31 March 2020

## **Coronavirus (COVID-19), corporate litigation, litigation and arbitration, procedural law**

The COVID-19 pandemic poses unprecedented challenges also for the German judiciary. While the majority of lawyers and clients are working from home, courts are maintaining at the very least emergency operations.

The German Association of Judges announced that "*the judiciary will continue to be able to fulfil its core tasks and make urgent decisions*". A partially discussed "*standstill of the judiciary*" as stated in sec. 245 of the Code of Civil Procedure – meaning a complete discontinuation of (civil) court activities - therefore seems far-fetched at this stage. Despite the continuity of the ongoing proceedings, the absolute majority of impending oral hearings in civil proceedings have been postponed. Nevertheless, the judges decide on the postponement in judicial independence; corresponding statements by the Ministries of Justice in the federal states (Bundesländer) are merely recommendations.

In this context, the government has reacted with comprehensive legislative packages, which, however, do not contain any civil procedural regulations. However, the Code of Civil Procedure already provides a sufficient scope for action that could be of increased relevance in this exceptional situation.

## **The possible use of video technology according to sec. 128a of the Code of Civil Procedure**

Sec. 128a of the German Code of Civil Procedure ("GCC"), provides for the possibility of conducting oral proceedings by way of image and sound transmission, namely via video conference. The provision is considered suitable for the purpose, on the one hand, of obviating the need for the parties to travel to the place of hearing, on the other hand, of reducing the number of people present in the courtroom and consequently minimizing the risk of infection. Although this provision was adopted in the Code of Civil Procedure back in 2001, it has not yet been implemented in current court practice in Germany.

In practice, sec. 128a of the GCC stipulates that, only the mandatory presence of the judges in the courtroom, while the parties and their representatives are allowed to be in attendance via video transmission or, alternatively, to attend the oral proceedings at the court. Procedural acts such as the filing of applications are also effectively possible via video transmission. Similarly, the taking

of evidence through the hearing of witnesses, experts and parties is also possible by video, as manifested in sec. 128a para. 2 of the GCC. However the taking of evidence through the inspection of objects of evidence is subject to restrictions to the effect that any objects that are inspected must be physically submitted to the judge. These oral proceedings are not video recorded, but, like all oral hearings, are recorded by the judges in accordance with the relevant provisions of sec. 159 et seq. of the GCC.

### How do you initiate a video conference hearing?

The initiation of an oral hearing of this kind can be ordered by the court on application of one of the parties or ex officio, whereby the consent of both parties is not a prerequisite for the order. The court shall decide on the application of a party to hold a video conference hearing by way of an order. However, the court shall have discretion to grant such request. Considering the current situation and the associated travel restrictions, such as various cancellations in public transport, there are many arguments in favour of holding a hearing via video conference. In addition, the court must take into account the time and cost savings of the parties when deciding on the application. Should the court, however, not grant the request, the corresponding negative court decision can unfortunately not be appealed separately (see sec. 128a para. 3 p. 2 of the GCC).

### What is the procedure?

First of all, it must be verified whether the respective court has the necessary technical equipment to facilitate these oral hearings. The entire proceedings in the courtroom must be visible to all parties involved in the proceeding on video, i.e. the transmission of the image from the bench, the opposing party and other parties to the proceedings. An oral hearing by means of spontaneous video telephony, e.g. with the help of the smartphones of judges or parties of the proceedings, even outside the courtroom, is also still excluded.

The exact technical equipment varies among the courts. Usually, the preparatory sending of dial-in data or invitation links as well as a test run, if necessary, is common. In some regional courts "Skype for Business" is used as a provider for this purpose. During the video conference it is also permissible for the parties to be at a different location than their authorized representatives. With regard to the general principle of publicity of oral hearings, the entire videoconference is transmitted into the courtroom, so that video conference hearings are held in public.

### Conclusion

All in all, sec. 128a ZPO provides courts with an effective and underestimated instrument to conduct oral video hearings even at the present time. The parties can work towards this by way of corresponding requests. Should you wish to conduct your oral proceedings by way of a video conference, we would be happy to be your competent partner and have the knowledge about which courts have the appropriate infrastructure at hand. Alternatively, there is the possibility of working towards the continuation of the proceedings without an oral hearing through a decision in written proceedings in accordance with sec. 128 para. 2 of the GCC.

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