Litigation in the Time of Covid-19: Some Observations from Germany

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If one wants to analyse the effects of the pandemic on German civil procedure law, it seems advisable to first take a look at the status quo ante. In principle, the Code of Civil Procedure (CPC) requires a public oral hearing of the case before the court may render its decision in a civil or commercial matter. Written proceedings are only allowed if stipulated by the parties, or for very small claims (up to € 600). There is, however, an important alternative: The creditor may obtain an enforceable instrument without a court hearing by way of summary proceedings for a payment order ('Mahnverfahren'). While some 8.5 million summery proceedings were initiated in 2018, less than 2 million ordinary actions were brought before the local and regional courts.

Even where an oral hearing must take place, physical presence and face to face interaction in the courtroom are not necessarily required: Already since 2001 the CPC provides for the possibility of video and audio transmissions. The 'new' rules allow the virtual participation of the parties, their attorneys and advisers, but also of witnesses and court experts.[1] The German courts are technically very well equipped, and training courses for judges are constantly being offered. Nevertheless, German judges are very reluctant to make use of such IT instruments. The parties cannot insist on video or audio transmission, but this is at the judge's discretion. Unfortunately, while IT has long been a matter of course for all generations in private everyday life, in the judicial workplace it is widely regarded as complicated, mysterious and unreliable. Every judge and every lawyer has heard of stories in which all kinds of things went wrong, but not too many have their own practical experience. Therefore, cases in which the 'new' rules are actually applied have been very rare so far.

One might think that Covid-19 has fundamentally changed this situation. There is no data available yet as to whether the courts have worked more intensively with IT technology in recent weeks. However, there is much to suggest that everything is more or less the same so far: apparently most judges are more inclined to simply postpone oral hearings that are not particularly urgent than to accept a fundamental change of their procedural routine. In

[1] Cf. Section128a CPC: *(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 argument, and to take actions in the proceedings from there. In this event, the images and sound of the hearing shall be broadcast 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 broadcast 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 broadcast 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.*

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Germany, most courts, with the exception of the so-called supreme federal courts, are a matter for the Länder. In Bavaria, which has been taking the lead in fighting the crisis so far, the Ministry of Justice has announced on 19 March 2020: 'Whether a court hearing takes place is to be decided by the judge as a matter of judicial independence. Also, the decision whether to cancel or postpone a hearing is made solely by the court. The Ministry of Justice can only make recommendations. […] In view of the worsening of the Corona crisis, it is important to focus on core tasks, set priorities and reduce public hearings to the bare essentials in order to protect health. […] In civil proceedings and in non-contentious matters, hearings should be held only in urgent cases. This applies, for example, in family and child care matters to cases involving protection against violence, threats to the well-being of children or forced placement.'

Two aspects seem particularly noteworthy here: firstly, that the official recommendation does not specifically refer to or promote the benefits of electronic communications, and secondly, that the question of whether the courts are open or closed is not to be decided by the ministry or at least by the presidents of the courts, but by every single (presiding) judge. In practice, the courts follow the official recommendations and have apparently become well accustomed to the situation. Fortunately, the initial fear that the pandemic will bring the administration of justice to a more or less complete standstill[2] has not come true. While more and more academic articles on the legal consequences of the crisis are being published,[3] the situation does not appear to be worsening too much in practice, especially as the crisis has presumably led to fewer new cases reaching the courts, at least for the time being. If one looks at some blogs where practitioners deal with civil procedure issues these days, it can be seen that most discussions mainly concern rather technical questions of case management (e.g. on the extension of time limits or the postponement of hearings). Many judges are working on their files in their home offices, and it is expected that oral hearings will take place again in the not too distant future. Even the fact that the public does not have access to the courts during curfew is not considered a particular problem, at least in civil law cases: It is considered that the principle of orality and public access can be restricted in the interests of public health.

All this may explain why the German legislator has so far seen no reason for further action. New rules were implemented surprisingly quickly to protect debtors (especially tenants) in the crisis.[4] But there have been no efforts to amend the CPC. As far as can be seen, new procedural rules are currently only discussed as regards the labour and social security

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[2] Cf. Sec. 245 CPC: *Should, as the consequence of war or of any other event, the court cease its activities, the proceedings shall be interrupted for the duration of this situation.*

[3] In the meantime, even a new journal on 'Covid-19 and the law' was founded ('COVuR', Verlag C.H. Beck). The first issue will be published in May 2020 and will inter alia contain a lengthy article by Thomas Rauscher on 'Covid-19 and civil procedure'. There are also more and more current articles in general periodicals, in particular in the much-read 'Neue Juristische Wochenschrift': von der Heide, NJW 2020, 1023 (Prozessrecht in Zeiten der Corona-Pandemie); Kulhanek, NJW 2020, 1183 (Saalöffentlichkeit unter dem Infektionsschutzgesetz); Vorwerk, NJW 2020, 1196 (Corona/Covid-19 – Wiedereinsetzung oder Unterbrechung?).

[4] Act of 27 March 2020 to soften the consequences of the Covid-19 Pandemic under private law, insolvency law and criminal procedure law, Federal Law Gazette part I of 27 March 2020, p. 569.

courts.[5] This can be explained by the fact that in labour law cases lay judges are involved and that an employee has to file his lawsuit within a very short period of time after a dismissal if he wants to defend himself in court.

Finally, two points seem remarkable, which were perceived with some astonishment in the scene. Firstly, the Länder and the bar associations have just now agreed on an increase in attorney's fees, and at the same time court fees are also to be increased. Secondly, some major law firms, which have been earning very well for many years, have started to lay off legal staff immediately after the crisis began. But that is life: Those who do not have too many scruples can profit from every crisis.

[5] Draft bill to ensure the functioning of the labour and social courts during the Covid-19 epidemic and to amend other laws of 9 April 2020.