



JUSTITIA 4.0 – THE PROS AND CONS OF DIGITAL COURT PROCEEDINGS AND NOTARIAL RECORDS

The contact restrictions introduced to contain the coronavirus pandemic have led to considerable upheavals in legal practice in many European Union countries. In particular for the areas of forensic activity and the creation of notarial documents, the irrevocable principle of attendance in person has continued to apply practically without restriction disregarding the progress in communication made possible by progressing digitalisation - whether it is to be able to get a personal picture of the parties (court proceedings), whether it is to confirm the personal identity of the persons appearing without doubt (notarial documents).

I. DIGITAL COURT PROCEEDINGS

The attendance in person in front of the judge, direct witness interviews “face to face”, the ritual of taking a seat in the “right” place in the courtroom: from the point of view of justice, the contact restrictions sometimes call into question centuries-old principles and traditions, some of which exist for good reasons of the rule of law, but some of which are certainly also due to a certain preference for traditions. From the point of view of the client concerned, however, the question arises as to whether the now inevitably triggered push for modernisation might also bring advantages: Can I save myself a long journey to a court that is located far from the company’s registered office when ordered to attend

in person? If the lawyer requests extensive information and documents for the substantiation of the pleadings, are there now also possibilities for non-paper-based formats for the presentation?

Depending on the status of the digitalisation of justice, the question arises as to how the experiences gained within the framework of the pandemic can also be made fruitful for the future in the interest of effective and modern legal protection.

II. DIGITAL NOTARIAL ACTS

It is now hard to imagine many areas of business life without videoconferencing – at least until notarial certification is required: the involvement of a notary always required attendance in person. The pandemic forced the legislator to become creative in this area as well and to put existing traditions and principles to the test: if it is possible to hold a shareholders’ meeting by videoconference, why shouldn’t it be possible to conclude a contract for the transfer of shares also by videoconference and using digital corporate identification? The notarial and the respective certification requirements are also fundamentally not subject to standardisation in the European Union so that each country could and had to develop its own solutions here in principle; however, the implementation of the digitalisation directive, which will certainly also have



an effect on the notary, must be taken into account. The range of solutions for a digital notarial records now introduced is correspondingly diverse.

As part of this newsletter, we present the experience gained in the individual Allianz countries from the perspective of judicial and notarial practice.

AUSTRIA

As in numerous other countries, digitalisation is also being incorporated into all areas of life in Austria. With Initiative 3.0, the justice department also wants to provide an offer of digital services and thus promote digital file and procedural management for the courts and public prosecutors – including oral hearings by means of video technology. It has already been possible to conduct individual interviews digitally using “appropriate technical means of communication for the transfer of words and images” – but not entire hearings. With the civil procedure amendment 2021 – ZVN 2021, the required statutory accompanying regulations are now being created. The assessment period of the ZVN 2021 ended on 05.09.2021.

Currently, the legal proceedings by means of video transmission are only possible for the area of disputed civil law. The legal basis for court hearings by videoconference is the Federal Law concerning accompanying measures 1st COVID-19 Justice Accompanying Act. Criminal proceedings or matters relating to family law are therefore left out for the time being. The basic principle of public domain can also be complied with – for example, by transferring the hearing in a public court room. Whether hearings are conducted by means of videoconference is at the discretion of the court; the parties can suggest a videoconference. Prerequisites for holding a digital court hearing are:

- the agreement of the contracting parties. However, their consent is already deemed granted if they do not object within a time limit determined by the court.
- the use of suitable technical means of communication for the transmission of words and images,
- the suitability of this procedure for the programme provided for in the session
- that this procedure is also feasible from the point of view of procedural economy and that the technical prerequisites are present in order to hold the session in accordance with the procedural provisions.

The Covid-19 pandemic has laid the foundation for court hearings via videoconference and lawyers of our law firm have already had numerous experiences in this regard. In particular, preparatory meetings in civil proceedings were mainly held via Zoom meetings due to the Covid-19 pandemic. These hearings were very well accepted by the parties who generally had no objections to holding the session via Zoom meeting as they also partially did not have to make a long journey to the court.

Implementation in practice was relatively simple. Certificates are “submitted” to the hearing judge in the session, e.g. by email. However, from our point of view, the hearing via videoconference is not yet suitable to fully replace an in-person hearing since the personal impression cannot (yet) be gained to the same extent in the context of taking evidence. Our practical conclusion: For shorter hearings such as preparatory meetings during which settlement discussions are held and the process programme is discussed with the parties, hearings via videoconference are advantageous since you save yourself the travel to the court or any necessary deputising by a colleague on site.

Since the amendment of the notarial regulations in 2020, notarial documents, other public or publicly certified documents and notarial certifications can be established by means of



electronic communication possibilities in relation to the notarial act.

Immediately after the entry into force of the 4th COVID Act and the associated amendment of the Notarial Code, our law firm accompanied the first conclusion of a notarial deed in Austria regarding a share assignment to a GmbH via videoconference and mobile phone signature. The parties involved in this, were, among others, from Los Angeles, Berlin and Munich.

The practice will show to what extent virtual court proceedings and notarial acts become a rule and will replace hearings in the courtroom.

CHINA

In accordance with the online court procedure rules of the Chinese People's Courts, digital court proceedings can be carried out in the context of a pilot project in specially set-up "pilot courts" in the following cases:

- civil and administrative disputes;
- criminal matters in accelerated proceedings, conversion and probationary matters as well as criminal matters that are not suitable for offline negotiations for other special reasons;
- special civil proceedings, supervision and bankruptcy proceedings as well as non-judicial enforcement cases;
- civil and administrative enforcement cases and enforcement cases of criminal law secondary actions.

Digital notarial documents are currently being tested in a pilot project. The respective notaries are entitled to execute selected digital notarial records (e.g. certification and securing of evidence).

In the aforementioned cases, the plaintiff can register on the platform for online disputes of the competent pilot court and upload electronic

documents. The implementation of the digital proceedings requires the defendant's consent. All parties participating in an online process may enter process documents or evidence directly into the process platform.

The online negotiation phase then takes place via video meeting on the platform. If witnesses and technical experts have to appear online, separate digital rooms for testimony are set up for this purpose (below the main digital meeting room) so that the witnesses and technical experts do not participate in the other hearing sections. At the end of the proceedings, the pilot courts may issue and deliver the decisions electronically.

CZECH REPUBLIC

Until recently, the digitalisation of the justice system in the Czech Republic had no priority. However, the coronavirus pandemic has required a change in the current procedure both in court matters and in notarial matters. The necessary amendments to the law have already been made, but have not been applied in practice yet. This is expected for 2022; the digitalisation of justice is expected to be completed by 2024. Since 01.09.2021, it has also been possible for notaries to create electronic notarial minutes of the shareholders' meetings by means of electronic identification and by videoconference. In connection with the use of direct entry in the commercial register, it is therefore possible, for example, to establish a company completely online.

It is expected that the implementation of online court proceedings will only be possible with the consent of all parties involved in the proceedings. In each court proceeding, the court first examines whether it is appropriate and suitable to carry out the hearing in the respective proceeding online. The appropriateness of conducting an online hearing should be assessed in particular based on whether a statement in the proceedings is required, whether an



interpreter must be involved in the proceedings or whether, for example, the parties involved must verify the authenticity of certain documents. The court then sends the parties to the proceedings a request for approval of the online hearing. The hearing itself takes place in the presence of a judge or a court in the courtroom and with the participation of the parties or their representatives via Skype for Business. However, witnesses or experts are personally questioned in the courtroom.

FRANCE

The Programming and Reform Act for Justice (LPJ) of 23 March 2019 provides that disputes with a dispute value of less than EUR 5,000 can be settled in a fully digital procedure:

- online contact with the court,
- digital transmission of evidence and
- digital monitoring of the procedure.

Since January 2018, the Ministry of Internal Affairs and the Ministry of Justice have been working together on the digital conversion of the criminal proceedings in order to make criminal justice more efficient by abolishing paper and handwritten signatures from the notification to the execution of the sentence. For the time being, this programme is in the trial phase at the courts of Amiens and Blois.

The digitalisation of court proceedings initially only concerns documents and pleadings that are exchanged and submitted via secure platforms of the Ministry of Justice. As regards criminal proceedings in particular, the first attempts in Amiens and Blois were limited to digitally signed proceedings which were successfully transmitted to the competent court by the police and the Gendarmerie.

GERMANY

According to the provision of Section 128a of the ZPO (Zivilprozessordnung [Code of Civil

Procedure]), a hearing by way of image and sound transmission for civil proceedings has already been permitted for a long time. The same applies to the administrative (Section 102a VwGO (Verwaltungsgerichtsordnung [Administrative Procedures Act])), financial (Section 91a FGO (Finanzgerichtsordnung [Fiscal Courts Procedures Act])), employment (Section 46 Para. 2 ArbGG (Arbeitsgerichtsgesetz [Labour Courts Act])) and social court proceedings (Section 110a SGG (Sozialgerichtsgesetz [Social Courts Act])). According to the aforementioned regulations, not only discussion meetings, but also hearings of witnesses, experts or a participant can be carried out upon request. For the area of criminal law, different regulations apply on the use of video technology in order to comply with the public policy and in view of a fundamental obligation of the parties to be present. For example, witness statements by video are only possible in very rare exceptional cases if this serves to protect victims or to defend against the risk of loss of evidence.

On 10.06.2021, the German Bundestag passed the law on the implementation of the Digitalisation Directive (Digitalisierungsrichtlinie, DiRUG). The law enters into force on 01.08.2022. The law introduces an online certification procedure for the establishment of limited companies (GmbHs) and an online certification procedure for certain commercial register applications. The reason for the introduction of the notarial online procedure is the implementation of the European Digitalisation Directive. In the future, the online procedure will be available exclusively for cash establishments of limited companies (GmbHs) and registrations to the commercial register regarding stock corporations, sole proprietorships and branches of domestic and foreign stock corporations.

According to the aforementioned regulations, not only discussion meetings, but also hearings of witnesses, technical experts or a participant can be carried out upon request. From a technical perspective, it is necessary that the hearing



or examination is transferred “simultaneously in picture and sound” to the other location and to the meeting room. In the case of video hearings, the public principle is regularly maintained in practice by setting up a screen in a courtroom. However, the transmission is not recorded or streamed online. Irrespective of whether stationary videoconference systems are used on the part of the court or are based on software-based cloud solutions, no special technology is usually required at the “other location”. Participation is generally possible with any standard internet browser and webcam.

According to Section 16a Para. 1 of the BeurkG new version (Beurkundungsgesetz [Notarisation Act]), online certification is only permissible via the video communication system operated by the Federal Council of Notaries in accordance with Section 78p of the BNotO new version (Bundesnotarordnung [Federal Notarial Code]). Accordingly, the Federal Council of Notaries has the obligatory task of developing and operating such a video communication system. The obligatory use of the video communication system of the Federal Council of Notaries excludes the use of other video communication systems on the market.

From our experience, we have only made isolated use of the possibility of negotiation by way of image and sound transmission. In the process, the parties involved in the proceedings are connected to the large screen in the courtroom in which the judges are personally present and can participate in the oral hearing. However, corresponding hearings have so far occurred without major technical problems so that after an initial familiarisation phase, it is to be expected that the number of video hearings will increase in the future for all participants. Based on previous experience, it is obvious that certain procedures are better suited for videoconferences than others. Hearings that are essentially limited to the discussion of legal issues are, of course, better suited than those in which the perception of participants plays an important role

within the framework of hearings or examinations.

Notarial video certifications are currently not possible in Germany for legal reasons. Certifications of declarations of intent and signature certifications are provided exclusively in-person. For this reason, there are not (yet) reports of experience in this regard. The only exception to this is the notarial support (creation of notarial general meeting minutes) of general meetings, which can already be held by videoconference since spring 2020.

HUNGARY

In Hungary, a comprehensive digitalisation of court proceedings began in 2017, which enables the parties to communicate electronically with the courts and submit their pleadings electronically to the courts. In addition, electronic means are increasingly being used to conduct hearings. For example, digital communication channels have been introduced nationwide, video and audio transmission enabled in the courtroom, as well as the use of speech recognition and transcription software heavily promoted. The introduction of these procedures or means has enabled the courts to increase the transparency of the proceedings and to accelerate the administrative work. Digitisation has also accelerated in the notary offices in recent years so that almost all registers are kept electronically and dunning procedures, for example, can be processed electronically.

In September 2018, the VIA VIDEO project was launched in Hungary, where customised digital communication systems were installed in around 180 meeting rooms throughout the country. This made it much easier to question the defendants or witnesses without having to travel to a court hearing in another part of the country, which saves time and money. As part of the project, a video and audio recording was introduced in the courtroom, which guarantees



precise and realistic file management of the proceedings. When reviewing the records, the judge can retrieve any part of the hearing or add his/her own notes to a point in the record. In the future, this technological innovation will probably completely replace the classic file management.

ITALY

According to the EU digital agenda, many measures have been taken in Italy to digitalise civil and criminal proceedings. In this respect, the most important investments concerned the computerisation of the justice of the peace courts and the office for service, enforcement and protests. Above all, the pandemic has contributed to the fact that digital court proceedings are increasingly being conducted with oral hearings on MS Teams so that the already existing regulations in this regard have applied.

Since 2010, there has also been the possibility of carrying out digital notarial records. On the one hand, this allows the specialists, e.g. to determine autonomous mortgage enquiries as well as cadastral surveys; on the other hand, the public administration is able to update the database thanks to security systems such as the digital signature and thus make digital entries in the commercial register.

As a result of the coronavirus pandemic, the instruments already available for carrying out digital court proceedings were also transferred into practice. While the electronic submission of files has already prevailed, digital court proceedings are something new so their regulation is still incomplete. Nevertheless, videoconferences have now practically established themselves as standard.

The digital court proceedings are carried out with Teams, creating a virtual meeting room. The judge must communicate the date and time of the hearing to the parties within a reasonable period, as well as the link to the virtual room.

The legal matter will be heard after the connection has been established and the identity of the parties has been proven. In this respect, however, it must be noted that the regulation of essential legal institutions such as witness questioning is still missing. In contrast, the question of the presence of the parties does not arise under Italian procedural law.

In Italy, we have already participated in several digital court hearings: the practical handling is very simple - a few days before, the party representatives declare their consent and indicate the email address to be used for the access link; Microsoft Teams is used as a platform. At the specified time, the virtual conference room will be unlocked and, after an explicit reference to the prohibition, the hearing will then proceed completely “normally”. The minutes of the hearing are then provided with a digital signature on the usual digital channels, i.e. sent by certified email and via the electronic court file. The experience with meetings in videoconferences has triggered a debate nationwide about a fundamental reform of the civil proceedings and in particular about the pros and cons of various meetings in order to achieve greater procedural efficiency.

POLAND

In Poland, digital court proceedings take place, especially in civil matters. In light of the COVID-19 pandemic, new regulations have been introduced in recent months, according to which the court hearings may only be conducted in digital form. A “live” hearing may only take place in exceptional cases. In practice, however, we observe that courts in larger cities in particular adhere to these rules. In smaller cities, several hearings are still being conducted in “analogous” form.

Since September, the court mail has in principle only been served by means of an electronic platform of the jurisdiction and not in written form. Digital processes are still somewhat unusual in criminal matters. The same applies to



the electronic notarial records; in particular, electronic notarial documents are not yet provided for by law.

The courts have two platforms: one serves to conduct digital negotiations and the other serves to deliver court mail. Unfortunately, the first-named platform has many flaws and there are often problems with audio or video transmission. In particular, the so-called hybrid hearings appear to be problematic if one party (such as an interpreter or expert) is in the courtroom and all others are sitting in front of their computers. Although e-hearings are no longer an exception, many practical problems remain unresolved – for example, how a document should be presented to the witness so that he/she can comment on them. The fact that the hearings are always recorded, regardless of whether they are carried out digitally or analogously, and that the recordings are made available to the parties is again positive.

Currently, a notarial document may not be issued in electronic form in Poland. However, it is possible, for example, to electronically certify that a copy or an extract matches the submitted document or to have an electronic extract from a notarial document created. An extract of this kind has the legal force of an original. We make use of this option, especially in the case of cross-border mandates. In addition, the notaries electronically transmit information about notarial documents to the company register and record notarial documents, which they have contributed to the creation, in a special e-directory. In practice, this solution is particularly useful in connection with the introduction of an obligation for companies to report all changes in the company register electronically from July 2021. In addition, there is also an electronic inheritance register in which the notaries in particular enter the information about registered certificates of inheritance.

ROMANIA

There is currently no legal basis for the implementation of digital notarial records in Romania. There are currently no concrete draft laws that provide for a corresponding introduction and thus personal attendance before the notary is still mandatory. With the exception of the questioning of individual witnesses or experts, which is possible under certain circumstances through the use of remote communication media (video/audio), there are currently no digitalisation efforts in the area of justice. All court hearings are held in Romania in the presence of the parties or, if applicable, by their legal representatives, before the competent courts.

The questioning of witnesses or experts by means of videoconference systems is currently planned in civil proceedings in those cases in which witnesses or experts are resident abroad. This procedure must be requested separately from the competent court. At the same time, the reasons for which personal attendance is not possible or not opportune and the court office abroad at which the questioning will take place must be notified in the application. The examination/questioning is carried out at the competent court in the presence of a representative of the court office abroad at which the questioning is carried out.

SPAIN

In Spain, the communication between the parties and the courts has been handled via online platforms since 2016; although there are different ones depending on the autonomous community, the largest is LexNET. In the process, the parties will be served the court decisions via the legal representative or lawyer and the documents must also be submitted digitally. Since the coronavirus crisis, it is now also possible to have some preliminary or main hearings via Webex, which is definitely faster and also more effective as further travel can be



avoided. Digital notarial records are not possible because they violate the applicable regulation of the notaries; the personal and physical presence of both the persons and the notary is the basic rule for the notarial records and certifications.

The online platforms are only accessible to authorised personnel and legal representatives. A digital certificate is required for this, whereby the digital ID card is also valid. In the case of court files, the court must authorise the person concerned separately for the case in order to receive correspondence or submit documents. The correspondence is stored for 90 days. If a party does not verify itself digitally within three working days after receipt of the correspondence, the court will deem the communication to have been delivered successfully and the deadlines shall begin to run; otherwise these shall run from the working day following the verification. No further technical limitations are envisaged with regard to online hearings. As a rule, an invitation with ID and password is sent to the parties and a virtual hearing room is created. A video transmission is mandatory.

In Spain, the majority of preliminary hearings in the ordinary civil proceedings have been held via Webex in the larger court districts since last year. In the main hearings with witness participation, this procedure violates the procedural principle of the immediacy of the evidence or witness statements, according to Article 229 of the Law on the Court of Justice (LOPJ) and Article 137 of the Spanish Code of Civil Procedure.

As a result, many oral hearings are still being heard on site at the court, but a tendency towards digital negotiations is also discernible here. With regard to the criminal court proceedings, it is still an exception that the complete main hearing is digitally conducted, but witness statements by means of video transmission from other court districts have been

possible for some time. However, the funds provided are not yet used in remote court districts.

SLOVAKIA

So-called dunning proceedings, in the context of which the court issues a payment order (dunning notice) in accelerated proceedings, are handled in electronic form if the court considers the claim asserted by the plaintiff to be justified on the basis of the submitted application and the attached evidence (without taking evidence in a court hearing). Execution proceedings are also carried out exclusively electronically. Other court proceedings and notarial hearings generally require the presence of participants, but digital tools are also used in some cases in these proceedings (electronic delivery of documents with electronic signature, electronic conversion of pleadings, electronic digital recording of hearings, creation of electronic court files). Entries in the commercial register are also made electronically.

Correspondence between courts and parties to the proceedings shall be done exclusively electronically if all parties have the required electronic reception media and a guaranteed electronic signature. The video hearings of witnesses are carried out as an exception, in particular in criminal proceedings. In practice, we are already working with the above-mentioned electronic tools, which are used in the Slovakian judicial system.

TURKEY

Since the Turkish courts have postponed court hearings completely over a longer period of time, and in order to keep the judicial system capable of action during the Covid-19-Pandemic, the possibility of digital court proceedings has been introduced so that court hearings can now take place by videoconference. Digital court hearings are permissible in all court



proceedings in civil matters. This also includes proceedings before the commercial, family and enforcement courts. Notarial records can also be carried out digitally if the client has a qualified electronic signature. However, this does not include notarial records in which a declaration of intent is submitted to the notary, and notarial certifications. In these cases, the personal appearance of the party/parties is required.

Court hearings can be held by court order or by videoconference at the request of one of the parties. If the court grants the application, the applicant party can participate in the court hearing by video chat, i.e. both sound and image must be transmitted, facial expressions, gestures, posture, other behaviour and emotions must be clearly recognisable and the voice must be well heard. Witnesses, technical experts and other experts can also be connected and heard via video chat. The parties and their lawyers can be connected from any location, unless they are questioned or sworn. In this case participation by videoconference as well as in the case of witnesses, technical experts and other experts is only permitted by the court of their place of residence or a prison. For age or health reasons, participation in the hearing may be approved from another location.

In Turkey, we have not had any engagement-related experience with digital court hearings/notarial acts. The digitalisation of court hearings is, however, one of the most important innovations of the judicial framework carried out in 2020. By May 2021, a total of 10,324 digital hearings were conducted in Turkey at 679 courts. This has contributed significantly to the functioning of the justice system in the Covid-19-Pandemic.

CONTACT

Austria:

Michaela Nill
M.Nill@scwp.com

China:

Marcel Brinkmann
Marcel.Brinkmann@schindhelm.com

Czech Republic/Slovakia:

Monika Wetzlerova
Wetzlerova@scwp.cz

France:

Maurice Hartmann
Maurice.Hartmann@schindhelm.com

Germany:

Axel Berninger
Axel.Berninger@schindhelm.com

Hungary:

Beatrix Fakó
B.Fako@scwp.hu

Italy:

Florian Bünger
Florian.Buenger@schindhelm.com

Poland:

Karolina Knysak
Karolina.Knysak @szlegal.pl

Romania:

Helge Schirkonyer
helge.schirkonyer@schindhelm.com

Spain:

Klaus Maziul
K.Maziul@schindhelm.com

Turkey

Senem Kathrin Güçlüer
senem.gucluer@schindhelm.com