

**VIDEOCONFERENCING IN TIMES OF THE PANDEMIC AND
BEYOND: ADDRESSING OPEN ISSUES OF
VIDEOCONFERENCING IN CROSS-BORDER CIVIL
PROCEEDINGS IN THE EU**

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Abstract

The article deals with selected legal problems of using videoconferencing technology in cross-border civil court proceedings in the EU, especially for the taking of evidence. The research is premised on the observation of a steep increase of videoconferencing during the recent Covid-19 pandemic, which exposed inherent legal issues of using the technology and derived legal issues, which result from the limitations of the technology. The national judiciaries of the EU member states were arguably ill-prepared for the mass adoption of videoconferencing, scrambling to quickly mediate the situation with soft-law approaches and less often by legislative intervention. The makeshift measures can be said to be lackluster as they were not prepared to develop a holistic approach. In the article we describe the most glaring and persistent problems of videoconferencing and then check for solutions in applicable international yet non-binding instruments, such as the European Council's Guide on videoconferencing in cross-border proceedings and the newly updated Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention. We attempt to provide an evaluation of these instruments as orientation for the national judiciaries and legislatures. We further analyze how the use of videoconferencing may adversely affect the immediacy of the proceedings.

Keywords: *videoconference, taking of evidence, civil procedure, immediacy, access to justice*

1. Introduction

Videoconferencing has proven essential in enabling the wheels of justice to turn in times of crisis, as evidenced by the Covid-19 pandemic. Available data demonstrates that the EU member states turned to the facilitated use of videoconference technology in courtrooms in the spring of 2020 at the beginning of the pandemic (European Commission, 2020; Council of Europe, 2020) and have continued to do so in the subsequent phases of the health crisis. It is expected that the trend of relying on the technology will subside in the aftermath of the pandemic, however, some of its forms and applications are likely to stay (S. Dodson, Rosenthal, C. L. Dodson, 2020, p. 2) and form the “new normal” (Anderson, Rainie, Vogels, 2021). Although videoconferencing is at this point not a novel technology, its global use by courts in the past year has revealed previously unthought-of challenges in its use in civil proceedings and exacerbated already apparent issues.

In accordance with the principle of national procedural autonomy, videoconferencing in civil procedures in the EU is governed by rules laid down in member states’ national laws (apart from certain aspects of cross-border taking of evidence). Participants must thus rely on the vigilance of the national actors to guarantee an effective, efficient and secure way of videoconferencing. Nonetheless, a number of non-binding documents at the supranational level may provide a set of quality instructions to remedy the shortcomings of national rules. For the purposes of this article, we shall take into consideration the European Council’s Guide on videoconferencing in cross-border proceedings (hereinafter Council Guide) and the newly updated Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention (hereinafter Hague Conference Guide). These Guides enjoy widespread use and recognition in the EU, due to their role supplementing the Council Regulation (EC) No 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters and the 1970 Hague Convention on taking of evidence abroad in civil or commercial matters, respectively.

The present article aims to address a select number of legal issues surrounding videoconferencing in civil proceedings. Based on a preliminary analysis of recent professional and scientific literature, national case law, and other legal sources, we have identified a set of issues which require addressing. First, the disparities in fact-finding stemming from the remote nature of evidence taking. Second, the physical disconnect between the participants and its psychological effects. Third, the issue of parties located in different time zones. Fourth, guaranteeing the parties’ access to lawyers and interpreters. Fifth, the amount of legal and technical information provided to participants on technical obstacles. Sixth, securing the publicity of hearings. Seventh, the role of principle of immediacy within taking physical evidence via videoconference.

Eight, potential problems in the cross-border context. Ninth, we will look towards cross-border proceedings as the generator of legal development for any useful cues. Each set is provided with a succinct description of the problem and its facets. We then test whether the mentioned non-binding documents provide for solutions and if so, to what extent. Our analysis shows that there are certain shortcomings found within the Guides. It also shows that regardless of the particular outcome of these tests, it is clear that videoconferencing diminishes the immediacy in civil proceedings. The results shows that further actions should be taken by relevant actors at the member states and the EU level to dispel looming concerns.

We must emphasize two limitations to our research. First, the research topic is in a state of perpetual flux due to the constant strains the pandemic exerts on national judiciaries. The findings of the article are thus prone to become obsolete. Secondly, the research does not deal with the laws of member states particularly. The identified issues and findings are therefore more expressed in some member states than in others. However, our findings result from persistent issues stemming from the very nature of the technology and are therefore universal to jurisdictions.

2. The coming of age for videoconferencing in civil proceedings

At the outset, it must be stressed that videoconferencing is not a term defined by EU law, even though the Evidence Regulation explicitly refers to it. It may be framed as “technology that allows two or more locations to interact simultaneously by two-way video and audio transmission” and is often synonymous to the term of “video-link technology” (Hague Conference Guide, 2020, p. 33). The aforementioned definition will suffice for the purposes of the present article. This definition is not limited to court-to-court communication, i.e. where the “location” per definition is the court and court-specialized equipment is used. Although the traditional approach in the EU member states has favoured court-to-court communication, the pandemic has accelerated the pilot use of more user-friendly, privately owned systems, such as Zoom in Germany, Austria, Spain, and Lithuania, Skype in Germany, Finland, and Italy and Microsoft Teams in Croatia and Poland, in combination with systems provided by the state (Sanders, 2020, pp. 12-13). The use of non-standardised systems presents new challenges in the handling of the videoconference. It introduces a variety of ways users can tamper with the transmission, for example the use of video-filters or private chats, and raises interoperability concerns. However, as mentioned, it is also more user-friendly and many of the users are already well versed in handling the technology.

The technology in general is not a novel one, with its first practical application dating back as far as 1927 with a link established between New York and Washington D.C. (Senft, 2019). It should come as no surprise then that the United States of America (USA) have been pioneering its use in the courtrooms (Kodek, 2012, p. 266). In Europe, the introduction of the technology has been more gradual. For example, Germany introduced §128a of its Code of civil procedure (Zivilprozessordnung or in abbreviation ZPO) in 2001 to allow for oral argument using image and sound transmission with consent of the parties.¹ At that time, the judiciary in the USA had already been experimenting with the concept of virtual courts.² The Western Balkan member states introduced the technology even later. The Slovenian Contentious Civil Procedure Act (Zakon o pravnem postopku or abbreviation ZPP) took inspiration from the ZPO and introduced Article 114.a ZPP as a functionally equivalent norm in 2008 (Zakon o spremembah in dopolnitvah Zakona o pravnem postopku, 2008), while the Croatian Contentious Civil Procedure Act only recently introduced the possibility of holding hearings via audio-visual means in 2019 (Zakon o izmjenama i dopunama Zakona o parničnom postupku, 2019), retaining the decision of conducting such proceedings to the discretion of the court.³ As mentioned, there has been a push for facilitating videoconferencing during the lockdowns, either through legislative or non-legislative action. While there is limited particular empirical data on the use of videoconferencing in member states, it is certain that the technology has experienced a steep increase in recent years, even before the pandemic, as evidenced by the Impact Assessment on regulation on taking of evidence. According to the latter, the number of cross-border videoconferences was set to increase annually by 1000 cases through the year 2030, rising from an estimated 3,600 conducted in 2017 to 4,600 in 2030 (Impact Assessment, 2018, p. 11), not taking account of national domestic videoconference court proceedings.

¹ By the year 2009, many member states, including Austria, Belgium, the Czech Republic, Finland, France, Ireland, Italy, Lithuania, Norway, Poland, Romania, Spain, and Sweden had introduced legal regulation for video-hearing, though made rare use of it (Sanders, 2020, p. 3).

² State of Michigan, 91st Legislature, Regular session of 2001, Act No. 262 (enrolled house bill No. 4140), which entered into force on January 9, 2002. See also <http://www.michiganycybercourt.net>

³ It must be emphasized that subsequent legislation in Germany allows that the court may mandate the use of videoconferencing technology even against the declared will of the parties (von Selle, 2021, ZPO § 128a, para. 3-4). In addition to Germany, in the Czech Republic, Ireland, San Marino, and Spain consent is not legally required to conduct videoconference in civil litigation (Sanders, p. 11). The authors note that they translated the text of the relevant laws themselves.

2.1 Access to justice and fair trial

Access to justice is a fundamental pillar of democracy, the exercise and functioning of which cannot be suspended or limited. This implies that the pandemic should not be used as a reason to suspend judicial proceedings (Inter-American Commission on Human Rights, 2020). Ensuring that judicial institutions can continue to function effectively at all times is essential to the right to fair trial by an independent and impartial court and the right to an effective remedy (International Commission of Jurists, 2020, p. 2).

Videoconferencing proves itself a valuable asset in this regard. In fact, the implementation of various forms of e-justice primarily serve the goal of ensuring access to justice for everyone (Churakova, 2021, p. 694). Although access to justice has acquired a variety of meanings, it is generally employed to signify the possibility of the individual to bring a claim before a court and have a court adjudicate it (Francioni, 2007, p. 64). The European Court of Human Rights (hereinafter ECtHR) has recognised that the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6 of the European Convention on Human Rights (hereinafter ECHR) (*Zubac v. Croatia* [GC], paras. 76 et seq.), while also stressing that the right to a fair trial, as guaranteed by said Article and Article 13 of the ECHR, requires that litigants should have an effective judicial remedy enabling them to assert their civil rights (*Běleš and Others v. the Czech Republic*, para. 49; *Nait-Liman v. Switzerland* [GC], para. 112). The existence of effective remedies is also a fundamental right enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (Gori, Pahladsingh, 2021, p. 565). An impediment to access to the national courts will affect the right to a fair trial. However, Articles 6 and 13 do not provide absolute rights (*Golder v. the United Kingdom*, para. 38; *Zubac v. Croatia* [GC], para. 78), and can thus be balanced with other rights protected by the ECHR. In regard to the pandemic, such rights needed to be balanced by legislatures and by courts with the protection of public health and with the absolute right to life itself (Gori, Pahladsingh, 2021, p. 567). Before any such balancing, it should be emphasized that there are absolute legal obstacles in the ECHR for the use of videoconferencing in civil proceedings (Fekete, 2021, p. 477).

In general, videoconferencing has proven an accepted form of guaranteeing the right of access to justice in an emergency. This is most prominently attested by its long history of use in international criminal tribunals (Van der Vlis, 2011) which require even heftier demands and restraints with respect to certain fundamental rights in comparison to civil proceedings. First, the technology has actually been used by the ECtHR during the pandemic to hold videoconference

hearings.⁴ However, as pointed out by the EU Agency for Fundamental Rights, if videoconferencing is used “by default”, as opposed to a case-by-case basis, there could be a negative impact on the minimum standards as developed under Article 47 of the Charter and Article 6 of the ECHR, in particular in relation to effective participation in proceedings (European Union Agency for Fundamental Rights, 2020, p. 10). In short, if videoconferencing is considered a method of holding hearings, it should nonetheless be conducted in respect of Articles 6 and 13 of the ECHR and Article 47 of the Charter (Gori, Pahladsingh, 2021, p. 574). This means that courts should weigh-in whether the technology at their disposal allows for broad considerations regarding access to justice and a fair trial, including the guarantee of parties’ equality of arms, the proper administration of evidence and publicity of hearings. The potential obstacles in these regards are addressed below.

2.2 The shifting perspectives on technology

Despite many shortcomings, there is no denying videoconferencing can be advantageous compared to in person proceedings, in cases where the participants are separated by vast distances (Kodek, 2012, p. 266) or, as recently evidenced, by restrictive measures on social distancing. It provides ease of scheduling, especially for proceedings involving many participants and the alleviation of the stress, hassle, burden, and cost of travel (S. Dodson, Rosenthal, C. L. Dodson, 2020, p. 10). These reasons are especially pronounced in the cross-border setting, where participants reside in another EU member state and the costs of travelling and being present at the court can represent a heavy financial burden for the proposing party to cover (Final Report, 2014, p. 21). Granted, if the proposing party is successful, it will usually be able to recover the costs from the opposing party, however, it will have to cover the up-front costs, which can present an insurmountable burden.

On the other hand, conducting a simple cost-to-benefit analysis within the framework of rules and principles of procedural law will not be wholly indicative of the current and future prospects of videoconferencing. The perspective of judicial participants towards its use will somewhat be determined by the perspective of the society at large, which may have one of two competing sets of views on technology (Winner, 2004, p. 105). First, the instrumental theories of technology, which are most widely accepted. Under this view, technology is treated as neutral, serving only the intended purposes held for it

⁴ The ECtHR drafted its own guidelines on conducting videoconferences: https://www.echr.coe.int/Documents/Guidelines_videoconference_hearings_ENG.pdf

by its users and is indifferent to politics or social contexts. In this view, the ability of humans to control technological outcomes is emphasized. Those holding an instrumental view are often optimistic about technology and take the position that technologies should be adopted as long as they promote an instrumental purpose that enhances efficiency. On the other end of the spectrum, one encounters substantive perspectives on technology, which emphasize the ways in which technological systems can have a substantive impact on individual and community interests that may differ from technology's intended impact. This view of technology rejects the proposition that technology is neutral and takes a more sceptical view of our capacity to exercise agency to control technology (Salyzyn, 2012, pp. 440-443). Because technological developments can undermine important interests and values that the law seeks to protect (Cockfield, 2004, pp. 383, 385-386), the law, and lawyers as its progenitors, will arguably hold the substantive theoretical view of the issue. The pandemic may have, however, provided a considerable push toward a more neutral and instrumental view.

3. Legal issues surrounding videoconferencing in civil proceedings

3.1 The disparities in fact-finding stemming from the remote nature of evidence taking

Apart from the subjective disconnect between the court and the parties and other persons being examined, there are several other disparities to fact-finding using videoconferences. Witnesses, experts or parties may not necessarily know what is going on during the proceedings, because they sit in a room on their own with a screen but cannot hear what is being said. Further, "video links may provide poor sound and image quality; some not working at all or functioning intermittently" (Mason, 2020, pp. 1-2). This may put some parties at a disadvantage in relation to opposing parties which enjoy high quality audio and video service, since the latter can be more expressive and convey more information. Effectively, the equality of arms and the adversarial nature of the proceedings are thereby hampered. In addition, if the subject has not been properly instructed, taking such evidence may be deemed inadmissible, depending on the severity of the deficiencies. Equality of arms is part of the broader concept of a fair hearing and requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place the litigant at a substantial disadvantage against the opponent. The above noted issues may not stem merely from technical obstacles, as the underlying reasons for worse equipment or broadband connection could be traced to the overall material situation of the person being heard. Even though videoconferencing is often subject to consent from all parties, the role of the

court should accordingly not be limited to checking consent but rather weighing-in on the capacity to guarantee the equality of arms of parties. This may require additional powers or duties on part of the court.

Both Guides (Council Guide and Hague Conference Guide) suggests that high quality technology should be used for videoconferencing (Cf. Council Guide, 2013, p. 18; Hague Conference Guide, 2020, pp. 121-122). However, these guides do not address how to proceed when a party, witness or expert does not have sufficient equipment for videoconferencing, mainly because both Guides focuses on taking of evidence from court to court.

3.2 The physical disconnect between the partakers and its psychological effects

The remote hearing of witnesses, experts or parties cannot guarantee the same level of interaction as physical hearings, wherein the judge or judicial officers can connect to the person emotionally, better observe gestures and other non-verbal communication in order to steer the hearing within an appropriate direction (Impact Assessment, 2018, p. 11). The remote nature of the process can lead to situations which would rarely arise in physical proceedings or would be quickly dispelled. For example, in 2020 the Austrian Supreme court was faced with the task of assessing whether the fact that a judge (arbitrator) rolled his eyes during a video conference supposedly demonstrated his bias in the case (OGH 18 ONc 3/20s). The physical disconnect may thus indirectly affect the decision-making process of the court and ultimately the outcome of the dispute. Regarding the latter, existing research from the USA indicates that people evaluate those with whom they work face-to-face more positively than those with whom they work over a video connection. In addition, research in Sweden shows that remote hearings from vulnerable groups, such as children, have also been perceived as less convincing than live hearings (Bannon, Adelstein, 2020, pp. 6-7). And if the hearing does not take place in the courtroom, the factor of seriousness maybe diminished, along with the feeling of relevancy and the respect of the participants regarding the procedure (Kodek, 2012, p. 275). The importance of these issues should not be subject to neglect in legal research.

Both Guides offer support in order to emulate a face-to-face hearing to the greatest extent possible. For example, efforts should be made to perceive non-verbal communication and body language such as external appearance, facial expressions and gestures. More so, it is stated that videoconferencing tools should be installed and used in such a way to ensure atmosphere of participating in a traditional courtroom setting (Council Guide, 2013, p. 18; Hague Conference Guide, 2020, pp. 101, 110).

3.3 The issue of parties located in different time zones

Access to justice and the equality of arms may additionally be hampered by videoconference hearings where subjects are located in different time-zones. The time of hearing should be balanced in order to allow suitable preparations for all parties. For this reason, both Guides suggests that time zone differences should be considered when scheduling a hearing (Council Guide, 2013, p. 17; Hague Conference Guide, 2020, p. 88).

3.4 Guaranteeing the parties' access to lawyers and interpreters

If the case is being litigated via videoconference, the party will wish to discuss matters with their respective lawyer. The UN Human Rights Committee considers that the right to communicate with a lawyer, in conditions that fully respect the confidentiality of their communications, is an important element of the guarantee of a fair trial and an application of the principle of equality of arms (HRC General Comment No 32, paras. 32-34). Any kind of videoconferencing should take place in respect of the party's right to consult their lawyer during the course of the proceedings. However, legal provisions regarding the conduct of the proceedings will often be ill-suited for an online setting.

Similarly, as per the previous paragraph, if a person who requires an interpreter to testify (which will especially be the case in cross-border context) and if the case is being litigated via videoconference, the setting must allow for consecutive or simultaneous interpretation.

For ensuring private communications between a party or witness and his or her representatives when they are not participating in videoconference from the same location means such equipment as a secure phone line, mobile phone, separate videoconferencing equipment should be available according to both Guides. Microphones and cameras connected to the videoconference call in progress should be switched off during private communication, especially if the party or witness is at the same location as his or her representative (Council Guide, 2013, p. 15; Hague Conference Guide, 2020, p. 94).

According to Council Guide, the procedure of taking of evidence could be consecutive with simultaneous interpretation. It is recommended to use consecutive interpreting when the interpreter is in a different location from those who require interpreting. The judge administrating the interpretation and giving instructions has a crucial role in consecutive interpreting. With this approach the person requiring interpretation can more easily enquire about clarification and interventions of the interpreting. On the other side,

simultaneous interpretation is considered to be more demanding as the interpretation is transmitted to the listeners with the use of special equipment which has specific requirements for higher audio and video quality and lip synchronisation. When interpreters work outside of courtrooms, it is important that the connection be a high quality transmission of sound. For better understanding of the hearings, the interpreter should be able to perceive visual and non-verbal expressions of the participants of the hearing (Council Guide, 2013, pp. 11-13). Hague Conference Guide does not differ in this judgement, at least not in a significant way compared with Council Guide since the former cites the latter in this context (Cf. Hague Conference Guide, 2020, pp. 96-97).

3.5 The amount of legal and technical information provided to partakers on technical obstacles

In the setting of modern videoconferencing applications, a plurality of technical obstacles bearing legal consequences may arise. Hearings may be coupled with the sharing and examination of documents, particularly when it comes to cross-examination. This option was merely envisaged in the e-booklet “Videoconferencing as a part of European e-Justice” prepared by the General Secretariat of the Council, but has since become reality. Modern applications allow for sharing of content and multimedia, as well as having a chat function. Care should be given to issues of preventing the incidental disclosing of confidential information or trade secrets as well as guaranteeing the right to privacy. The law should envisage the sanctioning of such disclosures. The project “Handshake MAIVC” has provided some insight into the practical and technical aspects of conducting cross-border research, however, the fact-finding and recommendations of that project require a legal follow-up.

The e-Justice portal contains only rudimentary information on the location where videoconferences may be held (European Commission, 2021), but has not been updated in years and lacks information on important details, e.g. how should the subjects participating in the videoconference set-up their equipment (what portions of their body should be in view), should the subject provide an anterior visual overview of their surroundings in order to dispel doubt regarding that he or she is under duress or is being fed information from a third party during the hearing or that he or she may be using other forms of technology simultaneously. These considerations may appear trivial at first glance, however, one may refer to a criminal proceeding conducted on Zoom in the USA, where the prosecutor deduced that the witness being heard and the defendant were situated in the same apartment by observing the body language and auditory cues (Li, 2021). The problem is immanent to every online

proceeding not taking place in a court room and not using a wide angle lens to transmit video (such as phone or computer cameras).

Similar considerations may be thought of concerning the audio-visual information available to parties, namely, how many cameras should transmit the interior of the court and the officials conducting the hearing. The national rules often do not specify such requirements.

Identification of parties, witnesses or experts may differ between jurisdictions, However, regarding to Hague Conference Guide, stringent rules shall be applied in the case of direct taking of evidence by the requesting state. When identification is requested, according to the Guide, the most convenient way is to show a valid identity document through the video camera (Hague Conference Guide, 2020, p. 62). On the other hand, the Council Guide does not offer any information on the process of the identification of parties, witness or experts for taking evidence in civil and commercial matters. However, the Guide states that, in criminal matters, judicial authority of the requested member state shall be responsible for ensuring the identification of the persons being heard (Council Guide, 2013, p. 23).

The Council Guide offers support concerning some technical aspects of videoconferencing, including placement and use of camera, lighting, screens and microphones and minimum industry standards of equipment to facilitate interoperability (Council Guide, 2013, pp. 17, 27). The Council Guide contains specific information on the angle size of the camera used for videoconferencing in order to ensure visibility of participant's face, shoulders and upper body (Council Guide, 2013, p. 19). The Hague Conference Guide, in a similar manner, addresses the adequacy of equipment (licensed software and use of commercial provider) and minimum technical standards (Council Guide, 2013, pp. 114-123; Hague Conference Guide, 2020, pp. 111-112).

3.6 Securing the publicity of hearings

Article 6 ECHR protects the right to a fair and public hearing and video (Sanders, 2020, p. 14). Opening the hearings to the public ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Accordingly, courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, among other things, the potential interest in the case and the duration of the oral hearing (International Commission of Jurists, 2020, p. 7). When it comes to an emergency situation, the online streaming of hearings may be even more

justified in order to expressly demonstrate that justice is being performed openly and in public (Betetto, 2020, p. 4). On the other hand, the necessity to guarantee publicity may, in the digital era, easily clash with the concept of “broadcasting hearings”, since the sharing of links can essentially amount to a public broadcast of a hearing and lead to unwanted consequences, e.g. the pressuring of the media and public on the impartiality of the court.

Accordingly, both practical solutions as well as legal consideration need to be taken into account. The former concern the access of the public (publicizing links, guaranteeing broadband capacity and preventing unauthorized recordings) while the latter concerns, among other things, the right of privacy of the persons speaking and the scope of the necessary publicity (only parts of the hearing may need to be disclosed or, alternatively, the court may publicize the minutes of the hearings).

Both Guides focus on the taking of evidence via videoconference *stricto sensu*. Neither of them regulates how to ensure publicity of the hearings via videoconference, nor do they provide any solution to the problems mentioned.

3.7 The role of principle of immediacy within taking physical evidence via videoconference

3.7.1 Principle of immediacy in light of the taking of evidence via videoconference

The purpose of this subchapter is to present the issues of the inspection of evidence and documentary evidence (physical evidence) when videoconferencing is used with respect to the principle of immediacy. Herein, we will analyse the use of videoconferencing as an instrument of information-communication technology for remote taking of evidence, e.g. examination of a witness situated in another country than that of the place of the hearing, could affect the principle of immediacy, since the judge would not have the evidence directly examinable at hand and would perceive it solely via videoconference system (Ivanc, 2016, pp. 267-274). This question is especially important when the judge is taking physical evidence, such as documents and inspection objects, via videoconference and not so much with testimonial evidence, such as hearing of an expert, a witness and a party. Accordingly, we provide an overview of the principle of immediacy and the methods of taking physical evidence via videoconference, both both according to the Council Guide and Hague Conference Guide. This allows us to draw certain conclusions on the plasticity of the principle of immediacy when examining physical evidence through videoconference. It should be noted that the traditional interpretation of principle of immediacy exclusively focuses on the directness of the subject

taking the evidence and does not address the role of the object used for remote taking of evidence.

The purpose of immediacy in civil proceedings lies in collecting and evaluating evidence as reliably as possible (Ahrens, p. 49). German law considers that the principle has two manifest forms: formal and material. For a civil procedure, the so-called formal immediacy applies (Prütting, 2020, 51). In accordance with the latter, a judgment is to be given by the judge that takes the party's statements and evidence. This ensures direct contact between the judge and the parties, without an intermediate that would provide the judge with evidence. The indirectness of the proceedings becomes evident if the taking of evidence and the trial are divided between different judges (Juhart, 1961, p. 44; Kodek, 2012, p. 275, Ahrens, p. 43, 49). Therefore, if the judge does not deal directly with the taking of evidence, the principle of immediacy is frustrated. The other manifest form of the principle of immediacy is "material" immediacy, which provides that the evidence, which is available most directly, is to be prioritized (Siebert, 2021, rn. 2; Foerste, 2021, rn. 22). It is worth pointing out that some EU member states traditionally rely on the opposite, i.e. "mediacy" principle, where the judge is merely presented with a transcript of the hearings (Verkerk, 2010, p. 248). In these cases, there can be no transgression against immediacy.

To properly observe the principle of immediacy when videoconferencing, the legal systems should set up a legal basis for taking of evidence via videoconference in civil procedures. National laws have opted for different solutions. For instance, the second paragraph of article 114.a of ZPP states that the courts have the right to take all types of evidence (hearing of the parties and witnesses, examination of evidence with expert witness, inspection, documentary evidence) through videoconference. In comparison, the ZPO provides, in the second paragraph of article 128.a, that the hearing of a witness, a party or an expert witness may be conducted via videoconference. Inspection of evidence and taking of documentary evidence through videoconference are not specifically regulated nor prohibited within ZPO. There are thus discrepancies in the scope of application of videoconferencing among the EU member states in regard to the type of evidence, which reflects different attitudes towards the weight of immediacy in respect of the type of evidence.

To guarantee immediacy, the methods of taking evidence are important. Commonly, legal systems do not regulate how to take physical evidence via videoconference. There are, in essence, two ways. The party could submit physical evidence to the court and the judge can perceive it directly or the party could submit evidence via videoconference (e.g. showing printed document through camera). The latter should be approached with caution, especially in regard to the authentication of the evidence, determination of originality, inclusion of the evidence in the record. However, one should be aware that there

are also different methods of submission of the evidence via videoconference. If the evidence is physical (e.g. printed) it can be presented through a video camera. If the evidence exists in electronic form (e.g. a file on a computer) it could be transmitted via software used for the hearing (e.g. Zoom, Skype, or specialized software) or shown with a screen-sharing function. The court should ensure that the storage of evidence submitted via videoconference will include all the necessary aspects of the evidence (e.g. metadata of electronic file). The court should carefully identify the most appropriate method for the submission of a particular type of evidence.

3.7.2 Council Guide and the Hague Conference Guide on taking physical evidence via videoconference

Both the Council Guide and the Hague Conference Guide address the issue of submitting documentary evidence via videoconference. We believe these guidelines can be analogously applied for the remote inspection of objects as well, even though they focus on documentary evidence, especially since, in certain legal systems, electronic documents are considered as objects of inspection, rather than a separate type of evidence (see e.g. para. 371 German ZPO). Granted, the Hague Conference Guide operates with the notion of “exhibits” in addition to documents in some of its parts. This could allegedly include objects of inspection.

A more detailed look at the Council Guide reveals different methods for submitting documents when videoconferencing. In accordance with the traditional approach, the party may prepare a copy of the documents in advance, which is anticipated to be required in the course of the proceedings. The requesting authority should send the received documents to the requested authority. The party could take a more state-of-the-art approach and present the documents with a separate document camera, using a fax connection or it could supplement videoconferencing with shared document repositories or document servers (Council Guide, 2013, p. 21).

On the other hand, the Hague Conference Guide indicates that it is principally concerned with the taking of testimonial evidence, since this type of evidence is most suitable for videoconferencing. Nevertheless, videoconferencing may also be used to obtain physical evidence, depending on the applicable law; however, the usefulness of the Guide would accordingly be limited. Within said Guide, it is stated that the parties should, prior to the hearing, attempt to agree on which documents or exhibits will be required in the course of the proceedings in order to make them available. Alternatively, there is a possibility of sharing documents through electronic document repositories. Furthermore,

the Guide lists methods for the presentation of documents or exhibits, such as the use of a document camera, a digital screen-sharing function or facsimile.⁵ Documents and exhibits should be shared or presented with an appropriate and agreed-upon medium. For the use of the document camera, presentation or screen sharing capability via videoconferencing, parties should, prior to the hearing, make enquires with the requested authority (Hague Conference Guide, 2020, pp. 19, 93, 94, 123).

To summarize, common methods of submission of documents (and exhibits when using Hague Conference Guide) via videoconference are (according to both Guides): a document camera, fax, a facsimile, shared document repositories and digital screen-sharing. Neither of the Guides offers more detailed guidelines on the process of transmission of documents and other physical evidence via videoconference.

3.7.3 Capacity of taking physical evidence via videoconference

Notwithstanding the aforementioned methods of submission of physical evidence, submitting an object of inspection via videoconference faces additional obstacles relating to the principle of immediacy. When taking evidence via inspection, the judge directly perceives the properties of the examined objects. However, due to the circumstances of an individual object of inspection, the court may, in certain cases, perform an inspection by other direct sensory perceptions than viewing. The object of inspection can be perceived through listening (sound recordings, voice, noise, etc.), smelling (e.g. detecting the presence of a stench), tasting (e.g. trying food, drink) or touching (e.g. determining temperature, structure) (Zobec, 2006, p. 411; Siebert, 2021, para. 1). The nature of videoconferencing deprives direct sensory perception when the object of inspection requires examination through with smell, taste or touch. The principle of immediacy is, however, preserved in respect of the visual and auditory senses, when the object of inspection is being viewed or listened and a stable quality of the connection is guaranteed.

The videoconference system serving as a platform for taking of evidence thus frustrates (if not infringes) the principle of immediacy as the videoconference does not enable the transmission of smell, taste and touch when the judge is taking evidence with inspection even though he or she is dealing directly with the evidence. Even when showing physical or electronic documents or inspecting objects, some elements (e.g. metadata) of evidence will not be available to the judge or the judge will not be able to perceive all elements of

⁵ Regarding some alternative possibilities the Hague Conference Guide (p. 94) cites the Council Guide.

the evidence through the camera (e.g. signature on the contract, condition of the object, etc.). All of the above points towards a standpoint, in theory, that the implementation of the principle of immediacy via video-conference is somewhere “halfway” at this stage. On the other hand, the principle of immediacy could be enhanced with the recording of videoconference proceedings and hearings, especially when the court proceedings take several months or even years (Harsagi, 2012, pp. 129-131).

3.8 Videoconferencing in the Cross-border context

The EU in general lacks competence to interfere with national laws laying down the rules of civil procedures, unless cross-border implications arise (Van Rhee 2012, p. 54; Kramer 2012, p. 127). Even though cross-border videoconferencing in such cases falls within the latter category, the state of the art in the development of the law and technology has not yet yielded detailed legislative efforts in this vein.⁶ Most importantly, the EU Regulation on the taking of evidence in civil and commercial matters has recently been recasted (Regulation (EU) 2020/1783). Said Regulation clearly identifies videoconferencing as an important method of obtaining evidence. In fact, the Regulation posits videoconferencing and other distance communication technologies as the default method of examining persons (witnesses, parties and experts) in cross-border cases (Recital no. 21 and Article 20 of the Regulation). However, it does not provide for specific rules on how to conduct the videoconference. The latter is still within the purview of national authorities taking part in the videoconference, subject to their agreements and the informing of persons speaking on the videoconference. A near-future prospect for more uniform rules will perhaps follow after the proper implementation of decentralized digital solutions, such as e-Codex, which is heavily favoured by the Regulation. The technology has in fact already been used to exchange evidence in pilot projects within the scope of the European Investigation Order

⁶ Videoconferencing in legal proceedings is, however, marginally regulated or even encouraged in several legal sources: May 2000 Convention on Mutual Assistance in Criminal Matters between the EU Member States, Art. 10; 28 May 2001 Council Regulation (EC) No 1206/2001 on Cooperation between the national Courts in the Taking of Evidence in Civil and Commercial Matters, Art. 10(4) and 17(4); 29 April 2004 Council Directive 2004/80/EC on Compensation to Crime Victims (2004/80/EC) Art. 9(1); 11 July 2007 Regulation (EC) of the European Parliament and of the Council No 861/2007 establishing a European Small Claims Procedure, Art. 8 and 9(1); 25 October 2012 Directive 2012/29/EU of the European Parliament, replacing Council Framework Decision 2001/220/JHA.

(Consiglio Nazionale delle Ricerche). In the absence of detailed rules on videoconferencing, the judge must therefore make use of ostensible national regulations, taking account of the law of the member state of the requested court due to the bilateral nature of the proceedings, and should preferably complement them with the two Guides to the degree possible.

4. Concluding remarks

The findings of our analysis show that both Guides cover most of the identified issues, however, they do not cover all of them. The issues not covered include, the lack of proper equipment for videoconferencing on the part of the person speaking, and the issue of guaranteeing the public access to the videoconference. Further, the Council Guide does not cover the method of identification of persons. Therefore, national judiciaries and/or legislatures cannot rely on the Guide(s) regarding the aforementioned areas. Apart from these areas, we have also identified a topic not addressed in the Guides, the transmission of physical evidence via videoconference for inspection. However, the rules on the transmission of documents can be applied analogously for these purposes within a limited capacity, as they do not allow for full sensory perception. Regarding other identified issues, our analysis shows that they are covered by both Guides reasonably well. The Guides provide a potent basis for the national judiciaries and/or legislators for addressing these issues. Both Guides contribute to safer and more just videoconferencing in civil procedures, notwithstanding that some legal issues remain unaddressed.

Regardless of these particular issues, videoconferencing affects one of the fundamental principles of civil proceedings, namely immediacy, due to the very nature of the technology. The technology limits the perception of the person being heard or object under inspection. The national courts must be aware of these shortcomings and make an effort to diminish the adverse effects of videoconferencing. After weighing the advantages and disadvantages, the courts may decide to take certain evidence physically rather than by videoconference, if need be.

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