

Virtual Hearing under Sec. 128a CPC

Introduction and Current Challenges

- Increased demand for digitised court proceedings due to COVID-19 pandemic



Media Society Law Scotland Wales Northern Ireland

● This article is more than 9 months old

Labour: livestream court cases during and after Covid-19 crisis

Opposition proposes changes to reduce backlog and improve weakened justice system

- Coronavirus - latest updates
- See all our coronavirus coverage



LTO AKTUELLES KANZLEIEN & UNTERNEHMEN ANWALTSBERUF JUSTIZ STUDIUM &

Coronakrise

Plant die Regierung "Online-Gerichte"?

von Annelie Kaufmann und Pia Lorenz und Dr. Markus Sehl

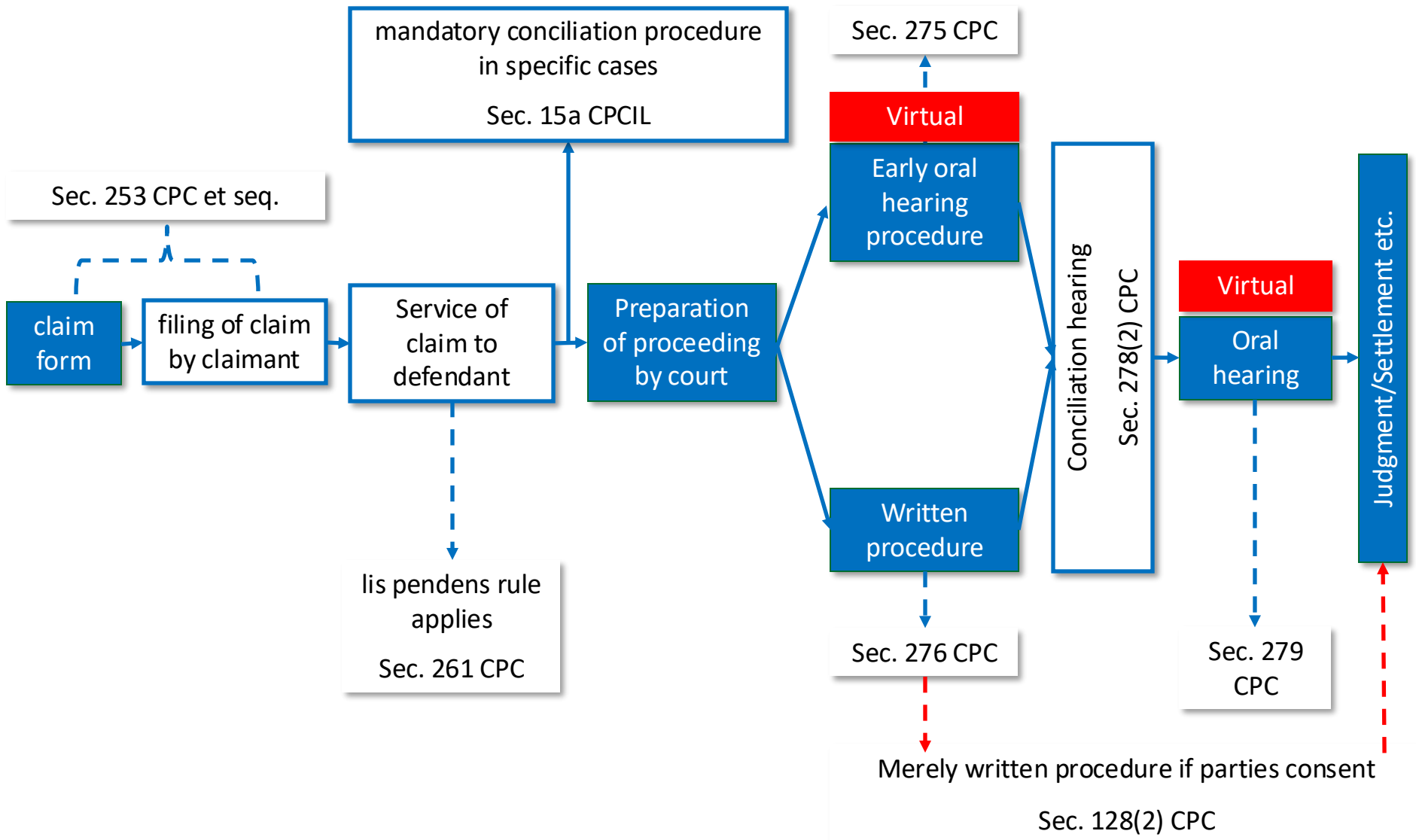
02.04.2020



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Die Gerichte kämpfen mit den Folgen der Coronakrise. Könnten Online-Verhandlungen helfen? Ein Vorstoß aus der Justiz deklariert sich selbst zum Referentenentwurf - was aber ist wirklich an angeblichen Plänen der Bundesregierung dran?

Course of the oral hearing



17. Partly-digital hearing (1)

- Until recently only partly-digital hearings were admissible

Section 128a CPC [Hearing for oral argument using image and sound transmission]

- (1) The **court may permit the parties, their attorneys-in-fact, 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.

- Provision is 20 years old and was applicable until July 18th 2024
- The judge (the court) needed to be present in the court room
- Audience was able to attend the proceeding in the court room (publicity)

17. Partly-digital hearing (2)

Section 169 CCA [Publicity]

(1) **Hearings before the adjudicating court**, including the pronouncement of judgments and rulings, **shall be public. Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible.** **Audio transmissions to a workspace for persons reporting for the press, radio, television or other media may be authorised by the court.** Audio transmissions may, in part, be prohibited in order to protect the legitimate interests of the parties or of third parties or to ensure the proper course of proceedings. In all other respects, sentence 2 shall apply to audio transmission to a workspace accordingly. [...]

17. Partly-digital hearing (3)



17. Partly-digital hearing (4)

- Witnesses, experts and parties may be examined digitally
 - Systematically part of the rules on the taking of evidence
- Recordings and appeal, Sec. 128a Para 3 S. 1 CPC
 - General prohibition of recordings
 - Decision regarding the digitality of the proceedings were not subject to appeal, Sec. 128a Para 3 S. 2 CPC
 - However, Court was forced to respect parties procedural rights:
 - Orality; Immediacy; Fair Trial; A.O.

■ Practical application of this provision

- Nearly no application before COVID-Pandemic
- Intense use during pandemic and thereafter

18. Fully-digital hearing (1)

394th Judicial District Court

Recording of this hearing or live stream
is prohibited.

Violation may constitute contempt of
court and result in a fine of up to \$500
and a jail term of up to 180 days.

394th Judicial District Court



18. Fully-digital hearings (2)



18. Fully-digital hearings (3)

- Reform of German CPC rules on online hearings
 - See [Act to promote the use of video conferencing technology in civil jurisdiction and specialised jurisdictions](#) of July 15th 2024
 - Applicable from July 19th 2024
- Alteration of Sec. 128a CPC extending partly-digital hearings
 - Only presiding judge has to remain in the court room
- Initiation of online hearings now possible
 - By binding order of the court (opt-out possible)
 - By demand of the parties (denial by court possible)

18. Fully-digital hearings (4)

Section 128a CPC [Videohearing]

- (1) The **oral hearing may be held as a video hearing in appropriate cases** and **if sufficient capacity is available**. An **oral hearing is to be held as a video hearing** if at least one party to the proceedings or at least one member of the court participates in it by video and audio transmission. [...]
- (2) Subject to the requirements of subsection (1) sentence 1, the **presiding judge may authorise or order the participation** in the oral hearing **by video and audio transmission for one, several or all parties** to the proceedings. The **addressee may lodge an objection** to an order within a period of two weeks. [...]
- (3) **If a party** to the proceedings **requests to participate by video and audio transmission**, the presiding judge **shall authorise** this under the conditions of paragraph 1 sentence 1. **The refusal** of a request to participate by video and audio transmission **shall give brief reasoning**.
- (4) **If the objection** pursuant to paragraph 2 sentence 2 **is lodged** in due time, the **presiding judge cancels** the order for all parties to the proceedings to whom an order has been issued. In this case, the presiding judge shall allow the parties to the proceedings who have not lodged an objection to participate by video and audio transmission. [...]
- (5) The **presiding judge shall conduct the video hearing from the court office**. **He may authorise other members of the court to participate in the hearing by video and audio transmission** if there are **substantial grounds** for doing so.
- (6) The parties to the proceedings and third parties are **prohibited from recording the video hearing**. They must be informed of this at the beginning of the hearing. **The video hearing may be recorded in whole or in part for the purposes of section 160a**. [...]
- (7) **Decisions in accordance with this provision are final**. Paragraph 2 sentence 2 remains unaffected.

18. Fully-digital hearings (5)

Section 16 ILCP [fully-digital hearings]

- (1) The **Federal Government and the governments of the federal states** are authorised to approve fully virtual video hearings by statutory order for their respective areas of responsibility for the purpose of testing them. A video hearing (Section 128a of the Code of 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 oral hearing by video and audio transmission and the chairperson conducts the video hearing from a location other than the court venue. The state governments may transfer the authorisation referred to in sentence 1 to the state justice administrations by statutory order.
- (2) [...]
- (3) If a fully virtual video hearing is authorised by ordinance pursuant to subsections (1) and (2), **it may only be conducted if**
 1. **all members of the court have declared** to the presiding judge that they **will participate in the hearing by video and audio transmission**,
 2. **a video hearing has been ordered for all parties** to the proceedings in accordance with section 128a (2) sentence 1 of the Code of Civil Procedure and
 3. **no party to the proceedings has lodged an objection** in due time in accordance with section 128a (2) sentence 2 of the Code of Civil Procedure.The chairperson shall decide whether to hold a fully virtual video hearing.
- (4) **In public hearings**, the public shall be established by **transmitting the fully virtual video hearing in image and sound to a publicly accessible room in the competent court**.

- **Stratutory order not yet existant**

19. Cross-border Cases (1)

■ Principle of Sovereignty

- State may act within its territory
- Territoriality principle → P: cross-border effect of acts of state (*acta iure imperii*)

Permanent Court of International Justice, Série A Nr. 10 (1927), p. 18 et seq. – LOTUS

„Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.“

- Cross-border hearing is an act of state that generally touches the sovereignty of other states
 - E.g. through imposing fines, interrogation of witnesses, by conducting an official formal proceeding

■ International Law demands legal basis for cross-border hearing

- International Treaty that the states are a party to
- Any other explicit/implicit permission of the affected state

19. Cross-border Cases (2)

- Great importance of cross-border proceedings in civil and commercial disputes, e.g. seat of parties outside Germany

		Sitz der Partei(en)	
8	Zahl der Kläger 1)	Anzahl	926 514
	davon hatten bei Rechtshängigkeit ihren Sitz gehabt im		
9	Inland	%	97,7
10	EU-Ausland	%	1,8
11	sonstigen Ausland	%	0,5
12	Zahl der Beklagten 1)	Anzahl	927 673
	davon hatten bei Rechtshängigkeit ihren Sitz gehabt im		
13	Inland	%	93,7
14	EU-Ausland	%	5,4
15	sonstigen Ausland	%	0,9

Source: www.destatis.de

- Issues involved in digitising International Civil Procedure
 - Gathering of evidence, Performance of „oral“ hearings, Communication with the court, Service of process (service of documents)

19. Cross-border Cases (3)

■ EU Small Claims Regulation (Reg. No 861/2007)

- Speedy EU proceeding on claims up to € 5.000,- in civil and commercial matters
 - Cross-border setting necessary, Art. 2(1), Art. 3 (at least one party must be domiciled or habitually resident in a Member State other than the Member State of the court seized)
 - National procedures remain applicable, Art. 1(1)2
 - Jurisdiction is dealt with by the Brussels Ia Regulation
- Proceeding designed as mainly written proceeding, Art. 5(1) but if an oral hearing is necessary, it has to be conducted via videoconferencing, Art. 8(1), 9(1)3
 - see also Sec. 1097-1109 Civil Procedure Code
 - Application of EU Evidence Regulation if person to be heard is domiciled or habitually resident in other Member State, Art. 8(1)2, 9(1)3
- Communication via electronic means is possible if the relevant Member State has accepted to use them, Art. 4(1)

■ No performance of digital „oral“ hearings by application of the EU Evidence Regulation besides the gathering of evidence so far!

- Sec. 128a(1) Civil Procedure Code does not provide for videoconferencing with persons situated abroad
 - legal assistance via ZRHO (regulation on legal assistance in cross-border cases) necessary

19. Cross-border Cases (4)

- EU Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters (Reg. (EU) 2023/2844)
 - Applicable from May 1st 2025
 - Establishing a uniform legal framework for the use of electronic communication between competent authorities, natural or legal persons in judicial procedures
 - Laying down rules for use of video-conferencing technology **in cross-border civil court proceedings** (outside scope of EU Evidence Regulation, Small Claims Regulation etc.)
 - Art. 5 enables courts to decide on the conduct of cross-border hearings by videoconferencing if
 - (1) a party/representative **requests** to do so or (2) **ex officio** if national law so provides
 - on the basis of
 - a. the availability of such technology,
 - b. the opinion of the parties on the use of such technology, and
 - c. the appropriateness of the use of such technology in the specific circumstances of the case
 - only applicable where party/representative is located in a different **Member State!**
 - National procedural law applies on the procedure, Art. 5 (4) Reg. (EU) 2023/2844
 - Sec. 128a CPC in the case of German law
 - Specific rules for criminal cases in Art. 6

Summary

- Introduction
- Partly-digital hearing
- Fully-digital hearing
- Cross-border cases