INSOL EUROPE

Judicial Wing

COVID-19: Which practical measures adapted by the insolvency courts because of the pandemic are desirable to become permanent changes of their practice?

Editors: The Co-chairs of the Judicial Wing

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Preface

General Information

This collection of articles is the sixth volume in a series of publications by INSOL Europe's Judicial Wing.

These publications provide insights into issues of insolvency law from a judicial perspective.

The articles in this volume describe how and to which extent the use of technology could help judges in different European countries to cope with the adverse impact of COVID-19 on their procedural work.

They were authored by members of the Judicial Wing and are based on six questions prepared by the Judicial Wing's co-chairs (see below)

The authors were not requested to adhere to any particular structure.

Some authors answered the questions sequentially, others wrote their articles in prose without explicitly referring to the questions.

The co-chairs received articles from 12 of the countries represented in the Judicial Wing.

Three members of the Judicial Wing let us know that nothing worth reporting has happened in their countries, neither by way of legislation nor by the provision of additional technology.

The information provided in the articles shows a broad range of different approaches to deal with the conditions under the pandemic:

> from no specific legislation and measures at all to legislation permitting remote hearings quite liberally and an extensive use of audiovisual technology by some courts.

Before the pandemic, the courts did not use audiovisual technology to an extent worth mentioning, even if their domestic law had permitted remote hearings at that time already.

The pandemic did not result in a universal increase of remote hearings in all countries.

Almost all authors had an issue with examining eyewitnesses remotely even if permitted by their domestic laws.

The main reasons they stated were mostly the same, such as:

- loss of body language as a basis of weighing credibility

- eyewitness may feel less inhibited to be untruthful than during an examination in the courtroom
- eyewitness may read statements from a priorly written document of unknown origin without the court and the parties becoming aware of it.

The answers also showed that judges were more likely to hold remote hearings if they had received good instructions on how to use the technology.

Another factor mentioned was the availability of assistant personnel for technically setting up remote hearings.

Some judges mentioned that preparing a remote hearing meant extra work for them because they had to technically set up remote hearings themselves.

The Questions

Question 1

Did your court receive additional technical equipment (such as webcams) and software platforms (such as Zoom or Webex etc.) for remote communications (audio and/or videoconferencing)?

Question 2

Did you have remote communications with parties of proceedings pending in your court before the COVID-19 crisis began?

Question 3

Did you receive instructions on

a) the use of conferencing technology

and on

b) best practices for remote communications?

If you did: Which method was used to provide instructions (classroom, webinar, printed tutorial, video tutorial or the like)?

Question 4

In which types/stages of proceedings did you use remote communications?

a) insolvency-related adversarial matters (litigation)

b) taking of evidence by eyewitness testimony
c) taking of evidence by expert testimony
d) creditors' meetings
e) ballots (e.g.,voting on an insolvency plan)
f) preliminary/case management hearings
g) other types/stages of proceedings (please specify)

Did you use remote interpreting services if a party did not speak the language used in your court?

Question 5

Which technology did you use for remote communications (e.g., telephone, email, video, letters)?

Question 6

a) On the basis of the experience you made during the pandemic, which of the changes you made in the management of proceedings are you planning to make permanent after the pandemic has ended?
b) How can these changes improve the quality and/or effectiveness of the proceedings?
c) Have you made changes to your management of the proceedings which have not been helpful? Which problems were caused by those changes?

Conclusion

The articles received show that the approaches taken to dealing with the pandemic largely depend on the available financial resources and on legal traditions.
Therefore, a comparison of those approaches does not necessarily help in finding the best solution for a particular jurisdiction.
However, the articles can help the reader to cherry-pick from the individual measures described in the articles and assemble them in a manner befitting the situation in the reader's home jurisdiction.
We encourage the reader to read all articles in order to benefit from the entirety of useful information to be found there.
Even though the use of audiovisual technology in civil and insolvency proceedings has not increased by a degree that might have been expected, the tenor of the articles is in favor of making remote hearings possible on a permanent basis.

This tenor makes us confident that the number of technology prone judges will grow steadily and result in an increased but diligent use of the available technical equipment in civil and insolvency proceedings.

We thank all the members of the Judicial Wing who have contributed articles to this collection for their great efforts to bring this project to fruition.

Our thanks are also extended to Michael Quinn's former judicial assistant Lorna Reid for her support in all administrative matters and to INSOL Europe for its technical assistance.

Nicoleta Mirela Nastasie Michael Quinn Eberhard Nietzer

Co-chairs of the Judicial Wing

The Articles

Austria

Christa Puschmann[1]

Prior to the start of the Covid-19 crisis Insolvency Judges in Austria did not communicate remotely with parties or their lawyers. It was however permissible for oral evidence to be taken remotely in any court's proceedings provided the witness giving evidence was in another court in Austria.

During the course of the pandemic Austrian insolvency judges:

(1) were provided with laptops with webcams, headphones and additional monitors;

(2) received instruction on the use of conferencing technology and best practice in webinars by way of both printed material and video tutorial;

(3) used Zoom for video-conferencing, in particular for creditors' meetings and balloting;

(4) made more use than previously in using the Digitaler Akt digital files which had been available for two years before the crisis;

(5) did not have available remote interpreting services.

Provided that the law will allow it after 31 December 2021 I plan to make permanent videoconferencing for short proceedings where only a few persons will be in attendance. This is convenient for my work, and will improve effectiveness for the lawyers not having to come to court for short hearings.

[1] Christina Puschmann is a judge of the Handelsgericht Wien (High Court for Commercial Law in Vienna)

Bulgaria

Атанас Димов Атанасов (Atanas Atanasov) [1]

In Bulgaria the COVID-19 pandemic has had its impact in general as follows:
On 13 March 2020 Parliament declared a state of emergency. Under that legislation Courts did not conduct open hearings and all judges worked from their homes, basically making judicial act rulings on pending cases. There were, however, exceptions with open court hearings conducted on specific cases – custody measures, parental rights cases, children`s alimony cases, unfair dismissal cases, seizures and, of course, insolvency procedures.
This state of emergency continued to 13 May 2020 and after that it was replaced by further emergency provisions which are still in force.
Prior to the Covid-19 crisis it was not permissible for there to be remote communication with the courts in Bulgaria. The Civil Procedure Code specified that court hearings had to be conducted openly in court rooms with judges, parties, lawyers, witnesses and any experts in attendance in person.
On 17 November 2020 the Civil Procedure Code was amended, and since then it has been possible for the parties to request a hearing by video conferencing if that party cannot appear in court. Where video conferencing is allowed, the parties must attend specially equipped premises in the nearest regional courts which are the main Courts of first instance in the Bulgarian judicial system.
Even in cases where there is no request from the parties, the judge has power to decide that evidence from witnesses and experts should be taken by video conferencing.
Although video conferencing is the practice in criminal cases where a detainee is involved, it is not yet a common practice to use videoconference in insolvency procedures. This is certainly the position in the District court of Stara Zagora. However, it is my opinion that insolvency judges will increasingly use video conferencing for taking evidence from witnesses and experts and also for holding creditors' meetings.

[1] Atanas Atanasov is a judge of the съдия в Окръжен съд - Стара Загора, Гражданско отделение (Regional court of Stara Zagora, Civil division)

Czech Republic

Rostislav Krhut[1]

Covid-19 – practical measures in the Czech Republic

No practical measures were adopted in the Czech Republic because of the pandemic. The reason being that it was not necessary to introduce any new measure. Czech Courts have been sitting continuosly and as far as I am aware there were no court hearings involving many participants due to be held.

Generally, Czech civil procedure rules (which are applicable also in insolvency proceedings) allow the use of online videoconferencing for participation of any a party, a wittness or an expert. Such participation however is only permitted from another court or from a prison where the identity of the participant may be verified by a court-authorised prison clerk. This clerk must be present throughout the entire time of the conference.

The need for verification of a participant‘s identity appears to be the biggest obstacle to the use of online communication with insolvency courts in the Czech republic.

[1] Rostislav Krhut has been an insolvency judge for 25 years, 19 years of which he served as a vicepresident of the Regional Court in Ostrava. He also spent three years at the Czech Supreme Court. He is a member of legislative groups and a lecturer.

Estonia

Kersti Kerstna-Vaks[1]

Generally

The jurisdiction of the administration of justice is granted to the courts alone under to the Constitution, and a seamless operation of the courts at a time of emergency situation is essential for the rule of law. Hence, despite the voices heard at the beginning of the emergency requesting that the courts be closed and the administration of justice suspended, the courts in Estonia relied on the principle that their work must continue, courthouses must remain open for proceedings, and court cases must be adjudicated, although, of course, while applying elementary safety requirements.[2]

In Estonia a state of emergency was announced on 12 March 2020 and it lasted till 18 May 2020.

No specific rules were implemented regarding judicial proceedings in the Estonian emergency legislation. The predominant problem for the courts in adjusting to the emergency situation arose from the legal requirement that persons involved in court proceedings should be physically present at the hearing. Although the Estonian Civil Procedure Act (TsMS) allows court hearings in civil cases[3] to take the form of a procedural conference, difficulties of organisation arise, for example in bankruptcy cases, where many debtors have no video access to the court. Coupled with this the law prescribes a time-limit for hearings to be held. In these circumstances, judges faced a dilemma whether to stick to the legal requirement of physical presence, thereby endangering the life and health of participants, or to postpone cases because of the emergency situation.

[1] Kersti Kerstna-Vaks is a judge of Tartu Court of Appeal and has participated as a lecturer in insolvency law in a number training courses organized for Estonian judges, prosecutors and attorneys

[2] V. Kõve, Chief Justice of the Supreme Court of Estonia. Review concerning courts administration, administration of justice and the uniform application of law during the emergency situation. 3 June 2020. Available: https://www.kohus.ee/en/estonian-courts/speeches-and-materials.

[3] There are no special rules for hearings in insolvency cases; in this case the Civil Procedure Act applies.

The Council for the Administration of Courts gave recommendations on how to organise the work of courts during the rapid spread of the Covid-19 virus and the state of emergency declared in Estonia. It was decided that as many cases as possible should be adjudicated in written proceedings, which can be done in the form of remote work using the Court Information System and the digital file.

Even before the beginning of the Covid-19 crisis Estonian courts had electronic communication tools. During the Covid-19 crisis, the advantages of our online court system were particularly clear. In 2006, the Court Information System (KIS) was launched, offering a single information system for all types of court cases in Estonian courts of 1st and 2nd instance and also the Supreme Court. KIS enables the registration of court cases, hearings, and judgments, automatic allocation of cases to judges, creation of summons, publication of judgments on the official website and collection of metadata. The parties to the proceedings are able to communicate with the court through the public e-file[4], which provides an overview of the different phases of all kind of court cases (including insolvency cases) to all parties involved.

During the emergency situation courthouses remained open for holding hearings as well as for office administration, but for a shorter time and with restricted access. Although the organisation of hearings was first and foremost promoted via technical means of communication, in the absence of a technological solution the court made a decision on the holding of a hearing depending on the circumstances of each individual case.

Parties to proceedings reacted differently to the emergency situation. There were those who were willing to conduct all procedural acts and to participate at the hearings, defying the risk of infection, but there were also those who were sincerely afraid of the virus. This had to be taken into account, both from the standpoints of the judges and the parties to the proceedings, and every single case had to be evaluated separately.

We are very proud that the emergency situation had little impact on the efficiency of judicial proceedings in Estonia. These indicators are definitely remarkable and possibly exceptional on a European scale,[5] but the Covid-19 crisis is not over.

[4] E-file is a web-based information system, which collects documents related to all kind of court proceeedings as well the related actions, data and processes. E-file enables parties to the proceedings to submit proceeding documents to the court electronically.

[5] V. Kõve. Ibid.

Questions and Answers

Question 1:

Did your court receive additional technical equipment (such as webcams) and software platforms (such as Zoom or Webex etc.) for remote communications (audio and/or videoconferencing)?

The digital capability of both the courts and the parties to the proceedings was tested at the beginning of the emergency. Not every courthouse was equipped with high quality video conference devices, so the capability of those courts was not sufficient in every case. It is important to note that a hearing or a procedural act through a video bridge requires other institutions besides the courts to be involved, such as the Prosecutor's Office, the Bar Association, etc. Other participants at hearings did not have always the necessary equipment or technical skills, or in other cases the quality of existing audio devices was insufficient for the purposes of a court hearing.
All judges and court clerks were provided with unlimited access to Internet. Those who had not been supplied with personal lap-tops were given them during the first few days of the emergency.

Question 2:

Did you have remote communications with parties of proceedings pending in your court before the Covid-19 crisis began?

Estonian law (TsMS § 350) allows the court to organise a session in the form of a procedural conference such that a party to the proceedings or his or her representative or adviser has the opportunity to be at another place at the time of the court session and participate from there in the conference in real time. A witness or expert who is not present at the court premises may be also heard in the same way by court. In a court session organised in the form of a procedural conference, every party to the proceedings has the right to file petitions and applications and to formulate positions on the petitions and applications of other parties to the proceedings. These rights must be guaranteed in a technically secure manner. With the consent of the parties and the witness and, in procedure for actions by petition, with the consent of the witness alone, the witness may be heard by telephone in a procedural conference.

In insolvency cases the court is allowed to to hear a person by phone.

In civil cases before Covid-19, video hearings were primarily used between different courthouses and for communication with prisons. In bankruptcy cases, for example, it was possible for the debtor to go to the courthouse closest to his home and communicate with the judge through a videobridge. In the same way it was possible to communicate with bankruptcy debtors in prison. These hearings were hybrid-hearings, with the judge and other parties to the proceeding in the courthouse. Since March 2020 we have used mainly Cisco videoconference system for procedural conferences.

Question 3:

Did you receive instructions on a) the use of conferencing technology and b) best practices for remote communications?
If you did: Which method was used to provide instructions (classroom, webinar, printed tutorial, video tutorial or the like)?

Judges had KHN instructions (in the form of written working) and every judge organised his/her work, as he/she could. From the beginning of March 2020 a special video-hearing platform for courts (Cisco) was ready for piloting. Accordingly, at the very beginning of the Covid-19 crisis court clerks started using a very new web-platform. This gave rise to a large number of problems. Clerks received their instructions by e-mail and no special training was organised. In the event, however, court clerks helped each other, and in that way it was possible to cope with the situation.

In county courts judges used telephone, Skype, Teams, etc for hearings. Some judges were very enthusiastic about this techonology, but there were also judges who preferred to work during the emergency only in written form.

The first hearing in a form of a procedural conference through Cisco video-conference system in an appeal court (panel of three judges) took place four weeks after the beginning of the crisis.

The first judicial training seminar (in the form of a webinar), where best practice for remote communication was discussed, was held year after, in May 2021.

Question 4:

In which types/stages of proceedings did you use remote communications?

a) insolvency-related adversarial matters (litigation)
b) taking of evidence by eyewitness testimony
c) taking of evidence by expert testimony
d) creditors' meetings-
e) ballots (e.g. voting on an insolvency plan)
f) preliminary/case management hearings
g) other types/stages of proceedings (please specify)

Did you use remote interpreting services if a party did not speak the language used in your court?

Under Estonian Civil Procedure Law it is possible to use remote communication in civil cases (including insolvency) for all types of hearings and oral proceedings and in all stages of proceedings. The use of remote interpreting services is also possible.

Question 5:

Which technology did you use for remote communications (e.g., telephone, email, video, letters)?

The main communication channel between the court and parties both before and during the Covid-19 crisis was/the e-mailing system (Court Information System (KIS). Judges and court staff are also able to use KIS at their home. Judges used telephone and e-mail for technical matters, and the Cisco video-conference system for oral hearings (in the form of a procedural conference) and Skype Business for in-house meetings.

With individuals who do not have an e-mail address, courts have communicated and continue to communicate by ordinary mail.

Question 6:

a) **On the basis of the experience you made during the pandemic, which of the changes you made in the management of proceedings are you planning to make permanent after the pandemic has ended?**

Judges are different. Some of us like remote work and communications, others like to work in their offfices and to meet people face to face. Generally, judges and staff get

tired of working remotely five days per week, and often parties to proceedings also prefer to have direct contact with the courts and the judges.
At the same time remote work and communication has come to stay. Most judges and court staff like to work in the office 2-3 days per week and do not want to return to the old routine of a “5 day working week at the courthouse”
There are some judges who live up to 200 km from the courthouse at which they sit. They prefer not to travel so much and are used to working from home using KIS and digifiles and holding court hearings remotely in the form of procedural conferences. Some colleages like to have the opportunity to work in different courthouses (for example during summer period), which makes it easier to maintain a good work-life balance.
Estonia is planning to introduce digital case files in all civil cases (including insolvency cases) on 1 June 2022. This is not popular with all judges. Not all judges are comfortable using the digital file program. It very much depends on the skills of the judges and court clerks. The younger gereration of judges are more eager to move over to the digital world. A digital case file needs to be regulated properly at a legal level. The Ministry of Justice has prepared a draft protocol and the judges are now discussing it.

b) How can these changes improve the quality and/or effectiveness of the proceedings?

Video hearings help to save both time and money of the participants to the proceedings.
For example, my court, Tartu Court of Appeal, is situated 190 km from Estonian capital Tallinn. Lawyers from Tallinn coming to a hearing at our court must spend 5 hours on a highway or 4 hours in a train (back and forth) where the hearing may last no more than 1 hour. This is a big waste of time at the expense of the client. Many law firms have excellent video conference technology and advocats use it for participating in video court hearings.
At the same time there are possibilities of improving the organisation of video hearings, to standardise and renew the software in use, and to equip the courthouses with the necessary techonological devices. The availability of simple and reliable platforms needs to be ensured, so that hearings do not necessarily have to be organised and recorded in a courthouse. The parties to the proceedings need to be guaranteed the chance to follow the course of the court hearing and to be heard

without technical malfunction. Moreover, there must be an efficient and confidential ability for a party to communicate with his or her lawyer.
A wider problem arising from an increase in virtual hearings concerns the openness of proceedings. The constitutional right for judicial proceedings to be in public protects both the interests of the parties to the proceedings and the public. If special rules are applied to persons unrelated to the proceedings wishing to participate at a hearing during the crisis, it is probably understandable. However, the question remains how to ensure public access to justice where there is a wider use of video hearings when the crisis is over. Following Covid-19 the emphasis will inevitably be on video hearings and so-called hybrid hearings, where some of the parties to the proceedings are in a courtroom but some are included through a video bridge. Discussions have now started about the public broadcasting of hearings on the Internet.

c) Have <u>you</u> made changes to your management of the proceedings which have not been helpful? Which problems were caused by those changes?

As an appeal court judge I have had no need to make any changes in the management of cases which have interfered with my resolving a case. I like the possibility to work out of the office some days of the week. I can use Court Information System and digital files for remote work. From the beginning of the crisis we have held many court sessions in the form of procedural conferences, mainly as hybrid hearings, while the three appeal judges have been mainly in the court-house. I prefer to work with paper files than working with electronic documents. The digital file program is not yet user-friendly. If paper files disappear, I suspect that we will resort to printing documents out. From the digital file program. That will be my biggest problem.

Germany

Eberhard Nietzer[1], Dr. Stephan Deyda[2]

Glossary of Terms and Abbreviations

Terms

Term in German	English Translation	Comments
Amtsgericht	Local Court	
Rechtspfleger	judicial court commissioner	no good translation available because there is no equivalent court officer in common law jurisdictions

Abbreviations

Abbreviation	Meaning in German	Meaning in English
InsO	Insolvenzordnung	Insolvency Code
ZPO	Zivilprozessordnung	Code of Civil Procedure
GVG	Gerichtsverfassungsgesetz	Judicature Act

The translation of the German Insolvency Code linked to above has been published by the law firm of Schultze & Braun GmbH & Co. KG in its 2021 Yearbook on Insolvency and Restructuring in Germany.
Other translations of German statutes linked to in this contribution may not be identical with the wording of the most recent German version of the respective statute.

[1] Eberhard Nietzer is the retired vice president of the Amtsgericht (local court) in Heilbronn where he sat as an insolvency judge until October 2020, a certified translator of German and English, and editor of the website insolvencycourts.org . He was a lecturer on European and international insolvency law for insolvency judges and professionals of several countries, such as Armenia, Croatia, Germany, and Latvia.
[2] Dr. Stephan Deyda is a civil and insolvency judge of the Amtsgericht (local court) in Cologne

General

The questions mentioned in the preface were answered by the German justices Dr. Stephan Deyda (Amtsgericht Köln[3]), Sabrina Kraus and Till Jakob (Amtsgericht Heilbronn), Bernd Anstadt (Amtsgericht Karlsruhe), Dr. Gunter Deppenkemper (Amtsgericht Mannheim).
These courts and judges are, from time to time, collectively referred to as “the courts / all courts” or “the judges / all judges”.
These courts are first instance courts and maintained by the German states of Nordrhein-Westfalen[4] (Amtsgericht Köln) and Baden-Württemberg (the other three courts).
This means that the quantity and quality of technology made available to the courts in the different German states may vary.
The answers provided by the judges show that the practical measures taken and the attitudes towards the use of audio-visual technologies vary as well.

Legal Basis of Adapted Measures

InsO Section 5

InsO section 5 subsection 2 sentence 1 permits the court to have written proceedings if the debtor’s financial circumstances are uncomplex and the number of creditors and the amount of the debt is low.
There has been discussion whether a “corona-friendly” extensive construction of this provision for protecting the health of all parties to the proceedings can help to reduce physical contacts between them during the proceedings even if the above requirements are not met.
The Amtsgericht (Local Court) Hamburg ruled that such an extensive interpretation is permitted but some authors disagree claiming that the reduction of risks to the parties’ and the court’s health is not a purpose pursued by this provision.

ZPO Section 128a

ZPO section 128a entered into force on January 1, 2002, and was amended for the last time in 2013.

[3] Cologne
[4] North Rhine-Westphalia

It authorises the court to grant leave for

- the parties to be at another location than the courtroom during the hearing and make themselves heard by using videoconferencing technology,
- an eyewitness, expert witness, or party to be at another location than the courtroom while being examined during the proceedings.

If such leave is granted, all parts of the hearing are simultaneously transmitted audio-visually to the courtroom and to all other places at which attending parties or witnesses are located.

It is up to the discretion of the court to decide whether such leave is granted.

Initially, remote audio-visual hearings required the consent of all parties involved.

Since 2013, the court may permit remote audio-visual hearings sua sponte[5] without obtaining the consent of the parties.

Even if the court permits the parties not to be present in the courtroom during a hearing, the hearing is not fully remote. This is because the judge is still required to be in a room, whether inside or outside the courthouse, which is accessible to all parties involved and, as the case may be, to the public during the hearing; and all parties involved may come to the courtroom and personally attend the hearing if they wish.

Questions and Answers

The answers to be found hereinafter are summaries of the information provided by the judges identified above unless specified otherwise.

Question1:

Did your court receive additional technical equipment (such as webcams) and software platforms (such as Zoom or Webex etc.) for remote communications (audio and/or videoconferencing)?

During the COVID-19-crisis, the courts were equipped with additional audio-visual technology including hardware and software.

This equipment included stationary cameras and microphones installed in courtrooms as well as mobile webcams and headsets.

One court purchased enough stationary units to equip almost all courtrooms, another bought only mobile units.

[5] = on its own motion (click here for a short analysis of “ex officio” and “sua sponte”)

In all courts, the judges can request the chief judge to make the technology available to them on a particular date.
All judges have received laptops they use for their daily work which are equipped with webcams.
Generally, cameras in the courtrooms are used in long shot mode so all parties who are not physically present in the courtroom get to see what is happening there.
By remote control, the cameras can, however, be zoomed, tilted or panned for focusing on an individual party or witness.
The software platforms are web-based.
In the state of North Rhine-Westfalia, the courts use mainly VMR (Virtual Meeting Room) and Jitsy.
The courts located in the state of Baden-Württemberg mostly use Cisco-Webex and Polycom, some use Skype for Business or Teams as well.
Before the pandemic, audio-visual technology was mainly used as a means of judicial assistance.
When a foreign court needed to examine a witness located in Germany, it could request that the German court make the witness available in a German courtroom equipped with the technology required for allowing the foreign court to examine the witness remotely.
Audio-visual technology was also used in criminal proceedings for examining victim-witnesses so they would not have to sit in the same room as the defendant.

Question 2:

Did you have remote communications with parties of proceedings pending in your court before the COVID-19 crisis began?

Practically, the use of audio-visual technology for holding hearings was very limited before the COVID-19 crisis.
Although the law had generally permitted the use of videoconferencing technology by the courts long before the COVID-19 pandemic, remotely held hearings were quite rare.
As the courts were very inadequately equipped with the required technology, holding remote hearings was practically impossible for most courts.
Moreover, the majority of judges did not consider the use of this technology beneficial for their work.

Only one of the courts answering the questions confirmed having used remote hearings before the pandemic, two of them stated that they never had remote hearings before the crisis. One court did not specify if it had held hearings remotely before 2020.

Question 3:

Did you receive instructions on
a) the use of conferencing technology and on
b) best practices for remote communications?

If you did: Which method was used to provide instructions (classroom, webinar, printed tutorial, video tutorial or the like)?

Three judges received instructions by webinars on the use of the technology and best practices.

The state of Baden-Württemberg's knowledge portal for the judiciary provides video films explaining the use of the technology.

It organised online training for judges including the legal aspects of video conferencing and of its practical aspects.

Some judges in Baden-Württemberg who had received the online training agreed to be trainers and share their new knowledge with other judges.

All judges have access to written instructional materials.

In one court, interested judges may receive a live introduction into the use of the technology by an officer of the court's administrative division.

Upon request by a judge, this officer also installs the equipment in the judge's courtroom and sends the necessary links to all involved parties and the judge.

In another court, the administrative division offered workshops, either in person or online, with practical instructions on how to use the technology.

This court had established an internal IT division the members of which provided technical support in the courtroom and guaranteed that the judges could always contact a person with the required technical expertise.

One judge wrote he did not receive any instructions but learned it all by himself because he is tech-savvy.

Question 4:

In which types/stages of proceedings did you use remote communications?
a) insolvency-related adversarial matters (litigation)

German insolvency judges do not preside over any adversarial litigation such as, e.g., avoidance cases.
Insolvency-related adversarial litigation is handled by the judges of the civil divisions of the courts.
Insolvency judges do, however, decide contested matters such as objections to the confirmation of an insolvency plan or to a discharge.
Most insolvency judges do not only handle insolvency cases but also have civil, family, or criminal dockets.
Two of the judges mentioned above have a mixed civil and insolvency docket, one has only an insolvency docket and two have civil dockets only.
All the judges who have civil dockets reported that they had permitted parties to join proceedings remotely.
Most of them did not specify the number of cases in which they did so.
One judge mentioned he had only held one remote hearing, another one wrote that he had held approximately 120 hearings with involved parties attending remotely.

b) taking of evidence by eyewitness testimony

Only two courts used audio-visual technology for hearing eyewitnesses.
One of them shared the information that the technology had proved to be very helpful and that parties and attorneys had requested the court to continue using it.
The other civil judges never heard witnesses remotely.
Their concerns are best explained by Judge Dr. Deyda:
“I would be very reluctant to hear a witness remotely, since it may hamper the direct impression necessary for assessing the credibility of a statement. Also, a witness might, in cases of questions which he/she has not expected and does not want to answer, pretend there were technical problems. As technical problems actually do occur, it would be impossible to know whether such technical problems were real or pretended.”
An appellate court has ruled that while exercising its discretion whether to permit the use of remote audio-visual communication in a proceeding, the court must weigh the aspects of procedural economy and cost of litigation against the answer to the question if the quality of the findings by the court can be expected to be improved by the presence of the parties or witnesses in person.[6]

[6] OLG Stuttgart 4 Ws 66/12

From my (Eberhard Nietzer's) point of view, the court should permit audio-visual communications regardless of such quality aspects if it is not possible to have the party or witness to appear in person, e.g., because she lives far away abroad or is unable to appear because of insufficient health.

c) taking of evidence by expert testimony

The judges neither mentioned any concerns about hearing expert witnesses remotely nor any practical experience of their own so far.

d) creditors' meetings

After an insolvency proceeding has been opened by the judge, it is assigned to a special judicial officer called "Rechtspfleger".

This means that the Rechtspfleger is generally in charge of convening and presiding over creditors' meetings.

The judge only convenes a meeting if an insolvency plan has been submitted and is to be discussed and voted on in that meeting.

None of the insolvency judges mentioned above has convened any remote creditors' meetings so far.

Two Rechtspflegers of the Amtsgericht Heilbronn reported that they have not convened any remote creditors' meeting either.

They mentioned safety concerns regarding the non-public character of the creditors' meetings and the verification of the identity of the attending creditors.

This lack of practical experience can most probably be explained as follows (explanation provided by Judge Dr. Deyda):

"It is possible to substitute creditors' meetings in the form of an oral hearing by setting a time limit for written statements (InsO section 5 subsection 2). The court has a wide discretion to order such written proceedings in lieu of a hearing. In most cases, where the debtor is not or no longer engaged in business activities, or, where the ongoing business activities are rather limited, written proceedings have been used already before the COVID-19-crisis had begun. Already before the crisis written proceedings were the rule and oral hearings the exception. During this crisis, even more physical creditors' meetings have been replaced by written proceedings."

e) ballots (e.g., voting on an insolvency plan)

Until now, Judge Dr. Deyda has not received any requests by involved parties to permit the remote attendance of meetings involving the discussion of and voting on

an insolvency plan.
Nor has he, so far, seen the necessity to grant this option sua sponte.
He has concerns regarding the remote attendance of creditors' meetings because of the risk of technical problems which may require an adjournment of a creditors' meeting.
This might be quite a burden to the court in cases with large numbers of creditors.
He reported, however, that other insolvency judges in Cologne have successfully held hybrid creditors' meetings to discuss and vote on insolvency plans.
These meetings were attended remotely by some creditors while other creditors appeared in person in the courtroom regardless of the permission to attend remotely.
The judges of the other courts have not so far used audio-visual technology during creditors' meetings and ballots.
One court mentioned that there is a growing demand for permission for remote attendance of creditors' meetings and ballots.
Another court expressed concerns regarding the use of audio-visual technology when more than 5 to 10 creditors are attending.
At that court, no technical support is provided for preparing judges to use the technology in creditors' meetings.
That court also sees the risk of parties moving for the recusal of a judge from the case because preparing the meeting involves preliminary talks and coordination with the parties.
The judge might express her preliminary view on some aspect which is later made the basis of claiming that the judge is not impartial.

f) preliminary hearings

All civil judges who answered the questions used audio-visual technology in preliminary hearings.
The great majority of them do not use it for hearing witnesses.
None of the judges identified above permitted the remote attendance of hearings sua sponte. They only did so upon the request of an involved party.

g) other types/stages of proceedings (please specify)

The insolvency judges reported the use of audio-visual and other remote communications technology in stages of the proceedings that are not considered formal hearings in terms of ZPO section 128a.
These are examples mentioned in the answers they provided:

Communications with court-appointed experts and officers such as insolvency administrators, custodians, restructuring practitioners and mediators, and professionals requesting to be included in the court's list of prospective insolvency administrators.

Question 5:

Did you use remote interpreting services if a party did not speak the language used in your court?

GVG section 185a subsection 1a permits the use of remote interpreting services.
Only one judge reported practical experience with such services.
So far, they have not proved to be very efficient, because the available technology only allows consecutive interpretation but not simultaneous interpretation.
Simultaneous interpretation requires two audio channels, but the available systems only have one audio channel.

Question 6:

Which technology did you use for remote communications (e.g., telephone, email, video, letters)?

Audio-visual technology is the only option for formal hearings.
Two courts are equipped with electronic filing systems which they use to make court files available to involved parties and to receive written communications.
Email can only be used with certain limitations because of data protection regulations to be observed by the judiciary.
Many judges most frequently use the telephone for informal communications, e.g., for the scheduling of hearings.

Question 7:

a) On the basis of the experience you made during the pandemic, which of the changes you made in the management of proceedings are you planning to make permanent after the pandemic has ended?

b) How can these changes improve the quality and/or effectiveness of the proceedings?

c) Have you made changes to your management of the proceedings which have not been helpful? Which problems were caused by those changes?

Judge Dr. Deyda stated the following:
"With regard to the management of proceedings, the pandemic had little effect on my work. However, before the pandemic, I had not used remote audio-visual

communication in formal hearings. I believe this possibility may be useful in many cases, but technical problems may occur, and an audio-visual hearing is not a fully equivalent alternative for a hearing in the presence of all parties involved. Therefore, it is and will remain to be an individual case-by-case decision whether to use or not to use this possibility."

One judge wrote that he did not plan on making any of the changes permanent because none of them had proved to be beneficial for his work.

The other judges consider the use of audio-visual technology helpful and plan to use it permanently except when witnesses are testifying.

The technology is seen as most effective in commercial cases with court-experienced parties.

Conclusion

The answers received by the courts showed that quite a few judges are willing to permit remote attendance of hearings.

A considerable number of judges prefer to have all involved parties present in person during the hearings even when no witnesses need to be heard.

One judge explained that, initially, it took him approximately an extra 45 minutes per case to prepare a hearing that included the use of audio-visual technology. Now, he has succeeded in cutting this extra time back to about 15 minutes per case.

The answers by all courts show that not all judges are ready yet to invest time for making themselves familiar with the use of audio-visual technology in formal hearings.

One judge, who has experience with instructing other judges on the use of the technology, thinks that the technology would be more frequently used if the use did not involve any additional work for the judge.

He expects that more judges would permit parties to attend hearings remotely if they could just click on a button while preparing the order permitting remote attendance without being involved in producing the link for the hearing and everything else was done by a judicial assistant.

Another court reports, however, that only very few judges permit remote attendance although a person from the administration division is available to provide all necessary services.

Two judges emphasise that they only permit remote attendance when all parties agree to it.

Permission to attend a hearing remotely is mostly requested by parties who have to travel a long distance for personally attending a hearing.
Sometimes, parties located near the court where the hearing is to be held disagree with such a request.
Often this disagreement is caused by insufficient technical equipment of the party's attorney or insufficient experience with the technology.
Sometimes, however, the disagreeing party merely wants to harass the other party.
A survey taken by the Ministry of Justice of the state of Baden-Württemberg among the courts in this state showed, however, that many judges recommended a change of ZPO section 128a to the effect that the court can order the parties to attend a hearing remotely without being allowed to appear in person.
They claimed that having to listen to attendees in the courtroom and online at the same time gave rise to various technical and organisational problems.
The survey showed that the higher the complexity of the case and the number of attending parties, the lower the efficiency of using audio-visual technology.
In summary, the answers received show that neither health-related aspects nor the new technological equipment are going seriously to change the procedural working styles of judges across Germany.
This conclusion is corroborated by the results of the abovementioned survey undertaken by the Ministry of Justice of Baden-Württemberg.

Hungary

Dr. Csőke Andrea[1], Dr. Balázs Ildikó[2], Róbert Muzsalyi[3]

How is the current crisis affecting the work of insolvency courts in Hungary?"

Technical circumstances

The first wave was a huge shock to the whole world. Nobody knew what we should do, and experts could not say how should we protect ourselves against this virus. There was a real lock-down of courts for a short period, and during this time leaders of the courts prepared a special way of working. During the first wave the Hungarian regulatory principle was that the courts should continue to perform their functions. Compulsory home office working was ordered in Hungarian courts, and the tasks that were permitted to be performed in the court building have been defined. Protective measures are now different compared to that time because we know more about the virus. But during the first period, for example, case documents went into quarantine before one colleague passed them on to another colleague because at that time it was thought that the virus could be caught through touching documents. The document quarantine covered both paper documents received by the court from litigants and paper documents received from other courts and associated bodies. The quarantine time period was seven days, then three days, except for cases requiring urgent processing. The court made available rubber gloves for those judges who had to touch documents which had been provided by the parties.

Due to the fluctuating epidemic protective measures have been constantly changing. Within the third Covid period everybody wore masks and in courtrooms there were high plastic-screens between the judge and parties, and also in front of the lawyers. On occasion it was difficult to hear when somebody was not loud enough.[4]

[1] Andrea Csőke is a judge at the Hungarian supreme Court, Kúria, she deals with insolvency cases and trials related to insolvency situations.

[2] Ildikó Balázs is a judge at the Budapest-Capital Regional Court, she deals with insolvency cases and trials related to insolvency situations.

[3] Róbert Muzsalyi is a judicial clerk at the Supreme Court of Hungary, senior lecturer at the Károli Gáspár University, Richard Turton Award winner in 2016.

[4] We are writing this article before the fourth wave is growing in Hungary. Nowadays the mask-wearing is not obligatory, but it is suggested, but we do not know what will happen in the future.

Internal court meetings and training sessions could only be held via Skype, and it has become common that panels at the second instance and at the Kúria (Supreme Court of Hungary) discuss cases by Skype for Business.

Before the epidemic Hungary had begun to increase the use of electronic technology in the courts. In Hungary case management is electronic, documents are available digitally, and all courts are equipped with video-conferencing facilities. Due to the Hungarian digital court project, a number of improvements had been completed before the pandemic; digitalisation of all documents in the judicial files, electronic availability of documentation for the judges, and ensuring online inspection of files for the clients anywhere, anytime. With the introduction of electronic communication in court proceedings, parties are able to communicate with the court electronically, without having to submit paper pleadings. Electronic communication has been mandatory for lawyers since 2016, and optional for parties acting without a legal representative.

In September 2018 Hungary started the VIA VIDEO project in which courtrooms were prepared for remote hearing. Judges were trained to use the technology and they were provided with written information. Some judges used remote hearing before the epidemic in civil cases for hearing witnesses who were either abroad or in another city within Hungary.

The company registration procedure has been exclusively electronic since 1 July 2008. In insolvency proceedings parties were able to opt for electronic liaising with court from 1 January 2015, and it has been mandatory since 1 July 2016. So, the protection measures in place because of Covid-19 were not unfamiliar to judges in Hungary during the first wave.

When there was the lock-down, almost every judge and court staff could reach via internet the central documentary system of their court and they could work with the cases remotely.

IT colleagues were real heroes because they worked permanently within the court during this time.

In 2020, when the second wave reached Hungary, every judge and trainee judge had laptops and the computers were provided with webcams.

Hungarian courts have uniformly used Skype for Business for procedural acts where personal attendance can be replaced in this way.

Insolvency judges are able to use remote hearing when every party and insolvency practitioner have technical support. In order to participate in the Skype e-hearing, parties must have provided their e-mail address in advance, they must have an internet connection and a mobile device capable of transmitting images and sound. The judge sends invitations to parties to enable them to connect to the hearing. However, while Skype for Business is suitable for ensuring personal identification, the biggest problem is keeping confidential the personal data of the parties and witnesses. Before documents were shown by any person, the judge closed out others from the hearing, but after the data had been checked, the other participants had to access the hearing again, because Skype for Business cannot close out somebody only for a limited period.

For civil law proceedings (including insolvency proceedings) there were decrees from the Government[5] allowing the conduct of hearings electronically, or, if the circumstances were not appropriate, parties could give their statements in written form. Judges have usually taken up the written option, because for an electronic hearing not only the judge but other parties and participants have to know how to use this tool, and it was not unusual for everyone involved to be accustomed to it.

As a tool in need, we can say that the use of electronic technology is useful, and without it we could not have worked without a degree of risk. But personal contact in hearings, meetings, discussions or conferences has been very much missed.

Change of the rules

After the first wave the Hungarian Insolvency Act (HIA)[6] was modified to take account of the epidemic. Generally, deadlines were extended, and there were two important changes which could be very useful for the future.

First, in insolvency proceedings it was not previously possible for the judge to communicate with liquidators and creditors by e-mail, on the basis that this was not a trustworthy method of communication[7]. Accordingly, insolvency practitioners had to write by post to creditors and vice-versa. It was very costly, and in cases with thousands of creditors it involved a huge amount of money. It was also very slow.

[5] For example 112/2021. (III.6.) Korm. rendelet. Based on the authorization of the Hungarian Parliament the Government may issue orders regarding the current situation.

[6] Act XLIX of1991. on Bankruptcy Proceedings and Liquidation Proceedings 5/B. §

[7] The reason of this opinion based on the rule of Civil Code – 6:7. § (3) Act V of 2013 on Civil Code

The modification of HIA in August of 2020 allowed parties in insolvency proceedings to communicate with each other by e-mail where both sides agreed in it.
The second big change relates to the creditors' meeting.[8] The liquidator (in a winding up proceeding) must offer the creditors the possibility of taking part in the creditors' meeting electronically. Before this modification in HIA there was no possibility for a creditor to take part in a meeting from a distance, and probably this was one of the reasons why only very few creditors went to the meetings. A judge was not able to reject an approval of a reorganisation proposal because only a few creditors attended the creditors' meeting. Now there is the prospect of more creditors attending meetings.
Our opinion that these are substantial changes in our procedure, and although they are direct consequences of Covid-19 they could transform our practice in the future.
There were other changes brought in by the Government in an effort to assist companies in financial difficulties, but these have not been successful across the board. This is particularly the case in areas where human contact is essential.
Hungary now has a new restructuring procedure, brought in by Act LXIV of 2021[9], to meet the requirements of Directive (EU) 2019/1023. This procedure will not be in force until 1 July 2022. This procedure is totally new in Hungarian law, and is rather complicated, and was promulgated by another order for reorganisation proceeding[10]. There is uncertainty as to whether it will be supported by the revenue authorities, so there is lack of enthusiasm as to its use when it comes into force.

[8] According to HIA at the beginning of the winding up proceeding it is obligatory for the liquidator to invite all creditors to a meeting, in which the insolvency practitioner informs creditors about economic conditions of the debtor. In this meeting creditors could create a creditor committee.
[9] According to the Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132
[10] 345/2021.(VI.18.) Korm. rendelet

Ireland

Michael Quinn[1]

Introduction

On 13 March 2020,[2] the business of all courts in Ireland was suspended in response to the threat of the COVID-19 pandemic, pre-empting the nationwide lockdown imposed by Government four days later. Aside from urgent matters, all cases were adjourned generally with liberty to re-enter.

The Courts Service and the judiciary responded promptly to the new restrictions and there followed a seismic change in how justice is administered in Ireland. On 20 April 2020, the Supreme Court and the Court of Appeal heard cases via Remote Video Technology for the first time, and on 18 May 2020, the first remote hearing of the Commercial Court took place. In the time since then, the use of virtual courtroom platforms has become commonplace.

Remote courts are not perfect and this article will explore some of the challenges encountered, principally in the Commercial Court, and considers whether the practical changes brought about by the pandemic should remain a permanent part of the Irish courts system.

The benefits of remote courts are numerous. They enable cases to be heard and the administration of justice to continue where otherwise, due to the pandemic and government health restrictions on the number of persons who could attend courtrooms, it could not continue, thereby avoiding significant delays in cases being heard. Remote hearings allow parties, regardless of location, to access and take part in court proceedings. This in turn can reduce costs for parties. For example, witnesses and experts located outside of Ireland can give evidence remotely thereby eliminating the travel costs associated with experts giving evidence in person.

Prior to the pandemic, civil litigation in Ireland was conducted almost entirely in person and on paper. Only in exceptional circumstances, such as to facilitate the presentation of a vast number of documents in court, or for the taking of evidence of

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[2] https://www.courts.ie/news/statements-respect-arrangement-courts-%E2%80%93-13th-march-2020

witnesses unable for special reason to attend at court, was video conferencing technology utilised. However, in criminal proceedings, various forms of remote courts have been taking place for many years prior to the pandemic.
The remote platform currently utilised by the courts service of Ireland allows participants to login from different locations and to see and hear all other participants, and to mute oneself and turn off one's camera. Generally, judges log in from chambers using his/her courts service laptop or tablet.
Litigants with the resources to expend on more sophisticated platforms (usually commercial parties) can opt to contract privately with other providers, such as TrialView and Opus 2, and these have been recognised by the courts. These platforms have a broader range of tools and functions such as live transcription of court proceedings, the facility to upload court documents for everyone to access, the digital annotation of documents, and to present court documents in real time for all participants to view. The enhanced features create a more interactive virtual courtroom experience and more accessible court proceedings where all participants have access to all court documents. Better access to such platforms in the future will improve the quality of remote hearings.

Legislation

The legislative backdrop underpinning remote courts and which enabled the Courts Service of Ireland and the President of each division of the Courts to introduce these new measures is as follows: -

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020
The Civil Law and Criminal Law (Miscellaneous) Act 2020 was enacted on 6 August 2020 as an urgent measure to assist the Courts Service in conducting remote courts. Section 11 of the Act places remote hearings in civil proceedings on the same legal footing as proceedings held in a physical courtroom. It empowers the President of each Court to designate a category or types of proceedings which may be conducted by remote hearing.[3]

[3] S. 11(1) of the Civil Law and Criminal Law (Miscellaneous) Act 2020

S. 11(2) empowers a judge in any particular case to direct a fully remote hearing. This power was considered and exercised by O'Moore J. in *IBRC v Browne* [2021] IEHC 83 where he stated: -

"*The power provided by section 11(2) is one which enables a judge of the High Court to decide that a specific action proceed remotely. At the risk of stating the obvious, in enacting section 11 of the 2020 Act, the Oireachtas* [Irish parliament] *has chosen to facilitate the remote conduct of litigation. While undoubtably the enactment of this provision was brought forward by the Covid-19 pandemic, the section is not restricted to remote hearings necessitated by the current public health crisis. It therefore represents a view by the legislature that remote hearings should be enabled in appropriate circumstances*."[4]

Restriction on the scope of the court's discretion is set out in s. 11(4). That subsection requires the court when considering whether to make an order under s. 11(2), to have have regard to whether it would be unfair to any of the parties or contrary to the interests of justice to conduct the hearing remotely. Where an order has already been made, the court must revoke same if it appears that either of those two circumstances are established. O'Moore J. remarked;

"*The degree of engagement on the part of the Court is such that not only may it make the original Order of its own motion but it must also revoke the Order of its own motion should it feel that there is a resulting unfairness or an effect contrary to the interests of justice. The only brake on such a revocation is the need to hear the parties on the issue and, by extension, fully consider any submissions they may make*."[5]

The wording of s. 11 (4) indicates that while a remote hearing may be fair to the parties, it still could be found to be contrary to the interests of justice. For example, in Ireland it is fundamental that all court hearings are held in public, with certain limited exceptions such as family law proceedings or certain proceedings concerning minors. Whilst remote platforms are in theory accessible to the public, there may be limitations.

[4] *IBRC v Browne* [2021] IEHC 83, para. 33
[5] *IBRC v Browne* [2021] IEHC 83, para. 39

A person who interferes with or obstructs the remote hearing shall be guilty of an offence and shall be liable on conviction to a fine[6] or to a term of imprisonment or both.

The broadcasting or recording of proceedings in Irish courts is prohibited, save with the leave of the court. This rule extends to remote hearings. The President of the High Court is empowered to introduce rules of court to make further provision for the conduct of remote proceedings including the conduct of such a hearing, the attendance of witnesses and the procedure a party must follow to object to a remote hearing.[7]

Remote Hearings in the Commercial Court

The introduction of remote hearings to the Commercial List of the High Court has been widely regarded as successful. Parties to proceedings in the Commercial List are frequently sophisticated, well-resourced, and accustomed to the use of technology in their business and communications. Rarely are parties unrepresented or otherwise vulnerable. Thus, the typical concerns associated with remote hearings involving lay litigants, such as the observance of fair procedures and access to justice, do not generally arise. The remote exchange of pleadings, discovery and disclosure of documents, and legal submissions, generally do not present a difficulty. In a recent interview with ISDA's IQ magazine, Mr. Justice David Barniville, judge in charge of the Commercial List of the High Court of Ireland, described the experience in the Irish Commercial Court: -

"*Like many equivalent jurisdictions around the world, when the COVID-19 pandemic hit in March 2020, the Commercial Court quickly moved to remote hearings and has since been conducting its business on an almost completely remote basis. We have not only been able to deal with applications but also with trials involving witnesses, which has enabled the court to continue its business almost unaffected by the pandemic. The Commercial Court saw an increase in business in 2020 in terms of cases admitted to and dealt with by the court*."[8]

In *IBRC v Browne* [2021] IEHC 83, O'Moore J., Judge of the Commercial Court, noted that s. 11(2) of the Companies (Miscellaneous Provisions (Covid-19) Act 2020

[6] As defined in s. 3 Fines Act 2010

[7] S. 11 (5) Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020

[8] '*A Common Law Alternative*', IQ Quarterly, ISDA (Vol 7, Issue 2: July 2021), pg. 28 https://www.isda.org/a/IfEgE/IQ-ISDA-Quarterly-July-2021.pdf

does not prevent the court from ordering a remote hearing in witness actions.[9] He proceeded, of his own motion,[10] to direct a fully remote hearing of the trial and concluded that the court had a "wide discretion"[11] to do so.

Ruling on an objection by the defendant to proceeding via a remote hearing, O'Moore J said: -

"*Thirdly, it was submitted that liaison with counsel's support team would be difficult in the event of a remote hearing, particularly given the amount of paper in the case. I do not accept that such a concern is well founded. Counsel can consult fully with his team in preparation for the examination of witnesses or the making of submissions; this may be done by video link, by phone call or by the provision of a memorandum, but that form of support is no less effective than a meeting. Indeed, it may be preferable. In terms of the examination of a witness, I am aware that (even in pre pandemic times) it was not unusual for solicitors to set up a WhatsApp group for the legal team in order to allow messages, prompts and advice to be communicated to counsel in real time while the court was sitting and while the witness was being examined. In truth, this was nothing more than a modern version of the note handed to counsel while they were on their feet. The note may not be possible now, but other forms of communication are available, as I have just described. It is worth noting that, during the opening of the case and the I.B.R.C. reply, both counsel were operating out of offices. Counsel for Mr. Browne made his submissions in the presence of his junior. If a similar arrangement was in place for the examination of Mr. Browne, or any other witness, counsel would have the benefit of conducting an examination with the benefit of a knowledgeable colleague who can be consulted across the table, in a sequestered room. This does not, in my view, represent a disadvantage*."

Providing an informative insight to the challenges of effective witness examination, O'Moore J. continued at paragraph 21: -

"*I would also observe that the examination of a witness is essentially a solitary pursuit; it is not a team sport. For each session, counsel will have prepared at least enough lines of examination (by which I in all cases include cross examination) to last the two hours. It may well be that there is an important prompt that needs to be given to counsel,* [this is a reference to instructions from solicitors and other

[9] Para. 41

[10] As opposed to on the application by any of the parties pursuant to s. 11(2) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020

[11] *IBRC v Browne* [2021] IEHC 83, para. 41

members of the legal team, and on occasion from the client directly], *but as I have described this can be done in a remote hearing. Even if the prompt cannot be given, and this is at least as likely to happen when evidence is taken physically, it can often be advantageous for counsel to return to the point after the break in proceedings. In fact, the incidences of helpful notes passed to counsel in the cross examination of a witness can be overwhelmed by the number of barely legible but distracting Post Its placed before the cross examiner at a critical time in the challenging of a witness's evidence. The absence of such contact with the rest of the team may therefore be as much a help as a hindrance*."

In ordering a remote hearing, O'Moore J. listed three factors which influenced his decision:

1. The nature of the commercial list being one in which the judge takes an active role in the efficient case management of proceedings.
2. The fact that six weeks had been set aside for the trial of the action, and that a remote hearing would facilitate the hearing of the case within this timeframe.
3. The long history of the proceedings, and the desirability that they be concluded.

In *Trafalgar Developments Limited & Ors. v Mazepin & Ors.* [2021] IEHC 69, Barniville J. made the following observation (at paragraph 80):-

"*Nor have I considered in the exercise of my discretion the fact that cross-examination would have to be set up at short notice and on a remote basis with Mr. Waller-Diemont being cross-examined remotely through the Trialview platform from Curacao. I am satisfied that if I felt that it was necessary or appropriate for Mr. Waller-Diemont to be cross-examined, the appropriate arrangements could have been made for his remote cross-examination on the Trialview remote hearing platform (which has worked well in other cases) and an order could have been made to provide for that under s. 11 of the 2020 Act*."

Striking a Balance

Perhaps the most challenging aspect to virtual hearings encountered in the Commercial Court has been in relation to oral testimony, particularly cross-examination where the witness' credibility is being tested. In the UK there has been extensive judicial commentary on such difficulties. This was articulated by The Hon

Mrs Justice Cockerill, Judge in Charge of the Commercial Court in London, at the Dispute Resolution Forum 2021 on 16 June 2021[12]. In her keynote speech, Cockerill J. spoke of the quality of evidence given via remote hearing and whether it is the same as that which would have been given at the hearing had it been a physical one. She put this down to the reduction or loss of body language between counsel and the witness, and the concern that giving evidence remotely may create a "*sense of disinhibition*" among witnesses "*which makes it easier for them not to tell the truth – or not to tell the whole truth*." A courtroom is a place "*inhabited by a sense of authority, control and respect which creates an ability to accept and respect decisions which are of great importance to people*." These "*numinous qualities*" are stripped away by the "*Covid paradigm*".

Cockerill J. cautioned the need to "*weigh carefully the balance between convenience and optimising the process. Of course we cannot go back to where we were before Covid, but what we had has a lot of merits which we should not take for granted and which we should look to enshrine at the heart of the post Covid justice system – including the world of commercial dispute resolution*."

The April 2021 Minutes of the Commercial Court User Group Meeting[13] in London record that the Court would require more persuasion that trials should take place remotely and that in-person trials remain the "gold standard".[14] The Group, chaired by Cockerill J., which comprises judges and users of the Commercial Court, emphasised the intention to return to in-person trials with only Fridays being kept fully remote for the foreseeable future.

In a joint statement of the Bar of Ireland, the Bar Council of England and Wales, the Bar Council of Northern Ireland and the Faculty of Advocates of Scotland on 4 May 2021,[15] the four Bars referred to remote hearings as "delivering a markedly inferior experience". This view was based on five main concerns:

(1) "*Experience shows that judicial interaction is different and less satisfactory in remote hearings from that experienced in "real life" with the result that hearings can be less effective at isolating issues and allowing argument to be developed.*

[12] Cockerill J, '*Learning our ABC's: Thoughts about Commercial Dispute Resolution After Brexit and Covid*' (Dispute Resolution Forum 2021 16 June 2021) https://www.judiciary.uk/wp-content/uploads/2021/06/Cockerill-Dispute-Resolution-Forum-2021-speech.pdf

[13] https://www.judiciary.uk/announcements/commercial-court-user-group-meeting-april-2021-minutes/

[14] *ibid* pg. 2

[15] https://www.lawlibrary.ie/News/Statement-on-the-Administration-of-Justice-Post-Pa.aspx

(2) *The management of witnesses, especially in cross-examination, is far less satisfactory when conducted remotely and we are concerned that it may have an adverse impact on the quality of the evidence given.* [emphasis added]

(3) We are concerned that remote hearings present very considerable challenges to effective advocacy in cases involving evidence or complex narrative submissions. The very real, but often intangible, benefits of the human interaction inherent in in-person hearings cannot be ignored. The universal sentiment across the four Bars is that remote hearings deliver a markedly inferior experience.

(4) The diverse and complex needs of our clients must be protected and their participation must be safeguarded. By its nature, a remote and automated system will only degrade the valuable human interaction that should be at the heart of meaningful and open access to justice.

(5) *There are also wider concerns arising from remote working. We have all found that the training experience has been markedly affected by the predominance of remote working, and the accompanying isolation – in marked contrast to the usual collegiality of our respective Bars – is also having a negative impact on wellbeing*."

The Bars acknowledged that "*the use of remote hearings to deal with short or uncontroversial procedural business is unobjectionable, and indeed to be welcomed in many cases, even after the current crisis has passed*".

Conclusion as regards virtual courtrooms

The Covid-19 pandemic was an unwelcome but overdue catalyst for courts everywhere to expedite the modernisation of their operations. There is broad consensus domestically and internationally that technology introduced to the courts system will be a long-term impact of the pandemic. The success of remote courts to date is due to the immediate buy-in by a range of stakeholders: the judiciary, Courts Service staff, a statutory basis permitting remote hearings, tech savvy solicitors and barristers, adaptable and skilled litigation service providers.[16]

[16] Cockerill J, '*Learning our ABC's: Thoughts about Commercial Dispute Resolution After Brexit and Covid*' (Dispute Resolution Forum 2021 16 June 2021) pg.4 https://www.judiciary.uk/wp-content/uploads/2021/06/Cockerill-Dispute-Resolution-Forum-2021-speech.pdf

There are mixed opinions in the business and legal community as to the extent to which remote hearings should continue in many classes of cases. It is expected that in important cases, particularly where the credibility of witnesses is to be tested in oral testimony, a trial with all relevant parties in the courtroom together is to be preferred. The search will continue to achieve the correct balance between the apparent convenience of remote hearings using the latest technology and in appropriate cases the requirement for parties to present themselves and their witnesses physically in the courtroom. Central to the expanded use of technology is an overriding policy requirement that methods utilised should improve, and not compromise, access to justice. Achieving a 'level playing field' is a part of this objective, and will inform the implementation of future reforms.

Legislative Support to Companies during the pandemic

Companies (Miscellaneous Provisions) (Covid-19) Act 2020

The Companies Act 2020 was enacted on 21 August 2020, and provides for temporary amendments to the Companies Act 2014 to provide relief to companies which have faced difficulties in complying with certain statutory requirements as a result of the pandemic.

The Act applies for an "interim period"[17] which may be extended by the Government.[18] To date the interim period has been extended twice and currently applies until 30 April 2022.[19]

The Act provides a range of options for companies to conduct general meetings during the interim period. General meetings and certain creditors' meetings including statutory meetings in a company winding up or examinership, may be conducted as partially or wholly virtual meetings provided that all those entitled to attend have a reasonable opportunity to participate.

The Act raises the debt threshold for a creditor or a group of creditors to petition for the commencement of a compulsory winding up of a company by the Court to €50,000 for both individual and aggregate debt.[20]

[17] S. 2 Companies (Miscellaneous Provisions (Covid-19) Act 2020
[18] S. 4 Companies (Miscellaneous Provisions (Covid-19) Act 2020 inserts s. 12A into the Companies Act 2014
[19] (S.I. No. 725/2021)

[20] S. 14 Companies (Miscellaneous Provisions (Covid-19) Act 2020 amends s. 570 of the Companies 2014

Examinership has remained a viable restructuring remedy throughout the pandemic for large insolvent companies with a reasonable prospect of survival as a going concern. The Companies (Miscellaneous Provisions) (Covid-19) Act 2020[21] introduced the option of extending the 100-day protection period in examinership to 150 days where "exceptional circumstances" exist. Exceptional circumstances include (but are not limited to) the nature and potential or actual impact of COVID-19 on the company.[22]

Companies (Rescue Process For Small And Micro Companies) Act 2021

On 22 July, 2021, the Companies (Rescue Process For Small And Micro Companies) Act 2021 was signed into law by the President. The Act received priority drafting due to predicted influx of corporate insolvencies as government financial supports for businesses are withdrawn.

The Act provides a dedicated rescue framework for small and micro companies which is more cost efficient and capable of conclusion within a shorter period of time than examinership. While examinership is regarded as a successful restructuring remedy, it can be disproportionately costly for many businesses in financial distress. The Act seeks to remove this barrier to access for smaller companies by reducing court oversight which results in efficiencies and lower costs.[23]

A key difference between the new Rescue Process and examinership is that there is no automatic stay on creditor claims under the Rescue Process. The debtor company must apply to court to impose a stay on creditor actions.

The process is commenced by resolution of the directors and does not require application to court. An insolvency practitioner, called a "process advisor", is appointed by the company to conduct engagement with creditors and prepare a rescue plan. The rescue plan must satisfy the "best interest of creditors" test and provide creditors with an outcome more favourable than a liquidation. No creditor may be unfairly prejudiced by the plan.

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[21] Amending s. 534 Companies Act 2014

[22] S. 534 (3A)(c) Companies Act 2014 inserted by s. 13(b) Companies (Miscellaneous Provisions (Covid-19) Act 2020

[23] '*Minister Troy publishes General Scheme for Small and Micro Business Administrative Rescue Process*' (Department of Trade, Enterprise and Employment, News & Events, 11 May 2021) https://enterprise.gov.ie/en/News-And-Events/Department-News/2021/May/20210511.html accessed 27 Januar 2022.

Creditors are invited to vote on the rescue plan by day 49 of the process advisor's appointment and the process must conclude by day 70, subject to extension, if necessary, for court applications.

The rescue plan can be approved and become binding without the requirement for Court approval, provided that a majority in value of an impaired class of creditors vote in favour of the proposal and no creditor raises an objection to the plan within a 21-day cooling-off period which follows the vote. Where an objection to the rescue plan is raised, there is an obligation on the company to seek the Court's approval of the plan.

State creditors, such as the Revenue Commissioners may decide to "opt out" of the process on the basis of statutory grounds, for example if the company has a poor history of tax compliance. This safeguards the process from abuse by companies availing of the Rescue Process as a tax avoidance measure.

It is intended that court intervention will only arise if there is a contentious issue. In that regard there are a few likely 'flashpoints'. For example, parties may challenge the opening or conduct of the process, there may an objection to an application for a stay or to an application for the repudiation of an executory contract. Where dissenting stakeholders object to the rescue plan a court application for confirmation is required.

Because of continued government support to business, an anticipated flow of cases has not yet materialised. Therefore the success of the small company Rescue Process remains to be tested as such supports are eased and the solvency and viability of such companies is exposed to greater scrutiny.

Italy

Caterina Macchi[1]

Question 1:

Did your court receive additional technical equipment (such as webcams) and software platforms (such as Zoom or Webex etc.) for remote communications (audio and/or videoconferencing)?

In April and May 2020, when the pandemic had already been showing its pervasive impact on every sector of human, economic and social activities, several emergency measures were adopted by the Italian Government and Parliament for civil, criminal, and administrative jurisdictions and new tools were provided for judicial work. In Italy insolvency judges are part of the civil jurisdiction. Insolvency courts therefore benefited from the new general civil procedural rules that were adopted, and from the technical tools that were provided to every Italian judge.

In order to enable the Courts to work while reducing the number of in-person hearings, new emergency rules enabled judges and attorneys to opt for either online hearings or for a written determination of the case, under certain specific limits and conditions that have been fine-tuned over the last 18 months.

The rules were meant to be temporary but have been extended several times as a consequence of the persistence of the pandemic. At present, Law Decree n. 105/2021 stipulates that written discussion and remote hearings are possible until 31.12.2021. But it is very likely that these measures are here to stay: the reform of the Civil Procedure Code which is already underway in Parliament contains provisions about hearings via remote and written communication. Broadly speaking, and focusing on insolvency matters, the insolvency judge today can choose to hold hearings in person, with punctilious respect of general safety rules and avoiding gatherings in narrow spaces, or to hold hearings via Microsoft Teams, or to have submissions and discussion of the case in writing.

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Every Italian Court received additional equipment in April-May 2020: every Italian judge was equipped with Microsoft Teams and provided with a webcam.

Question 2:

Did you have remote communications with parties of proceedings pending in your court before the COVID-19 crisis began?

Remote communication was not allowed by Italian Civil Procedure Code before the pandemic began, nor was it accepted under the insolvency law. It is the case however, that there was a move in the direction of remote hearings in the new Code of Crisis and Insolvency, the entry into force of which was due on September 2020 but which has been repeatedly postponed because of the Covid 19 emergency. (The Code stipulates that ballots on restructuring/liquidation plans are to be held through electronic communications, and that hearings for verification of claims in judicial liquidation can be held by the judge either in person or by remote electronic communication).

If remote communication has been a novelty put into force by the emergency rules, electronic proceedings in civil Courts have been a reality in Italy for almost a decade, having been progressively implemented in First Instance Courts and then in the Courts of Appeal. This proved to be a good basis on which to rely when the pandemic broke out. Before the pandemic, the initial filing of a civil or insolvency case could be done either in paper or by electronic filing, and once the case was pending all the subsequent petitions, acts or documents of any kind could only be submitted electronically. The alternative paper filing was removed by Law Decree 18/2020 in March 2020. Accordingly electronic filing is now the only option for civil and insolvency cases at any stage of the proceedings both at first instance and on appeal (electronic filing in Supreme Court cases has also been implemented, but at the moment paper filing is still possible). Exceptions are limited to the deposit of documents that are not technically supported by the judiciary electronic system (e.g., certain types of video files).

Question 3:

Did you receive instructions on:

a) the use of conferencing technology, and

b) best practices for remote communications?

As the use of remote communication technology was something new for the civil judiciary, all judges received instruction via webinars that were immediately organized by the Ministry of Justice. Instruction webinars have been held on a regular basis since then, and in the Ministry of Justice website a Portal has been set up, accessible by every Italian judge with a password, where all the webinars as well as video tutorials about all Microsoft Teams features are constantly available.

Question 4:

In which types/stages of proceedings did you use remote communications?

a) insolvency-related adversarial matters (litigation)
b) taking of evidence by eyewitness testimony
c) taking of evidence by expert testimony
d) creditors' meetings
e) ballots (e.g. voting on an insolvency plan)
f) preliminary/case management hearings
g) other types/stages of proceedings (please specify)

Did you use remote interpreting services if a party did not speak the language used in your court?

The use of remote communication via Microsoft Teams by Italian insolvency Courts has undoubtedly been extensive. That said, this technology has been adopted and can be used within the general limits imposed by the law (e.g., taking of evidence by eyewitness testimony is not allowed in hearings on the electronic platform). The improving general health situation has also enabled a progressive return to in-person hearings.

Here are some relevant examples of hearings held via Microsoft Teams platform over the last year:

a) in insolvency-related litigation: when only attorneys and parties are to be heard, or a technical advisor to the judge is to be appointed, or to be heard after fulfilling his assignment;

b) in the proceedings of *concordato preventivo* (a restructuring or liquidation proceeding filed by the debtor that remains in possession of the business) when the

debtor is to be heard on a restructuring or liquidation plan that is not admissible or has not been approved by creditors;

c) in a creditors' meeting in *concordato preventivo,* where the creditors are summoned to vote on the plan;

d) in the Court's confirmation proceedings, after the restructuring or liquidation plan has been approved by creditors, either if there is an objection by any creditor to the plan or there is no objection;

e) in the verification and admission of claims in bankruptcy proceedings (in the Italian insolvency law the proceeding of verification is held by the judge through one or as many hearings as are necessary, depending on the number of claims lodged);

f) in informal hearings with the bankruptcy trustee or with practitioners appointed by the Court in restructuring proceedings.

Remote hearings have been held by single judges as well as by panels of judges. A great part of Italian insolvency courts' activity is done by panels of three judges.

No cases are known which required interpreting services.

The law also allows chambers' hearings to be held on the Microsoft Teams platform.

Question 5:

Which technology did you use for remote communications (e.g., telephone, email, video, letters)?

Hearings cannot be held by means that are not specifically permitted by the law: Courts have no power on the matter. Consequently, when the Insolvency law or the Civil Procedure Code stipulates that a hearing must be held, it cannot be substituted by letters or emails.

Neither may hearings be held using a platform different to the one provided by the Ministry of Justice, at present Microsoft Teams.

Contacts between the insolvency judge and bankruptcy trustees or insolvency practitioners appointed in restructuring proceedings are not governed by statutory rules and can certainly be held via email or telephone, or via Microsoft Teams.

Question 6:

On the basis of the experience you made during the pandemic, which of the changes you made in the management of proceedings are you planning to make permanent after the pandemic has ended?

How can these changes improve the quality and/or effectiveness of the proceedings?

Have <u>you</u> made changes to your management of the proceedings which have not been helpful? Which problems were caused by those changes?

Views among judges differ remarkably as to the evaluation of the changes made in the management of cases over the pandemic crisis. I will make some brief personal remarks, on the assumption that when the pandemic is over the emergency rules that now permit written discussion and remote hearings will be kept in Italian law, which is the most likely scenario, as mentioned above.

Simple cases, as well as simple phases of complex cases, can be dealt with by using the written discussion proceeding (there are of course specific rules to preserve the adversarial principle in this kind of written proceeding): this is particularly true for simple insolvency-related controversies (as in simple cases of avoidance actions), as well as for simple adversarial applications in the context of more elaborate cases (e.g. creditors challenging a restructuring plan, or a distribution of proceeds, or a discharge, with relatively simple arguments).

It may be noted that written communications between the insolvency judge and a debtor in possession who has filed a *concordato preventivo* petition have always been common practice, e.g., when clarifications are required or changes are to be made on the plan, or the Court is asked to allow non-routine obligations, or new financing, or the rejecting of contracts. Insolvency procedural rules about these matters have always been flexible, and written communications will continue to be possible in any case.

Remote hearings on software platforms have proved essential in the most severe phases of the pandemic and can be fruitfully kept as an ordinary tool at the disposal of judges also for future times, hopefully no longer marked by the Covid 19 epidemic.

Communications via email or by telephone with insolvency practitioners have become much more usual and will be retained.
The question that the judge must ask himself is what is the best way to understand the particular case more thoroughly, as there is no effective management without a deep understanding. On this respect, remote communication should not be overrated or regarded as valuable in itself. Especially when the parties are numerous, or the cases are very complex, remote hearings tend to be longer and heavier than in-person meetings, and even minimal technical problems create undesirable incremental difficulties to the court. (To give a very simple example, the quality of web connection has significantly improved in Italian Courts, but when there is one attorney in a multi-party hearing with a poor web connection and he cannot hear or be heard or be seen, the hearing is obviously hampered and risks postponement).
It has to be underlined, in a more general way, that in remote communication much of the interaction in personal communication is lost, not only between the judge and each single party, but also between the attorneys representing the various parties involved in adversarial issues. It is not a loss that should be overlooked, as communication is the way to comprehension and not a mere matter of words proffered and put into the minutes of the hearing.
The experience has then shown that flexibility in the choice of the best instrument in respect to the specific characteristics of the single case is the real key to tackle the needs of the courts.

Poland:

Legal changes in Poland in connection with the SARS CoV – 2 virus

Anna Hrycaj[1], Marek Sachajko[2], Emil Szczepanik[3]

Solutions related to the judiciary adopted in Poland in connection with the threat of the spread of SARS CoV-2 virus infection

Due to the threat of the spread of SARS CoV-2 virus infections, it has been necessary to introduce specific solutions aimed to minimise the risk to public health. These solutions have also affected the judiciary.

On March 8, 2020, the Act of March 2, 2020 on Special Solutions addressing the prevention and eradication of COVID-19, other infectious diseases and the crisis caused by them, entered into force (Journal of Laws of 2020, item 374), subsequently amended by the laws of March 31 and April 16, 2020 (respectively, Journal of Laws of 2020, item 568 and item 695). Act of March 2, 2020 in art. 14a paragraph 4 and 5 introduced a catalogue of urgent matters. In urgent matters, pursuant to art.15 zzs paragraph 2 of the Act, the suspension of the start and the time limits did not apply.

In other cases, the running of procedural and judicial time limits did not begin, and the commenced dates were suspended for the time of epidemic emergency. In addition, pursuant to art. 15zzs paragraph 6 during the period of epidemic emergency or the state of epidemic announced due to COVID, no hearings or public meetings were held, except for public hearings and public meetings in urgent cases. Such an approach froze the judiciary regardless of the fact that pursuant to art. 14a paragraph 9 the President of a competent court could order the examination of each case as

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[2] Marek Sachajko is the judge at Wojewódzki Sąd Administracyjny w Poznaniu – Wydział Gospodarczy (the Provincial Administrative Court in Poznań – Commercial Division)

[3] Emil Szczepanik is the judge at Sąd Rejonowy dla miasta stołecznego Warszawy (the District Court for the Capital City of Warsaw), on secondment to the Ministry of Justice (Head of the Unit for Supervision over Insolvency Practitioners)

urgent, if a failure so to recognise the case could cause a danger to life or health of humans or animals, a serious damage to the public interest, or imminent material damage, as well as when it was required in the interests of justice. Initially, only cases for opening restructuring proceedings were recognised as urgent cases. After some time, it was recognised that the courts had to return to work. The state and the economy require a functioning judiciary. Therefore, further changes were made by the Act of 14 May 2020 on the Amendment of Certain Acts in the Field of Protective Measures in connection with the spread of the SARS-CoV-2 virus (Journal of Laws of 2020, item 875). During the period of the epidemic emergency status or the epidemic status announced due to COVID-19, and within one year of the repeal of last of these status in cases examined pursuant to the provisions of the Act of 17 November 1964 - Code of Civil Procedure the following provisions were introduced:

a) the hearing or public meeting is to be conducted using electronic devices enabling the meeting to be held remotely with simultaneous transmission of image and sound, without the necessity for the participants to be in the court building , unless conducting the hearing or the public meeting without using electronic devices does not cause excessive risk to the health of the persons participating in it;
b) the chairman may order a private meeting or closed session if he deems it necessary for the examination of the case, and conducting the hearing required by the Act could cause an excessive threat to the health of the persons participating in them and cannot be conducted remotely with simultaneous direct transmission of the image and sound and neither party objected to holding a closed session within 7 days from the date of service of notifying them of the referral to a closed session. (In a notice served on a litigant who is not legally represented, the right to object and the time limit for filing an objection must be clearly stated). ;
c) if due to special circumstances the President of the Court so orders, the members of the panel, other than the chairman and also the clerk of the case, may participate in the meeting by means of electronic communication, except for the final hearing meeting.

Currently, courts in Poland have a videoconference platform, the AVAYA SCOPIA application. Using the Central Video Conferencing Platform - the Ministry of Justice,

managed by the Centre for Competence and Information for the Judiciary - both preparatory meetings and hearings can be conducted remotely. Using an email programme (e.g. Outlook after installing the appropriate "AVAYA SCOPIA plugin"), it is necessary to plan the date and duration of the hearing by generating an "invitation" - an email sent to the addresses indicated. People who are to participate in the hearing are instructed to download the AVAYA SCOPIA application on a smartphone (available free of charge for both Android and iOS) or install and run the application (the so-called client) on a computer with a camera. The "invitation" message is sent to the participants of the proceedings who will be able to join the meeting by "clicking" the "Join meeting" icon. Included in the "invitation" is the majority of the necessary connection information, including the phone number which may be used in case problems arise with the connection. This enables the caller to connect to the virtual courtroom by ordinary telephone.

The AVAYA SCOPIA application is similar in functionality to other popular programs enabling video conferencing. The chairman conducting the hearing / meeting (using the function of moderator) has the right to close video conferencing access for other participants. In a situation where a deliberation of members of the composition of the court is to be held or the case will be subject to non-disclosure, this functionality is of fundamental importance. The chairman also has the right to "ask" the participant to withdraw from the videoconference, which may be useful when interviewing more than one witness or there is a violation of the seriousness of the court. Another important functionality of the application is to withdraw the voice of a video conference participant. This functionality consists in switching off the microphone of one or all participants. A person who has the microphone off can report their desire to speak again by raising their hand (pressing the icon with a raised hand) or entering their request in a text chat. Using a document camera allows the participants to show case files to participants. It is also possible, through the screen presentation function, to provide participants with documents - e.g. a hearing plan as part of a preparatory meeting for the purpose of joint analysis and tracking of applied changes. The application in question allows for efficient online proceedings, but unfortunately the technical possibilities of its use are currently limited - e.g. the District Court in Warsaw currently has the option of conducting one hearing / sitting simultaneously. Currently, courts are also using Microsoft Teams which is much more comfortable then AVAYA SCOPIA. For example more then 80% of open hearings in civil and

commercial cases in District Court in Warsaw are conducted online by Microsoft Teams.

Solutions related to the insolvency in Poland in connection with the threat of the spread of SARS CoV-2 virus infection

Simplified restructuring procedure.

In response to the COVID-19 crisis the Polish government has prepared a simplified version of one of four restructuring proceedings that are available in Polish law for business entities and entrepreneurs. This law[4] has been entered into force in June 2020 and was available until 1 December 2021, before the first step in the introduction of the Restructuring Directive will enter into force.

The essence of this new law is to enable the debtor to initiate the procedure without a court decision but with some consequences that before were only available under court control in other three restructuring procedures, where court involvement is much more significant.

The most important features of that new law are as follows:

- It is initiated by the announcement of the debtor in the official commercial journal;
- The debtor must be supported by a insolvency practitioner (licensed by the Ministry of Justice);
- the announcement has the effect of a general stay of individual enforcement actions that covers both unsecured and secures claims (generally, secured claims are not covered by restructuring proceedings in Poland, without creditor's consent);
- crucial contracts are protected from early termination – this protection covers lease contracts, licence agreements, bank account agreements, credit agreements, property insurance agreements, letters of credit. The protection does not cover non-performance of obligations that arise after the commencement of the procedure, where they are not covered by the arrangement;

[4] Ustawa z dnia 19 czerwca 2020 r. o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorcom dotkniętym skutkami COVID-19 oraz o uproszczonym postępowaniu o zatwierdzenie układu w związku z wystąpieniem COVID-19 (t.j. Dz. U. z 2021 r. poz. 1072 z późn. zm.).

- any conduct of the debtor outside normal business activity is not allowed without the insolvency practitioner's agreement;
- the insolvency practitioner may authorise new financing that will be protected in the insolvency procedure if it is presented in the restructuring plan and the plan is accepted;
- the insolvency practitioner may convene a creditors' meeting to vote on the restructuring plan;
- the restructuring plan that covers secured creditors must guarantee that those creditors should be compensated at least at the same level as if they were satisfied from the security;
- creditors, the debtor, and the insolvency practitioner may apply to terminate the consequences of the announcement to initiate the procedure if these consequences are detrimental to creditors.
- the debtor must apply for confirmation of the restructuring plan within 4 months from the announcement; this period cannot be extended.
- the announcement protects the debtor from responsibility for not applying for insolvency, if the restructuring plan is confirmed or other restructuring procedures are opened immediately after the termination of this simplified procedure.
- It may be used only once.
- If 4 months passes without application for confirmation of the plan, the procedure is terminated automatically, ipso iure.
- the debtor has civil responsibility in the event that he abuses this procedure.

Time limit to file for insolvency

Apart from that, as of 13 April 2020, the time limit to file for insolvency is suspended for the period of the declared state of epidemic where the insolvency is due to COVID-19. After the end of the state of epidemic it will run anew. At the same time the law introduced the rebuttable presumption that any insolvency that occurred during the state of epidemic is caused by COVID-19. To protect the creditors this solution is assisted with the rule that time limits for creditors to oppose transactions of the debtor in the vicinity of insolvency in the insolvency law (e.g. claw back provisions) are prolonged accordingly (art. 15zzra in the Act of March 2, 2020, mentioned above).

Portugal

Rute Lopes[1], Luísa Gomes[2]

Introduction

In common with other countries, Portugal has had to adapt some of its law and procedure to deal with the situation arising from the Covid pandemic. This article covers some of the measures adopted by the judiciary generally, but specifically by the insolvency courts.

The pandemic has required the judiciary to come to terms with a very different situation than that we faced pre-Covid. This has resulted in our reviewing practices we have followed for many years. Changes introduced to manage the challenges of Covid now appear to be beneficial not just for the immediate requirements of dealing with Covid but also for the longer term. Consequently, Covid enforced changes may become permanent which will be for the overall benefit of the legal system generally.

Legislation

During the first lockdown, the Portuguese Parliament enacted Law 1-A/2020, of 19 March 2020 designed to minimize the adverse social and economic consequences of the pandemic. The most relevant aspects of this law to the courts were the following:

a) All proceedings, including judicial deadlines, were stayed in non-urgent cases;
b) All statutes of limitation were suspended;
c) The legal deadline for an insolvent to file for insolvency was stayed;
d) All proceedings legally considered to be urgent continued, but with court hearings held by remote means where possible. In cases regarding people over 70, or with vulnerable health, remote hearings were the rule.
e) Within insolvency proceedings, evictions from the bankrupt's main family home were stayed, albeit on a case by case evaluation.

[1] Rute Lopes is now a judge of the Intellectual Property Court in Lisbon, Portugal. She has accepted to be assigned some insolvency cases because of a backlog in the Commerce Court in Lisbon.
[2] Luisa Gomes has 20 years of judicial experience. Currently, she is a judge of the Commerce Court in Sintra, Portugal, where she has held office for 10 years.

Law 75/2020 of 27 November 2020, enacted the following measures which are temporary and continue until 31 December 2021:

f) The deadline for negotiations for a recovery plan within insolvency proceedings is extended;
g) The Extrajudicial Proceedings for the Recovery of Companies law (RERE), enacted by Law 8/2018, is extended to companies that became insolvent due to Covid 19.
h) A new proceeding to restructure companies in difficulty, due to Covid 19, has been created.
i) An obligation on the liquidator to pay installments to creditors in respect of their debts before the end of liquidation has been established, provided that the proceeds from the realization of assets recovered by the estate exceeds €10,000.00.
j) An order of priority on proceedings regarding warranties within insolvency proceedings has been established.

Remote communications with parties in courts before and during the COVID-19 crisis

Before the pandemic it was legally permissible to hear witnesses in Portuguese court proceedings by remote communication. Such communications were on a court-to-court basis, with a witness testifying from another court facility using the court remote communication system. It was therefore necessary for all courts to have the necessary technical systems to enable these communications to take place. When the first lockdown was imposed, in March 2020, as it was not lawful for there to be remote communication with a court by any system other than the court-to-court facility remote hearing of witnesses had to be suspended.

The pandemic legislation authorised the use of other technical systems, enabling the possibility of working through virtual courtrooms such as with the Webex platform. As the Webex platform is quite intuitive, the use of it by judges, prosecutors, and lawyers was essentially self-taught. Besides Webex, hearings were also conducted via Zoom, Skype, and other similar platforms in individual cases. However, remote hearings did not become universal. There were technical problems, resistance from parties, and

difficulty in reaching a consensus between parties as to the use of remote hearings. As a consequence there was a return to face-to-face communications in many cases, as before the lockdown.

Remote communications in insolvency proceedings

Since the law covering remote hearings did not have exemptions, it was possible to use remote communication in any kind of proceeding. It was a matter for the judge to decide whether remote communication would be appropriate in any particular case. In practice, remote communication was more commonly used for preliminary and case management hearings, witness hearings, and expert hearings.
In most cases the courts cancelled creditors' meetings which had already been scheduled and refrained from scheduling new creditors' meetings. With the acceptance of all participants, ballots on insolvency plans were often conducted in writing, although in some cases such ballots continued to take place in court.

Post pandemic

In a post-pandemic scenario, it would be desirable to widen the scope of remote communications, although this will require changes to our procedural law. Certain hearings or meetings could, indeed should, take place by remote means. In particular:

- Witnesses with health problems or disabilities who are unable to go to court, or who find court attendance difficult. Such a change would have to take into account the fact that for some hearings the court may have difficulties in assessing the credibility of oral evidence by remote means, particularly where the witnesses are giving evidence from their own homes. It may be necessary to provide for exceptions, taking into account the situation of the individual witness, and the risk (albeit small) of there being a third party who might be perceived to be suggesting answers to the witness, especially where the witness shows some physical weakness or psychological dependence.
- Meetings with lawyers or liquidators. A remote hearing will provide more flexibility and efficiency to court proceedings, and will also permit better management of both lawyers' time and court's listings.

Conclusion

As a final note, we can say that in general the Covid changes were beneficial. The most negative aspects concerned technical problems. There were cases where it was very difficult to adapt the courtroom system to the platforms mentioned above so as to achieve good quality remote communication.

Romania

Nicoleta Mirela Năstasie [1]

A. Introduction

Online justice in insolvency proceedings and electronic judicial communication have become a real problem, especially in the last year, in relation to the restrictions and burdens generated by the COVID pandemic. This requires identifying answers to questions such as what appropriate digital solutions need to be applied in the work of judicial authorities and insolvency practitioners, what are the current challenges and prospects for the operation of these systems, especially in cross-border insolvency disputes.

Digitisation has a huge impact not only on judicial activity. Analysing the state of "digitisation" in the Romanian judiciary, there are courts that have purchased their own internet domains or have implemented applications such as the electronic file. From the point of view of infrastructure, all 109 courts have a functional videoconferencing system. Almost all hearings and decisions of the court are public. All court hearings are recorded on audio or video platforms, or steno graphed. The insolvency register (the Insolvency Procedures Bulletin) is effectively online.

By the Decrees of the President of Romania no. 195/2020 regarding the establishment of the state of emergency on the Romanian territory and no. 240/2020 on the extension of the state of emergency, some measures were instituted, of paramount urgency, with direct and temporary applicability, including in the field of justice, subject to the rules of health discipline established by the competent authorities.[2]

[1] Nicoleta Mirela Năstasie is a member of the Romanian judiciary at Bucharest Tribunal, and she has PhD in commercial law (summa cum laude), Titu Maiorescu University, Romania. She is Fellow INSOL International, member of the Judicial Group INSOL International, CERIL Executive, member for the International Insolvency Review Editorial Board, member of the INSOL Europe Council, member of the Group of Early Career Researchers INSOL International

[2] Informare publică privind măsurile luate pe zona de competență a Ministerului Justiției pentru prevenirea și limitarea efectelor Pandemiei – Ministerul Justitiei

The State of Alarm established the suspension of the terms, the suspension and interruption of the procedural deadlines of all types of courts, including commercial courts. The activity of the courts has been significantly reduced since March 16, 2020, the hearings of other civil lawsuits than those of special urgency were suspended,[3] judicial activity in pending cases continued only in extremely urgent cases, that could not be postponed (the Courts of Appeal established a list of such cases for all the courts in their jurisdiction). Courts set short deadlines and if possible, held the hearing through videoconference. In addition to that, judiciary employees, including judges, rendered their services remotely, through virtual means, if possible. Only limited activities that could not be rendered remotely were undertaken in court. The High Court of Cassation and Justice (HCCJ) has published statistics on the number of cases tried in the first cycle of the state of emergency (March 16 - April 16, 2020). In total, 2,550 cases were filed, 655 were resolved, and 1,586 were suspended or postponed.[4]

B. Solutions related to the judiciary adopted in Romania in connection to the threat of the spread of SARS CoV-2 virus infection

The Romanian Ministry of Justice published[5] and updated[6] a Practical Guide to Measures on Justice, a set of first-rate measures with direct and immediate applicability, aiming to maintain access to justice and provide key services, in the context of protecting citizens from the consequences of the COVID pandemic.
In insolvency proceedings pending on 16 March 2020, judicial activity was suspended ex officio, and only extremely urgent actions were resolved (temporary suspension of enforcement actions against the debtor until a decision on the opening of the insolvency procedure at the request of the debtor were taken as well as other actions that could be resolved in the absence of parties). In appeal proceedings against the decisions of the syndic judge, certain enforceable decisions could be suspended (decisions to open the insolvency procedure against the debtor or to enter in simplified bankruptcy procedures were suspended by the courts of appeal).

[3] Primii paşi spre reluarea activităţii de justiţie în contextul pandemiei - Opinia specialistilor Deloitte - HotNews.ro
[4] Primii paşi spre reluarea activităţii de justiţie în contextul pandemiei - Opinia specialistilor Deloitte - HotNews.ro
[5] final-Ghid-justitie-18-martie-2020.pdf
[6] Ghid-practic-masuri-justitie-15.04.2020_b.pdf

The activity of judicial administrators/liquidators in pending procedures continued, when possible, under the sanitary requirements.

As of 15 May 2020, the state of emergency ended and in all civil cases, procedures have resumed ex officio. Following the lifting of the state of emergency, the administration of justice was resumed, being promoted, including in the context of establishing the state of alert, by entities with responsibilities in the field, some measures at legislative and organizational level to prevent the risk of SARS coronavirus Cov-2.[7] The Romanian Ministry of Justice has drafted a public policy document, with recommendations addressed to magistrates, clerks and specialized staff, in order to resume the full activity of the courts and prosecutor's offices, after the cessation of the state of emergency.[8] The Ministry of Justice clarified the manner in which courts may use private remote hearings, as well as providing for media access and publicly available recordings of such hearings to preserve the principle of open justice, but considered responsibility and duty lay with each institution within the judicial system or related to it and recommended drawing up a plan for the gradual resumption of activity.

1. Legislation

Public discussions[9] call urgent adoption of a common and unitary strategy to combat the COVID-19 pandemic. In this respect, the Romanian Ministry of Justice has launched in September 2020 a public debate on a Project of Law on some measures in the field of justice in the context of the COVID-19 pandemic,[10] providing for the possibility of restricting the judicial activity of a court, partially or in its entirety, for reasons generated by the COVID-19 pandemic. The draft law was adopted by the Government on November 19,2020 and approved by the Romanian Council of Magistracy on January 15, 2021.[11] The Law no.114 on 28 April 2021 on some

[7] Proiect de lege privind unele măsuri în domeniul justiției în contextul pandemiei de COVID-19 – Ministerul Justitiei

[8] "Justiție în pandemie" – Recomandări pentru armonizarea regulilor de prudență sanitară în sediile instanțelor și parchetelor – Document de politică publică elaborat de Ministerul Justiției – Ministerul Justitiei

[9] UNJR, AMR, AJADO si APR solicita CSM si MJ sa ia urgent masurile necesare pentru gestionarea pandemiei de COVID-19 ce afecteaza grav instantele si pachetele | Uniunea Nationala a Judecatorilor din Romania

[10] Proiect de lege privind unele măsuri în domeniul justiției în contextul pandemiei de COVID-19 – Ministerul Justitiei

[11] The Decision of the Superior Council of Magistracy Plenum no. 222 of 18 November 2020, ViewFile.ashx (csm1909.ro)

measures in the field of justice in the context of the COVID-19 pandemic was published on 29 April 2021[12]

According to this law, while a restriction is in force, which could be for no more than 14 days, judicial activity continues for cases of utmost emergency and is postponed by law for the others. Thus, in order to carry out the judicial activity in optimal conditions, the project proposes the establishment of a series of regulatory measures in civil matters, such as: where possible, with the agreement of the parties, the courts may decide that the hearings shall be conducted by means of teleconference, with strict rules; the courts, taking into account the circumstances, may set short deadlines for hearings; when possible, the courts proceed to the communication of the procedural documents by fax, electronic mail or by other means that ensure the transmission of the text of the document and the confirmation of its receipt; when possible, the case file is sent to the delegated court in electronic format; any impediment to the functioning of the court is made known by posting it at the court's headquarters, as well as by publishing it on the court portal and on the website of the Ministry of Justice.

New regulations regarding out-of-court restructurings in relation to public authorities and budgetary debts have been introduced. A new national legislative act implementing the EU Directive on Restructuring and Insolvency is also expected in 2021. As court operations have been significantly reduced, we anticipate an increase in interest of entrepreneurs and their advisers for out-of-court agreements and arbitration services, which also offer electronic services and hearings, as valuable alternatives to court restructuring proceedings.

2. Remote Hearings in the Commercial Court

Romanian insolvency is a system based on court hearings for almost all petitions and procedural steps. This overloads the courts and judges. For example, a typical reorganisation procedure demands a hearing every 3 months, plus separate hearings in each incident, making the total number of hearings very difficult to manage. Due to the insufficient number of clerks and courtrooms, in a court session approximately

[12] http://legislatie.just.ro/Public/DetaliiDocument/241925

80-100 hearings may be conducted. This traditional system leads to the conviction that it should be possible to improve the overall working of the courts, although this may be complicated to put in practice.

In insolvency and civil cases, in Covid-19 time, most of hearings are in the courts, with physical presence of parties. The court hearings may be held by videoconference only if the cases are not confidential and when the judges considers that this method is necessary and possible if the parties or some of them express their agreement and have the technical means and necessary knowledge to make the electronic connection. If at least one of the parties agrees, the videoconference is used in those situations in which the judge considers that this method is necessary to protect the health of the participants in the trial and if the proper conduct of the trial can be ensured. So, the judge has limited discretion before deciding to have a remote hearing. Parties are asked to communicate before the hearing in electronic format, the request for summons / appeal, as well as all necessary documents.

I have not been involved in a virtual hearing until now at Bucharest Tribunal.

The courts prepared their own individual protocols in response to the pandemic, regarding remote hearings and practical steps as to how this is to be achieved, electronic filing, where electronic filing system were available. In this respect, some general rules have been recognised at national level. All filings must be submitted on paper either in person or by registered mail. Courts established the conditions for dealing with processes and doing acts either in person or remotely, by distance communication, including teleconferencing. Telephonic hearings are not used. When it is not possible to carry out procedural steps remotely because they require the physical presence of the parties, their lawyers or other people involved in the case, the hearing can be held in person. Social distancing measures are in place, and it is mandatory to wear a mask or any protective equipment covering the mouth and nose in courtrooms, along with other measures, as daily cleaning and disinfection of courtrooms, strict limits for number of cases in one judicial session, limitation on the presence of the public and others who are not strictly necessary to the procedure in question. For example, at the Bucharest Tribunal[13] the following

[13] https://tribunalulbucuresti.ro/images/documente/Anunturi/extras-pct-8-HCC-82020-rectificat.pdf

procedure was established for the conduct of the court hearing by videoconference in non-criminal matters. The court hearings are held by videoconference only in cases are not confidential and on which the president of the court considers that this method is necessary and possible, if the parties or some of them - persons physical or legal, public institutions - represented by lawyers / legal advisers / judicial liquidators or who participate in the trial in their own name or as a legal representative, express their agreement and have the technical means and knowledge necessary to make the electronic connection. For this purpose, together with the agreement regarding the conduct of the court hearing by videoconference, the court will be communicated the mobile phone number, as well as a valid e-mail address of the party / legal or conventional representative / judicial liquidator. If at least one of the parties agrees, the videoconference is used in those situations in which the judge considers that this method is necessary to protect the health of the participants in the trial and if in this way the proper conduct of the trial can be ensured. When some parties cannot be contacted or do not give their consent for the hearing by videoconference, the judge will assess whether the trial will be able to take place in this way. The party who could not be contacted or did not give his consent for the videoconference can participate in the debates by physically appearing in court.

In national procedural law, as in many civil law systems, a witness is heard by the court; the parties can ask “additional questions” to a witness or expert, but under the supervision of a court. Article 321 of the Code of Civil Procedure, which governs the hearing of witnesses, provides that this procedure is oral, during the hearing of the witness is allowed to testify freely, without permission to read a previously written answer; the witness may use notes with the approval of the President, but only to specify numbers or names. The testimony will be written by the clerk, after the judge’s dictation, according to article 323 of the code of civil procedure. In the COVID 19 pandemic period when the law required the presence of a witness in a court proceeding, to give evidence in person, and the court approved the evidence with interrogation and / or witnesses, the rule is the direct administration of this evidence in the court, observing the norms of special protection*, not* a virtual hearing.
In relation to the use of email and written communication, most of the cases are carried out through written procedure applications filed using the judiciary’s online

case management system, electronic case filing, with procedural guidelines that allow documents and messages to be sent via a safe email channel of the judiciary communication to take place through electronic means.

C. Solutions related to the insolvency in Romania in connection with the threat of the spread of SARS CoV-2 virus infection

In this respect, two laws should be mentioned here, that is, Law No 55/2020 on some measures intended to prevent and fight the effects of Covid-19 pandemic, which became effective on May 18, 2020, published in the Official Journal of Romania No 396 of May 15, 2020 and Law No 113 of July 8, 2020 for approval of Government emergency Ordinance No 88/2018 amending and supplementing some insolvency regulations and other norms, published in the Official Journal of Romania No 600 of July 8, 2020.

A summary of the most relevant provisions of the two above mentioned laws is presented herein below.

Law No 55/2020 refers to some measures intended to prevent and fight the effects of Covid-19 pandemic spread over eight main areas that is: economic, health, occupational and social protection, transport, education and research, culture, insolvency, and execution of sentences and of other measures ordered by the judicial bodies during the criminal trial.

As regards insolvency – which is addressed in Section 8 of the law – the idea was to find a balance between the interests of debtors which allows them to be protected during the state of alert without prejudice to the creditors' rights meaning without restrictions as far as the filing of petitions for statements of claims is concerned. Hence, this law:

- Was intended to have only *temporary effect*, applicable for a determined period, in some cases for only two or three months from becoming binding, and there was no extension of its effects, although the national state of alert was later extended successively and is persisting at the time of writing (the

state of alert was last extended by Government Decision No 3 of January 12, 2021[14], by 30 additional days).

- With some small exceptions, the law was directed solely at those debtors whose activity was suspended – in full or in part – because of the measures ordered by the competent public authorities according to the law to prevent the spread of COVID-19 pandemic. It was not, therefore, applicable to all debtors undergoing insolvency proceedings.

The most relevant legal provisions from among the (temporary) measures are:

i) In pre-insolvency proceedings, that is, preventive concordat (which is a pre-insolvency judicial proceeding consisting in an arrangement between the debtor and its creditors who hold at least 75% of the accepted and undisputed claims):
   - Extension by two (2) months of the deadlines agreed in the concordat (de *lege lata*, the deadline for realization of claims agreed in the concordat is twenty-four (24) months from the homologation thereof by writ of enforcement, with the possibility to extend it by twelve (12) months).
   - Extension basically by sixty (60) days of the deadlines agreed in the preventive concordat.
   - Extension by sixty (60) days of the terms allowed to debtors to negotiate and prepare the concordat offer; the debtor has the right to apply for the opening of the insolvency proceeding but its obligation in this respect was temporarily eliminated.
   - If, on the effective date of this law the debtor was undergoing a preventive concordat, the term for the realization of claims agreed in the concordat is extended by two (2) months.

ii) In insolvency proceedings:
   - A creditor who applies for the opening of the insolvency proceeding against its debtor shall be bound to first obtain an amicable settlement (a condition which is applicable only to debtors that fully or partially suspended their activity pursuant to the measures ordered by the public authorities).

[14] Published in the Official Journal of Romania, Part I, No 36 of January 12, 2021

- During the state of alert, the applicability of some legal provisions is suspended; among them, the power to initiate forced execution for fcurrent claims which are older than sixty (60) days.
- The minimum amount of the debt for which, during the state of alert one may apply for the opening of the insolvency proceeding (the threshold), was increased from 40,000 Lei to 50,000 Lei.
- The observation period was extended by three (3) months in case of debtors which were undergoing the observation period at the time this law became effective.
- Correspondingly, the timeframe within which the stakeholders may lodge a reorganisation plan is extended by three (3) months, including if the timeframe allowed for lodging a plan as laid down by the law has already started running.
- The debtors who lodged a reorganisation plan which was not yet confirmed by the court, may adjust it during the three (3) months following the effective date of the law if they notify their intention in this respect within fifteen (15) days from the effective date of the law.
- The term of implementation of the plan is generally extended by two (2) months with no reference to the condition that the debtor's activity was suspended or not.
- For debtors who suspended their activity in full or in part because of the measures ordered by the public authorities according to the law, the initial term of implementation of the reorganization plan may be four (4) years, with the possibility to extent it to five (5) years (de *lege lata*, according to the Insolvency Law No 85/2014 this term was three (3) years with the possibility to extend it to four (5) years).

Law No 113 of July 8, 2020[15] for approval of Government emergency Ordinance No 88/2018 amending and supplementing some regulations on insolvency and other laws represents a distinct legislative change which impacts also the Law on pre-insolvency and insolvency proceedings No 85/2014.

This law brings significant legislative changes in that it does not only cover temporary measures; the main changes are:

[15] Law No 113/2020 was published in the Official Journal of Romania, Part I, No 600 of July 8, 2020.

- The minimum amount of the debt in respect of which one would be entitled to apply for opening of the insolvency proceeding (the threshold), raised from 40,000 Lei to 50,000 Lei.
- The condition according to which if the debtor is the one who applies for opening of the insolvency proceeding the amount of budgetary claims must be less than 50% of the total claims (such condition was introduced by Government emergency Ordinance No 88/2018[16] and was criticized by professionals because it limited the right of the debtor to file for opening of the insolvency proceeding whenever its debts to the state budget were in excess of 50% of its total debts[17]) was removed;
- The law also removed the creditors' possibility, in case of failure by the debtor to pay the current debts, to initiate enforcement proceedings (which was also criticised by professionals because it prejudiced the *automatic stay* principle and had been introduced by Government emergency Ordinance No 88/2018; it was later suspended by Law No 55/2020 and finally removed by this law).
- The law also clarifies the matter of the tax applied on the claims haircut in that it expressly states that the moment when the debtor is liable for the payment of this tax is the one when the reorganization proceeding is closed and not the date when the reorganization plan is confirmed by the syndic judge[18];
- The law further introduces the possibility of assigning budgetary claims where the assignee takes over the assignor's rights by subrogation, which is intended to give an incentive to investors interested in taking over the debtor's business to pay the face value of the budgetary claim and thus obtain the benefit of the subrogation in the creditor's rights.

D. Prospects for the future

[16] Government emergency Ordinance No 88/2018 was published in the Official Journal of Romania, Part I, No 840 of October 2, 2018.
[17] By Decision No 49/14.10.2019 the panel of judges called to rule on some legal matters in the High Court of Cassation and Justice withheld that: "*In construing the provisions of article 5 par. (1) section 72 of Law No 85/2014 on pre-insolvency and insolvency proceedings, as further amended by Government emergency Ordinance No 88/2018, published in the Official Journal of Romania, Part I, No 840 of October 2, 2018, the requirement according to which the budgetary claims must be less than 50% of the total claims against the debtor is not applicable to applications for opening of the insolvency proceeding filed by the liquidator appointed during the liquidation proceedings referred to in the Company Law No 31/1990*".
[18] Par. 24 of Law No 113/2020 – the timeframe of application – laid down the reorganization plans in respect of which the hair-cut tax is applicable: "[…] *it applies to all proceedings opened for debtors where no approved reorganization plan exists at the time this law becomes effective*".

Judicial management of the insolvency proceedings is one of the important elements for the success of the insolvency process. Internationally, there has been a trend in recent decades to reduce the parties' freedom over proceedings towards more effective control of the judicial system, a trend considered necessary, including its recognition as a general principle. We appreciate that the idea of implementing a system in which the management and control of the proceedings are the responsibility of the judicial authority ("managerial adjudication") requires judges to accept the managerial approach to work, both by reference to purely procedural aspects of the civil process and complex issues, as the substance that arises in this type of cases. This means exercising stricter control by the court, as the authority that conducts the proceedings and actively manages them. Romanian legislation has gone a different way in the management of local insolvency cases, from total administration and control by the court to more freedom for the parties and insolvency practitioners.

Only the Bucharest Tribunal has a separate division of judges dealing with insolvency cases, in other courts and tribunals judges have general civil jurisdiction. More efficient management of insolvency proceedings, especially restructuring processes, requires specialised judges with both a deep economic understanding of the management of a company and the cross-border aspects of insolvency. There are changes to be made to the involvement of insolvency practitioners in relation to preventive restructuring processes. There is no body of insolvency practitioners specialising in restructuring, separate from bankruptcy practitioners. Out-of-court restructuring mechanisms and turnaround management are not sufficiently explored and promoted at national level.

Romania has less practice in cross-border insolvency, but members of the Romanian judiciary, considering how to use in the future the experience with the facilities implemented for the digitization of justice and trying to answer some general questions as to how long-distance hearings would become an indispensable tool after the challenges of the COVID-19 pandemic, should be careful to ensure adequate safeguards to protect the substantive and procedural rights of the parties.

The subject matter of judicial communication by remote means can be represented by formal orders or decisions; provision of notes on general information, questions, and comments; transcripts of court proceedings; communication can be by telephone, video link, fax, and e-mail. As regards oral and written submissions, in cross-border insolvency disputes, a real problem for foreign creditors and sometimes for insolvency representatives and practitioners, it is possible to present oral arguments, to participate in the final hearing before the judges in the proceedings. Another problem is the participation of creditors and other foreign parties interested in hearing other parties or witnesses, especially when the participation of creditors, for example, involves high costs in relation to the value of their claims. In the case of the main witness statements, most traditional legal systems, including the Romanian one, have regulated the oral hearing of witnesses, but in modern case law a new general direction may be to replace the oral statement of a witness by a written statement.

Another possibility and a real challenge in the process of digital communication is the organisation and conduct of joint international hearings, joint hearings in courts corresponding to parallel insolvency proceedings. In this respect, it is necessary to set out the details for such hearings involving courts and practitioners from two or more jurisdictions in a protocol, agreed prior to the hearing. In this respect, the courts should be empowered by Romanian law to take all measures to make such a hearing possible. And, of course, an efficient electronic system should be available to courts competent to decide in parallel insolvency proceedings.

In Romanian cases, conferencing, and videoconferencing, involving judges and party representatives from each jurisdiction, have not been used for communication in cross-border insolvency proceedings. Joint hearings and videoconference hearings can be very important for judicial communication in cross-border insolvency cases. In this respect, there is a need for a legislative structure establishing appropriate rules to protect the parties involved from harm or possible damage through appropriate measures.

The advantages of information technology are obvious, being able to provide a decentralised and open system of cooperation, transparent monitoring of information,

data confidentiality, security and verification, real-time and direct communication without intermediaries. Increasing the confidence of participants in the security of the system can make cross-border cooperation a practical possibility. If we look to the future of cross-border insolvency, we can imagine a digital platform based on the blockchain system, a communication and information storage system developed internationally, at least between national judicial authorities and for cross-border cooperation. This type of communication involves storing and analysing information that usually accumulates during legal proceedings and requires systems that ensure long-term security. The issues become more complex in cross-border proceedings. Of course, this means identifying ways to protect the integrity and confidentiality of information, especially in restructuring and pre-insolvency proceedings, providing the necessary infrastructure, funding and training, ensuring international legal standards for such IT platforms, but at the same time , to ensure a balance between the need for transparency and the protection of data and information, essential for the competitiveness of companies in the international competitive environment. Given that IT technology can help us in Europe to at least overcome the difficulties related to the different official languages spoken in the Member States, through instant translations into different languages of Member States' national legislation, documents, court decisions, court pleadings, this would be an extraordinary step towards increasing European cooperation and communication in cross-border insolvency matters. IT technology can be used to develop an international online judicial platform for communication to share direct experiences and best practices. Digitisation mechanisms can be used to promote national case law, publishing short summaries of national decisions relevant to insolvency in different languages, in this way to promote Romanian law and practice, to entrust foreign companies to deal with Romanian insolvency procedures as flexible, modern, tailored mechanisms.

Spain

Bárbara Córdoba[1], Ignacio Sancho[2]

Question 1:

Did your court receive additional technical equipment (such as webcams) and software platforms (such as Zoom or Webex etc.) for remote communications (audio and/or videoconferencing)?

Yes, it did.

Regular court activity was halted for a few weeks, between March and May 2020. When court activity resumed at the beginning of June, a legal regulation had been issued that encouraged the holding of hearings by videoconference and, in general, teleworking. Article 19 of Royal Decree Law 16/2020, of April 28, regulated the publication of procedural acts preferably on-line, in order to guarantee the health of the intervening parties and reduce the risk of contagion. Although this measure was initially foreseen to be for a period of three months, Law 3/2020 extended it and it is still in force today.

To make it effective, the following means were provided to the courts:

1) the necessary computer programs for holding telematic hearings were installed in the courthouses, preferably using “professional zoom”.

2) webcams and loudspeakers were installed in the courtrooms to ensure better sound and image quality.

3) the same computer program (“professional zoom”) was installed on the laptops of the judges who requested it, so that they could hold meetings with the parties to the proceedings and their lawyers, as well as witnesses and experts, without having to be present in the courtroom.

Question 2:

Did you have remote communications with parties of proceedings pending in your court before the COVID-19 crisis began?

[1] Barbara Córdoba is a judge of the Commercial Court of Madrid

[2] Ignacio Sancho is a judge of the Spanish Supreme Court

Yes we did, but with a more limited scope. Before COVID 19, in order to facilitate the attendance of witnesses and experts to trials and avoid the inconvenience of travel if they resided in another town, they could ask the judge to testify by videoconference. If their request was accepted, the judicial body requested the collaboration of the court of the place where the witness and/or expert witness lived, so that, on the day of the trial, it would make available the necessary telematic means to connect to the trial by videoconference.

The advantages of this system were that, since the witness and/or expert witness had to go to a court, his identity was verified. Furthermore, he could not receive any instructions as to the meaning of the answers given during the trial, and could not consult any notes, making his answers more spontaneous and, therefore credible, unlike the zoom trials, in which it is more difficult to control such matters.

On the other hand, zoom trials allow for:

1) greater flexibility of the proceedings and avoidance of unnecessary suspensions, it is no longer necessary to coordinate the agenda of two courts.

2) greater flexibility of the procedure, since connection is easy and intuitive.

3) greater convenience for participants. Justice is brought closer to citizens, since they can connect, by their own means, from anywhere. In addition, a lawyer does not have to be from the place where the trial is going to take place.

4) reduced costs of the procedure.

5) the parties, witnesses and experts do not have to wait in court before being called to testify in the courtroom. They can be working right up until they are called to the videoconference.

Question 3:

Did you receive instructions on a) the use of conferencing technology and on best practices for remote communications? If you did: Which method was used to provide instructions (classroom, webinar, printed tutorial, video tutorial or the like)?

The computer specialists who provide support to the court sent, by e-mail, an explanatory video with instructions on how to use the software for remote communications. Telephone support and, ultimately, personal assistance was also provided.

Likewise, the General Council for the Judiciary, on 11 May 2020, approved a good practice guide on guidelines and criteria for the reordering of the scheduling agendas

of the courts and on the development of hearings by videoconference. However, this guide was merely a guideline that left many procedural issues unresolved. Some issues were resolved differently by different judges, with the consequent detriment to legal certainty. For example: How do we identify the professionals, witnesses and experts who have to intervene during the trial? How will new documents be provided at the hearing?, etc.

Question 4:

In which types/stages of proceedings did you use remote communications?

a) insolvency-related adversarial matters (litigation).

Nowadays, there is a special system of communication between parties and the court by Internet.

b) in taking of evidence by eyewitness testimony.

Yes, it is possible for witnesses to testify without having to be present in the courtroom, by videoconference. The witness can intervene in the trial from home or from his or her office, by zoom or the platform that is enabled.

The witness must identify himself with his national identity card number or similar document, which will be recorded on an audio-visual recording medium, while being warned that he must be alone in the room and may not consult any paper and document nor receive instructions about the answers to the questions put to him, during his testimony.

c) taking of evidence by expert testimony

Also yes. As in the case of witnesses, they can testify by videoconference, with the same legal warnings and cautions as witnesses. However, unlike witnesses, experts are allowed to consult their technical report during their testimony in order to be able to clarify those aspects of it that the parties request.

d) creditors' meetings.

No. In this case, the courts decided to replace the creditors' meeting by a written procedure, so that the creditors had two months to learn about the content of the arrangement and decide whether to agree to it.

e) ballots (e.g. voting on an insolvency plan)

No. Both before and after COVID-19, creditors who wish voluntarily to join a restructuring plan must express their willingness before a notary.

f) preliminary/case management hearings.

Yes, the law allows the courts to hold both trials and preliminary hearings by videoconference. During the pandemic, the law makes this the preferred way of holding hearings and trials. However, the judge is empowered to order the attendance in person of the parties, witnesses or experts, when he or she deems it convenient.

g) other types/stages of proceedings (please specify)

The suspension of judicial activity due to the declaration of the state of alarm imposed the need to promote the digital file of judicial proceedings and to abandon the “paper format”. In fact, although many courts already had computer systems for this purpose, few courts made use of them, as well as electronic agendas, etc. Following the order imposed by the government to prevent the movement of the population with the declaration of the state of alarm, clerk of court made an effort to digitise, as far as possible, a large part of the judicial proceedings, which made it possible to maintain judicial work in a reasonable way.

h) did you use remote interpreting services if a party did not speak the language used in your court?

Yes, when a witness or expert does not speak Spanish, it is up to the parties to ensure the presence of an interpreter to assist the witness or expert during his or her testimony at the trial. This practice is regulated by the Civil Procedure Act and was in place before COVID. The parties, witnesses or experts cannot suffer any limitation of their rights due to the fact that the trial is held by telematic means.

Question 5:

Which technology did you use for remote communications (e.g., telephone, email, video, letters)?

It depends on the procedural act to be performed.

For example:

a) For summoning parties to proceedings or summoning witnesses and/or experts to trials, they are still notified by registered mail with acknowledgement of receipt.

b) For trials, parties/witnesses/experts are allowed to attend in person or by remote means. The court creates a link for this purpose, which is sent to them by e-mail.

c) For informal meetings with the parties, it is usually maintained either in person or the possibility of attending by remote means.

d) In order for the appointed insolvency administrator to take office, he/she must go to the court in person. However, during the state of alarm, they were also allowed to do it by telematic means.

e) Any doubts or queries that the insolvency administrator wishes to make to the judge, in connection with the management of the insolvency proceedings, can be made by remote means, by email or by telephone, depending on the nature and urgency of the query made.

Question 6:

a) On the basis of the experience you made during the pandemic, which of the changes you made in the management of proceedings are you planning to make permanent after the pandemic has ended?

The use of remote means to hold meetings with the parties, insolvency administrators, etc. will be maintained due to its agility, as well as the use of the digital file and the electronic agenda.

The holding of trials by remote means will depend not only on the judge but also on the laws that are passed for this purpose and the guiding criteria issued by the General Council for the Judiciary.

b) How can these changes improve the quality and/or effectiveness of the proceedings?

The use of remote means to hold hearings and trials makes proceedings much more flexible, as the parties, witnesses and/or experts can connect to the trial by their own means, simply by clicking on the link sent to them for this purpose, without having to travel to the court. This also reduces the costs of the proceedings.

People are also spared the inconvenience of unexpectedly adjourned trials, as well as the long waits they often have to endure until the judge summons them to testify, according to the order pre-established by the parties. With remote means, the witness and/or expert witness has access to the remote waiting room and can continue with their ordinary work until the judge gives them access to the courtroom.

c) Have you made changes to your management of the proceedings which have not been helpful? Which problems were caused by those changes?

Further computerisation of the courts is always a step forward in the process of modernising justice. These means have also made it possible to bring justice closer to the people and, therefore, we believe that they will continue to be used after the

pandemic. However, their use needs to be regulated in a considered manner to ensure uniformity in their application by the courts and to safeguard the rights and obligations of the parties.