

IAJ - Second Study Commission (Civil Law and Procedure)
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Questionnaire 2022

Austria

1. Did your jurisdiction offer complete or partial virtual civil trials or hearings before the Pandemic? If yes, please describe what was offered and how often the offer was exercised.

The use of videoconference technology for evidentiary hearings in civil law cases has first been introduced in 2004 and has then been subsequently amended. Pursuant to the current version of Section 277 of the Austrian Code of Civil Procedure (CCP), the court may, subject to the technical possibilities, hear witnesses/parties, which reside outside the court venue, via a specific videoconferencing tool each (district) court in Austria is equipped with. As of 2011, such virtual interrogation of witnesses shall prevail over claiming for judicial assistance by another court, fostering the principle of immediacy.

The provision, however, only provides for the virtual interrogation of one or more persons, which are digitally connected to the court via a specific videoconference tool (while the judge, the parties and counsel are still gathered in the court room). Section 277 CCP does not allow for a fully remote hearing, where all participants merely enter a virtual court room. The latter has only been introduced in Austria in the arise of the Covid19 pandemic (see Question Nr 2 below).

2. Did your jurisdiction offer civil virtual trials or hearings during the Pandemic? If yes, was there a change in how, what and when it was offered? Were protocols published? Also, if yes, when were the virtual trials/hearings offered and what was the uptake?

In March 2020, only weeks after Austria had been hit by the Covid19 pandemic for the first time, the Austrian legislator passed a law containing several measures that affected the conduct of civil proceedings, amongst those also a provision enabling

(fully) virtual hearings:

According to Section 3 of said law („1. COVID-19-Justiz-Begleitgesetz“), the court may conduct oral hearings in civil law cases virtually, provided that both parties agree to it. The parties' consent is presumed to be given, if the parties do not object within a reasonable period of time set by the court.

Furthermore, any party/witness/expert/interpreter or any person otherwise involved in the proceedings may request to participate in an (ordinary) oral hearing via a videoconference tool, when they certify an increased health risk from COVID-19 for themselves or for people in their closest surroundings.

The Austrian Ministry of Justice did not provide a specific software for conducting the virtual hearings but rather resorted to the platform „ZOOM“ and purchased respective licences.

According to the original version of the „1. COVID-19-Justiz-Begleitgesetz“, the provision on virtual hearings should have only been applicable until the end of 2020. As the pandemic turned out to linger longer than originally anticipated, however, the applicability of the provision has been prolonged several times, with a current expiry date on 31 December 2022. In the meantime, there are ongoing legislative discussions on incorporating a permanent provision on virtual hearings into the body of Austrian procedural law.

3. Presuming that civil virtual trials were offered, was there any improvements made in the technology/software that the government provided? How were documents and exhibits managed?

As stated above, the Austrian Ministry of Justice turned to the widely known platform „ZOOM“ (Zoom Video Communications, Inc.) for offering virtual court hearings. So far, the software has not been specifically adapted for the Austrian judiciary. All general features that the business version of ZOOM offers to customers (such as breakout-rooms, etc) can also be used for hearings. Security concerns, especially with regard to data security, have been rejected by the Austrian Ministry of Justice. In this regard, the Ministry of Justice issued a written statement referring, *inter alia*, to the specific technical set up of ZOOM for the Austrian judiciary that would allow for the relevant content data to be processed and stored exclusively within the network of the Austrian Justice Department.

As regards the submission of documents and exhibits, it must be mentioned that

already for 15 years (since 2007) attorneys have been legally obliged to submit documents to court (before/after the oral hearing) only via an electronic transfer system („Elektronischer Rechtsverkehr“); submissions in hardcopy will be rejected by the court. In 2016, the fully electronic court file has been introduced in Austria, the nation-wide rollout is still ongoing. These two components proved to be helpful when conducting virtual oral hearings, as previously submitted documents could be accessed digitally by all participants. For exhibits that shall be submitted during the – virtual – oral hearing, there does not exist a general rule and had to be dealt with individually by every court/judge.

4. What does the future hold in your jurisdiction with respect to the continuation of virtual trials? What are the issues and or benefits that have arisen?

Currently, there is an ongoing debate as to if and in which form the possibility of virtual hearings shall be transferred to the permanent body of Austrian civil procedure law. In the first half of 2022, the Austrian legislator introduced a broad amendment to the Austrian Code of Civil Procedure and related laws („Zivilverfahrens-Novelle 2021“), mainly focussing on digitalization of the Austrian court system. The first ministerial draft also contained a provision on (fully) virtual hearings, which strongly resembled the provision introduced during the Covid19 pandemic but also set some further – rather broad – criteria to be met (i.e. technical requirements provided; videoconference suitable for the specific hearing; arguments of procedural economy) for allowing an oral hearing to be conducted virtually.

Amid the ongoing legislative process, however, the draft provision on virtual hearings has been subject to quite some controversy, the strongest opposition being raised by the Austrian attorneys. Against this background, the Austrian legislator removed said provision from the final draft of the latest law amendment – which has already entered into force in early summer 2022 – and postponed the introduction of a provision on virtual hearings to enter into further legislative discussions.

5. Has or is research being done in your jurisdiction to help ameliorate some of the concerns that have arisen with virtual trials?

The legislative acts introduced during the pandemic as well as the current drafts have been subject to scrutiny by Austrian scholars. In the context of virtual hearings, concerns as to granting public access to the virtual trials, the right to be heard and

data protection were raised. Discussions still continue, as the debate on incorporating a permanent provision on virtual hearings is still ongoing.

Some examples for legal articles (also) covering the topic of virtual hearings:

Garber/Neumayr in Resch, Corona-Handbuch^{1.06} (2021) Chap 13: Zivilverfahren in der Krise: COVID-19 und die Auswirkungen auf zivilgerichtliche Verfahren, paras 54 et seqq

Koller, Krise als Motor der Rechtsentwicklung im Zivilprozess- und Insolvenzrecht, JBI 2020, 53

Oberhammer/Scholz-Berger, Möglichkeiten und Grenzen der Videoeivernahme nach § 277 ZPO, ecolex 2022, 285

Scholz-Berger/Schumann, Die Videokonferenz als Krisenlösung für das Zivilverfahren, ecolex 2020, 469

Schumacher, Corona-Krise und das Zivilverfahren, AnwBI 2020/286

Wittmann-Tiwald/Wannenmacher, Videokonferenzen, Fast-Track-Prozesse und englischsprachige Verfahren undenkbar? ecolex 2021, 178

6. How did the digitally excluded people in your jurisdictions have access to justice and specifically to virtual trials during the Pandemic?

There has not been a specific instrument to grant access to virtual hearings for digitally excluded people. As regards fully virtual trials, the Austrian legislator rather focussed on an opting-out strategy, as the law prevents the court from conducting the hearing via videoconference, when at least one party expressly objects to it.

When it comes to people with an increased health risk related to Covid19, however, Section 3 para 2 of the „1. COVID-19-Justiz-Begleitgesetz“ contains a fallback option for those, who do not dispose of the appropriate technical means of communication: In such a scenario, an unrepresented party may request the hearing to be adjourned. Parties represented by counsel and witnesses may request the court to (temporarily) refrain from interrogating them in the oral hearing.

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