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On Some of the Theoretical and Practical Problems Accompanying Remote Hearings in the Light of a Fair Civil Trial[2]

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Abstract

It is quite paradoxical that such a negative social phenomenon as the ever-present threat of the SARS-CoV-2 virus and its mutations has contributed to the exceptional acceleration of the widespread adoption of the institution of remote hearings in the area of civil trials in our country. Traditional hearings are no longer the only possible format of public hearing in the form of a trial. We are now witnessing a new quality in the way in which civil cases are heard. Most importantly, the nature of the court's communication with the parties and other participants of such proceedings has changed significantly in the broad sense due to the remote nature of the hearings. At present, the venue where a court gets to hear the parties to proceedings is not only the courtroom in a court building, but also cyberspace. Thus, the landscape and the structure of civil trials have changed considerably.

Keywords: remote hearings, court communication, civil trial structure.

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Introductory remarks

It is quite paradoxical that such a negative social phenomenon as the ever-present threat of the SARS-CoV-2 virus[3] and its mutations has contributed to the exceptional acceleration of the widespread adoption of the institution of remote hearings in the area of civil trials in our country. Traditional hearings are no longer the only possible format of public hearing in the form of a trial. We are now witnessing a new quality in the way in which civil cases are heard. Most importantly, the nature of the court's communication with the parties and other participants of such proceedings has changed significantly in the broad sense due to the remote nature of the hearings. At present, the venue where a court gets to hear the parties to proceedings is not only the courtroom in a court building, but also cyberspace. Thus, the landscape and the structure of civil trials have changed considerably. Interestingly enough, this new situation has come to be despite the legislator's great restraint in creating the necessary legal framework. The increasing popularity of remote hearings in recent years may seem as unexpected as it is impressive. What is surprising is that this spectacular change occurred not evolutionarily, but revolutionarily. Not all civil litigants know how to navigate their way through this new landscape. But the institution of remote hearings, while still a legislative innovation, is already an institution that has somewhat taken root in our civil trial system. It is certainly not an experiment. And yet, there appears a question of whether this legislative novelty meets the expectations of society. It seems that the answer to this question is affirmative. But it is still a bit too early to be absolutely positive in this regard. From the point of view of the judiciary itself, the growing significance of remote hearings brings both advantages and disadvantages. It would be certainly premature to believe that these hearings are a remedy for many of the ills of our general judiciary. At the same time, it would be preposterous to claim that their number must be significantly reduced.

The expansion of the range of means of conducting hearings in civil trials to include remote hearings has led to the emergence of a number of issues affecting both the overriding principles of justice and the general principles and rules of

[3] Initially it was about the spreading COVID-19 pandemic, but now it is a state of epidemic emergency. See the Council of Ministers' Regulation of 13 May 2022 amending the regulation on the establishment of certain restrictions, orders, and prohibitions in connection with the occurrence of the state of epidemic (Journal of Laws of the Republic of Poland, item 1025).

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civil procedure.[4] It seems therefore reasonable to take a closer look at some of these issues. These are issues that are most often associated with the procedural rules that form the broad legal framework for remote hearings. It appears to be necessary to consider in particular the issue of the trial's remoteness in terms of such procedural principles as the principle of fair proceedings, the principle of external and internal openness, the principle of equality – including a party's right to be heard, the principle of directness, and the principle of free evaluation of evidence. These principles remain in quite close relationships with each other, complementing each other – even though in different configurations and subject scopes.[5] Such an approach to the issue will eventually allow us to see the possible shortcomings of remote hearings from the perspective of the fairness of civil proceedings understood in broad terms. In other words, it is an attempt to specify what factual, technical, and legal conditions must be satisfied in order to be able to conclude that the abovementioned new way of proceeding in civil courts meets the criteria and standards for the fairness of a civil trial. The point of reference is, of course, a traditional trial.

It should be emphasised that from a legal point of view, the title issue is of a multi-layer nature, and apart from the abovementioned procedural layer, the most important ones seem to those concerning constitutional, EU, conventional, and systemic aspects. Yet, the subject of this discussion will not be a detailed dogmatic-legal analysis of the issue concerning the possibility of holding public hearings in civil proceedings in remote form (Article 151 § 2 of the Code of Civil Procedure and Article 15 zzs[1] section 1 items 1 and 3 of the act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them).[6] In fact, there is no need for such an analysis because this issue has already been thoroughly and extensively explored in the published views of legal academics and commentators as well as in the established line of judicial decisions issued in civil proceedings.[7]

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4 On account of the subject matter of the paper, I am leaving out an issue that has also come into the spotlight in connection with the COVID-19 pandemic – the creation of a broad legal framework for adjudicating on the merits at a sitting in camera.

5 Cf. G. Sikorski, *Posiedzenie przygotowawcze w świetle zasad postępowania cywilnego*, [in:] S. Cieślak (ed.), *Założenia aksjologiczne nowelizacji KPC z 4 lipca 2019 r.*, Łódź 2020, p. 157.

6 Uniform text: Journal of Laws of the Republic of Poland of 2021, item 2095 as amended, hereinafter referred to as the Anti-Covid Act.

7 A highly successful broad overview of the most relevant aspects of the abovementioned issue was proposed by e.g. A. Łazarska, *Zdalne rozprawy cywilne – wyzwanie czy zagrożenie dla rzetelnego procesu*, [in:] A. Kidyba, A. Olejniczak (ed.), *Nowoczesne technologie. Szansa czy zagrożenie dla funkcjonowania przedsiębiorców w obrocie prawnym i postępowaniach sądowych*, Warszawa 2022, pp. 131–169. See also: K. Kurosz, W.P. Matysiak, *Refleksje na temat rozprawy zdalnej w postępowaniu cywilnym i zasady suwerenności terytorialnej*, [in:] *Nowoczesne technologie. Szansa czy zagrożenie dla funkcjonowania przedsiębiorców w obrocie*

Certain relevant regulations will be quoted here only for illustrative purposes. In other words, only in order to make a particular problem more specific will the current normative state be taken into account.

In fact, the subject to be considered will be the essence and certain procedural consequences of holding court hearings remotely (online) – with the use of modern audio-visual equipment that makes remote communication possible.[8] If there is going to be a reference to the location of an adjudicating panel, this will mean either the actual building of the court hearing the case or another location, outside of that building.[9] Without going into technological details, it should be noted that some audio-visual solutions already make it possible to create to some extent the impression that all participants in the proceedings – including the court – are all present in one and the same courtroom, albeit a virtual one. In this case, all those participating in a remote hearing can see and hear the person speaking at all times on the screen. Sometimes they can also see the panel of judges and the other participants in the hearing at the same time.[10] Thus, we are dealing with a substitute for a real courtroom.

The current normative state in the field in question is rather unsatisfactory due to its fragmentary and laconic nature, but this situation does not make it impossible to analyse the problem named in the tile more extensively in both theoretical and pragmatic aspects. This kind of analysis and its conclusions may contribute to the legislator's decision to change and organise the current legal landscape better. This is actually crucial because legal regulation should not only efficiently keep up with the new phenomena of social life and the development of technology, but also aim to unify the procedural rules of conduct in the event of their undesirable divergence in judicial practice – which is a situation we are witnessing right now.

The concept of "fairness" referred to in the title of this article, being a concept of legal language, calls for at least a concise explanation of it, especially since it can be understood in many different ways. Shifting P. Wiliński's inspiring perspective

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prawnym i postępowaniach sądowych, Warszawa 2022, pp. 103–130. Many aspects of the subject matter in question are also discussed in the article by W. Piątek, *Rozprawa w formie zdalnej przed sądem administracyjnym – nieunikniona przyszłość czy rozwiązanie tymczasowe na czas pandemii?*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2022, 2, pp. 17–33.

8 On distinguishing online courts in broad and narrow terms, see: R. Susskind, *Sądy internetowe i przyszłość wymiaru sprawiedliwości*, Warszawa 2021, pp. 18 et seq. See also his *The end of the world of lawyers. The contemporary nature of legal services*, Warszawa 2010, pp. 195–217.

9 On the so-called de-localisation of hearings under the current state of the law, see: A. Łazarska, *Zdalne rozprawy…*, p. 141.

10 More extensively: P. Pietrasz, *Konstrukcje zdalnej rozprawy w postępowaniu sądowoadministracyjnym*, [in:] *Ius est ars boni et aequi. Studia ofiarowane Profesorowi Romanowi Hauserowi Sędziemu Naczelnego Sądu Administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego", special issue, October 2021, pp. 397 et seq.

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on the concept of a fair criminal trial onto the science of civil procedure, it should be assumed that the concept of a fair civil trial encompasses a set of generally understood values and sometimes can be treated as a special general clause.[11] The starting point for adopting the quoted view is the author's claim that the issue of a fair trial should be considered in the context of either a procedural model, subjective rights, or existing line of judicial decisions.[12] In specifying this view, it should be stressed that fairness can also be treated as an overriding value that needs to be guaranteed by and in judicial proceedings.[13] To offer a fuller view of the issue referred to in the tile, it needs to be emphasised that fairness can also be combined with such terms as the right to a fair hearing.[14]

Also in the modern line of decisions issued in civil trial, in the context of the constitutional regulation of guarantees of a fair trial, there is a number of diverse perspectives, although this diversity is not that extensive. Thus, for example, there is a view according to which this regulation creates a meta-principle, which is the right to a fair trial.[15] Article 45(1) of the Polish Constitution[16] expressly stipulates that everyone has the right to a fair and public hearing without undue delay, before a competent, independent, impartial, and independent court. At the same time, it needs to be stressed that the source of the right to a fair trial is also Article 6(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[17] which established the aforementioned right. Pursuant to this article, everyone has the right to have their case concerning their civil rights and obligations heard in public in a fair manner within a reasonable time by an independent and impartial court operating within the framework of the law in force and established on the grounds of this law (…).

Due to its dual nature, i.e. both systemic and procedural, the meta-principle in question is treated as a kind of link between the principles of justice and the principles of civil procedure.[18]

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11 P. Wiliński, *Pojęcie rzetelnego procesu karnego*, [in:] A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (ed.), *Księga ofiarowana Prof. S. Stachowiakowi*, Warszawa 2008, p. 399; idem, *Współczesne dyskusje o zasadach procesu karnego*, [in:] P. Hofmański (chief ed.), *System Prawa Karnego Procesowego*, Vol. 3, *Zasady procesu karnego*, part 1, ed. P. Wiliński, Warszawa 2014, pp. 258 et seq.

12 P. Wiliński, *Pojęcie rzetelnego…*, pp. 406–409.

13 Ibidem, p. 399.

14 Ibidem, p. 401; see also: E. Skrętowicz, *Z problematyki rzetelnego procesu karnego*, [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Prof. Zofii Świdy*, Warszawa 2009, p. 21.

15 A. Łazarska, *Rzetelny proces cywilny*, Warszawa 2012, p. 21.

16 Journal of Laws of the Republic of Poland of 1997 No. 78, item 483 as amended.

17 Hereinafter referred to as the ECHR.

18 More extensively on the matter: A. Łazarska, *Rzetelny…*, pp. 21 and 63 et seq. Cf. T. Wiśniewski, *Przebieg procesu cywilnego*, Warszawa 2013, pp. 47–48.

Recognising the issue of fairness as one of the guiding principles of justice, as set forth in Article 45(1) of the Polish Constitution and Article 6(1) of the ECHR, but making it somewhat narrower, it is quite fair to construe it as a concretisation of the right to a trial. As a result, the principle of fair proceedings affects the overall assessment and perception of the entire course of civil trials, since each party of given proceedings can expect that the proceedings will be conducted accordance with the provisions of the Code of Civil Procedure, and therefore with proper, adequate, and full respect for the procedural rights, as well as with due solemnity and proper manners at court.[19] The fairness of judicial proceedings understood as above makes it possible to extract from it an important component, which is procedural fairness.[20] And there is no doubt that the indicated element of fairness of civil trails should be taken into account when organising a remote hearing. It is reasonable to refer here to the existing body of judicial decisions concerning the matter in question. On 2 December 2021, the European Court of Human Rights issued a judgement in case 36516/19, Jallow v. Norway, where it expressed the view that an online hearing does not violate the right to a fair trial. The reasoning in the judgement can be summarised as follows: Conducting the hearing with the plaintiff present online via the Skype communications application did not violate the right to a fair trial.[21]

The constitutional and conventional requirement that a case be heard in public and without undue delay is also of fundamental significance. Therefore, from the point of view of the issue in question, it is important to stress the right of a party (participant in civil proceedings) to efficient proceedings. Let it be noted here that under Article 6 of the Code of Civil Procedure, courts are bound with the duty to prevent protraction of the trial and aim to resolve the case at the first hearing. Another important thing to add is that the realisation of a party's right to an efficient hearing of a case is to some extent facilitated by the institution of complaint

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19 T. Wiśniewski, op. cit., p. 47. The principle of fair trial (sometimes in close connection with the right to have a case heard without undue delay) is mentioned as one the main principles of justice also by e.g.: T. Misiuk-Jodłowska, [in:] J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz, *Postępowanie cywilne*, Warszawa 2014, pp. 111 et seq.; A. Marciniak, [in:] W. Broniewicz, A. Marciniak, I, Kunicki, *Postępowanie cywilne w zarysie*, Warszawa 2020, p. 71; M. Skibińska, *Postępowanie cywilne* (edited by M. Rzewuski), Warszawa 2019, p. 27; M. Krakowiak, *Zmiany w zakresie ogłaszania i uzasadniania orzeczeń a prawo do rzetelnego procesu*, [in:] S. Cieślak (ed.), *Założenia aksjologiczne nowelizacji KPC z 4 lipca 2019 r.*, Łódź 2020, pp. 181 et seq.

20 It should be emphasised that procedural fairness is generally treated explicitly as an element of the right to a trial.

21 prawo.pl – news of 29 December 2021.

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about the violation of the right to have a case heard in court proceedings without undue delay.[22]

In order to add the right context to the considerations offered below, it is reasonable to recall that a civil trial governed by the current Code of Civil Procedure is a complaint, open, and oral-verbal proceeding. It is also a direct proceeding. And since a civil trial involves a dispute, a conflict, its essential element is evidentiary proceedings, and thus the principle of free evaluation of evidence is considered extremely significant here. It is also important to bear in mind the purpose of a civil trial, which, in my opinion, is to resolve the dispute primarily on the basis of facts established in accordance with material truth (and in accordance with formal truth only by way of exception) and after adopting a correct, accurate legal basis. It can then be said that justice has been done. After all, a fair and accurate decision is to be supported by the proper standardisation of rules related in particular to the course and conclusion of a civil trial.

The concepts of hearing and remote hearing should be addressed as well, as this will make it possible to decide whether a remote hearing is fully suitable to serve the role intended under the Code of Civil Procedure for a hearing as such. Although the core of further discussion will be remote hearings, the idea of hybrid hearing will also be clarified because it involves the aspect of remoteness after all.

In the most general sense, a hearing should be considered an extremely important – if not the most important – element of a civil trial, a perfect display of the conflict upon which the trial is founded. A hearing is the heart of a civil trial. It is also the stage during which the parties present arguments to support their positions. These arguments and counter-arguments are usually presented – or at least mentioned in the lawsuit and the response to the lawsuit – beforehand, and then in the preparatory letters. The statements of the parties concern their demands, motions, claims, and evidence submitted. In addition, the parties may indicate the legal basis for their requests and motions (Article 210 § 1 of the Code of Civil Procedure). It is also necessary to highlight that depending on the circumstances, the hearing may include the taking of evidence and the deliberation of findings (Article 210 § 3 of the Code of Civil Procedure). The exchange of arguments makes it possible to clarify the disputed and uncontested facts of the case. Statements by the parties or their attorneys may also concern legal issues.

After the conclusion of the evidentiary proceedings, the hearing ends with the parties' closing arguments (Article 224 § 1 of the Code of Civil Procedure). They

[22] Act of 17 June 2004 on complaints about the violation of a party's right to have their case heard in pre-trial proceedings conducted or supervised by a prosecutor and in judicial proceedings without undue delay, uniform text: Journal of Laws of 2018, item 75).

pertain not only to the outcome of the evidence proceedings conducted, but also to the analysis and evaluation of all the other procedural material collected in the case. In addition, the parties present their own legal assessment of the case. The parties' final statements made in the case are an opportunity for them to respond to the arguments raised in the conducted proceedings and convince the court that the action should be admitted (the plaintiff's view) or dismissed (the defendant's view). It is also necessary to mention that the failure to give the parties the chance to present closing arguments is an obvious fault. And it always depends on the specific situation whether such a fault could have affected the judgement.[23]

A remote hearing should be understood as a public hearing in which all the participants, including members of the court hearing the case, are not physically present in the same place and communicate with each other through electronic devices that allow mutual audio-visual – or at least audio – interaction. The location of the court can take two different forms: the panel of judges can be located in a court building[24] or outside this building.[25]

A hybrid hearing, on the other hand, combines elements of both a traditional hearing and a remote hearing. In this case, the adjudicating panel and some of the participants in the proceedings (at least one of the parties) are in the same place, usually in the court building, while the rest of the participants take part in the hearing using means of electronic communication.[26]

Let us now try to describe remote hearings in the context of the procedural principles mentioned earlier. The idea would be to answer the question of how specifically these principles are implemented in the course of a remote hearing, and what risks arise in this regard on account of the special role of the technical factor involved. In remote hearings, this factor has a significance presence and directly – and sometimes only indirectly – affects the way the mentioned principles are implemented. This factor is closely associated with the issue of acquisition of the ability to efficiently use the electrical engineering equipment by all participants in the remote hearing.

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23 As for the above aspects of the parties' closing arguments, see: T. Wiśniewski, op. cit., p. 272 and the literature indicated therein.

24 See: Art. 151 § 2 of the Code of Civil Procedure.

25 See: Art. 15 zss[1] (1)(1) of the Anti-Covid Act.

26 As for both forms of hearing indicated, cf. W. Piątek, op. cit., p. 18. Both of these forms of hearing can be found in the current state of the law in Poland: Article 151 § 2 of the Code of Civil Procedure and Article 15zzs[1] items 1 and 3 of the Anti-Covid Act.

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The principle of openness of proceedings

The principle of openness surely comes to the foreground in this discussion. When speaking of this principle, it is necessary – in accordance with the established and uniform line of judicial decisions issued in civil proceedings – to take into account its two aspects: internal, i.e. openness of the proceedings to the parties, and external, i.e. openness of the proceedings to the public.

The issue of the openness of court hearings in a civil trial can be considered both in the context of the Polish Constitution and the conventions to which Poland is a signatory, as well as in the context of the Code of Civil Procedure. In considering this issue from a constitutional perspective, it is first necessary to refer to the previously cited Article 45(1) of the Polish Constitution, which provides for the right of everyone to have their case heard in public. This right is not absolute and may be subject to limitations. Indeed, according to Article 45(2) of the Polish Constitution, a hearing may be closed to the public for reasons of morality, state security, public order, as well as to protect the private lives of the parties or other important private interests. Yet, judgements still need to be announced publicly in such situations. Closing a hearing to the public is allowed also under Article 31(3) of the Polish Constitution, according to which the restrictions on the exercise of constitutional freedoms and rights may be established only by law – and only if they are necessary in a democratic state to ensure its security or public order or to protect the natural environment, public health and morals, or the freedoms and rights of others. These restrictions must not violate the essence of freedoms and rights.

The principle of openness in question is also expressed in a number of conventions. Thus, the openness of judicial proceedings, with certain exceptions, is guaranteed by the second sentence of Article 6(1) of the ECHR and Article 14(1) of the International Covenant on Civil and Political Rights. What is relevant here is also Article 47 of the Charter of Fundamental Rights of the European Union, with wording similar to that of Article 6(1) of the ECHR, except that it does not mention any of the permissible exceptions to the open hearing of court cases.

In addition, the source of law regulating civil proceedings is also the Polish act of 27 July 2001 – the Law on the System of Common Courts.[27] It is important to consider Article 42 § 2 of this law, which stipulates that courts shall hear and determine cases in open proceedings, as well as § 3 of this article, according to which conducting the proceedings in camera or closing the hearing to the public is allowed only to the extent provided for in the acts.

[27] Uniform text: Journal of Laws of the Republic of Poland of 2020, item 2072 as amended

The principle of openness is a codified principle.[28] It has been included explicitly in Article 9 of the Code of Civil Procedure.[29] According to § 1 of this article, court cases shall be heard in public unless a special provision provides otherwise. The said article regulates two aspects of openness – the external openness of hearings to the public, further confirmed in Article 148 § 1 of the Code of Civil Procedure, and the internal openness of hearings to parties and participants in the proceedings, concerning their right to participate in any open court session and to access and review case files, receive copies or excerpts thereof, as well as any audio or video and audio recordings (the principle of availability of case files). This second aspect of internal openness doesn't matter from the point of view of the institution of remote hearing, and therefore doesn't need to be elaborated on any further.

Thus, in such a constitutional, conventional, systemic, and code context, the concept of remote hearings should be considered as a variation of a public hearing. After all, there is no doubt that holding hearings remotely must be treated as a manifestation of their openness. In this view, remoteness does not become autonomous, which means that the possibility of holding court hearings remotely in civil proceedings has resulted in a decomposition of the principle of openness. The significance of remote hearings for judicial practice has increased greatly in recent times. There has also been a considerable increase in the number of these hearings – compared to the initial situation. It seems that this trend will continue in the years to come. The abovementioned phenomenon of the decomposition of the principle of openness may even lead to arguments for the need and advisability of treating the remoteness of hearings as a specific and separate principle of civil proceedings. Let us notice that other procedural actions carried out in electronic form, such as the taking of evidence remotely (Article 235 § 2 of the Code of Civil Procedure), etc., should also be considered in this context.

There is a question of how to understand the implementation of the principle of openness in relation to remote hearings. Openness of hearings to the parties requires that they be given the opportunity to participate in procedural activities relevant to the scope and stage of a given hearing. Regardless of whether the hearing takes place on-site or remotely, the parties thereto must be guaranteed free access to the court and the opportunity to act in person or through an attorney.

Internal openness cannot be restricted as a matter of principle. Internal openness stems from the adversarial nature of civil proceedings – since the parties are in dispute, they should be involved in the entire proceedings. Excluding in-camera

[28] K. Piasecki, *Postępowanie sporne rozpoznawcze w sprawach cywilnych*, Warszawa 2011, p. 87.

[29] In the Code of Civil Procedure, such special provisions include Article 153 § 1, 1^1, 2; Article 427.

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hearings,[30] the parties to a hearing have the right to be present at procedural acts performed in the course of the proceedings, which means that they should be notified of them. In a civil trial, there is a principle of optionality of the parties' acts, which is why there are no procedural obligations, but only procedural burdens. This means that despite the procedural need for the parties to appear at the hearing, no coercive measures may be applied to them. This works differently only in matrimonial proceedings (Article 429 of the Code of Civil Procedure). Under the current state of the law, the principle of internal openness understood as above is not subject to any amendment in relation to remote hearings.

From the perspective of view of the principle of openness, it can be generally assumed that the parties, their attorneys, and other participants in the proceedings use the technical means available to them to communicate electronically with the court. However, if such persons, especially a party to a hearing, report to the court that they do not have such means or do not know how to use them, it should be the court's task to provide them with the right tools to enable them to participate in a remote hearing. This could take the form of making such tools available to them in the building of the court hearing the case or in the building of another court.[31]

It is easy to see that the remote nature of hearings does not make it difficult for parties thereto to present their arguments in oral form as part of their procedural acts. However, some procedural acts of the parties must take a written form, and this not concerns, as provided for in Article 125 § 1 of the Code of Civil Procedure, motions and statements made outside the hearing. This written form applies to, for instance, an appendix to the minutes of the court session. This is because the legislator has allowed motions, declarations, supplementations, and corrections to motions and declarations to be included during the hearing in the appendix to the hearing (first sentence of Article 161 of the Code of Civil Procedure). At the same time, the presiding judge may require such an appendix to be submitted within the prescribed period if the party is represented by an attorney, legal counsel, patent agent or the General Prosecutor's Office of the Republic of Poland (second sentence of Article 161 of the Code of Civil Procedure). According to the cited regulation, if a party acts in person, they cannot be required to submit an appendix to the minutes, which means their motions and statements included in in the full written minutes of the remote hearing must suffice, If the hearing is recorded by means of an electronic device that records sound or sound and video, these motions and

[30] I leave aside the question of the recent normative extension of the basis for hearing cases and adjudicating in in-camera hearings from the point of view of the principle of openness of legal proceedings.

[31] See: regulation of this matter in Article 151 § 2 of the Code of Civil Procedure and Article 5zss[1] (2) of the Anti-Covid Act.

statements may be included in written abbreviated minutes (Article 158 § 1 and §1[1] of the Code of Civil Procedure).

The remote nature of the hearing precludes the possibility of submitting an appendix to the minutes during the hearing. It is then obvious that it must be submitted to the court before or after such a hearing. Due to the requirement of written form (Article 204 § 3 of the Code of Civil Procedure), the permissibility of filing a counterclaim, as specified in the second sentence of Article 204 § 1 of the Code of Civil Procedure, at the commencement of the first hearing also becomes obsolete.[32]

What becomes a challenge is a situation in which parties wish to enter into a court settlement. Indeed, based on the existing body of judicial decisions, there appears to be no adequate legal basis either for the electronic signature under such a settlement agreement, or for its conclusion by means of minutes recorded and verified by a recording – which means not requiring the signatures of the parties to the settlement. However, one can take into account the regulation contained in Article 223 § 1 of the Code of Civil Procedure, which implies that any case of impossibility to sign a settlement agreement is stated by the court in the minutes. Thus, it seems fair to assume that in the current state of the law, in the case of a remote hearing, we are dealing with a situation exactly as described above.[33] The above interpretation seems therefore appropriate.

The restrictions on the openness of hearings do not stem solely from the legal grounds mentioned earlier. The exclusion or limitation of openness may also occur for factual reasons. When it comes to traditional hearings, they may become 'non--open' because of e.g. unavailability of premises, underperformance of courts, or the lack of professionalism of court staff. The above apply to remote hearings as well to a greater or lesser extent. Such hearings bring also other – new – obstacles and complications to light. They have to do with the special role of technical devices in conducting remote hearings. Based on experience, any remote hearing – like any other meeting involving the use of electronic devices – may, unfortunately, fall victim to the unreliability of these devices, which may cause various interferences in the audio-visual transmission, preventing the proper reception of the signal of this transmission. In the event of a failure, the technical factor, in all its glory, may lead to a complete interruption of the court's connection with the parties and *vice versa*. Unstable connection is a significant weak spot in remote court hearings. It is to be hoped that the future development of technology will make it possible for electronic equipment to become more reliable and high-performing.

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[32] A counterclaim at the commencement of a remote hearing, however, can be filed by an employee defendant (Article 466 in conjunction with Article 477[7] of the Code of Civil Procedure).

[33] A. Łazarska, *Zdalne rozprawy…*, p. 143.

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In the current age, however, as already mentioned, there exists a real threat that the participation of parties in a remote hearing will be disrupted – and even made impossible in extreme cases – due to the unreliability of modern electronic devices. If the court's communication with the parties is temporarily disrupted and then re-established, the parties should naturally be given the opportunity, as appropriate, to perform the necessary legal procedures or take part in such procedures they might have missed due to technical issues. If the connection between the court and the parties or only one of the parties to a hearing is lost for good, the hearing should be adjourned. In fact, there are good reasons for such an adjournment, as provided for in Article 214 § 1 of the Code of Civil Procedure, because according to this article, a hearing shall be adjourned (…) if the absence of a party is caused by an extraordinary event or other obstacle that is known to the court and cannot be overcome. Otherwise, the proceedings will be subject to a sanction of invalidity due to the fact that a party has been deprived of their ability to defend their rights (Article 379(5) of the Code of Civil Procedure). Let us note here that if a court carried on with a remote hearing despite having lost the connection with the parties, it would be treated as hearing of a case in an informal and therefore unacceptable in-camera session. Such a perspective makes the problem at hand even more serious.

The issues discussed in connection with the requirement for external openness deserve a separate examination. Although the nature and manner of practical implementation of the openness of traditional (on-site) hearings cannot be equated with some special kind of openness of remote trials, there is no reason to depart from the rules established under the current legal order in terms of making hearings in civil proceedings open to the public in the case of remote trials. It is only necessary to take into account the special nature of a public hearing conducted remotely, i.e. the manner in which a remote hearing is made public should be derived from the manner in which the hearing is conducted. This means that if a hearing is not made unavailable to the public and is not conducted in camera, the public interested in the civil case being heard remotely should be given the opportunity to watch the hearing.

How can this possibility – guaranteed by the law in force – be granted in practice? It was mentioned earlier that, theoretically speaking, during a remote hearing, the location of the judges can take two forms, so to speak. The panel may be present either inside the usual court building or in another location outside the building. Considering the first scenario, the question may be whether the public should only be given the opportunity to either enter the courtroom or watch the hearing remotely, or whether it should be granted a choice between entering the courtroom and connecting online. As for the second scenario (remote form), a viable solution

may take the form either of a publicly available online broadcast (so-called video conference) or of providing the interested third parties with a link to the remote hearing. In practice, which is not consistent due to the absence of relevant regulations, another possibility allowed is a broadcast of the remote hearing in another room of the court building.[34] The possibility of taking part in a remote hearing by means of a video conference would need to be made known to the participants of the proceedings as well as to third parties (possible audience). This involves indicating a website via which it will be possible to join an online video conference broadcasting the scheduled hearing on a given day at a given time.[35]

The pinnacle of the external openness of a hearing, so to speak, is the public announcement of the judgement or ruling concluding a given case. Even if the court session is held in camera, the announcement of the decision ending the case is to be made in public (Article 154 § 2 of the Code of Civil Procedure). The legislator does not distinguish here between on-site and remote hearings. Thus, since *lege non distinguente nec nostrum distinguere*, it is necessary in the latter situation to provide third parties with the opportunity to hear the final ruling itself with the use of the technical/technological means applied to take part in the remote hearing.

The legislator did not specify the standards and technical parameters regarding audio-visual equipment, but it is obvious that such equipment should transmit a broadcast that takes place in real time and is faithful, complete, as well as confidential to third parties if necessary.[36]

As shown above, there are several ways to solve the problem of audience participation in a remote hearing. Such solutions can be applied separately or cumulatively. The normative decision is, of course, in the hands of the legislator. Certainly, the public's right to watch remote hearings, if only because of its gravity, must be taken seriously in practice. There is no room for any half-measures or makeshift solutions. In this regard, court staff must do their best to make sure that access to remote hearings is not an empty promise, but a real option.[37] After all, this is about the social control of the judiciary as provided for in the Polish Constitution. Therefore, it is hard to disagree with the claim that the transparency of the proceedings in its various aspects is a necessary and absolute prerequisite for a fair civil trial.[38]

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34 See how these issues are discussed by A. Łazarska, *Zdalne rozprawy…*, pp. 150–152.

35 Cf. P. Pietrasz, op. cit., p. 401.

36 Cf. ibidem, p. 407.

37 Cf. A. Orzeł-Jakubowska, *Review of monograph entitled "Civil Courts Coping with COVID-19", ed. Bart Krans and Anna Nylund, The Hague 2021*, "Polski Proces Cywilny" 2022, 1, p. 273.

38 Extensively on the matter: A. Łazarska, *Rzetelny…*, pp. 327 et seq. On the standards for the organisation of remote hearings under international law, especially according to the guidelines of the Committee of Ministers of the Council of Europe, see: W. Piątek, op. cit., pp. 23 et seq.

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Any technical or organisational difficulties in making a hearing public do not justify closing it to the public or even limiting its openness. We see this approach to the issue in question regulated in the Code of Civil Procedure. The first sentence of Article 9 § 1 makes it clear: court cases shall be heard in public unless a special provision provides otherwise.[39]

According to the existing body of judicial decisions, the aforementioned Article 9 § 1 of the Code of Civil Procedure is a *lex imperfecta* because no specific sanction is provided for in it (or in any other provision on making hearings accessible to the public).[40] This means that in the event of the actual closing of a hearing conducted by a court of first instance to the public for technical reasons or organisational errors, an appellate issue pointing to this procedural defect will generally be ineffective. Indeed, it is difficult to imagine that the failure to make a hearing public could affect the outcome of the case – excluding any dysfunctional situations, of course.

The principle of equality – including a party's right to a hearing

Like in the case of the principle of openness, it is necessary to initially define the meaning, the procedural conditions, and the significance of the principle of equality. This is because the comments in this regard will be the starting point for determining how to respect it in the case of a remote hearing.

The procedural principle of equality is actually closely linked to the constitutional principle of equality. The equality before the law provided for in Article 32(1) of the Polish Constitution, as well as the statement that all persons shall be equal before the law and have the right to equal treatment by public authorities apply entirely to parties to and other participants in a hearing, as well as to the court examining a given case. The principle of equality in civil proceedings seeks to ensure that the parties thereto have the opportunity to be heard (or at least to comment on their own and their opponent's legal situation) and to guarantee, taking into account the specificity of procedural roles, equality of opportunity to act (equality of arms). On the other hand, the court has a duty to treat the parties equally.

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39 More extensively on the matter: K. Flaga-Gieruszyńska, *Konstytucyjne standardy prawa do sądu a ochrona prywatności stron postępowania na przykładzie spraw cywilnych*, [in:] Ł. Błaszczak (ed.), *Konstytucjonalizacja postępowania cywilnego*, Wrocław 2015, pp. 222 et seq.

40 K. Piasecki, [in:] K. Piasecki (ed.), *Kodeks postępowania cywilnego*, Vol. 1, *Komentarz do artykułów 1–366.*, Warszawa 2010, p. 124.

Considering the principle of equality together with its procedural consequences, it should be stressed that a violation of this principle may lead to invalidity of the proceedings due to deprivation of the opportunity to act (Article 379(5) of the Code of Civil Procedure).

The principle of equality understood in this way must take proper form in a civil trial that involves a significant aspect of remoteness. There is no doubt that the peculiarities of a remote hearing significantly impacts the practical application of the principle in question. This is because technical factors play a very important part in this context. The court may not disregard any difficulties or obstacles in communication with the parties. From this point of view, stability and good quality of remote connection are prerequisite to making sure that the parties' rights are not violated. In order to ensure that the parties are fully free to take procedural action, it is also necessary to organise a remote hearing in a proper manner.[41]

The principles of direct examination of evidence and free examination of evidence

The principles mentioned in the heading above are related to each other to the extent relevant to our discussion, which is why they should be considered together.

To start with, there is a question of whether one can even speak of adherence to the principle of direct examination of evidence in its current understanding in the context of a remote hearing. In seeking an answer to this question, it needs to be emphasised that the existing body of judicial decisions issued in civil proceedings points to a few aspects of this principle.[42] Let us deal with two of them for now. First, it is understood that the principle of direct examination of evidence is manifested in the personal interaction of the judge with the participants in the proceedings: the parties, their attorneys, witnesses, and experts. Second, this principle requires the panel of judges to interact directly with the procedural material of the case, especially the evidence. The only exception includes situations when the adjudicating court decides to have the evidence taken by a designated judge or a summoned court. The deviation from the principle is motivated by the nature of the evidence or by serious inconvenience or disproportionate costs in relation to the subject matter of the dispute (Article 235 § 1 of the Code of Civil Procedure).

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41 As for the issue considered, a more extensive argument is offered by A. Łazarska, *Zdalne rozprawy…*, pp. 159 et seq.; W. Piątek, op. cit., p. 25. Cf. P. Pietrasz, op. cit., p. 405.

42 Cf. K. Knoppek, *Rozdział 1. Zagadnienia ogólne*, [in:] T. Ereciński, T. Wiśniewski (eds.), *System Prawa Procesowego Cywilnego*, Vol. II, part 2, *Postępowanie procesowe przed sądem pierwszej instancji*, Warszawa 2016, pp. 36 et seq. and the literature indicated therein.

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Such an approach to the principle of direct examination of evidence, especially with regard to all the evidence collected, in conjunction with the principle of free examination of evidence, has to do with the conviction that the judge's personal examination of this material is conducive to the optimal determination of the facts underlying the decision issued in a given case.[43]

It needs to be stressed that if the nature of evidence does not prevent it, the adjudicating court may decide that the evidence be taken with the use of technical measures making it practicable remotely (Article 235 § of the Code of Civil Procedure).

However, from the point of view of the issue considered, it is irrelevant that when speaking about the principle of direct examination of evidence, we also take into account whether the evidence is primary or secondary in terms of its source. It should be stressed, though, that in a civil trial, unlike in a criminal trial, there is no requirement for continuity of trial, except that the judgement may be made only by judges before whom the hearing immediately preceding the judgement was held (Article 323 of the Code of Civil Procedure). When it comes to the latter issue, however, the fact that a trial is conducted in remote form is irrelevant since the aforementioned change in the composition of the panel of judges is also unacceptable.

Considering the different importance of the indicated elements of the principle of direct examination of evidence, it is clear that situations where courts use remote and ICT technology during hearings is of the utmost practical importance. The issue is highly relevant to judicial practice, as the adopted procedural measures should provide effective legal protection.[44] When referring to the existing body of judicial decisions issued in civil proceedings, it is common to find a view that the means of information and communication technology applied in evidentiary proceedings – e.g. in the questioning of a witness or expert, translate into direct interaction between the investigator and the party giving testimony.[45] At the same time, the author stresses that in addition to this, the principle of direct examination of evidence is affected by the so-called electronic protocol. This is because the testimony recorded in the form of image and sound has the indisputable value of authenticity, which makes it possible to later review and present not only the

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43 Cf. E. Waśkowski, *Podręcznik procesu cywilnego. 1. Ustrój sądów cywilnych. 2. Postępowanie sporne*, Wilno 1932, p. 92; J. Jodłowski, [in:] J. Jodłowski, Z. Resich, J. Lapierre, T. Misiuk-Jodłowska, K. Weitz [text updated by K. Weitz], *Postępowanie cywilne*, Warszawa 2014, p. 137; K. Piasecki, *Postępowanie…*, p. 91; W. Siedlecki, [in:] idem, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Warszawa 2003, pp. 64 et seq.

44 K. Piasecki, *Postępowanie…*, p. 93.

45 A. Zalesińska, *Wpływ informatyzacji na założenia konstrukcyjne procesu cywilnego*, Warszawa 2016, p. 97. At the same time, let us notice that the provided example lacked a hearing of the parties, which is explainable because the author was considering the application of Article 235(2) of the Code of Civil Procedure, cited above, in connection with the inability of a witness or expert to personally appear at an on-site hearing conducted by the court hearing the case. Of course, in the case of a remote hearing, this example would have to be expanded to include evidence from the hearing of the parties.

content of the testimony, but also the entirety of visually and aurally graspable circumstances accompanying the giving thereof and the overall dynamics of the interrogation. As a result, such testimony becomes usually more credible in terms of its content and the course of its giving.[46] An important aspect regarding the claim of the greater credibility of testimony recorded in the form of an electronic protocol is the use of the phrase "usually". This is a by all means essential because without this phrase, the claim would be far-reaching and thus highly controversial.

The relativisation of the electronic protocol is worth considering also in light of the lack of a requirement for continuity of the personal composition of the judicial panel in a civil trial, as well as in light of possible appellate proceedings, which, after all, is a continuation of the examination of the case by a court of first instance (see Article 382 of the Code of Civil Procedure). This is because changing judicial panels of the court of first instance – sometimes even several times during the course of a case – and appellate judges can use the electronic protocol to have a better, more faithful, view of the manner in which witnesses and parties testified as well as any other statements made by participants in the proceedings compared to the usual full written minutes. In other words, they are able to reconstruct the course of the court session with better knowledge and in greater detail. This statement should be applied *mutatis mutandis* to the electronic record (electronic protocol) of remote hearings.

As for the direct examination of evidence in the case of the court's use of ICT devices, the standpoint of A. Zalesińska, who claims that such situations do involve direct examination of evidence, appears to be well-founded.[47] However, it cannot be argued that the same type of 'directness' of examination of evidence takes place in this context as in the situation of live, in-person interaction of the court with parties, witnesses, and experts.[48] This is because it seems that the former is a lower--tier 'directness', one that does not fully coincide with the traditionally understood model of directness. Media (media-interpersonal) communication differs from the standard, usual interpersonal communication. Although the electronic devices used by courts make it possible to transmit the image and voice of the parties speaking, and the transmission is two-way and in real time – which makes the

46 Ibidem, pp. 97 et seq.

47 Ibidem, pp. 97 et seq. See also: A. Kościółek, *Elektroniczne czynności dowodowe a zasada bezpośredniości*, [in:] eadem, *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym*, Warszawa 2012, LEX 2012 and the literature cited therein; A. Klich, *Komentarz do art. 235 k.p.c.*, [in:] J. Gołaczyński, D. Szostek (eds.), *Informatyzacja postępowania cywilnego. Komentarz*, Warszawa 2016, p. 186; K. Ziemianin, *Dowód z zeznań świadka w procesie cywilnym*, Warszawa 2019, pp. 36 et seq.

48 As for the personal interaction between the court and an expert, this is a less important matter compared to the testifying witness or party since the expert's opinion is evaluated not based on the criterion of credibility, but on the basis of its professional – possibly scientific – reliability, accuracy, etc.

communication interactive and synchronous and we can actually speak of face-to-face contact in such situations, the communication between the parties speaking is somehow different from the interaction in a real courtroom. Besides, in some cases – depending on the equipment used, the method of communication adopted, due to the possible reaction time of the recipient of the message, can be quite far from a face-to-face conversation.[49] To conclude, a remote hearing is a specific situation that affects the practical application of the principle of free evaluation of evidence and, therefore, on the outcome of the evidentiary proceedings in the context of the factual basis for the determination of the case. It is clear that the correct application of Article 233 § 1 is of great importance when it comes to making factual findings reliable.

However, it seems not unfounded to say that evidence tends to be somewhat degraded in a permanent manner when witnesses and parties are questioned in a remote hearing, although sometimes, especially in the case of poor quality online connection, such a situation may occur. In extreme cases, this obliges the court to repeat the taking of evidence. Poor video and audio transmission means that the quality of the examination of the evidence provided by witnesses will be questionable and jeopardize the guarantee of a fair trial.[50] After all, the guarantee of revealing the truth and, as a result, arriving at accurate factual findings, which is so desirable from the point of view of the proper functioning of justice, is the practical application of the principle of direct examination of evidence without actually distorting it. High-quality video and audio are like a well-washed windowpane. The action of questioning of witnesses and parties becomes closer, so to speak, and may even evoke impressions similar to those that occur when listening to witnesses at a traditional hearing, in a courtroom. Therefore, it is necessary to share A. Kościółek's view that evidentiary action carried out remotely, in line with the principle of direct examination of evidence, should be considered as an electronic alternative to the standard – traditional – direct evidentiary action.[51] This is an alternative that surely deserves to be popularised. It is also easier to view the situation favourably because during a remote hearing, the online communication between the court and the parties is two-way, real-time, and in line with the principle of oral form, like in the case of a traditional hearing.[52] Although in some types of civil cases, especially in business cases, documentary evidence plays a dominant role, when it comes to the actual judicial practice, in most civil cases, the number of

[49] Cf. M. Marcjanik, *Grzeczność w komunikacji językowej*, Warszawa 2007, pp. 55 et seq.

[50] Cf. A. Łazarska, *Zdalne rozprawy…*, p. 156.

[51] A. Kościółek, op. cit.

[52] Cf. W. Piątek, op. cit., p. 24.

procedural acts performed during a hearing is usually greater than the number of acts performed outside the hearing in the form of pleadings and other submissions. This means that the principle of oral form still matters in civil proceedings.[53]

Finally, let us bear in mind that the taking of evidence at a remote hearing results in the need to take into account the credibility of evidence provided in oral form when examining it in line with Article 233 § 1 of the Code of Civil Procedure – oral evidence obtained through the use of the court's ICT system.[54] Thus, this is a new criterion, previously unknown in the practical application of the principle of free evaluation of evidence. There is an important argument raised in the existing body of judicial decisions. The argument is that the remote character of hearings, their 'virtuality', despite the interaction being made possible thanks to audio and video transmission, is not a full substitute for direct, in-person interaction between the court and the parties at a traditional hearing. A significant part of human communication involves non-verbal communication, which involves various types of gestures, signals, and emotional reactions – all highly informative and meaningful. They would not even require any verbal explanation if the person questioned (witness, party) and responding both non-verbally was physically present in the courtroom.[55]

Conclusion

The picture of remote hearings in civil proceedings as painted above certainly does not exhaust all aspects of the issues related to such hearings. Due to the nature of this argument, covering all these issues was not the author's intention. The goal was far smaller. Remote hearings are a new procedural phenomenon and presenting this phenomenon from the point of view of the standards of a fair civil trial seemed highly reasonable. Treating these standards in the sense of a principle of civil proceedings, it appears that they provide, together with the other principles discussed above, the legal foundation for the correct establishment of this phenomenon in the existing judicial practice.

Moreover, if we assume that a given solution is supposed to serve a certain purpose, it must be positioned in a broader context, as part of a greater mechanism. In the case in question, this would be the system of civil procedural law. Applying a new solution is practice is also problematic. A new solution can sometimes bring

53 K. Knoppek, *Postępowanie cywilne*, Warszawa 2022, p. 159.

54 K. Ziemianin, op. cit., pp. 37 et seq.

55 Cf. W. Piątek, *Rozprawa*…, pp. 27 et seq.; A. Łazarska, *Zdalne rozprawy*…, pp. 156 et seq.; K. Kurosz, P. Matysiak, op. cit., p. 115; K. Knoppek, *Postępowanie*…, p. 465.

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destruction, and this can happen easily when it comes to remote trials. The remote hearing system is, after all, a system prone to failure. Failure that may be caused by external factors, but also by human error or negligence, which may involve insufficient attention to periodic maintenance and ongoing technical inspections. In the event of a prolonged failure, there is no alternative. The affected hearing should be adjourned, although a 'back-up' solution is possible: duplicate electrotechnical equipment. However, this solution is costly and may be ineffective in the event of a permanent loss of the Internet connection. Hacker attacks (cyberattacks) should also be taken into consideration. This threat cannot be underestimated, especially since we have had many cases of hearings becoming interrupted as a result of false bomb alarms even recently.

Remote hearings repeatedly, and therefore not always, increase the dynamics of the proceedings. The human factor is important here, but the role of the organisational factor is of no less importance. In any case, it appears that remote hearings can successfully replace in-person hearings in certain types of civil cases – to a significant extent. When there is not enough courtrooms in the courthouse, remote hearings become a good alternative. The emergence of the possibility of conducting remote hearings in judicial practice certainly works in favour of the administration of justice. There seems to be no dispute over the roles of traditional and remote hearings. The number of remote hearings is bound to grow, regardless of further advances in technology and an increase in the quality and reliability of digital devices. There is much room for this growth in any case. All the more so if we bear in mind that the use of digital equipment is not a rare ability nowadays, and since it does not require long learning, it is popular among an increasing number of citizens.

Acknowledging remote hearings as a legitimate new standard is certainly a fundamental change in the way our courts operate when it comes to civil proceedings. At the same time, it is a unique sign of the times (*signum temporis*) for what we generally refer to as the computerisation of civil proceedings. Despite remote hearings being considered a procedural novelty, traditional hearings should not be viewed as old-school or outdated.

It is difficult to enumerate the consequences of incorporating unified standards governing the application of remote solutions into our civil procedure regulations for good. These consequences come in plenty.

Combining remoteness with 'on-siteness' is certainly complementary. Both of these forms of hearing in civil cases, if necessary, can function in procedural and factual combination as a hybrid form, but can also be made use of separately. All this means that this new procedural phenomenon can positively affect the effectiveness and efficiency of civil proceedings. The dualism that currently exists with regard to public hearings certainly deserves approval. It helps civil courts – both

first and second instance courts – work much more efficiently. Therefore, it is necessary to establish such an organisational model for them that meets the relevant constitutional (and European law) standards and, as a result, offers parties to hearings the necessary protection. The idea is to develop such an organisational formula for remote hearings that would make it possible to remove all of the currently exising shortcomings of the solution.

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