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# Digitization, new procedural institutions and temporary solutions. Is the civil procedure resistant to unexpected outbreaks like Covid-19? Analysis of selected issues in Polish regulations[1]

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**Abstract:** The subject of considerations of this article is the issues related to ensuring the functioning of the justice system in crisis situations. The covid-19 pandemic has highlighted the real problem of the organizational nature of state bodies, including courts. While the event of force majeure was known, the scale of disruptions in the operation of judicial authorities was so large that it became necessary to implement temporary solutions. The new procedural institutions introduced to counter the effects of the coronavirus pandemic and ensure the continuity of the functioning of the courts raise many doubts regarding their compliance with the basic procedural rules. In Poland, shortly before the outbreak of the pandemic, new tools were also implemented with the intention of accelerating proceedings. In addition, the need for digital transformation of court proceedings has been discussed for years, which is in line with public expectations and, at the same time, could also speed up the time of hearing cases. The coronavirus pandemic has shown that changes to the procedure are necessary, however, they require preparation and implementation of the right to a fair trial, and certainly should not be implemented in a hasty and chaotic manner.

**Keywords:** civil procedure, digital transformation, documents workflow, remote hearing

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## 1. Introduction

The Polish civil procedure has been amended many times in recent years. The negative effect of these changes is the lack of transparency of the rules. There are also problems with the interpretation of the introduced legal norms. The changes reveal a tendency to limit the openness of the proceedings, as more and more procedural steps are performed without the participation of particular parties. This trend is also part of the desire to replace the principle of oral proceedings in favor of written proceedings. One major amendment, which included about 300 articles, entered into force just before the outbreak of the coronavirus pandemic, on November 7, 2019.

The changes concerned both the proceedings before the court of first and second instance. Quite a number of critical voices have been voiced in the doctrine, especially regarding the possibility of violating civil rights and freedoms and the principle of public proceedings, as well as limiting the right to be heard[3].

Due to the spread of the Covid-19 pandemic, new procedural solutions were introduced in Poland in March 2020, however of a temporary nature. The regulations included in the Code of Civil Procedure have not been changed, and only short-term regulations have been included in a special act regulating measures related to counteracting the effects of the pandemic. The pandemic and the broad-spectrum lockdown caused by the pandemic sparked a discussion about the need to modernize and digitize the civil procedure, and to enable communication between the court and participants in the proceedings by electronic means.

There has been a debate taking place in the Polish doctrine for years on the possibility and necessity of digitizing judicial procedures[4]. It is emphasized that in everyday life, many activities are carried out only by means of distance

[3] RYLSKI P. "Transformation of Polish Civil Procedure in Light of Covid-19*"* [in:] KRANS B. (ed.), NYLUND A. (ed.), *Civil courts coping with Covid-19"*, Eleven International Publishing, Hague, 2021, p. 155-165, https://boeken.rechtsgebieden.boomportaal.nl/publicaties/9789462362048#165 (access 28.09.2022)

[4] In Polish literature see KACZMAREK-TEMPLIN B., *Dowód z dokumentu elektronicznego*, C. H. Beck, Warszawa, 2012; KACZMAREK-TEMPLIN B., *Elektroniczny obieg dokumentów a zasady procesowe w procesie cywilnym*, C. H. Beck, Warszawa, 2023; GOŁACZYŃSKI J. (ed.) *Informatyzacja postępowania sądowego w prawie polskim i wybranych państw*, C. H. Beck, Warszawa, 2009; FLAGA-GIERUSZYŃSKA K. (ed.), GOŁACZYŃSKI J. (ed.), SZOSTEK D. (ed.), *Sztuczna inteligencja*, blockchain, *cyberbezpieczeństwo oraz dane osobowe*, C. H. Beck, Warszawa, 2018; SZOSTEK D., *Informatyzacja postępowania cywilnego. Elektroniczne biuro podawcze* [in:] FLAGA-GIERUSZYŃSKA K. (ed.), KLICH A. (ed.), *Współczesne problemy postępowania cywilnego*, Wydawnictwo Adam Marszałek, Toruń, 2015, s. 67; ZAŁUCKI M., *Wykorzystanie sztucznej inteligencji do rozstrzygania spraw spadkowych*, [in:] LAI L. (ed.), ŚWIERCZYŃSKI M. (ed.), *Prawo sztucznej inteligencji*, C. H. Beck, Warszawa, 2020, p. 145–156; KOŚCIÓŁEK A., *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym*, Wolters Kluwer, Warszawa, 2012; MARCINIAK A. (ed.), *Elektronizacja postępowania wieczystoksięgowego*, C. H. Beck, Warszawa, 2016; GOŁACZYŃSKI J. (ed.), *Elektroniczne postępowanie upominawcze. Komentarz*, Wolters Kluwer, Warszawa, 2010.
In foreign literature see DYMITRUK M., "The right to a fair trial in automated civil proceedings*"*, "*Masaryk University Journal of Law and Technology*" 2019, vol. 13, No 1, pp. 27–44; ZAŁUCKI M., "The road to modern judiciary. Why new technologies can modernize the administration of justice?, [in:] SZOSTEK D. (ed.), ZAŁUCKI M. (ed.), *Internet and new technologies law*, Nomos, Baden Baden, 2021, p. 159–171; RYLSKI P., "Polish Civil Procedure: Yesterday, Today and Tomorrow – Some Remarks about Recent Changes of Procedural Law in Poland*"*, "*Bratislava Law Review*" 2019, No 1, pp. 139-146; KAROLCZYK B., "Informatization of the Civil Justice System in Poland: An Overview of Recent Changes*"*, [in:] UZELAC A. (ed.), VAN RHEE H. C. (ed.), *Transformation of Civil Justice. Unity and Diversity*, Springer, Cham, 2018, pp. 99-117; KULSKI R., "Some Remarks on the Course of Polish Electronic Proceedings by Writ of Payment*"* [in:] KENGYEL M., *Electronic Justice – Present and Future. Colloquium of the IAPL*, Pecs, 2010, p. 17.

communication (e-commerce, access to digital services, both offered by public administration and by commercial entities), and society also expects that such a possibility will be provided by the judiciary.

In fact, it turned out that the Covid-19 pandemic markedly accelerated the digitization of the Polish civil procedure One prime example here is in the possibility of conducting an online hearing and in introducing electronic service of correspondence to professional attorneys via the case management system.

At this point, a question should be asked whether the Polish procedure is being revolutionized or it is dealing with a legislative chaos that will require ordering and implementing new, more refined regulations. In particular, it would be worth considering whether, in the event of recurrence of pandemic-like difficulties, the rules of procedure will ensure the functioning of the judiciary in times of crisis.

## 2. Digital technologies

Digital technologies have great potential for improving the efficiency and access to justice. The European Commission's priorities for 2019–2024 include the digital strategy 'Europe fit for the digital age.' Its main goal is to provide people with access to the latest generation technologies[5]. The EU's digital strategy aims to ensure that the digital transformation benefits Europeans and European businesses. This goal will be achieved by intoducing in the EU a digital decade in the coming years, which should strengthen its digital sovereignty and establish its own digital standards with a clear focus on data, technology and infrastructure.

Since 2008, the European Commission and the Council of the EU have been working closely together to establish a range of cross-border digital initiatives in the field of justice. One of the effects of this cooperation was the adoption on November 25, 2020 of two EU regulations: on the service of documents[6] and on the taking of evidence. Both proposals update existing EU rules on the service of documents and the taking of evidence[7] to ensure the best use of modern digital solutions and the modernization of the EU justice systems. While digital solutions have already been introduced in some countries, cross-border litigation is still mostly paper-based. The adopted regulations are aimed at increasing the effectiveness of cross-border cooperation between national courts in various Member States of the European Union. It is worth mentioning that about 3.4 million cross-border deliveries are carried out annually in the European Union[8], which undoubtedly requires the improvement of administrative processes, and the implementation of electronic document exchange would certainly benefit the system.

The basic element necessary to ensure access to justice and, consequently, to fair trials is the provision of transparent rules based on mutual trust and mutual recognition of judgments. Lack of confirmation of the document initiating the

[5] https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_pl, (access 28.09.2022)

[6] Regulation (EU) 2020/1784 of the European Parliament and the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), Official Journal of the European Union from 2.12.2020, L 405/40, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1784, (access 28.09.2022)

[7] Regulation (EU) 2020/1783 of the European Parliament and the council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence), Official Journal of the European Union from 2.12.2020, L 405/1, https://eur-lex.europa.eu/eli/reg/2020/1783/oj, (access 28.09.2022)

[8] *New EU rules: digitalization to improve access to justice*, https://www.europarl.europa.eu/news/en/headlines/society/20201126STO92502/new-eu-rules-digitalisation-to-improve-access-to-justice (access 28.09.2022).

proceedings by appropriate judicial services is the most common reason for refusing recognition and enforcement of judgments[9].

Due to the fact that the digital transformation will include cross-border disputes, it is also justified to implement the same solutions in national regulations. The more so because their need arose in the era of the coronavirus pandemic.

## 3. Limitating openness of proceedings

Many changes to the last amendment concerned the limitation of openness of court proceedings. It is worth emphasizing that the Polish CCP is based on the principle of openness and of the oral nature of hearings, which has been historically derived from the impact of codification of law in Russia and France in the 19th century. It differed from the written procedure regulated in the German law[10]. The principle of the oral hearing is closely correlated with the written nature of the procedure. Neither of them is absolutely admitted in civil proceedings. Both are related to the form in which procedural steps are to be performed. Giving the primacy to oral hearing would result in considerably prolonged proceedings, and is therefore limited to the trial itself. On the other hand, outside the hearing, the rule of writing prevails, and it should not be equated solely with the paper form.

Although a thorough analysis of the issue of the form of procedural acts allows us to distinguish, apart from the written and oral form, another one with an equivalent status – the electronic form, taking into account the principle of oral hearing, certain reservations should be made. The division into oral and written proceedings generally relates to the moment when the parties' declarations are submitted to the court. The inherent part of the proceedings is the oral hearing, i.e. by verbally exchanging statements of the parties and articulating the statements of other entities participating in the hearing orally. On the other hand, all statements that are submitted outside the hearing take the form of pleadings or court proceedings, or documents submitted by third parties. Electronic document circulation does not change this rule. The possibility of using the ICT system allows only for submission of letters in electronic form. With this approach, it should be assumed that it does not in any way affect the very structure of the oral procedure. In addition, it should be noted that the electronic form can also be an alternative to activities that are usually done orally. An example may be the institution of interrogating a witness with the use of technical devices that enable it to be carried out remotely (in the so-called videoconference mode) pursuant to Art. 235 § 2 of the Code of Civil Procedure[11].

Introducing the electronic form and accepting that it is a new, independent form of procedural activities does not cause any modification in the dichotomous division into oral and written. The electronic form can be an alternative to both written and oral procedural steps. Orality should be understood as statements made with the aid of a vocal apparatus and received through the sense of hearing. Writing, however, should be equated with statements made in the form of pleadings, court documents or other documents recorded and then recreated using the sense of sight.

In fact, as a result of the implementation of electronic document flow in civil proceedings, the principle of oral administration does not undergo any modifications.

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[9] European Commission, Directorate-General for Justice and Consumers, GASCÓN INCHAUSTI M., HESS B., CUNIBERTI G., and others, *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law: strand 1: mutual trust and free circulation of judgments*, Publications Office 2017, https://data.europa.eu/doi/10.2838/38491 (access 28.09.2022).

[10] RYLSKI P., WEITZ K., "The Impact of the Russian Civil Judicial Proceedings Act of 1864 on the Polish Civil Proceedings*"*, "*Russian Law Journal*" 2014, No 4, p. 85.

[11] KOŚCIÓŁEK A., *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym*, Wolters Kluwer, Warszawa, 2012.

The teleinformation system does not change the general rules of the course of the proceedings and the examination of the case through hearings.

For the implementation of the principle of oral hearing, it does not matter whether a party submits pleadings in paper form or via the ICT system.

It would be advisable to modify the understanding of the principle of orality and the related written form and to clarify that they do not so much relate to the form of procedural acts as to the manner of submitting statements and transferring certain information to the court. This means that we have three forms of procedural acts (written, oral, electronic), but two ways of their implementation, that is through oral statements or in the form of a pleading[12].

After the last amendments, the trial (open court hearing) becomes an exception. As a rule, judgments are given *in camera* without any involvement of the parties and without publicity. Secondly, appeals may be heard in closed doors (Art. 373 of the Code of Civil Procedure), and some judgments were appealed against, which was examined by the same court, and not by a court of second instance.

In accordance with Art. $148^1$ of the Code of Civil Procedure, the court may consider the case in closed session, when the defendant admitted the claim or when, after the parties have submitted pleadings and documents, including after submitting objections or an objection to an order for payment or an objection to a default judgment, the court decides – having regard to all the above-mentioned statements and reported evidence motions – that holding a hearing is not necessary.

In exceptional cases, there is also a new possibility to end the case quickly. If the content of the statement of claim and attachments as well as the circumstances of the case, along with the facts commonly known, the claim is obviously unfounded, the court may dismiss the claim in closed session, without serving the claim to the person indicated as the defendant or not examining the applications submitted with the claim (art. $191^1$ CCP).

The court of second instance may process the case in closed session, if a hearing is not necessary. The examination of the case in closed session is inadmissible if the party to the appeal or the response to the appeal has applied for a hearing, unless the statement of claim or appeal has been withdrawn or the proceedings are null and void (art. 374 CCP).

During the pandemic, a special law was passed, which contains legal solutions, inter alia, regarding the principles of operation of administrative and judicial bodies, an act from 2 March 2020 on special solutions related to the prevention, counteraction and combating COVID-19, other infectious diseases and emergencies caused by them[13]. The provisions of this act contain further regulations limiting the openness of proceedings[14].

According to art. 15zzs1 item 3 in those regulation, the chairman may order a closed session when it is not possible to conduct a remote session and it is not necessary to conduct a hearing or an open session.

Art. 15zzs2 states that, if, in the case examined pursuant to the provisions of the Code of Civil Procedure, the evidentiary proceedings have been conducted in full, the court may close the hearing and issue a ruling in closed session after receiving written statements from the parties or participants in the proceedings.

While during a pandemic, due to concerns about the health of citizens, it was justified to introduce restrictions on the movement of people and the calling of assemblies in order to ensure the functioning of the courts, however, limiting the

[12] KACZMAREK-TEMPLIN B., "Zasady procesowe a informatyzacja postępowania cywilnego*"* [in:] GIL I. (ed.) *Transformacje postępowania cywilnego w postępowaniach rozpoznawczych*, Currenda, Sopot, 2017, Part III, Chapter 2, pp. 293-294.

[13] Dz. U. from 2021, item 2095.

[14] Compare GAJDA-ROSZCZYNIALSKA K., "Abuse of Procedural Rights in Polish and European Civil Procedure Law and the Notion of Private and Public Interest*"*, "A*ccess to Justice in Eastern Europe*" 2019, No 2, pp. 53-85

openness of proceedings should be approached with great caution, as it may consequently violate fundamental right to a fair trial.

Limitations related to the openness of proceedings are associated not only with an increase in the number of situations in which the court may hear cases in closed sessions, but they are also visible in other procedural institutions, such as, for example, hearing a witness in writing (written testimony). In a situation where the witness does not appear in court, the party is deprived of the possibility to ask questions and to hear the statements made by the witness in real time.

Undoubtedly, the inability of a party to react and take a position in the course of proceedings constitutes a violation of the right to a fair trial. However, there seems to be no reason at present to maintain such restrictions any longer.

## 4. Written testimony

The latest amendment to the Code of Civil Procedure[15] introduced a revolutionary possibility of hearing a witness by collecting testimony from him in writing, if the court so decides (Article $271^1$ of the Code of Civil Procedure). Admittedly, it is not a new institution, as a regulation was in force since 12/12/2012, according to which a witness could testify in writing in the European Small Claims Procedure. The basis of such a solution was, first of all, the fact that it was in force in cross-border proceedings with a relatively low value of the subject of the dispute, and the procedural economy called for refraining from summoning a witness to court, which could sometimes be located in another country. Moreover, it was a consequence of Regulation (EC) No 807/2007 of 11.07.2007 establishing a European Small Claims Procedure[16]. Currently, the institution of a written testimony by a witness may be used in any proceedings pending before a court, provided that it deems it to be justified in given circumstances.

The legislator introduced the possibility of receiving laconic written testimony from a witness. In the justification of the act amending the CCP and introducing the written testimony by a witness, it was explicitly stated that it was the intention of the legislator that the development of detailed rules for the application of this institution, in particular the procedure for receiving such testimony and the requirements for them, should be left to practice.

The introduction of a new form of witness testimony in the present shape has its advantages and disadvantages. The former undoubtedly include the simplification and acceleration of the procedure. This solution is more convenient and less burdensome for potential witnesses, as there will be no need to adjust their life or professional matters to the date of the trial. Among the latter, doubts are raised as to the independence of preparing a written testimony, as it may be influenced by third parties, including those interested in the outcome of the case. As a consequence, it raises the problem of assessing the credibility of the witness and his testimony[17]. The court cannot assess the fluency of a witness's speech, facial expressions or intonation either.

In general, oral hearing of a witness remains the principle, while the institution under Art. $271^1$ of the Code of Civil Procedure breaks this rule. Therefore, the court, when making a decision, should do so with great caution, and also due to the fact that the prerequisites for the application of written testimony have not been specified.

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[15] Act amending the Act - Code of Civil Procedure and certain other acts of 4.07.2019, Dz. U. z 2019 item 1469.

[16] Dz. U. EU from 2007, L 199, p. 1.

[17] Dziurda M., "Dowód z zeznań świadka na piśmie", „Palestra" 11-12/2019, p. 103-112. See also FLAGA-GIERUSZYŃSKA K., who states that the possibility of manipulating the statements of the witness' knowledge in relation to oral testimony, as it happens that witnesses are "prepared" to testify of a specific content [in:] "Środki dowodowe i postępowanie dowodowe w nowelizacji Kodeksu postępowania cywilnego z 4.07.2019 r.", „*Palestra*" 11-12/2019, p. 96.

There were voices that written testimony may be applied to less important witnesses, and only if it may accelerate the course of taking evidence, but without prejudice to the obligation to clarify all the factual circumstances relevant to the resolution of the case[18]. Making statements at a distance may be useful when it is necessary to hear a party or a witness staying abroad, or a sick person whose ailments make it difficult to come to court[19].

In essence, this regulation may be an alternative to hearing a witness through judicial assistance before the requested court or a designated judge, as well as to hearing a witness through active or passive requisitioning in cross-border cases.

The implementation of the principle of equality, as well as the principle of directness, requires that the admission of evidence from written testimony may not violate the rights of the parties to participate in evidence proceedings and directly confront their positions with the witness's testimony (by asking questions (Article 271 § 1 of the Code of Civil Procedure) and discussing the results of evidence (Article 210 § 3 of the Code of Civil Procedure).

In the case of the oral testimony by a witness, it was emphasized that during the testimony, the witness cannot read the testimony he had previously written. In addition, he is also not allowed to use written notes made by other persons, and the witness must obtain the court's approval to use his own notes[20].

We are dealing with a witness testimony in writing only if the court admits such evidence before the testimony is given. Where a party submits a witness statement in writing on his own initiative as an attachment to his pleading, before considering an application for evidence on the subject, such a statement may possibly only be treated as a private document. However, they can be treated as circumvention of the provisions on evidence from witness testimony in the traditional approach.

Before issuing an order to admit evidence from written testimony by a witness, it would be reasonable for the court to hear the parties in this respect. Although the court is not bound by the position of the parties, their arguments and intentions in terms of, for example, asking the witness questions, should be taken into account[21]. In the decision, the court should also specify the details of the witness, a detailed description of the facts on which the testimony is to be made (court questions), as well as questions formulated by the parties, unless they are considered unnecessary or inappropriate, and the manner and time limit for the witness to testify (Article 236 of the Code of Civil Procedure). The court cannot merely refer to the party's letter containing the questions or deliver such a letter to the witness. It is necessary to indicate the questions to which the witness is to answer in the content of the decision itself. The witness should refer only to the document coming from the court (order), which at the same time sets out the obligations of the witness and may be the source of responsibility for evading the obligation to testify.

The decision should be accompanied by the text of the oath along with information about the need to sign it and return it along with the testimony to the court. It is worth mentioning that the text of the oath becomes inadequate when the testimony is received from a witness in writing. First of all, minor modifications should be made[22]. As the text of the oath becomes a specific appendix to the written testimony by a witness, it should be written in the perfect mode and the word 'speak'

[18] CUDAK A. [in:] MARCINIAK A. (ed.), *Kodeks postępowania cywilnego. Tom II. Komentarz. Art. 205[1]-424[12]*, remarks to Art. 271[1], Warszawa, 2019, Legalis/el.
[19] JAWORSKI S., *Kodeks postępowania cywilnego. Komentarz do zmian, remarks to Art. 226*[1], Warszawa, 2019, Legalis/el.
[20] JAWORSKI S., *Kodeks postępowania cywilnego. Komentarz do zmian, remarks to Art. 226[1]*, Warszawa, 2019, Legalis/el.
[21] CUDAK A. [in:] MARCINIAK A. (ed.), *Kodeks postępowania cywilnego. Tom II. Komentarz. Art. 205[1]-424[12]*, remarks to Art. 271[1], Warszawa, 2019, Legalis/el.
[22] KORCZAK L. [in:] GOŁACZYŃSKI J. (ed.), SZOSTEK D. (ed.), *Kodeks postępowania cywilnego. Komentarz*, remarks to Art. 371[1] KPC, thesis 4, Warszawa, 2019, Legalis/el.

should be replaced with the word 'write.' The text should read, 'Aware of the meaning of my words and of the criminal liability for submitting a false statement, I solemnly pledge that I have written the honest truth, not hiding anything that is known to me.

It ought to be postulated that the witness should also confirm with their signature that they have read the instructions on criminal liability for making false statements and the right to refuse to answer a question, as well as the content of Art. 233 § 1 and § 1a of the Criminal Code providing for liability for attesting untruth or concealing the truth. The witness should also be instructed on how to exercise such rights. It seems advisable to inform a witness that if there are grounds for refusing to testify or answer a question, they should notify the court of such a fact by submitting a written statement.

The witness should begin the testimony by providing information about themselves and indicating their attitude towards the parties; they should also information about their possible criminal record, and only then can they start answering relevant questions.

The legislator does not specify the form of submission: pleading or some other form. Art. 125 § 1 of the Code of Civil Procedure provides that pleadings include motions and statements of parties submitted outside the trial. On the other hand, in the literature some experts claim that pleadings are also filed by other entities in the proceedings which, apart from the trial (open hearings), want to submit some statements[23].

Recognizing a testimony by a witness in writing as a pleading would have far-reaching consequences; among other things, it would lead to the conclusion that the provisions on deficiencies in formal pleadings and their supplementation apply here as well (Art. 130 et seq. of the Code of Civil Procedure).

Such a conclusion is not easy to accept. It should be borne in mind that a witness may not include information that should be made available in the written testimony, such as specifying his first name and surname or case reference number to which they should be attached in a form of writing.

Although the application of the provisions on pleadings to the written testimony by a witness is generally met with disapproval, some authors point out that some provisions should be applied to them by analogy[24]. Such provisions would include art. 128 of the Code of Civil Procedure, as this would make it possible to demand that the witness should attach copies to his testimony to be served on the parties in the proceedings. There is also a completely different position in the doctrine, namely, that testimonies are to be submitted in one copy for the case files[25]. It does not follow from the provision that they should be served on the parties, who could read this evidence in the files (or demand a copy of the document from the case files on the basis of Art. 9 of the Code of Civil Procedure). However, the court should inform the parties that a witness has given evidence no later than at the hearing following the testimony. In order to enable them to refer to this evidence, it would be reasonable to send them this information before the hearing, so that they could become familiar with the that evidence, prepare their procedural position and present it at the hearing[26]. It seems, however, that if the court were to inform the parties, which is not mentioned in the provision, about a written testimony by a witness being included in the case file, it should also send information about the

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[23] JĘDRZEJEWSKA M., WEITZ K. [in:] ERECIŃSKI T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom. 1. Postępowanie rozpoznawcze*, Warszawa, 2016, remarks to Art. 125, thesis 3.

[24] DZIURDA M. [in:] ZEMBRZUSKI T. (ed.), *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian. Tom I i II*, remarks to Art. $271^1$, Warszawa, 2020, Lex/el

[25] GÓRSKI K. [in:] SZANCIŁO T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1-505[39]. Tom I*, Warszawa, 2019, remarks to Art. $271^1$, Legalis/el.

[26] GÓRSKI K. [in:] SZANCIŁO T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1-505[39]. Tom I*, Warszawa, 2019, remarks to Art. $271^1$, Legalis/el.

appearance in the files of any document originating from any entity other than a participant in the proceedings (e.g. a probation officer interview in family matters), and there is no such practice.

## 5. Possibility of Interrogation of Parties in a Simplified Manner (Art. $226^1$ CCP)

Pursuant to the provisions of Art. $226^1$ of the Code of Civil Procedure, whenever the law provides for the hearing of the parties or other persons, it may be done, depending on the circumstances, by summoning the parties to submit appropriate statements at the meeting or by setting a deadline for taking a position in a procedural letter or by means of distance communication, provided that they allow confidence in the person submitting the declaration.

The provision provides for three manners of hearing the parties or other persons: making appropriate statements at the meeting, filing a pleading or taking a position by means of distance communication. It does not, however, decide whether the full catalog of measures may be used only by the parties or also by other persons if separate regulations provide for their hearing. The wording used by the legislator is inconclusive. In the first part of the provision, reference is made to 'the parties or other persons,' and in the following — it only refers to 'summoning the parties' to make relevant statements at the meeting or 'setting a deadline' to take a position in the pleading. A literal wording could indicate that the summons to make statements at the meeting may be addressed only to the parties, while other persons may be heard only by means of distance communication. Such a solution appears unreasonable, and all three manners of hearing should apply both to parties and other people.

In the context of the provision, the written form of the hearing is equated with a pleading. Therefore, there is a dissonance, as pursuant to Art. 125 § 1 of the Code of Civil Procedure, pleadings include motions and statements of the parties submitted outside the trial. However, the doctrine advocates the approach that pleadings may also be filed by other entities in the proceedings which, apart from the trial (open court session), would like to submit statements or motions. These other entities include participants in non-litigious proceedings, a prosecutor, the Ombudsman, non-governmental organizations, labor inspectors, consumer ombudsmen, incidental interveners, persons summoned or notified about pending proceedings[27]. In conclusion, there are no obstacles to include witnesses who would have to testify in writing.

The last entity provided for in Art. $226^1$ of the Code of Civil Procedure, while offering explanations and taking a position by means of distance communication, outght to produce a proof that they are indeed the person submitting the statement. On the other hand, no measures for establishing identity are given for the group of the above-mentioned identities.

'Taking a position by means of distance communication cannot be limited only to submitting statements via the ICT system, referred to in Art. 125 § $2^1$ of the Code of Civil Procedure. First of all, because the first possibility to provide explanations is in the form of a pleading, which, inter alia, allows the use of an ICT system, and if the legislator identified both methods, there should be no need to introduce an additional distinction in the provision of Art. $226^1$ of the Code of Civil Procedure. Moreover, in a situation where the possibility of using the court's ICT system is offered for a particular activity, it is directly referred to in the provision.

Therefore, it seems that only the jurisprudence will allow to decide which other means of distance communication provide certainty as to the identity of the person

[27] JĘDRZEJEWSKA M., WEITZ K. [in:] ERECIŃSKI T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom. 1. Postępowanie rozpoznawcze*, Warszawa, 2016, remarks to Art. 125, thesis 3.

submitting the declaration. Probably, the most attention should be paid to the analysis of the most common forms of communication, i.e. e-mail correspondence and submitting statements via instant messaging.

Undoubtedly, the means of distance communication should be indicated as as such, which will ensure the identity of the person submitting the declaration (videoconferences organized by the court, under which the identity of persons submitting the declaration is checked, Article 151 § 2 of the Code of Civil Procedure, so that any doubts about the identity of the person making the statement are removed, in the case of videoconference via Skype or FaceTime[28]). Also, the use of the so-called trusted (or certified) profiles allow to ensure the identity of the person submitting the statement.

The issue of the participation in the proceedings (including the party) that is in the hearings via social instant messaging was presented to the Supreme Court in the case III CZP 13/19[29]. Although the Court refused to adopt a resolution, in the justification of its decision, it indicated the direction of the interpretation of the provisions, stating that 'only Art. 151 § 2 of the Code of Civil Procedure in connection with Art. 13 § 2 of the Code of Civil Procedure and Art. 514 of the Code of Civil Procedure, participants staying outside the seat of the court where the proceedings are conducted may participate in the open session of that court only if they are in the building of another court. This requirement is related to the need to guarantee the integrity and seriousness of the proceedings, including the proper identification of persons participating in the activities and the security of data transmission. Presence in another court of law, in the seat of another court (cf. Articles 54, 94 and 175dc of the Act of 27 July 2001 – Law on the System of Common Courts, single text: Journal of Laws of 2019, item 52) is an absolute requirement, which results directly not only from Art. 151 § 2 of the Code of Civil Procedure, but also from the course of the discussion preceding the entry into force of the Act of 10 July 2015 amending the Act - Civil Code, Act - Code of Civil Procedure and some other acts (Journal of Laws No. of 2015, item 1311), during which it was proposed to waive the discussed requirement, but the project initiator definitely did not accept that proposal. In other words, nowadays participants in non-contentious proceedings cannot participate in a hearing by means of electronic communication in a manner not provided for in Art. 151 § 2 of the Code of Civil Procedure in connection with Art. 13 § 2 of the Code of Civil Procedure and Art. 514 of the Code of Civil Procedure.

## 6. Art. $271^1$ of the Code of Civil Procedure and Art. $226^1$ of the Code of Civil Procedure

In the comments to the act amending the Code of Civil Procedure[30], there were considerations regarding the application of Art. $226^1$ of the Code of Civil Procedure to testimonies of witnesses and the possible mutual relation of this provision to Art. $271^1$ of the Code of Civil Procedure.

The doctrine often considers whether the mentioned provision could also apply to the questioning of a witness in both the envisaged forms (oral and written). According to the doctrine, that the scope of application of the two provisions is divergent. Article $226^1$ of the Code of Civil Procedure concerns the 'hearing' of parties or other persons, not testimony. In addition, the testimony of a witness in writing has been regulated separately in Art. $271^1$ of the Code of Civil Procedure.

[28] JAWORSKI S., *Kodeks postępowania cywilnego. Komentarz do zmian, remarks to Art. $226^1$*, Warszawa, 2019, Legalis/el.

[29] Decision of Supreme Court from 8.11.2019, sygn. III CZP 13/19, http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20CZP%2013-19.pdf

[30] Act amending the Code of Civil Procedure and certain other acts of July 4, 2019, Dz. U. z 2019 item 1469.

According to the literal wording of Art. $226^1$ of the Code of Civil Procedure, it can be used to hear not only the parties (sometimes only one of them, e.g. the plaintiff, as indicated, inter alia, by Art. $505^{20}$ § 3 of the Code of Civil Procedure), but also other persons. This applies, for example, to a witness, expert, attorney or statutory representative (Article 110 of the Code of Civil Procedure), a third party refusing to present a document (Article 251 of the Code of Civil Procedure), as well as 'other interested persons' (Article 508 § 3 of the Code of Civil Procedure).

Art. $226^1$ of the Code of Civil Procedure does not apply to the testimony of a witness. It follows from the wording of the provision that it concerns the 'hearing' of the parties or other persons, not the testimony, and should therefore not apply to the taking of evidence[31]. Moreover, the testimony of a witness in writing has been regulated separately in Art. $271^1$ of the Code of Civil Procedure, and this kind of dualism does not appear to have any justification. One should also pay attention to the provision of Art. 235 § 2 of the Code of Civil Procedure, which allows for the taking of evidence using technical devices remotely. The use of less formalized possibilities of hearing a witness (or even the party itself) would not be conducive to maintaining the dignity of the court and maintaining the authority of the judicial institution; especially since the provision of Art. 151 § 2 of the Code of Civil Procedure introduced the possibility of holding a public hearing with the use of technical devices enabling its conduct at a distance provided it takes place in a building of another court.

## 7. Coronavirus regulations

In Poland, due to the increase in the number of people infected with the coronavirus, the state of epidemic threat was first introduced (from March 14, 2020), and then the state of epidemic (from March 20, 2020), as a result of which the actions of the courts were impeded. Almost all hearings, except for emergencies, were cancelled. Due to limitations in the work of the postal operator (Poczta Polska) and limitations in the possibility of moving around and performing professional work, the legal community discussed issues related to the possibility of submitting letters to the courts and the possibility of meeting deadlines.

As a result, there was a positive draft of the provision of Art. 15 zzv to the Act of March 2, 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them.

According to the draft provision of Art. 15zzv of the aforementioned Act, during an epidemic emergency, epidemic or in the event the postal operator ceases to provide universal services, the party's pleading could be brought to court using the ePUAP[32] platform, the information portal of common courts or by e-mail. The letter was to be considered to have been filed the moment it was entered into the

[31] On the contrary, A. RUTKOWSKA and D. RUTKOWSKI, who believe that the possibility of hearing a witness may be admitted, as long as the means of distance communication provide certainty as to the identity of the person who makes a specific statement, [in:] PIASKOWSKA O. M. (ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, remarks to Art. $226^1$, Warszawa, 2020, Lex/el. Also M. DZIURDA expressed the view that from the functional point of view, it would be most advisable to apply Art. $226^1$ to hear witnesses or even parties. The applicability of art. $226^1$ for the hearing of witnesses or parties (in the latter case, not only in the scope of the information hearing provided for in Article 212 § 1, but also the evidence provided for in Article 299 et seq.), would allow without any doubts to assume that the hearing of witnesses or parties may take place by means of distance communication, as long as they provide certainty as to the identity of the person making the declaration "[in:] ZEMBRZUSKI T. (ed.), *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian. Tom I i II*, remarks to Art. $226^1$, Warszawa, 2020, Lex/el.

[32] Electronic Platform of Public Administration Services.

electronic means of communication and sent to the court's e-mail address indicated on the court's website.

However, before the proposed regulations were enacted, the provision of Art. 15 zzv had been removed. This means that despite the appeals of the legal community and despite the real demand for a new solution, the provision was removed form the aforementioned article. The reason for resigning from this breakthrough solution was the concern that the court would be charged with the burden and cost of printing the letters together with attachments submitted electronically. Economic considerations turned out to be more important than the interests of citizens and the possibility of maintaining the proper functioning of the courts, which after the epidemic will probably be paralyzed by overdue cases and new cases, which will certainly be initiated in a cumulative amount.

Instead of introducing the possibility of submitting pleadings by electronic means, according to the provision of Art. 15 zzs, during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the running of procedural and judicial deadlines, including court proceedings, do not start, and the pending ones are suspended. The new provision immediately raised doubts. First of all, one may wonder why the legislator mentioned, apart from court proceedings, criminal proceedings, penal fiscal proceedings, cases of petty offenses, but did not mention civil proceedings as such. Point 1 of this provision indicates court proceedings, and yet both criminal and civil proceedings are conducted before a court. Moreover, the enforcement proceedings are civil proceedings in the broad sense, and they have also been mentioned. On the other hand, the legislator considered it appropriate to emphasize that administrative court proceedings are one kind of court proceedings. Another doubt concerns the determination of the duration of the provision, as it refers to the state of epidemic threat, which was introduced on March 14, and the act itself was in force from March 31, 2020. In addition, the reason for the introduction of an epidemic threat or state of the epidemic was the spread of the COVID-19 disease, which is an abbreviation of the English name Coronavirus Disease 2019, and not COVID, which could theoretically mean another disease entity.

In general, it can be considered that this provision was a kind of alternative to the possibility of submitting letters to the court by electronic means. Electronic communication with the court was postulated due to the need to meet deadlines and the resulting need to submit pleadings. Therefore, since the time limits were suspended or their commencement was suspended, there was no urgent need to submit such letters to the court. However, the legislator did not decide whether a party, in the period of an epidemic threat or epidemic, may still submit letters to the court via the postal operator and what will be the possible effect of letters submitted at that time. Also, in a situation where a party would be interested in submitting a pleading due to the interruption of the limitation period, there is no need to submit a pleading to the court, because, as stipulated in Art. 15zzr, among others time limits, the failure to observe of which causes the expiry or change of rights *in rem*, as well as claims and receivables, and tight deadlines, non-observance of which leads to negative legal effects for the party, does not begin, and the pending one is suspended. It is puzzling, however, why the provision defines them as administrative legal terms.

The provision of Art. 14a states that the court may stop operating altogether due to COVID-19. In the event the court ceases to act, no procedural steps will be taken, and thus it will not be possible for the parties to be obliged to act within certain time limits, which means that, in fact, there will be no need to submit any pleadings.

The introduction of the above-mentioned provisions in fact eliminated the need to enable the parties to communicate with the court by electronic means. In a situation where the courts do not take any action, no deadlines are set, and the party does not have to take any action to defend its rights and interests either.

Many voices in the discussion on the state of courts and court proceedings during an epidemic threat and epidemic state postulated extending the functionality

of the ePUAP platform to enable communication between defendants and courts, especially since such a possibility exists at the level of administrative matters (submission of complaints and motions). Although in theory the ePUAP platform provides the ability to communicate and handle cases, in practice it is quite ineffective. Extending its functionality to support court cases would undoubtedly lead to some kind of paralysis of this platform. Contrary to the demands of a friendly state (friendly administration), initiating matters via ePUAP is difficult. For people who have not used it so far, it may turn out to be almost impossible. The platform does not function properly in many popular web browsers. Error messages are unreadable for the average user, there is no possibility to create any letters, apart from the available forms, there are problems with attachments; these being just a few obstacles related to its use. It seems that allowing the use of ePUAP in court proceedings at the moment would result in its paralysis, and in many cases users would have problems handling it, and thus the problem of communication with the court would not be solved. It is no coincidence that the legislator resigned from introducing such a possibility to the provisions of the civil procedure. It is also worth mentioning that the possibility of communicating with the court via the ICT system is optional, so even in the era of the coronavirus epidemic, participants cannot be forced to communicate with the court in this way. It would also lead to a situation where digitally excluded persons could not exercise their procedural rights and obligations.

According to Art. 15zzs2, if a case is considered within the provisions of the Code of Civil Procedure, and the evidentiary proceedings have been conducted in full, the court may close the hearing and issue a judgment in a closed session after receiving written positions from the parties or participants in the proceedings. At first glance, the above solution complements Art. $226^1$ of the Code of Civil Procedure, according to which, whenever the law provides for the hearing of the parties or other persons, it may be done, as appropriate, by summoning the parties to submit appropriate statements at the meeting or by setting a deadline for taking a position in the procedural letter or by means of remote communication as long as to the identity of the person making the declaration can be confirmed with absolute certainty. In fact, one may wonder whether the second of the provisions cited above would not be sufficient in itself, and the provision of Art. 15zzs2 is some kind of statutory superfluum. After all, according to Art. $226^1$ of the Code of Civil Procedure, it is possible to oblige the parties to take a position in the pleading even by means of distance communication. The provision also uses the phrase 'as appropriate,' which undoubtedly includes in its conceptual scope also situations where 'the evidentiary proceedings have been carried out in full.' On the other hand, the provision of Art. $148^1$ § 1 of the Code of Civil Procedure states that the court may hear the case in closed session, *inter alia*, if after the parties have submitted pleadings and documents, the court finds that a hearing is not necessary, having regard to all the relevant statements and evidentiary motions. However, for this solution, an exception is provided for in § 3, namely the examination of the case in closed session is inadmissible when a party in the first pleading filed a request for a hearing, which does not apply to a situation where the defendant has recognized the claim. The legitimacy of introducing Art. 15zzs2 should be seen in the exclusion of the application of Art. $148^1$ § 3 of the Code of Civil Procedure. However, this conclusion can also be questioned because, as stated in Art. 15zzs2, the court is not obliged to issue a judgment in closed session.

In terms of deliveries to the Act of March 2, 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them, added by the Act of April 16, 2020 (Journal of Laws of 2020) r., item 695), which entered into force on 18/04/2020, a number of provisions from art. 15zzu1-15zzu10.

Until 30 September 2020, as part of the implementation of COVID-19 countermeasures, the designated operator referred to in art. 3 point 13 of the Act of 23 November 2012 - Postal Law (Journal of Laws of 2018, item 2188, of 2019, item

1051, 1495 and 2005, and of 2020, item 695), is to provide postal services referred to in art. 2 clause 1 point 3 of this Act, or by using electronic means of communication at the delivery stage. The postal service referred to above is understood as the acceptance of a registered item, and then its transport and delivery in the form of an electronic document to the addressee without the need to submit a personal signature. The service is intended for entities with a trusted profile within the meaning of art. 3 point 14 of the Act of February 17, 2005 on the computerization of the activities of entities performing public tasks (Journal of Laws of 2020, items 346, 568 and 695). 'Registered mail is also understood to mean a registered mail with an acknowledgment of receipt or an electronic acknowledgment of receipt.

The electronic document created as part of the implementation of the service in question has the power equal to the paper document from which it was transformed (Article 15zzu5).

The indicated solution could have constituted the foundations of the electronic delivery system, but it was excluded from the scope of mail sent to or sent by courts and tribunals, the prosecutor's office and other law enforcement agencies, and a court bailiff (Article 15 zzu10).

In the Act of March 2, 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and the crisis situations caused by them, there is also the provision of Art. 31 zze, according to which, during the period of the epidemic threat or epidemic state announced in connection with COVID-19, the notary public may print an electronic document drawn up by a public entity referred to in art. 2 of the Act of February 17, 2005 on the computerization of the activities of entities performing public tasks (including the court), and date the printout with a certain date, provided that this document is necessary to perform a notarial act. A printout of a document made by a notary public with a certain date has the legal force of an electronic document. A public entity, at the request of a person authorized to receive an electronic document drawn up by a public entity, provides a notary public with an electronic document via the electronic platform for public administration services (ePUAP).

Despite the repeal of Art. 14a of the Act on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws, item 1842, as amended), the need for regulation was noticed in the event courts of law cannot operate as a result of an epidemiological situation. The new provision of Art. 15zzs10 was added by the Act of May 28, 2021 (Journal of Laws of 2021, item 190), which entered into force on July 3, 2021, the state of an epidemic threat or state of an epidemic announced due to COVID-19, the president of the court of appeal, may designate another equivalent court, located in the same appeal area, as competent to hear urgent cases belonging to the jurisdiction of the court that has ceased to act, with a view to ensuring the right to the court and in order to accommodate the organizational conditions of the courts. The designation is made for a specified period of time, related to the expected period of discontinuation of activities. In the event of complete cessation of activities by all common courts in the appeal area during the period of an epidemic threat or an epidemic announced due to COVID-19, the First President of the Supreme Court, at the request of the president of the court of appeal, in whose area the courts have ceased their activities, appoints other equivalent courts, located, if possible, in the area of a neighboring appeal, as appropriate for examining urgent cases belonging to the jurisdiction of courts that have ceased activities with a view to ensuring the right to court and in order to accommodate the organizational conditions of courts. The designation is made for a specified period of time, resulting from the expected period of discontinuation of activities.

Other changes introduced by the same act apply, in particular, to conducting court hearings, the requirements of formal pleadings and deliveries of documents. Since 3 July 2021, in principle, public hearings should be conducted remotely, but the participants, including members of the adjudication panel, do not have to be in

the court building. The conduct of a remote hearing may be waived only if examination of the case in open court is necessary and their conduct in the court building does not cause excessive risk to the health of the persons participating in them. The chairman may order a closed session when it is not possible to conduct a remote session, and it is not necessary to conduct a hearing or a session in the open air.

During the period of the epidemic threat or the state of epidemic announced due to COVID-19 and within one year from the appeal of the last of them, in cases conducted under the Code of Civil Procedure, in the first pleading submitted by an attorney, legal advisor, patent attorney or the Public Prosecutor's Office of the Republic of Poland send by e-mail address and telephone number as contact data for the court. Failure to comply with this obligation results in a formal failure of the letter. This means that the obligation existing so far in economic proceedings has been extended to all other types and modes of proceedings, and its scope has also been extended to include telephone contact details. It seems to be justified by the need to ensure quick contact of the court with a professional attorney, but it does not involve the need to serve any documents in this way. Electronic mail should not be used to effect service, as for this purpose the sharing of information through an information portal has been sanctioned.

The provision of art. 15zzs9 paragraph. 2 of the Act on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws, item 1842, as amended) introduced a revolutionary change with regard to deliveries of documents. Although, as the legislator declares, the change is temporary, it can be assumed that it will last longer. Pursuant to this provision, during the period of the epidemic threat or the state of epidemic announced due to COVID-19 and within one year of the appeal of the last of them, in cases conducted under the Code of Civil Procedure, if it is not possible to use the ICT system supporting court proceedings, the court serves the barrister, counselor court letters to a legal representative, patent attorney or the General Prosecutor's Office of the Republic of Poland by placing their content in the ICT system used to make these documents available (information portal). This does not apply to letters to be served together with copies of the parties' pleadings or other documents not originating from the court. The date of delivery is the date on which the recipient reads the letter posted on the case management system. If the letter remaind unread, the letter is deemed delivered after 14 days from the date of placing the letter on the case management system. Service of a letter via the case management system produces procedural consequences specified in the Code of Civil Procedure, appropriate for the service of a document. The chairman shall order that the letter should not be served through the case management system, if it is impossible to deliver the letter due to the nature of the letter.

The introduction of the above change caused a number of discussions in legal circles. Doubts about this solution were related to the method of its implementation. In the case of IT services, there are rare situations where their introduction did not involve any test period during which users could report defects and faults related to its functionalities. Preliminary tests are usually carried out with the participation of professional testers or users who voluntarily decide to use the new solution. In the case of the news portal, the change took place very quickly and affected all professional attorneys who did not have any possibility to opt out of this form of communication between them and the court.

Many attorneys have not used the news portal so far, while the literal wording of the provisions allows the conclusion that the lack of an account in the news portal does not constitute grounds for recognizing court documents as served. It is in vain to look for provisions in the CCP or corporate acts that would impose an obligation on professional attorneys to have an account in the case management system. However, the lack of a lack of account among the reasons for withdrawing from the delivery via the portal means that the delivery will take place upon the expiry of the

deadline for collecting the letter. There are also unresolved cases where the attorney has an account on the portal, but no access to the case in which the service is to take place. Such a situation may refer to the access of an attorney to an already pending case or may refer to a new case, as the court is not obliged to automatically assign an attorney to the case. It is also not known how to calculate the time limit if the attorney gains access to the case during or after the deadline for collecting the letter.

The case management system, due to its functionality, is updated at specific times, which means that sometimes a letter placed on the portal by a court employee will not be available to the attorney until the next day. This causes problems with counting the time limit for procedural activities. The fact that access to the portal is possible 24 hours a day on all days of the week means that letters that will be received by proxies on Saturdays, Sundays or other non-working days. The procedural period will not start in such cases, which results from the provision of Art. 134 of the Code of Civil Procedure, unless the order of the president of the court is considered an exceptional case.

The login to the information portal is the user's PESEL number. This raises doubts in the context of the provisions on the protection of personal data. The President of the Polish Bar Council sent a question and a request to take a position to the President of the Personal Data Protection Office on this matter[33]. The use of the PESEL number as a login in the case management system and the processing of this data is not based on the consent expressed by the data subject, but is the result of the use of an IT solution that requires such a method of logging in to this portal. The reservations result from the fact that the use of such a login as a user identifier may lead to the disclosure of personal data to unauthorized persons. The personal data administrator is obliged to exercise due diligence in caring for personal data which is processed, and should not apply solutions that may pose a risk of disclosure of the personal data processed. The PESEL number should not be used as an identifier in public services or digital solutions. This is related, for example, to the elimination of threats related to identity theft or the unauthorized use of this number in legal actions with material consequences. The PESEL number not only reveals the date of birth or gender, but also uniquely identifies a natural person, and is also used to authorize sensitive activities.

There are also reservations about the legal basis for the functionality and use of the case management system. They are not regulated by law, but only by instructions published by the Ministry of Justice[34].

Another issue worth discussing is the use of the term "court letters" by the legislator, which, after all, has not yet been defined either in the CCP or in any specific act. The same is true of the term ‘case management system.’

When analyzing the service of documents via the portal, it should be noted that there is no provision for an attorney to request the court to serve the document in the traditional way, the exception being the need to serve a letter together with copies of the parties' pleadings or other documents not from the court. It may happen, however, that the attorney will receive a security order that will be made available to another entity, and which is not provided with an enforcement clause and does not actually require a paper form. However, due to the fact that the printout of the document from the portal will not be provided with any verification code, a third party will not be able to verify the authenticity of the document.

The doubts indicated above do not exhaust the problems related to the functioning of the new delivery method. In addition, there is a whole range of errors and doubts caused by the human factor, e.g. placing a damaged file, incorrect

[33] The request was submitted on 16.7.2021, https://www.adwokatura.pl/admin/wgrane_pliki/file-20210716-pismo-prezesa-nra-do-prezesa-uodo-31377.pdf (access 28.9.2022).

[34] https://www.gov.pl/web/sprawiedliwosc/instrukcje-obslugi-portal-informacyjnego (access 28.09.2022).

determination of the date of the shared document, incorrect marking of the document misleading the recipient as to its content. Probably more will be submitted in the near future, which is a consequence of the lack of testing of this IT solution.

## 8. Remote hearing

The possibility of interviewing the participants of the proceedings by videoconference appeared in the Polish Code of Civil Procedure in 2009 (Art. 235 CCP). However, it could take place when the interviewed person was present in the court building in whose district they were staying, and the proceedings themselves were pending before another court. This option was introduced due to the economics of the proceedings and so that the participant would not have to make time-consuming and costly trips to the court. The requirement to appear in another court was dictated, inter alia, by the need to verify the identity of a participant in the proceedings and was related to the exercise of the right to a fair trial. In practice, however, despite the technical possibilities and equipment of courtrooms, videoconferencing did not become popular.

It was only in the era of the coronavirus that the legislator decided to modify the regulations and allow videoconferences, although on quite different terms. Art. 15zzs1 point 1 of the Act of March 2, 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them states during the period of the state of epidemic threat or state of epidemic announced due to COVID-19 and within one year from the appeal of the last of them, in cases examined pursuant to the provisions of the Act of 17 November 1964,the Code of Civil Procedure:

1) a hearing or a public hearing is carried out with the use of technical devices that make it possible to conduct hearings remotely with simultaneous direct transmission of image and sound (remote hearing), however, the persons participating in it, including members of the adjudication panel, do not have to be in the court building;

2) a remote session may be waived only if examination of the case though hearing or in open court is necessary, and their conduct in the court building will not cause excessive risk to the health of the persons participating in them.

This regulation may come as a great surprise because so far a witness could be questioned at his place of stay solely due to an illness or disability, and in such situations, the evidence was carried out by a designated judge. The witness has always had direct contact with the judge. It seems that while the motivation behind introducing the possibility to participate in a court hearing from anywhere in the world was right, this solution raises serious legal doubts, in particular related to the right to a fair trial. Undoubtedly, the lack of direct contact with a judge, and the lack of a requirement to appear in court in person weakens the authority of the judiciary. A party or a witness who takes part in a hearing through sound and image transmitting devices does not feel that he is actually facing a judge. It often happens that the party does not see the judge, but only the judge sees the participant in the proceedings. Remote hearing may make it easier for participants to testify in false statements, as it is easier to lie when you do not have direct eye contact with your interlocutor.

## 9. Conclusions

The Polish civil procedure is subject to constant changes, although most of them are chaotic and inconsistent with other regulations. The regulations are partially amended, without taking into account the existing regulations. Consequently, interpretation problems arise.

The legislator tries to follow the trends, in particular, tries to adapt the regulations to new, changing technologies. In recent years, changes have been

introduced to avoid the collapse of the judiciary caused by downtime owing to the Covid-19 pandemic. However, a deeper analysis of the changes allows us to assume that the consequences that they may have on the level of the structural procedural principles were indeed considered. While changes related to the sanitary situation may be accepted in a limited period of time, in the future it would be required to introduce systemic solutions that would not restrict the right to a fair trial. The direction of changes resulting from social expectations and aimed at digital transformation of the justice system is justified and necessary. The possibility of filing pleadings and collecting them by electronic means would allow to avoid the organizational paralysis of the judiciary in the event of obstacles caused by force majeure. The Polish CCP introduced the possibility of electronic communication of participants with the court; however, there are still no executive provisions and this possibility is still hypothetical.

It is worth mentioning that technological solutions require ensuring an appropriate level of security of the processed data. Due to system imperfections, their implementation requires prior testing and providing users with the possibility of notifying errors and ensuring protection against negative consequences of technical problems related to the functioning of the IT system. Nevertheless, it seems that enabling participants to communicate electronically with the court will help to reduce the turmoil related to obstacles to the functioning of the justice system caused by unexpected events. It is also worth remembering that too much liberalization of formal requirements relating to the court procedure will violate the right to a fair trial and therefore should not be accepted. Faced with difficulties in the functioning of the courts, the fundamental rights of citizens should not be restricted in the name of ensuring their operation. It also seems that maintaining full continuity of the functioning of the courts is not an overriding good and is not at all necessary when it entails such serious consequences as violation of the right to a fair trial.

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