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Consequences of coronavirus on Swiss civil proceedings

On the basis of its constitutional authority to legislate by issuing direct orders to maintain public order, the Swiss Federal Council on April 16, 2020 enacted a COVID-19 regulation affecting prevailing judiciary and procedural rules. The regulation sets out the possibilities and requirements for Swiss civil courts to make use of audio and video conferencing instead of the ordinary conduct of proceedings in person as ordinarily prescribed by the Swiss Code of Civil Procedure. These provisions came into effect on April 20, 2020 and are meant to stay in force until September 30, 2020.

In order to guarantee the operation of the civil courts and the functioning of the justice system in civil and commercial matters during the COVID-19 pandemic, the Federal Council has made adjustments concerning the conduct of civil proceedings. Looking across the border, similar amendments are being enacted in several other jurisdictions that do not already have appropriate provisions in place.

A functioning justice system includes procedural acts by the parties and the court and thus in particular administrative and judicial negotiations and hearings. So whenever the hygiene specifications of the Swiss Federal Office of Public Health cannot be complied with, civil courts now have various possibilities to conduct the proceedings nevertheless.

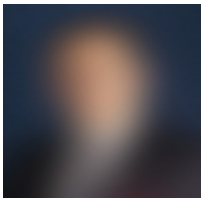
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According to the Swiss Code of Civil Procedure, court hearings are generally conducted in the presence of all persons involved (parties, witnesses, judges, court personnel, et cetera) and are held in public. In view of the current special circumstances, the Swiss Federal Council decided that this important principle must temporarily stand back to ensure the functioning of the courts and the uninterrupted running of civil proceedings.

Court hearings may now be conducted by video conference if the parties agree or if there are important reasons for doing so, especially urgency. Similarly, the interrogation of witnesses and the rendering of expert opinions by specialists can be carried out by means of video conferencing. The competent court has to ensure the right to be heard and take into account the technical capabilities of the parties.

Under the emergency dispensation, the public may be excluded from court hearings conducted by means of video conferences with the exception of accredited media professionals. The consent of the parties is not required.

When implementing the new measures, the courts must ensure that all parties have access to the sound and/or images of the involved persons contemporaneously. In addition, the courts must ensure data protection and data security. This means in particular that the transmission must be "end-to-end" encrypted and the servers used must be located in Switzerland or the European Union. In addition, safeguards against unintended data transfer to third parties and illicit access, participation or recording must be implemented.

With the same objective in mind and instances of urgency, the Swiss Federal Council created the possibility of conducting main proceedings solely by written exchange, if a hearing by means of video conferencing is not possible or unreasonable and no important reasons exist against such a method. Important reasons shall be deemed to exist in particular if lay parties without legal representation are involved in the proceedings or if the court's obligation to ask questions requires an oral hearing. The right to be heard has to be granted in any event. Under the current law, many summary proceedings can already be carried out in written proceedings.

In accordance with the fundamental principles of emergency law, the regulation has been limited in its duration to the absolute minimum. It entered into force on April 20, 2020 and shall apply until September 30, 2020. If necessary, the regulation may be repealed earlier if circumstances change and the need for it no longer exists, or it can be extended.

This new possibility for Swiss civil courts to hold hearings using phone or via videoconference is an important step towards the digitalisation of Swiss civil procedure. Without the current pandemic, this legislative development might well have been delayed. Nevertheless, it remains to be seen whether the measures imposed will survive beyond the September 30 deadline and establish themselves as a regular feature in future proceedings.

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