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Corona exceptions in court or not?

In a recent decision of the Federal Supreme Court (BGer 4A_180/2020 of July 6, 2020), the highest appeal body in Switzerland ruled that in civil proceedings the conduct of the main hearing by video conference against the will of one of the parties contravened the Civil Procedure Code (CPC). In its findings against a Zurich Commercial Court decision, it held that the lower instance could not rely on the exceptional situation resulting from the Corona pandemic to justify such a transgression. The decision is noteworthy against the following backdrop.

I. Statutory framework in civil procedure matters during Covid-19 pandemic

On April 16, 2020, the Swiss Federal Council had adopted its Covid-19 regulation affecting prevailing judiciary and procedural rules on the basis of art 185(3) of the Federal Constitution. This provision grants the federal government far reaching legislative authority in emergency situations. This regulation expired on September 30, 2020 (see Prager Dreifuss May 2020 newsletter). On September 25, 2020, the Federal Parliament adopted the new Covid-19 Act, creating the formal legal basis for the current Covid-19 regulations which were premised on the constitutional emergency norm. In doing so, Parliament passed legislation and created the statutory basis for hearings by video conference, the lack of which had been criticized by

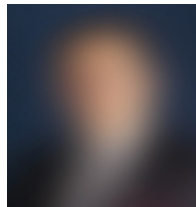
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the Federal Supreme Court in the noted decision.

Based on the amendment of September 25, 2020, the Federal Council extended the temporary Covid-19 regulation on judiciary and procedural rules until the end of the period of validity of the Covid-19 Act, i.e. until December 31, 2021. The government may repeal the regulation in whole or in part earlier if the need for it no longer exists. The amendments entered into force on September 26, 2020.

In addition to the extension of the period of validity, the amendment includes the abolition of the exception for the waiving of hearings (art. 5) as well as adjustments to the rules on the use of video and telephone conferences (art. 2(1) and (2), art. 3). Furthermore, the amendment includes an adjustment to the service without acknowledgement of receipt in debt enforcement procedures (art. 7(1)).

II. Modifications in detail

a) Use of videoconferencing (art. 2(1) and (2))

In the current conditions, complying with the recommendations of the Swiss Federal Office of Public Health when conducting a hearing with a physical presence of the court officials and the parties is hardly possible. The regulation includes provisions governing the use of video conferences under certain conditions, as provided for in the Covid-19 Act. As noted at the outset, the Federal Supreme Court had argued that this was not provided for under the CPC.

Art. 2(1) of the revised regulation now states that the use of videoconferencing solutions for hearings shall be deemed the exception and shall therefore be considered only under certain conditions these being (a), where this is mutually agreed between the parties. The requirement of mutual consent may be

waived if: (b) at least one party or its representative body so requests and provides prima facie evidence that he or she belongs to a category of persons particularly vulnerable to the coronavirus and that there are no good reasons against holding a hearing by video conference, or (c) if a member of the court belongs to a category of persons particularly vulnerable to the coronavirus and there are no good reasons against holding a hearing by video conference. Finally (d), the conduct of a hearing by video conference can still be considered without the consent of the parties in cases of particular urgency.

These rules take into account the needs of persons particularly susceptible to the coronavirus. Conceptually, this is in line with the provision on categories of persons particularly prone to the virus in the Covid-19 regulation 2, though repealed, now be found in the corresponding "Categories of particularly endangered persons" published by the Swiss Federal Office of Public Health. The provision concerns both the parties and their representation (i.e. in particular their attorneys) and the members of the court (i.e. the judges). The legitimate interests of a (counter-)party who does not consent as well as any special features of the specific case or its circumstances and other interests worthy of protection must also be considered. Finally, the court must consider in its decision in particular the technical possibilities of the parties and grant them leave to be heard on the proposal.

Art. 2(2) regulates the use of video conferences for the examination of witnesses and the provision of expert opinions. Here too, the consent of all parties is required in principle (a). As in the case of hearings, the consent of all or the other parties may be waived if a party, its legal representation, the witness or the expert person so requests and substantiates that he or she belongs to a category of persons particularly at risk from the coronavirus and there are no good reasons

against holding the examination by virtual means (b) or if a member of the court belongs to one of these categories and there are also no good reasons against holding a hearing by video conference (letter c).

b) Use of video or telephone conferences in matrimonial proceedings (art. 3)

Despite the particular importance of court hearings in person and negotiations before court in matrimonial proceedings, the regulation is premised on the legal presumption that there are no good reasons against the use of video or telephone conferences in such proceedings. Video conferences may thus be implemented where there exists the agreement of all parties (letter a). A deviation is again possible if a person participating in the proceedings belongs to a category of persons particularly vulnerable to the coronavirus (letters b and c). In contrast to the previous regulation, it is no longer possible to deviate from these conditions in instances of urgency (see our May 2020 newsletter).

c) Waiver of hearing (art. 5)

The possibility of waiving the holding of an oral hearing under certain conditions has been abolished in view of the normalized Covid-situation at the time of passing the amendment. It is though noteworthy, that the infection rates in Switzerland have increased sharply.

d) Service without acknowledgment of receipt (art 7(1))

The amendment also did away with the eased service options. The previous provisions on notification in debt enforcement and bankruptcy proceedings are now only permissible under the following two cumulative conditions:

(1.) Only after a failed ordinary attempt of service by means of an acknowledgement of

receipt by the authority (or on its behalf by the post office or another provider) is a simplified form of service with proof of delivery permissible.

(2.) The addressee of the consignment must have been informed by the delivering authority by means of a notification of the specific delivery at the latest on the day before the alternative service. In the event of a dispute, the authority which initiated the notification shall be responsible for proving that the prior information on the notification was actually and timely given to the addressee. Art. 8 of the regulation maintains the new rule of reinstating a missed time limit under regime of the interim service rules.

III. Outlook

The new act and revised regulation may embolden Swiss civil courts to hold hearings using phone or via videoconference and may prove to be 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 December 31, 2021, deadline and establish themselves as a regular feature in future proceedings.



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