Conclusions on Civil Courts Coping with Covid-19

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1 Differences and Resemblances

Civil courts have coped with Covid-19 mainly by digitising paperwork, severely restricting the presence of parties and witnesses and pivoting to remote hearings. Under normal circumstances, it would probably have taken decades to construct the infrastructure, implement the new work processes and complete the numerous other developments necessary for this manifest, inevitable and pervasive leap in digitisation. The pandemic has unleashed an unprecedented flow of creativity and innovativeness among courts, judges and lawyers. Simultaneously, the pandemic has exposed how courts have been slow to digitise, as well as some of the underlying reasons for resisting the concepts of paperless courts, remote hearings and online dispute resolution (ODR). While some of the reasons for this resistance are well justified and timely, some of the resistance seems to originate from the friction that a culture change inevitably entails.

This book contains reports from 23 countries. It is not easy to attribute differences in the way civil courts in these countries are coping with the outbreak to specific factors. Some of the variation could be attributed to the fact that the Covid-19 pandemic has hit countries with various levels of severity and 'waves' of infections and at different speeds and intervals. When the infection rate has been relatively low, courts have been able to conduct hearings in courthouses with rules imposing social distancing and sanitation, as well as careful planning of the conduct of the hearing to minimise the number of people present in the room by having witnesses testify remotely, scheduling breaks between witness testimonies or other necessary measures.[1] However, differences in the levels of infection are difficult to quantify, difficult to interpret and, above all, beyond the scope of this study. Correspondingly, access to high-speed internet and computers, as well as the general level of digitisation, are also likely to influence how courts respond in the state of exception. These differences, too, are difficult to quantify. Attributing differences to societal factors

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1 *E.g.*, Pereira Campos, this volume, Section 4.

rather than legal factors is, hence, problematic. Nevertheless, many similarities among the countries studied, beyond rapid digitisation and introduction of remote hearings, can be identified. Courts in all countries have been remarkably resilient in adapting to the new normal. However, for many reasons, the transition has not been entirely smooth. Finally, the technological leap and other advancements have opened up new horizons into the future of civil justice.

Moreover, we have asked the authors to discuss topical issues in their countries in fairly short chapters. Consequently, the chapters in the book are not exhaustive. Moreover, to some extent, debates in many countries are not always triggered by the most pressing issues. A single case might spark a long discussion. It is also important to remember that we are still in the middle of the pandemic, and unexpected turns may lie ahead.

The chapters in this book shed light on many different aspects of how Covid-19 has influenced courts, and there is certainly a plethora of issues that have not been raised within the scope of this study. Hence, in this concluding chapter, we identify and discuss the topics that we find the most interesting. Each of these topics addresses a different aspect of civil litigation during the present state of exception. First, we make some observations (Section 2) regarding the legal framework for handling cases during the pandemic. In Section 3, we explain some insights on justice without hearing. Section 4 deals with courts resolving pandemic-related issues. In Section 5, we analyse digitisation, which in many ways has been the main mechanism that has enabled courts to continue rendering justice during the pandemic. The approach in Section 5 is three-pronged: the first prong analyses technology as an essential prerequisite of courts remaining operational during the pandemic, the second prong examines different forms of scepticism to technology and the third prong concerns novel issues that the introduction of new technology has raised. Final observations on the 'new normal' are examined in Section 6.

2 Usual Rules of Civil Procedure or Pandemic Rules

A first observation of this study is that courts have largely been able to operate during the outbreak based on the regular rules of civil procedure. Some countries had technology-neutral rules: documents could be filed on paper or electronically, witness testimony could take place remotely and, at least, some hearings could be conducted remotely. Rules regarding disruptions to communications and other exceptional situations and rules allowing courts to introduce pilot schemes[2] and flexible, discretionary procedural rules rendered courts indispensable leeway in adapting to lockdowns and social distancing.[3]

2 Sorabji, this volume, Sections 3.2 and 4.
3 Hau, this volume, Section 1.

Japanese courts had already prepared business contingency plans in 2016 to enable them to continue functioning during a pandemic. These plans are based on the principles of balancing the need for keeping courts operational, at least at a minimum level, with the need to protect the judges, staff, parties and others from the disease.[4]

'Emergency' legislation enacted in the early months of the pandemic is remarkably limited, and many countries have partially repealed the emergency rules.[5] For instance, courts in some Australian jurisdictions have replaced the jury with a single judge to enable courts to continue hearing cases.[6] Some of the changes to civil proceedings can be regarded as innovations that will apply permanently, some as 'emergency' rules that could be applied in future states of exception and some as redundant or mistakes, and thus, are likely to be repealed. One could say that the usual rules of civil procedure, at least in certain countries, offer flexibility that has facilitated resilience.

3 Civil Justice without Hearings

While some courts have exploited the opportunities of new technology by pivoting to remote hearings, courts in other countries have resorted to hearings *in camera*, which are conducted without public scrutiny, or to increased use of written elements – sometimes even entirely written proceedings. The turn towards increased use of written proceedings was, at least in countries like Belgium, France and Poland, initiated *before* the pandemic,[7] but the pandemic seems to have accelerated the process.

The shift towards written proceedings should lead us to question the value of court hearings along several dimensions. It may be the case that some hearings have been redundant and only added to the cost and delay of justice, or that some arguments become clearer and more concise when presented in writing. Nonetheless, the increased use of written proceedings might also amount to a violation of the right to a fair trial, *inter alia* because a hearing enables the parties to see justice done and to cross-examine witnesses.[8] The partial displacement of final hearings challenges courts to rethink the concept of public hearings. Hearings *in camera,* which are closed to the public, could also propel a shift towards written proceedings, since the public has access to them through court records.[9]

In some countries, the pandemic has driven the use of alternative dispute resolution (ADR), particularly mediation, and other mechanisms that facilitate consensual outcomes.

4 Kakiuchi, this volume, Section 3.3.3.
5 Sorabji, this volume Section 1.
6 Bamford, this volume, Section 1.
7 Ferrand, this volume, Section 3; Rylski, this volume, Section 2; Taelman, this volume, Section 5.
8 Ferrand, this volume, Section 1.3; Silvestri, this volume, Section 1.
9 Rylski, this volume, Sections 2, 4 and 6.

The advantages of negotiated outcomes transpire when *force majeure* is omnipresent and creativity is the only way out. Closed courts and rescheduling of hearings push parties and courts to identify alternatives to regular court proceedings, both within and outside courts. In this regard, the pandemic could help overcome reluctance towards mediation and other forms of ADR.[10] Simplified arbitration proceedings have been introduced to make arbitration a more accessible and attractive alternative to litigation in commercial disputes,[11] and new rules have been introduced to enable the parties to shift from litigation to arbitration.[12] Obviously, ADR reduces the need for court hearings, but it may still entail a 'hearing' within the scope of the alternative process.

Encouraging the parties to settle within the framework of regular civil litigation is another option to forgo hearings, as is the introduction or increased use of simplified proceedings. Avoiding hearings could also be an incentive to attempt to resolve cases on procedural grounds, because hearings are mandatory only when the courts rule on the merits. Moreover, courts could attempt to reduce the scope of the hearing by employing these techniques or a combination of them, such as by dismissing part of the case on procedural grounds and inducing the parties to settle the remaining issues.

4 Courts Resolving Disputes Related to the Pandemic

In Brazil, courts have stepped in to contribute to an adequate response to the exceptional situation; in so doing, they needed to reconsider the doctrine of self-restraint and subsequently struck down political decisions that violated generally accepted scientific knowledge.[13] This illustrates the potentially pivotal role of courts in the pandemic. In regard to the case law induced by the pandemic, the paramount task for the legal community is to separate procedural innovations that should be retained as part of regular civil proceedings from those that need to be retained not as part of regular rules but as a body of the 'procedural law of disasters'.[14] Even though courts have overruled decisions of other state powers during the pandemic with good reason, it is not self-evident that they should continue doing so after the pandemic.[15]

Courts are also involved in managing life in the state of exception. Singapore enacted a special procedure for obtaining temporary relief in disputes arising from non-performance

10 *E.g.*, Delgado Suárez, this volume, Section 4; Kakiuchi, this volume, Section 5; Petersen, this volume, Section 2; Silvestri, this volume, Section 2; Shen, this volume, Section 3.
11 Petersen, this volume, Section 2; Silvestri, this volume, Section 3.
12 Shen, this volume, Section 3.
13 Didier, Zaneti and Peixoto et al., this volume, Section 5.1.
14 Didier, Zaneti and Peixoto et al., this volume, Sections 3-5.
15 Didier, Zaneti and Peixoto et al., this volume, Section 6.

of a contractual obligation due to the pandemic.[16] German courts have faced a tide of cases, wherein restrictions such as curfews have been challenged and claims for compensation due to these measures have been made, either between a private entity and the government or between two private entities, such as insurance companies and their clients claiming compensation for business closure.[17] Courts in Belgium and Lithuania have witnessed a drop in the number of certain types of cases, but the number is expected to grow in 2021.[18] Differences among countries in the number of cases filed should be analysed after the pandemic is over to uncover whether the differences are of a temporal nature (*i.e.*, the waves of pandemic-related cases hit countries at different times) or whether some underlying mechanisms result in a surge of cases in some countries but not in others.

5 Technological Innovations

5.1 Technology As an Integral Element of Resilience

The most prominent and common element among the many contributions in this book is a rather obvious one – the use of technology. For some countries, it took a pandemic to force courts to pivot to online hearings and to finally use the technology already installed in the courts.[19] All judiciaries studied have attempted to keep their courts operational. During the first wave of the pandemic, in the early months of 2020, courts had to halt cases, at least for a short period, and many hearings were discontinued. However, in many countries, citizens could reach courts via telephone or electronic communication, and courts soon put more technology into use for urgent cases (domestic violence, certain types of parental responsibility cases, interlocutory measures, etc.).

Soon after the outbreak, courts started experimenting with technological solutions that would enable them to operate, if not normally, at least with as little disruption as possible. The willingness and capability to innovate has been remarkable. Judiciaries that had implemented electronic case filing, case management, remote communication or other types of technology before the pandemic, such as China, Denmark, Finland, Singapore and Taiwan, had a tangible advantage vis-à-vis those judiciaries that had taken fewer such steps, since judges and lawyers had already acquired experience in (at least partly) paperless proceedings, remote hearings or both.[20] In these countries, the written elements of civil

16 Pinsler, this volume, Section 3.
17 Hau, this volume, Section 2.1.
18 Taelman, this volume, Section 6; Vėbraitė, this volume, Section 1.
19 Uzelac, this volume, Section 3; Vėbraitė, this volume, Sections 1 and 2.
20 *E.g.*, Ervo, this volume, Section 1; Fu, this volume, Sections 1 and 2; Pereira Campos, this volume, Section 3; Petersen, this volume, Section 1; Pinsler, this volume, Section 1; Shen, this volume, Section 2.

proceedings could be performed with only minor disruptions. Although online case management platforms are not perfect (e.g., it has not been possible to pay court fees on the Taiwanese platform), they have, nevertheless, been highly advantageous.[21] The better the technological infrastructure (as measured *inter alia* by the percentage of citizens having access to high-speed internet, laptop computers and tablets) in a country or region, the smoother the transition to online proceedings is likely to be. In some respects, courts in several countries have paradoxically become more accessible during the pandemic, because electronic communication is much more convenient than paper-based communication.[22]

Pivoting hearings with a limited scope (e.g., case management and settlement hearings) online is relatively easy, and lawyers appreciate that they do not have to spend time travelling across their town or country to attend a short hearing at court. On the other hand, hearings on the merits are more challenging to conduct remotely or in a hybrid format. However, courts in countries where case management and preparatory hearings were conducted remotely, and witnesses and experts were allowed to testify remotely, before the pandemic, had an advantage in being able to transfer the skills obtained in more limited settings to the final hearing or trial.[23] The pandemic has influenced the relation between telephone hearings and video hearings by improving the quality of remote hearings, since a hearing using video is superior to one using only telephone communication.[24] The stronger the tradition for a trial or main (final) hearing where witnesses are examined and parties argue their cases, the more difficult it is to replace the hearing with fully or partly written proceedings, and thus the more urgent the need for remote hearings will be.

Moreover, some countries were in the process of digitising courts and implementing online courts, and they were therefore in a position to expedite the process by expediting the enactment of draft versions of rules, widening the scope or duration of pilot projects and so forth.[25] The pre-pandemic idea of a remote hearing was based on at least the judge(s) and court staff being present at the court: conducting hearings with everyone participating from their respective homes was unimaginable. Remote participation of judges raises several questions. For example, can judges use their personal computers (rather than equipment provided by the court)?[26] What happens if the judge participates from abroad?[27]

In the absence of specific technologies at hand, courts put readily available technology into use: they allowed parties to serve documents by email and Twitter[28] and file briefs,

21 Shen, this volume, Section 2.1.
22 *See*, particularly Uzelac, this volume, Section 3; *see also* Fu, this volume, Section 2 on transparent online courts.
23 *E.g.*, Bamford, this volume, Section 2.1; Ervo, this volume, Section 3.
24 Sorabji, this volume, Section 3.1; Nylund, this volume, Section 2.
25 Sorabji, this volume Section 1.
26 Hau, this volume, Section 2.2.
27 Sorabji, this volume, Section 3.1.
28 Marcus, this volume, Section 3.1.

submissions and evidence via email;[29] held hearings using Zoom, Teams, Skype and similar software,[30] and broadcasted hearings on their websites, YouTube or other platforms.[31] Singapore implemented Zoom Rooms to enable self-represented litigants to attend hearings remotely.[32] Despite the variation in the level of digitisation before the pandemic and variation in the specific solutions chosen, courts across the world have demonstrated an astonishing flexibility and willingness to experiment to continue their operations. As a result, later lockdowns have had fewer tangible impacts on the operation of courts. Digitisation now seems omnipresent in the civil justice system, including ADR, since mediation services have also shifted online.[33] One could claim that ODR is finally experiencing a large-scale dawn.[34]

5.2 Resistance to Technological Innovations

Despite courts embracing new technology, resistance to remote hearings is still widespread and multifaceted. Virtually every contribution in this book describes some reluctance to engage in remote hearings, but resistance appears to be more pronounced and widespread in some countries.[35] Rigid procedural rules and practices are also relevant in this regard, because they encumber innovations and adaptations,[36] while change necessitates agility, and flexible procedural rules and judicial discretion expedite swift transitions and adaptation to new circumstances. The mindset of judges and lawyers is vital in this regard, as well:[37] innovation requires an open mind and willingness on the part of judges and lawyers to exploit the available opportunities and experiment with new methods. Reports on federal countries in this book, notably Australia,[38] illustrate tangible differences among states or territories within the same country in the level of digitisation before the pandemic. These differences have repercussions for the equal access to justice during the state of exception.

Moreover, the absence of appropriate technology is far from the only challenge for digitising courts. Many chapters in this book discuss how persistent efforts to digitise their courts and to facilitate the use of remote and hybrid hearings have largely failed or been postponed. The reasons for failure to implement paperless courts and remote hearings have often been mundane. Budget overruns, high estimated costs, diverging views of the

29 Bamford, this volume Section 2.
30 *E.g.*, Pereira Campos, this volume, Section 4.
31 *E.g.*, Krans, this volume, Section 3; Sorabji, this volume, Section 1.
32 Pinsler, this volume, Section 2.
33 Silvestri, this volume, Section 2.
34 *E.g.*, Kakiuchi, this volume, Section 5; Shen, this volume, Section 3.
35 Uzelac, this volume, Section 5.
36 Galič, this volume, Section 2.
37 Galič, this volume, Sections 2 and 3.
38 Bamford, this volume, Section 1.

technical solutions and functions of digital platforms, and lack of proper funding appears to be the dominant reason for delayed digitisation in many countries, including affluent, technologically advanced countries, such as Australia, Denmark and Japan.[39] Nevertheless, practically all countries in this study were in a process of digitisation of courts before the pandemic and had foreseen remote and hybrid hearings.

Digitisation raises many questions. For instance, several authors in this book describe how lawyers and judges are sceptical about the veracity of digital documents. They assume that digital filing is more vulnerable to abuse because false documents are easy to produce and difficult to detect. Chinese courts have implemented blockchain and other technologies to enable courts to verify documents.[40] Interestingly, digital documents do not seem to be a major concern in all countries, at least not based on the reports in this book. It would be interesting to investigate differences is attitudes among countries and, in the event that palpable differences are found, the sources of these differences: do they reflect differences in attitudes towards digitisation in general, differences in the level of digitisation in general or other factors (e.g., variation in the trust in state organs)? Moreover, we need to understand whether lawyers are suspicious of digital documents in court proceedings in general or mainly in some situations where verification of the document might be particularly important or problematic, such as uncontested cases.

Remote hearings also entail some inherent problems. For instance, how can the public gain access to remote hearings? How can courts mitigate the risks related to some of the built-in functions of these services, such as the possibility of making unauthorised recordings and 'Zoom bombing' (i.e., unauthorised disruptive access to meetings)?[41] Other problems are of a more practical nature. Jury trials are practically impossible to conduct online, since jurors could be distracted, hence risking the fairness of the trial.[42]

The digital divide – that is, the unequal access to high-speed internet, IT equipment and IT skills among people living in different parts of a country and people from different social strata – is also a significant hindrance to digitisation of court proceedings in many countries.[43] In cases where the digital divide could render justice less accessible for some groups of citizens, it is understandable that courts resist digitisation. The digital divide can be overcome, however, as the use of Zoom Rooms in Singapore demonstrates.

Attitudes towards digitisation and new technologies have been, and still are, a serious impediment to the shift to online and remote proceedings. One source of resistance is found in the inevitable initial efforts and additional work needed to implement technological

39 Bamford, this volume, Section 2.1; Kakiuchi, this volume, Section 4; Petersen, this volume, Sections 1 and 2.

40 Fu, this volume, Section 2.

41 *See* Marcus, this volume, Section 3.5.

42 Marcus, this volume, Section 3.4.

43 Delgado Suárez, this volume, Section 2.

shifts, including the time needed to learn to navigate new systems and the need to develop new routines. Incomplete or incompatible systems are a source of irritation and a consistent source of frustration: the advantages of digital filings are lost if the court must make paper copies of the files.[44] This kind of fragmentary digitisation understandably breeds resistance to digitisation. Similarly, unsystematic regulation of online processes also hampers the leap into digitisation.[45] Moreover, many judges and lawyers question, with good reason, whether the technology implemented complies with the standards of data protection.[46] Judges in some countries face the challenge of unreliable electronic case management platforms, and, thus, many of the advantages of digitisation disappear into thin air.[47] Nevertheless, the pandemic demonstrates the need for court proceedings to keep pace with technological advances; hence, it is likely to induce many judges and lawyers to reconsider their attitude towards online courts.[48]

5.3 Several Unresolved Issues Related to the Use of Technology

Several authors pose issues related to the quality of regulation for online courts, *inter alia* that the criteria for determining when a remote hearing is appropriate are too rudimentary.[49] A related issue concerns the criteria for replacing a hearing with written proceedings.[50] Should the court take into account that one or both parties, or the court itself, lack the equipment needed to participate in a videoconference and that the remote hearing must accordingly be organised via telephone? Even if some types of cases, such as small or commercial cases, were conducted fully or partly online, the rules and practices concerning these cases might not be appropriate for other types of cases.[51] For instance, litigants in commercial cases usually have far better access to technology than litigants in smaller cases, and managing a hearing in a legally and factually simple case is obviously different to managing a hearing in a complex case.

The 2019 reform of Polish civil proceedings has some elements that might endanger fair trial rights, such as the reduction in the public nature of the proceedings. The pandemic could impel courts to maximise the potential of the new rules regarding *in camera* hearings and dismissal of unfounded claims, although the rules minimise public scrutiny and other fair trial rights. Will Polish courts revert to old habits, keep their new habits or chart a new

44 *E.g.* Bamford, this volume, Section 2.2.
45 Silvestri, this volume, Section 2.
46 Taelman, this volume, Section 3.
47 Uzelac, this volume, Section 5.
48 Rylski, this volume, Section 8.
49 *E.g.*, Bamford, this volume, Section 2.2; Nylund, this volume, Section 3.
50 Ferrand, this volume, Section 1.
51 Fu, this volume, Section 3.

path after the pandemic?[52] In Croatia, 'emergency' procedural rules that brought court proceedings to a halt have had severe repercussions for access to justice.[53] Rules enacted with good intentions can have draconian consequences.

Remote and hybrid hearings raise a number of questions, relating to both practice and principle. Is it appropriate for courts to conduct cross-examination remotely? How can we ensure that the witness is not unduly distracted or instructed when we are not able to see what happens behind the camera?[54] How can we ensure equal access to justice if many citizens (and perhaps some lawyers as well) do not have access to high-speed internet and appropriate devices to attend hearings remotely? Is it possible to manage a remote hearing with many witnesses? The absence of uniform guidelines for courts results in divergent practices.

Remote hearings also result in question of a fundamental nature. Does remote attendance influences our perception of a witness or party, and if so, how? Is something essential lost if non-verbal language is reduced in remote hearings?[55] Do the background, angle of the camera, lightning and other factors influence whether we consider the witness trustworthy? What is the impact of a shaky internet connection?[56] Does remote attendance create additional distance between the court and the person attending remotely, or does it shorten the distance since the cameras provide a close-up view of the person speaking? Could a hybrid format entail a disadvantage when one party is physically present while the other attends remotely, or when the witnesses for one party testify at court while the witnesses for the other party testify remotely?[57] A strongly related matter is the relation between proportionality and the use of technologies.[58]

Conducting mediation sessions online raises several questions, such as how to ensure confidentiality when it is virtually impossible to verify that only the party (and the legal counsel) are present in the room, as well as how to create an atmosphere of trust and proximity online.[59] In some disputes, emotional distance is disadvantageous for the success of mediation, while in other disputes it might, in contrast, facilitate resolution.

Digitisation of civil proceedings will continue to be an important research area in civil procedure law.

52 Rylski, this volume, Sections 6 and 8.
53 Uzelac, this volume, Section 2.
54 *E.g.* Vėbraitė, this volume, Section 2.
55 Krans, this volume, Section 4.
56 Krans, this volume, Section 4.
57 Nylund, this volume, Section 3.
58 Piché, this volume, Section 2.
59 Silvestri, this volume, Section 2.

6 Resilience, Resistance and Reorientation

Since the outbreak of the pandemic, the R (regarding the infection ratio) has become infamous, because it plays an important role in many countries when governments determine the measures to combat the virus. In some respects, that appears to be the case in this study as well, albeit using different Rs – resilience, resistance and reorientation.

Although the pandemic is far from over at the time of this writing, and the future remains unknown, the contributions in this book almost unanimously argue that there is no way back to the old normal. It is too soon to tell exactly what the new normal for civil courts will be like, but it seems sensible not to 'waste the crisis'. Hopefully, reorientation is around the corner.

Digitisation of court proceedings is irreversible, particularly in regard to paperless courts (*i.e.*, digital filing, digital service and digital evidence). The pandemic has exposed outdated rules and practices in many countries, and the need to revise legislation and reimagine litigation (and dispute resolution) practices is more acute in some countries than in others.[60] One of the main questions to be addressed after the pandemic will be which innovations should be kept, refined and proliferated across the civil justice system. Moreover, which innovations should be kept as part of the domain of civil procedure for emergencies, and which of the adaptations are only disruptive, with no tangible advantages?[61]

Limited access to courts and hindrances to procedural steps have delayed the course of the proceedings, and time limits have been postponed, all of which have caused a backlog of cases.[62] Moreover, a flood of submerged disputes may resurface after the pandemic, and pandemic-related cases might surge as well. Courts clearly need a strategy to deal with the possible influx of new cases and deal with the pandemic-induced backlog at the same time. Simplified proceedings, joinder of cases and pilot cases are all possible solutions, as is the use of artificial intelligence.[63]

Remote and hybrid hearings will be part of the new normal in many countries. However, several authors raise questions related to psychological and cognitive aspects of remote and hybrid hearings. We need to understand whether and how the background, camera angle, other persons present and other factors influence the audience's perception of the

60 *E.g.*, Galič, this volume, criticises Slovenian law.

61 *See also*, European Commission for the Efficiency of Justice (CEPEJ), CEPEJ Declaration: Lessons Learned and Challenges Faced by the Judiciary during and after the Covid-19 pandemic. Ad hoc virtual CEPEJ plenary meeting Wednesday 10 June 2020, CEPEJ (2020) 8 rev, p. 4.

62 The Netherlands is an interesting case in this regard, since postponed hearings in some types of cases has enabled judges to work on cases that can be resolved without a hearing. As a result, the backlog of some types of cases has been reduced during the pandemic.

63 Delgado Suárez, this volume, Section 5; Fu, this volume, Section 2.

person giving testimony, as well as how to overcome problems relating to unstable connections and accessibility of technology. Are some types of cases generally more amenable to being conducted online or in hybrid hearings?[64] Research is needed to ensure the quality of remote hearings by adopting research-based policies regarding remote and hybrid hearings.

Technology challenges many of the foundational tenets of civil procedure and has exposed the rigidity of the 'old' paradigms, perhaps more palpably in some countries than in others.[65] The large-scale introduction of novel technology and shifts in the mode of 'hearing' cases blur the boundaries between oral and written proceedings. Traditionally, written communication is asynchronous and associated with a significant delay between sending and receiving information, as well as a markedly formal style, whereas oral communication requires the synchronous presence of all persons involved in the communication. However, these conceptions are challenged by case management platforms and emails, which allow for simultaneous written communication and can be informal; voice messages, which allow for asynchronous oral communication, and remote hearings. Perhaps the pre-pandemic structure of proceedings, with its clear division between written and oral elements, will dissolve or new patterns will be established. This would be the perfect opportunity to elevate cooperation to the core of proceedings by requiring judges and parties to use a single document as a basis for collaboration to pinpoint the core disputed issues.[66]

'Zoom fatigue' (*i.e.*, the tendency for video calls to drain personal energy levels) might be an impetus for making hearings more efficient and focused and might make us question whether some rituals are outdated. The concept of 'hearing' should also be reconsidered. Perhaps 'seeing' – that is, parties having the right to see and be seen by their judge – is more important than hearing and being heard by the judge.[67] In this regard, video communication might entail several advantages, *inter alia* with cameras enabling close-up images. The displacement of being heard by being seen and seeing could also be an impetus for rethinking whether and when a hearing should be scheduled and which parts of the case should be discussed.

New technology renders hearings much more affordable and, thus, also proportionate in small(er) cases.[68] Simultaneously, increased emphasis on proportionality and lower costs could spur a shift towards predominantly written proceedings, where hearings would

64 Krans, this volume, Sections 4-6; Nylund, this volume, Section 4; Piché, this volume, Section 2.
65 Delgado Suárez, this volume, Section 3.
66 Hau, this volume, Section 3.
67 Krans, this volume, Section 3.
68 Piché, this volume, Sections 2 and 4.

be the exception rather than part of the default process, or in other changes that may have repercussions for fair trial rights.[69]

Changes in the use of written and oral elements in court proceedings should be the result of careful deliberation, not an easy way out of dissatisfactory practices. Consequently, we should ask when, why and how hearings are superior to written proceedings, and we should not assume that small cases are most suitable for written proceedings, remote hearings or both.[70] Flexible, discretionary rules have clearly been advantageous in many countries. Countries with more rigid approaches to civil justice should reconsider their approach.

Since ADR has become a more attractive option as court proceedings have been less accessible, it will be interesting to observe whether familiarity with ADR during the pandemic breeds continued use of ADR processes after the pandemic. Will parties continue to prefer mediation and arbitration to litigation, and will mandatory mediation schemes introduced shortly before or during the pandemic be successful after the pandemic?[71] Finally, if parties continue to favour ADR processes over litigation, how will this influence the role of courts in society?

Before the pandemic, ODR was regarded some times as a set of obscure processes serving a small niche, such as platforms for trade on the internet. Today, courts across the globe have moved some of their functions online. The demarcation between 'regular' dispute resolution and ODR becomes less clear when electronic filing and case management is omnipresent and remote hearings are the new normal.

In regard to reorientation, a final question can be raised: what is the exit strategy of courts regarding the pandemic? How do courts envision the transition to life after the pandemic, when all the cancelled and postponed hearings will need to be dealt with, and when best practices of the digital leap will need to be preserved?[72] Since the countries have taken similar steps concurrently, international cooperation in drafting the map for the future of civil litigation could be more fruitful than ever.[73] A joint effort to identify best practices and to reimagine civil courts and court proceedings in civil cases could be beneficial. More collaborative research to guide courts in making a successful transition into post-pandemic times seems advisable.

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69 Ervo, this volume, Sections 5 and 6.

70 Piché, this volume, Sections 2 and 3.

71 Shen, this volume, Section 5; Petersen, this volume, Section 2.

72 On exit strategy, *see also* European Law Institute, ELI Principles for the COVID-19 Crisis, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf, principle 15.

73 Hau, this volume, Section 3.