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## COVID-19 and the Courts: U.S. and German Courts Managing Civil Dockets in a Crisis

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### I. INTRODUCTION

While the COVID-19 crisis may have been brewing for some time, neither the U.S. nor the German court systems seemed to prepare for it until mid-March 2020, when spiking infection numbers forced them to respond. Since that time, both the U.S. and German court systems have

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employed a patchwork of measures meant to reduce the risk of infection to all involved, even if at the expense of expeditiously resolving legal disputes.

In this Article, we look at the sources of the courts' authority—in Germany, the courts of general justice, and in the United States, the federal courts—for managing their civil dockets in the face of the COVID-19 pandemic.<sup>1</sup> America's state courts have, of course, also responded to the COVID-19 crisis; surveying so many different court systems, with widely varying responses,<sup>2</sup> is beyond the scope of this Article. Then we review the measures the courts have implemented, how they have played out in the two countries, and consider their implications, particularly as the COVID-19 crisis drags on.

## II. FEDERALISM AND CIVIL DOCKET MANAGEMENT AUTHORITY IN GERMANY AND THE UNITED STATES: AN EXERCISE IN CONTRASTS

Germany and the United States both have federal systems of government. But the way in which that manifests itself in each country's court system differs substantially.

The United States has essentially parallel court and legal systems, with the federal judiciary funded by the federal government primarily to resolve disputes about federal law—something it does with a flexible procedural framework, the Federal Rules of Civil Procedure, and a great amount of local discretion.<sup>3</sup>

Individual U.S. federal courts possess the inherent power “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”<sup>4</sup> That inherent authority encompasses the power to manage the civil dockets<sup>5</sup> and allows courts to manage their affairs locally and creatively in the face of new challenges and technologies.

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1. For ease of use, German sources are formatted to match with their U.S. analogues.

2. Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave a Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies>.

3. *Comparing Federal & State Courts*, U.S. COURTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Sept. 29, 2020); *Court Role and Structure*, U.S. COURTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Sept. 29, 2020).

4. *Link v. Wabash R.R. Co.*, 370 U. S. 626, 630–31 (1962).

5. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016); *Landis v. N. Am. Co.*, 299 U. S. 248, 254 (1936).

The German court system, by contrast, does not consist of parallel court systems. Instead, generally, the state courts serve as the “backbone” of the German civil justice system.<sup>6</sup> Those courts are organized and funded primarily by the states, or *Bundesländer*,<sup>7</sup> but they apply primarily federal law pursuant to statutory federal procedure and are subject, in the highest instance, to appellate review by the Federal Supreme Court, or *Bundesgerichtshof*.<sup>8</sup>

German courts’ primary source of authority for managing their civil cases is the German Code of Civil Procedure. It is a highly detailed federal statutory code applicable in all of Germany’s sixteen states and supplants any sort of inherent, general power to adopt procedural measures.<sup>9</sup> Thus, in responding to evolving technology or a sudden crisis such as COVID-19, courts are restricted to what German lawmakers have already expressly authorized.

### III. COURT MEASURES IN THE COVID-19 CRISIS

While their sources of authority differ, both German and U.S. courts began using theirs in March 2020 to respond to the COVID-19 crisis. A common initial response—and one still popular months later—has been “kicking the can,” through extensions and stays.

#### A. *Pushing Back Deadlines, Staying Matters*

Many courts’ first response to the COVID-19 crisis, in Germany as well as the United States, was to put civil matters on hold.<sup>10</sup> Pushing the pause button made sense early on: it gave the courts, and everyone else, time to sort out how to move forward under very different circumstances.

The German Code of Civil Procedure provides for the automatic suspension of proceedings under very restrictive conditions: in the event of a war or other event that causes the court to cease activities.<sup>11</sup> Cessation of activities is, however, an extreme requirement no longer met as soon as

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6. PETER MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 51 (Carolina Academic Press, 2004).

7. *Staatliche Aufgaben sind grundsätzlich Ländersache*, DEUTSCHER BUNDESTAG, [https://www.bundestag.de/dokumente/textarchiv/2014/47689345\\_kw02\\_grundgesetz\\_30-213968](https://www.bundestag.de/dokumente/textarchiv/2014/47689345_kw02_grundgesetz_30-213968) (last visited Sept. 29, 2020).

8. MURRAY & STÜRNER, *supra* note 6, at 51, 60.

9. *Id.* at 11.

10. Hon. Karen L. Stevenson, *Telephonic Hearings in a Pandemic*, in A.B.A. LITIG. NEWS, Summer 2020, Vol. 45, No. 4, at 18.

11. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 245, [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html).

a judge handles e-mails and calls from home. Another provision allows German courts, *ex officio*, to suspend proceedings where a party is cut off from communications with the court due to pertinent authorities' having issued orders leading to the situation.<sup>12</sup> As soon as the party can call the court and receive mail, particularly if the oral hearing is not imminent, the applicability of this statute becomes questionable at best.<sup>13</sup>

Beyond these limited circumstances, German courts have no authority to stay proceedings *sua sponte*. Instead, the parties must move unanimously for a stay, and the court must determine that a stay is “suitable for the purpose intended in light of the pendency of settlement negotiations or of other sound reasons,” surely an easy mark to meet under present pandemic circumstances.<sup>14</sup> But unanimity and litigation rarely go hand in hand, likely limiting the potential for staying proceedings.

Beyond putting entire matters on ice, German courts explored extending deadlines to accommodate parties in a pandemic-stricken world. German courts can easily extend deadlines in civil matters once upon a party's motion, provided the moving party can show substantial cause.<sup>15</sup> Multiple extensions, however, require that the non-moving party be heard before any such motion may be granted.<sup>16</sup> That multiple extensions will be granted therefore cannot simply be assumed—though currently, in practice, courts are granting extensions generously.<sup>17</sup>

Similarly, in the United States, many courts stayed and extended deadlines for periods ranging from a few months to indefinitely.<sup>18</sup> For example, the United States District Court for the Southern District of New York enacted local orders indefinitely suspending all jury trials “because it is not yet possible to call *venires*.”<sup>19</sup> The standing order leaves “all trial-specific deadlines” within individual judges' discretion.<sup>20</sup> And the United States District Court for the Southern District of California granted a motion to stay all proceedings indefinitely based on the fact that “[c]ounsel

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12. *Id.* at § 247.

13. Frank Zscheschack, § 13 *Zivilverfahren in Zeiten von Corona* ¶¶ 11-13, COVID-19 RECHTSFRAGEN ZUR CORONAKRISE (Hubert Schmidt ed., 2020).

14. *Zivilprozessordnung [ZPO]* [Code of Civil Procedure], § 251 (Ger.).

15. *Id.* at § 224(2).

16. *Id.* at §§ 224(2), 225(2).

17. Zscheschack, *supra* note 13, ¶ 99.

18. Eddy Salcedo & Owen R. Wolfe, *Many Courts Delay Civil Litigation Due to the Pandemic, but Some Courts Are Pushing Back*, SEYFARTH SHAW (Mar. 30, 2020), <https://perma.cc/6N3J-ZKB5>.

19. *Second Amended Standing Order In Re: Corona Virus/COVID-19 Pandemic*, 20 Misc. 196 (S.D.N.Y. June 12, 2020), available at <https://perma.cc/S8UM-Z2CS>.

20. *Id.*

are unable to go into the office to work” and have experienced difficulties “obtaining documents and information.”<sup>21</sup> The court held off from setting further deadlines, instead directing the parties to submit periodic joint status reports “on their current working conditions and abilities to properly litigate [the] case.”<sup>22</sup>

Whether to extend deadlines and stay matters is, however, left up to the U.S. courts’ discretion, and some courts have been less giving than those mentioned above. The United States District Court for the District of Kansas, for example, held that the COVID-19 crisis, standing alone, was not a sufficient reason to stay discovery indefinitely.<sup>23</sup> And a federal court in the state of Washington held that the parties failed to justify a joint request for an extension of case deadlines due to a lack of “specifics concerning any discovery that they have been unable to obtain due to circumstances surrounding the COVID-19 pandemic” and a failure to explain “why they cannot conduct [discovery, including depositions] by telephone or other remote means.”<sup>24</sup>

Even before the current COVID-19 crisis, however, civil litigation in both Germany and the United States had been widely perceived as taking too long and thereby costing too much.<sup>25</sup> The costs include: parties not wanting to bring or continue pursuing meritorious claims due to economic pressure; consumption of judicial time and resources due, e.g., to personnel turnover; and reduced public confidence in the judicial system.<sup>26</sup> These problems may well be exacerbated during the COVID-19 crisis, in which “many civil court cases have been placed on the backburner or even completely ignored.”<sup>27</sup>

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21. *Collier v. California*, No. 19-cv-1599-BAS-RBM, slip op. at 1 (S.D. Cal. Mar. 24, 2020), <https://www.courtlistener.com/recap/gov.uscourts.casd.643712/gov.uscourts.casd.643712.22.0.pdf> (granting motion to stay proceedings indefinitely and directing parties to submit joint status reports).

22. *Id.* at 2.

23. *Nekouee v. Privitera Realty Holdings, L.L.C.*, No. 19-2773-JAR, slip op. at 3 (D. Kan. Mar. 24, 2020), available at [https://ecf.ksd.uscourts.gov/cgi-bin/show\\_public\\_doc?2019cv2773-25](https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2019cv2773-25).

24. *Velicer v. Falconhead Capital, L.L.C.*, No. C19-1505 JLR, 2020 WL 1847773, at \*2 (W.D. Wash. Apr. 13, 2020).

25. Joachim Wagner, *Gerichtsverfahren in Deutschland dauern zu lange*, DIE WELT (May 21, 2017), <https://perma.cc/RW3M-G5CM>; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 1, available at [https://www.uscourts.gov/sites/default/files/iaals\\_civil\\_case\\_processing\\_in\\_the\\_federal\\_district\\_courts\\_0.pdf](https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf). [hereinafter CIVIL CASE PROCESSING].

26. CIVIL CASE PROCESSING, *supra* note 25, at 1.

27. *Justice Delayed: Civil Cases Pile Up Amid the Coronavirus Pandemic*, NYC STUDIOS (Oct. 6, 2020), <https://www.wnystudios.org/podcasts/takeaway/segments/civil-cases-pile-amid-coronavirus-pandemic>.

*B. Flight to the Written Word*

Another strategy that German and U.S. courts have explored during the COVID-19 crisis is resolving disputes, to the greatest extent possible, solely in writing.

In Germany, so long as the parties consent, the court may render its next decision in a dispute without any oral hearing.<sup>28</sup> The court simply sets a deadline for written submissions, including documentary evidence, as well as the date on which its decision will be pronounced.<sup>29</sup> A decision without an oral hearing is permitted only within three months of the parties' consent, however.<sup>30</sup> And without party consent, the courts' hands are tied, and an oral hearing is required.

German writing-based proceedings, while theoretically useful during a pandemic, have some striking limitations and disadvantages. For one, the formal taking of evidence is not possible without an oral hearing.<sup>31</sup> Further, if a party fails to meet a deadline, the court may not issue a default judgement in the absence of an oral hearing.<sup>32</sup> Additionally, if, after having elaborately discussed the facts and the legal arguments with the parties—a common practice in German civil litigation, a party brings new facts or amends its arguments, the court may nevertheless not issue a judgment after the date it had set for its next decision; rather, it must set a new deadline. And because the parties' consent covers only one (the immediate next) decision and does not represent a blanket consent to written-only proceedings, the parties' consent is effectively wasted and would need to be obtained anew for any further writing-based decisions.<sup>33</sup> Finally, parties rarely waive oral hearings because they give attorneys the opportunity to convince the judges of their arguments face to face and allow attorneys to experience and respond to non-verbal cues.<sup>34</sup> At the end of the day, therefore, conducting proceedings in writing is a tool of only limited utility

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28. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 128(2) (Ger.); Benedikt Windau, *Die Verhandlung im Wege der Bild- und Tonübertragung*, 73 NEUE JURISTISCHE WOCHE (NJW) 2753, 2754 ¶ 7.

29. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 128(2) (Ger.) (also requiring that the decision issue within three months of the parties' consent to resolution without an oral hearing).

30. *Id.*

31. Zscheschack, *supra* note 13, ¶ 92.

32. Richard Zöller & Reinhard Greger, ZPO, § 128, 7 (33d ed. 2020).

33. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 128(2) (Ger.).

34. *Id.* at § 355; Reto Mantz & Jan Spoenle, *Corona-Pandemie: Die Durchführung des schriftlichen Verfahrens gem. § 128 Abs. 2 ZPO als Alternative zur Präsenzverhandlung*, 74 MONATSSCHRIFT FÜR DEUTSCHES RECHT (MDR) 12, 703, 705.

to the German courts to keep their civil dockets flowing during the pandemic.

For U.S. attorneys, determinations based solely on written submissions where salient facts are disputed are hard to imagine. But decisions on the briefs in disputes of law are nothing new. Since the start of the COVID-19 crisis, courts such as the U.S. Court of Appeals for the Ninth Circuit have increasingly relied solely on briefs, without oral argument, particularly in civil matters.<sup>35</sup> In the U.S. Court of Appeals for the Fourth Circuit, cases calendared but not actually orally argued in the spring were allowed to be decided by published opinion.<sup>36</sup> Decisions based on the written record help courts stay current at the appeals level and allow for the resolution of even some trial-level disputes. Nevertheless, in the United States, the utility of written proceedings is limited.

### C. *Virtual Hearings*

Courts cannot indefinitely extend or stay all civil matters, nor can they resolve all civil disputes on briefs alone. As the COVID-19 crisis drags on, therefore, courts in both Germany and the United States have needed to address the competing demands of resolving civil disputes while maintaining physical distance. One prime way of doing that: virtual hearings.

Both U.S. and German courts have the authority to hold virtual hearings in the civil cases before them.<sup>37</sup> And the courts in both countries have been employing virtual hearings, to greater or lesser extents, over the past year. While virtual hearings may not be perfect substitutes for their in-person counterparts, they warrant close consideration, particularly in the absence of an imminent end to the COVID-19 crisis.

#### 1. United States Courts

In March 2020, as COVID-19 cases began to spike, the U.S. Judicial Conference, the federal courts' policy-making body, expressly approved the use of video and teleconferencing for civil proceedings during the

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35. Blaine Evanson et al., *Argued vs. Submitted Cases at 9th Circ. During Pandemic*, LAW360 (Apr. 24, 2020), <https://www.law360.com/articles/1267014/argued-vs-submitted-cases-at-9th-circ-during-pandemic>.

36. 4th Cir. Standing Order 20-01, adopted Mar. 23, 2020, amended Apr. 7, 2020, [https://www.ca4.uscourts.gov/docs/pdfs/amendedstandingorder20-01.pdf?sfvrsn=3b41b909\\_16](https://www.ca4.uscourts.gov/docs/pdfs/amendedstandingorder20-01.pdf?sfvrsn=3b41b909_16).

37. It bears mention that the Coronavirus Aid, Relief, and Economic Security Act, Public Law No: 116-136 of 2020, Section 15002 granted express authority for the use of video conferencing in certain criminal judicial matters. But because the focus of this article is civil litigation, we do not explore that provision here.

crisis.<sup>38</sup> Unsurprisingly, therefore, federal district courts nationwide issued orders encouraging and implementing the use of technology.<sup>39</sup> By September 2020, ninety percent of United States District Courts and all of the federal courts of appeal had been holding virtual hearings.<sup>40</sup>

While the federal courts have nearly unanimously used technology to enable physically distanced hearings, their approaches have varied. They use a bevy of different video conferencing platforms, including FaceTime,<sup>41</sup> Cisco Jabber,<sup>42</sup> Skype,<sup>43</sup> and Zoom,<sup>44</sup> with varying degrees of specificity and focus on telephonic versus video. The Supreme Court of the United States, for example, ordered the use of old-fashioned telephone conferences instead of video conferences.<sup>45</sup> The District Court for the District of Wyoming, by contrast, ordered that in-person civil proceedings were generally to be held remotely and provided special forms and detailed instructions for teleconferencing and Facetiming with the court.<sup>46</sup> The District Court for Hawaii left up to each presiding judge how to proceed with civil non-jury matters, including whether to hold hearings via Zoom or telephonically.<sup>47</sup>

Has the federal courts' formal embrace of technology been a success? The infamous toilet flush heard during the Supreme Court's first

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38. *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. COURTS (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-video-audio-access-during-covid-19-pandemic>.

39. *Courts' Responses to the COVID-19 Crisis*, BRENNAN CTR. FOR JUST. (Mar. 19, 2020), <https://www.brennancenter.org/our-work/research-reports/courts-responses-COVID-19-crisis>.

40. Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19>.

41. Forms, D. WYO., available at <https://www.wyd.uscourts.gov/forms/> (last visited Oct. 26, 2020).

42. D.P.R. For Attorneys, <https://www.prd.uscourts.gov/how-setup-video-tele-conference-vtc-virtual-courtroom-proceedings> (last visited Oct. 31, 2020).

43. *Skype for Business Instruction Guide For Attorneys*, S.D.N.Y., available at <https://nysd.uscourts.gov/sites/default/files/2020-05/SKYPE%20Instructions%20for%20Attorneys%205.1.20.pdf> (last visited Oct. 31, 2020).

44. *Preparing to Participate in a Zoom Video Conference*, N.D. Cal., available at <https://cand.uscourts.gov/zoom/> (last visited Oct. 31, 2020).

45. *Courts' Responses to the COVID-19 Crisis*, *supra* note 39; see Press Release, U.S. Supreme Court (Apr. 13, 2020), available at [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-13-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20).

46. D. WYO., *supra* note 41; General Order Vacating All Civil Trials and In Court Appearances Scheduled Prior to June 1, 2020, (D. Wyo., Mar. 20, 2020), available at <https://www.wyd.uscourts.gov/sites/wyd/files/general-ordes/General%20Order%202020-02.pdf>.

47. *In Re District of Hawaii Response to COVID-19 Pandemic*; August 24, 2020 Temporary General Order Regarding District of Hawaii Response to COVID-19 Pandemic, available at <https://www.hid.uscourts.gov/files/29sidefile125/GeneralOrderAugust24.pdf>.



telephonic oral argument serves as somewhat of a cautionary tale about what can go wrong in a technology-enabled hearing.<sup>48</sup> Nevertheless, virtual hearings have allowed courts across the country to keep their civil dockets more or less on track in trying times. In New York, for example, the federal courts have enacted instructions and best practices for remote hearings and court reporting<sup>49</sup> and have transitioned smoothly to remote hearings, handling non-jury-trial matters “at a rate pretty close to normal.”<sup>50</sup>

In sum, the U.S. courts’ implementation of virtual hearings, while perhaps varied in the details, has been widespread and successful. “While the technology isn’t a perfect replacement for physical face-to-face interactions, it [has] allow[ed] our court[s] to maintain stability in a time of instability,” in the words of Hanorah Tyer-Witek, Clerk of Court for the United States District Court for the District of Rhode Island.<sup>51</sup>

## 2. German Courts

In Germany, the courts’ primary source of authority for and experience with virtual hearings differs notably. German Code of Civil Procedure § 128a, a federal law applicable in all civil proceedings in German general courts of justice, specifically authorizes the court to allow hearing participants “to stay at another location in the course of a hearing for oral argument, and to take actions in the proceedings from there” through audio/video technology.<sup>52</sup> Judges need to be present in the court house, where they must ensure that matters remain open to the public by making the hearing’s audio feed available to members of the public who may be present in the court room.<sup>53</sup> Further, Section 128a, by its plain language, does not allow for telephone-only conferencing.<sup>54</sup>

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48. Fred Barbash, *Oyez. Oyez. Was That a Toilet Flush in the Middle of a Supreme Court Live-streamed Hearing?*, WASH. POST (May 7, 2020), <https://www.washingtonpost.com/nation/2020/05/07/toilet-flush-supreme-court/>.

49. Memorandum on Court Reporter Tele/Videoconferencing Best Practices, S.D.N.Y. (Mar. 24, 2020), <https://nysd.uscourts.gov/sites/default/files/2020-03/Court%20Reporter%20Teleconferencing%20Memo%20to%20Bar%20and%20Public.pdf>.

50. Jed S. Rakoff, *COVID & the Courts*, N.Y. REV. OF BOOKS (May 28, 2020), <https://www.nybooks.com/articles/2020/05/28/COVID-19-and-the-courts/>.

51. *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, U.S. COURTS. (Apr. 8, 2020), <https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak>.

52. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 128a(1) (Ger.)

53. Zöller & Greger, *supra* note 32, at 6.

54. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 128a (Ger.); Windau, *supra* note 28, at 2754, ¶ 4.

Generally, therefore, Section 128a gives German judges less flexibility than their U.S. counterparts have in how to conduct physically distanced hearings. Indeed, they have little say over whether hearings are (fully) virtual at all, because parties maintain the right to appear live in the courtroom—even though it has been argued that the court should be allowed, in the face of extenuating circumstances like a pandemic, to order the parties to appear only remotely.<sup>55</sup>

Though German Code of Civil Procedure § 128a has been on the books since 2002, it had, until very recently, received little attention, instead remaining a prescient theoretical vehicle for virtual hearings without real-world application.<sup>56</sup> Prior to the pandemic, German states had begun enhancing their digital infrastructure, e.g., with e-justice projects introducing electronic court files and abandoning paper (something the U.S. federal courts accomplished on a large scale nearly two decades ago<sup>57</sup>) underway and mandatory by the year 2022.<sup>58</sup> In Frankfurt, the local court began experimenting with virtual hearings in December 2019—with technology wheeled into a courtroom on a cart, initially for usage only in certain civil cases and only once per week.<sup>59</sup>

In response to the COVID-19 crisis, however, German courts have accelerated efforts to digitize and implement Section 128a. German states have dedicated funds for further enhancing their digital infrastructure.<sup>60</sup> In Frankfurt, the local court has increased its nascent use of virtual hearings beyond once per week.<sup>61</sup> The District Court in Hannover, Lower Saxony

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55. Windau, *supra* note 28, at 2755, ¶ 13.

56. Zschieschack, *supra* note 13, ¶ 99.

57. 25 YEARS LATER, PACER, ELECTRONIC FILING CONTINUE TO CHANGE COURTS, <https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts> (last visited April 12, 2021).

58. Zöller & Greger, *supra* note 32, at 6; *Masterplan Digitalisierung in der Justiz*, NIEDERSÄCHSISCHES JUSTIZMINISTERIUM, [https://www.mj.niedersachsen.de/startseite/themen/personal\\_haushalt\\_organisation\\_sicherheit\\_it/masterplan\\_digitalisierung/masterplan-digitalisierung-in-der-justiz-194960.html](https://www.mj.niedersachsen.de/startseite/themen/personal_haushalt_organisation_sicherheit_it/masterplan_digitalisierung/masterplan-digitalisierung-in-der-justiz-194960.html) (last visited Oct. 3, 2020); *E-Justice—Wo geht die Reise hin?*, FACHBEREICH BUND + LÄNDER NRW, <https://bund-laender-nrw.verdi.de/land/justiz/++co++e5119a00-310b-11e5-85f4-525400248a66> (last visited Oct. 19, 2020).

59. Helena Hauser, *Verhandlungen per Video: Die Krise beschleunigt die Digitalisierung der Justiz*, JUVE (Mar. 31, 2020), <https://www.juve.de/nachrichten/namenundnachrichten/2020/03/verhandlungen-per-video-die-krise-beschleunigt-die-digitalisierung-der-justiz>.

60. Zschieschack, *supra* note 13, ¶ 82; Wolfgang Janisch, *Gerichtsverhandlung aus dem Home Office*, SÜDDEUTSCHE ZEITUNG (Apr. 30, 2020), <https://www.sueddeutsche.de/politik/justiz-gerichtcoronavirus-1.4891246?print=true>.

61. Hauser, *supra* note 59.

had held over fifty virtual hearings by May 2020.<sup>62</sup> And some states, like Bavaria, are actively working to achieve large-scale state-wide virtual hearing capabilities.<sup>63</sup> Those German courts engaging in virtual hearings tend to use U.S. video conferencing tools such as Microsoft Teams, Cisco WebEx, and Polycom to enable them.<sup>64</sup>

Despite recent efforts, however, German courts lack sufficient technical equipment to enable the sudden, large-scale implementation of virtual hearings.<sup>65</sup> According to a survey in the *Journal of German Judges*, or *Deutsche Richterzeitung*, in May 2020, the entire State of Saxony-Anhalt had three video conference systems, the entire State of Brandenburg had two, and the State of Mecklenburg-West Pomerania had just one.<sup>66</sup> The courts in the state of Thüringen had, amongst them, only twelve video conferencing systems covering less than ten percent of the state's court rooms.<sup>67</sup> Even in Baden-Wuerttemberg, the German state with the highest number of local courts, or *Amtsgerichte*, equipped for virtual hearings only 33 of the total 108 local courts had video conferencing equipment.<sup>68</sup>

Not surprisingly, therefore, German courts have not yet been able to harness the power of virtual hearings to maintain docket flow during the pandemic. In the major international commercial center of Düsseldorf, the District Court, or *Landgericht*, held its first ever virtual hearing in May 2020—two months into the pandemic, and nearly two decades after the statute authorizing such hearings went into effect.<sup>69</sup> And even in Berlin, Germany's capital, video conferences had been used only occasionally.<sup>70</sup>

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62. Britta Schultejan & Martin Höke, *Wegen Corona: Gerichte setzen auf Video-Verhandlungen* (May 7, 2020), <https://rsw.beck.de/aktuell/daily/meldung/detail/wegen-corona-gerichte-setzen-auf-video-verhandlungen>.

63. *Bayern treibt Digitalisierung der Gerichte voran*, BAYERISCHE JUSTIZMINISTERIUM (May 6, 2020), <https://www.justiz.bayern.de/presse-und-medien/pressemitteilungen/archiv/2020/34.php>.

64. Benedikt Windau, *Technische Voraussetzungen für Verhandlungen im Wege der Bild- und Tonübertragung gem. § 128a ZPO* (May 10, 2020), <https://www.zpoblog.de/verhandlungen-im-wege-der-bild-und-tonuebertragung-gem-§-128a-zpo-skype-webex-polycom/>.

65. A state list of video conferencing locations of courts and public prosecutors' offices is available at <https://www.justizadressen.nrw.de/de/justiz/suche>.

66. Sven Rebehn, *Justiz braucht Update*, DEUTSCHE RICHTERZEITUNG (DRIZ) 2020, 202.

67. *Id.*

68. Janisch, *supra* note 60.

69. Schultejan & Höke, *supra* note 62.

70. Rebehn, *supra* note 66, at 202.

### 3. Virtual Hearings: Causing More Problems Than They Solve?

Virtual hearings may serve as one solution for German and American courts facing the conundrum of resolving disputes and administering justice in the midst of a public health crisis. Understandably, they are widespread in the United States and gaining steam in Germany. But do they simultaneously create or exacerbate other problems?

For example, may a court render a default judgement if it is unclear whether the default may have been caused by technical malfunctioning of the video infrastructure? Defaults in the context of virtual hearings surely need to be handled with extra care.<sup>71</sup>

How can courts assess witness credibility in virtual hearings, where visual images may be pixelated and audio may echo? The virtual court may be unable to see shaky hands and a sweating forehead at a remote location, even with the best of audio/video technology. And regardless of the particulars, witnesses who appear virtually may generally be perceived as being less credible and less sympathetic.<sup>72</sup>

Might virtual hearings exacerbate the inequalities that have long plagued justice systems? It is difficult to imagine that, e.g., a solo practitioner appearing by smart phone will not suffer from at least implicit negative bias when up against a large-firm opponent with professional lighting, makeup, and high-quality digital transmission equipment. Where parties appear *pro se*, digital divides along socioeconomic, racial, and age lines may be particularly troubling.<sup>73</sup> Further, in Germany and the United States, rural areas in particular may lack the infrastructure needed for reliable high-speed internet suitable for virtual hearings.<sup>74</sup> Put bluntly, the uneven distribution of quality and quantity of technology and internet access may create a digital “caste system” in the courts.<sup>75</sup>

Virtual hearings will almost surely loosen the court’s grip over proceedings. How, for example, can a court effectively know, much less

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71. Zschieschack, *supra* note 13, ¶ 87.

72. Norma C. Izzo, *How Litigators Are Confronting COVID in the Courtroom*, A.B.A. (Aug. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/covid-19-video-testimony-courtrooms/>.

73. *Id.*

74. Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RSCH. (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>; Claire Jones, *Powerhouse Germany Badly Trailing Rivals in Broadband*, FIN. TIMES (Aug. 23, 2017), <https://www.ft.com/content/8f2e623c-7d1a-11e7-ab01-a13271d1ee9c>.

75. Elizabeth Brico, *Virtual Hearings Have Created a ‘Caste System’ in American’s Courts*, THE APPEAL (July 31, 2020), <https://theappeal.org/virtual-hearings-have-created-a-caste-system-in-americas-courts/>.

control, who is physically present, whether witnesses are being coached, or whether someone is secretly recording proceedings at distant locations?<sup>76</sup> Can such problems be overcome, e.g., with the threat of contempt proceedings?

Virtual hearings may also restrict communications otherwise common to in-person proceedings and beneficial to their stakeholders. A U.S. lawyer accustomed to passing notes with clients during hearings, for example, may worry about how, if at all, to engage in confidential communications during a video conference.<sup>77</sup> Might counsel need to put the proceeding on hold, or even hang up and dial back in—neither tempting prospects?<sup>78</sup> Or might technological tools like virtual break-out rooms suffice? Attorneys may also feel hampered in approaching the virtual bench to discuss legal issues with the judge and opposing counsel without being heard by witnesses or observers.<sup>79</sup> And in cases being heard by more than one jurist—a constellation not uncommon in complex cases even at the trial level in Germany—will judges' ability to privately confer amongst themselves be impinged upon by virtual hearings?<sup>80</sup> Or will they be satisfied with technical work-arounds like muting proceedings to talk amongst themselves?

Public access to virtual hearings poses a double-edged problem. On the one hand, a shift to virtual hearings could diminish public access to court proceedings, a requirement in both Germany and the United States. In Germany, not only is streaming the hearing over the internet prohibited by the German Court Constitution Law, or *GVG*,<sup>81</sup> that law even prohibits broadcasting a hearing in another court room within the courthouse.<sup>82</sup> In other words, German law does not provide for physically distanced

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76. Shalini Nangia et al., *The Pros and Cons of Zoom Court Hearings*, NAT'L L. REV. (May 20, 2020), <https://www.natlawreview.com/article/pros-and-cons-zoom-court-hearings>; Zöller & Greger, *supra* note 32, at 4.

77. Albert Fox Cahn & Melissa Giddings, *Virtual Justice: Online Courts During COVID-19*, SURVEILLANCE TECH. OVERSIGHT PROJECT, 11 (July 23, 2020), available at <https://perma.cc/R3HN-94AA>.

78. Brico, *supra* note 75.

79. Cahn & Giddings, *supra* note 77, at 5.

80. Reto Mantz & Jan Spoenle, *Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung*, available at <https://perma.cc/QJE9-BPQR> (last visited Oct. 19, 2020).

81. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act] § 169 (Ger.); cf. Richard Zöller & Clemens Lückemann, *ZPO, GVG § 169*, 3 (33d ed. 2020).

82. Zöller & Lückemann, *supra* note 81, at 9; Otto Rudolf Kissel & Herbert Mayer, *GERICHTSVERFASSUNGSGESETZ § 169*, 27 (9th ed. 2018); *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, *GVG § 169*, 33, 44 (4th ed. 2013).

broadcasts for public consumption; a member of the public would be forced to risk exposure to illness to realize their right to attend a court hearing. In the United States, some are convinced virtual hearings have indeed diminished court openness, even where courts provide access codes for interested court watchers.<sup>83</sup> On the flipside, making hearings broadly available over internet platforms—an option only in the United States—raises serious privacy issues surrounding litigants' confidential information, which would be more difficult to keep out of the hands of nosy neighbors and identity thieves.

Data security issues are myriad in the virtual hearing context. Hearings taking place through private video-conferencing tools may, for example, lack robust encryption, be vulnerable to hacking, or create auto-transcripts without all users' knowledge.<sup>84</sup> Even official court recordings of virtual proceedings or admitted evidence must be stored and protected, raising questions about the where and how.<sup>85</sup> There have been calls for standards and enforcement mechanisms regarding the preserving, securing, and storing of hearing data; how they will be answered remains unclear.<sup>86</sup>

A more philosophical question regarding virtual hearings is how, if at all, the inherently informal nature of online events might impact litigation. Courtrooms “embody the administration of justice.”<sup>87</sup> Virtual proceedings arguably threaten that sense of solemnity and may unwittingly turn the administration of justice into just another chat room.<sup>88</sup> A letter penned by a Florida judge, calling out lawyers for attending virtual hearings shirtless and while lying in bed, suggests the risk is real.<sup>89</sup>

#### IV. CONCLUSION

The COVID-19 pandemic has been raging for over a year, and while the U.S. and German vaccination campaigns give reason for hope, the end is, unfortunately, not yet imminent. For this reason, some of the German

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83. Zoe Schiffer, *The Jury Is Still Out On Zoom Trials*, VERGE (Apr. 22, 2020), <https://www.theverge.com/2020/4/22/21230022/jury-zoom-trials-court-hearings-justice-system-virtual-transparency>.

84. Cahn & Giddings, *supra* note 77, at 4-5.

85. *Id.*

86. *Id.* at 13.

87. Fredric I. Lederer, *The Road to the Virtual Courtroom*, 50 S.C. L. REV. 799, 841 (1999).

88. Mantz & Spoenle, *supra* note 80.

89. Lederer, *supra* note 87, at 841; Jacey Fortin, *When Court Moves Online, Do Dress Codes Still Matter?*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/corona-virus-lawyers-court-telecommute-dress-code.html>.

and U.S. courts' immediate responses, such as extending deadlines and staying matters, are of limited utility. A longer-term solution is needed to this longer-term problem, one that allows for the continued administration of justice.

In-person hearings in the midst of a pandemic are not necessarily a sound response. Participants may be inadequately protected and exposed to COVID-19, or they may be only partially visible and audible, seated far away from one another, hidden behind masks and plexiglass. In any event, the fact that, despite precautions, at least nine United States District Courts had had employees test positive for COVID-19 by September 10, 2020<sup>90</sup> leaves no doubt that actively seeking alternatives to in-person hearings makes sense.

German and U.S. courts have thus both turned to virtual hearings as a potential, if imperfect, solution. In Germany, virtual hearings have long been available in theory, but, until Spring 2020, nearly non-existent in practice, not least due to a shortage of the necessary technical equipment. In the United States, there is no express vehicle for virtual hearings, e.g., in the Federal Rules of Civil Procedure. But federal courts have inherent authority to manage their dockets, including through the use of technology, official United States Courts policy has encouraged using technology in response to the COVID-19 crisis, and the federal courts have done so en masse.

Virtual hearings are, without a doubt, an imperfect substitute for their pre-pandemic analogues. They may raise more questions than they answer. But what they allow for makes them worth pursuing—the administration of justice and resolution of civil disputes in the timely fashion that all participants in the process deserve, even in the face of a pandemic.

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90. Adelstein, *supra* note 40.