

THE IMPACT OF THE COVID-19 PANDEMIC ON CIVIL PROCEEDINGS IN POLAND

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ABSTRACT

The article discusses a possibility and circumstances of conducting a remote hearing in the Polish civil procedure. Especially, the authors describe and analyse the legal provisions applicable prior, during and after Covid-19 as well as their impact on the process of informatization of the civil proceedings in Poland with the main focus on remote hearings that were not - generally, possible before Covid-19. The article also takes a closer look at the possibility to participate in a trial outside the seat of the court and the principle of openness of the proceedings.

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I. THE POSSIBILITY OF CONDUCTING A HEARING IN A REMOTE LOCATION

The possibility of conducting a hearing in a remote location already existed prior to the introduction of specific solutions in the Act of 14 May 2020 on amending certain acts in the area of protective measures in connection with the spread of the SARS-CoV-2 virus¹ in civil cases in common courts and subsequently in the Act of 29 May 2021 on amending the Act - Code of Civil Procedure (CCVP) and certain other acts. The Code of Criminal Procedure (CCRP), on the other hand, does not provide for a similar regulation due to the lack of provisions CCRP analogous to Article 151 § 2 of the CCVP (the provision of Article 177 § 1a of the CCVP only provides for the possibility of conducting evidence from the testimony of a witness by means of technical devices allowing for remote transmission of images and sound). During the hearing, it is also possible to hear the testimony of a witness simultaneously by means of devices enabling this to be done remotely or to ensure the participation of entitled persons in the hearing in the form of a trial at a distance, as well as to present evidence on screen via document camera. Both the recorded hearing of the witness and the image of the evidence presented become part of the electronic record. To ensure the transparency of the recording, (the image is divided into parts), only the so-called civil and misdemeanour rooms have been equipped², the content of Article 147 of the CCRP has been amended by introducing the so-called electronic protocol into the criminal procedure. The estimated budget for such measures is approximately PLN 70 million. The implementation of this project, according to the explanatory memorandum of the amending act, was to take place within the allocated budget limits without increasing its burdens. The budget of the project was to be financed from the Operational Programme Digital Poland 2014–2020 (OPDP). The Ministry of Justice in the previous term received funding from this programme in an amount that corresponds to the costs. According to the OPDP³, the e-protocol project in criminal cases was not supposed to be a burden on the state budget. Unfortunately, the agreement on this was eventually terminated, and the funds were returned. The equipment for the recording of the e-protocol was not implemented in the ‘criminal courts’; consequently, the recording of the meeting, as well as the extensive use of videoconferencing, is only possible when there is a free room equipped with the equipment. Otherwise, the recording of the minutes can only take place on equipment at the court’s disposal (e.g. a dictaphone). On

¹ Journal of Laws of 2020, item 875, as amended

² Act of 10.7.2015 amending the Act, Code of Criminal Procedure, Journal of Laws of 2015, item 1334

³ Operational Programme Digital Poland for 2014–2020<<https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/operational-programme-digital-poland-for-2014-2020/>> (accessed 12 December 2023)

the other hand, remote questioning might be held in dedicated rooms. The provisions of the criminal procedure do not provide for the so-called ‘distant hearing’. Therefore, there are no possibilities, both legal and technological, for a hearing to be held remotely.

II. REGULATION SO FAR GIVING THE POSSIBILITY OF “DE-LOCATING” A TRIAL OR A PUBLIC HEARING

So far, the possibility of “de-locating” a trial or a public hearing was regulated by the provision of Article 151 § 2 of the CCVP, according to which the presiding judge may order the conduct of a public hearing with the use of technical devices enabling its conduct at a distance. In such a case, the participants of the proceedings may participate in the court session while they are in the building of another court and perform procedural actions there, and the course of procedural actions shall be transmitted from the courtroom of the court conducting the proceedings to the place of stay of the participants of the proceedings and from the place of stay of the participants of the proceedings to the courtroom of the court conducting the proceedings. This provision derogates from the previous rule that court hearings take place in the court building. Outside the court building, hearings are held when court actions must be performed elsewhere or when holding a hearing facilitates the conduct of the case or contributes to saving the costs of the proceedings. The current provisions of the CCVP provide for the possibility to perform certain court actions outside the court building when, for example, it is necessary to hear a person affected by illness or infirmity (in such a case, the hearing takes place in the place where disabled persons reside)⁴ or when it is necessary to inspect an object that cannot be delivered to the court premises⁵.

III. THE POSSIBILITY OF HOLDING A PUBLIC HEARING AT A DISTANCE BY MEANS OF VIDEOCONFERENCING

The provision of Article 151 § 2 of the CCVP, on the other hand, introduces the possibility of holding a public hearing at a distance by means of videoconferencing, upon the order of the chairman. There is no doubt that this provision refers to Article 235 § 2 of the CCVP, which made it possible to take

⁴ Article 263 CCVP

⁵ Articles 293, 294 CCVP; T. Demendecki in A. Jakubecki (ed), *Code of Civil Procedure*, vol. 1, 2017, LEX

evidence at a distance and was introduced into the CCVP in order to adapt Polish law to Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing European Small Claims Procedures⁶. In a situation where a public hearing is held remotely, the participants in the proceedings may participate in the hearing if they are in the building of another court and may perform procedural acts there with procedural effect. The provision of Article 151 § 2 of the CCP was introduced by the Act of 10 July 2015 amending the Act - Code of Civil Procedure and certain other acts⁷. Since the entry into force of the above amendment, no court in Poland has conducted a public hearing remotely, despite the fact that the provision of Article 235 § 2 of the CCP has been successfully applied. One of the obstacles to introducing remote public hearings into the practice of civil judicature was related to organizational reasons. The application of this provision would involve providing a courtroom to the parties and their attorneys in their respective locations of residence, allowing them to connect remotely with the court conducting the proceedings in another city. However, this solution cannot be used for hearings or other public sessions due to the ongoing pandemic threat and the risk it poses to the health of the participants. Hence, there was the above-mentioned proposal to modify the rule of Article 151 § 2 of the CCVP by allowing videoconferencing from a place other than the court building⁸. It has also been pointed out in the doctrine, on the basis of Article 235 § 2 of the CCVP, that the admissibility of conducting evidence at a distance or a public hearing at a distance will affect the dynamics of civil proceedings⁹.

IV. ELIMINATING BARRIERS CAUSING POSSIBLE LEGAL EXCLUSION OF PERSONS

Enabling parties, witnesses, and experts to participate in a public hearing remotely may contribute to the inclusion in the judicial process of those persons

⁶ Official Journal of the EU L No 199, 1

⁷ Journal of Laws, item 1311 and entered into force on 8 September 2016

⁸ J. Gołaczyński, D. Szostek, Epidemia może przyspieszyć informatyzację sądów, <https://www.prawo.pl/prawnicy-sady/informatyzacja-sadow-zdaniem-ekspertow-moze-byc-przyspieszona-w,499106.html> 31.3.2020 (accessed 15012024).

⁹ B. Kaczmarek–Templin, Zasady procesowe a informatyzacja postępowania cywilnego [in:] Transformacje postępowania cywilnego w postępowaniach rozpoznawczych, ed. I. Gil, Sopot 2017 ; A. Klich in J. Gołaczyński and D. Szostek (eds), *Informatyzacja postępowania*, Warsaw, 1016, p. 187; A. Zalesińska, *Wpływ informatyzacji na założenia* (CH Beck, Warsaw, 2016), p. 232; M. Uliasz, *Zasada jawności sądowego postępowania egzekucyjnego w dobie informatyzacji*, Warsaw, 2018 p. 510

who, due to the necessity to appear in court in person, have so far given up on pursuing claims in court. In this way, the barriers causing possible legal exclusion of persons who, due to their state of health or the degree of disability, are deprived of the possibility to participate in the hearing in person are also eliminated¹⁰.

V. LEGISLATIVE CHANGES

The provision of Article 151 § 2 of the CCVP has not been repealed, but the provision of Article 15zzs1 of the CoronavirusU in the wording established by the Act of 28 May 2021 on the amendment of the Act - CCVP and some other acts in Article 4 has significantly amended the Act of 2 March 2020. At present, therefore, it is still possible to hold a public hearing remotely based on the provision of Article 151 § 2 of the CCVP, and the question arises whether, after the end of the episodic Act and Article 15zzs1 contained therein, the provision of Article 151 § 2 of the CCVP should not be amended so that it is possible for parties and attorneys to participate in a public hearing remotely, but from a place other than the seat of the court. This is because the solution providing for a remote (distant) hearing provided for in Article 15zzs1 of the CCP has proved to be very practical. A return to the existing Article 151 § 2 of the CCP would result in the suspension or significant limitation of remote hearings.

The provision of Article 15zzs1 of the CoronavirusU now stipulates that during the period of an epidemic emergency or epidemic due to COVID-19 and within one year after the last one is cancelled, in cases heard under the provisions of the CCVP, a trial or public hearing shall be held using technical devices that allow them to be held remotely with simultaneous direct transmission of video and audio (remote hearing), except that the persons participating in it, including members of the panel, need not be in the court building. The previous version of this provision provided for the holding of a hearing or public hearing remotely, but the persons participating in it did not have to be in the court building unless the holding of the hearing or public hearing without the use of the above-mentioned devices would not cause an undue risk to the health of the persons participating in it. However, the provision now states that holding a public hearing by videoconference is the rule and should be applied, disregarding the provision of Article 151(2) of the CCP, in the period after the declaration of an epidemic

¹⁰ See: A. Klich, *Możliwość wykorzystania protokołu elektronicznego i środków komunikacji na odległość na potrzeby postępowania dowodowego w sprawach cywilnych* [in:] *Informatyzacja postępowania cywilnego. Teoria i praktyka*, (eds K. Flagi-Gieruszyńska, J. Gołaczyński, D. Szostek, Warsaw, 2016, p. 89; Ł. Goździaszek, *Zasada bezpośredniości i pisemności postępowania dowodowego w świetle nowelizacji Kodeksu postępowania cywilnego z 5 grudnia 2008 r.*, Warsaw, *Prawo Mediów Elektronicznych* Nr 2/2010, p. 28

emergency or COVID-19 and one year after their declaration. This view of the remote hearing is also supported by Article 15zzs1(1)(2) of the CoronavirusU, which provides that the holding of a remote hearing may be waived only if the hearing of the case at a trial or public hearing is necessary and their holding in the court building would not cause a risk to the health of the persons participating in them, but the waiver requires the consent of the president. There is, therefore, no doubt that this provision unambiguously indicates that a hearing or public hearing conducted remotely is now a rule that may be waived exceptionally, and additionally with the consent of the president of the court. This principle is also underlined by the power of the chairman to refer a case to a closed hearing for the purpose of hearing the case if a remote hearing cannot be held (e.g. for technical reasons) and a hearing or a public hearing is not necessary. The decision in this respect (i.e. to refer the case to a closed hearing) shall be taken by the chairman. In this case, the legislator does not even provide for the consent of the president of the court to waive the remote hearing. The decision is made by the presiding judge, but it must clearly indicate that it was not possible to hold a remote hearing (e.g. for technical reasons on the part of the court). This is because, if it was not technically possible for a party to participate in the case, it follows from Article 15zzs1(2) of the CoronavirusU that the court is obliged to ensure that the party or person summoned is able to participate in the remote hearing in the court building. This applies if the party or person summoned demonstrates in the application that he or she does not have the technical facilities to participate in the remote hearing outside the court building. In order to ensure participation in a remote hearing in the court building, a party or person summoned to a public hearing should submit an application within five days of the date of the summons. Thus, only technical reasons on the part of the court can actualise the premise of Article 15zzs1(1)(3) of the CoronavirusU, and not technical obstacles on the part of the parties to the proceedings or other persons summoned to the hearing. This circumstance underscores unequivocally that the remote hearing is now a mode of procedure of an essential nature, from which deviations are limited (both the deviation by holding a stationary hearing and the referral of the case to a closed hearing). The consent of the president of the court is also not required here, as previously with regard to the abandonment of the remote hearing. Obviously, such a solution may be deemed contrary to the principle of openness of civil proceedings and the principle of public hearing of cases. This is because it makes it impossible for the parties and their attorneys to participate in a closed session, as they can only submit written statements, but no longer have the opportunity for ordinary interaction during the hearing. It is also important to note that the openness of a court hearing is also manifested in the right to participate as an audience. Indeed, the public at court hearings held without *in camera* or not *in camera* have the right to listen to the trial, which also implements the principle of social control over the

administration of justice. However, the holding of a hearing in a closed session is only allowed if it is not possible to hold a videoconference and a traditional hearing (public hearing) when there is no risk to the health of those attending. This underlines that it is now the rule to hold hearings and public hearings by videoconference, in the manner set out in Article 15zzs1(1)(1) of the CoronavirusU.

The provision of Article 15zzs1(1)(1) of the CoronavirusU even stipulates that the restriction of simultaneous attendance at the place and time of a trial or public hearing also affects the composition of the judiciary. In the earlier version of this provision (Article 15zzs1(3)), it was the president of the court who could order that the members of the formation, with the exception of the chairman and the clerk of the case, may participate in the sitting by electronic communication, except for the sitting at which the hearing is closed. In the case of a multi-member formation, by order of the president of the court issued pursuant to Article 15zzs1(1)(3) of the CoronavirusU, only the chairperson and the clerk will participate in the trial or public hearing, while the other members of the formation will participate by electronic means of communication. With that said, the term “electronic means of communication” itself is defined in the Act of 18 July 2002 on the provision of services by electronic means. Article 2(55) of the WitnessElektU defines these means as “technical solutions, including ICT devices and cooperating software tools, enabling individual communication at a distance using data transmission between ICT systems, and in particular electronic mail”. It was therefore not necessary for the members of the formation of the court to communicate by means of an ICT system supporting the transmission of video and audio at a distance, but only a simple instant messenger such as Messenger, WhatsApp, email, etc. was sufficient. The solution introduced at the time was to preserve the security of the composition of the judiciary by avoiding participation in a multi-hour trial or public hearing in a small courtroom of multi-member composition. In civil cases, the composition of the judges is usually one person, even in appeal cases (ie in cases where the presiding judge was also the clerk), then the case was heard by one person. The presiding judge and the clerk could proceed at trial or in open session, while the parties and their attorneys participated by videoconference, or, if the court assessed that there was no health risk to those attending the trial, by traditional means.

VI. THE POSSIBILITY FOR ALL PARTICIPANTS IN A TRIAL TO PARTICIPATE OUTSIDE THE SEAT OF THE COURT

The provision discussed above has changed. Now, Article 15zzs1(1)(1) of the CoronavirusU clearly indicates that all participants in a trial or remote hearing may participate in it while away from the seat of the court, including the panel of judges. A remote hearing can therefore become “remote” for all its participants,

including the judges. There is, however, no information in this amendment as to how judges are to participate in a remote hearing, how they are to rule, how they are to deliberate, how they are to deliberate, and what their access to the case file will be. The answer to these questions may be sought in part in Article 324 § 4 of the CCP, which provides that in proceedings initiated via an ICT system, the judgement may be recorded in the ICT system and affixed with a qualified electronic signature¹¹. It can be considered, in the context of the wording of the provision of Article 125 § 21a of the CCVP introduced by the 2019 Amendments to the CCVP, that the Information Portal now constitutes an ICT system performing the function of electronic service of court letters to professional attorneys. Thus, there is a potential possibility of issuing a judgement in this system under the above-mentioned provision. However, the possibility to issue a judgement in electronic form is reserved only for cases in which a party has initiated proceedings by means of the ICT system (has opted for filing letters by means of the ICT system). This is because at present, an ICT system serving court proceedings also with regard to the filing of pleadings within the meaning of Article 125 § 21a of the CCVP, has still not been launched and made available for use by the parties. And although the judges from the panel may attend the hearing in a location other than the court building, the judgement should still be drawn up in writing, in accordance with Article 324 § 1 et seq. CCP. Therefore, at the end of the remote hearing or the remote public hearing, they should sign the judgement and announce it, with the exception provided for in Article 326 § 4 CCP.

VII. LACK OF ACCESS TO THE FILE

Another problem in cases where judges decide to participate in the hearing remotely is the lack of access to the case file. As a rule, the file is in the court building, but with the consent of the president of the court, the file may be given, for example, to a judge in order to prepare for the case, so there is a possibility for a judge hearing a case remotely to have the file; however, in the case of multi-member formations, such a solution will no longer be applicable.

VIII. LACK OF ELECTRONIC CASE FILES

As can be seen, the lack of an ICT system for court proceedings currently results in a lack of electronic case files that can be accessed remotely by all

¹¹ Ł. Gozdiaszek, in: K. Flaga Gieruszyńska, J. Gołaczyński (eds.), *Law*, 140

participants, whether judges from the panel, parties and their attorneys¹². Pursuant to Article 53 § 4 of PrUSP¹³, the ICT system supporting court proceedings, in which case files are created and processed, is maintained by the Minister of Justice, who is also the administrator of this system. It should also be recalled that a document from the court obtained from the ICT system supporting court proceedings has the force of a document issued by the court, provided that it has features enabling its verification in this system¹⁴.

IX. OFFICIAL DRESS OF JUDGES AND PROFESSIONAL ATTORNEYS

The official dress of judges and professional attorneys is also an important issue. It seems that in this particular respect, the provision of Par. 84 of the RUSP¹⁵ may be applied, according to which a judge or an advocate, legal adviser, prosecutor, or counsel for the Public Prosecution Service of the Republic of Poland, if they participate in court actions outside the court building, do not have to wear official attire. Obviously, the intention of the creator of the regulation was to refer to such activities as inspection, interrogation of a minor in a blue room, etc., but it seems that this provision may also apply to hearings and public hearings conducted remotely. However, the amendment providing for the possibility of a remote hearing (public hearing) also for a panel seems to be overdue. In fact, in the same Act, multi-member formations were abandoned as a matter of principle. Thus, at present, as will be discussed further below, a remote hearing for judges will be of lesser importance (the intention of the legislator, who abandoned multi-member formations, was health reasons resulting from the pandemic (i.e. that there should be fewer people in the courtroom at the same time) only the judge and the protocol officer).

The legislator also abandoned the regulation limiting the hearing of the case at a hearing (also remote) (e.g. in cases where the entirety of the evidence proceedings had already taken place) the court could close the hearing and issue the decision in a closed session after taking written positions from the parties or

¹² The possibility of creating electronic case files is already provided for by Article 53 § 1a-1c of the Act of 27 July 2001, Law on the Common Court System (ie Journal of Laws of 2020, item 2027, as amended)

¹³ Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (eng. Act of 27 July 2001. Law on the system of common courts), t.j. Dz.U. 2023 poz. 217

¹⁴ Article 53a § 1 of the USP; more in the Regulation of the Ministry of Justice of 7 September 2016 on the manner and features enabling verification of the existence and content of a letter in the ICT system supporting court proceedings, Journal of Laws of 2016, item 1422

¹⁵ Minister of Justice Regulation, 18 June 2019, 'Rules of Operation of Common Courts', Dz.U.2022.2514, 2019

participants in the proceedings. This provision was an important exception to the setting of a hearing or public hearing traditionally (i.e. with the participation of the court, the parties, and their attorneys, and even in the case described therein (the taking of evidence in its entirety) it was not necessary to set a hearing or public hearing by videoconference. The question arose as to whether this provision referred only to the hearing before the court of the first instance, given that in the second instance under the current appellate model (*apellatio com beneficio novorum*), the appellate court is also the court obliged to hear the case on the merits, obviously within the limits of the charges and appellate motions. The doubts were all the greater because the subsequent provision of Article 15zys3 of the CoronavirusU provided¹⁶ that the provision of Article 374 of the CCP also applies to appeals filed before 7 November 2019, unless the court deems it necessary to hold a hearing, as well as when a party requested a hearing or to take evidence from witnesses or the hearing of the parties that is not subject to omission. In that case, the request for a hearing had to be made within seven days of the service of the notice of the referral to a closed hearing. Of course, in the notice sent, the party not represented by a lawyer, legal counsel, patent attorney, or the Public Prosecutor's Office of the Republic of Poland had to be instructed about the right and the deadline for filing the request.

X. CLOSING OF THE HEARING

From the systematics of the provisions of the Act of 2 March 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them, it could be concluded that in any case heard according to the provisions of the CCVP (ie both before the court of first instance and before the court of second instance) the court may close the hearing and, after taking the positions of the parties, issue a ruling in the case, provided, of course, that the evidentiary proceedings have already been conducted in their entirety. Therefore, for what purpose did the legislator provide in Article 15zys3(1) of the CoronavirusU¹⁷, when Article 374 of the CCP, allowed the court of second instance, to hear the case in closed session if none of the parties in the appeal or in the response to the appeal has requested a hearing. The provision of Article 15zys2 of the CoronavirusU would have been entirely sufficient to achieve the same objective, which seems to have been to deliver a judgment in closed session, in a situation where the evidence proceedings

¹⁶ Subsequently repealed on 28 May 2021.OJ 2021, item 1090, which came into force on 2 July 2021

¹⁷ In the wording established by the Act of 7 March 2020, Journal of Laws of 2020, item 374

had already been fully conducted. However, doubts have been formulated as to whether we apply the existing provision of Article 374 of the CCP in appeal cases¹⁸ (i.e. waiver of the appeal hearing is subject to the absence of a party's request) with the modification introduced by the Act under discussion that the provision of Article 374 CCP will also apply to appeals filed before 7 November 2019¹⁹.

XI. DISTINCTION OF THE WILL OF THE PARTIES

It seems that it is indeed a question of distinguishing between situations where the court is hearing the case at the first and second instance. In the second instance, it is still the will of the parties that determines whether the court will be able to hear the appeal in closed session or at a hearing. Such a solution may be questionable, because in proceedings before the court of the first instance, the will of the parties is irrelevant to the possibility of referring the case to a closed session in order to rule on the case, provided, however, that the evidentiary proceedings have been conducted in full.

Amendment

However, the Act of 28 May 2021 on amendments to the Act - Code of Civil Procedure and certain other acts, repealed the provision of Article 15zzs3, which, as indicated above, provided for the case to be heard in closed session, also with regard to appeals filed before 7 November 2019. This means that now, with regard to any appeal, regardless of the date on which it was filed (ie prior to the entry into force of the amendment to the CCVP of 4 July 2019 or after that date) the provision of Article 15zzs1, paragraphs 1 to 3 of the CoronavirusU will apply. The rule will therefore be a remote trial or a remote public hearing. An exception will therefore be the traditional remote hearing or public hearing. This is because only if it is necessary to hear the case at a trial or public hearing, and holding them in the court building would not pose a health risk to those attending them

¹⁸ Gibec J., in Gołaczyński J., Szostek D. (eds), *Kodeks postępowania cywilnego: komentarz do ustawy z 4.7.2019 r. o zmianie ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw* (CH Beck, 2019) p. 282. M. Michalska-Marciniak [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian. Tom I i II*, red. T. Zembrzusi, Warsaw, 2020, LEX

¹⁹ ie before the entry into force of the Act of 4 July 2019 amending the Act - Code of Civil Procedure and certain other acts

and the president of the court agrees, will a traditional trial or public hearing be held.

Public hearing as an exception for a remote hearing

Another exception for a remote hearing (public hearing) will be if the presiding judge orders that a public hearing be held²⁰. Therefore, there is no possibility for a party to invoke the provision of Article 374 of the CCP in appeal cases and request a hearing in a situation where the presiding judge considers that a hearing is not necessary to hear the case and it was not possible to hold a hearing remotely²¹. However, this provision should be assessed negatively. The referral of a case to a closed session on appeal, where the Civil Procedure Code provides a proper regulation, making the possibility of a closed session in an appeal subject to the absence of objections from the parties (except for the invalidity of the proceedings), ensures the parties' right to a fair trial, including the right to participate in the hearing.

THE PRINCIPLE OF OPENNESS OF PROCEEDINGS

The principle of the openness of civil proceedings is realised, inter alia, by hearing the case in public. A distinction is made in the doctrine of civil procedure between the principle of internal and external openness of civil proceedings²². Openness is intended to guarantee the regularity of civil proceedings and affects the formation of the procedural situation of the party and the participants in the proceedings and the influence on the activities of the procedural authority. Openness is a sine qua non for the realisation of procedural rights, burdens, and obligations in civil proceedings. Secrecy of civil proceedings would therefore be contrary to the essence of these proceedings and their purpose²³. The openness of civil proceedings to the parties to the proceedings (internal openness) results from such guarantees as the right to participate in procedural actions, the right to

²⁰ When a remote hearing cannot be held and it is not necessary to hold a hearing or public hearing, Article 15zzsl(1)(3) CoronavirusU

²¹ Due to technical reasons on the part of the court

²² K. Gajda-Roszczyńska, Zasada jawności w postępowaniu cywilnym, „Iustitia” 2013, nr 1, p. 17; Cieślak Z., „Aksjologiczne podstawy jawności. Perspektywa nauk o administracji [in:] Jawność i jej ograniczenia, t. 2: Podstawy aksjologiczne, red. Z. Cieślak, C.H. Beck, Warsaw, 2012, LEGALIS, ; M. Uliasz, Zasada jawności sądowego postępowania egzekucyjnego w dobie informatyzacji, Warsaw, 2018, p. 164

²³ J. Lapierre., J. Jodłowski, Z. Resich, T. Misiuk-Jodłowska, K. Weitz (eds), „Postępowanie Cywilne”, Warsaw, 2016 p. 26

information about these actions and the right of access to the case file. If a party or other participant in the proceedings can be present at the hearing and can familiarise themselves with the actions that are taken by the court in the case, they are given a real opportunity to exercise their procedural rights²⁴. For these reasons, the solution introduced in Article 15zzs1(1)(3) of the CoronavirusU should be assessed negatively.

REQUEST BY A PARTY OR SUMMONED PERSON TO ENSURE THE POSSIBILITY OF PARTICIPATION IN A REMOTE HEARING IN THE COURT BUILDING

In order to enable the parties to participate in a remote hearing, the legislator introduced Article 15zzs1(2) of the CoronavirusU, pursuant to which, upon the request of a party or summoned person filed at least five days before the scheduled date of the remote hearing, the court will ensure that he or she can participate in a remote hearing in the court building *if* the party or summoned person indicates in the request that he or she does not have the technical equipment to participate in a remote hearing outside the court building. Such a solution is necessary to ensure the participation of parties and other persons in court proceedings, in which currently a hearing or public hearing is, as a rule, held remotely.

THE SOLUTION PROVIDING THAT IN EACH CIVIL CASE, REGARDLESS OF WHETHER IT IS HEARD IN THE FIRST OR SECOND INSTANCE, THE COMPOSITION OF THE COURT SHALL CONSIST OF ONE JUDGE

In the case of proceedings before the court of first and second instance in cases in which the court decides in a multi-member composition, pursuant to Article 15zzs1(1)(4) of the CoronavirusU, the court shall hear cases in a single judge composition. Only the president of the court, if he deems it advisable due to the particular complexity or precedential nature of the case, may order that the case be heard by three judges²⁵. The above solution provides that in each civil case, regardless of whether it is heard in the first or second instance, the composition of the court consists of one judge. Therefore, this applies, for example, to divorce cases (heard by a bench), guardianship cases (heard by a

²⁴ A. Góra-Błaszczkowska, “Wszczęcie postępowania cywilnego przez prokuratora w świetle zasady równości stron (kilka uwag na tle aktualnego stanu prawnego)”, *Opolskie Studia Administracyjno-Prawne* 5 (2008), Opole, 2008, p. 131

²⁵ A similar regulation is found in Article 47 § 4 of the CCVP

three-judge panel), but above all appeal cases heard, as a rule, by a three-judge panel. Such a solution has become the subject of discussion and even criticism from the ombudsman, nongovernmental organisations (eg the Helsinki Foundation for Human Rights, the Watch Dog Poland Foundation) with the justification that one-person cognisance of appeal cases does not guarantee the realisation of the right to a court. Other issues already of a practical nature also arise against the background of this amendment, namely, whether after the amendment enters into force (ie after 3 July 2021) every civil case should be heard by a one-person panel, or only new cases that come before the court after that date. From Article 6(1) of the Revised CCVP of 2021, the provisions of the Act amended in Article 4²⁶ shall also apply to proceedings heard in accordance with the provisions of the CCVP initiated and not concluded before the date of entry into force of this Act. Therefore, if a case was filed with the appellate court before 3 July 2021 and a referee and a permanent panel were drawn, the judge who will continue to hear the case will be the referee. However, a doubt arises as to whether, for example, if a judgement has been rendered in the court of appeal hearing the case so far in a three-judge formation, whether the rectification of this judgement after 3 July 2021 should take place in a three-judge or a one-judge formation. Since three judges were previously involved in the judgement as a composition of the court, it would seem that it is not possible to subsequently rectify it by only one judge. These issues are not merely theoretical, as one of the grounds for the invalidity of civil proceedings is the improper composition of the court²⁷.

FULL TWO-WAY ELECTRONIC COMMUNICATION WITH THE COURT

In contrast, the situation is different with regard to full two-way electronic communication with the court. Nowadays, due to the epidemiological threat, courts allow various possibilities for filing pleadings. Some have dedicated secure filing offices, others have dedicated mailboxes and, where it is not possible to submit a letter in person, it is still necessary to visit the post office to send it by registered mail through a designated operator. There are courts that consciously allow the filing of procedurally defective pleadings through various means of electronic communication (eg ePUAP, email, fax, etc.) The fears of the parties and their attorneys of a possible different evaluation of the procedural actions made by the court of second instance are also not insignificant.

²⁶ The Act of 28 May 2021 on the amendment of the Act - Code of Civil Procedure and certain other acts

²⁷ Article 379(4) CCVP; T. Zembrzusi, “Nieważność postępowania w procesie cywilnym, Warsaw, 2017”, p. 209

THE CRISIS SHIELD 3.0

The answer to these problems was to be found in the anti-crisis shield 3.0 (i.e. the bill contained in the Sejm print No. 344, of the Ninth Sejm), which allowed electronic communication with the court. Pursuant to Article 15zzu13(1) of this bill²⁸, during a state of epidemic emergency or a state of epidemic declared due to COVID-19, the court was to be able to make service through the ePUAP platform:

- to a participant in court proceedings who has filed a letter via this platform and has consented to the service of letters in this manner, via the information portal of the common courts;
- to a participant in the court proceedings who has given his or her consent to service of letters in that manner or at an electronic mail address;
- to a litigant who has requested the court to serve letters in this manner and has indicated an e-mail address to the court for this purpose. The addressee was to confirm receipt of the letter by filing a confirmation through the ePUAP platform or from the electronic mail address previously indicated to the court within 14 days from the date of posting the letter or posting it on the information portal of common courts. The date of service of the letter was to be the date indicated in the confirmation received by the court. In the absence of an acknowledgement, the service of the letter was deemed to have been made on the expiry of 14 days from its posting or posting on the information portal of the common courts. The possibility of remote communication with the court has been advocated for years by legal practitioners and theorists²⁹. Such a method of communication not only speeds up and streamlines the course of proceedings, but also, in times of epidemiological threat, excludes the need for personal contact, thus ensuring the highest level of security. However, these regulations were removed from the draft at the loss of citizens³⁰.

²⁸ Course of the legislative process <<http://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=344>> (accessed 1 June 2023)

²⁹ See D. Szostek, *Want to be eco*, accessed 9 May 2020

³⁰ See P. Rojek-Socha, *Tarcza 3.0 uchwalona, ale znowu bez e-komunikacji z sądem*, <<https://www.prawo.pl/prawnicy-sady/e-doreczenia-usunie-te-z-tarczy-antykrzysowej-3,499987>> accessed 12 December 2023

AMENDMENT ON E-CLAIMS SUBMITTED BY THE KRRP CENTRE FOR RESEARCH, STUDIES AND LEGISLATION TO THE SENATE

The Centre for Research, Studies and Legislation of the National Chamber of Legal Advisers submitted an amendment on e-claims to the Senate. It assumed the introduction of the possibility of optional communication of parties and attorneys by means of electronic communication with the courts³¹. These proposals were not included in the final version of the Act.

POTENTIAL OF THE INFORMATION PORTAL

Currently, operating successfully in common courts, the Information Portal has great potential both as an IT tool supporting the daily work of attorneys and as an ICT system being an official communication channel with the court³². The regulations introduced to the civil procedure in 2015 by the Act of 10 July 2015 amending the Act - Civil Code, the Act - Civil Procedure Code and some other acts are important.

Lawyers welcomed with interest this amendment to the CCP to the extent that it introduced electronic exchange of information with common courts. As of 8 September 2016, the provisions that were to allow electronic communication in civil proceedings came into force. Pursuant to Article 20 of ZmKPC of 2015, for a period of three years from the entry into force of this Act³³, the choice of filing pleadings via an ICT system serving court proceedings and the further filing of these pleadings via this system was to be allowed if, for technical reasons on the court's side, this was possible. Thus, an ICT system was to be established during this period, which would implement the assumptions of the 2015 Amendments. It was not until 8 September 2019 that common courts were to be obliged to accept pleadings in electronic form with attachments, perform electronic service, and provide access to electronic files in civil proceedings electronically through the ICT system serving courts and court proceedings. Unfortunately, neither during the transitional period, when the pilot was to take place in selected courts, nor on 8 September 2019 was the system commonly referred to as the Electronic Filing Office (EBP) launched in any court. The term EBP should be understood

³¹ Rojek-Socha, Tarcza 3.0 uchwalona, ale znowu bez e-komunikacji z sądem, <<https://www.prawo.pl/prawnicy-sady/e-doreczenia-usuniete-z-tarczy-antykryzysowej-3,499987>> accessed 12 December 2023

³² See W. Łukowski, Portalu Informacyjnego Czar, <<https://www.rp.pl/opinie-prawne/art8965701-wojciech-lukowski-portalu-informacyjnego-czar>> accessed 12 June 2023

³³ Repealed by the Act of 4 July 2019

as a complete solution, allowing filing of pleadings electronically and making electronic service also in “traditional” civil proceedings³⁴. The 2019 Revised CCVP amended the provision of Article 125 of the CCVP by introducing § 21a which reads: “the choice of filing pleadings by means of an ICT system and the continued filing of those pleadings by means of that system is permissible if, for technical reasons on the part of the court, it is possible to do so”³⁵. At the same time, Article 6 of the 2019 Revised Code repealed Article 20 of the 2015 Revised Code, which provided that, for a period of three years from the entry into force of this Act, the choice of filing pleadings through an ICT system supporting court proceedings and the continued filing of those pleadings through that system is permissible if, for technical reasons on the court’s side, this is possible. The purpose of this regulation was to ensure adequate time for the creation and successive implementation of an ICT system for court proceedings. However, despite the passage of four years since the enactment of the 2015 Revised Code, the aforementioned system has not been implemented, hence the need to amend Article 20 of the 2015 Revised Code³⁶.

SIMPLIFIED FORM OF ELECTRONIC SERVICE IN CIVIL PROCEEDINGS

With the amendment of 28 May 2021, the provision of Article 15zzs1 introduced a simplified form of electronic service in civil proceedings. Thus, during the period of the state of epidemic emergency or the state of epidemic declared due to COVID-19 and within one year from the revocation of the last of them in the cases listed in Article 15zzs1 of the CoronavirusU, in the first pleading filed by an advocate, legal counsel, patent attorney, or the Public Prosecutor’s Office of the Republic of Poland, an e-mail address for service and a telephone number shall be provided. Further, during the period indicated in paragraph 1, in the absence of the possibility of using an ICT system serving court proceedings³⁷

³⁴ See J. Gołaczyński, and A. Zalesińska, *Kierunki informatyzacji postępowania cywilnego*, *Monitor Prawniczy* 7, 349–355

³⁵ Ł. Goździaszek Ł, in *New Technology Law*, 2012, 141

³⁶ M. Uliasz, *Zasada jawności sądowego postępowania egzekucyjnego w dobie informatyzacji*, Warsaw, 2018, p. 73; A. Zalesińska [in:] J. Gołaczyński, D. Szostek (eds.), *Informatyzacja postępowania cywilnego. Komentarz.*, Warszawa, 2016, p. 164; J. Gołaczyński [in:] J. Gołaczyński, D. Szostek (eds.), *Informatyzacja postępowania cywilnego. Komentarz.*, Warsaw, 2016, p. 139–140. Regarding the electronic form of procedural actions, see A. Kościółek, *Elektroniczne czynności procesowe w sądowym postępowaniu cywilnym*, Warsaw, 2010 E. Rudkowska-Ząbczyk, *Pisemne czynności procesowe w postępowaniu cywilnym*, Warsaw, 2008, p. 241; Ł. Goździaszek, *Elektroniczne postępowanie upominawcze*, Warsaw, 2014, p. 193; S. Cieślak, *Formalizm postępowania cywilnego*, Warszawa 2008, p. 125

³⁷ Article 1311 of the CCVP

the court shall serve a digital reproduction of notices, summonses and judgements on the advocate, legal adviser, patent agent, or the General Prosecutor's Office of the Republic of Poland by placing them in an ICT system serving these letters³⁸. The date of service is the date on which the addressee becomes acquainted with the letter posted on the information portal³⁹. In the absence of familiarisation, the letter shall be deemed to have been served 14 days after the date on which the letter was posted on the information portal. The service referred to herein shall have the procedural effects set out in the CCVP appropriate for the service of a pleading, notice, summons, or judgement. At the same time, the presiding judge may waive service by electronic means (via the information portal) if service is impossible due to the nature of the letter.

APPLYING THE MODEL OF SERVICE ENVISAGED IN ARTICLE 1311 § 1 OF THE CCVP

The above regulation should be noted positively, as it enables in each civil case the application of the model of service envisaged in Article 1311 § 1 of the CCVP, according to which “the court shall make service by means of an ICT system if the addressee has filed a letter by means of an ICT system or has opted for filing letters by means of this system”. In the discussed regulation of Article 15zss9 there is, as can be observed, no prerequisite for the use of electronic service, in the form of filing a letter or choosing to file pleadings via an ICT system⁴⁰. As is well known, the teleinformatic system supporting the filing of pleadings has not yet been established, and therefore the current regulation only indicates a state of emergency or epidemic as a premise for the use of electronic service and, in terms of subjects, limits the scope of use of this form of service in relation to advocates, legal advisers, patent attorneys, or the Prosecutor General's Office of the Republic of Poland. It can only be pointed out that the legislator has also used an ICT system for the service of court letters on parties represented by professional attorneys and the General Prosecutor's Office of the Republic of Poland, and this is a system for making information available⁴¹.

Finally, a similar solution contained in Article 15zss9, sentence 3 of the CoronavirusU and with that contained in Article 1311 § 2 of the CCVP is the

³⁸ A. Zalesińska [in:] J. Gołaczyński, D. Szostek (eds.), *Informatyzacja postępowania cywilnego. Komentarz.*, Warszawa, 2016, p. 131

³⁹ Article 15zss9(3) KoronovirusU

⁴⁰ Ł. Goździaszek, [in] *“The Law of New Technologies”*, (eds) K. Flaga-Gieruszyńska, J. Gołaczyński Warsaw, 2021, p. 146

⁴¹ Article 9 § 1, sentence 3 of the CCVP

marking of the date of service of the letter. Thus, in Article 131 § 2 of the CCVP, in the case of electronic service, the letter is deemed served at the time indicated in the electronic acknowledgement of receipt of the correspondence. The provision of Article 134 § 1 of the CCVP does not apply in the absence of such acknowledgement, and electronic service is deemed to be effective 14 days after the date of posting the letter in the ICT system. On the other hand, the provision of Article 15zzs9(3) of the CoronavirusU clearly indicates that the date of service of a court letter is the date on which the recipient became acquainted with the letter posted on the Information Portal (i.e. the ICT system designed to provide information about the case), and in the absence of acquaintance, the letter is deemed served after the expiry of 14 days from the date on which the letter was posted on the Information Portal. Hence, a doubt arises whether the provision of Article 131(1) of the CCP and the ordinance of the MS on the mode and manner of electronic service issued on its basis should be applied to Article 15zzs9(2) of the CoronavirusU. This is because the provision of Article 131(2) of the CCVP excludes from its scope of application the provision of Article 134 of the CCVP, which refers to the issue of the possibility to serve at night or on a public holiday, making such a possibility dependent on an order of the president of the court, and only in urgent cases. Such an exemption (ie the application of the provision of Article 134 KPC) is not contained in Article 15zzs9(2) KoronovirusU, which begs the conclusion, that it was not the will of the legislator to allow the service of court letters on professional attorneys through the Information Portal, as in the case of service under Article 131(1) of the CCVP . There is also another view, namely, that Article 134 of the CCP does not apply to electronic service through the Information Portal because this provision refers only to traditional service (under Art. 131 of the CCVP) and protects the household mirrors from service precisely at night or on public holidays, and therefore service takes place if the professional representative becomes acquainted with the content of the court letter even on a public holiday, and if the content of the court letter is not directly acquainted, the time limit for the effect of service runs from the day on which the letter was posted on the Information Portal (e.g. even on a public holiday). The only guarantee for the party is that the running of the procedural or judicial time limit cannot end on a public holiday, but on the following first working day.

It should be borne in mind, however, that the provision of Article 149 § 1 of the CCVP, which provides that the court may summon parties, witnesses, experts, or other persons in the manner it considers most expedient, disregarding the methods of service provided for in Chapter 3, Section I, Title VI, Book One of the CCVP, if it considers it necessary to expedite the examination of the case, will still apply. A summons made in this manner shall have effect if it is undoubted that it has reached the addressee within the time limits set out in Article 149 § 2 of the CCVP . This provision also gives the possibility to make a summons by e-mail,

telephone, electronic messenger, etc. The provision of Article 15zzs9(1) of the CoronavirusU, which requires an advocate, solicitor, patent agent, or the Public Prosecutor's Office of the Republic of Poland to provide his or her e-mail address for service and telephone number in the first pleading filed with the court, will also be helpful here. Obviously, this provision only applies to pleadings filed during a state of emergency or state of the epidemic and for a period of one year after the revocation of one of them.

THE CONCEPT OF A COURT WRIT SUBJECT TO SERVICE

The concept of a court writ subject to service may also be questionable. Court writs are currently, without doubt:

- court decisions;
- presiding orders;
- notices and summonses for public hearings, closed hearings;
- other orders (e.g. on supplementing formal deficiencies, on the obligation to take a position).

However, § 21 of the zarz. MS of 19 June 2019 on the organisation and scope of activities of court secretariats and other court administration departments⁴² provides that letters with Annexes No. 3 to the Instructions are sent without a signature.

Thus, based on Article 15zzs9(2) of the CoronavirusU, it will be possible to serve only court letters without a signature (i.e. notices and summonses for a public hearing, orders on the return of a letter (statement of claim, application), orders for payment issued in a writ of payment proceedings. and non-appealable orders). Hence, without an amendment to the Clerks' Manual based on the provision of § 21(4) of OrgSekSądZ, service through the Information Portal may be made only with respect to the above-mentioned court letters, and the others must bear the official seal and the signature of an authorised person.

However, since the scope of the term (court documents include all writings issued by courts of law), it also encompasses judgements, justifications, summonses, notices, etc. Paragraph 68(1) and (2) of OrgSekSądZ provides for a broad definition of court documents, including judgements, justifications, as well as summonses and notices, etc.

Service by the Information Portal should therefore apply to all summonses, notices, and judgements⁴³. Annex No. 3 defining court letters that do not require

⁴² Official Journal of the Ministry of Justice of 2019, item 138 as amended

⁴³ e.g. orders for payment served on the plaintiff's attorney

a signature and seal mentions in its content judgements (orders, injunctions, orders not subject to appeal).

Under these circumstances, there do not appear to be grounds for excluding judgements or justifications from the concept of court letters indicated in the amended Article 15zzs9(2) of the CoronavirusU as being served on the entities indicated therein by the Information Portal. In the absence of an amendment of Annex No. 3 to the OrgSekSądZ indicated in point 1, presidents of district and appellate courts may expand the catalogue of court letters served without signature and official seal, acting on the basis of § 21(6) sentence 2 of the OrgSekSądZ. Ultimately, however, an amendment to the Clerks' Instructions is necessary. The question also arises as to whether a court letter served by the Information Portal fulfils the prerequisites referred to in Article 53a(1) of PrUSP. Let us recall that the latter provision prejudices the issue of the legal status of a document originating from the court information and communication system, namely, that such a document has the force of a document originating from the court (an official document), but on the condition that its content can be verified in the information and communication system. Is it possible to verify the content of a court document published on the Information Portal, treated as an ICT system? At present, there is no possibility, as in the case of electronic writ of payment proceedings, to verify in the information system serving these proceedings the existence and validity of the payment order issued therein. The verification is also obligatory even for the court bailiff, prior to the initiation of enforcement proceedings in order to satisfy a debt established by an order for payment, but the party itself, having only the so-called verification printout, may verify at the court bailiff or court whether the order for payment actually exists. Such a procedure does not exist in the case of the Information Portal and therefore the obvious question arises as to whether service of the court writ itself or only the content of the writ is effected through the Information Portal. If it is considered that service is effected by reading the content of the court letter, then the provision of Article 53 a(1) PrUSP will not apply.

SUMMARY

Broad possibility to participate in the trial by videoconference

As a result of the enactment of the Act of 28 May 2021 on amendments to the Act - Code of Civil Procedure and certain other acts (CoronavirusU), the legislator decided to allow a broad possibility to participate in the trial via videoconference. Pursuant to Article 15zzs1 of the CoronavirusU, during the period of the state of epidemic emergency or the state of epidemic declared due

to COVID-19 and within one year from the cancellation of the last of them, in cases heard according to the provisions of the CCVP or a public hearing shall be held by means of technical devices allowing them to be conducted remotely with simultaneous direct transmission of video and audio, with the proviso that the persons participating in them, including the members of the adjudicating panel, do not have to be in the court building. Exceptionally, the possibility to waive a remote hearing or public hearing has been allowed if the hearing of the case at a hearing or public hearing is necessary and does not jeopardise the health of the persons participating in it and, in addition, the president of the court gives his consent. It is very important here that the previously existing understanding of a distant trial, which so far required the presence of its participants in the court building, has been changed. Pursuant to Article 15zzs1 of the CoronavirusU, the participants of a distant hearing do not have to be in court and may participate in the hearing remotely from a private computer.

At the same time, the legislator has introduced electronic service, using an ICT system through which the court will serve court letters to advocates, legal advisers, patent attorneys, or the General Prosecutor's Office of the Republic of Poland. Exceptionally, this form of service may be waived. However, electronic service will not be used on parties to proceedings acting independently.

PODSUMOWANIE

W wyniku nowelizacji ustawy z dnia 28 maja 2021 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (ZmKoronawirusU), ustawodawca zdecydował się na szerokie możliwości uczestnictwa w procesie sądowym za pomocą wideokonferencji. Zgodnie z art. 15zzs1 ZmKoronawirusU, w okresie stanu zagrożenia epidemicznego lub stanu epidemii ogłoszonej z powodu COVID-19 oraz przez rok od odwołania ostatniego z nich, w sprawach rozpoznawanych zgodnie z przepisami Kodeksu postępowania cywilnego lub przewidzianej rozprawy publicznej może odbywać się za pomocą urządzeń technicznych umożliwiających prowadzenie ich zdalnie, przy jednoczesnej bezpośredniej transmisji wideo i dźwięku, z tym zastrzeżeniem, że osoby w nich uczestniczące, w tym członkowie składu orzekającego, nie muszą być obecne w budynku sądu. Wyjątkowo dopuszczono możliwość zrzeczenia się przeprowadzenia rozprawy zdalnej lub rozprawy publicznej, jeżeli przeprowadzenie rozprawy w trybie rozprawy lub rozprawy publicznej jest niezbędne i nie zagraża zdrowiu osób w niej uczestniczących oraz prezes sądu wyrazi na to zgodę. Bardzo ważne jest tutaj, że dotychczasowe rozumienie rozprawy na odległość, które dotychczas wymagało obecności jej uczestników w budynku sądu, zostało zmienione. Zgodnie z art. 15zzs1 ZmKoronawirusU,

uczestnicy rozprawy na odległość nie muszą być w sądzie i mogą uczestniczyć w rozprawie zdalnie za pomocą prywatnego komputera.

Jednocześnie ustawodawca wprowadził elektroniczną doręczenie, za pomocą systemu teleinformatycznego, poprzez który sąd będzie doręczał pisma sądowe adwokatom, radcom prawnym, rzecznikom patentowym lub Prokuraturze Generalnej Rzeczypospolitej Polskiej. W ramach wyjątku, tej formy doręczeń można nie stosować. Elektroniczne doręczenia nie będą stosowane wobec stron postępowań działających samodzielnie.

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