The use of videoconferencing in the litigation - a legal perspective

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General

With the change Code of Civil Procedure Act (CCP) of the Republic of Slovenia, Slovenia provided a proper legal basis for the use of modern Information and Communication Technology (ICT) at the Slovenian courts. This represents a decisive step of Slovenian Justice that begins with the introduction of new technologies of taking evidence, all in order to increase efficiency and reduce costs.

Many countries are rapidly deploying videoconferencing systems in civil and criminal procedure, especially in those processes where it makes sense and represents an increase in efficiency and cost reduction. That is especially the case in cross-border cases, in particular for the purpose of hearing and interpreting.

Video Conferencing (VC) enables any person who has an interest in court proceedings to be involved in a hearing from a remote location. In its simplest form, a witness at a remote location may give his/her evidence via a video link to the court with one screen and one camera in the courtroom.

The technology needed to establish a video link is relatively simple. A screen and a camera with a microphone are required at each location. Any form of screen can be used. An ISDN telephone line supplied by BT is used to transmit the pictures and sound electronically between the locations. Connection is made by dialing the telephone number allocated to the relevant location.

Advances in technology allow witnesses to give testimony via video conferencing ("VCF") with greater visual and audial clarity than ever before. But in stark contrast, how the Courts decide

whether VCF evidence should or should not be admitted is often relatively unclear. References are casually made to factors in favour or against it, depending on the facts of each case.

Evidence in general

In civil litigation each party shall state the facts and adduce the evidence, upon which their claims are based, and by means of which they contest the facts stated and evidence adduced by the opposing party (article 212 CCP).

According to Slovenian Code of Civil Procedure we have several means of proof: hearing of witnesses and/or parties, evidence with experts, view and documentary evidence.

The correct application of substantive law, among others, also depends on proper findings of fact. It is for this reason, the law prescribes the duty of the parties to the court indicate any facts[1] and submit all the evidence upon which it is to establish the facts (compare Article 7 CCP). In civil proceedings parties wear the burden of proof. So we are talking about pleading and burden of proof (see also Article 215 CCP).[2] In theory, the evidence (also means of proof) are divided into direct and indirect evidence.[3]

Each party in the course of civil litigation has an active role to provide the evidence which is relevant to the decision.[4] This option also has the third persons involved in a lawsuit (intervening party, State Attorney, Attorney General).

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[1] Thus, for example arguments deployed by an expert in its opinion (the same applies to statements of witnesses), is not yet an argument of the party. And the party that his claim or defense based on those arguments (from the other participants in the process), must express these statements in a concrete reference, that they can be regarded as arguments of the parties (judgment Higher Court in Ljubljana, I Cpg 908/2000).

[2] Zobec stresses that these are the most important procedural burdens, because they directly affect the success of the litigation. The plaintiff must indicate all the facts which justify the claim and prove it. – Zobec in Ude et al., Civil procedure, 2. book, p. 344; the same Rechberger/Simotta, Zivilprozessrecht, p. 337; Lüke, ZPO, p. 280; Musielak, Grundkurs ZPO, p. 246.

[3] Thus, for example according to settled case-law, expert opinion that one of the parties acquired pre-litigation itself, can only be considered as an indication of the party rather than evidence. - Judgment II Ips 647/2006.

[4] However, proving the success of the party who bears the burden of proof under the rules of the substantive burden of proof, the burden of proof shifts the process to the other party which must then rebut the counter evidence supporting the success of the main proof. Since in this case the defendant did not succeed, the plaintiffs indicative success changed into a definitive proof success. – Judgment II Ips 544/2003.

The request for the evidence is usually placed in the application[5], the defense[6], but no later than the first hearing of the trial. Only in exceptional cases may be new facts and new evidence suggested later (according to the rules that apply to ius novorum - Article 286 CCP).

At the main hearing, the evidence shall be produced before the panel. However, for justified reasons the panel may decide that specific pieces of evidence be produced before the presiding judge or before the judge of a requested court (requested judge). In such event, the record on production of evidence shall be read at the main hearing.

If the panel decides that specific pieces of evidence be produced before the requested judge, the request to this effect shall state the description of the stage of litigation, and shall specifically state the circumstances to which special attention should be paid upon the production of evidence.

The parties shall be advised of the production of evidence before the presiding judge and/or requested judge, except if they have waived the right to be advised thereof.

In the producing the evidence, the presiding judge and/or requested judge shall have the same powers as are vested in the single judge and/or presiding judge with respect to the production of evidence at the main hearing.

No special appeal shall lie against the decree by means of which the production of evidence is entrusted to the presiding judge and/or requested judge (Article 217 CCP).

The principle of immediacy requires that the evidence shall be carried out at the trial and before the Senate, which will decide the matter.[7] Compelling reasons which the presiding judge may decide to apply to each piece of evidence carried out before the senate requested, are all those who make faster and more efficient process.[8] Such is the case for example, given if necessary, in order to carry out a proof, which is located in the area of the second court, as for example: view, expert opinion,

[5] The plaintiff must prove e.g. relevant facts, facts from which he derived his claim – Ude, Civilno procesno pravo, p. 256; Zobec v Ude et al., Pravdni postopek, 2. book, p. 344.

[6] The defendant must prove the facts on which bases its objections. – Ude, ibidem, p. 256; Zobec v Ude et al., Pravdni postopek, 2. book, str. 344. See also Judgment VSL I Cp 2012/2000, Decision VSK I Cp 502/2001, Judgment and Decision VSL I Cpg 1050/2000.

[7] Ude, ibidem, p. 262; Zobec v Ude et al., Pravdni postopek, 2. book, p. 401.

[8] Access to the file of the other courts is not the evidence before the requested judge. – Desicion VSL I Cpg 1032/2000.

examination of witnesses, or even hearing of one or both parties. In this Zobec points out that, when the process economics requires the taking of evidence requested from the judge, taking into account the price directly derivative evidence, the value of the object and the importance of the evidence to be made indirectly. If in all three cases at the expense of immediacy economy prevailed, the court conducted evidence requested by the judge.[9]

Digital evidence

A document in physical and electronic form issued by a government body in the prescribed form and within the limits of its powers, or a document issued by a local government body or other statutory authority in the said form and manner (public document) shall prove the truth of what is certified or determined therein.

The same effect of proof shall be recognized to other documents whose effect of proof is equated with that of public documents pursuant to special regulations.

Submitting of evidence by a microfilm, or electronic copy of a document, or by reproduction of such a copy, shall be regarded as equal to submitting of evidence by a document in physical form, or electronic copy, or reproduction thereof has been issued by the competent state authority, self-managing local community, or a body exercising public powers.

But consideration should be given that the parties shall be allowed to submit evidence that a microfilm, or electronic, copy, or a reproduction thereof, differs from the original document.

Facts contained in a public document and correctness of composition of the same may be subject to contestation. If the court has doubts over the authenticity of a public document, it may require the body purported to have issued it to produce a statement thereon (article 224 CCP).

In theory, it is stressed that the document is any object which is expressed as a thought. [10]

[9] In detail Zobec v Ude et al., Pravdni postopek, 2. book, p. 402.

[10] Juhart, Civilno procesno pravo FLRJ, p. 369; Ude, Civilno procesno pravo, p. 265; Rosenberg/Schwab/Gottwald, ibidem, 16. edition, p. 814. Documents can be divided into public and foreign, discretionary (with the direct relationship established, modified, terminated) and documentaries (instrument made solely for evidentiary purposes - eg. Extract from the land register), classical and electronic. – See Zobec

CCP expressly states that have the same probative value as a public document to other documents that are based on specific provisions regarding the probative force equal to public documents (e.g., return of service, a medical certificate[11]).[12]

Given the increasingly widespread trend and the use of electronic commerce in the light of evidence relevant to proving the microfilm or electronic copy of the document or the reproduction of copies are equal to that document in physical form (a public document). This of course is only provided if the microfilm or electronic copy or reproduction of copies issued by a competent state body, local authority or public authority powers (e.g. electronic land registers extract).[13]

The legal presumption is that all public documents are true and that the participants, both parties and the Court rely on them in the process. In cases where there is doubt as to the authenticity of the documents proving the reality of what is to certify that the Court is authorized to also ex officio required to make a declaration of authority from which to document originated.

If a party disputes the authenticity of the document, the burden of proving the authenticity or inauthenticity does not wear one that is disputed, but his opponent, which relies on the document that it establishes facts from which it exercises its rights.[14]

In such a case it can be shown that the public document is not properly assembled, as it relates to the assumption that it is not an authority, which is marked as its issuer, or that its contents are not true.

If it is a public document, which provides some (eg, a final judgment or order of the court), it is not possible to doubt its content. Such a public document can be challenged in civil proceedings. Such a document is thus challenged by the extraordinary legal remedies provided for in the proceedings in which the decision was taken.

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in Ude et al., Pravdni postopek, 2. book, p. 417-419; same Rechberger/Simotta, ibidem, p. 355; Lüke, ibidem, str. 311, pointing out that this definition does not correspond to an electronic document which is not materialized, but that is not the reason that under certain conditions, including electronic document shall be considered as a document.

[11] Compare Reichold v Thomas/Putzo, ZPO, p. 479.

[12] Zobec in Ude et al., Pravdni postopek, 2. book, p. 420.

[13] Compare Rechberger/Simotta, ibidem, p. 353.

[14] Juhart, Civilno procesno pravo FLRJ, p. 371.

As with the physical document is also in microfilm or electronic copies or reproductions of these copies can prove that it differs from the original document.

Videoconferencing

Videoconferencing is a useful instrument for hearing both witnesses and parties to the proceedings. Slovenian Code of civil procedure enables videoconference for the taking of witness evidence, questioning of the parties and hearing of experts.

Videoconferencing is also used in civil proceedings, on the basis of consent of the parties and permit of the judge or under EU Council Regulation on cooperation between the courts of the Member States in the hearing in civil and commercial matters.[15]

According to article 114.a CCP we have an opportunity to use videoconference in civil judicial proceedings in Slovenia since 1 October 2008.

The amendment CPP-D among the most important novelty introduces the possibility of the provision of hearings over video conferencing.[16]

By consent of the parties, the court shall have the right to permit to the parties and their counsels to be at another place at the time of the hearing and to perform procedural acts there provided an audio and visual transmission has been provided from the site of the hearing to the place, or place, where the party (parties) and their counsels are located, and vice-versa (video conference).

Under these conditions the court shall also have the right to take evidence by hearing the parties and witnesses and evidence by a court expert.

In the event that the court decides that a hearing will be made via a video conferencing system shall issue a decision against which there is no appeal. It is an option and not an obligation for the courts.

[15] UL L 174/2001, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[16] A similar arrangement is also known nZPO in § 298 a, where an electronic procedural acts is limited to specific procedures. – Thomas/Putzo, ZPO Kommentar, p. 500−501.

Another possibility is the use of videoconferencing in legal assistance between the courts.

The legal co-operation in civil matters is regulated in the Republic of Slovenia by the Code of Civil Procedure (OG RS, No. 26/99), by the Act on Execution and the Interim Protection of Claims (OG RS, No. 51/98), by the Private International Law and Procedure Act (OG RS, No. 56/99), by the Act on Legalization of Public Documents in International Traffic and by bilateral and multilateral conventions valid in relations between the Republic of Slovenia and individual countries.

Unless otherwise provided by an international agreement, the Court shall proceed with a foreign Court's request for legal aid only when the request is communicated through diplomatic channels and if the request and enclosures thereto are composed in the Slovenian language, or are enclosed with a certified translation in the Slovenian language (article 177 CCP).

At this point it should be noted by Council Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, which aims to improve, simplify and accelerate cooperation between courts in the taking of evidence.

The Regulation provides two methods of taking evidence between Member States: the direct transmission of requests between the courts and the direct taking of evidence by the court from which sends the request (Article 1).

The Regulation makes it easier to take evidence in another Member State. It applies in civil and commercial matters where the court of a Member State: requests the competent court of another Member State to obtain evidence; requests to gather evidence themselves in another Member State.

The Regulation provides that the requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference (sound transmission).

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.

If there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement (Article 10 of the Regulation).

Since Slovenian CPA allows the taking of evidence via video-conferencing, the only impediment to the implementation of such a request is technical equipment of the Courts.

Conclusion

In practice, the Slovenian Courts in civil proceedings have not use the videoconferencing system yet, but it has been used in criminal matters several times. Slovenian Courts are generally equipped with the equipment for videoconferencing. By promoting electronic commerce and the increasing number of electronic evidence, it will become the giving of evidence via video-conferencing increasingly important. Especially in cross-border disputes the use of video conferencing has become an important tool to reduce costs and speed up procedures. With adequate training of judges in our view, will the Slovenian Courts in the future often implement evidence with the use of videoconferencing system.