

# Brazil/Canada/France/Germany/Mexico/United Kingdom/United States/International - International Association of Tax Judges Webinar: Tax Courts during the COVID-19 Pandemic

Bob Michel[\*]  
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This report summarizes the webinar held on 25 September 2020 by the judges of the International Association of Tax Judges on the topic of the functioning of tax courts around the globe during the COVID-19 pandemic.

## 1. Introduction

Due to the COVID-19 pandemic, the International Association of Tax Judges (IATJ) suspended its annual assembly in 2020. Instead, the judges are holding a series of webinars. The first webinar on the topic of “Tax Courts during the COVID-19 Pandemic” took place on 25 September 2020. The information reflects the situation as it stood on that date.

Peter Panuthos, US Tax Court (USTC), served as the moderator of the webinar, which contained interventions by the following panellists: Anette Kugelmüller-Puh, *Bundesfinanzhof* (Federal Fiscal Court, BFH), Germany; Christopher McNall, First-tier Tribunal (FT), United Kingdom; Emin Toro, USTC; Manuel Luciano Hallivis Pelayo *Tribunal Federal de Justicia Fiscal y Administrativa* (Federal Court of Fiscal and Administrative Justice, TFJFA), Mexico; Marcus Lívio Gomes, *Juiz Federal* (Federal Judge), Brazil; and Pierre Collin, *Conseil d’Etat* (Supreme Administrative Court, CE), France.

Panuthos opened the session by referring to the current COVID-19 pandemic and its pressure on national courts around the globe to adopt procedures to keep staff and the public safe from the virus, as traditional court settings bring together judges, lawyers and litigants in a closed environment. Courts quickly realized that such traditional settings pose substantial health risk during the pandemic. Immediate steps were taken by many courts to mitigate these risks and, most importantly, to continue to accomplish their mission of providing access to justice for taxpayers. On this last point, Panuthos suggested that the COVID-19 pandemic could serve as an enabler for courts to increase access to justice in ways not previously provided, for example, by the use of technology.

Panuthos highlighted that court proceedings differ in common law and civil law jurisdictions, and so does the impact of the COVID-19 pandemic. Similarly, not every jurisdiction is affected to the same degree by the virus, and, therefore, not all tax courts around the globe are affected to the same degree.

Panuthos closed the introduction by explaining that the objective of the webinar was to provide details of what tribunals worldwide have been doing in relation to the COVID-19 pandemic and to exchange ideas to aid the continuing challenge of dispensing justice in these difficult times. These issues are now considered in sections 2. to 6. Some final remarks are set out in section 7.

## 2. Question 1: How Did the Tax Authorities and Bar Associations Respond to the COVID-19 Pandemic and How Did This Response Affect Tax Courts?

### 2.1. United States

Emin Toro believed that the USTC has the ability to communicate with the tax bar and with the tax authorities about systemic issues that affect the proceedings before the court as a whole. In general, the relationship of the USTC with these and other stakeholders – such as legal clinics advising low-income taxpayers – is good. This situation permits issues that arise to be dealt with and that this was not different in relation to the COVID-19 pandemic.

With specific regard to the COVID-19 pandemic, the USTC set up a working group to obtain feedback, not just from internal sources, but also from both the Commissioner of Internal Revenue (CIR), representing the tax authorities, and the tax bar, representing taxpayers, on how to move forward in the scenario that the pandemic lasted longer than anticipated. The purpose was to ensure that if the USTC were to strengthen its online presence and proceedings, it would do so by making sure that the fundamentals that are important for carrying out justice, like a taxpayer's ability to be heard, the ability for the court to validate credibility and argument and the ability not to disadvantage those who do not have resources, are respected.

It should be noted that 75% of the petitioners before the USTC represent themselves. Accordingly, it was especially important that, when ordinary citizens come before the USTC, they have their case heard, to inform them properly of how the USTC was dealing with the virus threat. Consequently, frequent press releases and other formal communications were issued on the matter. This last aspect was also regarded as important by the tax bar, which provided input to the USTC on how to revise procedures where needed, but taking into account the fact that taxpayers do not necessarily have the same resources available to embrace certain changes like the government.

### 2.2. France

Pierre Collin observed that the contradictory proceedings of the French CE are essentially written procedures. Communication between court and parties always takes place in writing. In France, the COVID-19 crisis can be divided in two phases. From mid-March to May 2020, every citizen was asked to stay at home under an order of the general confinement of the population. Regular operations of the courts ceased, except for very urgent hearings in cases related to the crisis and the measures taken to contain it. Tax case proceedings were suspended. However, with regard to written procedures, contradictory proceedings continued with the parties involved working from home. It was the CE that guided this procedure, and

this was also the case when a digital platform was used. A party submitted briefs, and it was for the CE to forward the brief to the opponent and so on. It was not very difficult for clerks and judges to continue this process from home.

From May 2020, public hearings in French tax courts were resumed. There was communication between the stakeholders, not about individual cases but about specific COVID-19-related issues, such as how to organize hearings, while, at the same time, upholding the social distancing or limiting public attendance, etc. For instance, lawyers were asked to attend hearings alone without the presence of the taxpayer they represented. Special priority rules were devised to select cases for hearings, given that the ordinary caseload that the courts could process was reduced.

## 2.3. Brazil

Marcus Lívio Gomes emphasized that, in Brazil, there is generally no formal communication between the tax courts and the tax authorities and the (tax) bar. The bar is very much institutionalized in Brazil, and does have a strong voice, though primarily heard at the level of the *Supremo Tribunal Federal* (Supreme Federal Court, STF). In Brazil, on average seven million tax cases are pending before the administrative and judicial courts. During the COVID-19 pandemic, the main concern for tax lawyers was to obtain a suspension of proceedings, both electronic and those involving physical appearance. In March 2020, at the beginning of the pandemic, the *Superior Tribunal de Justiça* (Superior Court of Justice, STJ) issued a normative order,<sup>[1]</sup> which granted a suspension of all deadlines. This action was the first COVID-19 related measure taken by the judiciary. The same request was addressed to the tax authorities and suspension at the administrative level was granted by the federal tax authorities.

Another concern was the mitigation of procedures to bring into contact courts, the tax authorities and the tax lawyers representing taxpayers in a safe way. The STJ urged the use of electronic communication means, such as WhatsApp, e-mail and the telephone. Despite the fact that there is no formal communication between those stakeholders, this solution has been adopted and implemented in a fast and efficient manner. In a later phase of the seemingly ever-enduring COVID-19 pandemic, this form of communication was institutionalized, but not without certain issues being raised. Before the COVID-19 pandemic, 90% of the procedures were already electronic, so the stakeholders were used to this way of working.

## 3. Question 2: How Did the Tax Courts in Particular Respond to the COVID-19 Pandemic?

### 3.1. Germany

Anette Kugelmüller-Pugh explained that the German BFH is located in Munich, Bavaria. Bavaria went in lockdown in March 2020. As a consequence, citizens were asked to stay at home. Judges and the staff of the courts were classified as “key-workers”, thereby implying that these individuals could travel to their place of work during the lockdown. As a key-worker, these officials were also exempt from the restrictions on travel to third countries designated as high-risk destinations.

Before the COVID-19 pandemic, the judges of the BFH had been provided with laptops connected to the secured servers of the court. In March and April 2020, when no public hearings could take place, judges were well equipped to prepare pre-procedure stage of cases from home. With regard to the administrative staff of the BFH, a rotating schedule was put in place to reduce occupancy of offices by two thirds, while continuation of certain services, such as telephone communications, were ensured. Many of the staff is not provided with remote access, which implied that their obligation to stay at home resulted in delays of the functioning of the court in some respect.

Litigants before the BFH usually physical appear before the court. This situation was not possible between March and May 2020, as the local hospitality business was closed, and there were no places to lodge litigants who travelled from afar. New hygienic standards were developed so as to enable physical hearings to take place, and these were put into practice in mid-May 2020.

### 3.2. Mexico

Manuel Luciano Hallivis Pelayo stated that, in Mexico, the TFJFA suspended all proceedings and stopped operation for two weeks until the end of March 2020 so as to be able to organize to cope with the pandemic. As of April 2020, staff migrated to a system of remote working, thereby implying that business could continue as usual but on a distanced basis. As a matter of fact, access to justice was improved under this system, given that court sessions were publicly broadcasted and temporarily stored on platforms, such as YouTube, with audiences of up to 600 viewers per session, well beyond the number of attendees in ordinary public sessions. The courts apply a system of alternating staff presence at the physical premises. Only urgent matters were dealt with by the Mexican courts between March and July 2020, so litigants were keen to reverting to the ordinary system of proceedings, which was planned to take place in the third semester of 2020.

### 3.3. United Kingdom

Christopher McNall reminded the audience that the United Kingdom went into a very strict lockdown in late March 2020 with the primary message for people to stay at home. The President of the FT issued a special order suspending all proceedings for an initial period of 28 days. Administrative staff had to stay at home initially. Litigants seemed to have had other things on their mind other than pursuing tax cases before the courts. Lawyers, therefore, adopted a wait-and-see approach. Following the end of the suspension period, the courts went back to functioning normally, albeit with judges and staff working remotely. Before the COVID-19 pandemic, a video project via a dedicated and secured video platform for remote court proceedings had been piloted. This was rolled out on a more universal basis during the COVID-19 pandemic.

## 4. Question 3: How Did the Tax Courts Continue to Process Cases and What Different Procedures Were Adopted during the COVID-19 Pandemic?

### 4.1. France

Pierre Collin reiterated that, in normal times, the French CE never physically meets representatives of the taxpayer or the tax authorities during the proceedings. This situation, however, did not mean that there was no need for the government to take action due to the COVID-19 pandemic, given that taxpayers and lawyers were facing practical difficulties in conducting their business in general. For this reason, the government issued regulations extending the time limits for all proceedings,<sup>[2]</sup> including deadlines to contest decisions, lodge appeals, etc. The way in which the judges of the CE work collectively on the deliberation of cases once the contradictory phase is over had to be modified significantly. Normally, the “*juge rapporteur*” (reporting judge) studies the case and prepares a decision. Subsequently, a “*juge reviseur*” (senior revising judge) takes a second look at the case. During an instruction session, the case is discussed, and a final decision is then submitted to the panel of judges for approval.

In France, judges were not considered to be “key workers” during the lockdown, and, therefore, the stay-at-home order in France made physical deliberations at the CE impossible. Videoconferencing was used instead. Collin observed that, in the experience of the judges, this modern way of working had its own difficulties, such as the increased difficulty for participants to maintain focus compared to physical deliberation sessions. Adaptations were made, for example, by shortening the online deliberation sessions compared to the physical sessions by focusing only on the most controversial issues at stake in cases and by requesting panel judges to undertake more preparatory work on individual cases to limit discussion, while passing over the presentation of the issues.

Collin concluded that, in a way, the COVID-19 pandemic compelled the CE to work more efficiently and more flexibly, which is a good thing. This conclusion is confirmed by the fact that, in summer of 2020, when the situation normalized somewhat, certain aspects of the altered procedures, like the increased individual preparation by panel judges, were retained as standard practice. There have also been experiments with mixed online and physical deliberations with a number of judges being physically present and others participating remotely.

## 4.2. United States

Emin Toro noted that the USTC, unlike most civil law courts, is a travelling court and hears cases in over 70 different US cities. In normal times, judges travel to these cities and conduct in-person proceedings. On-paper proceedings are possible in certain circumstances, but physical appearances in court is the standard rule. Accordingly, as travelling and confinement in a single room of many individuals were all problematic during the COVID-19 pandemic, the ordinary proceedings of the USTC were greatly affected. As a result, the USTC adopted rules from late February 2020 to limit the number of people present during trials and, eventually, decided to cancel all sessions and proceed only with issues that could be resolved on paper. Parties were urged to continue to work their cases. Some did, and some did not. Sixty percent of cases scheduled to be tried in the spring of 2020 were effectively resolved before the trial, whereas in normal times 90% of the cases would have been resolved. However, this slowdown was compensated for by the fact that the judges of the USTC could increase the number of opinions on cases that it had already heard, as the spring sessions were all cancelled.

Toro observed that not every case is suitable for a remote hearing, and hearing live testimony over a (secured) online video platform might not be possible in certain cases. In the great

majority of the cases, the judges of the USTC found it to be a suitable approach, however. Taxpayers seem to be able to navigate the online tools easily, and some did appreciate the fact that they were not required to leave their homes and travel large distances to attend court hearings. The proceedings of the USTC were adapted a little to accommodate the remote process. For instance, deadlines for the submission of paperwork were advanced so that judges can have better access to anticipated evidence in advance of sessions. In general, the tax judges seemed to get involved in the cases sooner in the process, by organizing conference calls with the parties to understand the issues and to help narrow the issues. Toro agreed with Pierre Collin that increased preparation is what led to success in the court during the COVID-19 pandemic. However, there is nothing that could be done for parties that cannot prepare, other than to wait until in-person proceedings are possible once again.

### 4.3. United Kingdom

Christopher McNall noted that, during the COVID-19 pandemic, as with the “Nightingale” emergency hospitals, a number of “Nightingale” courts have been set up in the United Kingdom in sufficiently large buildings, such as theatre venues, to safely hold criminal proceedings with social distancing measures in place. These venues also contain a room for the FT to hold in-person sessions, if necessary.

### 4.4. Canada

Eugene Rossiter explained that, in Canada, there was a lockdown from March until June 2020, during which time everything was shut down, including the Tax Court of Canada (TCC), which was deemed not to be an essential court. From the end of July 2020, the TCC was fully operational again with its 120 members of staff being back full time. In addition to the operations in Ottawa, the number of locations in Canada to where the judges ordinarily travel to hear cases has been reduced.

## 5. Question 4: Are There Practical or Legal Impediments to Virtual Proceedings?

Christopher McNall expressed the opinion that it was difficult to find disadvantages to virtual proceedings. For instance, in some cases, the judge’s trial bundle consists of thousands and thousands of pages. These are much easier to handle on a digital interface than in physical copy, if there is sufficient digital screen space available. Moreover, in McNall’s experience, the overall quality of evidence presented over videoconference seems to be better than that presented face to face in a court room. Witnesses are more relaxed, as they are in their natural habitat and are not facing a contingent of lawyers.

The mandate of a court is to deal with cases fairly and justly. McNall was confident that the video hearings are fair and just and answer to the requirements of article 6 of the European Convention on Human Rights (ECHR). He expected the way of working during the COVID-19 pandemic to be continued after the lockdown. The FT is mostly a traveling court that traditionally moves to where a taxpayer is located. This approach is believed to be seen as outdated, just like the use of paper in court.

With regard to whether remote testimony should be admissible if it consisted only of audio and not of video, McNall believed that it should be. In his experience, the cross-examination of witnesses by telephone did not seem to affect the quality or the utility of the evidence. The answer might be different in case the judge has to assess the demeanour of a witness. However, remote sessions with only audio participation are difficult to conduct in an orderly fashion, as people do not know when to stop or start talking. Hybrid video and/or audio sessions are a good option.

Manuel Luciano Hallivis Pelayo emphasized that the sessions of the TFJFA in Mexico are public, but that only judges participate in the debate. It is the judges who present the arguments prepared by the parties. There are no legal or constitutional impediments to conducting virtual trials. The *Cámaras Regionales* (Regional Chambers) of the TFJFA could keep to their normal schedules, and the COVID-19 pandemic had little effect, except for the rotating of the staff and the obligation to work from home.

Anette Kugelmüller-Puh observed that the German *Finanzgerichtsordnung* (Law on Fiscal Court Procedures, FGO)<sup>[3]</sup> contains a section that requires judges to be in the court room, and that hearings must be public. However, a court may permit the parties to participate by video conference, but this does mean that there is a clear legal impediment to a full virtual hearing in Germany. Unlike the United Kingdom and the United States, the German system subscribes to the principle that taxpayers are expected to travel to the physical premises of the court. Partial virtual hearings are especially popular in first instance tax courts which decide on factual matters, most certainly if these cases involve cross-border elements. Foreign witness testimony by video conference is very convenient in such circumstances. First instance courts have a fully electronic filing system and electronic signature facility. The FGO permits judges to decide on a case without an oral hearing if the parties renounce their right to such a hearing. By using the electronic signature, the judges can fully consider a case in written form.

For the time being, the situation is different at the level of the BFH, the tax appeal court. A pilot project is ongoing, but electronic facilities have not implemented across the board. Accordingly, BFH must travel physically to the court building. In Kugelmüller-Pugh's own experience at the BFH, the parties seem to cherish the in-person hearing, even during the COVID-19 pandemic, and seem to like the opportunity to visit the court. The appellate judges would welcome the implementation of the electronic facilities, though. McNall believes that, although people might feel a sense of nostalgia going into a court building, if remote proceedings effectively permit the consideration of cases in a fair and just way, it would not make sense to revert to the old ways after the crisis.

## 6. Question 5: Will the Operation of Tax Courts Post-Pandemic Be Changed by the Lessons Learned?

Manuel Luciano Hallivis Pelayo believed that the pandemic permitted the courts in Mexico to experience the benefits of remote working without any fall in productivity. Working from home seems to allow both court clerks and judges to make the most of their time and to maximize output, both qualitatively and quantitatively. Questions have been raised as to whether this system should be maintained, at least partially after the termination of the lockdown measures. The electronic platforms developed for the submission of cases, both directly via input on the platform or in an intermediate way by submission of scanned

documents, seem to work well and without harming taxpayer rights. As the tax court procedure in Mexico is written, the conversion to fully electronic case proceedings has not been difficult, and has been in force since 2011. At the time of writing this report, an updated version with additional facilities and security of the Mexican e-trial system is set to be launched in December 2020.

Emin Toro took the traditional view in defence of in-person proceedings. Remote proceedings are effective and very useful in certain cases. However, Toro reminded the online audience that there is also a benefit in justice being seen and seeing a human being on a screen is different from seeing a person on a bench. Human beings are essentially geared towards physical contact. Online video platforms are a perfect solution in cases high (health) risks, and benefits need to be balanced. But, if Toro had a choice and if there were no risks, he would prefer an in-person session instead of an online session. However, the COVID-19 pandemic has demonstrated to the courts that there are cases that are very suitable for video conferencing and remote proceedings, for example, in respect of taxpayers residing in Alaska or in the case of hearings on motions before the trial that would be resolved otherwise only on paper without the need to admit a hearing. Nevertheless, Toro said that he was looking forward to reverting to in-person proceedings once it was safe.

Anette Kugelmüller-Pugh agreed that, also in Germany, remote working and remote proceedings will always serve as a supplement of in-person proceedings, without the aspiration for the former to replace the latter. She did agree that it would be an improvement to retain electronic documentation to remove the burden of physical paper. Before the COVID-19 pandemic, judges in Germany were expected to be physically present in the court buildings for two to three workdays per week. This situation has definitely changed over the lockdown period, as the judges have experienced first-hand that the productivity at home with regard to the preparation of cases is greater than at the office. However, working from home obviously comes with its own challenges which are different depending on the individual. Kugelmüller-Pugh also did not believe that the German tax court proceedings would migrate to being fully virtual any time soon, as such a change would require an amendment of the FGO.

Marcus Lívio Gomes observed that, in Brazil, the move from in-person to remote interactions between the parties and the courts led to a fall in the rate of success for taxpayers. Before the pandemic, 45% of court decisions were in favour of the taxpayer. In the first half of 2020, this percentage fell to only 15%. Accordingly, lawyers representing taxpayers are not keen on remote proceedings, and believe that it affects the rights of the taxpayers they represent.

Christopher McNall believed that the issue of whether the nature of the persuasive exercise and the relationship between the bench and the bar was affected whether the proceedings were face to face or virtual was a very interesting point. He believed, however, that it did not matter and that there was much (misplaced) romanticism regarding the relationship between the bench and the bar. Moreover, he found that speaking in person to a judge was no more persuasive than communicating through video conferencing.

Toro thought that this position depended on the sophistication of the party. He believed that, for taxpayers representing themselves, it might be more difficult in remote proceedings to prepare their evidence and present a cogent argument in making their case.

McNall had stated that he believed the opposite to be true, based on his experience that taxpayers are more comfortable speaking over the screen than in front of the physical bench, surrounded by lawyers. He also did not believe that witness tampering was an issue. The FT handed witnesses a checklist before testifying for them to confirm that they are in a room on their own and could not be assisted. McNall reminded the audience that in the standard in-person proceedings issues with witnesses arise, for example, witnesses communicating amongst each other during lunch breaks.

## 7. Final Remarks

Eugene Rossiter, Chief Justice of the TCC and President of the IATJ, concluded the webinar. He noted that, even though the approaches to deal with the COVID-19 pandemic worldwide were initially very similar in all jurisdictions, and involved a period of adjustment and adaptation through embracing technology, it was clear that different jurisdictions took different measures, and that the embrace of technology was not uniform across the tax courts around the world.

The overviews provided by the judges from different countries clearly revealed a wide variety of approaches adopted during the COVID-19 pandemic by the courts represented by the speakers. Rossiter believed that there might be a generational divide between younger judges, who might be more “tech-savvy” and prefer brand new technology, and older judges, who could prefer good old pen and paper. Technology was key for the future, but Rossiter foresaw problems in this regard. Lay litigants, for example, might face difficulties presenting claims if proceedings became electronic and digital. Rossiter believed that, at the TCC, fully remote multi-day proceedings like those before the UK FT, were not possible at present and for the foreseeable future. Personally, he preferred a hands-on approach that involves face-to-face sessions in the courtroom. As said, such a view might be a testimony to his age, however.

In closing the session, Rossiter thanked the panellists and the moderator. He also thanked Wim Wijnen of the IBFD and the permanent scientific committee for selecting and preparing the topic of the webinar.

**\*Adv. LLM, international tax policy advisor and editor of the Tax Treaty Case Law Collection, IBFD. The author can be contacted at [michel.bob@gmail.com](mailto:michel.bob@gmail.com).**

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BR: Superior Tribunal de Justiça, Resolution STJ/GP No. 6, 20 Mar. 2020, available at [https://legalclouds3.s3-sa-east-1.amazonaws.com/dje/STJ/20200323\\_stj\\_resolucao\\_n6.pdf](https://legalclouds3.s3-sa-east-1.amazonaws.com/dje/STJ/20200323_stj_resolucao_n6.pdf) (accessed 25 Feb. 2021). For more resolutions by the STJ with COVID-19 measures, see <https://www.stj.jus.br/sites/portalp/Paginas/STJ-no-Combate-ao-Coronavirus.aspx> (accessed 25 Feb. 2021).

2.

FR: Emergency Act No. 2020-290 of 23 March 2020 to deal with the COVID-19 pandemic, article 11(2)(b), available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746313/> (accessed 25 Feb. 2021).

3.

DE: *Finanzgerichtsordnung* (Law on Fiscal Court Procedures, FGO).