CIVIL COURTS COPING WITH COVID-19

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The unforeseen Covid-19 pandemic has propelled, and continues to propel, unprecedented transformations to civil proceedings and the landscape in which they operate. Courts have proven to be creative and innovative in their responses to the pandemic, and in their ability to implement digitisation of paperwork and remote hearings. This book contains a comparative study of how courts in 23 countries have coped with the pandemic, addressing selected innovations and adaptations to court proceedings, factors facilitating and impeding the digital leap, and new concerns that new technology and the pandemic engenders. The authors discuss the implications of digitisation, such as ensuring equal access to courts, novel issues concerning fair trial rights in remote proceedings, the role of alternative dispute resolution during the pandemic, and the roots of resistance to digitisation. Several contributions also address whether and how innovations during the pandemic may transform civil litigation in the future.

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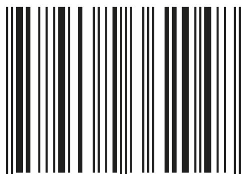
ISBN 978-94-6236-204-8



Civil Courts Coping with Covid-19

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international publishing

Published, sold and distributed by Eleven International Publishing
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
email: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
Independent Publishers Group
814 N. Franklin Street
Chicago, IL 60610, USA
Order Placement: +1 800 888 4741
Fax: +1 312 337 5985
orders@ipgbook.com
www.ipgbook.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

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ISBN 978-94-6236-204-8
NUR 822

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Table of Contents

Civil Courts Coping with Covid-19 – Exceptional Times, Normal Times, New Times? **1**
Bart Krans and Anna Nylund

Responding to Covid-19 – Australian Civil Courts in 2020 **7**
David Bamford

The Impact of Covid-19 on Civil Procedure in Belgium **15**
Piet Taelman

Brazilian Precedents in Covid-19 – Supreme Court Matters? **25**
Fredie Didier Jr., Hermes Zaneti Jr. and Ravi Peixoto

The 'New Normal' of Civil Procedure in Canada – Technological Efficiency over Proportionality and Accuracy of Outcomes **35**
Catherine Piché

Civil Justice in China in the Covid-19 Period **41**
Yulin Fu

Croatian Civil Justice v. Covid-19 – The Empire Strikes Back **47**
Alan Uzelac

Digitalization of Danish Civil Justice – Perspectives from the Pandemic **57**
Clement Salung Petersen

Developing the New Normal for English Civil Procedure Post Covid-19 **63**
John Sorabji

Pandemic and Digitalization – The Situation in the Finnish Lower Courts **73**
Laura Ervo

Covid-19 and French Civil Justice – What Future for Civil Hearings? **83**
Frédérique Ferrand

Covid-19, Civil Justice 2020 and German Courts 2021? **93**
Wolfgang Hau

Covid-19 and Civil Justice – News from the Italian Front **103**
Elisabetta Silvestri

Impact of Covid-19 on Japanese Civil Justice **113**
Shusuke Kakiuchi

Impact of Covid-19 Pandemic on Lithuanian Civil Justice **123**
Vigita Vėbraitė

The Aftermath of the Covid-19 Pandemic in the Netherlands – Seizing the Digital Gains **129**
Bart Krans

Covid-19 and Norwegian Civil Justice **139**
Anna Nylund

Peruvian Judicial System during the Covid-19 Pandemic **147**
Christian Delgado Suárez

Transformation of Polish Civil Procedure in Light of Covid-19 **155**
Piotr Rylski

Singapore Civil Procedure and Covid-19 **167**
Jeffrey Pinsler

Coping with an Outdated and Rigid Civil Procedure in the Era of Covid-19 – The Experience of Slovenia **173**
Aleš Galič

Civil Justice after the Covid-19 Pandemic in Taiwan **179**
Kuan-Ling Shen

The Impact of the Covid-19 Pandemic on the Civil Procedure in Uruguay **189**
Santiago Pereira Campos

Covid-19 and American Civil Litigation **195**
Richard Marcus

Conclusions on Civil Courts Coping with Covid-19 **205**
Anna Nylund and Bart Krans

Covid-19 and Norwegian Civil Justice

Anna Nylund[*]

1 Introduction

Norwegian courts have been digitised at an unprecedented pace during the Covid-19 pandemic. Because case management hearings were already conducted remotely and expert witnesses were often examined remotely, the transition to fully remote hearings has been fairly smooth in Norway, as will be explained in Section 2. However, the implementation of new technology has entailed some difficulties, in particular, regarding the application of the rules on remote hearings. These challenges will be discussed in Sections 3 and 4. Section 5 discusses whether paperless courts and remote hearings are overly modest advancements considering the potential that lies in digitisation.

2 A Successful Transition to Remote Hearings

Although Norway is a technologically advanced country where most people have access to computers, tablets and high-speed internet in their homes,[1] Norwegian courts have had only rudimentary electronic filing and case management systems.[2] Digitisation has been slow and gradual. Until recently, most courtrooms in Norway were not equipped with audio and video recording devices, and only courts in some parts of the country had access to the electronic filing system, due to insufficient funding of digitisation. This might be surprising considering that Norway has funded similar equipment for courts in Central

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1 In 2020, 94% of the Norwegian adult population (age 16-74 years) used the internet daily or almost daily, and 96% of households, including 88% of low-income households, had access to broadband internet according to Statistics Norway, www.ssb.no/statbank/table/10999/tableViewLayout1/ and www.ssb.no/statbank/table/11124/tableViewLayout1/ (accessed 11 November 2020).

2 Riksrevisjonen, Undersøkelse av saksbehandlingstid og effektivitet i tingrettene og lagmannsrettene. Dokument 3:3 (2019-2020), 22 October 2019 and NOU 2020: 11 Den tredje statsmakt. Domstolene i endring, p. 249 ff.

and Eastern European countries[3] and how technology permeates other domains of Norwegian society.

Norwegian courts have examined experts and expert witnesses remotely for a few decades, thus laying a fertile ground for rapid extension of the use of remote hearings. Although the Dispute Act (DA, the Norwegian Civil Procedure Act)[4] that entered into force in 2008 was drafted 20 years ago, it foresees the use of remote and hybrid hearings. Hence, most courts have routinely held case management hearings remotely (DA section 9-4 subsection 3), and experts and some witnesses have sometimes testified remotely via telephone (DA section 21-10). More recently, judges at some courts have experimented with conducting court-connected mediation sessions via telephone. Additionally, section 13-1 subsection 3 allows courts to hold remote hearings with the consent of the parties, and section 9-5 subsection 3 allows the court to have preparatory hearings remotely to rule on procedural issues.

During the early weeks of the initial lockdown, in March and April 2020, many Norwegian courts shifted to remote main hearings using off-the-shelf technology. Within a few weeks, the Norwegian Courts Administration had developed a platform for remote hearings and hybrid hearings (i.e., hearings where only one of the parties is present and witness and expert testimony is given remotely). The platform signified a leap from using a telephone to using a video link. Thus, in addition to enabling the participants to see each other, the platform also enables the participants to use visual aids, such as diagrams, pictures and excerpts from documents. Nevertheless, many judges still conduct case management hearings via telephone. A temporary act grants courts discretion to conduct remote main hearings when a remote hearing is 'necessary and unobjectionable'.[5] The audio-visual platform, presence of judges and court employees with solid technological knowledge and skills, lawyer's positive attitudes towards technology, access to high-speed internet and a pragmatic legal culture paved the way for the transition to remote hearings. Before courts had established common routines for remote hearings, journalists were the only vocal opponents to remote hearings, as they feared reduced access to main hearings. However, the platform for remote hearings also allows those interested in the case to gain access by

3 I. Arnstad, 'Opptak i alle rettssaler – i Litauen', Rett på sak, 2016(1), pp. 30-31. www.domstol.no/globalassets/upload/internett_fillister/da/publikasjoner/rett-pa-sak/2016/rps1-2016.pdf#page=30 (accessed 20 November 2020).

4 Lov om mekling og rettergang i sivile tvister (tvisteloven), 17 June 2005 no. 90. Act relating to mediation and procedure in civil disputes (Dispute Act), unofficial English translation available at https://lovdata.no/dokument/NLE/lov/2005-06-17-90.

5 Midlertidig forskrift om forenklinger og tiltak innenfor justissektoren for å avhjelpe konsekvenser av utbrudd av Covid-19 FOR-2020-03-27-459. Decree was later repealed and replaced by a temporary act, Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv. of 26 May 2020 no. 47, and extended until 1 June 2021, Lov om forlengelse av midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv. of 6 November 2020.

requesting an access code. The Supreme Court, a court of *de facto* precedent,[6] decided to broadcast all its hearings on its website,[7] and lower courts have broadcasted selected high-profile cases.[8] The previous scepticism towards broadcasting from courts seems to have disappeared in light of the pandemic.[9] The government has proposed a new rule to ensure that the public has access to remote hearings to the same extent as to face-to-face hearings.[10] The platform for remote hearings will likely continue to operate even after the pandemic, although the number of fully remote hearings will be far lower. Considering the importance of Supreme Court rulings in Norwegian legal culture, lawyers outside Oslo would prefer that broadcasting hearings in the Supreme Court will become the new normal.

3 Remote Hearings, Equal Access to Courts and Judicial Discretion

While the pragmatic legal culture in Norway allows courts to be flexible, it also results in unprincipled approaches to many issues. As mentioned above, remote and hybrid hearings are allowed when the court considers them to be 'necessary and unobjectionable'.[11] In the preparatory works of the temporary procedural rules, the government provided a list of general criteria for such hearings, such as the 'character of the case' and the presence of circumstances that hinder parties or witnesses from attending the hearing in person.[12] The rules are highly discretionary and give no guidance regarding whether courts would always have to offer parties to some cases the opportunity to appear in person. Some courts have interpreted the rules liberally, which allowed them to continue hearing up to 80% of the civil and criminal cases during the spring 2020 lockdown.[13] Other courts have interpreted the rules more narrowly and thus have opted to reschedule most hearings. Hence, in the absence of uniform guidelines for conducting remote and hybrid hearings, tangible

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6 J. Ø. Sunde, 'From courts of appeal to courts of precedent – access to the highest courts in the Nordic countries', in C.H. van Rhee and Y. Fu (eds.), *Supreme Courts in Transition in China and the West,* Springer, Cham 2017, pp. 53-76.

7 https://www.domstol.no/en/Enkelt-domstol/supremecourt/attend-a-hearing/ (accessed 28 February 2021).

8 *See* A. Nylund, 'Civil procedure in Norway and Covid-19: some observations', in B. Krans and A. Nylund (eds.), *Civil Justice and Covid-19,* Septentrio Reports. No 5 (2020): DOI: https://doi.org/10.7557/7.5468.

9 The Courts of Justice Act (Lov om domstolene, of 13 August 1915 no. 5, section 131a) explicitly forbids any broadcasting and even taking of pictures in criminal cases. Although the act remains silent regarding civil cases, the rules have been applied *mutatis mutandis.*

10 Høringsnotat om forslag til endringer i tvisteloven mv. – Ankesiling, rettsmekling mv. Justis- og beredskaps-departementet. 7 oktober 2020, pp. 59-62.

11 Lov om forlengelse av midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv. of 6 November 2020, section 3.

12 Prop. 94 L (2019-2020) Midlertidig lov om tilpasninger i prosessregelverket som følge av utbruddet av covid-19 mv.

13 www.domstol.no/nyheter/digitale-rettsmoter-ble-losningen-pa-stengte-rettslokaler/ (accessed 11 November 2020).

divergences among courts in the number of postponements have emerged.[14] Differences in the level of local lockdown measures account for only a fraction of the variation in the rate of postponed hearings among courts.

In the early days of the pandemic, one could not expect detailed rules regarding postponement and remote hearings to be in place. However, the prolonged restrictions during the pandemic necessitate a uniform approach to remote hearings. Currently, the preferences of the chief judge and other judges at each individual court determine the extent to which remote hearings are used. Since hybrid and remote hearings will be the norm until the end of the pandemic, they are also likely to become part of the 'new normal'; thus, a principled discussion is urgently needed even if the temporary regulations were repealed.

The parties cannot appeal a decision to hold the main hearing remotely or in a hybrid format; the parties can only appeal a decision the court has made its final ruling in the case. Although the Supreme Court has struck down rulings to have remote hearings in pre-trial police detention, remote hearings in civil cases have not been subject to appeal to my knowledge.[15]

4 The Need for Research-Based Rules on Remote and Hybrid Hearings

Since hybrid hearings are likely to be far more common after than before the pandemic, regulation and practices should be informed by psychological and cognitive research, not merely by assumptions. According to several studies, judges believe that they are in a better position to assess the accuracy of a witness statement if the witness is present in the same room than if the witness testifies remotely, and that audio-visual communication is superior to audio-only (i.e., telephone) communication.[16] However, research suggests that detecting lies is actually *easier* when the witness is heard and not seen.[17] Thus, hearing witnesses via telephone could be preferable to using audio-visual communication.

14 *E.g.*, the Agder Court of Appeals heard virtually no cases in the period from 16 March to 4 May, although other courts heard relatively many cases. www.domstol.no/Enkelt-domstol/agder/koronaviruset---redusert-drift-i-domstolene/ (accessed 11 November 2020), www.domstol.no/nyheter/hva-skjer-med-rettsmotene-i-tingrettene-na/ (accessed 14 January 2021) and note 6, above.

15 HR-2020-972-U.

16 L. Schelin, *Bevisvärdering av utsagor i brottmål*, Stockholm, Norstedts juridik, 2007, pp. 215-216; S. Landström, R. Willén and E. Bylander, 'Rättspraktikers inställning till modern ljud- och bildteknik i rättssalen – en rättspsykologisk studie', *Svensk Juridisk Tidskrift,* No. 6, 2012, pp. 197-218.

17 Schelin, note 16, pp. 225-228, C.F. Bond Jr. and B.M. DePaulo, 'Accuracy of deception judgments', *Personality and Social Psychology Review*, Vol. 10, No. 3, 2006, pp. 214-234; S. Mann, A. Vrij and R. Bull, 'Detecting true lies: police officers' ability to detect suspects' lies', *Journal of Applied Psychology*, Vol. 89, 2004, pp. 137-149.

A Swedish study indicated that judges tend to evaluate more vivid statements more positively than less vivid statements. In this respect, the shorter the sensory, temporal and spatial distance between the judge and the witness, the more vivid the presentation is perceived to be, and, thus, the more the judge tend to trust the witness to tell the truth.[18] The camera angle, objects in the backgrounds of the witness and other factors might influence a judge's impressions of a witness and potentially lead judges to make erroneous conclusions about the credibility of witnesses.

Based on these studies, parties who attend a hearing remotely while the other party attends in person, and parties whose main witnesses are examined remotely while the other party's main witnesses are examined in person, risk being at a disadvantage. Moreover, it could be more demanding to provide sufficient proof for one's claim when all or most witnesses are examined remotely, since the judge might regard each witness as less credible than if the witnesses had appeared in person. Moreover, although examination via telephone could enhance detection of untruthful witness statements, judges could still assign less weight to those witnesses due to increased perceived distance. Educating judges on cognitive biases related to the use of technology is thus vital when remote hearings and remote witness examinations constitute the norm. Moreover, studies on how remote and hybrid hearings influence the perception of fairness among parties and the public are needed to understand whether such hearings reinforce or undermine trust in courts and the quality of justice. The omnipresence of digital communication during the pandemic might influence how we perceive others in a digital setting. Hence, pre-pandemic research findings might no longer be accurate post-pandemic.

5 TRANSITION FROM PAPER TO ONLINE CASE MANAGEMENT: A LOST OPPORTUNITY FOR COURTS?

The case management system in Norwegian courts has been digitised gradually and late compared to many other organisations. In October 2019, the Office of the Auditor General of Norway issued a report criticising the Norwegian courts for failing to introduce and make use of new technology, thus reducing the efficiency of courts.[19] The Norwegian courts are lagging behind in digitisation compared both to countries such as Denmark and to the rest of society.[20] The pandemic has signified a leap in this regard, in particular in the level

18 S. Landström, P.A. Granhag and M. Hartwig, 'Witnesses appearing live versus on video: effects on observers' perception, veracity assessments and memory', *Applied Cognitive Psychology*, Vol. 19, 2005, pp. 913-933.

19 Riksrevisjonen, note 2.

20 NOU 2020: 11, note 2, pp. 273-274.

of funding of new technology. The government intends to make the use of the electronic case management system mandatory for lawyers.[21]

Although lawyers applaud the jump in digitisation of courts, one should ask whether the act of turning paper into PDFs and in-person hearings into hybrid or remote hearings is, in fact, deprived of visionary, innovative qualities. Perhaps the courts are facing a 'Kodak moment',[22] which refers to the inability to adapt to a situation where the business is turned on its head, as was the case with the introduction of digital cameras. The expression pairs with the concept of disruptive technology. That is, instead of courts seizing the opportunity to rethink their 'business model' and taking full advantage of the possibilities that new technologies entails, they continue operating according to the old model, the only difference being digital documents.

The practices of filing pleadings have been largely unaltered despite the technological transition from typewriters and handwriting to electronic files. The plaintiff files a document, the defendant files a second document, the plaintiff files a reply or comment in a third document, the defendant files a reply in a fourth document and so forth. In almost any other context, a single, co-authored document is used, and amendments result in updated versions, not entirely new documents.[23] We could envisage, for example, a new, digital case management system where the parties would operate with a single, shared document. The defendant would insert comments to indicate disagreement with the contentions of the plaintiff and to identify the ground for disagreement by pinpointing disagreement related to factual circumstances (e.g., 'I did not do that'), application of norms to the situation (e.g., 'my behaviour cannot be classified as negligent') or interpretation of law (e.g., 'another legal norm applies or the interpretation of the rule is incorrect').[24] These disruptions to practices could enable us to overcome the problems associated with the identification of key disputed issues in separating disputed issues from undisputed issues and pinpointing the reason for disagreement. There are, of course, numerous other ways in which technological advancements could be, and should be, integrated into civil justice, with artificial intelligence as an obvious example.

The strict demarcation between oral and written communication in court proceedings that dominates Norwegian legal thinking should also be re-examined. Previously, written

21 Høringsnotat om forslag til endringer i tvisteloven mv., note 10, pp. 40-41.

22 Kodak moment refers to the inability to adapt to a situation where the business is turned on its head, as was the case with the introduction of digital cameras. The expression pairs with the concept of disruptive technology. *See e.g.*, D. Nunan, 'Reflections on the future of the market research industry: is market research having its "Kodak moment"?', *International Journal of Market Research,* Vol. 59, No. 5, pp. 553-555 and C.M. Christensen, M.E. Raynor and R. McDonald, 'What is disruptive innovation', *Harvard Business Review*, Vol. 93, No. 12, 2015, pp. 44-53.

23 I thank Professor Wolfgang Hau for sharing this idea.

24 *See* A. Krokan and R. Aarli, 'Den digitale dommer – Om endring av arbeidsprosesser i domstolene', *Lov og Rett*, Vol. 59, No. 3, 2020, pp. 149-166, at pp. 159-160.

communication was asynchronous and, until recently, associated with a significant delay in the transmission of the message, whereas oral communication was always synchronous. Modern technology has abolished the ties of timing and format of communication. Since oral statements can be, and are, recorded, and artificial intelligence enables their expedient transcription, some of the inherent differences between oral and written statements have disappeared in this regard, too.

In its recent report, the Norwegian Courts Commission (*Domstolkommisjonen*) – a government-appointed committee – has conducted extensive research on the quality and efficiency of Norwegian courts.[25] The Court Commission recommends that courts introduce new technology for simplifying existing processes and for assisting the judge in making correct decisions, specifically regarding the damages for bodily injury and other damages, where monetisation is complicated and where calculations will often rely on incomplete information. However, a revision of current procedural rules is a prerequisite for some of the technological innovations, and hence further investigations are required. The Courts Commission notes that practices and work processes must be modernised in order for courts to be able to reap the fruits of digitisation.[26] The pandemic has demonstrated that slow digitisation was a matter of lack of proper funding of courts, not the unwillingness or inability of Norwegian courts to implement new technology. Although the committee drafting the DA did foresee the use of novel technology 20 years ago, it was not possible for them to grasp fully the extent to which such technologies would be available today. Thus, the procedural rules need to be modernised.

At the time of this writing, it is unclear whether the pandemic will detain the much-needed reforms by diverting resources and attention to more immediate problems, such as pandemic-related backlogs and a potential surge in bankruptcies. The Covid-19 pandemic might distort the incorporation of novel technologies in several ways. The lockdowns have resulted in a hibernating mode, where the focus is on getting by, leaving little room for innovations more distantly related to resolving immediate problems. The lockdowns could also result in reduced resources for conducting ambitious research and development projects within courts. However, the pandemic is an opportunity to profoundly rethink and redesign Norwegian court proceedings. It could induce us to replace dogmas of the 20th century with ideas that correspond with contemporary society and technology. In doing so, we could utilise the period of disruption in Norwegian civil justice to propel constructive changes.

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25 NOU 2020: 11, note 2, p. 249 ff.

26 *See* NOU 2019: 17 Domstolstruktur. Delutredning fra Domstolkommisjonen oppnevnt ved kongelig resolusjon 11 August 2017. Avgitt til Justis- og beredskapsdepartementet 1. oktober 2019; NOU 2020: 11, note 2; and Krokan and Aarli, note 24.