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Small claims



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SMALL CLAIMS: MARKET REALITIES AND NEW POSSIBILITIES

BACKGROUND

Many jurisdictions worldwide have small claims courts or simplified procedures to deal with small claims.¹ From a legal standpoint, to qualify under the definition of ‘small claim’ the monetary value of a claim is considered. The maximum pecuniary threshold varies from one jurisdiction to another and is determined by the economic circumstances of a country.² Small claims are numerous and often tedious. Most of these claims require time but not such a high intellectual knowledge in law and normally a small claim case does not involve complex legal issues. Above all, they tend to be replicas of each other. Basically, they are just time and money consuming for the judicial system leading to considerable court backlogs.³ Nevertheless, small claims are important since their creditors are mainly consumers. Many of these consumers are ordinary citizens that belong to low-income categories of society.

¹ Elisabetta Silvestri, ‘Small claims and procedural simplification: evidence from selected EU legal systems’ (2019) 10 (2) *Civil Procedure Review* 41 <<https://civilprocedurereview.com/revista/article/view/189>> accessed 25 April 2022; See also Elena D’Alessandro, *Il procedimento uniforme per le controversie di modesta entità* (Giappichelli, Torino 2008); Massimiliano Bina, ‘Il procedimento europeo per le controversie di modesta entità (reg. CE n. 861/2007)’ (2008) 63 RD PROC 1629 ss.; Cristina Asprella, *Il «procedimento europeo per le controversie di modesta entità»*, GM, 2008, 29 ss.; Emmanuel Guinchard, ‘Europe, civil procedure and the creditor: the European order for payment and the European small claims procedure’ [2008] Quarterly review of commercial law and economic law 465.

² For instance, while this pecuniary threshold in Germany is €00, this threshold is fixed as €5,000 in Luxemburg and €25,000 in the Netherlands. See Georgia Harley and Agnes Said, ‘Fast-Tracking the Resolution of Minor Disputes: Experience from EU Member States’ [2017] World Bank 8. <<https://openknowledge.worldbank.org/handle/10986/26100>> accessed 25 April 2022.

³ In Europe, many of small claims are submitted by consumers against traders because of the market malpractices. Given the frequency and the high number of consumer small claims, a considerable amount of time and human resources of courts are taken to deal with these cases. See Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016).

Whereas they cannot afford high costs of attorney fees, they appear in court as self-represented litigants.⁴ The creditors of small claims face even more significant procedural hurdles (i.e., in terms of cost, time, and complexity of proceedings) in cross-border cases.⁵ That is the reason why they are in constant need of justice for strong protection for their interests and rights.⁶ Jurisdictions across the world have put in different levels of efforts to overcome inefficiency and increase legal certainty to promote access to justice for their citizens in small claims.⁷ A major question that arises is to what extent the procedural designs have been able to provide creditors of small claims with an affordable, timely, and simplified access to justice for their rights. Historically, the initial in-depth discussions about this question took place in the United States (U.S.).⁸ Over the past century, the American civil justice reformists have made serious attempts to promote citizens' access to justice through a simplified, expeditious, and informal legal institution for their minor pecuniary claims.⁹ As the result of these movements, the first successful small claims courts were established in the early 1960s.¹⁰ Later, alternative dispute resolution, class actions, and online dispute resolution mechanisms were also introduced into the U.S. legal system as other means of dealing with these claims. Since then, many jurisdictions around the world – including in the EU – have adopted some forms of simplified special procedures for handling low-value claims. Considering that the first serious discussions and initiatives for promoting access to justice in small claims emerged in the U.S. civil justice system, it is appropriate to draw a comparison between the U.S. and EU developments in dealing with such claims.

⁴ Ellen Waldman, 'How Mediation Contributes to the "Justice Gap" and Possible Technological Fixes' (2020) 88 *Fordham L. Rev.* 2425 <<https://heinonline.org/HOL/P?h=hein.journals/flr88&i=2483>> accessed 25 April 2022.

⁵ Marc Wilikens, Arnold Vahrenwald, and Philip Morris, 'Out-of-court dispute settlement systems for e-commerce, Report of an exploratory study' (2000) Joint Research Centre of the EC, 15; See also Matthew A. Shapiro, 'Distributing Civil Justice' (2020) 109 *Geo. L.J.* 1473 <<https://heinonline.org/HOL/P?h=hein.journals/glj109&i=1492>> accessed 25 April 2022.

⁶ Jacqueline Nolan-Haley, 'Does ADR's Access to Justice Come at the Expense of Meaningful Consent' (2018) 33 *Ohio St. J. on Disp. Resol.* 373 <<https://heinonline.org/HOL/P?h=hein.journals/ohjdr33&i=391>> accessed 25 April 2022.

⁷ Antonio Gidi and Hermes Zaneti, Jr., 'The Cost of Access to Justice Revisited--The 'Age of Austerity' in Brazilian Civil Procedure Five Years Later. Winds of Change?' (2021) 52 *University of Miami Inter-American Law Review* 49, 55.

⁸ Some scholars have urged that the original idea of small claims court evolved in Norway and Denmark more than a century ago. See Dwayne L. Oglesby & Waggoner Carr, 'The Small Claims Court in Texas' (1955) 3 *U Kan L. Rev.* 238 <<https://heinonline.org/HOL/P?h=hein.journals/ukalr3&i=250>> accessed 25 April 2022.

⁹ Ricardo Lillo, 'Access to Justice and Small Claims Courts: Supporting Latin American Civil Reforms Through Empirical Research in Los Angeles County, California' (2016) 43 *Revista Chilena de Derecho* 955, 956-957 <<https://www.redalyc.org/pdf/1770/177049708008.pdf>> accessed 25 April 2022.

¹⁰ Eric H. Steele, 'The Historical Context of Small Claims Courts' (1981) 6 (2) *American Bar Foundation Research Journal* 293, 294 <<https://www.jstor.org/stable/828089>> accessed 25 April 2022.

SMALL CLAIMS IN COURTS

In the U.S., dealing with small claims has a long and intricate history. The small claims were perceived as one of the most important systematic injustices among different classes of society. As a result, the legal solutions provided were conceived with a considerably high social impact. In this light, the small claims courts were established to deal with these claims as the most effective possible response to the needs of the vulnerable social classes.¹¹ In Europe, the methods in which small claims are dealt with vary from one country to another. In most EU jurisdictions, the lowest level of the ordinary civil courts handles small claims. For instance, in Austria and Finland it is the District Courts, while in Italy and Belgium the Justices of the Peace—as the semi-judiciary bodies—who are competent to deal with small claims. Most EU civil justice systems have introduced the specific small claims track for handling these cases. Nevertheless, in some other EU jurisdictions (i.e., Belgium, Bulgaria, and Czech Republic) small claims are dealt with through ordinary civil proceedings.¹² In general, the existing traditional court proceedings in the EU jurisdictions are lengthy, costly, and complex. Therefore, these civil justice systems have failed to effectively meet the needs of creditors of low-value claims for access to justice.¹³

The situation is even worse in the case of cross-border small claims. The creditors face major barriers with ambiguous costs, unfamiliar foreign laws, language obstacles and complex enforcement procedures in different EU jurisdictions. To overcome these impediments in transnational low-value claims, the European Small Claims Procedure Regulation (ESCP)¹⁴ was adopted in 2007. So far, this legislative instrument has failed to meet its core objectives in facilitating access to justice for creditors of cross-border small

¹¹ *ibid* 295.

¹² Small Claims (European e-Justice Portal, 16 March 2022) https://e-justice.europa.eu/42/EN/small_claims accessed 25 April 2022.

¹³ According to official statistics, most online consumer purchases across the EU fall into the price category between 100 euros to 499 euros. For more information, see European Commission, Consumer Conditions Scoreboard (2019) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> accessed 25 April 2022.

¹⁴ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure with its amendment Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. See Isabel Jahn, 'Das Europäische Verfahren für geringfügige Forderungen' [2007] NJW 2890; Christoph A. Kern, 'Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze' (2012) 8 JZ 398 <<https://doi.org/10.1628/002268812800262003>> accessed 25 April 2022; Dieter Leipold, 'Das europäische Verfahren für geringfügige Forderungen. Vorbild für einen Europäischen Zivilprozess?' (2018) 70 Festschrift für Hanns Prütting 401 <<https://www.jura.uni-freiburg.de/de/institute/izpr2/downloads/dateienleipold/das-europaeische-verfahren-fuer-geringfuegige-forderungen-nutzung-des-verfahrens-vor-deutschen-gerichten-statistische-befunde>> accessed 25 April 2022. Pablo M. Baquero and Matteo Winkler, 'The Implementation of the European Small Claims Procedure in France' (2021) 10 (1) EuCML 36 <<https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/10.1/EuCML2021012>> accessed 25 April 2022.

claims. This failure arises from the lack of sufficient awareness about this procedure, the excessive reference to national procedural laws, and complicated and lengthy enforcement procedures for the issued ESCP judgements.

ALTERNATIVE DISPUTE RESOLUTION

The unsatisfactory administration of civil justice in small claims cases—similar to other types of civil and commercial disputes—has pushed disputants to seek non-adversarial procedures, namely alternative dispute resolution (ADR).¹⁵ In the U.S., following the attempts for access to justice reforms during 60s and 70s¹⁶, ADR methods were introduced to the U.S. legal system.¹⁷ The reformists aimed at increasing the accountability and responsiveness of the civil justice system to the needs of all citizens through alternative processes to formal litigation. In contrast to adjudication, ADR generally provides disputants with an informal, more expedited, cost-effective¹⁸, and flexible dispute resolution process.¹⁹ ADR mechanisms, specifically mediation and conciliation, empower the parties to tailor their own settlement agreement according to their needs and interests.²⁰ These characteristics have incentivised many civil justice systems to promote the use of ADR specifically mediation in small claims mainly to minimise the court backlogs.²¹

In Europe national policymakers have taken relevant measures to encourage the use of ADR mediation, particularly in small claims cases within their respective jurisdiction. These legal provisions aim for tackling the existing case backlogs and delays in delivering justice by national courts, on the one hand, and improving effective access to justice for citizens on the other. Nevertheless, there is a considerable disparity among the national civil procedural rules of the EU Member States in application of ADR process to small claims cases. For instance, while in Germany and Belgium mediation – as

¹⁵ Robert A. Baruch Bush, 'Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice' [1984] *Wis. L. Rev.* 893, 896-897 <<https://heinonline.org/HOL/P?h=hein.journals/wlr1984&i=915>> accessed 25 April 2022.

¹⁶ Mauro Cappelletti and Bryant Garth, 'Access to justice: the newest wave in the worldwide movement to make rights effective' (1977) 27 *Buff. L. Rev.* 181 <<https://heinonline.org/HOL/P?h=hein.journals/buflr27&i=193>> accessed 25 April 2022.

¹⁷ Steele (n 10).

¹⁸ Norman W. Spaulding, 'The Ideal and the Actual in Procedural Due Process' (2021) 48 *Hastings Const. L.Q.* 261, 281 <<https://heinonline.org/HOL/P?h=hein.journals/hascq48&i=263>> accessed 25 April 2022.

¹⁹ See Yona Shamir 'Alternative Dispute Resolution Approaches and Their Application. Potential Conflict to Cooperation Potential' (UNESCO 2003).

²⁰ Lydia Nussbaum, 'ADR, Dynamic (In)Justice, and Achieving Access: A Foreclosure Crisis Case Study' (2020) 88 *Fordham L. Rev.* 2337, 2341-2343 <<https://heinonline.org/HOL/P?h=hein.journals/flr88&i=2395>> accessed 25 April 2022; See also Jacqueline Nolan-Haley, 'Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here' (2018) 87 *Fordham L. Rev.* 1 <<https://heinonline.org/HOL/P?h=hein.journals/resgest9&i=78>> accessed 25 April 2022.

²¹ Hazel Genn, 'What Is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24 (1) *Yale Journal of Law & the Humanities* 397.

part the general ADR regime – is not mandatory, in France and Italy parties are required to attempt mediation as a prerequisite to litigation.

At the Union level, the EU legislator has taken two major policy measures in promoting the use of ADR for resolution of civil and commercial disputes.²² First, Directive 2008/52/EC was adopted with the aim of promoting the use of mediation in certain civil and commercial matters.²³ The EU Mediation Directive was the leading joint effort in regulating mediation in the Union.²⁴ Second, Directive 2013/11/EU²⁵ on Alternative Dispute Resolution for consumer disputes was established to facilitate the access to justice for citizens through use of amicable models of dispute resolution including mediation. This instrument aims at safeguarding a balanced connection between ADR and litigation.²⁶ Despite the adoption of these legislations, they have not succeeded in promoting the use of amicable dispute resolution methods against the adversarial proceedings.²⁷ As regards small claims cases, there is still considerable imbalance in using ADR—and mediation in particular—in EU national civil justice systems.²⁸

CLASS ACTIONS AND SMALL CLAIMS

Under the U.S. legal system, consumers Under the U.S. legal system, consumers united in their interest in the same cause of action can join their forces to start class actions lawsuits against a defendant or a group of defendants.²⁹ Class actions are specifically notable for small claims since the costs of civil litigation can be high for individual consumers in seeking justice for their rights.³⁰ In most cases, the procedural costs are disproportionate to

²² Christopher Hodges, 'Unlocking Justice and Markets: The Promise of Consumer ADR' in Joachim Zekoll and others (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill Nijhoff 2014) 364.

²³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters 2008 [32008L0052].

²⁴ See Elizabeth Birch, 'The Historical Background to the EU Directive on Mediation' (2006) 72 (1) *The International Journal of Arbitration, Mediation and Dispute Management* 57.

²⁵ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

²⁶ Marta Poblet and Graham Ross, 'ODR in Europe' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (2nd ed, Eleven Intl. Publishing 2021).

²⁷ Giuseppe De Palo, 'A Ten-Year-Long 'EU Mediation Paradox': When an EU Directive Needs to Be More ...Directive' (European Parliament Briefing 2018) 1.

²⁸ Carlos Esplugues, 'General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives' in Carlos Esplugues and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Springer International Publishing 2015) 20.

²⁹ Amy J. Schmitz, 'Addressing the Class Claim Conundrum with Online Dispute Resolution' [2020] *J. Disp. Resol.* 361 <<https://scholarship.law.missouri.edu/jdr/vol2020/iss2/10>> accessed 25 April 2022.

³⁰ *ibid.*

the original amount of the claim.³¹ Class actions can be economically efficient in these circumstances by considerably reducing the procedural costs for the litigants and minimising the enormous costs of operating the justice system.³² Furthermore, dealing with small claims cases in class actions can reduce court backlogs due to lodging of similar or identical consumer claims that arise from the same cause of action.³³ This issue can be observed in litigations that handle claims arising from large-scale market malpractices of multinational corporations that infringe consumer rights.³⁴ The U.S. model of opt-out class actions has been criticised for lacking meaningful control by claimants' over the negotiation process and imposing settlements with minimum compensation upon them.³⁵

In Europe, some Member States—i.e., Italy, France, Belgium, Poland,—have already adopted some form of collective redress in specific areas including consumer claims.³⁶ However, the existing European models differ from the American class actions system especially in the scope of application and the default opt-in mechanism in EU countries.³⁷ Most of national collective redress mechanisms have not achieved success in protecting consumers because of their limited scope of application and insufficient procedural effectiveness.³⁸

At the Union level, after decades of discussions on collective actions, the EU Directive 2020/1828 on representative actions for the protection of the collective interests of consumers has been in force since 24 December 2020.³⁹

³¹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge University Press, 2017) 83.

³² Besides the economic efficiency, other benefits in connecting class actions to small claims include preventing parallel judicial proceedings and the possibility of engaging highly knowledgeable and experienced legal counsels if total amount of the joint claims allows this. See Alexander Stöhr, 'The Implementation of Collective Redress – A Comparative Approach' (2020) 21(8) *German Law Journal* 1606 <<https://heinonline.org/HOL/P?h=hein.journals/germlajo21&i=1677>> accessed 25 April 2022; See also C I Nagy, *Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis* (Springer, 2019); Thomas S. Ulen, 'The Economics of Class Action Litigation', in Jürgen G. Backhaus, Alberto Cassone and Giovanni B. Ramello (eds), *The law and economics of class actions in Europe: lessons from America*, (Edward Elgar, 2012) 75; Robert G. Bone, *Civil Procedure: The Economics of Civil Procedure* (Foundation Press, 2003).

³³ Ulen (n 32) 79-81.

³⁴ Schmitz (n 29) 370.

³⁵ See Howard M. Erichson, 'The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks' (2020) 88 *Fordham L. Rev.* 2155 <<https://heinonline.org/HOL/P?h=hein.journals/flr88&i=2213>> accessed 25 April 2022.

³⁶ Other Member States are Austria, Bulgaria, Denmark, Finland, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, Malta, Hungary, Slovenia, and Lithuania. See Frank Alleweldt et al., 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Final report—Part I: Main report' (2008) <http://www.civic-consulting.de/reports/collective%20redress_study.pdf> accessed 25 April 2022.

³⁷ Schmitz (n 29) 370.

³⁸ Zheng Sophia Tang, 'Consumer Collective Redress in European Private International Law' (2011) 7(1) *Journal of private international law* 101, 101-102 <<https://heinonline.org/HOL/P?h=hein.journals/jripil7&i=101>> accessed 25 April 2022.

³⁹ The European Parliament and the EU Council Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Di-

This legislation underlines the existing deficiencies in individual actions and aims at facilitating effective collective access to justice for consumers and increase their confidence in the EU internal market.⁴⁰

Generally, instead of the ordinary individual litigation, alternative dispute resolution methods and collective actions are both used for resolution of small claims. This given, critics have argued that private and informal alternative dispute resolution does not have the same judicial weight as class actions under the principle of the rule of law.⁴¹ This is because while ADR is considered as an 'alternative' method to seek justice, class actions are a different form of litigation. Thus, ADR does not foster the rule of law and ultimately justice for citizens. Despite this criticism, scholars have argued that ADR specially in small claims can supplement the rule of law by providing an easier, more simplified, timely, and cost-effective access to justice for vulnerable citizens of the society.⁴² Hence, ADR has already bestowed necessary functions on modern civil justice systems.⁴³

SMALL CLAIMS IN DIGITAL ERA: NEW ISSUES AND NOVEL POSSIBILITIES

Digital marketplaces enable individuals to make convenient and expedited online purchases regardless of any geographical distance.⁴⁴ These characteristics strongly incentivise consumers to participate in the market. This increased contribution leads to a more competitive market.⁴⁵

Most of these online purchases—also known as electronic (e-)commerce transactions—involve the exchange of goods/services for a small amount of

rective 2009/22/EC [2020] *OJ L 409/1*.

⁴⁰ For a detailed analysis on the approach and objectives of these two instruments, see the comprehensive review conducted by the Working Group on Parties of the European Law Institute (ELI) and the International Institute for the Unification of Private Law (UNIDROIT) as part of the joint project 'From Transnational Principles to European Rules of Civil Procedure' on 'Collective Redress' in 2018 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/Unidroit_Materials/Trier_2018/WG_Parties_-_Draft_on_Collective_Redress.pdf> accessed 25 April 2022.

⁴¹ Annabel Shaw, 'ADR and the rule of law under a modern justice system' [2016] Te Herenga Waka-Victoria University of Wellington <<https://doi.org/10.26686/wgtn.17143697.v1>> accessed 25 April 2022; See also Gerhard Wagner, 'Collective redress—categories of loss and legislative options' (2011) 127 (1) *Law Quarterly Review* 55, 58.

⁴² Jean R. Sternlight, 'Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad' (2997) 56 *DePaul L. Rev.* 569, 576 <<https://heinonline.org/HOL/P?h=hein.journals/deplr56&i=579>> accessed 25 April 2022.

⁴³ Shaw (n 41).

⁴⁴ Faye Fangfei Wang, '*Online Dispute Resolution. Technology, Management and Legal Practice from an International Perspective*' (Chandos Publishing 2009) 63-64.

⁴⁵ A strong and united Europe that reflects European values and thrives globally in an open economy - DIGITALEUROPE (2019) <<https://www.digitaleurope.org/resources/a-strong-and-united-europe-that-reflects-european-values-and-thrives-globally-in-an-open-economy/>> accessed 25 April 2022.

money between businesses and consumers.⁴⁶ Even though e-commerce has massively increased shopping convenience for consumers, it has generated a significant number of low-value disputes arising from infringements of consumers' rights.⁴⁷ The primary causes of these e-commerce disputes lies in the late or no delivery of goods/services; wrong or damaged goods; technical issues with business platforms; product safety; issues with contractual terms and conditions; and overcharging the consumers.⁴⁸

Most significantly some of the incurred disputes are new tech-driven legal challenges that, in particular, involve the application of artificial intelligence and have a more complex nature compared to offline legal issues.⁴⁹ To enhance consumer confidence in the market, it would appear necessary to improve their access to justice using more compatible methods of dispute resolution in consumer small claims cases.

Parties may want to avoid physical participation in dispute resolution processes due to a variety of reasons including travel costs, time-consuming procedures, fear of complex formal rules, shame, or difficulties related to disability. As the result, they may give up seeking their rights. This also leads to taking a conservative attitude towards digital purchases. Online dispute resolution (ODR), however, provide parties with an opportunity to overcome these challenges. It also improves consumers wilful participation in dispute resolution processes.⁵⁰ From the technical perspective, ODR is also a method that is more compatible with the nature of e-disputes as well. It is to be, however, noted that not all types of disputes are appropriate for online dispute resolution.⁵¹ Nevertheless, ODR has been nominated as the most appropriate response to the massive accumulation of small claims by providing their creditors with a more accessible, simplified, expedited, and cost-effective access to justice.⁵²

Over the past two decades ODR has been widely embraced as part the U.S. civil justice system. The major objective was to narrow the current 'justice gap' in the society. It also aims at maintaining an appropriate balance be-

⁴⁶ Anne McCafferty, 'Internet Contracting and E-Commerce Disputes: International and United States Personal Jurisdiction' (2011) 2 *Global Bus L Rev* 95, 98 <<https://heinonline.org/HOL/P?h=hein.journals/glbure2&i=1>> accessed 25 April 2022.

⁴⁷ Colin Rule, *Online dispute resolution for business: B2B, ecommerce, consumer, employment, insurance, and other commercial conflicts* (John Wiley & Sons 2003).

⁴⁸ Jie Zheng, *Online Resolution of E-commerce Disputes* (Springer International Publishing 2020).

⁴⁹ David Freeman Engstrom, 'Digital Civil Procedure' (2020) 169 *University of Pennsylvania Law Review* 2243, 2258 <<https://heinonline.org/HOL/P?h=hein.journals/pnlr169&i=2277>> accessed 25 April 2022.

⁵⁰ David Allen Larson, 'Designing A State Court Small Claims ODR System: Hitting A Moving Target In New York During A Pandemic' (2021) 22 *Cardozo Journal of Dispute Resolution* 572.

⁵¹ *ibid* 574.

⁵² Ellen E. Deason et al., 'ADR and Access to Justice: Current Perspectives' (2018) 33 *Ohio St. J. Disp. Resol.* 303, 327 <<https://heinonline.org/HOL/P?h=hein.journals/ohjdr33&i=321>> accessed 25 April 2022.

tween civil legal needs of low-income citizens with the available resources.⁵³ ODR was initially deployed by private sector e-commerce companies in the U.S. The most prominent example is the e-Bay ODR model that has been efficiently working for almost two decades. This model achieved remarkable success and effective results in resolution of consumer-to-traders disputes incurred on the e-Bay platform.⁵⁴ With respect to public-run ODR systems, several States have already launched some forms of public-run ODR as pilot programs. These models mainly consist of hybrid ODR designs including negotiation, mediation and/or facilitation. These ODR schemes have specifically focused on the resolution of small claims cases.

In Europe, the current state of the art ODR is still making significant progress.⁵⁵ Some Member States such as Estonia, Lithuania, and the Netherlands have made efforts in adopting some forms of ODR models into their national civil justice systems. Similarly, at the Union level, one of the major ODR developments is the launch of the EU Online Dispute Resolution Platform (EU ODR Platform).⁵⁶ This instrument was established by Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes.⁵⁷ One of the major objectives of this tool is to provide consumers and traders with effective, low-cost, expedited, and fair non-litigious dispute resolution mechanisms for the incurred dispute from online purchases.⁵⁸ The Platform has been in use since early 2016 as a central access point to connect the EU-based consumers and traders with the nationally accredited ADR bodies.⁵⁹ This is however important to note that the Platform suffers from a number of shortcomings: lack of sufficient consumer awareness of the Platform; insufficient technical features and functioning only as a connecting point between disputants and ADR bodies. Consequently, this instrument has not achieved notable success in providing effective access to justice for its potential users. In general, it should be noted that the state of ODR deployment in EU is still far reaching in comparison to its implementation in the U.S.

⁵³ Legal Services Corporation, 'The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (Washington DC Office 2017) 6 <<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>> accessed 25 April 2022.

⁵⁴ According to the published statistics by eBay, out of 60 million disputes claimed to eBay, over 80 percent of them are settled by using ODR. For more information, see Pablo Cortés, *The law of consumer redress in an evolving digital market: Upgrading from alternative to online dispute resolution* (Cambridge University Press 2018) 228.

⁵⁵ Poblet and Ross (n 26).

⁵⁶ See the EU ODR Platform at <<https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase>> accessed 25 April 2022.

⁵⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

⁵⁸ The Platform is designed for consumers cases and not specifically to handle small claims. However, since most C2B disputes fall under the categories of low threshold claims, it is necessary to discuss the EU ODR Platform.

⁵⁹ Chung Yongkyun, 'Artificial Intelligence and the Virtual Multi-Door ODR Platform for Small Value Cross-Border e-Commerce Disputes' (2019) 29 *J. Arb. Stud.* 99, 104 <<https://heinonline.org/HOL/P?h=hein.journals/jarbstu29&i=530>> accessed 25 April 2022.

ONLINE MEDIATION

In the framework of small claims, online mediation is more commonly deployed for resolution of these disputes. This method enables parties to benefit from the assistance of a neutral third party to resolve their problems through an informal, convenient, timely, and cost-effective process.⁶⁰ Therefore, online mediation – as a form of online ADR – can promote access to justice for consumers as creditors of small claims.⁶¹ Online mediation also potentially increases consumers access to competent dispute resolution bodies regardless of any geographical restrictions.⁶²

A successful model of online mediation can be observed in the U.S. based e-Bay⁶³ ODR system which runs in a collaboration with SquareTrade.⁶⁴ In this mechanism, the assigned mediator guides and assists disputants to reaching a fair and amicable settlement.⁶⁵

In Europe and since the outbreak of the COVID-19 pandemic, many mediation service providers across the continent have shifted towards presenting online services to their clients. From a legal standpoint, the EU Mediation Directive has not explicitly recognised online mediation as a form of dispute resolution.⁶⁶ The EU ODR Regulation does not envisage any specific legislative provisions for online mediation either. This approach clearly indicates that the EU legislator leaves it completely up to the Member States whether, or not, to adopt online mediation as a valid method of dispute resolution within their respective jurisdictions.⁶⁷

⁶⁰ Bruce Leonard Beal, 'Online Mediation: Has Its Time Come' (1999) 15 Ohio State Journal on Dispute Resolution 735, 736 <<https://heinonline.org/HOL/P?h=hein.journals/ohjdpr15&i=755>> accessed 25 April 2022.

⁶¹ See Steve Abernethy, 'Building large-scale online dispute resolution & Trustmark systems' (2003) Proceedings of the UNECE Forum on ODR <<https://www.mediate.com/Integrating/docs/Abernethy.pdf>> accessed 25 April 2022.

⁶² Ursa Jeretina, 'Consumer online dispute resolution (ODR)-a mechanism for innovative e-governance in EU' (2018) 16 *Cent. Eur. Pub. Admin. Rev.* 45, 64.

⁶³ 'EBay Services: Buying and Selling Tools: Dispute Resolution Overview' <<https://pages.ebay.com/services/buyandsell/disputeres.html>> accessed 25 April 2022.

⁶⁴ 'Allstate Protection Plans' <<https://www.squaretrade.com/>> accessed 25 April 2022.

⁶⁵ Louis F. Del Duca, Colin Rule and Brian Cressman, 'Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems' (2015) 4 *Penn St JL & Int'l Aff* 242, 270 <<https://heinonline.org/HOL/P?h=hein.journals/pensalfaw4&i=252>> accessed 25 April 2022.

⁶⁶ Pablo Cortes, 'Accredited online dispute resolution services: creating European legal standards for ensuring fair and effective processes' (2008) 17 (3) *Information & Communications Technology Law* 221, 227 <<https://heinonline.org/HOL/P?h=hein.journals/infctel17&i=219>> accessed 25 April 2022.

⁶⁷ *ibid.*

ONLINE COURT PROCEEDINGS

In recent years and particularly during the pandemic, using online court proceedings has been accelerated as part of the general ODR regime.⁶⁸ Involvement of courts in ODR can play a significant role in increasing their effectiveness. This is more evident in disputes where small amount of money is involved, and parties generally belong to the most vulnerable classes of society. Therefore, involving courts as part of an ODR system can strongly protect fundamental rights of such creditors and incentivize them to use ODR.⁶⁹

In the U.S., several States including Utah⁷⁰ and California have taken a serious approach towards launching ambitious court connected ODR pilot projects.⁷¹ These systems are generally state-run programs that offer a multi-layer dispute resolution model that mainly comprises online negotiation, online mediation and/or facilitation, and online litigation.⁷² Despite the pivotal role of online court proceedings in increasing the trustworthiness of ODR, critics have argued that there are some risks in implementing online litigations. Therefore, policy makers must take appropriate measures to ensure procedural fairness, providing equal access to online proceedings for all citizens, and regular assessment of online proceedings to ensure they comply with standards of judicial protection.⁷³

THE NEVER-ENDING FLOW OF SMALL CLAIMS IN DIGITAL MARKET

Small claim types are not limited to consumer-to-business disputes. There are also newly emerged legal challenges that have arisen in the digital world. For instance, some types of intellectual property (IP) rights—i.e., domain names disputes and copyrights ownership infringements—fall under these new claims categories. The ordinary court proceedings are generally lengthy and costly for IP rights holders, especially where the claim does not involve complex legal issues. Therefore, some of these rights, in particular where

⁶⁸ Amy J. Schmitz and Janet Martinez, 'ODR and Innovation in the United States', in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds.), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021) 11.

⁶⁹ Brian A. Pappas, 'Online Court: Online Dispute Resolution & the Future of Small Claims' (2008) 12 UCLA J. L. Tech 1 <<https://ssrn.com/abstract=2266516>> accessed 25 April 2022.

⁷⁰ Devin Cooper, 'Utah, ODR, and the New "Millennial"um' (2021) 35 BYU J. Pub. L. 26.

⁷¹ Deno Himonas, 'Utah's Online Dispute Resolution Program' (2018) 122 Dick. L. Rev. 875.

⁷² See Ayelet Sela, 'The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, And Future Directions' (2017) 21 Lewis & Clark Law Review 633 <<https://heinonline.org/HOL/P?h=hein.journals/lewclr21&i=667>> accessed 25 April 2022.

⁷³ Fernando Esteban de la Rosa, 'ADR-Rooted ODR Design in Europe: A Bet for the Future' (2018) 5 International Journal of Online Dispute Resolution 154, 156 <<https://heinonline.org/HOL/P?h=hein.journals/ijodr5&i=154>> accessed 25 April 2022.

monetary damages are involved, can be considered small claims and be pursued through simplified procedures. An ODR⁷⁴ small claims system can compensate IP rights holders in a more expedited, cost-effective, and more compatible manner.⁷⁵ Likewise, since technological developments have altered the mode of human interactions, the scope of rights has been widened. The right to data protection and data privacy are among the most recent recognized rights in the digital era. These rights are considered as inalienable. It is thence important to take appropriate legal stand against any infringement of the right to data protection and privacy.⁷⁶

OBJECTIVES OF THIS SPECIAL ISSUE

The Italian-Spanish Journal of Procedure Law explores opportunities to foster in-depth and stimulating conversations about the issues related to procedural laws in Europe and beyond. Considering the tremendous importance of conducting research within the scope of small claims in digital markets, the Journal decided to publish this Special Issue on 'DEALING WITH SMALL CLAIMS IN THE DIGITAL ERA'. In this respect, all contributors to this Issue were selected based on the content of paper presentations in International SCAN Project Conference. The conference theme was specifically focused on the most recent developments around Small Claims Dispute Resolution for Consumers in Europe.

In this Special Issue, the opening paper by *Jordi Nieva-Fenoll* focuses on online dispute resolution for small claims from a critical legal standpoint. The author argues that some jurists believe that the judicial process is not adequate for these lawsuits when they are transnational, but in fact, neither is it when they are national. It is true that a transnational claim is challenging in terms of applicable law, the search for national lawyers, the search of evidence and even the translations. But actually, all inconveniences are based upon a very old mentality linked with the also very old 'de minimis non curat praetor'. Whoever thinks that dealing with transnational small claims is not really feasible, does not see how to deal with them adequately in domestic law either. These authors also think that the resolution of small claims should

⁷⁴ An example of using ODR for infringements of IP rights can be observed in the case of Internet Corporation for Assigned Names and Numbers (ICANN) that deploys ODR for resolution of domain names disputes. See Althaf Marsoof, 'Intersections *Between Intellectual Property and Dispute Resolution*' in Irene Calboli and Maria Lilla Montagnani (eds.), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford University Press 2021).

⁷⁵ Ben Depoorter, 'Intellectual property enforcement costs' in Ben Depoorter, Peter Menell, and David Schwartz (eds.), *Research Handbook on the Economics of Intellectual Property Law* (Edward Elgar Publishing 2019) 416; also see Cori Henris, 'Oof! Nice Try Congress – The Downfalls CASE Act and Why We Should be Looking to our Cousins Across the Pond for Guidance in Updating our New Small Claims Intellectual Property Court' (2021) 29 J. INTELL. PROP. L. 175 <<https://heinonline.org/HOL/P?h=hein.journals/intpl29&i=179>> accessed 25 April 2022.

⁷⁶ Adam D. Moore, 'Privacy, Interests, and Inalienable Rights' (2018) SSRN Journal <<https://ssrn.com/abstract=3107324>> accessed 25 April 2022.

be transferred to mediation or to consumer arbitration, despite whose institutional development as parallel to state justice is extremely complicated. Collective redress may be one more option, although in the vast majority of cases there is not really a group of stakeholders that can be managed together. Furthermore, organizing this kind of collective redress is very difficult. It's maybe necessary to remember that class-actions in the US almost never reach the trial phase.

In the second paper, *Adriano Maffeo* and *Flavia Rolando* discuss the EU action in the field of small claims procedures and the limits resulting from its implementation in the national legal systems. The authors firstly illustrate the reasons that led the Union to adopt a regulation on small claims, focusing on the objectives set by the EU legislator in 2007 and 2015, through the amending regulation. Secondly, they focus on the effects that such an instrument is intended to have on internal legal systems. In a critical light they examine the limits deriving from the need to integrate the EU mechanism into national procedural rules.

The third paper by *Fokke Fernhout* discusses the EU Small Claims Procedures in the Netherlands. This contribution focuses on the Dutch Small Claims Act that amended in 2017 as a result of the changes in the ESCP of 2017, obviously taking into account earlier developments that still determine the workings of the ESCP. The framework of civil litigation in the Netherlands and the implementation of the ESCP is discussed and explained. The main part is devoted to the workings of the ESCP in practice, including an analysis of the way the ESCP is used (and maybe abused). The paper concludes that in less than 3 % of the cases the ESCP is used in conformity with its objectives, but that legal practice profits from its aspects that help to avoid the workings of other European instruments, especially the EU Service Regulation.

In the fourth paper, *Sara Hourani* presents a critical analysis of the recognition and enforcement of cross-border consumer ODR outcomes in the EU. This paper addresses that the EU ODR platform was created with the objective of offering better access to justice for the consumer, especially for cross-border disputes. The recognition and enforcement of cross-border ODR outcomes in the EU is however a complex procedure, and not always possible under the current EU legal framework. This article therefore questions whether a digitalised ESCP procedure is a better alternative to the enforcement of consumer redress for cross-border electronic-based small claims procedures.

The fifth contribution by *Rhonson Salim* presents discussions on UK and EU cross border consumer dispute resolution in the post Brexit landscape. The paper analyses and evaluates key challenges to UK and EU consumer cross border dispute resolution. It also considers procedural impediments to UK consumers enforcing consumer rights against EU/EEA traders as well as to EU consumers bringing claims against UK traders. Specifically, the paper considers the jurisdictional impact of UK's status and its effect upon the re-

reciprocal enforcement of consumer court judgments/ADR decisions between the EU and UK. Finally, the paper suggests that a Lugano+ approach would help to mitigate the impact of the impediments to effective consumer dispute resolution between EU and UK entities. In doing so, it first takes a preliminary look at the existing paradigm of cross border cooperation in consumer dispute resolution. The contribution also includes some thoughts on the normative clashes facing the creation of a new relationship in this area.

The sixth paper by *Rimantas Simaitis*, *Vigita Vėbraitė*, and *Milda Markevičiūtė* focuses on the European Small Claims Procedure in the realm of the other European proceedings. In this article, the ESCP is analysed in the context of the other European procedures, namely Brussels I bis Regulation (Regulation (EU) No 1215/2012), European Enforcement Order Procedure, European Payment Order Procedure and Consumer ODR Procedure. The aim of each procedure, their benefits for users and drawbacks are compared to establish the areas in which the European Small Claims Procedure can be improved or modified contributing better towards the development of more efficient and user-friendly European Union civil proceedings system. Results of the SCAN | Small Claims Analysis Network consortium studies of the application of the ESCP are used as a basis of this article. The article among other issues covers premises to introduce seamlessly integrated dispute resolution methods and tools in the ESCP such as early-diagnostics, negotiations, mediation, etc. to create a pyramid-shaped dispute resolution system so that only the disputes that cannot be resolved by using other tools would be channelled to the adjudicative stage.

In the seventh paper, *Beatrice Zuffi* provides in-depth analysis of an effective on-line dispute resolution network for enhancing collective redress in Europe and how to handle mass small claims through an integrated approach. This article maintains that the ESCP disappointing results, the scarce interconnection between Reg. 861/2007, ADR legislation and Directives 2019/2161 and 2020/1828, as well as the suboptimal functioning of the ODR platform urge for a global rethinking. The author points out some possible interventions to implement consumers' and users' protection in relation to small and homogenous claims, hoping that the European Institutions will soon consider a reform aimed at establishing an online integrated justice service in which court procedures merge with mechanisms of amicable solution.

The eighth contribution by *Davide Turroni* discusses oral hearing management under the E.S.C.P. Regulation. The author argues that the ESCP is featured as a written procedure, wherein the oral hearing is granted limited space. The reason stems from the fact that oral hearing in cross-border litigations takes significantly longer time and its worth seems to be – notably in civil matters such as those included in the ESCP scope – inversely related with the case value (the smaller the value, the lesser the worth). Such a discipline gives rise to a number of significant issues, concerning its consistency with the procedural fundamental «right to be heard»; the correlative margin of discretion the court may rely on in deciding whether a hearing shall be

scheduled or not; not least the role played by the modern communication technologies in this respect. The author deals with such issues in their multiple features and connections, trying thence to offer proper answers thereto. The overall author's view is that the ESCP Regulation's restrictive approach to oral hearing is reconcilable with the right to be heard and that the broad discretion conferred to the court in this respect is justified as well.

In the ninth paper, *Sajedah Salehi* and *Marco Giacalone* discuss small claims and the pursuit of digital justice from a tiered online dispute resolution perspective. This contribution investigates the most recent developments in completely online small claims processes as a response to the extreme delays in delivering justice by courts. This study argues that adopting a tiered online dispute resolution system design can increase access to justice for individuals by simplifying the processes; reducing excessive procedural length and costs; also expanding accessibility to dispute resolution bodies. The present research also proposes that the COVID-19 pandemic has widely opened a bundle of opportunities for complete digitalisation of small claims procedures at the EU and Member State levels. Nevertheless, it deems necessary to closely monitor the function of these systems to ensure that the digitalised small claims procedures meet the standards of procedural fairness and efficiency of justice, in particular concerning self-represented litigants.

Prof. Gina Gioia

A SERGIO CHIARLONI (16-1-2022)

Ricordo ancora la sua mail di quando Michele Taruffo è scomparso, appena un anno fa. “Era più giovane di me!” mi disse, lamentando la morte del suo vecchio amico. Ho parlato con lui molto recentemente. La sua voce vecchia e leggera era allegra, nonostante i suoi molti disagi fisici, come lo era sempre stata. Personalmente e nei suoi modi di comportarsi e di dialogare, era sempre stato un vero gentiluomo, sempre impeccabile nei modi, estremamente attento quando si aveva la fortuna di essere suo ospite. E sempre accompagnato dalla sua amata Mirella, che gli ha dato enorme simpatia e profondità, uscendo dal campo del diritto processuale. In effetti, i due erano probabilmente la coppia più affettuosa immaginabile.

Non posso parlare di un Chiarloni giovane, perché non lo conoscevo. I suoi scritti sulla cassazione e sulla nomofilachia sono tra i primi che ho letto e, come sempre accadeva per gli autori italiani, non si sapeva se fossero vivi o morti o più o meno giovani. Li immaginavo come pozzi di saggezza, inaccessibili nella loro eccellenza e pieni di idee formulate con una vocazione teorica ma sempre con immenso realismo. Ed è esattamente così che era Sergio. Qualcuno che rispettava la dottrina tradizionale, ma che non aveva avuto problemi a finire per denunciare la tremenda difficoltà dello *ius constitutionis* o per dimostrare l'impraticabilità della distinzione tra fatto e diritto, almeno in cassazione.

Per tutte queste ragioni, nella prima conferenza che l'ho ascoltato sull'oralità, nel lontano 2008, mi aspettavo di sentire l'insegnante che era veramente. Ma ho anche conosciuto una persona discretamente atletica, alta, e con gesti che combinavano misteriosamente l'aristocratico con una tremenda vocazione di vicinanza al suo pubblico, direi quasi al popolo. Con quella voce leggera che aveva sempre e quel sorriso un po' nervoso all'inizio del suo discorso, spiegava in modo perfettamente strutturato, cercando di farsi capire. E soffriva molto per non esserlo, soprattutto quando si esprimeva in un'altra lingua. Conservo per me i commenti che mi ha fatto prima e dopo i

convegni che abbiamo condiviso in Argentina con Federico Carpi, su gentile invito di Eduardo Oteiza. Più di una volta ha chiesto privatamente una parola in spagnolo per essere più preciso, ma quello che mi ha colpito è l'umiltà che ha mostrato quando ha finito la sua lezione, e già seduto al tavolo dei relatori ha chiesto, sempre privatamente, se si avesse capito quello che aveva detto, se avesse comunicato bene. Sì, solo i giganti della scienza esitano e sono preoccupati per ciò che possono portare al loro pubblico.

La prossima volta che lo incontrai fu a Torino, nella sua università. Era da poco che avevo vinto la cattedra di diritto processuale a Barcellona, e lui mi aveva suggerito di andare dopo il concorso a un congresso da lui organizzato, in cui si sarebbe discusso proprio di cassazione. Michele Taruffo è apparso al congresso, ovviamente scendendo da un aereo dopo un lungo viaggio e quasi in paracadutismo, come ha dichiarato pubblicamente Federico Carpi. Ma la sorpresa è stata quando all'improvviso Sergio si è avvicinato e mi ha detto che aveva appena scoperto che un oratore non sarebbe venuto, e in quel momento mi ha chiesto di sostituirlo per iniziare a parlare tra 30 minuti durante altri 30 circa. Come dire di no... soprattutto quando dopo annunciò pubblicamente che un relatore aveva fallito ma che "grazie al cielo", io c'ero e avevo accettato di tenere la conferenza sul tema che era già stato annunciato. Consapevole della difficoltà — era la prima volta che teneva una relazione in italiano — durante tutto il mio intervento mi ha seguito con lo sguardo, cercando di accompagnarmi con il suo gesto di gentilezza, anche sui punti in cui non ero d'accordo con lui — che lui conosceva bene — fino a quando ho finito.

Racconto l'aneddoto precedente solo per espiegare la sua dolcezza, quella che usava sempre con tutti. Una presenza amichevole sempre pronta ad affidare sinceramente idee, anche politiche, al suo interlocutore, partendo sempre da dati concreti ben compilati. Non era il tipico cittadino lamentoso di "piove, governo ladro", ma era evidente che aveva una formazione completa sul governo e sui movimenti sociali, del tutto estranea al diritto processuale, che ha arricchito notevolmente i suoi colloqui.

Ma dove il Chiarloni scientifico era probabilmente più visibile era, non solo nelle sue pubblicazioni, ma anche nei dibattiti nei convegni. Ha mantenuto la mente straordinariamente chiara, veloce e precisa fino all'ultimo momento, ascoltando i contributi che ha dato alle parole di un altro essendo incredibilmente costruttivi. Non parlava per parlare o dire la prima cosa che gli veniva in mente, che è ciò che accade nella stragrande maggioranza di quei frequentissimi "brainstorming", che raramente servono ad altro che a disorientare chi ha le idee chiare, ed è turbato dalle parole di opinionisti improvvisi che cercano solo di non tacere. Al contrario, Sergio, come i bravi conversatori, ha compilato i pensieri degli altri e costruito sulla base di quelle idee, non le sue, che è proprio ciò che deve essere apprezzato nelle conversazioni scientifiche. Se c'è qualcosa che davvero non ha caratterizzato Sergio, è stata la vanità, che penso che trovava semplicemente divertente negli altri, ma che lui rifiutava per se stesso.

Parte un'ottima persona, che ci lascia di nuovo orfani, anche se con l'eredità del suo esempio personale e scientifico. Molte volte evocheremo il suo sguardo timido ma attento, il suo sorriso discreto e alcuni dei suoi silenzi rispettosi, che dicevano tutto ad alta voce.

Jordi NIEVA-FENOLL

A SERGIO CHIARLONI (16-1-2022)

Aún recuerdo su mail de cuando falleció Michele Taruffo, hace un año escaso. “*Era più giovane di me!*”, me dijo, lamentando el fallecimiento de su viejo amigo. Hablé con él hace muy poco tiempo. Su anciana y ligera voz era alegre, pese a los muchos achaques que padecía, como siempre lo había sido. En lo personal y en sus modos de comportarse y de conversar había sido siempre un auténtico caballero, siempre impecable en las formas, extremadamente atento cuando tenías la suerte de ser su huésped. Y siempre acompañado de su amadísima Mirella, que le otorgaba enorme simpatía y profundidad saliendo del ámbito del Derecho procesal. En realidad, ambos eran probablemente la pareja más unida en el afecto que quepa concebir.

Yo no puedo hablar de un Chiarloni joven, porque no lo conocí. Sus escritos sobre casación y nomofilaxis son de los primeros que leí, y como siempre ocurría entonces con los autores italianos, no sabías si estaban vivos o muertos o eran más o menos jóvenes. Los imaginabas como pozos de sabiduría, inaccesibles en su excelencia y llenos de ideas formuladas con una vocación teórica pero siempre con un inmenso realismo. Y justamente así era Sergio. Alguien que respetaba la doctrina tradicional, pero que no había tenido inconveniente alguno en acabar denunciando la tremenda dificultad del *ius constitutionis* o demostrando el carácter impracticable de la distinción entre hecho y derecho, al menos en casación.

Por todo ello, en la primera conferencia que le escuché sobre oralidad, allá por 2008, esperaba escuchar al maestro que verdaderamente era. Pero además me encontré con alguien discretamente atlético, espigado, y con unos ademanes que combinaban misteriosamente lo aristocrático con una tremenda vocación de cercanía a su público, casi diría al pueblo. Con esa voz ligera que siempre tuvo y esa sonrisa algo nerviosa al iniciar su intervención, exponía de una forma perfectamente estructurada, buscando ser entendido. Y sufría mucho por no serlo, sobre todo cuando se expresaba en otra lengua. Para mí guardo los comentarios que me hacía antes y después de las

conferencias que compartimos en Argentina con Federico Carpi, por amable invitación de Eduardo Oteiza. Más de una vez preguntaba en privado una palabra en español para ser más preciso, pero lo que me dejó impresionado es la humildad que exhibía cuando había acabado su conferencia, y ya sentado en la mesa de los ponentes preguntaba, nuevamente con sigilo, si se había entendido lo que había dicho, si había comunicado bien. Sí, solo los gigantes científicos dudan, y les preocupa lo que puedan aportar a su público.

La siguiente vez que lo encontré fue en Turín, en su universidad. Hacía muy poco que había ganado una cátedra de Derecho Procesal en la Universidad de Barcelona, y él me había sugerido por *mail* que fuera después del concurso a un congreso que había organizado, en el que precisamente se hablaría de casación. En el congreso apareció Michele Taruffo, por supuesto bajando de un avión tras un largo viaje y casi cayendo en paracaídas, como dijo públicamente Federico Carpi. Pero la sorpresa fue cuando de repente, Sergio se aproximó a mí y me contó que acaba de saber que un ponente no vendría, y en ese momento me pidió sustituirle para empezar a disertar en treinta minutos durante otros treinta aproximadamente. Cómo decirle que no... sobre todo cuando después anunció públicamente que había fallado un ponente pero que "*grazie al cielo*", yo estaba ahí y había aceptado impartir la conferencia sobre la temática que ya estaba anunciada. Consciente de la dificultad -era la primera vez que hacía una conferencia en italiano-, durante toda mi intervención me fue siguiendo con la mirada, intentando acompañarme con su gesto de gentileza, incluso en los puntos en que discrepaba con él -y que él conocía- hasta que acabé.

Cuento la anécdota anterior solamente para glosar su dulzura, la que siempre empleó con todo el mundo. Una presencia amable siempre dispuesta a confiar sinceramente ideas incluso políticas a su interlocutor, partiendo siempre de datos concretos bien compilados. No era el típico ciudadano quejoso de "*piove, governo ladro*", sino que era evidente que tenía una completa formación en materia de gobernación y movimientos sociales, completamente ajena al Derecho procesal, que enriquecía mucho sus conversaciones.

Pero donde probablemente más se dejaba ver el Chiarloni científico era, no solo en sus publicaciones, sino en los debates posteriores a las conferencias. Conservó la mente extraordinariamente clara, rápida y precisa hasta el último momento, siendo increíblemente constructivo escuchar las aportaciones que realizaba a las palabras de otro. No hablaba por hablar ni decía lo primero que se le venía a la cabeza, que es lo que ocurre en la enorme mayoría de esos tan frecuentes "*brainstormings*", que pocas veces sirven para algo aparte de para desorientar a quien sí que tiene las ideas claras, y se ve perturbado por las palabras de opinadores repentinos que solo buscan no permanecer callados. Al contrario, Sergio, como los buenos conversadores, compilaba el pensamiento ajeno y construía partiendo de esas ideas, no de las suyas propias, que es justamente lo que sí es de agradecer en las conversaciones científicas. Si hay algo que verdaderamente no caracterizaba a Sergio

era la vanidad, que tengo para mí que le parecía simplemente divertida en los demás, pero que rechazaba para sí.

Se va una excelente persona, y nos deja huérfanos de nuevo aunque con la herencia de su ejemplo personal y científico. Evocaremos muchas veces su mirada tímida pero atenta, su discreta sonrisa y algunos de sus respetuosos silencios, que lo decían todo a voces.

Jordi NIEVA-FENOLL

ONLINE DISPUTE RESOLUTION FOR SMALL CLAIMS: IS THIS THE ONLY REALISTIC SOLUTION?

Jordi NIEVA-FENOLL

Full Professor (Chair) of Procedural Law
University of Barcelona

ABSTRACT: Some jurists believe that the judicial process is not adequate for these lawsuits when they are transnational, but in fact, neither is it when they are national. It is true that a transnational claim is challenging in terms of applicable law, the search for national lawyers, the search of evidence and even the translations. But actually all inconveniences are based upon a very old mentality linked with the also very old 'de minimis non curat praetor'. Whoever thinks that dealing with transnational small claims is not really feasible, does not see how to deal with them adequately in domestic law either. These authors also think that the resolution of small claims should be transferred to mediation —often useless—, to consumer arbitration, whose institutional development as parallel to state justice is extremely complicated, or even to collective redress, although in the vast majority of cases there is not really a group of stakeholders that can be managed together. Furthermore, organizing this kind of collective redress is very difficult. It's maybe necessary to remember that class-actions in the US almost never reach the trial phase.

KEYWORDS: Artificial Intelligence, collective redress, consumer, mediation.

SUMMARY: 1. Introduction; 2. The everlasting problem of small claims; 3. The nuanced failure of arbitration; 4. The failure of mediation; 5. The failure of collective redress; 6. Artificial intelligence and predictive justice.

1. INTRODUCTION

It would be easy to say that in times of pandemic, judicial processes are only possible online. However, the pandemic will end up some day and a very

old problem will still remain among us: which is the more suitable judicial process to deal with small claims?¹

Various solutions have been proposed to deal with these disputes. Nevertheless, no one seems to be willing to offer a good solution, despite the deep sense of injustice that the parties of the conflict often feel after these disputes, also if they were finally somehow “solved”². Throughout history we have seen summary and special proceedings for small claims, special courts, lay judges, or professional but rookie judges³, and also a resort to A.D.R. All these possible solutions have been tried repeatedly, and although not in all cases it is possible to speak of a failure, the problem remains unsolved.

In this paper I will briefly review this whole little story of misadventures, which will conclude with a look into the future that is probably, finally, the definitive key that we have been searching for centuries to solve the small claims. In this matter, as in so many others, it is possible that technology represents a definite leap forward.

2. THE EVERLASTING PROBLEM OF SMALL CLAIMS

*De minimis non curat praetor*⁴ is probably one of the most sincere phrases in the history of law. Certainly, the problem with small claims is not their complexity, which is often low. The drawback is their large number, since they really affect all citizens, as well as the resistance of the public powers to manage these disputes for two main reasons.

The first is the idea that the social conflict they produce is low, since they are not serious confrontations that could put the community or the powerful on the warpath. And certainly it is so. This sort of conflicts, even leaving them unresolved, do not usually cause greater evils, especially of public order.

The second reason is somewhat cruel. Resolving these disputes would require a judicial structure much more ambitious than the one we currently have, and much more than the one that has historically existed. Governments tend to find a multitude of places in which to invest money that are politically more profitable than Justice⁵. In the past it was wars, large commercial

¹ See HAU, Wolfgang, „Zivilprozesse mit geringem Streitwert: Small claims courts, small claims tracks, small claims procedures”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, n. 81, 2017, vol. 3, p. 570.

² See MOLINER, B. y FUENTES, M. (2011): “Causas y consecuencias de la insatisfacción en consumidores con atribuciones externas”, *Cuadernos de Gestión*, Vol. 11, n. 1, p. 37.

³ Again HAU, Wolfgang, „Zivilprozesse mit geringem Streitwert: Small claims courts, small claims tracks, small claims procedures”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, n. 81, 2017, vol. 3, p. 570.

⁴ The oldest reference of this phrase might be found in DE BENINTENDI, Pietro, *Decisiones causarum bononiensis*, Frankfurt. 1573, p. 6. Nevertheless, the phrase is probably still older. See KLINGENBERG, Georg, “Minima non curat praetor”, en: *FS Rolf Knütel* (2009), p. 559.

⁵ CEPEJ, 8th report «European judicial systems - CEPEJ Evaluation Report - 2020, (2018 data). https://www.coe.int/en/web/cepej/home/-/asset_publisher/CO8SnxIjXPeD/content/the-cepej-report-con

companies or the construction of palaces of all kinds. Now, without ruling out all of the above, there are a multitude of issues that attract the vote of the citizenry, but none of them usually have anything to do with the proper maintenance of a court structure.

Ultimately, nothing is done except to put patches, although legislators have not lacked imagination. Imagination, however, must be assumed, of very low intensity, really inferior to the Roman one. In the *Corpus Juris Civilis* any reader will be surprised to find out that the lawsuits that settle those old laws are almost always small lawsuits typical of a rural economy or little commerce⁶, above all. In fact, if Rome demonstrated something throughout its entire trajectory, it is its concern for the proper resolution of disputes, precisely those small disputes, even as a priority to the issues that we now include under criminal law.

And this was because they probably realized that these small litigation do cause a problem of public order, because they are usually at the origin, sometimes remote, of greater evils. In a historical moment like that of the Roman expansion in which, precisely, it was a question of abolishing self-defence as a way of establishing the authority of Rome, the worst thing would have been leaving open the daily conflicts of the population, as in this way the inhabitants, not seeing them resolved, will privately seek their particular way of resolving conflicts, failing to establish the aforementioned authority.

That could be, among other reasons⁷, the ground why Rome created the formulary system, seeking the indicated political end⁸. This process might have been aimed to be a conflict resolution mechanism in order to attract the newly conquered local population to Roman authority. For this reason, they might have arranged a process with two phases, the first —*in iure*— before a praetor; that is to say, a Roman authority, who would hear the conflict and would say what Roman law provides. The second, before lay judges —frequently constituted in jury⁹— who were neighbours of the place, so that the last word was theirs, and not of the Roman authority.

The praetor, at that time, was not in a courthouse, but in the *forum*¹⁰, in the central square of the town, where people walked and traded. The *praetori* performed as one more merchant. It is possible that this mechanism imposed the *pax romana* to a greater extent than any army. And we must not lose sight of the fact that the romans were dealing with what for centuries afterwards

taining-the-figures-on-the-efficiency-of-the-functioning-of-judicial-systems-in-europe-has-been-published?_101_INSTANCE_CO8SnxIjXPeD_viewMode=view/

⁶ See KASER, M. / HACKL, K., *Das römische Zivilprozessrecht*, München, 1996, pp. 156, 408.

⁷ KUNKEL, Wolfgang / SCHERMAIER, Martin, *Römische Rechtsgeschichte*, Köln, Weimar, Wien, 2001, p. 112. KASER, M. / HACKL, K., *Das römische Zivilprozessrecht*, München, 1996, p. 156.

⁸ See NIEVA-FENOLL, J., “El primer escrito judicial de Hispania: reflexiones de Derecho Procesal sobre el bronce II de Botorrita o Tabula Contrebiensis”, in *Jurisdicción y proceso*, Madrid, 2009, p. 147.

⁹ KASER / HACKL, *Das römische Zivilprozessrecht*, p. 192.

¹⁰ HÖCKER, Ch., “Forum” *Der Neue Pauly*, vol. 4, Stuttgart, 1998.

the authorities have refused to resolve again as Rome did: precisely the small claims.

In other words, what we are currently experiencing is the result of a progressive elitization of the legal profession, which probably produced a gradual distancing from the current people, focusing only on the lawsuits of those who could pay them. In fact, the all-free-justice which exists in various places, is not only very recent, but also does not even exist in most countries¹¹. Therefore, what one day probably did not cost too much money—the work of a praetor and some lawyers— progressively became unattainable for the majority, and even for the State when it came to providing what was necessary to sustain the system.

As a result, it is very likely that the real problem is only the elitization of the access to Justice, a problem that has not been completely overcome since the French *Constitution* of 1791 tried to confront it¹². What's more, as has already been said, different solutions have been tested, but they actually have been nothing more than patches, observing the result as a whole.

Canon Law tried to somehow control this elitization process with the summary procedure of the Decree of Clement V *Saepe Contingit* in 1306¹³, by the way, the first Pope of Avignon. In this way, the trend of trying to configure special, simpler procedures to solve small claims was inaugurated. However, this trend generated a multiplication of special procedures over the centuries, many of which still exist in our laws, the trend reaching even to the very European legislation with the European Small Claims Procedure¹⁴.

Other legislators, without renouncing the above, decided to have special judges for small cases. Thus arose the justices of the peace in 12th century England¹⁵, whose long history continues to this day, and which inspired the *justice de paix* of the French Revolution and other homonymous jurisdictions, particularly in Spain and Italy. In any case, these jurisdictions are related to other European courts also dedicated to small cases, such as the *Amtsgerichte* in Germany or the small claims courts in the USA since the mid-1950s of the 20th century, which came to replace precisely the justices of the peace, or the *Justice de proximité* in France, of short-lived duration, since created by the

¹¹ See *Gerichtskostengesetz* in Germany or the loi 30-12-1977 in France as examples of both trends.

¹² Chap. V, art. 2. – La justice sera rendue gratuitement par des juges élus à temps par le peuple, et institués par des lettres-patentes du roi qui ne pourra les refuser. – Ils ne pourront être, ni destitués que pour forfaiture dûment jugée, ni suspendus que pour une accusation admise. – L'Accusateur public sera nommé par le Peuple.

¹³ See GUTIÉRREZ BERLINCHES, Á., "Algunas reflexiones sobre el concepto de sumariedad", *RDProc*, 2003, n. 1-3, p. 296.

¹⁴ Regulation (EC) N. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

¹⁵ BEARD, Ch. A. *The Office of Justice of the Peace in England in Its Origin and Development*, 1904. PICARDI, Nicola, "Il giudice di pace in Italia. Alla ricerca di un modello", *Riv. Dir. Proc. Civ.*, 1993, 3, p. 661. PRONIER, Dominique, *Le juge d'Instance dans la société française*, Paris, 1993, p. 36.

Law of September 9, 2002, it was abolished on July 1, 2017. Another example of the incredible accumulation of failed solution attempts on this topic¹⁶.

There are, of course, many other examples that reveal that concern for small claims has never ceased to be present in consciences¹⁷, despite not having received due political attention. But perhaps the most prominent is a synthesis of all the above: the UK tracks¹⁸, that is, that combination of special judges and procedural specialties, at the discretion of the litigant or judge, depending on the case. It is another attempt, one more in history, to try to solve this problem, although neither its success is remarkable nor does it seem to have been an inspiring model outside the United Kingdom, beyond the references, always somewhat diffuse, to case management¹⁹.

3. THE NUANCED FAILURE OF ARBITRATION

Another alternative to deal with small claims can be found in the repeated attempts to implement arbitration in our society, attempts that in general have again ended in failure. To quote just one example, the Spanish one, from 1953 until today there have been three arbitration laws: the Law of December 22, 1953, Law 36/1988 of December 5 and the current Law 60/2003 of December 23. It goes without saying that none of the three have served to solve, at all, the problem of small claims.

Arbitration, in reality, was a victim of the same problem that has already been explained regarding professional justice: elitization. Starting from good will intentions, always bucolic and even, let's say it, flower-power, to seek alternatives to state justice to try to combat its delays and costs, everything ends up generating a mechanism that, in reality, costs even more money²⁰.

Arbitration doesn't work because is not very realistic to think that two opposing litigants are going to find a trusted third party to resolve the dispute. On the contrary, what these two litigants seek is someone with moral and intellectual authority who finds for whoever is right, but this is hard for a friend of both to do. Even in larger lawsuits, an arbitration association is usually resorted to in search of that impartial third party. And that is the central

¹⁶ See. NIEVA-FENOLL, J., "La justicia de proximidad", in *Jurisdicción y proceso*, Madrid, 2009, p. 111.

¹⁷ *Vid.* sobre el tema CAPPELLETTI, Mauro / GARTH, Bryant, "Access to Justice: The Worldwide Movement to Make Rights Effective – A General Report", en *Access to Justice*, vol. I/1: A World Survey, (1978) 3, pp. 69 y ss; *Access to Justice*, vol. II/2: Promising Institutions, dirs. Mauro CAPPELLETTI / John WEISNER (1979) pp. 489 y ss.

¹⁸ SORABJI, J., "Austerity's Effect on English Civil Justice", *ELR*, 2015, p. 159.

¹⁹ NYLUND, Anna, "Preparatory Proceedings in Norway: Efficiency by Flexibility and Case Management", in Ervo / Nylund (eds.), *Current Trends in Preparatory Proceedings*, 2018, p. 57. CABRAL, A. "New trends and perspectives on case management: Proposals on contract procedure and case assignment management", 2019, *Peking University Law Journal*, p. 6.

²⁰ See the main data about the different arbitration associations in NIEVA-FENOLL, J., "Mediation and Arbitration: A Disappointing Hope", 6 *IJPL*, 2016, p. 350.

problem: independence and impartiality. So easy to visualize —more than to define— and so difficult to obtain. Moreover, in these arbitration institutions, some even prestigious, there have been various not infrequent cases of lack of those characteristics that must always be present in judges²¹.

It is for this reason that perhaps other attempts in this area that specifically focus precisely on small claims can be fruitful. It is worth mentioning the experience of consumer arbitration boards in Spain, whose regulation and procedure is in another rule —the fourth— of arbitration: Royal Decree 231/2008, of February 15, which regulates the Arbitration System of Consumers, and that in fact it was published to adapt the system to the 2003 Law.

This norm establishes a very simple arbitration procedure before the arbitrators appointed by the arbitration board, which are public law bodies that are created within the framework of the state, regional or local administration. This way consumer disputes, that is, small claims, can be finally solved. To do this, consumers are helped to make their claim and everything possible is done to resolve it, usually in equity, a decision that must be made by the parties to the conflict.

This mechanism does seem to be working better²², although the reason is that it deals with very few claims. In order to attend the arbitration board, the trader must have adhered to the consumer arbitration system. The membership is voluntary, and few traders or corporations attend it. In reality, it is much more convenient for them to try to block consumers by resorting to the delays and costs of traditional justice.

For this reason, voices are rising more and more in favour of the mandatory nature of consumer arbitration, which has even reached a Justice of the Constitutional Court who has written a dissenting vote in this regard²³. But for now that adhesion remains voluntary because the Constitutional Court has stated that a mandatory character would violate the right of defence, of course that of the trader. Apparently, for the Constitutional Court, it is not a denial of justice the fact that the consumer has at his disposal a mechanism that he cannot afford in terms of money and time: the judicial process.

4. THE FAILURE OF MEDIATION

Another means that has not usually worked is mediation. Despite the strenuous attempts of the European Union to promote it (Directive 2008/52 / EC

²¹ See FACH GÓMEZ, Katia, “La creación y el funcionamiento de los tribunales comerciales internacionales: estudio de sus efectos en el ámbito del arbitraje comercial internacional”, (18 de septiembre de 2018), en A. M. López Rodríguez and K. Fach Gómez (eds.) *Reconocimiento Y Ejecución De Sentencias Arbitrales Extranjeras en España Y Latinoamérica*, Valencia, 2019. See also https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255670, and PARK, W.W., “Procedural Tension in International Arbitration: Arbitration in Autumn”, *International Arbitration*, 2013, p. 3.

²² See <https://juntarbitral.bcn.cat/>

²³ See STC 1/2018.

of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters), mediation is present currently in only 1% of EU disputes²⁴.

And no wonder. First of all, neither the doctrine nor the European Union should have been unaware that for a long time an identical—rather than analogous—mechanism was tried in several European countries: conciliation. And it failed because when the parties are already at odds, they do not have the slightest intention of conciliating, unless someone with a certain authority urges them to do so. And if that someone, who was normally a judge—as it happens with mediation in Germany (§278.5 ZPO)—goes overboard, the alleged conciliation ceases to be a peaceful method of conflict resolution to become a threat.

It is not possible to foresee a different future for mediation, also taking into account the naive doctrinal claims that the mediator only “dynamize” the conflict, but does not propose any solution²⁵, which the parties should find on their own. How is it possible that parties find common solutions if they are maintaining the dispute precisely because they have not found them? If at least the mediator could make a proposal with a certain *auctoritas* being a well-learned jurist... But mediators, in theory, cannot make proposals, or tell the parties how the judgment in a case could be. Nevertheless, such proposals could certainly weaken the intransigence of the parties...²⁶

But there is also another problem. Lowering the emotions of two opposing parties takes time. A time that a consumer, for instance, does not have. The consumer wants the trader to comply at once, and not to acquire any advantage because he behaves like a fair person and gives in. This way one of the worst problems of mediation is observed: too many times someone who does not deserve anything gets something, and simply because he refused to fulfil his obligation. In consumer litigation, precisely, that is a constant.

Therefore, it does not seem that insisting on mediation will lead anywhere. Mediation is a space in which the powerful have everything in their favour to abuse the vulnerable. It may be a suitable instrument in conflicts that are only emotional, but where there is no real discrepancy, as fake discrepancy is simply used to keep emotions alive. This is also the case frequently in conflicts of international law²⁷. But in the rest of the litigation, particularly in

²⁴ ZATO ETCHEVERRÍA, María, “Una aproximación al mapa de la mediación en la Unión Europea”, *Revista de Mediación*, vol. 8, n. 1, 2015, pp. 72 y ss.

²⁵ PUNZI, Carmine, “Mediazione e conciliazione”, *Rivista di diritto processuale*, vol. 64, n. 4, 2009, p. 848. See also MARQUES CEBOLA, C., *La mediación*, Madrid, 2013.

²⁶ About these and other problems of mediation, specially the biased statistics of its success, see some relevant assertions in NIEVA-FENOLL, J., “Mediation and Arbitration: A Disappointing Hope”, *International Journal of Procedural Law*, vol. 6, 2016, p. 358.

²⁷ TAMARIT SUMALLA, J., “Justicia penal, justicia reparadora y comisiones de la verdad”, in Tamarit Sumalla (ed.), *Justicia de transición, justicia penal internacional y justicia universal*, Barcelona, 2010, p. 45. MARTIN, A., *La mémoire et le pardon. Les commissions de la vérité et de la réconciliation en Amérique Latine*, Paris, 2009.

civil conflicts, that emotional charge is mostly non-existent. Being aware of this, perhaps it is time to put efforts in mediation on hold.

5. THE FAILURE OF COLLECTIVE REDRESS

I am very much afraid to say that collective redress will end up following a very similar path. It is already a reality in European legislation through Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020 on representative actions for the protection of the collective interests of consumers.

This directive is inspired, as it is well known, in the US class actions. And as has happened with practically all the studies dedicated to this subject, it has been ignored that class actions PROCESSES practically never reach the trial phase²⁸. Parties, being faced with the terror of the expenses caused by the judicial process in a society that in recent years has been increasingly neoliberal, reach any agreement rather than risk going through a process before a jury, whose results are obviously unpredictable, given the lay character of its members, but who may have a tendency to rule in favour of the consumer by being consumers themselves. It is unspeakable that this lack of impartiality of the “judge” ends up causing as a positive effect on consumers, being the right to consumer protection practically absent in the US²⁹. That is precisely, and not by chance, one of the main flags of the European Union, which of course should be maintained.

If the collective process reaches the trial phase, the process becomes a nightmare. It is not easy to bring together the entire group of the stakeholders, but it is even more difficult to put everyone in agreement so that they have only one lawyer, or at least a few, because otherwise it will be impossible to carry out the process.

Likewise, it is often impossible to collect all the evidence. Lawyers must be in charge of this work, and even with relatively small groups, this work is usually very complex, and must take a long time since those affected tend to have contrasting documentation that can harm the evidence strategy.

Finally, the complexity is reproduced not only in remedies, for the same reason of the disparity of opinions of the plurality of litigants, but also when deciding who is affected by the judgment. The most original doctrinal³⁰ ela-

²⁸ See ORMAZABAL SÁNCHEZ, Guillermo, “El “dieselgate” ante los tribunales alemanes y norteamericanos: lecciones que cabe extraer respecto del tratamiento de la litigación masiva”, *InDret* 3, 2020, p. 25.

²⁹ See anyway the Bureau of Consumer Protection in <https://www.ftc.gov/es/about-ftc/bureaus-offices/bureau-consumer-protection>, and specially the mentality involved: “Competition in America is about price, selection, and service. It benefits consumers by keeping prices low and the quality and choice of goods and services high.” See <https://www.ftc.gov/about-ftc/what-we-do>

³⁰ VIGORITTI, V., *Interessi collettivi e Processo. La legittimazione ad agire*, Milano, 1979. PELLEGRINI GRINOVER, A., “La tutela giurisdizionale degli interessi diffusi nel sistema brasiliano”, *Riv.*

borations on the matter have appeared with conclusions that can lead to an unacceptable legal uncertainty for the company by questioning *res judicata*. Another difficult topic arises regarding the enforcement. Its results can be very uncertain if the judgment has not clearly delimited the stakeholders, as it usually happens.

In order to summarize, collective redress has usually been presented as one of the main developments that occurred as a consequence of the social and economic changes of the 20th century³¹. Nevertheless, collective redress is much older than is believed and it is not a good solution in systems such as civil law ones, where processes usually reach the trial phase. It is different in places like the US where everything possible is done to deter or even chill litigants from keeping the process alive. And in fact, class actions are a deterrent mechanism for traders.

6. ARTIFICIAL INTELLIGENCE AND PREDICTIVE JUSTICE

So what to do? Maybe nowadays online resolution offers an adequate answer to this problem, with the help of Artificial Intelligence. It is true that not so often a “group of stakeholders”, in terms of small claims, is to be found, even if they are consumers. Nevertheless, it is also true that small claims are usually analogous in many cases, and can be classified by large groups that, in reality, when they are analysed by a court, they are always resolved in the same way, and almost always looking for the same evidence. The defence of the parties in the vast majority of these cases is predictable.

Therefore, the most important challenge is to identify these groups of small claims, as well as the more frequent grounds of defence of plaintiffs and defendants. The cases are so highly analogous that an algorithm can be—even easily—designed. The algorithm would allow these disputes to be resolved at a European level without translations or applicable law difficulties, provided that the small claim refers to matters that have been subject to European regulation. If this is not the case, maybe the substantive law applicable in the different countries is very similar. Thus, judgments could be issued very shortly with the assistance of Artificial Intelligence and the supervision of a judge. All with very little expenses, no need for travelling at all or other complications. This would lead companies and consumers to adapt their behaviour to the fact that they no longer have a slow justice as an ally.

Trim. Dir. Proc. Civ., 1984, p. 66. BARBOSA MOREIRA, J. C., “La iniciativa en la defensa judicial de los intereses difusos y colectivos (un aspecto de la experiencia brasileña)”, *RDProc.*, 1992, n. 3, p. 527. PROTO PISANI, “Appunti preliminari per uno studio sulla tutela giurisdizionale degli interessi collettivi (o più esattamente: superindividuali) innanzi al giudice civile ordinario”, en: “AAVV, *Le azioni a tutela di interessi collettivi*, Atti del Convegno di studio, Pavia 11-12 de junio de 1974, Padova, 1976, p. 815. COSTANTINO Giorgio, *ibidem*, p. 817.

³¹ CAPPELLETTI, Mauro, “Formazione sociali e interessi di gruppo davanti alla giustizia civile”, *Riv. Dir. Proc.*, 1975, p. 361.

Artificial intelligence is a tool that has infiltrated a good part of our daily lives. It is so integrated into our normality and makes things so comfortable for us, that we do not realize that it is not only social networks or internet search engines that make use of it, but also the traffic lights on the streets, the lights of a building or some surveillance systems whose effectiveness we enjoy but do not perceive because we do not even know they exist.

Leaving aside the Chinese experience for being undemocratic by pretending, with elegant and attractive subterfuges, to make of the adjudication an automaton manifestation³², in matters of justice³³ some applications have already been developed that help to manage the day-to-day running of a court by classifying matters and anticipating their processing. Some other applications automate claims of monetary debts, or try to process the most frequent complaints in a much faster way³⁴, although not always efficient. They have even gone so far as to assist judges in planning the search of evidence and assessing it³⁵, or in the evaluation of the risk of criminal recidivism in the interim measures in the criminal process³⁶.

Not all these means work correctly, and on many occasions they generate great controversy, not so much because of the fearsome—and somewhat unreal—assumption that machines are going to replace the judges, but because the use of such tools has led to the settlement of rejectable biases in judges' decisions, such as racism³⁷ or other marginalization of minorities. After all, artificial intelligence is just a huge database with a more complex operation

³² See "Big Data, AI and China's Justice: Here's What's Happening", *China Justice Observer*, 1-12-2019. <https://www.chinajusticeobserver.com/a/big-data-ai-and-chinas-justice-heres-whats-happening>. See also Jie-jing YAO / Peng HUI, "Research on the Application of Artificial Intelligence in Judicial Trial: Experience from China", *Journal of Physics: Conference Series*, vol. 1487, 2020. <https://iopscience.iop.org/article/10.1088/1742-6596/1487/1/012013/meta>.

³³ See NIEVA FENOLL, *Inteligencia artificial y proceso judicial*, Madrid 2018. QUATTROCOLO, S., *Artificial Intelligence, Computational Modelling and Criminal Proceedings*, Springer, 2020.

³⁴ Vid. PÉREZ COLOMÉ, "Así sabe la policía si tu denuncia es falsa (y acierta un 91% de veces)", *El País*, 17-9-2018, https://elpais.com/tecnologia/2018/09/16/actualidad/1537135174_883514.html

³⁵ BROMBY, Michael C. / HALL, Maria Jean, "The Development and Rapid Evolution of the Knowledge Model of ADVOKATE: An Advisory System to Assess the Credibility of Eyewitness Testimony Article", January 2002, pp. 143 y ss, <https://www.researchgate.net/publication/228189761>, y https://www.researchgate.net/figure/ADVOKATE-Witness-Compellability_fig3_228189761. NISSAN, Ephraim, "Digital technologies and artificial intelligence's present and foreseeable impact on lawyering, judging, policing and law enforcement", *AI & Society*, 2015, p. 5.

³⁶ NORTHPOINTE INC., "Practitioners Guide to COMPAS", 17-8-2012, http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf. LARSON, J. / MATTU, S. / KIRCHNER, L. / ANGWIN, J., "How We Analyzed the Compas Recidivism Algorithm", *Propublica*, 23-5-2016, <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>. PEARSON, Jordan, "Bail algorithms are as accurate as random people doing an online survey", *Motherboard*, 17-1-2018, https://motherboard.vice.com/en_us/article/paqwmv/bail-algorithms-compas-recidivism-are-as-accurate-as-people-doing-online-survey. THADANEY ISRANI, Ellora, "When An Algorithm Helps Send You To Prison", *The New York Times*, 26-10-2017, <https://www.nytimes.com/2017/10/26/opinion/algorithm-compas-sentencing-bias.html>. TURKE & STRAUSS LLP, "Algorithms and criminal sentencing", <https://www.turkestrauss.com/2016/06/algorithms-and-criminal-sentencing/>

³⁷ LARSON, Jeff / MATTU, Surya / KIRCHNER, Lauren / ANGWIN, Julia, "How We Analyzed The Compas Recidivism Algorithm", *Propublica*, 23-5-2016, <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>. DRESSEL, Julia / FARID, Hany, "The Accuracy, Fairness,

than usual that is conducted through so-called algorithms, which are what allow the application to manage data, even offering the judgment alternatives of the case. This design of the algorithms can be influenced, naturally, by the computer scientists that configures them. For this reason, enormous political—democratic—care must be taken in the selection of that people and in the control of their work, so that they do not introduce authoritarian biases, or simply personal trends, into the algorithm. It has already happened³⁸, and therefore States must be very aware that the risk is real.

The proposal made here is to find out if consumer claims are classifiable with some ease, which must be evaluated, using information that is, in fact, already available on several websites³⁹, but in much more detail, from consumer arbitration boards but also from companies' claims departments. If the answer to that question is positive, as it is, the next step is to select the complaints that are most frequent and that, in addition, tend to be similar both in the allegations presented by the consumer and in the defences offered by the traders. If so, this means that the jurisdictional response can also be predictable, opening the way for its automation through artificial intelligence algorithms.

If all of the above is possible, the response capacity of the judges who use artificial intelligence will increase to rates never seen before, and litigation can be resolved in a record time of a few days, basically those that are considered convenient to offer to the trader to prepare his defence, taking into account that these are repetitive cases and, therefore, of highly predictable response, which greatly simplifies the alternatives for this defence and decision. If this is the case, claims that currently take weeks to be resolved before the Consumer Boards or months and up to a year by the courts, would be settled long before the consumer feels the tension or fatigue that usually makes them give up their claims.

This automatisisation task is not a job that a ministry of justice can carry out alone, but rather requires specialized computer scientists. But what ministries can do is to start preparing this task, carrying out the work to which I referred before classifying claims, defence arguments of both parties, usual evidence and more frequent alternatives of application of the legal system. With all this, the work of computer scientists will already be well advanced, because what they always ask for is that type of data to apply their technical knowledge.

Doubts will only arise in terms of the unexpected defence arguments, which after being reviewed by the application and discarding that they are

And Limits of Predicted Recidivism", *Science Advances*, 17-1-2018, <http://advances.sciencemag.org/content/4/1/eaao5580.full>.

³⁸ TORRES MENÁRGUEZ, Ana, "Kate Crawford: "Los ricos temen la rebelión de las máquinas, no tienen otra cosa de la que preocuparse", *El País*, 18-6-2018. https://elpais.com/tecnologia/2018/06/01/actualidad/1527868778_834780.html.

³⁹ Vid. <http://consum.gencat.cat/es/consultes-i-reclamacions/reclamacio-queixa-denuncia/>

inscribable arguments in the established categories, appear as really novel. At that time, human intervention will be necessary, in this case of a judge, in order to evaluate that factual or legal argument, issuing the final decision by traditional means.

The whole system could be set up in an experimental way until a good operation with hardly any errors is obtained, which requires some time, but is not wasted time at all. At the same time, a legal reform should be promoted so that this telematics procedure is possible and is considered compatible with the right of defence, which should not raise doubts if its operation and efficiency are shown in a transparent manner.

Perhaps this will be inspiring for the courts, which will begin to yearn for similar procedures to reduce their workload, and which should already be foreseen in our procedural laws, thus saving an extraordinary volume of processing that currently overwhelms the clerks of the tribunals, who spend their days acting mechanically like machines, covered by a tangle of bureaucratic paperwork that perhaps made sense before the existence of computer science, being completely inefficient right now.

In this new reality, other problems will emerge, especially over the necessary disclosing of algorithms⁴⁰ or about its elaboration, in order to prove beyond any reasonable doubt the independence / impartiality of the tool, as well as its compatibility with the right of defence. Although at the beginning the AI tool will generate doubts and even reluctance, its use will soon lead to a quick, cheap and predictable solution for consumer complaints, which is what we all want.

⁴⁰ Cfr. *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

THE EU ACTION IN THE FIELD OF SMALL CLAIMS PROCEDURES AND THE LIMITS RESULTING FROM ITS IMPLEMENTATION IN THE NATIONAL LEGAL SYSTEMS¹

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ABSTRACT: This article aims to illustrate, in the first part, the reasons that led the Union to adopt a regulation on small claims, focusing on the objectives set by the EU legislator in 2007 and 2015, through the amending regulation.

In the second part, the effects that such an instrument is intended to have on internal legal systems will be examined, highlighting in a critical light the limits that derive from the need to integrate the EU mechanism with national procedural rules.

KEYWORDS: European Small Claims Procedure; Cross-border cases; SCAN Project; Procedural autonomy; National procedural rules

SUMMARY: 1. INTRODUCTION.— 2. THE PURPOSE OF ESCP REGULATION AND ITS LIMITATIONS.— 3. THE PRINCIPLE OF NATIONAL PROCEDURAL AUTONOMY AS A LIMIT TO THE IMPLEMENTATION OF THE ESCP.— 4. CONCLUSIONS

¹ Paragraphs 2 and 4.1 were edited by Dr. Rolando, paragraphs 3 and 4.2 by Dr. Maffeo while the premise was edited jointly by the Authors.

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1. INTRODUCTION

The European Small Claims Procedure (hereinafter: ESCP) was introduced to provide EU citizens as well as Small and Medium Enterprises (hereinafter SME) with an agile tool to recover their cross-border claims efficiently and at an acceptable cost. However, this tool has not been used as much as expected and has remained rather unknown in practice. In this paper, we intend to analyse the changes that have taken place over time to improve this tool and we will try to assess whether the substantial lack of use of the ESCP is due to particular practical or procedural issues or whether it is merely a knowledge deficit (Para. 2).

Moreover, although the ESCP Regulation has introduced a uniform judicial remedy as an alternative to those that may already exist in the legal systems of the different Member States, its implementation cannot completely avoid the recourse to the rules of national procedural law.

Therefore, in this contribution it will be attempted to highlight how the national procedural law may affect the application of the small claims procedure (Para 3) and how the implementation of this instrument could, conversely, play an action of indirect harmonization of some national procedural rules (Para 4).

2. THE PURPOSE OF ESCP REGULATION AND ITS LIMITATIONS

In its proposal adopted in 2005 aiming at introducing the ESCP regulation⁴, the European Commission has underlined the need for simplified and accelerated small claims litigation. This need was first expressed by the European Council in Tampere 1999 and then endorsed by the European Parliament and by the Council. In this connection, in 2002 the European Commission started a wide-ranging consultation of both Member States and all the interested parties of civil society through the adoption of the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation⁵. The European Commission's approach, also shared with a meeting of experts of the Member States and generally

⁴ Proposal for a Regulation of the European parliament and of the Council establishing a European Small Claims Procedure presented by the European Commission, COM(2005) 87 final, legislative procedure 2005/0020 (COD). About this proposal see G. HAIBACH, "The Commissions proposal for a regulation establishing a European small claims procedure: an analysis", in *European review of private law*, 2005, 4, p. 593-601; X. E. KRAMER, "Harmonisation of Procedures in Europe: the proposal for a European Small Claims Procedure", in *Int'l Lis*, 2006, no 3-4, p. 109-115.

⁵ Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM (2002) 746 final. Through this Green paper, the European Commission gave an overview of the currently existing Small Claims procedures in the Member States and, considering the comparative study of how Member States deal with the relevant procedural issues, it formulated a number of questions concerning the desirable scope and features of a European instrument.

appreciated by them, was focused on adopting a regulation establishing a European Small Claims Procedure available to litigants as an alternative to the procedures existing under the laws of the Member States which will remain unaffected. Moreover, this instrument was supposed to abolish the intermediate measures to enable the recognition and enforcement of a judgment given in another Member State.

First of all, it is interesting to remark that this European procedure has been adopted by way of regulation and not of a directive. In its proposal, the European Commission affirmed that the choice of that legal instrument was made considering that this type of legal act leaves the right of the Member States unaffected to continue the application of their domestic rules alongside the European Small Claims Procedure⁶; thus, a regulation encroaches much less on the national procedural systems than a Directive that would require an adaptation of national legislation to the standards set in that instrument. Furthermore, the European Commission highlighted that a regulation would ensure the uniformity and direct applicability of the procedure. Through this legislative instrument, in fact, a common minimum level in the efficiency of the recovery of small claims is ensured in all Member States, notably in those Member States where no simplified procedures were in place, at the same time it permits to Member States that have developed an even better-functioning domestic system to retain it. As we know, this proposal resulted in the adoption of the regulation 861/2007⁷.

If we look at the practice, we see that the expectations expressed by the Commission and by other European institutions have not been met: the European Small claims Procedure has not become an alternative tool but has remained in the background.

In 2011, the European Parliament called on the Commission to take steps to ensure that consumers and businesses are made more aware and make use of existing legislative instruments, such as the ESCP⁸. In the same year, a EP

⁶ See Para 2.2.2 of the Proposal for a Regulation of the European parliament and of the Council establishing a European Small Claims Procedure presented by the European Commission, cit.

⁷ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, GU L 199 del 31.7.2007, p. 1-22. For a comment on the Regulation establishing the ESCP see, between the others, P. CORTÉS, "The need for synergies in judicial cooperation and dispute resolution : changes in the European small claims procedure", in H. BURKHARD, X. E KRAMER (eds.), *From common rules to best practices in European civil procedure*, Hart Publishing, Oxford, 2017, p. 379-401; A. FIORINI, "Facilitating Cross-Border Debt Recovery: The European Payment Order and Small Claims Regulations", in *The International and Comparative Law Quarterly*, 2008, 2, p. 449-465; X. A. KRAMER, "The European Small Claims Procedure: Striking the Balance Between Simplicity and Fairness in European Litigation", in: *Zeitschrift für europäisches Privatrecht*, 2008, pp. 355-373; C. O. MARTINEZ, "The Small Claims Regulation: On the Way to an Improved European Procedure?", in H. BURKHARD, M. BERGSTRÖM and E. STORSKRUBB (eds.), *EU Civil Justice: Current Issues and Future Outlook*, Hart Publishing, Oxford, 2015, p. 123-140.

⁸ European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters, (2011/2117(INI)), point 40.

Policy Department Study⁹ suggested that consumers wishing to bring a small claim may face several practical problems and highlighted some shortcomings of the ESCP Regulation, such as the threshold of 2,000 Euro, considered to be too low; the Claim form too complex and potentially to be completed in another language, i.e. that of the counterpart; the consumer's difficulty in fully understand the procedure in the Member State concerned, e.g. as to the costs involved and the length of the procedure¹⁰.

In the practice, according to a Eurobarometer Survey conducted in 2012 and published in 2013¹¹, only 12% of the respondents were aware of the existence of the ESCP, and an even smaller proportion of Europeans have used it: only 1%! But we can also point out that 69% of those who already used the ESCP were satisfied and 97% of all respondents who took businesses to court and won within the last 2 years (both domestically and cross-border) had their judgements enforced successfully¹².

Following the calls for action by the Parliament and considering the findings of the survey, the Commission announced its intention to issue a proposal to amend Regulation 861/2007¹³, especially taking into account that respondents said that they would be most encouraged to go to court in their country by the following factors: being able to conduct proceedings only in writing without physically going to court (37%), being able to conduct proceedings without having to hire a lawyer (31%), and being able to conduct proceedings online (20%)¹⁴.

In its proposal for amendments of the ESCP Regulation¹⁵, the European Commission affirmed that the problems were arising mainly from the deficiencies in the established rules, such as the limited scope of application in terms of low threshold as well as cross-border coverage. Moreover, the procedure was too cumbersome, costly and lengthy and does not reflect the technological progress achieved in the Member States' justice systems since the adoption of the Regulation¹⁶. Consequently, the European Commis-

⁹ F. ALLEWELDT, (ed.), *Cross-Border Alternative Dispute Resolution in the European Union*, Policy Department A Study, 2011.

¹⁰ See F. ALLEWELDT, cit., p. 81.

¹¹ Special Eurobarometer survey no. 395, <https://europa.eu/eurobarometer/surveys/detail/1045>.

¹² See the Summary of the Special Eurobarometer survey no. 395, p. 23 ff.

¹³ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, *Citizenship Report 2013 EU citizens: your rights, your future*, COM(2013) 269 final.

¹⁴ See p. 16 of the Citizenship Report 2013 EU citizens: your rights, your future, cit., where the Commission also envisaged the revision of the existing rules raising the threshold to EUR 25000.

¹⁵ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, COM/2013/0794 final, legislative procedure 2013/0403 (COD). About this proposal see J. P. CORTÉS, "Does the proposed European procedure enhance the resolution of small claims?", in *Civil justice quarterly*, 2008, 1, p. 83-97.

¹⁶ See p. 3 of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007, cit., where the European Commission also pointed out that "Even

sion proposed as major changes: the extension of the scope of the Regulation to cross-border claims from 2,000 € to 10,000 €¹⁷; the extension of the definition of cross-border cases; the enhancement of the use of electronic communication, including for the service of certain acts; the obligation for courts to use videoconferencing, and other distance means of communication to conduct hearings and take evidence; providing a maximum cap on court fees at 10% of the value of the claim, excluding all interest, expenses and disbursements. At the same time, the European Commission highlighted its efforts in support of the dissemination on this European procedure¹⁸.

We know that some of these proposals were not approved by the European Parliament and by the Council during the legislative procedure. It is quite interesting to observe that, after an initial debate in the Council, the Parliamentary Commission decided to open interinstitutional negotiations. Then, the modified text has been adopted in first reading by the two institutions¹⁹.

About the monetary limit of the procedure, an early working document of the European Parliament made a distinction between ESCP against legal persons, available for claims up to 10000 €, and individuals, available for claims of less than 5000 €²⁰. In the final text approved by the European institutions²¹ the limit is 5000 € for claims against legal and natural persons.

where problems are related to the poor implementation of the current rules —as is the case to a certain extent with the problem of the lack of transparency— it must be acknowledged that the rules of the Regulation are not always clear. In order to address the problem of lack of awareness, the European Commission launched already several actions, for example a series of thematic seminars in the Member States to inform SMEs about this procedure, the publication of a practice guide and the distribution of teaching modules to train European entrepreneurs on this subject”.

¹⁷ In the Commission Staff Working Document - Executive Summary of the Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, SWD/2013/0460 final, the European Commission affirmed that “The threshold of €2,000 severely limits the availability of the procedure for SMEs, whose cross-border disputes with another business amount on average to €39,700. About 30 % of the claims of businesses have a value between €2,001 and €10,000. These businesses have to revert to national small claims procedures or —where there is no such national procedure in place for cross-border cases— to ordinary civil proceedings. Particularly in Member States which do not provide for procedural simplifications in small claims disputes, this leads to disproportionate litigation costs and lengthy proceedings, which in turn deter claimants from pursuing their claims.”

¹⁸ See p3 of the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007, cit.

¹⁹ The development of the legislative procedure related to the adoption of the Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation, (EC) No 1896/2006 can be observed in <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52013PC0794&qid=1623692786511>.

²⁰ See the Report on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment procedure, A8-0140/2015, PE539.630v02-00, p. 9, Amendment 7.

²¹ Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regula-

Moreover, the proposed modification of the extension of the cross-border cases covered by the scope of the ESCP Regulation was not adopted. Also Art. 3, para. 1, has remained unchanged: “For the purposes of this Regulation, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised”²². The European Commission tried to include in the scope of the regulation also the case where the claimant and the defendant are both domiciled in the same Member State but they can choose the jurisdiction of a third Member State under the provision of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²³.

Also the cap on the fees has not been introduced as drafted by the European Commission. However, a principle in this regard has nevertheless been included in the Regulation: according to Art. 15a the court fees shall not be disproportionate and shall not be higher than the court fees charged for the correspondent national simplified court procedures.

The modifications relating to electronic communications, applied for the hearing and for the service, have substantially been adopted as well²⁴.

Any change has been introduced with regard to the language of certain part of the application form: in the ESCP application form the reasons for the claim, for instance, have still to be expressed in the language or one of the languages of the competent court or tribunal. In this regard, this is not a problem for most consumers, since under Regulation No 1215/2012 they can choose the court of their domicile as the competent court, and thus write in their own language or at least in the language of the country where they live. However, this may continue to be a problem for Small and Medium Enterprises (Hereinafter SMEs), which are instead bound to refer to the jurisdiction of the consumer or of the counterparty.

We can therefore see some improvements, although not all of those suggested by the Commission, but the modifications in the ESCP Regulation did not really increase the use of the ESCP. Five years later we are faced with a similar situation. Therefore, the question is whether the substantial lack in using the ESCP still lies in particular practical or procedural issues, which

tion (EC) No 1896/2006 creating a European order for payment procedure, GU L 341 del 24.12.2015, p. 1–13

²² About this point, see also p. 2 of Commission Staff Working Document - Executive Summary of the Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 861/2007, cit.

²³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. As an example of this circumstance, consider the case of two parties to a contract who are domiciled in the same Member State but the place of performance was established in another Member State: in such a case art. 7 of Regulation 1215/2012 may apply.

²⁴ See art. 8, 9 and 13 of ESCP Regulation as adopted in 2007 and as modified by Regulation No 2015/2421, cit.

are still present, or whether the limitation is merely a knowledge deficit. Perhaps these two explanations are both valid and the latter is in part dependent on the former.

With regard to practical or procedural issues²⁵, we can refer to the guidelines expressed by the SCAN Project²⁶ and endorse in particular some of them. Since claimants may have a problem filling in some parts of the application form in the language of the competent court, it may be appropriate to intervene on this point. Among the various possibilities that might overcome this difficulty, we believe that a mandatory requirement to accept a second language between the most common EU languages (e.g. English or French) could be introduced.

This choice could lead to difficulties in the management of the procedure by national courts. However, this problem, as well as, more generally, the inefficiency in the procedure's management determined by the fact that it is a rarely used procedure and, therefore, not well known even by judges, could be resolved by reserving the competence of ESCP to functionally-specialised sections of domestic courts. It will be also envisageable a modification of the text of the Regulations aiming at obliging courts to accept forms and documents by electronic means and to promote the digitalization of the procedure.

With regard to the knowledge deficit, we can only commend the Commission's continuing efforts to support projects that seek to raise awareness of this instrument²⁷. Indeed, dissemination initiatives remain the main tool to bring the ESCP to the attention of consumers and ESCPs. While it is true that the e-justice portal provides all the main information related to this instrument, it is also true that usually if a consumer searches on the web using simple combined keywords (e.g. damages, litigation, EU) there is no direct link to the pages related to this instrument. Maybe, if Member States were to introduce an analogous procedure for domestic disputes, the stakeholders would be more likely to use it. However, we have to remind that the EU cannot require Member States to do so, considering the limitation established by

²⁵ See, between the others, G. Y. NG, "Testing transborder civil procedures in practice: findings from simulation experiments with the European payment order and the European small claims procedure", in F. CONTINI, G.F. LANZARA, (eds.) *The circulation of agency in e-justice*, Springer, 2014, pp. 265-286 and for a focus on the Italian legal system see P. C. RUGGIERI, *La European Small Claims Procedure in Italia in Federalismi*. cit.

²⁶ See I. ABIGNENTE, R. TUCCILLO, "European Small Claims procedure. Guidelines for an effective response to the call for justice", in *i-Lex*, 2020, 1 and I. ABIGNENTE, F. G. SACCO, R. TUCCILLO, "Il Progetto SCAN", in F. ROMEO, F. GIUSEPPE SACCO (eds.), *Il procedimento europeo per le controversie di modesta entità. L'esperienza del progetto SCAN*, Naples, 2021.

²⁷ Also the SCAN Project contributed in the dissemination of the ESCP, specially with the creation of the ESCPlatform in <https://www.scanproject.eu/small-claims-platform-euscplatform/>. About the Platform see C. D'ONOFRIO, F. ROLANDO, "La piattaforma EUSCP: un nuovo strumento per migliorare l'accessibilità alla European Small Claims Procedure", in F. ROMEO F. G. SACCO (eds.), *Il procedimento europeo per le controversie di modesta entità. L'esperienza del progetto SCAN*, cit.

Article 81 TFEU²⁸ and especially that, as mentioned above, this instrument was adopted in this form in order not to affect national procedural autonomy.

3. THE PRINCIPLE OF PROCEDURAL AUTONOMY OF MEMBER STATES AS A LIMIT TO THE IMPLEMENTATION OF THE ESCP

The provision, pleonastically²⁹ set out in Article 4(1) TEU, that any competence not conferred on the Union remains, in principle, a competence of the Member States makes it possible to assert that the Union's competence is an exception to the national competences which constitute the norm and that its powers are derivative since they are based on the transfer of sovereignty voluntarily made by the Member States.

In the context of procedural law, however, identifying a clear dividing line between State and Union competences and placing the competence in one of the categories resulting from the framework of the Treaties is not an easy task.

This is because, although the adoption of the measures provided for by the Treaty on judicial cooperation certainly falls within the category of shared competences, there is a whole series of further activities which, even if not falling within those attributed to the EU and, therefore, apparently placed within the dimension of State competences, are nevertheless strongly influenced and conditioned by EU law. However, in principle, in the absence of a specific conferral of competence on the Union to adopt uniform procedural rules and in the absence of codification of those provisions in the body of the Treaties, the Member States retain a high degree of autonomy in organising their internal procedural systems³⁰.

Therefore, it is possible to agree with the assumption that the exercise of the Union's competences is based on the fundamental contradiction that, on the one hand, the nature itself of the EU order imposes the requirement of an intrinsic primacy, but, on the other hand, the implementation of this requirement presupposes the concurrence and the use of the instruments of national law³¹. In fact, since the Union does not have direct and autonomous executive power within the Member States, the application of EU law is in any case largely left to the national authorities, which will have to resolve,

²⁸ According to Art. 81 TFEU, The Union shall develop judicial cooperation in civil matters having cross-border implications.

²⁹ G. STROZZI, R. MASTROIANNI, *Diritto dell'Unione europea. Parte istituzionale*, Torino, 2013, p. 68.

³⁰ G. GRECO, "A proposito dell'autonomia procedurale degli Stati membri", *Riv. ital. dir. pubbl. comunitario*, 2014, p. 1 ss.

³¹ In this sense, see D. SIMON, *Les exigences de la primauté du droit communautaire: continuité ou métamorphoses*, *Mélanges Boulouis*, Paris, 1991, p. 481; and P. GIRERD, « Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres », *Rev. trim. droit. eur.*

according to the rules in force in their own legal system, the complex issues of jurisdiction, the legitimacy of the parties to bring and resist legal proceedings, the assessment of limitation and prescription periods, all aspects—to name but a few—connected to procedural autonomy.

A corollary of this is that, as stated by the Court of Justice in the *Rewe* judgment, in the absence of harmonised rules, «it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law»³². This means that «the rights conferred by Community law must be exercised before the national courts in accordance with the rules of procedure laid down by national law»³³.

This implies a manifest decentralization of the application of EU law, which is therefore entrusted to the national courts in the absence of harmonization of procedural rules and remedies available in the event of infringement of rights³⁴. However, the principle of procedural autonomy of the Member States, like other fundamental principles and rights deriving from EU law, cannot be considered absolute and is therefore also subject to a necessary balancing exercise³⁵.

This balancing operation is in practice carried out through the application of some fundamental principles such as that of equivalence between judicial remedies aimed at protecting legal positions deriving from national law and legal positions of European derivation, as well as that of effectiveness of the instruments available in the domestic system.

Although these principles can sometimes serve as an instrument of indirect harmonization³⁶ of national procedural rules, the limitation imposed by the procedural autonomy of the member States may, nevertheless, also constitute a limitation on the application of those regulatory instruments developed at the European level for the purpose of standardizing and simplifying certain national procedures.

In this perspective, the case of the ESCP is emblematic.

³² ECJ, 13 December 1976, *Rewe*, EU:C:1976:188, pt. 5.

³³ ECJ, 13 December 1976, *Comet*, EU:C:1976:191, pt. 15.

³⁴ Of decentralized application also speaks K. LENAERTS, “The Decentralised Enforcement of EU Law: The Principles of Equivalence and Effectiveness”, U. LEANZA, A. TIZZANO, T. VASSALLI DI DACHENHAUSEN, R. MASTROIANNI, P. DE PASQUALE, R. CICCONE (eds.), *Scritti in onore di Giuseppe Tesauero*, Naples, 2014, p. 1057.

³⁵ R. MASTROIANNI, “Diritti dell’uomo e libertà economiche fondamentali nell’ordinamento dell’Unione europea: nuovi equilibri?”, L.S. ROSSI (eds.), *La protezione dei diritti fondamentali. Carta dei diritti UE e standards internazionali*, Naples, 2011, p. 359. On the configurability of “absolute” rights, see A. TANCREDI, “L’emersione dei diritti fondamentali “assoluti” nella giurisprudenza comunitaria”, *Riv. dir. int.*, 2006, p. 644 ss.

³⁶ In this sense, A. MAFFEO, *Diritto dell’Unione europea e processo civile nazionale*, Naples, 2019, p. 37 ss.

Even if Regulation 861/07 is careful to regulate in detail the different steps of a uniform procedure, which is an alternative to the procedures for small claims already existing in the various national legal systems, and which is informed by extreme simplicity, being substantially written and structured to be carried out through the compilation and exchange of specific forms annexed to the regulation which introduced it, the ESCP fails to completely detach from the procedural law of the Member States.

In fact, despite the fact that it is a “complete” procedure³⁷, in order to correctly implement the provisions of the ESCP Regulation, it is sometimes necessary to refer to the procedural rules of each national legal system. This happens, for example, with regard to activities connected with the service of the forms to the counterparties³⁸, the payment of fees connected with the introduction of the dispute, the appeals³⁹, as well as the determination of legal costs.

With reference to this last aspect, it is interesting to note that the regulation merely provides that «the unsuccessful party shall bear the costs of the proceedings»⁴⁰ specifying that they «should be determined in accordance with national law» and clarifying that «having regard to the objectives of simplicity and cost-effectiveness, the court or tribunal should order that an unsuccessful party be obliged to pay only the costs of the proceedings, including for example any costs resulting from the fact that the other party was represented by a lawyer or another legal professional, or any costs arising from the service or translation of documents, which are proportionate to the value of the claim or which were necessarily incurred»⁴¹.

In this context, problems could arise in the application of the principle described above where, for example, in the event of only partial success of the claim, national law considers the parties’ loss to be reciprocal, allowing in this case for the offsetting of costs. The problem, moreover, has been addressed in the recent *Jonsson* case⁴² in which the ECJ clarified that the regulatory provision is to be understood as referring only to the hypothesis in which the party is totally successful, and therefore, as the regulation only

³⁷ This is how define it P. FRANZINA, “Regolamento (CE) n. 861/2007 del Parlamento europeo e del Consiglio, dell’11 luglio 2007, che istituisce un procedimento europeo per le controversie di modesta entità. Sub. Art. 81 TFUE”, in F. POCAR, M. C. BARUFFI (eds.), *Commentario breve ai Trattati dell’Unione europea*, Padova, 2014, p. 580.

³⁸ In the silence of the Regulation, for example, the provisions and the Italian procedural practice lead to the conclusion that the burden of the service of the form, together with the part filled in by the judge, is on the plaintiff, but it is not excluded that the procedural rules in force in another State regulate this task differently.

³⁹ Pursuant to art. 17 of the Regulation, an appeal against a judgment issued at the end of the ESCP shall be admissible if permitted by the national law of the court seised and in accordance with the formalities provided for by the national procedural law.

⁴⁰ ESCP Regulation, art. 16.

⁴¹ ESCP Regulation, recital 29.

⁴² ECJ, 14 February 2019, C-554/17, *Jonsson*, EU:C:2019:124.

operates a partial harmonization of the internal procedural rules, the judge is free to allocate costs according to the rules established by national law⁴³.

It should be added that, in some cases, application problems and doubts regarding coordination with internal procedural rules may also arise from the absence of harmonized concepts. An emblematic example of this can be found in the *ZSE Energia* case⁴⁴ in which the Court was called upon to clarify whether or not the notion of «party» mentioned in the ESCP Regulation could include the intervener who had applied to participate in the proceedings according to national procedural rules.

The question, moreover, may be particularly important when, as happened in the above-mentioned case, in which only the intervener was habitually resident in a Country other than that of the court before which the case was brought, the adherence to one solution rather than another could have the effect of making the ESCP admissible or not.

In fact, a condition for its application is that at least one of the parties must be domiciled or habitually resident in a different Country from that of the court hearing the case.

The Court's ruling resolved the interpretative doubt by excluding the applicability of the ESCP where the only person domiciled in a different State is the intervener, considering that the general structure of the Regulation, and the implied requirements of simplicity and rapidity, reveal the absence of a provision for interventions with reference to which national law is therefore irrelevant. Nevertheless, the analysis of the procedure as a whole, also in the light of what has been highlighted above, shows that domestic procedural law still plays an important role by completing and sometimes setting the conditions through which the judicial protection pursued by European provisions can be made effective.

In view of the above, it is self-evident that in the absence of a broader and more comprehensive harmonization of national procedural rules, at least as far as cross-border litigation is concerned, the ESCP may encounter a limitation in national procedural law, which must necessarily be referred to for the concrete implementation of the ESCP instrument.

4. CONCLUSIONS

4.1. The ESCP could be an instrument that facilitates the resolution of small claims and in particular both consumers and SME could benefit from

⁴³ Nevertheless, it cannot be excluded that the concrete application of national procedural law, although permitted by the regulation, could in practice be limited by the general principles of equivalence and effectiveness if it were to have the effect of leading the interested parties to renounce the European procedure, requiring the plaintiff, where he has been largely successful, to sustain his procedural costs or a substantial part of them.

⁴⁴ ECJ, 22 November 2018, C-627/17, *ZSE Energia*, EU:C:2018:941.

it, the first ones to solve their small claims arising from the purchase of goods and services in the EU, and the second ones to supply or serve a market outside of their own country. In reality, as we have seen, this tool has not been widely used, both for practical and procedural issues and because of an awareness deficit.

Small practical issues prevent the easy use of this tool, first of all some differences in the lodging of the application form, by post or by any other means of communication, since each Member State establishes the acceptable means. Also the costs of the procedure and the competent Court are different, since they depend on the national jurisdictional system. Therefore, in the perspective of a future modification of the text of the Regulations, as suggested by the SCAN Project, it could be established that national courts are obliged to accept forms and documents by electronic means and foster the digital handling of the procedure. Furthermore, the difficulty encountered in filling in the application form also with sections directly translated into the language accepted by the competent Member State, which particularly interests SME, could be resolved by obliging Member States to accept at least one other of the most common languages, i.e. English or French.

The lack of use of the ESCP may also have another negative consequence its limited knowledge by national judges, who rarely have to apply the procedure. For this reason, reserving the competence of ESCP to functionally-specialised sections of domestic courts could also improve efficiency in the management of the procedure, especially if a second language, such as English or French, could be employed in the ESCP procedure.

Perhaps the limited use of this procedure is in part dependent on the above-mentioned issues. Then, the concrete feasibility and efficiency of this tool, together with the ongoing effort to disseminate it among stakeholders, could be the best way to facilitate its diffusion.

4.2. An implementation of the use of the ESCP instrument, despite the limitations and difficulties highlighted above, could also trigger a positive process and accelerate that process of harmonization of national procedural rules⁴⁵ which could now constitute an obstacle to the uniform application of the instrument.

The necessary complementarity between national procedural rules and the ESCP Regulation is, in fact, likely to trigger a relationship of mutual osmosis between EU law and national procedural law, as a result of which the latter can be strongly “contaminated” by principles, theories and concepts present in the European legislation but unknown to the domestic system.

⁴⁵ M. STORME, “Closing Comments: Harmonisation or Globalisation of Civil Procedure?”, X.E. KRAMER, C.H. RHEE (eds.), *Civil Litigation in a Globalising World*, L’Aja, 2012, p. 379, affirms that «the process of harmonisation and unification of procedural law on European level appears to be an irreversible trend».

Taking the Italian legal system as an example, the ESCP could, in the future, be the key to open the national legal system, at least with reference to proceedings of more modest value, to the less onerous provision on the burden of proof accepted by Regulation 861/07.

In fact, the ESCP Regulation relieves the plaintiff of the burden of providing the legal elements on which he bases his claim, requiring only a mere description of the fact in dispute. It requires that the plaintiff must provide a «description of the evidence» that he intends to offer in support of his claim, attaching, where appropriate, «any relevant supporting document»⁴⁶.

Therefore, the reference to the mere «description of the evidence», in the absence of clarifications by the European legislator or the Court of Justice, seems to mean that the plaintiff does not necessarily have to prove his or her right in documentary form, but may, as in the case of the German enforcement procedure, limit himself or herself to a mere description of the evidence in support of his or her claim.

This interpretation of the rule is, furthermore, confirmed by the provision of art. 4(4) of Regulation 861/07 according to which if «the Court or Tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it shall, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies».

In conclusion, the analysis in this paper demonstrates that the ESCP is a tool with a great potential and that, if its application is maximized by increasing information and awareness among practitioners, it could be fully exploited and it could accelerate the process of harmonization of some national procedural law rules.

⁴⁶ ESCP Regulation, art. 4.

THE EU SMALL CLAIMS PROCEDURES IN THE NETHERLANDS — SOME GOOD AND SOME BAD NEWS

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ABSTRACT: The EU Small Claims Procedure (henceforth: ESCP)¹ has been implemented in the Netherlands by a separate statute,² that entered into force on 10 June 2009.³ This Dutch Small Claims Act (henceforth: SCA) has been amended in 2017 as a result of the changes in the ESCP of 2017. About the initial implementation of the SCA has been reported in 2013.⁴ This contribution will focus on the situation since the amendments of 2017, obviously taking into account earlier developments that still determine the workings of the ESCP.

First, the framework of civil litigation in the Netherlands will be described. Second, the implementation of the ESCP will be discussed and explained. The main part will be devoted to

¹ Established by Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, as amended by the Council Regulation (EU) No 517/2013 of 13 May 2013, Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 and the Commission Delegated Regulation (EU) 2017/1259 of 19 June 2017. The abbreviation is also used for the regulation itself.

² *Uitvoeringswet verordening Europese procedure voor geringe vorderingen* ([Implementation Act of the European Small Claims Procedure Regulation]). It has been modified in 2010 to comply with the new Dutch Civil Court Fee Act (*Staatsblad* [Dutch Bulletin of Acts Orders and Decrees] 2010, 715).

³ Dutch Bulletin of Acts Orders and Decrees 2009, 234.

⁴ F.J. Fernhout, *Simplification of debt collection in the EU: the Netherlands, National report*, EU-project JLS/2009/JCIV/AG/003-30-CE, <<http://www.acj.si/en/pres-simpf>>, 2013, p. 1-12. The book version of this report is to be found in F.J. Fernhout, *Netherlands: Debt Collection in the Netherlands from a National and EU Perspective*, In: V. Rijavec, Tjaša Ivanc, Tomaž Keresteš (eds.), *Simplification of Debt Collection in the EU*, Alphen aan de Rijn: Kluwer Law International 2014, p. 327-346. On a national level the workings of the SCA was discussed in X.E. Kramer, E.A. Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections', *NIPR* 2013, nr: 3, p 319-328, and X.E. Kramer, 'Ervaringen met Europese civiele procedures in Nederland' [Experiences with European civil litigation in the Netherlands], *NtEr*, 2014, nr. 4, p 99-108.

the workings of the ESCP in practice, including an analysis of the way the ESCP is used (and maybe abused). The conclusion will be that in less than 3 % of the cases the ESCP is used in conformity with its objectives, but that legal practice profits from its aspects that help to avoid the workings of other European instruments, especially the EU Service Regulation.⁵

KEYWORDS: Small Claims Procedure; Netherlands; Issues in Practice; Statistics: Non-Intended Usage.

SUMMARY: 1. CIVIL PROCEDURE IN THE NETHERLANDS. 1.1. Default procedure. 1.2. Petition procedure 1.3. Enforcement of titles. 1.4. Remedies— 2. IMPLEMENTATION OF THE ESCP. 2.1. Initial implementation of the ESCP. 2.2. Amendments to the SCA in 2017— 3. THE ESCP AS IMPLEMENTED IN THE NETHERLANDS IN PRACTICE. 3.1. Exchange of pleadings and the principle of simplicity. 3.2. Oral hearings. 3.3. Costs (orders). 3.4. Length of the procedure. 3.5. Miscellaneous remarks. 3.6. Use (and abuse?) of the ESCP.— 4. CONCLUSIONS

1. CIVIL PROCEDURE IN THE NETHERLANDS

The ESCP is available to litigants as an alternative to the procedures existing under the laws of the Member States.⁶ To understand its implementation it is therefore indispensable to understand the procedural framework within which it functions.

The rules of civil procedure in the Netherlands are mainly to be found in the *Wetboek van Burgerlijke Rechtsvordering* ([Code of Civil Procedure], henceforth: CCP) and apart from that in some specific statutes. The latter are almost all the result of EU directives which have not been integrated fully in the code just mentioned, mainly because their range of applicability is limited to cross-border litigation. There is no distinction between civil and commercial cases. All civil cases are decided in first instance by District Courts⁷, the territorial jurisdiction of which is ultimately determined on the basis of geographical criteria.⁸

In general, for civil cases one of two procedures has to be followed.⁹ The first one is the procedure introduced with a writ of summons, served by a process server on the defending party. This procedure is the default procedure¹⁰

⁵ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (last amended 1 Juli 2013).

⁶ Art. 1 ESCP.

⁷ In Dutch: *Rechtbank*. When referring to a judgment of a District Court the abbreviation “Rb” will be used.

⁸ Art. 99-109 CCP. Agreements regarding territorial jurisdiction are allowed to a limited extent (Art. 108 CCP), but not in most cases allocated to the single judge track (see *infra*).

⁹ There are some very specific exceptions, related to the enforcement of titles of execution (Art. 438 (4) and 486 CCP) and bankruptcy (Art. 122 Dutch Bankruptcy Act), but these exceptions are not relevant for this report.

¹⁰ Art. 78 CCP.

and will here be referred to as such. The second one is the procedure introduced with a petition, filed at the registry of the competent court. This procedure only applies when this is stipulated by a specific provision.¹¹ It should be remarked that procedural law does not leave any choice to the parties. The procedural regime is not optional, but mandatory and has to be enforced by the court. When the wrong procedure has been chosen, the court must remit the case to the other procedure.¹² Money claims that are not covered by supranational legislation must follow the default procedure.¹³

1.1. Default procedure

Civil proceedings in the default procedure start with a writ of summons, served on the defendant by a process server. The writ contains the statement of claim of the claimant. After service, the writ has to be submitted to the registry by (or on behalf of) the claimant.¹⁴ The case is struck out in an early stage if the claimant does not pay the court fee.¹⁵ If the defendant does not appear, he is sentenced by default on the facts as stated by claimant.¹⁶ If the defendant appears he is only allowed to file a statement of defence after paying the court fee,¹⁷ except when no court fee is due (see *infra*). When the court fee is not paid in time, the defendant is sentenced by default on the facts as stated by the claimant. The statement of defence may contain any counterclaim, even when completely unrelated to the original claim.¹⁸

Exchange of pleadings takes place in a cause-list sitting.¹⁹ In almost all cases, the statement of defence is followed by a post-defence hearing. An interim judgment sets a date for this post-defence hearing. During this hearing, which on average takes about forty-five minutes, parties are usually given some time to present their opinions, information is gathered and attempts are made to reach a settlement. After the hearing, the court is supposed to give a judgment. Several options are open, such as ordering a witness hearing (*enquête* or *getuigenverhoor*) or a site inspection (*descente* or *plaatsopneming*),

¹¹ Art. 261 CCP.

¹² Art. 69 CCP.

¹³ Maintenance claims form an exception. They follow in all aspects their own rules, which all have the objective to guarantee the proper assessment and payment of the right amounts in procedures that are simple, cheap, fast and efficient, but nevertheless fair. They fall outside the scope of the ESCP (Art. 2 (2)(a)).

¹⁴ Art. 125 CCP.

¹⁵ Art. 127a CCP.

¹⁶ Art. 139 CCP.

¹⁷ Art. 128 CCP.

¹⁸ Art. 136 CCP.

¹⁹ Pleadings are mostly (for the exceptions see *infra*) in written form. Electronic exchange of pleadings is not possible except at the Supreme Court. The project that was meant to introduce digital litigation (*Kwaliteit en Innovatie* [Quality and Innovation], abbreviated as KEI) has been canceled in 2019. New developments are on the way, but have not been implemented yet. Obviously, communication with and by the courts mostly takes place in electronic form when possible.

but more often than not a final judgment can be given. Accordingly, at the end of the hearing a date is set for the pronouncement of this judgment.

Within the default procedure, some mostly smaller claims are allocated to a single judge track (*kantonrechter* [cantonal judge]). These claims are specified in Article 93 CCP as follows:

- money claims up to € 25.000 including interests and costs due before the day the writ of summons has been served;
- claims of which the value is clearly not higher than € 25.000;
- all claims related to rent contracts, (collective) labour contracts, consumer purchase agreements, agency contracts, some retirement agreements and consumer credit agreements, all regardless of the amount claimed.

Procedural rules for the single judge track are the same as the rules for the normal track, except that:

- the writ of summons should contain some extra notifications for the defendant (Article 111 CCP);
- the defendant does not have to pay court fees (Article 4(1)(b) *Wet griffierechten burgerlijke zaken* [Civil Court Fee Act]);
- legal representation by a lawyer admitted to the bar (*advocaat* [solicitor/barrister]) is not mandatory (Article 79 CCP);
- the statement of defence and later pleadings do not have to be submitted in writing (Article 82 (2) CCP), while written pleadings will be sent to the parties by the registry (Article 84 (2) CCP);
- minutes of the hearing of witnesses in court are not mandatory in cases in which appeal is excluded (Article 181 CCP);
- costs orders may include travelling costs and lost income of the unrepresented winning party due to its presence at the court hearings (Article 238 CCP);
- appeal is excluded when the claim that had to be decided (together with a possible counterclaim) does not exceed the amount of € 1.750, including interests and costs due on the day the writ of summons has been served (Article 332(1) and (3) CCP);
- cassation in the latter cases is limited to some very specific grounds (Art. 80 *Wet op de rechterlijke organisatie* ([Act on the Organisation of the Judiciary]), not including the merits of the decision, except when Article 6 of the ECHR has been violated.²⁰

All other cases are allocated to the regular track. In that case pleadings must always be submitted in writing. Legal representation is mandatory. The cause-list sitting is therefore dealt with electronically. In the regular track, it is up to the court to decide whether the case will be decided by a single judge or by a panel of three judges. Since cases in the regular track tend to be more

²⁰ Hoge Raad (*Supreme Court*, when referring to case law henceforth also: HR) 16 March 2007, NJ 2007/637. Violation of the ESCP cannot be submitted as a ground of cassation to the Supreme Court in cases in which appeal is excluded (HR 9 October 2020, ECLI:NL:HR:2020:1591).

complicated, time limits for submitting pleadings are longer (six weeks instead of four weeks) and the overall length of the proceedings is also longer.

In the Netherlands, there are no special procedures for debt collection nor for small claims and there is no fast track for cases in which no defence is expected (in fact, there is no fast track at all). These procedures are not missed either, since most debt collection cases fall under the provisions of the single judge track, which produces default judgments within two to six weeks after the date for appearance mentioned in the writ of summons.²¹ However, especially in regular track cases, debt collection may profit from the possibility to obtain an interim order from a summary proceedings judge (Art. 254 CCP). These summary proceedings are definitely faster than the regular procedure, since there are no written pleadings, the writ of summons is immediately followed by a court hearing that has been scheduled in advance and judgment follows within two weeks, also when a defence has been filed (against 6-12 months when the regular procedure is followed).

To obtain an interim order for a money claim, on the whole three requirements have to be met:²²

- the claim must be uncontested or only be contested using defences that are clearly ill-founded;
- the claimant must show to be in real need of the money (imminent problems of liquidity);
- the restitution risk (i.e. the risk that the claimant will not be able to pay the money back in case the final judgment proves that he is wrong) must be limited.

In the default procedure, the losing party will have to pay the costs of the winning party. A court may refrain from a costs order (ordering that each party bears its own costs or apportioning those costs between the parties) when the claim is partly denied, and in procedures between family members, (former) spouses, and (former) partners. In case of abuse of procedural possibilities, a costs order may be directed against that party even when that party is the overall winner of the procedure.²³

Costs are limited to court fees, bailiff's and process server's fees, remuneration of witnesses and court appointed experts, and lawyer's fees.²⁴ As regards the last item, the court has discretion, which allows the court to award the lawyer's fees fully or only in part.²⁵ In practice, all courts always apply a fixed tariff when determining the lawyer's fees.²⁶ The tariff is based on points based on the procedural activities of a party (statement of defence, being present

²¹ See footnote 94.

²² HR 22 January 1982, NJ 1982/505; HR 19 February 1993, NJ 1995/704; HR 14 April 2000, NJ 2000/489.

²³ Art. 237 (1) CCP.

²⁴ Art. 239 CCP. The fees of bailiffs and process servers are determined by a separate regulation (Art. 240 CCP).

²⁵ HR 3 april 1998, NJ 1998/571.

²⁶ *Liquidatietarief* [Tariff of Costs to be Paid]. The tariff is the result of a long standing agreement between representatives of the courts and representatives of the bar association. The tariff is adjusted

at a court hearing, witness examination etc.) and a fixed amount per point depending on the value of the case. There is a separate tariff for cases in the single judge track. In regular track cases, the gap between the real lawyer's costs and the awarded costs is sometimes estimated at 90 %. In cases in the single judge track, the gap turned out to be 75 %.²⁷

1.2. Petition procedure

The petition procedure was originally meant for non-contentious litigation, especially in family law. This procedure is less adversarial and therefore more suitable when deciding on the measures that have to be taken regarding children, spouses, partners, and similar problems. Over the years, the legislator moved certain forms of contentious litigation in and out of the petition procedure, as has been the case with labour and tenancy cases. The result has been that the court applying the petition procedure and using its large powers of discretion takes into account whether the nature of the case is contentious or not.

In petition cases, for every specific procedure the law determines whether the case is allocated to the single judge track (cantonal judge) or the regular track. In the last case, legal representation is mandatory.²⁸ Pleadings are always written. In cantonal (single judge track) cases, no court fee has to be paid by the defending party.

The procedure is commenced with a petition filed at the court registry. If the applicant does not pay the court fee, the application is declared inadmissible.²⁹ The court should order an oral hearing, unless the petition can be granted without a hearing.³⁰ It is the court's responsibility to summon all interested parties to the hearing, the costs of which by lack of a provision stating otherwise are all paid by the State.³¹ Every interested party has the right to file a written defence,³² for which in the regular track a court fee has to be paid. If the court fee is not paid, the written defence is not taken into consideration.³³ In single judge track cases (cases before the cantonal judge), no court fee is due.³⁴ An oral defence is always possible and free.³⁵ A written

for inflation, but this does not happen frequently. It can be found on <www.rechtspraak.nl> (search for "liquidatietarief").

²⁷ M. Janssen, *De proceskostenveroordeling middels het Liquidatietarief: fooi of kostenprikkel* [Costs orders using the Liquidatietarief: peanuts or costs incentive?], Master thesis Maastricht University 2015 (unpublished). This is the only empirical study that has been done into this subject until now.

²⁸ Art. 278 (3) CCP.

²⁹ Art. 282a CCP.

³⁰ Art. 279 (1) CCP.

³¹ Art. 279 (1) jo. 271-277 CCP.

³² Art. 282 CCP.

³³ Art. 282a CCP.

³⁴ Art. 4(2)(a) Civil Court Fee Act.

³⁵ Art. 3 (2) Civil Court Fee Act.

defence may contain a counterclaim, but this counterclaim should be related to the original petition.³⁶

After the hearing the court decides about the continuation of the procedure. Evidence can be taken, which in family cases mostly consists of reports from experts or advices from institutions like child welfare offices. In contentious cases, the normal rules of (the taking of) evidence apply.³⁷ In the order deciding on the petition, the court may decide about the costs without having any obligation in that respect.³⁸ A costs order can be given against either party with the only restraint that it should not be unreasonable.³⁹

1.3. Enforcement of titles

All judgments and court decisions (like all other writs of execution) containing orders against one of the parties are enforceable by all means provided by the law as of right. No leave or court permission is needed; the choice of the method of enforcement is entirely left to the creditor. However, enforcement measures can only be taken by bailiffs, who will have to check whether the means of enforcement chosen are in accordance with the law and reasonable in the given circumstances. The measures to be taken include attachment, seizure, garnishment, and sometimes even civil arrest.

Enforcement is suspended in case the debtor filed an ordinary remedy (opposition, appeal, cassation) against the judgment. This can be prevented when the judgment has been declared immediately enforceable by the court. The order of immediate enforceability is left to the discretion of the courts in both procedures,⁴⁰ but in practice an application for such an order (usually combined with the claim itself in the writ of summons or the request in the petition) is always granted, even when contested. Enforcement of an immediately enforceable judgment is at the risk of the creditor. If the judgment is quashed later, the creditor will be liable according to tort law for all the damages caused by the enforcement, since the quashed judgment is deemed not to have existed at all.⁴¹

1.4. Remedies

In the default procedure, the defendant convicted by default has the remedy of opposition. Opposition starts with a writ of summons, served by a process server on the plaintiff on the request of the defendant, and reopens

³⁶ Art. 282 (4) CCP.

³⁷ Art. 284 CCP.

³⁸ Art. 289 CCP.

³⁹ HR 20 March 2009, NJ 2009/234.

⁴⁰ Art. 223 and 234 CCP.

⁴¹ HR 19 December 2014, ECLI:NL:HR:2014:3678.

the original procedure before the court that gave the judgment. The writ of summons should contain the statement of defence.⁴² In the petition procedure, the remedy of opposition is not available.

All appeals are decided by the appellate courts (*Gerechtshoven*). The procedure that is followed in appeal depends on the procedure of first instance (default or petition). In general, the party appellant submits his complaints in written form, to which the other party responds. Ordering a hearing is left to the discretion of the court in the default procedure and is mandatory in the petition procedure. In both cases, the appeal procedure is governed by the principle of devolution (*tantum devolutum quantum appellatum*). This means that the appeal is to be seen as a continuation of the law suit started in first instance. The appellate court cannot remit a case, but has to decide on it, taking into account all grounds and defences that have been put forward in both instances.

In petition cases, every decision is open to appeal for all the parties involved, unless the possibility of appeal is explicitly excluded in a special provision.⁴³ In the default procedure, when not explicitly excluded appeal is open in all cases in which the court had to decide on an amount of more than € 1.750, including interests and costs due on the day the writ of summons has been served. The amount on which the court had to decide is calculated by adding all claims and counterclaims.⁴⁴

Cassation at the Supreme Court is open in all cases that cannot be appealed, including the decisions of the appellate courts.⁴⁵ In small claims cases up to € 1.750 the grounds of cassation are limited to some formal aspects of the decision and violation of art. 6 ECHR (see supra). Apart from that, cassation is not about the facts but about the law only. Complaints about factual issues cannot be submitted to the Supreme Court.

2. IMPLEMENTATION OF THE ESCP

The ESCP leaves the implementation of the ESCP to the Member States in so far as the regulation itself leaves matters unregulated.⁴⁶ This section describes first the initial implementation and will then consider the changes that were made pursuant to the amendment of the ESCP in 2017.

⁴² Art. 147 CCP.

⁴³ Art. 358 (1) CCP. Art. 676a CCP for instance contains a long list of decisions in succession cases against which no remedy can be filed.

⁴⁴ Art. 332(1) (2) and (3) CCP.

⁴⁵ Art. 398 CCP.

⁴⁶ Art. 19 ESCP.

2.1. Initial implementation of the ESCP

The EU Small Claims Procedure was implemented in the Netherlands in 2009 by a separate statute, which is referred to here as SCA (see *supra*). The SCA has no other purpose than to fill in the gaps of the ESCP. Therefore, the scope of the SCA is identical to the scope of the ESCP.⁴⁷

The provisions of the SCA —though not explicit in this respect— have to be understood such that the District Court is the competent court for claims falling under its scope. These claims are allocated to the single judge track (see *supra*).⁴⁸ The Civil Court Fee Act applies,⁴⁹ which means that the claimant has to pay a court fee based on the value of the claim and the defendant is exempted from paying court fees, since the procedure has been allocated to the single judge track.⁵⁰ A claimant who does not pay the court fee will be declared inadmissible (Article 282a CCP). There are no provisions concerning the language to be used, which means that the application has to be written in Dutch or Frisian.⁵¹ The rules of the petition procedure apply, unless the SCA or ESCP provide otherwise.⁵²

This implies that territorial jurisdiction in absence of a provision of international law stating otherwise⁵³ is determined by Article 262-269 CCP. According to Art. 262 CCP, territorial jurisdiction is assigned to the court of the place of residence of the applicant, unless one of the special provisions of Art. 262-269 applies (which will be exceptional in ESCP cases). If the applicant does not have his place of residence in the Netherlands, the case belongs to the territorial jurisdiction of the District Court of The Hague.⁵⁴ The courts are bound to remit the case of their own motion if it does not belong to the jurisdiction of the court.⁵⁵

The applicability of the rules of the petition procedure also implies that in principle the court has a large discretion regarding costs orders (see *supra*). However, this discretion is limited by Article 16 ESCP, prescribing that the losing party shall bear the costs of the proceedings, unless these costs were unnecessarily incurred or disproportionate to the claim. In Dutch Parliament

⁴⁷ Art. 1(b) SCA. The provision is not very precise, since the definition of European small claims does not include the exclusion of certain types of cases of Art. 2(2) ESCP. From Art. 4 SCA it can be derived, however, that the SCA does not intend to apply the ESCP to other claims than covered by the ESCP.

⁴⁸ Art. 2(1) SCA.

⁴⁹ Art. 3 SCA.

⁵⁰ Art. 4 (1)(a) and (2)(a) Civil Court Fee Act.

⁵¹ Which are the official languages in Dutch courts. *Vid.* art. 6 ESCP.

⁵² Art. 9 SCA.

⁵³ Dutch law is monistic in the sense that international law can be applied directly and prevails over national law in case of a conflict (Art. 92 and 93 Constitution).

⁵⁴ Art. 269 CCP.

⁵⁵ Art. 270 CCP. As expressly confirmed in *Kamerstukken II* [Parliamentary Proceedings II] 2007-2008, 31596, 3, p. 4. These rules are usually overlooked in ESCP cases, since courts do not expect at all that civil commercial cases follow the territorial jurisdiction rules of petition cases. For instance, in *Rb 's-Hertogenbosch* 13 December 2010, ECLI:NL:RBSHE:2010:BO7878, the Court explicitly bases its territorial jurisdiction on Art. 99 CCP, but that provision does not apply at all.

it was assumed that this rule has to be explained in the light of Dutch law.⁵⁶ Apart from the above, Article 5 SCA stipulates that the Articles 238, 241, 242 and 244 CCP shall apply correspondingly. This means that travelling expenses of the winning party can be included in a costs order if this party was not represented by a lawyer or other proxy, that non-legal expenses covered by a costs order cannot be awarded separately and that agreements regarding costs may be moderated by the court.

Appeal from the judgment in a SCA small claims case, is excluded.⁵⁷ This has been firmly criticized in Dutch literature,⁵⁸ which led to one of the amendments made to the SCA in 2017. Cassation is possible, but only on limited, formal grounds.⁵⁹ Cassation can only be lodged with the Supreme Court. Since the rules of the petition procedure apply, the time limit for this appeal in cassation will be three months, starting the day the judgment was pronounced in public.⁶⁰ Opposition against a decision by default will be impossible, since the rules of the petition procedure apply (see supra section 2.4).

The review procedure of Article 18 ESCP is regulated by Article 6 SCA. The general rules for the petition procedure apply, so legal representation is not mandatory, since the case has been allocated to the single judge track.⁶¹ The time limit for review is set at four weeks

— from the day the defendant got to get knowledge of the judgment in the case of Article 18 (1) (a) Regulation 861/2007;

— from the day the defendant was no longer prevented from objecting to the claim in the case of Article 18 (1) (b) Regulation 861/2007.

2.2. Amendments to the SCA in 2017

Amendments to the ESCP in 2017 necessarily led to a reconsideration of the implementation of the ESCP. The resulting changes were enacted in the Act of 22 March 2017,⁶² which entered into force on 14 July 2017.⁶³

Obviously, the scope of the SCA was adapted in accordance with the change of the maximum amount of the claim to €5.000 in the ESCP. This change threatened to create a disparity between ordinary cases in the default procedure, which could be appealed when the value of the claim was over €1.750, and the ESCP cases, which until then could not be appealed at all. The legis-

⁵⁶ Parliamentary Proceedings II 2007-2008, 31596, 3, p. 3.

⁵⁷ Art. 2(2) SCA.

⁵⁸ R. de Moor, *Uitsluiting hogere beroep bij Europese procedure voor geringe vorderingen: geen gering verschil met nationaal recht* [Exclusion of appeal for the European small claims procedure: not a small difference with national law], NJB 2009, nr. 8.

⁵⁹ Art. 2(3) SCA, see supra for a description of these grounds.

⁶⁰ Art. 426 CCP.

⁶¹ Art. 278(3) CCP.

⁶² Dutch Bulletin of Acts Orders and Decrees 2017, 125.

⁶³ Dutch Bulletin of Acts Orders and Decrees 2017, 176.

lator decided therefore to create a possibility of appeal for ESCP cases on the same conditions and under the same rules as default procedure cases, with the only difference that the period for appeal was limited to 30 days instead of 3 months.⁶⁴ The new possibility of appeal only applies to cases that were filed after 14 July 2017, the day the amended implementation entered into force.⁶⁵

It has to be noted that these choices promised to create a lot of confusion. The implemented ESCP follows the rules of the regulation, which are supplemented by the SCA, which in turn is supplemented by the rules governing the Dutch petition procedure. Yet in case of appeal, the rules of the default procedure apply, but the period of appeal is shortened to 30 days. It is easy to see that all this will not contribute to the principles of simplicity, speed and proportionality which should cover this procedure.⁶⁶

The change of art. 18 ESCP, introducing a time limit for review of 30 days, made the Dutch specification of these limits unnecessary. Therefore Article 6(2) SCA was repealed.

3. THE ESCP AS IMPLEMENTED IN THE NETHERLANDS IN PRACTICE

As regards the working of the ESCP in practice, attention will be paid to the exchange of pleadings, the use of oral hearings, the costs orders, the length of the procedure and some miscellaneous subjects. This will be followed by an analysis of the characteristics of the cases in which the claimant chose to make use of the ESCP.

What is stated in this section is exclusively based on published judgments. In the Netherlands, judgments are published by the Council of the Judiciary on the website *www.rechtspraak.nl*. This website is an extremely useful and highly appreciated source to study case law. New cases are added on a daily basis to a total approaching 20.000 civil cases per year. The total number of cases (including criminal and administrative law) at this very moment is 354.157 and the aim is to ultimately publish 1/3 of all judgments and court decisions.

The criteria for publication are laid down in the *Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl* [Decree regarding publication criteria for the case law database Rechtspraak.nl]. The judgments of the four High Courts are all published and when it comes to the lower courts, it depends on their contents and relative importance. As long as these criteria do not create a bias towards a certain topic of research, any findings from this database will also have an empirical value. If for instance the gender of suspects is expressed

⁶⁴ Art. 2(2) SCA 2017.

⁶⁵ As follows from *Hof* [Appellate court]'s-Hertogenbosch 11 April 2019, ECLI:NL:GHARL:2019:3239, 3245, 3247 and 3425.

⁶⁶ Recital 7 ESCP.

in a judgment, just counting the number of female suspects in the database will give an extremely good estimate of the percentage of female suspects in Dutch courts, since the publication criteria are neutral towards the gender of suspects and therefore in this respect the database gives us a random sample.

Using this feature, something can be said about the whole population of ESCP cases by studying the cases in the database of <www.rechtspraak.nl>. At this moment, the database contains 228 ESCP judgments related to 220 unique court cases.⁶⁷ Since the population of ESCP cases is in principle homogenous (there are no regional differences to take into account, for instance), this is a sufficient sample to draw some conclusions about the way things work, even though the size of the entire population is not known (see *infra*). The number of published judgments varies enormously over the years,⁶⁸ but that will only reflect the variations in yearly influx.

The total number of ESCP cases in the Dutch courts is unknown, simply since no-one counts them in a systematic way. We do know, however, that there has been an enormous increase since 2017 (the year in which the scope of the ESCP was broadened to claims with a value up to €5.000). In 2016 the total number of ESCP cases for all of the Netherlands was estimated at a mere 20 to 30.⁶⁹ If we take the number of published cases in 2020 (47.236) in relation to the total number of cases in Dutch courts (1,37 million) and we apply the same proportion to the number of published ESCP cases in 2020 (64), then we obtain a total of 1855 cases for 2020. This should be a reliable estimate, since it is not much different from informal information obtained from court employees. Below it is argued that this increased popularity cannot be attributed to the intrinsic qualities of the ESCP itself.

The figures mentioned are more or less corroborated by an informal counting done by the administration of the District Court Rotterdam.⁷⁰ It appears that the computer system of the Dutch courts provides a field tagged 'Remark' and a field tagged 'Subject'. Some courts use these fields to indicate that a procedure falls under the scope of the ESCP, although we do not know how consistently this is done. These fields have been searched using keywords like "small claim" and "geringe vorderingen". This led to the following overview, which is the best that can be produced at the moment.

⁶⁷ Where a court case is defined as a procedure that started with Standard Form A attached to the ESCP. This is not at all identical to a ESCP claim, since in many instances claims of different parties (sometimes up to 9) are combined in one form.

⁶⁸ 2010: 7; 2011: 2; 2012: 4; 2013: 8; 2014: 0; 2015: 3; 2016: 1; 2017: 11; 2018: 46; 2019: 38; 2020: 64; 2021: 44.

⁶⁹ Letter of the President of the Council of the Judiciary to the Minister of Justice and Security, 1 August 2016, ref. 771162 (<www.rechtspraak.nl>, search for "Advies wijziging Uitvoeringswetten Europese procedure geringe vorderingen").

⁷⁰ The following is based on an email of P. Schouwenburg-Van der Laan, Vice-President of the District Court of Rotterdam, of 16 June 2021.

NUMBER OF ESCP PROCEDURES	YEAR FILED				TOTAL
	2018	2019	2020	2021	
Court					
Rechtbank Amsterdam	26	42	176	41	285
Rechtbank Den Haag	8	17	16	10	51
Rechtbank Gelderland	10	23	15	15	63
Rechtbank Limburg	15	6	16	2	39
Rechtbank Midden-Nederland	13	7	8	4	32
Rechtbank Noord-Holland	2	1	7		10
Rechtbank Noord-Nederland	4	4	12	1	21
Rechtbank Oost-Brabant	449	1067	579	104	2199
Rechtbank Overijssel	5	4	4	2	15
Rechtbank Rotterdam	1	2	3	1	7
Rechtbank Zeeland-West-Brabant	5	1	3		9
TOTAL	538	1174	839	180	2731

Figure 1. Table of ESCP cases registered in the court systems per court and per year.

Below it will be shown that 89 % of the ESCP cases is based on the Flight Compensation Regulation (see below). Many of these cases are related to the airports of Schiphol (District Court Noord-Holland) and Eindhoven (District Court Oost-Brabant). The latter court is apparently very precise in registering ESCP cases, since we can follow the increase in ESCP cases from 2018 to 2019 and the decrease from 2019 to 2020, reflecting the decrease in air travel due to the CODID-19 pandemic.

In general, these statistics confirm that the ESCP has rapidly become more popular, increasing from 30 cases a year in 2016 to at least 1174 in 2019. In fact, the procedure has been discovered by claimants, but it will be shown below that this is not due to its procedural merits. The rest of this section is devoted to the procedural complications the ESCP evokes and the way the procedure is used in practice.

3.1. Exchange of pleadings and the principle of simplicity

The ESCP has been designed as a written procedure in which the decision if possible should be given after one written round of pleadings.⁷¹ Therefore, oral hearings are considered as something exceptional,⁷² whereas at the same

⁷¹ Recital 14 ESCP; art. 5(1) ESCP.

⁷² Art. 5 (1a) ESCP.

time Article 7 (1) of the regulation seems to imply that a second written round should not occur too often.

In practice, it simply does not work that way. It is impossible for the claimant to foresee all defences of the defendant, so it is to be expected that sometimes a reply is needed for the sake of justice and the right to a fair trial. Moreover, some defences are such that the claimant will have to take additional steps to secure the admissibility of the claim. This is unavoidable when, like in the case of the ESCP, legal representation is not mandatory. Parents without legal schooling will not know, for instance, that to represent their children in court an authorization of the cantonal judge may be needed.⁷³ Apart from that, cross-border litigation always adds legal dimensions to a case that are and cannot be simple, like the international jurisdiction of the court and the applicable law.

As was to be expected, in a large number of the published cases (93) the court gives permission for or asks for additional pleadings. This amounts to 42,3 % of the total number of cases. When the court sticks to the original idea of one written round for the sake of "simplicity" for better or for worse, the outcome becomes blatantly unjust when the other party does not get the opportunity to reply to new statements or documents.⁷⁴ The percentage therefore should even have been higher.

The pressure provided by this "principle of simplicity" even serves as an excuse for courts to avoid complications. In a case before the District Court of Noord-Holland, the court concluded that, since the Italian defendant had gone bankrupt, the receiver of the bankrupt company should be summoned to the proceedings. The court decided however that this was too complicated—despite its obligations under Article 5(2) and 13 of the Regulation—and declared the claim inadmissible.⁷⁵

In another case (the AirBNB-case) the claimant stated that under Dutch law AirBNB was not allowed to charge the renter for its services. This was supported by grounds taking six pages in addition to Form A. Form C of the defendant was supplemented with 57 pages of defences. The claimant also

⁷³ Art. 1:253k jo. 1:349 *Burgerlijk Wetboek* [Civil Code, henceforth CC]. The problem was found in several cases (for instance Rb Noord-Holland 10 February 2021, ECLI:NL:RBNHO:2021:1218). Mostly, the procedure is stayed to allow the claimant to produce the necessary authorization. Nevertheless, this shows extremely well the confusion that is created by the Dutch legislator by mixing all available procedures into one. From the wordings of art. 1:349 CC it follows that this rule of requiring authorization of the cantonal judge only applies in cases in the default procedure. Since the rules of the petition procedure apply (art. 9 SCA), in fact no authorization is needed. This is overlooked in all published judgments with claimants who are minors.

⁷⁴ As in Rb Noord-Holland 19 August 2020, ECLI:NL:RBNHO:2020:5955. The claimant states that the flight had a delay of more than 3 hours, the airline denies that producing a document and the claim is rejected without giving claimant the opportunity to react to the document. A similar course of events is found in: Rb Noord-Holland 22 July 2020, ECLI:NL:RBNHO:2020:6234; Rb Noord-Holland 30 October 2019, ECLI:NL:RBNHO:2019:9122; Rb Noord-Holland 17 July 2019, ECLI:NL:RBNHO:2019:6352; Rb Noord-Holland 2 May 2018, ECLI:NL:RBNHO:2018:3547.

⁷⁵ Rb Noord-Holland 20 January 2021, ECLI:NL:RBNHO:2021:520.

stated that the decision could have a large impact on all contracts of AirBNB in the Netherlands. The cantonal judge then decided that the ESCP does not leave any room for debates like this and refused to give a decision. The claim was dismissed. Moreover, contrary to Dutch law, the court qualified the claim as one of indeterminate value, giving a costs order against the claimant that was much higher than justified by the value of the claim.⁷⁶ Thus the disparity between the “ideal” procedure as wished by the ESCP and legal reality gives courts a pretext to avoid difficult decisions. It will not come as a surprise that this AirBNB decision was heavily criticized in Dutch literature.⁷⁷ Fortunately, other courts asked to rule on these issues concerning AirBNB took a different stance.⁷⁸

3.2. Oral hearings

The idea behind the ESCP is that oral hearings should be avoided. This appears from Article 5(1a) ESCP, stating that oral hearings should only be held when necessary and that a request for an oral hearing (which is one of the cases to be ticked on Form A) can be denied when an oral hearing is not necessary for the conduct of the proceedings.

As far as appears from the published judgments, a request of the claimant in Form A for an oral hearing is always denied (8 cases). In 9 cases out of 220 (5 %), a hearing was ordered, apparently by the court of its own motion under Article 7 (1)(c) or at the request of the defendant. As far as could be established, none of these hearings used any form of distance communication technology.⁷⁹ This can be explained from the fact that in 8 out of 9 of these cases the claimant was Dutch (see *infra* for this peculiar state of affairs) and the defendant a foreign company with representatives in the Netherlands. In the 9th case, the claimant was from Luxembourg, did not show up at the hearing but submitted comments to what was said in written form.⁸⁰

This limited use of oral hearings is in conformity with Dutch litigation in other small claims cases.⁸¹ The courts are stimulated by the CCP to order

⁷⁶ Rb Rotterdam 6 September 2019, ECLI:NL:RBROT:2019:7159.

⁷⁷ Annotation of M.B.M. Loos in TvC 2019, nr. 6, p. 297; C.M.D.S. Pavillon, L. Bos, ‘Small mass claims - de inzet van de Europese Procedure voor Geringe Vorderingen (EPGV) bij de afwikkeling van grensoverschrijdende massaschade’ [Small mass claims - the use of the European Small Claims Procedure (ESCP) when dealing with crossborder mass damages], TvC, 2020, nr.3, p 119-128.

⁷⁸ Rb Amsterdam 9 March 2020, ECLI:NL:RBAMS:2020:1477.

⁷⁹ Before 2020, nobody had heard of Zoom, and specific technology was not available in the courts. However, there was no legal obstacle to use technology, since Dutch legislation did not have to be amended for online hearings (*Parliamentary Proceedings II* 2014/15, 34 059, 3, p. 31). It seems that this was forgotten when at the beginning of the COVID-19 crisis a special provision was enacted to allow for online hearings (Art. 2(1) *Tijdelijke wet COVID-19 Justitie en Veiligheid* [Temporary Act COVID-19 Justice and Security] of April 2020).

⁸⁰ Rb 's-Hertogenbosch 13 December 2010, ECLI:NL:RBSHE:2010:BO7878.

⁸¹ The exact percentage is not published. According to the *Jaarplan 2011* [Annual plan 2011] of the Council of the Judiciary the goal was set at 25 % (p. 11). From that year on, these goals were replaced

an oral hearing,⁸² but especially in the single judge track these hearings are avoided since they are often disproportionate in relation to the value of the claim. The use of oral hearings in ESCP cases therefore does not deviate from practice in other small claims cases.

3.3. Costs (orders)

Article 16 ESCP stipulates that “the unsuccessful party shall bear the costs of the proceedings”. It has already been remarked that according to the Dutch legislator this should be interpreted in the Dutch way. This means that the legislator recommended to follow the regular practice of awarding costs using a fixed tariff that is unrelated to the real costs of a party.

The courts follow this recommendation without any exception. The tariff applied is to be found on the site of the Dutch judiciary.⁸³ To give an idea, for a claim between € 1.250-2.500 to cover the costs of legal assistance an amount of € 187 is awarded for every action that corresponds with a point. Filing Form A or Form C yields 1 point, reacting to a later pleading of the other party yields 1 point and attending an oral hearing yields 1 point as well.

The costs order also covers the court fee that has been paid by the claimant.⁸⁴ There is a nicety in Dutch law that helps the claimants to reduce these costs to a more convenient amount. In cases following the default procedure, every claimant will have to pay a separate court fee for his part of the claim. On the other hand, in the petition procedure, the court fee is calculated only once, independent of the number of applicants and claims.⁸⁵ Since the provisions of the petition procedure apply (Article 9 SCA), claimants may profit from this peculiarity by combining their claims in one form. In practice, this is what actually happens. Taking the published judgments given in the months of March and April 2021 as a sample, this yields an average number of 2,6 claimants per Form A.

In determining whether a party is unsuccessful, the courts mostly follow the rule that rejecting only a (relatively) small part of the claim (or awarding only a small part of the claim when we look at the defendant) does not make a party unsuccessful. In those cases, the costs order is fully awarded in favour of the claimant viz. defendant.⁸⁶ However, judgments in which part of

by goals for throughput times. Since oral hearings do not speed up proceedings (the planning alone will take a lot of time), it is to be expected that the percentage of oral hearings will be far below the goal of 2011 and thus around the percentage of 9 % found in ESCP cases.

⁸² Art. 131 CCP.

⁸³ <www.rechtspraak.nl>, search for “liquidatietarief kanton”.

⁸⁴ The defendant is exempted from paying court fees (see *supra*).

⁸⁵ Art. 2(1) and (2) Civil Court Fee Act.

⁸⁶ Full costs order in favor of claimant where € 250 was awarded out of € 413: Rb Noord-Holland 12 September 2018, ECLI:NL:RBNHO:2018:7863. See also Rb Noord-Holland 11 April 2018, ECLI:NL:RBNHO:2018:2872 (€ 500 out of € 181,50). Full costs order in favor of defendant

the claim is rejected are not consistent, varying from full compensation even though half of the claim was rejected⁸⁷ to no costs at all in a case where only € 60 of a total claim of € 685,54 was not awarded.⁸⁸

Usually, rejection of around 50 % of the claim leads to the decision that each party has to bear its own costs.⁸⁹ This is standard practice under Dutch law and not incompatible with Article 16 ESCP.⁹⁰ However, when we look at cases in which combined claims of different claimants had to be decided, the pattern becomes chaotic when some of these claims are rejected and others awarded. In some decisions of this kind, each party has to bear its own costs,⁹¹ whereas in others the costs order is fully in favour of (all of) the claimants.⁹² Logic nor Article 16 ESCP supports either of these approaches, since in both cases there is at least one successful party that does not get the costs order it is entitled to. The decision in which no costs order was issued on the ground that the claimant did not have a claim, but could be excused for having thought so, seems equally incorrect.⁹³

3.4. Length of the procedure

The ESCP intends to speed up small claims litigation in cross-border cases.⁹⁴ To determine the speed with which these cases are dealt with a sample of first instance decisions was taken from the database of all 228 published judgments, ordered by date, by taking every fifth judgment (1, 6, 11 and so on). If a judgment did not contain the necessary information or the case was undisputed,⁹⁵ the next judgment was taken. This resulted in 46 scores with an average of 330 days, with the first judgment from February 2010 and the last from April 2021. Figure 2 shows the development in time with the ca-

in a case where only € 43,50 was awarded out of € 543,50: Rb Noord-Holland 21 October 2020, ECLI:NL:RBNHO:2020:7718.

⁸⁷ Rb Noord-Holland 27 January 2021, ECLI:NL:RBNHO:2021:2798.

⁸⁸ Rb Oost-Brabant 31 January 2019, ECLI:NL:RBOBR:2019:599.

⁸⁹ For example: Rb Noord-Holland 27 January 2021, ECLI:NL:RBNHO:2021:2804; Rb Noord-Holland 17 July 2019, ECLI:NL:RBNHO:2019:6089; Rb Noord-Holland 15 May 2019, ECLI:NL:RBNHO:2019:3794; Rb Noord-Holland 1 May 2019, ECLI:NL:RBNHO:2019:3549.

⁹⁰ ECJ 14 February 2019, *Jonsson*, C-554/17, ECLI:EU:C:2019:124.

⁹¹ Rb Noord-Holland 10 February 2021, ECLI:NL:RBNHO:2021:2805; Rb Oost-Brabant 17 December 2020, ECLI:NL:RBOBR:2020:6159; Rb Noord-Holland 6 May 2020, ECLI:NL:RBNHO:2020:2938; Rb Limburg 7 November 2018, ECLI:NL:RBLIM:2018:10576.

⁹² Rb Noord-Holland 22 April 2020, ECLI:NL:RBNHO:2020:3608; Rb Noord-Holland 11 March 2020, ECLI:NL:RBNHO:2020:2920; Rb Noord-Holland 5 February 2020, ECLI:NL:RBNHO:2020:444.

⁹³ Rb 's-Hertogenbosch 19 January 2012, ECLI:NL:RBSHE:2012:BV1931.

⁹⁴ Recital 6-8, 23, 36 ESCP.

⁹⁵ Comparing with undisputed cases is not informative. Undisputed cases are being dealt with in the Netherlands within six weeks, starting from the day the case starts in court until the judgment (Council for the Judiciary, *Kengetallen* [Indicators] 2019, <www.rechtspraak.nl>, p. 83. Actually, the delays are mostly even shorter, since the Litigation Regulation for the single judge track stipulates that the judgment should be rendered after two weeks in default cases. All this also holds for cross-border litigation. The design of the ESCP makes this impossible.

veat that considerably more judgments were published in the last three years (see supra).

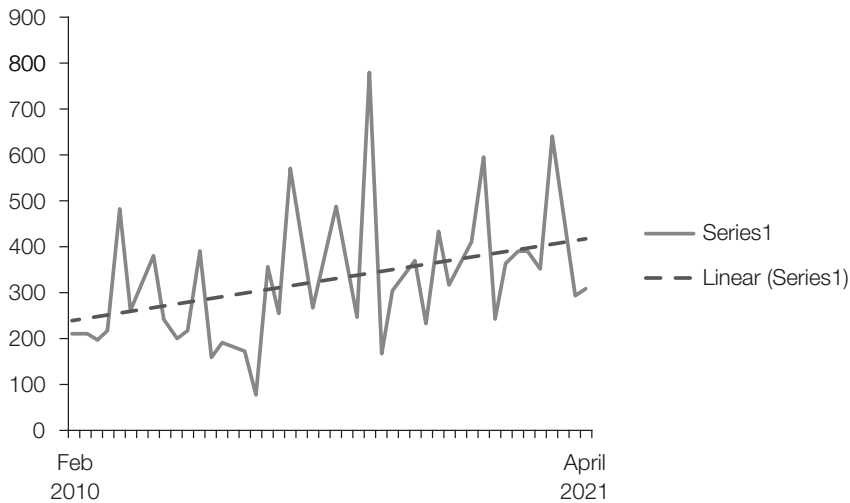


Figure 2. Throughput time of contested cases from 2010-2021.

There is a definite increase in the throughput period of a judgment over time. The explanation will be that these procedures are no longer prioritized (they are not new anymore) and that the defences became stronger (which is related to the lopsided distribution of these cases over private law, as will be discussed below). The explanation cannot be that in general throughput times have increased, since these have been rather constant since 2010 (see the source mentioned below).

The average of 330 days (11 months) as such—which average is even higher when only the last three years are taken into consideration—is very poor, bearing in mind that this is a written procedure (only 9 % oral hearings) and that evidence is literally never taken (see *infra*). In ordinary cases 93 % is dealt with within a year, including the taking of evidence.⁹⁶ The cause should be found in the design of the ESCP, which is, notwithstanding all the proclamations in the recitals of the regulation, not really suitable to speed up proceedings. The basic idea of the ESCP seems to bring the court to the parties instead of the parties to the court. In the latter case, parties who appeared are deemed to inform themselves about the next step instead of being informed. Probably, that would make a difference.

⁹⁶ Council of the Judiciary, Indicators 2019, <www.rechtspraak.nl>, p. 83.

3.5. Miscellaneous remarks

There are several smaller topics that still deserve some attention. They will be enumerated in this single section for the sake of brevity. They are:

— In 119 out of 153 cases in which (part of) the claim was awarded, a certificate as mentioned in Article 20(2) ESCP was asked and issued. Why the claimant did not ask for a certificate in the remaining cases, is a mystery. Probably the question in the form is not fully understood by all claimants. It would be better and fairer to have a certificate issued in all cases. Moreover, in only 12 cases the certificate was (visibly) issued in the language of the State of the defendant. All other certificates were therefore probably useless. It would be better to have the certificate issued in the language of the State of the defendant, unless the claimant requests otherwise.

— No certificates were issued on behalf of the defendant in cases where the defendant obtained a costs order against the claimant. This shows that the forms are unfair. The claimant is asked expressly whether he wishes a certificate or not, whereas the form to be used by the defendant (Form C) does not mention the subject at all. This problem could be solved when certificates are issued in all cases by the court of its own motion.

— Courts seem to overlook the subtleties that are hidden in the multi-layer structure of rules applicable to ESCP cases. Mistakes are made that show that courts have a problem to get used to the mix of procedural rules that is concocted by the Dutch legislator (see *supra*). An example not yet mentioned is declaring a decision immediately enforceable. In Dutch law this is necessary, since remedies suspend the enforceability of a decision. Article 15(1) ESCP rules this out for decisions given under the regulation, so a declaration of immediate enforceability does not make sense. Nevertheless, 17 judgments (almost 10 %) were counted that were declared immediately enforceable.

— Evidence other than in the form of documents is never taken in ESCP cases, although Article 9 (2) ESCP expressly allows for this. This confirms the uneasy feeling that the courts feel a pressure to take a decision on the file as it is with disregard of the rights of the parties under Article 6 ECHR.

— There was only one decision in which a counterclaim was filed. Since the court assessed the counterclaim at an amount of more than €5.000, the case was remitted to the default procedure (Article 5(7) ESCP). Nevertheless, several mistakes were made in this decision. The court overlooked that counterclaims should arise from the same facts or the same contract to start with.⁹⁷ Moreover, once a counterclaim fulfils this requirement international jurisdiction, contrary to what the court assumed, has to be taken for granted. Once again, the regime of the ESCP is far more complex than the regulation seems to believe.

⁹⁷ Recital 16 ESCP jo. Art. 8 (3) Brussel I recast. It has to be said that a rule like this should not have been hidden in the recitals.

— Language issues did not really occur. The courts are willing to take into account pleadings written in English, even though this is not the official Dutch language.⁹⁸ Since in 89 % of the published cases the defendant is an airline company, this is understandable. When an airline company insists on pleadings in another language, the court is willing to ignore this.⁹⁹

3.6. Use (and abuse?) of the ESCP

Obviously, the ESCP is meant for litigation in which the claimant has a claim on a defendant in another Member State and has to litigate in that State. After all, realizing a claim in one's own country does not encounter any obstacle that distinguishes a small claim under €5.000 from any other national claim. In cases where the defendant is a resident of another Member State, the EU Service Regulation gives the rules regarding service and transmission of documents, so that is already provided for.

This rationale of the ESCP is confirmed by Recital 7 to the regulation, which states that the objective of the procedure is to facilitate access to justice. In national litigation, there are no specific obstacles to access to justice. Moreover, the examples given in the Commission proposal¹⁰⁰ all show that the ESCP primarily aims at the situation in which the claimant had to start proceedings in another Member State than his own.

In the proposal it is remarked that in a cross-border context “it will often be necessary to hire two lawyers, there are additional translation and interpretation costs and miscellaneous other factors such as extra travel costs of litigants, witnesses, lawyers etc.”,¹⁰¹ all of which does not occur in litigating a claim before one's own national courts. On the same page the Proposal mentions that owners of small businesses want to pursue their claims in *another* Member State and it speaks of the practical difficulties which are likely to ensue, which obviously do not arise in litigation before one's own courts.

The fact that, contrary to the original proposal, the Council and Parliament decided to limit the scope of the ESCP cross-border cases, confirms this point of view.

In the Netherlands, the actual use of the ESCP is not at all in conformity with these original ideas. Out of 220 cases, only 6 cases were initiated by a claimant outside the Netherlands against a defendant in the Netherlands (less than 3 %). Almost all of the remaining cases had a claimant inside and a defendant outside of the Netherlands, although in 8 cases it could be establis-

⁹⁸ Rb Noord-Holland 1 November 2017, ECLI:NL:RBNHO:2019:4282.

⁹⁹ Rb Limburg 2 October 2017, ECLI:NL:RBLIM:2017:9652.

¹⁰⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM (2005) 87 final (henceforth: Proposal).

¹⁰¹ Proposal, p. 3.

hed that both parties were not Dutch residents.¹⁰² Overall, 89 % of all cases concerned claims based on Regulation 261/2004 (Flight Compensation Regulation). For these claims, the Rehder judgment¹⁰³ attributes international jurisdiction to the court of the place of departure *and* the court of the place of arrival of the aircraft, which explains why the Dutch courts are allowed to decide many of these cases even though the defendant has his residence in another country.

The question is why specifically in cases where the claimant is a Dutch resident and the defendant a resident of another Member State, the ESCP is chosen. There is little evidence that this is done because of the swiftness of the ESCP, since the procedure has proven to be slower than the Dutch default procedure (see *supra*). The fairness of the procedure will not be an argument either, since evidence will not be taken and there is a risk of losing the case because the court decides on the defences of the defendant only without allowing any reply (see *supra*). The fact that the procedure may be commenced with a form could be attractive, but since most claimants are represented by professionals and semi-professionals (like specialized debt-recovery agencies) this seems not very likely either.

The best explanation seems to be that by following the ESCP the costs, delays and complications of the EU Service Regulation can be avoided. Using the ESCP, it is up to the courts to serve the form on the defendant; the claiming party does not have to bother and does not have to pay. That is a huge relief, since following the EU Service Regulation amounts to paying twice (in both States the process server had to be paid), to waiting a long time and to uncertainty about the outcome of service abroad. This analysis is confirmed by the fact that claims are sometimes actually transferred to a party outside the Netherlands with the sole objective to make it possible to use the ESCP.¹⁰⁴

4. CONCLUSIONS

Although no official statistics are available, it seems that the procedure has become very popular in the past few years. Probably around 5000 ESCP

¹⁰² *Brasil vs Portugal* (Rb Noord-Holland 12 August 2020, ECLI:NL:RBNHO:2020:5808); *United States vs Ireland* (Rb Noord-Holland 10 June 2020, ECLI:NL:RBNHO:2020:5154); *France&Belgium vs UK* (Rb Noord-Holland 22 April 2020, ECLI:NL:RBNHO:2020:6677); *France vs Ireland* (Rb Noord-Holland 22 January 2020, ECLI:NL:RBNHO:2020:535); *Russia vs UK* (Rb Noord-Holland 13 November 2019, ECLI:NL:RBNHO:2019:9429); *UK vs Ireland* (Rb Oost-Brabant 11 July 2019, ECLI:NL:RBOBR:2019:4890); *France vs Ireland* (Rb Oost-Brabant 27 December 2018, ECLI:NL:RBOBR:2018:6562); *Ireland vs Ireland* (Rb Noord-Holland 12 February 2020, ECLI:NL:RBNHO:2020:1066). The last case is particularly weird: why not start a procedure in your own country?

¹⁰³ ECJ 9 July 2009, *Rehder*, C-204/08, ECLI:EU:C:2009:439.

¹⁰⁴ In *Rb Amsterdam* 7 September 2015, ECLI:NL:RBAMS:2015:6384, the claim had been transferred to the sister of the creditor, which sister lived in Germany. The court declared the claimant inadmissible on the ground that this was not a cross-border case. A similar transfer was allowed and accepted in *Rb Noord-Holland* 10 February 2021, ECLI:NL:RBNHO:2021:2623.

cases are now commenced on a yearly basis. In 2016 this was estimated at a mere 20 to 30. That is the good news. However, from an analysis of available case law (228 judgments) some conclusions about the ESCP have to be drawn that mostly show that the popularity of the procedure is probably not related to its intrinsic qualities. That is the bad news. These conclusions are the following.

First of all, the idea that one written round is the rule and a more complicated form of litigation the exception, does not fit the facts. Cross-border cases are intrinsically complicated and at least in half of the disputed cases more procedural steps were necessary than one written round. Moreover, the idea of one written round seems to put some pressure on the courts, which could lead to an unjust outcome.

Second, evidence is never taken. There is no chance that this is accidental and it seems to violate the right to a fair trial in some cases.

Third, close analysis of the decisions shows many smaller and bigger mistakes made by the courts. This could be due to the fact that there is a four-layered legal framework within which litigation has to be conducted: the ESCP regulation, supplemented by the implementation act, supplemented by the rules for the Dutch petition procedure and in appeal replaced by the rules for the Dutch default procedure. The “principle of simplicity” should have been taken as a guideline to avoid this state of affairs.

Fourth, ESCP cases are slower than ordinary cases, not faster. This could be due to the fact that every step involves separate communications between the parties and the court.

Fifth, when it comes to costs orders, the rules set down by the regulation and the ECJ are respected. However, the amounts awarded for legal representation are based on Dutch tariffs that cover approximately only 25 % of the real costs.

Sixth, 89 % of all ESCP cases are based on the Flight Compensation Regulation. Of all cases, less than 3 % is a cross-border case with a claimant outside of and a defendant inside the Netherlands. The ESCP is therefore used for other purposes than it was meant for. This can probably be explained by the wish to avoid the costs and delays caused by the EU Service Regulation. The unpleasant conclusion that the EU Service Regulation is a major obstacle to an effective enforcement of cross-border consumer rights seems to be inevitable.

MIND THE GAP? A CRITICAL ANALYSIS OF THE RECOGNITION AND ENFORCEMENT OF CROSS-BORDER CONSUMER ODR OUTCOMES IN THE EU

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ABSTRACT: The EU ODR platform was created with the objective of offering better access to justice for the consumer, especially for cross-border disputes. The recognition and enforcement of cross-border ODR outcomes in the EU is however a complex procedure, and not always possible under the current EU legal framework. This article therefore questions whether a digitalised ESCP procedure is a better alternative to the enforcement of consumer redress for cross-border electronic-based small claims procedures.

KEYWORDS: ODR, consumer redress, access to justice, ESCP, small claims, digitalisation, recognition and enforcement, cross-border disputes.

SUMMARY: 1. THE APPLICABLE LAW TO THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER CONSUMER ODR OUTCOMES: 1.1. The Enforceability of the Consumer ODR Outcome is Determined by Each Member State. 1.2. The Enforceable ODR Outcome: Obligation to Inform the Consumer and Unilateral Effect.— 2. THE ENFORCEMENT OF CROSS-BORDER CONSUMER ODR OUTCOMES IN THE EU.— 3. ANALYSIS OF THE LIMITATIONS IN THE EU LEGISLATION ON THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER ODR OUTCOMES: 3.1. The Limitations in the EU Legislation: An Obstacle for Access to Justice for the Consumer? 3.2. Analysis of the Reasons Behind the Gap in the EU Legislation.— 4. OTHER EU LEGISLATIVE SOLUTIONS FOR THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER ODR OUTCOMES: 4.1. The Enforcement of Online Mediation Outcomes through the Directive on Mediation. 4.2. Towards an Emerging Online-Based EU Small Claims Procedure?. 4.3. The Impact of Covid-19 and the Move Towards Digitalisation. 4.4. The Impact of Digitalisation on the Recognition and Enforcement of Cross Border ESCP Judgements in the EU.— 5. CONCLUSION

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On 15 February 2016, the European Union Online Dispute Resolution (ODR) platform became available for use by consumers and traders across the EU, in order to resolve disputes arising from business-to-consumer (B2C) e-commerce transactions.¹ The platform was built with the objective of enabling easier access to a remedy for small claims arising from these transactions. The simplification of access to a remedy through the ODR platform can therefore be seen as key for building consumer confidence, particularly for EU cross-border trade. The necessity of having simplified ICT-based access to a remedy for disputes was especially demonstrated in the wake of the Covid-19 pandemic as a large wave of consumer claims ensued.²

ODR was first developed in the 1990s as a method for the resolution of the increasing number of internet-based disputes.³ One of the earliest and most successful ODR systems is the eBay dispute resolution center, which reported to have dealt with up to 60 million disputes per year in 2010.⁴ There is no established uniform definition of ODR, and a definition is also lacking in the EU Regulation on consumer ODR.⁵ ODR can however be defined as being a form of alternative dispute resolution (ADR) that is adapted through the use of ICT.⁶ There is no common definition of ADR in any legal instrument either, but it normally includes negotiation, mediation, conciliation and arbitration.⁷ ODR has come to also encompass problem diagnosis tools, community courts, ombudsmen and other similar variations.⁸ The EU Directive on consumer ADR does not indicate to Member States what type of procedure design they need to adopt, which gives them the freedom to choose the type of procedure to apply in their jurisdictions.⁹ It can be noted though that one of the mostly used ADR methods in ODR in the EU is mediation.¹⁰

¹ The platform was established under the application of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

² The European Consumer Centres (ECC) have reported a sharp increase in consumer complaints since the beginning of the COVID-19 pandemic in March. A special webpage on Covid-19 was set-up by the EU Commission to show the extent of these complaints. This information is available at https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net/ecc-net-and-covid-19_en

³ Katsh E., 'ODR: A Look at History: A Few Thoughts About the Present and Some Speculation About the Future,' 2012, p. 27 available at <https://www.mediate.com/pdf/katsh.pdf>

⁴ *Ibid.*

⁵ Koulu R., 'Law, Technology and Dispute Resolution: Privatisation of Cercion,' Routledge, 2019, p. 7.

⁶ See Schmitz A., 'Measuring "Access to Justice" in the Rush to Digitise,' 88 *Fordham Law Review* 2381 (2020), p. 2382.

⁷ See Micklitz H.W. and Saumier G., 'Enforcement and Effectiveness of Consumer Law,' in Micklitz H.W. and Saumier G. (eds.), *Enforcement and Effectiveness of Consumer Law, Ius Comparatum: Global Studies in Comparative Law* (Springer International Publishing, 2018), p. 4.

⁸ Schmitz A., *supra* n. 6, p. 2382.

⁹ Storskrubb E., 'Alternative Dispute Resolution in the EU: Regulatory Challenges,' *European Review of Private Law* 1-2016, 7-32, p. 23.

¹⁰ A large number of ADR providers on the EU ODR platform offer mediation (and/or conciliation) as the main ODR method. This observation is based on the current list of ADR providers that

The use of ODR for cross-border B2C transactions has advantages of being a quick, accessible, simple and low-cost procedure for obtaining consumer redress that does not require any physical displacement.¹¹ These advantages apply to the use of the EU ODR platform. The consumer can use the platform to communicate with the trader in case of a problem with the transaction and eventually pass on the complaint to an ADR entity to start the ODR process. The procedure is free for the consumer and offers translated information in cases where several languages are involved.

According to the most recent EU Commission report on the application of the Directive on consumer ADR and the Regulation on ODR for consumer disputes¹², the platform was used in 44% of the cases for the resolution of cross-border consumer disputes. The report nevertheless states that parties agreed on appointing an ADR entity in only 2% of the cases, and that in about 80% of the cases the trader had not engaged with the ODR process which led to the automatic closure of the proceedings.¹³ Given that such non-engagement by the traders is due to the non-coercive nature of the ODR procedure¹⁴, the question that arises is whether traders would be legally obliged to enforce the ODR outcomes should they decide to engage with the entire process. This question arises especially for cross-border recognition and enforcement of ODR outcomes across the EU due to the different legal systems involved.¹⁵

As ADR falls outside the remit of the Brussels I (recast) Regulation¹⁶, it is not made very clear to the consumer what the legal framework supporting the cross-border judicial enforcement of ODR outcomes would be. This also leaves us with the uncertainty of how courts of the EU member states would recognise and enforce each other's decisions regarding the enforcement of ODR outcomes. Not all types of ODR outcomes are binding of course, but for those that are considered to be binding such as a settlement agreement following a mediated outcome the question is posed. This legal gap creates un-

is found on the EU ODR platform. The information is available at <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>

¹¹ See Schmitz A. and Rule C., 'The New Handshake: Online Dispute Resolution and the Future of Consumer Protection,' (ABA Book Publishing, 2017) and Schmitz A., *supra* n. 6, p. 2383.

¹² Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, Brussels, 25.9.2019, COM(2019) 425 final, p 15 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:425:FIN>

¹³ *Ibid*, pp. 15-16.

¹⁴ See recital 49 of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

¹⁵ See Storskrubb E., *supra* n. 9, p. 14.

¹⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast).

wanted uncertainty in this process for the consumers and discourages them from using ODR, which would consequently discourage cross-border trade.¹⁷

This paper therefore examines the extent to which there is a minimum standard of harmonisation within EU law in the enforcement of binding cross-border ODR outcomes in B2C disputes. Understanding the extent of harmonisation for consumer redress in the EU derives its importance from Article 81(2)(e) of the Treaty on the Functioning of the European Union (TFEU) which sets the importance of the adoption of measures aimed at ensuring effective access to justice for the proper functioning of the internal market.¹⁸ In light of the gaps affecting the EU cross-border enforcement of ODR outcomes, the question of the impact of the Covid-19 pandemic over EU small claims procedures arises. As the use of ICT in dispute resolution has become increasingly popular, it is starting to be picked up for use by public courts.¹⁹ This is an interesting development as the concept of ODR as it is currently understood is potentially shifting to include a public justice dimension.²⁰ Consequently, this paper also examines the degree to which technology-facilitated consumer small claims court decisions can be used across the EU for the enforcement of online consumer redress.

To do so, part 1 of this paper will examine the extent to which the current applicable EU law on ODR recognises the legal enforceability of cross-border consumer ODR outcomes. In part 2, a discussion of the reasons behind the limitations on the cross-border enforcement of consumer ODR outcomes in the EU will follow. The paper finally tackles the alternative solutions to this gap in the law in part 3, and shows the significance of the impact of the Covid-19 pandemic on the recognition of ICT-facilitated dispute resolution for consumer small claims in the EU.

1. THE APPLICABLE LAW TO THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER CONSUMER ODR OUTCOMES

The ODR outcome is the result of the ODR process which can be either binding or non-binding on the parties. Binding ODR outcomes consist of a settlement resulting from a mediation outcome, a conciliation agreement or

¹⁷ See Daniels C., 'Alternative Dispute Resolution for European Consumers: A Question of Access to and Standards of Justice,' in Daniels C., Cadiet L., Hess B., Requejo Isidro M. (eds.), *Privatizing Dispute Resolution* (Nomos; Baden-Baden, 2019), p. 258.

¹⁸ See Farah Y. and De Oliveira L.V.P., 'Releasing the Potential for a Value-Based Consumer Arbitration under the Consumer ADR Directive,' *European Review of Private Law* 1-2016, 117-142, p. 118.

¹⁹ See Koulu R., *supra* n. 5, p. 6.

²⁰ The use of ICT by state courts is already referred to as 'courtroom technology.' See Koulu R., *supra* n. 5, p. 6. Also, see in Koulu R., *supra* n. 5, p. 6 the discussion on how the nomenclature of ODR that is used by developers has changed to 'legal technology.' Also see, Rabinovich-Einy O. and Katsh E., 'A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution,' 32 *Ohio State Journal on Dispute Resolution*, 2017, 695.

an arbitral award. If the ODR outcome is binding and the trader for example does not comply with it, the consumer will have to resort to the enforcement of the ODR outcome. As ODR is an out-of-court procedure, the enforcement of the outcome would have to be effected by a public court. The EU ODR procedure is currently governed by the Directive on consumer ADR²¹ and the Regulation on consumer ODR.²² This part will analyse the legal provisions in these texts regarding the requirements for the legal enforceability of ODR outcomes. This part will also analyse whether the Brussels I (recast) Regulation²³ has any role in the recognition and enforcement of EU cross-border ODR outcomes.

1.1. The Enforceability of the Consumer ODR Outcome is Determined by Each Member State

Article 9(3) of the EU Directive on consumer ADR provides that “where, in accordance with national law, ADR procedures provide that their outcome becomes binding... .” This means that if the member state recognises the validity and binding effect of the ODR outcome in question, it would then be binding. Article 2(4) of the Directive also states that member states have the competence to decide whether ADR entities can impose a solution through the ADR process.²⁴

Based on these provisions, it can be deduced that the judicial enforceability of the ODR outcome is possible at national level as long as the member state recognises and enforces the nature of the ODR outcome in question. The majority of the EU member states recognise the validity of consumer mediation for example, which might explain why it is the most popular method for consumer ODR that is used in the EU.²⁵ When it comes to consumer arbitration however, the Directive on consumer ADR only refers to arbitration in recital 29 which shows that the Directive distinguishes arbitration from other ADR procedures.²⁶ The Directive on consumer ADR does not give much guidance on the regulation of consumer arbitration proceedings which could affect the consumer’s adequate access to justice.²⁷ The enforcement of consumer arbitral awards is therefore a matter that is left to be regulated by the national laws of the member states.²⁸

²¹ *Supra* n. 14.

²² *Supra* n. 1.

²³ *Supra* n. 16.

²⁴ See Daniels C., *supra* n. 17.

²⁵ See *supra* n. 10.

²⁶ Farah Y. and De Oliveira L.V.P., *supra* n. 18, p. 136.

²⁷ See *ibid.*, pp. 139-140. The authors discuss that lack of regulation of consumer arbitration in the Directive on consumer ADR could lead to obstacles such as the refusal of member states to accredit an ADR entity or revoking the accreditation of such entities.

²⁸ *Ibid.*, p. 120. See the discussion on this point by Eidenmuller H. and Engel M., ‘Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe,’ *Ohio State Journal on Dispute Resolution*, 29(2), 2014, 261-298, p. 292.

Consumer arbitration is seldom used in practice as a method for dispute resolution on the EU ODR platform. Spain is amongst the few EU member states that has adopted consumer arbitration.²⁹ Many member states prohibit the binding effect of consumer arbitral awards. In France it is considered to be an unfair contract term.³⁰ This position on consumer arbitration was reconfirmed by a recent Court of Cassation ruling where it was held that the arbitration agreement was not binding on the consumer.³¹ The same stance was adopted in Germany as it does not recognise and enforce arbitration awards against consumers.³² Czechia is also another member state that prohibits consumer arbitration and that would not recognise the enforceability of the arbitral award against a consumer.³³ Moreover, the Court of Justice of the EU (CJEU) has adopted the position that tends to limit the inclusion of arbitration as a method for resolving consumer disputes. This position can be seen for example from the CJEU preliminary ruling in *Content Services Ltd v Bundesarbeitskammer*.³⁴ The CJEU stated in this case that it is important to use a durable medium when communicating with a consumer and stressed on the strict interpretation of what such a method of communication would be in order to protect the consumer's rights.³⁵

Regarding enforceability of the ODR outcome, there is mention in the Directive for ADR entities to publish the legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties,³⁶ the enforceability of the ADR decision,³⁷ and the rate of compliance, if known, with the outcomes of the ADR procedures.³⁸ Nevertheless, there are no provisions in the Directive that impose the requirement for judicial enforcement of the ADR outcome, and there is also no such provision for the cross-border recognition of the binding effect and enforcement of the ODR outcome. This means that the enforcement of the consumer ODR outcomes is limited to the legal systems that recognise the ADR method used in the procedure, and that this is a clear

²⁹ Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' ERA Forum, 16(2), 2015, 125-147 and Esteban de la Rosa F. and Marques Cebola C., 'The Spanish and Portuguese Systems: Two Examples Calling for a Further Reform- Uncovering the Architecture Underlying the New Consumer ADR/ODR European Framework,' *European Review of Private Law*, 6-2019, 1251-1278, p 1264 and p. 1275.

³⁰ Farah Y. and De Oliveira L.V.P., *supra* n. 18, p. 123-124.

³¹ Arrêt n° 556 du 30 septembre 2020 (18-19.241) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2020:C100556

³² See Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', *supra* n. 29.

³³ Micklitz H.W. and Saumier G., *supra* n. 7, p. 23.

³⁴ C-49/11, [2012] ECR I-02213.

³⁵ See for a more detailed discussion on this point in Hanriot M., 'Online Dispute Resolution (ODR) as a Solution to Cross-Border Consumer Disputes: The Enforcement of Outcomes,' *McGill Journal of Dispute Resolution*, Vol. 2, 2015-2016, 1-22, p. 11.

³⁶ Article 7(1)(n) of the EU Directive on consumer ODR, *supra* n. 14.

³⁷ Article 7(1)(o), *ibid*.

³⁸ Article 7(2)(g), *ibid*.

limitation for the recognition and enforcement of ODR outcomes across the EU.³⁹

1.2. The Enforceable ODR Outcome: Obligation to Inform the Consumer and Unilateral Effect

If an ODR outcome is recognised as binding and enforceable by a member state, the consumer needs to have been informed in advance of the enforcement of the outcome that it is binding and the binding effect is only unilateral. According to Article 10(2) of the Directive on consumer ADR, the solution given by the ADR entity may be binding on the parties if they were informed of this in advance and accepted this binding solution. This provision goes further to specify that the consent of the trader is not required if the law of the member state provides that the outcome is binding on the trader.

Concerning the unilateral effect of the enforceable ODR outcome, Article 9(3) of the Directive states that the outcome of the ADR procedures becomes binding on the trader once the consumer has accepted the proposed solution. This provision continues to state that Article 9(2) shall be read as applicable only to the consumer. The Directive on consumer ADR provides that the ODR outcome is therefore unilaterally binding on the trader, and not binding on the consumer.

Most often, the consumer ODR procedure would be based on a pre-dispute ADR (or ODR) agreement which means that the consumer would enter into an agreement to resolve any future disputes through ODR prior to the dispute taking place. This agreement is normally incorporated within the main contract between the consumer and the trader. Article 10(1) of the Directive on consumer ADR disposes that a pre-dispute agreement to submit to ADR (or ODR) is not binding on the consumer. Recital 43 of the Directive adds that a pre-dispute agreement is not binding on the consumer and does not affect his right of access to court. It is therefore possible for the consumer, but not the trader, to withdraw from the ODR procedure at any time, and start court proceedings instead.⁴⁰ This right of withdrawal of the consumer would apply even in case where the consumer and the trader conclude an agreement based on the ODR outcome.

Article 11 of the Directive explains the reason behind the unilateral binding effect of the outcome and provides that the solution given by the ADR entity cannot deprive the consumer of the protections that he is entitled to. Moreover, recital 49 of the Directive states that the outcome of the procedures should not be binding and should not prevent the parties from having access to court. The main reason for this is to protect the consumer and to not pre-

³⁹ Luzak J., 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice,' *European Review of Private Law*, 1-2016, 81-102, pp. 89-90.

⁴⁰ Hanriot M., *supra* n. 35, p. 9.

vent the consumer from having access to a public court for the resolution of the dispute.⁴¹

2. THE ENFORCEMENT OF CROSS-BORDER CONSUMER ODR OUTCOMES IN THE EU

If a consumer needs to enforce an ODR outcome, that ODR outcome needs to be binding. Mediation and conciliation outcomes for example are not binding on their own and do not have any enforceability value as they are the outcomes of a non-adjudicatory procedure. These outcomes can however be agreed upon by the parties and can be materialised in the form of a settlement agreement.⁴² A settlement agreement resulting from a mediation or a conciliation outcome is a post-dispute agreement. These agreements can come under the application of Article 18(1) of the Regulation and benefit from the simplified proceedings for enforcement. Article 18(1) of the Regulation states that “a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.” The consumer would thereby be able to apply for the judicial cross-border enforcement of the outcome of the online mediation procedure or the online conciliation procedure across the EU. A more detailed discussion of this solution will be discussed in part III(A) of the paper, as it is aided by the application of the EU Directive on Mediation.⁴³

Since the Brussels Regulation only refers to consumer contracts in Article 18(1) and not ADR or ODR-based agreements as such, uncertainty regarding the manner in which member states would enforce the mediation or conciliation agreement would still loom. As seen in section I(A) of this paper, each member state is given the choice to determine the enforceability of ADR outcomes as per the Directive on consumer ADR. Each member state would therefore be able to give its own interpretation of whether a mediation or conciliation agreement is a valid consumer contract according to the meaning of the Brussels I Regulation.

Another major issue that affects the judicial enforcement of cross-border ODR binding outcomes in the EU is that there is no online procedure or simplified mechanism available to the consumer to carry this out. Applying the Brussels I Regulation to recognise and enforce an ODR outcome would require the consumer to bring proceedings against the trader in court. Even though the consumer has the option to bring proceedings where he is domiciled, the risk of not having the trader show up to the proceedings runs.

⁴¹ See *Ibid*, p. 8. Also see Daniels C., *supra* n. 17, pp. 283-284 on this point.

⁴² Hanriot M., *supra* n. 35, p. 8.

⁴³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

The consumer also has the option to open proceedings against the trader in the member state where the trader is domiciled. In both circumstances, this would inconvenience the consumer with the cost of the proceedings and the time spent pursuing them. Having court proceedings against the trader in a different jurisdiction would have additional disadvantages and barriers in addition to the costs involved such as the lack of knowledge of the legal system, of the language, of hiring a lawyer etc. This would obviously result in the consumer being discouraged from pursuing the judicial cross-border enforcement of an ODR outcome, even if it is considered to be legally binding.

These issues stem from the lack of a provision in the Directive on consumer ODR and the Regulation on consumer ODR on the domestic and cross-border judicial enforcement of binding ODR outcomes. The request for the judicial enforcement of ODR outcomes requires an online avenue that is tailor-designed to the this type of procedure.

3. ANALYSIS OF THE LIMITATIONS IN THE EU LEGISLATION ON THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER ODR OUTCOMES

The EU ODR mechanism was introduced to raise consumer trust in cross-border trade in the EU.⁴⁴ The extent to which such trust can be raised is put into question in light of the current legal limitations affecting the enforcement of EU cross-border ODR outcomes, as discussed in section I(C) above. On one hand it can be argued that these limitations act as an obstacle for providing the consumer with effective access to justice or a remedy. On the other hand, the question of whether the enforcement of B2C ODR outcomes is necessary is also posed. It may be argued that cross-border enforcement of the ODR outcome might not be needed as enforcement is important in the country where the trader is located. According to the EU ODR system the consumer would have to contact an ADR entity that is located in the trader's jurisdiction to carry out the procedure which would solve this dilemma. The problem of access to a remedy would however persist in cases where the jurisdiction in question does not provide or allow for the enforcement of ODR outcomes. After all, the success of a dispute resolution procedure hinges on the ability of the winning party, or the consumer in this case, to enforce the final outcome.⁴⁵

This part is going to examine the impact of the gap in the law on the consumer's ability to have effective access to justice in the first sub-section, and

⁴⁴ Loos M.B.M., 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law,' *European Review of Private Law*, 1-2016, 61-80, p. 67.

⁴⁵ See Cortés P., 'Online Dispute Resolution for Consumers in the European Union,' *Routledge Research in IT and E-commerce Law*, (Routledge, Taylor & Francis Group, London, 2010), p. 35.

then conduct an analysis of the reasons behind the existence of this gap in the second sub-section.

3.1. The Limitations in the EU Legislation: An Obstacle for Access to Justice for the Consumer?

According to the famous ‘Florence project’ on access to justice conducted in the late 1970s by Mauro Cappelletti and Bryant Garth it was concluded that one of the ways to open up access to justice is to make such access cheaper and more effective.⁴⁶ Namely, Cappelletti and Garth considered that access to justice would be improved through the introduction of alternative forums to the traditional court system. The study found that the use of out-of-court alternative methods of dispute resolution was part of a third wave of access to justice that would improve such access for individuals.⁴⁷ Access to justice in this third wave had an expanded meaning which did not only include the idea of improving access to legal justice.⁴⁸ The conception of access to justice according to the study also covered the idea of guaranteeing the legal rights of all.⁴⁹ Effective access to justice that guarantees legal rights was therefore considered to be the most basic requirement as a human right by Cappelletti and Garth.⁵⁰

It can be said that the EU consumer ADR and ODR procedures form part of this third wave of access to justice.⁵¹ It would therefore be important for these procedures to offer such a guarantee of legal rights through the recognition and enforcement of their outcomes.⁵² EU legal instruments of course embrace the importance of access to justice as a general principle. Article 67(4) of the TFEU provides that ‘the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.’ Also, Article 47 of the Charter of Fun-

⁴⁶ Cappelletti M. and Garth B., ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective,’ 27 *Buffalo Law Review*, (1978), pp. 186-190.

⁴⁷ *Ibid*, p. 224 and p. 232.

⁴⁸ Yuthayotin S., ‘Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms (Springer International Publishing, 2015), p 46, citing Tunc A., ‘The Quest for Justice,’ in Cappelletti M. (ed.), ‘Access to Justice and the Welfare State,’ (1981), p. 315 in Daniels C., *supra* n. 17, p. 261.

⁴⁹ See Storskrubb E., *supra* n. 9, p. 15, and Cappelletti M. and Garth B., *supra* n. 48, pp. 183-185. Also see, Whytock, C. A., ‘Transnational Access to Justice,’ *Berkeley Journal of International Law (BJIL)*, Vol. 38, No. 2, (2020). UC Irvine School of Law Research Paper No. 2021-15, available at <https://ssrn.com/abstract=3790971> for a discussion of transnational access to justice.

⁵⁰ Cappelletti M., Garth B. and Trocker N., ‘Access to Justice: Comparative General Report,’ 40 *Rabel Journal of Comparative and International Private Law* (1976), 669, p. 672.

⁵¹ See Philippe M., ‘Access to Justice Through Online Dispute Resolution Is Not Science Fiction: A Practitioner’s Perspective on the Good, the Bad and the Future,’ in: Valladares L. and Hourani S. (eds), *Access to Justice in Arbitration: Concept, Context and Practice*, Wolters Kluwer (November 2020).

⁵² See Howells G., Twigg-Flesner C. and Wilhelmsson T. (eds), *Reyhinking EU Consumer Law*, (Routledge, 2018). Also see Gelinas F., Benyekhlef K., Bailey J and Burkell J. (eds), ‘eAccess to Justice,’ (University of Ottawa Press, 2017).

damental Rights of the European Union (EUCFR) states the importance of having a right to an effective remedy and a fair trial. It can be seen from these provisions that the TFEU places an importance on access to justice through out-of-court mechanisms, and that the EUCFR places emphasis on the significance of access to a remedy. The combination of these provisions would result in the understanding that it would be important to provide a remedy through an ADR procedure, which would mean that ODR offers access to justice and that it needs to offer a remedy as a result.

The main objective of consumer ODR is for consumers to have easier access to resolve their disputes through this forum. ODR helps consumers to resolve disputes more efficiently and avoid travel, stress and inconvenience.⁵³ In theory, the consumer would gain access to quick and easy remedies through a quick click.⁵⁴ From a theoretical perspective therefore, ODR seems to be one of the best modern solutions for the facilitation of access to a remedy for small claims. ODR seems to facilitate such access where courts have failed to provide access to justice for individual small claims.⁵⁵ Namely, courts in the majority of EU jurisdictions are perceived as slow and inefficient, which raises the necessity for ODR.⁵⁶ Moreover, reports have shown that ODR expands access to remedies for self-represented litigants.⁵⁷

The importance of having an efficient ODR procedure is reflected in parts of the Directive on consumer ADR and the Regulation on consumer ODR. Recital 4 of the Directive on consumer ADR states the importance of ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes. Recital 11 of the same Directive stresses the significance of providing a properly functioning infrastructure for ADR and ODR for boosting citizen's confidence to use cross-border online commerce in the EU internal market. Articles 1 and 2(3) of the Directive also place emphasis on the importance of having an efficient ADR procedure and ensuring that the consumer has access to an effective out-of-court redress mechanism throughout the EU. Also, recital 26 of the Regulation on consumer ODR mentions that the right to an effective remedy in ODR is based on Article 47 of the EUCFR.

Furthermore, the concept of access to a remedy through ODR in the EU is closely connected to the concept of consumer protection. Article 114(3) of the TFEU and Article 38 of the EUCFR both state that consumer protection in the EU benefits from a high level of protection. Article 169 of the TFEU stipulates that in order to achieve such a high protection, the Union shall contribute to protecting the health, safety and economic interests of consumers,

⁵³ Schmitz A., *supra* n. 6, p. 2386.

⁵⁴ *Ibid*, p. 2383.

⁵⁵ Hodges C. and Voet S., 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles,' in Hess B. and Kramer X.E. (eds.), *From Common Rules to Best Practices in European Civil Procedure*, (Baden-Baden: Hart/Nomos, 2017), p. 354.

⁵⁶ *Ibid*, p. 354.

⁵⁷ Schmitz A., *supra* n. 6, p. 2384.

as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.⁵⁸ Recital 1 and Article 1 of the Directive on consumer ADR reiterate the importance of this high level of consumer protection that needs to be achieved through ADR and ODR. It can be deduced from the above discussion that the meaning of consumer protection in the Directive on consumer ADR and the Regulation on consumer ODR encompasses the idea of offering an efficient remedy through these procedures to protect the economic interests of the consumer. This would mean that according to the EU texts, having an efficient access to justice for the consumer through ODR would mean having efficient access to a remedy.

It is therefore clear that the objective of the EU ODR platform and procedure is to provide a feasible and easily accessible forum through which consumers can pursue their rights quickly and effectively.⁵⁹ The EU ODR procedure does indeed offer access to a remedy through ODR outcomes, however this access is not as efficient as it can be due to the limitation in the legal framework regarding the judicial enforcement of these, especially at a cross-border level. Despite the importance given to having an efficient access to a remedy through the ODR procedure, the current EU legal framework weakens the effective enforcement of the consumer's right to a remedy. The lack of the judicial enforcement of the ODR outcome leads to the weakness of the ODR procedure and no commitment to it by the traders. Consumer rights need to be enforced to be effective.⁶⁰ It is concurred that the legal uncertainty concerning the enforcement of ODR is one of the major reasons that hinder the development of ODR.⁶¹

3.2. Analysis of the Reasons Behind the Gap in the EU Legislation

Even though EU legislation on consumer ADR and ODR seems to encourage having access to a remedy through ADR or ODR, access to justice in EU law is mainly understood as having access to public courts. Access to justice traditionally meant access to state courts under EU law.⁶² ADR entities are not considered to be tribunals in the sense of Article 267 of the TFEU. If there is a question regarding the interpretation of a legal issue for example, ADR entities do not have access to the CJEU to ask about this which would have a detrimental effect on the consumer's rights.⁶³ Article 47 of the EUCFR refers

⁵⁸ See Daniels C., *supra* n. 17, p. 262 for a further discussion on this.

⁵⁹ See Eidenmuller H. and Engel M., *supra* n. 28, p. 263.

⁶⁰ See Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', *supra* n. 29, p. 125. Also see, Cortes P. and Lodder A.R., "Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress", *Maastricht Journal of European and Comparative Law*, 21(1), 2014, 14-38, p. 19.

⁶¹ Cortés P., 'Online Dispute Resolution for Consumers in the European Union,' *supra* n. 47, p. 82.

⁶² Daniels C., *supra* n. 17, p. 257.

⁶³ Loos M.B.M., *supra* n. 46, pp. 29 and 76-77.

to having a fair trial, for a tribunal to provide an effective remedy and that everyone is entitled to have a public hearing. All of this wording alludes to the use of public courts to provide access to justice.⁶⁴ Additionally, consumer dispute resolution entities do not qualify as tribunals under Article 6 of the European Convention on Human Rights (ECHR).⁶⁵

This understanding of access to justice is corroborated in the Directive on consumer ADR and the Regulation on consumer ODR. Recitals 45 and 60 of the Directive on consumer ADR state that ADR does not replace access to justice to state courts and that it should not act as a restriction of having access to them. Recital 61 of the Directive and recital 35 of Regulation on consumer ODR stipulate that fundamental rights such as those stated in Article 47 of the EUCFR on access to justice are to be respected by both the Directive and the Regulation.

It can be argued that mandatory ODR can be detrimental to the consumers' right of access to justice to public courts and authorities.⁶⁶ The proliferation of the use of consumer ADR (or ODR) could lead to barring consumers from having the needed access to courts.⁶⁷ This could consequently be detrimental to the consumer's right of access to justice as it is currently understood in EU law.⁶⁸ According to the CJEU ruling in *Alassini*⁶⁹ ADR and ODR cannot impede over the consumers' right of access to justice to public courts.⁷⁰ The binding effect of the ODR outcome on the consumer could affect the degree to which the consumer would be able to challenge the outcome in court.⁷¹ The ADR agreement with the consumer could therefore turn into an unfair contract term for the consumer.⁷² Moreover, it is still not entirely clear what the standards of justice of Consumer ADR are, even in the EU context.⁷³ Also, the Directive on consumer ADR seems to undermine Article 6 of Brussels I recast Regulation as the proceedings are initiated in the trader's jurisdiction.⁷⁴ Consumer protection measures thereby need to be in place to avoid placing barriers for public access to justice, which could explain the lack of clear EU laws for the judicial enforcement of consumer ODR outcomes.

Another major reason that could explain the current limitations in the law regarding the judicial enforcement of ODR outcomes in the EU is the protec-

⁶⁴ See Daniels C., *supra* n. 17, p. 264.

⁶⁵ *Ibid*, pp. 274-275.

⁶⁶ Hanriot M., *supra* n. 35, p. 8. Also see Loos M.B.M., *supra* n. 46, p. 69.

⁶⁷ Daniels C., *supra* n. 17, p. 272.

⁶⁸ Storskrubb E., *supra* n. 9, p. 16, 17. Also see, Schmidt-Kessen M.J., Nogueira R. and Gamito M.C., 'Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU,' *Journal of Consumer Policy*, 43, 2020, 659-686, p. 663. Also see, Micklitz H.W. and Saumier G., *supra* n. 7, p. 23.

⁶⁹ ECJ, *Rosalba Alassini and Others v Telecom Italia*, [2010], C-317/08-C-320/08, ECR I02213.

⁷⁰ Hanriot M., *supra* n. 35, p. 7; Daniels C., *supra* n. 17, p. 279, Cortes P. and Lodder A.R., *supra* n. 60, p. 24.

⁷¹ Hanriot M., *supra* n. 35, p. 9.

⁷² *Ibid*, p. 6.

⁷³ Daniels C., *supra* n. 17, p. 159.

⁷⁴ Loos M.B.M., *supra* n. 46, pp. 78 and 74-75.

tion against the danger of the privatisation of justice.⁷⁵ So far, it is contended that research has shown that public bodies can provide better redress and access to justice for consumer disputes.⁷⁶ It has been argued that increasing efficiency in consumer dispute resolution via ADR and ODR goes against the idea of judicial scrutiny and the application of due process,⁷⁷ which could result in the danger of having a 'second-class' justice.⁷⁸ According to this line of reasoning, state courts cannot be 'side-lined' in the name of the efficiency of consumer ADR and/or ODR.⁷⁹ There is also a greater risk for private dispute resolution providers have to have a conflict of interest with providing adequate access to justice and enforcement consumer rights.⁸⁰ ODR processes thereby run the risk of not abiding by due process standards.⁸¹ It would consequently be essential to have a rights-based procedure than private and binding consumer ADR processes that have the objective of satisfying businesses.⁸² By adopting the above line of reasoning, this would be essential for the protection of the consumer as the weaker party.⁸³

4. OTHER EU LEGISLATIVE SOLUTIONS FOR THE RECOGNITION AND ENFORCEMENT OF EU CROSS-BORDER ODR OUTCOMES

In light of the current limitations in the Directive on consumer ADR and the Regulation on consumer ODR that are affecting the judicial enforcement of EU cross-border ODR outcomes, there are two other EU legislative solutions that could apply to reinforce them. This part will first examine the extent to which the Directive on Mediation⁸⁴ can be a relevant solution for simplifying the enforcement of consumer online mediation outcomes across the EU. Second, this paper is going to explore how the EU small claims procedure is embracing technology and the impact that this could have on the cross-border judicial enforcement of ODR outcomes.

⁷⁵ See Resnik J., 'A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations,' *North Carolina Law Review*, Vol. 96, 2018. Also see, Micklitz H.W. and Saumier G., *supra* n. 7, p. 36.

⁷⁶ Storskrubb E., *supra* n. 9, pp. 20 and 30.

⁷⁷ Eidenmuller H. and Engel M., *supra* n. 28, p. 263.

⁷⁸ Daniels C., *supra* n. 17, pp. 285-286.

⁷⁹ Eidenmuller H. and Engel M., *supra* n. 28, p. 263.

⁸⁰ *Ibid.*

⁸¹ Schmitz A., *supra* n. 6, p. 2383.

⁸² Eidenmuller H. and Engel M., *supra* n. 28, pp. 280-281.

⁸³ Storskrubb E., *supra* n. 9, p. 18.

⁸⁴ *Supra* n. 43.

4.1. The Enforcement of Online Mediation Outcomes through the Directive on Mediation

The EU Directive on Mediation applies to the mediation of civil and commercial matters, which includes consumer mediation. The Directive was created with the objective of encouraging the use of mediation for the resolution of cross-border disputes in the EU.⁸⁵ Therefore, this Directive complements the Directive on consumer ADR and the Regulation on consumer ODR as it offers clarity on the legal status of mediated outcomes, which elucidates the legality of their enforcement in the EU.

The Directive makes express reference to the possibility of the judicial enforcement of mediation agreements.⁸⁶ Namely, Article 6(1) of the Directive states that member states must ensure that a mediated agreement can be made enforceable upon the request of the parties. Article 6(2) continues to state that a mediation agreement can be enforced through a court decision, a decision of a public authority or through an authentic instrument issued from a court or a public authority. According to this provision, the enforcement procedure to be followed is decided by each member state. Thus, if the consumer concludes a mediation settlement with the trader that ensues from online mediation he could use these provisions as a basis to apply for its enforcement. What is interesting about this provision is that it gives the possibility to have a non-judicial enforcement of the mediation agreement, which could simplify the enforcement proceedings for the consumer as he would not be required to file for court proceedings to enforce the agreement.

Despite these clarifications and simplifications in the Directive on Mediation however, mediation agreements are still not directly enforceable at cross-border level in the EU. The application of Brussels I would still be needed for the cross-border recognition and enforcement of court decisions on the enforcement of the agreement. This means that the consumer would still have to have recourse to court proceedings in the member state where the trader is located to have the enforceability decision recognised and enforced by the local court.⁸⁷ The issue of having effective consumer redress through the enforcement of ODR outcomes encountered under the ADR Directive and the ODR Regulation is still not resolved by the Directive on Mediation for cross-border mediation procedures.

The cross-border enforcement procedure can also become complicated as the enforcement modalities and proceedings are left to each individual member state to regulate as prescribed in subsections 1 and 4 of Article 6 of the Mediation Directive.⁸⁸ The question of whether a court decision to enforce

⁸⁵ See Article 1 of the Directive on Mediation, and Cortes P. and Lodder A.R., *supra* n. 58, p. 22.

⁸⁶ See Daniels C., *supra* n. 17, p. 280.

⁸⁷ This would be possible through the proceedings provided in Article 18(1) of the Brussels I recast Regulation.

⁸⁸ Storskrubb E., *supra* n. 9, p. 25.

the mediation agreement can be recognised and enforced in another member state that does not recognise the validity of consumer mediation agreements ensues.⁸⁹

For example, the enforcement of mediated settlements for consumer disputes might be considered to be unconstitutional in some member states.⁹⁰ This is possible as the Directive on Mediation was not specifically designed for Consumer ADR. Spain for instance does not apply the mediation procedure for consumer claims and thus does not recognise the validity of consumer mediation agreements.⁹¹

4.2. Towards an Emerging Online-Based EU Small Claims Procedure?

The use of technology in the context of the European Small Claims Procedure (ESCP) is gradually being adopted. This development is important as the online format of the ESCP can be used as an alternative mechanism to ODR since both procedures would involve the use of an electronic-based procedure for the resolution of small claims. The advantage of using an online ESCP would be having easier enforcement of the judgment cross-border in the EU for the consumer.

The adoption of technology in the ESCP started to be seen through the possibility of conducting hearings online or via video or tele-conference if the equipment is available to the court for example. This option is brought forth by Article 8 of the ESCP Regulation⁹² in case there is a need for oral hearings to take place, and where it is considered that such hearings are more suitable than in-person hearings. Moreover, Regulation 2015/2421⁹³ amended the older ESCP Regulation by putting the electronic service of documents on an equal footing with a postal service and enhancing the use of distance means of communication for the purpose of conducting the hearings and taking of evidence.⁹⁴ This facilitates the enforcement of small claims judgments for the consumer for cross-border cases in the EU if the entire procedure is conducted electronically, and if the laws of the member states involved recognise the validity of electronic procedures and judgments.

⁸⁹ See Hanriot M., *supra* n. 35, pp. 13-14.

⁹⁰ Eidenmüller H. and Engel M., *supra* n. 28, p. 267.

⁹¹ Cortes P., 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?', *supra* n. 29, pp. 6-7.

⁹² Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015.

⁹³ Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure.

⁹⁴ See Article 8 and 13 of Regulation 2015/2421. Hodges C. and Voet S., *supra* n. 55, p. 360.

Other examples of this move towards the adoption of technology for the conduct of the ESCP include the creation of the e-Justice online platform⁹⁵ which provides a portal for the filing of small claims.⁹⁶ The forms of application of the procedure can be found on the portal and can be filled out on a computer and printed out to be used for filing a claim. There is however currently no possibility of using the portal for submitting the claim via the platform itself. This limitation in the use of technology for the processing of an ESCP claim might however change as a result of the Covid-19 pandemic which had a major impact on the use of ICT in the ESCP, and the EU Digitalisation agenda that has been put in motion.

4.3. The Impact of Covid-19 and the Move Towards Digitalisation

The pandemic led to the need of the judiciary to rely much more heavily on digital tools for processing their work. Consequently, the ESCP procedures in many EU member states have become mainly electronic-based as court proceedings in these states moved online.⁹⁷ Measures that have been taken by member states for justice systems, according to the information provided by the e-Justice platform⁹⁸, include the use of remote means of communication for hearings and electronic-based communications.

For example, Austria, Bulgaria, Croatia, Ireland, Italy, the Netherlands and Spain all started using teleconferencing and virtual hearings for court proceedings. Finland started using virtual hearings to the largest extent possible, France opened the possibility to use them and Sweden reported that the use of video and telephone conferences in judicial proceedings has increased. Austria, Bulgaria, Croatia, Finland, Italy, the Netherlands, Spain and Sweden all confirmed that they shifted to the use of online and electronic communications with and by the judiciary. It was reported by Lithuania that bailiffs are required to register actions of enforcement processes issued by the judiciary via electronic means, which was in place before the Covid-19 crisis. It is to be noted that there was no particular mention of the ESCP procedure in these measures, but the natural presumption is that this has been adopted for all types of court procedures including the ESCP.

There is still currently no EU legal instrument to harmonise the use of an online or electronic-based ESCP procedure. As observed, these measures

⁹⁵ See the e-Justice portal for the EU Small Claims Procedure available at https://e-justice.europa.eu/content_small_claims-42-en.do

⁹⁶ Cortes P. and Lodder A.R., *supra* n. 60, p. 33.

⁹⁷ See the e-Justice page on the Impact of COVID-19 on the justice field available at https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do. See the Comparative Table on Covid-19 Impact on Civil Proceedings and the Digital Tools in Member States list for the judiciary available on the same website.

⁹⁸ *Ibid.*

have been adopted at national level by the member states. Not all member states provided information on the measures taken, and not all of them adopted online or electronic-based procedures to be used by the judiciary and other legal services. EU member states have been however encouraged to use electronic communications for matters relating to judicial cooperation⁹⁹ for example, which could potentially have had an impact on the cross-border recognition and enforcement of ESCP judgments in the EU. Nevertheless, there is still no data about this that has been provided by the EU at the time of writing of this paper.

As a result of the Covid-19 crisis, the EU Commission conducted a fact-finding exercise to get an understanding of how to step up the digitalisation of justice in the EU. The European Commission consequently adopted a package of initiatives to modernise the EU justice systems through their digitalisation.¹⁰⁰ In December 2020, the Commission published a communication on the Digitalisation of justice in the European Union where it stated that it is seeking through this initiative to achieve the digitalisation of justice systems in the EU, at both national and EU level.¹⁰¹ The Communication focuses on the digitalisation of justice systems to improve access to justice for consumers and businesses, and to make cross-border judicial procedures more efficient and simple. To do so, the Commission proposed a number of tools to be adopted in order to achieve these objectives.

Some of the tools proposed in the Communication include making the digital channel the default option in EU judicial cooperation, establishing a “My e-Justice space”, which would be available for use by individuals and businesses as an electronic access point with links to available national services, and the use of IT tools for secure cross-border cooperation in civil, commercial and criminal matters such as the e-CODEX system. This software allows judicial authorities, legal practitioners and members of the public in the EU to communicate documents, legal forms, evidence and other information. Although this platform already exists, the Commission adopted a proposal to Regulate this software. The adoption of these tools and measures shows how keen the Commission is on the adoption of digitalisation for judicial proceedings.¹⁰²

⁹⁹ See the e-Justice page on the Covid-19 impact on civil and insolvency matters available at https://beta.e-justice.europa.eu/37843/EN/covid19_impact_on_civil_and_insolvency_matters?clang=en

¹⁰⁰ European Commission press release, ‘Modernising EU justice systems: New package to speed up digitalisation of justice systems and boost training of justice professionals,’ available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2246

¹⁰¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Digitalisation of justice in the European Union: A toolbox of opportunities,’ COM/2020/710 final available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>

¹⁰² See Onanu E.A., ‘Encoding Justice: A Quest for Facilitating Access to Justice by e-Handling of Cross-Border Litigation. The Example of the European Uniform Procedures’ in: Burkhard Hess, Koen Lenaerts (ed.), *The 50th Anniversary of the European Law of Civil Procedure* (Nomos, 2020), pp. 473 – 506 for a deeper discussion on the adoption of digitalisation for the judiciary systems in the EU.

Such initiatives for the digitalisation of small claims procedures are on the rise.¹⁰³ The adoption of ODR and e-court solutions for the resolution of small claims is increasingly becoming the norm, especially after the Covid-19 pandemic in many parts of the world too.¹⁰⁴ Such public ODR projects have also been launched in the USA, Canada and China for example.¹⁰⁵ These ODR projects make it possible to incorporate negotiation and mediation stages prior to the online litigation stage to save courts from the administrative burden.¹⁰⁶

To illustrate a recent example, courts in the State of Utah are launching an online small claims program¹⁰⁷, and a small claims ODR program has already been implemented in the State.¹⁰⁸ Another recent ODR initiative in the US is the Manhattan ODR platform for small claims.¹⁰⁹ This platform can be used to file small claims of up to \$10,000 and the claim is filed in the Small Claims Part of the New York County (Manhattan) Civil Court. The process consists of the possibility of the parties to bid on how they would like to settle the case, then negotiate directly on the platform if the dispute is not resolved in the first stage. If the parties are not successful at negotiating the dispute, they would be moved to the mediation stage where they would have to work with a mediator to resolve the dispute. If the dispute is still not resolved, the parties would eventually take part in a virtual court hearing.¹¹⁰

According to the results of a survey conducted on the improvement of access to justice in cross-border EU litigation via the use of ICT, it was demonstrated that the ESCP needs to embed ICT for a more successful and efficient procedure that would improve access to justice.¹¹¹ The use of ICT would help with a more efficient enforcement of judgments, which includes cross-border judgments.¹¹² This would help reduce uncertainty and build trust in the procedure that enables for getting more efficient redress.¹¹³ The results of the

¹⁰³ See Report by CBA TaskForce 'No Turning Back: CBA TaskForce Report on Justice Issues Arising from Covid-19,' (February 2021) available at https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf. Also see speech by Sir Vos G., 'Reliable data and technology – the direction of travel for Civil Justice,' (28 January 2021) available at <https://www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice/>. See also Susskind R., 'The Future of Courts,' *The Practice*, Volume 6, Issue 5 (July/August 2020) available at <https://thepractice.law.harvard.edu/article/the-future-of-courts/>

¹⁰⁴ See Schmitz A., *supra* n. 6, p. 2383. See the turbocourt platform (available at <http://info.turbocourt.com/>) for example which provides access to the preparation and the filing of court document online in the US.

¹⁰⁵ *Ibid*, p. 2384.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*, p. 2390.

¹⁰⁹ See the platform on the official website available at <https://cii2.courtinnovations.com/NYNYSC>

¹¹⁰ See Greiling D., 'New York launches ODR for Small Claims in Manhattan (January 29, 2021), available at <https://getmatterhorn.com/new-york-launches-odr-for-small-claims-in-manhattan/>

¹¹¹ Velicogna M. and Ontanu E.A., 'Improving Access to Courts and Access to Justice in Cross-Border Litigation: Lessons from EU Experiences,' *Ciências e Políticas Públicas (Public Sciences & Policies Journal)*, V(1), 67–93, pp. 86-87.

¹¹² *Ibid*, p. 87.

¹¹³ *Ibid*.

survey sit well with the reasoning of the CJEU in *Pönkä v Estonia* 114 where it was suggested that small claims should benefit from a simplified civil procedure.¹¹⁵ As the impact of technology on consumer redress and enforcement is inevitable, using technology as a means of communication for the enforcement of cross-border small claims judgments seems to be key here.¹¹⁶ Therefore, the digitalisation of the ESCP, especially in the context for cross-border EU disputes, would definitely be an interesting development.

4.4. The Impact of Digitalisation on the Recognition and Enforcement of Cross Border ESCP Judgements in the EU

The question that ensues in this article is whether an EU online-based small claims procedure would be a more efficient alternative to the use of ODR. This question namely arises in the comparison between the cross-border enforcement in the EU of online-based ESCP judgments and ODR outcomes. The Regulation establishing the ESCP¹¹⁷ already makes the enforcement of ESCP cross-border judgments much easier in comparison to the cross-border enforcement of ODR outcomes. Article 20 of the Regulation states that an ESCP judgment should be automatically recognised and enforced in all member states without the need to issue a declaration of enforceability. This means that the consumer would not have to file a claim in court to have the judgement recognised cross-border in the EU.

Now that EU member states started adopting an online-based procedure, and taking into account the EU Commission's digitisation of the judiciary agenda, the cross-border enforcement of ESCP judgments could become simpler, in theory at least. Following from this, it can be said that a digital form of the ESCP would seem to provide more efficient access to justice for the consumer, as the entire procedure would take place online, including the recognition and enforcement of the cross-border judgment which could be enforced electronically. In addition, it has been argued that public redress is a better option when it comes to consumers for access to remedies for the consumer, than private ODR.¹¹⁸

The adoption of the EU ESCP as an alternative to the use of ODR does however have its limitations though. The ESCP procedure has had a low number of claims since its inception.¹¹⁹ The procedure is not free unlike the

¹¹⁴ App no 64160/11 (ECtHR, 8 November 2016).

¹¹⁵ Daniels C., *supra* n. 17, pp. 263-264.

¹¹⁶ See Micklitz H.W. and Saumier G., *supra* n. 7, p. 36.

¹¹⁷ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

¹¹⁸ Storskrubb E., *supra* n. 9, pp. 13 and 30. Also see, Eidenmuller H. and Engel M., *supra* n. 28, pp. 294-296.

¹¹⁹ Hodges C. and Voet S., *supra* n. 55, p. 359. Also see, Micklitz H.W. and Saumier G., *supra* n. 7, p. 23.

EU ODR procedure. The ESCP therefore leads the consumer to incur extra costs for the proceedings.¹²⁰ The procedure can also be slow and complex which can be aggravated depending on which member state the proceedings are taking place in.¹²¹ There is the burden of translation that falls on the consumer as the Regulation on ESCP does not provide that the proceedings need to be translated when dealing with cross-border disputes.¹²² Also, claims of up to only 5,000 Euros in value can be submitted under the ESCP.

Moreover, the consumer runs an economic risk if he loses the case as the judgment can be enforced against the consumer under the ESCP.¹²³ The consumer does not benefit from the same protections that he would from the EU ODR procedures as the ESCP was established to mainly deal with small B2B claims.¹²⁴ The lack of these protections and the economic risks involved deter the consumer to file for low value claims in court.¹²⁵ So far, there have been no investment or funding initiatives on improving the ESCP by member states¹²⁶, although after the statement made by the European Commission in its Communication, there might be funding for carrying this out. The Communication by the Commission stated that funding for the digitalisation of judicial procedures by member states could be available under the European Regional Development Fund and the European Social Fund Plus.¹²⁷

Even if an online-based ESCP is adopted at EU level to render the cross-border enforcement of judgments as more attractive than the cross-border enforcement of ODR outcomes, these aforementioned issues would still subsist. Also, other challenges could arise that need to be carefully dealt with such as difficulties of the harmonisation of standards on this across the EU, and other issues such as having access to ICT.

5. CONCLUSION

This article has examined whether there is a harmonised approach towards the judicial enforcement of cross-border consumer ODR outcomes in the EU legislation. The paper has shown that there is a clear gap in the EU legislation when it comes to this issue. First, the Directive on consumer ADR and the Regulation on consumer ODR contain no provisions on this matter. Second, although it is possible to have certain types of binding ODR outcomes such as a mediation agreement enforced under the Brussels I Regu-

¹²⁰ Micklitz H.W. and Saumier G., *supra* n. 7, p. 19. Also see, Eidenmuller H. and Engel M., *supra* n. 28, pp. 267-268.

¹²¹ Daniels C., *supra* n. 17, p. 258.

¹²² Luzak J., *supra* n. 39, p. 83.

¹²³ *Ibid*, pp. 85-86.

¹²⁴ Hodges C. and Voet S., *supra* n. 55, p. 360.

¹²⁵ Schmidt-Kessen M.J., Nogueira R. and Gamito M.C., *supra* n. 68, p. 663.

¹²⁶ Micklitz H.W. and Saumier G., *supra* n. 7, p. 35.

¹²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *supra* n. 101.

lation, this paper has discussed how this is only a partial harmonisation due to the absence of express reference to ADR and ODR in the Regulation, and the absence of an efficient remedy outlet for the consumer. Non-adjudicatory ODR outcomes for example are not judicially enforceable on their own without becoming an agreement. So if the trader does not engage with the procedure already because it lacks legal enforceability, it would be difficult to come to an agreement that could be enforceable under the Brussels I recast Regulation. Therefore, it can be safely said that the EU legislation does not currently provide a harmonised approach on the enforcement of cross-border consumer ODR outcomes.

The gap in the law can be explained through the importance of ensuring that the consumer has adequate access to justice. Ensuring access to justice in the EU sense means having access to public courts. Rendering the ODR outcome as binding could lead the consumer from being barred from having access to resolve his dispute before state courts. It can however be contended that, as long as the ODR outcome is only unilaterally enforceable against the trader and the legal framework gives the consumer the possibility to withdraw from the process at any time, having a harmonised rule for the judicial enforcement of ODR outcomes would not eliminate the consumer's right of filing his claim in national courts.¹²⁸ Of course, the problem with assessing whether the consumer knows what he is getting himself into despite choosing to go ahead with the enforcement of the ODR outcome.

It has been explored whether the Directive on Mediation and the ESCP can be applied and used to deal with the gap discussed in this paper. Concerning the Directive on Mediation, despite the clarification that it offers on the legal status of mediation agreements, it still has the limitation of having to apply the Brussels I recast Regulation in cases where the laws of all member States involved recognise consumer mediation agreements. As already mentioned in this paper, the application of the Brussels I recast Reregulation does not solve much in terms of giving the consumer an efficient access to a remedy. Concerning the ESCP, it was analysed in this paper that the best option to enable the consumer to have an efficient access to a remedy through an online medium is to have an online-based ESCP.¹²⁹

Virtual or tele-video hearings and electronic-based communications have become the norm for some EU member states after Covid-19. It has been discussed that this contributes to the simplification of the recognition and enforcement of cross-border ESCP court decisions in the EU, as the decision is given electronically and would be directly enforceable in the trader's jurisdiction. The impact of digitalisation on judicial cooperation in the EU could develop this even further. Despite these advantages and facilitations through the use of technology, the ESCP still has its drawbacks. The main limitation

¹²⁸ See Hanriot M., *supra* n. 35, p. 7. Also see, Storskrubb E., *supra* n. 9, pp. 10 and 29. Also see, Luzak J., *supra* n. 39, pp. 91 and 100-101.

¹²⁹ See Hodges C. and Voet S., *supra* n. 55, pp. 361-364.

perhaps is the cost that the consumer would incur which includes the eventual economic risks of losing the case. Access to justice remains essential and this has been restated by the EU Commission in its statement on the digitalisation of the judiciary, so it would be important to deal with these limitations.

In sum, this paper tried to bring an analytical contribution on how to render a more efficient enforcement of the results of online-based procedures in the context of consumer disputes within the EU. The paper has shown the need for having effective harmonisation of the issue in the EU legal framework so that the ODR procedure would be able to achieve the objectives it was set up to fulfil to provide efficient access to a remedy for the consumer online.¹³⁰ The paper has also demonstrated the importance of having a digital form of the ESCP, which can be used as an alternative to ODR with regards to cross-border disputes. Since both the ODR procedure and the ESCP deal with small claims, it might be a solution to combine both procedures in one, and carry out necessary reforms to deal with the current limitations of the ESCP. This could be a potential solution to deal with the current limitations affecting the consumer's access to a remedy in cross-border cases. A digital ESCP could be a more simple alternative to ODR in the EU, especially if there is direct judicial cooperation that operates on the same electronic medium of communication. The question that ensues is however whether such changes would form part of the digitalisation agenda.

¹³⁰ See Cortes P. and Lodder A.R., *supra* n. 60, p. 34 on the need an efficient small claims system in the EU.

QUO VADIS CONSUMER DISPUTE RESOLUTION? UK & EU CROSS BORDER CONSUMER DISPUTE RESOLUTION IN THE POST BREXIT LANDSCAPE

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ABSTRACT: The United Kingdom's exit from the European Union challenges the existing framework for cross border consumer dispute resolution and exacerbates the negative effect of the EU's harmonisation approach in this area. This paper will analyse and evaluate key challenges to UK and EU consumer cross border dispute resolution. The paper will consider procedural impediments to UK consumers enforcing consumer rights against EU/EEA traders as well as to EU consumers bringing claims against UK traders. Specifically, the paper will consider the jurisdictional impact of UK's status and its effect upon the reciprocal enforcement of consumer court judgments/ADR decisions between the EU and UK. Finally, the paper suggests that a Lugano+ approach would help to mitigate the impact of the impediments to effective consumer dispute resolution between EU and UK entities. In doing so, it first takes a preliminary look at the existing paradigm of cross border cooperation in consumer dispute resolution. The chapter also includes some thoughts on the normative clashes facing the creation of a new relationship in this area.

KEYWORDS: cross border; consumers; dispute resolution; Brexit.

SUMMARY: INTRODUCTION.—1. THE PRE-BREXIT EU LANDSCAPE IN CONSUMER DISPUTE RESOLUTION: 1.1. Private law judicial elements in the 'EU enforcement toolbox'; 1.2. The extrajudicial elements in the 'EU enforcement toolbox'; 1.2.1 ADR Directive. 1.2.2. ODR. 1.2.3. BREXIT. 1.3. Impact on legislative measures. 1.4. Impact on extra judicial measures— 2. WHAT DOES THIS MEAN FOR CONSUMERS?: 2.1. Judicial Tools. 2.1.1. The EU consumer 2.1.2. The UK consumer, 2.1.3 . Recognition & Enforcement 2.1.4. The UK consumer. 2.1.5. A trader's perspective. 2.2. Extrajudicial tools. 2.2.1 ADR Directive. 2.2.2. ODR.— 3. POTENTIAL OPTION FOR THE FUTURE: 3.1. Swiss Model. 3.1.2. The Lugano Convention.— CONCLUDING REMARKS

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INTRODUCTION

The United Kingdom's decision to leave the European Union has unmasked legal and practical conundrums inherent in the unravelling of a closely bound legal relationship. The UK's ambition to create a 'new, deep and special partnership with the European Union' will need to cohabit with the underpinning norms of the European Union and its legal instruments. This will involve addressing a series of challenges; challenges which will influence the facilitation of cross border consumer dispute resolution for UK and EU consumers. This paper contends that a Lugano plus (Lugano+) model would help to mitigate the impact of the impediments to effective consumer dispute resolution for EU and UK consumers post Brexit. The paper first takes a preliminary look at the pre-Brexit paradigm of cross border cooperation in consumer dispute resolution. It then analyses the implications of the UK and EU's post Brexit approach to cooperation in civil and commercial matters for consumers. The paper ends with consideration of the Lugano+ approach as a model for a new relationship in this area.

1. THE PRE-BREXIT EU LANDSCAPE IN CONSUMER DISPUTE RESOLUTION

The EU's current framework for consumer protection has its provenance in its treaty instruments² and the Charter of Fundamental Rights of the European Union ('CFR'). Indeed Articles 114(3) and 169 TFEU and Article 38 CFR all refer to the EU's purpose in this area as ensuring a 'high level' of protection. It is within this framework that *judicial* and *extrajudicial* mechanisms to facilitate the private enforcement of consumer rights were created. These mechanisms seek to reassure the EU consumer by the provision of protections and entitlements that are substantively similar across Member States. The operation of these mechanisms is strengthened by the EU's legislative measures on judicial cooperation particularly, Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Ibis')³. Together, they constitute the core of the private law measures in the 'EU enforcement toolbox' for consumer law. Unfortunately, the judicial and extra judicial tools largely operate in parallel, supplementing each other rather than forming part of a coherent, interconnected system specifically designed for consumer dispute resolution.⁴

² See for example, The Treaty of the Functioning of the European Union, OJ C 326, 26.10.2012.

³ (2012) OJ L 351. The EU Mediation Directive (Directive 2008/52/EC) is also of relevance as it contains enforcement provisions for cross-border civil and commercial disputes involving parties from EU member states.

⁴ See Cortés P., 'The Need for Synergies in Judicial Cooperation and Dispute Resolution' in Burkhard Hess, Xandra E. Kramer (Ed.) *From common rules to best practices in European Civil Procedure, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law*, (2017) vol. 8, pg. 393.

Consequently, this structural approach compartmentalizes the enforcement of consumer law,⁵ thus effective and efficient enforcement of consumer rights is largely contingent upon the peculiarities of the consumer's chosen judicial /extra-judicial procedure.

1.1. Private law judicial elements in the 'EU enforcement toolbox'

Key private judicial measures within the toolbox are the European Order for Payment (EOP) procedure⁶ and the European Small Claims Procedure (ESCP)⁷. Whilst not specifically designed for consumer dispute resolution, both optional instruments are geared towards consumers. The objective of the procedures is to achieve equality of treatment for its users.⁸ The intentions of the measures are to 'simplify, speed up, and reduce the costs of litigation concerning claims in cross-border cases'⁹ as well as to secure easier circulation of judicial decisions between Member States via the removal of enforceability proceedings.¹⁰ Operationally, these procedures supplement national court procedures in Member States rather than replacing them.¹¹

The EOP procedure seeks to reduce the cost of cross-border enforcement where an uncontested debt is owed by a party in one Member State to a party in another Member State. The ESCP is designed to provide a standardized procedure for cross-border civil and commercial claims up to EUR5,000.¹² The ESCP supplements the operation of Art.17 Brussels 1bis, providing an avenue for claims by consumers who are not able to satisfy the 'purposes' requirement in s.1 of that Article. The abolition of the exequatur is one of the most important features of the EOP and ESCP procedures. In consumer claims, the likely cost of enforcing a cross-border judicial decision may exceed the value of the claim, especially where the claim sums are of low value. As a result of such enforcement costs, consumers may be deterred from pursuing the enforcement of their rights at the outset. As such, the EOP and ESCP procedures mitigate the impact of this deterrent and make it wor-

⁵ See also Onanu E., 'Court and Out-of-Court Procedures: In Search of a Comprehensive Framework for Consumers' Access to Justice in Cross-Border Litigation' in Cadiet L., Hess B., Requejo Isidro M., (eds.) *Privatizing Dispute Resolution: Trends and Limits* (Nomos 2019). Onanu argues that a danger of fragmentation is created (pg. 51).

⁶ Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006.

⁷ Regulation 861/2007/EC of the European Parliament and of the Council. The UK decided to opt out of one additional measure – the European Account Preservation Order Procedure. Accordingly, UK courts do not issue EAPOs, and UK bank accounts held are not subject to these orders.

⁸ Storskrubb E, *Civil Procedure and EU Law: a Policy Area Uncovered* (Oxford University Press 2008) pgs. 229-230.

⁹ Recital 9 of the EOP and recital 8 of the ESCP.

¹⁰ Recital 9 and Art 1(1)(b) of EOP and recital 30 of the ESCP.

¹¹ See recital 10 of the EOP and recital 8 of the ESCP.

¹² Art. 2(1).

thwhile for parties to pursue claims (particularly those for money) which they might otherwise have abandoned.

However, the procedures are not perfect, and their aims are undermined by their structural design and the degree of their reliance/ dependence upon national procedural rules. Indeed, the functionality, success and consumer experiences of these procedures are dependent upon the national procedural rules in each Member State. For example, both procedures leave costs and service of documents at the discretion of national courts.¹³ Further, in some Member States, consumers will have to navigate internal national procedural rules to determine which specific courts have competence to hear their claims under these procedures.¹⁴

1.2. The extrajudicial elements in the 'EU enforcement toolbox'

The EU's extrajudicial mechanisms complement the judicial instruments. When compared to judicial measures, ADR processes for consumers pursuing small value claims can be at times 'the only proportionate option'.¹⁵ ADR options, when available, offer a higher degree of satisfaction for users with consumers tending to be 'more satisfied with out-of- court dispute resolution (54.1%)' compared to courts' handling of claims (45.7%).¹⁶ Accordingly, ADR options sit at the top of the hierarchy of options for consumers to resolve their disputes. The ADR Directive¹⁷ and ODR Regulation¹⁸, which pursue a horizontal legislative framework for consumer ADR and ODR, are key extrajudicial components of the EU's toolbox.

1.2.1 ADR Directive

Under the ADR Directive, EU Member States are required to enable access to ADR for consumers. Member States have to ensure that consumers are directed to quality-certified ADR entities to resolve domestic and cross-border Business to Consumer (B2C) disputes with a trader established within the EU.¹⁹ Through a minimum harmonization approach, the Directive imposes

¹³ See for example Art. 13 EOP and Art. 13 (1)(b) ESCP on service.

¹⁴ Hess B et al (ed.), *Mutual Trust and Free Circulation of Judgments Study (2017)* available at: <https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75e-d71a1/language-en>, pg.340 -347.

¹⁵ Cortés P and Mañko R, 'Developments in European Civil Procedures' in Cortés P (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 56-57.

¹⁶ European Commission, *Consumer Conditions Scoreboard. Consumers at Home in the Single Market (2019)* < https://ec.europa.eu/info/files/consumer-conditions-scoreboard-2019-edition_en > pg. 10.

¹⁷ Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

¹⁸ Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes.

¹⁹ Certification is not compulsory for all ADR entities under the Directive. Further, the Directive's provisions are not designed to apply to complaints submitted by traders against consumers or to dis-

binding quality requirements for ADR entities and the ADR procedures offered by these entities.²⁰ Compliance with the quality requirements is ensured through certification and monitoring executed by competent national authorities in each Member State. The Directive also imposes information obligations on traders to let consumers know the ADR provider(s) with competence to resolve a dispute.²¹

In line with its minimal harmonization approach, the Directive does not regulate whether participation in the procedure is voluntary or mandatory²² nor does not prescribe the types of ADR procedures Member States should have. Most importantly however, the Directive does not prescribe whether a procedure's outcome should be binding²³ or stipulate how an ADR procedure's outcomes are to be enforced. As the Directive sets the floor for quality requirements, Member States have the freedom to establish or maintain quality requirements that go beyond those laid down in the Directive.²⁴

The minimum harmonization approach has led to doubts about the Directive's ability to facilitate and promote high quality ADR across the EU.²⁵ In practice, Member States have capitalized upon the flexibility built into the Directive, tailoring their ADR architectures and oversight processes to reflect their individual legal traditions²⁶ or their respective national policies. Across the EU, Member States either opted for an open system whereby dispute resolution bodies are certified if they comply with stipulated quality requirements or a closed system where an exhaustive list of ADR entities is provided in the implementing legislation. Where the open models exist, divergences in certification approaches occur. Member States have either adopted a sectoral model where different authorities operate according to the sector (e.g. UK), or a generalist model where a singular authority is responsible for certifying ADR entities across all sectors (e.g. France). Further layers of diversity and

putes between traders (recital 16). However, the Directive's provisions do not preclude Member States from adopting provisions on procedures for the out-of-court resolution of such disputes.

²⁰ See Chapter II of the Directive with specific provisions on accessibility, expertise, independence, impartiality, transparency, effectiveness, fairness, liberty and legality.

²¹ Art. 13.

²² Recital 49.

²³ *Ibid.*

²⁴ Article 2(3) of the ADR Directive. See recital 15 of the Directive where this approach is premised on the need to respect Member State legal traditions.

²⁵ Kirkham, R. 'Regulating ADR—lessons from the UK' in Cortés P. (Ed.), *The New Regulatory Framework For Consumer Dispute Resolution* (Oxford: Oxford University Press 2016) pp. 297–324. See also, Cortés, P. (2015) The impact of EU law in the ADR landscape in Italy, Spain and the UK: Time for change or missed opportunity? ERA Forum, 16, 125–147 and Loos, M. 'Enforcing consumer rights through ADR at the detriment of consumer law' (2016) (1) *European Review of Private Law*, pg. 61.

²⁶ See European Commission, Report From The Commission To The European Parliament, The Council And The European Economic And Social Committee On The Application Of Directive 2013/11/EU Of The European Parliament And Of The Council On Alternative Dispute Resolution For Consumer Disputes And Regulation (EU) No 524/2013 Of The European Parliament And Of The Council On Online Dispute Resolution For Consumer Disputes Com (2019) 425 Final and Biard, A., 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2019) 142 *Journal of Consumer Policy* 109.

complexity are prevalent in some Member States where ADR providers are granted permission to operate in confined parts of sectors,²⁷ and non-certified private ADR entities (who fulfill national quality requirements but did not seek certification) can offer ADR services alongside certified ones.

The ADR Directive was transposed into the UK via two statutory instruments: the Alternative Dispute Resolution for Consumer Dispute (Competent Authorities and Information) Regulations 2015 and the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (both instruments are herein referred to as 'ADR Regulations 2015'). Overall, the ADR landscape in the UK is characterized by a fragmented mixture of schemes across regulated and unregulated sectors.²⁸ This fragmentation is caused in a large part by a drive for competition between schemes,²⁹ an absence of a requirement for all ADR schemes to become certified and the absence of a requirement for businesses to participate in an ADR scheme in all sectors. Whilst it is common for businesses to be required to participate in ADR schemes in regulated sectors³⁰, businesses retain a large degree of discretion in the unregulated sectors. Additionally, the UK has adopted a largely sectoral approach to ADR certification and monitoring with several independent authorities operating in sectors. The Government took the view that "unpicking existing statutory relationships between regulators and ADR schemes would not be helpful and requiring ADR bodies to provide similar information to a regulator and a separate ADR Competent Authority would be duplicative and an unnecessary and costly burden"³¹

Overall, the ADR Directive has had some impact within Member States. In each Member States, ADR schemes are now available. However, in the light of the ADR Directive and the consequential growth of ADR schemes (with varying architectures) across the Union, consumers in cross border consumer disputes face a sectoral lottery as to ADR quality and are therefore subjected to a haphazard experience in resolving their disputes. It is not surprising that consumers are therefore confused³² as to the ADR schemes to be used for the

²⁷ For example, the AMF Ombudsman in France who can act in some financial services matters and not others. The AMF ombudsman can deal with disputes relating to investment services providers, but not in the areas of life insurance, taxation or bank transactions. See also Baird (n26), pg. 121 for further discussion.

²⁸ See also, Cortés, P., 'Consumer ADR in Spain and the United Kingdom' (2018) 2 EuCML, 82. Cortés describes the UK system as 'patchy'.

²⁹ On the desire for competition, see for example, CTSI chief executive letter to BIS (8 July 2016). Chartered Trading Standards Institute: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/559877/alternative-dispute-resolution-annual-CTSI-letter-fees.pdf

³⁰ See for example, the Financial Ombudsman Service for the financial sector.

³¹ BIS, Government response to the consultation on implementing dispute resolution directive and the online dispute resolution regulation. November 2014. Department for Business Innovation and Skills: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf

³² See UFC Que Choisir (2016) Généralisation de la médiation de la consommation. L'heure doit être à la bonne information: www.quechoisir.org/action-ufc-que-choisir-generalisation-de-la-mediation-de-la-consommation-l-heure-doit-etre-a-la-bonne-information-n13131/ and Biard, A (n 26), pg. 120.

resolution of their disputes. As such, it is arguable that the ADR Directive has underachieved in its goal to reduce 'barrier(s) to the internal market'³³ and increase consumer confidence.

1.2.2. ODR

The ODR Regulation created an online dispute resolution (ODR) platform which is operated and maintained by the EU Commission. The online platform facilitates the resolution of a dispute through the coordination claims. In this light, the ODR complements the ADR Directive, supporting the uptake of ADR processes for the resolution of disputes. The platform hosts the complaint form, informs the respondent party about the complaint, identifies national ADR bodies who will consider the dispute (if the trader agrees to its use) and supports electronic case management.

1.2.3. BREXIT

The state of play of European legislation within the UK at the end of the transition period is determined by the EU (Withdrawal) Act 2018 ('EUWA'), the EU (Withdrawal Agreement) Act 2020 ('WAA'), and Brexit related statutory instruments. The Withdrawal Acts give effect to the Withdrawal Agreement between the UK and EU. Substantively, EUWA repeals the European Communities Act 1972 (ECA 1972). However, EUWA simultaneously introduced savings provisions which preserve the legislative status quo during the transition period. At the end of the transition period, EUWA also creates a new category of UK law: EU retained law³⁴, a domestic form of law which is based on applicable EU law up to the end of the transition period. This species of law will be subject to statutory instruments, the majority of which came into force at the end of the transition period as well.

1.3. Impact on legislative measures

As the transition period has now expired, claimants in the UK are unable to avail themselves of the EOP and ESCP procedures against defendants in EU Member States.³⁵ Reciprocal enforcement of EU court decisions made under the EOP and ESCP Regulations are also no longer possible. The practi-

³³ Recital 6.

³⁴ Excluding the Charter of Fundamental Rights (see s5(4) EU (Withdrawal) Act 2018).

³⁵ The converse will also apply i.e. the use of these procedures by EU claimants against UK defendants will no longer be possible. The EOP and ESCP Regulations are revoked by the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (2018/1311) which prevents those Regulations from becoming part of retained EU law.

cal consequence of the removal of these procedures is a reduction in judicial options for UK and EU consumers to enforce their rights before national courts. In particular, should consumers wish to pursue a judicial measure to resolve their dispute, they will have no choice but to utilise regular civil court procedures in their respective State.

In addition to the removal of the EOP and ESCP, significant changes to the field of judicial cooperation in civil and commercial matters have transpired. Save for matters commenced prior to the end of the transition period³⁶, the Brussels Ibis regime no longer governs judicial cooperation in civil and commercial matters between the UK and EU. Within the UK, the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 ('CJJ')³⁷, modifies the existing framework. This SI revokes the application of Brussels Ibis and terminates the effect of the Lugano Convention 2007³⁸. Consequently, statute and the law of each UK jurisdiction will determine the rules governing jurisdiction, recognition and enforcement of judgments in cross-border disputes.³⁹ Within England and Wales, the provisions of the Civil Jurisdiction and Judgments Act 1982, the common law and Part 6 of the Civil Procedure Rules 1998⁴⁰ are key. However, the UK government has introduced exceptions to the revocation and, in relation to jurisdiction in consumer matters, have taken the approach of adopting and restating consumer specific Brussels Ibis rules into national law. Accordingly, pursuant to s. 26 CJJ, the Brussels regime rules on jurisdiction in consumer matters is *retained* and sections 15A, 15B, 15D and 15E is inserted into the Civil Jurisdiction and Judgments Act 1982⁴¹. These provisions largely mirror Sections 4 of Brussels Ibis.

Unlike the approach taken to the EOP and ESCP, the CJJ inserts provision to preserve the utility of EU law on jurisdiction in consumer matters after the transition period. S.15E(2) empowers English courts to have regard to, but not obliged to follow, "any relevant principles laid down before exit day by the European Court in connection with Title II of the 1968 Convention or Chapter 2 of the [Brussels Ibis] Regulation and to any relevant decision of

³⁶ Art. 67(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

³⁷ The Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 will also amend the CJJ in order to better align the savings provisions with Title VI of the Withdrawal Agreement.

³⁸ This approach is taken as the regime operates on a reciprocal basis and this reciprocity is lost due to Brexit. See paras. 2.3-2.5 of the CJJ's Explanatory Memorandum.

³⁹ There is an argument that pre-EEC judgment recognition conventions and treaties (not discussed in this paper) will resurrect. See for example, Dicey, Morris & Collins on The Conflict of Laws (Sweet & Maxwell, 15th ed, 2012), 5th Supplement. Potential revived instruments include: The Convention Between The United Kingdom Of Great Britain And Northern Ireland And The Kingdom Of The Netherlands Providing For The Reciprocal Recognition And Enforcement Of Judgments In Civil Matters 1967.

⁴⁰ See also Practice Direction 6B.

⁴¹ S.42 of CJJ inserts S42A into the Civil Jurisdiction and Judgments Act 1982. This provision incorporates the definition of domicile of a corporation or association as used in EU law for the purposes of s15.

that court before exit day as to the meaning or effect of any provision of that Title or Chapter...”⁴²

1.4. Impact on extra judicial measures

The approach to extrajudicial measures has been less drastic compared to the approach taken to judicial measures⁴³ and has largely involved removing references to EU legislation from EU-derived consumer protection legislation and the insertion of amendments to confirm equality of treatment for consumers from both EU countries and non-EU countries.⁴⁴ In respect of ADR regimes, ADR providers in the UK are no longer *required* to act in cross-border disputes and the ODR platform will no longer be available in the UK.⁴⁵ With regards to mediation specifically, the provisions of the Civil Procedure Rules to aid in the enforcement of cross-border mediation settlements have been revoked.⁴⁶

2. WHAT DOES THIS MEAN FOR CONSUMERS?

Given the impacts mentioned above, consumer choice of options to resolve cross border disputes is diminished. More importantly, the hierarchy between judicial and extrajudicial measures to resolve cross border UK/EU consumer disputes is now reversed. In particular, the option that grants consumers greater confidence and reassurance is likely to be the resolution of disputes via national court procedures rather than through ADR processes. This will worsen the enforcement gap for consumers, particularly as only 32.7 % of consumers think it is easy to settle disputes with retailers and service providers through the courts.⁴⁷

At present, the EU-UK Trade and Cooperation Agreement (“TCA”) currently governs the post Brexit relationship between the EU and UK in specific areas.⁴⁸ Unfortunately, the TCA is largely silent on a post transition agreement on judicial and extrajudicial mechanisms to facilitate the private enforcement of consumer rights. In specific sectors⁴⁹, it adopts a vague approach to measures

⁴² See s.15E 2(a).

⁴³ See the Consumer Protection (Amendment etc.) (EU Exit) Regulations (SI 2018/1326).

⁴⁴ See The Consumer Rights Act 2015 and the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations.

⁴⁵ Fn.43. Additionally, UK traders will no longer be able to offer consumers EU alternatives to UK-based ADR regimes.

⁴⁶ The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 and will repeal Part 78 of the CPR

⁴⁷ Consumer Scorecard, (n.16) pg. 28. This can be compared to 43% of consumers who think it is easy to settle disputes through an out-of-court body.

⁴⁸ The TCA was signed on 30 December 2020 and took provisional effect on 1 January 2021. It entered into force on 1 May 2021.

⁴⁹ E.g. e-commerce, air transport, energy.

to protect consumers, directing the ‘what’, but not the ‘how’ for enforcement of consumer protection.⁵⁰ Additionally, it does not address judicial cooperation in civil and commercial matters.

2.1. Judicial Tools

2.1.1. *The EU consumer*

For EU consumers, the continued operation of some provisions of Brussels Ibis between EU and UK parties remains a useful tool. The provisions in Section 4 are of note. These provisions are protective and are premised on the consumer being in a weaker position⁵¹ compared to other party to the contract. If the consumer successfully fulfils the gatekeeper provisions of Art.17, Art 18 gives the consumer a choice of bases to commence a claim—either the other party’s domicile (where that party is domiciled in a Member State) or, regardless of the domicile of the other party, in the consumer’s domicile.⁵² Where the consumer is the defendant in proceedings, the consumer can only be pursued in their domicile.⁵³ Art 18(1) is particularly beneficial to the EU consumer as it enables the consumer to commence a claim in its own domicile against a trader not domiciled in an EU Member State. In the post transition paradigm, this provision allows the EU consumer to maximise the procedural and jurisdictional advantages of its domicile against a UK trader, particularly one who does not have an established presence in the EU.

The inapplicability of the ESCP for EU-UK claims after the end of the transition period has removed the extra layer of protection that it afforded. EU consumers now face a limit on the options available to enforce their rights against UK domiciled defendants. Arguably, this leaves the EU consumer at a disadvantage compared to their UK counterparts. However, it is recognised that in practice, the ESCP and EOP procedures are underused by the EU consumer⁵⁴ and so the impact of the unavailability of the procedures in EU-UK disputes may not be as extreme as it appears.

⁵⁰ See for example, Article DIGIT.13 which seeks to afford protection of consumers engaged in online transactions between the EU and UK. The Article mandates the parties to “adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including but not limited to measures that[...] grant consumers access to redress for breaches of their rights, including a right to remedies if goods or services are paid for and are not delivered or provided as agreed.”

⁵¹ See recitals (14), (18) and (19) of Brussels Ibis.

⁵² An EU consumer is also free to utilise the residual or traditional jurisdictional rules in their domicile. (See Art. 6).

⁵³ Art 18(2). The rules in Art.18 are subject to the operation of Art.26.

⁵⁴ European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC) No. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (Commission ESCP Report), COM(2013) 795 final, Brussels, 19 November 2013; European Commission, Report from the Commission to the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation (EC)

2.1.2. *The UK consumer*

Through the adoption and retention of the Brussels Ibis rules on consumer jurisdiction, the UK legislator has embarked upon a version of its ‘copy out’ exercise commonly used for the transplantation of EU Directives into national law. The ‘copy out’ exercise raises the danger of an incoherence between existing national law and newly implemented law⁵⁵ and has undermined the timely creation of a coherent system of consumer law within the UK in the past.⁵⁶ The concern is whether the domestic law provisions adopting and retaining the pre-Brexit interpretation of Art.17-19 Brussels Ibis will adequately align to existing national consumer law. It is argued that the interpretation of ‘consumer’ retained for the functions of s15 of Civil Jurisdiction and Judgments Act 1982 does not adequately align with the existing interpretation of consumer under key domestic law provisions such as s.2(3) of the Consumer Rights Act (‘CRA’).⁵⁷ A key concern arises from the thresholds for a ‘consumer’ in mixed purposes contexts. Whereas the CRA incorporates a wider “wholly or mainly” threshold in its definition of ‘consumer’, EU law contains a narrower construction for the purposes of the operation of Art. 17, preferring instead to focus on whether the trade or professional element was ‘marginal to the point of having a negligible role’.⁵⁸ Accordingly, wholesale adoption of the Art. 17 definition into UK domestic law effectively creates two different interpretations (and tiers) of ‘consumer’, fragmenting the alignment between standards and enforcement in national consumer law. The utilisation of this threshold for the purposes of s15 of Civil Jurisdiction and Judgments Act 1982 severely limits the range of UK consumers who can benefit

No. 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure (Commission EOP Report), COM(2015) 495 final, Brussels, 13 October 2015. See also Onjanu E, *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures* (Intersentia 2017); Hess B et al (ed.), *Mutual Trust and Free Circulation of Judgments Study* (2017) available at: <https://publications.europa.eu/en/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en> , pg.340 -347. Eurobarometer 395 showed that 86% of citizens had never heard of the ESCP.

⁵⁵ See discussion in Van Hoecke M, *et al*, ‘Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law’ (1998) 47 *International and Comparative Law Quarterly* 495, 533. See also Giliker, P., ‘The transposition of the Consumer Rights Directive into UK law: Implementing a maximum harmonisation directive.’ (2015) 23(1) *European Review of Private Law* 5.

⁵⁶ See Giliker, *ibid* and her discussion of the transposition of the Consumer Rights Directive.

⁵⁷ Section 2(3) CRA defines ‘consumer’ as: ‘an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession’. An individual is a ‘natural person’ (See CRA Explanatory Notes, para. 36). A consumer under Art.17 of Brussels Ibis is regarded to be a person who concludes a contract for a purpose outside and independently of his present or future trade/profession. See also *Benincasa* Case C-269/95, [1997] ECR I-3767, *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659, citing *Benincasa*.

⁵⁸ *Bay Wa AG v. Gruber* C-464/01, [2005] ECR I-439. Given that the ECJ in *Schrems* applied the ‘predominant test’ at the enforcement stage of the contract, EU law is one step away from inserting this test at the earlier ‘creation’ stage when the contract is actually agreed. *Schrems* can be distinguished in that the case concerned the evolution of the weaker party’s position where they slowly take on professional services but was originally a consumer.

from its provisions. A realignment of the meanings of the term will need to be executed. The domestic courts can utilise the interpretive freedom available to them under s.15E (2) and expand the adopted meaning of 'consumer' to achieve a better alignment. This can only benefit UK consumers and offers them more space for enforcement before national courts compared to consumers based in EU Member States. With regards to defendants, the reference to 'other party'⁵⁹ as used by Brussels Ibis is unlikely to pose similar problems to 'consumer' as this term adequately covers 'trader' as used in s.2(2) of the CRA.

In addition to the above, for a consumer to benefit from the provision of s15, the contract itself must still fall within the purposive definition of a 'consumer contract' as elucidated under s15E(1). This provision incorporates the EU approach in Art 17 (1)(a) - (c) and Art. 17(3) and reaffirms the position that not every contract entered into by a consumer will be a 'consumer contract'. From a UK consumer perspective, the adoption of the law behind Art. 17(1) (c) does have a benefit. Given its wide material scope⁶⁰ and its low threshold to establish 'activities pursued' and 'activities directed'⁶¹, UK consumers will benefit from the ease in which a consumer contract with an EU retailer can crystallise to enable them to seize the advantage of their domestic jurisdiction to resolve a claim.

An additional benefit to the UK consumer is given by s.15B 5(c) which preserves the operation of any other rule of law which permits a person not domiciled in the UK to be sued in the courts of a part of the United Kingdom. This is particularly useful to the consumer given the operation of the common law rules on submission to the jurisdiction of the English courts. Additionally, the classic requirement for claimants to seek permission to serve out of jurisdiction (where the defendant is outside the UK) is dispensed with where the court has jurisdiction under the new s15 rules for consumers.⁶² This dispensation of permission bolsters the value of S. 15B and complements the safety net provided by s.15B 5(c) for the English consumer.

⁵⁹ s2(2) CRA defines 'trader' as: a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf. Reference to "Other Party" in the Brussels Ibis refers to a party engaged in commercial or professional activities (See See C-508/12 *Vapernik v Thurner* [2014] 1 WLR 2486)

⁶⁰ C-180/06 *Ilsinger v. Schlank & Schick GmbH (in liq)* [2009] ECR I-3571, [50].

⁶¹ Subject of course to the need for the retailer to exhibit 'positive conduct' preceding the consumer's involvement. (See: joined cases of *Pammer v. Reederei Karl Schlatter & Co KG* and *Hotel Alpetihof GmbH v. Heller* [2010] ECR I-12527) The test to determine whether a trader has directed activities seems to be an objective one and each case will be decided on its facts - See *Pammer*) See also the factors listed in The Joint Statement by the Council and Commission on Arts 15 and 73 of the Brussels I Regulation.

⁶² CPR r. 6.33(2). See also: Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521).

2.1.3 .Recognition & Enforcement

The inapplicability of Brussels I bis regime to EU-UK cross border dispute resolution has its greatest impact on UK and EU consumers in the cross-border enforcement of decisions.

2.1.4. *The UK consumer*

It is noteworthy that the logic of the UK approach to jurisdiction lies in the belief that the adopted provisions provide “ a right to sue the other party in such a dispute in parts of the UK with relevant connections – all of which largely obviates the need for the consumer, ...to sue abroad in such cases (with the attendant expense and difficulty for this category of economically weaker parties which having to sue outside their own forum brings).”⁶³ This seems to demonstrate that the greater focus of protection lay in the issue of jurisdiction rather than in enforcement.⁶⁴ The deficiency in the UK government’s thinking is the belief that the approach to jurisdiction “*obviates* [emphasis added] the need for the consumer ... to sue abroad”. The UK government seems to have overlooked that in consumer claims, where the sums involved can be minimal, the enforcement costs of cross-border judicial decision may exceed the value of the claim, thus deterring consumers from pursuing the enforcement of their rights at the outset. The value of the ability to sue an EU retailer in the UK is only maximised or enhanced if the consumer has confidence that any successful domestic judgement will be easily recognised and/ or enforced in the domicile of the retailer in an EU Member State.

As a matter of principle, judgments obtained at the end of the transition period will not be automatically recognised and enforced in the respective national jurisdictions of the parties but will be subject to national rules on recognition and enforcement.⁶⁵ From a UK claimant perspective, reversion to individual national rules raises practical concerns. These include coping with variations of public policy in different EU Member States with regards to enforcement of foreign (here UK) judgments and the unenforceability of costs awards in some EU states. The latter is particularly problematic as, depending on the Member State concerned, these types of judgments will not be recognised in their jurisdictions.⁶⁶ This extra layer of difficulty complements the existing challenge to judgement creditors to navigate divergences across Member States as to the competent authority responsible for enforcement.⁶⁷

⁶³ Paragraph 2.6 and 7.19 of the CJJ’s Explanatory Memorandum.

⁶⁴ See comment on jurisdiction above.

⁶⁵ It is recognised that the revocation of Brussels Ibis, the reanimation of bilateral treaties on recognition and enforcement of decisions between some EU Member States and UK is theoretically possible. These include Austria, Belgium, France, Germany, Italy.

⁶⁶ These would have previously been enforceable under Art 2(a) of Brussels 1 bis.

⁶⁷ See Hess et al (fn.16) para.311 ff.

Overall then, UK consumers can expect an increase in the timing and costs of enforcement proceedings.

Due to these enforcement difficulties, it is foreseeable that more proficient UK consumers may embark upon actions in the domicile of the EU trader. However, this will be fraught with difficulty. Recent jurisprudence has shown that some Member State courts are steadfast in their application of national procedural rules that were not previously applicable to UK claimants as long as the UK was part of the EU.⁶⁸ This (re)emerging burden, coupled with known challenges, such as language barriers, and those discussed in the preceding paragraph cumulatively increase the enforcement deficit that UK consumers face.

2.1.5. *A trader's perspective*

In English common law, a key criteria to enable enforcement of a foreign decision is whether, from the English court's perspective and according to English private international law, the foreign court had 'international jurisdictional' competence over the defendant- i.e. the foreign court is entitled to summon the defendant and subject it to judgement.⁶⁹ The foreign court's own view as to whether it had jurisdiction according to its own domestic law is immaterial.⁷⁰ This international jurisdictional competence is determined according to whether the defendant was present when proceedings in the foreign court were instituted, or the defendant voluntarily submitted⁷¹ himself to the jurisdiction of that court. In essence, both standards generally require a positive act on behalf of the defendant to subject itself to the foreign court. Where a defendant is absent from a country, the defendant will not be deemed to be subject to jurisdiction of a court unless he has voluntarily submitted to that court.⁷² Accordingly, it is argued that an EU trader, who contrary to s15(B)(3) commences an action outside of the UK consumer's domicile when the consumer has not submitted to that foreign court's jurisdiction, will find that its subsequent judgement is unenforceable before the English

⁶⁸ See the German experience where litigants with a habitual residence in the UK were required to provide security for the likely costs of the defendants pursuant to s110 of the German Code of Civil Procedure (Federal Supreme Court on 1 March 2021 and by the Federal Patent Court on 15 March 2021). The CJEU in C-323/95, *David Charles Hayes and Jeanette Karen Hayes v Kronenberger GmbH* ruled the application of this requirement to EU claimants as illegal. This decision was based on the prohibition of discrimination on the grounds of nationality (today Art 18 TFEU, ex Art 12 TEC). See also Dutch courts in *Global Foods Network v RM Support BV*, ECLI: NL: RBOVE: 2018: 4365 - Overijssel District Court, 07-11-2018 / C / 08/219128 / HA ZA 18-278.

⁶⁹ See, e.g. *Salvesen v Austrian Property Administrator* [1927] AC 641, 659, *Pemberton v Hughes* [1899] 1 Ch 781. In common law, the foreign judgment must also be 'final and conclusive' and be for a fixed sum of money.

⁷⁰ Briggs, A. *Civil Jurisdiction and Judgements* (6th ed., Routledge 2015) para. 7.47.

⁷¹ Submission includes being the claimant, voluntarily appearance (subject to restrictions on what is appearance to contest jurisdiction in s33 Civil Jurisdiction and Judgements Act 1982).

⁷² *Harris v Taylor* [1915] 2 KB 580, 589.

courts. This high risk of non-enforcement exists due to the combined operation of both the common law rules and the policy objectives underpinning the UK's approach in the CJJ. Indeed, para. 7.19 of the CJJ's Explanatory Memorandum reiterates the need to "ensure that the consumer ... should in general not ... be sued, in a jurisdiction which is unfamiliar to him in terms of, for example, language."⁷³

Where the reverse is present – i.e. a UK trader has commenced action in their domicile against an EU consumer who has not submitted to the jurisdiction of a court in the UK, the question arises as to whether the provision of Art. 45(1) (e)(i) Brussels Ibis should apply to preclude enforcement of the decision in an EU Member State. As matter of interpretation, the answer is no as the decision would not fulfil the meaning of a 'judgment' in Art.2 of the Brussels Ibis (i.e. judgement *given by a court or tribunal of a Member State* [emphasis added]) and questions of enforcement are left to the domestic law of the court of the Member State where the UK trader is seeking enforcement⁷⁴. As a matter of principle, it seems counterproductive for Brussels Ibis to retain protective jurisdiction over matters relating to EU consumers where a non-EU party is involved, but not offer the same protection and govern the enforcement of non-EU decisions that violate that protective jurisdiction. Arguably the ethos of, and degree of the protection offered in section 4 (particularly Art 18(2)) is undermined by enforcement of a violating non-Member State decision being left to the national law of each Member State.

Art. 45 Brussels Ibis can be viewed as an 'insurance' provision, providing an extra layer of protection at the enforcement stage to address circumstances where the jurisdictional rules in Section 4 Brussels Ibis are not followed. However, it is noteworthy that s26 CJJ has not incorporated an equivalent provision of Art.45 (1)(e) Brussels Ibis into domestic law. The absence of this equivalent protection is not a detriment as it appears. Arguably, the common law rules on enforcement elucidated above, will operate to curtail the effect of the absence of this provision. In particular, it could be argued that failure of an EU trader to sue the UK consumer in the consumer's domicile, negates a finding that the foreign court hearing the EU claimant's claim had 'international jurisdictional' competence to give a judgement. Additionally, the potential for abuse of intra-UK jurisdictional arrangements is mitigated by the combined operation of s. 15(D)(5) and s.15(D) (6) which create a jurisdictional shield for the consumer where that consumer has not entered an appearance when it is sued by an unscrupulous EU trader in a court of a part of the United Kingdom other than the part in which it [consumer] is domici-

⁷³ The UK legislator sought to retain the approach inherent under the Brussels Ibis section 4 rules so that the protective rule on suing the consumer in his domicile is continued irrespective of the domicile of the trader. Additionally, with the exception of the operation of CJJ, the same risk of non-enforcement of a judgement from an EU Member State judgement is present where EU consumers commence claims in their domicile against a UK trader.

⁷⁴ See AG Lenz in Case C-129/92 *Owens Bank v Bracco (No.2)* [1994] QB 509 at para. 22-23.

led. In such cases, subject to narrow exceptions,⁷⁵ a court other than a court in the defendant consumer's domicile *must declare of its own motion* that it has no jurisdiction. This approach is analogous to Article 28 Brussels Ibis and its effect is the incorporation into domestic law of a natural justice threshold where intra-UK jurisdictional consumer matters are concerned. Whilst this level of protection at the outset is to be welcomed, there was an opportunity to go further and expand the scope of the obligation imposed on the courts to decline jurisdiction. A consumer who wishes to contest jurisdiction before a court in a part of the United Kingdom other than the part in which it is domiciled is likely to be pulled into making an appearance before that court. This is not without costs and inconvenience to the consumer, the burden of which can be challenging for a weaker party in a dispute. Arguably, the consumer should be given greater protection. As such, the creation of a similar provision to s. 15(D) (6) to require courts other than those in the consumer's domicile to declare *of their own motion that they have no jurisdiction* should be considered wherever the consumer's evidenced response to a claim is that their domicile is in another part of the United Kingdom. This would protect the consumer from the costs associated with entering an appearance, even if to contest jurisdiction.

2.2. Extrajudicial tools

2.2.1 ADR Directive

The ability of EU and UK consumers to take advantage of ADR regimes to resolve UK-EU cross border complaints largely depends on the type of ADR provider and the implementation of the ADR Directive in each Member State.

As a matter of principle, the ADR Directive has a specific jurisdictional scope and applies to procedures for the out-of-court resolution of domestic and cross-border disputes between a trader established in the Union and a consumer resident in the Union.⁷⁶ Operationally, the Directive's obligations are imposed on Member States. Member States are required to 'facilitate' access for EU consumers to ADR and to 'ensure' an ADR procedure is available for the resolution of a dispute where such dispute involves a trader established on their respective territories.⁷⁷ The trigger for a Member State's adherence to the ADR Directive's requirements is not the location of the consumer but on the location of the trader. Additionally, a Member State's obligation to facilitate access to an ADR process for the resolution of 'cross border' disputes under Art.5 is tied to an ADR entity that has been certified.⁷⁸

⁷⁵ For example, in proceedings brought in relation to movable property.

⁷⁶ Art 2(1) of the ADR Directive.

⁷⁷ Art.5(1) of the ADR Directive.

⁷⁸ Art 4(1)(h) of the ADR Directive defines an 'ADR entity' as 'any entity, [...] that is listed in accordance with Article 20(2)'.

With regards to UK consumers utilisation of EU based ADR schemes to resolve their dispute with an EU based trader, the question is whether Member States have inserted the jurisdictional limitation on 'cross border' and adopted the full meaning of 'ADR entity' when transposing the ADR Directive into their domestic law so as to preclude the benefit of the schemes in its territory by non-EU consumers. If not, the issue is determined by competence - which ADR schemes in that Member State considers itself competent to deal with a case.⁷⁹ If the law transposing the ADR Directive does not contain any limitation, then non-EU users of ADR schemes in Member States can indirectly benefit from the quality and information requirements imposed by the ADR Directive, even though they were designed for EU consumers.

It is also noteworthy that in line with the minimal harmonisation approach, the Directive does not preclude Member States from adopting or maintaining rules that go beyond what is provided for in the Directive⁸⁰, neither does it preclude Member States from fulfilling their obligations under the ADR Directive by building on existing properly functioning ADR entities and *adjusting their scope of application*. Accordingly, Member States do have the freedom to enable non-EU consumers to benefit from ADR procedures in their jurisdiction should this be required.

However, within the UK, the obligation in Art 5(2) of the ADR Directive was given effect in national law through s.9(4) and Sch. 3(1) of the ADR Regulations 2015. In its transposition of the ADR Directive, the UK legislature adopted the 'copy out' approach, albeit with modification. Whilst the 'copy out' method of transposition meant that capacity to act in 'cross border'⁸¹ cases is linked to certification, it is notable that under the ADR Regulations 2015, 'cross border' is given a narrower scope than that used in the ADR Directive. Whereas the ADR Directive defined 'cross border' as dispute arising between a "...consumer ...resident in a Member State *other than the Member State in which the trader is established* [emphasis added]"⁸², the ADR Regulations 2015 adopted a definition restricting 'cross border' to disputes where "...the trader is established in the United Kingdom [emphasis added] and the consumer is resident in another member State..."⁸³.

Under the Brexit SI⁸⁴, a 'strike out' approach has been taken which removes the references of 'cross border' throughout the ADR Regulations 2015.

⁷⁹ See Gascón Inchausti F, 'Transplanting Best Practices from ADR Mechanisms to Court Proceedings in Cross-border Litigation?' in Hess B., Kramer X., (eds.) *From common rules to best practices in European Civil Procedure*, (2017) 8 Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. Gascón Inchausti argues that international procedural law is not applicable in the consumer cross border ADR context as a State's powers are not at stake.

⁸⁰ Recital 38 of the ADR Directive.

⁸¹ Defined as 'a dispute concerning contractual obligations arising from a sales contract or a service contract where, at the time the consumer orders the goods or services, the trader is established in the United Kingdom and the consumer is resident in another member State'.

⁸² ADR Directive, Art. 4(1)(f).

⁸³ Part 1, s.5 of the ADR Regulations 2015.

⁸⁴ See fn. 47.

The consequence is that 'certified' UK ADR entities are no longer able to act in disputes where a UK trader and EU resident consumer is concerned. Arguably, the strike out approach has been much more drastic than required. The Explanatory Memorandum⁸⁵ to the Brexit SI justifies the 'strike out' approach on the basis that "...it will no longer be appropriate for ADR entities to be required to resolve cross-border disputes involving residents of other member states."⁸⁶ Unfortunately, the memorandum does not give a rationale as to why it would be inappropriate for an ADR entity to resolve disputes involving a UK trader and an EU consumer. Given that the ADR Regulations 2015 are designed to govern questions of quality of ADR schemes and do not address aspects of enforcement of ADR decisions, the UK's strike out approach is surprising.

The aforementioned consequence does not mean that all UK based ADR schemes are precluded from resolving disputes between a UK trader and EU consumer. As mentioned earlier, the Directive did not make certification compulsory for all ADR entities. Therefore, it is theoretically possible that non-certified ADR entities can act in the resolution of disputes between UK traders and EU consumers. The use of non-certified ADR entities is not a new phenomenon and there is evidence of their growth and operation in the UK and some EU countries.⁸⁷ Whilst the use of these non-certified entities may not be a problem where they practically fulfil the quality requirements as listed in the ADR Directive, it will be a problem where they do not. The absence of certification leaves the long-term continuous adherence to quality standards to chance. It is not an ideal solution for the protection of weaker parties in a dispute. Should a better solution not be found to enable EU-UK cross border ADR, consumers will be pushed into the deregulatory space where these schemes operate with little guarantees of quality.

2.2.2. ODR

Despite its predominant case management function, there is growth in the use of the EU's ODR platform. 50% of the complaints on the ODR platform are cross-border in nature⁸⁸. Interestingly, consumers and traders from Germany and the UK make up the largest proportion of cases lodged on the

⁸⁵ Explanatory Memorandum to The Consumer Protection (Amendment Etc.) (EU Exit) Regulations 2018 No. 1326.

⁸⁶ *Ibid.*, para. 2.11.

⁸⁷ See Citizen's Advice, *Confusion, gaps, and overlaps. A consumer perspective on alternative dispute resolution between consumers and businesses for a UK perspective* < <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf> > accessed 2 May 2021 and Miquel, R. 'The implementation of the consumer ADR directive in Germany' in Cortés P. (Ed.), *The new regulatory framework for consumer dispute resolution* (Oxford University Press 2016) pp. 169.

⁸⁸ Functioning of the European ODR Platform, Statistical report, December 2020. pg.3. Accessed via: https://ec.europa.eu/info/alternative-dispute-resolution-reports_en

platform.⁸⁹ However, despite the large number of cases lodged, the platform is underachieving its goals and the efficacy of the platform requires improvement. The success rate of a dispute being referred to an ADR entity is approximately 2% and 83% of the complaints lodged have been automatically closed after the 30-day legal deadline.⁹⁰ Nonetheless, the ODR platform seems to be practically working through the use of soft pressure to facilitate resolution of consumer disputes. 20% of the consumers who initiated complaints (or direct talks with the trader) expressed the view that their dispute had been resolved through the platform or outside of it. Furthermore, 18% of respondents were still in discussions with the trader with a view to resolve their dispute.⁹¹ As such, the inability to use the platform for cross border consumer dispute resolution between EU-UK parties will be a loss for consumers from both jurisdictions. This is particularly so for those at the weaker end of the spectrum as consumers. The platform seems to be particularly useful in facilitating the resolution of everyday retail cases in the airline (14.8%), clothing and footwear (10.6%) and ICT goods (6.2%) sectors.⁹²

3. POTENTIAL OPTION FOR THE FUTURE

In the light of the preceding discussion, it is arguable that there is one feasible option for the UK and EU to mitigate the impact of the impediments to effective consumer dispute resolution between EU and UK entities: Accession to the Lugano II Convention + Bilateral Agreements (Swiss Model). It is this author's view that the Swiss Model approach is the most appropriate given the policy positions of the UK and the nature of the legal and regulatory architecture required for effective consumer dispute resolution between EU and UK parties.

3.1. Swiss Model

3.1.1. *The Lugano Convention*

The Lugano II Convention ('the Convention') is in effect, a mirror of the Brussels I Regulation⁹³ for matters of jurisdiction and recognition and enforcement of judgments. However, the Convention does not contain the same degree of protective jurisdiction for consumers as Brussels Ibis, nor does it contain the same enforcement process. Nonetheless, it is argued that the di-

⁸⁹ Functioning of the European ODR Platform, Statistical report, December 2020. Accessed via: https://ec.europa.eu/info/alternative-dispute-resolution-reports_en

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Brussels I Regulation (EC) No 44/2001 of 22nd December 2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.

fference is not as detrimental as it appears. With regards to the special jurisdictional privilege granted to consumers, a major shortfall of the Convention lies in the narrower scope of the jurisdictional privilege offered. In particular, there is an absence of the ability for the consumer to sue in the court of its domicile where the dispute is with a trader from a third country.⁹⁴ However, the absence of this privilege will have no bearing on the resolution of disputes between EU and UK parties if the UK becomes a party to the Convention in its own right. With regards to the protection offered to the special jurisdictional bases in enforcement, Art 35 of the Convention offers a similar level of protection as Art 45 1(e) Brussels Ibis.

Given the current absence of any agreement on judicial cooperation in civil and commercial matters, accession to the Convention should be a palatable compromise for both the EU and UK in the absence of a readily available, suitable alternative. From a UK political perspective, accession to the Convention is attractive as it offers an indirect avenue for the UK to influence interpretative matters in both the Lugano and Brussels regimes. As a party to the Convention, Protocol 2 would entitle the UK to make written submissions to the CJEU if an EU Member State refers a question on the interpretation of the Lugano Convention to it. However, the scope of this entitlement extends beyond the Convention, and the UK will also be able to make submissions when a question on the interpretation of the Brussels I Regulation is submitted. Given the continued relevance of the Brussels I Regulation case law to the interpretation of the Brussels Ibis regime, this offers an indirect, albeit limited, avenue for the UK to influence EU jurisprudence in this field.

The UK has applied to accede to the Convention as an independent member.⁹⁵ Accession would require the agreement of all signatories, including the EU. However, at the date of writing, unanimous agreement has not been reached on the UK's application⁹⁶ and the EU Commission has recommended that the UK's application for accession should be rejected.⁹⁷ The crux of the EU Commission's objection lays in its perspective that the Convention is a "flanking measure for the EU's economic relations with the EFTA/EEA countries... [and] supports the EU's relationship with third countries which have a particularly close regulatory integration with the EU, including by aligning with (parts of) the EU *acquis*"⁹⁸ The Commission took the view that "[t]he United Kingdom is a third country without a special link to the internal market. ..."⁹⁹

⁹⁴ Arts. 15 and 16 of the Convention.

⁹⁵ See: https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf

⁹⁶ Whilst the non-EU countries have backed the UK's accession, the EU has not given its consent at the date of writing.

⁹⁷ See EU Commission, Communication From The Commission To The European Parliament And The Council Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention, Com (2021) 222 Final.

⁹⁸ *Ibid.*, section 2.1.

⁹⁹ EU Commission Communication (fn. 105), section 3.

The basis for the EU Commission's recommendation is to be questioned. Arguably, the occurrence that Contracting Parties to the Convention are in some form of regulatory integration with the EU is a matter of coincidence rather than what is required by the Convention itself. Indeed, the wording of Art 70(1) of the Convention demonstrates that the Convention envisages the accession of countries with varying degrees of connection to EFTA/EEA states, including no connection at all. In particular, the wording of Art 70(1) (c) seems to provide for "any other State" to apply to become a Contracting Party of the Convention. Arguably, what should be the key basis for admittance to the Convention is the potential for synergy between the Convention, the internal law concerning civil procedure and enforcement of judgments of the applicant state as well as the private international law relating to civil procedure in that state.¹⁰⁰

In its Communication, the Commission was of the view that the Hague Conventions (particularly, the Hague Judgments Convention¹⁰¹) should provide the framework for future cooperation between the European Union and the UK in the field of civil judicial cooperation.¹⁰² It is argued that this approach would not offer the optimum basis of protection for the cross-border protection of consumer interests. The advantage of the Brussels and Lugano systems lies in the duality and complementarity of the protection offered to consumers in jurisdiction and recognition and enforcement matters in those instruments - for example, the relationship between Section 4 and Art 45 Brussels 1 bis. On the other hand, the Hague Judgments Convention only governs enforcement and so, by itself, would be a half measure for the adequate protection of consumers in cross border disputes.¹⁰³

Substantively, it is argued that the provisions of the Hague Judgments Convention will offer less protection to consumers seeking to enforce judgments against foreign traders.¹⁰⁴ Where the consumer is a judgment *creditor*, the provisions of Arts. 5(1), 5(3) and 6 will apply and the consumer will need to satisfy the gateway provisions contained in those articles.¹⁰⁵ Of note are

¹⁰⁰ See Art 72(1)(c) of the Convention which provides: "Any State referred to in Article 70(1)(c) wishing to become a Contracting Party to this Convention: [...] (c) shall provide the Depositary with information on, in particular: (1) their judicial system, including information on the appointment and independence of judges; (2) their internal law concerning civil procedure and enforcement of judgments; and (3) their private international law relating to civil procedure".

¹⁰¹ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2019.

¹⁰² See Section 3 of the Communication.

¹⁰³ For further comment on the Hague Judgments Convention and consumer protection (particularly on the consumer as a *judgment debtor*), see de Araujo, N. and De Nardi, M., 'Consumer Protection Under the HCCH 2019 Judgments Convention' (2020) *Netherlands International Law Review* 67. It is noteworthy that the Hague Convention on Choice of Court Agreements (which is envisaged as complementing the Hague Judgments Convention) expressly excludes consumer matters from its scope - see Article 2(1)(a).

¹⁰⁴ At a basic level, the Hague Judgments Convention enables broader grounds than Brussels 1 bis and the Convention for the refusal of recognition and enforcement of judgements. (Art.7).

¹⁰⁵ Art 5(2) applies where the consumer is a defendant. It is noteworthy that the Hague Judgments Convention confines its applicability to consumers in a contractual relationship with the trader.

the indirect jurisdictional bases of recognition and enforcement under Art 5(1). The trend in the wording of 5(1)(a),(b),(d) and (g) is that a close, strong nexus between the defendant and the court of origin of the judgment is to exist in order for the judgment to be enforced in a contracting State. This is noticeably more substantial/concrete test than the one used under Art 17(1) (c) Brussels 1bis i.e. ‘positive conduct’ and ‘directed activities’. Given the preference for the connection to be based on “habitual residence” (Art. 5(1) (a), “principal place of business” (Art. 5(1)(b)) and “purposeful and substantial connection” (Art 5(1)(g), it is doubtful whether judgments given at the consumer’s domicile pursuant to the *forum actoris* provisions of Art 17(1) (c) Brussels 1bis and s.15 of the Civil Jurisdiction and Judgments Act 1982 would be recognised under the Hague Judgements Convention.¹⁰⁶ This is particularly the case where the consumer has obtained judgment in their domicile, which is not also coincidentally a place listed under Art 5(1)(a)–(g). Whilst Art 5(1)(g) of the Hague Judgements Convention may provide some relief to consumers where the place of performance is in their domicile. It is noteworthy that Art. 5(1)(g) imposes the ‘safeguard’¹⁰⁷ requirement of a substantial presence/connection of the defendant in the jurisdiction of the court giving judgment. As such, consumers with disputes involving traders of occasional presence/marginal connection to the place of performance of the contract may find it difficult to enforce a judgment in their favour. This is likely to be the case where the trader does not actively direct their activities to the place of performance under the contract with the consumer.¹⁰⁸ Additionally, the safeguard will also work to preclude the enforcement of judgments based on disputes arising from consumer contracts performed online as the “connection with the State of origin may be merely virtual and therefore insufficient to justify circulation of the judgment under the Convention.”¹⁰⁹

In light of the above, it is argued that accession to the Convention is the optimum option for the cross-border jurisdiction and enforcement matters. However, even if accession is granted, the delay in the UK’s accession will create a lacuna in the temporal scope of application of the Convention¹¹⁰, creating even further complexities for consumers to navigate. On the assumption that consent is eventually granted,¹¹¹ the question arises as to whether a

¹⁰⁶ It is noteworthy that Art. 5(1) (g) requires a connection between the place of performance of an obligation and the court giving judgement. Therefore, enforcement is unlikely to be an issue where a consumer’s domicile coincides with the place of performance. It will be when it does not.

¹⁰⁷ See Explanatory Report, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, para. 187.

¹⁰⁸ An example is where the consumer is domiciled in England, enters into a contract with a German domiciled trader whose main activities are directed to Spain with occasional activity directed to England and the place of performance of contract is France.

¹⁰⁹ See Explanatory Report, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, para. 187.

¹¹⁰ In order for the Convention to have entered into force after the end of the Brexit transition period, the UK had to have received the EU’s approval and deposited its instrument of accession by 1 October 2020. Neither have occurred.

¹¹¹ Art. 69(5) of the Convention provides that it “shall enter into force in relation to any other Party on the first day of the third month following the deposit of its instrument of ratification”.

retrospective application of the Convention from 1st January 2021 onwards is possible to provide protection for consumers commencing claims in that temporal lacuna.

Arguably, the effect of the wording of Article 63 (1) of the Convention is that its rules will apply only to cases commenced after the UK has re-joined. As such, cases commenced prior the UK's re-joining will not benefit from the Convention's jurisdiction and enforcement rules. However, Art. 63 2(b) somewhat mitigates the danger for consumers and seems to provide an exception to this provision. It enables claims instituted before the UK re-joined to be subsequently enforced if a decision in the proceedings is given after the entry into force of the Convention when the UK re-joins. In particular, the wording of Art. 63(2)(b) seems to provide for alternative bases for this, either: 1) "if jurisdiction was founded *upon rules which accorded* [emphasis added] with those provided for either in Title II or, 2) in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted." It is arguable that the wording of the first provision seems to be a test of similarity - whether jurisdiction was founded upon rules similar to/the same with those in Title II. Accordingly, it is argued that, as the new sections 15A-15E of the Civil Jurisdiction and Judgments Act 1982 are adopted provisions of Brussels Ibis (which are, subject to minor changes in wording - substantially the same wording under the Brussels 1 Regulation), these rules are similar to that of Section 15-17 of the Convention. Thus, it is argued, would inherently 'accord with those provided for ... in Title II' of the Convention. As such, upon the date of re-joining, it is arguable that decisions given by a UK court after entry into force would be enforceable under the Convention. Given the current precarious position of consumers and the legal complexities for consumers to resolve cross border disputes, it is submitted that a retrospective application of the Convention would be the better option.

However, the operation of the Convention on its own will be an inadequate tool to facilitate the provision of effective consumer dispute resolution. The use of an additional bilateral agreement on extrajudicial measures (such as on cross border ADR and mediation) and regulatory cooperation is to be encouraged. The latter is particularly important given the break in consumer protection cooperation arrangements between UK and other EU member state authorities after Brexit. To future proof the bilateral agreements, it is recommended that 'ratcheting provisions' are included to adequately cater for future progression in the standards in consumer protection between the EU and UK. This can include future improvements in the standards ADR entities need to hold to be certified to act in the resolution of cross border disputes between parties within the UK and EU Member States. These ratcheting provisions will also enable each party to make updates to any agreement in a timely and uncomplicated manner. Indeed, the need for cooperation between UK and EU Member State regulatory bodies is touched upon in the TCA. In digital trade, the importance of 'entrusting consumer protection agencies

with adequate enforcement powers and the importance of cooperation between these agencies in order to protect consumers...’ was recognised.¹¹² Bilateral agreement(s) facilitate the achievement of that envisioned cooperation.

CONCLUDING REMARKS

EU judicial cooperation in civil matters is based upon the concept of mutual trust. Third States who do not fully and comprehensively subscribe to these principles cannot expect to be given the same level of deference and involvement as a Member State. Irrespective of the post-Brexit route it takes, cross border consumer dispute resolution will not be the same between the UK and EU Member States prior to Brexit. The overriding aim of the future relationship in this area should be to reduce as many hurdles as possible to enable effective consumer dispute resolution between parties in the UK and EU.

The UK’s Brexit legislation does not seem to adequately take into account the practical challenges for consumers in resolving their cross-border disputes. By focusing the support in Brexit legislation on judicial proceedings before the courts, it is likely that UK consumers will face hurdles such as increased costs and longer proceedings that will deter these consumers from enforcing their rights. Additionally, what seems to be underestimated is the value of efficient reciprocity in the enforcement of judicial decisions in consumer disputes between UK consumers and EU traders. Based on the Explanatory Memorandum for the CJJ, the focus of the UK legislature seems to have been on rules governing enforcement of foreign decisions within the UK, less so of need to mitigate the difficulties of weaker parties such as UK consumers enforcing judgments in EU Member States. Where EU and UK consumers need to navigate domestic law rules on enforcement for their judgement, the value of the jurisdictional protections offered to them as weaker parties is stymied.

As part of a coherent consumer dispute resolution framework, the development of an ADR framework between the EU and UK for properly functioning ADR is necessary to strengthen consumers’ confidence in each other’s market. From a UK perspective, the vast majority of consumers who used ADR were of the view that they would use these processes again should they experience a similar customer dispute in future.¹¹³ The utilization of high-quality ADR therefore remains a valuable tool for UK consumers. Should the likely restriction in the availability of cross border ADR remain addressed, the proliferation of non-certified ADR entities is likely. Given the volume of

¹¹² See Article DIGIT.13 (2) of the TCA which is geared towards online consumer trust. Article DIGIT.16 also mandates parties to exchange information on regulatory matters on the protection of consumers in the context of digital trade.

¹¹³ DBEIS, *Resolving Consumer Disputes, Alternative Dispute Resolution and the Court System*, Final Report, 2018.

ADR complaints between the UK and some EU Member States, this will leave consumers in a precarious position and will lead to greater fragmentation of the ADR landscape in each jurisdiction for consumers. As a consequence, efforts of protection to increase confidence will be undermined. Therefore, renewed consideration should be given to the facilitation of cross border ADR in the light of the removal of the use of ADR and ODR procedures for UK and EU consumers, perhaps utilising the benefit of bilateral arrangements in this area.

EUROPEAN SMALL CLAIMS PROCEDURE IN THE REALM OF THE OTHER EUROPEAN PROCEEDINGS

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ABSTRACT: In this article, the European Small Claims Procedure (hereinafter – ESCP) will be analysed in the context of the other European procedures, namely Brussels I bis Regulation (Regulation (EU) No 1215/2012), European Enforcement Order Procedure, European Payment Order Procedure and Consumer ODR Procedure. The aim of each procedure, their benefits for users and drawbacks are compared to establish the areas in which the European Small Claims Procedure can be improved or modified contributing better towards the development of more efficient and user-friendly European Union civil proceedings system. Results of the SCAN | Small Claims Analysis Network consortium studies of the application of the ESCP are used as a basis of this article. The article among other issues will cover premises to introduce seamlessly integrated dispute resolution methods and tools in the European Small Claims procedure such as early-diagnostics, negotiations, mediation, etc. to create a pyramid-shaped dispute resolution system so that only the disputes that cannot be resolved by using other tools would be channeled to the adjudicative stage.

KEYWORDS: EU Civil Procedure; Small Claims Procedure; EU Law, Civil Proceedings; ODR.

SUMMARY: 1. THE EUROPEAN PROCEEDINGS' ENVIRONMENT.— 2. ANALYSIS OF THE ESCP.— 3. POSSIBLE VECTORS FOR REFINING OF THE ESCP.— CONCLUSIONS

1. THE EUROPEAN PROCEEDINGS' ENVIRONMENT

In the recent decades, the European Union has adopted a number of regulations in the area of civil justice with the aim of simplifying cross-border litigation, reducing its costs, and providing tools that could facilitate access to justice for businesses and also consumers. These regulations were adopted gradually to cover a specific area that was selected instead of introducing a large piece of universal legislation. Hereby it created the legal system in which there are several different legal tools adopted at EU level that have similar intent: to provide EU citizens (natural and legal persons) with the clear means to protect one's rights against infringements with the cross-border (intra-EU) element. The aim of this article is to distinguish between these EU proceedings and determine the goals, boundaries, benefits and drawbacks for users for the each of them. The ESCP proceedings are analysed to establish their place within the EU legal system in the context of the other EU civil proceedings, and delineate its future evolution.

The most important regulation for European civil and commercial litigation is EU Regulation, No. 1215/2012¹ (hereafter – Brussels Ibis Regulation). It sets jurisdiction rules, abolished exequatur procedure for the most judgments delivered in EU Member States. Sometimes it is even said that the Brussels Ibis Regulation is *the magna carta* of international procedural law in Europe². Although Brussels Ibis Regulation does not set procedure of dispute resolution *per se*, but it is the one regulation that makes disputes between persons originating from different EU Member States work by setting the jurisdictional ground rules. Brussels Ibis regulation is mandatory in its nature and sets clear boundaries to its applicability. The Member States cannot introduce alternative national legislation on issues covered by the Brussels Ibis Regulation. This legal act, therefore, establishes jurisdiction rules not only for civil and commercial disputes overall but also for below analysed EU Regulations meaning that without this regulation, the intra-EU-cross-border disputes would be extremely difficult to handle. Nowadays this regulation is probably one of the most frequently applied and does not receive much criticism.

The Regulation No. 805/2004 on the European Enforcement Order³ (hereafter – EEO Regulation), Regulation No. 1896/2006 creating a European order for payment procedure⁴ (hereafter – EOP Regulation) and Regulation

¹ Regulation (EC) No 1215/2012 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. OL, 2012, L351, p. 1-32.

² P. Mankowski. Research Handbook on the Brussels Ibis Regulation. Edward Elgar Publishing, 2020, p. 9.

³ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. OL, 2005, L 143, p. 15-39.

⁴ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. OL, 2006, L399, p. 1-32.

No. 861/2007 establishing a European Small Claims Procedure⁵ (hereafter – ESCP Regulation) are so-called second generation⁶ EU regulations which aim to abolish exequatur procedure, provide procedural minimum standards, or even provide a self-standing European procedure for cross-border cases. We believe that the latter regulations have not reached all their goals, they are still not well-known for the public or even lawyers, and the joint reform of these legal acts should be discussed. The main aim of EEO Regulation is set conditions that a judgment could be certified as uncontested while EOP and ESCP Regulations establish separate procedures which should be simple, swift and attractive for litigants in EU Member States.

The EEO Regulation was introduced to ensure free circulation of judgments, court settlements and authentic instruments in all Member States, cancelling the procedure of the recognition and enforcement of a foreign court judgment. A judgment can be certified as EEO if set conditions are fulfilled (it is enforceable in the Member State of origin and certain minimum requirements are met). It is obvious that the significance of EEO Regulation diminished after adoption of the Brussels Ibis Regulation. The latter Regulation abolished the exequatur procedure for most civil and commercial disputes. It can be mentioned that the evaluation of EEO Regulation is ongoing and statistical data and opinions of different institutions are collected by European Commission now. Still, it could be said that available information provides that usually EEO is used for authentic instruments. For instance, in Lithuania, in year 2019 89 authentic instruments certified as EEO were submitted for enforcement and only 18 certified judgments were submitted⁷. Council of Notariats of European Union also stressed that authentic instruments drawn up by notaries or other public officer holders are an important part of EEO⁸. We believe that EEO Regulation played an important role in abolishment of exequatur procedure within EU Member States and now has lost its importance as Brussels Ibis Regulation came into force.

European Commission considered that the EOP Regulation will be sufficient help for plaintiffs in cross-border civil and commercial cases, because between 50 and more than 80 percent of claims in courts of first instance in the Member States are uncontested⁹. The EOP Regulation introduced a written procedure which does not require presence before the court nor the assistance of a lawyer. No documentary evidence is needed to support the

⁵ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. OL, 2007, L199, p.1-22. The Regulation was amended by adopting Regulation No. 2015/2421.

⁶ B. Hess. *Europäisches Zivilprozessrecht*. C.F. Müller, 2010. p. 23.

⁷ Information received from from Chamber of Lithuanian Bailiffs.

⁸ Position paper of the Council of Notariats of the European Union (CNUE) On the evaluation of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. 20/11/2020. Available online here: <http://www.notaries-of-europe.eu/index.php?pageID=18032>.

⁹ EU Commission „Proposal for a Regulation creating a European order for payment procedure” COM (2004) 173 final 3, Explanatory Memorandum.

application and no further actions of the claimant are required during the procedure. Although, the European Court of Justice (hereafter – CJEU) ruled that in consumer disputes the court can request from the creditor additional information relating to the terms of the agreement relied on in support of the claim at issue, to carry out an *ex officio* review of the possible unfairness of those terms¹⁰. The procedure is designed only for uncontested claims. The defendant can lodge a statement of opposition within 30 days of the order being issued. The defendant must only indicate that he contests the claim, without having to specify reasons for it. Notwithstanding this fact, report on the application of EOP Regulation showed that the Regulation is not quite as popular as it had been anticipated. According to the available information, which includes the years up to and through 2015, between 12,000 and 13,000 applications for European orders for payment are received by the courts of Member States per year. The highest numbers of applications (more than 4,000 annually) are in Austria and Germany where also most European orders for payment are issued¹¹. We could see that the potential of the Regulation is still not exploited.

The ESCP Regulation creates a comprehensive adversarial procedure, which is available to plaintiffs as an optional instrument for cross-border claims, alongside the existing procedures at the national level. The ESCP is, since the amendments brought about by Regulation No. 2015/2421, applicable to claims not exceeding € 000. Unlike the procedure for the EOP which is limited to monetary claims, non-monetary claims can be the subject of a claim under the ESCP Regulation. The scope of the Regulation applies in the same way as the other instruments, i.e., to civil and commercial matters. Interestingly, there are further substantive exclusions, which state that matters concerning, for instance, employment law, tenancies of immovable property, except for actions on monetary claims, or violations of privacy and of rights relating to personality, including defamation, are also excluded from the scope and cannot be the subject of ESCP¹². The EOP procedure should be more appealing for legal entities and the ESCP procedure is more dedicated for consumer disputes. Amendments of ESCP in year 2015 also aimed to strengthen the use of distance communication technology, including conducting oral hearings, taking of the evidence, enabling the e-service of documents and distant payment of court fees.

Both the EOP and the ESCP Regulation procedures are meant to be conducted mainly by means of standard forms. CJEU confirmed that regarding the general scheme of Regulation No 861/2007, it must be noted that that regulation provides solely for the rights and obligations of the applicant and defendant in the main proceedings. It follows that Forms A and C in Annexes

¹⁰ CJEU preliminary ruling of 19 December 2019, Case No. C-453/18 and Case No. C-494/2018.

¹¹ Report on the application of Regulation (EC) 1896/2006 of the European Parliament and of the Council creating a European Order for Payment Procedure COM (2015) 495 final.

¹² E. Storskrubb. *Civil Procedure and EU Law. A Policy Area Uncovered*. Oxford University Press, 2008, p. 224.

I and III to that regulation must be filled in respectively. No other section is provided for other persons who may be involved in the dispute in the main proceedings¹³. In seeking to speed up litigation, the ESCP Regulation sets specific time limits for various stages of the proceedings. The text of the Regulation as well as the recent amendment do not foresee any sanctions for exceeding the time limit, apart from the foreclosure sanction for parties not complying with their duties within the set procedural time¹⁴. The Regulation does not contain rules on the appeal. This is left to the national laws of the Member States.

As we could see, all these so-called second generation regulations have their problems and the implementation of the procedures is not as successful as it was anticipated. All three mentioned Regulations are not well-known for the public or even practitioners and they are applied quite rarely and even concrete statistical data on the application is lacked. It could be agreed that sounder and more detailed national statistics are sorely needed, and if made available will certainly provide better information on how the procedures function. This will also increase the comparability of the collected data. Better national statistics would help identify more courts experienced in handling EOP and ESCP claims and allow an investigation of possible best practices as well as their dissemination together with acquired expertise¹⁵. Also, the national procedures influence the way the EEO, the EOP and the ESCP are applied. The limited experience and lack of understanding for practitioners means that national rules and national traditions influence more and more these procedures.

To disseminate information on Regulations more effectively, also more detailed and relevant up-to-date information must be available on e-Justice portal. A database of the most important judgments in the field of discussed Regulations would help to gather and spread information of the practice. Training of practitioners on all Regulations, not only on Brussels Ibis Regulation, should be organized more frequently in all Member States. In such way lawyers and judges would better understand in what instances which Regulation should be applied, would have broader knowledge on cross-border litigation and perhaps would interpret provisions of European instruments according to the aims of EU civil procedure. We believe that the level of awareness of Brussels Ibis Regulation is much higher as it is necessary to apply jurisdiction rules in all cross-border civil or commercial disputes and on the other hand EEO, EOP and ESCP Regulations are only of optional nature.

Notwithstanding all the problems, we agree that second generation Regulations have great political value¹⁶. These European instruments paved the

¹³ CJEU preliminary ruling of 22 November 2018, Case No. C-627/2017, para 26.

¹⁴ E.A. Ontanu. *Cross-Border Debt Recovery in the EU. A Comparative and Empirical Study on the Use of the European Uniform Procedures*. Intersentia, 2017.p.48.

¹⁵ *Ibid.* p. 419.

¹⁶ *Op. cit.* p. 248.

way to abolish *exequatur* in Brussels Ibis Regulation by reducing fear and reinforcing mutual trust.

EU Regulation on online dispute resolution for consumer disputes¹⁷ (hereafter — ODR Regulation) is a quite different legal act. Similarly, like the ESCP Regulation it is devoted to consumer disputes, but otherwise it has many differences. According to the Art. 2 of the Regulation, it is applied to the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the Union and a trader established in the Union. The ODR Regulation aims to facilitate access to alternative dispute resolution (hereafter – ADR) and ODR providers by creating a European ODR platform¹⁸. Since 15 February 2016, the ODR platform is available to consumers and businesses in all official EU languages for complaints concerning online sales or service contracts in the EU. However, it should be mentioned that from the 1st of July 2017 the scope of the Regulation is also expanded to consumers or traders in Norway, Iceland and Liechtenstein.

The aim of the Regulation is to provide consumers with a practical approach to resolving domestic or cross border disputes in their own language without the need of court proceedings. The ODR platform allows consumers to submit their applications on settlement of disputes to the platform in the language of their choice, and then use an online ADR procedure to resolve the dispute. It is to be stressed that the ODR Regulation contains no detailed requirements for the dispute resolution procedure itself. It can be agreed that the European ODR platform does not act as a dispute resolution service itself, but merely as a ‘clearing house’ that brings together consumers, businesses and ADR or ODR providers¹⁹. We believe that ODR Regulation, as well as above mentioned regulations, are not well known by the public and they are still applied too rarely.

2. ANALYSIS OF THE ESCP

To analyse the possibilities to improve the ESCP, the construction of the ESCP and its drawbacks shall be discussed as well as the reasons that influenced them.

The ESCP was intended to be speedy, simple to use and requiring lower costs than other available alternatives. The ESCP aimed at application without the need of legal advice. At the same time ESCP was created as an al-

¹⁷ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. OL, L165, p. 202-213.

¹⁸ See <https://webgate.ec.europa.eu/odr/>

¹⁹ G.P. Calliess, S.J. Heetkamp. Online Dispute Resolution: Conceptual and Regulatory Framework. SSRN Electronic Journal (2019). p. 16. Available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505635

ternative to domestic (national) procedures, meaning that it is the claimant that decides whether to use ESCP or other available option. The ESCP was intended to be more advantageous than available domestic alternatives for it to be used resulting in situation that the applicability and popularity of the ESCP depend on each different Member State and its legal system. However, drawbacks of the ESCP can be identified even without comparing the ESCP to the certain domestic proceedings.

The ESCP Regulation sets the general rules of the procedure. The ESCP is initiated by submitting form A (Statement of Claim) alongside supporting evidence to the competent court. The competent court is selected according to the rules set in Brussels Ibis Regulation. If the claim is not sufficiently clear, the court is to use form B to give the claimant opportunity to rectify the shortcomings of the claim. The defendant is to submit its position in standardised form C. The procedure shall be conducted in a written form. The court or tribunal may hold an oral hearing if it considers necessary. All documents and hearings are to be conducted in the language or one of the languages of the court or tribunal. After the hearing, the court shall issue a binding decision in form D which is enforceable in all Member States without it any additional recognition or *exequatur*.

The common ground of the ESCP is sufficiently clear and simple at the first sight. However, the drawbacks of the ESCP are revealed once the procedure is applied in practice as the devil hides in the details.

The first problem identified is the language of the ESCP. It already has been mentioned that ESCP applies to cross-border disputes. Art. 6 of the ESCP Regulation sets that the forms and supporting evidence shall be submitted in the language or one of the languages of the competent court. It makes the ESCP dependant on the national language of the certain Member State in which the proceedings are conducted. It is noteworthy that in some Member States only documents submitted in national language are accepted, without any bilingual option. Even though the forms are available in the language of each Member State, the supporting evidence is to be translated, thus the costs of the procedure dramatically increase. The costs of the dispute are to be reimbursed pursuant to the national rules, although unnecessary or disproportionate costs are not to be reimbursed (Art. 16 of the ESCP Regulation), leaving it up to the competent court whether costs of translations are proportionate. Although online forms are provided in a language a user chooses, the forms are provided in one selected language only and are not bilingual, meaning that in order to fill the standardised form, a party to the dispute is to open to different sets of forms: one in the language of the competent court, another – in the language the user understands. It also decreases user-friendliness of the ESCP. Therefore, the language of the ESCP is one of reasons discouraging from use of the ESCP.

Another issue that inconveniences users of ESCP is related to procedures of appeals. According to Art. 17 of the ESCP Regulation, it is governed by the

national procedural rules of the respective Member States. Thus, both the possibility to appeal the decision adopted during the ESCP and the rules applicable differ in each Member State. Moreover, national regulation of some Member States requires an attorney to sign on the appeal which is in direct contradiction with the principle that representation of a lawyer shall not be mandatory in ESCP proceedings.

It can be observed that the application of the national rules to the ESCP proceedings is a source of complications. This problem was programmed by the initial decision on how the ESCP is to be drafted. It is noteworthy that ESCP was drawn not as a unified procedure, applicable to all EU Member States, but rather as an instrument creating general principles only. Art. 19 of the ESCP Regulation expressly states that subject to the provisions of the ESCP Regulation, the “procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.” This method of creating the ESCP resulted in 27 different sets of procedural rules. ESCP applies to cross-border disputes only, thus, the procedural rules of the Member State the Respondent is domiciled in applies (Art. 3 of the ESCP). It creates situation that if a Claimant intends to launch an ESCP dispute, it shall be done in the courts of another Member State, in the language of another Member State and pursuant to the procedural rules of another Member State. Depending on the fact whether the respective Member State provides easily accessible information on its civil procedure in foreign languages, the Claimant might be in a need of legal assistance not because the civil procedure is complex, but because it is unknown to the Claimant coming from different jurisdiction. This is not only against the idea that the ESCP dispute should be sufficiently easy to conduct without legal assistance but also discourages from proceeding with the ESCP claim overall. If the intention of the ESCP was to simplify the procedure in cases concerning small sums and thus increase access to justice, then this aim cannot be achieved by creation of 27 different procedures.

Another reason that prevents the more frequent application of ESCP in cross-border disputes is a voluntary/optional nature of its application. Users tend not to opt for possibilities that are new and initially more difficult to understand if they have such choice. If comparing ESCP Regulation with other EU Regulations analysed in this article, the example of a mandatory EU regulation is Brussels Ibis Regulation. It has already been mentioned that Brussels Ibis Regulation is probably one of the most well-known and most often applied. Therefore, the voluntary option whether to use the ESCP does not encourage use of the ESCP Regulation and creates opportunity to choose a different legal instrument that is better-known and not more convenient or advantageous for the user.

Lastly, the analysis on costs and benefits often results in choosing another procedure or dropping the dispute entirely, especially having in mind that the value of such cases is not high. analysis of the ESCP. The costs decrease not

only applicability of ESCP, but the barriers to access to justice in cross-border small value disputes remain.

As one of the means of solving the problem thereof, the European E-Justice portal²⁰ was accommodated with the information on the ESCP. The idea behind it is to provide general summarised information in each national language of the EU that are easily understandable and applicable for users of ESCP. However, the analysis of the contents of E-Justice portal on ESCP proceedings in various Member States suggests that the effectiveness of this tool directly depends on timely and efficient information being uploaded. It was noticed that some information is obsolete. In some chapters the links provided redirect to the legal regulation and/or informational webpages in national languages without translations to the other official languages of the EU. Therefore, the E-Justice portal does not eliminate the problems created by the decision that the ESCP Regulation should not establish universal proceedings for small claims' disputes throughout the EU.

The same problem is relevant to any other informational tool on ESCP. Its effectiveness and subsequently the applicability of the ESCP directly depends on the content of the information on the national procedure. If such information is not provided in a user-friendly manner, its contents are obsolete, and it direct viewers to webpages in national languages, then such a tool will not be sufficient. Therefore, it is necessary to analyse other means of eliminating the problems that make the ESCP non user-friendly, rarely applicable, and that result in low public awareness.

3. POSSIBLE VECTORS FOR REFINING OF THE ESCP

Art. 1 of the ESCP Regulation sets its goals as simplifying, speeding up and making less expensive litigation concerning small claims in cross-border cases. As we can see from the previous chapter there are multiple issues with efficiency and awareness in relation to the ESCP. These problems preclude exploiting of full potential of the amazing ideas that lay behind the ESCP Regulation. If there is no adequate alternative to solve a problem of too-expensive, too-complex and too-slow cross border adjudication of intra-EU small claims, we believe the ESCP Regulation should be further developed. Below we discuss main directions of possible upgrades that may help the regulation to achieve its goals and unleash its full potential.

Unification

Lack of unity in procedural terms of the ESCP results in multiple variations of ESCP procedures in practice, instead of one.

²⁰ <https://e-justice.europa.eu/home?action=home>.

That creates inequality of users of the proceeding on a broad scale. The inequality starts from the very beginning with different rules of court fees and finishes with differences as to the availability of an appeal.

On the other hand, 27 variations of the ESCP Regulation are obscure. The Regulation creates an initial vision of a simple and easy procedure. However, as discussed previously such a view is misleading. Selection of court where to start your ESCP would result in conduct of the proceeding in lines with the national rules of the particular Member State by virtue of Art. 19 of the ESCP Regulation. A user cannot identify the specific variation and compare it with possible alternatives offered by jurisdiction rules of Brussels Ibis Regulation without proper knowledge of sources of national procedural law that shall be applied. Due to legal training focusing on single jurisdictions and language barriers it is rather difficult if not impossible even for professional users.

These issues effectively would be solved by introducing a unified proceeding. All the most significant aspects of the proceeding should be included in the body of the regulation itself. The application of national rules can help to accommodate the particularities, but the application of national rules should not result in significantly different modalities of the ESCP as it is now.

Digitalisation, automation and online connectivity

The SCAN²¹ consortium studies of the ESCP revealed that in the number of countries courts do not accept digital documents and digital evidence, and the management of the ESCP proceeding is not automated. Even in countries where level of digitalisation of civil proceeding is high, there are no links between the European E-Justice portal and national E-justice systems.

In the current era of the fourth industrial revolution it is odd and outdated to design a proceeding based on the premise of paper-document processing. This should be changed if we seriously consider offering users of small value disputes efficient, fast and simple method for their resolution. In our thinking, new generation of the ESCP should be based on a fully digital format, fully online connectivity, adequate up-to-date automation, and operational links between EU and national e-justice systems.

Efforts of courts to operate in conditions of COVID-19 pandemic demonstrated that EU national judicial systems can adapt to a digital format and online connectivity. In Lithuania, more than 70 percent of all civil cases are examined remotely, employing digital filing, digital payment and management of court fees, digitalization of all materials of civil cases, automated case management, online-access to civil case files, e-service to parties, massive conversion of physical hearings into videoconferencing via Zoom and

²¹ **SCAN – Small Claims Analysis Net** is a **EU-funded project** coordinated by University of Naples Federico II, involving other 8 partners in a consortium. More information here: <https://www.scanproject.eu/>

other advanced technologies. Such progressive practices from Lithuania and other digitally advanced countries should be used as a basis for modification of the ESCP towards digital format, online connectivity and automation.

Automation can be an efficient direction to solve many issues. The SCAN studies have identified, for example, translation issues and referrals of cases to the proper judicial forum as main obstacles in fluent functioning of this proceeding. AI-enhanced translation solutions may be integrated into the system.

Technological progress should not stop with the application of AI functionalities for automated translations only. AI-based technologies may be used to improve handling of repetitive issues, assistance for users and judges, increasing user satisfaction, and so on.

Methodology shifts

The current setup of the ESCP seems rather outdated from the methodological perspective as well. Its current design streamlines all low-value disputes straight to adjudication. However, modern trends in efficient dispute resolution systems do the opposite. They integrate dispute diagnostics, negotiations and mediation methodologies for early settlement of disputes before presenting any dispute to a judge for adjudication. Such a pyramid-shaped method of dispute resolution helps to reduce cost, increase speed and satisfaction of parties.

We believe the future of efficient pan-European low-value dispute resolution lays with implementation of a pyramid-style dispute resolution methodology where adjudication comes as a last resort. Handling of an intra-EU low-value dispute should start with early dispute diagnostics, then seamlessly evolve into negotiations, mediation and adjudication if previous stages of a dispute do not result in settlement.

In addition to advocating for enlarging the methodological base of small claims dispute settlement and advancing toward full online connectivity, the authors of this article also recommend consolidating the efforts to develop the consumer ODR and the ESCP. Merging these two streams may help to save costs and reveal points for synergies in the development of both these pan-European instruments of dispute resolution.

Simplification and user-friendliness

One of the backbones of the ESCP is the idea that this proceeding should be easy to use by non-professionals. The SCAN analysis of the ESCP proceedings application, in reality, reveals that there is still a persistent need to simplify user's interface. The current version of the ESCP forms is not easy to handle by non-professionals. There are number of questions which require

professional advice and guidance to answer. Art. 11 of the ESCP Regulation envisages assistance to the parties that shall be ensured by the Member States. In real life such assistance is not easily accessible. Even if a user can access it, it is not satisfactory when professionals themselves find they must deal with complex and difficult practicalities of selection of proper court to address, translations, payment of court fees, differences in variations of proceedings, and so on.

The ESCP interface should be redesigned to allow fluent use by non-professionals and increase user-friendliness.

Binding nature

Art. 1 of the ESCP Regulation stipulates that this proceeding is available as an alternative option *vis-a-vis* domestic proceedings. This means that EU common rules intended for more effective handling of intra-EU low-value claims are applied only as an alternative to main-stream rules – domestic rules. This is a paradox in the current modern dispute resolution environment. Cost efficiency and optimal speed are predominant concepts nowadays in well balanced dispute resolution systems. A dispute resolution system where a user can elect to use more expensive, slower and less effective proceeding does not meet modern quality standards.

The ESCP should be made mandatory for intra-EU small claim matters. Such a shift in the nature of the ESCP may not only increase the frequency of its use. It can catalyze more rapid development of it as well. Alternative application may be left as an option for use with domestic low-value disputes.

CONCLUSIONS

The ESCP was introduced in the European realm of civil proceedings as a second-generation instrument for more efficient handling of low value intra-EU civil claims. It was a significant step in the evolution of pan-EU cooperation in the civil justice field. However, recent studies of the ESCP practical application revealed that there are many shortcomings hindering the full realization of the potential of the basic principles on which this process is built.

The current evolution of the EU civil procedure instruments can be characterised as an increase of mutual trust among Member States, furthering gradual harmonisation or unification and efforts to achieve optimal efficiency. In this context obstacles preventing the full functionality of the ESCP can be surmounted by striving for a unified procedure and improving its design as well as technical aspects.

Upgrades in the form of unification, digitalization, automation, online connectivity, simplification of user's interface, should be combined with the wider scope of modern dispute resolution methods and with a requirement

that the ESCP proceeding be mandatory. These steps can help develop a progressive, comprehensive and powerful tool to deal with low-value disputes at a pan-European level. We believe the ESCP should be refined in these directions.

Hereby the third-generation prototype of the EU civil procedure instruments can be born. This could mark a meaningful step in the evolution of the EU cross-border civil dispute resolution toolkit.

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ORAL HEARING MANAGEMENT UNDER THE E.S.C.P. REGULATION*

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ABSTRACT: The European Small Claims Procedure (ESCP) is designed as a written procedure, wherein the oral hearing is granted limited space. The reason stems from the fact that an oral hearing in cross-border litigations takes a significantly longer time and its worth seems to be – notably in civil matters such as those fall within the ESCP’s scope – inversely related to the value of the case (the smaller the value, the less the worth). Such a procedure gives rise to a number of significant issues, concerning its consistency with the fundamental procedural principle of the «right to be heard»; the correlative margin of discretion the court may rely on in deciding whether a hearing shall be scheduled or not; not least the role played by the modern communication technologies in this respect. The author deals with such issues in their multiple features and connections, trying to thus offer proper answers thereto. The author’s overall view is that the ESCP Regulation’s restrictive approach to oral hearing is reconcilable with the right to be heard and that the broad discretion conferred on the court in this respect is justified as well

KEYWORDS: oral hearing; right to be heard; small claims; European small claims procedure; ESCP; videoconference; orality.

SUMMARY: I. INTRODUCTION. A. The oral hearing in ESCP as a «Residual Tool» in the ESCP; B. Lexical remarks on the term “oral hearing”; C. The main rules on oral hearing as set out in art. 5(1a) ESCP.— II. IS DISPENSATION WITH ORAL HEARING CONSISTENT WITH THE PRINCIPLES OF FAIR TRIAL? A. Where doubts arise from – apropos of a first set of ECtHR case-law; B. Fair trial between wordings and reality in cross-border litigations for small claims – In this context is an unwavering implementation of orality actually «fair»?; C. Where doubts (should) end – along with a second set of ECtHR case-law; D. Collateral insights – on how the national law approach towards orality may influence the interpreters’ judgment; E. Overview and practical implications.— III. THE ROLE OF MODERN COMMUNICATION TECHNOLOGIES IN THE ESCP’S APPROACH TO ORALITY.

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A. On the availability of appropriate technology; 1. Introduction; 2. On the availability; 3. On «appropriateness». B. The «language divide» in connection with videoconferencing; C. The (inconvenient) reference to the Evidence Regulation; D. Overview and some proposals; E. How to handle the choice (if available and proper) between in-person and remote oral hearings.— IV. CASES IN WHICH ORALITY SHOULD PREVAIL OVER WRITTEN FORM. A. Compulsory cases: 1. Evidence to be taken before the court; 2. The party requesting an oral hearing is self-represented; 3. About the remedies. B. Some expedient cases.

I. INTRODUCTION

A. The oral hearing as a «residual tool» in the ESCP

The European Small Claims Procedure (henceforth ESCP) “shall be a written procedure”, as article 5(1) of Regulation n. 861/2007 sets forth, thus making it clear that an oral hearing results in a deviation from the ESCP’s standards.

Regarded as a curbing factor for a cross-border procedure designed to be as accelerated and simplified as possible, the oral hearing, though viable, is discouraged and never arises as an automatic pre-determined moment along the course of the ESCP¹.

Article 5(1a) ESCP shapes the «oral hearing» accordingly: a residual instrument which is for the court to provide in the absence of possible alternatives in written form and on the basis of a broad discretion. It is also an instrument each party is entitled to ask for but does not have the right to claim – in the sense that the party’s request is not binding. Besides, ESCP Regulation regards traditional face-to-face hearings as exceptional, as its article 8 singles out the video- or teleconference as (a possibly) usual way for a hearing to be held.

B. Lexical remarks on the term “oral hearing”

From a terminological standpoint, it is worth recalling that the seemingly redundant term «oral hearing» instead of the simpler «hearing» depends on a significant grade of ambiguity attached to the latter. With the word «hearing»,

¹ An approach that, lest it be underestimated or misunderstood, has been additionally stressed by the amending Regulation 2421/2015, both in the Preamble, point 11, and in the wording of article 5(1a) as introduced by the said Regulation with the aim of leaving the court a wider margin of discretion in refusing a party’s request for oral hearing. This aim is pursued by ousting the adverb «obviously» from the wording of the previous article 5(1): “The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is *obviously* not necessary for the fair conduct of the proceedings”. For a recent survey on the use of ESCP (along with that of the other “2nd generation Regulations”) containing specific data on the oral hearing and its use in several EU countries (namely Belgium, France, Germany, Luxembourg, the Netherlands, Poland and Spain), see the features available in IC2BE project online platform, on <https://www.uantwerpen.be/en/projects/ic2bel>. From a statistic point of view, however, the (well-known) under-use of the ESCP renders the relevant data extremely poor and not particularly significant.

reference is made at times to the complex of activities and guarantees that the adversarial principle consists in, irrespective of whether and to what extent they are provided orally or in writing ². In this connection, «oral hearing» provides a disambiguation of an otherwise too versatile legal term.

The predicate «oral hearing», in turn, entails also an ambiguity: it may be referred, more strictly, to the chance for the party to orally address the and be questioned by the court on the matter concerned; but also, more extensively, to any chance for official and direct confrontation between any of the participants, including the judge, the parties, counsels, witnesses and any other person entitled to appear before the court. That said, it is equally clear that in the ESCP Regulation – notably in article 5 – the term is intended in the latter and more extensive sense, provided that article 5(1a) relates oral hearing both to the taking of evidence on a subsidiary basis (which might involve the parties and their counsels as well as other subjects like the witnesses) and to the specific activity of orally addressing by and to a party.

C. The main rules on oral hearing as set out in art. 5(1a) ESCP

The text of article 5(1a) literally states:

1) by its first sentence, that the court shall schedule an oral hearing whenever the sole array of written evidence proves unsatisfactory to draw a judgment; which is for the court to assess under the applicable rules of evidence (generally the *lex fori*);

2) by its second sentence, that the party may request an oral hearing regardless of the reasons, provided the court may then refuse it. Hence, the party's request may be based on any reason: e.g., for a self-represented litigant to better explain his arguments; for the parties in complex cases to take a full and simultaneous stand on the relevant issues so as to prevent possible unbalances in the right to be heard.

As to point 1), an despite the emphasis that the verb «shall» places on the court's duty to hold a hearing, this provision does not really deprive the court of discretionary power.

² Such being the sense as the right “to a fair [...] hearing” as set forth art. 6 EConvHR is generally understood, and provided that the adversarial principle is in turn strictly connected to that to “equality of arms” and to a “reasoned decision”. Instead, the more specific reference by the EConvHR to oral hearing is generally recognized in the predicate “public hearing”. See, on the subject, and for the appropriate case-law references, the following reviews: *Handbook on European law relating to access to justice ECtHR* – prepared by European Union Agency for Fundamental Rights *et al.* – Luxembourg, 2016, 40 ff., available online at: <https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>; *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)* – prepared by the Council of Europe – Strasbourg, upd. 31.12.2020, available online at: https://ECtHR.echr.coe.int/Documents/Guide_Art_6_ENG.pdf. An even broader meaning attaches the German legal system to the «Recht auf rechtliches Gehör» (art. 103 GG), though literally consisting in the «right to a rightful hearing»: see for all H. SCHULZE-FIELITZ, GG Art. 103 Abs. 1, in ECtHR. Dreier (edit.), *Grundgesetz-Kommentar*, III, 2018, Tübingen, nr. 1 ff.

As far as the taking of evidence by oral hearing is concerned, article 9(2) ESCP admits the use of written statements coming from witnesses, parties and experts; subject to the subsidiary character conferred to witness and expert evidence (however to be taken possibly through written statements) by article 9(4) ESCP as well as to the general clause set out in article 9 (1), whereby the court “shall use the simplest and least burdensome method of taking evidence.”

A similar consideration applies *a fortiori* to the sentence in point 2), concerning the judicial discretion on the party’s request for an oral hearing, as the wording “the court may” definitely suggests a wider larger margin of appreciation. Even considering that the court’s discretion is limited insofar as the requested hearing turns out to be “necessary for the fair conduct of the proceedings”, it is however for the court to decide in what case such a necessity may arise.

For the same reasons a party may request an oral hearing, the court should in turn be able to set a hearing on its own motion. Such direction relies – again – upon a literal basis, since the provision referred to in point 1) – first sentence of article 5(1a) – in establishing that the judge «shall» hold the oral hearing in that particular situation, simply does not prevent the judge from holding it whenever deemed appropriate³.

II. IS DISPENSATION WITH AN ORAL HEARING CONSISTENT WITH THE PRINCIPLES OF FAIR TRIAL?

A. Where doubts arise from – apropos of a first set of ECtHR case-law

Yet doubts over the viability of the scheme provided for in article 5(1a) of the ESCP are diffusely cast on the basis of the «fair and public hearing» clause as set forth by the EConvHR in article 6, par. 1, as interpreted by the case law of the EConvHR Court and hence transposed in article 47, comma 1, of the Charter of Fundamental Rights of the EU (CFR).

In the opinion of many authors – especially Germans – the way the ESCP Regulation limits the party’s right to a hearing does not meet the standards of a fair trial as set out in article 6 EConvHR, insofar as the former leaves to the discretion of the court whether or not to grant the party’s request to be heard. Nor does the low value of the claims involved lead to a basically different conclusion, as there is no steady correlation between the economic value of a

³ This is also the sense of the wording of article 5(1a), second sentence, according to which the court “may” refuse the party’s request – thus it is not obliged to refuse it – ; and the more general fact that article 5(1), by stating that ESCP “shall be a written procedure”, does not derive any procedural consequence to the case the court sets a hearing without it being necessary for the fair conduct of the proceedings.

litigation and its factual or legal complexity⁴. Hence there is a need – as an alternative to simply assuming the irreconcilability of art. 5 ESCP with the fair trial guarantees – for a very strict application of the court’s discretion, so as to make it conform with the exceptional cases in which the same ECtHR allows courts to dispense with holding an oral hearing requested by the party.⁵

The said criticism relies upon the assumption that, according to ECtHR case-law, article 6 EConvHR must be interpreted as meaning that, aside from some limited exceptions, the court shall not deny a party’s request to be heard.

It is in fact well known that, according to the Court of Strasbourg, the right to be publicly and orally heard by the court at least once before one instance⁶ is a fundamental component for the fair trial that neither the lawmaker nor the court may disregard without violating article 6 EConvHR.

As it is also well known, the ECtHR accepts that such guarantee, in both its elements of publicity and orality, may be dispensed with in exceptional circumstances⁷. Notably, established case-law admits that an oral hearing may be departed from insofar as the proceedings concern purely legal issues of limited scope or highly technical issues⁸. Such an exception also adds up

⁴ C.A. Kern, *Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze*, JZ, 2012, 395; J. Wolber, *Der Beitritt der Europäischen Union zur EMRK im Lichte des Europäischen Zivilprozessrechts*, ZeuP, 2017, 942.

⁵ J. Wolber, *Der Beitritt der Europäischen Union zur EMRK*, cit., 940 ff.; T. Garber, *EuGFO, article 5*, in Geimer - Schütze (dir.), *Europäisches Zivilverfahrensrecht*, 2020, nr. 5 f.; W. Hau, *EG-BagatellVO - Article 5*, in Krüger - Rauscher (dir.), *Münchener Kommentar zur ZPO*, 2017, III, n. 2; C.A. Kern, *Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze*, JZ, 2012, 394-396; E.A. Ontanu, *Cross-Border Debt Recovery in the EU*, Cambridge, 2017, 49; M. Mellone - A. Pancaldi, *Il nuovo regolamento comunitario sulle controversie di modesta entità*, Dir. Un. Eur., 2008, pag. 281 ff., spec. par. XI; according to C. Oro Martinez, *The Small Claims Regulation: On the Way to an Improved European Procedure?*, in B. Hess, M. Bergström, E. Storskrubb (eds.), *EU Civil Justice: Current Issues and Future Outlook*, Oxford, 2016, whereas the original value threshold of €2.000 didn’t raise issues in this respect, the subsequent increase up to €5.000 requires the limitation of oral hearing to be “seriously reconsidered”. Contrary opinions thereon in P. Schlosser, *EU-GFVO, Article 5*, in Schlosser - Hess, *EU-Zivilprozessrecht*, München, 2015, nr. 1; M. Peiffer, *VO (EG) 861/2007, Article 5*, in Geimer - Schütze - Hau (edit.), *Internationaler Rechtsverkehr in zivil- und Handelssachen*, München, 2021, nr. 9; Jahn, *Das europäische Verfahren für geringfügige Forderungen*, NJW, 2007, 2890, spec. 2892; E. D’Alessandro, *Il procedimento uniforme per le controversie di modesta entità*, Turin, 2008, 86–88; in principle X.E. Kramer, *The European Small Claims Procedure: Striking the Balance between Simplicity and Fairness in European Litigation*, ZEuP, 2008, 355 ff., spec. 371 f., albeit assuming that, as a matter of fact, “the court will usually respect of a party to a hearing...”; so inclined is also J. Kropholler – J. Von Hein, *Europäisches Zivilprozessrecht*, Frankfurt a. M., 2011, 1117 f.

^{As to the domestic case-law, among the very few retrieved, see Court of Appeal of Barcelona, 26 sept. 2012, as reported by <https://ic2be.uantwerpen.be/#/search/national>, which rejects the appeal raised by the defendant on account of the refusal by the Court of first instance to grant the party’s request for oral hearing allegedly aimed at taking of (not specified) evidence.}

⁶ In these terms see once again ECtHR, *Salomonsson*, para. 36; ECtHR, 26 apr. 1995, C-16922/90, *Fischer*, para. 44.

⁷ As to the publicity as such see ECtHR C-58675/00, *Martinie*, para. 42-44; as to the overall dispensing with an oral hearing see *inter alia* ECtHR 12.11.2002, 38978/78, *Salomonsson*, para. 34; ECtHR 30 sept. 2020, C 58512/16, *Cimperšek v. Slovenia*, para. 41; ECtHR 23 feb. 1990, *Fredin*, para. 21 f.

⁸ See in this respect ECtHR 6 nov. 2018, C 55391/13, *Ramos Nunes de Carvalho e Sá*, para. 188-190; ECtHR 24.06.1993, C 14518/89, para. 58; ECtHR 6 apr. 2017, C 2229/15, *Karajanov*, para. 60; whereas the latter exception is generally upheld in disputes concerning social-security benefits. In a different

to the more general dispensation admitted, whereby “a hearing may be dispensed with if a party unequivocally waives his right thereto and there are no questions of public interest making a hearing necessary”⁹, the party’s consent thus playing a key role in issues concerning the right to be heard.

**B. Fair trial between wordings and reality
in cross-border litigations for small claims –
In this context is an unwavering implementation
of orality actually «fair»?**

The criticism over the handling of the oral hearing in the ESCP Regulation appears quite unconvincing. In contrast to the adversary principle, orality does not rise to a self-evident absolute guarantee in judicial procedures: the value of orality depends on the function of a specific procedure and on other variables influencing the effectiveness of the outcome. Orality plays in principle a positive role, which justifies the general assumption that the oral hearing shall in principle be granted; but without disregarding the fact that its related inconveniences¹⁰ in some cases make an oral hearing even detrimental. This is a well-known fact and there’s no need to wait for the acknowledgment of ECtHR to take notice of it¹¹.

In this respect, and considering the scope of a cross-border small claims procedure, it seems less plausible that article 5(1a) ESCP must comply with the wording of article 6 EConvHR, than, quite to the contrary, said article must be implemented with greater flexibility.

Besides the just mentioned limitations on the right to an oral hearing, a significant role in ESCP proceedings shall be given to the need for proportionality in administering justice within the meaning of recital nr. 7 ESCP, here intended as sustainable *ratio* between the importance attached by a subject to an alleged right and the resources such subject is normally ready to spend on its judicial protection, mainly in terms of related times and costs¹². The low value of the disputes, in connection with all the serious disadvantages involved in an ordinary cross-border litigation – in terms of costs, court’s

and even more restrictive view, C. Favilli, *L’orizzonte dell’asilo e della protezione dello straniero*, in *Questione giustizia*, 2018, fasc. n. 2, 34 ff., maintains that the exceptional dispensation with oral hearing refers exclusively to the hearing intended as «party’s audition» and it may not be intended as possibility for ruling out the oral hearing at all, which article 6 EConvHR would not allow.

⁹ So ECtHR 38978/78, *Salomonsson*, *ibid.* and the case-law therein cited.

¹⁰ See in this regard the suggestive overview sketched by J. Nieva Fenoll, *The disadvantages of orality*, in F. Carpi - M. Ortells Ramos (ed.), *Oralidad y escritura en un proceso civil eficiente*, València, 2008, II, 471 f.

¹¹ Even a highly authoritative promoter of orality in civil procedure as G. Chiovenda, *Relazione al progetto di riforma del processo elaborato dalla commissione per il dopoguerra*, in *Saggi di diritto processuale civile*, Roma, 1931, II, 42 f., had to recognize that orality is not always convenient, and, when disadvantage prevails, then its theoretical primacy should give way to practical needs.

¹² See accordingly B. Vidal Fernández, *Oralidad y escritura en el proceso declarativo europeo de escasa cuantía*, in F. Carpi - M. Ortells Ramos (ed.), *Oralidad y escritura*, cit., II, 517 ff.

distance, language and time – are the main hurdles to the effectiveness of legal protection in this context; and that these are the fundamental issues the ESCP aims to address. It is thus worth noting that focus here is on the party's (notably the claimant's) own conflicting interests affecting his willingness to bring civil action; in contrast, the interest of the State to conserve judicial resources, although typically crucial in domestic small claims litigations¹³, plays a secondary role in this setting.

Lest the basic purpose of the ESCP be frustrated, it is therefore crucial to find a proper and fair balance between the factors, so as to grant the parties – especially a «weaker» one – judicial protection that is effective. For the ESCP device to work properly, it is also important to grant the court a broad discretion¹⁴, notably to prevent a party – above all the one presumably interested in dragging out the proceedings – from systematically invoking his right to be heard and from doing so with high chances of succeeding¹⁵.

It must be added, on the other hand, that, pursuant to article 8 ESCP, the oral hearing – when ordered – shall be held preferably by videoconference or by some other appropriate distance communication technology¹⁶. The interaction of the ESCP with videoconferencing could actually change the terms of the question regarding the extent to which the oral hearing should be prevented or encouraged. The point shall be addressed later (*infra*, III.), as it is in many respects a quite problematic one, especially in the context of cross-border litigations.

C. Where doubts (should) end – along with a second set of ECtHR case-law

As a matter of fact, the ECtHR jurisprudence proves on its part far less restrictive than the previously mentioned case-law may suggest.

To begin with, the above-mentioned case-law must be understood in light of the clarification given by the ECtHR in the *Chimperšek* case, which said

¹³ On proportionality as an interpretative and legislative standard in the judiciary, see for all R. Caponi, *Il principio di proporzionalità nella giustizia civile: prime note sistematiche*, RTDPC, 2011, 389 ff. As to the fundamental role such a principle plays in the assessments of the European Courts and notably of the ECtHR, see G. Scaccia, Proportionality and the Balancing of Rights in the Case-law of European Courts, *Federalism*2019, no. 4, 1 ff. For a more general overview of the proportionality doctrine, see. K. Möller, *Proportionality: Challenging the critics*, ICon (Intl. Journ. of Const. Law), 2012, 709 ff.

¹⁴ The inherent connection between handling orality and granting the court a broad margin of discretion in this regard is pointed out in B. Vidal Fernández, *Oralidad y escritura*, cit., 528.

¹⁵ Same remark in F. Ferrand, *Bilan d'application du règlement...*, in S. Guinchard (dir.), *Droit et pratique de la procédure civile* (online ed.), Dalloz, 2021, par. 449.51; see also in this vein P. Schlosser, EuGFVO, Article 5; F. Netzer, EuBagatellVO, Article 5, in Kindl - Meller-Hannich – Gesamtes (edit.), *Recht der Zwangsvollstreckung*, Baden-Baden, 2021, nr. 4.

¹⁶ A preference already made in the original text but now emphasised by the amending Regulation 2421/2015, in line with the general directions as defined by the European Council in the Stockholm Programme (OJEU, C 115, 4.5.2010, 1 ff., spec. n. 3.4.1.) and with the European Council Draft Strategy on European e-Justice 2014-2018 (OJEU, C 376, 21.12.2013, 7 ff.).

that in the absence of “*issues of credibility or contested facts which necessitate a hearing... the courts may fairly decide the case on the basis of the parties’ submissions and other written material*”¹⁷. This criterion makes the oral hearing plainly dependent on the general standard of relevance, notably on the understanding that if a fact can be established from a document already admitted into evidence, an oral hearing on the same fact may be in principle denied. Therefore, one can hardly say that the lack of «issues of credibility» may be assessed on the basis of strict and binding criteria, having to concede, on the contrary, that the court shall deploy a significant degree of discretion in this regard, notably in order to evaluate if and to what extent “the parties’ submissions and other written material” are credible enough to override possible objections – and, conversely, whether an objection is «non credible» enough to be promptly set aside¹⁸.

All the more significant in the particular context of small claims is the ECtHR 8 feb. 2016, C 64160/11, *Pönkä v. Estonia*, ruling on the domestic small claim proceedings as laid down by articles 404 and 405 of the Estonian CCP. The applicant, a Finnish national convicted of murder in an Estonian court and transferred to Finland to serve his sentence, was sued again for damages before an Estonian court by the owner of the apartment where the murder occurred. In consideration of the low value of the claim, the court seised ordered the case to be dealt with according to the simplified procedure for small claims as set out by article 405 CCP, which had admittedly been drafted on the basis of the ESCP and entitles the court to conduct the proceedings entirely in writing. The applicant’s request to be heard was denied and the proceedings unfolded exclusively in written form: it should be noted that the applicant argued for the necessity of an oral hearing on the basis of the need to take direct evidence from him and some witnesses, whereas the Court did not provide any reason for its refusal. The complete lack of justification for such refusal was decisive for the ECtHR to uphold the applicant’s complaint about the violation of article 6 of the Convention.

Albeit confirming the alleged violation of article 6, comma 1, EConvHR, by no means did the ECtHR cast doubts upon the consistency of article 5(1a) ESCP with article 6 of the Convention – nor did it cast doubts against the relevant provisions of the Estonian CCP. On the contrary, the Court showed itself to be basically open to the judicial discretion in the matter concerned, as the following assertions make it clear.

Apart from a formal tribute to the «exceptional character» of what may dispense with an oral hearing, the Court – not before having pointed out that “it does not mean that refusing to hold an oral hearing may be justified only

¹⁷ ECtHR in *Cimperšek*, *ibid.*; ECtHR, 18 dec. 2008, C 69917/01, para. 73 *Saccoccia v. Austria*.

¹⁸ Also worth mentioning is ECtHR 19 apr. 2007, C 63235/00, *Vilho Eskelinen v. Finland*, spec. par. 73 f., stating that a party shall be given the opportunity to request an oral hearing and that a subsequent court’s dismissal shall be motivated; and neither the Court’s statements nor the circumstances of the case suggest that ECtHR confined the court’s refusal to exceptional and strictly predetermined situations.

in rare cases” – goes on to say that “Likewise, a hearing may not be required when the case raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations”¹⁹.

This implies a wide use of judicial discretion and no rigid, predetermined restrictions underlying the assessment of whether the written material concerned is «adequately resolving»; so far, there is no presumption that a refusal of the party’s request for hearing entails a violation of the fair trial. There is instead an assumption that a denial is rightfully given wherever the requested hearing tends to reintroduce in oral form what is already taken in writing. In other words, even in the ECtHR’s assumption, the oral hearing is not different enough from written allegations as to prevent the court from making a comparative evaluation of the respective contents and to refuse the former whenever it tends to reiterate the findings already obtained from the latter.

Just as important is what the ECtHR states about its competence in the matter concerned, *viz.* the extent to which the ECtHR may scrutinize a domestic court’s assessment of the adequacy of the written material produced and the correlated need for an oral hearing. In this respect the Court shall examine whether the domestic court provided a proper explanation as to the facts underlying the denial of the requested oral hearing; in addition, the Court considers itself fully entitled to review the domestic court’s judgment on the merits²⁰.

D. Collateral insights – on how the national law approach towards orality may influence the interpreters’ judgment

In addition to Estonia, other EU national lawmakers outline civil contentious proceedings capable of unfolding entirely in written form, although the conditions for ruling out the oral hearing vary, sometimes being far more restrictive than that observed in the Pönkä case²¹. It is, in fact, worth noting that some Member States still regard orality as the most effective instrument for ensuring speed and simplicity in small claims domestic proceedings²²; which in principle may indeed prove right, provided both parties may easily access the court and speak the same language. Several Member States have in addition adopted specific coordination rules for better implementing the ESCP Regulation.

¹⁹ So literally ECtHR 12 nov. 2002, C 28394/95, *Döry*, which the said judgment refers to.

²⁰ See also in this sense ECtHR 13 mar. 2018, C 32303/13, *Mirovni Inštitut*, para. 44.

²¹ A general review thereto is available on the e-Justice Portal on https://e-justice.europa.eu/content_small_claims-42-es.do.

²² So, in Spain, the *Juicio verbal* under articles 437 ff. LEC (Ley 1/2000 de *Enjuiciamiento Civil*) – as its name conveys – with general application to claims up to € 6.000 pursuant to article 250, comma 2, LEC; in Italy, the proceedings before the Justice of the Peace under articles 311 ff. CPC with a general application to claims up to € 5.000 – though the bias in orality is more theoretical than implemented in practice.

France and Germany provide two examples of such dual-level legislative action and they are worth being briefly describing.

As to the coordination rules, neither of them departs from the provisions as set out in article 5(1a) ESCP. Article 1388²³ of the French CPC recalls implicitly the criteria set out therein; whereas the German ZPO, in its section dealing with the ESCP coordination rules²⁴, does not even contain a tacit reference to such criteria.

As far as domestic small claims proceedings are concerned, it is then worth considering that both French and German procedural rules make the full written procedure in principle dependent on the parties' explicit approval, as will be seen below.

By law 23 march 2019, n. 2019-222, France enacted a double set of provisions concerning the waiver of oral hearing in civil litigations: a general regime and a specific one concerning the small claims (*petit litiges*). According to the general regime, as defined by article 757, comma 2, and 828 CPC²⁵ in connection with article L 212-5-1 COJ²⁶ («Code de l'Organisation Judiciaire»), the three of them as amended by provisions entered into force on 1st January 2020), the tribunal – namely the *tribunal judiciaire* – at the request of the parties and provided all of them agree with that, may order the entire proceedings to be held in writing; thus implying that a waiver of oral hearing requires the parties' consent.

²³ Article 1388 French CPC: “Lorsque le tribunal décide de tenir une audience en application de la procédure européenne de règlement des petits litiges, il connaît du litige conformément à la procédure au fond applicable devant lui.” For a general survey on ESCP implementation in France, see recently M. Winkler – P. M. Baquero, *The implementation of the European Small Claims Procedure in France*, EuCML, 2021, no. 1, 36 ff.

²⁴ §§ 1097 – 1109 ZPO, forming the ZPO Section dedicated to ESCP 861/2007 Regulation. § 1100 provides for the alternative between face-to-face and remote hearings, that is, though, a different topic, the relevant ESCP provision on which being article 8.

²⁵ So article 757 CPC “Outre les mentions prescrites par les articles 54 et 57, la requête doit contenir, à peine de nullité, un exposé sommaire des motifs de la demande. Les pièces que le requérant souhaite invoquer à l'appui de ses prétentions sont jointes à sa requête en autant de copies que de personnes dont la convocation est demandée. / Le cas échéant, la requête mentionne l'accord du requérant pour que la procédure se déroule sans audience en application de l'article L. 212-5-1 du code de l'organisation judiciaire.”

²⁶ In turn, article 828 CPC sets out that “A tout moment de la procédure, les parties peuvent donner expressément leur accord pour que la procédure se déroule sans audience conformément aux dispositions de l'article L. 212-5-1 du code de l'organisation judiciaire. / Dans ce cas, le juge organise les échanges entre les parties. Celles-ci formulent leurs prétentions et leurs moyens par écrit. La communication entre elles est faite par lettre recommandée avec demande d'avis de réception ou par notification entre avocats et il en est justifié auprès du juge dans les délais qu'il impartit. Le juge fixe la date avant laquelle les parties doivent communiquer au greffe leurs prétentions, moyens et pièces. A cette date, le greffe informe les parties de la date à laquelle le jugement sera rendu. Celui-ci est contradictoire. / Le juge peut décider de tenir une audience s'il estime qu'il n'est pas possible de rendre une décision au regard des preuves écrites ou si l'une des parties en fait la demande.”

²⁶ Article L 212-5-1 COJ so states: «Devant le tribunal judiciaire, la procédure peut, à l'initiative des parties lorsqu'elles en sont expressément d'accord, se dérouler sans audience. En ce cas, elle est exclusivement écrite. Toutefois, le tribunal peut décider de tenir une audience s'il estime qu'il n'est pas possible de rendre une décision au regard des preuves écrites ou si l'une des parties.»

As for the the specific regime concerning the *petit litiges*, the French lawmakers introduced an article L 212-5-2 COJ setting out a procedure allegedly shaped on the basis of the ESCP ²⁷; which, in part, actually matches with article 5(1a) ESCP – even by picking it up literally – and in part does not. This procedure is yet to be completed by a decree of the Conseil d’Etat ²⁸determining the maximum value of the claims to which such rule applies. What definitely differs from the ESCP is – aside from its restriction to money claims – that article L 212-5-2, comma 1, COJ still makes the waiver of oral hearing dependent on the initiative and consent of all the parties, by means of a joint request for the proceedings to take place completely online (“*dans le cadre d’une procédure dématérialisée*”). This renders the outcome similar to that provided for by the general set of rules already referred to²⁹, but more complicated, insofar as its II comma provides for a sort of «reconsidering clause» whereby a party may request an oral hearing in a second time, except that the court may in such case discretionally reject it. In short this is quite a «winding route», which conveys either the idea that under the ESCP too the waiver of the oral hearing is basically left to the prior consent of the parties, or that the national stakeholders are not yet ready to face a different solution.

As for Germany, the domestic proceedings for small claims is at present provided for by § 495a ZPO, the scope of which encompasses claims up to 6.000 Euros before the *Amtsgericht*. Besides entitling the court to decide by equitable discretion, § 495a states that the oral hearing shall be held at the party’s request; which underlies, inversely, a general waiver of the oral hearing – unless, as said, otherwise requested by a party ³⁰. So far, this provision defines quite a different scheme from the general rule contained in § 128

²⁷ In this sense see for all F. Eudier, *Les dispositions de procédure civile de la loi du 23 mars 2019*, AJ Famille, 2019, 323 ff., spec. note 27. Article L 212-5-2 COJ reads as follows : « Les oppositions aux ordonnances portant injonction de payer statuant sur une demande initiale n’excédant pas un montant défini par décret en Conseil d’Etat et les demandes formées devant le tribunal judiciaire en paiement d’une somme n’excédant pas ce montant peuvent, à l’initiative des parties lorsqu’elles en sont expressément d’accord, être traitées dans le cadre d’une procédure dématérialisée. Dans ce cas, la procédure se déroule sans audience. / Toutefois, le tribunal peut décider de tenir une audience s’il estime qu’il n’est pas possible de rendre une décision au regard des preuves écrites ou si l’une des parties en fait la demande. Le tribunal peut, par décision spécialement motivée, rejeter cette demande s’il estime que, compte tenu des circonstances de l’espèce, une audience n’est pas nécessaire pour garantir le déroulement équitable de la procédure. Le refus de tenir une audience ne peut être contesté indépendamment du jugement sur le fond. [...] »

²⁸ This decree, scheduled by 1 January 2022, hasn’t been enacted so far (up to the proofread).

²⁹ This is what one gets from the wording of the said article L 212-5-2 COJ and what the French interpreters actually accordingly draw therefrom: see for references S. Guinchard (dir.), *Droit et pratique de la procédure civile* (online ed.), Dalloz, 2021, § 441.461. – *Procédure dématérialisée*; F. Eudier, *Les dispositions de procédure civile*, cit., 323 ff., spec. para. 2; Conseil Constitutionnel, 21 mar. 2019, n. 2019-778, ECLI:FR:CC:2019:2019.778.DC, para. 63-67.

³⁰ § 495a ZPO – Verfahren nach billigem Ermessen – 1Das Gericht kann sein Verfahren nach billigem Ermessen bestimmen, wenn der Streitwert 600 Euro nicht übersteigt. 2Auf Antrag muss mündlich verhandelt werden.

ZPO, whereby – subject to limited derogations – a judgment without a previous oral hearing may be rendered only “with the parties’ consent”³¹.

The above-mentioned rules apply to national proceedings. Insofar as they are more restrictive than those provided by article 5 ESCP, the conditions set out by national law for avoiding an oral hearing shall (and should) not prevent article 5(1a) ESCP from fully operating in its specific scope as defined in article 1 and 2 ESCP. Although such a conclusion may in technical terms sound obvious (*i.e. according to* the primacy of EU law in its field of application) the influence exerted by national procedural standards could be significant, especially when it comes to applying article 5(1a) ESCP. It is thus understandable – also considering the comparatively ancient influence the orality principle exercised in their judicial culture – that German and French interpreters incline to an «inside-out harmonization», tending to concede little space for a refusal of the party’s request for an oral hearing: less than what the EConvHR requires as a minimum standard according to the *Pönka* case-law, and less than the ESCP *ratio* actually needs.

E. Overview and practical implications

In the light of the foregoing, I would maintain that:

— article 5(1a) ESCP does not conflict with the fundamental right to be heard as set out in article 6 EConvHR; in fact

— in the relevant ECtHR case-law, the court actually enjoys large discretion in deciding whether to hold or not an oral hearing under the said provision and in particular whether a hearing is necessary for the fairness of the proceedings;

— even where hearing is requested by a party, the court’s discretion is not restricted to a rigid and predetermined list of exceptions: if there is a «list», then it is significantly open and comes down to the features of the single case;

— at least in the context of ESCP proceedings, oral modality is not different enough compared to written allegations, to forbid the court to deny a request for an oral hearing wherever the relevant evidence can be found in allegations and other documents already submitted in writing or that may be easily so submitted;

³¹ § 128 “– Grundsatz der Mündlichkeit; schriftliches Verfahren – (1) Die Parteien verhandeln über den Rechtsstreit vor dem erkennenden Gericht mündlich. (2) 1Mit Zustimmung der Parteien, die nur bei einer wesentlichen Änderung der Prozesslage widerruflich ist, kann das Gericht eine Entscheidung ohne mündliche Verhandlung treffen. 2Es bestimmt alsbald den Zeitpunkt, bis zu dem Schriftsätze eingereicht werden können, und den Termin zur Verkündung der Entscheidung. 3Eine Entscheidung ohne mündliche Verhandlung ist unzulässig, wenn seit der Zustimmung der Parteien mehr als drei Monate verstrichen sind. (3) Ist nur noch über die Kosten oder Nebenforderungen zu entscheiden, kann die Entscheidung ohne mündliche Verhandlung ergehen. (4) Entscheidungen des Gerichts, die nicht Urteile sind, können ohne mündliche Verhandlung ergehen, soweit nichts anderes bestimmt ist.”

— however wide the scope of judicial discretion may be, it can be reviewed when there is scrutiny on the merits by means of appeals or other remedies and eventually by application before the ECtHR against the judgment of last instance; which does not by any means contradict the nature of judicial discretion (not to be confused with unquestionable freedom of choice, which is not for a court to wield);

— accordingly, such discretion does not entitle the court to reject a party's request for an oral hearing without providing a reason for this, as a justification is necessary – irrespective of the merits – for the decision to comply with the fair trial standards;

— conversely, the party requiring an oral hearing should always submit the reasons underlying the request, so as to allow the court to assess it accurately and in turn give reasons for it.

Accordingly, the question to be answered is not (and should not be) in what particular and exceptional situations is the court excused from granting the party's request for an oral hearing; but – and somehow to the contrary – in what particular situations the court may not deny a party's request for oral hearing or should even hold one on its own motion.

Thus set forth, the problem will be dealt with in the following.

III. THE ROLE OF MODERN COMMUNICATION TECHNOLOGIES IN THE ESCP'S APPROACH TO ORALITY

A. On the availability of appropriate technology

1. Introduction

A first element to be reckoned with concerns the use of modern communication technologies and its possible impact on the margin of discretion for a refusal of an oral hearing, since full availability of such technologies might *per se* render a judicial denial of the (remote) oral hearing in principle unfair, notably when a hearing is requested by the party³².

Insofar as the said technologies are at the court's disposal, it is yet to assess how «advanced» they are at present and, in the ESCP specific context, how capable they are of overcoming the disadvantages of a traditional in-person hearing.

³² Definitely in this sense is C.A. Kern, *Das europäische Verfahren*, cit., 396.

2. On the availability

Yet problems arise right at the first step. Provided that the ESCP Regulation does not (and hardly could) require the Member States to outfit the courts with appropriate facilities, expressing more likely a wish in this regard, in the EU area – and even within each member State – the quality of remote communication technologies available to the judiciary is far from uniform and, even worse, far from consistent with the needs of a remote-hearing³³. Some EU countries lack communications technologies for remote oral hearings at all; others have more of a patchwork situation, where some fairly well-equipped offices alternate with serious deficiencies in others³⁴.

As for Italy³⁵, the pressing need to contend with the CoViD-19 pandemic has given a fundamental impulse to the introduction of videoconferencing in civil proceedings. Facilities for remote hearings are currently available in several first or second instance judicial offices (*Tribunali, Corti d'Appello*) but in a patchy way and by using private platforms – like *Microsoft Teams* and *Skype for business* – clearly not designed for judicial activity, which may raise doubts as to their being «appropriate» in the sense referred to by article 8 ESCP. What's worst, such facilities are absent in the offices where the competence on ESCP matters is primarily concentrated: Justices of peace (*Giudici di pace*), whose general competence encompasses the claims not exceeding 5.000,00 Euros, are at present lacking even the basic technologies for tele-matic transmission of written acts and documents – not to mention video-conferencing. As a matter of fact, neither the increasingly urgent need for modernization nor the CoViD-19-related contingencies proved strong enough to resolve this situation.

Comparing to Italy, things in France seem going slightly better for the ESCP. French tribunals, heavily under pressure from CoViD-19 pandemic, have somehow managed³⁶ to make use of private generic platform for the *visioconférence* in civil procedures (basically *Zoom, Skype* and *Jitsi*), though in an improvised and non-homogeneous way; however, at the very least the tribunals primarily competent for the ESCP claims³⁷ don't suffer a total black-out.

³³ See in this respect I. Abignente – R. Tuccillo, *European Small Claims Procedure Guidelines for an Effective Response to the Call for Justice*, I-LEX, 2020, fasc. 1, 70.

³⁴ See in this regard I. Abignente – R. Tuccillo, *European Small claims procedure*, cit., loc. cit., 70: “offices today [i.e. up to december 2020] in charge of being aware of ESCP, in most of the cases have no information nor electronic devices available to correctly carry out the procedure”

³⁵ See P.C. Ruggieri, *La european small claims procedure (Reg. CE 861/2007) in Italia: un (rimediabile?) insuccesso*, in *Federalismi*, 2020, fasc. 21, 288; I. Abignente – F. Rolando – P.C. Ruggieri: *The Implementation of the European Small Claims Procedure in Italy*, EuCML, 2021, 40 ff., spec. 44 ff.

³⁶ The main legal instrument has been Ordonnance 25 mar. 2020, n. 2020-304, enacted under delegation of article 11, L. 23 mar. 2020, n. 2020-290; notably article 7 of the said Ordonnance.

³⁷ See G. Thierry, *Le confinement, crash test de la transformation numérique de la justice*, Dalloz actualité, 10.6.2020; ID., *Le second confinement remet à l'épreuve la numérisation de la justice*, Dalloz ac-

A better way, but still with uneven coverage in terms of appropriate remote hearings, also occurs in Germany³⁸. Notwithstanding that § 128a ZPO – by its first version in force since 2002 – provides for a wide-ranging possibility for remote hearings, its implementation was gradual and is still ongoing. The legislature itself, pushing forward the implementation in 2013 by an appropriate bill (Law 25.04.2013 in BGB 2013, n. 20, 935 ff.), extended until January 2018 the time for the Länder to comply. Though still incomplete,³⁹ the coverage is nowadays widespread and, according to reports, the use of videoconferencing for oral hearing has been giving good results⁴⁰. Since § 128a ZPO reads that the court may «allow» the parties – as well as the other participants to the hearing – to attend remotely through audio-video communication tools, it is generally accepted that, despite the court's «authorisation», those subjects are however entitled to physically appear in the courtroom and lawfully participate in the scheduled hearing⁴¹. Regarding the judicial choice between in-person or remote oral hearing, article 128a, comma 3, ZPO (unlike article 8 ESCP) provides no remedy, though some interpreters hold a remedy to be available by challenging the final decision on this specific point⁴².

3. On «appropriateness»

Where technologies for remote oral hearings actually exist⁴³, an obvious problem is whether their standards may be qualified as «appropriate». Such a qualification depends on many variables, the analysis of which goes beyond the subject of this contribution. What can be said is just that the technologies in question should satisfy the following general objectives⁴⁴ and notably: a) ensure the identity of the subjects present at the hearing; b) ensure the quality of audio-visual transmission; c) prevent to a reasonable degree any

tualité, 2.11.2020; L. Cadiet, *Un état d'exception pour la procédure civile française à l'épreuve du coronavirus*, La Semaine Juridique, 13.4.2020, n. 15, 754 ff., spec. 758. A predominantly negative assessment is depicted in M. Winkler – P. M. Baquero, *The implementation of the European Small Claims Procedure in France*, cit., 38: “videoconferences are theoretically possible in French courts, but often may not be available due to technical and economic constraints.”.

³⁸ J. Wolber, *EuGFVO, article 8*, in V. Vorwerk – C. Wolf, BeckOK ZPO, München, upd. 01.03.2021, para. C, I.

³⁹ A nearly in real time adjourned list of offices is available on <https://justiz.de/service/verzeichnisse/index.php>.

⁴⁰ CoViD-19 pandemic gave anyway a significant contribution to its expansion, as remarked by U. Berlit, *E-Justiz en Allemagne - La progression de la numérisation de la justice*, RFDA 2021 p. 397 ff., spec. text including footnotes from 23 to 27.

⁴¹ See in this regard R. Köbler, *Die Videoverhandlung im Zivilprozess – Vorschlag einer Neuregelung*, NJW, 2021, 1072, pointing out the need to change such henceforth outdated provision, in such a way as to entitle the court to order the parties to appear by remote and the parties to comply with it.

⁴² C.A. Kern, § 128a, in Stein-Jonas, *Kommentar zur Zivilprozessordnung*, München, 2016, par. 34; Stadler, § 128a, in Musielak – Voit, *Zivilprozessordnung*, München, 2021, par. 9; otc. D. Von Selle, § 128a, in Vorwerk-Wolf, BeckOK ZPO, München, 2021.

⁴³ Besides (to a great extent) Germany, mention can be made of Lithuania

⁴⁴ For more specific requirements, see the Guide provided by e-Justice on the dedicated page https://e-justice.europa.eu/content_manual-71-en.do?init=true.

interference from unidentified subjects and from unlawful data-gathering – a requirement that is particularly at risk where online platforms and related software consist in generic features (like those of Zoom, Facebook, Microsoft, Google) not calibrated for judicial purpose; d) are sophisticated enough to be reasonably easy to handle; e) ensure that costs are affordable for all the stakeholders, hence not only by judiciary but also by private professionals (legal counsels as well as technical advisors) and personally by the parties. The latter two requirements, d) and e), are particularly important in the ESCP context, where legal assistance is not mandatory⁴⁵.

Assuming the above-mentioned requirements are satisfied, the court should seemingly be more in favour of a remote oral hearing – especially if requested by the party – than otherwise. But even disregarding the current situation of technological inadequacy in a large majority of courthouses, further significant issues remain, making the remote oral hearing a quite demanding occurrence, in terms of both preparation and the risks of something going wrong.

B. The «language divide» in connection with videoconferencing

A first well-known issue is the «language divide» between the official one of the proceedings and the often different language of at least one of the parties. In cross-border litigations this issue is a systemic complication, far more acute than in other judicial contexts where the interests at stakes are greater and either the parties or their professionals are acquainted enough with the court's official language; or these interests are worth the burdens and costs involved in assigning interpreters⁴⁶.

As far as the oral hearing is concerned, the language issue results in the need for simultaneous assistance afforded by reliable instruments.

The ESCP provides no guidance in this regard, leaving the matter to the Member States' law pursuant to the general direction as set out by its article 19. In fact, in the case of a remote oral hearing, article 8, par. 1., comma

⁴⁵ It may be objected that, as videoconferencing still requires the parties and other persons involved to be present in the courtroom, point d) should be a court's concern only and not one of the parties. This assumption would be incorrect, since videoconferencing is explicitly extended to the direct taking of evidence pursuant to article 17 of the 1206/2001 Regulation (which article 8 ESCP refers to in general terms: on such reference see below, III.C.), whereby in principle the requesting court bypasses other courts to make direct contact with the party or his counsel.

⁴⁶ As some Authors point out, language issue is in fact less dissuasive than one might fear. Provided that the party who is more sensitive to the issue is the consumer, who generally acts as plaintiff in the ESCP; and that, pursuant to articles 17 ff. of the Brussels I Regulation (recast), this party benefits in principle from the jurisdiction of his own national court, it follows that the party for whom the language issue could be more dissuasive for remains mostly unaffected by the problem since the court's official language is that of his own: see in this sense C.A. Kern, *Das europäische Verfahren für geringfügige Forderungen*, cit., 396.

2 – as well as in the situation referred to in article 9, 3., of taking evidence through an oral hearing, which references article 8, 1. – the ESCP redirects to the 1206/2001 Regulation on the taking of evidence; which in turn leaves the matter to the law of the requested court (article 10, 2. of the said Regulation) or exceptionally to that of the requesting court in the case of direct taking of evidence provided for by article 17 (only in this case there may be a «third kind» of proceeding resulting in a blend of both the national laws of both the requesting and requested courts).

The role of the interpreter (either in person or remote) is still considered as essential when language issues arise; and when carried out remotely, the task is demanding, time-consuming and somehow even more complex than a traditional in-person interpretation⁴⁷.

It should be added that modern communication technologies offer advanced features for automatic online translations that already provide a viable alternative to the interpreter (a lot of features embedded or integrated in the main platforms for videoconferencing are already available). The problem is that, as of now, such features are not specifically set up for forensic use; therefore, their implementation (in judicial proceedings in general and) in ESCP proceedings is yet to be accomplished, as various specific issues still require proper solutions. For example, it would be possible for the court to make a record of the oral hearing so to allow a subsequent check on the text of the translation, but this is a controversial solution, given the various objections towards recording the videoconference⁴⁸.

C. The (inconvenient) reference to the Evidence Regulation

Another factor hampering recourse to oral hearings also affects its «remote version» and arises from the last sentence of article 8, 1., comma 2, ESCP, whereby the remote hearing too⁴⁹ shall be carried out in compliance with the just mentioned 1206/2001 EU Regulation on the cross-border taking of evidence (ER). As is well known, this Regulation defines a mechanism the functioning of which strictly depends on the active cooperation of an authority (a court in principle, under article 2 ER or the central authority pursuant

⁴⁷ An insight to the instructions provided by the e-justice portal may be just quite instructive in this regard: https://e-justice.europa.eu/content_manual-71--maximize-en.do?idSubpage=6.

⁴⁸ So the German ZPO § 128a explicitly forbids the videoconference taping. In Italy, despite the absence of a legal express prohibition, many practice directions so forbid, although they don't have *per se* binding force. Nonetheless it is hard to conclude that – especially in the matters covered by ESCP – the risks of recording a hearing cannot be overcome by adopting some precautions, so to achieve a reasonable balance between the need not to uncontrollably disseminate the recording and that of keeping documented track of the hearing. See in general and in favour of the recording D. Cerri, *Emergenza e provvedimenti dei capi degli uffici: il caso pisano*, *ECTHR, iudicium.it*, 8 apr. 2020.

⁴⁹ The provision obviously takes for granted that this Regulation applies to cross border oral hearings to be held in person.

to ar. 17 ER) of the member state where the evidence must be taken, whose involvement is therefore mandatory and which may not be sidestepped without violating the procedure⁵⁰. In terms of speed and simplicity, the price this instrument exacts is high⁵¹, and even more so when considering the inconveniences the ER carries with it even in its normal application⁵².

However, justified it may be when it comes to the taking of evidence abroad by traditional face-to-face hearings, in cases of remote oral hearings in small-value litigation the ER appears to be overly burdensome, especially in the light of the development of in-distance communication technologies during the last decade. In the context of a small claim, the mandatory intervention of the said authority and the related procedural complications seem disproportionate⁵³. Especially when the hearing addresses to a party (not to a witness) and is intended for clarification purposes only, specific relevance shall be given to *a*) the possibility for the ESCP judge to freely address the party any question deemed relevant for adjudicating the dispute and *b*) the possibility for all the parties and the judge to interact directly and immediately with one each other according to the typical adversarial scheme. In such a context, the intermediation of a «requested court» seems rather unclear if not utterly dysfunctional⁵⁴.

⁵⁰ There seems to be a significant difference with the inherent scope of the ER, which in principle is optional since it does not exclude the use of other legal tools if deemed more efficient (so ECJ 21 dec. 2013, C-332-11, *ProRail BV*, spec. para. 40 ff.). By contrast, in article 8, 1., comma 2, ESCP the application of the ER is designed as binding and non-optional whenever the situation set out in such provision occurs; notably, where the remote oral hearing concerns a person resident and domiciled in another Member State, article 8 states clearly that it (instead of “may”) “shall be arranged by making use of the procedures provided for in Council Regulation (EC) No 1206/2001”. And the same goes for article 9.3. in case evidence taken by way of an oral hearing.

⁵¹ In this vein see e.g. F. Gascón Inchausti, *The 2017 Directive Proposal on Common Minimum Standards of Civil Procedure in the European Union*, in F. Gascón Inchausti – B. Hess (eds.), *The Future of the European Law of Civil Procedure*, 2020, Cambridge, 245. For a favorable evaluation of such discipline see, conversely, E.A. Ontanu, *Cross-Border Debt Recovery in the EU*, cit., 49.

⁵² To the point that “...national reports and interviews also show a clear tendency to by-pass the provisions of the Evidence Regulation, which are very frequently considered as cumbersome, bureaucratic and time-consuming”: F. Gascón Inchausti – B. Hess *et al.*, *An evaluation study of national procedural laws and practices... – Strand 1 – Mutual Trust and Free Circulation of Judgments*, Luxembourg, 2017, 113 ff., spec. 242, where, in addition, is reported that “With the background of the ECJ Decision in *ProRail* ... courts summon directly witnesses to appear in front of them, instead of asking the judicial authority of the member state where the witness is domiciled. In a similar vein, it has also been reported the possibility of using written testimony (affidavit) to avoid resorting to mutual legal assistance (Malta).”

⁵³ The reference by article 8 ESCP Regulation to the Evidence Regulation procedures entails for the competent court the burden of an application to be addressed to the competent central body of the Member State requested (which may, in turn, assign a national court to take part in the activity) and the related expenditure of time and resources that such a procedural device requires.

⁵⁴ Indeed, reference to the Evidence Regulation solves for the party concerned the problem of the language; but it is hard to concede that this advantage (presumably not the overriding objective of the ER, since otherwise the same instrument should have been extended to the in-person oral hearing) is worth the sacrifice of the direct and immediate confrontation between the judge and the parties, that is basically what the party's oral hearing is meant for. Unless assuming that in the case of an oral hearing under article 8(1), para. 2, ESCP Regulation (i.e. concerning the parties only and in the sole ESCP application field) the request is not needed insofar as acceptance may be taken for granted, except

No significant innovation in this regard derives from the recast of the ER by the 2020/1783 Regulation (applicable from 1 July 2022): although opportunely encouraging the direct taking of evidence by videoconferencing⁵⁵, it does not envisage a «fast track» onto which situations like that of ESCP may be conveniently channeled.

D. Overview and some proposals

To sum up the foregoing, the effectiveness of remote oral hearing and the degree it pursues the ESCP goals still raises multiple issues and is far from achieving a level of speed and simplicity comparable to that currently provided through the online exchange of documents. The preference indisputably granted by ESCP to e-hearings instead of traditional in-person hearings is therefore still far from making the oral hearing a suitable instrument to ensure the effectiveness of the ESCP. The court's approach to oral hearings in the ESCP – as easier though it may be through videoconferencing – should therefore remain at present quite cautious, and the need for broad judicial discretion in whether to hold it stands firm.

The major issues encountered in this respect concern:

— the still scarce and non-homogeneous availability of videoconferencing or other remote audio-visual systems that can be assessed as «appropriate» under article 8(1) ESCP;

— the still significant complexity of multilingual hearings even where interpretation is provided remotely;

— the still significant complexity of the procedural rules, which article 8 draws from the 1206/2001 Evidence Regulation, which will not change significantly with the recasting of the latter by 1783/2020 Regulation.

For the videoconferencing to become in the ESCP context an effective substitute for written statements, there is still a long road ahead, both in terms of availability of the appropriate features and of simplification of some of the relevant procedural rules.

As to the procedural rules, the remote oral hearing under article 8 should be freed from the formalities currently set out in the ER Regulation.

that such an interpretation would actually neutralise the significance of the referral to the Evidence Regulation.

⁵⁵ See in this regard article 20 of ER recast, whereby the cross-border direct examining of a person shall in principle be taken by videoconferencing; to be read in connection with the recital n. 21, suggesting the direct taking of evidence "Where evidence is to be taken by examining a person such as a witness, a party to the proceedings or an expert present in another Member State..." and by "...directly using videoconferencing or other distance communications technology, where that technology is available...". See also the provision in article 12 which, in case of taking of evidence by the requested court, sets out specific provisions for videoconferencing.

Insofar as the remote oral hearing is not about taking evidence, but only serves to grant a party an oral hearing from abroad, there is no apparent need for applying a procedure developed for a different and more formal activity such as that of acquiring evidence. The judge would be able to better carry out his task if entitled to proceed directly, *i.e.* without the need for the videoconference to be previously requested and authorised by a «central body» located in another Member State.

As for acquiring proper evidence – and provided it may not be taken through written statements – it would be useful if each Member State drew up a list containing the means of proof admitted by default in cases relying on distance communication technologies, conceding that in such cases the direct taking of evidence does not require the prior scrutiny by any authority or court of the Member State where the evidence must be taken.

As to the language issues, together with developing specific remote translation features for judicial use, a double-step system should be considered, consisting at the first stage in holding a remote oral hearing with the assistance of a translator providing written translation that can be seen on the video. The hearing should be recorded to permit the translation to be subsequently checked, with appropriate safeguards so as to avoid improper dissemination: considering the matters involved in the ESCP, the advantages of recording the hearing should be far higher than the risk of inappropriate use⁵⁶. A second step, to protect against serious issues concerning the correctness of the translation, should result in an interpreter being entrusted with the issue and, where necessary, the revision of the translation in question.

E. How to handle the choice (if available and proper) between in-person and remote oral hearings

Some final remarks shall be addressed to the issue on how to handle the choice between remote and face-to-face oral hearings. Provided that the alternative is practicable (*i.e.* the appropriate distance communication technology is available), the preference for remote hearing is stated in plain terms by article 8(1), comma 1, ESCP; conversely, the final sentence of the said provision confers a wide discretion on the court to decide otherwise and opt for an in-person hearing. The parties, for their part, may request the court to change its decision thereto, then challenge the judgment on this point in the event of refusal.

⁵⁶ Possible misuses result mainly in indiscriminate dissemination or manipulation of the copy. This risk that could in any event be reduced by adopting some precautions, like that of keeping the video under the court's custody, or letting the interested subjects watch the video but preventing them from downloading it. One could indeed try to make a second-hand footage by filming the computer screen; but that is an ever-incumbent risk even during the videoconference.

While removing oral hearings from a procedure raises obvious issues of consistency with the right to be orally heard, such a guarantee remains *per se* unaffected by waiving a traditional face-to-face hearing in favour of one held by videoconference or vice-versa. Here it seems appropriate to maintain that, in principle, both the modalities are interchangeable, unless particular situations require otherwise, making *one or the other* detrimental to the said right, in which case the possible prejudice pertains to the general right to be heard in the sense explained above (I.B.).

In this connection, and within the ESCP's scope, possible violations of the right to be heard may occur, *e.g.* if the inadequacy of the distance communication system prevents it from being «appropriate» according to article 8 (see above, III.3.). Conversely, a party may disagree with the court's choice to hold a face-to-face hearing on account of the court's significant distance from his or her residence or by alleging circumstances rendering significantly difficult an otherwise comfortable journey (a widespread pandemic hampering the circulation of persons may serve as an example)⁵⁷.

In both cases, the party's refusal to attend the hearing in question, along with the alleged detrimental consequences in the outcome of the proceedings, should entitle such party to challenge the judgment⁵⁸.

IV. CASES IN WHICH ORALITY SHOULD PREVAIL OVER THE WRITTEN FORM

A. Compulsory cases

1. Evidence to be taken before the court

Taking into account the preceding considerations, it is now possible to briefly address the problem of when in the ESCP context the oral hearing (either in-person or remote) should be regarded as necessary or at least expedient.

A first group of cases relates to the taking of the evidence, insofar as it is mandatory for a relevant means of proof to be taken through an oral hearing. This somewhat obvious remark also raises obvious issues in the light of article 9(2) ESCP, pursuant to which the court “may admit” written statements of

⁵⁷ According to J. Wolber, article 8, *cit.*, nr. 17, the eventuality for challenging the decision on this arises only in the event that the court reject a party's request for a face-to-face oral hearing. The author does not explain this limitation, probably assuming it to be obvious that the right to be heard sticks to the paradigm of the traditional in-person hearing. Which is precisely, though, what deserves to be discussed, since sometimes the alternative of a remote hearing may prove much more functional in safeguarding the effectiveness of access to justice.

⁵⁸ Article 8, last paragraph, ESCP, whereby the decision in question “may not be contested separately from a challenge to the judgment itself”, ought to be interpreted in this sense. For further remarks concerning the technique article 8 borrows from article 5(1a) ESCP, see above, III.C.

witnesses, experts or parties; that is, the entire catalogue of the most common means of evidence, the taking of which is traditionally associated with the oral hearing.

So a cautious formula is clearly intended to confer on the court a margin of discretion in deciding whether and to what extent the court should depart from a domestic rule prescribing the taking of evidence through oral hearings only or placing significant limitations on the taking of evidence in writing. In this respect, article 9(2) ESCP should prevail over domestic regulation – subject to the following.

As the ESCP doesn't lay down specific rules as to how such written statements should be obtained, it is then right, in principle, to assume that national rules apply on a subsidiary basis⁵⁹ – with a limit, though. The court's choice for written statements pursuant to art. 9(2) should not be hampered by significant restrictions set out by the national provisions, which should therefore not apply. So, by way of example, if the court avails itself of art. 9(2) ESCP, then article 257-bis of the Italian CPC, which in principle requires the consent of all the parties for written testimony to be taken⁶⁰, should not apply. Since the court may override the set of procedural rules imposing the oral hearing for the taking of evidence, the same court should be given the power to derogate from domestic provisions such as article 257-bis Italian CPC, which severely reduce the actual chance to have a witness's statement taken in writing.

However, the court is obviously not excused from observing the fundamental principles of a fair trial, which means that by admitting the written statement it shall not disregard those procedural rules (whether contained in specific domestic provisions or not) that are necessary to the protection of the said principles (mainly the adversary principle and the right of defense during the taking of the evidence).

In addition, the court's discretion in admitting written statements should not prevail over possible «public policy clauses» presiding over the oral hearing for some types of evidence; hence the need for the court to approach the matter (besides the fundamental guarantees of the civil trial notably as set forth and implemented in the ECtHR and UE legal system) in accordance with the imperative rules governing its law system⁶¹.

⁵⁹ So J. Wolber, EuGFVO, Article 9, in V. Vorwerk – C. Wolf, BeckOK ZPO, cit., no. 6.

⁶⁰ On the contrary, in the sense that article 257-bis should apply, see D'Alessandro, *Regolamento 11 luglio 2007, n. 861 istitutivo di un procedimento europeo per le controversie di modesta entità*, *Judicium*, it, para. 8, thus reconsidering her former approach expressed in E. D'Alessandro, *supra* n. 5, 87 f.

⁶¹ In the specific area the ESCP covers, though, it seems hard to come across national «imperative rules» prescribing evidence to be taken in oral form instead of taking it in written. However, in the sense that the Spanish provisions imposing the oral taking of statements from witnesses and parties shall be regarded as imperative, see J.L. Blasco Arévalo, *La prueba en el proceso europeo de escasa cuantía ECtHR su incidencia en el ordenamiento jurídico español*, RJD, 2019, 123.

2. *The party requesting an oral hearing is self-represented*

A party not assisted by a legal professional should also be granted an oral hearing if he so requests. Since in such a case the party may lawfully participate in the proceedings under article 10 ESCP, the risk is comparatively high for the unassisted party to undermine his position because of mere ignorance of the legal issues or his inability to state the facts properly. Accordingly, a direct and oral confrontation with the court and the other party could here become crucial, and is ultimately consistent with the choice to encourage the use of the ESCP.

3. *About the remedies*

In the above-mentioned situations, a court's denial of an oral hearing may expose the judgment to challenge as set out by article 5(1a), last sentence, ESCP⁶².

Given that it is for the *lex fori* to rule on the specific remedies against the judgment, the said provision makes quite clear that such a challenge should not be filed without alleging an actual harm specifically resulting from the outcome of the dispute and causally connected to the denial of the oral hearing.

According to one scholarly view, the provision in question does not grant the party enough protection, insofar as it leaves to the *lex fori* the discipline of the remedies concerned, without considering that the domestic law may completely rule out any possible remedy against the conclusive judgment⁶³. The premise of this criticism is that the (unlawful) denial of an oral hearing is such a severe breach of the fair trial rules that one cannot permit the deprivation of remedies. This view, though, is unconvincing either from a domestic or from a European perspective.

A domestic procedure may prevent some judgment from being appealed and the choice may be criticised as a whole. But it would be rather inconsequential to assume that, even in such a case, a remedy should however be given for procedural breaches of this kind. As to the European standpoint, article 18 ESCP Regulation provides for a specific remedy against what the ESCP regards as the most serious procedural violations of the fair trial principles, but the said provision definitely does not cover breaches such as the rejection of the party's request for the oral hearing. That is in fact quite a sensible exclusion: insofar as the party may submit written statements and documents, a denial of the requested oral hearing is not likely to radically undermine the

⁶² See on this topic X.E. Kramer, *The European Small Claims*, cit., 366 f.; E. D'Alessandro, *Regolamento 11 luglio 2007*, cit., para. 8; P.C. Ruggieri, *La European Small Claims Procedure*, cit., 281 ff.

⁶³ See in this sense C.A. Kern, *Das europäisches Verfahren für geringfügige Forderungen*, cit., 395.

adversarial principle or prevent the opportunity for the party to take express his views on the relevant circumstances of the case.

B. Some expedient cases

If all the parties so require, an oral hearing then seems highly recommendable⁶⁴. The risk of abuse to the detriment of the other party is here neutralised: albeit not binding, such a converging request implies that both parties are willing to sacrifice some procedural speed in exchange for a more intense confrontation with the court. In this connection, it is *a fortiori* expedient for the court – as well as consistent with article 23a ESCP – to grant a joint request for an oral hearing when the reason is the actual chance of settling the dispute.

In the light of the previous remarks (*supra*, IV.A.3.), though, it is unlikely that in such cases the court's decision not to grant the oral hearing could entitle the party to challenge the final judgment, since here it would be extremely difficult to complain of being adversely affected by the court's refusal.

⁶⁴ So essentially J. Kropholler – J. Von Hein, *Europäisches Zivilprozessrecht*, cit., 1118.

AN EFFECTIVE ON-LINE DISPUTE RESOLUTION NETWORK FOR ENHANCING COLLECTIVE REDRESS IN EUROPE: HOW TO HANDLE MASS SMALL CLAIMS THROUGH AN INTEGRATED APPROACH*

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ABSTRACT: The ESCP disappointing results, the scarce interconnection between Reg. 861/2007, ADR legislation and Directives 2019/2161 and 2020/1828, as well as the suboptimal functioning of the ODR platform urge for a global rethinking. The Author points out some possible interventions to implement consumers' and users' protection in relation to small and homogenous claims, hoping that the European Institutions will soon consider a reform aimed at establishing an online integrated justice service in which court procedures merge with mechanisms of amicable solution.

KEYWORDS: Reg. 861/2007; Dir. 2013/11; Reg. 524/2013; Dir. 2019/2161; Dir. 2020/1828; Small claims; Enforcement of consumer rights; Alternative Dispute Resolution; Online Dispute Resolution Platform; Collective Redress and Settlements; E-justice; ADR/ODR and Adjudication as Different Levels of an Integrated Public Service Provided Online.

CONTENTS: 1. IS THE ODR ARCHITECTURE OF CONTROL LAID OUT BY THE EUROPEAN LEGISLATOR SUFFICIENTLY STURDY IN ORDER TO MAXIMIZE THE OUTCOMES IN TERMS OF MASSIVE ENFORCEMENT OF EU RIGHTS FOR CONSUMERS?— 2. THE FUNCTIONING OF ODR PLATFORM 7 SEVEN YEARS AFTER ITS INTRODUCTION REVEALS LARGE ROOM FOR IMPROVEMENT.— 3. SOME PROPOSALS ON HOW TO ENHANCE ODR PROCEEDINGS IN RELATION TO HOMOGENOUS INDIVIDUAL RIGHTS... TOWARDS AN INTEGRATED SERVICE OF E-JUSTICE FOR SMALL CLAIMS?

* The present text is the extended version of the talk I had the pleasure to deliver on 22th January 2021 at the *Small Claims Analysis Net (SCAN) project final conference*, organised on 22nd January 2021 by Università degli Studi di Napoli Federico II and Vrije Universiteit Brussel.

1 IS THE ODR ARCHITECTURE OF CONTROL LAID OUT BY THE EUROPEAN LEGISLATOR SUFFICIENTLY STURDY IN ORDER TO MAXIMISE THE OUTCOMES IN TERMS OF MASSIVE ENFORCEMENT OF EU RIGHTS FOR CONSUMERS?

This paper addresses the question whether the tools set by the EU legislator in relation to ODR for consumers and users are apt to face effectively the myriads of small claims that can arise especially in the field of electronic commerce and that, if not timely and efficiently resolved, may affect consumers' and users' rights.

After the enactment of Reg. no. 861/2007, that refers to simplifying and speeding up the settlement of cross-border litigation on small claims with a view to facilitating access to justice, the European Institutions have tried to improve the enforcement of consumer rights also through the harmonisation of ADR methods. Given the increasing importance of online commerce and in particular cross-border trade as a pillar of Union economic activity, a properly functioning of ADR infrastructure for consumer disputes and a properly integrated ODR framework for consumer disputes arising from online transactions have been deemed necessary in order to achieve the aim of boosting citizens' confidence in the internal market.

The purpose of Dir. 2013/11 is, through the achievement of a high level of consumer protection, to ensure that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures. Reg. no. 524/2013 provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures¹. Online traders and online marketplaces are indeed required to include on their websites an electronic link to the ODR platform².

On 11th April 2018 the Commission launched the "New Deal for Consumers" initiative aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernising EU con-

¹ The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform. As is well known, the ODR platform is a multilingual interactive website that allows consumers to submit online their consumer-to-business disputes over (domestic or cross-border) online purchases. It informs the parties on the quality-certified ADR entity or entities which is/are competent to handle their case and transmits the dispute to the ADR entity on which the parties have agreed. The ADR entity has then the possibility to use the platform's case management tool and handle the case online on the platform. If the parties do not agree on an ADR entity within 30 days from submission of the complaint, the case is automatically closed on the platform. There is obviously no prejudice to the consumer's possibility to pursue his or her complaint outside the platform e.g. by submitting the complaint directly to an ADR entity.

² Online traders are furthermore obliged to provide their e-mail address.

sumer protection rules in view of market developments. This brought about the adoption of the Dir. 2019/2161 on better enforcement and modernisation of EU consumer protection³ and of the Dir. 2020/1828 on Representative Actions⁴. Particularly, this latter Directive aims to ensure that at Union and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States. This goal would boost consumer confidence, empower consumers to exercise their rights, contribute to fairer competition and create a level playing field for traders operating in the internal market.

Although Dir. 2013/11 and Reg. no. 524/2013 share with the New Deal package the same objective (strengthening consumers' rights), the interconnections between the ADR/ODR set of rules, the Reg. on small claims and the two new Directives are negligible.

On the one hand, the entire ADR/ODR architecture seems to be conceived only to manage individual claims: as regards collective claims, no provision can be found in Reg. no. 524/2013, while just a brief reference appears in Dir. 2013/11⁵.

On the other hand, Dir. 2019/2161 confines itself to adopting the same notion of marketplace used by the ODR platform, while Dir. 2020/1828 provides only for the possibility that pending a representative action for redress:

³ This Directive, adopted by the European Parliament and the Council on 27th November 2019 (<https://eur-lex.europa.eu/eli/dir/2019/2161/oj>), amends the existing EU instruments in line with digital developments particularly in order to get:

- more transparency on online marketplaces (about seller's identification, consumer reviews, application of algorithms for personalizing prices and criteria for ranking the offers on platforms);
- the same protection in relation to service contracts under which the consumer pays or undertakes to pay a price as well as to contracts for digital services under which the consumer provides personal data to the trader without paying a price;
- individual remedies (such as ending the contract, getting a price reduction or financial compensation) when consumers are affected by unfair commercial practices;
- more effective penalties for cross-border infringements;
- better protection against unfair practices in doorstep selling and commercial excursion.

⁴ Adopted by the European Parliament and the Council on 25th November 2020 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG).

⁵ Recital 27 of Directive 2013/11 merely states that Member States can maintain or introduce ADR procedures dealing jointly with identical or similar disputes between a trader and several consumers. The clarification is accompanied by two general recommendations: firstly, comprehensive impact assessments should be carried out on collective out-of-court settlements before such settlements are proposed at Union level; in the second place, the existence of an effective system for collective claims and easy recourse to ADR should be complementary and they should not be mutually exclusive procedures. The solution of these difficult issues is therefore completely left out and remitted to the discretionary choices made by the national legislators. *Amplius* LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice in Eur. Rev. Private Law*, 1-2016, 81 ff. (especially at 92), where the Author points out that the ADR directive «does not enable consumers bringing collective claims to ADR entities», and VOET, «Where the Wild Things Are» – *Reflections on the State and Future of European Collective Redress*, 8 february 2017, in www.ssrn.com, 56 ff., who hopes for «an integrated and holistic framework».

- the parties jointly propose a settlement or
- the seized authority invite the trader and the qualified entity that commenced the proceeding to enter negotiations⁶.

As far as Reg. 861/2007 is concerned, art. 12 § 3 simply enables the judge of the small claim procedure, whenever appropriate, to seek to reach a settlement between the parties.

It is hardly necessary to say that most of unfair commercial practices cause minor damages to consumers and therein lies the problem, as the small value of the claims makes really unlikely for the weaker market players to search for right compensation before Courts. The small claim procedure is, regrettably, still not well-known among litigants, especially in some countries⁷, and its application scope does not cover domestic disputes, however. To be truly

⁶ According to article 11, in both situations the settlement which may have been reached shall be subject to the scrutiny of the court or administrative authority to ensure that it is not contrary to mandatory provisions or includes conditions that are not enforceable, taking into consideration the rights and interests of all parties, and in particular those of the consumers concerned. The Directive on representative actions is aimed at a minimum harmonisation: the basic provisions outlined by article 11, here summarized, are consistent with the reluctance of the European law systems to embrace the U.S. class action model. In fact, in the Old Continent national legislation on collective redress doesn't seem to be enhancing class settlements, with the sole exception of the Netherlands, Belgium and, to some extent, Italy (see, respectively, VAN DER ELST AND WETERINGS, *The Dutch Mechanisms for Collective Redress: Solid, and Excellent within Reach* in *The Cambridge Handbook of Class Actions, An international Survey*, edited by Fitzpatrick and Thomas, Cambridge, p. 272 ff. (2021); NOTHOMB, *L'action en réparation collective à la belge, état des lieux presque deux ans après son entrée en vigueur*, in <https://dial.uclouvain.be/memoire/ucl/en/object/thesis%3A3891>; ZUFFI, *The Italian Class Actions Reform: a Conservative Revolution* in *ZZP Int - Zeitschrift für Zivilprozess International*, 2020, p. 23 ff., vol. 24 (2019)).

⁷ A survey conducted in 2012 by the ECC-net, known as *ECC-Net European Small Claims Procedure Report* (https://ec.europa.eu/info/sites/info/files/small_claims_international_claims_2012_en.pdf) has shown that the awareness about the Reg. no. 861/2007 was rather scarce, with the exception of Estonia, Ireland and UK, where the ESCP is more widely known and used, probably because those legal systems have provided for a small claim procedure also as far as no-cross-border litigation is concerned. According to the outcomes of the interviews made for the Special Eurobarometer 395, disclosed in April 2013, three-quarters of respondents have not heard of the simplified procedure for small claims in their country; slightly less than one in five respondents have heard of the procedure (19%) and an additional 3% of Europeans have used it. Some statistical data about the number of ESCP applications received by the Courts in Europe have been gathered by the Deloitte Report (*Assessment of socio-economic impact of policy options for the future of ESCP Reg., Final Report*), published in November 2013 (http://www.marinacastellaneta.it/blog/wp-content/uploads/2013/11/com_2013_795_en.pdf): they are referred to below in chart no. 1. Unfortunately, most Member States do not collect in a systematic manner the figures about the European small claim proceedings commenced or the ESCP judgments issued by their judicial authorities, hence no constant monitoring on the enforcement of Reg. no. 861/2007 is available. This is also the case for Italy, as the IT-system used by the Justices of the Peace and the Tribunals does not allow to label the European small claims proceedings and so it is not possible to launch a query to extract the relevant case-files. To have a rough idea of how many ESCP have been initiated in Italy in the last years I searched through various sources the rulings made pursuant to Reg. no. 861/2007 by Italian Courts and I found 24 final judgments. Furthermore, I sent an e-mail to the Justices of the Peace of the main Italian cities, asking if they have in any way recorded or tracked the European small claim procedures pending or defined before them. Some clerks, judges and officers kindly replied to my request and I would like to express here my gratitude to all of them. Read in chart no. 2 the results of this very incomplete enquiry.

Chart no. 1 – ESCP in Europe

cost-effective ESCP should rely heavily on ICT⁸, while in the majority of jurisdictions, there is a gap between providing information about small claims procedure and actually offering online services⁹. This deficiency looks likely

Member State	Number of ESCP applications received by the Courts of the MS (from Deloitte Report – table 54)				
	2009	2010	2011	2012	Total
Austria				222	
Bulgaria				3	
Finland	12	7	9	46	
France	3	27	49	54	
Germany		187	332		
Malta	1	3	8	3	
Portugal		3	6	15	
Poland					193
UK					526

Chart no. 2 – ESCP in Italy

Justice of the Peace	no. ESCP per year	Total ESCP
Aosta		1 (2018)
Reggio Calabria		19 (2017-2020)
Milano	20-25	
Bologna		30 (2017-2020)
Gorizia		1 (2018)
Udine		1 (2020)
Belluno		0
Vicenza		1 (2020)
Rovigo		4 (2016-2020)
Bolzano		5 (2012-2021)
Trento	2-3	
Tione		3
Rovereto		3 (2018-2020)
Egna		2 (2014, 2018)

⁸ As noticed by CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, Oxon (2011), p. 4.

⁹ See the *2016 EU Justice Scoreboard* (<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1555419683920&uri=CELEX:52016DC0199>), page 21: as shown by the figure 22 only Estonia, Lithuania, Malta, and Portugal score 100 percent for online availability of ESCP. However, the gap could be soon filled. As a consequence of the Communication from the Commission on the *topic Digitalisation of justice in the European Union. A toolbox of opportunities*, 2.12.2020, COM(2020) 710 final, a Proposal has been put forward for a *Regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation*, 1.12.2021, COM(2021) 759 final. According to article 20 of this draft, Reg. 861/2007 should be amended in order to provide for the compulsory digitalisation of the ESCP.

to worsen within the context of the digital market, where the ever-growing e-commerce¹⁰ brings about a substantial number of disputes, most of whom cross-border¹¹, that are expected to be defined electronically¹² or, anyway, through a quick and not expensive method.

2. THE FUNCTIONING OF ODR PLATFORM 7 SEVEN YEARS AFTER ITS INTRODUCTION REVEALS LARGE ROOM FOR IMPROVEMENT.

As already observed, the European legislator apparently has not seen fit to integrate the ADR/ODR system with the major tools recently designed to enhance consumers' protection against massive infringements and no adjustment has been made to connect the small claim procedure to out-of-court dispute resolution mechanisms.

The issue wouldn't be all in all paramount if the ADR/ODR system — meant just to guarantee access to simple, efficient, fast and low-cost alternative techniques of resolving domestic and cross-border disputes — was resulted very efficient and satisfactory in facing the bulk of small claims emerging from the internal market. Unfortunately, the report published by the Commission at the end of September 2019 on the application of Dir. 2013/11 and of Reg. 524/2013 illustrates that in about 80% of disputes submitted to the ODR platform the case was closed automatically after 30 days because the trader had not reacted to the notification of the claim and the invitation to propose an ADR entity to the consumer. Besides, only in 2% of the thin slice of cases in which the trader was willing to participate to ADR proceedings, the parties agreed on an ADR body¹³.

¹⁰ According to the final report 2018 on the *Retailers' attitudes towards cross-border trade and consumer protection – EU Commission*, dated February 2019, more than half of all retailers (53.1%) are currently engaged in distance selling, with e-commerce (37.8%), mobile commerce (18.4%) and tele-sales (17.9%), the three most common methods. Overall, four in ten retailers sell via e-commerce or mobile commerce (41.5%). More than one third of retailers (36.4%) sell online to final consumers in their country, 13.7% sell online to consumers in non-EU countries and 13.6% to those in other EU countries. As pointed out by the final report 2018 on the *Consumers' attitudes towards cross-border trade and consumer protection – EU Commission*, the average proportion of consumers who shop online in the European Union is 72.0%, with 63.0% having purchased goods or services online domestically, 28.3% crossborder from EU-based online retailers or service providers and 18.4% cross-border from online retailers or service providers located outside the EU.

¹¹ Almost four in ten retailers in EU27_2019 have received complaints from domestic consumers in the last 12 months, and a large majority of these were about the product itself. More than one third of retailers (35.1%) have received complaints from consumers in their own country in the past 12 months. 15.5% of retailers selling cross border received complaints from consumers located in other EU countries.

¹² ROGERS, *Knitting the Security Blanket for New Market Opportunities*, in Wahab, Katsh and Rainey (ed.), *Online Dispute Resolution: theory and practice*, The Hague, p. 95 ff. (2012) has suggested establishing a global online dispute resolution system for cross-border online transactions for the sale of goods.

¹³ Read page 14 in https://ec.europa.eu/info/sites/info/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf.

This failure is probably due to several factors. A statistical survey conducted among retailers during the period 2016-2018 shows that the awareness about ADR is still scarce (43,4% of retailers do not know any ADR body) and there is a not insignificant percentage of traders (8%) who acknowledge the system, but do not want to use it¹⁴. Besides, according to the 2017 web-scraping study on ODR, less than a third part of the investigated traders' websites include a link to the ODR platform¹⁵.

To work on these flaws, the platform's homepage and messaging were overhauled and new information pages and a feedback system introduced. The Commission also conducted a targeted ADR communication campaign aiming to improve traders' awareness of and engagement on the ODR platform. As a result, the number of traders registered in the platform increased by 54% in 2018 and by another 24% in the first five months of 2019¹⁶.

One of the main shortcomings of the ODR platform was the cumbersome flow designed to handle the claims: the requirement that the parties need to agree on an ADR entity before the platform transmits the dispute to it was perceived as an unnecessary passage. Most of the queries addressed by consumers to the ODR contact points have concerned the automatic closure of the case when the trader does not respond to the complaint submission on the platform: indeed, they believed that the platform factually provides for ADR proceedings.

To respond to these criticisms, some novelties were introduced in mid-2019¹⁷. The ODR platform now enables the consumer to contact the trader to resolve the dispute directly, instead of trying to agree on an ADR body: this is certainly a step forward, but the system is still far from being efficient. According to the last report, published in December 2021¹⁸, there was a sharp increase in the number of unique visitors to the ODR platform in

¹⁴ See page 52 of the *Consumer Conditions Scoreboard*, 2019 edition (https://ec.europa.eu/info/sites/info/files/consumers-conditions-scoreboard-2019_pdf_en.pdf).

¹⁵ Read *Online Dispute Resolution: web-scraping of EU Traders' websites, Executive summary*, November 2017, page 2 (https://ec.europa.eu/info/sites/info/files/odr_web scraping_executive_summary_en.pdf).

¹⁶ See page 15 of the Report referred to at footnote 8.

¹⁷ A "self-test" helps consumers to identify a redress solution most appropriate for their specific problem: launching a complaint on the ODR platform, contacting the trader bilaterally or a European Consumer Centre or an ADR entity directly. Indeed, since July 2019 there has been the chance to make a request for direct talks: the consumers are given an option to share a draft complaint with a trader before submitting it officially, to try to settle the dispute directly.

¹⁸ See it at <https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>. Side-by-side comparison to 2019 (August to December) shows a 70% increase in submissions (both for traditional complaints and for direct talks). The report confirms the failure of the ODR complaints system: in 2020 as well 89% of complaints formally launched on the platform were automatically closed after the 30-day legal deadline for the trader to eventually agree to proceed to an ADR procedure; 6% were refused by the trader and 4% withdrawn by the consumer. As a result, only 1% of the complaints reached an ADR body. The report finally notes that in a survey of all consumers who launched a complaint or made a request for direct talks, 20% of respondents say that their dispute had been resolved either on the platform or outside the platform, and a further 19% responded that they were continuing to discuss with the trader.

2020, especially due to the pandemic (3.3 million, with an average of 275,000 per month), but, in the end, only a small proportion of visitors submitted a finalised complaint (17,461) or a request for direct talks (30,319). This begs the question of whether the ODR system is really offering the service that consumers/users expect.

3. SOME PROPOSALS ON HOW TO ENHANCE ODR PROCEEDINGS ESPECIALLY IN RELATION TO HOMOGENOUS INDIVIDUAL RIGHTS... TOWARDS AN INTEGRATED SERVICE OF E-JUSTICE FOR SMALL CLAIMS?

The competence of the European Parliament and Council in adopting measures aimed at the development of alternative methods of dispute settlements, insofar as they are necessary to ensure the proper functioning of the internal market, is founded, as is widely known, on art. 81, letter g), of the TFUE, which allows for different degrees of implementation¹⁹. The disappointing outcomes of the CADR package should nudge the European Parliament towards abandoning the minimum harmonization approach adopted so far²⁰ to the advantage of a new more engaging and thorough vision, intended for offering an integrated on-line service of (formal and consensual) justice in relation to consumer small claims throughout the European Legal Area, as I will try to better explain at the end of this paragraph²¹. The futuristic scenario just sketched out could also be justified by the spectacular failure of the ESCP, which turned out to be incapable of facilitating access to justice for low value disputes. In any case, while waiting for such a revolutionary makeover, several improvements could make the current ADR/ODR system more efficient. In the six points hereunder listed some areas of possible intervention are recommended especially in order to implement consumers' and users' protection in relation to small and homogenous claims.

I. DIVERSITY of ADR MODELS. One of the issue that have so far arised from the practice is that ADR landscapes are highly diverse across Member

¹⁹ DE LA ROSA, *Principios de protección del consumidor para una iniciativa europea en el ámbito de la resolución electrónica de diferencias (ODR) de consumo transfronterizas*, op. cit., 10 ff. Cf. ROTT, *Consumer ADR in Germany*, in *EuCML*, 3-2018, 121.

²⁰ See also CORTÉS, *The impact of EU law in the ADR landscape in Italy, Spain and the UK: Time for change or missed opportunity?*, ERA Forum, 16, pp. 125–147 (2015); Loos, *Enforcing consumer rights through ADR at the detriment of consumer law*, *European Review of Private Law*, 1, pp. 61–80 (2016); BIARD, *Monitoring consumer ADR in the EU: A critical perspective*, *European Journal of Private Law*, 2, pp. 171–196 (2018); Id., *Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK*, *Journal of Consumer Policy*, 42, 109–147 (2019). Read SCHULTE-NÖLKE, *The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?*, in *EuCML*, 4-2015, 135 ff., who advocates for the move for full harmonisation.

²¹ The introduction of the new system could be envisaged only for cross-border litigation, leaving to the Member States the choice to extend it also to national cases or, alternatively, it could at first be “tested” in relation to e-commerce disputes only.

States, in particular as regards the number of certified ADR entities and ADR models in terms of corporate identity, funding, coverage and type of ADR procedure operated²². According to the 2019 Report on the application of Dir. 2013/11 and Reg. no. 524/2013, the «diversity of ADR landscapes makes them difficult to navigate for consumers and traders, in particular in the Member States with a large number of certified ADR entities. Overall, there is less clarity about the ADR entity to which consumers and traders can turn when there is more than one ADR entity per retail sector. A specific difficulty in navigating a Member State's ADR landscape arises when it features ADR entities whose scope is limited to specific aspects of a dispute in a given retail sector – to the effect that the consumer might need to turn to two ADR entities to have his or her issue dealt with fully»²³. Therefore, wouldn't it be better to make this landscape more uniform and less confusing, for example through the identification of a unique model of Ombudsman or negotiation/mediation service (maybe a combination of both these tools would be better) to be enforced in all member states as far as consumer disputes are concerned?

II. FAIRNESS IN DISPUTE AVOIDANCE. In many cases e-commerce platforms and large traders provide for dispute avoidance mechanisms such as internal complaint procedures, feedback systems and trustmarks²⁴. The proliferation of trustmarks has brought confusion instead of promoting confidence in legitimate business: that's why European Institutions have come to develop, in collaboration with consumers' associations of 16 countries, the Ecommerce Europe Trustmark²⁵, bound to one set of rules (the Code of Conduct): if you see the Ecommerce Europe Trustmark on the website of an online shop you are visiting, it means that the company has made a commitment to work in compliance with the ethical standards laid down for the digital marketplace. This goal is ensured also because webshops which use

²² Read page 9 of the Report. Cf. LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, *op. cit.*, 87.

²³ According to HODGES, *Consumer Redress: Implementing the Vision*, in *University of Leicester, School of Law Research papers*, no. 16-27, 2016, p. 6: «A CDR system should have a unified and not a pluralist design. Treating CDR as a market and hence permitting multiple diffuse CDR entities is unlikely to attract maximal usage or data. If the five functions are to be delivered, CDR coverage should be provided by a restricted number of entities». This leads the Author to conclude that the best current model is that of «a unified Consumer Ombudsman. At the least, the EU regulatory regimes in regulated sectors (financial services, energy, communications, utilities) should switch from requiring ADR to requiring Ombudsmen».

²⁴ For an overview of the O.D.A. phenomenon, defined as the use of ICT to impede the occurrence of disputes between the parties and the resolution of disputes at an early stage without requiring the disputants to become fully engaged in a dispute resolution process, see CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, *op. cit.*, p. 59 ff.

²⁵ The Ecommerce Europe Trustmark – operating in Austria, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain and Switzerland – has been developed in continuing dialogue with consumer organizations. It is meant to stimulate the cross-border e-commerce through better protection for consumers and merchants by establishing one Code of Conduct and by ensuring clear communication of these rules. Online shops may carry the Ecommerce Europe Trustmark for free via one of the National Associations that has joined Ecommerce Europe: sellers or traders who use the Trustmark without proper authorization from Ecommerce Europe are blacklisted in the website (see <https://ecommercetrustmark.eu/>).

Ecommerce Europe Trustmark without proper authorization are inscribed in a black list. A further problem is that many of the traders' internal complaint procedures are not fair and they often lack transparency. Also on this side a lot of work has been made by designing and integrating into the ODR platform infographics and simple information about EU' rights and thus by leading consumers to understand if the solution envisaged by the internal complaint procedure or by the negotiation occurred with the trader can be considered just. Nevertheless, more should be done: individualized assistance should be available to online users and the traders' websites should show the ADR system as a clear alternative to their internal complaint procedures: what, for example, if vendors had to post the link to the ODR platform in the same position and with the same accessibility reserved to their internal dispute avoidance mechanisms? What if they had to outline their internal complaint procedures and the European ADR/ODR framework²⁶, letting users to comparatively evaluate the two systems from the beginning of the dispute?

III. CONFIDENCE AND COMMITMENT IN ADR. We have seen that many (especially small) traders do not know or trust the ADR system (maybe because they perceive the ADR bodies as tied to the consumers' perspective); most websites are not connected to the ODR platform. These issues need a double-face approach: to conquer traders' trust it would be probably convenient for the ADR/ODR framework to be backed by national authorities and to become part of a greater integrated service of justice (read *infra*); in order to increase the traders' uptake in ADR I think the obligation to post the link for the ODR platform on their websites should be more effectively enforced by inscribing those who do not comply in a black list²⁷, which could be conveniently advertised on the website of the Ecommerce Europe Trustmark²⁸.

²⁶ *Amplius* ABEDI, ZELEZNIKOW AND BELLUCCI, *Universal standards for the concept of trust in online dispute resolution systems in e-commerce disputes*, in *International Journal of Law and Information Technology* (2019), 27 (3), pp. 209-237 note that «One of the main elements that contribute to evaluation of trust in ODR systems is the existence of knowledge about the process. It is important that individuals have adequate information and knowledge about ODR systems, in order to trust them. Moreover, there is a strong relationship between reputation of government authorities and trust. Therefore, a well-designed ODR platform should provide knowledge for individuals. This could occur in two ways: (i) Reputation and endorsement by official bodies: for example, ODR providers could create a strong reputation by using feedback systems and review forums, gain endorsement by recognized law firms or government bodies and by presenting official logos on their website. (ii) Transparency of the procedure: ODR providers should offer a full road map of the process for users, including how their system works, how long the process will take, what are the steps in the ODR process and what are the possible outcomes».

²⁷ Reputational sanctions can be very powerful in the fields where to be trustworthy is essential: the stigma attached to the act leading to the blacklist might entice players to "spontaneously" comply with rules, because the consequences of a "bad exposure" are unbearable not only in terms of shaming, but also as regards with the financial losses implied. For instance, in Italy the publication of the non-compliers in a blacklist has proven very effective in assuring the enforcement of non-binding decisions of the Banking and Financial Ombudsman (ABF - *Arbitro Bancario Finanziario*). This is an out-of-court system introduced in 2009 for the resolution of disputes concerning banking and financial transactions and services, as well as payment services. The procedure, made available to the clients of banks and financial intermediaries, is essentially free of charge (the small sum of € 20 paid at the sub-

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IV. FAIRNESS IN ADR. Mediation, arbitration and ODR have been criticised for being open to manipulation by vendors, especially when these services are paid by them²⁹. What can guarantee that these providers do not tweak the system in favour of their paymasters? To avoid biases in ADR, Dir. 2013/11 essentially states the duty of impartiality and independence for the natural person or collegial body in charge, but it allows that she/he/it is employed or receives remuneration from the trader or from a professional organisation or a business association of which the trader is a member. The requirement that a separate and dedicated budget has to be at their disposal seems not sufficient, according to many commentators³⁰. In my opinion reg-

mission of the claim is returned in case of “victory”) and quicker to respond than the ordinary justice system. According to the last Annual Report (published in July 2021: you can also find an abridged English version at <https://www.arbitrobancariofinanziario.it/abf/relazione-annuale/index.html>), the Ombudsman has received a total of 30,918 complaints. Since its establishment, roughly 150,000 decisions were issued and despite the fact that these rulings are not legally binding neither for the financial intermediaries nor the clients, the compliance rate is very high (it recently fell due to disagreement on the part of intermediaries with decisions concerning the pledge of one-fifth of salary and postal savings bonds, but apart from these matters, the compliance rate with the decisions of the Panels is close to 98 %). Between 2015 and 2020 more than €100 million have been awarded to complainants. In 2017 a new ADR service for disputes between retail investors and financial intermediaries has been instituted by the National Securities and Exchange Commission (CONSOB) with the name of ACF - *Arbitro per le Controversie Finanziarie*: it deals with different kinds of disputes, but it works in a similar way to the ABF. In the first five years of functioning the ACF received 8,582 claims and issued 7,016 non-binding decisions for a total amount of €111,066,146 awarded to investors (data relating to the 2017-2021 period are available at <https://www.acf.consob.it/publicazioni/relazioni-annuali>). ACF decisions were complied with by financial intermediaries in 95.6 % of cases, except for the disputes relating to the failure of some banks, where the non-compliance rate reached acute levels. The decisions of both procedures, ABF and ACF, are adopted by panels of highly-skilled experts and are published in the corresponding websites, providing bank customers, investors and financial operators with useful guidance.

²⁸ See DE LA ROSA, *Principios de protección del consumidor para una iniciativa europea en el ámbito de la resolución electrónica de diferencias (ODR) de consumo transfronterizas*, in *Revista General de Derecho Europeo*, 2011 (25), 37 ff., who wishes for the introduction of a quality-labelling system for the ADR bodies in order to ensure conformity with the standards provided for by the European legislator.

²⁹ As demonstrated by some empirical studies, ADR services funded by companies and traders impair the impartiality of the procedures, whose outcomes tend to favour the funding party: see CFPD, *Arbitration study – Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Iowa City, Consumer Financial Protection Bureau, 2015; DRAHOZAL AND ZYONTZ, *Empirical Study of AAA Consumer Arbitrations Samantha*, in *25 Ohio State Journal on Dispute Resolution* (2010), 843 ff. Read also: LOOS, *Enforcing Consumer Rights through ADR at the Detriment of Consumer Law*, in *Eur. Review of Private Law*, 1-2016, 66 ff. and, *amplius*, CONDLIN, *Online Dispute Resolution: Stinky, Repugnant, or Drab?*, Digital Commons @UM Carey Law, Faculty Scholarship, 1576, in *CARDOZO Journ. of Conflict Resolution* (2017), vol. 18:717 ff., at 722: «When not based on normative standards, dispute resolution is just another form of bureaucratic processing, the resolution of disagreements according to a set of tacit, often biased, intra-organizational, administrative norms (e.g., the seller is always correct), that are defined by repeat players who “capture” the system and use it for their private ends».

³⁰ For a critical analysis of the weaknesses in the Dir. 2013/11 as regards impartiality and independence of ADR bodies read: WAGNER, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, in *54 Common Market L. Review* (2014), 174-5, 174 ff.; WEBER, *Is ADR the Superior Mechanism for Consumer Contractual Disputes? – An Assessment of the Incentivizing Effects of the ADR Directive*, in *Journ. Consumer Policy*, May 2015, 18; DE LA ROSA AND CORTÉS, *Un nuevo derecho europeo para la resolución alternativa y en línea de litigios de consumo*, in *La Protección del Consumidor en dos Espacios de Integración – Una perspectiva de Derecho Internacional, Europeo y Comparado*, edited by De La Rosa, Valencia, 2015, 514 ff.; GIOIA, *L’uniforme regolamentazione della risoluzione alternative delle controversie*

istered ADR entities should mainly rely on public funding and on users' fee income, while the possible traders' contribution should be limited to that which is strictly necessary³¹. Also, the creation of a database, integrated into the platform, gathering the decisions issued by the ADR bodies as well as the most relevant and "typical" settlement agreements reached for sets of issues/disputes could contribute towards building a trustworthy and solid system of alternative justice for consumers and users³².

V. SMALL MONETARY CLAIMS AND COLLECTIVE REDRESS. Most small disputes refer to money issues: consumers usually seek restitution/reduction of the price paid for a defective product or may ask to be compensated for non-fulfilment of a service contract. For these claims we might perhaps consider to supplement the ODR platform with a blind bidding software³³, which enables parties to find a satisfying and quick solution straight on the institutional European website for ODR. Obviously due cautions shall be prompted: litigants should be guided in filling a preliminary on-line form

con i consumatori, in Contratto e impresa. Europa, 2016, 501 ff.; LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, op. cit., 99; DALLA BONTÀ, *Una giustizia "coesistenziale" online nello spazio giuridico europeo?*, in *Giustizia consensuale*, 2021, 191 ff., especially at 219 ff.

³¹ In Italy the ADR schemes of ABF and ACF, which have proved rather efficient at handling a large bunch of disputes with high standards of competence and fairness (see footnote 27), are based on several sources of funding such as: the fees due at the submission of the complaints by the clients, the contributions paid by banks and financial intermediaries and also a percentage of the amount of penalties collected by the competent authorities for the infringements of financial and banking regulations. Other possible solutions, as far as funding of ADR bodies is concerned, are enumerated by DE LA ROSA, *Justicia digital, Mercado y solución de litigios de consumo*, Aranzadi Thomson Reuters, 2021, 319.

³² According to research conducted on 266 cases decided by the Dutch *Geschillencommissie*, the main ADR entity in the Netherlands, which as such is well respected, it seems that the consumers were not offered the minimum protection of the law in at least 58 disputes: see PAVILLON, *Geschillencommissies en dwingend recht. Over de gevolgen van een door de ADR-richtlijn gedwongen huwelijk*, 5. TvC (*Tijdschrift voor Consumentenrecht en handelspra ktijken*) 2015, pp 239–252. Several scholars, particularly in Germany, have raised criticisms about the enforcement of something different from consumer law with the ADR/ODR: SCHULTE-NÖLKE, *The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?*, op. cit., 137; WAGNER, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, op. cit., 186. As a corrective to this underlying flaw it has been proposed to publish all ADR cases: read WEBER, *Is ADR the Superior Mechanism for Consumer Contractual Disputes? – An Assessment of the Incentivizing Effects of the ADR Directive*, op. cit., 19 and DE LA ROSA, *Justicia digital, Mercado y solución de litigios de consumo*, op. cit., 309. Indeed, the statistical reports that ADR bodies have to publish every year don't give the consumers «any information on the type of cases that have been won or lost by consumers or discontinued by either part[y]. It seems, therefore, that the ADR Directive does not diminish the uncertainty as to the consumers' chances of winning and, consequently does not reduce this element of consumer enforcement costs» (in such terms, see: LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, op. cit., 88 ff.). An interesting remark on the tension existing in this regard between the principles of transparency and confidentiality is made by ROTT, *Consumer ADR in Germany*, op. cit., 124, who rightly points out that «businesses want to keep the outcomes of their ADR proceedings secret, so as to avoid broader effects, in particular, when they lose the case. And if they do not have confidentiality guaranteed, they may not participate in ADR in the first place. At the same time, ADR being a black box in terms of outcome of procedures, can be a disincentive for consumers to engage with ADR, as they may suspect that they are unlikely to have their claims fulfilled entirely; which is however denied by ADR practitioners. [...] The middle ground between the principles of transparency and confidentiality appears to be the publication of anonymised decisions or recommendations».

³³ See also DE LA ROSA, *Justicia digital, Mercado y solución de litigios de consumo*, op. cit., 312.

to help them focus on the legal terms of the claim and the fairness of the bid outcome could be afterwards controlled by a judicial or administrative authority on the request of the party who wants to be sure that justice is done³⁴. As regards massive infringements of consumers' or users' rights, I think a special IT tool could be designed to handle collective ODR proceedings. A first modest step taken in this direction could be found, for example, in art. 139, lett. b)-ter of Italian consumer code (before articles from 139 to 140-bis were repealed by law n. 31 of 2019), which apparently entitled consumer associations to submit a complaint through the ODR platform in the collective interests of consumers. But to my knowledge no device was adopted to make feasible that provision. Instead, an interesting experiment has been driven by *Belmed*, the Belgian Digital Portal for Consumer ADR services: *Belmed* is a public entity, which acts as a "serving-hatch", i.e. it only administers ADR proceedings (conducted by mediation or negotiation bodies or authorities). This portal operator collects the statistical data of all the proceedings administered also for the purpose of identifying the widespread problems and of stimulating some initiatives for collective redress³⁵. This seems to be an attempt to build «a multi-layered framework of regulation, lawmaking and law application»³⁶, that could be conveniently extended to the entire common market. Already in 1975, Mauro Cappelletti wrote that optimal collective redress can only be achieved by a matrix of intertwined models³⁷. So, why not

³⁴ To this regard, for instance, the achievements of *Rechtwijzer*, the Dutch platform for separating couples, could be taken into consideration. This tool – as illustrated by ZELEZNIKOW, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, in *Group Decision and Negotiation* (2021) 30, 789 ff. especially at 802 –, works through a case management process where the prevalent dispute resolution model is integrative negotiation, «focussing upon the childrens' and parents' interests rather than haggling about rights. Nevertheless, the ex-partners are informed of relevant processes – such as those for dividing property, child support and standard arrangements for visiting rights. This allows the disputants to agree based on informed consent, and essentially allows the parties to Bargain in the Shadow of the Law». It is also important to notice that final agreements are reviewed by an independent lawyer. The platform uses algorithms to find points of agreement and then proposes solutions that couples are free to adopt or not. If these solutions are not accepted, the disputants can request a mediator or ask for a binding decision to be made by an adjudicator.

³⁵ Read VOET, *Belmed: The Belgian Digital Portal for Consumer A(O)DR*, 6 April 2013, in www.ssrn.com.

³⁶ VOET, "Where the Wild Things Are" – *Reflections on the State and Future of European Collective Redress*, *op. cit.*, 56.

³⁷ CAPPELLETTI, *La protection d'intérêts collectifs et le groupe dans le procès civil – Métarmorphoses de la procédure*, in *Rev. Int. de Droit Comparé*, 1975, 571 ff. We owe this Author the ground-breaking idea of a "social" protection of civil rights (as opposed to the traditional "individual" way of conceiving the due process of law). Effective access to justice should be seen, in fact, «as the most basic requirement – the most basic 'human right' – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all». The most important legacy of this Italian scholar is tied to the World-wide Movement for Access to Justice and to the three waves he imagined navigating for the purpose of overcoming the existing barriers: the first wave was intended to arrange mechanisms for providing legal aid; the second one aimed at giving representation to "diffuse" collective interests or to protect "homogeneous" individual interests through tools such as class actions and granting standing to sue to consumer and environmental associations; the third one involved the simplification of proceedings as well as the development of alternative methods of dispute resolution (see CAPPELLETTI AND GARTH, *Access to Justice: The Worldwide Movement to make rights effective*, *General Report*, in *Access to Justice, A World Survey*, vol. I (1978), 1 ff., especially at 9, 49 ff.). By placing the ADR in this complex

try to help consumer associations to collect directly from the European ODR platform the claims caused by the same reiterated trader behaviour and start a mediation/negotiation proceedings on the behalf of the group of damaged individuals³⁸? Or, more audaciously asking: couldn't the ODR platform embed a collective on-line settlement proceeding, possibly on an opt-out basis, as provided for in the Dutch WCAM legislation³⁹?

transformation of the legal systems and by affirming the need for a «co-existential justice», Cappelletti warned, however, about the danger of «a *second class justice* because, almost inevitably, the adjudicators in these alternative courts and procedures would lack, in part at least, those safeguards of independence and training that are present in respect of ordinary judges. And the procedures themselves might often lack, in part at least, those formal guarantees of procedural fairness which are typical of ordinary litigation»: CAPPELLETTI, *Alternative Dispute Resolution Process within the Framework of the World-Wide Access-To Justice Movement*, in 56 *Modern Law Rev.* (1993), 282 ff., especially 288. Cf. CAPONI, «Just Settlement» or «Just About Settlement»? *Mediated Agreements: A Comparative Overview of the Basics*, in *Rabels Zeitschrift für ausländisches und internationales*, Bd. 79, H. 1 (January 2015), 128, according to whom «an effective and efficient machinery of public justice is needed to ensure that the risk of unequal bargaining power between the parties giving rise to instances of unjust settlements remains as low as possible» and SCHMITZ, AKIN OJELABI, ZELEZNIKOW, *Researching Online Dispute Resolution to Expand Access to Justice*, in *Giustizia consensuale*, 2021, 269 ff., at 270: «Alternative dispute resolution (ADR) processes, particularly mediation, have been the subject of criticisms spanning from the privatization of justice to the delivery of second-hand justice. To improve [access to justice] despite these criticisms, ADR and ODR processes must address inequality by catering to the needs of the most vulnerable and addressing disadvantage that may result in procedural and substantive unfairness».

³⁸ «In evaluating the likely effects of ADR, the purview must not be limited to bilateral, i.e. one-one litigation in court. Rather it needs to include mechanisms of collective redress, i.e. mechanisms that aggregate multiple claims so that they can be enforced in a single lawsuit»: WAGNER, *Private Law Enforcement through ADR: Wonder Drug or Snake Oil?*, *op. cit.*, 166.

³⁹ Since 2005, thanks to the Dutch Act on the collective settlement of mass damages (*Wet Collectieve Afwikkeling Massaschade*, WCAM) it is possible to ask the Amsterdam Court of Appeals to approve an agreement concluded by the alleged tortfeasor and one or more social organizations (representative associations, foundations or even specifically-set «claim vehicles») about the compensation due for the damages suffered by a group of persons. The court shall verify that the associations or foundations representing the (purported) victims are sufficiently representative of their interests and that the group of persons on whose behalf the agreement was concluded is large enough to justify a binding declaration. Moreover, the court will check that there is a precise description of the group and of the conditions to meet in order to be considered part of it, with the most accurate possible indication of the numbers of persons belonging to it. With regards compensation, the court will make sure that the amount of compensation contractually awarded is «reasonable». Other necessary requirements are: sufficient security lodged from the purported tortfeasor in order to pay the contractually agreed amounts, the provision of an independent dispute resolution method for any issue which may arise from the agreement and, finally, the opportunity for the represented purported victims to be heard on their request. It is then fundamental that all those persons whose interests are at stake are properly notified, so that they may decide to join the proceedings before the court and provide input on the settlement which is sought to be declared binding. If the court grants application, the agreement is binding on the entire group of victims referred to in the contract between the tortfeasor and the social organization(s), unless said purported victims declare that they do not wish to be bound by the contract, by means of a written or e-mail notification to the address provided therein within the time set by the Court. Other interesting solutions are in this respect provided for by the Belgian and the Italian legislation. In Belgium the *action en réparation collective*, introduced in 2014 into the *Code de droit économique* at the *Chapitre XVII*, for the enforcement of an exhaustively listed number of specific statutory provisions, mainly dealing with consumer protection, is subject to a mandatory attempt to reach a settlement after the issue of the eligibility order: the Court shall set a time limit between 3 and 6 months, within which the parties may negotiate an agreement on the compensation due for the collective damages claimed. At the joint request of the parties a mediator can also be appointed. If a deal is concluded, the most diligent party shall ask for the Court approval. If the requirements laid down by the law are not satisfied or the terms

VI. SETTLEMENTS' ENFORCEMENT. The ADR/ODR architecture does not deal with the enforcement of the settlement agreements, mainly because the system is meant to embrace all kinds of proceedings whether they aim at proposing or imposing a solution to the litigants. However, in relation to the ADR techniques which lead to a binding contract, although the parties usually abide by the rules they have consensually stipulated, it may happen that one of them tries to draw back. Thanks to art. 6 of Dir. 52/2008 Member States have entitled the parties of a written agreement resulting from a mediation, to enforce it before courts. But what about other kinds of binding agreements reached through ADR/ODR proceedings? Would it be unthinkable to provide for reputational penalties in case of non-fulfilment?⁴⁰

relating are deemed manifestly unreasonable, the judicial authority may invite the parties to reconsider, adjust or supplement the settlement. Once approved, the agreement will bind as *res judicata* all the consumers damaged who did not opt-out, but, as specified by art. XVII.46, the conclusion of such an agreement implies no admission of liability by the defendant enterprise. If no deal is reached or the agreement is not approved by the Court the trial continues (for more details read DE WULF, *Class actions in Belgium*, in *The Cambridge Handbook of Class Actions*, *op. cit.*, p. 194 ff.). As far as Italy is concerned, the reform enacted by Law no. 31 of 2019, entered into force on 19th May 2021, repeals articles 139, 140 and 140-bis of the consumer code (Legislative Decree no. 206 of 6th September 2005), which until then had provided for a compensatory class action and an injunctive collective expedient in the field of consumer protection. A broader and implemented version of both the remedies now finds regulation into the code of civil procedure. According to articles 840-bis and ff. c.p.c. every person, whether a consumer or not, as well as the associations or non-profit organizations aimed at protecting the rights involved, can launch a class action against private companies and providers of public services in order to get a refund or compensation for mass damages suffered in connection with illicit acts and behaviors implemented in the performance of their activities. The Italian class action works on an opt-in basis and the proceeding consists of several stages: if the claim is maintained, a first deadline to file the adhesions of other class members will be established. The adjudication of defendant's liability shall then follow: if the claim is accepted, the judgment will sentence the company to compensate the plaintiff (when he is an individual) and will define the elements characterizing the class member's rights, establishing a second (and last) deadline for the filing of adhesions. In the same decision the Tribunal shall appoint a delegated judge and a class representative for the distribution proceedings. On the settlement side, art. 840-quaterdecies c.p.c. enables the Tribunal to notify the individuals who have already filed their adhesions of a proposal for an amicable agreement, provided that this happens before the hearing dedicated to the discussion of the case. If the proposal is accepted by the parties, the agreement has to be communicated to the class members so that they can subscribe it, inserting, within a deadline, an acceptance declaration into the file-case. However, a serious attempt to settle the dispute at this very early stage is unlikely to be made, as the defendant will hardly consider a proposal before acknowledging the final number of class members who opt-in. It is far more realistic that the parties will look for an amicable solution after the adjudication on the liability of the enterprise/provider of public service, when the second lapse-time for the filing of adhesions has expired. According to art. 840-quaterdecies c.p.c., during the distribution stage, the class representative may draw up, together with the defendant, an outline of settlement agreement, which is served to the class members for possible objections. The delegated judge shall check this draft and if it results suitable for the interests of the class, may approve it. Only the class members who had contested the proposal in due time can revoke the mandate to the representative as far as the settlement subscription is concerned (see GIUDICI AND ZUFFI, *The New Italian Regulation on Class Actions in The Cambridge Handbook of Class Actions*, *op. cit.*, 217 ff., especially at 224 ff.).

⁴⁰ This arrangement is also suggested by LUZAK, *The ADR Directive: designed to fail?, A Hole-Ridden Stairway to Consumer Justice*, *op. cit.*, 90: «ADR entity could have been required to publish a list of traders who do not comply with their awards. Such a 'name and shame' practice could be quite effective».

By and large, perhaps the time has come to discuss a European integrated justice service in which court procedures merge with ODR mechanisms⁴¹. We could draw inspiration from the Canadian experience of the British Columbia Civil Resolution Tribunal, which has been operating online since 2012⁴², or from the Chinese Internet Courts⁴³. The first on-line tribunal ever estab-

⁴¹ The 2016 Hiil Report IV *ODR and the Courts: The promise of 100% access to justice?*, in <https://www.hiil.org/projects/trend-report-4-odr-and-the-courts-the-promise-of-100-access-to-justice/> is geared also towards this direction.

⁴² The Civil Justice Reform Working Group to the British Columbia Justice Review Task Force was formed in 2004 to explore fundamental change to British Columbia's civil justice system from the time a legal problem develops through the entire Supreme Court litigation process in relation to non-family civil matters. The goal was to assist citizens in obtaining just solutions to legal problems quickly and affordably. This vision involved providing everyone, regardless of their means, with access to civil justice through two broad strategies:

1) providing integrated information and services to support those who want to resolve their legal problems on their own before entering the court system, and

2) providing a streamlined, accessible Supreme Court system where matters that can be settled are settled quickly and affordably and matters that need a trial get to trial quickly and affordably.

As explained in the report *Effective and Affordable Civil Justice*, released in November 2006 (in https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf) the first strategy should be pursued by creating a central hub to provide people with information, advice, guidance and other services they require to solve their own legal problems. At this regard the Working Group proposed to support dispute prevention and plan through plain language, legal education, preventive law and systems design; to facilitate access to mediation or other dispute resolution processes; to create a central hub initiated by government and guided by an advisory board of key stakeholders. The second policy line brought about the introduction of a case planning conference, which the parties have personally to attend before they actively engage the system. The most visible and popular novelty introduced on the heels of this report was the establishment, under the Civil Resolution Tribunal Act (2012) of the Civil Resolution Tribunal (CRT), Canada's first online tribunal. The CRT initially had jurisdiction over small claims up to \$5,000 and strata property (condominium) disputes. On 23rd April 2018, the government of British Columbia introduced legislation to expand the CRT's jurisdiction to include certain motor vehicle accident disputes, disputes under the Societies Act, and the Co-operative Association Act. The CRT encourages a collaborative, problem-solving approach to dispute resolution, rather than the traditional model. It works on a platform, which is accessible 24 hours a day, 7 days a week, from a computer or mobile device that has an internet connection. CRT services are also available by phone. A timely and effective access to justice is thus ensured in the abovementioned sectors of litigation by providing legal information, self-help tools and dispute resolution services.

The reform process of the British Columbia judiciary has not stopped yet: the Ministry of Attorney General has recently launched the *Court Digital Transformation Strategy 2019-2023* (in <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf>), a roadmap of initiatives aimed to furtherly modernize the whole court system. The path traced implies to secure self-serve access from anywhere, anytime to digital court information, proceedings and decisions. Herebelow some of the keywords of the project: *Self-Service* - This starts with the ability of the litigant or public to access court services online and includes online filings, services with paperless options with 24/7 access and self-service kiosks in the courthouses; the access to court information enabled by the use of technologies such as Blockchain for authentication and verification of users and content; guided-form submissions and possibility to submit documents and evidence digitally; *Digital Court Room* - A digital courtroom operating without paper thanks to a digital court file; online procedural guidance helps participants to navigate court processes and helps to find the right services (enabled by Artificial Intelligence and other technologies); this could include convenient one-stop online resources on civil proceedings for self-represented litigants and streamlined processes for inmates to access court documents and legal advice.

⁴³ China established the first Internet Court in Hangzhou in August 2017. The following year two other Internet Courts became operative in Beijing and Guangzhou. These judicial authorities deal only

lished likely offers the better benchmark to be considered: the Canadian CRT follows a stepped ODR process, beginning with a problem solving “wizard”, that helps complainants assess their problem and decide the best option to proceed in dealing with the issue. If the parties don’t find a solution thanks to the wizard, the process moves to an ODR portal, which begins with party-to-party negotiations. If this attempt also fails, a mediation will take place. Should the litigants still be unable to reach a mutually agreeable solution, an online arbitrator will make the ultimate decision after online or telephonic hearings. The process typically takes sixty to ninety days, with overall costs that are much lower than those of face-to-face proceedings.

Almost in the same direction, the UK has put forward a thoughtful proposal for a new structure of the judicial system: the coveted goal is that of using technology to deliver services and facilities that are not possible in a non-digital environment. Based on the reports so far published this project is entailing the introduction of a several-tier model of access to justice, embracing legal health promotion, dispute avoidance and containment and, finally, authoritative dispute resolution⁴⁴.

with disputes arising from the web and work totally paperless, through an online e-litigation platform which is accessible 24/7. MEIRONG GUO, *Internet court's challenges and future in China*, in <https://www.sciencedirect.com/science/article/pii/S0267364920301278>, stresses that the intent pursued by the Chinese Institutions was «to take full advantage of Internet technology to construct a professional, highly effective, convenient judicial operating system; to remove Internet-related cases from the existing adjudication system; to satisfactorily handle Internet-related disputes and to employ the Internet as a vehicle for judicial governance». The outcomes so far reached seem promising: as reported in the White paper *Chinese Courts and Internet Judiciary*, issued by the Supreme People’s Court (SPC) on 4th December 2019 (available, if you can read Chinese, at <https://drive.google.com/file/d/1T8i303Czq1GV3RAB-Jc7tHXpSPxT2nv-5/view>), the Internet courts had processed more than 88,000 cases and over 91% of the cases were conducted online throughout. The court hearing time and the trial cycle are half of the time spent in the traditional courts (it takes only 5 minutes to file a case and the court hearings last on average 28 minutes) and the costs borne by the parties are also reduced (on average, each litigant saved CNY 800 in case expenditure and 16 hours in transit). The ADR methods are also integrated into the E-Justice. In June 2016, the SPC promulgated two judicial interpretations on mediation, according to which, Chinese courts should cooperate with mediation institutions and establish a platform (the so-called “docking platform of litigation and mediation”) in order to ensure a synergy between litigation and mediation. To get an idea of the massive use of court-connected mediation, statistical data point out that in 2019 Beijing Internet Court dealt 29,728 mediation cases, all mediation being conducted online (with a success rate of 23.9%). Furthermore, on 1st August 2019, the SPC promulgated a new judicial interpretation, requiring all courts nationwide to establish one-stop multi-mechanism for dispute resolution and one-stop litigation service center by the end of 2020. The SPC has thus begun to promote the synergy between mediation and litigation nationwide, as well as to establish such a mechanism based on the litigation service center of the courts. In fact, the one-stop multi-mechanism for dispute resolution is not limited to the synergy between mediation and litigation, but will cover more issues related to dispute resolution within this one-stop mechanism. For example, various means such as settlement, mediation, notarization, arbitration, administrative mediation, administrative reconsideration, administrative adjudication and litigation will be combined to provide the parties with optimal dispute resolution services; third parties such as experts, scholars, lawyers, psychologists, notaries, appraisers and volunteers will participate in the dispute resolution; the court will provide all relevant litigation services to the parties in relatively fixed office premises and on the Internet.

⁴⁴ Despite the introduction of the 1998 CPR, implemented as a result of reforms suggested by the report published in 1996 by Lord Woolf and his committee, there were serious concerns regarding access to justice in the United Kingdom. To overcome some of these issues, after the creation, in 1990, of the County Court Business Centre (CCBC), enabled to issue and serve claims through information technol-

Nevertheless, as claimed by some scholars, this idea of an on-line combined service of consensual and formal justice, could potentially lead to «major problems for the digitally disadvantaged»⁴⁵. To deal with this dilemma, potential litigants could receive assistance in accessing the internet, but «the case for ODR is still weak on justice and fairness»⁴⁶. Many deeper studies have indeed to be conducted in order to identify the best human-centered and designed ODR models⁴⁷, that will probably have to be configured taking

ogy, the Money Claim Online procedure was established in February 2002. MCOL provides users who wish to issue a limited number of claims to commence and manage County Court proceedings using a website and to pay court fees online using a credit card. Nevertheless the court system seemed still too costly, too slow and too complex for effectively handling small value civil claims. In February 2015, Professor Richard Susskind, OBE Chair of Civil Justice Council's Online Dispute Resolution Advisory Group IT Adviser to the Lord Chief Justice, called for radical change. The principal recommendation contained in the Report *Online Dispute Resolution for Low Value Civil Claims* of the UK Civil Justice Council (in <https://www.judiciary.uk/publications/online-dispute-resolution-for-low-value-civil-claims-2/>) was indeed that HM Courts & Tribunals Service (HMCTS) should establish a new, Internet-based court service provided on a three-tier structure: Tier One dealing with *Online Evaluation*, deemed as a service apt to help users with a grievance to classify and categorize their problem, to be aware of their rights and obligations, and to understand the options and remedies available to them; Tier Two concerning *Online Facilitation* in order to bring a dispute to a speedy, fair conclusion without the involvement of judges (also through telephone conferencing facilities and automated negotiation); Tier Three providing *Online Judges*, *id est* full-time and part-time members of the Judiciary meant to decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online pleading. This major reform project is still in progress, but it led to a digital service for resolving civil money claims in a simple, accessible and proportionate way. According to the information available in <https://www.gov.uk/guidance/hmcts-reform-update-civil#what-our-reforms-have-delivered-so-far>, since March 2018 users have been able to issue and respond to online civil money claims of less than £ 10,000. By the end of April 2019, over 62,000 claims had been issued using this system and more than £ 6.36 million taken in court fees. Almost 90% of users of the service say they are satisfied or very satisfied with the new service and cases are being resolved more quickly too. The average time to settle a case using the online process is 5.2 weeks compared to 13.7 using the non-reformed services. The service also allows users to settle claims without the need for any third-party involvement. Parties can make and accept “without prejudice” offers online and a settlement agreement, drafted by the service, is provided to settle the case. By the end of April 2019, more than 200 settlements had been reached in this way. A version of the system designed to support legal professionals managing multiple claims on behalf of their clients has also been tested with 10 firms. Furthermore, an “opt-out” mediation service for defended cases up to £ 300 has been planned, meaning those claims that meet the criteria will be automatically scheduled for mediation in an attempt to resolve the case before to going to court, unless either party decides against it. The service is finally supposed to be expanded and improved to make available to users a complete digital end-to-end system, while further stages of the system are being built, enabling more online negotiation and settlement, as well as the uploading of evidence and giving judges the facility to decide cases ‘on the digital papers’ either at a face to face hearing or by determination on the digital papers.

⁴⁵ ZELEZNIKOW, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, *op. cit.*, 802.

⁴⁶ Thus concludes CONDLIN, *Online Dispute Resolution: Stinky, Repugnant, or Drab?*, *op. cit.*, 755, after a critical overview of all major ODR programs (text-based and video-based) in current operation; see also 744 ff.: «The jurisprudential premise of ODR—that outcomes dictated by algorithms based on Big Data and crowdsourced data will produce just results – isn't grounded in any well-known political or jurisprudential theory of procedural fairness or substantive justice, and it is based on somewhat of a contradiction. The algorithms in question are proprietary in nature and thus known only to their owners and creators. But a system of public dispute resolution must be based on substantive standards and procedural rules that are transparent and known equally to all. The conception of fair outcome underlying public dispute resolution cannot be private».

⁴⁷ *Amplius* ZELEZNIKOW, *Using Artificial Intelligence to provide Intelligent Dispute Resolution Support*, *op. cit.*, who emphasises the need to develop solutions that rely upon the needs and wants of

into the proper consideration both the kind of dispute (by diversifying the service delivered, e.g., according to the small/high value of the claim or to its typical/non-recurring character) as well as the different positions and skills of litigants (especially when they are self-representing).

With the awareness that without appropriate ethics and governance procedures, users and professionals will always be reluctant to engage in the ODR process, I wonder if in the near future European Institutions will launch a Second New Deal for consumers capable of transforming the current platform in a greater new concept: the virtual construction of a multi-door courthouse, a sort of coming true of the world-famous idea that Frank Sander had almost 50 years ago⁴⁸.

users. This Author outlines a six-stage model for constructing user-centric intelligent Online Dispute Resolution systems apt to integrate the following features: (1) Case management, (2) Triaging, (3) The provision of Advisory tools, (4) Communication tools, (5) Decision Support Tools and (6) Drafting software and Agreement Technologies.

⁴⁸ I am obviously referring to the speech, entitled *Varieties of Dispute Processing*, delivered at the 1976 Pound Conference convened by Chief Justice Burger. In this renowned address, considered as the official birth of the modern ADR movement, Professor Sander boldly imagined a court system that would function as a diagnostic gatekeeper for parties, directing them to the dispute resolution process (mediation, negotiation, litigation, arbitration, or some combination of these) best suited for their own dispute. Read about this concept and some examples of its implementation in SANDER AND HERNANDEZ CRESPO, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, in 5 U. St. Thomas Law Journal (2008), 665.

SMALL CLAIMS AND THE PURSUIT OF (DIGITAL) JUSTICE: A TIERED ONLINE DISPUTE RESOLUTION PERSPECTIVE*

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Abstract: This paper investigates the most recent developments in completely online small claims processes as a response to the extreme delays in delivering justice by courts. This study argues that adopting a tiered online dispute resolution (ODR) system design can increase access to justice for individuals by simplifying the processes; reducing excessive procedural length and costs; also expanding accessibility to dispute resolution bodies. The present research also proposes that the COVID-19 pandemic has opened up a bundle of opportunities for complete digitalisation of small claims procedures at the EU and Member State levels. Nevertheless, it deems necessary to closely monitor the function of these systems to ensure that the digitalised small claims procedures meet the standards of procedural fairness and efficiency of justice, in particular concerning self-represented litigants. The overall structure of this paper takes the form of four sections. The first part lays out the evolution of ODR in relation to small claims and analysing a tiered ODR system design for these cases. The second section gives an overview of the most prominent operating online small claims processes from a global perspective in the United Kingdom, Canada, China, and the United States. The third part is concerned with the status of online small claims processes and the taken measures at EU and Member States level. The final section provides a discussion on the lessons learnt, the opportunities, and the risks in full digitalisation of small claims processes.

Keywords: small claims; online dispute resolution; ODR system design; access to justice.

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SUMMARY: INTRODUCTION.— 1 ONLINE DISPUTE RESOLUTION FOR SMALL CLAIMS CASES; 1.1. A Tiered ODR System Design Explained.— 2. ONLINE SMALL CLAIMS PROCESSES IN ACTION: A GLOBAL PERSPECTIVE; 2.1. Online Civil Money Claims in England and Wales; 2.2. British Columbia Civil Resolution Tribunal in Canada; 2.3. Internet Courts and Small Claims in China; 2.3. Online Dispute Resolution and Small Claims in the United States.— 3. DIGITALISATION OF SMALL CLAIMS PROCEDURES IN THE EU; 3.1. At the European Cross-border Level; 3.2. At the EU Member State Level.— 4. SMALL CLAIMS, DIGITALISATION, AND THE EU'S POST-COVID PERSPECTIVE; 4.1. The Lessons to Learn and the Opportunities to Take; 4.2. Digitalisation and the Risks to Avoid.— CONCLUDING REMARKS

INTRODUCTION

Despite their low monetary threshold, small claims are significantly important in two aspects. First, they are extremely high in number which leads to considerable court backlogs.¹ Second, many creditors of small claims belong to the most vulnerable class of society that generally appear in civil courts as self-represented litigants. For this reason, their interests need strong protections.²

In most EU jurisdictions, the existing ordinary national civil proceedings do not meet citizens' needs in providing them with effective access to justice for their small claims.³ The notion of 'effective access to justice' in civil matters is enshrined in Article 47⁴ of the Charter of Fundamental Rights of the European Union (CFREU) and Articles 6 (1)⁵ and 13⁶ of the European Convention on Human Rights (ECHR). Within these legal instruments, the European legislator emphasises safeguarding the rights to an effective remedy and a fair trial. In addition, the given interpretations by the Court of Justice of the EU (ECJ) and the European Court of Human Rights manifest several elements as the main pillars of effective access to justice for individu-

¹ Small claims are categorized as civil disputes that usually refer to simple cases that do not involve a large amount of money or complex matters. In Europe, many of small claims are submitted by consumers against traders because of the market malpractices. Given the frequency and the high number of consumer small claims, a considerable amount of time and human resources of courts are taken to deal with these cases. See Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge University Press 2018). See also Svetozara Petkova and Runyararo Gladys Senderayi 'Two For One: How Leveraging Small Claims Procedures Can Improve Judicial Efficiency and Access to Justice' (2020) Equitable Growth, Finance and Institutions Notes, *World Bank* <<https://openknowledge.worldbank.org/handle/10986/34927>> accessed 7 June 2022.

² Georgia Harley and Agnes Said, 'Fast-Tracking the Resolution of Minor Disputes: Experience from EU Member States' [2017] *World Bank* 8 <<https://openknowledge.worldbank.org/handle/10986/26100>> accessed 7 June 2022.

³ According to official statistics, most online consumer purchases across the EU fall into the price category between 100 euros to 499 euros. See European Commission, Consumer Conditions Scoreboard (2019) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> accessed 7 June 2022.

⁴ Article 47 of the CFREU refers to the 'Right to an effective remedy and to a fair trial'.

⁵ Article 6 (1) of the ECHR indicates the 'Right to a fair trial'.

⁶ Article 13 of the ECHR stipulates the 'Right to an effective remedy'.

als.⁷ These key components include efficient access to a dispute resolution body; the right to timely resolution of disputes; the right to cost-effective civil proceedings and the right to sufficient redress in delivering effective civil justice.⁸ Nevertheless, neither the adopted legislations nor the ECJ judgements have achieved a high level of protection for creditors of small claims.

The low pecuniary threshold of claims⁹ does not prevent traditional court proceedings from being extremely lengthy, expensive and complicated.¹⁰

By the same token, at the EU cross-border level, the major barriers that creditors of small claims face in seeking justice for their claims are even higher. Parties can meet practical difficulties in dealing with uncertain costs; unfamiliar foreign laws; foreign languages and complicated enforcement procedures in different European Member States. Further inefficiency arises out of the regulatory instrument, namely the European Small Claims Procedure (ESCP) Regulation¹¹ that has been designed to deal with transnational low threshold disputes at the Union level. This legislative instrument has failed to meet its core objectives in facilitating access to justice for creditors of cross-border small claims.¹² An additional regulatory effort established the EU Online Dispute Resolution (ODR) Platform on a need-based approach to resolve consumer-to-business (C2B) disputes in a more efficient way through using ODR.¹³ However, a number of obstacles – e.g., the lack of sufficient consumer

⁷ Guide on Article 6 of the European Convention on Human Rights (Right to a fair trial (civil limb)), Council of Europe/European Court of Human Rights (30 April 2021) 28-30 <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 7 June 2022.

⁸ European Union: European Agency for Fundamental Rights, *Handbook on European law relating to access to justice* (June 2016) 17 <https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf> accessed 7 June 2022.

⁹ The monetary threshold of small claims is specifically determined according to the civil procedural rules and varies from one jurisdiction to another. For example, while this pecuniary threshold in Germany is €600, it is fixed for the claims with the value of up to €5,000 in Luxemburg and €5,000 in the Netherlands. See Xandra E. Kramer and Elina Alina Ontanu, 'The Dutch Perspective on Cross-Border Small Claims Litigation: Guarded Optimism and Pragmatism. A Normative and Empirical Approach' in Nanette Neuwahl and Saïd Hammanoun (eds), *The European Small Claims Procedure and the Philosophy of Small Change* (Les Editions Thémis 2014); Elisabetta Silvestri, 'Simplification of Debt Collection in Italy – National and EU Perspectives' in Vesna Rijavec, Tomaž Keresteš, and Tjaša Ivanc (eds), *Simplification of Debt Collection in the EU* (Kluwer Law International 2014); Gregory C. Shaffer and Hakan Nordstrom, 'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?' (2007) 7 *World Trade Review* 587 <<https://ssrn.com/abstract=983586>> accessed 7 June 2022.

¹⁰ Alan Uzelac and C. H. Van Rhee, 'The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms Unity and Diversity' in Alan Uzelac and C. H. Van Rhee (eds), *Transformation of Civil Justice. Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2018) 3, 4.

¹¹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure with its amendment Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure.

¹² Marco Giacalone and Seyedeh Sajedeh Salehi, 'The European Small Claims Procedure: Implementation and Enforcement Revisited in Italy and Belgium' (2020) 9 *Journal of European Consumer and Market Law* 181, 182.

¹³ 'EU ODR Platform' <<https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>> accessed 7 June 2022. See Elisabetta Sciallis, 'ODR and Access to Justice for Vulnerable Consumers: The

awareness about the Platform and its function as well as inadequate technical features – have hindered this tool from providing an effective access to justice for the potential users. As a consequence, the status of access to justice for creditors of low-value claims – in most Member States and specifically at EU level – does not adequately meet the judicial protection standards envisaged by Article 47 of the CFREU, nor those envisaged by Articles 6 (1) and 13 of the ECHR.¹⁴

With the outbreak of the COVID-19 pandemic, extreme delays have been registered in court proceedings across the EU and the globe.¹⁵ To deal with these pandemic-induced long delays in judicial proceedings, many justice systems have used information and communication technology (ICT) to digitalise their services and improve citizens' access to justice.¹⁶

It must be stressed that some jurisdictions, and particularly the United States, Canada, the United Kingdom and China had already taken serious measures in implementing ICT in their civil justice systems, regardless of the pandemic crisis.

Many scholars have maintained that small claims are the most appropriate type of civil case for online alternative dispute resolution (ODR), particularly online negotiation and online mediation.¹⁷ In recent years and particularly during the pandemic, using online court proceedings have gained momentum as part of the general ODR regime.¹⁸

Currently, there are several successful implementations of completely online small claims procedures outside of the EU that benefit from ODR to in-

Case of the EU ODR Platform' in Christine Riefa and Séverine Saintier (eds), *Vulnerable Consumers and the Law* (Routledge 2020).

¹⁴ Marek Safjan and Dominik Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 *Yearbook of European Law* 3 <<https://doi.org/10.1093/yel/yeu015>> accessed 7 June 2022.

¹⁵ European Commission 'Impact of COVID-19 on the Justice Field' <https://e-justice.europa.eu/37147/EN/impact_of_covid19_on_the_justice_field?clang=en> accessed 7 June 2022.

¹⁶ In this paper, the terms 'digital', 'virtual', and 'online' are used interchangeably referring to utilising ICT in civil justice systems as a substitute for physical ADR and/or court proceedings in the context of small claims cases. Hence, while discussing digitalisation of small claims proceedings in this study, we have excluded advanced and re-structured algorithmic-driven models of dispute resolution. See Orna Rabinovich-Einy and Ethan Katsh, 'The New New Courts' (2017) 67 *Am U L Rev* 16 <<https://heinonline.org/HOL/P?h=hein.journals/aulr67&i=173>> accessed 7 June 2022.

¹⁷ See David Allen Larson, 'Designing a State Court Small Claims ODR System: Hitting a Moving Target in New York during a Pandemic' (2021) 22 *Cardozo J Conflict Resol* 569; David Allen Larson 'Designing and Implementing a State Court ODR System: From Disappointment to Celebration' [2019] 2 *Journal of Dispute Resolution University of Missouri-Columbia* 77; Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24 *Deakin Law Review* 101.

¹⁸ Amy J. Schmitz and Janet Martinez, 'ODR and Innovation in the United States' in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021) 11. See also Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49 *Federal Law Review* 161; Anne Wallace and Kathy Laster, 'Courts in Victoria, Australia, During COVID: Will Digital Innovation Stick?' (2021) 12 *International Journal for Court Administration* 9; Leah Wing and others, 'Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party' (2021) 37 *Negotiation Journal* 49.

crease effective access to justice for citizens.¹⁹ These ODR systems are generally state-run programs offering a tiered dispute resolution model that mainly comprises online negotiation, online mediation and online litigation.²⁰

Over the past years, a considerable amount of literature has emerged around online alternative dispute resolution and online civil proceedings.²¹ Much of the research to date has been carried out on the impact of ICT facilities implementation in enhancing access to justice. However, only a few studies have thoroughly investigated from both a global and an EU perspective the status of best practices in resolving small claims cases through using a tiered ODR system design. Therefore, this paper aims to explore the most recent developments in completely online small claims procedures as a response to the extreme delays in delivering justice through in-person court procedures. This study argues that adopting a tiered ODR system design can increase access to justice for individuals by simplifying the processes; reducing excessive procedural length and costs and expanding accessibility to dispute resolution bodies. This study also proposes that the COVID-19 pandemic has opened up a bundle of opportunities for fully digitalising small claims procedures at the level of both the EU and of the individual Member States.

This paper is divided into four sections. The first part lays out the evolution of online dispute resolution in relation to small claims and analyses a tiered ODR system design for these cases. The second section gives an overview of the most prominent online small claims processes from a global perspective in the U.K., Canada, China and the U.S. The third section is concerned with the status of online small claims processes and the measures taken at the EU cross-border level and at the national level in Member States. The final part provides a discussion on the lessons learnt, the opportunities, and the risks in full digitalisation of small claims processes.

¹⁹ In this paper, in defining the concept of 'digitalisation' of court proceedings we adopt the approach in which an entirely digital small claims procedure must entail all the following features: a) the entire court administrations are fully digitalised; b) a digital case management system is provided to the users to submit and respond to the claim, all the communications and sharing data and documents with the court and the other party are conducted via the digital platform; c) the ODR services e.g., negotiations, mediation, facilitation, scheduling hearings, and court hearings are all conducted online via the electronic platform.

²⁰ For more information on tiered ODR system designs, see Ayelet Sela, 'The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, And Future Directions' (2017) 21 *Lewis & Clark Law Review* 633 <<https://heinonline.org/HOL/P?h=hein.journals/lewclr21&i=667>> accessed 7 June 2022.

²¹ See Robert Thomas and Joe Tomlinson, 'The Digitalisation of Tribunals: What We Know and What We Need to Know' [2018] Research Paper in Public Law Project <<https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>> accessed 7 June 2022; Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021); Cortés (n 1); Brian A. Pappas, 'Online Court: Online Dispute Resolution & the Future of Small Claims' (2008) 12 *UCLA J. L. Tech* 1 <<https://ssrn.com/abstract=2266516>> accessed 7 June 2022; Rabinovich-Einy and Katsh (n 16).

1. ONLINE DISPUTE RESOLUTION FOR SMALL CLAIMS CASES

Despite the existing differences of opinion among scholars, there appears to be some agreement that ODR generally refers to the application of ICT to the process of dispute resolution on the Internet.²² In this general definition, ICT is the determining element that differentiates ODR from offline dispute resolution methods.²³ Katsh and Rifkin (2001) refer to ICT as the ‘Fourth Party’ which enters a dispute resolution process and modifies the mode of interactions between the parties.²⁴

In the literature, it is a widely held view that the term ODR refers to various types of alternative dispute resolution (ADR)—including negotiation, mediation, and arbitration—conducted over the Internet.²⁵ In our viewpoint, this widely embraced definition poses a problem for exclusively focusing on ADR methods. As a result, it does not include judicial proceedings that can be held online. In that sense, Sternlight (2020) emphasises that this extremely broad definition of ODR can potentially include any type of virtual dispute resolution method, including litigation.²⁶

It must be noted that in this study the term ODR is used in its broadest sense to refer to any intended form of ADR and judicial proceeding in the framework of small claims dispute resolution.

It is significant to note that ODR did not emerge to displace existing legal frameworks. In fact, it aims to improve effective access to justice by closing gaps in circumstances where the authority of law is absent or lacking.²⁷

²² Thomas Schultz and others, ‘Online Dispute Resolution: The State of the Art and the Issues’ [2001] University of Geneva 102.

²³ Sela (n 20) 654.

²⁴ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001).

²⁵ There are other forms of ADR, including facilitation; ombudsman procedures; conciliation; and hybrid ADR models (e.g., med-arb and mini-trials). See Brian A. Pappas, ‘Med-Arb and the Legalization of Alternative Dispute Resolution’ (2015) 20 *Harvard Negotiation Law Review* 157; Sherry Landry, ‘Med-Arb: Mediation with a Bite and an Effective ADR Model’ (1996) 63 *Defense Counsel Journal* 263; Reba Page R and Frederick J. Lees, ‘Roles of Participants in the Mini-Trial’ (1988) 18 *Public Contract Law Journal* 54; Gina Gioia, ‘L’uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori’ (2018) 1 *Revista Italo-española De Derecho Procesal* 501; Ethan Katsh, ‘Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace’ (2007) 21 *International Review of Law, Computers & Technology* 97; Colin Rule, *Online Dispute Resolution for Business: B2B, ECommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (John Wiley & Sons 2003); Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International BV 2004).

²⁶ Jean R. Sternlight, ‘Pouring a Little Psychological Cold Water on Online Dispute Resolution’ [2020] *J. Disp. Resol.* 5 <<https://scholarship.law.missouri.edu/jdr/vol2020/iss1/5>> accessed 7 June 2022.

²⁷ It is argued that ODR aims at filling the existing civil justice gap (as a remedy) by providing appropriate alternatives – to the ordinary civil proceedings – for dispute resolution in a more expedited, cost-efficient, and simplified manner. For more information on ‘filling the justice gap and ODR’, see Orna Rabinovich-Einy and Ethan Katsh, ‘Technology and the Future of Dispute System Design’ (2012) 17 *Harvard Negotiation Law Review* 151; Danielle Linneman, ‘Online Dispute Resolution for Divorce Cases in Missouri: A Remedy for the Justice Gap’ [2018] *J. Disp. Resol.* 281.

In relation to small claims, the existing barriers (i.e., lengthy proceedings, high costs incompatible with the low value of the claim and complex civil procedures) have seriously obstructed access to effective dispute resolution for claimants.²⁸ Arguably, ODR has been nominated to simply be a response to the massive accumulation of low-value disputes with the primary aim of increasing effective access to justice.²⁹ Many scholars have urged that ODR promotes the quality of access to justice—notably for certain types of disputes such as small claims—by providing citizens with a more accessible, simplified³⁰, expedited and cost-effective dispute resolution process.³¹

In this sense, one critical question that arises is how ODR processes can improve effective access to justice in small claims cases considering that most claimants are classified as members of vulnerable social groups.³² To answer this question, it is vital to understand the advantages that ICT—as the fourth party and the main differentiator between ODR and offline dispute resolution methods—would bring to the dispute resolution table. In addition, it is necessary to investigate what role a tiered ODR system design can play in enhancing efficiency of the process.

Rapid advancements in ICT have made a revolutionary change in the mode of social communications. The distinctive characteristics of online communications—i.e., swiftness, cost-effectiveness, flexibility, convenience and accessibility—have made this phenomenon an attractive and reasonable alternative to traditional face-to-face dispute resolution processes. The substantial advantages of digital communications are more evident in cases with low pecuniary thresholds. Using ICT tools for conducting dispute resolution sessions can save significant time and costs by eliminating the need for travel, particularly where parties are in distant geographical locations.³³

²⁸ Elina Alina Ontanu, 'Adapting Justice to Technology and Technology to Justice: A Coevolution Process to e-Justice in Cross-border Litigation' (2019) 8 *East European Quarterly* 54 <<https://repub.eur.nl/pub/120004>> accessed 7 June 2022.

²⁹ Maxime Hanriot, 'Online Dispute Resolution (ODR) as a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes' (2016) 2 *McGill Journal of Dispute Resolution* 1 <<https://mjd.openum.ca/files/sites/154/2018/05/1.-Hanriot1.pdf>> accessed 7 June 2022.

³⁰ Many scholars have commonly expressed that simplification of civil proceedings is a critical element in increasing the effectiveness of access to justice in small claims. For example, see Xandra Kramer and Shusuke Kakiuchi, 'Austerity in Civil Procedure and the Role of Simplified Procedures' (2015) 4 *Erasmus Law Review* 139; Stefaan Voet, 'Relief in Small and Simple Matters in Belgium' (2015) 4 *Erasmus Law Review* 147; Jonathan Silver and Trevor C.W. Farrow, 'Canadian Civil Justice: Relief in Small and Simple Matters in an Age of Efficiency' (2015) 4 *Erasmus Law Review* 232.

³¹ Sela (n 20) 642-43. See also Larson (n 17); Tan (n 17).

³² It is critical to note that some critics have pointed at the pitfalls in the overemphasis on using ODR for low-value claims and the risk it may impose on procedural quality standards. See Julia Hörnle, 'Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?' [2012] Queen Mary School of Law Legal Studies Research Paper No. 122/2012 <<https://ssrn.com/abstract=2154214>> accessed 7 June 2022; Julia Hörnle, 'Online Dispute Resolution: The Emperor's New Clothes?' (2003) 17 *International Review of Law, Computers & Technology* 27; Wing and others (18).

³³ Orna Rabinovich-Einy and Ethan Katsh, 'Lessons from Online Dispute Resolution for Dispute System Design' in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2021) 50.

As pointed out by Colin Rule (2003), the use of ICT devices in the spectrum of dispute resolution processes has dramatically changed the notion of time for the parties.³⁴ There are two major types of virtual communication channels in ODR systems: synchronous and asynchronous.

In online synchronous communications, parties communicate with each other simultaneously and in 'real-time'. The most prominent examples are communications through audio conferencing and video conferencing.³⁵ On the other end, in asynchronous communication, parties do not communicate concurrently, thus the transition of data happens independent of time. E-mails, chat boxes and sending messages in online discussion forums are categorised as asynchronous communications.

It is important to note that each of these two categories have their specific advantages and disadvantages that must be considered while designing ODR systems. In small claims cases, it is appropriate to ensure that the chosen type of online communication responds to the needs of parties in the dispute resolution process.³⁶ For instance, as in most low threshold cases parties are self-represented, using asynchronous communication—e.g., chat boxes or forum discussions—at the online negotiation level is more suitable for parties.³⁷ Since asynchronous communication provides parties with adequate time to think through and prepare their responses, they may experience less pressure concerning the consequences. Notwithstanding, synchronous communication such as video conferencing is more appropriate for conducting online mediation sessions that happen in real-time.³⁸ This type of communication enables the mediator to facilitate discussions between parties and assist them in reaching a more satisfactory settlement.³⁹

An increasing number of low threshold cases are consumer claims arising from online transactions in digital marketplaces. From the technical perspective, ODR mechanisms are more compatible with the nature of these disputes to deal with these cases. As a result, online dispute resolution can be a more

³⁴ Rule (n 25) 46-7.

³⁵ For more information on synchronous and asynchronous communication methods, see Janet K. Martinez, 'Designing Online Dispute Resolution' (2020) 1 *Journal of Dispute Resolution* 135 <<https://heinonline.org/HOL/P?h=hein.journals/jdisres2020&i=137>> accessed 7 June 2022; Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 *International Comparative Jurisprudence* 76 <<https://heinonline.org/HOL/P?h=hein.journals/icjuris1&i=76>> accessed 7 June 2022.

³⁶ Rule (n 25) 48.

³⁷ See Arno R. Lodder and John Zelznikow, 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model' (2005) 10 *Harv Negot L Rev* 28 <<https://heinonline.org/HOL/P?h=hein.journals/haneg10&i=291>> accessed 7 June 2022.

³⁸ See Noam Ebner, 'The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation and Mediation', in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds.), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021).

³⁹ Katrina J Kluss K, 'Mediation Mediums: The Benefits And Burdens Of Online Alternative Dispute Resolution In Australia' [2018] *Australian Alternative Dispute Resolution Law Bulletin* (Lexis Nexis) 1 <https://www.lexisnexis.com.au/_data/assets/pdf_file/0015/322620/Mediation-mediums-benefits-burdens-of-online_Aust_Wendy-Morell-Becker.pdf> accessed 7 June 2022.

pragmatic response to the needs of small claims creditors in seeking justice through a more expedited, flexible, convenient and simplified process.⁴⁰

In terms of costs, considering the low monetary threshold of claims, ODR can resolve these disputes in a more cost-effective manner. Using online communications, particularly in the context of cross-border small claims, eliminates the need for physical travel to attend dispute resolution sessions and hearings.⁴¹

Small claims cases are generally brought by self-represented claimants who are unfamiliar with complex court procedures. Consequently, they encounter difficulties in dealing with related procedural and substantive legal matters in courts⁴² that may compel them to give up seeking justice for their rights.⁴³ In these circumstances, ODR—specifically in tiered processes—can be a more effective response to the needs of particularly self-represented litigants.⁴⁴

The main conclusion to draw from the above arguments is that ODR systems—compared to traditional civil proceedings—are more effective in handling large volumes of small claims in a more expedited, cost-efficient and simplified manner. As noted by Schmitz (2019), ODR liberates courts from the huge administrative workload of small claims cases and saves government time and money.⁴⁵

1.1. A Tiered ODR System Design Explained

Over the past years, we have witnessed an increasing awareness about the benefits of online dispute resolution. As a result, many jurisdictions across the world have adopted implementation of ODR systems to enhance effective access to justice for their citizens.

In relation to process design, all the studied ODR systems—for the purpose of this research—follow a tiered dispute resolution model in handling small claims cases. These models are generally state-run⁴⁶ programs that are made available to the public in the form of virtual platforms—e.g., British Columbia Civil Resolution Tribunal and Utah ODR Program—for dispute resolution.

⁴⁰ See Sela (n 20) 643-44.

⁴¹ Hanriot (n 29).

⁴² Larson (n 17) 77-8.

⁴³ Ayelet Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation' (2016) 26 *Cornell journal of law and public policy* 331, 332 <<https://heinonline.org/HOL/P?h=hein.journals/cjlp26&i=339>> accessed 7 June 2022.

⁴⁴ See Joint Technology Committee (JTC), 'ODR for Courts' (November 2017, ver. 2.0) <https://www.ncsc.org/_data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf> accessed 7 June 2022.

⁴⁵ Amy J. Schmitz, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67 *Buff L Rev* 89 <<https://heinonline.org/HOL/P?h=hein.journals/buflr67&i=97>> accessed 7 June 2022.

⁴⁶ Either by judiciary or any other civil justice authority in that specific jurisdiction.

To use these ODR platforms, a party must first register with the system and go through identity authentication steps before beginning the dispute resolution process. Upon successful identification of the party, the process—in a tiered ODR system design—generally begins with online negotiation and/or online mediation, followed by a possibility to escalate the case to the online litigation level.⁴⁷ (See Figure 1.)

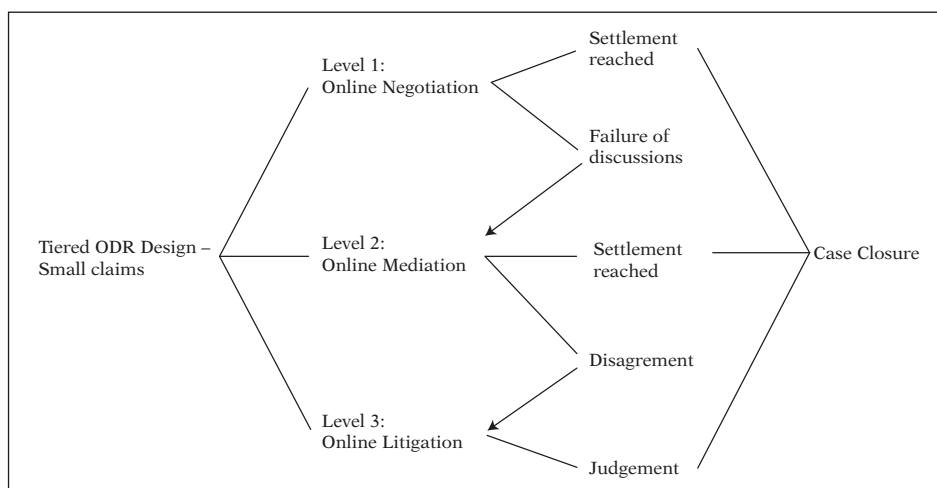


Figure 1. A Tiered ODR System Design for Small Claims

As illustrated in Figure 1, the tiered ODR system design is composed of three dispute resolution phases with distinctive features. The first two levels are negotiation and mediation that are forms of alternative dispute resolution.⁴⁸ The third and the ultimate phase is litigation where the case can be lodged with the court by either one or both parties. The particular importance of this ODR design is attached to the fact that the entire small claims process is conducted completely through one single online platform.⁴⁹

In the beginning of the dispute resolution process, the system provides parties with simple explanations about the purpose and function of each phase. The system also notifies the users about the potential consequences at the end of each phase. This information is of great importance as it helps

⁴⁷ In circumstances that parties fail reaching a settlement. See Sela (n 20) 650.

⁴⁸ In some ODR systems, facilitation is used – in the second phase – either instead of mediation or as a pre-mediation step. However, in the studied ODR system design for the purpose of this research we only refer to mediation as the second level of dispute resolution for small claims. For a detailed comparison between facilitation and mediation, see Janice M Fleischer and Zena D Zumeta, 'Preventing Conflict through Facilitation' (*Mediate.com*, December 1999) <<https://www.mediate.com/articles/zenandfleischer.cfm>> accessed 7 June 2022.

⁴⁹ See Md Mahar Abbasy, 'The Online Civil Money Claim: Litigation, ADR and ODR in One Single Dispute Resolution Process' (2020) 7 *International Journal of Online Dispute Resolution* 4.

the parties to make informed decisions at each level of dispute resolution process.

The process officially begins with online negotiation as the initial phase of this ODR design. At this level, parties have more control over the process through the exchange of desired data, collecting of information and sharing relevant documents. The system can provide self-help guides and a solution explorer to educate parties about the specific subject of the case. Increasing parties' knowledge of their case grants them autonomy and control over the dispute resolution process. This will also help the parties to form agreements based on their preferred terms and conditions. Should the parties fail to reach an agreement, either party can request the involvement of an impartial third party to mediate the case.

Online mediation, as the second phase of the process, offers the parties an opportunity to receive professional assistance from a mediator. During this stage, a mediator closely monitors communications between the parties. There is also the possibility to hold individual and joint online sessions with the disputants. The main objective of these sessions is to build trust and facilitate discussions to reach an effective solution.⁵⁰ Nevertheless, if resolution is not reached through mediation within a specified space of time, the case can be escalated to online litigation as the last resort.

In the final phase, the entire court proceedings (i.e., filing the claim, submission of evidence, hearing, and issuance of a judgement) are conducted online on the same ODR platform. The process usually begins with the creditor requesting to file the unresolved case with the court. Once the case has been submitted, the court reviews the case—within a specific time-limit—to ensure all the conditions are fulfilled. Once the court decides that the claim is admissible, a virtual hearing will be scheduled. The system will immediately notify the parties about the acceptance of the case and the online trial date. When the virtual hearing is conducted, the judge must decide on the case within a short space of time. The parties then have access to the court decision through their profiles in the system.

It is critical to note that the courts can play a significant role in increasing the effectiveness of a tiered ODR system design for the resolution of small claims. The courts—as part of judiciary systems—are one of the main pillars of any government to protect the rights of individuals in seeking justice. In low value disputes many claimants are amongst the most vulnerable classes of society. Therefore, involving the courts as part of an ODR system design can play an effective role in safeguarding the fundamental rights of the small claims claimants. As pointed out by Pappas (2008), the court can join the process as the 'Fifth Party' to add authentic legitimacy to ODR.⁵¹ One of the major outcomes of this legitimacy is building up more citizen trust in using ODR mechanisms. Thus, connecting online ADR methods to online court

⁵⁰ See Rabinovich-Einy and Katsh (n 27).

⁵¹ Pappas (n 25).

proceedings—particularly in small claims cases—can create additional incentives for claimants to use the tiered ODR systems.⁵²

In our viewpoint, there are several reasons to support the argument that a tiered ODR system design is a more suitable method for resolution of small claims cases. First, because this design offers a well-balanced layered structure. In this ODR system design, all three levels of dispute resolution occur on a single online platform in a tiered structure. This feature reduces the redundant administrative procedures that are usually employed to escalate a case from one dispute resolution process to another. Second, this model of ODR also promotes disputants' autonomy to have more control over the length of the process, particularly at the negotiation and mediation levels. Therefore, if there is a collaboration between the parties, they can expedite the process to reach an amicable settlement within a reasonable period. Further, parties can maintain control of the costs of the process—mainly where fees are charged based on the level of dispute resolution.⁵³

Having discussed the use of a tiered ODR system design in the context of small claims dispute resolution process, the following section provides an overview of how a tiered ODR model is implemented as part of civil justice systems in some non-European jurisdictions. The section that follows also discusses the specific features that these designs offer to their users. It is important to emphasise that as online civil proceeding is one of the main pillars of the studied tiered ODR designs in small claims cases, this paper has exclusively focused on the examples of state-run ODR services as discussed below.⁵⁴

2. ONLINE SMALL CLAIMS PROCESSES IN ACTION: A GLOBAL PERSPECTIVE

2.1. Online Civil Money Claims in England and Wales

In August 2017, the U.K. Ministry of Justice launched Online Civil Money Claims (OCMC), as a pilot project, where claimants were invited to use an online service to submit their small monetary claims.⁵⁵ This project was developed as part of the Reform programme in making new digital services available to the public.⁵⁶ The specific purpose was to provide an alternative mechanism – to the ordinary court proceedings and the existing Money Claim

⁵² *ibid.*

⁵³ Sela (n 20) 673-74.

⁵⁴ *ibid* 649-51.

⁵⁵ The OCMC service is accessible via <<https://www.moneyclaims.service.gov.uk/eligibility>> accessed 7 June 2022.

⁵⁶ For more information on the U.K. Judiciary Reform programme, see Natalie Byrom, 'Digital Justice: HMCTS data strategy and delivering access to justice' (The Legal Education Foundation 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 7 June 2022; Civil Justice Council, 'The Resolution of Small Claims,

Online service⁵⁷ – for citizens to have a faster and more simplified access to justice for their small claims. The user feedback indicated that the OCMC is a user-friendly online service. It was also reflected that the defendants' engagement in the process has particularly increased compared to the traditional small claims track. Due to the success of the six-months pilot scheme, the OCMC service was officially made available to the public in March 2018.⁵⁸

The OCMC can be used in the context of pecuniary claims with the fixed—and specified—amount of money of up to £10,000 involving only one claimant and defendant.⁵⁹ The defendant must have his/her address in England and Wales. The claims submitted through the OCMC are handled by the Country Court Money Claims Centre.⁶⁰ The cost of using this self-represented online service varies between £35 to £455 depending on the value of the claim. This fee must be paid at the time of lodging the claim. The applicant may be able to claim the fees back if he/she wins the case. Upon submission of the digital claim by the applicant, the claim notice will be instantly sent to an e-mail address the claimant has provided for the defendant. If the defendant challenges the claim, parties have the option to either escalate the case to ordinary court proceedings or agree upon reaching a settlement using the mediation service on the OCMC. The mediation service is free of charge with the aim of encouraging parties to settle the dispute at an early stage of the process.⁶¹ It is critical to note that in the post-pilot stage, the OCMC has introduced opt-out mediation for claims of less than £500. As a result, these cases are automatically referred to mediation unless a party or both refuse mediation.⁶² However, where both parties agree to mediation, the system will appoint a neutral third party to take disputants through the mediation procedure. Mediation sessions are carried out either on the telephone or online (e.g., through videoconferencing). The incorporation of mediation in the OCMC provides a great added value for this online service since it improves the use of alternative dispute resolution methods.

Interim Report 2021' (*UK Judiciary*, 2021) 6 <<https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf>> accessed 7 June 2022.

⁵⁷ Money Claim Online (MCOL) is an Internet-based service to be used for claims with a fixed amount of money not exceeding £100,000 in one claimant against maximum two defendants with an address in England and Wales. See 'Make a Money Claim Online' (*GOV.UK*) <<https://www.gov.uk/make-money-claim>> accessed 7 June 2022.

⁵⁸ Ignacio Oltra Gras, 'Online Courts: Bridging the Gap between Access and Justice' (2021) 10 *UCLJLJ* 24, 35 <<https://heinonline.org/HOL/P?h=hein.journals/ucljlj10&i=32>> accessed 7 June 2022.

⁵⁹ *ibid.*

⁶⁰ Civil Justice Council, 'The Resolution of Small Claims, Interim Report 2021' (*UK Judiciary*, 2021) 6 <<https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf>> accessed 7 June 2022.

⁶¹ 'Online Civil Money Claims Service (OCMC): Acting on Feedback' (*GOV.UK*, 2022) <<https://www.gov.uk/government/case-studies/online-civil-money-claims-service-ocmc-acting-on-feedback>> accessed 7 June 2022.

⁶² Ahmed Masood, 'Alternative Dispute Resolution During the Covid-19 Crisis and Beyond' (2021) 32 *King's Law Journal: Covid-19: Political Responses and Legal Consequences* 147, 151 <<https://doi.org/10.1080/09615768.2021.1886651>> accessed 7 June 2022.

The OCMC service is believed to be established on a needs-based approach with the focus on designing a new process that enables small claims creditors to seek justice through a user-friendly, expedited and simplified digital process.⁶³ User feedback on the pilot phase of the OCMC indicated that it is an easy-to-use online service. However, it should be noted that this assessment only covered the initial six-months of the pilot scheme. Therefore, further research is needed to determine the effectiveness of this digital process

2.2. British Columbia Civil Resolution Tribunal in Canada

The Civil Resolution Tribunal (CRT)⁶⁴, as Canada's first online tribunal, was established by the Civil Resolution Tribunal Act 2012 in British Columbia.⁶⁵ This administrative tribunal was established as an alternative to ordinary court proceedings.⁶⁶ The CRT provides citizens with a combined model of dispute resolution process including negotiation, facilitation and, if necessary, adjudication.⁶⁷ Currently, the CRT has jurisdiction over the majority of low threshold claims that fall under 5,000 Canadian dollars.⁶⁸

The CRT uses a multi-tier model of ODR to provide more convenient, cost-effective and facilitated access to justice for citizens.⁶⁹ Prior to beginning with the formal dispute resolution process, the system guides the applicant to use a solution explorer. This service is free and functions as a self-help tool which enables the applicant to use it without any necessity to get involved in a formal dispute resolution process with the counterparty. This web-based expert system assists the user – through asking a series of questions – in diagnosing the problem, and possibly finding tailored information in terms of legal rights to resolve the issue.⁷⁰ If the applicant is unable to find the answer to her/his

⁶³ Emma Jones, Hugh Mcfaul, and Francine Ryan, 'Clinical legal education in the United Kingdom: Origins, growth and the technological innovations and challenges of its future' (2017) 4 *German Journal of Legal Education* 107, 119-20 <<http://b-s-r-b.de/wp-content/uploads/2017/12/GJLE-2017-Vol.-4.pdf>> accessed 7 June 2022.

⁶⁴ 'Civil Resolution Tribunal' <<https://civilresolutionbc.ca/>> accessed 7 June 2022.

⁶⁵ Civil Resolution Tribunal Act, RSBC 2012, c C-25, [Bill 44].

⁶⁶ Anjanette H. Raymond and Scott J. Shackelford, 'Technology, ethics, and access to justice: Should an algorithm be deciding your case?' 35 (3) (2014) *Michigan Journal of International Law* 485, 505 <<https://heinonline.org/HOL/P?h=hein.journals/mjil35&i=503>> accessed 7 June 2022.

⁶⁷ Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 *Windsor Yearbook of Access to Justice* 112, 114 <<https://heinonline.org/HOL/P?h=hein.journals/windyrbj34&i=116>> accessed 7 June 2022.

⁶⁸ The CRT has also jurisdiction over specific types of traffic injury disputes; strata property (regardless of the amount of the claim); and disputes related to societies and cooperative associations of any amount. See Salter (n 67) 114; Rebecca Dickson, 'Does the Notice of Objection Mechanism Available to Civil Resolution Tribunal Small Claims Parties Enhance Access to Justice?' (2021) 54 *UBC L Rev* 119 <<https://heinonline.org/HOL/P?h=hein.journals/ubclr54&i=127>> accessed 7 June 2022.

⁶⁹ Shannon Salter S and Darin Thompson, 'Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' [2017] *Social Science Research Network* 116 <<https://heinonline.org/HOL/P?h=hein.journals/mgmdp3&i=115>> accessed 7 June 2022.

⁷⁰ See Dickson (n 68) 126; Dorcas Quek Anderson, 'Old ethics in new wineskins? Examining the ethical difficulties in court online dispute resolution' [2019] *Research Collection School of Law* <<https://>

issues in the solution explorer, she/he can file the claim with the CRT. At this stage, the applicant must pay an application fee that varies from 75 to 125 Canadian dollars depending on the amount of the claim.⁷¹ The parties can involve in an online negotiation process and try to reach a settlement. The negotiation phase is voluntary and aims to encourage the parties to find a solution in an amicable manner. As a result, parties can have an interest-based online negotiation and emphasise identifying their common ground through direct communications with each other to reach a possible agreement.⁷² The CRT model of online negotiation is optimised by a constructed direct party-to-party negotiation with particular emphasis on the parties' collaboration. This non-adversarial collaborative negotiation process facilitates a more amicable, cost-effective and expedited dispute resolution for the users.

During the negotiation process, the system provides parties with the possibility of using specific templates to form their statements and arguments. The process is, however, subject to short and strict timelines. Within the entire online negotiation procedure, the CRT's intervention is exclusively limited to monitoring the communications exchanged between the parties to ensure that communications are free from abuse or harassment.

If parties fail to reach a collaborative solution within their negotiations, the case will be referred to the next phase, namely facilitation. Parties are required to participate in facilitation processes where a neutral third party—as the case manager—assists them in reaching an agreement. In the event that facilitation fails, parties can escalate the case to adjudication as the final phase of the process. The system will appoint an independent CRT expert member to make a binding decision about the small claims dispute. In this phase, parties can submit their evidence and arguments to the CRT member before the process comes to an end.⁷³ The adjudication process is entirely conducted in writing unless the CRT decides it is necessary to hold an oral hearing or a combination of both. The oral hearings are, however, held by phone or videoconferencing.⁷⁴ Upon complete review of the case materials, the CRT member issues a decision about the dispute. If none of the parties raise any objection within 28 days of the small claim decision, it becomes binding and enforceable.⁷⁵

Today, CRT is indeed one of the most prominent examples of tiered ODR system designs that has successfully deployed technology to deliver justice for small claims. As indicated by Salter (2017), CRT is most notable for em-

ink.library.smu.edu.sg/sol_research/2920> accessed 7 June 2022.

⁷¹ Civil Resolution Tribunal (n 64).

⁷² Salter and Thompson (n 69).

⁷³ Dickson (n 68) 126-27.

⁷⁴ Civil Resolution Tribunal (n 64).

⁷⁵ The objection mechanism against a CRT decision is only available to small claims disputes. See Dickson (n 68) 126-27.

powering people and placing them at the heart of a dispute resolution process rather than focusing on the CRT and its relevant authorities.⁷⁶

2.3. Internet Courts and Small Claims in China

In line with China's ambitious judicial reforms in using new developments in information technology, the first Chinese Internet Court was established in Hangzhou in 2017.⁷⁷ As the e-commerce cross-border pilot zone of China, the primary focus of Hangzhou region has been on sales of consumer goods.⁷⁸ Many of these online transactions are low in monetary value. As a result, providing effective access to justice for low-value consumer claims has been of the utmost importance in the region.⁷⁹ Accordingly, Hangzhou Internet Court retains jurisdiction over certain types of disputes with emphasis on small claims disputes.

One of the principal objectives of this online court is to provide more effective access to justice to claimants of Internet-related minor cases.⁸⁰

Currently, the Internet Court has a rather limited scope of admissibility of subject-matter and jurisdiction. The eligible disputes include Internet-related small claims or cases submitted in the context of demand-for-payment that are at the first level instance.⁸¹ As pointed out by Guo (2021), the nature of these cases is more compatible with a fully digital process since they usually do not require complicated procedures and special means of remedy.⁸²

In terms of general territorial jurisdiction, Article 21 of the China Civil Procedure Law stipulates that the court in the place of domicile or the habitual residence—if it is different from the place of domicile—of the de-

⁷⁶ Salter (n 67) 129.

⁷⁷ 'Hangzhou Internet Court' <<https://www.netcourt.gov.cn/?lang=En>> accessed 7 June 2022.

⁷⁸ Lin Yang, 'China's Three Internet Courts' [2021] *The Journal of the Society for Advanced Legal Studies* 532 <<https://heinonline.org/HOL/P?h=hein.journals/amcrae2020&i=531>> accessed 7 June 2022.

⁷⁹ The Hangzhou Internet Court has extensive experience in dealing with e-commerce related claims in China. This region is the most developed e-commerce region in the country particularly as Alibaba's (the largest e-commerce company in China) headquarter is in Hangzhou. See Meirong Guo, 'Internet Court's Challenges and Future in China' (2021) 40 *Computer Law & Security Review* 8 <<https://doi.org/10.1016/j.clsr.2020.105522>> accessed 7 June 2022.

⁸⁰ Changqing Shi, Tania Sourdin and Bin Li, 'The Smart Court - A New Pathway to Justice in China?' (2021) 12 *IJCA* 1, 8 <<https://heinonline.org/HOL/P?h=hein.journals/ijca12&i=45>> accessed 7 June 2022.

⁸¹ In accordance with the Hangzhou Internet Court's Trial Rules of the Litigation Platform, admissible cases are: "1. *Contract disputes and product liability disputes arising from e-commerce relationships*; 2. *Disputes related to Internet service contracts*; 3. *Microfinance loan contracts with the value of up to RMB 500,000*; 4. *Specific Intellectual Property related disputes (i.e., copyright ownership infringements and domain names disputes)*; 5. *Disputes regarding Internet administration*; 6. *Certain types of Internet related civil and administrative disputes referred by higher instances of courts to the Hangzhou Internet Court.*" See Gianna Abegg and Felix Engelhardt, 'China Takes Online Dispute Resolution to the Next Level' (2019) 4 *Jusletter* 1, 4.

⁸² Guo (n 79).

fendant has territorial jurisdiction to deal with a lawsuit against him/her.⁸³ Thus, Hangzhou Internet Court has territorial jurisdiction over those who have their domiciles within this city. Despite this, the issue of geographical jurisdiction in the Internet Court remains a challenge to the general rules of territorial jurisdiction under the Chinese legal system, which requires in-depth scholarly discussions on the topic.⁸⁴

The Hangzhou Internet Court's Litigation Platform operates on a 24-hour basis allowing parties to have intermittent access to their case. This enables parties to freely submit or respond to a claim at their convenience. The entire dispute resolution process is held online on the Litigation Platform.⁸⁵ The Internet Court is equipped with the most advanced hardware facilities to assist the willing parties to attend live trials using these systems at the Court's premises in Hangzhou.⁸⁶

To file a claim, the claimant must register in the system and verify his/her identity either through using the Alipay application⁸⁷ or visiting the e-Court's premises and showing their identification documents to the clerk.⁸⁸ Upon identity authentication, the plaintiff must log into the Litigation Platform on the Hangzhou Internet Court's website to choose the type of claim and complete the online complaint form.⁸⁹ At this phase, electronic evidence can be uploaded and attached to the claim form. If the evidence is in hard copy, it must be scanned before submission to the system. The Internet Court uses encryption and blockchain technologies to ensure maximum security for electronic evidence and mitigate the risks of hacking or falsification of e-evidence.⁹⁰ Once the submission of the case is completed, the system will inform the defendant—via phone—about the case information. This notification contains a link to the website of the Hangzhou Internet Court Litigation

⁸³ According to Article 21 of China Civil Procedure Law: "A civil action instituted against a citizen shall come under the jurisdiction of the people's court in the place where the defendant is domiciled; if the defendant's place of domicile is different from the place of his or her habitual residence, the people's court in the place of his or her habitual residence shall have jurisdiction. A civil action instituted against a legal person or any other organization shall come under the jurisdiction of the people's court in the place where the defendant is domiciled.

⁸⁴ *if the places of domicile or habitual residence of several defendants in the same lawsuit come under the jurisdiction of two or more people's courts, each of those people's courts shall have jurisdiction.*" See Civil Procedure Law of the People's Republic of China 1991.

⁸⁵ See Lin Yifu, 'Rethinking the Territorial Jurisdiction of the Chinese Internet Courts' [2019] STL Law Review <<https://sillawreview.com/index.php/2019/04/17/rethinking-the-territorial-jurisdiction-of-the-chinese-internet-courts>> accessed 7 June 2022.

⁸⁶ Hangzhou Internet Court (n 77).

⁸⁷ Yang (n 78); Abegg and Engelhardt (n 81) 5.

⁸⁸ Alipay is an international online payment platform that was established in 2004 in Hangzhou, China by Alibaba Group. See 'Alipay' <<https://global.alipay.com/platform/site/ihome>> accessed 7 June 2022.

⁸⁹ Abegg and Engelhardt (n 81) 5.

⁹⁰ Huang-Chih Sung, 'Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China' (2020) 39 Computer Law & Security Review 1, 6 <<https://doi.org/10.1016/j.clsr.2020.105461>> accessed 7 June 2022.

⁹¹ *ibid* 3.

Platform. The defendant is then able to refer to the system to register, review the case, and submit any possible responses to the claim.⁹¹ According to the Hangzhou Internet Court website, the parties can agree on the pre-litigation mediation while their case is pending. If the parties agree to mediation, the system appoints an expert mediator to assist the disputants to reach an agreement within 15 days (or within any other mutually agreed timeframe).⁹² Where the parties reach a settlement, the case can be withdrawn from the system. On the contrary, if the mediation is not successful, the case will be escalated to the next level and it will be submitted to the Case Filing Division of the Internet Court.⁹³ The application will be then reviewed by an online Court's clerk to ensure the claim meets all the requirements.⁹⁴ Upon approval of the case, the claimant will be informed to pay the litigation fee within seven days from the notification date. The fees can be paid through e-wallets such as Alipay.⁹⁵

The court hearings are held entirely online and are recorded.⁹⁶ Where necessary, the online sessions can be transcribed using a speech recognition system to ensure the trial records are consistent and authentic. After the hearing, a transcript of the trial is uploaded into the system and the parties can suggest any necessary modifications to the text. The Internet Court uses an integrated artificial intelligence in the system that assists the judge to—partially or fully—generate the final judgement.⁹⁷ The parties can appeal against this judgement to the Hangzhou Intermediate People's Court.⁹⁸

According to the official statistics on the website of the Hangzhou Internet Court, approximately 14,700 claims have been registered into the system since the Platform establishment in 2017.⁹⁹ The acceptance rate of judgements by the parties has been 99.06%, which indicates the Internet Court is successful in delivering justice.¹⁰⁰ Further, the establishment of the two other Internet Courts in Beijing and Guangzhou—in 2018 and with the similar objectives—is another convincing indicator that the Internet Court has provided an innovative, expedited, cost-effective and more convenient model of access to justice for citizens.¹⁰¹ Nevertheless, there are still some concerns with the Internet Courts in China—e.g., territorial jurisdiction, and particu-

⁹¹ Abegg and Engelhardt (n 81) 6.

⁹² The parties are, however, free to appoint their preferred mediator. See *ibid* 7.

⁹³ *Ibid*.

⁹⁴ If the case review manifests that the claim is not suitable for online litigation, it will be transmitted to the ordinary offline litigation process. See *ibid*.

⁹⁵ *ibid*.

⁹⁶ Guo (n 79).

⁹⁷ Abegg and Engelhardt (n 81) 7.

⁹⁸ Sung (n 89) 9.

⁹⁹ Jianing Sang, 'Internet court on solving online consumer contract disputes: Case of China' (2021) 2 *Digital Law Journal* 23 <<https://doi.org/10.38044/2686-9136-2021-2-3-23-45>> Accessed 7 June 2022.

¹⁰⁰ Guo Wenli, 'The Four Major Judicial Innovations of China's Guangzhou Internet Court, China Guiding Cases Project' [2019] *Stanford Law School* <<https://cgc.law.stanford.edu/commentaries/clc-6-201909-29-guo-wenli/>> accessed 7 June 2022.

¹⁰¹ Shi, Sourdin, and Li (n 80).

larly the use of artificial intelligence in issuing judgements in relation to data privacy, fairness and efficiency of justice—which requires the need for detailed research.¹⁰²

2.4. Online Dispute Resolution and Small Claims in the United States

One of the principal objectives of embracing ODR as part of the civil justice system in the United States (U.S.) is to narrow the current ‘justice gap’ in the society. The aim was to specifically maintain an appropriate balance between civil legal needs of low-income citizens with available resources.¹⁰³ In this sense, over the past five years online civil dispute resolution, in particular for small claims, has gained significant momentum as part of the U.S. civil justice system reforms.¹⁰⁴ Many jurisdictions in the country have already established their specific ODR—e.g., online negotiation and online mediation tracks—models as part of their small claims proceedings. In some other jurisdictions, including Utah and California, the courts have taken a more serious approach towards launching ambitious ODR pilot projects to handle minor monetary cases.¹⁰⁵ According to Schmitz and Martinez (2021), ODR pilot programs are essential to learn from experiences. This is particularly helpful for court staff and lawyers who are key role players in identifying issues in civil justice system and working toward finding solutions to these deficiencies by using ODR.¹⁰⁶

One of the prominent examples of ODR pilots in the context of small claims started in Utah in September 2019.¹⁰⁷ Utah was the first state in the country to initiate a mandatory ODR Pilot Program to officially process small claims. This completely online track covers monetary claims of up to 11,000 USD.¹⁰⁸ The primary purpose of this ODR program was to promote access to justice for disputants without any necessity to be physically present in the court.¹⁰⁹ To achieve this goal, the Utah Court enables parties to benefit from

¹⁰² *ibid*; Guo (n 79).

¹⁰³ Legal Services Corporation, ‘The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (Washington DC Office 2017) 6 <<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>> accessed 7 June 2022.

¹⁰⁴ Schmitz and Martinez (n 18) 2.

¹⁰⁵ Deno Himonas, ‘Utah’s Online Dispute Resolution Program’ (2018) 122 Dick. L. Rev. 875 <<https://heinonline.org/HOL/P?h=hein.journals/dknslr122&i=895>> accessed 7 June 2022. See also Paula Julianne Dardanes, ‘When Accessing Justice Requires Absence from the Courthouse: Utah’s Online Dispute Resolution Program and the Impact it Will Have on Pro Se Litigants’ (2021) 21 Pepp. Disp. Resol. L.J. 141 <<https://digitalcommons.pepperdine.edu/drlj/vol21/iss1/5>> accessed 7 June 2022.

¹⁰⁶ Schmitz and Martinez (n 18) 11.

¹⁰⁷ Hannaford Agor and others, ‘Impact of the Utah Online Dispute Resolution (ODR) Pilot Program: Final Report (State Justice Institute NCSC 2020) 2 <https://www.ncsc.org/_data/assets/pdf_file/0025/57823/NCSC-UT-final-2020.pdf> accessed 7 June 2022.

¹⁰⁸ See ‘Utah Court’ <<https://www.utcourts.gov/smallclaimsodr>> accessed 7 June 2022.

¹⁰⁹ Agor and others (n 107).

a self-education process, the evaluation of negotiations by a facilitator and access to an online hearing if necessary.¹¹⁰

To begin the process, parties must register into the court-run online platform developed by the State of Utah.¹¹¹ This system is accessible from both desktops and mobile devices. Prior to initiating the case, parties can go through education and evaluation phases to obtain accurate information about their claims and potential defences.¹¹² Educating self-representing litigants in small claims cases is a significant part of the Utah ODR Pilot.¹¹³ This initiative assists claimants and defendants to understand the process and court functions in relation to their case.¹¹⁴ Next, the parties can negotiate using the provided chat function to reach a settlement. All the shared data, documents, and communications remain confidential. At this stage, a system-appointed facilitator assists the parties in working towards reaching an agreement. If a settlement is not reached within 35 days from the start of negotiations, the facilitator prepares the parties for trial. The hearing can take place online; however, the court may consider the necessity for physical hearings based on the complexity of a case.¹¹⁵ Online trials can begin immediately after the parties submit all the evidence to the system. The online trial has no specified timeframe; nonetheless, the parties must abide by the specified deadline set by the judge. Once the decision is taken by the judge, this order will be posted on the same online platform where parties will have access to it.¹¹⁶

The Utah ODR pilot project demonstrated that digitalising small claims procedures can be an effective instrument in encouraging—specifically self-represented litigants and defendants—to actively engage in a more time-efficient and cost-effective dispute resolution process.¹¹⁷ As maintained by Schmitz and Martinez (2021), the Utah ODR pilot project proved that it is possible to reimagine civil court rules to adapt to new innovations in the judicial process to increase access to justice for low-income citizens.¹¹⁸

The lessons learnt from Utah's ODR program encouraged other States to embrace new technology to digitalise small claims procedures within their jurisdictions. In a recent example, the Superior Court of California, County of Los Angeles has introduced a free ODR program (LA-ODR) to deal

¹¹⁰ Melisse Stiglich, Utah Online Dispute Resolution Pilot Project: Final Report (National Centre for State Courts 2017), 7 <<https://ncsc.contentdm.oclc.org/digital/api/collection/adr/id/63/download>> accessed 7 June 2022.

¹¹¹ Himonas (n 105) 880.

¹¹² Stiglich (n 110) 8.

¹¹³ Due to the low threshold of claims, most parties – specifically claimants – are self-represented litigants that need legal assistance.

¹¹⁴ Stiglich (n 110).

¹¹⁵ *ibid* 11.

¹¹⁶ *ibid* 12.

¹¹⁷ Schmitz and Martinez (n 18).

¹¹⁸ *ibid* 12.

with civil monetary claims of up to 10,000 USD.¹¹⁹ The major purpose of this program is to provide accessible, timely and cost-effective digital access to justice for citizens. The LA-ODR uses an innovative and secure system to ensure maximum privacy and confidentiality for the users.¹²⁰ Similar to the Utah ODR pilot program, the LA-ODR platform provides precise step-by-step education for its users through simple questions about the dispute.¹²¹ This program guides plaintiffs and defendants by asking a series of questions—e.g., regarding the requested or offered amount of money; preferred payment dates; and any specific terms or conditions for payment—to assist them in planning their negotiations more effectively.¹²² Parties can use a chat function to negotiate and share documents. If they reach an agreement within two court days, the system automatically generates a form of settlement. This form must be approved and signed by parties prior to submission to a judge. However, if parties fail to reach an agreement, they must attend the scheduled court hearing.¹²³ It is to be noted that during the ODR process, parties can always request free assistance from a trained mediator. The mediator can chat with both parties in separate and joint chatrooms to help them reach a customised settlement for the dispute. Providing free expert mediation for small claims cases is an added-value of a court-connected ODR system, since it enables parties to reach an amicable and satisfactory settlement. Like the Utah ODR pilot, the LA ODR program aims at improving access to justice for claimants of small claims by using innovative technology. It should be, however, noted that the LA-ODR project is a quite recent establishment. Therefore, it is early to draw any conclusions from the efficiency, feasibility and benefits of this system for courts and citizens.¹²⁴

3. DIGITALISATION OF SMALL CLAIMS PROCEDURES IN THE EU

During recent decades, improving access to justice for citizens, and in particular consumers, has gained momentum in Europe. Considering that many consumer claims comprise a low amount of money, ordinary civil pro-

¹¹⁹ 'Los Angeles Court' <<http://www.lacourt.org/division/smalleclaims/SC0010.aspx>> accessed 7 June 2022.

¹²⁰ This system is designed and run by the *TurboCourt* Company. See 'Turbo Court Company' <<https://info.turbocourt.com>> accessed 7 June 2022.

¹²¹ Ariella Wasser, 'Online Dispute Resolution Services for Small Claims Now Live in Los Angeles County' (*TurboCourt* 24 February 2021) <<https://info.turbocourt.com/online-dispute-resolution-services-for-small-claims-now-live-in-los-angeles-county/>> accessed 7 June 2022.

¹²² 'LA-ODR Program FAQs' <<https://my.lacourt.org/odr/assets/ODR-SC-ProgramFaq.pdf>> accessed 7 June 2022.

¹²³ It is critical to note that the judge has no access to any of exchanged communications that took place on the LA-ODR platform. See 'Los Angeles Court' <<https://my.lacourt.org/odr/assets/ODR-SC-ProgramFaq.pdf>> accessed 7 June 2022.

¹²⁴ Stiglich (n 110) 16.

ceedings have not succeeded in meeting the justice needs of claimants.¹²⁵ This failure is mainly due to costly, time-consuming, and complex court proceedings. These barriers pose more serious challenges for consumers seeking legal redress for their cross-border cases. Consequently, access to justice for claimants of minor pecuniary claims does not properly meet the judicial protection standards of the right to an effective remedy and to a fair trial as envisaged by Article 47 of the CFREU, and also by Articles 6 (1) and 13 of the ECHR. To narrow this justice gap, digitalisation of small claims procedures is considered as an optimal solution for responding to the needs of creditors to facilitate their access to justice.¹²⁶ For this purpose, some regulatory initiatives have been launched by the EU and national policymakers to imbed technology – in both ADR and litigious procedures – into their judicial systems. The establishment of the ESCP Regulation (and its amendment) and the EU ODR Platform are amongst the most prominent examples at the Union level. At the Member State level, Estonia, Lithuania and recently Malta have attempted to move towards fully digitalising their civil justice systems. Nevertheless, with respect to small claims these efforts are still far from offering a tiered ODR system design as discussed in Sections I and II of this paper. In the sub-sections that follow, we discuss these regulatory initiatives for digitalising small claims procedures and analyse whether they have succeeded in promoting citizen access to justice for claimants.

3.1. At the European Cross-border Level

The Regulation on European Small Claims Procedure and its amendment were established by the EU Commission to encourage the use of simplified and digitalised civil proceedings for cross-border low-value claims. Currently, the ESCP Regulation covers transnational pecuniary claims of up to 5,000 euros within the EU.¹²⁷ As many small value disputes arise from e-commerce transactions, this instrument particularly intends to protect consumers against malpractices in the Digital Single Market.¹²⁸ With respect to digitalisation, the ESCP Regulation and its amendment explicitly encourage the Member States to use technology for reducing the time and costs of the proceedings. In this regard, Article 8 (1) of the Regulation stipulates that “*Where an oral hearing is considered necessary in accordance with Article 5(1a), it shall be held by making use of any appropriate distance communication technology, such as*

¹²⁵ See Xandra E. Kramer, ‘Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU’ in Karim Benyekhlef et al., *eAccess to Justice* (University of Ottawa Press 2016) 351.

¹²⁶ The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM (2021) 389, 4.

¹²⁷ With the exception of Denmark.

¹²⁸ See Hörnle (n 32) 5; Pablo Cortés, ‘Enforcing EU consumer policy more effectively: a three-pronged approach’ in Sara Drake and Melanie Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar Publishing 2016).

videoconference or teleconference, available to the court or tribunal, unless the use of such technology, on account of the particular circumstances of the case, is not appropriate for the fair conduct of the proceedings.” Likewise, the amending Regulation of 2015—within Recitals 7, 12, and 13—strongly emphasises the use of ICT facilities by the parties and the courts to reduce the costs and length of the ESCP proceedings.

Thus far, the ESCP has not been widely endorsed by creditors of small claims due to several obstacles. These barriers include the inadequate awareness of this procedure among citizens; excessive reference to national procedural and enforcement laws of the Member States; lack of centralisation; language barriers; and most significantly, the lack of adequate ICT facilities in courts.¹²⁹ Nevertheless, the current body of theoretical and empirical literature on assessing the effectiveness of the ESCP Regulation recognises the potential of this instrument in facilitating access to justice for transnational small claims.¹³⁰ Considering that the lack of sufficient digitalisation in national courts is one of the major hurdles to effective implementation of this instrument, scholars strongly suggest that Member States equip their courts with sufficient ICT facilities.¹³¹ Digitalisation of the ESCP proceedings will enable the courts to carry out the entire judicial process online. This will incentivise consumers to seek justice for their cross-border small claims—without the need to be physically present at the court—in a more cost-effective and expedited manner. Nonetheless, digitalisation will have the most significant impact on increasing consumer trust and confidence in the EU Digital Single Market.¹³²

¹²⁹ Marco Giacalone, Irene Abignente, and Sajedeh Salehi, ‘Small in Value, Important in Essence: Lessons Learnt from a Decade of Implementing the European Small Claims Procedure in Italy and Belgium’ (2021) 17 *Journal of Private International Law* 308.

¹³⁰ See Pablo Cortés, ‘Does the Proposed European Procedure Enhance the Resolution of Small Claims?’ (2008) 27 *Civil Justice Quarterly* 83; Xandra E. Kramer, ‘Small Claim, Simple Recovery? The European Small Claims Procedure and Its Implementation in the Member States’ (2011) 12 *Springer-Verlag* 119; Xandra E. Kramer, ‘European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects’ in Burkhard Hess, Maria Bergström, and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing, 2015); Elena D’Alessandro, ‘Choosing among the three regulations creating a European enforcement order (EEO regulation, EOP regulation, ESCP regulation): practical guidelines’ (2010) 1 *Int’l Lis* 39.

¹³¹ For a thorough analysis on the insufficiency or lack of digitalisation for ESCP cases refer to the published series of country reports that were conducted as part of Small Claims Analysis Net (SCAN) project in 2020. See Maksimilijan Gale and Katarina Zajc, ‘The Implementation of the European Small Claims Procedure in Slovenia’ (2020) 9 *EuCML* 262; Rimantas Simaitis, Vigitė Vebraitė, and Milda Markevičiūtė, ‘The Implementation of the European Small Claims Procedure in Lithuania’ (2020) 9 *EuCML* 267; Pablo M. Baquero and Matteo Winkler, ‘The Implementation of the European Small Claims Procedure in France’ (2021) 10 *EuCML* 36; Irene Abignente and Paola Chiara Ruggieri, and Flavia Rolando, ‘The Implementation of the European Small Claims Procedure in Italy’ (2021) 10 *EuCML* 40; Onntje Hinrichs and Jakob Thevis, ‘The Implementation of the European Small Claims Procedure in Germany’ (2021) 10 *EuCML* 75; Sajedeh Salehi and Marco Giacalone, ‘The Implementation of the European Small Claims Procedure in Belgium’ (2021) 10 *EuCML* 80.

¹³² Sara Hourani, ‘Mind the Gap? A Critical Analysis of the Recognition and Enforcement of Cross-Border Consumer ODR Outcomes in the EU’ [2022] *Revista Ítalo-española de Derecho procesal* 1 <<http://www.revistamarcialpons.es/rivitsproc/article/view/681/843>> accessed 7 June 2022.

In the context of online alternative dispute resolution for small claims at the Union level, the Commission adopted Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the EU ODR Regulation).¹³³ One of the major objectives of this Regulation was to establish an EU-wide Online Dispute Resolution Platform to deal with C2B disputes.¹³⁴ According to Article 2 of the ODR Regulation, this Platform is designed to facilitate the use of effective, low-cost, expedited and fair non-litigious—in particular negotiation and mediation—dispute resolution mechanisms.¹³⁵

The Platform is in function since early 2016 as a central access point to connect EU-based consumers and traders with the nationally accredited ADR bodies.¹³⁶ These ADR institutions assist parties in settling the incurred disputes that have arisen from online purchases of goods and services.¹³⁷

The ODR Platform procedure comprises of four main phases. First, the consumer completes an online complaint form and submits it to the Platform.¹³⁸ This form is available in all the EU official languages. The users can also benefit from an integrated translation tool—in the system—to convert the exchanged messages and texts into the language of the recipient.¹³⁹ Given that language is one of the major impediments to access to justice for consumers in the EU, offering consumers gratis translation is a major step towards facilitating access to justice for them.¹⁴⁰

In the second phase, the trader will receive an e-mail that contains a link to the Platform. Once the trader has been notified about the complaint and provided with supporting information three possible scenarios can be imagined: i) to directly contact the consumer to resolve the dispute through negotiation; ii) to agree with the consumer to engage in the dispute settlement through an approved ADR body and pay the settlement fees, or; iii) to avoid responding to the consumer's complaint that closes the case within 30 calendar days since submission of the complaint.¹⁴¹ In the latter circumstance, according to

¹³³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

¹³⁴ Sciallis (n 13).

¹³⁵ It should be noted that the Platform is designed for consumers cases and not specifically to handle small claims. However, since most C2B disputes fall under the categories of low threshold claims, it is necessary to discuss the EU ODR Platform.

¹³⁶ Chung Yongkyun, 'Artificial Intelligence and the Virtual Multi-Door ODR Platform for Small Value Cross-Border e-Commerce Disputes' (2019) 29 *J. Arb. Stud.* 99, 104 <<https://heinonline.org/HOL/P?h=hein.journals/jarbstu29&i=530>> accessed 7 June 2022.

¹³⁷ Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 5.

¹³⁸ The Form is accessible via <<https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase>> accessed 7 June 2022.

¹³⁹ Emma Van Gelder and Alexandre Biard, 'The Online Dispute Resolution Platform after One Year of Operation: A Work in Progress with Promising Potential' [2018] *Social Science Research Network* 5 <<https://papers.ssrn.com/abstract=3169254>> accessed 7 June 2022.

¹⁴⁰ Cortés (n 1) 119.

¹⁴¹ *ibid* 121.

Article 9 (8) of the ODR Regulation, the consumer shall be informed by the Platform about the right to contact an ODR advisor to obtain information regarding other available remedies for seeking justice.¹⁴²

In the third stage, where the parties agree upon an approved ADR body to assist them in resolving their dispute, the Platform will automatically send the related information and details of the case to the chosen ADR entity. The dispute resolution body evaluates the dispute without delay and informs the parties whether it will handle the case. Upon refusal by the ADR body, the file will be closed, and the case will be treated according to the provisions of Article 9 (8) for contacting an ODR advisor.

In the final phase, the ADR entity has agreed to handle the case. It is critical to note that it is not mandatory to conduct the dispute resolution process on the EU ODR Platform. Thus, the ADR body can invite the parties to an external platform to proceed with the case. Upon completion of the process, the ADR body must issue the final decision within maximum 90 calendar days from the date it has completely received the case.¹⁴³ The ADR entity must transmit all the information regarding the case—including the date of receipt of the complaint, the subject-matter of the case, the closure date of the dispute resolution process and the result of the procedure—to the Platform.

Perhaps the Platform has had a major impact on raising citizens' awareness about the use of ODR methods for resolving C2B disputes. Citizen awareness is key in the success of an ODR instrument.¹⁴⁴ The data published by the Commission within the recent Statistical Reports on the function of the Platform reveals significant information on its recognition by consumers within the last three years.¹⁴⁵ According to these official statistics, 5 million in 2018¹⁴⁶, 2.8 million in 2019¹⁴⁷, and 3.3 million unique visits in 2020¹⁴⁸ have been registered for the Platform.

¹⁴² Article 9 (8) of the EU ODR Regulation on the 'Processing and transmission of a complaint' stipulates that: "Where the parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further. The complainant party shall be informed of the possibility of contacting an ODR advisor for general information on other means of redress."

¹⁴³ Cortés (n 1) 109.

¹⁴⁴ Maria Jose Schmidt-Kessen, Rafaela Nogueira, and Marta Cantero Gamito, 'Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU' (2020) 43 *Journal of Consumer Policy* 659, 668 <<https://rdcu.be/cMSXT>> accessed 7 June 2022.

¹⁴⁵ The 3rd Statistical Report of the European Commission on the Functioning of the European ODR Platform, December 2020 <https://ec.europa.eu/info/sites/info/files/odr_report_2020_clean_final.pdf> accessed 7 June 2022.

¹⁴⁶ The 2nd Statistical Report of the European Commission on the Functioning of the European ODR Platform, December 2018 <https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf> accessed 7 June 2022.

¹⁴⁷ The 3rd Statistical Report of the European Commission on the Functioning of the European ODR Platform (n 145).

¹⁴⁸ The 4th Statistical Report of the European Commission on the Functioning of the European ODR Platform, December 2021 <<https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>> accessed 7 June 2022.

From our perspective, the main shortcoming of the EU ODR Platform is that this online tool only functions as a referral point in connecting disputants to an ADR body. In this study, we have already discussed the effectiveness and greater compatibility of a tiered ODR design with small claims; in particular those arising from digital transactions. On this account, we suggest that the EU ODR Platform must be developed into a tiered ODR system with the possibility of hosting the entire dispute resolution process.

In this proposed system design, the Platform can play the role of a third-party in online negotiation. As the result, the disputants should be able to directly negotiate their issue without the need for any external intervention. The parties should have the possibility of recording all the exchanged communications and information between them.¹⁴⁹ If the parties cannot reach an agreement based on negotiation, they can request to go to online mediation. The mediator can be selected from a list of approved ADR bodies available on the Platform. At this stage, the mediator joins the process to assist disputants to reach a settlement. If mediation fails, and a party or both requests to go to litigation, the Platform should automatically refer the case to the competent court for online civil proceedings.

There is also a further possibility for connecting the EU ODR Platform with the ESCP proceedings.¹⁵⁰ This view was also echoed in a comprehensive study by Cortés and Maňko (2016) in which they emphasised establishing a synergic link between the ESCP and ODR systems.¹⁵¹ In this respect, there should be a pre-action mandate for parties to an ESCP case to first exhaust the possibility of settling their dispute using the EU ODR Platform.¹⁵² In the event that the parties fail to reach an agreement within the framework of the Platform, the case can be automatically referred to the competent court to follow with the ESCP proceedings in a fully online format.

Strengthening the link between these two significant EU initiatives can be an optimal solution to tackle the existing barriers to effective access to justice for creditors of cross-border low threshold claims. This synergy—in the capacity of a fully digital format—becomes a strategic necessity to respond to social emergencies such as the COVID-19 pandemic.

In a nutshell, the establishment of the ESCP and the EU ODR platform can be considered as initial steps taken by the EU in moving towards raising citizen awareness of online dispute resolution mechanisms. However, future improvements are crucial to develop efficient models of tiered ODR systems

¹⁴⁹ Cortés (n 1) 136-37.

¹⁵⁰ *ibid* 131.

¹⁵¹ Cortés (n 137) 56-60.

¹⁵² Mireze Philippe, 'ODR Redress System for Consumer Disputes' (2014) 1 *International Journal of Online Dispute Resolution* 68.

that provide creditors of small claims with a fully digitalised and trustworthy dispute resolution processes to be entirely conducted on a single platform.¹⁵³

3.2. At the EU Member State Level

The previous part discussed the recent digital developments in improving access to justice for claimants of small claims at the Union level. This part focuses on the status of digital small claims procedures within Member States. We will thus explore whether EU civil justice systems have already fostered any innovations related to digitalising small claims procedures within their respective jurisdictions.

During our investigations, we found out that there is limited progress regarding the digitalisation of small claims procedures at national level in Europe. The outbreak of the COVID-19 pandemic was a strong trigger for many Member States to adapt their court proceedings to the new physical mobility restrictions. The justice systems that were not well-prepared for the digital transformation of their proceedings had to deal with extreme delays in delivering justice to their citizens.¹⁵⁴

Nevertheless, there are a few Member States, such as Estonia and Lithuania, that have already taken well-documented measures in establishing e-justice systems. As a result, during the pandemic these States did not face major challenges in meeting the justice needs of their citizens including in small claims procedures. The widespread and well-established use of digital tools as integrated within their justice systems enabled these States to ensure the functioning of the courts continued during a time of uncertainty.¹⁵⁵

A prominent example of this can be observed in the case of Estonia and its advancements in delivery of digital civil justice. The Estonian e-File (e-

¹⁵³ For instance, as a solution the function of the EU ODR Platform can be enhanced through installations of some plugins into the already established system and increase capabilities of the system be a more user-friendly ODR service.

¹⁵⁴ For the 2021 progress reports of the EU Member States on the status of court digitalisation at national courts, see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report, The rule of law situation in the European Union*, 20 July 2021, COM/2021/700 final <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021DC0700>> accessed 7 June 2022.

¹⁵⁵ For Estonia, see European Commission: *Commission Staff Working Documents 2021 Rule of Law Report, Country Chapter on the Rule of Law in Estonia, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report, The rule of law situation in the European Union*, SWD/2021/708 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0708>> accessed 7 June 2022. For Lithuania, see European Commission: *Commission Staff Working Documents 2021 Rule of Law Report, Country Chapter on the Rule of Law in Lithuania, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report, The rule of law situation in the European Union* SWD/2021/717 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0717>> accessed 7 June 2022.

toimik)¹⁵⁶ system—in the form of a platform—was developed in 2005 with the aim to provide all citizens with effective, accessible and high-quality court services. Within the framework of low-value cases, Estonia has not introduced a distinguished and expedited online track. Hence, the claimants and defendants can use the e-File system to submit and respond to civil cases to the courts via this fully digital platform. This system also allows parties and courts to use a digital workflow to share relevant data and documents that are secured by digital signature or by encryption.¹⁵⁷ During the pandemic, the e-File platform enabled Estonia to be one of the best performing Member States in providing advanced digital justice to its citizens. By mid-2020, Estonia officially launched a virtual courtroom where civil cases can be dealt with in an entirely online format. All the stages of processing of a case from submission of the claim, responses, exchange of documents and data, submission of evidence and hearings are conducted completely online on this platform.¹⁵⁸ In general, the Estonian civil justice system has proven to be highly advanced in the digitalisation of civil proceedings.

Lithuania is another example that deploys advanced ICT facilities within its court system to provide more effective and accelerated access to justice for its citizens. The government has taken serious measures towards digital transformation of the country's justice system. The main core of these efforts is evident in developing a digital unified information system (*LITEKO*) in 2004.¹⁵⁹ The major aim is to automate the systematic collection, storage, and provision of data related to the courts' functions. *LITEKO* has been constantly upgraded with new ICT functions to expedite the procedures and provide high-quality access to public services for the courts and other users. This has improved public access to judicial activities.¹⁶⁰ In relation to digitalising court proceedings, Lithuania has adopted the rules on the use of ICT tools in courts to conduct virtual hearings through videoconference and teleconference in 2013. Prior to the pandemic, virtual hearings had not been frequently used in civil proceedings including small claims cases. Nonetheless, with the outbreak of the COVID-19 these already existing rules on the use of ICT for the hearings were sufficient to swiftly shift from physical to fully digital litigations.¹⁶¹

Within our investigations, we noticed that Malta has launched a fully digitalised court proceedings to handle small claims cases. To promote the effectiveness and quality of court proceedings, the Maltese government integrated the use of ICT tools into its civil justice system. The e-Court project

¹⁵⁶ 'E-File' <<https://www.rik.ee/en/international/e-file>> accessed 7 June 2022.

¹⁵⁷ Anett Numa, 'Artificial Intelligence and the New Reality of e-Justice' (*e-Estonia.com*, 27 April 2020) <<https://e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice>> accessed 7 June 2022.

¹⁵⁸ The Commission Report on the Rule of law in Estonia (n 155).

¹⁵⁹ 'Official Website of the Lithuanian Courts' <<https://www.teismai.lt/en/national-courts-administration/activities/competence-areas/685>> accessed 7 June 2022.

¹⁶⁰ *ibid.*

¹⁶¹ See Vīgita Vēbraité, 'Impact of the COVID-19 pandemic on court proceedings in Lithuania' (2020) 7 *Access to Justice in Eastern Europe* 156 <<https://heinonline.org/HOL/P?h=hein.journals/ajee3&i=158>> accessed 7 June 2022.

was implemented as part of Malta's first Digital Justice Strategy in 2020.¹⁶² The fundamental objective is to make justice accessible to the public, in particular in response to the pandemic-induced restrictions.¹⁶³

To initiate the online small claims tribunal procedure, the plaintiffs and defendants can submit and respond to the small claims complaints by referring to the e-Court system. This website provides direct links to necessary forms such as claim, response, counterclaim and appeal.¹⁶⁴ These forms are used at different stages of the dispute resolution process. The website also provides the users with brief information about the function of each form, the eligibility to use the specified form and the timeline of the submission process. Upon selecting the appropriate form, the user is directed to the main e-Court case management system for registration and filling in the form. Users are required to register through their e-ID prior to initiating the process.¹⁶⁵ The entire process is conducted on the single platform in a fully digitalised format. Given these features, the e-Court website does not provide sufficient information regarding the post-submission status of digital small claims. This is a new initiative in full digitalisation of small claims court proceedings in Malta. Therefore, it is early to provide a concrete analysis of the effective function of this platform and its impact on access to justice for citizens.

To conclude, despite these digital advancements in judiciary services, none of these Member States have offered a specific tiered ODR process for handling small claims cases within their respective jurisdictions.

4. SMALL CLAIMS, DIGITALISATION, AND THE EU'S POST-COVID PERSPECTIVE

4.1. The Lessons to Learn and the Opportunities to Take

The outbreak of the COVID-19 pandemic provided civil justice systems with an unexpected opportunity to experience online dispute resolution. Most significantly, virtual hearings were used for a wide variety of disputes, proving that the dream of digital justice can come true. Small claims are considered an appropriate candidate to be handled through an entirely digital process comprising of OADR and online litigation. Digitalisation of small claims procedures – through a tiered ODR design – can be a viable solution to tackle barriers of time, costs and complex civil proceedings. This is proved

¹⁶² See Malta's e-Court website <<https://ecourts.gov.mt/onlineservices>> accessed 7 June 2022.

¹⁶³ Government of Malta: Ministry for Foreign and European Affairs, 'Rule of Law: Malta's Input to the 2021 European Rule of Law Annual Report' (2021) 17 <<https://ec.europa.eu/info/sites/default/files/mt-input.pdf>> accessed 7 June 2022.

¹⁶⁴ See e-Court Website <<https://ecourts.gov.mt/onlineservices>> accessed 7 June 2022.

¹⁶⁵ See Government of Malta's website <<https://eid.gov.mt/auth/Account/Login/08d0bb129da54f-70be9c459def657f87?minLevel=1&forceFullLoginScreen>> accessed 7 June 2022.

by the successful implementations of online small claims dispute resolution models across the world, such as Utah ODR Pilot in the U.S. and CRT in Canada.

The situation, however, is different in Europe. At the Union level, most transnational small claims arise from malpractices by traders in the Digital Single Market. Thus, the EU has pursued this long-term objective of protecting consumers as the weaker position in any given trade by providing them with an expedited, cost-efficient and simplified access to justice for their low-value claims.

With the pandemic and its accompanying extreme delays in the delivery of justice, this objective was declared to be more important than ever to the EU. Therefore, it became a necessity to accelerate substantial reforms of judicial systems with new technologies and innovations. According to the EU Justice Scoreboard 2021, digitalisation of access to justice as a core element to improve effectiveness of justice systems in Member States is being monitored by the Commission.¹⁶⁶ In December 2020, the Commission manifested its strong willingness to speed up moving towards digital transformations in Member States by issuing a Communication.¹⁶⁷ This instrument proposes a toolbox of opportunities and targeted measures on digitalisation of justice in the European Union.¹⁶⁸ The ultimate objective of this Communication is to enhance access to justice and efficiency of justice systems in the Union. To achieve this, digital technologies are deployed to promote cross-border judicial cooperation among competent authorities of the member countries.¹⁶⁹

In the specific context of small claims, the Communication emphasises facilitating access to justice for claimants by promoting user-friendliness and efficiency of the ESCP. Effectiveness has been defined in the context of overcoming hurdles such as lengthy, costly and complex national civil procedures. As a solution, the Communication suggests that all the relevant—to the ESCP proceedings—information must be easily and directly accessible on the e-Justice portal as an entry point for the public. The Communication also proposes to establish a cross-border access point on this portal. This establishment will enable creditors of small claims to file their ESCP claims

¹⁶⁶ The 2021 EU Justice Scoreboard (n 126).

¹⁶⁷ According to the Staff Working Document accompanying the Communication on Digitalisation of justice in the European Union 2020, only 10 out of 26 EU Member States use ICT (videoconferencing) tools in handling civil and commercial cases. This statistical data indicates the considerable needs for digitalising justice systems in the EU. See the Commission Staff Working Document (2020) 540 final accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Digitalisation of justice in the European Union, a toolbox of opportunities COM (2020) 710 final, 7.

¹⁶⁸ This toolbox refers to a great range of legal, financial, and information communication technology tools to be used by various actors – i.e., plaintiffs, defendants, lawyers, judges, other judiciary staff, etc – in justice systems of Member States based on their needs. See *ibid.*

¹⁶⁹ *ibid.* 2.

directly on the portal and get electronically connected with national authorities of the competent jurisdiction.¹⁷⁰

The Communication embodies the strong and incentivised approach from the EU to accelerate digital transformations of justice systems on the continent. Despite these devoted efforts, there is not any significant progress in the context of promoting access to justice for claimants of small claims. From our viewpoint, this existing justice gap can be narrowed using a tiered ODR system design to handle small claims.

Digitalisation of small claims—as part of the general ODR regime—makes justice more accessible to everyone. As a result, citizens' fundamental rights of access to an effective remedy and to a fair trial are protected. Finally, future measures and time will prove whether digitalisation of civil justice systems provides effective access to justice for citizens, including claimants of small claims.

4.2. Digitalisation and the Risks to Avoid

There are indeed opportunities in fully digitalising small claims procedures. Nonetheless, there are also some concerns that are specifically expressed in terms of conducting virtual court proceedings either independently or in conjunction with OADR methods. Therefore, it would be necessary for the policymakers to primarily make a risk assessment prior to adopting ICT implementations into their civil justice systems.

In this respect, it is equally important to avoid overemphasising the advantages of fully digitalised dispute resolution models as it may lead to ignoring the potential barriers and risks.

It is crucial to note that there are real obstacles to launching fully digitalised court proceedings, including in small claims cases. Scholars have expressed serious concerns about online litigation and virtual hearings. They have explicitly referred to the public perception of equal access to justice and procedural fairness.¹⁷¹

In relation to access to justice, according to the Joint Technology Committee 2020 Report on virtual court processes, there is a common perception among the public that physical hearings are superior to online hearings.¹⁷²

¹⁷⁰ *ibid* 19.

¹⁷¹ See Legg (n 18); Elizabeth G. Thornburg, 'Observing Online Courts: Lessons from the Pandemic' [2020] SMU Dedman School of Law Legal Studies Research Paper No. 486 <<https://ssrn.com/abstract=3696594>> accessed 7 June 2022; Joe McIntyre, Anna Olijnyk, and Kieran Pender, 'Civil Courts and COVID-19: Challenges and Opportunities in Australia' (2020) 45 *Alternative Law Journal* 195 <<https://doi:10.1177/1037969X20956787>> accessed 7 June 2022; S.I Strong, 'Procedural law in a time of pandemic: Australian Courts' response to COVID-19' (2020) 20 *University of Sydney Law School* 2 <<https://ssrn.com/abstract=3639673>> accessed 7 June 2022.

¹⁷² Joint Technology Committee (JTC), 'Judicial Perspectives on ODR and Other Virtual Court Processes' (May 2020, ver. 1.0) <https://www.ncsc.org/_data/assets/pdf_file/0023/34871/2020-05-18-Ju

This is especially important in cases that involve people with disabilities or individuals from the most vulnerable groups in society. According to this approach, online litigation may deprive individuals with special needs effective access to justice. These special needs have been broadly defined in the context of the need for language translation, mental illness issues and physical disabilities. In addition, low-income citizens and those with limited access to ICT facilities are considered as vulnerable groups of society. As a result, the fundamental right of these vulnerable groups and people with special needs in accessing justice for their small claims might be infringed by virtual court proceedings.

On the other end, procedural fairness is referred to as another barrier that may arise with the implementation of virtual court proceedings. In terms of small claims virtual hearings, procedural fairness – as a main pillar of the rule of law – refers to the opportunity for receiving the claim notification and to be heard. In this sense, the main expressed concern is that online hearing may deprive or hinder a party from presenting or challenging arguments or evidence.¹⁷³

Safeguarding individuals' access to justice as a fundamental right and procedural fairness as a central concept to the rule of law are of crucial importance in the establishing of any online court proceedings. Therefore, policy-makers must take necessary and appropriate measures to ensure the rights of individuals are guaranteed while participating in virtual hearings. Broadly speaking, in designing any ODR system particular attention must be paid to ensure its compliance with existing judicial protection standards in guaranteeing effective access to justice.¹⁷⁴

CONCLUDING REMARKS

The main purpose of this study was to investigate the most recent developments in the establishment of completely online small claims procedures from the global and the European perspectives.

It was argued that an online dispute resolution system design plays a significant role in fulfilling the justice needs of claimants of small claims and safeguarding their effective access to justice. This study has shown that a tiered ODR system design—OADR methods in conjunction with online litigation—can be a highly suitable dispute resolution model for small claims cases. It was maintained that this design is compatible with the nature of e-commerce driven low-value claims, in particular where individuals are self-represented litigants.

dicial-Perspectives.pdf> accessed 7 June 2022.

¹⁷³ Legg (n 18).

¹⁷⁴ Fernando Esteban de la Rosa, 'ADR-Rooted ODR Design in Europe: A Bet for the Future' (2018) 5 *International Journal of Online Dispute Resolution* 154, 156.

This study reviewed the most prominent examples of tiered ODR systems for small claims from across the world, including Online Civil Money Claims in the U.K.; Civil Resolution Tribunal in Canada; the Internet Courts in China; and the Utah and the Los Angeles ODR Pilot projects in the U.S. The scope of application and functions of these systems were closely discussed. It was concluded that these ODR systems—in comparison to the ordinary civil proceedings—have generally delivered more expedited, simplified and cost-efficient justice to their users.

At the EU level, it was confirmed that despite the potential of the ESCP Regulation and the EU ODR Platform, they have not achieved considerable success in facilitating access to justice for citizens. One of the major reasons for this failure can be found in the lack of sufficient awareness among citizens about the existence and functions of these instruments. It was pointed out that creating a strong synergy between the ESCP and the Platform can promote their effectiveness and increase their use by claimants of low-value claims.

At the Member States level, it was stated that only a few jurisdictions – specifically Estonia and Lithuania – have implemented advanced ICT facilities for digitalising court proceedings. The evidence from these jurisdictions proved that during the COVID-19 pandemic these States faced far less barriers in making justice accessible to their citizens and meet their judicial needs. Nevertheless, none of the European jurisdictions have adopted a tiered ODR system design – like the discussed non-European models – for small claims.

The findings of this study indicated that the outbreak of the pandemic incentivised the EU and its member countries to improve digital access to justice. It was noted that a tiered ODR system design to deal with small claims can provide a timely response to the pandemic's negative impact on prolonging the (already) lengthy civil proceedings. Given this, the EU and its Member States' journey towards an entirely digitalised small claims procedures should be observed from a post-pandemic perspective.

Eventually, this paper emphasised a careful consideration of the possible risks to the equal access to justice and procedural fairness in designing fully digitalised small claims procedures. It was recommended that policymakers carry out risk assessments, for digitalising court proceedings specifically, prior to launching an ODR system.

