

## PART IX

### DIGITAL REVOLUTION AND PROCEDURAL LAW

#### CHAPTER 4

#### FROM REMOTE HEARINGS TO ONLINE COURTS

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<https://www.cplj.org/publications/9-4-from-remote-hearings-to-online-courts>

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- 1 The Covid-19 pandemic has triggered a broadening of remote or virtual hearings. Before the public health crisis, one could speak less about remote hearings being conducted in standard civil cases than occasional remote examinations of witnesses, which were allowed as a last-resort alternative in exceptional circumstances. As the crisis lengthened, the prospect of an indefinite adjournment of civil proceedings prompted the courts and the legal communities at large to take reasonable steps to facilitate and allow for the conduct of remote hearings, as a whole. This phenomenon triggered a big momentum for a transition towards a new shape of justice, to be completely delivered online.
- 2 Indeed, the use of IT in court proceedings has been thus far mainly limited to specific moments or activities: service of documents, filing of submissions, hearing experts or witnesses online, creating electronic files and accessing them at any moment by the parties are good examples of this piecemeal approach to digitization of justice.
- 3 But this approach assumed the structure of a (civil) procedure designed to be managed face to face and by courts located in brick and mortar buildings, which can be physically visited and where the key part of any process, the trial, should be carried out as the place and time where the parties meet before the judge/s to formulate their pleadings and take evidence, that is, as a way of providing the court with the elements on which it will, in turn, have to make its decision.
- 4 The advent of virtual trials has been completely disruptive, as it has served to prove how it is possible that the core of proceedings can be fully developed remotely, without the need for the parties and the court to meet face to face and in the same place. Their generalization has prompted discussion and concern in regard to specific aspects of their content – ie, what is done in a virtual manner, especially in regard to the credibility of witnesses or the quality of judicial immediacy, which could in turn infringe the right to a fair trial. There is a fear that virtual hearings may have a negative impact on the adequate reconstruction of the facts, that ensures that quality decisions continue to be handed down. These concerns are of paramount importance and must be addressed. But we should be even more concerned about the implications of breaking the taboo of the face-to-face oral trial as a key element of a good administration of justice, of a well-designed process.  
Indeed, once this ‘dam of containment’ has been broken, the way is paved towards a total dematerialization of proceedings through their complete digitalization. This is the challenge facing judicial systems for the future. Talking about online courts does not only mean a change in the way court proceedings are handled; moreover, it has the potential to bring about major changes in the way justice and the role of the courts are conceived. The very recent emergence of (generative) artificial intelligence, with increasingly developed applications in the legal field, is contributing to this, forcing a reconsideration of the role of lawyers, but also of the way in which judicial decisions are to be reached.
- 5 This chapter is therefore divided into two parts. The first part analyses the first of the steps described above, ie, the generalization of remote hearings, as a transition point towards

online justice. At this stage, it is possible to make a diagnosis of the situation and, above all, an analysis of the main challenges posed by virtual trials. In the second part, the analysis will focus on online courts, understood as those capable of developing entirely dematerialized proceedings. This is a constantly evolving subject, where projects and initiatives are continuously emerging. There is no doubt, therefore, that between the time these lines are written and the time they are read, changes and improvements will have continued to take place. The purpose, therefore, will focus above all on raising the structural challenges, especially in terms of rights and safeguards, that this new way of conceiving justice will entail.

**PART I****REMOTE HEARINGS: THE TRANSITION TOWARDS A NEW SHAPE OF CIVIL JUSTICE****1 WHEN (HEALTH) NEED MEETS (BUDGETARY) CONVENIENCE**

- 6 The option for virtual or remote hearings was one of the most visible measures taken in many countries to react to the COVID-19 health emergency and fostered a tendency to generalize the digital format for the development of oral proceedings in many national legal systems.<sup>1</sup> By doing so, it also put back on the table the ‘classical’ debate about the weight of orality in civil proceedings and, with it, about the meaning of immediacy.
- 7 Indeed, from a rather ‘resilient’ approach, it is often said that the crisis caused by the pandemic is providing an opportunity to improve Justice, which must come hand in hand with new technologies, which in turn have become a lifeline in times of restrictions on mobility and on the gathering of people.<sup>2</sup> The pandemic – it is often said – may end up serving to promote a digital transformation of the administration of justice which, without the revulsive of the health crisis, would perhaps still be perceived as a mere wish difficult to achieve.<sup>3</sup>
- 8 Remote hearings, which have become commonplace in the last four years,<sup>4</sup> are the most recognizable part of this transformation and the proof that a sort of ‘new modernity’ is trying to make its way into civil justice. It should not be forgotten, in this regard, that when the pandemic broke out, civil justice systems in much of the world were immersed in a crisis of identity and, above all, of efficiency: they were faced with the need to ensure access to justice for large numbers of cases, but with limited resources and higher quality requirements.

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<sup>1</sup> This is one of the conclusions that may be deduced from the different reports collected in B Krans and A Nylund (ed), *Civil Courts Coping with Covid-19* (Eleven International Publishing 2021); more specifically on remote hearings, A Sanders, ‘Video-Hearings in Europe Before, During and After the COVID-19 Pandemic’ (2021) 12(2) *International Journal of Court Administration* 1. See also European Commission for the Efficiency of Justice (CEPEJ), ‘Lessons learnt and challenges faced by the Judiciary during and after COVID-19’ (2020) <https://rm.coe.int/declaration-en/16809ea1e2> accessed 20 September 2024.

<sup>2</sup> And this is another conclusion to be retrieved again from Krans and Nylund (n 1).

<sup>3</sup> M Fabri, ‘Will COVID-19 Accelerate Implementation of ICT in Courts?’ (2021) 12(2) *International Journal of Court Administration* 1; M Velicogna, ‘Cross-border dispute resolution in Europe: looking for a new “normal”’ (2022) 12(3) *Oñati Socio-Legal Series* 556.

<sup>4</sup> Of course, they are not new. For a very interesting description of the pre-pandemic state of the art, see L Dumoulin and C Licoppe, ‘Grasping the Discrete Link between Filming and Videoconferencing in the Courtroom. Reflections from the French Case’ (2017) 112 *Revista Crítica de Ciências Sociais* 115 <http://journals.openedition.org/rccs/6608> accessed 2 October 2024.

- 9 On the other hand, a good part of the national civil procedural systems give special value to orality and, with it, to immediacy;<sup>5</sup> and they do so because both are perceived as tools to place the judge – singularly, the first instance judge – in the best conditions to give the best possible judgment.<sup>6</sup>
- 10 Civil proceedings are now in crisis; probably they have always been in crisis – it may be unavoidable, due to their social and political function. The landmark of the current situation is efficiency: how shall the state manage to provide for dispute resolution in times of increased needs to access and reduced budgetary availability? In this context, it is common to hear that orality – at least in its most traditional sense – and efficiency do not necessarily go hand in hand.<sup>7</sup> The paradigm in this regard seems to be changing: proposals that advocate the construction of comprehensive systems for the resolution of private disputes based on the notions of efficiency and proportionality have been predominant for some time now. States must design – and economically sustain – systems that allow the settlement of disputes seeking a balance between cost, duration and quality, resolving the tensions between these variables with criteria of proportionality – to the detriment, if appropriate, of orality and with an almost blind trust in the digital revolution as a tool to obtain the ‘squaring of the circle’.
- 11 The greater and more effective incorporation of information and communication technologies into judicial activity is a recurring mantra that cannot be rejected as such, since it is the result of an obvious observation: certain technological tools significantly improve the efficiency of the management of complex procedures and activities of all kinds. And, of course, this is an issue that has been of concern to legislators and public sector managers for quite some time now.<sup>8</sup> But it is also important to determine its limits, especially from the perspective of basic procedural safeguards. The transition from

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<sup>5</sup> The ECtHR itself considers that in proceedings before a court of first and only instance the right to a ‘public hearing’ under Art 6(1) entails an entitlement to an ‘oral hearing’ unless there are exceptional circumstances that justify dispensing with such a hearing (*Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb)*, updated to 31 August 2021, [https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf) accessed 25 September 2024. For a recapitulation of the case-law, see *Ramos Nunes de Carvalho e Sá v Portugal* [GC], Cases 55391/13, 57728/13 and 74041/13 (ECtHR), Judgment 6 November 2018 [ECLI:CE:ECHR:2018:1106JUD005539113] para 188-190.

<sup>6</sup> See, for instance, M Cappelletti, *Procédure orale et procédure écrite. Oral and written procedure in civil litigation* (Giuffrè 1971); M Cappelletti, *La testimonianza della parte nel sistema dell'oralità. Contributo alla teoria della utilizzazione probatoria del sapere delle parti nel processo civile* (Giuffrè 1974); M Storme, ‘More voice, less print. Why court proceedings should become oral’ in F Carpi and M Ortells Ramos (ed), *Oralidad y escritura en un proceso civil eficiente. Oral and written proceedings: efficiency in civil procedure* (Vol I, Valencia University Press 2008) 34; R Stürner, ‘Mündlichkeit und Schriftlichkeit im europäischen Zivilprozess’ in R Geimer and R A Schütze (ed), *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag* (Sellier 2012) 991.

<sup>7</sup> Although the issue has long been controversial: see, for instance, M Taruffo, ‘Orality and Writing as Factors of Efficiency in Civil Litigation’ in Carpi and Ortells Ramos (n 6) 163; J Nieva Fenoll, ‘Los problemas de la oralidad’ (2007) 1-2 *Justicia* 101.

<sup>8</sup> Good examples of the latter can be found in M Kengyel and Z Nemessányi (ed), *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World* (Springer 2010).

‘traditional orality’ to ‘digital orality’ can be a good sample to see how far we are willing to go for the sake of efficiency.

## 2 THE EXPLOSION OF VIRTUAL HEARINGS FOR EMERGENCY HEALTH NEEDS

- 12 When the COVID-19 pandemic broke out, the first reactions were drastic: in line with the general objective of curbing contagion through strict lockdown, legislators and national governments suspended and interrupted procedural deadlines – except for certain cases – with the consequent de facto paralyzation of judicial activity:<sup>9</sup> scheduled hearings and trials were postponed, without it being easy to determine the new date on which they would be held or resumed; judicial buildings and offices were closed to the public; and a large number of court staff had to remain at home, without being able to implement work-from-home tools quickly and easily.
- 13 This paralysis, however, was not sustainable: jurisdictional activity could not be put on hold, given its constitutional significance and its social function in times of crisis; from a more pragmatic point of view, neither could the congestion it caused be tolerated. In a rather ‘artisanal’ way, most courts tried to gradually recover their activity, on many occasions based on good will and procedural improvisation. In this context, certain urgent procedural actions requiring oral proceedings began to be carried out by videoconference.
- 14 This opened the way for the use of remote hearings as an ‘emergency functional equivalent’, which made it possible to reconcile the need for an operative administration of justice, the protection of health – individual and collective – and respect for the oral form and immediacy, legally required for the development of certain procedural acts. The notion of ‘remote presence’ also emerged, referring to participation in the process through a videoconference platform that allows the simultaneous participation of all the protagonists by means of an internet connection. This was a generalized trend in the comparative panorama – from the beginning, in most developed countries and later in others which, trusting in a shorter duration of the emergency situation, had opted at the beginning of the lockdown to convert oral proceedings into written ones.<sup>10</sup>

<sup>9</sup> See B Krans, A Nylund, D Bamford, L Ervo, F Ferrand, A Galič, W Hau, J Nieva Fenoll, C Salung Petersen, C Piché, P Rylski, E Silvestri, J Sorabji, V Vèbraitè and H Zaneti jr, ‘Civil Justice and Covid-19’ (2020) 5 Septentrio Reports <https://doi.org/10.7557/sr.2020.5> accessed 25 September 2024. See also, for Australia, M Legg and A Song, ‘The Courts, the Remote Hearing and the Pandemic: From Action to Reflection’ (2021) 44(1) University of New South Wales Law Journal 126; for India, A Pal Singh, ‘Virtual Courts during the COVID-19 Pandemic: A Critical Exposition’ (2021) 24 Supremo Amicus 452; and for the United States, K K Henrickson, ‘COVID-19 & the Courts: The Pandemic’s Impact on the Practice of Litigation and Considerations for Future Remote Proceedings’ (2021) 40(2) Review of Litigation 305. Describing the situation in International Commercial Courts – but, in fact, analysing the domestic law of the countries where these courts are established –, see S Domhan, ‘Online Hearings in Proceedings before International Commercial Courts’ (2021) 30 Juridica International 49.

<sup>10</sup> This was the case, for instance, of Belgium, Italy and The Netherlands (see P Taelman, ‘The Impact of Covid-19 on Civil Procedure in Belgium’ in Krans and Nylund (n 1) 15, 17–19; E Silvestri, ‘Covid-19 and Civil Justice – News from the Italian Front’ in Krans and Nylund (n 1) 103, 103; and B Krans, ‘The Aftermath of the Covid-19 Pandemic in the Netherlands – Seizing the Digital Gains’ in Krans and Nylund (n 1) 129, 130.

- 15 In a general panorama of health exceptionality, remote hearings operated as the functional equivalent of many oral acts regulated by procedural legislations in a 'traditional'/face-to-face manner. Remote hearings were resorted to for reasons of necessity, as they were considered preferable to the paralysis or to the holding in writing of oral proceedings – eg, replacing the oral testimony of a witness with written affidavits or statements, or refraining from cross-examination of experts – and, thus, just reading their reports.
- 16 Both in the toughest periods of lockdown and in more relaxed moments, a very large number of civil procedural activity was carried out through these channels, especially preliminary hearings or procedural management hearings, but also trials in simple and/or repetitive cases. In fact, in a scenario of progressive de-escalation, 'hybrid' formats became equally common, with some subjects intervening remotely – some of the parties, witnesses, experts – and others present with the court in the courtroom.<sup>11</sup>
- 17 However, it is convenient to insist on this notion of functional equivalence: it is a way of proceeding that produces similar effects to that which it replaces, but which is not identical to it.
- 18 It is also important to bear in mind that this pandemic recourse to remote or virtual hearings had to be done hastily, in many cases through exceptional regulatory solutions, which addressed in a fragmentary and unequal manner a series of particularly relevant matters, such as (i) the technical availability, as a conditioning factor; (ii) the powers of the judge and the parties regarding their use; or (iii) the existence of limits or red lines. Their possible 'standardization' in the future, however, cannot be done either on the same basis or in the same terms.

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<sup>11</sup> John Sorabji reports up to seven different kind of hybrid hearings being held currently in England (J Sorabji, 'Developing the New Normal for English Civil Procedure Post Covid-19' in Krans and Nylund (n 1) 63, 66–67).



### 3 SUBSISTENCE AND GENERALIZATION OF VIRTUAL HEARINGS AFTER THE PANDEMIC FOR REASONS OF EFFICIENCY: REMOTE ORALITY AND DIGITAL IMMEDIACY

- 19 As the health emergency situation continued, but also as it eased, what was initially exceptional was normalized and the possibility of remote hearings becoming a regular feature of judicial proceedings clearly emerged. This is a clear trend in most national civil procedural systems.<sup>12</sup> In fact, it is also the European Union's approach. Before the pandemic, the possibility of videoconferencing was already envisaged in some instruments of judicial cooperation, both civil and criminal, but rather as an alternative, somewhat 'exotic' option.<sup>13</sup> The post-pandemic approach is now much more determined and is evident in Regulation 2023/2844 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, which insists on the standardization of the use of videoconferencing by parties who have to participate in legal proceedings concerning them and to be held in other Member States.<sup>14</sup>
- 20 It should be borne in mind, in this regard, that all oral acts – and certainly the most substantial ones – are in the abstract susceptible of being held remotely: in most cases, therefore, oral proceedings could be imagined, at least in the abstract, in a face-to-face, virtual or hybrid format.
- 21 In fact, many judges<sup>15</sup> and lawyers assess positively the virtual format of oral acts during the years of the pandemic and afterwards, especially preliminary and equivalent hearings, because it allows them to better manage their time: there are still waits, but there is no feeling of 'having wasted a morning' when these waits are endured in the office itself, working on other matters. The greatest reluctance is, of course, with respect to procedural acts involving evidentiary activity.<sup>16</sup> It is perceived, although it is difficult to verbalize the

<sup>12</sup> Although some of them also show a trend to shift back to 'traditional' oral proceedings, as reported from Croatia (A Uzelac, 'Croatian Civil Justice v. Covid-19 – The Empire Strikes Back' in Krans and Nylund (n 1) 47, 54–55).

<sup>13</sup> See, in this vein, Art 10(4) of Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 1206/2001 of 28 May 2001 (EU) – now repealed – and Art 24 of Directive regarding the European Investigation Order in criminal matters, 2014/41 of 3 April 2014 (EU).

<sup>14</sup> On this, see F Gascón Inchausti, 'The new regulation on digitalisation of judicial cooperation in the European Union: something old, something new, something borrowed and something blue' (2024) 24(4) ERA Forum. Journal of the Academy of European Law 535, 546–550; E A Ontanu, 'The Digitalisation of European Union Procedures: A New Impetus Following a Time of Prolonged Crisis' (2023) 5(1) Law, Technology and Humans 93; E Themeli, 'The frontiers of digital justice in Europe' in X Kramer, J Hoevenaars, B Kas and E Themeli (ed), *Frontiers in Civil Justice. Privatisation, Monetisation and Digitisation* (Edward Elgar 2022) 102.

<sup>15</sup> This was highlighted by a survey of judges in Spain, '¿Qué opinan los jueces españoles de los juicios telemáticos?' (2020) 40 La Ley Ciberderecho. It is also a valid conclusion for English judges and legal professionals, according to the Report delivered by HM Courts & Tribunals Service (J Clark), 'Evaluation of remote hearings during the COVID 19 pandemic' (2021) <https://www.gov.uk/government/news/evaluation-of-remote-hearings-during-the-covid-19-pandemic-published> accessed 14 September 2024.

<sup>16</sup> According to a survey carried out in the Netherlands among lawyers, most of them seemed to prefer a physical hearing to a digital one [Krans (n 10) 132].

reasons, that oral proceedings in virtual format do not provide the same ‘added value’ as face-to-face oral acts, especially when it is a question of acts on whose content the making of relevant decisions for the parties depends.

- 22 The conclusion is thus reached – or, perhaps, it is just a mere intuition –<sup>17</sup> that the remote holding of a hearing may affect essential procedural principles associated with the legal option for orality, particularly immediacy and publicity. But it is also difficult to clearly establish the limits imposed by the need to abide to these principles. A legislative commitment to generalizing and/or mainstreaming remote hearings – including virtual trials and main hearings – should not be made without reflecting on these issues. The use of adjectives to qualify substantives that have hitherto had a clear content is usually an indication that a change has taken or is taking place to some extent. And this is what happens when, instead of orality, we speak of ‘remote’ orality; or when, together with immediacy – pure and simple –, ‘digital immediacy’ appears. Language is not innocent, and it is therefore legitimate to ask to what extent the changes brought about by online trials (will) affect the quality of justice and the rights of the parties involved. Even more so when virtual trials are being the lever for the transition towards a completely digital justice system.
- 23 When they came into use at the beginning of the pandemic, remote hearings were intended to circumvent the restrictions to the mobility of citizens and legal professionals during periods of lockdown and, in general, to avoid the concentration of people in closed places for a prolonged period of time. They were therefore legitimized, at least primarily, on public health grounds. Obviously, there were underlying reasons of effectiveness and efficiency: they were the way to avoid a collapse of the administration of justice due to paralysis. The progressive overcoming of the pandemic and the easing of restrictive measures brought a shift or reversal in the rationale for remote hearings: the need to preserve health takes second place – and eventually vanishes – while efficiency is enshrined as an element with sufficient virtuality to legitimize them in a post-pandemic scenario – and speediness of proceedings should be included as one of the ingredients of efficiency.
- 24 In addition to efficiency, there is another relevant ground to justify a generalization of virtual hearings: sustainability and the contribution to the fight against climate change – ie, compliance with the 2030 agenda for sustainable development. When hearings are held remotely participants do not have to travel to court and this – especially when trips with private vehicles are avoided – may certainly lead to a reduction in CO2 emissions.<sup>18</sup>

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<sup>17</sup> Bart Krans also suggests the possibility of facing a ‘feeling’ [(n 10) 132]; and Anna Nylund calls for more empirical research before defining the legal regime of remote hearings in the future (A Nylund, ‘Covid-19 and Norwegian Civil Justice’ in Krans and Nylund (n 1) 139, 142–143).

<sup>18</sup> In Spain, for instance, the Government presented in November 2021 a draft bill on the digital efficiency of the public justice service, aiming – among other purposes – at generalizing remote hearings (<https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/APL%20Eficiencia%20>

- 25 In any case, all of them are valid aims: preserving public health is more than acceptable, but it is also legitimate in the abstract to sustain a procedural change on the objective of promoting the efficiency of the administration of justice; it has been said before that this has been, since the beginning of the millennium, the sign of the times in procedural matters. And the same can be said, without the need for special justifications, with regard to the now added purpose of contributing to the fight for sustainability and against climate change.<sup>19</sup>
- 26 It is being the lawmaker's task to establish the criteria or valid reasons for choosing one or the other modality of holding an oral act. On that legal basis, of course, the choice of one or the other will correspond in each specific case to the courts, whether the general rule by default is the face-to-face celebration or the remote one. In times of pandemic, the most frequent rule has been that the judge's decision, not necessarily reasoned, could be sufficient for the virtual format to be appropriate. But, of course, it is questionable whether it is reasonable for things to be this way when the basis is no longer the protection of public health. For the future, therefore, the challenge is to determine whether efficiency and sustainability justify a recourse to remote hearings that is not subject to further limits. To this end, it is necessary to take into account the other values with which 'virtual' orality may collide and which should be weighed up, both by the lawmaker – at a general level – and by the court in each particular case.
- 27 It is indeed possible to conclude that remote trials may be considered of lower quality: and a lower quality of the trial may lead to a lower quality of the judicial decision – which is what really matters. From an efficiency perspective, however, one could counter-argue that remote trials, at least for certain categories of litigation, are 'the most that the system can offer' in terms of orality and 'day-in-court'. In such a case, one would have to recognize that they would not be of 'inferior' or 'lower' quality,<sup>20</sup> as there would be no better real alternative to compare them with. This can – and often is – the reasoning behind proposals to generalize virtual trials, at least for repetitive litigation of lower intensity. However, before drawing any further conclusions, it is useful to analyse what are the drawbacks of virtual trials and what, if any, are the ways to correct them.
- 28 The generalization of remote hearings that many jurisdictions are currently experiencing tends to be justified on grounds of efficiency and, as just noted, sustainability. Of course, these are not the only arguments for a court to agree, in a specific case, to hold a virtual hearing or, at least, the remote participation of one of the parties or a person who must intervene at the proceedings (a witness, an expert). Thus, in some systems, it is possible for persons who are in prison or even abroad – but prefer not to travel – to participate in

Procesal.pdf). The report accompanying the draft stated that the holding of telematic hearings has avoided an enormous amount of travel, which in turn has prevented the emission of 5,851 tonnes of CO<sub>2</sub>.

<sup>19</sup> This opens up a new space for legal reflection: to what extent environmental protection and the fight against climate change can become elements that justify the restriction of other fundamental rights, including procedural safeguards.

<sup>20</sup> Richard Susskind describes this as 'economy-class Justice' [*Online Courts and the Future of Justice* (Oxford UP 2019) 187–191].

this way. In this type of situation, the legal debate is different, as it is not a question of analysing in the abstract the advantages and disadvantages of a system of justice based on physical or virtual presence, but of promoting in the specific case the best option for the person concerned in the light of the circumstances of the specific case.

- 29 A good example of this is provided by the judgment of the European Court of Human Rights in *Jallow v Norway*<sup>21</sup>. It was a case concerning parental responsibility for a child living in Norway, lodged before Norwegian courts by the child's father, a Gambian national living in Gambia, after the mother's death, and against the child's aunt. For reasons of immigration control, the father was not granted a visa to enter Norway to attend the hearing and the Norwegian court eventually decided that he would participate via Skype, his lawyer nevertheless being present in the courtroom; the other alternative would have been to postpone the case for an indefinite period and with no solution in view – the immigration authority refusal was final. Before the Strasbourg Court, Mr Jallow alleged that he had not had a fair procedure, since he had not been allowed to appear in person, suffering a clear disadvantage vis-à-vis the other party and, more generally, by the remote presence itself. From the outset, at 64, the ECtHR recalled its doctrine, according to which 'the appearances by video-link are as such not necessarily problematic, as long as this measure in any given case serves a legitimate aim and that the arrangements are compatible with the requirement for due process'.<sup>22</sup> Assessing the specific circumstances of the case at hand, the ECtHR considered that there might have been two relevant obstacles, one regarding the assistance by a lawyer and the other linked to potential technical difficulties during the videoconference. The Court came eventually to the conclusion that the presence of the lawyer at the hearing, along with the possibility of the applicant to prepare the case in advance with the lawyer, had been sufficient; as to the second, no real difficulties had impaired a reasonable holding of the hearing.
- 30 As can be seen, many of the elements to consider when assessing whether in a particular case, remote intervention is an admissible functional equivalent are also relevant when deciding on the generalization of virtual hearings, ie, without the need to take into account the circumstances of each individual case. Technical difficulties and assistance by a lawyer, explicitly stressed in *Jallow v Norway*, are proof of this; they are not, however, the only ones.

<sup>21</sup> *Jallow v Norway*, Case 36516/19 (ECtHR), Judgment 2 December 2021 [ECLI:CE:ECHR:2021:1202JUD003651619].

<sup>22</sup> On this point, the Court brings up some of its rulings in relation to participation by videoconference in criminal proceedings, in cases such as *Dijkhuizen v the Netherlands*, Case 61591/16 (ECtHR), Judgment 8 June 2021 [ECLI:CE:ECHR:2021:0608JUD006159116] para 53; *Bivolaru v Romania (no. 2)*, Case 66580/12 (ECtHR), Judgment 2 October 2018 [ECLI:CE:ECHR:2018:1002JUD006658012] para 138; *Ichetovkina and Others v Russia*, Cases 12584/05 and 5 others (ECtHR), Judgment 4 July 2017 [ECLI:CE:ECHR:2017:0704JUD001258405] para 37; and *Marcello Viola v Italy*, Case 45106/04 (ECtHR), Judgment 5 October 2006 [ECLI:CE:ECHR:2006:1005JUD004510604] para 67 and 73–74. See also *Sakhnovskiy v Russia*, Case 21272/03 (ECtHR-GC), Judgment 2 November 2010 [ECLI:CE:ECHR:2010:1102JUD002127203] para 98.

## 4 TECHNICAL CONSTRAINTS, DIGITAL GAP AND ACCESS TO JUSTICE

- 31 Technical constraints are among the most visible drawbacks of virtual trials, from at least three different points of view: a properly functioning technology, duly equipped courts, and digitally competent participants.

### 4.1 Properly Functioning Technology

- 32 There is, of course, the more technical dimension of the phenomenon, which requires a smooth functioning of the system to be really performing, ensuring proper participation.<sup>23</sup> It is frequent to find criticism of the poor quality of videoconferencing systems as such, which do not always allow an adequate viewing of the participants. For example, a camera sometimes focuses statically on the table where the court sits from a distance that is insufficient to really see the faces of the acting judges.
- 33 On the other hand, unexpected system failures are more common than desirable. Most readers will probably still have in mind, during the post-Covid-19 restrictions period, the widespread news of the US-lawyer unable to remove a Zoom-filter and claiming not to be a cat in the context of a remote hearing before the 394<sup>th</sup> District Court of Texas.<sup>24</sup> But, aside from anecdotal situations, it is not unusual for the connection to be lost, for the sound quality to be poor, for the image to freeze, for the meeting not to have been properly recorded (if it had to be). It is not easy to say that, in these cases, the hearing is carried out 'normally', ie, with full safeguards for the participants. In this vein, it is interesting to read the findings of the report carried out in the United Kingdom during and shortly after the pandemic, describing many sorts of technical issues during remote hearings.<sup>25</sup>
- 34 In principle, as far as a pure technical dimension is concerned, only improvements and progress can be expected. But failures should not be excluded, and procedural rules should be introduced that specifically address the consequences of a technically defective conduct of a virtual hearing – which may include, of course, the need to repeat it, retaking the evidentiary examination, if necessary.

### 4.2 Duly Equipped Courts

- 35 The widespread use of virtual hearings is subject to the availability of the necessary technical means for the courts and the litigants. From the point of view of the courts, the

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<sup>23</sup> The European Court of Human Rights has emphasized this in *Sakhnovskiy v Russia* (n 22) para 98: 'As regards the use of a video link, the Court reiterates that this form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is *able to follow the proceedings and to be heard without technical impediments*, and that effective and confidential communication with a lawyer is provided for.'

<sup>24</sup> The video went viral in February 2021 and is still to be easily retrieved on the internet <https://www.youtube.com/watch?v=IGOofzZOyl8> accessed 10 September 2024.

<sup>25</sup> HM Courts & Tribunals Service (n 15) 86–89.

availability of the appropriate means is a condition in the strict sense of the term, on which the real possibility of complying with what the legislator may have envisaged depends. In India, for instance, the criticism was drawn that courts do not have the proper infrastructure to move online, both on the hardware and the software side,<sup>26</sup> something that has been emphasized by the Supreme Court.<sup>27</sup> But also more developed countries endure similar concerns: this was, indeed, part of the discussion in Germany, triggered during the legislative process to approve the Act to Promote the Use of Video Conferencing Technology in Civil and Specialist Jurisdictions.<sup>28</sup>

- 36 During the pandemic, in fact, the use of remote hearings, as the visible face of the ‘technological solution’ to the emergency, showed in most countries to what extent sufficient progress had or had not been made in the digitization of justice. After all, for this ‘functional emergency equivalent’ to be possible and useful, it was necessary for the system as a whole to be already operational beforehand with digital schemes. In this vein, countries like Norway, Finland, England or Australia reported a very fluid transition into the digital format, thanks to the previous developments.<sup>29</sup> The experience in Denmark was apparently paradoxical: previous digitization of justice allowed courts to work on an electronic basis almost immediately, although this did not reach main hearings, which were postponed instead of being held remotely.<sup>30</sup> Surprisingly, German courts did not experience a clear shift into the use of ICTs.<sup>31</sup>
- 37 Apart from the dynamics associated with the pandemic, but still in relation to this aspect of the technological equipment of the courts, two different approaches can be detected. On the one hand, there are those systems that are committed to incorporating those technologies that are available at any time and place. An example is provided by the ELI/UNIDROIT Model European Rules of Civil Procedure, the result of academic and practical efforts to reach a sort of codification of civil procedure in Europe under a ‘best rule approach’, showing the architecture of what could be considered fair and efficient

<sup>26</sup> See R Jain and S Chaudhary, ‘The Renaissance of Virtual Courts: Towards the Digital Age’ (2021) 4 International Journal of Law Management & Humanities 5722, 5728; V Kartikeya Agrawal, ‘Importance of Virtual Courts in India’ (2021) 26 Supremo Amicus 550.

<sup>27</sup> In *Ashwini Kumar Upadhyay v Union of India*, Writ Petition P(C) No 699-2016 (Supreme Court, India) Judgment 9 November 2023 [2023 INSC 991] para 16, also cited in A Pal Singh (n 9).

<sup>28</sup> *Gesetz zur Förderung des Einsatzes von Videokonferenztechnik in der Zivilgerichtsbarkeit und den Fachgerichtsbarkeiten* (15 July 2024, *Bundesgesetzblatt* No 237, 18 July). The Draft was presented in November 2022 and, during the legislative process, concerns were raised regarding the technical requirements to meet all the expectations that the new provisions would create, as described by M Stürner and J Stürner, ‘Videoverhandlung im zivilprozessualen Erkenntnisverfahren’ (2023) 8 *JuristenZeitung* 340, 342–343.

<sup>29</sup> Nylund (n 17) 139; Sorabji (n 11) 63; L Ervo, ‘Pandemic and Digitalization – The Situation in the Finnish Lower Courts’ in Krans and Nylund (n 1) 73, 75. The positive response of Australia is described in Legg and Song (n 9).

<sup>30</sup> C Salung Petersen, ‘Digitalisation of Danish Civil Justice – Perspectives from the Pandemic’ in Krans and Nylund (n 1) 57.

<sup>31</sup> W Hau, ‘Covid-19, Civil Justice 2020 and German Courts 2021?’ in Krans and Nylund (n 1) 93, 99.



proceedings.<sup>32</sup> Rule 18(4), under the heading of ‘Oral and Written Proceeding’ states as follows: ‘In so far as appropriate, proceedings may be conducted using any *available* means of information and communication technology’ (emphasis added). As the official comments to this rule underline, it is considered desirable that ICT means that already exist should be made available to the courts, so that they can use them in the management of the proceedings.<sup>33</sup> It is therefore an approach that creates a duty on governments to make available to the courts the technological means available at any given time, depending on their evolution. Of course, the Model Rules avoid making explicit financial commitments in procedural laws: what is considered reasonable – courts should have adequate ICT means – is stated, although it is assumed that, depending on the place and the period of time, the reality may be different.

- 38 But it is also frequent to find national rules that allude to the possibility of certain proceedings being carried out remotely ‘provided that the court has the appropriate means at its disposal’ or similar expressions.<sup>34</sup> These approaches carry the danger of conformism and wishful thinking: ICTs can be used by those who already have them, but there does not seem to be a commitment to provide them to those who do not.
- 39 In a different vein, it should be understood that the reference to ‘adequate means’ also covers personal means: judges and other court staff must be in a position to adequately manage the resources at their service – in what matters to us now, the tools for the management of virtual hearings. For this reason, it will be necessary to provide adequate training for these persons, the financing of which must also be provided by the public authorities.

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<sup>32</sup> The text of the Model European Rules of Civil Procedure, along with the official comments, is available at [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/200925-eli-unidroit-rules-e.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/200925-eli-unidroit-rules-e.pdf) accessed 24 September 2024. General explanations can be read in R Stürner, ‘The ELI/UNIDROIT Model European Rules of Civil Procedure. An Introduction to Their Basic Conceptions’ (2022) 86 *Rechtszeitschrift* 421 and F Gascón Inchausti, ‘Las European Rules of Civil Procedure: ¿un punto de partida para la armonización del proceso civil?’ (2021) 13(1) *Cuadernos de Derecho Transnacional* 277. For an exhaustive and comprehensive commentary, see A Stadler, V Smith and F Gascón Inchausti, *European Rules of Civil Procedure. A Commentary on the ELI/UNIDROIT Model Rules* (Edward Elgar 2023).

<sup>33</sup> The ‘official’ Comments to the rule, at 8, add the following: ‘The prevailing view was that the judiciary should have at its disposal appropriate modern means of electronic communication, and that they should be given the discretion to determine their appropriate use without the need for specific technical rules to be formulated.’

On this, see also A Bruns, ‘General principles: rights of parties’ in Stadler, Smith and Gascón Inchausti (n 32) para 4.035–4.039.

<sup>34</sup> In Germany, for instance, the newly amended version of § 128a ZPO (Code of Civil Procedure) conditions the applicability of the provisions on videoconferencing by the existence of ‘sufficient capacities’ (*ausreichende Kapazitäten*). For this very reason, the new Act has been criticised, since it does not really promote videoconferencing, but looks rather as a placebo (see B Windau, ‘Kein Gesetz zur Förderung des Einsatzes von Videokonferenztechnik’ (2024) *Anwaltsblatt* <https://anwaltsblatt.anwaltverein.de/de/zpoblog/gesetz-zur-foerderung-des-einsatzes-von-videokonferenztechnik-zivilgerichtsbarkeit> accessed 24 September 2024).

### 4.3 Litigants Able to Access ICT and to Manage Themselves Properly in Technological Environments

- 40 The analysis, however, is different from the perspective of the litigants. For them, whether or not to have the necessary technical means to act remotely is not only a constraint but may affect their access to justice.<sup>35</sup>
- 41 The problem may be seen as secondary when it comes to proceedings in which the assistance of a lawyer is mandatory: lawyers are presumed to be in the possession of the appropriate equipment and, in fact, it would be reasonable for professional standards to oblige them to acquire and update digital skills. Indeed, an extension of the use of ICT systems in the judicial sphere must go hand in hand with increased competence of the lawyers who have to assist the parties.<sup>36</sup> Consequently, the duties of lawyers must be strengthened when dealing with this type of environment and, to that extent, we could even talk about the right to a ‘technologically competent lawyer’, which is reflected in the requirements imposed by professional associations for access to the profession, as is happening in the United States, where in more and more states technological competence is being imposed among the obligations of members;<sup>37</sup> the issue, of course, is discussed as well in many other jurisdictions.<sup>38</sup>
- 42 In addition, in many jurisdictions the scope of self-representation is still very wide, and the digital gap may compromise the access to justice of those who would be expected to intervene remotely without having the appropriate means. Challenges triggered by the digital gap are recurrently highlighted in connection to remote hearings, a problem which will undoubtedly be aggravated by their generalization.<sup>39</sup> If they are expected to participate in a remote hearing, litigants in person need to have computer equipment, an internet connection and a minimum level of skill in the use of videoconferencing tools; indeed, litigants should have these means also if they are assisted by a lawyer if they want to have some independence and/or are not able to attend the meeting from their lawyer’s premises.

<sup>35</sup> In this vein see also Krans (n 10) 133.

<sup>36</sup> On this, see A Dondi, ‘Processo civile, new technologies e implicazioni etico-professionali’ (2019) 73(3) *Rivista trimestrale di diritto e procedura civile* 863; see also C L Reyes and J Ward, ‘Digging into Algorithms: Legal Ethics and Legal Access’ (2020) 21(1) *Nevada Law Journal* 325.

<sup>37</sup> This has been the case, for instance, of California. Since March 2021, the comments to California Rule of Professional Conduct 1.1 provide that competent legal services include ‘the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.’

<sup>38</sup> See J Burke and S McCarthy, ‘Should Remote Hearings Be Extended Post the COVID-19 Pandemic in Hong Kong and What Could Be the Ramifications for Practical Legal Training?’ (2022) 9(1) *Journal for International and Comparative Law* 155.

<sup>39</sup> See for the UK HM Courts & Tribunals Service (n 15) 58 ff.



- 43 Many citizens in developed countries take this availability for granted, but these requirements can be a real obstacle to access to justice in developing countries<sup>40</sup> and, more generally, for vulnerable people:<sup>41</sup> not only for those who lack financial resources, but also for those who do not have a minimum of digital literacy.<sup>42</sup> This is therefore a criticism that can also be made, with all the more reason, in the face of an ultimate full digitization of court proceedings. In fact, this digitization extends to all areas of civil life, not just justice, and this should generate a duty on the part of public authorities to ensure the digital inclusion of all citizens.<sup>43</sup>
- 44 The problem became evident during the pandemic and will not disappear with it. It is therefore necessary that national and supranational regulations of virtual hearings take this into account and establish appropriate solutions, either by way of exception – excluding the virtual format and opting for face-to-face proceedings which, in principle, should be virtual –, or by way of assistance – providing the litigant with adequate means to appear remotely, for example through public offices or enabling *ad hoc* spaces in court buildings, where some expert assistance would be made available – as recently established, for instance, by Spanish law.<sup>44</sup>
- 45 On a partially different level, halfway between technology, the digital divide and the quality of justice, an additional issue can be identified, that of how the participants in a virtual hearing should behave. In some jurisdictions, it has been deemed necessary to adopt guidelines or recommendations regarding decorum and how to behave. In this regard, the guide drawn up in March 2021 by the judges of New York<sup>45</sup> should be highlighted, because of its simplicity and clearness:

Appropriate decorum/etiquette is a necessity during all virtual court proceedings.

<sup>40</sup> Addressing the situation in India during the pandemic, see Pal Singh (n 9). Digital divide issues have also been identified in Nigeria (see O Olugasa and A Davies, 'Remote Court Proceedings in Nigeria: Justice Online or Justice on the Line' (2022) 13(2) International Journal for Court Administration 1).

<sup>41</sup> In the US, for instance, see DG Carnahan, 'Access to Justice in a Time of COVID' (2021) 51(1) Southwestern Law Review 91, who also recalls the problems created by platforms in dealing with persons with disabilities, for first-time users or non-English speaking litigants.

<sup>42</sup> See, on this, E Gabardo, A C Aguilar Viana and O L Castreghini de Freitas, 'The digital divide in Brazil and the accessibility as a fundamental right' (2022) 11(2) Revista chilena de derecho y tecnología 1: although the article is not strictly focused on digital justice, it analyses the notion of digital gap in a broad sense and claims for the recognition of the right to access the internet as an essential aspect of freedom and the essential means for exercising an individual's citizenship in a digital society.

<sup>43</sup> On this, from a Colombian perspective, see M C Moreno Torres, 'Los nuevos entornos tecnológicos y su impacto en la garantía del derecho humano al acceso a la justicia: Un enfoque en la época de covid-19' (2021) 10(1) Revista chilena de derecho y tecnología 309.

<sup>44</sup> See Art 4 and 5 of the Act on the use of ICT in the Administration of Justice (included in the framework of the *Real Decreto-ley 6/2023, de 19 de diciembre, por el que se aprueban medidas urgentes para la ejecución del Plan de Recuperación, Transformación y Resiliencia en materia de servicio público de justicia, función pública, régimen local y mecenazgo*, Boletín Oficial del Estado 20 December 2023, <https://www.boe.es/buscar/act.php?id=BOE-A-2023-25758> accessed 10 September 2024.

<sup>45</sup> Available under: State Of New York – Unified Court System, 'Memorandum' 18 March 2021 <https://www.law.buffalo.edu/content/dam/law/content/cle/22feb24-materials/Virtual%20Proceedings-Appropriate%20Decorum.pdf> accessed 12 September 2024.

All court proceeding participants shall recognize that this is a formal appearance and should ensure the following:

- Dress in appropriate attire, as if you were appearing in-person in court
- Display an appropriate and professional background
- No consumption of food or drink during the proceeding
- Remain professional and dignified
- As in In-Person proceedings, only one person should be speaking at a time

Please ensure that judges, court staff, attorneys, and all participants in court proceedings are aware of the importance of the appropriate decorum which is necessary for all virtual court proceedings.

- 46 These guidelines, as many others approved in other places,<sup>46</sup> are fully valid and generalizable for a post-pandemic scenario and applicable in any country and before any type of court.
- 47 The need to adopt such recommendations and guidelines is basically a reminder of the need to reinforce the seriousness of judicial proceedings when they take place online. In this sense, it is also worth referring to the rules established in China's online courts: the Beijing Internet Court, for example, explains in a video<sup>47</sup> that in virtual hearings the symbols of the judiciary and the People's Republic will appear as a background and that, in addition, a sort of robot judge will remind the participants that they are in a judicial, and therefore solemn, context. Similar issues, although more specifically addressed to jury trials, are dealt with in an interesting study/experiment carried out in the United Kingdom,<sup>48</sup> where judges and lawyers appeared in full court dress and in transition moments participants were reminded of the solemnity of the occasion.
- 48 Sticking to the old formats, for the time being, is a transitional solution, possibly necessary to preserve the dignity and solemnity of online judicial acts. Nevertheless, the virtual format will eventually lead to the emergence of new rituals or changes to existing ones.<sup>49</sup> Rituals are strongly associated, among other factors, with the spaces in which they are to take place; and the virtual space is different from a courtroom, so that the way to reinforce the seriousness of the proceedings may not only focus on the manner of dress, or the need to stand up when the judge enters the courtroom, or the presence of a bailiff who can forcibly ensure the peaceful conduct of the session – to give some examples that many readers may draw from their 'film memory'.

<sup>46</sup> See, for instance, the case of Singapore (below, under 11.1.2).

<sup>47</sup> Beijing Internet Court, 'Virtual court cabin eases hearings' (2020) [https://english.bjinternetcourt.gov.cn/2020-12/14/c\\_321.htm](https://english.bjinternetcourt.gov.cn/2020-12/14/c_321.htm) accessed 4 October 2024.

<sup>48</sup> W Teeder, L Mulcahy and E Rowden, 'Virtual courtroom experiment: Data report Third evaluation of a virtual trial pilot study conducted by JUSTICE' (2020) [https://files.justice.org.uk/wp-content/uploads/2020/10/06165906/FINAL-JUSTICE-III\\_Exploring-the-case-for-Virtual-Jury-Trials-during-the-COVID.pdf](https://files.justice.org.uk/wp-content/uploads/2020/10/06165906/FINAL-JUSTICE-III_Exploring-the-case-for-Virtual-Jury-Trials-during-the-COVID.pdf) accessed 25 September 2024.

<sup>49</sup> On this, see M Rossner, 'Remote Rituals in Virtual Courts' (2021) 48(3) *Journal of Law & Society* 334.

## 5 VIRTUAL ORALITY, EFFICIENCY AND RELEVANCE OF THE MATTER AT STAKE: CRIMINAL JUSTICE AND LOW INTENSITY CIVIL CASES

- 49 Both during the hardest times of the pandemic and in later times it was assumed, at least in some jurisdictions, that certain procedural acts, legally foreseen as oral, were only possible in person, so that they could not be held virtually. The clearest example is provided by criminal justice, where some countries established red lines. By way of example, the legislation that temporarily regulated remote hearings in Spain<sup>50</sup> established two important exceptions in criminal matters. (1) In trials for serious crimes, the physical presence of the accused and their lawyer is always required; the same applies if the crime is less serious, but the prosecution has requested a prison sentence of more than two years – in this case, the face-to-face hearing is imposed if so requested by the accused or their defence. (2) In addition to the trial itself, the physical presence of the investigated or accused person shall be required, at their own request or that of their counsel, at the hearing to be held to decide on the request for pre-trial detention. These rules do not apply to the prosecuting parties or to those responsible for civil liability, nor do they apply to witnesses and experts who are required to testify.
- 50 A similar result was reached in France, albeit in a different way. Initially, no limits were placed on the possibility of holding criminal trials virtually. In the face of criticism that due process was being violated, the French *Conseil d'État* suspended the application of the rule.<sup>51</sup>
- 51 The debate surrounding remote trials in criminal matters has been particularly intense in the United States, where its constitutionality has been questioned. The origin of the discussion lies in the Confrontation Clause under the Sixth Amendment, which gives any criminal defendant the right 'to be confronted with the witnesses against him'. The validity of this clause at the state level, as is well known, was made operative through the Due Process Clause of the Fourteenth Amendment. However, during the pandemic, but also afterwards, the question has arisen as to what extent this constitutionally required confrontation should take place face to face or whether, on the contrary, it can also be satisfied in virtual environments. The impact of virtual trials on the right to counsel has also been questioned, in cases where the virtual format imposes physical separation

<sup>50</sup> First, through the *Real Decreto-ley 16/2020, de 28 de abril, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia*; later on, by means of the *Ley 3/2020, de 18 de septiembre, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia*, which applied until the health emergency was officially declared to be over in July 2023.

<sup>51</sup> F Ferrand, 'Covid-19 and French Civil Justice – What Future for Civil Hearings?' in Krans and Nylund (n 1) 83, 85–86.

between the defendant and their lawyer. The right to a public trial has also been put at stake.<sup>52</sup>

- 52 As is common in American doctrine, precedents, including nineteenth century rulings, have been invoked for and against both positions; there have also been court decisions in both directions during the period of lockdown.
- 53 In any case, and apart from the question of their constitutionality in the strict sense of the term, there are significant reservations about virtual trials in criminal matters, considering that they are of inferior quality for the accused and that they do not allow them to defend themselves in the same way as in face-to-face trials. In this line, it is worth recalling a study coordinated by the Stanford Criminal Justice Center of the Stanford University School of Law, based on both quantitative and qualitative analyses carried out in judicial districts with very diverse characteristics.<sup>53</sup> The conclusions are devastating in relation to issues such as access to technology (the digital gap is a recurrent issue), the dehumanization of the proceedings (eg, through less attention and less empathy), the difficulties in assessing the credibility and the truthfulness of remote witnesses or the quality of communication between the attorney and the client: and this should trigger reflection before advancing in the path of generalization of remote trials. It has been strongly asserted that ‘making virtual proceedings an option might thus open the courthouse doors wider only to relegate some to the basement’.<sup>54</sup>
- 54 At the European Union level, it may not be long before there is a more or less ‘official’ answer from the Court of Justice on this issue, as it has been the subject of a preliminary ruling in relation to the Directives regulating the European Investigation Order<sup>55</sup> and the presumption of innocence.<sup>56</sup>

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<sup>52</sup> See, among many others, D F Engstrom, ‘Post-COVID Courts’ (2020) 68 UCLA Law Review 246; A F Abu, ‘Remote Justice: Confronting the Use of Video Teleconference Testimony in Massachusetts Criminal Trials’ (2020) 34(1) Harvard Journal of Law & Technology 307; D Ariturk, W E Crozier and B L Garrett, ‘Virtual Criminal Courts’ (2020) University of Chicago Law Review Online 57 <https://lawreview.uchicago.edu/online-archive/virtual-criminal-courts> accessed 21 October 2024; N M Garland, ‘The Constitutionality of Remote Trials’ (2021) 51(1) Southwestern Law Review 107; S E Smith, ‘The Online Criminal Trial as a Public Trial’, (2021) 51(1) Southwestern Law Review 116; M C DeRegis, ‘Can You Hear Me Now?: The Implications of Virtual Proceedings on Criminal Defendants’ Constitutional Rights’ (2022) 81 Maryland Law Review Online 71 <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1080&context=endnotes> accessed 21 October 2024

<sup>53</sup> T Benninger, C Colwell, D Mukamal and L Plachinski, *Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court* (Stanford Law School 2021) <https://law.stanford.edu/publications/virtual-justice-a-national-study-analyzing-the-transition-to-remote-criminal-court/> accessed 25 September 2024.

<sup>54</sup> Engstrom (n 52) 257.

<sup>55</sup> Directive regarding the European Investigation Order in criminal matters, 2014/41/EU of 3 April 2014 (EU).

<sup>56</sup> Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, 2016/343 of 9 March 2016 (EU).

- 55 Art 24 of the EIO Directive envisages the possibility that witnesses, experts and suspected or accused persons be heard by videoconference – or other audiovisual transmission – if so requested by the issuing authority. In such cases, in addition to the general grounds for non-recognition or non-enforcement of an EIO, the execution of the EIO in such a manner – ie, by means of videoconference – may be refused if either (a) the suspected or accused person does not consent or (b) the execution of such an investigative measure in a particular case would be contrary to the fundamental principles of the law of the executing State.
- 56 Specific provisions are additionally set up regarding the way to perform the hearing by videoconference.
- (i) The executing authority shall undertake to summon the witness, expert, suspected or accused persons to appear for the hearing in accordance with the rules of the executing State and ensure the identity of the person to be heard.
  - (ii) The hearing is to be conducted by the issuing authority according to its own law, but the competent authority of the executing State shall be present and ensure both the identity of the person to be heard and respect for the fundamental principles of its law.
  - (iii) Suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State. Witnesses and experts may claim the right not to testify which would accrue to them under the law of either the executing or the issuing State and shall be informed about this right in advance of the hearing.
- 57 Art 8(1) of the Directive on the presumption of innocence enshrines the right to be present at the trial in a very simple and general manner: ‘Member States shall ensure that suspects and accused persons have the right to be present at their trial’. No distinction is made, thus, between ‘physical’ and/or ‘remote/virtual’ presence; the Directive, on a different vein, is concerned with setting limits and conditions to trials in absentia.
- 58 Within this framework, a Latvian court – the *Ekonomisko lietu tiesa* – lodged a request for a preliminary ruling<sup>57</sup> addressing many of the questions that are recurrently at stake when dealing with videoconferencing. First of all, the court asks for clarification on whether the hearing envisaged by the EIO includes the trial in a criminal case; in other words, the question is whether the EIO provisions on videoconferencing are only applicable during the investigative or preliminary phases of civil proceedings or, on the contrary, they may also be used to allow the accused person to participate in their criminal trial. In addition – but not directly depending on the answer to that first question –, the Latvian court asks if

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<sup>57</sup> The request was lodged on 3 May 2023; *Linte*, Case C-285/23, OJ C 271, 31 July 2023, 15–16.

the right of accused persons to attend the oral procedure may also be ensured by an accused person participating in the trial in a criminal case taking place in a different Member State by videoconference from that person's Member State of residence and if participation by an accused person in the trial in a case that takes place in a different Member State by videoconference from the Member State of residence equate to that person's physical presence at the hearing before the court in the Member State which is hearing the case. Although the cross-cutting issue of the cross-border element is of relevance, the core question remains that of functional equivalence between physical presence and video-participation: the cross-border dimension of the case may demand higher standards (eg, interpreters), but only if it is assumed that voluntary video-participation is admissible.

- 59 Indeed, the Latvian court goes on to address another crucial issue for the cross-border dimension of virtual hearings, that of the possibility of a court to summon directly a witness, an expert or even an accused person to join a videoconference by sending them the link, without 'asking permission' to the authorities of the Member State of residence of the concerned persons: should this be regarded as an invasion of the other State's sovereignty and, thus, is it mandatory to arrange such a videoconference via the competent authorities of the Member State of the affected person's residence?<sup>58</sup>
- 60 The answer of the Court of Justice to these relevant issues is still waiting. The Court, nevertheless, has addressed a connected issue: in *Sofiyska gradska prokuratura*,<sup>59</sup> the question posed was practically the reverse, ie, whether Art 8(1) of the Directive on the presumption of innocence could preclude an accused person from being able, at his or her express request, to participate in the hearings in his or her trial by videoconference. The Court, however, considered that this precise issue was not governed by the Directive (para 29) and, therefore, limited itself to recalling the general duty of the courts of Member States to guarantee the right to a fair trial.
- 61 The legal exceptions adopted in some jurisdictions and, more broadly, the discussion on the admissibility of criminal virtual hearings<sup>60</sup> show the special value that the lawmaker and legal operators recognize to the physical presence of the defendant before the judge conducting the investigation or before the trial court: however much functional

<sup>58</sup> The Court of Justice has already had the opportunity to rule on a similar question, albeit in civil matters. In *VP v KS*, Case C-188/02 (CJEU), Order of 8 September 2022 [ECLI:EU:C:2022:678], it recognized that the courts of the Member States are not necessarily obliged to use the cooperation mechanisms established by European legislation – at that time Regulation 1206/2001 on the taking of evidence abroad – but that they may also make use of tools provided for in their national legislation (in that case it was a question of obtaining a written statement from a person resident in another Member State). In general, in relation to this issue, it is useful to have regard to Part XIV of this Compendium.

<sup>59</sup> *Sofiyska gradska prokuratura*, Case C-760/22 (CJEU), Judgment 4 July 2024 [ECLI:EU:C:2024:574].

<sup>60</sup> The US also seem to have treated criminal cases differently, and not only those to be tried by a jury (see R Marcus, 'Covid-19 and American Civil Litigation' in Krans and Nylund (n 1) 195, 196 and 201–202). In Finland, from a different perspective, no limits were set to conducting criminal trials virtually, provided that the defendant agrees; strikingly, this possibility is excluded for negotiated criminal justice [Ervo (n 29) 79–80].



equivalence a virtual presence may provide, there is no desire to renounce the direct confrontation between the accused and the judicial body that may end up taking a decision with a serious impact on their personal sphere. It is thus legally recognized that direct interpersonal contact has a value that is difficult to explain, but that can have an impact on the quality of the procedural activity – including the quality of the exercise of the right of defence.

- 62 It is clear, therefore, how lawmakers and courts have assumed the limitations of remote hearings: in rules and in rulings such as those described above, the legislator and the courts implicitly recognize that they are not the same as ordinary hearings and that they may affect certain basic procedural safeguards.
- 63 These precautions are exacerbated when the seriousness of what is at stake becomes apparent, hence the clearest example is proceedings with potential consequences on personal liberty. In civil proceedings, freedom is not at stake. But it seems that the importance -social, economic, personal – of what is at stake in a proceeding – also a civil one – is an element of relevance, which should work as a counterweight to mere efficiency<sup>61</sup>. In complicated cases involving large sums of money, it is difficult to imagine a court preferring a virtual hearing for the trial/main hearing or that this format could be imposed on those who have large sums of money or equivalent benefits at stake in the procedure. The same applies, for example, in family proceedings where the court must hear a child before deciding to whom to award custody or whether there are any valid grounds under the 1980 Hague Convention for refusing an application for the return of a child who has been wrongfully removed or retained.<sup>62</sup> However, and even within these ‘complicated’, ‘high-value’ or ‘sensitive’ cases, a videoconference will still be a reasonable and proportionate way to hold a preliminary conference between the court and the lawyers in order to decide on some procedural and managerial issues.
- 64 In this vein, it is frequently heard that, for the sake of efficiency and proportionality, virtual hearings should become the rule for ‘low intensity cases’, ie, for repetitive litigation, cases with a low economic value and/or an apparent low difficulty, either from a factual or a legal perspective. This approach also may justify a more general recourse to virtual hearings for managerial purposes, whereas reluctance should still be justified for main hearings and/or evidentiary hearings to take place online, unless there is a relevant ground to do it.<sup>63</sup>

<sup>61</sup> In this vein, see also C Piché, ‘The “New Normal” of Civil Procedure in Canada – Technological Efficiency over Proportionality and Accuracy of Outcomes’ in Krans and Nylund (n 1) 35-40, 38.

<sup>62</sup> The proposal of Laura Ervo, who points out the need for the rules on the format of hearings to be applied always taking into account the singularities of the specific case, without generalizing, is therefore very sensible (Ervo (n 29) 78).

<sup>63</sup> See also Legg and Song (n 9) 166 ff.

## 6 'VIRTUAL ORALITY', IMMEDIACY AND QUALITY OF JUSTICE: THE 'ADDED VALUE' OF FACE-TO-FACE HEARINGS?

- 65 The origin of the reticence and caution against the 'new virtual orality' is probably to be found in the intuition that it has a negative impact on the principle of immediacy or, if preferred, on the values that are associated to the physical presence of the judges, the parties, the lawyers, the witnesses and the experts in a same room at a same time.
- 66 A very clear synthesis of this 'vision' lays in a Decision of the Vienna Oberlandesdgericht given on 7 July 2024.<sup>64</sup> In the context of insolvency proceedings, the defendant's administrator, who resided outside Austria and who was to be cross-examined by the court, requested to do it by videoconference, invoking the Austrian special COVID-19 legislation, in order to avoid the risk of detention – a possibility envisaged by the Austrian insolvency legislation regarding the administrators of the insolvent business, that had been already ordered by the judge, although it had been subsequently revoked by the OLG. The request to proceed by videoconference was rejected in the first instance, on the ground that there was not a real Covid risk nor a detention probability to sustain it. He then lodged the appeal that was decided – and dismissed – by the Vienna Superior Court. Among the legal reasoning of the Court, the following shall be highlighted (para 5.2):

Since the direct impression of the judge is of particular importance in the examination of the parties, the law stipulates that the examination of the party before the adjudicating court is the rule and only allows this evidence to be taken by way of legal assistance in exceptional cases and to a much narrower extent than in the case of witness evidence [...]. Video conferences are therefore not generally authorised, but only as a substitute for the taking of evidence by way of legal assistance. In this area, the advantages clearly outweigh the disadvantages, because hearings by way of legal assistance – if they are successful at all – often only provide results that are of little use [...].

The law refers to the possibility of questioning using technical equipment for audio and video transmission as 'direct taking of evidence', although strictly speaking this does not really apply. Ultimately, the use of video conferencing technology means a compromise between genuine (physical) immediacy and the avoidance of direct impressions. However, if the court takes evidence by means of video conferencing without the legal requirements being met (i.e. if it is not a matter of substituting a legal assistance examination), this constitutes a substantial procedural defect within the meaning of Section 496 (1) Z 2 ZPO due to the violation of the principle of immediacy [...].

Strictly speaking, the principles of orality (Section 176 ZPO) and immediacy (Section 276 ZPO) are not breached by the authorization of the hearing by video conference,

<sup>64</sup> OLG Wien 3R149/22m, Decision 7 July 2023, ECLI:AT:OLG0009:2022:00300R00149.22M.0909.001; the text quoted below is the author's free translation.



but they are modified due to the physical distance and the acoustic and visual perception with the aid of technical means of communication. With regard to immediacy, weaknesses of hearings by videoconference are criticised above all in connection with the evidence procedure. The personal impression gained during a face-to-face hearing is of essential importance for the assessment of the hearing and evidence and cannot be gained to the same extent during a video conference. Above all, there is a risk that the video conference distorts interpersonal perceptions and that non-verbal expressive behaviour is lost. In addition, there is the lack of atmosphere in the courtroom and the lack of direct confrontation with the other party, which could hinder the honesty of the parties and thus the establishment of the truth, but at the same time also the amicable settlement of the dispute [...]. In addition, when hearing a person connected from outside the court building, for example, there is the problem that it is difficult to avoid influencing them [...]

- 67 According to the classical procedural literature, there is a legal notion of immediacy, which has an unquestionable relevance for the right to effective judicial relief – endorsed, indeed, by the case law of the European Court of Human Rights<sup>65</sup> – and which is identified with the direct contact of the judge with the parties and the evidence, which must be taken before the judge who has to issue the decision.<sup>66</sup> This notion of immediacy and this approach have also been assumed by the ELI/UNIDROIT Model European Rules of Civil Procedure and, more specifically, by Rule 64(2), pursuant to which '[t]he final hearing must be before the judge or judges who are to give the final judgment'.<sup>67</sup>

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<sup>65</sup> According to the *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)* [updated on 31 December 2021, Nos 255–261, [https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf) accessed 12 August 2024]: 'The Court has held that an important element of fair criminal proceedings is also the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case. Such a principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused.'

According to the Spanish Constitutional Court, for instance: '[t]he safeguard of immediacy consists in the requirement that the evidence is taken before the judicial body which is to assess it. This is a safeguard of correctness which avoids the risks of inadequate assessment arising from the intermediation between the evidence and the assessing body and which, in personal evidence, as opposed to the [...] minutes of the hearing, makes it possible to evaluate not only the essence of a verbal sequence [...] but also the totality of the words pronounced and the context and the way in which they were pronounced: it allows access to the totality of the verbal communicative aspects; it allows access to the non-verbal communicative aspects, of the person testifying and of third parties; and it also allows, even to the limited extent tolerated by its impartiality, the intervention of the judge to check the certainty of the factual elements' [Case 4870-2004 (Constitutional Court, Spain), Judgment 16/2009 of 26 January [ECLI:ES:TC:2009:16] para 5; author's free translation].

<sup>66</sup> For a general overview of the meaning of the principle, see C A Kern, 'Der Unmittelbarkeitsgrundsatz im Zivilprozess' (2012) *Zeitschrift für Zivilprozess* 53.

<sup>67</sup> The official Comments on the rule are particularly telling: 'Rule 64(2) addresses the principle of immediacy, according to which only those judges who adjudicate in the final hearing are competent to give the final judgment. This principle has a long common tradition across all of European civil procedure. It has been, however, of limited significance in continental European jurisdictions. According to the prevailing continental European understanding, it does not apply to those hearings that precede the final

- 68 Can it be said that this direct contact also takes place in a virtual context? In my opinion, not entirely, although we are already beginning to speak of ‘digital immediacy’ – and the need to use an adjective is not without significance.
- 69 In a remote hearing the spoken word is certainly used as a communication tool, discussions, depositions and interrogations are possible, and documents can also be exchanged instantaneously. It is common to point out, however, that in a virtual framework the participants – often referred to as witnesses – are not subject to the environmental and ritual influence typical of oral proceedings<sup>68</sup> and that the judge may thus be deprived of useful elements for assessing the credibility of the account given.<sup>69</sup> It has also been said that remote hearings have a negative impact on the adjudicator’s empathy – although it is arguable whether empathy should be relevant or not for a fair decision making.<sup>70</sup> These assessments are also frequently countered by the argument that orality and immediacy are somehow overvalued because the supposed ‘metadata’ they provide are refutable from a scientific point of view<sup>71</sup> – judges, according to some, lack adequate training to properly assess the body language of witnesses or the way they

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hearing where aspects or, in some jurisdictions, where all of the evidence may be taken and considered by the court. In such cases, this limited approach to the principle of immediacy has only prevented judges from rendering judgments without them having conducted the hearing where the parties make their final submissions on the evidence and where any preceding oral consultations between court and parties may take place. Rule 64(2) combined with Rule 64(3) extends, in part, the scope of immediacy to mandatory evidence-taking within the final hearing (also see Rule 97(1), comment 2). At the same time, it strengthens the significance of oral proceedings (see Rule 18). The use of communication technology (Rule 64(1)) and especially of video-conferencing creates new forms of immediacy and orality of proceedings, albeit of a lesser effect than when parties and witnesses are physically before the court (also see Rule 97(3)). These Rules, however, consider such a development arising from communication technology to be more efficient and citizen-oriented than written proceedings. The immediacy principle is the main one to facilitate the best evaluation of evidence which is, in principle, not bound to specific rules (see Rule 98).’ See also E Vallines García, ‘Proceedings before a final hearing and final hearing’ in Stadler, Smith and Gascón Inchausti (n 32) para 14.057–14.064.

<sup>68</sup> See O Chase, *Law, Culture, and Ritual. Disputing Systems in Cross-Cultural Context* (New York UP 2005).

<sup>69</sup> See, among many others, A De la Oliva Santos, ‘Justicia y pandemia’ 10(2) *International Journal of Procedural Law* 230; K Lisko, ‘Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony versus in-Court Testimony’ (2021) 51(1) *Southwestern Law Review* 63. This is also one of the main shortcomings identified by those involved in the studies reflected in Benninger, Colwell, Mukamal and Plachinski (n 53); D L F de Vocht, ‘Trials by video link after the pandemic: the pros and cons of the expansion of virtual justice’ (2022) 8 *China-EU Law Journal* 33 <https://doi.org/10.1007/s12689-022-00095-9> accessed 20 September 2024.

<sup>70</sup> See S A Bandes and N Feigenson, ‘Empathy and Remote Legal Proceedings’ (2021) 51(1) *Southwestern Law Review* 20.

<sup>71</sup> See W P Heath and B D Grannemann, ‘How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant’ (2014) 32(4) *Behavioral Sciences & the Law* 496.

speak, for example.<sup>72</sup> The controversy can be even more intense when it comes to jury trials.<sup>73</sup>

- 70 The debate is undoubtedly of the utmost interest, a preferably written or oral model of civil procedure and also from the perspective of the search for efficiency – and that is the leitmotiv that seems to guide legislative action. But it cannot be forgotten that in many systems the legislative option for a predominantly oral model is still in force, which seeks to reinforce the value of personal evidence and increase the options for the parties to place the judge in the best position to construct the factual account that is most in line with reality. This decision of the legislator is influenced by that part of immediacy which is not easily defined, and which derives from the advantages intuitively associated with the notions of meeting and ritual,<sup>74</sup> of encounter and of direct and immediate contact, without interfering elements.<sup>75</sup>
- 71 Opting for orality and immediacy means assuming that direct communication between persons interacting in the same physical space increases the chances that the process will better fulfil its functions, including the consensual resolution of the dispute<sup>76</sup> – although the lack of direct contact may be advisable in some cases.<sup>77</sup> Orality, implemented through face-to-face hearings, also influences the social legitimacy of the judicial system:<sup>78</sup> it gives litigants their 'day in court' and increases the perception that the State, through the court,

<sup>72</sup> In this vein, P Andrés Ibáñez, 'Sobre el valor de la intermediación (una aproximación crítica)' (2003) 46 *Jueces para la Democracia* 57; J Nieva Fenoll, 'Oralidad e intermediación en la prueba: luces y sombras' (2012) 1 *Justicia* 101; C De Miranda Vázquez, 'El mito de la influencia de la intermediación judicial en la valoración de la prueba personal: una revisión crítica' (2014) 2 *Justicia* 344. See also M A González Coulon, 'El uso de videoconferencias en audiencias de prueba: ¿Desconfianza en la tecnología o en los medios de prueba declarativos?' (2022) 11(2) *Revista Chilena de Derecho y Tecnología* 27, who claims that, in the end, the origin of the reluctance towards evidence taking in remote hearings does not lay in the technological mean that is used, but in the type of evidence itself, always difficult to assess, either on-line as face-to-face. In a similar vein, see the German literature cited by Stürner and Stürner (n 28) 345.

<sup>73</sup> See, among many others, T A Donner, 'Civil Jury Trials by Zoom: We're All Plugged into One World Now' (2021) 51(1) *Southwestern Law Review* 71; or Lisko (n **Fehler! Textmarke nicht definiert.**).

<sup>74</sup> A Garapon and J Lassègue, *Justice digitale* (Presses Universitaires de France 2018) insist on the impact of the digital element on the ritual of proceedings and justice.

<sup>75</sup> In this vein, see also R Magnus, 'New Media in the Courtroom: Benefits and Challenges' in B Hess and A Koprivica Harvey (ed), *Open Justice. The Role of Courts in a Democratic Society* (Nomos 2019) 91, 92. There are also those who have noted the limitations imposed by face-to-face meetings: see O Rabinovich-Einy and E Katsh, 'Digital Justice. Reshaping Boundaries in an Online Dispute Resolution Environment' (2014) 1(1) *International Journal of Online Dispute Resolution* 5, 10–12.

<sup>76</sup> Meetings in court premises, forced by face-to-face events, may serve as an opportunity for negotiation, even if it is not a factor that can be measured empirically.

<sup>77</sup> In Spain, for example, an analysis of the complaints lodged by litigants shows that they are more frequent in the courts of first instance, which are the courts where this direct contact is most clearly made; they are fewer, however, in the courts of appeal, where cases are processed in writing and, in fact, the Supreme Court, the slowest and most congested court, receives only a small percentage of the complaints (see B Sánchez López, 'Entre la oralidad telemática y la escritura digital: ¿caminamos felices hacia el «medievo digital»? ' in F Gascón Inchausti and P Peiteado Mariscal (ed), *Estándares europeos y proceso civil. Hacia un proceso civil convergente con Europa* (Atelier 2022) 19, 43–45).

<sup>78</sup> See also Garapon and Lassègue (n 74) 180. It has been said, in this vein, that 'an adherence to tradition is often perceived as a strength of courts, imbuing their procedures, including the hearing, with legitimacy' (Legg and Song (n 9) 164).

takes the resolution of the specific case seriously – both for litigants who are natural persons<sup>79</sup> and for the natural persons who are always behind the litigants who are legal entities – securing what has been called as ‘the subjective experience of procedural justice’.<sup>80</sup>

- 72 From this angle, both the screens and the limitations of videoconferencing programs can be seen as instruments that mediatize the contact between the protagonists of the procedural activity at hand and, to that extent, distort the communication required by the process and a hypothetical ‘genuine’ immediacy, only achievable in face-to-face environments. For this reason, the generalization of remote hearings as opposed to ‘traditional’ hearings brings into play two different ways of implementing the interaction between the subjects involved in an oral procedural act. The absence of direct personal contact of remote hearings may not in itself entail a complete breakdown of immediacy and adversarialism, as advocated by the legal option for orality. The procedural activity takes place in any case ‘before’, or ‘in front of’, the court, and it is possible to fully comply with the legal provisions on the content of each procedural act (adversarial debate using the spoken word). However, the feeling inevitably remains that this is an orality of inferior quality, because it determines a diminished immediacy: the screens and programs impose limits on the contact of the court with the parties and other intervening subjects; elements of assessment and context may be lost, which would result in a better quality of oral judicial activity and, ultimately, of the process itself.
- 73 A good example of an official assumption of these caveats may be found in a 2020 judgment of the Constitutional Court of Chile,<sup>81</sup> where it had to address to what extent criminal virtual trials – under the exceptional provisions given during the pandemic – were compatible with the constitutional model of oral criminal proceedings. The Constitutional Court expressly stated the following:

In this, the material dimension of immediacy is relativised and degraded by virtual trials, because the transmission by screen and the focus only on the face accompanied by the voice becomes a substitute for the most complete and immediate face-to-face perception, this videoconference mechanism being a kind of ‘telematic mediation in real time’, that can also be called ‘virtual presence’, which in principle is considered to be equivalent to face-to-face presence, but without the elements of face-to-face

<sup>79</sup> Perhaps, in the future, it will lose relevance in a society of ‘digital natives’, accustomed to perceiving virtual encounters as the rule and, who knows, with greater difficulties of interaction in face-to-face contexts. But the legislator is beholden to society as it is currently shaped.

<sup>80</sup> See Ervo (n 29) 81.

<sup>81</sup> Case 8892-2020 (Constitutional Court, Chile), Judgment of 10 December 2020, <<https://www.diarioconstitucional.cl/wp-content/uploads/2020/12/144270.pdf>> accessed 24 September 2024.

perception, since not even the field of vision can be the same and it is not possible to perceive whether or not the prohibition on reading scripts is being observed.<sup>82</sup>

- 74 It is therefore necessary that a commitment to greater use of remote hearings, aimed at making the system more efficient, takes on board this intrinsic deficit and establishes the appropriate requirements to compensate or mitigate it: what is more easily accepted in times of pandemic – second-rate or low-cost orality and immediacy – must be rigorously subjected to the sieve of the right to a fair trial once health normality is restored. For the future, therefore, it is essential to ensure that all remote hearings meet adequate technical requirements in terms such as the location of the participants' cameras, the possibility of close visual contact between the interlocutors – ie, the speakers should be able to see the faces and expressions of the listeners up close<sup>83</sup> –, the existence of a channel for the instantaneous sending of documents while the hearing itself is taking place or the availability of confidential 'breakout rooms' for attorney-client conversations. It must also be clear how to prove the identity of the participants, how to ensure data protection, and how to record and preserve information, among other issues. The guides and protocols approved in many countries at the beginning of the pandemic were concerned with these questions, but it seems unavoidable that these requirements should attain true legal/binding status so that real procedural rights and powers should be derived from them, the infringement of which could have legal consequences – eg, a lack of defence with constitutional significance for one of the parties. If the courts are to be given the power to decide and impose the format – virtual or face-to-face – of oral proceedings in the exercise of case management powers, the parties must be given the right to expect the virtual format to meet high-quality standards.
- 75 The quality of 'virtual courtrooms' is therefore a determining factor in the quality of the virtual hearings themselves,<sup>84</sup> just as the architecture and internal layout of the court buildings themselves have an impact on the justice system:<sup>85</sup> it is important, for instance,

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<sup>82</sup> The text above, from recital 44, is a free (non-official) translation of the Spanish original: 'En ello, la dimensión material de la intermediación se ve relativizada y degradada por los juicios telemáticos, pues la transmisión por pantalla y el enfoque solamente en el rostro acompañado de la voz pasa a ser un sucedáneo de la más completa e inmediata percepción presencial, siendo este mecanismo de videoconferencia una suerte de 'mediación telemática en tiempo real', también denominable como 'presencia virtual' que es tenido en principio por una equivalencia de presencialidad, pero sin los elementos de percepción presencial, pues ni siquiera el campo visual puede ser el mismo y tampoco se puede percibir si se cumple o no la prohibición de lectura de libretos.'

<sup>83</sup> A common complaint from many lawyers is that the videoconferencing system places the court so far away from the camera that it is not possible to see the judge's face and reactions, which is essential when making arguments or formulating the conclusions of a trial.

<sup>84</sup> On the 'architecture' of virtual courts and its impact on the quality and fairness of proceedings, see A Sela, 'E-Nudging Justice: The Role of Digital Choice Architecture in Online Courts' (2019) 2 *Journal of Dispute Resolution* 127; A Saukuma, 'Legal and Ethical Issues in Designing Online Courts' (2020) 19 *Baltic Yearbook of International Law* 138; also L Frame, 'On the Design of Virtual Courts: Creating User-Centred, Evidence-Based Spaces' (2022) 80(3) *Advocate* (Vancouver Bar Association) 385. See also the findings on this issue in HM Courts & Tribunals Service (n 15) 71–73.

<sup>85</sup> See J Resnik and D E Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale UP 2011).

that there are fixed positions for all participants (judge or judges, parties, witnesses), in order to minimize confusion about who is who and what is each one's role; different cultural traditions, in addition, should lead to diverging settings depending on the jurisdiction. It is clear that, in this respect, improvements can only be expected, through platforms and programs that are progressively better adapted to the needs of the judiciary. But we must insist on the need to understand that these are not merely technical or ancillary issues, which the procedural legislator can disregard, because they have an influence on the environment in which the fundamental right to effective judicial relief is exercised.

- 76 In any case, it seems to me essential to recall that a possible choice by the legislator in favour of remote hearings – even with their shortcomings – is still a reaffirmation of the value of orality as opposed to writing, even if orality needs to be reconsidered from the perspective of digitalization.<sup>86</sup> That is why it is so important to regulate them correctly. This is the only way to avoid criticisms that delegitimize them for their lack of usefulness or their low quality, something that in the end would not serve to justify a return to face-to-face hearings, but rather the disappearance of orality itself.<sup>87</sup>

## 7 VIRTUAL HEARINGS AND PUBLIC PROCEEDINGS

- 77 Beyond immediacy, remote hearings also entail a paradigm shift in terms of publicity.<sup>88</sup> The court is no longer a physical space where any citizen can go to see how justice is administered, since the hearings take place in virtual environments and platforms whose location is not always public. On many occasions, the legal system tries to alleviate the lack of publicity by allowing the court to agree to broadcast the hearings by electronic means, provided that the material equipment is available to do so – although without specifying what those means are or could be. This is an essential adjustment to ensure the validity of

<sup>86</sup> See the 'official' comments to Rule 64(2) of the ELI/UNIDROIT Model European Rules of Civil Procedure (n 32): 'The use of communication technology (Rule 64(1)) and especially of video-conferencing creates new forms of immediacy and orality of proceedings, albeit of a lesser effect than when parties and witnesses are physically before the court (also see Rule 97(3)). These Rules, however, consider such a development arising from communication technology to be more efficient and citizen-oriented than written proceedings.'

Also E Vallines García (n 67) para 14.062; and C Chainais, 'Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law' in Hess and Koprivica Harvey (n 75) 59, 68: 'it must be acknowledged that the choice of the authorities to use videoconferencing also demonstrates a *positive* reaffirmation, in the digital era, of the irreplaceable role of the public hearing'.

<sup>87</sup> As is more and more the case in some jurisdictions, like France (see Ferrand (n 51) 87 ff).

<sup>88</sup> For a comprehensive and comparative view on the impact of new technologies on the principle of public proceedings, see Chainais (n 86). Addressing the difficulties during pandemic and post-pandemic times, see Ariturk, Crozier and Garrett (n 52) 62 ff, who refer to studies showing harsher decisions taken after virtual hearings with no real publicity. See also, among many others, Engstrom (n 52) 255–257. See also M Warren, 'Open Justice in the Technological Age' (2014) 40(1) Monash Law Review 45; S Ahmed, 'Online Courts and Private and Public Aspects of Open Justice: Enhancing Access to Court or Violating the Right to Privacy?' (2023) Age of Human Rights Journal <https://doi.org/10.17561/tahrj.v20.7516> accessed 21 Octobr 2024; K Puddister and T A Small, 'Navigating the principle of open court in the digital age: The more things change, the more they stay the same' (2019) 62(2) Canadian Public Administration 202.



the principle of public proceedings – as enshrined at a supranational level, for instance, by Art 6 ECHR and Art 47 CFREU<sup>89</sup> – and, with it, the constitutionality of the system of virtual hearings.<sup>90</sup>

- 78 If proceedings are written, the constitutional mandate of publicity is fulfilled by allowing access to the files and/or records of the case to the parties or to third parties showing a legitimate interest,<sup>91</sup> provided that data protection is safeguarded.<sup>92</sup> And it is also true that virtual hearings will be documented by means of their recording, which will also be accessible to interested parties.<sup>93</sup> However, being satisfied with this form of publicity would entail a ‘label fraud’, since it would mean treating remote hearings as written acts, when the truth is that they have been designed as an alternative format to comply with the legal option for orality. Except for justified reasons associated with certain values -such as privacy, the rights of minors or national security, it is characteristic of oral proceedings that the public can attend them spontaneously if they so wish, without the need to show a specific legitimate interest<sup>94</sup> – which is required for access to court records or files.<sup>95</sup>
- 79 It is equally important to insist on the value that publicity brings to oral proceedings: it is not only a basic safeguard for the parties, which protects them against the arbitrariness of the public power;<sup>96</sup> again in the realm of the ineffable, the (possible) presence of the public

<sup>89</sup> See, on this, M Szpunar, ‘Right to a Public Hearing According to Art 6 ECHR and Art 47 of the Charter of Fundamental Rights of the EU: Constitutional Perspectives’ in Hess and Koprivica Harvey (n 75) 47.

<sup>90</sup> In general terms, this risk is also warned of by J Walker, ‘Courts in Lockdown: Lessons from International Arbitration’ (2020) 10(2) International Journal of Procedural Law 178, 199.

<sup>91</sup> See, for instance, § 299 of the German ZPO (Code of Civil Procedure) or Art 234 of the Spanish Act on the Judiciary (*Ley Orgánica del Poder Judicial*).

<sup>92</sup> Electronic access to court files triggers a challenge to data protection and could discourage litigants from accessing the court system, if there are not sufficient safeguards that their privacy will not be exposed in the future. On this, N Vermeys, ‘Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values’ in K Benyekhlef, J Bailey, J Burkell and F Gélinas (ed), *eAccess to Justice* (University of Ottawa Press 2016) 123.

<sup>93</sup> This appears to be established in England (Sorabji (n 11) 66), as in Spain or Germany (see above n 91).

<sup>94</sup> And it may end up being tricky, as detected by the Court of Justice of the European Union in *Commission v Breyer*, Case C-213/15 P (CJEU), Judgment 18 July 2017 [ECLI:EU:C:2017:563], concerning a request for access to pleadings submitted to the Court.

<sup>95</sup> In that vein, the European Court of Human Rights stated in *Riepan v Austria*, Case 35115/97 (ECtHR), Judgment 14 November 2000 [ECLI:CE:ECHR:2000:1114JUD003511597] para 29 the following: ‘The Court considers that a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases, these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.’

<sup>96</sup> Again, the ECtHR in *Riepan v Austria* (n 95) para 27: ‘The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.’

in oral proceedings results in a better quality of the system, since it encourages the protagonists of the act – primarily judges and lawyers – to a better performance of that part of their function that is visible in it; and this even if the audience at a trial ‘is not supposed to do anything’, since ‘[t]he ultimate purpose of the public trial is to prevent anything from occurring during the proceedings that would be subject to public condemnation’.<sup>97</sup>

- 80 Therefore, any option for the generalization of remote hearings should be accompanied by a more detailed regulation of public access to the ‘virtual courtrooms’,<sup>98</sup> through mechanisms that would ensure the publication on the electronic sites of the judicial bodies of the links<sup>99</sup> or channels for live broadcasting of their proceedings.<sup>100</sup> The Indian criterion on this matter, set already in 2018 in *Swapnil Tripathi v Supreme Court of India*,<sup>101</sup> is of great interest: upon the petitions filed by various individuals and groups before the Supreme Court of India under Art 32 of the Constitution, the Supreme Court ruled that proceedings before the Supreme Court in cases having constitutional and national importance and/or having an impact on the public at large or a large number of people should be broadcast to the public.<sup>102</sup>
- 81 It should be noted, in addition, that it is not the same to broadcast – on TV or on an internet channel – a trial that is taking place in public, which can be said to be in any case public,<sup>103</sup> as it is to broadcast an on-line trial, for which streaming may be the only real formula for public access. After all, this is not just an issue for virtual hearings, but more generally for all ‘online courts’ or equivalent features of the future. The requirement for publicity will

<sup>97</sup> S E Smith, ‘The Online Criminal Trial as a Public Trial’ (2021) 51(1) Southwestern Law Review 116, 121 and 122. More extensively, J Simonson, ‘The Criminal Court Audience in a Post-Trial World’ (2014) 127(8) Harvard Law Review 2173.

<sup>98</sup> Having again recourse to the *Riepan v Austria* judgment of the ECtHR (n 95), it should be recalled that ‘hindrance in fact can contravene the Convention just like a legal impediment’ (para 28).

<sup>99</sup> In Nigeria, for instance, virtual hearings before the National Industrial Court are accessible by the public through Zoom and this, apparently, satisfies the public proceedings standard of this country’s constitution (see E Emudainohwo, ‘Appraising the Constitutionality of Virtual Court Hearings in the National Industry Court of Nigeria’ (2021) 12(1) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 16. In the US, guidelines on remote hearings also demand that information about the links be provided by court offices and/or websites (see, addressing the example of Maryland, DeRegis (n 52) 104).

<sup>100</sup> Live broadcasting of trials is a problematic issue, as explained by Szpunar (n 89) 53–55, who refers to the case law of the German Constitutional Court (on this, with more detail, see also J Jahn, ‘German Courts Open Their Doors (a Little Bit) Wider to the Media’ in Hess and Koprivica Harvey (n 75) 269).

<sup>101</sup> Case 1232-2017 (Supreme Court, India), Judgment 26 September 2018 [10 SCC 628].

<sup>102</sup> According to the Court, in such cases the principles of public proceedings and open justice prevailed over the rights of privacy of the parties involved; the ability to view live broadcasts of the Supreme Court proceedings flowed, therefore, from the right of access to justice in the Constitution. The Court also held that this right should not be absolute and provided a set of Model Guidelines which should govern the courts’ discretion on when such broadcast should be used.

<sup>103</sup> See, eg, the successful experience of the China Trial Live Broadcast (see Y Fu, ‘Civil Justice in China in the Covid-19 Period’ in Krans and Nylund (n 1) 41).



be in these cases more necessary than ever because, as has been noted, ‘digital courts must be open courts’.<sup>104</sup>

- 82 It is, in any case, something that must be done with caution and with limits.<sup>105</sup> On the one hand, national lawmakers should not fall into the temptation of anachronism and disregard the impact of ICT on the notion of public proceedings.<sup>106</sup> The German Act to Promote the Use of Video Conferencing Technology in Civil and Specialist Jurisdictions might be seen, nevertheless, as an example of attachment to an outdated approach to publicity, still identified to the possibility for the public to enter the physical premise where the court activity is taking place. According to the new legislation, publicity of virtual hearings is ensured in one of the following ways: if the judge (or at least the presiding judge) is directing the hearing from the court premises any interested person could enter the room and, of course, watch the screen where the virtual part of the hearing is being displayed;<sup>107</sup> if the hearing is being conducted in fully virtual manner, then the hearing shall be broadcasted into a room within the court building, where any interested person could enter into.<sup>108</sup>
- 83 The recent Spanish Act on the use of ICT in the Administration of Justice enacted in 2023<sup>109</sup> is more reasonable on this point, as it provides for public broadcasting of procedural activity trials that are held entirely by videoconference through electronic channels. In order to ensure the public’s knowledge, the electronic judicial sites will publish the list of trials and hearings to be held by each judicial body, and the form of access to them for publicity purposes. It is also contemplated that there may be different levels of security and public access, as well as non-transmission in the same cases in which a face-to-face trial would have to be held behind closed doors (eg, when dealing with intimate matters or those affecting public safety). Where the proceedings are hybrid, however, the solution

<sup>104</sup> Sir E Ryder, ‘Securing Open Justice’ in Hess and Koprivica Harvey (n 75) 125, 128.

<sup>105</sup> See, in this vein, the risks also identified by Magnus (n 75) 95, who mentions the protection of the privacy of the parties and the potential negative influence on witnesses or parties giving statements if they are aware of being the object of worldwide broadcasting. In the same volume, see also M Bobek, ‘Past and Looming Challenges to Open Justice’ in Hess and Koprivica Harvey (n 75) 277, 282.

<sup>106</sup> As stated by Chainais (n 86) 65: ‘we must avoid an outdated interpretation of publicity. Denying the contributions made by the development of technology would be nonsensical. The vision of public access to hearings that prevailed at the beginning of the twentieth century, limited to the public that was physically present in the room, or to the accounts then provided by journalists, is obviously outdated.’

<sup>107</sup> New §128a (5) ZPO (Code of Civil Procedure).

<sup>108</sup> New §16(4) of the German Act to Give Effect to the Code of Civil Procedure (*Gesetz betreffend die Einführung der Zivilprozessordnung*): ‘In öffentlichen Verhandlungen ist die Öffentlichkeit herzustellen, indem die vollvirtuelle Videoverhandlung in Bild und Ton an einen öffentlich zugänglichen Raum im zuständigen Gericht übertragen wird’. On this see (critically) Stürner and Stürner (n 28) 345.

<sup>109</sup> It is included in the *Real Decreto-ley 6/2023, de 19 de diciembre, por el que se aprueban medidas urgentes para la ejecución del Plan de Recuperación, Transformación y Resiliencia en materia de servicio público de justicia, función pública, régimen local y mecenazgo*, *Boletín Oficial del Estado* 20 December 2023 <https://www.boe.es/boe/dias/2023/12/20/> accessed 24 September 2024. The issue of public virtual proceedings is addressed in Art 66.

is similar to the German one: the court may consider it sufficient to allow the public access to the courtroom from which the physical part of the hearing takes place.

- 84 Courts are public institutions and, therefore, must act in the public eye, an eye that has become digital: digital publicity seems to be of the essence. Nevertheless, it is necessary to act with clear awareness of the new context, where social media and social networks are not neutral and may have an impact on judicial proceedings, on the independence of adjudicators and on the privacy of the parties (especially, accused parties in criminal cases). This explains, for instance, why Malaysia bans photography of any proceedings in the ‘physical’ courtrooms and is considering whether taking screenshots during virtual hearings and sharing them would also amount to contempt.<sup>110</sup> And it also explains, to put an example from the other side of the globe, the ban to record virtual hearings that should be imposed in Germany on the parties according to the above mentioned Act to Promote the Use of Video Conferencing Technology in Civil and Specialist Jurisdictions<sup>111</sup> or in Spain, pursuant to the new Act on the use of ICT in the Administration of Justice.<sup>112</sup>
- 85 Data protection is equally essential – and the need to respect it goes without saying. But it is not only about protecting the data of the parties and participants in the proceedings. For the public, one can imagine that in many cases, access to a virtual hearing will be made available through a link to the virtual session, which may be available online without further ado, or which may be received upon registration and request. This second mode of access through a link obtained upon registration avoids the risk of interference or disruption of the proceedings, but it should be borne in mind that it removes the anonymity usually enjoyed by those who attend trials and hearings in person at the physical seats of the courts. It must therefore be ensured that the data collected for the purpose of authorizing public access to a judicial videoconference cannot be used for other purposes and that the records are deleted after the videoconference has been held.
- 86 And new additional safeguards, not imaginable in the face-to-face world, can be used, like establishing a time gap between the filming and the dissemination, when this appears sensible for the proper administration of justice.

<sup>110</sup> On this, see S Mizan Ismail, T Shu Yee and S Mohd Hussein, ‘Taking and Sharing Photographs of Virtual Court Proceedings to Social Media: A Critical Appraisal on the Law of Contempt in Malaysia’ (2022) 13(2) International Journal for Court Administration 1.

<sup>111</sup> The new version for § 128a (6) ZPO (Code of Civil Procedure). reads as follows: ‘*Den Verfahrensbeteiligten und Dritten ist es untersagt, die Videoverhandlung aufzuzeichnen. Hierauf sind sie zu Beginn der Verhandlung hinzuweisen.*’ (The parties to the proceedings and third parties shall be prohibited from recording the video hearing. This shall be pointed out to them at the beginning of the hearing).

<sup>112</sup> Art 67.2 of the Act prohibits parties, participants or any persons having access to a remote hearing from recording, taking images or using any means that allow for the subsequent reproduction of the sound and/or image of the event.

## 8 POWERS OF THE COURT AND OF THE PARTIES AS TO THE FORMAT OF THE HEARING

- 87 In a scenario of procedural reforms aimed at standardizing remote hearings, legislators can be expected to offer general rules – in one sense or another – but also exceptions to the rule and/or criteria to take into account for their application. Therefore, an essential piece for a good regulation of the use of remote hearings will be the distribution of powers between the court and the parties when defining the format of a specific oral activity, in application or development of the legal provisions.
- 88 Many of the rules regulating remote hearings as an emergency solution during the pandemic established a preference for the virtual format, so that it would be the in-person hearing that would have to be justified in each specific case. The initiative to opt for the virtual or the face-to-face holding of an oral hearing was also attributed to the court, which could impose it on the parties. This is a logical regulation in times of emergency and restrictions on mobility and meetings of people in closed places.
- 89 Is it reasonable to maintain it for the future? In my opinion, the answer must be yes, at least in general terms.
- 90 Indeed, it is up to the legislator to determine what the general rule should be if it considers that there should be one: face-to-face or virtual (or hybrid) development. It is also conceivable that there may be different general rules depending on the type of oral activity in question or their possible content: thus, as seen above, it is conceivable that the virtual holding of complex trials or trials in which important interests are at stake – be they economic or not – may be prohibited. And it is also possible that the legislator prefers not to make any general choice and refers the decision to the court in each specific case.
- 91 However, whether there is a general referral to the court or to legal rules, the court must have the power to define the specific format of an oral hearing, depending on the circumstances of the case and those of the judicial body itself (agenda, available space, local epidemiological situation, etc). Conversely, the court should also have the power to force the personal presence of subjects who would have preferred a remote presence. The court should thus be attributed an unequivocal case management power regarding the format of the hearings, for the exercise of which a succinct motivation should suffice.
- 92 Assuming the primary role of the court, in practice it is interesting to define what the powers of the parties should be in relation to the format of oral activity.
- 93 (1) The will of the parties should undoubtedly be a very relevant element when the court decides on the format of a hearing and, in any case, it should be provided for in the legislation as a possible exception to any general rule. In fact, in some jurisdictions, it is

seen as a precondition for a virtual trial to take place.<sup>113</sup> But it would be excessive and, in many cases, dysfunctional for the will of the parties to be imposed on the court. This approach probably explains why regulation<sup>114</sup> or practice,<sup>115</sup> in other jurisdictions, grants the court the power to decide the format. In addition, it is also worth considering the possibility that the parties may enter into procedural contracts regarding this issue,<sup>116</sup> either to try to force the virtual holding of a hearing legally foreseen as face-to-face or, conversely, to try to impose on the court their will to hold a certain hearing foreseen as virtual by the law in a face-to-face manner. Even if parties would not be allowed absolute power, it would be sensible, at most, to require the court to provide a reinforced statement of reasons for departing from the previously agreed will of the litigants.

- 94 (2) But, above all, it is up to the legislator to decide to what extent it allows exceptions to the rule and, especially, to what extent it grants the parties the right to request an exception to the rule.
- 95 In accordance with what has been mentioned above, it would be reasonable that a litigant could object to the virtual format of a hearing on the grounds of lack of technical means to face it with full guarantees. In such a case, for purely procedural fairness reasons, the court should offer adequate support measures and, if these are not feasible, a return to physical presence could be considered, although this could result in the postponement of the procedural activity to a later, perhaps undetermined, time.
- 96 On the other hand, a possible rejection of the virtual holding of a hearing validly based on an alleged lower quality of the procedural activity carried out in this way would be more questionable. As seen above, there may be grounds for such a rejection, especially if no legal measures have been taken to ensure a sufficient standard of technical quality. But the generic nature of the argument would turn it into an overly broad power that would lead in practice to a lack of legal certainty concerning the format of proceedings. In the United States, there are precedents in which the primacy of the court's discretion has been recognized.<sup>117</sup> In Australia, the holding of a virtual trial was also challenged on the grounds that it would deprive the parties of the safeguards of a face-to-face trial, especially regarding the cross-examination of witnesses. The Federal Court, however, considered

<sup>113</sup> This appears to be the rule in France, China or Denmark (see Ferrand (n 51) 88–90; Fu (n 103) 42; Salung Petersen (n 30) 58–59).

<sup>114</sup> This is, for instance, the current situation in Spain (Art 129bis and 137 bis of the Code of Civil Procedure) and in Norway, where remote or hybrid hearings may be imposed if the court considers them 'necessary and unobjectionable', bearing additionally in mind that the court's decision on this issue may not be challenged (Nylund (n 17) 141–142).

<sup>115</sup> For instance, Australia (D Bamford, 'Responding to Covid-19 – Australian Courts in 2020' in Krans and Nylund (n 1) 7, 11–12; Canada (Piché (n 1) 36) or the USA (see the cases reported below, n 117).

<sup>116</sup> As foreseen in Brazil for the so-called *Juízo 100% Digital* (see below, 11.1.3).

<sup>117</sup> See *Gould Elecs. Inc. v Livingston Cnty. Rd. Comm'n* (US District Court, E.D. Michigan, Southern Division), Judgment 30 June 2020 [470 F. Supp. 3d 735 (E.D. Mich. 2020)]; also in *Andrews v Autoliv Japan, Ltd.* (US District Court, N.D. Georgia) Judgment 27 January 2021 [No 1:14-cv-3432 N.D. Ga. 2021], where it was explicitly stated that 'the Court is of the opinion that it has discretion to order a virtual bench trial over Plaintiff's objection'. See also some further cases referred to in Henrickson (n 9) 317.

that the technical advantages of videoconferencing platforms did not create a real disadvantage.<sup>118</sup> In Canada, to end the examples, courts have upheld the prevalence of virtual trials on proportionality considerations.<sup>119</sup>

97 Since 2021, China's Online Litigation Rules of the People's Courts opened the way to the so-called 'Smart Court'<sup>120</sup> and offer a very detailed regulation on this issue.<sup>121</sup> Pursuant to Art 21, the decision to hold the trial online will rest on the court that will decide based on factors such as the willingness of the parties, the circumstances of the case, its social impact, and the technical conditions. However, the rules provide for explicit exceptions, where online trial shall not apply:

- (1) if all parties expressly object, or one of the parties objects with justifiable reasons;
- (2) if none of the parties has technical conditions and capability to participate in online trial;
- (3) if it is necessary to ascertain the identity, verify the original documents, or examine the physical evidence on site during the trial;
- (4) if the case is difficult and complicated, has considerable evidence, and applying online trial is inconducive to ascertaining the facts of the case and applying the law;
- (5) if the case concerns national security or State secrets;
- (6) if the case has a significant social impact and has attracted wide public attention; or
- (7) if the People's Courts deem that there are other circumstances under which online trial is inappropriate to be applied.

98 If the trial started under online format and any of the aforementioned circumstances is detected at a later moment, the court shall immediately switch the trial to offline trial, but activities completed during the online trial shall have legal effect. (This last provision is very relevant, although it might be debatable, especially if the reason to abandon the online trial is related to a defective taking of evidence).

99 Looking into the future, interesting guidance is offered, once again, by some of the most recent legal reforms. The German Act to Promote the Use of Video Conferencing

<sup>118</sup> In *Capic v Ford Motors Ltd* (Federal Court of Australia) Judgment 15 April 2020 [2020] FCA 486.

<sup>119</sup> See the cases, especially from Quebec courts, reported by Piché (n 61) 36.

<sup>120</sup> See C Shi, T Sourdin and B Li, 'The Smart Court – A New Pathway to Justice in China?' (2021) 12(1) International Journal for Court Administration <https://iacajournal.org/articles/10.36745/ijca.367> accessed 23 September 2024.

<sup>121</sup> See Z S Tang, 'Virtual Hearing in China's Smart Court?' (2021) ConflictOfLaws.net <https://conflictoflaws.net/2021/virtual-hearing-in-chinas-smart-court/> accessed 23 September 2024; T Liao, 'How Emerging Technologies Shape the Face of Chinese Courts?' (2021) ConflictOfLaws.net <https://conflictoflaws.net/2021/how-emerging-technologies-shape-the-face-of-chinese-courts%EF%BC%9F/> accessed 23 September 2024; G G Zheng, 'China's Grand Design of People's Smart Court' (2020) 7(3) Asian Journal of Law and Society 561; W Y C Cheng, 'Courtroom on the Clouds: How Online Courts Are Transforming China's Court Performances at the Local Level' (2021) 9(1) Peking University Law Journal 45; Z Cao, 'Online Dispute Resolution Mechanism in China: Principle of Proceedings and Impact of Technologies' (2022) 8(1) China & WTO Review 29; Z Xia, 'Observation, Reflection and Prospects for Remote Civil Trials in China: Historical, Theoretical and Comparative Perspectives' (2023) 13(1) International Journal of Procedural Law 97.

Technology in Civil and Specialist Jurisdictions has reinforced the judicial powers regarding the holding of a hearing remotely: (i) the main power rests on the presiding judge, who is entitled to order the remote participation in the oral hearing for one party, several or all parties to the proceedings; (ii) this decision may be taken *ex officio* or at the request of a party; (iii) the presiding judge shall give reasons for refusing a request to participate by videoconference in the oral hearing.<sup>122</sup> The Spanish Act on the use of ICT in the Administration of Justice also gives judges the final say on the format of hearings and the type of participation – face-to-face or virtual – to be had by the parties and other participants (such as witnesses and experts).<sup>123</sup>

- 100 In short, it is preferable for the general rule to be the primacy of the court's criterion, although it is a good legislative technique that the regulation on this point should not be too rigid. After all, it is a matter of seeking efficiency with parameters of proportionality. The legislator is, of course, expected to formulate in the procedural law, in general terms, how the various conflicting values are to be reconciled. But it is the task of the court, with the cooperation of the parties, through the notion of active case management, to establish what is most efficient and fair in a specific case, something that is only possible with flexible rules.
- 101 This is, in fact, the approach that can be deduced from the ELI/UNIDROIT Model European Rules of Civil Procedure. First of foremost, because they place the principle of cooperation at the heart of the relations between the court and the parties, and between the parties among themselves.<sup>124</sup> And, as far as the specific issue of remote hearings is concerned, because they offer a balanced, sensible and reasonable view. They do not directly address the issue of virtual hearings, possibly because they were drafted before the pandemic. Perhaps this is why special value should be placed on the general rule contained in Rule 18(4), which, in the context of the dichotomy between oral and written proceedings, states that: 'In so far as appropriate, proceedings may be conducted using any available means of information and communication technology'. This provision, in turn, is linked to the more specific Rule 97(3), which deals with the taking of witness evidence, for which videoconferencing is admitted as a possibility.<sup>125</sup> All of this, in turn, is related to the notion

<sup>122</sup> See §128a (2) and (3) of the German ZPO (Code of Civil Procedure). The initial Draft of the Act established an additional rule: if all parties request their participation by video and audio transmission, the presiding judge shall order it. Some judges criticized the reduction of their powers that such a provision would entail, which explains that it was not finally adopted (see Stürner and Stürner (n 28) 344).

<sup>123</sup> See Art 129bis of the Spanish Code of Civil Procedure, as amended by the *Real Decreto-ley 6/2023*. On this, see F Gascón Inchausti, 'Régimen jurídico de las actuaciones judiciales por videoconferencia' in J Banacloche Palao and F Gascón Inchausti, *Los procesos judiciales tras las reformas introducidas por el Real Decreto-Ley 6/2023* (La Ley 2024) 201, 220–221.

<sup>124</sup> According to Rule 2, 'Parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute'. See on this L Cadiet and S Amrani-Mekki, 'General principles: co-operation and proportionality' in Stadler, Smith and Gascón Inchausti (n 32) para 2.015–2.022.

<sup>125</sup> 'The taking of evidence, in hearings or in camera, can involve, where appropriate, the use of technology, such as videoconferencing or similar distance communication technologies'. See A Stadler and M Strandberg, 'General and procedural issues' in Stadler, Smith and Gascón Inchausti (n 32) para 12.052–12.053.



of case management on which the procedural model of the European Rules also rests. And the case management powers of the court include, according to Rule 49(3), that to ‘determine the type and form of the procedure’.

## 9 SOME FINAL REMARKS

- 102 The necessary reaction to the pandemic served to enshrine or to reinforce remote hearings in civil proceedings all around the world. Now that the health emergency is over, health protection is giving way to efficiency and sustainability in order to justify a format that represents a turning point in the way of conceiving orality, immediacy and publicity of procedural activity. The advantages of virtual hearings have been discovered and tested during the last four to five years: they bring flexibility, convenience and procedural economy *lato sensu*; this explains the current trend, in most jurisdictions, to turn provisional and emergency regulation into a far-reaching development. But the experience of the last years has also served to detect – even to study – their inconveniences: they deprive oral proceedings of ingredients that redound to the quality of judicial activity and that, to a large extent, lie behind the legislative option for orality.
- 103 It would be wrong, therefore, to consider that the commitment to virtual hearings only affects the external or purely procedural dimension, ie, the forms or the ‘visible’ part of the development of proceedings. It should never be forgotten that the external design of the procedure determines and guarantees the fairness of the process as a tool for the protection of the legal system and the satisfaction of claims. The higher the quality of the tool, the higher the quality of the result.
- 104 By opting for remote hearings, most legislators are undoubtedly seeking to jump on the bandwagon of efficiency, technological modernity, and sustainability. But they are running the risk of doing so insufficiently if they omit the mandatory nature of technical and procedural requirements suitable for reinforcing the quality in the development of the hearings, in terms of immediacy and publicity. And it should not be forgotten that efficiency, properly understood, always requires preserving the quality of the results.
- 105 Likewise, it must be remembered that efficiency must always go hand in hand with proportionality: the virtual development of the trial or the main hearing in a complex case with abundant evidence will undoubtedly have a greater (negative) impact on the final outcome of the process than the virtual holding of the hearing to decide on purely procedural or incidental issues. A good exercise of the case management powers should include the appropriate choice – of course, in a scenario without health hazards – of those hearings that are to be carried out in a virtual format.
- 106 At the moment, most countries are in a transition period and, to a large extent, many of them are extending the validity at this point of rules on virtual hearings that were approved in an emergency situation or that predated the pandemic and, therefore, had not been

subjected to the 'stress test' of 'courts in lockdown'. It remains to be seen, therefore, how the proposed or planned reforms will turn out.

- 107 It is possible, in fact, that the debate on remote hearings will see its paradigm shift in the years to come. In fact, we are still analysing the impact of virtual hearings in the framework of proceedings that are still 'traditional' in their structure, that is, they are still predominantly imagined by the legislator and practitioners as taking place 'face-to-face' in most of their parts: how the parties communicate with each other before the conflict crystallizes; how lawyers relate to their clients; how the court staff works in the courtroom; how the various judges who have to decide in panel communicate among them; and so on.
- 108 But all this is what is changing. Possibly the generalization of virtual hearings will cease to be so disruptive once – or if – online courts and online proceedings become widespread – or even the normal. This will be discussed in the next part of this chapter.



**PART II****ONLINE COURTS AND ONLINE PROCEEDINGS: THE FUTURE OF CIVIL PROCEEDINGS?**

- 109 Using videoconferencing to take evidence or to hear one party still leaves a physical place for the court and the rest of the parties, as well as for the rest of the activity that the whole development of a procedure requires. As analysed in other chapters of this segment, remote hearings are not the only IT-technology being used to improve procedural efficiency: new functionalities are continually being added to the existing tools, which may lead to forgetting the court as a physical place and replacing brick-and-mortar courtrooms by virtual judicial networks in the near future. This is what lies behind the notion of online courts and online proceedings and the different projects and experiences that are currently being developed in different jurisdictions.<sup>126</sup>
- 110 We have already seen how the use of videoconferencing does not have merely formal consequences but can produce much more substantial effects. It is therefore conceivable that the establishment of online courts affects not only fundamental procedural principles (such as that of the adversarial principle) but also the way in which the administration of justice is perceived (by lawyers, judges, and, above all, citizens).

**10 TOWARDS A DEFINITION OF ONLINE COURTS**

- 111 What are we talking about when we talk about online courts? This is a basic question since the expression seems to be used to refer to different realities depending on who is using it and what they are using it for. Many governments – as well as private businesses and platforms – use the label ‘online courts’ or ‘virtual courts’ in the projects they develop to promote the use of ICTs in the administration of justice. It is clear, on the other hand, that talking about online courts in 2024 cannot have the same meaning it had in 2010, because the evolution on this point is being dizzying. Nor can the content of the expression be expected to be the same depending on whether we are in a developing country or a pioneering country in the incorporation of technology into public governance.
- 112 If we want to start with the simplest, we have to make clear what online courts are not: they are not ordinary courts that use ICTs for a more efficient operation; or, if preferred, the fact that an ordinary court uses technological tools does not automatically make it an online court; in these cases we can speak of heavily technologized courts or courts that rely, to a greater or lesser extent, on technological tools.
- 113 Otherwise, the paradox would be that, thanks to e-filing and e-service, many courts have unwittingly – even magically – become online courts! This would be the case, for instance, in many courts of appeal and supreme courts, where hearings are not common, especially at the highest level, where the extraordinary nature of cassation appeals does not require

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<sup>126</sup> For a wide and positive approach, primarily focusing on the situation in England and Wales, see R Susskind, *Online Courts and the Future of Justice* (Oxford UP 2019).

the taking of evidence: if the appellate procedure is conducted in writing and all communications and exchanges of pleadings take place via a digital platform, the illusion would be triggered that the procedure is online and that the court itself operates online, even though nothing has changed in the procedure itself or in the court. It would also be the case for those courts which deal with written procedures in the first instance, something which is relatively frequent in administrative matters, but also in the field of small claims: it should be recalled, in this respect, that the European legislator itself attributes to the European Small Claims procedure a preferably written character.<sup>127</sup> And it would be the same whenever a court conducts a full procedure online, but online because the circumstance is given that the preliminary hearing (if any) and the trial (if any) take place online.

- 114 However, the notion of online court cannot be identified with a mere result that can be achieved because the conduct of proceedings before a court – before any court – does not require the litigants, their lawyers or even the judges to go to the physical location of a court building. In a different way, the expression online courts seeks to mark a difference, with the intention of conveying the message that they are something more, that they represent a turning point, insofar as a qualitative change in the way justice is dispensed is inherent to them, and that this change is not limited to the mere use of electronic tools - although it is sustained by such use.
- 115 At the present time, I believe there are two essential elements that define what a true online court is or should be: they are ODR systems, but they are still courts.

### 10.1 Online Courts as ODR Systems

- 116 An online court is not an ordinary court, that is, it is not a structure of human and material resources, *attached to a physical space*, placed at the service of the development of those material activities that are necessary to apply the law in particular cases and, thus, to solve disputes.
- 117 Online courts belong to the world of Online Dispute Resolution and, therefore, rather than bodies or structures, they are better qualified as *systems* and, more precisely, as comprehensive systems for the online processing of certain activities that are considered appropriate to resolve a dispute.

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<sup>127</sup> See Art 5(1) and 5(1a) of Regulation establishing a European Small Claims Procedure, 861/2007 of 11 July 2007 (EU) (consolidated version, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02007R0861-20170714>):

1. The European Small Claims Procedure shall be a written procedure.

1a. The court or tribunal shall hold an oral hearing only if it considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests. 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 not necessary for the fair conduct of the proceedings. The reasons for refusal shall be given in writing. The refusal may not be contested separately from a challenge to the judgment itself.

- 118 ODR is a very broad concept that does not coincide exactly with that of jurisdiction or ADR.<sup>128</sup> What is unique to ODR is undoubtedly that all activities are carried out in an advanced electronic form, based on communication networks (Internet) and with the use of software and computer programs that allow the efficient processing of huge amounts of data: what is characteristic, therefore, is that the resolution of disputes is carried out online. Of the three letters of the acronym, therefore, it is the O that is most typically defining: dematerialization is complete, as the support for all activity becomes electronic and is available online.
- 119 Things can be done online that would not work or would not make sense in person (such as asynchronous communication at a distance); and, conversely, there are certain things that make sense in a physical environment, but do not make sense online (such as the use of gowns and wigs, where they still persist, which are associated with a type of formality and ritualism that makes less sense online, even though formality itself and a certain ritualism may still be considered essential). It is crucial to keep this in mind in order to understand that ODR is not about mimicking traditional judicial processes, transferring the activity itself to the web. In a different way, ODR requires a different way of working, which allows taking advantage of the functionalities of digital and online, and which determines the need to resort to procedures that, undoubtedly, will also have to be different. This is an essential factor when it comes to properly regulating ODR systems and, more specifically, online courts.
- 120 With ODR – and, hence, with online courts – technology ceases to be a tool and becomes the core of the system.<sup>129</sup> It has been said, therefore, that in ODR technology is a sort of ‘Fourth Party’,<sup>130</sup> whose function is to be at the service of a more efficient resolution of the dispute by the neutral third party – the court, as far as we are now concerned, but not only.
- 121 As has been accurately noted by Katsh and Rabinovich-Einy,<sup>131</sup> ODR brings about three major shifts in dispute resolution:
- From face-to-face or physical settings to virtual ones.
  - From human intervention and decision making to software-supported processes.
  - From confidentiality to data management.

<sup>128</sup> See P Cortés, ‘Using Technology and ADR Methods to Enhance Access to Justice’ (2018) 5(1-2) International Journal of Online Dispute Resolution 103. More generally, see Part XIV of this Compendium.

<sup>129</sup> This was indeed one of the theses stated already in 2012 by J E Cabral, A Chavan, T M Clarke and J Greacen, ‘Using Technology to Enhance Access to Justice’ (2012) 26(1) Harvard Journal of Law & Technology 241.

<sup>130</sup> E Katsh and O Rabinovich-Einy, *Digital Justice. Technology and the Internet of Disputes* (Oxford UP 2017) 37; the expression is also used and developed by Garapon and Lassègue (n 74) 196 ff.

<sup>131</sup> Katsh and Rabinovich-Einy (n 130) 46–47.

- 122 (a) Regarding the first shift, ODR leads to the disappearance of the court as a physical space or as a 'place' and, with it, to the disappearance of the notion of 'courtroom'. The implications of abandoning this courtroom-centric approach are many.
- 123 The most visible one has occupied us so far: the replacement of face-to-face by virtual hearings. In fact, this change is based on a larger one: it is not that some hearings can be held virtually, while maintaining the physical space of the court as a possible meeting place for the parties, lawyers, judges and court officials. The disappearance of the court as a physical space determines that during the proceedings there is no interpersonal contact other than remote. Consequently, the variables will no longer oscillate between face-to-face and virtual, but there will be other duplexes for communication activities that will always take place online: synchronous or asynchronous; in writing or with image and sound; intended to be recorded or conceived not to be recorded, for instance. As can be seen, the debates currently existing in relation to virtual hearings are typical of the pilot or 1.0 versions of genuine online court.
- 124 If the notion of the court as a physical space disappears, so do the constraints that space itself imposes on traditional courts and proceedings.<sup>132</sup> It has been said, in this vein, that the virtual element modifies the relationship between the proceedings, on the one hand, and the notions of time and space, on the other hand.<sup>133</sup> To the extent that technology permits, it is possible to design virtual environments suitable for the development of procedural activities that require a meeting and interaction between the parties, their lawyers and/or judges. There may be more scope for catering to the user experience, to the extent deemed appropriate.<sup>134</sup> It is also clear that certain obstacles generated by physical barriers can be alleviated. The 'digital architecture' of online courts may also play a significant role in the fairness of the proceedings and in the procedural safeguards of litigants: decisions can be made as to how it shall look like on the basis of psychology and behavioural research, aimed in turn at nudging users to properly take advantage of all the facilities provided by the platform.<sup>135</sup> One latest trend (in spring 2024) is the holding of trials 'in the metaverse':<sup>136</sup> with the use of virtual reality glasses and through avatars, the joint presence is recreated, in the same imaginary space, of those who are in different

<sup>132</sup> O Rabinovich-Einy and E Katsh, 'Digital Justice. Reshaping Boundaries in an Online Dispute Resolution Environment' (2014) 1(1) *International Journal of Online Dispute Resolution* 5, 27–29.

<sup>133</sup> Garapon and Lassègue (n 74) 117.

<sup>134</sup> This is sometimes emphasized as one of the clearest strengths of ODR systems, their capability to adapt to the specific needs of users depending on the affected sector of litigation: see D Reiling, 'Beyond Court Digitalization with Online Dispute Resolution' (2017) 8(2) *International Journal for Court Administration* 2; Sela (n 84).

<sup>135</sup> On this, E Katsh and J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001) 93–94. More recently, D Q Anderson, 'Ethical Concerns in Court-Connected Online Dispute Resolution' (2018) 5(1-2) *International Journal of Online Dispute Resolution* 20; Sela (n 84).

<sup>136</sup> In February 2023 a court in Colombia held an –official and valid– trial in the metaverse, as reported in the media (see, for instance, the news on CNN <https://cnnespanol.cnn.com/video/colombia-celebra-primer-juicio-metaverso-avatares-magdalena-clix/#:~:text=En%20el%20metaverso!-,Tribunal%20colombiano%20celebra%20su%20primer%20juicio%20con%20realidad%20virtual,una%20sala%20de%20audiencias%20virtual> accessed 10 September 2024).

places. Like everything else, this option has advantages and disadvantages (in addition to those of virtual trials). On the positive side, it can be said that the use of avatars, for example, can free the parties from the prejudices that their physical appearance can provoke; in the case of vulnerable persons or minors, it can provide a less hostile environment that mitigates secondary victimization. But genuine eye contact – not even contact mediated by the screen – will no longer be possible, and the notion of ‘justice with a human face’<sup>137</sup> may be seriously compromised.

- 125 It is to be expected that this type of experience will become more widespread; but there is also a serious danger that, precisely because of its drawbacks, another trend of a different sign will become mainstream: avoiding simultaneous meetings – ie, what we still know as oral hearings – as much as possible and replacing them with writing or with asynchronous exchanges of video messages or recordings. The progressive decline of personal means of evidence, criticized for their reduced reliability, and the impressive tendency to have electronic traces of much of the human activity, that leads to the use of electronic means of evidence, may end up triggering the perception that oral trials, as the scenario where personal means of evidence are taken in a ritualized manner, are unnecessary.
- 126 The change of physical space should also lead – as mentioned above – to the progressive replacement of the formalities and rituals that are currently used – and which, in fact, vary from country to country – with others that make sense in the virtual environment. In this respect, the evolution will probably be slower and will be associated with a progressive generational changeover – from citizens to ‘netizens’<sup>138</sup> –, as people whose lives have developed more intensely in digital environments become active participants in the judicial system and who are consequently clearer about the elements (visual, sound, design) that are perceived as useful for reinforcing the seriousness and importance of what takes place online.
- 127 On the other hand, the disappearance of the physical-spatial dimension of justice could end up influencing the judicial organization and the rules for distributing the workload among the courts of each state. If there is one thing that characterizes an online court, it is that it is not located in any specific place and can be accessed from anywhere: for this reason, the very notion of territorial jurisdiction – ie, venue rules inside the borders of a State – may become obsolete,<sup>139</sup> since online courts do not need to be linked to a portion of the territory of the State that is close to their seat (remember that, traditionally, judicial districts were constructed according to the distance it would take for litigants to reach a

<sup>137</sup> *Towards a justice with a human face* was the title of a seminal International Congress of the International Association of Procedural Law that took place in Ghent in 1977 under the direction – and the inspiration – of Professor Marcel Storme. It is also the title of the book gathering the proceeds of that conference: M Storme and H Casman (ed), *Towards a justice with a human face: the first International Congress of the Law of Civil Procedure* (Kluwer 1978).

<sup>138</sup> I take the term from Z Juanjuan, ‘On China Online Dispute Resolution Mechanism: Following UNCITRAL TNODR and Alibaba Experience’ (2017) 4(1) *International Journal of Online Dispute Resolution* 14, 19.

<sup>139</sup> This is also suggested by Cortés (n 128) 117.

court – eg, less than X days on horseback or less than Y hours by car). If up to now the division and territorial deployment of courts have been based on criteria of access to justice understood as physical access to the court building, the paradigm changes with online courts, since there is no other access than good computer equipment and a good internet connection. The duty of the state, therefore, has to be directed more than ever towards bridging the digital divide in all its dimensions (including access to good internet-connected computer equipment in remote locations).<sup>140</sup> Although it is to be expected that online courts will continue to have one or more physical seats,<sup>141</sup> these are irrelevant for litigants. Therefore, a generalization of online courts should make subject matter the prevailing criterion for the distribution of work among the courts of a state: it is easier to promote judicial specialization in online courts, because the distribution of human resources (ie, specialized judges) is done on a national, not territorial, basis.

- 128 In fact, the notion of ODR and online courts was initially associated with the idea of litigation also arising online,<sup>142</sup> mainly in the field of consumer e-contracting.<sup>143</sup> However, this is not a requirement, because an ODR system is suitable, in principle, for the adjudication of any matter. In any case, it is easier to imagine an online court in disputes in which (all or part of) the facts to be judged have occurred online and, consequently, the evidence to be handled by the court to resolve the dispute is also electronic. And, of course, it seems difficult to imagine an online court dealing with a proceeding aimed at taking protective measures in respect of an incapacitated person, where direct contact between the judge and the alleged incapacitated person is usually required –to pose a radical example.
- 129 (b) The second shift is even more disruptive for many of the current generations, since it involves moving from a procedural model in which all decisions are made by human beings to one in which decision-making is supported by computer programs, or even some decisions are made directly by such programs.<sup>144</sup>

<sup>140</sup> I Oltra Gras, 'Online Courts: Bridging the Gap between Access and Justice?' (2021) 10(1) UCL Journal of Law and Jurisprudence 24, 45-47; J A Allende Pérez de Arce, 'Tribunales civiles en línea: Una propuesta para introducirlos sin afectar el derecho a acceder a la justicia de quienes no están conectados a internet' (2019) 8(1) Revista Chilena de Derecho y Tecnología 185.

<sup>141</sup> This is the case, eg, with the Chinese Internet Courts, as will be seen below at 11.2.1.

<sup>142</sup> The mismatch between the needs of online disputes and the reality of ordinary courts became apparent as more areas of legal life became virtualised. See, for instance, K W Saunders, 'Virtual Worlds – Real Courts' (2007) 52(1) Villanova Law Review 187.

<sup>143</sup> See, for a very detailed evolution, Katsh and Rabinovich-Einy (n 130) 25–38. This link to e-commerce is on the basis, for instance, of UNCITRAL's Technical Notes on Online Dispute Resolution, approved in 2017 [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382\\_english\\_technical\\_notes\\_on\\_odr.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf) accessed 10 September 2024. It is still visible in China's Internet Courts.

<sup>144</sup> Strictly speaking, it is debatable whether a decision taken by a computer system is a real decision or something else, to be defined by other parameters. In any case, and for functional purposes, it cannot be forgotten that every process operates on the basis of 'decisions' that define its milestones; and the legislator can establish that these milestones are reached not only on the basis of human decisions, but also on the basis of computerized or automated 'decisions'.



- 130 From this point of view, what ends up changing is the structure of the proceeding, that is, the pieces that compose it. The classic definition of ‘process’ tells us that it is a series or succession of acts, regulated by law, which leads to the achievement of a certain end: in the case of a judicial process in the first instance, to the issuance of a judgment that resolves the claim for relief brought by the plaintiff. The incorporation of technology in the development of proceedings admits many degrees, depending on the type of technology and depending on the aspect of the procedure to which it refers. The most basic, of course, is the automation of decisions that depend on objective variables that can be ascertained without difficulty.<sup>145</sup> The most sophisticated, of course, is the incorporation of artificial intelligence tools in decision making, whether these are purely procedural<sup>146</sup> or even if it is a matter of the judgment on the merits.<sup>147</sup>
- 131 In many respects, the transition from human decisions to machine decisions can be justified on purely efficiency grounds: machines, if they are well programmed and well ‘trained’, work better than humans and are capable of doing much more (especially, as we shall see below, taking better advantage of data). An automated structure, on the other hand, makes it possible to better interconnect negotiation and decision-making techniques: this is why, as we shall see, in most of the online court experiences developed so far, negotiation and mediation are part of the ODR system and are not conceived as something ‘prior’ and, therefore, distinct or alien to the proceedings.
- 132 An online court, in any case, is characterized by using a procedure that is highly digitalized and strongly controlled in its development by software programs: in other words, it is a procedure much less dependent on the human factor to fulfil its purpose. [The human factor is indispensable, but not so much in the operation as in the design and control of the software and especially of the algorithms.]
- 133 Automated processing of procedures may end up having an unexpected beneficial effect on judicial processes. Indeed, one of the major criticisms levelled against state justice is that it is slow, which is associated with its overload: with (very) limited human and material resources, delays in the processing of cases cannot be avoided. Automation should bring an exponential increase in the processing capacity of the courts and this, if well managed, may eventually defuse the aforementioned criticism associated with slowness.

<sup>145</sup> In this, in fact, German procedural law showed us several decades ago the possible automation of order for payment proceedings (the so-called *maschinelle Bearbeitung der gerichtlichen Mahnverfahren*), which has opened the door to its online management (see ‘Online-Mahnverfahren’ <https://www.mahngerichte.de/online-mahnverfahren/> accessed 4 October 2024).

<sup>146</sup> See J Zeleznikow, ‘Using Artificial Intelligence to provide Intelligent Dispute Resolution Support’ (2021) 30 Group Decision and Negotiation 789 <https://doi.org/10.1007/s10726-021-09734-1>; D Marcos Francisco, ‘Smart ODR y su puesta en práctica: el salto a la inteligencia artificial’ (2022) 59 Revista General de Derecho Procesal 114.

<sup>147</sup> On this, J Zeleznikow, ‘Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts’ (2017) 8(2) International Journal for Court Administration 30, addressing caveats in the light of some models and proposals.



134 This, however, should be taken with a grain of salt. At least at present, a blind trust in technology, and especially in Artificial Intelligence, is not properly justified. AI tools that support judicial work and that simplify and reduce procedures are undoubtedly more acceptable and less controversial: it is not just a matter of speeding up the course of proceedings, through a more automated impulse; we can also think, for example, of increasingly accurate translation tools, or of tools for transcribing recordings of hearings. On the other hand, their use is much more questionable when it comes to making autonomous decisions on relevant aspects of the process and, in particular, to drafting decisions on the merits, even in simple cases. On this point, supranational legal texts insist on the need to maintain human control and to limit the role of computerized systems as much as possible.<sup>148</sup>

See, among the most relevant:

- The *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment*, adopted in December 2018 by the Council of Europe's CEPEJ (European Commission for the Efficiency of Justice).<sup>149</sup>
- The *CCBE Considerations on the legal aspects of Artificial Intelligence*, approved in 2020 by the Council of Bars and Law Societies of Europe.<sup>150</sup>
- The *Guidelines of the Committee of Ministers of the Council of Europe on online dispute resolution mechanisms in civil and administrative court proceedings*, adopted in June 2021,<sup>151</sup>
- The *Guiding Principles for Automated Decision-Making in the EU* approved by the European Law Institute in May 2022.<sup>152</sup>
- The *Opinion Moving forward: the use of assistive technology in the judiciary* adopted by the Consultative Council of European Judges (CCJE) on 1 December 2023.<sup>153</sup>
- The *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, approved by the Council of Europe on 17 May 2024.<sup>154</sup>
- The *Artificial Intelligence Act* of the European Union,<sup>155</sup> including among high-risk AI systems those:

<sup>148</sup> See F Gascón Inchausti, 'Regulating AI in Civil Justice' (2024) 11 Pázmány Law Review.

<sup>149</sup> European Commission for the Efficiency of Justice 'CEPEJ European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment' <https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment> accessed 24 September 2024

<sup>150</sup> Council of Bars and Law Societies of Europe – The voice of European Lawyers, 'CCBE Considerations on the Legal Aspects of Artificial Intelligence' (2020) [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Guides\\_recommendations/EN\\_ITL\\_20200220\\_CCBE-considerations-on-the-Legal-Aspects-of-AI.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_20200220_CCBE-considerations-on-the-Legal-Aspects-of-AI.pdf) accessed 24 September 2024.

<sup>151</sup> 'European Committee on Legal Co-operation (CDCJ)' [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a2cf96](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a2cf96) accessed 24 September 2024.

<sup>152</sup> European Law Institute, 'Guiding Principles for Automated Decision-Making in the EU – ELI Innovation Paper' [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Innovation\\_Paper\\_on\\_Guiding\\_Principles\\_for\\_ADM\\_in\\_the\\_EU.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Innovation_Paper_on_Guiding_Principles_for_ADM_in_the_EU.pdf) accessed 24 September 2024.

<sup>153</sup> Opinion No 26 <https://www.coe.int/en/web/human-rights-rule-of-law/-/the-ccje-adopts-opinion-no.-26-2023-moving-forward-the-use-of-assistive-technology-in-the-judiciary> accessed 24 September 2024.

<sup>154</sup> Council of Europe, 'The Framework Convention on Artificial Intelligence' <https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence> accessed 24 September 2024.

<sup>155</sup> Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 2024/1689 of 13 June 2024 (EU).

intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution.<sup>156</sup>

135 (c) The third shift<sup>157</sup> is possibly the least flashy or glamorous, but the most transformative. The big difference between the use of technology by ordinary courts to be more efficient and the use made of it in ODR systems is that in the latter, data are collected, used and reused. In other words, ODR systems are also characterized by the use of the data generated by each specific case not only for the purposes of the case itself, but also for purposes other than the management of that same case. Indeed, the processing of the data allows the system to identify the type of litigation in progress, the identity of the litigants, the type of claim and the type of defence put forward, among many other variables. This, when permitted by law and under the terms allowed by it, can be used by AI systems to propose decisions to the judge or to automate certain decisions to be taken in the course of the proceedings. But, beyond the specific process, ODR systems make it possible to gather huge volumes of information through the data of each proceeding, which can be used by the public authorities in many ways. On the one hand, to feed algorithms that propose solutions or decisions in specific cases. Also to have a much more accurate and comprehensive judicial statistics, which can be generated automatically, without relying on the human factor (where court officers are the ones who periodically send information on specific items). This information can also be used to take a step forward and prevent litigation. This is Online Dispute Prevention (ODP),<sup>158</sup> insofar as the data extracted from the system makes it possible to detect the most recurrent types of disputes and the most common sources of controversy, which in turn can lead to legislative changes aimed at correcting them or to the adoption of other measures capable of reducing litigation (eg, by imposing new obligations on businessmen in their transactions with consumers). This is why online courts and ODR are related to the notion of e-governance.<sup>159</sup>

136 This data handling, typical of ODR systems, always generates the reluctance associated with the collection of big data and the respect of data protection rules. Judicial proceedings, by definition, are public and, therefore, there is no confidentiality other than the strict confidentiality stemming from the subject matter of certain disputes (eg, when they involve minors or family law issues). The same is not true of ADR systems, which can also be channelled through ODR systems: one of the advantages that ADR has over state justice is precisely confidentiality. It is reasonable to think that the data processing techniques used by ODR systems do not make them public – ie, generally available to the public – and that, in any case, when the data are personal data, they will have to be

<sup>156</sup> Annex III, Sec 8 (a) of the AI Act.

<sup>157</sup> Taking as a base, also here, the proposals of Katsh and Rabinovich-Einy (n 130) 49–51.

<sup>158</sup> Katsh and Rabinovich-Einy (n 130) 51–54. Addressing more specifically the way data may be used for dispute prevention, see 167.

<sup>159</sup> E-governance is a very broad notion, encompassing many different areas of public life. For a comprehensive overview backing on a European perspective, see D Ramiro Troitiño (ed), *E-Governance in the European Union. Strategies, Tools, and Implementation* (Springer 2024).

respectful of the rules governing their processing (in Europe, the GDPR and its national developments). But it is clear that this data will be stored and will be subject to use and reuse so that the issue of security and protection takes on a scope with the ODR that it would not ordinarily have.

## 10.2 Online Courts Are (Still) State Courts

- 137 The notion of ODR is neutral in relation to who is its ‘sponsor’. In fact, its origins are in the field of ADR and, more specifically, associated with the dispute resolution mechanisms offered by large online trading platforms, which assume that their users value the existence of online channels for dispute resolution without having to go to court. When an ODR system is used to operate a private ADR scheme – eg, the arbitration court of a chamber of commerce or bar association – it is, in one way or another, subject to the rules of competition in the market: if it is well designed and works well it will find more users and handle more cases, which in turn will reinforce the volume and quality of the data, in whose proper processing and use its strengths will also be found.
- 138 However, to speak of online courts is to speak of the use of ODR systems at the service of state justice. Online courts are courts of justice in the strict sense of the word, ie, they are organs of the state that are vested with the public powers of courts and their decisions therefore have all the attributes of judicial decisions.<sup>160</sup> They may even present themselves as ‘court-annexed’, but indeed as a part of the court system.<sup>161</sup>
- 139 Some experiences in the ODR field present the bodies that administer it as online courts. It is important, however, to avoid misunderstandings and confusion with the names: there are only true online courts, in the sense that interests us here, when they are State bodies that meet the conditions to be qualified as judicial bodies.<sup>162</sup> Otherwise, they are in fact ADR or arbitration systems, with decision-makers who may be empowered by the will of the parties to make binding decisions, nothing more – but also nothing less.<sup>163</sup> This would

<sup>160</sup> See, among many others, B Toy-Cronin, B Irvine, D M Nichols, S J Cunningham and T Tkacukova, ‘Testing the Promise of Access to Justice through Online Courts’ (2018) 5(1-2) *International Journal of Online Dispute Resolution* 39, 42–43; N Vermeys and J-F Roberge, ‘ODR as a Public Service: The Access to Justice-Driven Canadian Experience’ (2019) 6(2) *International Journal of Online Dispute Resolution* 227.

<sup>161</sup> See, for instance, the project to establish in the state of New York a court annexed online dispute resolution for consumer credit card claims, described by D A Larson, ‘Designing and Implementing a State Court ODR System: From Disappointment to Celebration’ (2019) 2 *Journal of Dispute Resolution* 77.

<sup>162</sup> This explains, for instance, why the UNCITRAL’s Technical Notes on Online Dispute Resolution insist on the need of private ODR systems to ensure the highest possible degree of independence in their ‘neutrals’, ie, in the persons that serve as mediators and/or may end up making a binding decision. Under the heading of ‘Independence’, Notes 13 and 14 read as follows:

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

<sup>163</sup> This is, for instance, the case of the Dutch *eCourt* experience, which involves an arbitration procedure (see W Netjes and A R Lodder, ‘e-Court – Dutch Alternative Online Resolution of Debt Collection Claims:

entail the additional paradox that it would be necessary to resort to the force of the state to promote the enforcement of decisions, given their arbitral nature and the lack of power of these so-called 'online courts' to force compliance.

- 140 Consequently, where genuine online courts and online proceedings exist, if the legislator so decides, they may be the only courts and the only way to obtain justice from the State: although in some pilot experiences recourse to an online court is optional and requires the agreement of both parties, it is also to be expected that at some point recourse to an online court will be inevitable – it will be the only type of court for the dispute – and that, as a result, online proceedings may be imposed on the opposing party. This, I believe, will only be a matter of time.
- 141 Moreover, the fact that online courts are courts in the strict sense of the term means that they have the full backing of public force in the broad sense of the term. This determines, firstly, that the judgments handed down by the online courts produce preclusion and can have the effect of *res judicata* in the same way as any other judgment handed down by a traditional court in the context of traditional proceedings. And, of course, these judgments will, depending on their content, have declaratory, constitutive and/or executory force. Thus, a judgment handed down by an online court can be entered in the land register if it declares a person other than the person registered as the owner of the property to be the owner. And, of course, judgments issued by online courts will also be enforceable. In fact, progress is also being made in the direction of electronic and online enforcement, which can be more easily imagined, for instance, when it comes to enforcing the payment of money judgments from assets held in bank accounts.
- 142 The Spanish *Punto Neutro Judicial* (Neutral Judicial Point) is a specific platform that shows great success in this regard.<sup>164</sup> The PNJ is a complex platform, created by the General Council of the Judiciary, which serves to make available to the courts a very diverse network of services, which have in common access to applications and databases with useful information for the development of judicial activity. Very diverse administrations are integrated into the PNJ: the Tax Agency, the representative bodies of the legal professions (lawyers, notaries, registrars), the police, the traffic administration, the Prosecutor's Office, the Ministry of Justice, the prison administration, the social security administration, among others. The PNJ provides a wide number of services, which include property inquiries, information exchanges, prison inquiries and access to judicial statistics. The PNJ has proven to be very useful in enforcement proceedings, more specifically when it comes to performing the necessary tasks to carry out the discovery of assets. The information in public registers should be made available through electronic means, as well

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A Violation of the Law or Blessing in Disguise?' (2019) 6(1) International Journal of Online Dispute Resolution 96.

<sup>164</sup> See J M González García, 'El Punto Neutro Judicial: una herramienta al servicio de la mayor eficacia de la Administración de Justicia española' in A De la Oliva Santos, F Gascón Inchausti and M Aguilera Morales (ed), *La e-Justicia en la Unión Europea. Desarrollos en el ámbito europeo y en los ordenamientos nacionales* (Aranzadi 2012) 197.

as that in the possession of public bodies and financial entities. This would allow sparing time, something which is of the essence if we want to avoid assets to ‘vanish’ as soon as the debtor has the suspicion that the creditor might be starting enforcement proceedings against him. When court clerks are required by the creditor to perform an investigation on the debtor’s assets, they just need to enter the platform and introduce the debtor’s official identification number and launch a search with all relevant entities. The request will be automatically transferred to the electronic files of those entities, which will in turn deliver the information they are holding: immovable property, cars, bank accounts, and so on. The system is not perfect, especially regarding bank accounts, because it does not allow any sort of online access to the debtor’s bank account, but only monthly or quarterly reports. As compensation, the system allows the court clerk to launch an immediate seizure of the money standing to the debtor’s account –provided that there are sufficient funds.<sup>165</sup>

143 In addition to the above, the fact that online courts are courts in the strict sense of the word means something even more important than the above – or, in any case, just as important: unless the parties reach an agreement during the proceedings, the parameter for the resolution of the dispute must be the law. This is not the right time to emphasize the relevance of the courts’ attachment to the law in designing a system of justice and, more generally, for the rule of law. The important issue to underline now is that an evolution in the comparative landscape towards online courts does not require a paradigm shift on this point: whether online or face-to-face, state justice resolves disputes by applying the law. And, because online courts are state courts, it is equally important that the proceedings before them are fair, ie, compliant with due process of law requirements – eg, Art 6 ECHR or Art 47 CFREU).<sup>166</sup>

144 In practice, however, there are at least two caveats to be made:

145 (a) To the extent that ODR and online court systems tend to incorporate negotiation and mediation tools within the procedure, it cannot be ignored that there will be a strong stimulus for a consensual solution, which does not necessarily have to be the one that would result from a full application of the law. It should be noted, in any case, that this

<sup>165</sup> It is the so-called *embargo masivo de cuentas a la vista* (ECCV), launched already in 2011, on the basis of an agreement between the CGPJ and the Spanish banking associations.

<sup>166</sup> On this – although addressing more broadly the phenomenon of ‘platform justice’, ie, including ‘private’ ODR – see E Tjong Tjin Tai and P Frenken, ‘Procedurale rechtvaardigheid bij platformprocedures’ (2023) 3 *Tijdschrift voor Civiele Rechtspleging* 56. See also Netjes and Lodder (n 163) describing the *e-Court* initiative, developed in 2017, where an online arbitration procedure was set up to handle debt collection claims and that was discontinued because of heavy criticisms from the procedural safeguards perspective (lack of impartiality, lack of transparency and shortcomings regarding the defendant’s right to a fair trial).

On a different vein, however, it has been suggested that ‘private’ ODR systems should not be conditioned by judicial due process standards (see Cortés (n 128) 111); it has also been mentioned that due process could be rethought where disputes take less time and involve no face-to-face human interaction (H Hongju Koh, ‘The “Gant Principles” for Online Dispute Resolution: Realizing the Chief Justice’s Vision for Courts in the Cloud’ (2021) 62(8) *Boston College Law Review* 2768, 2784. An additional question arises, as to who should design the online court and establish the online proceeding: should it be the court itself? (see, on this, Anderson (n 135) 24).

phenomenon of imposing mediation – even if it does not become formally compulsory – is already occurring in the ordinary courts.

- 146 (b) The more online courts rely on AI systems to assist them in their decision-making, the greater the risk that decisions will be based on an algorithmic view of the law, conditioned by the AI systems' analysis of past court decisions. This, again, is not a problem unique to online courts, but it can be aggravated in this context and, above all, its use in this area can be used as an argument to legitimize its extension to other areas. And all this, of course, assuming the absence of errors, something which, however, is far from being a reality: in this sense, a recent study carried out at Stanford University reveals a very high percentage of hallucinations and, therefore, of legal mistakes,<sup>167</sup> something that was already beginning to be sensed as the media echoed the sanctions imposed on lawyers for alleging non-existent court decisions in their pleadings, due to the use of generative AI tools for their preparation without subjecting the case law citations included to subsequent contrast, as detected in the US<sup>168</sup> or in Spain.<sup>169</sup> This, indeed, has forced the bar

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<sup>167</sup> V Magesh, M Suzgun, F Surani, C D Manning, M Dahl and D E Ho, 'Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools' (2024) Stanford University – Human-Centered – Artificial Intelligence, pre-print version available at <https://hai.stanford.edu/news/ai-trial-legal-models-hallucinate-1-out-6-or-more-benchmarking-queries> accessed 25 September 2024.

<sup>168</sup> See, for instance, in *Mata v Avianca* (US District Court, S.D. New York) 22 June 2023 [22-cv-1461 (PKC) (S.D.N.Y. Jun. 22, 2023)], a judge of the Southern District of New York imposed a USD 5,000 fine for bad faith to the lawyers that submitted pleadings including inexistent precedents (the decision is retrievable at <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2022cv01461/575368/54/> accessed 6 October 2024). In *Kruse v Karlen* (Court of Appeals of Missouri, Eastern District, Second Division) 13 February 2024 [EDI 11172 (Mo. Ct. App. Feb. 13, 2024)], the *Missouri Court of Appeals Eastern District* ordered the non-represented appellant to pay USD 10,000 to respondent in damages for filing a frivolous appeal generated by ChatGPT including many inexistent precedents (the decision is retrievable at <https://casetext.com/case/kruse-v-karlen> accessed 6 October 2024). In *Smith v Farwell* (Massachusetts Superior Court, US) 12 February 2024, the Massachusetts Superior Court imposed USD 2,000 fine to be paid to the court (the decision is retrievable at <https://masslawyersweekly.com/wp-content/blogs.dir/1/files/2024/02/12-007-24.pdf>, accessed 6 October 2024). More similar cases are reported by E Clinton jr at 'Category: Fake Citations – Lawyer Referred to Grievance Panel for Nonexistent Citation' <https://legalethicslawyer.blog/category/fake-citations/>.

<sup>169</sup> The Spanish Constitutional Court, for instance has sanctioned – for disrespect – with a warning (*apercibimiento*) a lawyer who submitted a statement of constitutional complaint quoting no less than 19 judgments of the Court that did not really exist, due to an improper use of GenAI (Decision of 19 September 2024 [https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP\\_2024\\_090/NOTA%20INFORMATIVA%20N%C2%BA%2090-2024.pdf](https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2024_090/NOTA%20INFORMATIVA%20N%C2%BA%2090-2024.pdf) accessed 4 October).



associations to take measures.<sup>170</sup> The problem may also affect judges, as already detected in Brazil.<sup>171</sup>

147 In a different vein, and looking into the future, there are sectors of legal life where it is difficult to imagine anything other than ODR to resolve the disputes that may arise. This is the case, namely, with smart contracts, where decisions have to be taken at high speed. In fact, judicial ODR may not be of any use to them either, as many of them use ways of deciding that would be difficult to reconcile with the way it is reasonable to reach a decision in a judicial proceeding (this is the case, for example, with the so-called ‘crowdsourcing jury voting’ on which many blockchain-based dispute resolution systems associated with smart contracts are based, such as Kleros).<sup>172</sup>

## 11 SOME EXPERIENCES AROUND THE WORLD

### 11.1 Systems in Transition

148 It has been said before that not every court that makes advanced use of technology is an online court: not all self-proclaimed online courts really are online courts. Nor are those bodies whose name in some way evokes their relationship with the digital – as is the case with the Cyber Appellate Tribunal in India –.<sup>173</sup> Nor, certainly, is there any such thing as an ‘official certification’ that a court meets all the requirements to be a genuine online court.

<sup>170</sup> For instance, the bar associations of California and New York have recently released guidance on the lawyers’ duty of supervision over work products created with AI tools. For California, see ‘The State Bar of California Standing Committee on Professional Responsibility and Conduct’ <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf> accessed 25 September 2024; and for New York see ‘Report and Recommendations of the New York State Bar Association – Task Force on Artificial Intelligence’ (2024) <https://nysba.org/app/uploads/2024/04/Task-Force-on-AI-Report-draft-2024-04-02-FINAL.pdf> accessed 25 September 2024.

<sup>171</sup> As reported in November 2023 in ‘CNJ vai investigar juiz que usou tese inventada pelo ChatGPT para escrever decisão’ <https://www.conjur.com.br/2023-nov-12/cnj-vai-investigar-juiz-que-usou-tese-inventada-pelo-chatgpt-para-escrever-decisao/> accessed 4 October 2024. A Brazilian judge faced an enquiry by the *Conselho Nacional de Justiça* for improper use of ChatGPT to draft a decision.

<sup>172</sup> See O Rabinovich-Einy and E Katsh, ‘Blockchain and the Inevitability of Disputes: The Role of Online Dispute Resolution’ (2019) 2 *Journal of Dispute Resolution* 47; A Schmitz and C Rule, ‘Online Dispute Resolution for Smart Contracts’ (2019) 2 *Journal of Dispute Resolution* 103; J Chaisse and J Kirkwood, ‘Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution’ (2022) 5(1) *Stanford Journal of Blockchain Law & Policy* 62 (addressing the specific issues of litigation linked to China’s Belt & Road Initiative).

<sup>173</sup> The Cyber Appellate Tribunal (CAT) was established under the Information Technology Act of 2000 to settle some cyber-related disputes. However, it is not a genuine court of justice, but rather an administrative organism that depends on the government (Sec 48–56 IT Act), whose main function is to solve appeals lodged against decisions made by a controller or an adjudicating officer under the IT Act (Sec 57 IT Act); the CAT’s decisions, indeed, may be challenged before the High Court (Sec 62 IT Act). And, moreover, it is not a cyber-court, ie, it is not an organ necessarily working online: it acts with powers equivalent to those of a civil court and, where appropriate, it may carry out its activity remotely, under the same requirements established for judicial acts to be performed online (Sec 58 Act), but nothing more: the word ‘cyber’ does not refer to the way the CAT acts, but to the scope of its competence.



On this point, as on so many others, the comparative picture offers very different and, above all, constantly evolving results.

149 The existence of genuine public or state online courts is, in some cases, the result of legislative action that has agreed to design them from scratch with these characteristics. Some of these will be discussed below. In most jurisdictions, however, an evolution or transition can be observed via the digitalization of the proceedings. ‘Traditional’ courts (offline courts, if the expression is accepted) are opening up to an increasingly complete handling of the proceedings through digital tools, which end up producing a result that is equivalent, at least externally, to an online court. The combination of e-filing, e-service and e-hearings results in neither litigants nor lawyers having to move to the courthouse. The evolution becomes more acute as all these tools are centralized through a platform capable of meeting appropriate security and authenticity requirements. The incorporation of tools – often based on artificial intelligence – that enable the generation of data that can be exploited – to better understand the reality of justice and litigation, on the one hand, and to design legislative policies and legal reforms, on the other – can close the transition. The seat of the court need not physically disappear, insofar as it is considered convenient to group judges and judicial officials in the same place, for reasons of public management. But it does disappear as the place where justice is dispensed, as that place will increasingly be the digital environment.

150 Some countries offer interesting examples of experiences that exemplify this transition process and, above all, show that progress affects different elements of proceedings: there is not a single way to make the transition into a clearer structure of online courts.

#### 11.1.1 Australia: the New South Wales Online Court

151 Australia offers one of the oldest examples of this phenomenon, through the so-called New South Wales Online Court, operational since 2005.<sup>174</sup> The terminology, of course, can be misleading. Indeed, the NSW government defines it on its website in the following terms: ‘Online court is an online forum that enables judicial officers and legal representatives in a case to exchange written messages about NSW Supreme, District or Local Court matters, instead of attending court to have the same exchange in person.’<sup>175</sup>

152 It can therefore be said that the online court does not exist as a specific judicial body, but that the online court is the expression used to describe the more or less virtual and

<sup>174</sup> *Practice Note SC Gen 12 – Supreme Court – online court Protocol* regulates the operation of the online court system within the Supreme Court in its version of 8 February de 2007 ([http://www.lawlink.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/e6574f94250a14d6ca2572ed000cecad?OpenDocument](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/e6574f94250a14d6ca2572ed000cecad?OpenDocument) accessed 24 September 2024). At the Local Court level the regulation is developed in *Practice Note Civ 1 of the Local Court of New South Wales* in its latest version approved on 3 June 2024 ([https://localcourt.nsw.gov.au/documents/practice-notes/Practice\\_Note\\_Civ\\_1\\_-\\_commencing\\_on\\_3.6.2024.pdf](https://localcourt.nsw.gov.au/documents/practice-notes/Practice_Note_Civ_1_-_commencing_on_3.6.2024.pdf) accessed 24 September 2024).

<sup>175</sup> NSW Government, ‘Online Court’ <https://courts.nsw.gov.au/going-to-court/online-services/online-court.html> accessed 24 September 2024.

electronic conduct of certain proceedings before the courts of that State. The aim of the online court is to replace face-to-face proceedings with online proceedings; hence it is probably more appropriate to speak of 'online proceeding' rather than of online court.

- 153 In addition, the New South Wales Online Court is limited in scope.
- 154 Firstly, not all proceedings can be supported by the online court. In the area of jurisdiction of the Supreme Court and the District Court, only some uncontested civil law matters are suitable to be completely developed under the scheme of online court. At Local Court level, it is only applied comprehensively in certain criminal cases.<sup>176</sup> In all other cases, the use of the online court, through the *JusticeLink* and *Online Registry* platforms,<sup>177</sup> is envisaged, but only as a basis for e-filing and communication of the parties with the court.<sup>178</sup>
- 155 The use of the online court, moreover, is not mandatory, but at the discretion of the court: in the Supreme Court, it is the judge, as a rule, who selects a case for online court and invites the legal representatives to participate (they can also suggest the use of the online court to the court).<sup>179</sup> At Local Court level, on the other hand, the procedure is triggered automatically if each of the parties is a registered user of the Online Registry Website and the proceeding enters an approved list.<sup>180</sup>
- 156 There are also some personal limits: before the Supreme Court the system is not available to litigants, self-represented litigants or non-parties.<sup>181</sup> It can only be used, therefore, by legal practitioners and judicial officers. In the Local Court, on the other hand, the use of the online court is generally open to all parties.<sup>182</sup>
- 157 Finally, the limits also affect the type of procedural activity to which the online court applies, as mentioned above. Practice Note Gen 12 (Sec 12) and Practice Note Civ 1 (Sec 42.1) state – and, thus, acknowledge – that 'online court is a virtual courtroom', ie, it is not intended to replace the physical seat of the court for all purposes, but primarily for oral proceedings and, above all, for channelling communications between legal practitioners, parties and the court. But it is excluded that it may be used 'for communications solely

<sup>176</sup> Preliminary committal matters for strictly indictable offences being prosecuted by the Office of the Director of Public Prosecutions at the Downing Centre.

<sup>177</sup> NSW Online Registry – Courts and Tribunals <https://onlineregistry.lawlink.nsw.gov.au/content/> accessed 24 September 2024.

<sup>178</sup> As established in the Electronic Transactions (ECM Courts) Order 2005 <https://legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2005-0710#statusinformation> accessed 24 September 2024.

<sup>179</sup> Sec 8 of Practice Note SC Gen 12. The NSW Online Registry platform enables to make a request for the court to process the case in that way; it also offers services for downloading forms, e-filing and access to information on pending cases in which the user is involved.

<sup>180</sup> Practice Note Civ 1, Sec 43.1.

<sup>181</sup> Practice Note SC Gen 12, Sec 5 and 7.

<sup>182</sup> Practice Note Civ 1, Sec 41.3.

between the representatives of parties' (Supreme Court)<sup>183</sup> or 'solely between the parties' (Local Court).<sup>184</sup>

- 158 This is a good example of the kind of evolution that many other countries have followed: the digitization of communications and of some hearings serves to change the landscape and to dematerialize proceedings, but falls short of a real revolution or disruption.

### 11.1.2 Singapore

- 159 Singapore is also often mentioned as one of the jurisdictions where justice is most digitized and which has made the most progress in having online courts.<sup>185</sup> Strictly speaking, it must be said that Singapore's courts are not online courts as such, as their dematerialization is not complete (nor does it seem to be necessary). However, it is true that court proceedings are heavily digitized and that judicial activity relies heavily on high-quality, specially designed platforms.
- 160 The most relevant platform, due to its general scope, is *eLitigation*,<sup>186</sup> which serves to support the development of civil cases in both the State Courts and the Supreme Court, to family cases in the Family Justice Courts and to criminal cases at the Supreme Court. Its main utility is e-filing of applications addressed to the courts.
- 161 Alongside this, there are more specific platforms for the management of certain types of proceedings or for the management of proceedings before certain courts. Access to these platforms for litigants in person is associated with being registered in the *Singpass* system, a kind of multipurpose digital identity.
- 162 *Community Justice and Tribunal Systems (CJTS)*,<sup>187</sup> for instance, offers support to Small Claims Tribunals, Employment Claims Tribunals, Community Dispute Resolution Tribunals and to the Protection from Harassment Court.
- 163 On family matters, two additional platforms are offered in addition to *eLitigation*. On the one hand, the *Integrated Family Application Management System (iFAMS)*,<sup>188</sup> which provides access to online services in matters related to maintenance, protection against family violence and protection for vulnerable adults (the platform enables the filing of applications, viewing case details, the submission of court documents or changing a court

<sup>183</sup> Practice Note SC Gen 12, Sec 12.

<sup>184</sup> Practice Note Civ 1, Sec 42.2.

<sup>185</sup> See O Y T Leong, 'Access to Justice and Innovative Court Solutions for Litigants-in-Person: The Singapore Experience' (2018) 5(1-2) International Journal of Online Dispute Resolution 9.

<sup>186</sup> SG Courts, 'eLitigation' <https://www.judiciary.gov.sg/services/elitigation> accessed 24 September 2024.

<sup>187</sup> SG Courts, 'Community Justice and Tribunals System (CJTS)' <https://www.judiciary.gov.sg/services/cjts> accessed 24 September 2024.

<sup>188</sup> SG Courts, 'Integrated Family Application Management System (iFAMS)' <https://www.judiciary.gov.sg/services/ifams> accessed 24 September 2024.

date, for instance). On an even more targeted basis *Divorce eService*<sup>189</sup> has been developed, that may be used to apply for divorce on the simplified track or to generate the documents needed to file a divorce.

- 164 In general, irrespective of the court, the proceedings are still associated with the physical seat of the court: preliminary hearings and hearings for most trials are face-to-face as a rule, notwithstanding the fact that the rules on videoconferencing may apply.<sup>190</sup> However, when measuring the relevance of this data to determine the degree of digitization of Singapore's justice system, the uniqueness of the country must be taken into account, especially in terms of its small size and the high concentration of its population, which undoubtedly reduces some of the requirements that are usually used to justify a greater generalization of remote hearings.
- 165 More specifically, although in principle only applicable within the Community Justice and Tribunal System, the possibility of launching an *eNegotiation* and *eMediation* tool,<sup>191</sup> which are both fully online, is particularly attractive. The *eNegotiation* tool offers up to five rounds of exchange, whereas the *eMediation* platform offers an online chat session with a court-appointed mediator. In both contexts, if an agreement is reached, the issuance of a consent order by the court can be requested electronically. This increased involvement of consensual resolution tools in the framework of state-run dispute resolution is, as noted above, one of the features marking the evolution towards new forms of e-Justice.
- 166 On a general level the enormous help offered to users and, above all, the high quality of the help for litigants in person is particularly significant: information on the legal dimension and on how to manage the various steps of the procedure (including what documents to bring, how to dress in case of a personal appearance or how to identify oneself in court) and the various functionalities of the platforms are offered in a clear and understandable way. At this point, of course, the end result is very similar to what a genuine online court would offer, as it allows the core of the procedural activity to be managed without having to go to the physical seat of the court. Although there is no online court, there is high quality online support for litigants in person, so that the outcome, in many respects, resembles that which would be generated by fully online litigation before a virtual court.
- 167 An observation of the situation in Singapore also shows the versatility and flexibility offered by the digital environment to provide courts and litigants with tailor-made tools, depending on the disputes. Online courts are often associated with procedural specialities, linked to both the subject matter and the digital environment of the process. The use of unique and *ad hoc* platforms is, of course, an example of their usefulness, especially if the

<sup>189</sup> SG Courts, 'Divorce eService' <https://www.judiciary.gov.sg/services/e-platforms/divorce-eservice> accessed 24 September 2024.

<sup>190</sup> 'Traditional' methods of serving the defendant with notice of the existence of the proceedings also have to be used in many cases.

<sup>191</sup> SG Courts, 'Settle a tribunal or protection from harassment dispute online: eNegotiation or eMediation' <https://www.judiciary.gov.sg/alternatives-to-trial/enegotiation-emediation> accessed 24 September 2024.

diversity of platforms does not lead to confusion thanks to the quality of the information. The transition towards greater digitization of the justice system seems to respond primarily to criteria of efficiency and, more generally, of pure modernity: it is a matter of adapting the justice system to the way in which economic and social life is increasingly developing.

### 11.1.3 Brazil and the Juízo 100% Digital

- 168 In Brazil the possibility of fully online proceedings has been open for almost two decades. In 2006, a regulation was passed at federal level, Law n. 11.419,<sup>192</sup> which aimed at a complete digitalization of judicial processes, both from the point of view of internal management within the court, as well as in terms of communication between the parties and with the court, which was implemented through platforms.<sup>193</sup> The most important is the so-called *Sistema Processo Judicial Eletrônico – Pje*.<sup>194</sup> Others have been developed subsequently, such as SNIPER, designed to increase the efficiency of asset searches for the purpose of enforcement.<sup>195</sup>
- 169 This full equivalence between ‘traditional’ and ‘digital’ procedural acts was maintained with the adoption in 2015 of the new Code of Civil Procedure. Its Art 193 contains a very simple and broadly effective general rule: ‘Procedural acts can be totally or partially digital, so that they can be produced, communicated, stored and validated by electronic means, in accordance with the law.’ This general rule, when the legislator considers it appropriate, is developed and detailed with regard to specific procedural activity (as is the case, eg, with electronic service).
- 170 During the pandemic, remote hearings, which were only an option, became mandatory. The *Conselho Nacional de Justiça* took the opportunity to deepen the digitization of justice through Resolution 345/2020,<sup>196</sup> which created a specific tool, the *Juízo 100% Digital* (‘100% Digital Trial’).
- 171 The *Juízo 100% Digital* is, first and foremost, an online procedure that has no specific regulation, but simply consists of all the procedural activities being carried out in electronic format via the Internet. It does not, therefore, create a different procedure from those regulated in the Code of Civil Procedure, but rather opts for the electronic format for all

<sup>192</sup> ‘Presidência da República – Casa Civil – Subchefia para Assuntos Jurídicos’ [https://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2006/lei/l11419.htm](https://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11419.htm) accessed 24 September 2024.

<sup>193</sup> A general depiction of the evolution of Brazil’s justice digitalization may be found in A Cabral, ‘Dispute Resolution and Technology in Brazil: Artificial Intelligence, ODR and Online Courts’ (2024) 14(2) *International Journal of Procedural Law*.

<sup>194</sup> Introduced by Resolution No 185 of 18 December 2013 of the *Conselho Nacional de Justiça* (the National Justice Council, with wide competences in this field).

<sup>195</sup> Acronym for *Sistema Nacional de Investigação Patrimonial e Recuperação de Ativos* (National Asset Investigation and Recovery System, ‘Sniper’ <https://www.cnj.jus.br/tecnologia-da-informacao-e-comunicacao/justica-4-0/sniper/> accessed 24 September 2024).

<sup>196</sup> Available at <https://atos.cnj.jus.br/atos/detalhar/3512> (accessed 24 September 2024) as amended by resolutions No 378 of 8 March 2021 and No 481 of 22 November 2022.

those that would also admit a face-to-face version. It is specifically specified that hearings will be held ‘exclusively’ by videoconference<sup>197</sup> and that any interaction between the court and the parties, outside the procedural activity in the strict sense of the word, will also be digital: thus, the courts’ attention to the public will be non-face-to-face (it will be done by telephone, e-mail, videocalls, or digital applications, such as the *Balcão Virtual*, a kind of kiosk that allows access to all the elements of a court file<sup>198</sup>); the attention of judges to lawyers will be developed in the same way;<sup>199</sup> it is clarified, however, that online attention does not mean 24/7 attention, since the opening hours for the public will have to be respected.

- 172 Beyond the foregoing – which is already a lot – the resolution of the *Conselho Nacional de Justiça* is interesting because it allows the creation of totally virtual judicial units, which assume beforehand that all their proceedings will be handled as *Juízo 100% Digital*. In principle, the choice of *Juízo 100% Digital* is optional, it cannot be imposed: it must be accepted by the parties; moreover, it can be the subject of a prior procedural contract.<sup>200</sup> However, in courts with several divisions, it is possible to allocate the cases in dispute in such a way that those cases in which the parties have opted for the digital process are attributed to the judicial units that have opted for this modality. These judicial units, therefore, would be the embryo of true online courts, with the singularity that they ‘replicate’ in virtual format a way of administering justice that is designed for the physical world and that they continue to have a defined territorial demarcation, which remains unchanged.<sup>201</sup>
- 173 In many ways, Brazil is a counterpoint to Singapore: a very large and populous country, but also very unequal and with a genuine problem of access to justice. However, digitization has also become a hallmark of its judicial system. Resolution 345/2020 stresses in its recitals that the digitalization of proceedings promotes an increase in the speed and efficiency of justice. But it can also be seen as an imperative to compensate for geographical and socio-economic gaps, and thus as a tool to improve access to justice – and this is also pointed out in the first recital of the resolution.
- 174 In addition to the above, the situation in Brazil is also interesting for the way in which the use of AI in the service of justice is managed. Since 2020, another resolution of the *Conselho Nacional de Justiça*, Resolution 332/2020 of 21 August, adopts a fairly permissive and decentralized approach on this point, which recognizes the initiative of the courts themselves to develop their own AI tools to support their tasks, while subjecting them to certain requirements or safeguards.<sup>202</sup> Foremost among these are, of course, respect for

<sup>197</sup> Art 5 of Resolution 345/2020.

<sup>198</sup> Art 4 of Resolution 345/2020.

<sup>199</sup> Art 6 of Resolution 345/2020.

<sup>200</sup> Art 3 and 3A of Resolution 345/2020.

<sup>201</sup> Art 2 of Resolution 345/2020.

<sup>202</sup> Available at <https://atos.cnj.jus.br/atos/detalhar/3429> accessed 24 September 2024.



fundamental rights,<sup>203</sup> data security and protection<sup>204</sup> and non-discrimination, which includes the duty to discontinue the use of an AI system when it becomes apparent that it is biased and that the bias cannot be corrected.<sup>205</sup> Transparency is also ensured, which includes, inter alia, documentation of identified risks, the possibility to identify the reason, in case of harm caused by the AI tool, and the provision of satisfactory and verifiable explanation by a human authority in relation to any proposed decision presented by the AI model.<sup>206</sup> The latter is associated with the requirement for human judicial oversight in those systems that allow for the production of judicial decisions (Art 19).<sup>207</sup>

#### 11.1.4 England and Wales: The Online Civil Money Claims

- 175 In the United Kingdom the creation of online courts has been the subject of political and academic discussion for some time now, with plans and studies taking place over the years.<sup>208</sup> At the present time, the approach seems to be more modest: instead of creating a genuine online court, the government decided to adopt an approach through which it would introduce digitized forms of process for procedure in the County Court.
- 176 The result, for the time being, has materialized in the Online Civil Money Claims (OCMC) Pilot, regulated in Practice Direction 51R<sup>209</sup> and applicable between 7 August 2017 and 1 October 2025. The aim is to experiment, on a test basis, an online process with a view to extracting information and experience to move towards wider digitization.<sup>210</sup> To that end, a new Online Procedure Rule Committee (an advisory non-departmental public body) was set up in 2022 to create rules governing the practice and procedure for specific types of

<sup>203</sup> Art 4 of Resolution 332/2020.

<sup>204</sup> Art 13–16 of Resolution 332/2020.

<sup>205</sup> Art 7 of Resolution 332/2020.

<sup>206</sup> Art 8 of Resolution 332/2020.

<sup>207</sup> Art 19 of Resolution 332/2020.

<sup>208</sup> For a comprehensive overview, C Hodges, 'Proposed Modernization of Courts in England & Wales: IT and the Online Court' (2016) 6(1) *International Journal of Procedural Law* 149; R Assy, 'Briggs's Online Court and the Need for a Paradigm Shift' (2017) 36(1) *Civil Justice Quarterly* 93; M Briggs, 'The Civil Online Court in England' in R Assy and A Higgins (ed), *Principles, Procedure, and Justice: Essays in honour of Adrian Zuckerman* (Oxford UP 2020) 135. A critical approach can be read in the report '*Online court services: Delivering a more efficient digital justice system*' (2023) The Law Society (<https://www.lawsociety.org.uk/topics/research/online-court-services> accessed 24 September 2024), according to which the way the government is carrying out the digitisation of the courts is 'adding to the delays plaguing the civil court system and undermining people's access to justice when they need it most'.

<sup>209</sup> 'Practice Direction 51R – Online Civil Money Claims Pilot' <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot> accessed 24 September 2024.

<sup>210</sup> And is linked, to that extent, with another pilot scheme, the Electronic Working, established in Practice Direction 51O to operate from 16 November 2015 to 1 November 2024, as a platform to enable parties to issue proceedings and file documents online 24 hours a day every day all year round (<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51o-the-electronic-working-pilot-scheme> accessed 24 September 2024).



online court and tribunal proceedings for civil claims, family disputes and disputes in the tribunals justice system.<sup>211</sup> The Committee has not produced tangible results so far.

- 177 The OCMC applies with the support of a specific platform, the OCMC Website, which is to be used to implement electronic communication. A claim is suitable to be dealt with under the OCMC if some conditions are met:<sup>212</sup> in short – nuances and exceptions are foreseen – monetary claims have to be involved, not for personal injury, and not exceeding the amount of GBP 25,000 or GBP 10,000 (including interest), depending on whether the parties will be assisted by a legal representative or not.
- 178 Practice Direction 51R regulates in great detail a procedure that is very special and that only sporadically and residually refers to the Civil Procedure Rules. Despite its name, the procedure that has been designed is not completely dematerialized (ie, it is not 100% online): rather, the regulation focuses on channelling the parties' communication with each other and with the court electronically (e-filing and e-service, although in some cases and with regard to some litigants without digital skills or equipment, the means of communication will continue to be traditional mail).
- 179 The procedure is only fully conducted in accordance with the provisions of the OCMC when a judgment on admission, a settlement agreement or a default judgment is reached, ie, when there is a consensual agreement or when the defendant's opposition is not openly expressed. This explains why the procedure is not normally under the control or direction of a judge but in the hands of a 'legal adviser'.<sup>213</sup> Its essence, therefore, is to channel communication between the parties that can lead to a solution that settles the dispute without the need for a trial on the merits. Thus, the process 'derails' and falls outside the OCMC track and is transferred to an ordinary court to follow the ordinary course when the parties do not reach an agreement (unless they are legally represented, in which case a hearing will be held before the same court, but it will not be necessarily a remote one).
- 180 In view of the description above, it could be said that it is not a particularly significant model. However, at least from an outsider's point of view, there are several interesting elements of the OCMC that allow it to be presented as an example of a transition towards the notion of an online court, ie, as something more than a traditional court carrying out its ordinary activity with the support of advanced IT tools.
- 181 Firstly, the design of an *ad hoc* procedure should be highlighted: the English legislator has considered that a generic 'functional equivalence clause', such as those seen in other

<sup>211</sup> 'Latest from the Online Procedure Rule Committee' <https://www.gov.uk/government/organisations/online-procedure-rule-committee> accessed 24 September 2024.

<sup>212</sup> Sec 2.1(3) of Practice Direction 51R.

<sup>213</sup> A 'legal adviser' is a court officer assigned to the County Court who is a barrister, a solicitor, a Fellow of the Chartered Institute of Legal Executives, or a CILEX lawyer, who may exercise the jurisdiction of the County Court with regard to the matters entrusted to them, including the management of OCMC.

systems analysed, is not sufficient. It is assumed, therefore, that online courts need tailor-made online proceedings.

- 182 Secondly, and closely related to the first point, it should be noted that the regulation of the procedure in Practice Direction 51R is hyper-detailed – one might say to the point of exhaustion –: an infinite number of scenarios are identified and meticulously regulated, combining the possible reactions of the defendant and the counter-reactions of the plaintiff in such a way that no hypothesis is left without a solution. It seems to have been conceived not so much by a traditional procedural legislator, but by a computer programmer who describes in the form of a provision what they themselves imagine as windows, screens and boxes in an application and on a platform.
- 183 A language is also used that is not excessively technical or legal (it is more user-friendly). However, precisely because of what has just been pointed out – detail and extension of the rules that make up Practice Direction 51R –, it is only really manageable for citizens if they access its content in a mediated manner, through the website and the platform (if the addressees of the OCMC had to read Practice Direction 51R directly, they would not have the feeling that their Access to justice was being improved, of course).<sup>214</sup> This changes the focus of the legislative technique, which is not necessarily thinking of a citizen who reads the law, but of a citizen who uses the application and the website designed by the law to access the relevant information and navigate the procedure autonomously and securely.
- 184 Finally, it is important to underline the approach of the procedure towards consensual conflict resolution, which is a feature closely associated with the notion of ODR and which allows for a procedural management that relieves judges of work, as it can be entrusted to other persons (in this case, the ‘legal advisers’).
- 185 In addition to the OCMC, England and Wales have very recently dealt with the use of AI in courts, following a soft law approach. On 12 December 2023, the Courts and Tribunals Judiciary published a Judicial Guidance document, entitled *Guidance for responsible use of AI in Courts and Tribunals*.<sup>215</sup> The document aims to assist judicial office holders in relation to the use of AI. On the one hand, it identifies risks and issues, and provides suggestions for minimizing them. On the other hand, the document includes potential (admissible) uses, recalling the judiciary’s overarching obligation to protect the integrity of the administration of justice.
- 186 The guidance is focused on seven main areas of recommendation: 1. Understand AI and its applications; 2. Uphold confidentiality and privacy; 3. Ensure accountability and accuracy; 4. Be aware of bias; 5. Maintain security (eg, using work devices and work email

<sup>214</sup> This can be seen by comparing the impression produced by reading the Practice Direction 51R with surfing in ‘Make a court claim for money’ <https://www.gov.uk/make-court-claim-for-money/print> accessed 24 September 2024.

<sup>215</sup> ‘Artificial Intelligence (AI) – Judicial Guidance’ <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/> accessed 24 September 2024.

address to use AI tools); 6. Take Responsibility. [The Guidance reminds judicial office holders that they are personally responsible for material produced in their name, even if an AI systems was used. But it also acknowledges that generative AI could be ‘a potentially useful secondary tool’ in judges’ preparatory work to produce a judgment]; 7. Be aware that court/tribunal users may have used AI tools (some indications that work may have been produced by AI are included)

- 187 In addition, indications are provided in distinguishing potentially useful tasks and AI performed tasks that are not recommended. Among the first ones (potentially useful), the following are mentioned: summarising large bodies of text (taking care to ensure that the summary is accurate), writing presentations, and composing emails and memoranda. The Guidance, however, does not recommend using AI tools to carry out legal research or legal analysis.
- 188 The main goal, therefore, is to guide ‘institutional users’ of AI systems and not to establish clear rules. It is probably just a first step, where the focus on the rights and safeguards of litigants is secondary: they are to be considered in an indirect manner, as a consequence of the recommendations and the rationale lying behind them.

#### 11.1.5 Spain and its ‘Data-Oriented Justice’ Programme

- 189 A final example of these various digital transition formulas is offered by the Spanish judicial system following the reform carried out in 2023 to further digitize justice (with the Act regulating the use of ICT in the justice system,<sup>216</sup> in force since 20 March 2024. In Spain, e-filing and e-service have been operational for almost two decades and have been mandatory since 2015, with the aim of streamlining case management and eliminating paper from the process – although in many cases it was and still is necessary to serve the defendant with a paper copy of the statement of claim and supporting documents. During the pandemic, moreover, a provisional regulation was approved that encouraged the remote holding of oral hearings<sup>217</sup> and which has been maintained, with some changes, after the reform of 2023, which aims to dematerialize the judicial system as much as possible. With the new regulation, it is in the hands of the court to decide whether the preliminary hearing and the trial are to be held in person or virtually (Arts 414.2 and 432.1 of the Spanish Code of Civil Procedure) and the right is recognized for parties, witnesses and experts to testify by videoconference if they reside outside the place where the trial is held, unless the judge justifiably requests their presence (Arts 129bis and 137 bis of the

<sup>216</sup> *Real Decreto-ley 6/2023, de 19 de diciembre, por el que se aprueban medidas urgentes para la ejecución del Plan de Recuperación, Transformación y Resiliencia en materia de servicio público de justicia, función pública, régimen local y mecenazgo*, Boletín Oficial del Estado 20 December 2023 <https://www.boe.es/boe/dias/2023/12/20/> accessed 24 September 2024. On the architecture of the system, see P Peiteado Mariscal, ‘Los nuevos procesos digitalizados’ in Banacloche Palao and Gascón Inchausti (n 123) 53.

<sup>217</sup> *Ley 3/2020, de 18 de septiembre, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia*, Boletín Oficial del Estado 20 September 2020 <https://www.boe.es/buscar/act.php?id=BOE-A-2020-10923> accessed 24 September 2024.

Spanish Code of Civil Procedure);<sup>218</sup> in many cases, therefore, it is possible for proceedings to be conducted entirely online, even if the court remains offline and even if, in fact, that same court may be conducting in parallel other proceedings in which all or some of the hearings are being or have been held in person. In this respect, therefore, nothing distinguishes the Spanish evolution from what is taking place or will take place in many other jurisdictions in the coming years. However, the reform of the Spanish system in 2023 is interesting for two additional reasons, which have a certain disruptive impact on progress in the digitization of justice.

- 190 Firstly, the notion of ‘data-oriented justice’ is openly embraced: the tools and platforms that are developed to support the e-management of the case must be designed to be able to extract reusable data from them. According to Art 35 of the Act, the systems used by the administration of justice must ensure the input, incorporation and processing of information in the form of metadata, in accordance with common schemas, and in common and interoperable data models that enable, simplify and support various purposes. Among them, we can now mention the search and analysis of data and documents for jurisdictional, organizational and statistical purposes or the publication of information on open data portals (in the service, thus, of dispute prevention). But this data collection is also intended to be used for the production of automated, assisted and proactive judicial and procedural acts, especially for the application of artificial intelligence techniques in support of the judicial function, the conduct of proceedings and the definition and implementation of public policies relating to the administration of justice. This legal option clearly shows that the possibilities offered by e-justice go beyond the simple electronic conduct of proceedings.
- 191 The new Spanish regulation is equally interesting, with regard to the above, because it expressly allows for the use of Artificial Intelligence tools, aimed at automating as far as possible the conduct of proceedings and assisting judges and prosecutors in their decision-making tasks, while at the same time imposing certain limits. In this vein, the new Act has expressly admitted making recourse to AI technology in support of a swifter development of court proceedings, distinguishing between ‘automated’, ‘proactive’ and ‘assisted’ activities.
- 192 (a) ‘Automated’ activities are defined as procedural activities carried out by a computer system without the need for human intervention.<sup>219</sup> They are foreseen mostly for simple tasks related to the management of electronic court files (eg, numbering or paging documents, generating copies or certificates, declaring that a decision is final because it has not been appealed within the legal time limit).
- 193 (b) Automated actions are labelled as ‘proactive’ when they are self-initiated by the system, without human intervention, taking advantage of the information in an electronic

<sup>218</sup> On this, see Inchausti, ‘Régimen jurídico de las actuaciones judiciales por videoconferencia’ (n 123).

<sup>219</sup> Art 56 of the Spanish Act.

judicial file for a specific purpose,<sup>220</sup> such as generating a notice that is automatically served on a party.

194 Automated and proactive activities aim to optimize the internal management of the court's more bureaucratic tasks, although even the most 'innocent' administrative task may end up having an impact on the parties. Therefore, the Act imposes three requirements on these automated and proactive activities:

- They shall all be identifiable as such, traceable and justifiable.
- It shall be possible to carry out the same actions in a non-automated form.
- It shall be possible to disable, revert or render ineffective the automated actions that have already taken place.

195 These provisions reflect the general principles of 'human supervision' or 'human in command': AI-generated activities need to be traceable for the parties, in order to allow them to react against them and, where appropriate, to have them revoked or replaced in a non-automated manner.

196 (c) The third category are 'assisted' procedural activities, representing an additional step: the system generates a full or partial draft of a complex data-driven document, which may be produced by algorithms, and may form the basis or support for a court decision.<sup>221</sup> The description is very broad and may encompass, among other examples, the drafting of an order for payment in order for payment proceedings or of a judgment upholding the claim in a simple eviction case. Most decisions could, at least in theory, undergo this first level of AI-generated draft, if the system has the data needed by the algorithm to produce it (something that should be possible in a data-oriented justice system, where the documents in all electronic court files are able to provide this sort of additional information).

197 As the qualitative impact is bigger, the safeguards imposed are larger:

- These drafts shall not be generated in a proactive manner, even if this could be technically possible: the draft will only be generated at the will of the user.
- The draft, additionally, has to be fully editable, ie, they user shall be able to modify it freely and completely.
- In no case shall the draft in itself constitute a judicial decision, but shall require validation by the competent authority.

198 Here again the 'human oversight' and 'human on command' approach prevails, as a clear policy choice by the Spanish lawmaker. These provisions do not eliminate completely the risk – perhaps the temptation – that the competent authority might tend to validate algorithmically generated drafts without further analysis, but at least they link decisions to

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<sup>220</sup> Art 56 of the Spanish Act.

<sup>221</sup> Art 57 of the Spanish Act.

specific individuals, not to ‘computer systems’ for which no one would ultimately be held responsible. It is part of the (legal and ethical) responsibility of ‘users’ to rigorously review drafts before validating them. And it is imperative to avoid that something similar to the examples of lawyers sanctioned for providing documents produced with generative Artificial Intelligence incorporating non-existent decisions could happen.

### 11.2 More ‘Advanced’ Online Courts

199 The examples analysed so far show that there is no single way to move towards a deeper digitization of justice and that there are many different elements to be taken into account until a point is reached where it is no longer just a matter of doing digitally what has been done non-digitally up to now, going beyond the mantra of functional equivalence. In the following, the most established experiences of ‘online courts’ will be addressed in order to verify to what extent the advantages described in an abstract manner may be confirmed in reality. What is interesting about these experiences is precisely that they assume a different way of dealing with court proceedings because they have to be conducted digitally: this new approach opens the way to establishing genuine online courts and to conducting genuine online proceedings. To this end, the analysis will focus on the Chinese Internet courts and on the Civil Resolution Tribunal of the Canadian British Columbia.

#### 11.2.1 China’s Internet Courts

- 200 China boasts of being the first country to have created internet courts. The interesting thing about the Chinese case is that it was the subject matter of the litigation (the internet) that foreshadowed the court. Indeed, the creation of online courts in China has its origins in the need to resolve disputes arising on the internet (if one prefers, arising from legal relations entered into on the Internet or from damages arising from activity carried out on the Internet). The uniqueness of the disputes and evidence has allowed the proceedings to be online and the courts themselves also to move online.<sup>222</sup>
- 201 The first online court was established in Hangzhou:<sup>223</sup> it was set up in June 2017. It was followed in September 2018 by the Beijing and Guangzhou internet courts. In other places, special courts have not been created, although specialized sections or benches have been set up for this type of case.<sup>224</sup>
- 202 Focusing on the Beijing Internet Court – for which there is more information available in English – it is possible to identify certain elements that are characteristic of these courts.

<sup>222</sup> See X Fang, ‘Recent Developments of Internet Courts in China’ (2018) 5(1-2) *International Journal of Online Dispute Resolution* 49; Z Cao, ‘Evolution of Online Courts in China: Situation and Challenges’ (2021) 11(2) *International Journal of Procedural Law* 300. The previous situation is well described in Juanjuan (n 138).

<sup>223</sup> The city where one of the internet giants, Alibaba, is based.

<sup>224</sup> Such as Changning Basic People’s Court in Shanghai Municipality; they may also be found in Tianjin, Shenzhen, Wuhan, and Chengdu.

- 203 (a) An internet-centric scope of jurisdiction. Internet Courts are so not so much because they operate on the internet, but because their objective is to solve disputes related to the internet, in a broad sense: they are therefore presented as courts specialized in litigation whose common element is their relationship with the internet and, in an increasingly broader sense, with the entire sector linked to ICT developments.
- 204 The Beijing Internet Court – and the other two courts appear to have an equivalent scope – has jurisdiction to hear, under the criteria of territorial jurisdiction that would refer the case to the Beijing courts, the following categories of matters:<sup>225</sup>
- (1) Disputes arising from the conclusion or performance of online shopping contracts through e-commerce platforms;
  - (2) Online service contract disputes where the conclusion and performance are completed on the Internet;
  - (3) Disputes over financial loan contracts and small loan contracts where the conclusion and performance are completed on the Internet;
  - (4) Disputes over the ownership of copyright or neighboring rights of works published on the Internet for the first time;
  - (5) Disputes arising from the infringement of copyright or neighboring rights on the Internet of works published or communicated online;
  - (6) Disputes over Internet domain name ownership, infringement and contracts;
  - (7) Disputes arising from the infringement of the personal rights, property rights or other civil rights of others on the Internet;
  - (8) Product liability disputes arising from the infringement of the personal or property rights of others due to the defects of products purchased through an e-commerce platform;
  - (9) Internet public interest litigations filed by the procuratorial organ;
  - (10) Administrative disputes arising from administrative actions taken by administrative organs such as Internet information service management, Internet commodity trading and relevant service management;
  - (11) Other Internet civil and administrative cases designated by the people's court at a higher level.
- 205 This is admittedly limited, although the possible type of litigation is becoming increasingly broad and includes e-commerce (sales and purchases, defective products), internet services (such as online music or video streaming, but also internet loans), copyright in works that are published or distributed on the Internet, domain names and cyber torts, among others. This is allowing these courts to be among the first to resolve particularly novel issues,<sup>226</sup> which also include the world of AI: thus, in February 2024 the Guangzhou

<sup>225</sup> See the official information provided by the court itself in its website: [https://english.bjinternetcourt.gov.cn/2019-03/25/c\\_23.htm](https://english.bjinternetcourt.gov.cn/2019-03/25/c_23.htm) accessed 3 October 2024.

<sup>226</sup> A document prepared by the Beijing Internet Court published in 2023 and titled 'Beijing Internet Court Top Ten Typical Cases in Five Categories' identifies five main areas: digital copyright, digital consumption,



Internet Court ruled on the possibility that a platform offering Generative AI may have infringed copyright, not only by using data and images from a content creator, but also by offering results very similar to those offered by the latter.<sup>227</sup> In fact, it is not hidden that the creation of these courts pursues to a large extent a strategic political goal, ‘becoming a powerful country in science and technology, as well as law-based governance of cyberspace’.<sup>228</sup>

- 206 (b) A clear state presence: they are not presented as something different or alternative to state justice, but rather as an improvement, an evolution or an adaptation of state justice to the needs of the new times. It is clear at all times that these are courts that are part of the Chinese judicial organization, composed of judges and staff of the ordinary Chinese judicial system.<sup>229</sup> As they operate only at first instance, they are integrated into the organizational pyramid of Chinese courts for appeal purposes.
- 207 (c) An adapted procedural regime: the creation of internet courts has been accompanied by the adoption of special procedural rules, designed to meet the new procedural needs arising from the dematerialization of the process.
- 208 Initially, the Supreme People’s Court (SPC) had accompanied the creation of the Internet courts with three sets of online litigation rules, applicable exclusively to these three courts.
- 209 The fundamental one was the ‘Regulation on Several Issues Concerning the Cases Adjudication by Internet Courts’ promulgated in September 2018, applicable to the three Internet Courts in Hangzhou, Beijing and Guangzhou. They were followed by the ‘Implementation Measures of the Pilot Reform on Separation between Complicated and Simple Cases in Civil Proceedings’ promulgated in January 2020, applicable to online case adjudication, electronic document submission and electronic service of specific courts; and the ‘Notice on Strengthening and Regulating Online Litigation during the Prevention and Control of COVID-19 Epidemic’ promulgated in April 2020, applicable to cases where courts could not conduct court hearings offline when the epidemic was severe.

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platform governance, data algorithm, and online-related rights protection (available at [https://english.bjinternetcourt.gov.cn/2023-12/13/c\\_677.htm](https://english.bjinternetcourt.gov.cn/2023-12/13/c_677.htm) accessed 3 October 2024).

<sup>227</sup> Legal operators in the sector commented extensively on the judgment, given the novel nature of the litigation and its potential value as a global leading case. See, among others, the information offered in M Nichols, ‘Guangzhou court finds that generative AI infringes copyright’ (2024) *The Trademark Lawyer* <https://trademarklawyermagazine.com/guangzhou-court-finds-that-generative-ai-infringes-copyright/> or in S Hann Chua, T Ke and A Roberts, ‘China: First AI output copyright infringement case’ (2024) *Linklaters* <https://techinsights.linklaters.com/post/102j4cb/china-first-ai-output-copyright-infringement-case> accessed 3 October 2024.

<sup>228</sup> [https://english.bjinternetcourt.gov.cn/2019-03/26/c\\_26.htm](https://english.bjinternetcourt.gov.cn/2019-03/26/c_26.htm) accessed 3 October 2024

<sup>229</sup> It is enough to see the court’s web presentation of its judges to realize the will to make clear their nature as State courts. The short video presentation available on [https://english.bjinternetcourt.gov.cn/2020-12/14/c\\_321.htm](https://english.bjinternetcourt.gov.cn/2020-12/14/c_321.htm) (accessed 3 October 2024) also insists on making the national emblem visible on the platform for the development of the videoconferences. According to Art 24 of the Online Litigation Rules, ‘[t]he online courtroom shall present the national emblem in a conspicuous position, and present the judges and table signs within the reasonable area of the screen.’

- 210 However, on 16 June 2021 the SPC promulgated a new set of procedural rules, the ‘Online Litigation Rules for People’s Courts’ (‘Online Litigation Rules’), intended to be applied not only by Internet Courts, but more generally by any court before which the parties opt for full or partial electronic development of the proceedings.
- 211 The Online Litigation Rules aim at embedding the online litigation technology into litigation proceedings in China.
- 212 In the case of Internet Courts, their use is self-evident and highlights the clear move towards an ODR system, as all procedural activity is articulated through a multifunctional platform that incorporates multiple technological developments. Blockchain technology is used to make the platform more reliable: multi-party supervision, non-tampering, and easy traceability ensure the protection of trial data and the certification of electronic evidence.
- 213 Several elements of this electronic procedure are worth highlighting:
- 214 (i) *The consensual settlement attempt as a stage of the process.* As in most ODR mechanisms, the legal regulation and the platform incorporate the attempt at conciliation as a stage of the procedure; if this attempt is unsuccessful, then the platform activates the more ordinary dispute resolution stage.
- 215 This initial mediation stage is highly developed and integrated into the structure of the process.<sup>230</sup>
- 216 Parties concerned file a request, which is assessed by a (human) judge. If the parties agree to mediate, the mediation system will be triggered. The first steps deal with the appointment and selection of the persons involved in the process: even if it sounds illogical, the trial team (professional judges) will be first appointed, according to the relevant provisions to distribute and allocate cases; the trial team will select the mediatorial judge, again pursuant to the relevant provisions. The mediatorial judge, along with the parties, will select the mediation organization which, in turn, will appoint the mediator. In this way, mediation is clearly under judicial control and its incorporation into the process is more justified. Once mediation has started, it can have two outcomes.
- 217 If mediation is successful, the parties and/or the mediator will inform the mediatorial judge of the result. If the judge confirms the result, a draft agreement will be created and, once signed by the parties, they will submit an application to withdraw the lawsuit.

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<sup>230</sup> See the description in Beijing Internet Court, ‘Mediation procedures’ [https://english.bjinternetcourt.gov.cn/2019-05/09/c\\_149.htm](https://english.bjinternetcourt.gov.cn/2019-05/09/c_149.htm) accessed 3 October 2024.

- 218 If mediation is unsuccessful, the mediatorial judge will be as well informed of the outcome and, if he/she confirms the result, the case will be referred to the judicial system to follow the ordinary trial procedures.
- 219 (ii) The possibility that the *hearing* of the parties does not take place in a concentrated (synchronous) manner, but *asynchronously*.
- 220 Pursuant to Art 14, if all parties agree to exchange evidence online asynchronously, the court will grant them a period where they shall log into the litigation platform, review and present examination opinions on the evidentiary materials that have been uploaded to the litigation platform.
- 221 But, more significantly, Art 20 must be taken into account: instead of holding an online hearing, the parties may record their oral statements and upload the video to the litigation platform within a designated period. This possibility, however, only applies for small claims and summary civil cases, if they meet three conditions: (1) all parties have difficulty participating in online trial simultaneously; (2) all parties agree; and (3) there is no dispute among the parties over the main facts and evidence of the case. In fact, the rule is rather narrower in scope, as it is intended to allow for asynchronous trials in which only legal issues are discussed, but in which adversarial taking of evidence is not required. The important thing is that this rule also assumes that the adversarial taking of evidence, which is necessary for it to be reliable, requires – at least for the time being – the simultaneous interaction of the parties – its synchronous character, to put it in the new terminology.
- 222 (iii) A strong support for *Artificial Intelligence tools* when developing many procedural acts;<sup>231</sup>
- 223 On the one hand, for the identification of the parties and the signing of documents: the parties can identify themselves through facial recognition, for which they can simply use the camera of their mobile phone; if a document needs to be signed, an online electronic signature system allows for this, through the generation of QR codes.
- 224 On the other hand, for the drafting of documents. A system of pleading automatic generation helps the parties to write their pleadings, by means of structured questions designed according to the type of cases. A voice recognition in real time system transcribes automatically oral activities and generates court records. And, especially, an AI assistant is able to automatically generate the first draft of the judgment, ‘according to the transcript of the trial and the rules of the case’.

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<sup>231</sup> According to the information provided by the BIC itself on its webpage [https://english.bjinternetcourt.gov.cn/2019-03/26/c\\_26.htm](https://english.bjinternetcourt.gov.cn/2019-03/26/c_26.htm) accessed 3 October 2024. The risks have been warned since the very beginning; see, for instance, Fang (n 222) 57.

- 225 Finally – and always according to the BIC website – the platform offers a ‘Litigation Risk Assessment’, that is, an ‘independent’ assessment of the probability of winning a lawsuit based on the basic facts entered by the parties.
- 226 Some conclusions: Experience is still recent, and information and data are still scarce, but it seems clear that the Internet Courts that China is promoting fit quite clearly into the notion of Online Courts and show where civil justice may evolve in the future:
- 227 The court is dematerialized as a place for the parties and for the conduct of the proceedings: they do not need to go to a specific venue in order for the process to be fully developed. However, the court as such still has a physical seat, where the judges and other court staff are located. Nor does the ‘human materiality’ of the court disappear, whose members are not replaced by machines – even if they are assisted by them. Moreover, although the court is dematerialized for the parties, it is still assigned a territorial scope of jurisdiction: internet courts still have specific territorial demarcations and litigation has to be linked to those demarcations. It is clear that this may change in the future, but it is also clear that a hypothetical ubiquity of the court does not define what an online court should be.
- 228 The procedure, as a tool, is becoming more technological and adapting to the reality of the disputes it has to resolve, which have a clear technological background. However, the evolution in Chinese law also shows that digitalization, initially promoted for these courts, can be generalized and applied to any dispute.
- 229 The prior attempt at mediation or conciliation is more naturally integrated into the structure of the procedure. It is not a matter of going to mediation first, in a place and before a structure other than the court, which can be approached later, if mediation fails. The process starts before the court, only once and in only one (electronic) venue, so that the attempt at mediation becomes a step in the process, not a prerequisite for it –which is often perceived as an obstacle that slows access to justice. In addition, the development of the entire process online facilitates the interrelation of the court with the institution managing the mediation and with the mediator.
- 230 The use of advanced technology and AI tools aims to promote procedural efficiency and, undoubtedly, data-driven justice, allowing the information generated in the procedure to be used for strategic and legislative policy purposes. In any case, the cautions regarding the advantages and disadvantages of AI in the field of justice make as much sense in these courts as in offline courts.
- 231 These courts, finally, are clear proof that digitizing justice does not necessarily mean privatizing it: Chinese internet courts are openly state courts, in which the presence of state power is evident and constant. Instead, they have adapted the forms of manifestation of public power to the online context.

### 11.2.2 The Canadian Experience and the British Columbia Civil Resolution Tribunal

232 Online courts also seem to have become an everyday reality in Canada. The most paradigmatic example – although not the only one<sup>232</sup> – is provided by the British Columbia Civil Resolution Tribunal.<sup>233</sup> It was created in 2012 through the Civil Resolution Tribunal Act<sup>234</sup> and started operating in 2016, becoming Canada's first online court. According to the data provided by the Tribunal on its website, by 5 September 2024, the Tribunal had rendered more than 9000 decisions (the vast majority of which were final decisions), which is indicative of its clear establishment in the dispute resolution landscape in this Canadian province.

233 Unlike what has just been seen with the Chinese Internet Courts, the Civil Resolution Tribunal (CRT, hereinafter) is not a specialized body for resolving disputes related to the Internet or new technologies. Rather, it offers itself as a mechanism to improve access to justice in disputes that, for the most part, take place offline.

234 More precisely, the Civil Resolution Tribunal has the authority to resolve most of the following claims:<sup>235</sup>

- Vehicle accident claims including entitlement to accident benefits and Insurance Corporation of British Columbia's assessment of responsibility for an accident.
- Small claims up to 5,000 Canadian dollars.<sup>236</sup>
- Strata property claims of any amount.<sup>237</sup>
- Claims of any amount about societies incorporated in British Columbia, and housing and community service cooperative associations.
- Intimate image protection claims.

235 It should be noted that the CRT is not a real judicial body (it is not a court), but something different, an administrative body specialized in dispute resolution (a tribunal), composed of persons who are not judges, but are appointed by the Lieutenant Governor of British Columbia.<sup>238</sup> In fact, the tribunal's decisions are subject to 'judicial review'<sup>239</sup> and not to a genuine system of appeal. This is a difference that may be relevant from the perspective

<sup>232</sup> Vermeys and Roberge (n 160).

<sup>233</sup> S Salter and D Thompson, 'Public-centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 McGill Journal of Dispute Resolution 113.

<sup>234</sup> Civil Resolution Tribunal Act [https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025\\_01](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025_01) accessed 5 September 2024. The Act is developed in the Tribunal's Rules of Practice (<https://civilresolutionbc.ca/wp-content/uploads/CRT-Standard-Rules-in-force-February-20-2024.pdf> accessed 5 September 2024).

<sup>235</sup> See Sec 118–137 CRT Act.

<sup>236</sup> According to the information provided by the CRT on its webpage (<https://civilresolutionbc.ca/>), small claims represent the main area of work of the Tribunal. Among the 8,355 final decisions rendered as of 5 September 2024, 5,954 belong to this area.

<sup>237</sup> These claims are the second most relevant in terms of workload, with 2,118 final decisions among the 8,355 rendered by the Tribunal as of 5 September 2024.

<sup>238</sup> Sec 67–77 CRT Act.

<sup>239</sup> Sec 56.6–56.9 CRT Act.

of what the judicial function is, especially if viewed through ‘continental’ eyes. Be that as it may, the CRT is publicly presented as ‘part of the British Columbia public justice system’. And, in any case, it is a public body: what it offers, therefore, is ODR, and *public* ODR.

- 236 The online character of the Tribunal, on the other hand, is not clear from a simple reading of the Act that regulates it. The key for the British Columbia legislator seems to be the use of electronic communication tools: pursuant to Sec 2(2)(c) CRT Act,

The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that [...] uses electronic communication tools to facilitate resolution of disputes brought to the tribunal.

- 237 However, when it comes to the regulation of the proceedings, the use of electronic communication tools is presented as a possibility for the Tribunal,<sup>240</sup> although it seems that it can in any case impose the use of electronic communication tools on the parties.<sup>241</sup>

- 238 The mere use of electronic communications does not, of course, simply turn a court into an online court. It is conceivable, however, that in 2012, when the CRT Act was passed, and even in 2016, when the Tribunal became first operational, this expression was intended to convey the idea that all acts of the proceedings could be conducted online, without the need for the parties or the tribunal members to physically come to the seat of the Tribunal. Today, the CRT operates through a platform and advertises itself as an institution that is accessible online every day and every hour. The only point in the proceedings that does not necessarily take place online is the first service on the defendant (‘Serving the Dispute Notice package’, in the terminology of the CRT), as claimants are usually instructed to do this themselves and, among the methods for doing so, the use of e-mail is only one possibility (not even the most recommended) and, in any case, it is done outside the CRT platform.

- 239 The CRT has its own special procedure, developed in the CRT Act. A reading of the act, at least in my opinion, leads to the conclusion that the existence of this special procedure does not derive from the online nature of the process, that is, it is not a response to the

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<sup>240</sup> Pursuant to Sec 19 CRT Act

The tribunal *may* use electronic communication tools in conducting all or part of a tribunal proceeding, and may require or authorize parties or other persons to use electronic communication tools provided by the tribunal in relation to tribunal proceedings or other dispute resolution services provided by the tribunal.

In the case management phase, Sec 25(2) states that

Facilitated settlement *may* be conducted in person, in writing, by telephone, videoconferencing or email, or through the use of other electronic communication tools, or by any combination of those means.

Finally, regarding the hearing phase, Sec 39(1) must be taken into account, establishing that

In resolving a dispute, the tribunal *may* conduct a hearing in writing, by telephone, videoconferencing or email, or through the use of other electronic communication tools, or by any combination of those means.

<sup>241</sup> See Sec 62(2)(f)(i) and 62(2)(l)(i) CRT Act; Sec 39(3), addressing the hearing phase, states that holding it in person has to be regarded as an exception that the Tribunal must justify if it ‘considers that the nature of the dispute or that extraordinary circumstances make an in-person hearing necessary in the interests of justice’.



need to regulate a digital process – unlike, therefore, what was seen with the Chinese internet courts. Instead, the process is special because it is intended to encourage ‘a collaborative approach to resolving disputes’, ‘rather than the traditional adversarial litigation model’<sup>242</sup> and to reinforce the role of the court as a public instrument to provide dispute resolution in a manner that is accessible, speedy, economical, informal and flexible<sup>243</sup>, which also explains the general rule that no lawyer is required<sup>244</sup>. These objectives are clearly visible when analysing the structure of the process.

- 240 First of all, and even before the complaint is filed, the CRT platform offers an online Solution Explorer, providing free legal information, not legal advice, based on the answers given to the (simple) questions asked about the dispute (in a free, anonymous and confidential manner). The Solution Explorer offers template letters that the prospective claimant can send to the other party in order to solve the dispute on their own. Finally, the Solution Explorer also classifies the dispute and leads the claimant to the right CRT online application form, in order for them to start the proceedings.
- 241 Once the application is submitted, the proceedings before the Tribunal are divided into two main phases,<sup>245</sup> the case management and the tribunal hearing.
- 242 In the *case management phase*, resolution by agreement between the parties is facilitated and preparations are made for the tribunal hearing should one be required.<sup>246</sup> This phase is in the hands of a case manager, who is a tribunal officer. The platform itself first offers an online negotiation tool, which allows the parties to agree on the best solution for the case. If the negotiation through the platform is unsuccessful, the case manager will get involved to help the participants reach an agreement (facilitation).
- 243 If the dispute is not solved in the case management phase the *tribunal hearing phase* will be opened, in which the dispute is heard and the tribunal gives a final decision to resolve the dispute. CRT decisions – including those upholding the agreement reached by the parties – can be enforced. They may be challenged by means of judicial review. The CRT publishes all final decisions – except decisions for intimate image protection orders – on its website, where it also offers a search tool. It should be noted, however, that these decisions are not binding as precedents for other cases.
- 244 As noted, the approach is clearly different from that offered by China’s Internet Courts. The emphasis here is on the user-friendly solution and the flexible development of the proceedings. In the CRT, therefore, the online dimension is not presented as a first step in a broader ambition to digitize justice. Its online nature is, to a certain extent, secondary or

<sup>242</sup> Both fragments appear on the Tribunal’s website (<https://civilresolutionbc.ca/> accessed 5 September 2024).

<sup>243</sup> Pursuant to the definition of the Tribunal’s mandate according to Sec 2(2)(a) CRT Act.

<sup>244</sup> Sec 20 and 20.1 CRT Act.

<sup>245</sup> Sec 17 CRT Act.

<sup>246</sup> Sec 17(2) CRT Act.

instrumental: it is at the service of that flexibility which, one senses, contributes to facilitating a negotiated settlement of the dispute. The same is true of the public nature of the tribunal: pragmatism predominates, and the emphasis is on *how* the dispute will be resolved (quickly and, as far as possible, consensually), not so much on *who* will resolve it (hence the secondary nature, in the system, of the concept of the CRT as a 'tribunal' and not as a genuine 'court').

- 245 It can be concluded, in short, that the notion of online court is quite flexible and can be adapted to the procedural culture of each country, ie, to the values that each country attaches to dispute settlement mechanisms. In particular, the CRT reflects the British Columbia legislator's interest in providing a simple channel for the resolution of more everyday disputes, with a focus on consensual settlement, but not at any price: at all times the users are informed that the absence of agreement is not a negative thing per se, but rather opens the door to a decision on the merits by the tribunal, which may end up giving them the whole reason (without the concessions of a negotiated settlement).

## 12 DEMANDS AND CHALLENGES FOR A JUST TRANSITION TO ONLINE JUSTICE

- 246 Online courts aspire to be the next step in the development of justice systems, insofar as they aim to represent the best of two worlds that, to a certain extent, would not be fully compatible.<sup>247</sup> (i) As ODR systems, online courts aim to bring the *efficiency* associated with digitization;<sup>248</sup> the development of software with the potential to increase the capabilities of the judicial system seems, in addition, unstoppable – at least as long as it is profitable. (ii) As genuine courts, online courts bring *justice*, as something that goes beyond the mere resolution of individual disputes and is linked to the social legitimization of the judicial system as a whole.
- 247 Less intense digitalization, focusing on the procedural dimension (e-filing, e-service, e-case management) also brings efficiency and justice and is more 'affordable', insofar as it does not require such profound changes as those associated with the establishment of genuine online courts. It is therefore worth asking what the incentive for national legislators would be to go down the path of creating online courts.
- 248 Private ODR mechanisms compete in the market precisely as an effective alternative to state justice and as an added value of online procurement platforms and large companies: many consumers prefer to purchase goods and services from companies and/or on platforms that provide them with ODR mechanisms to resolve potential disputes. As far as these private ODR mechanisms are concerned, the regulatory challenge consists of

<sup>247</sup> See Zeleznikow (n **Fehler! Textmarke nicht definiert.**); Oltra Gras (n 140).

<sup>248</sup> It is worth recalling, for instance, the CEPEJ Action Plan 2022-2025 *Digitalisation for a better justice*, approved on 8 and 9 December 2021 <https://rm.coe.int/cepej-2021-12-en-cepej-action-plan-2022-2025-digitalisation-justice/1680a4cf2c> accessed 30 September 2024.

ensuring the existence of a real will on the part of those involved in their use, in order to avoid situations of abuse and imposition.<sup>249</sup>

- 249 This competitive incentive does not really exist in the case of state justice systems: it is very forced to state that they compete with ADR mechanisms and private ODR systems. However, there are several reasons that can be put forward by legislators to justify the additional effort involved in the transition to a judicial system in which online courts play a greater role.
- 250 On the one hand, there are certain 'liquid expectations',<sup>250</sup> especially among the digital natives, who demand more digital governance from the public authorities, which also includes the justice system. It seems reasonable to expect the judicial system to be a reflection of the society it serves; and that society is increasingly digital, which means, among other things, that many citizens aspire to have their disputes – at least some of their minor disputes – resolved online, in a manner analogous to other aspects of their relationship with the public authorities for other purposes – eg, paying taxes or claiming social security benefits.
- 251 In addition, there is the argument of 'enhanced efficiency' or, if preferred, the added value in efficiency provided by online courts: they bring about more efficiency than digitized offline courts. Simply being satisfied with progress in the managerial dimension, when technological advances allow for a much greater qualitative leap forward, would mean failing to keep up with the times.
- 252 And, above all, it is argued with the utmost forcefulness that a deeper digitalization such as that provided by online courts and online proceedings ensures a higher level of access to justice, for people and for claims that, in a different context (of no digitalization or of a more tenuous digitalization), would not reach the state courts.<sup>251</sup> Efficiency and digitalization are therefore allied in the political-legislative discourse to link online courts, online proceedings and access to justice.
- 253 Whether this 'triad' deserves veneration or is merely an advertising slogan has clear ideological connotations but also depends to a large extent on the actual delivery that citizens receive: unfulfilled promises, whether due to lack of means or lack of technological capacity, are one of the greatest dangers facing legislators.
- 254 Efficiency and digitization cannot come at the expense of quality: the access to justice that is promised only deserves that label if it meets certain standards, traditionally encompassed in the notion of procedural safeguards. Digitization is not a value in itself,

<sup>249</sup> H Eidenmüller and G Wagner, 'Digital Dispute Resolution' in H Eidenmüller and G Wagner, *Law by Algorithm* (Mohr Siebeck 2021) 223.

<sup>250</sup> Katsh and Rabinovich-Einy (n 130) 152.

<sup>251</sup> On this, again, Garapon and Lassègue (n 74) 93; Vermeys and Roberge (n 160); M Philippe, 'What Does It Take to Bring Justice Online?' (2019) 6(2) *International Journal of Online Dispute Resolution* 183.

which can be imposed on any other consideration, but rather a tool at the service of another purpose, which is the one that really matters, the resolution of the dispute in a legal manner, in the interests of the litigant who is in the right and as a way of socially legitimising the validity of the legal order. A just transition towards an intensification of online courts and online proceedings should not be approached without responding to certain demands and facing certain challenges, all of which are linked to the idea of quality.<sup>252</sup> Comparative experience with virtual hearings, the various forms of transition to a more digital justice system and existing examples of more digitized court proceedings at least serve to identify them.

- 255 a) Online courts are associated with increasingly automated procedures: in online proceedings the passage from one stage of the process to the next can be managed automatically by a computer system, without the need for a specific person (the judge, the court clerk, a court official) to keep an eye on and drive the process forward. However, adequate human supervision must be foreseen in any case: a court system in which the only humans are judges and in which the only function of the judges is to resolve the merits of the dispute would not be acceptable. Even if the process is automated, there must be people (humans) responsible for its proper functioning who have expertise as judges, court clerks or court officials. These will, of course, need to be joined by experts in technical matters – currently absent from the ordinary staff of our courts – but they should not replace them.
- 256 b) For online courts and online proceedings to function effectively as an advanced manifestation of ODR, the computer system must have the data it needs to operate: in other words, the system must be able to feed on the information contained in the parties' submissions – including, why not, videos or recordings that form part of an asynchronous remote communication, as envisaged in the Chinese Online Litigation Rules. These documents or procedural 'objects' have to provide metadata that can be exploited – as demanded by the Spanish legislation; thus, regarded from the outside, online proceedings before online courts require the use and the setting of forms that, in turn, are supported by technical systems that extract the necessary information from them. This in turn makes it necessary to ensure compliance with the rules on personal data protection – an issue on which there is no need to elaborate further at this point. The need to extract metadata from procedural objects and, in turn, the need to work with standardized forms to enable such metadata collection will eventually influence the way parties' submissions and courts' decisions are structured.
- 257 c) A more digitalized procedure is an opportunity to integrate the attempt at consensual resolution into the structure of the process itself, as seen in the Chinese Internet Courts and the Civil Resolution Tribunal of British Columbia. This, in turn, helps to shift the focus away from the constant discussion about the admissibility and/or desirability of imposing

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<sup>252</sup> Garapon and Lassègue also advocate for the need to submit digitalization of justice to human values (n 74) 327 ff.

mediation as a pre-trial step – criticizable as costly and dilatory. The regulation of online proceedings before the online courts may open the door to a more cooperative structure. At the same time, the integration of the conciliation or mediation phase within the process itself helps citizens – especially the most vulnerable – to understand that they do not have to settle for whatever is offered to them in a negotiation, as the decision on the merits in accordance with the law is always available to them without changing channel or platform.

- 258 d) A more digital justice system will undoubtedly have to rely on AI tools: at this stage of development, it seems difficult to deny this. However, all the precautions alluded to in supranational texts and already echoed by some national legislators, such as the Spanish one, must be imposed, especially as far as human control is concerned.<sup>253</sup> On this point, I must now refer to chapter 6 of this segment.
- 259 e) The transition to a more digital justice system is forcing a different way of legislating or, if preferred, to have different laws<sup>254</sup> – as evidenced by the regulation of the OCMC in Practice Direction 51R in England and Wales. There is a need for technical rules, which involve extra-legal terms and concepts, but through which the architecture of the system is designed, as they regulate the way in which the abstract design of an online process is ultimately reflected on a computer screen or in an application managed from a smartphone or tablet. Of course, there is still a need for ‘classical’ procedural rules, intelligible to lawyers and defining the safeguards and the ‘rules of the game’ according to which to define procedural strategies, although these more classical rules cannot help but ‘imagine’ their transfer to an environment that is virtual by definition, not physical nor virtual as a functional equivalent of a physical one. This aspect of legislative technique is, in my view, particularly important, although it has not been addressed as such. On the one hand, laws must always be comprehensible to their addressees, so that the technological nature of their content must not be a pretext for their obscurity. On the other hand, it is necessary to avoid procedural laws that, in an excessive and unjustified way, refer their development – ie, their effective operation – to infra-legal rules or to administrative decisions – eg, made by technical bodies or expert committees – that do not have democratic endorsement. It should not be forgotten that procedural laws are the development of the fundamental right to effective judicial protection.
- 260 f) A more digital justice can only be fair if it pays due attention to the shape of the virtual space in which the proceedings take place. Procedural activities move from buildings to platforms, which have to be user-friendly and simple to handle for any litigant – as shown, for instance, by the Singapore experience. The setting for virtual trials has to be configured in a way that minimizes the inconvenience of non-contact as much as possible. Trials in the metaverse, for the time being at least, should be approached with great caution: the use

<sup>253</sup> D Amoroso and G Tamburrini, ‘The Human Control Over Autonomous Robotic Systems: What Ethical and Legal Lessons for Judicial Uses of AI?’ in X Kramer, A Biard, J Hoevenaars and E Themeli (ed), *New Pathways to Civil Justice in Europe. Challenges of Access to Justice* (Springer 2021) 23.

<sup>254</sup> On this, see Garapon and Lassègue (n 74) 13, 101, who point out how digitalization of law modifies its elaboration and how a computerized reading of the law is redefining its very notion.

of avatars distorts the perception of the human nature of disputes, proceedings and their participants.<sup>255</sup>

261 g) Digitization entails a dependence on technology which, in turn, obliges the legislator to be very cautious, from several points of view, including at least the following:

(i) There must always be an escape valve that allows all or part of a judicial process to be conducted in a non-digital way, if necessary.

(ii) A situation of dependence on external technology providers, usually private companies,<sup>256</sup> who promise a lot and do not always deliver, must be avoided.<sup>257</sup>

(iii) The legislator must adapt the regulation to the real technological capacities of each moment, that is, making sure that the system at its disposal is able to carry out the services that the law foresees. ‘Technological fantasies’ should have no place in procedural law.

(iv) Systems should have tools to detect possible malfunctions.

262 h) Finally, legislators who consider moving towards the creation of online courts and the regulation of online proceedings have to face at least three decisions of the utmost relevance, which have a rather strategic significance, ie, they do not condition the admissibility of online courts in terms of justice, but in terms of political appropriateness.

263 Firstly, it is up to national legislators to establish the scope of action of these courts and to decide whether they are only offered to litigants for small disputes – as is the case, roughly speaking, with the CRT in British Columbia or the OCMC in England and Wales –, whether they are limited to disputes arising in digital environments and linked to that sector – as in the Chinese internet courts – or whether they are attributed a much more general potential. On this point, one thing must be clear: in the abstract, online courts should be able to resolve any type of dispute, since elements such as the economic amount or the legal complexity of a claim are unrelated to the online/offline variable. Therefore, on this issue, it is to be expected to act on the basis of pilot and experimental programmes, normally confined to small claims or technological disputes, probably because they are the ones where the (r)evolution is most easily justified: to give access to justice to smaller cases and to respond to the expectations of the players in the digital economy. However, in doing so, it is equally important to avoid these two possible side effects: for small disputes, the

<sup>255</sup> Other mechanisms should be used if the aim is to avoid biases related, for instance, to people’s physical appearance. On the possibilities offered by online courts to overcome some barriers, see A Sela, ‘Diversity by Design: Improving Access to Justice in Online Courts with Adaptive Court Interfaces’ (2021) 15(1) *Law & Ethics of Human Rights* 125.

<sup>256</sup> S Díaz Bolívar and M M Bustamante Rúa, ‘Análisis de los sistemas de solución de conflictos en línea en el mundo y propuesta para su implementación en Colombia’ (2022) 11(2) *Revista Chilena de Derecho y Tecnología* 245.

<sup>257</sup> A similar warning in Philippe (n 251) 191.



perception that online proceedings before online courts are of poorer quality than traditional ones; for digital-related disputes, and conversely, the perception that only the technological world benefits from the advantages associated with digitization, even though they could be projected to many other areas.

- 264 In regulating online courts and online proceedings, legislators also face the challenge of defining the role of lawyers and other legal professionals.<sup>258</sup> Online courts and online proceedings tend to present themselves as more favourable environments for unrepresented litigants,<sup>259</sup> especially if they provide ‘online guidance’.<sup>260</sup> Added to this are the possibilities opened up by certain AI tools to offer something akin to legal advice. On this issue, again, I refer to what is raised in chapter 6 of this segment.
- 265 Finally, a last general issue shall be pointed out: the need to regulate the coexistence between ordinary courts and online courts and, ultimately, the need to consider whether online courts are bound to lead to the disappearance of online courts. In principle, online courts are genuine state courts, and it would therefore be legitimate for legislation to stipulate that they are the only courts available in their sphere of jurisdiction – and hence that proceedings must be also conducted online proceeding. Assuming that adequate access to the online courts is granted for litigants – through assistance and by making the necessary means available to them – this would be a legitimate option, compatible with the standards of access to justice that stem, eg, from Art 6(1) ECHR or Art 47 CFREU. It is also possible, of course, for the legislator, especially in an initial, more experimental phase, to subject their jurisdiction and their operation to the will of the parties and consequently to present them as an alternative for the willing parties – or, at least, for the willing claimant. In this, of course, the economic, social and cultural context of each country will be a determining factor. In the very long term, of course, it is conceivable that most courts will be online courts, provided that in any case, as stated above, an escape route is guaranteed if this proves to be indispensable. How desirable and convenient this image of the future will be, especially for those who are still ‘offliners’, is another question.

<sup>258</sup> See, on this, the analysis (and predictions) of R Susskind and D Susskind, *The Future of the Professions. How Technology Will Transform the Work of Human Experts* (Oxford UP 2022).

<sup>259</sup> This is strongly sustained by A Shela, ‘Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation’ (2016) 26(2) Cornell Journal of Law and Public Policy 331. See also F Esteban de la Rosa and J Zeleznikow, ‘Making Intelligent Online Dispute Resolution Tools available to Self-Represented Litigants in the Public Justice System’ (2021) ICAIL '21: Proceedings of the Eighteenth International Conference on Artificial Intelligence and Law 195 <https://doi.org/10.1145/3462757.3466077> accessed 24 September 2024.

<sup>260</sup> Susskind (n 126) 121–133.

**ABBREVIATIONS AND ACRONYMS**

Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
CJEU	Court of Justice of the European Union
ed	editor/editors
etc	et cetera
ECtHR	European Court of Human Rights
ECLI	European Case Law Identifier
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
EU	European Union
ff	following
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
Sec	Section/Sections
UK	United Kingdom
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	
University Press	
US / USA	United States of America
v	versus
vol	volume/volumes
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

## LEGISLATION

### International/Supranational

Directive regarding the European Investigation Order in criminal matters, 2014/41 of 3 April 2014 (EU)

Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, 2016/343 of 9 March 2016 (EU)

European Convention on Human Rights 1950

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