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**Online Dispute Resolution and Compliance with the Right
to a Fair Trial and the Right to an Effective Remedy
(Article 6 and 13 of the European Convention of Human Rights)**

TECHNICAL STUDY ON ONLINE DISPUTE RESOLUTION MECHANISMS

Prepared by Prof Julia Hörnle, CCLS, Queen Mary University of London,
Matthew Hewitson (South Africa) and Illia Chernohorenko (Ukraine)

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EXECUTIVE SUMMARY

We find the following trends in the Council of Europe member States:

(i) A few states (for example Bosnia-Herzegovina, Croatia, Czech Republic, Denmark, France, Georgia, Germany, Montenegro, Poland, Switzerland) use, or encourage preliminary, pre-trial ADR procedures- however they are rarely a mandatory pre-requisite to filing proceedings in the civil courts (with the exception, for example, of family disputes or certain labour disputes in Croatia, or of certain disputes in Georgia, their use in labour disputes in Turkey or the new procedure introduced in France which obliges the parties to make an attempt to use mediation in certain cases, or certain family cases in Montenegro), but usually are recommended by the judge/court to the parties. In one example the parties had to state on the claims form whether they had considered mediation and justify, why, if they had not (Poland). Furthermore in a few States there may be cost penalties if the parties do not even consider mediation (England & Wales, Ireland). Only very few of the States have reported that these preliminary pre-trial procedures use ODR techniques (for example in France remote communication tools similar to Skype are used in family mediation). However in some of these states using preliminary, pre-trial procedures, the mediation or conciliation is carried out by a private mediator and these private parties may resort to ODR techniques (for example the Czech Republic mentions the use of video-conferencing for remote meetings). In other Member States the mediation is done by an official body or authority (such as court-annexed conciliation in Germany which is carried out by a judge, or in Georgia for some types of disputes or in Switzerland). However, the majority of States do not use preliminary, pre-trial ADR procedures.

(ii) No state has as yet implemented a separate, parallel ODR track or pathway through a new set of procedural rules in an existing, civil or administrative, court. This is planned for the new Online Court in England & Wales (civil disputes up to a value of £25,000). Moreover, no state has as yet moved their civil or administrative court procedures completely online and digitalised courts completed by creating an online platform where court users can file and access statements, evidence and court documents online and incorporating synchronous communication channels such as video-conferencing, thus replacing traditional courts (although the Netherlands and Portugal have gone into this direction). Moldova is in the process of implementing digitalised courts as a parallel track, giving the parties the choice between traditional court proceedings and online court proceedings.

In any case, elements of ODR techniques exist in various states:

(iii) Some states have expedited or simplified procedural rules for 1) small claims, 2) consumer disputes (although these are not within the scope of this Report) and 3) payment orders (undefended money claims to enforce debts). As regards expedited and simplified procedures for payment orders, they are sometimes limited to a maximum amount (for example the electronic Electronic Payment Order Motion up to a limit of 1,000,000 CZK in the Czech Republic or in Portugal), or limited to B2B claims (for example in Belgium). Furthermore, there was also an example of an expedited procedure for terminating a lease (see eviction proceedings in Portugal). Ireland has an online court platform for certain small claims and so does Hungary.

(iv) Sometimes these expedited procedures are online, but normally move “offline” into the traditional court processes if a defence is filed (for example in England & Wales with the Money Claim Online , or in Poland, in Portugal, or in Switzerland). In Germany, claims for payment orders and small claims in particular can be filed electronically.

(v) Some states have introduced (or are in the process of introducing) electronic court management systems (internal electronic file management) and electronic filing for external court users, providing for secure and authenticated filing through the use of electronic signatures and allowing the parties or their advocates access to their court files after authentication (for example Denmark, Germany, Latvia, the Netherlands, or the Citius platform in Portugal, and Slovakia). Montenegro has created the legal framework for this in its civil procedure and has started training its judiciary. Moldova is also introducing electronic filing (including digital evidence) and this is piloted in 2018. Online filing platform for administrative matters will be provided in the near future in Finland. In the Czech Republic businesses and advocates may communicate with the court through a secure, authenticated databox. The Czech legal system provides an online/e- filing system for certain legal forms and a data box system for secure communication – the “ePodatelna“ system can be used. Croatia also has a pilot project on e-communication in the courts.

(vi) Many states have introduced video-conferencing from a remote location into their courts, for example for the appearance of witnesses and experts on a case-by-case basis. Some states use this for requests for cross-border evidence taking under the corresponding Hague Convention (for example Slovakia and Switzerland). Some states use a variety of communication channels for remote video-conferencing, see for example Portugal: any means of technological communication, capable of simultaneous real-time video and audio communication – such as ‘Skype’, ‘Facetime’ or ‘Whatsapp’ - can be used for taking testimony or statements. In December 2017 all Moldovan courts have installed video-conferencing equipment in order to use it for online meetings and online hearings. The period of piloting the installed tools is forecast for 2018. In Germany there is electronic filing, electronic communication and access to the court records plus the possibility to take part in hearings by simultaneous two way video-communication, but no full implementation of online court platforms.

(vii) No state as yet has introduced artificial intelligence to replace human decision-making (for example for deciding preliminary issues or for providing the parties with legal advice through the use of extensive expert systems, although the Netherlands Rechtswijzer system goes into this direction).

(viii) Few states have considered the use of ODR techniques for enforcing court judgments- some states who have introduced online platforms for document management have extended this to enforcement (Portugal). An interesting example of an ODR technique for online enforcement is the online auction of seized goods in Portugal.

We recommend that states pay attention to the following issues when implementing ODR:

- (1) A fair hearing in the courts must be guided by the “equality of arms” principle, giving each party an equal opportunity to present his/her own case and respond to the case of the other.
- (2) For example an assumption is normally made that technology speeds up processes (which is true), but little regard is given the fact that technology also increases information overload (which slows down information processing)- so for example shortened and inflexible deadlines for filing statements or evidence can affect the ability of a party to have a fair hearing (where for example a micro-business litigates against a much larger business) and the sole director cannot cope with short deadlines.
- (3) Furthermore, it is often the assumptions we make about technology (rather than the technology itself) which may have an impact on a fair hearing. So the assumption for example will be that technology always works (not accounting for technical glitches or downtime) which may prejudice a party in filing their case.
- (4) A different aspect is the question of open, public hearings (where virtual hearings in the courts replace a court hearing), which is essentially a question of transparency. This is not a real problem as a platform may in fact allow access to virtual hearings and information in a controlled manner without the observers having to physically go to a courtroom. This is more a question of designing technology in a particular way. Thus digital courts may be open courts, if not more so than physical court buildings.
- (5) The use of online courts has the ability revolutionise access to justice for litigants. The development of new procedures to resolve disputes online can revolutionise access to justice to persons who would usually be unable to understand court procedures without hiring a lawyer. The use of ODR could level the playing field of parties who would ordinarily find it hard to access courts. It could improve the justice system to make it more accessible for those who live far from legal centres or who struggle to afford the costs of seeking justice, by providing cheaper, alternative means to resolving disputes.
- (6) Using technology and the internet can allow litigants to access information about how to lay a claim, submit a claim and inform them of the process of how to go about resolving their dispute. In fact, ODR may structure the process itself for litigants. It also means that this process can be done just about anywhere with internet access, making the process convenient and easy for litigants. This is a massive improvement of access to justice for litigants.
- (7) An issue with ODR and access to justice is that those who are computer illiterate or have no access to technology might be side-lined in the process. Increased high internet access reflects social and generational change of how people now lead their lives, but what of the vulnerable users and those without access? Requiring parties to use technology to resolve disputes could inhibit access to justice if there is a great discrepancy between the parties and their access to technology. The move to online and virtual justice also threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to

inhibit the relationship between defence lawyers and their clients, and, as some argue, make justice less open.

- (8) If some litigants do not have access to, or the ability to use, technology and the internet, these litigants will be excluded from the administration of justice. Therefore, if ODR is implemented, there should (a) either be an alternative paper-based traditional means of having a dispute resolved for parties who do not have this access to technology and the internet or (b) a comprehensive system of legal representation made affordable.
- (9) As courts are being digitalised and are going online there may be (in certain countries) a temptation to outsource the technology and to save money by using “free” commercial applications, who then, in return collect court users’ personal data for online profiling purposes. We have not seen this as part of our research for this study and as far as we are aware, the ODR communication and data processing technologies developed by the courts to date are not based on commercial tracking. However in times of decreasing public budgets and increased pressure on government departments to save money, this topic is not entirely irrelevant.
- (10) It does appear that at some stage of this process you must have the opportunity to have an oral hearing. Thus, for compulsory ODR, there must be the opportunity to appeal the ODR decision which must be oral. Or, the ODR processes must have an oral element to it.
- (11) This raises the interesting question of whether “oral” hearing is to be equated with “face-to-face” hearing? While there is no direct authority on this it would make sense to argue that video-conferencing where the communicators can hear and see each other in real time (and where provision is made that, for example witnesses are not coached from behind the screen and that witnesses’ identity is properly authenticated) is functionally equivalent to an “oral” hearing (provided the technology works on both ends of the transmission and this can be protocolled).
- (12) The ECtHR requires there to be some form of publicity which allows for public scrutiny of any court proceedings, with the additional requirement of having the decision made public. Therefore, any ODR proceeding must ensure that there is this degree of transparency involved.
- (13) In particular, if hearings were conducted entirely online in a fully digitalized court it would be important that the public can access the hearing- subject to specific exceptions, court hearings must be open to members of the public (in the sense that members of the public can follow proceedings from a public gallery in the court building). Functionally equivalent access would have to be provided technically in a fully online court, allowing interested members of the public to follow the course of proceedings.
- (14) An interesting question here is a question of numbers. Traditionally members of the public have been granted physical access to the court building, but many countries in Europe do not allow public broadcasting of trials on TV for the reason that this may influence advocates and judges who then “play” to populist sentiments of crowd watching which may not lead to better justice. Clearly if there is online access to “court channels” (for example on Youtube) then a similar effect may arise.

- (15) It is interesting to note in this context that few Council of Europe States at present use ODR to make the enforcement of court decisions more effective (with some notable exceptions). We recommend that greater use of ODR could be made at this stage.
- (16) The introduction of ODR and digitalization of courts means that court procedures may build in several tiers into the process, where only at the last tier there is an adjudication by judges with an oral hearing of the parties. This would correspond to the pyramid model of dispute resolution which integrates legal advice (the parties informing themselves about their legal rights and their legal position through the use of expert systems/artificial intelligence), negotiation and conflict resolution techniques (restorative justice), facilitated negotiation and mediation, and adjudication (potentially several stages, including the possibility of review and appeal). These tiers of processes could take place all within the same digital ODR platform, integrated as part of the court system with the relevant data being moved from one stage of the procedure to the next one as appropriate. The idea behind this tiered model of dispute resolution is that most disputes are solved at the lower levels, thus being cost-effective while at the same time giving more disputants access to justice. Thus ODR could also mean a reorganisation of traditional court processes by integrating processes which currently take place outside the court system, provided by private entities (legal advice, ADR).
- (17) Generally speaking, like in other areas of digitization, ODR may have a negative impact on data protection and privacy in that online justice is likely to generate a much greater wealth of data (including metadata, for example who accessed a particular court record when and from where), increases the possibilities of data processing, searching, data mining and the use of artificial intelligence (which is the other side of the coin of increased access to justice) and online data (including court data) may be more mobile (easy online transfer), sticky (in the sense that data remains on storage devices until erased) and vulnerable to unauthorised, remote access (computer hacking from anywhere in the world).
- (18) These risks which are a concomitant risk of ODR should be counter-balanced by data protection & privacy training of court officials, clear data protection laws, data protection policies and guidelines on a “need to know” basis, implementation of the “privacy by design” principles in new ODR/court technologies, data protection & privacy audits and criminal laws (on computer misuse) and their effective enforcement.
- (19) Cybersecurity has to be a priority and needs to be properly resourced in addition to just developing the systems and technology for ODR. Inadequate cybersecurity may mean that access to the courts is effectively denied and court users’ privacy is seriously threatened.
- (20) It is of fundamental importance to any ODR system that information and data that is uploaded, exchanged, transferred and stored in an ODR system is kept secure. All court documents and any evidence that is uploaded onto an ODR system must be kept free from manipulation and attack to ensure its integrity. The system requires protection to prevent external parties from hacking the system and obtaining non-public information. Regarding the authority to access information, there should be internal limitations that are put in place to ensure that parties to disputes cannot

access information that they are not allowed to view. This requires secure authentication.

- (21) One issue about digital security and ODR is the establishment of the identity of the disputants. It is important that the parties to the ODR process are truly the correct parties and that there is no issue of fraudulent identities.
- (22) Every litigant must have the right to an effective participation in the proceedings. This would mean that those participants who are computer illiterate, who have no access to an online computer system, who are otherwise disabled or previously disadvantaged must be given the chance to effectively participate in ODR proceedings. One way in which to ensure that such persons do receive the necessary attention is to follow the mechanisms implemented by the British Columbia ODR system. In this system, while the backbone of the system is the use of technology online, persons who would otherwise be side-lined from accessing the system are given the necessary attention by the availability of alternative means to having the dispute resolved online. Such persons may access the ODR platform by attending the CRT service centres which are located across British Columbia. Here, the litigants can appear in person at the relevant centre and have an assistant help them with accessing and using the ODR system.
- (23) There may be a divide between legal representatives and their knowledge of and access to technology in ODR proceedings. Large law firms may have the financial ability to use and understand technology in a way that will assist their clients. This may include law firms developing and using systems that analyse data, information and evidence in preparation for a case, which might place a great advantage on the party who has access to such a system. This should be compared to a legal representative who does not have access to such technology and as a result of which his/her client may be left disadvantaged. Large law firms may also have the ability to develop specialist ODR practices wherein certain lawyers specialise in ODR proceedings. This, again, would create a divide between specialist ODR legal representatives and legal representatives who do not have the knowledge of or access to such technology. This in turn would create a divide between the litigants.
- (24) ODR systems must therefore be developed in such a way that this issue of the digital divide is adequately addressed. The currently existing divide in the quality of legal representation cannot be further enhanced by the introduction of technology. If ODR is to be implemented into public justice systems, these systems must be designed in such a way that there is equality of arms between the litigants. Everyone, no matter their level of computer literacy, their age, social status etc. must have access to the ODR system and this may entail the need either to maintain a certain degree of paper based systems and/or to employ assistants to assist and guide such disadvantaged litigants. The use of pilot schemes, reach out to certain disadvantaged groups, user-feedback and centres where court users could physically go to access ODR systems may go some way to alleviate these concerns.
- (25) Given the pressure of high caseloads and insufficient resources from which most justice systems suffer, there is a danger that support systems based on artificial intelligence are inappropriately used by judges to “delegate” decisions to technological systems that were not developed for that purpose and are perceived as being more ‘objective’ even when this is not the case. Great care should therefore be

taken to assess whether such systems can deliver and under what conditions that may be used in order not to jeopardise the right to a fair trial.

CONTEXT AND PURPOSE OF THE RESEARCH

1. The Council of Europe European Committee on Legal Co-operation (CDCJ) commissioned the Online Dispute Resolution (ODR) expert Prof Julia Hörnle to draw up a Feasibility and Scoping Report (FSR) in December 2015 which contained an initial analysis of the due process issues connected to ODR and examined the feasibility and possible scope of a CDCJ activity on ODR. At the CDCJ meeting on 25. February 2016, it was concluded that the scope of disputes should be further narrowed for two reasons: 1) the diversity of civil disputes is too great to allow for an in-depth examination of the issues arising under Articles 6 and 13 ECHR and 2) the need to avoid duplication of existing international activities on ODR. As a consequence Proposal for an Activity on ODR was drawn up in July 2016 and approved by the CDCJ at the meeting in November 2016. After the recruitment of two research assistants, Matthew Hewitson and Illia Chernohorenko, the project commenced in June 2017. A second expert was also appointed, Petra Jurina who is Head of Service for Civil Procedure Law, Commercial Law and Alternative Dispute Resolution at the Ministry of Justice in Croatia who helped to produce the Draft Questionnaire. The questionnaire was drafted and revised with the invaluable input from the state members and was finalised in October 2017.

2. After the expiry of the deadline for responses from the CDCJ expert members (28. February 2018) we had responses from 23 Council of Europe Member States: Belgium, Bosnia Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Moldova, Montenegro, Netherlands, Poland, Portugal, Slovakia, Sweden, Switzerland and Turkey. This Report reflects the Responses.

3. The activity is a Study conducted by independent experts with the following aims:
- i. To analyse the compatibility of Online Dispute Resolution with the right to a fair trial both in terms of the challenges to the right of a fair trial as well as opportunities afforded by Online Dispute Resolution to provide greater access to justice and enhanced due process.
To examine whether online dispute resolution could open new avenues of redress for infringements of ECHR rights.

We would like to thank the experts of the States of the Council of Europe who kindly completed the Questionnaire for their country and the independent experts who kindly gave their time for interview and shared their expertise with us.

METHODOLOGY OF THE RESEARCH

4. The research contains three distinct elements 1) literature review on Online Dispute Resolution and the right to a fair trial; 2) interviews with experts in the field of Online Dispute Resolution; 3) responses to a Questionnaire by the experts in the Council of Europe Member States.

5. We obtained answers to survey questionnaires from 23 Council of Europe Member States: Belgium, Bosnia Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Moldova, Montenegro, Netherlands, Poland, Portugal, Slovakia, Sweden, Switzerland and Turkey.

6. We interviewed the following experts in ODR:

- i. [INTERVIEW WITH ARNO R. LODDER](#)
- ii. [INTERVIEW WITH JUDGE DORY REILING](#)
- iii. [INTERVIEW WITH PABLO CORTES](#),
- iv. [INTERVIEW WITH PAVEL LOUTOCKÝ](#) -.....
- v. [INTERVIEW ROADMAP - DR STEFAAN VOET](#)
- vi. [INTERVIEW WITH DARIN THOMSON](#) -
- vii. [INTERVIEW WITH ANGIE RAYMOND](#):.....
- viii. [INTERVIEW WITH COLIN RULE](#):.....
- ix. [INTERVIEW WITH FERNANDO ESTEBAN DE LA ROSA](#):
- x. [INTERVIEW WITH JOHN ZELEZNIKOW](#)
- xi. [INTERVIEW WITH SHANNON SALTER](#)

7. In this Report we have summarized our review of the literature, and the expert views formed the background for our critical analysis. We analysed the responses from the 23 questionnaires and set them out in summary in this Report. We present our analysis and the findings as to the ODR techniques used in the Council of Europe States and the fair trial issues arising therefrom in this Report.

DEFINING AND EXPLAINING THE CONCEPT OF ODR

8. While it is always useful to set out a clear definition of the subject matter of a research topic, this has proven particularly difficult for ODR, as ODR is not clearly defined or widely understood. ODR is a relatively new field, encompassing a broad range of concepts and involving a variety of procedures and methods. It is a growing field that is constantly developing, with many people having a view of what it entails and how it should develop.

9. ODR is defined by UNCITRAL, as “a mechanism for resolving disputes facilitated through an IT based platform and facilitated through the use of electronic communications and other information and communications technology”.¹ Essentially, it is dispute resolution that is carried out through the use of computers and the internet.²

10. ODR involves dispute resolution at a distance. Documents (statements, pleadings, evidence, court documents) can be directly uploaded onto an ODR platform hosted in the cloud. Remote asynchronous communication (for example discussion boards, blogs, email; various forms of secure and authenticated databoxes guaranteeing the authenticity and integrity of a communication) or synchronous communication (chat, instant messaging, audio- and video-conferencing tools) can be used to maximise the flexibility and convenience of communication and to hold online hearings. Court users can access the court file online from a remote place. ODR means that the parties, witnesses and

¹ UNCITRAL Working Group III (Online dispute resolution) Thirty-third session, New York, 2016, Online dispute resolution for cross-border electronic commerce transactions, A/CN.9/WG.III/WP.140, accessed via <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/089/59/PDF/V1508959.pdf?OpenElement> on 26 June 2016.

² See also further J Hornle *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009)

adjudicators/mediators do not need to travel and may schedule their communications around other commitments more effectively.

11. ODR may also involve a degree of automation. Automation can range from diary management (for example filing deadlines/organising virtual meetings) to tailored legal advice for the parties on aspects of their dispute to forms of automated negotiation assistance or decision-making. Automation may be based on repeating patterns of factual scenarios and the legal categorization of disputes.

12. ODR is therefore leading to greater automation, greater speed of information processing, more efficiency and lower costs of dispute resolution. This in turn means more disputes can be solved, leading ultimately to greater access to dispute resolution and cost savings.³

13. In addition to classifying disputes as 'online' vs 'offline', it may also be useful to develop a typology of disputes, in which it can be ascertained what types of disputes could be resolved through ODR mechanisms and what type of disputes might still require the traditional court process.

14. The role of courts in general is to produce enforceable decisions.⁴ These decisions come about through the courts fulfilling specific roles: (1) title provision, (2) notarial role, (3) settlement, and (4) judgment.⁵ Within these roles, information is used by the courts in particular ways to reach the outcome, and it is the type of dispute that may determine the role of the court and the decision that is ultimately made.⁶

15. Two factors affect the way in which a court makes a decision: (1) the uncertainty of the outcome, and (2) the relationship between the parties.⁷ In terms of game theory, the outcome is either zero-sum or win-win.⁸ Zero-sum describes a situation in which a participant's gain or loss is exactly matched by the losses or gains of the other participant.⁹ The relationship between the parties is irrelevant to the outcome.¹⁰ In win-win, parties can achieve the best result by cooperating. In this case, cooperation can affect the quality of the outcome.¹¹

16. In disputes where there is a zero-sum game and a certain outcome, all the court is tasked with deciding is the issue of title, and providing that title. These are disputes where the case is cut and dried, such as an undefended money claim.

17. In disputes where there is a win-win and the outcome is certain, the court is required to produce an affirmation, formal declaration etc. in what is called a 'notarial role'. The courts also play a relatively straight forward role in this process and there is a rather certain outcome to which the parties have co-operated to achieve.

³ J Hornle Cross-border Internet Dispute Resolution (Cambridge University Press 2009)

⁴ Dory Reiling, 'E-justice: experiences with court IT in Europe' at pg. 10.

⁵ Ibid..

⁶ Ibid..

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

18. Where the outcome is uncertain but the parties co-operate, the court plays a role in leading and affirming the parties' settlement. Very complex information, needed to help the parties to reach agreement, can be the object in this process.

ODR TECHNIQUES-TOOLS USED

19. As has been explained above in respect of the definition of ODR, ODR is not a clearly defined concept and consists in practice of a range of techniques using various software tools. As has been stated above, this Study has examined both civil and administrative procedures in the courts of the Council of Europe Member States. In this context, for the purpose of this Study we have distinguished between the following five ODR techniques (see also the Questionnaires in the Annex):

- i. Online filing systems/platforms directly accessed and used by the parties and/or their advocates for the filing of statements and procedural documents (such as claims, counterclaims, responses);
- ii. The use of online systems for storing, processing, assessing and presenting evidence in electronic format;
- iii. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
- iv. The use of platforms for communication, including online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
- v. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding. In other words this covers the use of artificial intelligence in preliminary processes before adjudication takes place. However such processes are only part of the Study to the extent that they are part of the civil or administrative procedure of the country concerned (ie mandatory or ordered by a judge or somehow annexed or integrated into the official civil/administrative justice system). Purely voluntary, out-of- court Alternative Dispute Resolution processes are excluded from the scope of this Study.

STAGES IN THE CIVIL OR ADMINISTRATIVE PROCESS IN WHICH ODR IS USED

20. The Survey covers the Online Dispute Resolution techniques mentioned in the preceding section. In addition to distinguishing between different ODR techniques it is necessary to distinguish between different stages of the civil or administrative processes and the different fora in which ODR techniques may be used. For the purposes of the Study we have identified the following possible stages in court procedures and variations of legal fora:

- i. Preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court (such as, in some jurisdictions, mandatory pre-trial alternative dispute resolution mechanisms);
- ii. Preliminary processes (including alternative dispute resolution mechanisms such as arbitration, negotiation or mediation) which are not mandatory as such, but can be recommended by the court/judge. Furthermore, if the parties refuse to engage in them there may be penalties in the award of costs;
- iii. Special online dispute resolution tribunals for some particular types of claims (e.g. Administrative Tribunals in the social security field, online dispute resolution for parking offences and administrative fines, or for social housing disputes, or for small claims disputes in the civil courts, or for neighbourhood or family disputes);
- iv. Litigation before a civil, commercial or administrative court under the ordinary procedural rules;
- v. Parallel tracks: claimants can choose whether they opt for the ordinary, "traditional" court procedures (not using Online Dispute Resolution) OR a special Online Dispute Resolution Court which has its own, separate procedure and uses some of the Online Dispute Resolution techniques mentioned above;
- vi. Use of Online Dispute Resolution in the enforcement of judicial decisions;
- vii. Out-of-court alternative dispute resolution mechanisms which the parties are required to use by law and which result in binding decisions not subject to judicial review.

21. This distinction between different ODR techniques on the one hand and between different stages of procedure and different fora provides the matrix for our examination of existing ODR in the Council of Europe Member States. The next section summarizes the ODR currently existing in the Council of Europe Member States as appeared from the answers to our Questionnaires kindly provided by experts in the States.

SUMMARY OF ODR IN THE COUNCIL OF EUROPE MEMBER STATES

Belgium

Q.A.1: there are no mandatory preliminary pre-trial processes in Belgium.

Q.A.2: Belgium introduced an online process for the recovery of business to business debts (undefended money claims) by Articles 1394/20 to 1394/27 of the Judicial Code in force since 2. July 2016. Although non-mandatory, there could be cost-penalties at the stage of the cost recovery, if the creditor does not use the least burdensome process. This process revolves round a central registry (an online database) for such uncontested business to business claims and if the debtor does not react within a month a judge can make the title enforceable- this leads to expedited debt recovery for uncontested claims- the process is further explained here .

Q.A.3: under Belgian Law family disputes are dealt with by the Family Tribunal and the Justice of the Peace deals with neighbourhood disputes and other minor disputes- but there are no specific ODR processes/techniques for these special tribunals other than those used in the ordinary civil courts.

Q.A.4: Belgian civil courts make use of several online database schemes which support the courts internally:

- first certain legal documents (“conclusions, mémoires et pièces en matière civile et pénale”) are stored and hosted in the “e-deposit” scheme and secondly there is a “e-box” scheme for secure electronic communication. This system is governed by Art. 32ter of the Judicial Code and several executive orders passed on 16. June 2016.
- secondly there is a central insolvency registry, a database which contains all relevant data and legal documents in insolvency cases since 1. April 2017 (see <https://www.regsol.be>)

This is governed by articles 5/3, 5/4 and 5/5 of the Insolvency Act of 8. August 1997 and the implementing orders. This has been further reformed with effect from 1. May 2018 by a new law on insolvency (Articles XX.15 to XX.19 Business Act) which will govern the central insolvency registry.

Q.A.5: No ODR tracks or pathways in the courts in Belgium

Q.A.6: No ODR elements to enforcement

Q.A.7: No obligatory ODR procedures outside the courts

The Belgian Questionnaire did not contain any answers to the questions concerning the administrative courts.

Bosnia Herzegovina

Q.A.1: Alternative Dispute Resolution procedures with judicial involvement exist in Bosnia Herzegovina, but they are not mandatory. In Bosnia and Herzegovina there are several preliminary pre-trial processes envisaged and recognized by the Law on Civil Procedure Before the Courts of BiH

(BiH Official Gazette No. 36/04, 84/07 and 58/03).

Pre-trial or trial processes are stipulated by the State Law on Civil Procedure Before Court of BiH. First Mediation can be used in pre-trial phase of the procedure, but also in the trial phase. The court may, if it finds appropriate with regard to the nature of the dispute and the circumstances, propose to the parties the resolution of the dispute through mediation proceedings. Mediation can be initiated at the preparatory hearing at the latest. Mediation proceedings can be also prescribed by a separate law. Bosnia and Herzegovina has adopted the Act on Mediation Procedures at State Level in 2004.

The second pre-trial or trial procedure prescribed by the State Code of Civil Procedure is Judicial Settlement. At any time during the proceedings the parties may settle their dispute. The court shall persuade parties in all phases to conclude Judicial Settlement. The only requirement is that settlement is reached in a way that does not compromise its impartiality. A Judicial Settlement may pertain to the whole claim or to a part thereof. It is also important to note that a Judicial Settlement is enforceable.

Bosnia and Herzegovina's civil procedures also envisages arbitration proceedings as one of the alternative settlement disputes mechanisms. An arbitration agreement may be concluded in respect of an existing dispute or future possible disputes that could stem from certain legal relationships. Arbitration is an important extrajudicial settlement mechanism in BiH.

Unfortunately, there are no preliminary pre-trial processes that use Online Dispute Resolution techniques. However, in near future it is realistic to expect that Bosnia and Herzegovina authorities shall start procedures with aim to implement these mechanisms in the legal system of BiH.

Q.A.2: There are no cost-penalties for not engaging in ADR and none of these procedures use ODR yet.

Q.A.3: There are no special tribunals using ODR.

Q.A.4: No ODR is used in the civil courts.

Q.A.5: There are no special ODR tracks or pathways.

Q.A.6: ODR is not used in the enforcement of judicial decisions.

Q.A.7: No mandatory ODR procedures with res judicata effect

Q.B.1: On 12 November 2000 the Law on the Court of Bosnia and Herzegovina was promulgated, and in 2002 The Court of Bosnia and Herzegovina was officially established. There are three divisions of the Court of BiH: Criminal, Administrative and Appellate Division.

Due to this specific court organization in Bosnia and Herzegovina and the fact that there is no lex specialis law that establishes a freestanding Administrative Court as special institution there is no preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court.

Furthermore there are no Online Dispute Resolution techniques in the legal system of Bosnia and Herzegovina at this moment.

Croatia

Q.A.1: Article 186.a of the Civil Procedure Act (OG, No. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13, 89/14) states that any person intending to sue the Republic of Croatia shall first, before lodging a complaint, address the state attorney's office, that has subject matter and territorial jurisdiction for representation at the court where an action against the Republic of Croatia is to be taken, with a request to settle the dispute amicably, with the exception of cases in which special regulations determine a time limit for lodging a complaint. Such request to settle the dispute amicably shall include everything that must be included in a complaint. This provision shall apply mutatis mutandis in cases where the Republic of Croatia intends to sue a person with legal residence or habitual residence in the Republic of Croatia.

Also, The Family Act (OG No. 103/15) states that if the spouses have a mutual minor child, when seeking for divorce, they have to obtain a report of mandatory family mediation and proof of participating in the first meeting of family mediation.

Article 206. of the Labour Act (OG No. 93/14) states that in case of dispute which could result in a strike or other form of industrial action, the mediation procedure must be conducted as prescribed by that Act, except when the parties have reached an agreement on an alternative amicable method for its resolution.

These processes do not use Online Dispute Resolution techniques.

Article 186d of the Civil Procedure Act states that the court may during the entire court proceedings propose to parties to resolve the dispute through a court mediation procedure. Where parties jointly propose or agree to resolve their dispute amicably before the court, a hearing to attempt mediation shall be set without delay and parties, their legal representatives or authorised agents, if any, shall be invited to such hearing. The court mediation process shall be conducted by a mediator judge designated from the list of mediator judges that is established by the president of the court with the annual schedule of responsibilities. A settlement entered into before a mediator judge shall be a court settlement and is enforceable.

Article 288a of the Civil Procedure Act states that the court shall during the preliminary hearing propose to parties to resolve the dispute through a court mediation procedure, or warn the parties of the possibility of a court settlement. If the parties refuse to engage in a court mediation procedure there are no sanctions prescribed for the parties involved. These preliminary processes do not use Online Dispute Resolution techniques.

Q.A.3 There are no special tribunals using ODR.

Q.A.4 On December 12, 2017, at the Commercial court of Bjelovar has started an e-Communication pilot project. The project refers to electronic communications between attorneys and commercial courts. Advocates are obliged to file statements (claims, counterclaims, responses and all other submissions) using the system of electronic communications. Courts will also submit court judgments using the e-communication system to attorneys. By the end of January 2018 e- Communication should be

applied to all commercial courts in the Republic of Croatia. The parties will also have accesses to the electronic communications system once implemented.

Q.A.5 No parallel ODR tracks or pathways in Croatia

Q.A.6 No ODR in enforcement

Q.A.7 No mandatory ODR processes

Q.B.1-6 No ODR in the Administrative Courts

Cyprus

Q.A.1: in Cyprus there are no mandatory pre-trial processes.

Q.A.2: in Cyprus there are no ADR pre-trial processes which can be recommended by judges or which give rise to cost penalties if not used in appropriate circumstances.

Q.A.3: there are no special tribunals for small claims or other civil disputes using ODR.

Q.A.4: The civil procedure rules in Cyprus provide for the taking of witness evidence by video-conferencing at the discretion of the judge. The following apply regarding the use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts (4):

Evidence Law, Cap. 9 , Amd. 122(I)/2010 – section 36A

1. If any criminal or civil proceedings, the Court may – if it considers that justice requires so – to allow a witness who is abroad, to give his/her testimony via videoconference.

2. For the purposes of this, “videoconferencing”, means the use of video and audio transmission technology or other arrangement by which the witness, despite his/her absence from the chambers of the Court can see and hear the persons who are in the courtroom and vice versa, the persons in the courtroom to see and hear the witness. It is considered that, for the purposes of this subsection, “persons who are in the courtroom” mean the Court, the accused concerned, the lawyers of the parties, the interpreter or other persons appointed to assist the witness or the accused concerned.

3. The Court may impose any terms it may consider necessary regarding the admission of evidence, but these terms should not be inconsistent with commitments undertaken by the Republic of Cyprus in bilateral or international conventions governing the matter in issue.

Q.A.5 There are no parallel tracks of pathways for ODR in Cyprus.

Q.A.6 ODR is not used in enforcement

Q.A.7 There are no mandatory ODR or other out-of court dispute resolution mechanisms

Q.B.1-6 ODR is not used in the administrative courts in Cyprus.

Czech Republic

Q.A.1 There are no mandatory pre-trial processes using ODR in the Czech Republic.

Q.A.2 The Czech legal system regulates arbitration and mediation. Arbitration is frequently used in the Czech Republic, but it is always consent/agreement based, ie agreed between the parties based on a voluntary agreement, not recommended by a judge. However judges can recommend or order mediation. The judge can recommend or order to the parties to attend the first meeting with mediator if he/she finds it effective and convenient. The law states only general and fundamental rules for these procedures. Therefore parties can use various online dispute resolution techniques. It is presumed that typically the audio- and video-conferencing tools could/should be used, so that meetings can be arranged at a distance.

Q.A.3 No special ODR tribunals for small claims or other civil disputes in the Czech Republic.

Q.A.4 The Czech legal system provides an online/e- filing system for certain legal forms and a data box system for secure communication.

The “ePodatelna” system can be used

<https://epodatelna.justice.cz/ePodatelna/epo1200new/form.do>).

The system enables easier communication between parties/their attorneys and court. The system can be used only with qualified electronic signature. It serves only as a communication tool from parties/their attorneys to courts (but not vice versa). The system offers a universal form that enables users to create a motion/petition/document. A special form is available only for a few types of motions (e. g. Electronic Payment Order). The system enables to upload enclosures/attachments in permitted file format (PDF, DOC, DOCX, XLS, XLSX, TXT and RTF). Generally, if there is a special form available, it is obligatory to use it (e. g. form for registration in Public Registers). Some forms are not available in the above mentioned system but on different websites managed by relevant authority. They can be also filed via the “ePodatelna” system.

Also, all attorneys at law obligatorily have to have a data box (see the definition below). The data box system enables easier communication between parties/their attorneys and the courts. If a party has a data box, a court is obliged to use the data box as the primary form of communication.

Courts have also online access to various registers which contain information that can be used as evidence in court.

The law explicitly envisages that courts may also use video-conferencing tools if it is found convenient.

A data box is an electronic storage site, intended for delivery of official documents and for communication with public authority bodies. Data boxes are established and managed by the Ministry of Interior. A data box is not obligatory for citizens and private individuals who carry out business activities. Establishment of a data box is obligatory for legal entities (including attorneys) and public authority bodies (state administration).

A document (data message), which is delivered to a data box, is delivered at the moment the authorised individual logs into his/her data box. The fiction of delivery applies similarly to letter mail: if you do not log-into your data box within a time limit of 10 days from the day the document was delivered to the data box, this document is considered delivered on the last day before the lapse of this time limit. Fictitious delivery of the document has the same legal effects as personal delivery. A data box is not an e-mail box; you cannot use it to communicate directly with individual clerks, only with the whole office. And you also cannot use the data box to communicate with another private individual, private individual carrying out business activities or legal entity. There is more information.

Q.A.5 There is no parallel track online dispute resolution procedure. However, the Electronic Payment Order is close to that. If a claim concerns pecuniary payment not higher than 1.000.000 CZK , a plaintiff can file the Electronic Payment Order Motion instead of filing a standard motion. The Electronic Payment Order Motion has to be filed in on an electronic form and has to be signed by a qualified electronic signature. Then the court issues the Electronic Payment Order. However, the whole procedure does not have to be electronic. It depends on the fact whether the defendant has a data box or not.

Q.A.6 ODR is not used in enforcement in the Czech Republic.

Q.B.1 Administrative complaints: there always must be administrative proceeding completed before the proceeding of administrative court is initiated. In principle, use of audio- and video-conferencing tools in the framework of administrative proceedings is possible, even though the law does not state it explicitly.

Q.B.2: there are no special administrative tribunals using ODR in the Czech Republic.

Q.B.3: the same online filing ("ePodatelna" system) and online messaging (Databox system) techniques are applicable to the administrative courts-see answers to Q.A.4

Q.B.4: there are not parallel ODR tracks or pathways in the administrative courts

Q.B.5 and 6: ODR is not used in the enforcement or there are no mandatory ODR procedures for administrative matters in the Czech Republic.

Denmark

Q.A.1 In Denmark there are no preliminary pre-trial processes which are mandatory

Q.A.2 All courts except the Supreme Court, are obliged to offer settlement activities and mediation services when a claim is brought in the court. This is regulated in the Administration of Justice Act, chapter 26 and 27. The services are not mandatory but may be recommended by the judge or requested by the parties. Participation in the services are voluntary and no penalties apply if the parties refuse to engage in them. Finally, these services are not available as an Online Dispute Resolution technique.

Q.A.3 In Denmark there are no special ODR tribunals for small claims or

other minor civil claims

Q.A.4 Yes, during 2017 Denmark has implemented an online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses). The platforms are also used for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts.

Q.A.5 There are no parallel ODR tracks or pathways.

Q.A.6 ODR is not used in the enforcement processes.

Q.A.7 There are no mandatory out of court processes with res judicata effect.

Q.B.1-6 Denmark did not complete this part of the Questionnaire.

Finland

Q.A.1 In Finland there are no preliminary pre-trial processes which are mandatory

Q.A.2 There are no preliminary ADR processes which can be recommended by the judge and/or give rise to cost penalties

Q.A.3 In Finland there are no special ODR Tribunals.

Q.A.4 In Finland there are no systems for online evidence, nor artificial intelligence.

If a civil claim relates to a debt of a specific sum and the plaintiff states that the matter is not under dispute, the application for a summons may be sent to the registry of a district court using an online filing system. The application of such a summons may also be sent as an electronic message transmitted through a technical link which the plaintiff has been granted license to install and use.

Witnesses, experts and parties may be heard in court proceedings using audio- and videoconferencing equipment.

Q.A.5 In Finland there are no parallel ODR tracks or pathways

Q.A.6 ODR is not used in the enforcement of decisions

Q.A.7 There are no mandatory out-of-court processes with res judicata effect.

Q.B.1 There are no mandatory preliminary processes in the administrative courts using ODR

Q.B.2 In Finland there are no special ODR tribunals for administrative matters.

Q.B.3 Online filing platform for administrative matters will be provided in the near future in Finland. The administrative and special courts will transition to the electronic work method in 2019-2020. A uniform case and documentation management system will be available and facilitate the computerization of all functions. At the moment there is only an internal online system that is used for transferring data between the administrative courts and the immigration authorities. However, oral hearings in the administrative and special courts can already be held using video conferencing. At present no introduction of artificial intelligence is planned.

Q.B.4 No parallel ODR tracks or pathways exist in the administrative courts.

Q.B.5 ODR is not used in the enforcement of administrative decisions in

Finland

Q.B.6 There is no binding ADR with res judicata effect for administrative matters.

France

Q.A.1 and Q.A.2 A 2016 Act (La loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIème siècle) has introduced into French Law an obligation to attempt mediation/conciliation led by a judicial mediator, when the submission of the case to the trial court is envisaged by statement to the court registry. This preliminary mediation attempt is mandatory in the sense that without it the case may be inadmissible and it must take place face-to-face (not using remote communication at a distance). The same Law of 2016 has introduced in certain Court Districts in France (Tribunal de Grande Instance) an obligation to conduct preliminary pre-trial mediation in family matters, in various pilot projects. Some of these family mediations can be conducted at a distance, using electronic communication (similar to Skype).

The French government has installed a working group on the simplification of the French civil procedure in October 2017 whose Report was submitted on 15. January 2018 to the Garde des Sceaux. This Report recommends the creation of a public service of Online Dispute Resolution. Furthermore, it recommends the expansion of mandatory pre-trial mediation attempts. These developments are now subject to the political process for reform.

Q.A.3 Currently, there are no special ODR tribunals- however the above-mentioned working group on the simplification of the French civil procedure recommends the creation of a new separate ODR track or ODR jurisdiction for small claims. France may therefore see new developments in this field.

Q.A.4 ODR is currently not used in the ordinary civil court procedure.

Q.A.5 There are currently no ODR tracks or pathways in France.

Q.A.6 ODR is also not used in the enforcement of decisions.

Q.A.7 There are no mandatory out-of-court processes with res judicata effect

Q.B.1-6 France did not reply to the questions on administrative procedures.

Georgia

Q.A.1 In Georgia there are no mandatory preliminary pre-trial processes.

Q.A.2 In Georgia there is a process of judicially recommended mediation for certain types of disputes. The Civil Procedure Code of Georgia contains articles regarding mediation, but it is not a mandatory prerequisite.

According to the Civil Procedure Code, Judicial Mediation may apply to the following types of disputes:

1. matrimonial disputes (except adoption, annulment of adoption, restriction and deprivation of parental rights, violence against women and domestic violence),

- 2.inheritance disputes;
3. neighbourhood disputes
- 4.with consent of the parties, to any other type of disputes. After a claim has been filed with the court, a case that falls within the jurisdiction of a judicial mediation may be transferred to a mediator based on the decision of the judge. A judgement on referring the case to a mediator may not be appealed. Legislation does not provide any Online Dispute Resolution techniques for the abovementioned process.

Q.A.3 In Georgia there are no special ODR tribunals for small claims and other minor disputes.

Q.A.4 There are provisions in the procedural rules for ODR. Georgia has Common Court system where there are special chambers (civil, criminal and administrative) in the Supreme Court and Appellate Courts; special panels in District (City) Courts.

Georgian legislation provides for the possibility of applying the following Online Dispute Resolution techniques in litigation:

- Online filing systems/platforms for the filing of statements (such as claims, counterclaims, responses) accessible online for the parties.
- According to Article 127(3) and Article 148(6) of the Civil Procedure Code of Georgia, examination of a party or interrogation of a witness may be conducted remotely from another court or administrative body by using a telephone, video equipment or other technical means, on the discretion of a judge.
- According to Article 205(1) of the same code a preliminary first hearing or a phone interview or videoconference with the parties as well as a phone interview or videoconference with a judge may also be conducted.

Parties may choose whether they want to file claims, counterclaims, responses in electronic form or physical hardcopies. Other documents shall be submitted to the court as hardcopies.

Q.A.6 The National Enforcement Agency uses an electronic communication system with other state institutions and partner companies but there is no online dispute resolution mechanism for private individuals in respect of enforcement.

Q.A.7 There are no compulsory ADR procedures with res judicata effect.

Q.B.1 Article 178 of the General Administrative Code deals with the administrative body authorised to review administrative complaints: the administrative body issuing the administrative act shall review and resolve the administrative complaint if there is an official at the administrative body superior to the official or to the structural sub-division having issued the administrative act. However in administrative complaints the use of online filing, electronic evidence and so on is not regulated by the law.

Under the Article 2 (5) Administrative Procedure Code of Georgia, the party is obliged to appeal the disputed administrative decision and lodge an administrative complaint with the higher administrative body (unless otherwise specified by law) in accordance with the procedure laid down in the General Administrative Code of Georgia. This administrative complaints process is a mandatory pre-requisite before a claim is

admissible in the court.

Thus the claimant must have used the possibility of escalating their administrative complaint at first. Here ODR could be used (?).

Q.B.2 There are no special tribunals for administrative cases using ODR.

Q.B.3 Use of ODR in the administrative courts- same as in the civil courts- see replies to Q.A.4

Q.B.4 There are no special ODR tracks or pathways in the administrative courts.

Q.B.6 There are no compulsory ADR procedures with res judicata effect for administrative matters.

Germany

Q.A.1 As to preliminary pre-trial processes, including ADR mechanisms, there is no general legal obligation for the parties to participate in mediation before going to court. However, pursuant to Section 15a para. 1 of the Act Introducing the Code of Civil Procedure (Gesetz betreffend die Einführung der Zivilprozessordnung, EGZPO), a federal state (Land) can require by law that an action regarding specific civil disputes shall only be brought before a court once an attempt to achieve consensus has been made at an officially recognized conciliation office (mandatory conciliation process). However there is no legal basis for using Online Dispute Resolution techniques by a recognized conciliation office (staatlich anerkannte Gütestelle) and the hearings are basically face-to-face.

Q.A.2 The German civil procedure rules require all courts to set up mediation programmes with judges who have trained as mediators (Güterichter). A Güterichter acts as a mediator with no decision-making power, using methods of ADR, Section 278 Para.5 Civil Procedure Rules. The case is normally referred to the Güterichter by the court. He or she does not handle the conciliation hearing on an online basis or by using online filing systems/platforms. However, the parties are fully entitled to file their statements electronically online under the same conditions as are applicable to claims and petitions in civil cases in general (see below Q.A.4).

Q.A.3 There are no special ODR tribunals for small claims or other minor disputes in Germany.

Q.A.4

In payment order processes (Mahnverfahren, Sections 688 ff. of the Code of Civil Procedure, Zivilprozessordnung - ZPO) and small claims proceedings (§§ 1097 ff. ZPO) electronic forms have been used for certain actions (at the parties' option). They, however, do not constitute „online filing platforms/systems“ in the sense of the question.

Furthermore, with effect from 1. January 2018, the law provides for the possibility of granting access to the court files by providing the content of the files for retrieval in a so-called "file access portal" ("Akteneinsichtsportal", § 299 ZPO in its new version). The court may

permit the parties and their attorneys, or witnesses or experts to stay at another location in the course of a hearing or an examination and to take actions in the proceedings from there. In this event, the images and sound of the hearing or the examination shall be broadcast in real time to this location and to the courtroom simultaneously (§ 128a ZPO).

Germany is taking a uniform approach to implementing electronic communication systems in all proceedings under equal conditions. Since 1 January 2018, all courts of the "Länder" and at the Federal Level (Regional and Federal Courts) are open for filing electronic documents via secure electronic paths. However, this mere possibility to access the court electronically (electronic communication) does not constitute full „online filing platforms/systems“ in the sense of the question. The same is true for the possibility granted by law to keep the court records of the dispute as electronic files (§ 298a ZPO).

So in Germany there is electronic filing, electronic communication and access to the court records plus the possibility to take part in hearings by simultaneous two way video-communication, but no full implementation of online court platforms.

Q.A.5 In Germany there are no parallel ODR tracks or pathways in the civil courts.

Q.A.6 German civil enforcement law does not provide for a closed online filing system/platform.

However, a creditor in possession of an enforceable title, may file his or her petition for enforcement measures to the enforcement court electronically, online under the same conditions as are applicable to claims and petitions in civil cases in general. The same conditions apply to instructions for enforcement that are transmitted directly to a court-appointed enforcement officer by the creditor. Additionally, petitions and instructions for enforcement can be transmitted exclusively electronically without a need to transmit a paper copy of the title if the title is a writ of execution and the monetary claim due that is set out in the writ of execution does not amount to more than 5,000 euros.

Regarding the use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, the court-appointed enforcement officer must endeavour to achieve an amicable termination of the matter in all situations of the proceedings. Any contact with the parties (particularly the debtor) required can also be achieved by using image and sound transmission systems.

Q.A.7 There are no mandatory out of court ADR procedures with res judicata effect.

Q.B.1 The rules of administrative court procedure provide for preliminary proceedings before instituting proceedings before the court by lodging an objection ("Widerspruch" under Section 68 of the Code of Administrative Court Procedure, Verwaltungsgerichtsordnung – VwGO and Section 78 of the Social Court Act, Sozialgerichtsgesetz – SGG; "Einspruch" under Section 347 of the Fiscal Code, Abgabenordnung - AO). These objections can be launched electronically (§ 70 VwGO, § 84 SGG, § 357 AO); they, however, do not constitute "online filing systems/platforms" in the sense of the question.

Q.B.2 There are no special online dispute resolution administrative tribunals for some particular types of claims in Germany.

Q.B.3 With effect from 1. January 2018, the law provides for the possibility of granting access to the court files by providing the content of the files for retrieval in a so-called "file access portal" ("Akteneinsichtsportal", cf. § 100 VwGO, § 78 FGO, § 120 SGG in their new versions).

The court may permit the parties and their attorneys, or witnesses or experts to stay at another location in the course of a hearing or an examination and to take actions in the proceedings from there. In this event, the images and sound of the hearing or the examination shall be broadcast in real time to this location and to the courtroom simultaneously in a two way broadcast (§ 102a VwGO, § 110a SGG, § 91a FGO).

Apart from that, there are elements of electronic procedure in the course of the ordinary proceedings none of which, however, constitute systems or platforms in the sense of the question, such as:

- Documents may be conveyed to the court electronically under certain conditions (§ 55a VwGO, § 65a SGG, § 52a Finanzgerichtsordnung - FGO (Tax Court Code)).

-The procedural files may be kept in electronic form (§ 55b VwGO, § 65b SGG, § 52b FGO).

Q.B.4 There are no separate ODR tracks or pathways in the administrative courts in Germany.

Q.B.5 Enforcement of judicial decisions in administrative matters is governed by the rules for the enforcement of civil titles (as is e.g. the case for enforcement sought against public authorities, cf. § 167 VwGO, § 198 SGG, § 151 FGO)- see the response to Q.A.6

Q.B.6 There are no mandatory out of court administrative processes with res judicata effect.

Greece

There are no ODR or ADR processes which would fall within the scope of the questionnaire, thus the answer to all questions is "no".

Hungary

Q.A.1 There are no mandatory preliminary pre-trial ADR processes in Hungary.

Q.A.2 There are no preliminary pre-trial processes recommended by a

judge or subject to cost-penalties.

Q.A.4 Hungary has an online filing procedure for small claims below a value of ca. Euro 10,000, which can be accessed directly by the parties and their advocates.

Online filing systems directly accessed by the parties and their advocates for the filing of statements.

The use of platforms for online meetings and online hearings: by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts

Artificial intelligence is used in the online, anonymous judgment database (searchable records).

Q.A.5 Claims [from (min.)10.000,- EUR to (max) 33.000 EUR] in which online filing system directly accessed by the parties and their advocates is used for the filing of state claims.

- traditional court procedures

- notary procedure

Q.A.6 ODR is not used in the enforcement of civil judgments

Q.A.7 In Hungary there are no mandatory ADR processes with res judicata effect.

Q.B.1 In Hungary there are no mandatory preliminary pretrial processes in the administrative courts.

Q.B.2 There are no special administrative ODR tribunals

Q.B.3 ODR is not used in the administrative courts in Hungary

Q.B.4 There are no parallel ODR tracks or pathways in the administrative courts in Hungary

Q.B.5 ODR is not used in the enforcement of administrative decisions.

Q.B.6 There are no binding, out-of- court ADR dispute resolution mechanisms in administrative matters.

Ireland

Q.A.1 There are no mandatory pre-trial preliminary ADR processes in the civil courts in Ireland.

Under Order 56A (Mediation and Conciliation) of the Rules of the Superior Courts, the High Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, may order that proceedings or any issue in the proceedings be adjourned for such time as the Court considers just and convenient and

- (i) invite the parties to use an ADR process (viz. mediation, conciliation or another dispute resolution process approved by the Court, but not including arbitration) to settle or determine the proceedings or issue, or

- (ii) where the parties consent, refer the proceedings or issue to such process,

and the court may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the court may specify.

Where the parties decide to use an ADR process, the court may make an order extending the time for compliance by any party with a time limit set by the rules of court or an order of the court.

The court may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process when awarding costs as between the parties.

Similar rules of court are in place for the other first instance jurisdictions.

The ADR process would not however, ordinarily involve the use of an online system/platform.

However, in the case of consumer claims with a cross-border element, under the European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015, responsibility is conferred on the European Consumer Centre Ireland to host the Irish ODR contact point and carry out the functions set out in article 7 of the ODR Regulation. These functions include providing information on the functioning of the ODR platform and facilitating communication between the consumer, trader, and competent ADR entity, if requested.

Q.A.3 Ireland has a special online platform system for small claims:

Q.A.3 A small claim

(viz. (a) a claim for goods or services bought for private use from someone selling them in the course of a business (consumer claims) (for example, claims for faulty goods or bad workmanship)

(b) a claim for goods or services bought for business use from someone selling them in the course of a business (business claims)

(c) a claim for minor damage to property (but excluding personal injuries)

(d) a claim for the non-return of a rent deposit for certain kinds of rented properties. For example, a holiday home or a room / flat in a premises where the owner also lives.

not exceeding €2,000 in value, may be lodged online on an online platform, which allows a party/advocate to

- create a small claim application online
- pay the appropriate small claim application fee and
- check the status of your online small claim.

(Editorial comment: this platform seems to allow for the filing of claims and viewing the status of the claim, but does not seem to be a fully online dispute resolution platform?)

Q.A.4 There are no ODR techniques in the ordinary civil court processes.

Q.A.5 There are no ODR parallel tracks or pathways in the civil courts other than the special filing and viewing process for small claims described under Q.A.3

Q.A.6 ODR does not play a role in the enforcement of civil judgments.

Q.A.7 Ireland there are no mandatory out of court processes with res judicata effect in civil cases.

Q.B.1 There are no mandatory preliminary pre-trial processes in the administrative courts.

Q.B.2 In Ireland there are no special ODR tribunals for administrative matters

Q.B.3 In Ireland there are no ODR administrative procedures

Q.B.4 There are also no special ODR tracks or pathways in the administrative courts

Q.B.5 ODR does not play a role in the enforcement of administrative decisions of the courts

Q.B.6 In Ireland there are no mandatory ADR procedures with res judicata effects in administrative matters.

Latvia

Q.A.1 Generally speaking there are no mandatory preliminary pre-trial procedures using ODR in Latvia. However some civil procedures such as injunctions, orders securing evidence in civil trials can be carried out using electronic communication:

There are some procedures in the Civil Procedure Law, for example, the securing of a claim, securing the evidence, provisional remedies in IP cases, which can be used before bringing an action in a court –here submission of documents may be done electronically (if using an electronic signature, documents have legal force according to law). Communication by the court in such procedures may be received electronically (if a party agrees), or within the special online system (for example, communications addressed to sworn advocates).

Q.A.2 No. A court can, for example, recommend the parties to use mediation, however it is not mandatory, and there are no cost penalties and no ORD is used.

Q.A.3 There are no “Special online dispute resolution tribunals for small claims” (But submission of documents in small claims procedures may be done electronically (if using an electronic signature/documents have legal force). Communication by the court received electronically (if a party agrees), or within the online system (for example, with regards to sworn advocates).

Q.A.4 Videoconferencing can be used in civil procedures. Each court in Latvia is equipped with at least one video conference room and EVERY court room is equipped with an audio equipment. A judge decides on the requests of participants in the case regarding participation of persons in the trial of the case by using a video conference. This can be beneficial in cases where, for example, a person is in a location not close to the court adjudicating the case, and cannot attend the hearing.

All court hearing protocols are made in an audio format using the audio-labelling system (TIX). TIX eases audio recording of court sessions, combining the written information with the audio record in one interactive protocol of PDF format, corresponding with the standard of the industry. The protocol of PDF format consists of the general information of the court session, audio record of the court session and course of the court session, organised pursuant to statements or issues to be adjudicated that are linked with the particular place in audio record. Preparation of the protocol does not require a lot of time, because the recorder has to record only the issues to be adjudicated. Full information on the course of the court session is provided by audio record. While, the place of interest in the audio record is to be found fast in the interactive protocol by pressing on the relevant issue to be adjudicated.

In general, submission of documents may be done through the court

portal: www.manas.tiesas.lv

As mentioned before, submission of documents may be done electronically (if using an electronic signature documents have legal force), and communication by the court received electronically (if a party agrees), or within the special online system (for example, documents addressed to sworn advocates).

Q.A.6 Some communications related to enforcement may be communicated electronically: Generally no, however, for example, procedures (communication) in Approval of a Statement of Auction are done electronically.

Q.A.7 No, there are no Alternative Dispute Resolution mechanisms which the parties are required to use by law, and which use ODR techniques.

Q.B.1-3 In relation to administrative disputes, in general submission of documents could be done through the court portal www.manas.tiesas.lv

As mentioned before submission of documents may be done electronically (if using an electronic signature documents have legal force), and communication by the court received electronically (if a party agrees), or within the special online system (for example, documents addressed to sworn advocates).

Videoconferencing can be used in administrative processes before the court. A judge can decide that video conference can be used in specified procedural actions if the participant in the proceedings, the witness or expert are in different places and cannot appear at the court hearing.

There are no online dispute resolution administrative tribunals in Latvia.

Q.B.4 There are no special ODR tracks or pathways before the administrative courts in Latvia.

Q.B.5 The Enforcement Case Register is accessible to the parties online.

Q.B.6 There are no out-of- court ADR procedures with res judicata effect in Latvia.

Moldova

Q.A.1 There are no mandatory preliminary pre-trial processes in Moldova.

Q.A.2 There are no pre-trial ADR processes which can be recommended by judges or are subject to cost penalties in Moldova.

Q.A.3 There are no special ODR Tribunals for small claims or other minor disputes in Moldova.

Q.A.4 According to the law, in the Republic of Moldova are functioning courts of general jurisdiction. The 2 specialised courts (military court, commercial court) ceased its activity starting with April 2017, according to the law no. 76 from 21.04.2016 about court reorganization.

In 2017 the e-File solution for courts was developed , which allows the

creation and administration of the electronic file with the access of the parties, the uploading of the evidence, the visualization of the materials attached to the electronic file, the electronic summoning of the parties, the coordination of the court sessions agenda by the judge with the participants in the trial, payment of state tax/fees through government e-services (Mpay), etc. The period of piloting for the developed tools is forecast for 2018.

The application is expected to be implemented in all Moldovan courts. The pilot does not include: (1) the use of artificial intelligence, big data analysis techniques and automation to reach decisions (which traditionally are adopted by judges and which traditionally have been dependent on human judgment) and (2) the use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding.

In December 2017 in all Moldovan courts have installed video-conferencing equipment in order to use it for online meetings and online hearings. The period of piloting the installed tools is forecast for 2018.

Q.A.5 There are PARALLEL TRACKS or PATHWAYS before the same court which allow claimants to choose between the ordinary, "traditional" court procedures (not using Online Dispute Resolution) AND a special Online Dispute Resolution Procedure.

This option is available for all types of cases and for all courts. The option (PARALLEL TRACK) does not include the use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment and the use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding.

Due to the recent development of the option it will be piloted in 2018 and then it is expected to be implemented in all Moldovan courts as well as the video-conferencing equipment recently installed.

Q.A.6 ODR is not used in the enforcement of judgments

Q.A.7 There are no mandatory ADR out-of-court processes which have res judicata effect

Q.B.1 There are preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court, but these preliminary pre-trial processes do not use Online Dispute Resolution techniques listed above.

Q.B.2 There are no special online dispute resolution administrative tribunals for some particular types of claims in Moldova

Q.B.3 The answer is the same as to Q.A.4- Moldova has introduced e-filing, access to online evidence and video-conferencing as described there.

Q.B.4 For the administrative cases as well for the civil cases there are PARALLEL TRACKS or PATHWAYS before the same court which allow claimants to choose between the ordinary, "traditional" court procedures (not using Online Dispute Resolution) AND a special Online Dispute Resolution Procedure. This option (PARALLEL TRACKS) is available for all types of cases and for all courts. The option does not include the use of artificial intelligence, big data analysis techniques and automation to reach decisions and the use of artificial intelligence, big data analysis, expert and

legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding.

Q.B.5 ODR does not play a role in the enforcement of decisions of the administrative courts.

Q.B.6 There are no out-of- court ADR procedures with res judicata effect in the Republic of Moldova.

Montenegro

Q.A.1 In Montenegro there are several preliminary pre-trial processes envisaged by the Law on Civil Procedure. Generally speaking, they are not mandatory as such: they are an optional choice of the parties, not an obligation. Mediation may not only be used in the pre-trial phase of the procedure, but also in the trial phase. Only mediation in family cases is obligatory for the parties. Mediation proceedings and judicial settlement can also be prescribed by a separate law. In the Montenegro legal system the parties may choose to use arbitration proceedings as one of the alternative settlement disputes mechanisms. Arbitration is governed by a separate Law on Arbitration. But there are no preliminary pre-trial processes that use ODR techniques, however.

Q.A.2 The preliminary pre-trial ADR processes can be recommended by the court/judge. It is actually the role of the court or the judge to encourage the parties to reach an agreement in a pre-court decision phase. However, there is no penalty if the parties refuse to engage in them. These preliminary processes as we have mentioned earlier do not use Online Dispute Resolution techniques.

Q.A.3 There are no special tribunals using ODR for small claims or other minor disputes in Montenegro.

Q.A.4 Pleadings can be delivered electronically in accordance with separate Law on Electronic Administration, as described in the Rules of Civil Procedures- thus the legal framework for this is in place. Furthermore a new strategy for the judiciary was adopted, setting directions for the development of judicial information; basic infrastructure was set up, accelerated training was delivered to the end users and it is now possible for all the judicial bodies to make entries and oversee the work on cases electronically. Given the importance of the judiciary for the society as a whole, as well as the rapid development and pervasiveness of information and communication technologies in the past two decades, a logical conclusion may be drawn that further development of ICT for the judiciary, and of administrative affairs in particular, will depend on the level of implementation of information and communication technologies in these institutions.

In regard to Civil and Commercial Courts there is not any Online Dispute Resolution techniques in legal system of Montenegro in this moment.

However, in the near future it is realistic to expect that Montenegro authorities will start procedures with the aim of implementing these online communication and filing mechanisms as part of the legal system of Montenegro.

Q.A.5 There are no special tracks or pathways using ODR in the same court.

Q.A.6 ODR is not used in the enforcement of judicial decisions.

Q.A.7 There are no out-of-court ADR processes with res judicata effect.

Q.B.1 Montenegro have Administrative Court as special institution. However, there is no preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court in administrative cases.

Q.B.2 There are no special online dispute resolution administrative tribunals in Montenegro.

Q.B.3 The administrative courts do not use ODR techniques.

Q.B.4 There are no alternative ODR tracks or pathways in the administrative courts.

Q.B.5 ODR is not used for enforcement of decisions of the administrative courts.

Q.B.6 In Montenegro there are no out-of-court ADR processes in the administrative courts with res judicata effect.

The Netherlands

Q.A.1 and Q.A.2 In the Netherlands there are no preliminary pre-trial ADR procedures.

Q.A.3 There are no special ODR tribunals for small claims or other minor disputes.

Q.A.4 In 2013 the Ministry of Security and Justice in cooperation with the Council for the Judiciary started a modernization program for the judiciary. One important part of the program is the mandatory digital procedure (for professionals) in civil and administrative cases. For citizens without legal aid the digital pathway will not be mandatory. For this modernization new legislation (civil and administrative procedure) was adopted by the Parliament in July 2016. The ambition is that in all kinds of civil and administrative procedures the digital procedure is the standard (and that paper will be banned). As discussed with the Parliament it is very important that the process of implementation of the legislation is not a matter of a 'big bang' but a process of phased entry into force, in cooperation with all the users of the digital systems (e.g. bar association, government bodies, bailiffs). The first part of the new legislation entered into force in February 2017 for civil procedures (claims) at the Supreme Court. The second step was in June 2017: In all asylum-cases (administrative law) from this month the process is fully digital. In September 2017 the legislation entered into force for civil procedures with mandatory legal representation in two districts courts only. The process of implementation will last still several years. Important to mention: the new digital procedure is, first of all, a way of electronic communication with the judiciary. The parties get access to some files of the judiciary. So strictly it is not a form of online dispute resolution.

In response to the questions above:

1. Under the new legislation (partly entered into force) every court procedure starts with a digital 'process startdocument' at the digital portal of the judiciary. In all cases there is a digital file. Parties concerned are given 24/7 access to court-files. Access is only possible with a digital authentication key. Every next step – except for the hearing – is done electronically. Parties receive a notification by e-mail for new documents. The decision is done electronically (also electronic signature). All court files are stored (archived) centrally. Court of Appeal (cassation) can

download the documents from the district court (not available yet).

2. Under the new legislation the evidence must be made available (uploaded) in the online portal of the judiciary (PDF-format, and also audio and video documents)
3. Under Dutch law the use of AI and automatic decisions is not possible
4. Video-conferencing, including the giving of testimony of witnesses and experts, is possible but rarely used in civil and administrative proceedings
5. Is not possible. The Judiciary is interested in new technology and investigates the possibilities to make use of for example Artificial Intelligence.

Q.A.7 There are no binding out-of-court ADR procedures with res judicata effects in civil and commercial matters.

Q.B.1 There are no preliminary pre-trial processes in the administrative courts.

Q.B.2 There is an online filing platform in respect of traffic offences (including all evidence)

Q.B.3 see the answer to Q.A.4

Q.B.5 ODR is not used for the enforcement of administrative decisions.

Q.B.6 There are no mandatory out of court ADR procedures with res judicata effect.

Poland

Q.A.1 In Poland, the Civil Procedure Code requires that the initial claim (the document initiating the proceedings) should contain a section which mentions whether there has been a mediation attempt or an explanation why the mediation has not been possible. Otherwise, the Code does not specify a legal obligation to undertake pre-trial mediation. Such mediation is considered to be an out-of-the court procedure. Some private mediators offer online (electronic or telephone) mediation. As this procedure is not regulated by law, no statistics are available.

Q.A.2 In Poland, the Civil Procedure Code contains a general duty of the court to promote conciliatory dispute settlement (Art. 10). In particular, Art. 210 § 22 requests the Court to inform the parties about possibility to settle the case directly among them, including through mediation. Also, at any stage of trial, the court may request parties to undertake mediation (Art. 1838). However, the mediation does not take place, if either party, within one week from receiving the court order, has not agreed to mediation. The trial president may call on the parties to attend an information meeting on mediation. As in the case of Q.A.1 we have only anecdotal information about the use of electronic, online mediation offered by private bodies.

Q.A.3 Not answered.

Q.A.4 1. The procedure for payment orders is fully electronic. The claim is submitted through an individual account opened in a dedicated IT system/IT platform. All acts and documents are available online. This applies also to the electronic enforcement order. Decisions may be taken by the court clerk. Opposition to the payment order (editorial comment: filing of a defence?) results in the case being transferred to ordinary proceedings before the territorially competent court.

2. As regards all other civil disputes the Civil Procedure Code provides for the possibility to file the case electronically, if the technical conditions so

allow. For the time being, this has not been implemented.
3. There are no videoconference platforms. In the context of international co-operation (MLA) in civil matters, Poland's central authority receives from abroad and executes app.4-5 requests per month for the taking of evidence through videoconference with Polish court (under EU regulation on the taking of evidence in civil and commercial matters).
Q.A.5-Q.B.6 not answered.

Portugal

Q.A.1 and Q.A.2 In Portugal there are no preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings or which are recommended by a judge/lead to cost penalties.

Q.A.4

Q.A.5

i) Order for payment proceedings

An order for payment proceedings, through which a claimant may claim an amount up to 15.000 EUR or any amount emerging from a commercial transaction arising out of a contract, can be initiated over an online mechanism at <http://www.bna.mj.pt> ('Balcão Nacional de Injunções'), using a standard form (in word or pdf formats). The application does not need to be made through a lawyer. In case of opposition by the defendant (editorial comment: when a defence is filed?), the order for payment proceeding is converted into standard judicial proceedings.

Legislation: Decree-Law no. 269/98, ELI: <http://data.dre.pt/eli/dec-lei/269/1998/09/01/p/dre/pt/html>, Decree-Law no. 62/2013, ELI: <http://data.dre.pt/eli/dec-lei/62/2013/05/10/p/dre/pt/html>; all related decrees are listed at <https://goo.gl/2GSF1S>

ii) Eviction proceedings

Eviction proceedings, meant to enforce the termination of lease contracts, can be initiated over an online platform at <https://bna.mj.pt> ('Balcão Nacional de Arrendamento'), using a standard form (in word or pdf formats). The application does not need to be made through a lawyer but the same does not hold true for the defendant's response (which requires legal representation)

Legislation: Decree-Law no. 1/2013, ELI: <http://data.dre.pt/eli/dec-lei/1/2013/01/07/p/dre/pt/html>

Paragraphs 1 and 2. The Portuguese Ministry of Justice has developed an online platform – named 'Citius', accessible at www.citius.mj.pt – to dematerialise proceedings by treating electronically all information belonging to the proceedings (such as claims, counterclaims, responses and related documents), thus reducing their physical form to a minimum. The system is composed by several applications, databases and services that communicate with each other: computer applications for public prosecutors, judges and court staff, as well as for lawyers and solicitors, complement each other in order to achieve full electronic pleading.

Paragraph 4. Since 2016, any means of technological communication, capable of simultaneous real-time video and audio communication – such as ‘Skype’, ‘Facetime’ or ‘Whatsapp’ - can be used for taking testimony or statements.

Legislation: Article 502 of the Civil Procedure Code, Law no. 41/2013, ELI: <http://data.dre.pt/eli/lei/41/2013/p/cons/20170616/pt/html>

Paragraphs 3 and 5. No artificial intelligence is used.

Q.A.6: If the claimant has appointed a lawyer, the enforcement application must be filled online, through the use of the ‘Citius’ platform. In any case, proceedings are always managed electronically through the platform.

While ‘Citius’ is managed by the Ministry of Justice, enforcement officers use an application managed by their professional association (‘Ordem dos Solicitadores e dos Agentes de Execução’) which interconnects with ‘Citius’.

In 2015, this same professional association developed the website ‘e-leilões.pt’ for the sale of goods by means of an electronic auction (which is currently the preferred sales method for seized goods).

Legislation: Articles 132 and 712 of the Civil Procedure Code, Law no. 41/2013, ELI: <http://data.dre.pt/eli/lei/41/2013/p/cons/20170616/pt/html>; Ordonnance no. 280/2013, ELI: <http://data.dre.pt/eli/port/280/2013/p/cons/20170606/pt/html>

Q.A.7 Portugal does not have any mandatory and binding out-of-court ADR procedures with res judicata effect

Q.B.1 Portugal does not have any mandatory preliminary pre-trial ADR procedures.

Q.B.2 There are no special online dispute resolution administrative tribunals.

Q.B.3 Paragraphs 1 and 2. As for civil courts, the Portuguese Ministry of Justice has developed an online platform designed for administrative courts – named ‘SITAF and accessible at www.taf.mj.pt – to dematerialise proceedings by treating electronically all information belonging to the proceedings (such as claims, counterclaims, responses and related documents), thus reducing their physical form to a minimum.

Paragraph 4 (audio- and video-conferencing). As in civil proceedings, any means of technological communication (namely ‘Skype’, ‘Facetime’ or ‘Whatsapp’) can be used for taking testimony or statements.

Legislation: Article 502 of the Civil Procedure Code and Article 1 of the Code of Procedure of the Administrative Courts, Law no. 15/2002, ELI: <http://data.dre.pt/eli/lei/15/2002/p/cons/20111214/pt/html>

Ordonnance no. 380/2017, ELI: <http://data.dre.pt/eli/port/380/2017/12/19/p/dre/pt/html>, which regulates «electronic proceedings» before the administrative and fiscal courts.

Paragraphs 3 and 5. No artificial intelligence is used in the Portuguese

administrative courts.

Q.B.4 There are no parallel ODR tracks or pathways in the administrative courts.

Q.B.5 If the claimant has appointed a lawyer, the enforcement application must be filled online. In any case, proceedings are always managed electronically through the platform.

Ordonnance no. 380/2017, ELI:

<http://data.dre.pt/eli/port/380/2017/12/19/p/dre/pt/html>,

which regulates «electronic proceedings» before the administrative and fiscal courts.

Q.B.6 Portugal does not have any out-of-court alternative dispute resolution mechanisms which the complainant is required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect in administrative matters

Slovakia

Q.A.1 Slovakia has no mandatory preliminary pre-trial ADR processes in the civil courts.

Q.A.2 There are no preliminary pre-trial ADR processes which can be recommended by the judge or are subject to cost penalties.

Q.A.3 There are no special ODR tribunals for small claims or other minor civil disputes.

Q.A.4 Claims can be filed online with an electronic authorised signature. If a person does not have it, he can still file a claim online but has to be additionally served by post.

Videoconferencing is used especially in proceedings involving a witness/expert living abroad. We have electronic file management for judicial files and parties are enabled to request access to their file online and, if approved, to have access to the content of the judicial file online.

Q.A.5 There are no parallel ODR tracks or pathways in the civil courts in Slovakia.

Q.A.6 There is no ODR in the enforcement of civil judgments.

Q.A.7 There are no mandatory out-of-court procedures with res judicata effect in civil matters.

Q.B.1 In Slovakia there are no preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court.

Q.B.2 There are no special ODR tribunals for administrative matters.

Q.B.3 In Slovakia there are no ODR techniques in the administrative courts.

Q.B.4 There are no parallel ODR tracks or pathways in the administrative courts.

Q.B.5 ODR is not used in the enforcement of administrative court decisions.

Q.B.6 In Slovakia there are no out-of-court alternative dispute resolution mechanisms which the complainant is required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect.

Sweden

Q.A.1 and Q.A.2 In Sweden there are no mandatory preliminary pre-trial processes in the civil courts nor are there such processes which can be requested by a judge or are subject to cost penalties.

Q.A.3 In Sweden there are no special ODR tribunals for small claims or other minor disputes.

Q.A.4 There are no ODR techniques in the civil courts.

Q.A.5 There are no parallel ODR tracks or pathways in the civil courts.

Q.A.6 ODR is not used in the enforcement of civil judgments

Q.A.7 In Sweden there are no out-of-court alternative dispute resolution mechanisms which the parties are required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect.

Q.B.1 There are no mandatory preliminary pre-trial processes in the administrative courts

Q.B.2 In Sweden there are no special online dispute resolution administrative tribunals.

Q.B.3 In Sweden the administrative courts do not use ODR techniques.

Q.B.4 In Sweden there are no parallel ODR tracks or pathways in the administrative courts

Q.B.5 ODR is not used in the enforcement of decisions of the administrative courts

Q.B.6 There are no mandatory out of court processes in administrative matters.

Switzerland

Q.A.1 and Q.A.2 There is a mandatory pre-trial conciliation procedure before the official conciliation authority. But there is a great diversity in terms of how the canton authorities are structured in our federal system, no-one has established formal procedural rules for any of the ODR techniques stated in the Questionnaire. Some authorities provide for an online claim form. But this form has to be printed out and filed "offline". There is a possibility to replace the pre-trial conciliation proceedings before the civil court with a privately agreed mediation. However, there is no public (or, to our knowledge, private) infrastructure provided that would allow for the application of any of the above mentioned ODR techniques. However, parties would, in principle, be free to agree to an online mediation procedure using some of these ODR techniques (probably limited to online filing and online platforms) if so provided for by private mediation entities (in the future- we are not aware of this currently being used).

Q.A.3 and Q.A.5 In Switzerland, there are simplified procedures applicable to proceedings before the ordinary civil courts as well as the possibility to have the conciliation authority authoritatively decide small claims. But there is no such thing as particular 'small claims tribunals'. Where the conciliation authority plays such a role (exceptionally), none of the above mentioned ODR techniques is available.

Q.A.4 Only some courts (depending on the canton) accept online filings (technique 1).

None of the other techniques (2 to 5 online platforms, artificial intelligence, video-conferencing) is used, except for very rare cases of online-hearings (4) in the context of requests for cross-border evidence taking under the corresponding Hague Convention.

Q.A.6 In Switzerland, the enforcement of payment obligations can be made through an online enforcement request. However, the online enforcement proceeding only covers the first steps of enforcement (request for initiation, transmission of the answer, request for continuation). Service of the documents to the debtor as well as any judicial proceedings (triggered by a refusal of the debtor to pay) must be initiated “offline”. It is therefore not actually a “dispute resolution” technique but a mere technical structure for transmitting documents and declarations. As of 2017, around 45% of the proceedings for enforcement of payments were initiated online. This is mainly due to “big debtors” (tax authorities, insurance companies, debt collection entities) making use of the tool in question (“eSchKG”).

Q.A.7 In Switzerland there are no out-of-court alternative dispute resolution mechanisms which the parties are required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect.

Q.B.1 There are no mandatory preliminary, pre-trial processes in the administrative courts.

Q.B.2 In Switzerland there are no special online dispute resolution administrative tribunals for some particular types of claims.

Q.B.3 Only very few cantonal administrative courts allow for the electronic filing of statements (1). The rest of the cited techniques is not available.

Q.B.4 There are no parallel ODR tracks of pathways in the administrative courts.

Q.B.5 Administrative judgments for payment of a sum of money are enforced under the same proceedings as civil decisions. Under those proceedings, a part of the enforcement (submission of the request for enforcement, request for continuation, information on status) can be made online. As per 2017, about 45% of enforcement requests for payment were made using the corresponding tool (“eSchKG”). However, all substantial legal questions (in case of an opposition to enforcement) that may arise are submitted to the courts and therefore initiated and conducted “offline”. It is therefore not actually a “dispute resolution” scheme but a mere technical structure for transmitting documents and declarations.

Q.B.6 There are no mandatory, binding, out of court dispute resolution processes with res judicata effect in administrative matters.

Turkey

Q.A.1 and Q.A.2 In Turkey, in the scope of preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court, mediation practice as a trial requisite is provided for in accordance with the Law on Labour Courts No. 7036. In the mediation practice, the parties who intend to institute proceedings before a public court in relation with labour disputes in the scope of the practice firstly try the mediation practice and, if it fails, then apply to the court. Where the mediation practice is concluded because of non-attendance of

one of the parties to the first meeting without an excuse, the party who has not attended in the meeting is specified on the report and even though this party prevails partly or completely as a result of the proceedings, it shall be responsible to cover the costs of the proceedings. Moreover, counsel fee is not rendered in favour of this person.

The proceedings for the mediation are carried out through UYAP (National Judiciary Informatics System). ADR// mediation practices in Turkey are carried out through the recommendation of a judge or the individual application of the parties. The infrastructure of UYAP system is used for this purpose. The system is operated through mediation offices established in 108 court houses in Turkey. In the UYAP system, the party applies to the mediation office and if the application is accepted, the mediation office assigns a mediator to the party. This mediator specifies a date for mediation and thereby initiates the mediation process. The last report drawn up by the mediator at the end of the mediation negotiations is submitted to the Department of Mediation of the Ministry of Justice Directorate General for Civil Affairs.

Q.A.3 • It is governed under article 66 of the Law on the Protection of Consumer No 6502 that at least one committee for consumer problems shall be established in the province centres and in the district centres of which competence requirements are defined under the bylaws in order to settle the disputes arisen from the consumer transactions and the practices intended for the consumers.

- Article 68 of the same Law states that, reserving the rights of the parties under the Law on Execution and Bankruptcy, it is mandatory to bring the disputes valuing under four thousand Turkish Lira before the district committee for consumer problems and the disputes valuing under six thousand Turkish Lira before the provincial committee for consumer problems, and in the metropolises, to bring the disputes valuing from four to six thousand Turkish Lira before the provincial committee for consumer problems.

- The disputes over the mentioned values may not be brought before committees for consumer problems.

- The mentioned monetary limits are increased and applied, valid from the beginning of that calendar year, according to the revaluation rates determined and declared each year in accordance with article 298 bis of the Tax Procedure Code dated 04/01/1961 and numbered 213.

- And this article does not prevent the application of the consumers to alternative dispute resolution authorities under the related legislation.

- Arbitration Committee for Consumers implements, with regard to the settlement of the disputes, the provision for proving such as witnesses and experts governed by Civil Procedure Code No. 6100.

- There is no online filing system/platform directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses) examined by the Arbitration Committee for Consumers or online system for storing, processing and assessing electronic evidence.

Q.A.4 In Turkey the civil courts do not use ODR techniques.

Q.A.5 There are no parallel ODR tracks of pathways in the civil courts in Turkey.

Q.A.6 ODR is not used in the enforcement of civil judgments in Turkey.

Q.A.7 There are no mandatory, binding out-of-court dispute resolution processes with res judicata effect.

Q.B.1

- Tax payers may carry out their transactions online in relation with tax disputes through the program called VEDOP (Tax Department Full Automation Project) in the Tax Department.
- Any judgement of both administrative and tax courts may be reached through UYAP

Q.B.2 Otherwise, there are no special online dispute resolution administrative tribunals for some particular types of claims in Turkey.

Q.B.3 ODR techniques are not used in the administrative courts in Turkey.

Q.B.4 There are no parallel ODR tracks or pathways in the administrative courts in Turkey.

Q.B.5 Online Dispute Resolution is not used in the enforcement of judicial decisions of the administrative courts in Turkey.

Q.B.6 There are no out-of-court alternative dispute resolution mechanisms which the complainant is required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect in the administrative courts in Turkey.

TRENDS FOR THE USE OF ODR IN THE COUNCIL OF EUROPE MEMBER STATES

22. We find the following trends in the Council of Europe Member States:

23. A few states (for example Bosnia-Herzegovina, Croatia, Czech Republic, Denmark, France, Georgia, Germany, Montenegro, Poland, Switzerland) use, or encourage preliminary, pre-trial ADR procedures- however they are rarely a mandatory pre-requisite to filing proceedings in the civil courts (with the exception, for example, of family disputes or certain labour disputes in Croatia, or of certain disputes in Georgia, their use in labour disputes in Turkey or the new procedure introduced in France which obliges the parties to make an attempt to use mediation in certain cases, or certain family cases in Montenegro), but usually are recommended by the judge/court to the parties. In one example the parties had to state on the claims form whether they had considered mediation and justify, why, if they had not (Poland). Furthermore in a few States there may be cost penalties if the parties do not even consider mediation (England & Wales, Ireland). Only very few of the States have reported that these preliminary pre-trial procedures use ODR techniques (for example in France remote communication tools similar to Skype are used in family mediation). However in some of these states using preliminary, pre-trial procedures, the mediation or conciliation is carried out by a private mediator and these private parties may resort to ODR techniques (for example the Czech Republic mentions the use of video-conferencing for remote meetings). In other Member States the mediation is done by an official body or authority (such as court-annexed conciliation in Germany which is carried out by a judge, or in Georgia for some types of disputes or in Switzerland). However, the majority of States do not use preliminary, pre-trial ADR procedures.

24. No state has as yet implemented a separate, parallel ODR track or pathway through a new set of procedural rules in an existing, civil or administrative, court. This is planned for the new Online Court in England & Wales (civil disputes up to a value of £25,000)¹².

¹² <https://www.theguardian.com/law/2015/feb/16/online-court-proposed-to-resolve-claims-of-up-to-25000>

Moreover, no state has as yet moved their civil or administrative court procedures completely online and digitalised courts completed by creating an online platform where court users can file and access statements, evidence and court documents online and incorporating synchronous communication channels such as video-conferencing, thus replacing traditional courts (although the Netherlands and Portugal have gone into this direction). Moldova is in the process of implementing digitalised courts as a parallel track, giving the parties the choice between traditional court proceedings and online court proceedings.

25. In any case, elements of ODR techniques exist in various states:

26. Some states have expedited or simplified procedural rules for 1) small claims, 2) consumer disputes (although these are not within the scope of this Report) and 3) payment orders (undefended money claims to enforce debts). As regards expedited and simplified procedures for payment orders, they are sometimes limited to a maximum amount (for example the electronic Electronic Payment Order Motion up to a limit of 1,000,000 CZK in the Czech Republic or in Portugal), or limited to B2B claims (for example in Belgium). Furthermore, there was also an example of an expedited procedure for terminating a lease (see eviction proceedings in Portugal). Ireland has an online court platform for certain small claims and so does Hungary.

27. Sometimes these expedited procedures are online, but normally move “offline” into the traditional court processes if a defence is filed (for example in England & Wales with the Money Claim Online¹³, or in Poland, in Portugal, or in Switzerland). In Germany, claims for payment orders and small claims in particular can be filed electronically.

28. Some states have introduced (or are in the process of introducing) electronic court management systems (internal electronic file management) and electronic filing for court users, providing for secure and authenticated filing through the use of electronic signatures and allowing the parties or their advocates access to their court files after authentication (for example, Denmark, Germany, Latvia, the Netherlands, or the Citius platform in Portugal, and Slovakia). Montenegro has created the legal framework for this in its civil procedure and has started training its judiciary. Moldova is also introducing electronic filing (including digital evidence) and this is piloted in 2018. Online filing platform for administrative matters will be provided in the near future in Finland. In the Czech Republic businesses and advocates may communicate with the court through a secure, authenticated databox. The Czech legal system provides an online/e- filing system for certain legal forms and a data box system for secure communication – the “ePodatelna” system can be used. Croatia also has a pilot project on e-communication in the courts.

29. Many states have introduced video-conferencing from a remote location into their courts, for example for the appearance of witnesses and experts on a case-by-case basis. Some states use this for requests for cross-border evidence taking under the corresponding Hague Convention (for example Slovakia and Switzerland). Some states use a variety of communication channels for remote video-conferencing, see for example Portugal: any means of technological communication, capable of simultaneous real-time video and audio communication – such as ‘Skype’, ‘Facetime’ or ‘Whatsapp’ - can be used for taking testimony or statements. In December 2017 all Moldovan courts have installed video-

¹³ <https://www.moneyclaim.gov.uk/web/mcol/welcome>

conferencing equipment in order to use it for online meetings and online hearings. The period of piloting the installed tools is forecast for 2018. In Germany there is electronic filing, electronic communication and access to the court records plus the possibility to take part in hearings by simultaneous two way video-communication, but no full implementation of online court platforms.

30. No state as yet has introduced artificial intelligence to replace human decision-making (for example for deciding preliminary issues or for providing the parties with legal advice through the use of extensive expert systems, although the Netherlands Rechtswijzer system goes into this direction¹⁴).

31. Few states have considered the use of ODR techniques for enforcing court judgments- some states who have introduced online platforms for document management have extended this to enforcement (Portugal). An interesting example of an ODR technique for online enforcement is the online auction of seized goods in Portugal.

ODR AND THE COURTS: CIVIL AND COMMON LAW SYSTEMS COMPARED

32. Existing ODR procedures (such as those that are developed by private companies) are not focused on procedural safeguards but are rather focused on having a dispute resolved in an effective manner in a cost-efficient way.¹⁵ This is true for almost all currently existing ADR- ODR mechanisms. This is a challenge which this report must attempt to tackle: how to ensure that, if ODR mechanisms are developed and implemented into the court systems of EU Member States, these ODR systems are compliant with the right to a fair trial: a right that imposes procedural safeguards onto the justice system, and which would impose procedural safeguards onto the ODR systems. This must be done in a way that does not destroy the efficiency savings and access to justice gained through ODR. The fair trial standards to be developed focus on the following challenges i) due process in a narrow sense (equality of arms, impartiality, transparency etc), ii) access to justice and the digital divide, iii) issues inherent in the technology itself, for example prejudice issues embedded in artificial intelligence and iv) cybersecurity (authenticity, identification and integrity) and data protection. These challenges will be discussed in the text below.

33. Another interesting point to note is the difference in approach to the development and implementation of ODR between common law and civil law countries. What seems to be the case in civil law countries is that introducing ODR into the court system will require significant changes to the procedural rules and legal framework, particularly in respect of formal requirement. This may be because civil law jurisdictions have less inherent jurisdiction, as do courts in common law countries. This may be an impediment – but a minor one at best.¹⁶

¹⁴http://www.hiil.org/data/sitemanagement/media/Online%20legal%20advice%20and%20conflict%20support_UTwente.pdf

¹⁵ Colin Rule interview – 2 October 2017.

¹⁶ Interview with Shannon Salter – October 2017.

ADDITIONAL INITIATIVES (NOT BASED ON THE QUESTIONNAIRES): THE CIVIL COURTS IN ENGLAND & WALES AND THE PARALLEL TRACK IN BRITISH COLUMBIA

Proposal for Online Courts in England & Wales

34. The Judiciary in England & Wales is currently consulting on whether small claims (under a dispute value of £10,000) should be heard by Online Courts. The Civil Justice Council formed an Online Dispute Resolution Advisory Group reporting in February 2015 and recommending that there should be a new, Internet based, court service, known as the HM Online Court. Under this recommendation it would be envisaged that there are three stages (and disputes may be settled/decided at any of the three stages). Stage 1 would involve legal advice and evaluation of the dispute. Stage 2 trained online facilitators would provide advice and information and support the parties through negotiation and mediation. At Stage 3 Online Judges (members of the Judiciary) would decide cases on an online basis. Lord Justice Briggs has been tasked in July 2015 to review the structure of the civil courts in England & Wales with a view to their modernisation and is currently consulting on the possibility of online courts for lower value disputes.

Civil Resolution Tribunal in British Columbia

35. In 2012, the British Columbia government passed the Civil Resolution Tribunal Act, “with the goal of using technology and ADR to increase access to justice for British Columbians with small claims and condominium property disputes.”¹⁷

36. The Civil Resolution Tribunal (CRT) is Canada’s first online tribunal, and currently the only ODR system in the world that is fully integrated into the justice system. The CRT allows the public to resolve their condominium property disputes fairly, quickly, and affordably. In the near future, the CRT will also be able to resolve small claims disputes in the same manner. The CRT provides the public with access to interactive information pathways, tools, and in a tiered structure, a variety of dispute resolution methods including negotiation, facilitation and, if necessary, adjudication.¹⁸

37. The CRT works in the following way¹⁹:

- i. Before beginning a claim with the CRT, a person with a dispute can access a free online tool called the Solution Explorer, which uses guided pathways to help a person learn more about their dispute so that they can make informed choices about how to resolve it. The Solution Explorer asks a series of questions about the dispute, and then provides information and resources tailored to that dispute... At the end of the pathway, the Solution Explorer provides a summary of the person’s claims, as well as recommended resources and next steps.
- ii. If someone is not able to resolve their dispute using the Solution Explorer, the next step is to start a CRT claim, using the online intake process. A key design feature of the CRT is that wherever possible, a user should only have to enter information once, and the system should carry this information forward to other stages of the CRT

¹⁷ Shannon Salter, ‘ODR and Justice System Integration: B.C.’s Civil Resolution Tribunal’ (2017) at pg. 8.

¹⁸ Shannon Salter, ‘ODR and Justice System Integration: B.C.’s Civil Resolution Tribunal’ (2017) at pg. 3. (2017) 34 Windsor Y B Access Just

¹⁹ Taken from Shannon Salter, ‘ODR and Justice System Integration: B.C.’s Civil Resolution Tribunal’ (2017) 34 Windsor Y B Access Just

process. Finally, the CRT process incorporates relevant parts of the tribunal's rules on an as-needed, when-needed basis, to avoid overwhelming parties with inapplicable (not-yet applicable) rules.

- iii. After serving the others in the dispute with notice of the claim, the parties have a brief opportunity to negotiate directly with each other. While the parties will be given some resources to help them do this, this is a low intervention area for the CRT.
- iv. If negotiation is not successful, the parties will enter a facilitation phase where an expert facilitator will help the participants to reach a consensual agreement. The facilitator can use a variety of communications channels to work with the parties, including the CRT platform, email, text, phone, video conferencing, fax and mail. Despite being online, the CRT is a very human driven process. Leveraging technology, the CRT democratizes access to dispute resolution services by connecting the public, wherever they may live, with expert facilitators and tribunal members. Settlement communications in the facilitation phase are confidential, and are not disclosed to tribunal members. If the parties reach an agreement, the facilitator can ask a tribunal member to convert the agreement into a binding order of the tribunal, which can be enforced in court, without the parties having to sue for a breach of the agreement.
- v. If no settlement is reached, "the dispute is then transferred to a tribunal member, a lawyer with specialized expertise in small claims or condominium property matters, who hears the parties' arguments (usually in written form), considers the evidence, and then issues a binding decision of the tribunal, which is emailed or mailed to the parties. If an oral hearing is necessary, due to credibility issues for example, this is conducted through telephone and video-conferencing. The CRT's adjudicative process is very similar to that of other large administrative tribunals, and of course, tribunal members are subject to the same procedural fairness requirements which govern administrative tribunals generally.²⁰

38. From beginning to end, the CRT process is intended to take 60 to 90 days for most cases, and the average total cost to the parties is roughly the same as in Small Claims Court, or about \$200.²¹

ODR AND ACCESS TO JUSTICE (ARTICLE 6 AND 13)

39. This part of the Report describes the requirements of the right to a fair trial set out in Article 6 (1) of the European Convention on Human Rights and ODR's compatibility with these requirements. In particular, this part of the Report considers requirements that are relevant to ODR; requirements that could be enhanced or impeded through the use of ODR to resolve commercial disputes.

40. As has been noted above, ODR has the ability to revolutionise the public justice system. If designed and implemented correctly, it has the ability to drastically enhance

²⁰ Shannon Salter, 'ODR and Justice System Integration: B.C.'s Civil Resolution Tribunal' (2017) at pg. 13.

²¹ Shannon Salter, 'ODR and Justice System Integration: B.C.'s Civil Resolution Tribunal' (2017) at pg. 13.

access to justice for persons who would ordinarily be outcasts in the justice system. However, if developed in the wrong hands it may have an opposite effect and actually reduce access to justice by placing technological barriers to persons who do not ordinarily have the capacity to use technology.

41. If ODR is the future of justice, which it seems is the case, then it is of fundamental importance to develop standards for ODR; standards by which ODR can be developed and implemented and under which justice can be carried out. To ensure that disputes are resolved fairly, there is a need to develop appropriate and adequate standards.

42. Article 6 (1) of the ECHR states:

“In the determination of his civil rights and obligations (...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

43. Article 13 of the ECHR states:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

44. From the wording of these Articles, the following requirements for a fair trial are evident:

- Fair hearing
- Public hearing
- Within a reasonable time
- Heard by an independent and impartial tribunal established by law
- Judgment pronounced publicly, with some justifiable exceptions
- The right to effective recourse for a violation of this right and other rights in the Convention.

45. These requirements are expressly stated. As will be seen further on in this section of the report, there are additional requirements that are implied in Article 6(1) and which give effect to these requirements.

46. Each one of the expressed requirements, as well as the implied principles which give effect to the right to a fair trial will be discussed below. These requirements are discussed and analysed in light of ODR, and in-depth analysis and discussion is given to requirements that are (or may become) relevant to ODR.

47. The right to a fair trial cannot be waived for processes which the parties have not agreed to, including formal processes in the courts which by their nature are coercive and not consensual and which lead to binding decisions with res judicata effect.

48. One view to approaching the issue of compulsory ODR is what McGregor calls the 'substantive distinction test'. This essentially states that if disputes must be resolved through alternative means, there may be a need to differentiate between different types of disputes, with some disputes, due to their nature, not being capable of being resolved through alternative means. For mandatory engagement with both agreement-based and adjudicative ADR and ODR (binding and non-binding), a second approach of the ECtHR could be read as prohibiting formal diversion to ADR and ODR based on the subject matter of the dispute²². Therefore, some disputes due to their subject matter may not be capable of being resolved through alternative means. They would have to go through the traditional court processes.

49. It is apparent that the requirements of Article 6 do apply, in one way or another to binding alternative dispute resolution and that they would most certainly apply to binding ODR mechanisms. The extent to which ODR mechanisms should comply with the requirements of Article 6(1) is rather unclear. There would certainly be a higher standard expected for compulsory ODR mechanisms, including in the courts, and arguably such compulsory ODR mechanisms should comply fully with the requirements of Article 6(1). What is important to note is that the right to a fair trial is not an absolute right; exceptions do exist and depending on the circumstances of the case and the type of dispute, certain elements of the right may be relaxed. For example the ECtHR has previously accepted that the initial decision-making body does not have to conform to the requirements of Article 6(1) of the ECHR provided the applicant has the possibility of appealing the decision to a court of law.

50. This is important in the context of court-annexed ADR, although in our survey of the Council of Europe Member States we have not found any examples of compulsory ADR/ODR.

THE CONTENT OF THE RIGHT TO A FAIR TRIAL: ARTICLE 6

51. The most important judgment of the ECtHR in relation to the civil aspect of Article 6 stems from the *Golder v. United Kingdom* case, as it defined the significance of the right.²³

52. The *Golder* decision essentially set out the basic requirements of Article 6(1) and provided an interpretation of the article, which has proved influential to this day. In deciding whether an individual has had a fair trial, it is necessary to examine the proceedings in light of the other three main elements of Article 6(1). These elements are: (i) the right to a public hearing, (ii) the right to a trial within reasonable time, and (iii) the right to an independent and impartial tribunal established by law. Certainly, the realisation of each of these elements is fundamental to ensuring that right to a fair trial has been achieved.²⁴

53. In addition to these explicitly stated requirements of the right to a fair trial, there are also fundamental principles that are implied into the fairness requirement. These include the

²² Pg. 625-626.

²³ Schiavetta, 'The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights', (2004) 1 *The Journal of Information, Law and Technology* at para 3.2.

²⁴ Para 3.4

right of access to court, equality of arms, transparency, duty to give reasons, the right to be given notice, prepare a case and to argue it.

54. To realise these elements of a fair trial, it is quite obviously essential that persons have the right of access to court, for without access to justice there cannot be justice. This principle will be discussed first.

55. The essence of Article 6 (1) is the right of effective access to a court. This right must not only be theoretical but also effective in practice²⁵. A private dispute resolution procedure which is binding with *res judicata* effect does bar the disputants' access to a court. But as has been outlined above, if the arbitration is voluntary in the sense that it is based on a contract voluntarily entered then this counts as a waiver of the right to access. If the arbitration is compulsory, then this means that the procedure must fully comply with Article 6 or be subject to review by a court.

56. A fair hearing in the courts must be guided by the "equality of arms" principle, giving each party an equal opportunity to present his/her own case and respond to the case of the other.

57. Technology may impact this principle in both negative and positive ways.

58. For example an assumption is normally made that technology speeds up processes (which is true), but little regard is given the fact that technology also increases information overload (which slows down information processing)- so for example shortened and inflexible deadlines for filing statements or evidence can affect the ability of a party to have a fair hearing (where for example a micro-business litigates against a much larger business) and the sole director cannot cope with short deadlines.

59. Furthermore, it is often the assumptions we make about technology (rather than the technology itself) which may have an impact on a fair hearing. So the assumption for example will be that technology always works (not accounting for technical glitches or downtime) which may prejudice a party in filing their case.

60. A different aspect is the question of open, public hearings (where virtual hearings in the courts replace a court hearing), which is essentially a question of transparency. This is not a real problem as a platform may in fact allow access to virtual hearings and information in a controlled manner without the observers having to physically go to a courtroom. This is more a question of designing technology in a particular way. Thus digital courts may be open courts.

61. Moreover, ODR can have various implications for the right of access to court (or access to justice). There are both advantages and disadvantages for how ODR may impact the right of access to court for parties involved in a dispute.

²⁵ *Airey v Ireland* (App. 6289/730) Decision of 9. October 1979.

62. The use of online courts has the ability revolutionise access to justice for litigants. The development of new procedures to resolve disputes online can revolutionise access to justice to persons who would usually be unable to understand court procedures without hiring a lawyer.²⁶ The use of ODR could level the playing field of parties who would ordinarily find it hard to access courts. It could improve the justice system to make it more accessible for those who live far from legal centres or who struggle to afford the costs of seeking justice,²⁷ by providing cheaper, alternative means to resolving disputes.

63. ODR processes may be able to facilitate access to justice in that, if designed and developed correctly, ODR systems can be economically viable, efficient, fast and flexible.²⁸ This is quite an obvious characteristic of online systems. Using technology and the internet can allow litigants to access information about how to lay a claim, submit a claim and inform them of the process of how to go about resolving their dispute. In fact, ODR may structure the process itself for litigants. It also means that this process can be done just about anywhere with internet access, making the process convenient and easy for litigants. This is a massive improvement of access to justice for litigants.

Disadvantages

64. An issue with ODR and access to justice is that those who are computer illiterate or have no access to technology might be side-lined in the process. Increased high internet access reflects social and generational change of how people now lead their lives, but what of the vulnerable users and those without access?²⁹ Requiring parties to use technology to resolve disputes could inhibit access to justice if there is a great discrepancy between the parties and their access to technology.³⁰ The move to online and virtual justice also threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and, as some argue, make justice less open.³¹

65. Given the discussion about advantages and disadvantages above, it is important to note that parties must always have the right of access to justice. Although ADR is permissible and parties are allowed to waive their right to access a court, when certain means of resolving a dispute become compulsory, it must be guaranteed that such means give the parties the right to access justice. Thus, if ODR is implemented into the court system or used in a compulsory ADR process, the right of the parties to access justice cannot be violated.

66. As noted above, one of the disadvantages of ODR and access to court is the issue of the digital divide, further discussed below. If some litigants do not have access to, or the ability to use, technology and the internet, these litigants will be excluded from the administration of justice. Therefore, if ODR is implemented, there should (a) either be an alternative paper-based traditional means of having a dispute resolved for parties who do not have this access to technology and the internet or (b) a comprehensive system of legal

²⁶ J Rozenberg QC, 'Justice Online: Just as Good?' (2017).

²⁷ L Tickle, The Guardian, 'Online Justice: why courts should explore emerging digital possibilities (2017).

²⁸ Ziemblicki, B (2016) 'Going Online – is the world ready to replace litigation with online dispute resolution mechanisms?' at pg. 43.

²⁹ Robert Thomas, 'Current Developments in UK Tribunals: Challenges for Administrative Justice' (2016).

³⁰ O Bowcott, The Guardian, 'Government's £1bn plan for online courts 'challenges open justice' (2017).

³¹ O Bowcott, The Guardian, 'Government's £1bn plan for online courts 'challenges open justice' (2017).

representation made affordable (for example through legal aid). The issue of the digital divide will be discussed further on in this report.

INDEPENDENCE AND IMPARTIALITY

67. Article 6(1) of the ECHR explicitly states that the court and/or tribunal must be independent and impartial. The tribunal and the decision maker must be both independent (no undisclosed conflict of interest) and impartial (not subjectively biased).

68. The term “independence” refers to the independence of the decision-maker vis-à-vis the other powers (the executive and the legislature) and also vis-à-vis the parties. In assessing independence regard should be had to the following criteria: (i) the manner of appointment of the members; the duration of their term of office; (iii) the existence of guarantees against outside pressures; and (iv) whether the body presents an appearance of independence.

69. This requirement is as important for ODR processes as it is for other dispute resolution processes. In fact, it is even more important for ODR processes as such processes may entail a process where the adjudicator is unknown or not physically present and trust issues may arise as a consequence. Therefore, neither the third party neutral nor the ODR institution must have an interest in the outcome of the case. One potential issue to be examined here in relation to ADR/out-of-court processes is whether systemic bias is introduced if one of the parties (for example the business in B2C e-commerce disputes) always pays for the dispute resolution procedure. Similar questions arise where ODR is undertaken by an e-commerce platform/marketplace/social media provider: to what extent do these internet service providers have an interest in the outcome of the case?

70. In relation to ODR used in the courts the question of independence and impartiality as such is no different than for offline courts. However where the question may arise is in relation to the use of artificial intelligence to replace human decision-making. Additionally, other serious concerns include how algorithms are coded, if they are used in an ODR process, and whether this may impact a decision that is reached and therefore impair the independence and impartiality of the decision-maker. This will be discussed further below (under artificial intelligence).

71. Another area where the independence and impartiality of the courts may be affected is the area of data protection. Many commercial, “free” online services (such as social media networks) rely on the collection of personal data from their users and commercially exploit this data through online tracking and profiling- this data is then aggregated and sold to third party entities for marketing and potentially for more sinister purposes (such as differential pricing, risk management). These tracking activities have potentially serious impacts on users’ personal freedom and autonomy and may lead to prejudice and discrimination (for example in the area of credit rating or insurability or provision of public services).

72. As courts are being digitalised and are going online there may be (in certain countries) a temptation to outsource the technology and to save money by using “free” commercial applications, who then, in return collect court users’ personal data for online profiling purposes. We have not seen this as part of our research for this study and as far as we are

aware, the ODR communication and data processing technologies developed by the courts to date are not based on commercial tracking. However in times of decreasing public budgets and increased pressure on government departments to save money, this topic is not entirely irrelevant.

73. An argument of some experts within the field of ODR is that organisations that develop ODR systems may have an ulterior motive for developing such systems and processes: access to valuable information which can be used and sold. This may have an impact on the way in which ODR systems are designed and there may be undue influence placed on the administrators of the ODR system to retrieve such information at the expense of the distribution of justice. This concern about organisations that develop ODR processes may violate the criteria of 'the existence of guarantees against outside pressures'. If there is outside pressure to have a dispute resolved in a particular way in order to retrieve certain information or have a particular outcome, this could certainly violate the right to a fair trial.

74. There is therefore most certainly a need for not only ensuring that the ODR system has an appearance of independence, but that it is guaranteed not to be subject to outside pressures.

PROCEDURAL FAIRNESS / EQUALITY OF ARMS

75. The principle of equality of arms³² requires a fair balance between both parties.³³ However, this does not mean that all pre-existing inequalities of the parties (for example in terms of resources to litigate) must be compensated for. So, for example a party who has no resources who is sued by a party with substantial wealth need not be brought to the same level of resource by the provision of legal aid.³⁴ At the same time if legal aid is necessary to help a party to achieve effective participation and general equality of arms to defend their freedom of expression right then a Member State has an obligation to grant legal aid and ensure effective representation of that party.³⁵ The ECtHR has held that it is central to the concept of a fair trial that a litigant should not be denied the opportunity to present his or her case effectively and should enjoy equality of arms with the opposing side.³⁶ The institution of a legal aid scheme was one way of guaranteeing those rights.³⁷ In the context of ODR there may be less of a need for representation - but this again will depend on the complexity of the dispute and the need for expert legal advice and representation. Furthermore, as will be discussed further below, the speed of technological innovation means that differential access to and penetration of technology exists between different parties, different age groups and small and large firms of lawyers (with the latter more prepared to innovate, having the resources to buy in the latest technology and train their employees to implement and use it).

76. For ODR systems that are used as an integral part of resolving a dispute, i.e. ODR going beyond mere e-filing and data boxes, there is a genuine risk that the use of ODR

³² Neumeister v Austria (1979-80) 1 EHRR 91.

³³ B Rainey et al, Jacobs White & Ovey The European Convention on Human Rights (6th Edition OUP 2014) 263.

³⁴ Steel and Morris v UK (2005) 41 EHRR 403 para 62.

³⁵ Ibid para 59; *Dombo Beheer BV v the Netherlands* (1994) 18 EHRR 213.

³⁶ Ibid.

³⁷ Ibid.

processes may create major issues for this principle. Along similar lines to the argument regarding access to (and the skills to use technology) under the section dealing with access to courts, if litigants do not have access to, or the ability to use technology, whereas other litigants to the same dispute do, then there would most probably be a violation of the principle of equality of arms and therefore a breach of the right to a fair trial. At the same time this risk can be managed if there is investment in training and public access points for litigants who do not have the requisite skills.

77. Equal treatment of the parties is regarded as one of the major principles of successful ODR.³⁸ Without this principle, ODR cannot address the concerns of fairness. Those with access to the relevant technology (and the skills to use it) which is used in resolving the dispute would quite obviously be at a massive advantage in having the dispute resolved in their favour, at the expense of the parties who do not have such access and skills.

78. One author argues that the move to online and virtual justice threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and to make justice less open.³⁹ This is most certainly a point that deserves attention. If technology is used (or allowed to be used) in a way that does not address concerns relating to access to justice and fairness, then those persons who are in a vulnerable position and who have less access to resources could be even more prejudiced than they already are, at the hands of technology.

79. Litigants who are unable to use or access the relevant technology to use an ODR process would most certainly be placed into a different position to another party who does have access and the ability to use the technology. The question is whether it amounts to complete inequality between the parties. If no alternative means to resolve the dispute exist (i.e. all disputes must be resolved online and no traditional paper based methods are used) then there would most certainly be discrimination between the parties. However, if alternative means do exist, such as in the British Columbia CRT, then it is arguable that this would suffice and that there would be equality of arms. However there are concerns for example in England & Wales, that in order to finance the digitalization of the courts, many court buildings will have to be closed, meaning that those who still want to use the (physical) courts have to commute further and further in order to do so.⁴⁰

80. A question does remain about whether, even if alternative means do exist, there is equality of arms between the parties? What if the use of technology by the one party places it into a superior position to that of the litigant who is not using the technology? The ECHR has been clear that: (i) equality of arms does not mean that all pre-existing inequalities of the parties must be compensated for; and (ii) what is required is for there to be a general equality of arms to ensure that both parties have the opportunity to effectively participate in advancing or defending their respective case. Thus, there does not need to be exact equality, and pre-existing inequalities do not need to be compensated for. Therefore, the fact that one party either does not have access to or the ability to use technology should not be

³⁸ Ziemblicki, B (2016) 'Going Online – is the world ready to replace litigation with online dispute resolution mechanisms?' at pg. 43.

³⁹ O Bowcott, The Guardian, 'Government's £1bn plan for online courts 'challenges open justice' (2017).

⁴⁰ <https://law-tech-a2j.org/odr/online-courts-in-england-and-wales-six-proposals-to-see-of-a-gathering-storm/>

considered a pre-existing inequality that requirements accommodation. Rather, effort does need to be made to ensure that the more vulnerable party does have some opportunity to make or defend his/her case, but it does appear to be acceptable that there is not perfect equality of arms.

ADVERSARIAL PROCESS AND DISCLOSURE OF EVIDENCE

81. One of the elements of the right to a fair trial requires that the party concerned is given notice in good time of the claim brought against him/her. This party should have enough time to peruse the relevant claim and have a chance to respond to the allegations. If left unchallenged, the decision-maker may make an adverse finding against the party. Essentially, each party must be given a fair and equal opportunity to argue his or her case as to both matters of fact and law and each party should have a right to react to and rebut the submissions of the other party. Evidence and relevant material must be disclosed to both parties in an accessible and adequate way so that they can obtain informed notice of the case, and the arguments against them.

82. Fairness, however is a flexible principle and the precise meaning must be ascertained on a case-by-case basis. Whether proceedings are fair can only be adjudged by looking at the proceedings as a whole. The detailed requirements vary according to the nature of the tribunal and the court's appraisal of what is appropriate in the circumstances.⁴¹

83. Under the Convention jurisprudence some procedural rights are regarded as absolute whereas others can be limited or qualified to a certain extent dependent on the particular facts of the case at issue.

84. Under the common law, the right to a fair hearing does not necessarily mean that it involves a right to make representations orally and in person, hence the parties may be limited to written submissions. Under the jurisprudence of the European Court of Human Rights, the right to a hearing requires an oral hearing, certainly in proceedings of first or only instance.⁴²

85. There is some case law from the European Court of Human Rights that suggests that there are exceptions to the requirement to be afforded an oral hearing. This appears to only be permitted in exceptional circumstances.⁴³ The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court.⁴⁴ Accordingly, unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing under Article 6(1) implies a right to an oral hearing at least before one instance.⁴⁵

⁴¹ See J. Hornle *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009)

⁴² *Fredin v. Sweden* (no. 2), §§ 21-22; *Allan Jacobsson v. Sweden* (no. 2), § 46; *Göç v. Turkey* [GC], § 47).

⁴³ *Hesse-Anger and Hanger v. Germany* (dec.).

⁴⁴ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Miller v. Sweden*, § 29; *Martinie v. France* [GC], § 41.

⁴⁵ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Fischer v. Austria*, § 44; *Salomonsson v. Sweden*, § 36

86. It does appear that at some stage of this process you must have the opportunity to have an oral hearing. Thus, for compulsory ODR, there must be the opportunity to appeal the ODR decision which must be oral. Or, the ODR processes must have an oral element to it. This raises the interesting question of whether “oral” hearing is to be equated with “face-to-face” hearing? While there is no direct authority on this it would make sense to argue that video-conferencing where the communicators can hear and see each other in real time (and where provision is made that, for example witnesses are not coached from behind the screen and that witnesses’ identity is properly authenticated) is functionally equivalent to an “oral” hearing (provided the technology works on both ends of the transmission and this can be protocolled).

TRANSPARENCY: PUBLIC HEARINGS AND PUBLIC JUDGMENTS

87. The right to a fair trial in Article 6 (1) requires that court hearings are public and that the judgments/decisions are made available to the public (subject to exceptions).⁴⁶ Transparency and publicity are important for three reasons (1) to ensure informational equality between the parties, (2) to ensure decisions can be scrutinized and (3) to guide the development of the law.⁴⁷

88. ADR (both the hearing and award) as a private form of dispute resolution are normally treated as confidential and the parties may have waived their right to a public hearing. This was recognized in the case of *Nordström-Janzen v Netherlands*.⁴⁸

89. “Civil proceedings on the merits which are conducted in private in accordance with a general and absolute principle, without the litigant being able to request a public hearing on the ground that his case presents special features, cannot in principle be regarded as compatible with Article 6 § 1 of the Convention; other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, though the court may refuse the request and hold the hearing in private on account of the circumstances of the case and for pertinent reasons.”⁴⁹

90. “The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained.”⁵⁰ “By rendering the administration of justice visible, 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, within the meaning of the Convention.”⁵¹

⁴⁶ *Werner v Austria* (1998) 26 EHRR 310,349; *Scarth v UK* (1999) 27 E.H.R.R. CD37 (in the context of small claims arbitration).

⁴⁷ J. Hörnle *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009) 144-149.

⁴⁸ *Admissibility* (App. 28101/95) Decision of 27. November 1996.

⁴⁹ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (2013); *Martinie v. France* [GC], at para 39.

⁵⁰ *Martinie v. France* [GC], at para 39.

⁵¹ *Martinie v. France* [GC], at para 39.

91. “Moreover, the Court has held that exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned (see, *mutatis mutandis*, *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005) may justify dispensing with a public hearing (see, in particular, *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002 -V). It thus considers, in particular, that social security proceedings, which are highly technical, are often better dealt with in writing than in oral submissions, and that, as systematically holding hearings may be an obstacle to the particular diligence required in social security cases, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy (see, for example, *Miller and Schuler-Zraggen*, cited above). It should be pointed out, however, that in the majority of cases concerning proceedings before “civil” courts ruling on the merits in which it has arrived at that conclusion the applicant had had the opportunity of requesting a public hearing.”⁵²

92. The transparency of court proceedings is of fundamental importance to a public hearing. Thus, any ODR process must comply with this transparency requirement to fully comply with the right to a fair trial. In fact, some authors argue that one of the disadvantages of ODR is that there are various transparency concerns.⁵³ For ODR to be compatible with the right to a public hearing, which encompasses a requirement of transparency, the ODR process must embody some form of transparency in its process. Parties who are party to the ODR process would want to be sure that they are dealing with a trustworthy institution that is independent (as regards to politics, race, gender, etc.).⁵⁴

93. Transparency could pertain to a wide variety of things and is a rather broad concept. Trust in a justice system is vital to its legitimacy and success.⁵⁵ If the public cannot scrutinise cases and decisions that are made, then there may be no public approval of the justice system, which leads to its illegitimacy and failure.

94. Transparency of proceedings also feeds trust through in-person interaction.⁵⁶ Trust is a major issue that deserves consideration in assessing ODR processes.⁵⁷ In-person interactions have been seen as necessary, or at least better than electronic communication, for building trust between litigants, law enforcement, and the court.⁵⁸ Non-verbal cues, such as facial expressions and tone of voice, are important to both a litigant’s perception of the fairness of proceedings and a judge’s decision-making process.⁵⁹ The absence of such face-to-face interactions from existing versions of online case resolution systems may cause a litigant to perceive a particular judicial process as unfair or produce negative emotional feelings toward court officials, as compared to traditional, in-person court proceedings.⁶⁰

⁵² *Martinie v. France* [GC], at para 41.

⁵³ Ziemblicki, B (2016) ‘Going Online – is the world ready to replace litigation with online dispute resolution mechanisms?’ at pg. 43.

⁵⁴ S Kallel (2008) ‘Online Arbitration’ *Journal of International Arbitration* 25(3):345 at 352.

⁵⁵ L Tickle, *The Guardian*, ‘Online Justice: why courts should explore emerging digital possibilities’ (2017).

⁵⁶ Y Hou, C Lampe, M Bulinski, ‘Factors in Fairness and Emotions in Online Case Resolution Systems’ (2017).

⁵⁷ Ebner, N & Zeleznikow, J, ‘No Sheriff in Town: Governance for Online Dispute Resolution’ *Negotiation Journal* (2016) 297.

⁵⁸ Y Hou, C Lampe, M Bulinski, ‘Factors in Fairness and Emotions in Online Case Resolution Systems’ (2017).

⁵⁹ Y Hou, C Lampe, M Bulinski, ‘Factors in Fairness and Emotions in Online Case Resolution Systems’ (2017).

⁶⁰ Y Hou, C Lampe, M Bulinski, ‘Factors in Fairness and Emotions in Online Case Resolution Systems’ (2017).

95. Moreover, in order for a process to satisfy the requirement of a public hearing, that there should be transparency of procedural rules and outcomes.⁶¹ Thus, the parties should be aware and have the ability to access information pertaining to the rules of procedure for resolving a dispute online. This is similar to how current procedural rules are transparent – any party to a dispute can access the procedural rules of a court. Importantly, and in addition to the transparency of rules, the outcomes of the proceedings should be transparent. At the very least this could mean that the result must be made transparent to the parties. This suggestion of the outcome being transparent is at odds with traditional ADR practices, wherein confidentiality of the proceedings is often a fundamental foundation of an ADR process.

96. It was held in the case of *Nordström-Janzen v Netherlands* that the parties to an ADR process may waive their right to a public hearing, and thus treat the proceedings as confidential.⁶² Thus, if an ODR process is conducted in a way similar to ADR, in that the parties enter an agreement to refer their dispute to ADR and in doing so waive their right to a public hearing, this would be permissible in terms of the jurisprudence of the ECtHR. However, it must be pointed out that this is a form of voluntary reference to ODR. If the parties were obliged to refer their dispute to ODR, as a compulsory means of resolving their dispute, then it is submitted that this would be impermissible with the right to a public hearing. A compulsory reference of a dispute to ODR would require that there be some form of transparency.

97. As noted above, public hearings allow for public scrutiny of judicial decisions and proceedings. Making proceedings transparent in this way is a form of accountability that enhances fairness. Thus, as has been held by the ECtHR, if a party is denied access to a public hearing, Article 6 of the ECHR will be violated.⁶³

98. Thus, it is apparent that the ECtHR requires there to be some form of publicity which allows for public scrutiny of any court proceedings, with the additional requirement of having the decision made public. Therefore, any ODR proceeding must ensure that there is this degree of transparency involved.

99. In particular, if hearings were conducted entirely online in a fully digitalized court it would be important that the public can access the hearing- subject to specific exceptions, court hearings must be open to members of the public (in the sense that members of the public can follow proceedings from a public gallery in the court building. Functionally equivalent access would have to be provided technically in a fully online court, allowing interested members of the public to follow the course of proceedings.

100. An interesting question here is a question of numbers. Traditionally members of the public have been granted physical access to the court building, but many countries in the EU do not allow public broadcasting of trials on TV for the reason that this may influence advocates and judges who then "play" to populist sentiments of crowd watching which may

⁶¹ Ziemblicki, B (2016) 'Going Online – is the world ready to replace litigation with online dispute resolution mechanisms?' at pg. 43.

⁶² *Nordström-Janzen v Netherlands* Admissibility (App. 28101/95) Decision of 27. November 1996.

⁶³ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Martinie v. France* [GC], at para 39.

not lead to better justice. Clearly if there is online access to “court channels” (for example on Youtube) then a similar effect may arise.

EFFECTIVENESS AND ENFORCEMENT OF ODR

101. Connected to the principle of effective access to the court is the principle that a final court decision should be enforced.⁶⁴ Article 6(1) applies to all stages of legal proceedings regarding the determination of civil rights and obligations and thus the execution of a judgment given by any court must be regarded as an integral part of a trial for the purposes of Article 6.⁶⁵ Every litigant has a right to enforcement of a judgment, and a delay in the execution of a judgment must never be such that it impairs the litigant’s right to enforcement.⁶⁶

102. It is interesting to note in this context that few Council of Europe States at present use ODR to make the enforcement of court decisions more effective (with some notable exceptions).

THE DUTY TO GIVE A REASONED DECISION

103. The right to a fair trial under Article 6 (1) includes a duty to give reasons by a court, as an element of the fairness requirement.⁶⁷ A justification for this requirement is that a reasoned decision shows the parties that their case has truly been heard.⁶⁸ A domestic court is obliged to justify its decision by giving reasons.⁶⁹ This ties in with the requirement that decisions and reasons should be published and accessible. In the context of ODR, the digitalisation of court proceedings makes decisions more accessible and is likely to improve court reporting, as court records are digitalized to start with and digital records in databases can be more easily accessed, searched and analysed through the use of artificial intelligence tools (as one of the state experts has pointed out in the answers to the questionnaire).

104. The extent of the duty to give reasons depend on the nature of the decision and the decision-maker.⁷⁰ In determining the reasons, it is necessary for the court to take into account the diversity of the submissions that a litigant brings before court and the differences that may exists in the Contracting States with regard to statutory provisions, customary rules,

⁶⁴ B Rainey et al, Jacobs White & Ovey *The European Convention on Human Rights* (6th Edition OUP 2014) 262.

⁶⁵ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (2013); *Hornsby v. Greece*, § 40; *Romańczyk v. France*, § 53.

⁶⁶ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (2013); *Burdov v. Russia*, §§ 35-37.

⁶⁷ *Van de Hurk v the Netherlands* (1994) 18 EHRR 481 para.61.

⁶⁸ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (2013).

⁶⁹ European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (2013); *Suominen v. Finland*, § 36.

⁷⁰ *Hirvisaari v Finland* [2004] 38 EHRR 7 para.30.

legal opinion and the presentation and drafting of judgments.⁷¹ Where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply.⁷²

105. It is thus apparent that with regard to mandatory ODR the decision-maker will be obliged to give reasons for the decision in order for the process to comply with the right to a fair trial. The extent of the reasons will depend on the circumstances of the case, but at the very least the parties' submission that are decisive for the outcome of the proceedings should be addressed and the parties should reasonably feel that their case has truly been heard.

106. With regard to voluntary ODR, it would be advisable for a reasoned decision to be given, but if reasons were not given for a decision because the parties agreed that this need not be the case, then the decision-maker would not be obliged to give reasons.

THE RIGHT TO AN APPEAL AND/OR REVIEW

107. The relevance of a right to appeal is that, in addition to the duty to give reasons and transparency discussed above, an appeal helps to eliminate bad judgments and mistakes occurring at first instance and thereby contributes to a fair outcome, and it also leads to accountability of the decision-maker.

108. The right to a fair trial must be interpreted in the light of the rule of law, which requires, in terms of the principle of legal certainty, that where courts have finally determined an issue their ruling should not be called into question.⁷³ A final decision may only be called into question when this is necessary by circumstances of a substantial and compelling character such as a judicial error.⁷⁴

109. Appeals lead to an increase in cost and add further significant delay. It should therefore be used sparingly and in the most exceptional of cases.

110. In the context of ODR appeals and reviews may take on a more important characteristic. It has been stated that a litigant must have the right to be heard, i.e. to make oral representations at some point during proceedings. This does not necessarily need to be at the court of first instance. Thus, if ODR proceedings are conducted in a manner in which there is no oral hearing, this may be permissible provided that the litigants have the right to have an oral hearing at a later stage if so required. This oral hearing may take the form of a review or an appeal of the decision. In this light, such ODR mechanisms must be subject to a review or appeal, depending on the circumstances.

⁷¹ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Ruiz Torija v. Spain*, § 29; *Hiro Balani v. Spain*, § 27.

⁷² European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Ruiz Torija v. Spain*, § 29; *Hiro Balani v. Spain*, § 27.

⁷³ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Brumărescu v. Romania* [GC], § 61; *Agrokompleks v. Ukraine*, § 148.

⁷⁴ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (2013); *Ryabykh v. Russia*, § 52.

111. If and ODR mechanism encompasses an oral hearing and otherwise fully complies with the right to a fair trial, then the proceedings should be subject to the same appeal and review considerations as any other matter. I.e., a final decision may only be called into question when this is necessary by circumstances of a substantial and compelling character such as a judicial error.

112. The introduction of ODR and digitalization of courts means that court procedures may build in several tiers into the process, where only at the last tier there is an adjudication with an oral hearing of the parties. This would correspond to the pyramid model of dispute resolution which integrates legal advice (the parties informing themselves about their legal rights and their legal position), negotiation and conflict resolution techniques (restorative justice), facilitated negotiation and mediation, and adjudication (potentially several stages, including the possibility of review and appeal). These tiers of processes could take place all within the same digital ODR system as part of the court system with the relevant data being moved from one state to the next as appropriate. The idea behind this tiered model of dispute resolution is that most disputes are solved at the lower levels, thus being cost-effective while at the same time giving more disputants access to justice. Thus ODR could also mean a reorganisation of traditional court processes by integrating processes which currently take place outside the court system, provided by private entities (legal advice, ADR).⁷⁵

DATA PROTECTION / PRIVACY / INFORMATION SECURITY / CYBERSECURITY

113. A detailed discussion of data protection law and its application to civil and administrative justice systems is beyond the remit of this research. Instead we only point to some pertinent issues of ODR, civil and administrative justice and data protection. Differences exist between the degree of anonymization of court reporting in the different Council of Europe Member States and the degree to which the court record is publicly accessible and to what extent one litigant can prevent the reporting of court cases.⁷⁶

114. Data protection law in the EU provides for the lawfulness of processing of personal data where “processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller”.⁷⁷ Thus in a nutshell, provided the processing of personal data is necessary (not excessive, proportionality test) for providing justice to litigants and running a justice system it is lawful under data protection law.⁷⁸

115. Generally speaking, like in other areas of digitization, ODR may have a negative impact on data protection and privacy in that online justice is likely to generate a much

⁷⁵ J. Hornle “Encouraging Online Alternative Dispute Resolution (ADR) in the EU and Beyond” (2013) 38 (2) *European Law Review* 187-208 discusses this in relation to ADR, but the same principles hold true for ODR in the courts.

⁷⁶ In England & Wales see the discussion surrounding the topic of super-injunctions and anonymity orders:

⁷⁷ Art 6 (1) (e) EU General Data Protection Regulation 2016/679, effective 25. May 2018 in the Member States of the EU

⁷⁸ To the extent that the data processing falls outside the scope of EU law there may also be an argument that data protection law is not applicable see Art 2

greater wealth of data (including metadata, for example who accessed a particular court record when and from where), increases the possibilities of data processing, searching, data mining and the use of artificial intelligence (which is the other side of the coin of increased access to justice) and online data (including court data) may be more mobile (easy online transfer), sticky (in the sense that data remains on storage devices until erased) and vulnerable to unauthorised, remote access (computer hacking from anywhere in the world).

116. These risks which are a concomitant risk of ODR should be counter-balanced by data protection & privacy training of court officials, clear data protection laws, data protection policies and guidelines on a “need to know” basis, implementation of the “privacy by design” principles in new ODR/court technologies, data protection & privacy audits and criminal laws (on computer misuse) and their effective enforcement.

117. One specific data protection issue already mentioned above (under 12.) would arise if private companies who provide ODR systems (for example software systems or storage capacities in the cloud) collect court user data and exploit this data through online tracking and online profiling activities.

118. Furthermore as far as cybersecurity is concerned, digitalised courts are not only vulnerable to hacking (data protection & privacy implications) but also vulnerable to other forms of malicious attack, affecting the integrity of data and the functioning of the justice system (one only needs to remember the large-scale Ransomware Wannacry attack of last year as an example of the impact⁷⁹). Such attacks are of course not limited to individual and organised criminality but are also perpetrated by states as a form of cyberwarfare. This is a real risk, which the courts would also be more vulnerable to the more they are digitalized and hence cybersecurity has to be priority and needs to be properly resourced in addition to just developing the systems and technology for ODR. Inadequate cybersecurity may mean that access to the courts is effectively denied and court users’ privacy is seriously threatened.

119. It is of fundamental importance to any ODR system that information and data that is uploaded, exchanged, transferred and stored in an ODR system is kept secure. All court documents and any evidence that is uploaded onto an ODR system must be kept free from manipulation and attack to ensure its integrity. The system requires protection to prevent external parties from hacking the system and obtaining non-public information. Regarding the authority to access information, there should be internal limitations that are put in place to ensure that parties to disputes cannot access information that they are not allowed to view. This requires secure authentication.

120. One issue about digital security and ODR is the establishment of the identity of the disputants. It is important that the parties to the ODR process are truly the correct parties and that there is no issue of fraudulent identities.

⁷⁹<https://www.zdnet.com/article/wannacry-ransomware-report-nhs-is-still-not-ready-for-the-next-big-attack/>

ARTICLE 13 – THE RIGHT TO AN EFFECTIVE REMEDY

121. Article 13 provides “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

122. Article 13 therefore imposes an obligation on Convention States to give persons whose Convention rights have been violated a means of redress whereby these persons can obtain relief at the national level. Therefore, for example, if a person’s right to a fair trial has been infringed that person must be able at the national level to have recourse to some form of effective remedy. For example, in a case of statutory, compulsory arbitration where one party has no opportunity to put her case or respond to the other party’s submissions, that party should have access to some sort of complaints mechanism providing for an effective remedy. While this process need not be judicial, it does need to be effective and provide for some procedural guarantees such as the independence of the complaints reviewer.⁸⁰ Ombudsmen schemes and other non-judicial reviews may be considered, as long as they are effective. Therefore, ODR mechanisms might be considered for this purpose.

123. Insofar as infringements of ECHR rights are concerned, the use of ODR mechanisms can indeed open up new avenues of redress for infringements of ECHR rights. It can be an effective and convenient tool for litigants who may have a claim of such an infringement. In order for such a mechanism to be effective and in order to comply with Article 13, the ODR mechanism should ideally comply with the requirements of Article 6, where practical and necessary. These issues have been elucidated above in the section dealing with ODR and issues of compatibility with the right to a fair trial.

124. One of the more important issues, given the fact that Article 13 deals with alleged infringements of ECHR rights is that of independence. The ODR mechanism must be independent from any authority that may have allegedly committed the infringement.

125. Standards have been developed by various organisations and bodies, and this Report read together with the literature review and research outcomes within this Report, borrows from these standards.⁸¹

APPLICABILITY OF THESE STANDARDS TO ODR

126. There is no doubt that while the application of these standards may be necessary to ensure that the development and implementation of an ODR system complies with the right to a fair trial, they may nonetheless prove burdensome to the development and implementation of an ODR system within the justice system. For example, the requirement to hold an oral hearing (or at least have the availability of one) at some stage in the

⁸⁰ *Khan v UK* (2001) 31 EHRR 1016.

⁸¹ Online Dispute Resolution Standards of Practice as developed by the ICANN available at <https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf>

proceedings may prove quite foreign to current providers of ODR who see one of the purposes of ODR as cutting down on the time-consuming and costly traditional court hearings. Another example is the standard of transparency. Many current ODR providers may not emphasize the need of being transparent about the development on their system and the administration of it since confidentiality is an integral part of arbitration and mediation. The only aspect of transparency which they may consider important is the handing down of decision. Furthermore, issues of data protection and cybersecurity are difficult and costly to implement.

127. Having said this, there has been an acknowledgement by the EctHR that the initial decision-making body does not have to conform to the requirements of Article 6(1) of the ECHR provided the applicant has the possibility of appealing the decision to a court of law.⁸² As discussed above, this argument pertains to the idea of compulsory ODR; where the disputant must submit their dispute through alternative means. Thus, there may be a way in which the ODR system can be developed with the overarching purpose of efficiency and effectiveness with some standards being relaxed. This, however, is subject the caveat that there must be the availability of an appeal before the traditional court system. This will ensure that the parties have a public hearing and the other Article 6 rights are given effect to.

THE DIGITAL DIVIDE

128. The issue here (and this is issue is by no means confined to ODR) is that technology is developing extremely fast and that the person who is constantly using an implementing (and training their staff in the latest technology) is likely to have a competitive advantage over the person who uses older technology (including cybersecurity). This is partly a question of costs and resources.

129. Hence a first digital divide may be created simply by access to technology resources. Secondly, the digital divide may appear inter-generational as digital natives who have grown up with gaming and social media find it easier to adapt to new technologies in other spheres.

130. A third digital divide may exist in respect of people with visual impairments or other disabilities (but this divide already exists in the offline and it is not clear whether ODR improves it or makes it worse).

131. But one could also argue that technology empowers, for example litigants in person to have access to legal information and less need for legal representation. The practical answer is to provide as much options as possible- ie to provide for support for individuals who have no access to technology (for example in libraries or other public places) and invest in enabling technologies and to make technology as user-friendly as possible.

132. The issue of the digital divide is a serious one. It is a broadly phrased concept that, for the purposes of this Report, entails the idea that the use of technology, particularly online technology, to resolve disputes might disenfranchise certain portions of the population from access to justice. Quite simply put, many people do not have access to a computer and the internet and many people are computer illiterate. ODR systems are dependent on

⁸² EctHR, *Albert and Le Compte v. Belgium*, Appl. no. 7299/75; 7496/76, Judgment of 10 February 1983, para.

technology. The absence of simple, affordable, and appropriate access to computers, the internet, and other technological tools will limit the possibilities of utilising ODR mechanisms.

133. This statement must be taken with some salt, however. It is a generalised statement, that while may be true for some states is certainly not true for very developed states. Nonetheless, it would be difficult to argue against the point that there will be some people in every society in the world, no matter how developed, that will not have access to or the ability to use the technology that ODR is reliant upon or will be seriously disadvantaged in doing so.

134. If one is to develop a public justice system that improves access to justice then such a system cannot come to be implemented if it will effectively deny certain persons access to justice.

135. One can foresee a range of issues within the digital divide: computer illiteracy, lack of access to a computer or broadband connection, access to the internet, physical and mental disabilities, socially disadvantaged individuals, and the elderly. It is quite apparent, and does not require much analysis, to understand that persons of these categories may be left disadvantaged and side-lined by a judicial system that embraces ODR, if ODR systems do not make space for such individuals.

136. Furthermore it must be emphasized that the digital divide is not just a black and white issue of “haves” and “have-nots” (at least in developed countries), but an issue of relative access to technologies in the sense that the party who can afford the latest computer and internet technologies will be at a substantial advantage over the party who is using technology which is, say five years old. There will be a difference not just between individuals, but also between attorneys and law firms (for example small and big law firms).

137. Having said the above, one author makes the point that not everyone within a society will always have access to technology, and that reason should not stop governments from implementing ODR systems. A similar argument about literacy could be made as follows: not everyone within every society can read and write but that does not mean governments prevent people from accessing justice through written proceedings.

138. The digital divide also applies to the difference in access to justice between developed and developing states. This is an international issue, when comparing the resources of two different states, and raises questions about the use of ODR when a dispute arises between persons from different states of different development statuses. This is beyond the scope of this Report but this is an issue that deserves consideration.

139. The issue of the digital divide is linked to the fair right principle of equality of arms. As noted above, the law requires that people be treated equally when having a dispute resolved. While this does not mean that all pre-existing inequalities of the parties must be dealt with, it does mean that there must be some form of effective participation of both parties who are subject to a dispute. This usually means the effective participation of a litigant through a legal representative. In the context of ODR, and the issue of access to and use of technology as raised above, the principle of equality of arms raises interesting questions.

140. Firstly, every litigant must have the right to an effective participation in the proceedings. This would mean that those participants who are computer illiterate, who have

no access to an online computer system, who are otherwise disabled or previously disadvantaged must be given the chance to effectively participate in ODR proceedings. One way in which to ensure that such persons do receive the necessary attention is to follow the mechanisms implemented by the British Columbia ODR system. In this system, while the backbone of the system is the use of technology online, persons who would otherwise be side-lined from accessing the system are given the necessary attention by the availability of alternative means to having the dispute resolved online. Such persons may access the ODR platform by attending the CRT service centres which are located across British Columbia. Here, the litigants can appear in person at the relevant centre and have an assistant help them with accessing and using the ODR system.

141. Secondly, there may be a divide between legal representatives and their knowledge of and access to technology in ODR proceedings. Large law firms may have the financial ability to use and understand technology in a way that will assist their clients. This may include law firms developing and using systems that analyse data, information and evidence in preparation for a case, which might place a great advantage on the party who has access to such a system. This should be compared to a legal representative who does not have access to such technology and as a result of which his/her client may be left disadvantaged. Large law firms may also have the ability to develop specialist ODR practices wherein certain lawyers specialise in ODR proceedings. This, again, would create a divide between specialist ODR legal representatives and legal representatives who do not have the knowledge of or access to such technology. This in turn would create a divide between the litigants.

142. ODR systems must therefore be developed in such a way that this issue of the digital divide is adequately addressed. The currently existing divide in the quality of legal representation cannot be further enhanced by the introduction of technology. If ODR is to be implemented into public justice systems, these systems must be designed in such a way that there is equality of arms between the litigants. Everyone, no matter their level of computer literacy, their age, social status etc. must have access to the ODR system and this may entail the need either maintain a certain degree of paper based systems and/or to employ assistants to assist and guide such disadvantaged litigants. The use of pilot schemes, reach out to certain disadvantaged groups, user-feedback and centres where court users could physically go to access ODR systems may go some way to alleviate these concerns.

THE USE OF ARTIFICIAL INTELLIGENCE IN THE COURTS

143. AI can be used in different ways which has different impacts on due process. First of all, AI, big data analysis and expert systems can be used to support dispute resolution processes, for example as more and more evidence is produced in electronic form, AI can help in the process of discovery/disclosure (in common law jurisdictions) or the finding of relevant evidence.⁸³

144. Secondly AI, big data analysis and expert systems can be used to guide the parties in respect of the legal issues, providing legal advice and narrowing down the issues or

⁸³ <http://inspiredthinking.dehns.com/post/102ddze/first-use-of-artificial-intelligence-in-legal-case>

helping the parties to focus on the most relevant issues particularly in negotiation and mediation processes.

145. Thirdly AI, big data analysis and expert systems can be used to replace human decision-making and human judgment. The most serious impact of AI would occur in this last use of AI, as it would affect human discretion. However, it is unlikely that AI would be used for this purpose in the immediate, foreseeable future (ie to replace human judgment).

146. Fourthly AI, big data analysis and expert systems are currently being used to analyse judicial reasoning and the use of precedents and legal reasoning. This use may well be a precursor for the third use (ie replacing human decision-making).⁸⁴

147. This raises the question of why AI is problematic from the viewpoint of Article 6 ECHR and more generally for the idea of justice. AI relies on mining large quantities of data for patterns and by developing algorithms from these patterns which are then applied to new sets of data to reach decisions (and further algorithmic learning)). In doing so AI relies heavily on correlation (if x and y then z seems a recurring pattern, then z must be the correct answer if x and y are present) without formulating causation.

148. Currently no AI exists which would be sophisticated enough to automate judgments. Several barriers present themselves: (1) the role of discretion in judicial decision-making, (2) legal interpretation is complex and multi-faceted and not limited to a rule-based system, (3) the adaptability of human language to new situations and how “relevance” can be adapted to new situations.

149. However the use of AI in policing (for example Predpol- used to prioritize police resources based on existing crime spots) or within the criminal justice system (for example to decide on matters of whether a suspect is released on bail) have been criticized for being (racially) prejudiced and creating new types of discrimination.⁸⁵ The concern here is that computer based decisions are inflexible and are not able to create exceptions or use human discretion. This may go to the very core of our notion of access to justice and lead to a denial of justice.

150. AI is increasingly used in the context of the civil and criminal justice systems where artificial intelligence is being developed to eventually support or replace decision-making by human judges. Such systems are currently being tested to identify decision outcomes with a view to detect patterns in complex judicial decision-making. Thus far, the reliable prediction rate is relatively low at 79%. It is therefore considered premature at the current time to imagine such systems replacing judges.⁸⁶ Nevertheless, it is suggested that such systems can support or assist judges (and lawyers).⁸⁷ Given the pressure of high caseloads and

⁸⁴ J Zeleznikov, D Hunter “Reasoning paradigms in legal decision support system” (1995) 9 (6) *Artificial Intelligence Review* 361-385; D.Carneiro et al “ODR: an Artificial Intelligence Perspective”(2014) 41 *Artificial Intelligence Review* 211-240

⁸⁵ Council of Europe Study on the Human Rights Dimension of Automated Data Processing Systems (2017) <https://rm.coe.int/study-hr-dimension-of-automated-data-processing-incl-algorithms/168075b94a>

⁸⁶ Nikolaos Altreas et al “Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective” *PeerJ Computer Science* Open Access (Published 24. October 2016) <https://peerj.com/articles/cs-93.pdf> at p.2; see also <https://www.lawgazette.co.uk/law/artificial-intelligence-mimics-judicial-reasoning/5056017.article>.

⁸⁷ibid

insufficient resources from which most justice systems suffer, there is a danger that support systems based on artificial intelligence are inappropriately used by judges to “delegate” decisions to technological systems that were not developed for that purpose and are perceived as being more ‘objective’ even when this is not the case. Great care should therefore be taken to assess whether such systems can deliver and under what conditions that may be used in order not to jeopardise the right to a fair trial. This is particularly the case when such systems are introduced mandatorily, as is the case for parole decisions in the United States. Concerns about judicial bias around parole decisions have led to the mandatory introduction of software to predict the likelihood of offenders reoffending in many U.S. states.⁸⁸ However independent investigation of this software suggests that the “software used [...] to predict future criminals [...] is biased against blacks”⁸⁹

CONCLUSION AND RECOMMENDATIONS

151. As has been discussed in this Report ODR is a relevant field of law that is growing in its importance. It therefore deserves real attention about how it should be regulated and introduced. In addition to developing online court systems, attention needs to be given to issues of data protection (especially in respect of commercial companies involved in the process).

152. ODR techniques adopted in the courts in Council of Europe Member States fall in the following categories i) pre-trial ADR processes (which may or may not use ODR) such as mediation; ii) e-filing of statements, court documents via secure and authenticated systems (databoxes, e-communication); iii) online access to court files for the relevant court users (again it has to be ensured that such access is authenticated and secure); iv) digitalisation of courts, creating an online platform which allows for e-filing, but also evidence production and a complete digital record; v) the use of video- (or audio-) conferencing in the courts, for example for witnesses, including experts; vi) a parallel, online track (for example for small claims, payment orders or other specific disputes in the civil and administrative courts); vii) the use of artificial intelligence to replace human decision making. We have found ODR techniques were adopted in the categories i)- v), but we have found no examples of vi) or vii).

We recommend that states pay attention to the following issues when implementing ODR:

- (1) A fair hearing in the courts must be guided by the “equality of arms” principle, giving each party an equal opportunity to present his/her own case and respond to the case of the other.
- (2) For example an assumption is normally made that technology speeds up processes (which is true), but little regard is given the fact that technology also increases

⁸⁸ See: <https://gcn.com/articles/2013/11/01/prison-analytics-software.aspx>

⁸⁹ Angwin, Julia, Surya Mattu, and Lauren Kirchner. 2016. ‘Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And It’s Biased Against Blacks.’ ProPublica. Retrieved 31 August 2016 (<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>)

information overload (which slows down information processing)- so for example shortened and inflexible deadlines for filing statements or evidence can affect the ability of a party to have a fair hearing (where for example a micro-business litigates against a much larger business) and the sole director cannot cope with short deadlines.

- (3) Furthermore, it is often the assumptions we make about technology (rather than the technology itself) which may have an impact on a fair hearing. So the assumption for example will be that technology always works (not accounting for technical glitches or downtime) which may prejudice a party in filing their case.
- (4) A different aspect is the question of open, public hearings (where virtual hearings in the courts replace a court hearing), which is essentially a question of transparency. This is not a real problem as a platform may in fact allow access to virtual hearings and information in a controlled manner without the observers having to physically go to a courtroom. This is more a question of designing technology in a particular way. Thus digital courts may be open courts, if not more so than physical court buildings.
- (5) The use of online courts has the ability revolutionise access to justice for litigants. The development of new procedures to resolve disputes online can revolutionise access to justice to persons who would usually be unable to understand court procedures without hiring a lawyer. The use of ODR could level the playing field of parties who would ordinarily find it hard to access courts. It could improve the justice system to make it more accessible for those who live far from legal centres or who struggle to afford the costs of seeking justice, by providing cheaper, alternative means to resolving disputes.
- (6) Using technology and the internet can allow litigants to access information about how to lay a claim, submit a claim and inform them of the process of how to go about resolving their dispute. In fact, ODR may structure the process itself for litigants. It also means that this process can be done just about anywhere with internet access, making the process convenient and easy for litigants. This is a massive improvement of access to justice for litigants.
- (7) An issue with ODR and access to justice is that those who are computer illiterate or have no access to technology might be side-lined in the process. Increased high internet access reflects social and generational change of how people now lead their lives, but what of the vulnerable users and those without access? Requiring parties to use technology to resolve disputes could inhibit access to justice if there is a great discrepancy between the parties and their access to technology. The move to online and virtual justice also threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and, as some argue, make justice less open.
- (8) If some litigants do not have access to, or the ability to use, technology and the internet, these litigants will be excluded from the administration of justice. Therefore, if ODR is implemented, there should (a) either be an alternative paper-based traditional means of having a dispute resolved for parties who do not have this access to technology and the internet or (b) a comprehensive system of legal representation made affordable.

- (9) As courts are being digitalised and are going online there may be (in certain countries) a temptation to outsource the technology and to save money by using “free” commercial applications, who then, in return collect court users’ personal data for online profiling purposes. We have not seen this as part of our research for this study and as far as we are aware, the ODR communication and data processing technologies developed by the courts to date are not based on commercial tracking. However in times of decreasing public budgets and increased pressure on government departments to save money, this topic is not entirely irrelevant.
- (10) It does appear that at some stage of this process you must have the opportunity to have an oral hearing. Thus, for compulsory ODR, there must be the opportunity to appeal the ODR decision which must be oral. Or, the ODR processes must have an oral element to it.
- (11) This raises the interesting question of whether “oral” hearing is to be equated with “face-to-face” hearing? While there is no direct authority on this it would make sense to argue that video-conferencing where the communicators can hear and see each other in real time (and where provision is made that, for example witnesses are not coached from behind the screen and that witnesses’ identity is properly authenticated) is functionally equivalent to an “oral” hearing (provided the technology works on both ends of the transmission and this can be protocolled).
- (12) The ECtHR requires there to be some form of publicity which allows for public scrutiny of any court proceedings, with the additional requirement of having the decision made public. Therefore, any ODR proceeding must ensure that there is this degree of transparency involved.
- (13) In particular, if hearings were conducted entirely online in a fully digitalized court it would be important that the public can access the hearing- subject to specific exceptions, court hearings must be open to members of the public (in the sense that members of the public can follow proceedings from a public gallery in the court building). Functionally equivalent access would have to be provided technically in a fully online court, allowing interested members of the public to follow the course of proceedings.
- (14) An interesting question here is a question of numbers. Traditionally members of the public have been granted physical access to the court building, but many countries in Europe do not allow public broadcasting of trials on TV for the reason that this may influence advocates and judges who then “play” to populist sentiments of crowd watching which may not lead to better justice. Clearly if there is online access to “court channels” (for example on Youtube) then a similar effect may arise.
- (15) It is interesting to note in this context that few Council of Europe States at present use ODR to make the enforcement of court decisions more effective (with some notable exceptions). We recommend that greater use of ODR could be made at this stage.
- (16) The introduction of ODR and digitalization of courts means that court procedures may build in several tiers into the process, where only at the last tier there is an adjudication by judges with an oral hearing of the parties. This would correspond to the pyramid model of dispute resolution which integrates legal advice (the parties informing

themselves about their legal rights and their legal position through the use of expert systems/artificial intelligence), negotiation and conflict resolution techniques (restorative justice), facilitated negotiation and mediation, and adjudication (potentially several stages, including the possibility of review and appeal). These tiers of processes could take place all within the same digital ODR platform, integrated as part of the court system with the relevant data being moved from one stage of the procedure to the next one as appropriate. The idea behind this tiered model of dispute resolution is that most disputes are solved at the lower levels, thus being cost-effective while at the same time giving more disputants access to justice. Thus ODR could also mean a reorganisation of traditional court processes by integrating processes which currently take place outside the court system, provided by private entities (legal advice, ADR).

- (17) Generally speaking, like in other areas of digitization, ODR may have a negative impact on data protection and privacy in that online justice is likely to generate a much greater wealth of data (including metadata, for example who accessed a particular court record when and from where), increases the possibilities of data processing, searching, data mining and the use of artificial intelligence (which is the other side of the coin of increased access to justice) and online data (including court data) may be more mobile (easy online transfer), sticky (in the sense that data remains on storage devices until erased) and vulnerable to unauthorised, remote access (computer hacking from anywhere in the world).
- (18) These risks which are a concomitant risk of ODR should be counter-balanced by data protection & privacy training of court officials, clear data protection laws, data protection policies and guidelines on a “need to know” basis, implementation of the “privacy by design” principles in new ODR/court technologies, data protection & privacy audits and criminal laws (on computer misuse) and their effective enforcement.
- (19) Cybersecurity has to be a priority and needs to be properly resourced in addition to just developing the systems and technology for ODR. Inadequate cybersecurity may mean that access to the courts is effectively denied and court users’ privacy is seriously threatened.
- (20) It is of fundamental importance to any ODR system that information and data that is uploaded, exchanged, transferred and stored in an ODR system is kept secure. All court documents and any evidence that is uploaded onto an ODR system must be kept free from manipulation and attack to ensure its integrity. The system requires protection to prevent external parties from hacking the system and obtaining non-public information. Regarding the authority to access information, there should be internal limitations that are put in place to ensure that parties to disputes cannot access information that they are not allowed to view. This requires secure authentication.
- (21) One issue about digital security and ODR is the establishment of the identity of the disputants. It is important that the parties to the ODR process are truly the correct parties and that there is no issue of fraudulent identities.
- (22) Every litigant must have the right to an effective participation in the proceedings. This would mean that those participants who are computer illiterate, who have no access to an online computer system, who are otherwise disabled or previously disadvantaged

must be given the chance to effectively participate in ODR proceedings. One way in which to ensure that such persons do receive the necessary attention is to follow the mechanisms implemented by the British Columbia ODR system. In this system, while the backbone of the system is the use of technology online, persons who would otherwise be side-lined from accessing the system are given the necessary attention by the availability of alternative means to having the dispute resolved online. Such persons may access the ODR platform by attending the CRT service centres which are located across British Columbia. Here, the litigants can appear in person at the relevant centre and have an assistant help them with accessing and using the ODR system.

- (23) There may be a divide between legal representatives and their knowledge of and access to technology in ODR proceedings. Large law firms may have the financial ability to use and understand technology in a way that will assist their clients. This may include law firms developing and using systems that analyse data, information and evidence in preparation for a case, which might place a great advantage on the party who has access to such a system. This should be compared to a legal representative who does not have access to such technology and as a result of which his/her client may be left disadvantaged. Large law firms may also have the ability to develop specialist ODR practices wherein certain lawyers specialise in ODR proceedings. This, again, would create a divide between specialist ODR legal representatives and legal representatives who do not have the knowledge of or access to such technology. This in turn would create a divide between the litigants.
- (24) ODR systems must therefore be developed in such a way that this issue of the digital divide is adequately addressed. The currently existing divide in the quality of legal representation cannot be further enhanced by the introduction of technology. If ODR is to be implemented into public justice systems, these systems must be designed in such a way that there is equality of arms between the litigants. Everyone, no matter their level of computer literacy, their age, social status etc. must have access to the ODR system and this may entail the need either to maintain a certain degree of paper based systems and/or to employ assistants to assist and guide such disadvantaged litigants. The use of pilot schemes, reach out to certain disadvantaged groups, user-feedback and centres where court users could physically go to access ODR systems may go some way to alleviate these concerns.
- (25) Given the pressure of high caseloads and insufficient resources from which most justice systems suffer, there is a danger that support systems based on artificial intelligence are inappropriately used by judges to “delegate” decisions to technological systems that were not developed for that purpose and are perceived as being more ‘objective’ even when this is not the case. Great care should therefore be taken to assess whether such systems can deliver and under what conditions that may be used in order not to jeopardise the right to a fair trial. This is particularly the case when such systems are introduced mandatorily.

ANNEX 1

QUESTIONNAIRE SENT OUT TO COUNCIL OF EUROPE MEMBER STATES

INTRODUCTION AND EXPLANATION

Online Dispute Resolution combines the information processing powers of computers with the networked communication facilities of the internet in dispute resolution processes. This Survey is in aid of important research to understand how Online Dispute Resolution impacts on the right to a fair trial.

The purpose of the Survey is to obtain a comparative picture of the civil, commercial or administrative procedure rules and practices in respect of Online Dispute Resolution in the Council of Europe Member States.

This Survey focuses on Online Dispute Resolution and the Courts. It does not cover the use of purely internal case management and filing systems, nor the use of IT in the courts generally.

The Survey also does not cover alternative dispute resolution outside the court system. Alternative dispute resolution (for example, arbitration and mediation) is only relevant if (1) it is used in conjunction with court proceedings as a preliminary procedure or (2) if it leads to a decision binding on the parties with res judicata effect (other than arbitration based on the voluntary agreement of the parties).

The Survey does not cover the use of Online Dispute Resolution in the context of consumer disputes, such as the disputes solved by the EU Online Dispute Resolution Platform.

The Survey covers specific Online Dispute Resolution techniques such as:

- (i) online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses);
- (ii) the use of online systems for storing, processing and assessing electronic evidence;
- (iii) the use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
- (iv) the use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
- (v) the use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding, only to the extent that they affect court processes.

Section A concerns civil and commercial disputes, and Section B concerns administrative disputes. Some of the questions may be repeated in each section but it was felt that it is clearer if the Survey contains two separate parts, one on civil and commercial courts and the other on administrative courts.

8. The Survey covers the Online Dispute Resolution techniques mentioned above under 6. for the following possible stages and variations of legal processes before the courts:

- i) preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court (such as, in some jurisdictions, mandatory pre-trial alternative dispute resolution mechanisms);
- ii) preliminary processes (including alternative dispute resolution mechanisms such as arbitration, negotiation or mediation) which are not mandatory as such, but can be recommended by the court/judge. Furthermore, if the parties refuse to engage in them there may be penalties in the award of costs;
- iii) special online dispute resolution tribunals for some particular types of claims (e.g. Administrative Tribunals, online dispute resolution for parking offences and administrative fines, or for social housing disputes, or for small claims disputes in the civil courts, or for neighbourhood or family disputes);
- iv) litigation before a civil, commercial or administrative court under the ordinary procedural rules;
- v) parallel tracks: claimants can choose whether they opt for the ordinary, "traditional" court procedures (not using Online Dispute Resolution) OR a special Online Dispute Resolution Court which has its own, separate procedure and uses some of the Online Dispute Resolution techniques mentioned above under 6;
- vi) use of Online Dispute Resolution in the enforcement of judicial decisions;
- vii) out-of-court alternative dispute resolution mechanisms which the parties are required to use by law and which result in binding decisions not subject to judicial review.

Since the Survey by its very nature explores what forms of Online Dispute Resolution are available in different states, many of the questions may not be applicable in every state.

THE COUNCIL OF EUROPE ACTIVITY

The activity is a study with the following aims:

- to analyse the compatibility of Online Dispute Resolution with the right to a fair trial both in terms of the challenges to the right of a fair trial as well as opportunities afforded by Online Dispute Resolution to provide greater access to justice and enhanced due process;
- to examine whether online dispute resolution could open up new avenues of redress for infringements of ECHR rights (Article 13).

This study is conducted by the independent expert, Prof Julia Hörnle, School of Law, Queen Mary University of London, j.hornle@qmul.ac.uk.

INSTRUCTIONS

Kindly complete the questionnaire. Please note that only some of the questions will be applicable to your legal system. Please email the completed form to the Council of Europe Secretariat (DGI-CDCJ@coe.int) no later than **Friday 12 January 2018**.

Where the response requires either “Yes” or “No” please tick YES or NO to mark your answer as appropriate.

All questions have a “Comments” field, to allow additional information to be entered. In order to assist in building a comparative picture of the civil, commercial and administrative procedures and practices in respect of the use of Online Dispute Resolution, please make use of the additional fields to provide as much information as possible such as reference to relevant legislation or regulations, and descriptions of State practice.

Would you kindly be prepared to answer a few more questions in a telephone interview scheduled at a mutually convenient time (about 45-60 minutes)?

YES / NO

If YES please state the name and email address of the person to be interviewed⁹⁰-much appreciated, many thanks!

State Name:

Contact person:

Telephone:

E-mail:

⁹⁰ The contact details provide in this section will not be published and are only for internal purposes.

SECTION A: CIVIL AND COMMERCIAL COURTS**QUESTION A.i**

In your country are there any preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court and do these preliminary pre-trial processes use Online Dispute Resolution techniques such as:

1. Online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding ?

YES / NO

If YES please provide details in the box below

QUESTION A.ii

In your country are there any preliminary processes (including alternative dispute resolution mechanisms such as arbitration, negotiation or mediation) which are not mandatory as such, but can be recommended by the court/judge and/or, if the parties refuse to engage in them there may be penalties in the award of costs, and do these preliminary processes use Online Dispute Resolution techniques such as:

1. Online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding?

YES / NO

If YES please provide details in the box below

QUESTION A.iii

In your country are there any special online dispute resolution TRIBUNALS for small claims disputes in the civil courts (or other types of civil disputes such as family or neighbourhood disputes) using Online Dispute Resolution techniques such as:

1. Online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses);
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the remote, online giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding, only to the extent that they affect court processes?

YES / NO

If YES please provide details in the box below

QUESTION A.iv

In your country do the civil and commercial courts use the following Online Dispute Resolution techniques in litigation under the ordinary procedural rules:

1. Online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses);
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;

5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding?

YES / NO

If YES please provide details in the box below

QUESTION A.v

In your country are there PARALLEL TRACKS or PATHWAYS before the same court which allow claimants to choose between the ordinary, “traditional” court procedures (not using Online Dispute Resolution) AND a special Online Dispute Resolution Procedure - and do these PARALLEL TRACKS provide for the following Online Dispute Resolution techniques:

1. Online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses);
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding?

YES / NO

If YES please provide details in the box below

QUESTION A.vi

Does your country use Online Dispute Resolution in the enforcement of judicial decisions?

YES / NO

If YES please provide details in the box below

QUESTION A.vii

Are there in your country out-of-court alternative dispute resolution mechanisms which the parties are required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect and using the following Online Dispute Resolution techniques:

1. Online filing systems/platforms directly accessed by the parties and/or their advocates for the filing of statements (such as claims, counterclaims, responses);
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding?

YES / NO

If YES please provide details in the box below

SECTION B: ADMINISTRATIVE COURTS

QUESTION B.i

In your country are there any preliminary pre-trial processes which under the law constitute a mandatory prerequisite to institute proceedings before a public court and do these preliminary pre-trial processes use Online Dispute Resolution techniques such as:

1. Online filing systems/platforms directly accessed by the complainant and/or the advocate for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding?

YES / NO

If YES please provide details in the box below

QUESTION B.ii

In your country are there special online dispute resolution administrative tribunals for some particular types of claims (e.g. online dispute resolution for parking offences and administrative fines, or for social housing disputes) using Online Dispute Resolution techniques such as:

1. Online filing systems/platforms directly accessed by the complainant and/or the advocate for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the remote, online giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice?

YES / NO

If YES please provide details in the box below

QUESTION B.iii

In your country do the administrative courts use the following Online Dispute Resolution techniques in litigation under the ordinary procedural rules:

1. Online filing systems/platforms directly accessed by the complainant and/or the advocate for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;

5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice?

YES / NO

If YES please provide details in the box below

QUESTION B.iv

In your country are there PARALLEL TRACKS or PATHWAYS before the same court which allow complainants to choose between the ordinary, “traditional” court procedures (not using Online Dispute Resolution) AND a special Online Dispute Resolution Procedure- and do these PARALLEL TRACKS provide for the following Online Dispute Resolution techniques:

1. Online filing systems/platforms directly accessed by the complainant and/or the advocate for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice?

YES / NO

If YES please provide details in the box below

QUESTION B.v

Does your country use Online Dispute Resolution in the enforcement of judicial decisions of the administrative courts?

YES / NO

If YES please provide details in the box below

QUESTION B.vi

Are there in your country out-of-court alternative dispute resolution mechanisms which the complainant is required to use by law and which result in binding decisions not subject to judicial review and with res judicata effect and using the following Online Dispute Resolution techniques:

1. Online filing systems/platforms directly accessed by the complainant and/or the advocate for the filing of statements;
2. The use of online systems for storing, processing and assessing electronic evidence;
3. The use of artificial intelligence, big data analysis techniques and automation to reach decisions which traditionally have been made by judges and which traditionally have been dependent on human judgment;
4. The use of platforms for online meetings and online hearings, for example by audio- and video-conferencing, including the giving of oral testimony of witnesses and experts;
5. The use of artificial intelligence, big data analysis, expert and legal advice systems for the purposes of negotiation, mediation, narrowing of issues or legal advice, including such systems as blind-bidding?

YES / NO

If YES please provide details in the box below

ANNEX 2
EXPERT INTERVIEWS

Arno R. Lodder - Professor of Internet Governance and Regulation, Department Transnational Legal Studies, Center for Law and Internet, VRIJU University Amsterdam.

<p>I. INTRODUCTION, BACKGROUND AND EXPLANATION CLARIFYING THE FIELD OF RESEARCH</p>
<p>QUESTIONS</p> <p>What is your personal experience of Online Dispute Resolution and your personal view on whether Online Dispute Resolution should be used (more widely) in the courts?</p> <p>Professor of Internet Governance and Regulation, Department Transnational Legal Studies, Center for Law and Internet.</p> <p>The research is mainly concerned with three aims regarding internet governance and regulation. Publication in ODR https://research.vu.nl/en/persons/arno-r-lodder/publications/</p>
<p>II. ODR OVERVIEW</p>
<p>1. Do you have any ODR mechanisms in your jurisdiction?</p> <p>In Netherland court proceedings are so complicated. The situation can be improved trough the implementation of ODR. If you can design the system, it will positive impact of fair trial. And we can also have a monitoring of the process, particularly to fix the information.</p> <p>Overall, ODR will bring only benefits from ODR.</p>
<p>2. Do you know any other ODR mechanisms outside your country?</p> <p>I don't know the situation in every state. But, ODR is developed in the United Kingdom and Netherlands (family cases). For instance, in the UK we've got MoneyClaim platform. In the Netherlands, we have Rechtwijzer.</p>
<p>3. Are ODR techniques used within the courts in your country?</p> <p>There is now sort of initiative. It's only for the exchange of documents. So, it's quite restrictive. They expected to launch system for exchanging the documents online, but they delayed and postponed it to 2018.</p> <p>Overall, the process of implementation of the ODR mechanisms in court proceedings should be improved.</p>
<p>4. What is your prediction as to the ODR development in your country/ in general (5 or 10 years)?</p> <p>Nowadays, ODR mechanisms are being used mostly is alternative dispute resolution. Maybe, if courts are using more and more technologies, it could work.</p> <p>What is very striking is that 10 years ago we expected more from ODR. But not all such expectations have been met.</p>

Thus, one has to be careful with the predictions as to the ODR mechanisms.
III. GENERAL QUESTION AS TO FAIR TRIAL ISSUES
<p>1. In your opinion, what are the main issues regarding ODR's influence on fair trial considerations (Article 6 of the European Convention of Human Rights)?</p> <p>It technically possibly to ensure fairness safeguards in ODR. I don't see how it might negatively influence on fairness of the proceedings.</p> <p>2. Do you think ODR processes and procedures work? Do they help resolve disputes fairly, efficiently and effectively?</p> <p>Yes. In the Netherlands, the process is so complicated. So, we can make it simpler using online technologies. You can design the system convenient for people. It will improve access to justice and accordingly fair trial.</p> <p>Only benefits.</p> <p>3. Do you think that ODR processes and procedures could work within the civil justice system? I.e. within the court system?</p> <p>Yes.</p>
IV. ODR AND IMPARTIALITY OF THE TRIBUNAL
<p>1. Do you think there is a risk the ODR will have negative influence on tribunal's impartiality and independence?</p> <p>The thing is that the judges will be the same in ODR procedures. So, it is not the issue of ODR, but of the bias of judges in general. So far, decision offered by private organization via ODR are high quality solutions. Thus, online decision offered by judges will be good enough, but it will depend on case-by-case basis.</p> <p>The technologies won't cause the difference in this regard.</p> <p>2. In which scenario ODR may be or may be not conducted in accordance with the requirement of Article 6 as to the 'public hearing' (Article 6)?</p> <p>To be honest, the courtroom is a limited space. So, using ODR we can ensure public hearing for unlimited number of people. For instance, we could use YouTube video link to ensure public hearing unless we have some privacy issues at hand.</p>
V. ODR AND DIGITAL ILLITERACY/DIGITAL DIVIDE/ACCESS TO THE COURTS
<p>1. Will ODR have negative influence on the right for a fair trial considering the level of digital illiteracy/digital divide in Council of Europe member states/your state?</p> <p>Maybe, this problem could have been actual 10 years ago. But not nowadays.</p> <p>More people would have problems using ordinary courts because of distance. So, in this case, people have to travel to the court from different towns etc.</p> <p>2. Could you suggest a solution on how individuals affected can get access to ODR?</p> <p>If you have online dispute resolution not necessarily everything has to be online.</p> <p>So, the idea is that the level of digitalisation might differ depending on the level of digital illiteracy of population.</p>

VI. ODR AND ARTIFICIAL INTELLIGENCE
1. Do you think AI nowadays exists in ODR mechanisms?
No, I don't think so.
2. Do you think AI will be introduced in the COURTS in the near future?
It has been introducing everywhere, so it will be introducing in ODR as well. Particularly, regarding the analysis of the information.
3. Do you think it might affect the right to a fair trial?
It depends on the level of access to the technology. In civil cases, for instance in the UK, people with more money have more options. If you could effort lawyers, you have an advantage. As to the concern that AI one day will substitute human being in dispute resolution process, it won't. Definitely, it won't.
4. Do you think automation might affect the independence and impartiality of judges and is there a risk that the removal of discretion and human judgment will lead to prejudice and stereotyping?
No. On the contrary, it could help to enhance the independence and impartiality of the judges. Moreover, judges remain the same in dispute resolution regardless of its form: online or offline.
VII. ODR AND SECURITY
1. To what extent are ODR mechanisms in your country protected from cyber-attacks?
There is definitely an issue here. The internet is not secured. What is important, it's technically not possible to prevent 100 % attracts. So, it always be a problem. At the same time, governments should ensure an appropriate level of digital security.

Judge Dory Reiling.

I. INTRODUCTION, BACKGROUND AND EXPLANATION CLARIFYING THE FIELD OF RESEARCH
<p>QUESTIONS</p> <p>What is your personal experience of Online Dispute Resolution and your personal view on whether Online Dispute Resolution should be used (more widely) in the courts?</p> <p>Judge with rich, varied, international experience in judicial reform and information technology for courts, from a long, diverse career in IT for courts, judicial reform at the World Bank, and independent consulting.</p> <p>Worked on judicial reform in Georgia, Nepal, Benin, Romania, Macedonia, Gambia, Sri Lanka, Kazakhstan, Jordan, Singapore, Australia, Croatia.</p> <p>Teaching experience at Dutch Judicial Academy (SSR), universities of Utrecht, Leyden, Amsterdam, Delft Technical University, Canberra and University of Victoria (Australia), German Judicial Academy, World Bank Institute, International Development & Law Organization (IDLO), Lee Kuan Yew School of Management (Singapore), T.M.C. Asser Institute, The Hague.</p> <p>Member of Editorial Board of Computerrecht (Kluwer), Hague Journal for the Rule of Law, and Springer Law, Technology and Governance Series.</p> <p>Specialises on Strategic advice, knowledge sharing, developing court IT, publishing on IT for judicial reform.</p>
I. ODR OVERVIEW
<p>5. Could you please give brief overview of ODR mechanism in court proceedings in your country?</p> <p>The ODR is considered to be a form of alternative dispute resolution. So, usually if we speak about ODR it means we speak about ADR (mostly privately run) and not about court proceedings.</p> <p>What I do try is to look at these experiments to understand whether they may provide some indications to what my court system could do using ODR mechanisms.</p> <p>As to examples of ODR in court proceedings in the Netherlands. In administrative proceedings courts handle appeals from administrative decisions and these appeals can be filed online.</p> <p>However, there is no complete ODR court proceedings (like UK pilot or British Columbia Civil Tribunal) we do not have.</p> <p>6. What is your prediction as to the ODR development in your country/ in general (5 or 10 years)?</p> <p>My own court system is aware of the necessity of using more ODR mechanisms. It is something we are working on, but it's really hard to predict exactly when we are going to implement it.</p>
II. GENERAL QUESTION AS TO FAIR TRIAL ISSUES

In your opinion, what are the main issues regarding ODR's influence on fair trial considerations (Article 6 of the European Convention of Human Rights)?

If we are talking about fair procedure it means we discuss the way the resolution of the dispute is being organized. If we do it online, the design needs to take into account the exchange of information. Such exchange must comply with fair procedure standards, such as equality of arms and transparency.

III. ODR AND IMPARTIALITY OF THE TRIBUNAL

3. Do you think there is a risk the ODR will have negative influence on tribunal's impartiality and independence?

If the system has been designed properly, it doesn't have to.

4. In which scenario ODR may be or may be not conducted in accordance with the requirement of Article 6 as to the 'public hearing' (Article 6)?

It's very hard to give a general answer to this question. Because court hearings as a rule are public. It means there is a lot of public attention for some hearings and less for others.

But the point we are really struggling at the moment is that our decisions also have to be public. On the other hand, there is Article 8 of the ECHR – the right to privacy, which means that personal information can't be public.

So, considering above-mentioned, we need to find balance and a solution.

IV. ODR AND DIGITAL ILLITERACY/DIGITAL DIVIDE/ACCESS TO THE COURTS

3. Will ODR have negative influence on the right for a fair trial considering the level of digital illiteracy/digital divide in Council of Europe member states/your state?

Step 1. It should not.

For instance, the Dutch legislation on digital procedure says that is should be equal access for those who are not digital illiterate. So, parties are allowed to use papers for the filing.

4. Could you suggest a solution on how individuals affected can get access to ODR?

Things are not that simple. People who can't use digital technologies shall be assisted. We can offer as a solution support kiosks in courts buildings or in legal aid bureau in some other public places to help people to file suits digitally.

And, of course, we have to design simple and user-friendly interface to enable as many people as possible to use the technology.

V. ODR AND ARTIFICIAL INTELLIGENCE

5. Do you think AI nowadays exists in ODR mechanisms?

Not, I am aware of current AI in ODR.

6. Do you think AI will be introduced in the COURTS in the near future?

I have no concrete information about whether it will be introduced.

7. Do you think it might affect the right to a fair trial?

As to the concern AI will substitute human being in DR.

AI can help a person to decide whether to take the case to the court. So, if I have an issue and I can put it before a legal bot or robot and it will tell me whether I have chances to win the case. That is a different question.

Accordingly, the bot can predict chances and I can decide now whether to go or not go ahead with my suit.

If you look at Supreme Court jurisprudence it is usually when the Supreme Court says well until now we had been adopted one position, however the circumstances in society have been changed and we have to apply different position now.

So, the jurisprudence is dynamic.

Thus, AI can adopt previous court position, but not generate the new one.

I know there is a tool which can predict ECHR decision with 60 % accuracy, but I am not sure it can predict (generate) changes in jurisprudence.

At the same time, AI can be helpful to judges when dealing with data analysing. In some cases, it can analyse data in a more efficient way the person does.

VI. ODR AND SECURITY

2. To what extent are ODR mechanisms in your country protected from cyber-attacks?

My impression and my experience is that the main concern is identification.

The general rule is that only someone who needs to have access should have access to this information.

Since we can't see parties online, ODR requires digital authorisation.

For instance, we can use credit card identification.

So, this is the main problem.

Pablo Cortes, Prof in Civil Justice at Leicester Law School.

I. INTRODUCTION, BACKGROUND AND EXPLANATION CLARIFYING THE FIELD OF RESEARCH
<p>1. What is your personal experience of Online Dispute Resolution and your personal view on whether Online Dispute Resolution should be used (more widely) in the courts?</p> <p>Pablo is a chair in Civil Justice at Leicester Law School. He has been invited to speak in many international conferences and expert meetings, particularly on ODR. He is a fellow of the National Centre for Technology and Dispute Resolutions (University of Massachusetts) and a member of the Online Dispute Resolution (ODR) Taskforce of the International Mediation Institute and of the ODR Advisory Group of the Civil Justice Council. The ODR should and will be used in the courts.</p>
II. ODR OVERVIEW
<p>7. Do you have any ODR experience and do you know of mechanisms in your jurisdiction?</p> <p>Yes, I do. For instance, I have been involved as an adjudicator for CIDR. It is ODR platform, designed by MODRIA to resolve aviation complaint from passengers. I receive complaints online through the platform, I revise them and then take the decision.</p> <p>That what I will be doing after this interview. It operates in the UK.</p> <p>As to the Spain, there is one domain names disputes system, which is equivalent to Nominet in the UK (the link).</p>
<p>8. Are ODR techniques used within the courts in your country?</p> <p>The ODR system in England and Wales is currently being implemented, as part of online court pilot. Also, we have a MONEYCLAIMS online. Also, we have traffic tribunals, which deal with claims between citizen and councils that have put a fine. So, the citizens can challenge this fine via online tribunal.</p> <p>Spain is less developed. As far as I know there is nothing. There one pilot (but it restricted to e-filing only).</p>
<p>9. What is your prediction as to the ODR development in your country/ in general (5 or 10 years)?</p> <p>It is difficult to predict. But it might be an online court with mandatory jurisdiction, which expects to capture a majority of civil claims.</p> <p>Online court might be used as a default by 2022.</p> <p>So, in the next 5 years we are going to see significant development.</p> <p>Also, we have to activate private initiatives in ODR.</p> <p>As to the Spain, it's a matter of political choices. Particularly, the question of support from</p>

government. Perhaps, in 5-10 years it will be developing in gradual manner.

III. GENERAL QUESTION AS TO FAIR TRIAL ISSUES

4. In your opinion, what are the main issues regarding ODR's influence on fair trial considerations (Article 6 of the European Convention of Human Rights)?

The main issue is an access to technology. Especially, for those who are without lawyers. This group of people may be disadvantaged. Clearly, there is problem.

It is a challenge for undeveloped countries.

It might be an issue in regard to authorisation in terms how to identify a person while logging in to a system.

5. Do you think ODR processes and procedures work? Do they help resolve disputes fairly, efficiently and effectively?

Yes. Definitely, it will enhance access to justice in case the mechanism has been designed properly.

6. Do you think that ODR processes and procedures could work within the civil justice system? I.e. within the court system?

It not just could. It should.

IV. ODR AND IMPARTIALITY OF THE TRIBUNAL

5. Do you think there is a risk the ODR will have negative influence on tribunal's impartiality and independence?

No. There is no major challenge. The perception may change via online, but there is no problem at all.

6. In which scenario ODR may be or may be not conducted in accordance with the requirement of Article 6 as to the 'public hearing' (Article 6)?

I think the problem is minor. If you want face-to-face, you can opt for this. Even video link is less time-consuming. But the door must be open for those who want to do it face-to-face. That doesn't mean the other party should do the same. So, we can ensure the public hearing by using technologies. Face-to-face should not be the default provision.

7. How will ODR affect the fairness of civil and administrative procedures- please give some examples...?

The quality of ODR decisions may be lower. It will be cheaper for low value disputes. And it can be justified by the possibility to review the decision. In general, it's not a problem, it's an access to justice.

V. ODR AND DIGITAL ILLITERACY/DIGITAL DIVIDE/ACCESS TO THE COURTS

5. Will ODR have negative influence on the right for a fair trial considering the level of digital illiteracy/digital divide in Council of Europe member states/your state?

Yes. It is a major problem. It could be a problem for some individuals with low level of digital literacy.

6. Could you suggest a solution on how individuals affected can get access to ODR?

We have to create system which will be assisting these individuals. We can provide computers in public libraries. So, in England, we have a citizensadvise service. Also, we have [McKenzie friend](#), when a person does not need to be legally qualified.

VI. ODR AND ARTIFICIAL INTELLIGENCE

8. Do you think AI nowadays exists in ODR mechanisms?

No. But, for instance, in the UK pilot it will be a tree of answers.

We have AI in Amazon dispute settlement mechanism.

Sometimes it's better to provide the solution which might be no so accurate, but it works.

We have AI in law firms – ROSS, for instance.

9. Do you think AI will be introduced in the COURTS in the near future?

It will take time. But, we have computer assistance when we need information on basic level.

10. Do you think it might affect the right to a fair trial?

No. I wouldn't think so. Going to Amazon example, if do not like a ODR solution, you can escalate it. If it is a final decision, it might be a problem.

11. Do you think automation might affect the independence and impartiality of judges and is there a risk that the removal of discretion and human judgment will lead to prejudice and stereotyping?

At the basic level, maybe yes. But, in general no.

VII. ODR AND SECURITY

3. To what extent are ODR mechanisms in your country protected from cyber-attacks?

Frankly, I have no idea.

TTPS protocol can be used. There is some level of security.

4. In your opinion, what are the main concerns in ODR in terms of digital security?

No. The one that the court use is quite robust. We pay taxes online. So, I don't think it will be challenging for the court.

Pavel Loutocky - Masaryk University

I. BACKGROUND AND EXPLANATION CLARIFYING THE FIELD OF RESEARCH
<p>QUESTIONS</p> <p>What is your personal experience of Online Dispute Resolution and your personal view on whether Online Dispute Resolution should be used (more widely) in the courts?</p> <p>I am doing my PhD in ODR. I have some publication about ODR and consumer claims. I also went through the ODR systems to check how does it work. I worked with Colin Rule, who has designed Ebay system and MODRIA. And again, as I am teaching at the university, I showed the students ODR mechanism.</p>
II. ODR OVERVIEW
<p>10. Do you have any ODR mechanisms in your jurisdiction?</p> <p>Yes, we do. For instance, we have Youstice in Czeck Republic.</p> <p>11. Do you know any other ODR mechanisms outside your country?</p> <p>I don't know the situation in every state. But, ODR is developed in the United Kingdom and Netherlands (family cases). I don't know about other states.</p> <p>12. Are ODR techniques used within the courts in your country?</p> <p>We have possibility to file a complainant online. To pay fee. To get basic information about the case. So, pretty elementary things. In e-justice Czech Republic is in a low position. As a rule, a paper work has been used. We have also governmental email. So, we have e-filing, but don't have ODR as such.</p> <p>There is some exclusion in the case of bankruptcy. It works more electronically. But, in other cases it is so hard to get online.</p> <p>13. What is your prediction as to the ODR development in your country/ in general (5 or 10 years)?</p> <p>I am trying to be optimistic. ODR helps people to overcome the distance. It will help the parties to submit electronic documents and courts won't disappear. So, simple questions should be resolved online. We have to give access to justice online to people in villages.</p>
III. GENERAL QUESTION AS TO FAIR TRIAL ISSUES
<p>7. In your opinion, what are the main issues regarding ODR's influence on fair trial considerations (Article 6 of the European Convention of Human Rights)?</p> <p>Perhaps, one of the issues is that witnesses can be influenced while resolving a dispute online. However, I don't see much differences. In general, ODR will have positive influence on dispute resolution process.</p> <p>8. Do you think ODR processes and procedures work? Do they help resolve disputes fairly, efficiently and effectively?</p> <p>Yes.</p> <p>9. Do you think that ODR processes and procedures could work within the civil justice</p>

<p>system? I.e. within the court system?</p> <p>Yes.</p>
<p>IV. ODR AND IMPARTIALITY OF THE TRIBUNAL</p> <p>8. Do you think there is a risk the ODR will have negative influence on tribunal's impartiality and independence?</p> <p>The thing is that the judges will be the same in ODR procedures. So, it is not the issue of ODR, but of the bias of judges in general. So far, decision offered by private organization via ODR are high quality solutions. Thus, online decision offered by judges will be good enough, but it will depend on case-by-case basis.</p> <p>The technologies won't cause the difference in this regard.</p> <p>9. In which scenario ODR may be or may be not conducted in accordance with the requirement of Article 6 as to the 'public hearing' (Article 6)?</p> <p>To be honest, the courtroom is a limited space. So, using ODR we can ensure public hearing for unlimited number of people. For instance, we could use YouTube video link to ensure public hearing unless we have some privacy issues at hand.</p>
<p>V. ODR AND DIGITAL ILLITERACY/DIGITAL DIVIDE/ACCESS TO THE COURTS</p> <p>7. Will ODR have negative influence on the right for a fair trial considering the level of digital illiteracy/digital divide in Council of Europe member states/your state?</p> <p>There is an issue is here. How many people use modern technologies? In some countries more, in some less.</p> <p>8. Could you suggest a solution on how individuals affected can get access to ODR?</p> <p>But, we have to balance by way of creating supportive programmes for the disadvantaged people. At the same time, ODR shall be a matter of choice. People with restricted level of digital illiteracy should remain a choice between ODR and ordinary court.</p> <p>In general, we have to introduce ODR gradually while educating people.</p>
<p>VI. ODR AND ARTIFICIAL INTELLIGENCE</p> <p>12. Do you think AI nowadays exists in ODR mechanisms?</p> <p>Answering the question, we have to define what AI is. We can observe machine learning on eBay. There was a project in Soviet Union aimed to create machine justice – computer that was supposed to resolve disputes. But, it failed.</p> <p>13. Do you think AI will be introduced in the COURTS in the near future?</p> <p>Perhaps no. Or on the very basic level.</p> <p>14. Do you think it might affect the right to a fair trial?</p> <p>No.</p> <p>15. Do you think automation might affect the independence and impartiality of judges and is there a risk that the removal of discretion and human judgment will lead to prejudice and stereotyping?</p>

AI won't substitute human being. But, in any case, any decision taken by AI shall be evaluated and assessed.

VII. ODR AND SECURITY

5. To what extent are ODR mechanisms in your country protected from cyber-attacks?

Cyber security is not only a problem of ODR. The situation really depends on national level of awareness. In Czeck Republic the personal data is secured.

6. In your opinion, what are the main concerns in ODR in terms of digital security?

Possibility of influence of the third parties

Dr Stefaan Voet - Institute for Procedural Law - the University of Leuven

<p>I. BACKGROUND AND EXPLANATION CLARIFYING THE FIELD OF RESEARCH LD OF RESEARCH</p>
<p>What is your personal experience of Online Dispute Resolution and your personal view on whether Online Dispute Resolution should be used (more widely) in the courts?</p> <p>Stefaan Voet is an associate professor at the University of Leuven and a host professor at the University of Hasselt in Belgium. Before that he was a doctoral research and teaching assistant at Ghent University. Stefaan teaches national, European and international civil procedure.</p> <p>Publication in ODR https://www.law.kuleuven.be/pub/en/staff/00103885</p>
<p>II. ODR OVERVIEW</p>
<p>14. Do you have any ODR mechanisms in your jurisdiction?</p> <p>There is one platform in ARD – BelMed (Belgium mediation). It was established in 2010-2011 by the government. As a consumer, you can go to platform and the system will send your dispute to ADR entity. For instance, second hand car – commission on second hand vehicles (online process).</p> <p>Another aspect is that statistics says that not a lot of people use the ODR platform tool. But, what you see is that BelMed offers a lot of information. And there are thousands of people who use this information.</p> <p>The second platform – consumer ADR platform. So, there are two platforms, which is crazy and stupid.</p>
<p>15. Are ODR techniques used within the courts in your country?</p> <p>In 2001 the Minister of Justice had a plan – Phoenix system – online dispute resolution. Now, the policy to use the platform for publishing decisions and track the statistics.</p> <p>But this week, the Minister of Justice announced the new system – JustOn. Unique system for the consumer and civil justice system. If I want to pay fine I can go to JustOn. Lawyers will communicate with court</p>
<p>16. What is your prediction as to the ODR development in your country/ in general (5 or 10 years)?</p> <p>It is an evolution we can't stop. The fact that it's technically possible. First of all, we have to create TRUST in these systems. Secondly, we have enough safeguard in regard privacy, impartiality etc.</p>
<p>III. GENERAL QUESTION AS TO FAIR TRIAL ISSUES</p>
<p>10. In your opinion, what are the main issues regarding ODR's influence on fair trial considerations (Article 6 of the European Convention of Human Rights)?</p> <p>I don't think it will be an issue. We need similar policy like in ODR in consumer ADR.</p>

11. Do you think ODR processes and procedures work? Do they help resolve disputes fairly, efficiently and effectively?

Yes.

12. Do you think that ODR processes and procedures could work within the civil justice system? I.e. within the court system?

Yes.

IV. ODR AND IMPARTIALITY OF THE TRIBUNAL

10. Do you think there is a risk the ODR will have negative influence on tribunal's impartiality and independence?

Judges remains the same, so no problem at all. But we can change the delay in proceedings. ODR will make the processes much effective, speedy and cheaper.

11. In which scenario ODR may be or may be not conducted in accordance with the requirement of Article 6 as to the 'public hearing' (Article 6)?

I think it is a very narrow view. If one of the cases will come before ECHR, they will give a current interpretation of 'public hearing'.

If one of the parties really want to do this, we should provide this party with the option to have this ordinary hearing.

We can also use YouTube. In Belgium, everything in writing. In Sweden, for instance civil cases are in oral.

So, as long as you offer the option of ordinary meaning you comply with Article 6 in any case.

V. ODR AND DIGITAL ILLITERACY/DIGITAL DIVIDE/ACCESS TO THE COURTS

9. Will ODR have negative influence on the right for a fair trial considering the level of digital illiteracy/digital divide in Council of Europe member states/your state?

Yes, it might be an issue. It depends on the country.

10. Could you suggest a solution on how individuals affected can get access to ODR?

Public libraries. Assisting programmes.

11. Do you see risks that certain individuals (with physical or mental disabilities/sight problems/ socially disadvantaged/the elderly) will find it more difficult to obtain access to justice?

No! On the contrary, it will be helpful for people who can't travel because of disability.

The system will have to adapt itself. You can use a part of public environment.

VI. ODR AND ARTIFICIAL INTELLIGENCE

16. Do you think AI nowadays exists in ODR mechanisms?

It exists. But, you have to make a distinction between court settings and non-court settings. Amazon, Ebay – we can see elements of AI there so far.

17. Do you think AI will be introduced in the COURTS in the near future?

I think, the AI will be use for the facilitation of data bases. I don't think it will be acceptable to replace humans except from the small disputes.

For instance, the Minister of Justice presented the plan to introduce AI court for dispute in regard to fines for illegal parking.

18. Do you think it might affect the right to a fair trial?

Not really.

VII. ODR AND SECURITY

7. To what extent are ODR mechanisms in your country protected from cyber-attacks?

I am not a specialist in cyber security. But, the government shall address this concern.

One of the reasons why Phoenix has failed is that government did not create enough safeguards, particularly in digital security.

So, we need TRUST and SAFEGUARDS.

Darin Thomson - Council of Europe Project on ODR

Interview roadmap

I. BACKGROUND AND EXPLANATION CLARIFYING THE FIELD OF RESEARCH LD OF RESEARCH	
<p>Interview about Online Dispute Resolution and the Courts (not Alternative Dispute Resolution). Looking at civil litigation and the administrative courts (not the criminal courts and criminal justice system)</p> <p>Two aspects: 1) use of ODR techniques in the COURTS and 2) possible interface between the courts and Alternative Dispute Resolution (ADR)/ Online Dispute Resolution (ODR).</p> <p>1) Use of IT/network technologies in the courts (specific to the courts and litigation processes):</p> <ul style="list-style-type: none"> -e-filing -online hearings -online adjudication -online techniques for the preparation and presentation of the evidence (including electronic evidence; for example in the common law context, e-discovery) -online platforms -online adjudication -moving from physical courts to virtual courts -use of artificial intelligence/automation to: <ul style="list-style-type: none"> ➤ Refine issues ➤ Analyse issues ➤ Decision-making <p>2) Interface/interoperability (?) between ADR/ODR and court procedures, for example (and this may vary between jurisdictions):</p> <ul style="list-style-type: none"> ➤ Enforcement of online arbitration under the New York Convention ➤ Recognition of an online mediation settlement by a consent order or a notary public (meaning it has the same legal status as a judgment, ie it is enforceable) ➤ Court-annexed pre-trial ODR (ie the parties must attempt some form of online ODR before allowing to proceed) or cost penalties if they do not attempt (online) mediation 	10 minutes
<p>QUESTIONS</p> <p>2. What is your personal experience of Online Dispute Resolution and your personal view on whether Online Dispute Resolution should be used (more widely) in the courts?</p> <p><i>I have been personally involved and have led multiple ODR initiatives in BC, including:</i></p> <ul style="list-style-type: none"> • <i>Development of Consumer Protection BC ODR consumer pilot in 2011 with Modria</i> • <i>Development of Property Assessment Appeal Board (an administrative tribunal) ODR initiative beginning in 2011 with Modria</i> • <i>Development of the Civil Resolution Tribunal (CRT) (an online administrative tribunal with civil jurisdiction) in 2011</i> • <i>Instructed the drafters on legislation to make ODR part of the body of law in BC and to create the authority for the</i> 	

<p><i>CRT in 2011-2012</i></p> <ul style="list-style-type: none"> • <i>Participated in the design for the technology and processes for the CRT beginning in 2012 (ongoing)</i> • <i>Drafted the CRT rules of procedure 2015-2016</i> • <i>Led the knowledge engineering work for the CRT Solution Explorer ODR expert system (similar to phase 1 of the proposed online courts for Eng & W)</i> • <i>Former CDN delegate to the United Nations Commission on International Trade Law ODR working group</i> • <i>Instructed Legal Information Technology law school courses at the University of Victoria and Osgoode Hall (York U) law schools, including a multi-week ODR simulation involving students from Canada, the US and England</i> • <i>Currently co-instructing knowledge engineering courses at Thompson Rivers University and University of Ottawa Law Schools</i> • <i>Participated in one of the Civil Justice Council ODR Working Group meetings in London, provided on and off consultation with individual members, HMCS representatives and judiciary.</i> • <i>Consulted with Lord Justice Briggs leading up to his reports on ODR</i> • <i>Part of a team developing new ODR initiatives for BC that touch on other areas for administrative tribunals, family justice other administration of justice issues</i> <p>More: http://darinthompson.ca/about/</p>	
II. ODR OVERVIEW	
<p>17. Are you aware of any ODR procedures and processes within your jurisdiction (nationally or regionally)?</p> <ul style="list-style-type: none"> - <i>Yes, many detailed above. The CRT may be the only public-system based ODR tribunal of its kind in the world</i> - <i>Ontario is planning to create a new “Condo Authority” that is apparently going to include ODR</i> - <i>There is also a low volume small claims ODR pilot led by the Vancouver-based Justice Education Society</i> - <i>The Vancouver-based Legal Services Society currently offers “MyLawBC” which is based on the Rechtwijzer and Modria platforms.</i> <p>18. Are you aware of any ODR processes and procedures which have been integrated into the civil and administrative justice procedure? If so, do you think that ODR works in this regard?</p> <ul style="list-style-type: none"> - <i>The Property Assessment Appeal Board and the CRT, each mentioned above, are both deeply integrated into the civil/admin justice context. They are both achieving very positive results.</i> <p>19. Do you have any tribunals which use ODR mechanisms?</p> <ul style="list-style-type: none"> - <i>Yes, the CRT is a leader in this respect.</i> - <i>The Property Assessment Appeal Board initiative recently faced an interruption when the ODR platform provider ended their service agreement. We’re working on onboarding the tribunal onto a new platform.</i> 	<p>20 minutes</p>

<p>20. Are you aware of any other ODR mechanisms outside your country? - Yes – <i>but none that your group wouldn't already know about</i></p> <p>21. Are ODR mechanisms used within the courts in your country? - No. - <i>I heard that the Quebec Court of Appeal was using video for mediations a few year ago. Unfortunately, I have no information or contacts on this anecdotal example.</i></p> <p>22. What type of ODR techniques/online filing/e-filing/other IT & networking technologies are used in your country? - <i>I'll limit my answer to BC:</i> - <i>We started e-filing in 2005</i> - <i>We have online court file access (since 2005)</i> - <i>I don't consider e-filing or online court file access to constitute ODR unless there are actual dispute resolution activities involved in the system.</i></p> <p>23. Do you have a distinct ODR procedure (in the civil or administrative procedure system) or are there plans to introduce one? - <i>I think this Q is answered above, but will be happy to provide more detail if necessary.</i></p> <p>24. What is your prediction as to the ODR development in your country/ in general (5 or 10 years)? - <i>I continue to be amazed at the inaction among leading justice stakeholders when it comes to conceptualizing and piloting ODR initiatives, let alone implementing them.</i> - <i>I can't confidently say any new initiatives will reach the stage of piloting or implementation in the next 5 years.</i> - <i>However, I know in BC that ODR has become "normalized" very deeply in a relatively short amount of time (5 years).</i> - <i>We had to "break the ice" and actually use ODR – even small scale initiatives – to make this happen. But it led to the current situation where BC has multiple ODR initiatives involving multiple organizations.</i></p> <p>*I'll use this spot to personally offer to assist and/or lead any new ODR initiatives in any other jurisdiction. I have taken several from the concept phase to the implementation phase, covering the tech, legislation, rules, workflows, user-focused design work, evaluation and more, and am firmly convinced that ODR is an effective response to many of the challenges facing justice systems everywhere.</p>	
III. GENERAL QUESTION AS TO FAIR TRIAL ISSUES	
<p>13. In your opinion, what are the main issues regarding ODR's influence on fair trial considerations (Article 6 of the European Convention of Human Rights)? - <i>In a relative sense, I haven't come across any specific ODR issues that have a more significant impact than those already found in the current court process.</i> - <i>I believe the "digital divide" is narrower than the gap in access to justice for most people. That said, I consider the digital divide to be a very important issue.</i> - <i>I think many of the potential fairness issues come down to process design, and aren't uniquely a result of technology.</i> - <i>I am not persuaded that the court practice of assessing the credibility of witness evidence is actually effective or supported</i></p>	15 minutes

<p><i>by independent scientific evidence. In fact, it's my understanding that in addition to believing we are good "lie detectors" we are actually very bad lie detectors. I believe this is a dangerous combination of circumstances.</i></p> <ul style="list-style-type: none"> - <i>I believe that concerns about varying levels of literacy are important, but that over-romanticized conceptions of court that suggest people get to walk in and "tell their story" to a judge completely mischaracterize the actual court process, with its mountains of difficult forms, long and complicated rules of procedure and the 98% chance (actual number) that you won't have your dispute resolved in a trial.</i> - <i>On the positive side, I believe that ODR can effectively incorporate procedures into the platform to reduce the impact on procedures on outcomes for non-experts, including self-represented litigants.</i> <p>14. Do you think ODR processes and procedures work? Do they help resolve disputes fairly, efficiently and effectively?</p> <ul style="list-style-type: none"> - <i>I know they work.</i> - <i>Merely doing ODR doesn't guarantee success. Design, resources and effective administration are critically important.</i> <p>15. Do you think that ODR processes and procedures should be made mandatory if introduced into court procedures? If so, at what stage of the dispute and why?</p> <ul style="list-style-type: none"> - <i>I believe that the appropriate way to handle this issue is to make ODR the main channel, but not the only channel. People should still be able to use other communication channels including telephone and paper. But there should be incentives to use the ODR channel (e.g. fee discounts).</i> - <i>If the system were primarily used by lawyers, I'd consider making ODR mandatory in an attempt to overcome the cultural resistance to new ways of interacting.</i> <p>16. Do you think that ODR processes and procedures could work within the court system?</p> <ul style="list-style-type: none"> - <i>Yes, provided the system was designed well.</i> - <i>Merely automating existing court procedures in an ODR platform may be unsuccessful.</i> - <i>Making an ODR system voluntary, secondary to another system, uncertain, etc can also set it up for failure.</i> <p>17. Do you think it may be more difficult to implement ODR techniques in the civil law court system (compared to the more flexible common law system)? If you think so, why?</p> <ul style="list-style-type: none"> - <i>I'm not an expert in civil law. But in my experience, most issues are not unique to ODR – but tend to boil down to design and implementation.</i> 	
IV. ODR AND IMPARTIALITY OF THE TRIBUNAL	
<p>12. Do you think there is a risk the ODR will have negative influence on the tribunal's impartiality and independence?</p> <ul style="list-style-type: none"> - <i>I can't imagine any objective reasons why this would be true, merely based on the reliance on ODR.</i> <p>13. In which scenario ODR may be or may be not conducted in accordance with the requirement of Article 6 as to the 'public hearing' (Article 6)?</p> <ul style="list-style-type: none"> - <i>If hearings are conducted asynchronously (e.g. on the documents) then it shouldn't be a new issue.</i> 	10 minutes

<ul style="list-style-type: none"> - <i>If hearings are held synchronously, they can be streamed live, as well as archived for viewing at any time. I'd suggest this arrangement would increase public access and openness.</i> <p>14. How will ODR affect the fairness of civil and administrative procedures- please give some examples...?</p> <ul style="list-style-type: none"> - <i>ODR can reduce the procedural burden on parties by building procedure into the platform</i> - <i>ODR can make it easier for non-experts to think about their interactions, avoid having to respond immediately, and expressing more emotion than they would if they had more time</i> - <i>ODR can make it much easier for non-experts to get help from a lawyer, trusted friend or family member</i> - <i>ODR can make it easier for people who don't use the language of the proceedings as their first language, particularly if they can get help from a family member or trusted friend.</i> - <i>Poorly designed ODR platforms will indeed some people at a disadvantage if they are struggling with the technology while they should be focusing on their disputes</i> - <i>I commented above on the common concern expressed about the perceived need to assess the credibility of witnesses in person</i> 	
<p>V. ODR AND DIGITAL ILLITERACY/DIGITAL DIVIDE/ACCESS TO THE COURTS</p>	
<p>12. Will ODR have negative influence on the right for a fair trial considering the level of digital illiteracy/digital divide in Council of Europe member states/your state?</p> <ul style="list-style-type: none"> - <i>It certainly could</i> - <i>Design of processes would determine the scale of impact.</i> - <i>Allowing people to participate remotely and asynchronously would open new opportunities for getting (affordable) support and could result in a net positive influence on the right to a fair trial</i> - <i>In my experience, setting up a multi-channel system is an effective way to respond to this concern</i> <p>13. Do you have civil or administrative trials where the litigant appears in person?</p> <ul style="list-style-type: none"> - <i>Yes</i> <p>14. In your opinion, do legal representatives suffer from digital illiteracy and will this affect the outcome of cases and have an impact on fairness?</p> <ul style="list-style-type: none"> - <i>If a legal representative isn't researching his/her area using electronic tools, I'd question whether (s)he is meeting ethical obligations to act in the best interest of client</i> <p>15. Do you see risks that certain individuals (with physical or mental disabilities/sight problems/ socially disadvantaged/the elderly) will find it more difficult to obtain access to justice?</p> <ul style="list-style-type: none"> - <i>Depending on the design of any ODR system, it's a definite possibility. But in the system we designed and implemented in BC, we actually do much more checking and customization than courts do. In addition, we offer free telephone interpreters for different languages.</i> - <i>We have also consulted extensively with advocates who tend to serve traditionally disadvantaged and marginalized groups</i> <p>16. What impact will ODR and automation have on access to justice?</p> <ul style="list-style-type: none"> - <i>It can be both positive and negative</i> 	<p>10 minutes</p>

<ul style="list-style-type: none"> - <i>Careful user-focused design, user testing, consultation, ongoing user feedback collection, continuous improvement, etc. can all contribute to making an ODR system superior to a traditional court or tribunal – but there’s not guarantee that this will happen merely by deciding to “do ODR”</i> 	
VI. ODR AND ARTIFICIAL INTELLIGENCE	
<p>19. Do you think AI nowadays exists in ODR mechanisms?</p> <ul style="list-style-type: none"> - <i>I have participated in the creation of an expert system that provides problem diagnosis, information, self-help and streaming functions – all using “1st wave AI” (i.e. handcrafted, rule-based knowledge)</i> - <i>I also wrote a book on the methodology for doing this. It’s still in the editing stages – but I’d be happy to send a copy anyway</i> <p>20. Do you think AI will be introduced in the COURTS in the near future?</p> <ul style="list-style-type: none"> - <i>I’m not sure if COURTS is a reference to a specific body – but it we’re referring to courts and tribunals generally, I don’t think many will even adopt 1st wave AI anytime soon</i> - <i>The “Tier One” planned for the online courts in Eng & W. may use some AI similar to the type we’ve implemented in BC</i> <p>21. Do you think it might affect the right to a fair trial?</p> <ul style="list-style-type: none"> - <i>Yes it might. But it isn’t an inevitability. I believe AI can be “audited” to respond to potential biases in ways that human decision makers never are</i> <p>22. Do you think automation might affect the independence and impartiality of judges and is there a risk that the removal of discretion and human judgment will lead to prejudice and stereotyping?</p> <ul style="list-style-type: none"> - <i>I’m not sure what this question is asking specifically – but it may be addressed in my answer immediately above</i> - <i>It’s certainly possible to “code” biases and prejudices into an algorithm. But it’s also possible to remove them. This is something that’s much harder to do in humans, as far as my understanding goes in this area.</i> 	15 minutes
VII. ODR AND SECURITY	
<p>8. To what extent are ODR mechanisms in your country protected from cyber-attacks?</p> <ul style="list-style-type: none"> - <i>We have conducted Privacy Impact Assessments and Security Risk Threat Assessments for our current system</i> - <i>We also rely on the commercially reasonable (or better) security native to the platform we’re using – which we believe to be used by large organizations handling a much higher volumes of transactions in other areas that also touch on serious issues and large sums of money</i> <p>9. In your opinion, what are the main concerns in ODR in terms of digital security?</p> <ul style="list-style-type: none"> - <i>I know many people question how you establish identity in an ODR system. I think there are ways to discourage fraudulent abuse of these platforms, but recognize that it’s difficult to make them truly “fraud proof”. I hold this same belief with traditional court and tribunal processes. I also note that I’ve never asked to provide ID in a courtroom in any appearances I’ve made.</i> 	5 minutes
VIII. ODR INTERFACE WITH THE COURTS THE PREVIOUS QUESTIONS ALL RELATED TO THE USE OF	

ODR MECHANISMS IN THE COURTS- THIS SECTION RELATES TO THE 2ND PART OF THE RESEARCH: THE INTERFACE BETWEEN THE COURTS AND ADR	
<ol style="list-style-type: none"> 1. Do the courts in your jurisdiction recognize and enforce an arbitration award which was made through online arbitration (using an online platform, remotely)? Is there any jurisprudence in this respect? <ul style="list-style-type: none"> - <i>I'm not sure. Presumably they would if it met our legislative requirements as to the validity of an arbitral award in all other respects (i.e. I'm not sure the form of interaction is relevant). But I'm no expert in this area. If it's held to be critically important, I can direct you to an expert.</i> 2. Do the civil procedure rules in your country recognize mediation settlements as enforceable "consent orders", is there a procedure whereby a mediation settlement would be recognized and enforced? If yes would this also apply to an online mediation settlement? <ul style="list-style-type: none"> - <i>As far as I'm aware, an agreement resulting from a mediation is not directly enforceable in my jurisdiction. You would have to "sue on the agreement" in a new court proceeding</i> - <i>When we created the legislation for the online Civil Resolution Tribunal we (i.e. the legislature of BC) specifically and deliberately gave it the authority to convert agreements reached through its facilitation (mediation-like) process into enforceable orders.</i> 3. Do the rules in your country provide for any form of mandatory ADR, ordered by the courts? <ul style="list-style-type: none"> - <i>Yes.</i> 4. If so could this mandatory form of ADR be conducted through ODR (for example: online mediation)? <ul style="list-style-type: none"> - <i>Not that I'm aware of.</i> 	10 minutes

Angie Raymond

16 NOVEMBER 2017 - ODR RESEARCH

Your personal experience with ODR?

Angie has been involved in international commercial law and arbitration for some time. Through this she came across new cutting-edge mechanisms and technology within this field, and naturally online mechanisms and ODR. Angie has been involved in ODR trade law with the UN and has attended numerous conferences on this subject. She has also been involved with the US State Department. Angie writes extensively on ODR.

ODR Overview

Using ODR in courts is well past due date. While ODR is hard to define, it should be used more within the justice system. The current system is burdensome, and we should do more to ensure that there is access to justice and fairness. ODR can be used to achieve this. But there is a difference between using simple ODR mechanisms such as e-filing and truly having disputes resolved online.

One issue with having a whole dispute resolved online is the effect it may have on populations across the world. If resolving a dispute online is the only opportunity that one has, then you will disenfranchise a very large part of the population. Many people do not have the skills to have a dispute resolved online; they may be digitally illiterate or not have access to such technology. This is the opposite of what we want. It is a similar issue when the EU tried to get rid of cheques; many people could not cope with a system which was not paper based – they did not have access to / or the ability to use technology. Thus, if ODR is implemented, there will be a period of time where one must operate a manual system.

Another question to ask is whether systems operate in an equal way? Does the person who has access to technology and the skills to use it have better access to justice than another person who does not have access to such technology?

Bandwidth issue will not be quickly overcome. Rural populations in developed countries have issues with accessing the internet.

Another important issue is when ODR systems are designed by private entities. The way in which the system designed could colour the way people see things. The system could change an outcome and lead to an outcome depending on the way in which it is designed. There might also be too much trust in digital technology? Should there be oversight of this?

How does the state regulate the way in which technology is developed for ODR for courts? Who develops the technology – private companies. Information is a commodity. Most people do not understand this. But information is very powerful. Money is in the information. System is a sinkhole of money and time. Sell process but keep information. Information has tremendous value. Companies can gain a massive competitive advantage by using information. There is a rise of information Power brokers. Government needs to consider whether we need to have this information system, and also who the people are who have power over it. How do we know that these companies with power over information will not use this information against us? This view is not widely shared. Government must keep an eye on this. Information might not be a good steward for justice.

We could find out 10 years down the line, after an ODR system has been implemented, that companies who developed the platforms and software have used the system to gain an advantage through their control over information, and which has negative implications for the

justice system. Money is in the information. Use information they way the Power broker wants to use it. Keep an eye out ahead of time.

Canada has a good system, which is under a government structure. There has not been private control over the system. Government has control. This is different to private companies who create ODR systems, such as Amazon, where it is all based on agreement and the ODR mechanisms contained within the terms and conditions of the agreement. So, Canada does have some oversight. If there is an issue with the system one can challenge the government.

Court system beginning to use more ODR for simple ODR things such as e-filing, tickets etc. Justice based kiosks. Automated disputes – being used in ODR. Drop down lists. Movement and development here.

In court room – videos, e-filing. Videos – recreation videos? – technology behind this. Will come up in ODR. There is an issue with how the video is created, and the inherent biases within that system.

In the USA, ODR is otherwise mainly used to resolve private disputes.

While we are not at the point of fully implementing ODR into the justice system, the process has begun.

Within the next 10 years there will be a lot of automation of disputes, which can be done through an app. Simple. E-filing. The introduction of technology into the justice system will not happen within the next 10 years, particularly in the USA. There is a culture in the US that disputes should be resolved in person – this is the understanding of justice. Older generation. Inherent bias – should be face to face.

Fair Trial considerations

By using ODR we may have to jeopardise an individual's right to a fair trial by not requiring the individual to be in person, in order to find out whether it does truly harm the overall right to fair trial. This needs to be tested. It could be beneficial in the long term. In the USA one has the right to face the accuser. Face-to-face in is imbedded in the justice culture. Only slowly moving to video testimony. It won't work in US. Does have issues. Waiving that right? – part waiver. Arbitration provides a good opportunity to create own justice system.

Right to present a case should be fine in civil cases. Long past days where we cannot do things online. No need to be in person.

If a civil dispute is resolved online, through compulsory means, there shouldn't be an issue (assuming that the system has been developed and programmed in a fair way, and all persons have access to and the skills to use technology). There is no reason why someone sitting in front of computer cannot resolve a dispute, except for the issue of 'open hearings'. This could be an issue. How would one accomplish having an open hearing through online mechanisms? This may be a technology based issue. It is an issue of transparency. Perhaps one could have an open broadcast. One could have an open court room – but not so open that anyone can access it. Close streams. Password. Etc.

AI is already being used. The issue within AI is the debate between having a structured learning AI system or an unstructured system. An unstructured system would have boundaries for what the system can learn. If you let AI learn what it wants – it will learn some bad things about us. An example of this is when our bad language is picked up. With structured learning – humans still have control – teach it what we want it to learn.

Automation is basic AI. In justice system? – already is to some extent – law firms use it to determine settlement points, to think through information. AI already part of decision making process even if person appears. It is part of a larger tree.

Design system to include advice on what legal rights are? Then could use it.

Judges being replace by AI – yes, this is possible. However, judges serve multiple roles. They are not just decision makers. They also act as umpires over the court process. AI can thus be used for decision-making but maybe not for the judges' other roles such as being an umpire. If AI is used, it must be used carefully. It will take more than a lifetime to get to that point, however.

An example of using AI in decision-making could be with regard to sentencing. Essential, through court mandated sentencing rules, sentencing is like a drop-down menu.

Technology can help resolve issues pertaining to decision-making and judge biases and errors. AI can be used as part of process but maybe it should not be the decision maker itself.

ODR processes through ODR or other alternative dispute resolution means enforced by courts in the USA? Are there issues with courts enforcing this? This has probably not been challenged yet. Regular process – probably enforced through normal arbitral awards. Hidden clauses – agreement. Court would probably enforce arbitral award unless it is challenged by someone based on the ground of ODR not being arbitration, or unfair etc.

Colin Rule: 18h30 – 19h00, 2 OCTOBER 2017**ODR RESEARCH**

Your personal experience with ODR?

Colin has been in dispute resolution for 27 years. He came across this while at College and furthered his interest and understanding in dispute resolution by undergoing training in mediation. Colin thereafter worked within the field of dispute resolution as a graduate. Being interested in technology, Colin combined his expertise in dispute resolution and technology and became the General Manager of the organisation “mediate.com”, a platform where dispute resolution could take place via the use of technology.

Colin thereafter founded the company, Online Resolution, and authored a book on issues pertaining to ODR. Colin was thereafter approached by E-Bay, where he pioneered their resolution centre, and at which he for 8 years.

In 2011 Colin moved from E-Bay to – modria.com. Here, Colin used the technology which he developed at E-Bay and used it for a wider client base. Modria.com was sold to Tyler Technology, which develops and markets court case management systems. Here, Colin integrated the technology developed at E-Bay and Modria.com into the court management system.

Colin is currently the co-chair of the Advisory Board of the National Centre for Technology and Dispute Resolution. This centre is involved with developing field of ODR. Developing the field of ODR and ethical standards therein.

1. ODR OVERVIEW

ODR is not a centrally managed process. It is therefore important to develop yardsticks and standards for its operation.

Colin has played a pivotal role in the International Council for Online Dispute Resolution (“ICODR”). ICDR is at the forefront of developing ethical standards for ODR processes and mechanisms. <http://icodr.org/index.php/standards/>

Regarding ODR procedures, generally, existing ODR procedures are not really focused on procedural safeguards. They are focused more on the efficiency of resolving disputes. Almost all disputes that are brought before ODR processes are small claims. At E-Bay, the average claim was about \$75. Such claims would not typically be brought before traditional courts. Resolving disputes before courts is very costly and time-consuming, and in cases with small claims, the costs far outweigh the benefits.

There has therefore been a move away from traditional court processes. Litigants therefore either avoid approaching court to resolve the dispute, or seek alternative means to resolve them.

Thus, ODR mechanisms evolved to resolve these smaller disputes efficiently and effectively, without the procedural safeguards in the traditional court system, which are costly.

ODR processes were also developed for algorithmic disputes – dispute that arise out of software programmes.

2. FAIR TRIAL ISSUES

To ensure that disputes are resolved fairly, there is a need to develop standards. ICODR is playing an important role in this regard, particularly in the USA.

There is also a need to verify standards. Government intervention? Who verifies this? Hotly debated. In the EU there would probably be more government intervention. In the USA this would not be the case as the government is traditionally quite hands off.

ODR should be jurisdiction independent. It may not be possible at this stage to have a worldwide set of ethical standards for ODR but it is important to develop standards for private use. This would involve self-verification and self-regulation.

An issue with this is if there is self-regulation and no government intervention and regulation there may be a proliferation of standards.

Colin says that at Tyler Technology this issue of mandatory ODR processes before court is a hot topic. How can you integrate ODR processes into the court process? E-filing of a dispute, then how is it resolved? Tyler Technology has developed a procedure by which a dispute is filed, and a hearing is scheduled. Thereafter, the parties are guided towards ODR procedures in the meantime. Parties decide – can opt out of this.

Colin is of the view that even though the parties can opt out of the process, they will make use of tool. Parties will probably engage in back and forth dialogue and will seek to achieve a settlement agreement. Court certifies settlement agreement. Thus, ODR is used as a first step in the resolution process. It is not the absolute determinant of the dispute. Parties still have access to the traditional court system and can opt out of the process.

In British Columbia, there is a compulsory ODR process that has developed and has been implemented. Here, certain disputes must be resolved through ODR mechanisms and procedures and the parties to these disputes can no longer go to traditional court. No in-person hearing. Evaluative process.

In the UK, compulsory ODR procedures are being introduced through HM Online court.

Colin is of the view that compulsory ODR procedures can be fair. ODR will become definitive way these disputes are handled. What is required to achieve this is sequencing and change management.

ODR can be fair. It can be transparent, fair and parties can be heard. There is a need for ODR to be confidential. Courts have enshrined this. Good faith negotiation. Not others to see. Negotiation and mediation needs to be confidential. Evaluation can be transparent. Awards and decisions can be redacted, they can show the decision but not the negotiation phases to achieve it.

Fernando Esteban de la Rosa: 14H00 – 15H20 - 4 DECEMBER 2017**ODR RESEARCH**

Personal experience with ODR

Fernando is a Professor in Private International Law at the University of Granada. Within the realm of Private International Law Fernando came across Alternative Dispute Resolution (“ADR”), in particular to issues concerning international consumer contracts and disputes. Fernando has written various books and articles on this field.

Within the area of consumer protection and ADR, Fernando found that the rules appeared to have no application at all; only few consumers actually had the ability of submitting claims and of enforcing their rights. There was a need to form effective entities that could provide consumers with an ADR solution. Fernando subsequently wrote a paper on consumer arbitration and online arbitration. He worked with Pablo Cortes wherein they share experiences with ADR and ODR. This led to developments within the field. Fernando has also worked with Julia Hornle, wherein they have assessed ADR and ODR within the EU and have developed proposals which have found their way into the drafts for Directives and Regulations on consumer protection and ADR. A lot of work has come from this research and as such Fernando has been involved with projects from the Spanish Ministry of Economy, which has led to the adoption of ADR legislation in Spain. Fernando’s research had an impact on this new legislation. Fernando is in the process of publishing a new book on ADR and ODR. He is also conducting further research in ADR to be used as a reference point to spread new knowledge.

ODR overview

There are big opportunities within the field of ODR. The first set of work that should come from this is the development of consumer protection principles for ODR. Fernando has been involved in drafting consumer protection principles for ODR within the EU. This was one of Fernando’s first papers in ODR.

There would need to be experimental projects with regard to the use and implementation of ODR. Initially, there was not much work with regard to ODR and consumer protection. There was no regulation. Therefore, there was a need to develop principles for good quality ODR. Therefore, the aim should be to develop principles for ODR. This should not only be general but also regard should be had to special needs within the private international law system. A new treatment for ODR in the EU ODR platform in cross border situations should also be considered.

With regard to ODR, what Fernando has found is that the treatment of consumers in the ODR is not satisfactory. When consumers file claims on an ODR platform it is not guaranteed that the consumers are aware that they are renouncing their right of access to court. This is because such a waiver is not always available in the consumer’s own language. It is very important that the party who is going through an ADR/ODR process is aware of their waiving this right. Thus, EU Regulations need to be modified.

General Risks and Principles of ODR

Information for the parties about the ODR process is important. It may not be possible to oblige people to use online courts as this could impede the parties’ right of access to court. There should always be the possibility for parties to access courts outside of technology. Otherwise issues may arise regarding access to justice. Not everyone has the knowledge to

use nor the access to technology. Technology must make it easier but not to hinder access to justice.

There will be an embrace of technology more and more. People must be allowed to use technology to make life easier. This can be made simple. There is a need to adapt our processes and procedures in order to fit to ODR systems. They can help to resolve conflicts. But there is a long way to go. But need for development and adaptation. Discover what the mission is for ODR? Will it help?

ODR and the Right to a Fair Trial

ODR and having an online court could assist parties in having their dispute resolved in advance. If online court grants parties access to legal advice wherein they may know their rights and how to go about solving dispute, before going to court, this could be advantageous. Robot decision making, in which AI is used to give advice and perhaps a proposal before the parties head to court is a good thing. Most parties do not want to go to court. This should be the first mission for ODR in courts. Offer a solution to the parties. Get parties to agree. Judge can then affirm this. Automated negotiation could also be useful.

If whole process is ODR, then this poses a different question as it leads to a substitution of traditional court proceedings. What changes are needed? It is not a bad idea, but there is a need to maintain the normal system. There could be the possibility of creating a special online court for people who want to follow this, while also maintaining the normal court. People should not be obliged to use the ODR system. But could be a good idea if law offers it. Benefit to society – speedy justice.

Canada use – UK proposed – need to have a look at this. We have technology. Must look at it and assess how it can be beneficial to us.

ODR and Enforcement

Fernando does not foresee a problem for courts enforcing awards that are made online. The Electronic character of an award should not be an issue.

ODR and change to the current justice system

Impression on civil law jurisdiction embracing change to justice system by implementing ODR? There is a need to come with support from all stakeholders – judges, attorneys, politicians – have their say – is it good for justice? This could be possible. With regard to technology and changes in law, in 2015, in Spain, there was a change to how administrative files can be managed and resolved using electronic means. There is now a law of general application in Spain wherein all administrative files are required to be managed and resolved by electronic means if a citizen requests this.

Changes are happening – new laws are being embraced. All stakeholders need to think about how to embrace it.

It does not make a difference in the change is happening within a civil law jurisdiction or within a common law jurisdiction, what matters is the political will. In order for change to happen, it is important for people to get familiar with ADR processes, this will help people to become more familiar with ODR processes. There needs to be proposals and input from academics.

Mandatory ADR?

There is mandatory ADR for disputes involving social services in Portugal. Here, parties must go to arbitration to have the dispute resolved. In Spain this is different. Mandatory arbitration is not recognised as a general rule. There have been judgments by the Constitutional Court in Spain – which considered problems relating to mandatory ADR. In one case it was held to be unconstitutional to have a party agree to go away from arbitration.

In the Legislation dealing with electrical suppliers and the like in Spain, traders are obliged to attend either mediation or arbitration in order to have their dispute resolved. Not against access to justice – adhere to this, not obliged to arbitrate can mediate.

John Zeleznikov: 12H30 – 13H15 - 1 DECEMBER 2017

ODR RESEARCH

ODR Overview

John is an expert in Mathematics and Computer Science. He currently teaches ODR and computer science.

He came across ODR when doing his PhD in mathematics. Over 20 years ago, John decided to move over to computer science and he made the choice of looking at AI and law. John was interested in showing how machine learning could be used in law. John helped build an ODR system in family law, where technology could be used to help resolve disputes. John is not concerned with how ODR can be used to give legal advice. He is instead interested in how ODR can be used to support negotiations to resolve disputes. He used aspects of Game Theory and notions of fairness and justice to develop these concepts about ODR.

John primarily approaches issues in ODR through an academic perspective, by considering principles of ODR. These principles that John considers include principles pertaining to governance and ethics. When is it appropriate to use ODR? How to provide technology that can resolve disputes?

ODR Overview: Biggest issues in ODR

One of the major issues in ODR is people who are looking to make a quick buck through developing and using ODR mechanisms. Some of these systems look at how ODR can provide legal advice. An issue with this is how can these systems be trusted? How does one know that the advice is accurate? How can we ensure that process is fair? There is a major issue of trust.

In order to combat such issues, there is a need to develop safeguards. One such safeguard is to ensure that the traditional face-to-face system is kept intact. It is also important to know who is building the system? Who is the provider? Who is going to use this system? Who are the experts in this area who can oversee the development and implementation of these systems?

Ideally there should be a global body that oversees the implementation of ODR. There is a need to develop ethics within the ODR field. Advice must be accurate. General principles for ODR should be developed. Technology should be used to enhance communications and the effectiveness and efficiency of dispute resolution.

All lower level data collection should be done online, such as submitting complaints, uploading pleadings, submitting evidence issues. There is still need for a face-to face contact. Opposing view. Face-to-face is important. See opponent. Read evidence. Psychological. Oral hearing is very important. At the very least one should be guaranteed of an oral hearing at some stage in the process. Dangerous not have face-to-face. Appeal.

Impartiality and independence: Decision makers should have the right information in order to make a decision. The process should be done in such a way so as to convince the parties that each of them have been fairly treated.

Artificial Intelligence

AI – used more and more in ODR. Used before stage of face-to-face, but do not replace it. AI can be useful in stages before the face-to-face stage. AI will be less useful in trying to

make decisions. AI should not be used in decision-making. If AI is implemented, and we reach a stage of robot decision-making, we will have entered new world.

Humans can be biased and discriminatory. But when AI makes a wrong decision it is essentially emulating humans. But when humans make decisions they take responsibility. There is a public belief that humans will make it right. If not, appeal. This would probably not be available if a robot acts. The public may feel pressure to accept a robot decision because it is a robot. It is undesirable for AI to make decisions.

Access to Justice

ODR can definitely enhance access to justice. Available to everyone. Low level tech can be used.

Digital divide – access to internet. People who do not have the skills to use technology or who do not have access to technology are disadvantaged in everyday life. They have a disadvantage with protecting and enforcing their legal rights. The world is not totally fair, but the provision of technology is going to make it fairer. Technology can provide people with access to justice who would not ordinarily or traditionally have had it.

Use of ODR

There has been an explosion of ODR within the last year. Many organisations have started using it or are keen to develop and implement it. E-commerce lower level courts wanting to use it. Ombudsmen wanting to use it. Far more effective. Quick. Efficient. Cheap. Public like it.

It is, however, not being used in the courts. There is the desire and intent to use it but there is a bureaucratic issue: courts and public institutions are slow to embrace change. There is a need to see a way to go. Desire is there. But it will take a long time to implement ODR within the court systems. Deal with current case load. Provide new services. Can't just flicks a switch.

Implementing ODR in the court system is a question of use of resources. Invest and take risks. Risks are there. People must uptake it. Ineffective? Heads may roll if not implemented correctly. Big risks. Big change.

ODR and Security

Regarding data security there is a need to ensure that there is the correct usage of encryption tools. There are ways of systems being secure provided the effort is put in to ensure security.

ODR can be governed correctly. In a similar way that lawyers do not disclose information and are bound by ethics, companies providing ODR services should be subject to the same sort of restriction. Legislation can be passed to ensure this. Collect data – do not give companies access to data. Security.

Summary

John's view is that ODR is a very useful tool to enhancing access to justice, ensuring efficiency and effectiveness in justice system. It can be used, if implemented correctly and ethically, to enhance access to justice and to ensure justice is carried out effectively and efficiently. ODR, however, should only be used up to the point of face-to-face interaction. It is a fundamental aspect of justice that parties meet face-to-face when assessing each other's cases, assessing evidence and arguing their respective cases before court. There should be

a guarantee of the right to an oral hearing. Humans should still make decisions. Although not perfect, and not always fair, parties have the right to appeal and humans who make decisions will be held responsible and accountable for their decisions. AI can be used in the administrative court process, as part of ODR, up until the face-to-face interaction stage. It should not be used in decision-making. This is potentially dangerous as machine decision-making could breach fairness. People may trust robot decisions more than they trust humans, which is a dangerous prospect.

Shannon Salter: 30 OCTOBER 2017; 16:00 – 16:45 -30 OCTOBER 2017

ODR RESEARCH

Personal experience of ODR

Shannon was originally a litigation lawyer at a large Vancouver law firm for several years before moving on to become a commissioner of the Financial Institutions Commission, vice president of the BC Council of Administrative Tribunals and a board member of the Canadian Legal Information Institute (CanLII). Shannon was initially involved with law from an administrative law perspective but was attracted to the potential use of ODR to address access to justice issues.

In 2014 Shannon was tasked with implementing a tribunal to resolve condominium disputes, which became the Civil Resolution Tribunal. It has now been operational for 16 months.

ODR overview

In general terms ODR is likely to develop. The functioning of the CRT can prove the model of ODR – that ODR mechanisms work. Bring the justice to where the system is. Respect people's human dignity.

It is unclear at this stage what the limits are of ODR. ODR still needs testing. ODR is being used in early mediation to lead to solutions for disputes. It has been used to solve family disputes, which is the most common area. It can also be used in Landlord-tenant disputes. Because ODR is such a broad area, it is unclear where the limits are.

ODR is separate to AI. This distinction should be made. One should be cautious to conflate ODR and AI. ODR is about using online tools to resolve disputes. It is not used to make automated decisions by a machine. ODR is used to facilitate procedural fairness.

ODR processes can be fair and comply with the right to a fair trial. It is important that information is made clear – what it is somebody needs to be do run with case and pursue their claim. It is important that the claimant has the opportunity to be heard. The CRT provides access to telephone conversations. The fairness of ODR is dependent on design issues.

It is important to have consultation with key stakeholders, to test the system with the community. Consultation about fees structures, testing with random members of the public, testing with lawyers. Free or low-cost tools should be used as part of the system.

Empathy and deep understanding when designing the system. There is no need to replicate the traditional court system which is not conducive to fairness and access to justice.

With regard to implementing an ODR system in the court system of civil law countries (as opposed to the more flexible common law system):

There is a EU regulation for e-commerce.

Dory Reiling from the Netherlands (a civil law jurisdiction) has been at the forefront of implementing an ODR system in the Netherlands. The Ukraine is looking at ODR. What seems to be the case in civil law countries is that introducing ODR into the court system will require significant changes to procedural rules. This may be because civil law jurisdictions have less inherent jurisdiction, as do courts in common law countries. This may be an impediment – but a minor one at best.

Digital divide: Issues of the digital divide could be addressed through the correct design of the system – having alternative means to ODR such as telephone, mail and fax. Access in person services. People can access CRT services at 62 Service BC counters throughout BC. There is a telephone based service. It is also encouraged for persons unfamiliar with technology to approach a trusted friend or family member out.

Out of approximately 3000 cases before the CRT only 3 cases requested no email (and traditional process). Paper forms are used on average for one case per week.

Access to justice – easier online.

High demand. Asynchronous communication. People would rather use an online form than a paper based form and needing to visit the court in person.

88 condominium decisions. These are published decisions which encourages transparency. Most claims settle at mediation or even negotiation.

The CRT follows a guided pathway system, known as the Solutions Explorer. This process is Anonymous – try get the litigants to resolve the dispute themselves.

Out of 14000 condominium disputes only 675 submitted a claim and into the official negotiation phase. (There have been over 14000 Solution Explorer explorations, and we can assume these are people with a condominium problem.)

Ensuring that the information available to the parties is important. The information must also be accessible and easily understandable. This has been achieved at CRT through the process of Knowledge engineering. A Knowledge engineer interviews lawyers and asks them what the common reasons disputes arose and what lawyers wished their clients understood and knew in order to proceed with a claim. From this information, the knowledge engineer works with a content specialist, who is good at translating complicated legal terms – put into plain language – and information is drafted into the system and made available to the users. It is important to make use of User testing. ODR needs to be a user centred design. Adapt and change. At CRT there are weekly change meetings, where changes and adaptations to the system are discussed. Feedback and rating of service is also important.

There will be cases in terms of which the dispute is too complicated to be easily resolved in the programme. Here, there are referral options, where litigants are referred to legal organisations which can assist them further with their dispute.

The CRT is User centred. What is required to implement the ODR system is change management, Goodwill and trust.

Fairness – in a modern world is different to what it was 300 years ago. User centred fairness is required now.