

SMALL CLAIMS: MARKET REALITIES AND NEW POSSIBILITIES

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

SMALL CLAIMS IN COURTS

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

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

¹¹ *ibid* 295.

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

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

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

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

ALTERNATIVE DISPUTE RESOLUTION

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

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

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

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

¹⁷ Steele (n 10).

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

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

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

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

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

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

CLASS ACTIONS AND SMALL CLAIMS

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

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

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

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

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

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

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

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

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

³⁰ *ibid.*

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

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

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

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

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

³³ Ulen (n 32) 79-81.

³⁴ Schmitz (n 29) 370.

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

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

³⁷ Schmitz (n 29) 370.

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

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

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

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

SMALL CLAIMS IN DIGITAL ERA: NEW ISSUES AND NOVEL POSSIBILITIES

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

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

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

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

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

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

⁴³ Shaw (n 41).

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

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

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

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

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

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

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

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

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

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

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

⁵¹ *ibid* 574.

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

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

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

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

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

⁵⁵ Poblet and Ross (n 26).

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

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

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

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

ONLINE MEDIATION

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

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

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

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

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

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

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

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

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

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

⁶⁷ *ibid.*

ONLINE COURT PROCEEDINGS

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

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

THE NEVER-ENDING FLOW OF SMALL CLAIMS IN DIGITAL MARKET

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

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

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

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

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

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

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

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

OBJECTIVES OF THIS SPECIAL ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prof. Gina Gioia

