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THE CHALLENGES OF DIGITALIZATION OF CIVIL JUSTICE: TOWARDS A FLEXIBLE ORALITY

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ABSTRACT: Small claims proceedings are increasingly characterized by the prevalence of writing over orality. EU Regulation No. 861/2007 provides for proceedings that reduces but does not eliminate oral and direct contact between parties and judge. The author considers it appropriate to enhance this flexible orality, also making use of the tools of digital proceedings.

Keywords: orality; UE regulation 861/2007; written procedures; digital orality.

1. INTRODUCTION

The debate between orality and writing is one of the great classics of procedural law. The fundamental question is which mode of conducting civil proceedings best serves the needs of justice.

In the 20th century, the idea prevailed that orality guaranteed better procedural justice. The idea was established that an immediate contact and dialogue between judge and parties could ensure a better reconstruction of factual circumstances and a personal and direct confrontation between judges and witnesses a more effective collection of investigative material.

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In recent times, the "oral model" of civil proceedings has entered into crisis for reasons that are more practical than theoretical: structuring the proceedings on periodic meetings between judges, parties and other subjects involved almost inevitably implies a lengthening of the so called "disposition time". Moreover, since traditionally, such a meeting, i.e. the hearing, had to take place "in presence", at the judge's office or in the courtroom, the orality of the proceedings implied an increase in costs for the parties (e.g. for lawyers' travel) and for the administration of justice (e.g. in terms of the preparation of the premises where hearings are to be held)[1].

In a world of limited resources, the judge's 'time' and the global costs of judicial activities take on a fundamental value. The principle of proportionality started therefore to be invoked[2], aiming at a "proportional" use of public resources dedicated to civil justice with respect to all civil disputes pending in a given system.

The principle of proportionality, in particular, on the one hand, requires that the time the court devotes to an individual dispute must take into account the overall number of pending cases; on the other hand, it leads to the view that it is fair to devote 'more time' to cases that, because of their 'complexity' or 'importance' or the sensitivity of the issues dealt with therein, require more effort in their preparation, collection of evidence and decision. This can be referred to as 'qualified' proportionality.

This "qualified proportionality" may be applied firstly by providing "simplified" procedural models for disputes that are "simpler" in fact and/or in law, as in fact happens in many jurisdictions: in Italy, for example, in the last 15 years, first a "summary" proceeding (*procedimento sommario di cognizione*: art. 702-bis c.p.c.) and then a "simplified" procedure (*procedimento semplificato*: art. 281-decies c.p.c.) were introduced for such "simpler" disputes. Experience, however, shows that it is not always easy to establish the "simplicity" of cases and that such an assessment is made by a judge (and thus with a commitment of valuable resources), just to determine whether a certain case should follow one track or another.

A more practical criterion for identifying "simple" litigation, for which it is fair to devote less "time", is that of their "value". In fact, all legal systems provide *ad hoc* procedural rules to so-called small claims[3], often even identifying specific courts to deal with them (in Italy, the *giudice di pace*).

[1] See Auletta, F. (2021), 44.
[2] For further reference, see Lupoi, M. A. (2018), 57 ff.
[3] See Silvestri, E. (2019), 41.

2. THE USE OF WRITTEN PROCEDURES FOR SMALL CLAIMS

Small claims are the most common disputes in any legal system[4] but, at the same time, often the most looked down upon by both judges and lawyers[5]. Cynical as it might sound, while most legal practitioners love big commercial cases, few are passionate about claims worth a few hundred or thousand euros.

For some time now, with respect to small claims, the (total or partial) abandonment of orality has been proposed, in favor of written procedures, often with the use of forms and, today, emphasizing only digital contacts between the parties and the judge.

In some jurisdictions, procedural models are even being experimented with, in which the setting of a hearing is excluded without exception[6].

The spread of written procedural models has obvious advantages in terms of reducing the costs, efforts and time involved in adjudicating a low-value claim. These advantages are particularly appreciated in cross-border litigation, where the need to physically 'travel' (for the party or, worse, her lawyer) can imply a staggering increase in costs, often exceeding the value of the claim itself.

Enhancing asynchronous dialogue between judge and parties[7], therefore, with particular reference to cross-border litigation, helps to protect rights and increase trust in procedural justice.

Totally asynchronous procedural models, on the other hand, have obvious disadvantages: justice is certainly a 'service' for citizens that the State must provide, but courts cannot be reduced to call-centers or virtual operators. Justice needs (also) physical places to manifest itself and 'rituals' in order to appear, even in the collective imagination, as an expression of sovereignty that justifies the binding effects of the judge's decisions.

3. THE WRITTEN PROCEDURE IN REGULATION N. 861 OF 2007

The European legislator intervened in this debate with Regulation n. 861 of 2007 (subsequently amended by EU Regulation No. 2421 of 16 December 2015), proposing an alternative procedural model for the adjudication of

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[4] See e.g. *Adjudication of Small Claims in the Countries of the South-West Mediterranean Basin: A Technical Note*, available online at *https://documents.worldbank.org/en/publication/documents-reports/documentdetail/168231632901079622/adjudication-of-small-claims-in-the-countries-of-the-south-west-mediterranean-basin-a-technical-note*.

[5] Lower value claims are sometimes referred to as "garbage" or "junk" cases: see Leader, K. (2022), 4, available online at *https://www.modernlawreview.co.uk/leader-small-claims-pilot/*. In Italy, they used to be called "controversie bagattellari".

[6] In England, e.g., it was proposed to remove the right to oral hearing for low-value claims in the County Courts: see Leader, K. (2022).

[7] On asynchronous procedural interaction, see Bigi, A. (2023), 68 ff.

small claims, in application of the principle of proportionality, to reduce the time and costs of small claims recovery.

The strengths of the procedural model thus introduced are well known: first of all, it aspires to develop in a basically written mode, with the use of forms, on the assumption that the judge is in the position to decide on the basis of the filed documents (including the written depositions of witnesses); moreover, the parties do not need to hire a lawyer for their defense and this obviously reduces the overall costs.

This procedural model implies a more active and interventionist judge, in particular with respect to the reconstruction of the relevant facts and the identification of the legal case: according to Art. 12, as a matter of fact, the parties may not be required by the court to make any legal assessment of the claim[8]. Arguably, this might imply a departure from the adversarial model of the proceedings.

On the other hand, no reduction of the evidentiary standards adopted in the Member States is implied. Rather, the procedural model affects the way evidence is collected: as a rule, the court "shall use the simplest and least onerous method of taking evidence" (Art. 9, para. 3). Art. 9, para. 1 reduces the possibility of using certain types of evidence and modifies the manner of taking other types of evidence (e.g. admitting the use written testimony). It does not, however, lower the standard of proof required for the judge's conviction. This has obvious consequences with respect to the possibility that proceedings governed by the Regulation will require an evidence collection phase.

As we have seen, the option for a 'written' procedural model is particularly appreciated in a cross-border context, where language differences imply additional costs for translations and interpreters: these are reduced, if not eliminated, by the use of standardized forms, available in all the official languages of the Union.

As a matter of fact, the *"basic"* "track" of the Regulation provides for a written-only procedure (Art. 5), through the use of forms for the plaintiff's application (Art. 4) and for the defendant's reply (Art. 5, paras. 2 ff.), with the possibility for the plaintiff to reply, again in writing, to any counterclaims (Art. 5, para. 6). At the end of these exchanges, the court gives judgment (subject to the possibility for the court to ask the parties for further details within a time limit set for this purpose: Art. 7, para. 1[*a*])[9].

[8] Frassinetti, A. (2021), 972.

[9] See also D'Alessandro, E. (2008), 85. On the compatibility between this model and the guarantees of the European convention on human rights, Nunner-Krautsgasser, B., Anzenberger, P. (2012), 141; Kramer, S. (2011), 123.

4. A FLEXIBLE ORALITY IN THE SMALL CLAIMS REGULATION

The Regulation, however, does not take an absolutist approach as to orality (and its elimination).

The small claims proceedings governed by the Regulation, in fact, have a flexible structure, in which the exchange of written forms can be alternated with one or more hearings, depending on the characteristics of the concrete case[10].

Such hearing may be devoted to the appearance of the parties, by order of the court (Art. 7, para. 1I)[11] or to the collection of evidence.

A hearing, however, is still considered an exception, as Art. 5 (amended in this respect by Regulation No. 2421 of 2015) makes clear. A more "structured" procedure, where a hearing is held, as a matter of fact, will only be adopted if the court considers that it is not possible to give the judgment on the basis of the written evidence or if a party so requests.

A party's request. however, does not automatically lead to the court's holding a hearing, since such request may be denied (giving written reasons) if the judge takes the view, having regard to the circumstances of the case, that a hearing is not necessary to resolve the issues and for a fair conduct of the case.

Art. 5, para. 1(a) specifies that such a refusal may not be contested separately from a challenge to the judgments itself.

All in all, the safeguards provided by Art. 5, para. 1, as to the court's refusal to hold a hearing, are merely formal. It is true that Art. 5, para. 1 requires the decision to refuse to hold the hearing to be reasoned in writing. This, however, may result in an ineffective protection of the party's wish to have her day in court. In the first place, the use of succinct and stereotyped reasons to refuse to hold the hearing might be expected. In any event, if the judge's decision may not be immediately contested as such, it means that, after the judgment is rendered, a party may appeal the refusal to schedule the hearing only if refusal was outcome determinative. And this may be difficult to prove, indeed.

On the other hand, some of the positive effects of the hearing (e.g. the possibility for the judge to stimulate an agreement between the parties) are not reflected in the final decision on the merits.

One must also consider that there are activities that necessarily require a direct confrontation between the judge and the parties.

In proceedings where only written forms are used, filled in by litigants in person, how can one verify, for evidentiary purposes, that a specific fact

[10] Frassinetti, A. (2021), 969.

[11] For D'Alessandro, E. (2008), 86, this is a residual hypothesis.

is disputed (as requested, e.g., under art. 115 of the Italian code of civil procedure)? And how may the judge make a settlement proposal to the parties, in the spirit of his role in these proceedings, bring to the attention of the parties issues that can be raised *ex officio* before rendering judgment or even ask the parties for clarifications[12]? Finally, in matters referred to in Sections 3, 4 or 5 of Regulation Brussels I-bis, where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, how can the court ensure, pursuant to Art. 26, para. 2 of Regulation No. 1215 of 2012, before assuming jurisdiction, that the defendant is informed of her right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance?

These (and other similar) considerations must be taken into account when deciding whether or not to schedule a hearing. In other words, it is argued that such a hearing, while still an exception[13], should never be a "concession" and that the court should refuse to hold it only after carefully assessing the reasons for the request and the circumstances of the case.

5. THE ROLE OF DIGITAL ORALITY

In the "tension" between written and oral procedures within the small-claims Regulation, technology introduces an element of flexibility.

From this point of view, Regulation No. 861, as amended in 2015, was ahead of its times.

Anticipating the emergency legislation of the pandemic period, in fact, the uniform European rules already provided for the use of the so-called digital orality.

In order to spare parties (who do not have, in this procedural model, the obligation to be assisted by a lawyer) the travel expenses required to attend a hearing, Art. 8 provides that, where an oral hearing is considered necessary in accordance with Article 5, para 1(a), it shall be held by making use of any appropriate distance communication technology, such as videoconference or teleconference, available to the court or tribunal, unless the use of such technology, on account of the particular circumstances of the case, is not appropriate for the fair conduct of the proceedings[14].

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[12] See also Bigi, A. (2023), 87.

[13] For a different perspective, see Nunner-Krautsgasser, B., Anzenberger, P. (2012), 143, with regard to the right to an oral hearing established by Art. 6 of the ECHR: "it is very doubtful that such an omission of an oral hearing can be justified with the mere reference to the general necessity of efficient proceedings". For the authors, therefore, such an omission should be considered "extraordinary", with a restrictive interpretation of Art. 5 para. 1 of the regulation.

[14] Further details in the Guidelines on videoconferencing in judicial proceedings, adopted by the CEPEJ at its 36th plenary meeting (June 2021), available at *https://edoc.coe.int/en/efficiency-of-justice/10706-guidelines-on-videoconferencing-in-judicial-proceedings.html#:~:text=These%20Guidelines%20provide%20a%20set,requirements%20of%20the%20Convention%20for*. See also the CCBE po-

Moreover, a party summoned to be physically present at an oral hearing may request the use of distance communication technology, provided that such technology is available to the court or tribunal, on the grounds that the arrangements for being physically present, in particular as regards the possible costs incurred by that party, would be disproportionate to the claim. Conversely, a party summoned to attend an oral hearing through distance communication technology may request to be physically present at that hearing.

Art. 9, para. 1, on its part, allows the taking of evidence by videoconference or other technological means of communication if available.

The pandemic experience has shown that judicial activity can be effectively carried out with the forms of digital orality, with fewer conceptual difficulties for civil than for criminal proceedings, and without prejudice to the specificities of hearings where oral evidence is gathered and where direct contact between the judge and the source of evidence continues to be privileged.

In the space of a few years, in fact, technology in this area has developed in a way that was previously inconceivable and judicial administrations all over the world have been able to transform an emergency into an opportunity to develop a different way of conceiving procedural activities, with due respect for fundamental principles.

Small claims proceedings, as a matter of fact, lend themselves to being the ideal test-bed for the new European digital justice. Their simplicity and, from a pragmatic standpoint, the modesty of the interests at stake allow the experimentation of innovative technologies therein, balancing fundamental principles with more flexibility.

Digital orality, as we have seen, reduces the costs and formalities of the proceedings while at the same time enabling a synchronous dialogue between the judge and the parties.

Costs are reduced, in the first place, by the possibility to use platforms that are now commonplace, allowing parties (and possibly their lawyers) to connect directly from their homes or offices.

The use of digital orality might also have an impact on the language barrier in cross-border litigation where, by definition, at least one of the parties habitually resides in a State other than the forum State. With the appropriate precautions (e.g. requiring the consent of all parties involved), it is, for example, conceivable to reduce the need for interpreters by using simultaneous

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sition paper on the proposal for a regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, of July 29th 2022, available online at: *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Position_papers/EN_ITL_20222907_CCBE-position-paper-on-the-proposal-for-a-regulation-on-the-digitalisation-of-judicial-cooperation-and-access-to-justice-in-cross-border-civil-commercial-and-criminal-matters.pdf*.

translation software, which is in fact already available for some videoconferencing platforms.

There is also another development to consider, which could rewrite some traditional rules of the legal profession.

The use of technology and of long-distance digital communications makes it possible to conceive that a party residing in a State other than the State of the forum be assisted, if only at the digital hearing, by a practicing lawyer from that first State, regardless of whether he or she is licensed to practice law in the State of the forum. In increasingly dematerialized proceedings, indeed, certain founding principles of cross-border legal practice might have to be reconsidered.

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