

SMALL CLAIMS AND THE PURSUIT OF (DIGITAL) JUSTICE: A TIERED ONLINE DISPUTE RESOLUTION PERSPECTIVE*

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Abstract: This paper investigates the most recent developments in completely online small claims processes as a response to the extreme delays in delivering justice by courts. This study argues that adopting a tiered online dispute resolution (ODR) system design can increase access to justice for individuals by simplifying the processes; reducing excessive procedural length and costs; also expanding accessibility to dispute resolution bodies. The present research also proposes that the COVID-19 pandemic has opened up a bundle of opportunities for complete digitalisation of small claims procedures at the EU and Member State levels. Nevertheless, it deems necessary to closely monitor the function of these systems to ensure that the digitalised small claims procedures meet the standards of procedural fairness and efficiency of justice, in particular concerning self-represented litigants. The overall structure of this paper takes the form of four sections. The first part lays out the evolution of ODR in relation to small claims and analysing a tiered ODR system design for these cases. The second section gives an overview of the most prominent operating online small claims processes from a global perspective in the United Kingdom, Canada, China, and the United States. The third part is concerned with the status of online small claims processes and the taken measures at EU and Member States level. The final section provides a discussion on the lessons learnt, the opportunities, and the risks in full digitalisation of small claims processes.

Keywords: small claims; online dispute resolution; ODR system design; access to justice.

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INTRODUCTION

Despite their low monetary threshold, small claims are significantly important in two aspects. First, they are extremely high in number which leads to considerable court backlogs.¹ Second, many creditors of small claims belong to the most vulnerable class of society that generally appear in civil courts as self-represented litigants. For this reason, their interests need strong protections.²

In most EU jurisdictions, the existing ordinary national civil proceedings do not meet citizens' needs in providing them with effective access to justice for their small claims.³ The notion of 'effective access to justice' in civil matters is enshrined in Article 47⁴ of the Charter of Fundamental Rights of the European Union (CFREU) and Articles 6 (1)⁵ and 13⁶ of the European Convention on Human Rights (ECHR). Within these legal instruments, the European legislator emphasises safeguarding the rights to an effective remedy and a fair trial. In addition, the given interpretations by the Court of Justice of the EU (ECJ) and the European Court of Human Rights manifest several elements as the main pillars of effective access to justice for individu-

¹ Small claims are categorized as civil disputes that usually refer to simple cases that do not involve a large amount of money or complex matters. In Europe, many of small claims are submitted by consumers against traders because of the market malpractices. Given the frequency and the high number of consumer small claims, a considerable amount of time and human resources of courts are taken to deal with these cases. See Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge University Press 2018). See also Svetozara Petkova and Runyararo Gladys Senderayi 'Two For One: How Leveraging Small Claims Procedures Can Improve Judicial Efficiency and Access to Justice' (2020) Equitable Growth, Finance and Institutions Notes, *World Bank* <<https://openknowledge.worldbank.org/handle/10986/34927>> accessed 7 June 2022.

² Georgia Harley and Agnes Said, 'Fast-Tracking the Resolution of Minor Disputes: Experience from EU Member States' [2017] *World Bank* 8 <<https://openknowledge.worldbank.org/handle/10986/26100>> accessed 7 June 2022.

³ According to official statistics, most online consumer purchases across the EU fall into the price category between 100 euros to 499 euros. See European Commission, Consumer Conditions Scoreboard (2019) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> accessed 7 June 2022.

⁴ Article 47 of the CFREU refers to the 'Right to an effective remedy and to a fair trial'.

⁵ Article 6 (1) of the ECHR indicates the 'Right to a fair trial'.

⁶ Article 13 of the ECHR stipulates the 'Right to an effective remedy'.

als.⁷ These key components include efficient access to a dispute resolution body; the right to timely resolution of disputes; the right to cost-effective civil proceedings and the right to sufficient redress in delivering effective civil justice.⁸ Nevertheless, neither the adopted legislations nor the ECJ judgements have achieved a high level of protection for creditors of small claims.

The low pecuniary threshold of claims⁹ does not prevent traditional court proceedings from being extremely lengthy, expensive and complicated.¹⁰

By the same token, at the EU cross-border level, the major barriers that creditors of small claims face in seeking justice for their claims are even higher. Parties can meet practical difficulties in dealing with uncertain costs; unfamiliar foreign laws; foreign languages and complicated enforcement procedures in different European Member States. Further inefficiency arises out of the regulatory instrument, namely the European Small Claims Procedure (ESCP) Regulation¹¹ that has been designed to deal with transnational low threshold disputes at the Union level. This legislative instrument has failed to meet its core objectives in facilitating access to justice for creditors of cross-border small claims.¹² An additional regulatory effort established the EU Online Dispute Resolution (ODR) Platform on a need-based approach to resolve consumer-to-business (C2B) disputes in a more efficient way through using ODR.¹³ However, a number of obstacles – e.g., the lack of sufficient consumer

⁷ Guide on Article 6 of the European Convention on Human Rights (Right to a fair trial (civil limb)), Council of Europe/European Court of Human Rights (30 April 2021) 28-30 <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 7 June 2022.

⁸ European Union: European Agency for Fundamental Rights, *Handbook on European law relating to access to justice* (June 2016) 17 <https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf> accessed 7 June 2022.

⁹ The monetary threshold of small claims is specifically determined according to the civil procedural rules and varies from one jurisdiction to another. For example, while this pecuniary threshold in Germany is €600, it is fixed for the claims with the value of up to €5,000 in Luxemburg and €5,000 in the Netherlands. See Xandra E. Kramer and Elina Alina Ontanu, 'The Dutch Perspective on Cross-Border Small Claims Litigation: Guarded Optimism and Pragmatism. A Normative and Empirical Approach' in Nanette Neuwahl and Saïd Hammanoun (eds), *The European Small Claims Procedure and the Philosophy of Small Change* (Les Editions Thémis 2014); Elisabetta Silvestri, 'Simplification of Debt Collection in Italy – National and EU Perspectives' in Vesna Rijavec, Tomaž Keresteš, and Tjaša Ivanc (eds), *Simplification of Debt Collection in the EU* (Kluwer Law International 2014); Gregory C. Shaffer and Hakan Nordstrom, 'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?' (2007) 7 *World Trade Review* 587 <<https://ssrn.com/abstract=983586>> accessed 7 June 2022.

¹⁰ Alan Uzelac and C. H. Van Rhee, 'The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms Unity and Diversity' in Alan Uzelac and C. H. Van Rhee (eds), *Transformation of Civil Justice. Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2018) 3, 4.

¹¹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure with its amendment Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure.

¹² Marco Giacalone and Seyedeh Sajedeh Salehi, 'The European Small Claims Procedure: Implementation and Enforcement Revisited in Italy and Belgium' (2020) 9 *Journal of European Consumer and Market Law* 181, 182.

¹³ 'EU ODR Platform' <<https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>> accessed 7 June 2022. See Elisabetta Sciallis, 'ODR and Access to Justice for Vulnerable Consumers: The

awareness about the Platform and its function as well as inadequate technical features – have hindered this tool from providing an effective access to justice for the potential users. As a consequence, the status of access to justice for creditors of low-value claims – in most Member States and specifically at EU level – does not adequately meet the judicial protection standards envisaged by Article 47 of the CFREU, nor those envisaged by Articles 6 (1) and 13 of the ECHR.¹⁴

With the outbreak of the COVID-19 pandemic, extreme delays have been registered in court proceedings across the EU and the globe.¹⁵ To deal with these pandemic-induced long delays in judicial proceedings, many justice systems have used information and communication technology (ICT) to digitalise their services and improve citizens' access to justice.¹⁶

It must be stressed that some jurisdictions, and particularly the United States, Canada, the United Kingdom and China had already taken serious measures in implementing ICT in their civil justice systems, regardless of the pandemic crisis.

Many scholars have maintained that small claims are the most appropriate type of civil case for online alternative dispute resolution (ODR), particularly online negotiation and online mediation.¹⁷ In recent years and particularly during the pandemic, using online court proceedings have gained momentum as part of the general ODR regime.¹⁸

Currently, there are several successful implementations of completely online small claims procedures outside of the EU that benefit from ODR to in-

Case of the EU ODR Platform' in Christine Riefa and Séverine Saintier (eds), *Vulnerable Consumers and the Law* (Routledge 2020).

¹⁴ Marek Safjan and Dominik Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 *Yearbook of European Law* 3 <<https://doi.org/10.1093/yel/yeu015>> accessed 7 June 2022.

¹⁵ European Commission 'Impact of COVID-19 on the Justice Field' <https://e-justice.europa.eu/37147/EN/impact_of_covid19_on_the_justice_field?clang=en> accessed 7 June 2022.

¹⁶ In this paper, the terms 'digital', 'virtual', and 'online' are used interchangeably referring to utilising ICT in civil justice systems as a substitute for physical ADR and/or court proceedings in the context of small claims cases. Hence, while discussing digitalisation of small claims proceedings in this study, we have excluded advanced and re-structured algorithmic-driven models of dispute resolution. See Orna Rabinovich-Einy and Ethan Katsh, 'The New New Courts' (2017) 67 *Am U L Rev* 16 <<https://heinonline.org/HOL/P?h=hein.journals/aulr67&i=173>> accessed 7 June 2022.

¹⁷ See David Allen Larson, 'Designing a State Court Small Claims ODR System: Hitting a Moving Target in New York during a Pandemic' (2021) 22 *Cardozo J Conflict Resol* 569; David Allen Larson 'Designing and Implementing a State Court ODR System: From Disappointment to Celebration' [2019] 2 *Journal of Dispute Resolution University of Missouri-Columbia* 77; Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24 *Deakin Law Review* 101.

¹⁸ Amy J. Schmitz and Janet Martinez, 'ODR and Innovation in the United States' in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021) 11. See also Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49 *Federal Law Review* 161; Anne Wallace and Kathy Laster, 'Courts in Victoria, Australia, During COVID: Will Digital Innovation Stick?' (2021) 12 *International Journal for Court Administration* 9; Leah Wing and others, 'Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party' (2021) 37 *Negotiation Journal* 49.

crease effective access to justice for citizens.¹⁹ These ODR systems are generally state-run programs offering a tiered dispute resolution model that mainly comprises online negotiation, online mediation and online litigation.²⁰

Over the past years, a considerable amount of literature has emerged around online alternative dispute resolution and online civil proceedings.²¹ Much of the research to date has been carried out on the impact of ICT facilities implementation in enhancing access to justice. However, only a few studies have thoroughly investigated from both a global and an EU perspective the status of best practices in resolving small claims cases through using a tiered ODR system design. Therefore, this paper aims to explore the most recent developments in completely online small claims procedures as a response to the extreme delays in delivering justice through in-person court procedures. This study argues that adopting a tiered ODR system design can increase access to justice for individuals by simplifying the processes; reducing excessive procedural length and costs and expanding accessibility to dispute resolution bodies. This study also proposes that the COVID-19 pandemic has opened up a bundle of opportunities for fully digitalising small claims procedures at the level of both the EU and of the individual Member States.

This paper is divided into four sections. The first part lays out the evolution of online dispute resolution in relation to small claims and analyses a tiered ODR system design for these cases. The second section gives an overview of the most prominent online small claims processes from a global perspective in the U.K., Canada, China and the U.S. The third section is concerned with the status of online small claims processes and the measures taken at the EU cross-border level and at the national level in Member States. The final part provides a discussion on the lessons learnt, the opportunities, and the risks in full digitalisation of small claims processes.

¹⁹ In this paper, in defining the concept of 'digitalisation' of court proceedings we adopt the approach in which an entirely digital small claims procedure must entail all the following features: a) the entire court administrations are fully digitalised; b) a digital case management system is provided to the users to submit and respond to the claim, all the communications and sharing data and documents with the court and the other party are conducted via the digital platform; c) the ODR services e.g., negotiations, mediation, facilitation, scheduling hearings, and court hearings are all conducted online via the electronic platform.

²⁰ For more information on tiered ODR system designs, see Ayelet Sela, 'The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, And Future Directions' (2017) 21 *Lewis & Clark Law Review* 633 <<https://heinonline.org/HOL/P?h=hein.journals/lewclr21&i=667>> accessed 7 June 2022.

²¹ See Robert Thomas and Joe Tomlinson, 'The Digitalisation of Tribunals: What We Know and What We Need to Know' [2018] Research Paper in Public Law Project <<https://publiclawproject.org.uk/wp-content/uploads/2018/04/The-Digitalisation-of-Tribunals-for-website.pdf>> accessed 7 June 2022; Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab, *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021); Cortés (n 1); Brian A. Pappas, 'Online Court: Online Dispute Resolution & the Future of Small Claims' (2008) 12 *UCLA J. L. Tech* 1 <<https://ssrn.com/abstract=2266516>> accessed 7 June 2022; Rabinovich-Einy and Katsh (n 16).

1. ONLINE DISPUTE RESOLUTION FOR SMALL CLAIMS CASES

Despite the existing differences of opinion among scholars, there appears to be some agreement that ODR generally refers to the application of ICT to the process of dispute resolution on the Internet.²² In this general definition, ICT is the determining element that differentiates ODR from offline dispute resolution methods.²³ Katsh and Rifkin (2001) refer to ICT as the ‘Fourth Party’ which enters a dispute resolution process and modifies the mode of interactions between the parties.²⁴

In the literature, it is a widely held view that the term ODR refers to various types of alternative dispute resolution (ADR)—including negotiation, mediation, and arbitration—conducted over the Internet.²⁵ In our viewpoint, this widely embraced definition poses a problem for exclusively focusing on ADR methods. As a result, it does not include judicial proceedings that can be held online. In that sense, Sternlight (2020) emphasises that this extremely broad definition of ODR can potentially include any type of virtual dispute resolution method, including litigation.²⁶

It must be noted that in this study the term ODR is used in its broadest sense to refer to any intended form of ADR and judicial proceeding in the framework of small claims dispute resolution.

It is significant to note that ODR did not emerge to displace existing legal frameworks. In fact, it aims to improve effective access to justice by closing gaps in circumstances where the authority of law is absent or lacking.²⁷

²² Thomas Schultz and others, ‘Online Dispute Resolution: The State of the Art and the Issues’ [2001] University of Geneva 102.

²³ Sela (n 20) 654.

²⁴ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001).

²⁵ There are other forms of ADR, including facilitation; ombudsman procedures; conciliation; and hybrid ADR models (e.g., med-arb and mini-trials). See Brian A. Pappas, ‘Med-Arb and the Legalization of Alternative Dispute Resolution’ (2015) 20 *Harvard Negotiation Law Review* 157; Sherry Landry, ‘Med-Arb: Mediation with a Bite and an Effective ADR Model’ (1996) 63 *Defense Counsel Journal* 263; Reba Page R and Frederick J. Lees, ‘Roles of Participants in the Mini-Trial’ (1988) 18 *Public Contract Law Journal* 54; Gina Gioia, ‘L’uniforme regolamentazione della risoluzione alternativa delle controversie con i consumatori’ (2018) 1 *Revista Italo-española De Derecho Procesal* 501; Ethan Katsh, ‘Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace’ (2007) 21 *International Review of Law, Computers & Technology* 97; Colin Rule, *Online Dispute Resolution for Business: B2B, ECommerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (John Wiley & Sons 2003); Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online dispute resolution: challenges for contemporary justice* (Kluwer Law International BV 2004).

²⁶ Jean R. Sternlight, ‘Pouring a Little Psychological Cold Water on Online Dispute Resolution’ [2020] *J. Disp. Resol.* 5 <<https://scholarship.law.missouri.edu/jdr/vol2020/iss1/5>> accessed 7 June 2022.

²⁷ It is argued that ODR aims at filling the existing civil justice gap (as a remedy) by providing appropriate alternatives – to the ordinary civil proceedings – for dispute resolution in a more expedited, cost-efficient, and simplified manner. For more information on ‘filling the justice gap and ODR’, see Orna Rabinovich-Einy and Ethan Katsh, ‘Technology and the Future of Dispute System Design’ (2012) 17 *Harvard Negotiation Law Review* 151; Danielle Linneman, ‘Online Dispute Resolution for Divorce Cases in Missouri: A Remedy for the Justice Gap’ [2018] *J. Disp. Resol.* 281.

In relation to small claims, the existing barriers (i.e., lengthy proceedings, high costs incompatible with the low value of the claim and complex civil procedures) have seriously obstructed access to effective dispute resolution for claimants.²⁸ Arguably, ODR has been nominated to simply be a response to the massive accumulation of low-value disputes with the primary aim of increasing effective access to justice.²⁹ Many scholars have urged that ODR promotes the quality of access to justice—notably for certain types of disputes such as small claims—by providing citizens with a more accessible, simplified³⁰, expedited and cost-effective dispute resolution process.³¹

In this sense, one critical question that arises is how ODR processes can improve effective access to justice in small claims cases considering that most claimants are classified as members of vulnerable social groups.³² To answer this question, it is vital to understand the advantages that ICT—as the fourth party and the main differentiator between ODR and offline dispute resolution methods—would bring to the dispute resolution table. In addition, it is necessary to investigate what role a tiered ODR system design can play in enhancing efficiency of the process.

Rapid advancements in ICT have made a revolutionary change in the mode of social communications. The distinctive characteristics of online communications—i.e., swiftness, cost-effectiveness, flexibility, convenience and accessibility—have made this phenomenon an attractive and reasonable alternative to traditional face-to-face dispute resolution processes. The substantial advantages of digital communications are more evident in cases with low pecuniary thresholds. Using ICT tools for conducting dispute resolution sessions can save significant time and costs by eliminating the need for travel, particularly where parties are in distant geographical locations.³³

²⁸ Elina Alina Ontanu, 'Adapting Justice to Technology and Technology to Justice: A Coevolution Process to e-Justice in Cross-border Litigation' (2019) 8 *East European Quarterly* 54 <<https://repub.eur.nl/pub/120004>> accessed 7 June 2022.

²⁹ Maxime Hanriot, 'Online Dispute Resolution (ODR) as a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes' (2016) 2 *McGill Journal of Dispute Resolution* 1 <<https://mjd.openum.ca/files/sites/154/2018/05/1.-Hanriot1.pdf>> accessed 7 June 2022.

³⁰ Many scholars have commonly expressed that simplification of civil proceedings is a critical element in increasing the effectiveness of access to justice in small claims. For example, see Xandra Kramer and Shusuke Kakiuchi, 'Austerity in Civil Procedure and the Role of Simplified Procedures' (2015) 4 *Erasmus Law Review* 139; Stefaan Voet, 'Relief in Small and Simple Matters in Belgium' (2015) 4 *Erasmus Law Review* 147; Jonathan Silver and Trevor C.W. Farrow, 'Canadian Civil Justice: Relief in Small and Simple Matters in an Age of Efficiency' (2015) 4 *Erasmus Law Review* 232.

³¹ Sela (n 20) 642-43. See also Larson (n 17); Tan (n 17).

³² It is critical to note that some critics have pointed at the pitfalls in the overemphasis on using ODR for low-value claims and the risk it may impose on procedural quality standards. See Julia Hörnle, 'Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?' [2012] Queen Mary School of Law Legal Studies Research Paper No. 122/2012 <<https://ssrn.com/abstract=2154214>> accessed 7 June 2022; Julia Hörnle, 'Online Dispute Resolution: The Emperor's New Clothes?' (2003) 17 *International Review of Law, Computers & Technology* 27; Wing and others (18).

³³ Orna Rabinovich-Einy and Ethan Katsh, 'Lessons from Online Dispute Resolution for Dispute System Design' in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2021) 50.

As pointed out by Colin Rule (2003), the use of ICT devices in the spectrum of dispute resolution processes has dramatically changed the notion of time for the parties.³⁴ There are two major types of virtual communication channels in ODR systems: synchronous and asynchronous.

In online synchronous communications, parties communicate with each other simultaneously and in 'real-time'. The most prominent examples are communications through audio conferencing and video conferencing.³⁵ On the other end, in asynchronous communication, parties do not communicate concurrently, thus the transition of data happens independent of time. E-mails, chat boxes and sending messages in online discussion forums are categorised as asynchronous communications.

It is important to note that each of these two categories have their specific advantages and disadvantages that must be considered while designing ODR systems. In small claims cases, it is appropriate to ensure that the chosen type of online communication responds to the needs of parties in the dispute resolution process.³⁶ For instance, as in most low threshold cases parties are self-represented, using asynchronous communication—e.g., chat boxes or forum discussions—at the online negotiation level is more suitable for parties.³⁷ Since asynchronous communication provides parties with adequate time to think through and prepare their responses, they may experience less pressure concerning the consequences. Notwithstanding, synchronous communication such as video conferencing is more appropriate for conducting online mediation sessions that happen in real-time.³⁸ This type of communication enables the mediator to facilitate discussions between parties and assist them in reaching a more satisfactory settlement.³⁹

An increasing number of low threshold cases are consumer claims arising from online transactions in digital marketplaces. From the technical perspective, ODR mechanisms are more compatible with the nature of these disputes to deal with these cases. As a result, online dispute resolution can be a more

³⁴ Rule (n 25) 46-7.

³⁵ For more information on synchronous and asynchronous communication methods, see Janet K. Martinez, 'Designing Online Dispute Resolution' (2020) 1 *Journal of Dispute Resolution* 135 <<https://heinonline.org/HOL/P?h=hein.journals/jdisres2020&i=137>> accessed 7 June 2022; Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 *International Comparative Jurisprudence* 76 <<https://heinonline.org/HOL/P?h=hein.journals/icjuris1&i=76>> accessed 7 June 2022.

³⁶ Rule (n 25) 48.

³⁷ See Arno R. Lodder and John Zelznikow, 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model' (2005) 10 *Harv Negot L Rev* 28 <<https://heinonline.org/HOL/P?h=hein.journals/haneg10&i=291>> accessed 7 June 2022.

³⁸ See Noam Ebner, 'The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation and Mediation', in Daniel Rainey, Ethan Katsh, and Mohamed S. Abdel Wahab (eds.), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2021).

³⁹ Katrina J Kluss K, 'Mediation Mediums: The Benefits And Burdens Of Online Alternative Dispute Resolution In Australia' [2018] *Australian Alternative Dispute Resolution Law Bulletin* (Lexis Nexis) 1 <https://www.lexisnexis.com.au/_data/assets/pdf_file/0015/322620/Mediation-mediums-benefits-burdens-of-online_Aust_Wendy-Morell-Becker.pdf> accessed 7 June 2022.

pragmatic response to the needs of small claims creditors in seeking justice through a more expedited, flexible, convenient and simplified process.⁴⁰

In terms of costs, considering the low monetary threshold of claims, ODR can resolve these disputes in a more cost-effective manner. Using online communications, particularly in the context of cross-border small claims, eliminates the need for physical travel to attend dispute resolution sessions and hearings.⁴¹

Small claims cases are generally brought by self-represented claimants who are unfamiliar with complex court procedures. Consequently, they encounter difficulties in dealing with related procedural and substantive legal matters in courts⁴² that may compel them to give up seeking justice for their rights.⁴³ In these circumstances, ODR—specifically in tiered processes—can be a more effective response to the needs of particularly self-represented litigants.⁴⁴

The main conclusion to draw from the above arguments is that ODR systems—compared to traditional civil proceedings—are more effective in handling large volumes of small claims in a more expedited, cost-efficient and simplified manner. As noted by Schmitz (2019), ODR liberates courts from the huge administrative workload of small claims cases and saves government time and money.⁴⁵

1.1. A Tiered ODR System Design Explained

Over the past years, we have witnessed an increasing awareness about the benefits of online dispute resolution. As a result, many jurisdictions across the world have adopted implementation of ODR systems to enhance effective access to justice for their citizens.

In relation to process design, all the studied ODR systems—for the purpose of this research—follow a tiered dispute resolution model in handling small claims cases. These models are generally state-run⁴⁶ programs that are made available to the public in the form of virtual platforms—e.g., British Columbia Civil Resolution Tribunal and Utah ODR Program—for dispute resolution.

⁴⁰ See Sela (n 20) 643-44.

⁴¹ Hanriot (n 29).

⁴² Larson (n 17) 77-8.

⁴³ Ayelet Sela, 'Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation' (2016) 26 *Cornell journal of law and public policy* 331, 332 <<https://heinonline.org/HOL/P?h=hein.journals/cjlp26&i=339>> accessed 7 June 2022.

⁴⁴ See Joint Technology Committee (JTC), 'ODR for Courts' (November 2017, ver. 2.0) <https://www.ncsc.org/_data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf> accessed 7 June 2022.

⁴⁵ Amy J. Schmitz, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67 *Buff L Rev* 89 <<https://heinonline.org/HOL/P?h=hein.journals/buflr67&i=97>> accessed 7 June 2022.

⁴⁶ Either by judiciary or any other civil justice authority in that specific jurisdiction.

To use these ODR platforms, a party must first register with the system and go through identity authentication steps before beginning the dispute resolution process. Upon successful identification of the party, the process—in a tiered ODR system design—generally begins with online negotiation and/or online mediation, followed by a possibility to escalate the case to the online litigation level.⁴⁷ (See Figure 1.)

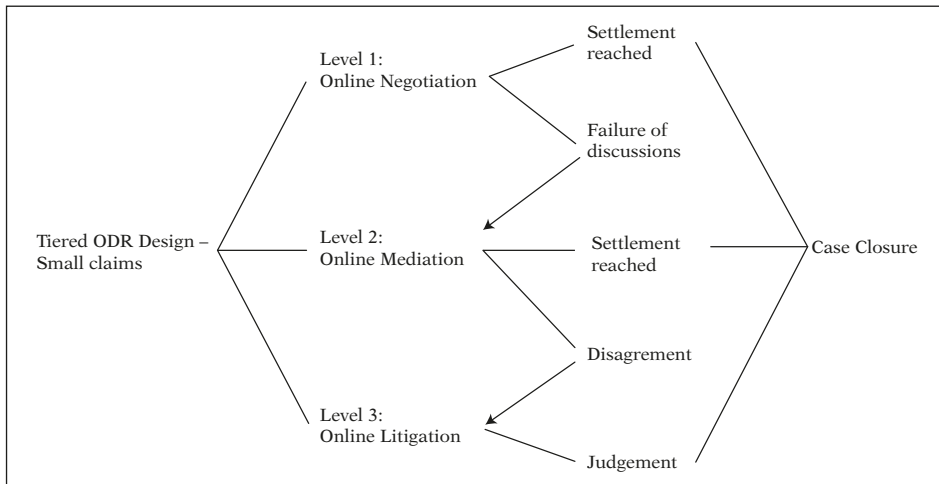


Figure 1. A Tiered ODR System Design for Small Claims

As illustrated in Figure 1, the tiered ODR system design is composed of three dispute resolution phases with distinctive features. The first two levels are negotiation and mediation that are forms of alternative dispute resolution.⁴⁸ The third and the ultimate phase is litigation where the case can be lodged with the court by either one or both parties. The particular importance of this ODR design is attached to the fact that the entire small claims process is conducted completely through one single online platform.⁴⁹

In the beginning of the dispute resolution process, the system provides parties with simple explanations about the purpose and function of each phase. The system also notifies the users about the potential consequences at the end of each phase. This information is of great importance as it helps

⁴⁷ In circumstances that parties fail reaching a settlement. See Sela (n 20) 650.

⁴⁸ In some ODR systems, facilitation is used – in the second phase – either instead of mediation or as a pre-mediation step. However, in the studied ODR system design for the purpose of this research we only refer to mediation as the second level of dispute resolution for small claims. For a detailed comparison between facilitation and mediation, see Janice M Fleischer and Zena D Zumeta, 'Preventing Conflict through Facilitation' (*Mediate.com*, December 1999) <<https://www.mediate.com/articles/zenandfleischer.cfm>> accessed 7 June 2022.

⁴⁹ See Md Mahar Abbasy, 'The Online Civil Money Claim: Litigation, ADR and ODR in One Single Dispute Resolution Process' (2020) 7 *International Journal of Online Dispute Resolution* 4.

the parties to make informed decisions at each level of dispute resolution process.

The process officially begins with online negotiation as the initial phase of this ODR design. At this level, parties have more control over the process through the exchange of desired data, collecting of information and sharing relevant documents. The system can provide self-help guides and a solution explorer to educate parties about the specific subject of the case. Increasing parties' knowledge of their case grants them autonomy and control over the dispute resolution process. This will also help the parties to form agreements based on their preferred terms and conditions. Should the parties fail to reach an agreement, either party can request the involvement of an impartial third party to mediate the case.

Online mediation, as the second phase of the process, offers the parties an opportunity to receive professional assistance from a mediator. During this stage, a mediator closely monitors communications between the parties. There is also the possibility to hold individual and joint online sessions with the disputants. The main objective of these sessions is to build trust and facilitate discussions to reach an effective solution.⁵⁰ Nevertheless, if resolution is not reached through mediation within a specified space of time, the case can be escalated to online litigation as the last resort.

In the final phase, the entire court proceedings (i.e., filing the claim, submission of evidence, hearing, and issuance of a judgement) are conducted online on the same ODR platform. The process usually begins with the creditor requesting to file the unresolved case with the court. Once the case has been submitted, the court reviews the case—within a specific time-limit—to ensure all the conditions are fulfilled. Once the court decides that the claim is admissible, a virtual hearing will be scheduled. The system will immediately notify the parties about the acceptance of the case and the online trial date. When the virtual hearing is conducted, the judge must decide on the case within a short space of time. The parties then have access to the court decision through their profiles in the system.

It is critical to note that the courts can play a significant role in increasing the effectiveness of a tiered ODR system design for the resolution of small claims. The courts—as part of judiciary systems—are one of the main pillars of any government to protect the rights of individuals in seeking justice. In low value disputes many claimants are amongst the most vulnerable classes of society. Therefore, involving the courts as part of an ODR system design can play an effective role in safeguarding the fundamental rights of the small claims claimants. As pointed out by Pappas (2008), the court can join the process as the 'Fifth Party' to add authentic legitimacy to ODR.⁵¹ One of the major outcomes of this legitimacy is building up more citizen trust in using ODR mechanisms. Thus, connecting online ADR methods to online court

⁵⁰ See Rabinovich-Einy and Katsh (n 27).

⁵¹ Pappas (n 25).

proceedings—particularly in small claims cases—can create additional incentives for claimants to use the tiered ODR systems.⁵²

In our viewpoint, there are several reasons to support the argument that a tiered ODR system design is a more suitable method for resolution of small claims cases. First, because this design offers a well-balanced layered structure. In this ODR system design, all three levels of dispute resolution occur on a single online platform in a tiered structure. This feature reduces the redundant administrative procedures that are usually employed to escalate a case from one dispute resolution process to another. Second, this model of ODR also promotes disputants' autonomy to have more control over the length of the process, particularly at the negotiation and mediation levels. Therefore, if there is a collaboration between the parties, they can expedite the process to reach an amicable settlement within a reasonable period. Further, parties can maintain control of the costs of the process—mainly where fees are charged based on the level of dispute resolution.⁵³

Having discussed the use of a tiered ODR system design in the context of small claims dispute resolution process, the following section provides an overview of how a tiered ODR model is implemented as part of civil justice systems in some non-European jurisdictions. The section that follows also discusses the specific features that these designs offer to their users. It is important to emphasise that as online civil proceeding is one of the main pillars of the studied tiered ODR designs in small claims cases, this paper has exclusively focused on the examples of state-run ODR services as discussed below.⁵⁴

2. ONLINE SMALL CLAIMS PROCESSES IN ACTION: A GLOBAL PERSPECTIVE

2.1. Online Civil Money Claims in England and Wales

In August 2017, the U.K. Ministry of Justice launched Online Civil Money Claims (OCMC), as a pilot project, where claimants were invited to use an online service to submit their small monetary claims.⁵⁵ This project was developed as part of the Reform programme in making new digital services available to the public.⁵⁶ The specific purpose was to provide an alternative mechanism – to the ordinary court proceedings and the existing Money Claim

⁵² *ibid.*

⁵³ Sela (n 20) 673-74.

⁵⁴ *ibid* 649-51.

⁵⁵ The OCMC service is accessible via <<https://www.moneyclaims.service.gov.uk/eligibility>> accessed 7 June 2022.

⁵⁶ For more information on the U.K. Judiciary Reform programme, see Natalie Byrom, 'Digital Justice: HMCTS data strategy and delivering access to justice' (The Legal Education Foundation 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 7 June 2022; Civil Justice Council, 'The Resolution of Small Claims,

Online service⁵⁷ – for citizens to have a faster and more simplified access to justice for their small claims. The user feedback indicated that the OCMC is a user-friendly online service. It was also reflected that the defendants' engagement in the process has particularly increased compared to the traditional small claims track. Due to the success of the six-months pilot scheme, the OCMC service was officially made available to the public in March 2018.⁵⁸

The OCMC can be used in the context of pecuniary claims with the fixed—and specified—amount of money of up to £10,000 involving only one claimant and defendant.⁵⁹ The defendant must have his/her address in England and Wales. The claims submitted through the OCMC are handled by the Country Court Money Claims Centre.⁶⁰ The cost of using this self-represented online service varies between £35 to £455 depending on the value of the claim. This fee must be paid at the time of lodging the claim. The applicant may be able to claim the fees back if he/she wins the case. Upon submission of the digital claim by the applicant, the claim notice will be instantly sent to an e-mail address the claimant has provided for the defendant. If the defendant challenges the claim, parties have the option to either escalate the case to ordinary court proceedings or agree upon reaching a settlement using the mediation service on the OCMC. The mediation service is free of charge with the aim of encouraging parties to settle the dispute at an early stage of the process.⁶¹ It is critical to note that in the post-pilot stage, the OCMC has introduced opt-out mediation for claims of less than £500. As a result, these cases are automatically referred to mediation unless a party or both refuse mediation.⁶² However, where both parties agree to mediation, the system will appoint a neutral third party to take disputants through the mediation procedure. Mediation sessions are carried out either on the telephone or online (e.g., through video-conferencing). The incorporation of mediation in the OCMC provides a great added value for this online service since it improves the use of alternative dispute resolution methods.

Interim Report 2021' (*UK Judiciary*, 2021) 6 <<https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf>> accessed 7 June 2022.

⁵⁷ Money Claim Online (MCOL) is an Internet-based service to be used for claims with a fixed amount of money not exceeding £100,000 in one claimant against maximum two defendants with an address in England and Wales. See 'Make a Money Claim Online' (*GOV.UK*) <<https://www.gov.uk/make-money-claim>> accessed 7 June 2022.

⁵⁸ Ignacio Oltra Gras, 'Online Courts: Bridging the Gap between Access and Justice' (2021) 10 *UCLJLJ* 24, 35 <<https://heinonline.org/HOL/P?h=hein.journals/ucljlj10&i=32>> accessed 7 June 2022.

⁵⁹ *ibid.*

⁶⁰ Civil Justice Council, 'The Resolution of Small Claims, Interim Report 2021' (*UK Judiciary*, 2021) 6 <<https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf>> accessed 7 June 2022.

⁶¹ 'Online Civil Money Claims Service (OCMC): Acting on Feedback' (*GOV.UK*, 2022) <<https://www.gov.uk/government/case-studies/online-civil-money-claims-service-ocmc-acting-on-feedback>> accessed 7 June 2022.

⁶² Ahmed Masood, 'Alternative Dispute Resolution During the Covid-19 Crisis and Beyond' (2021) 32 *King's Law Journal: Covid-19: Political Responses and Legal Consequences* 147, 151 <<https://doi.org/10.1080/09615768.2021.1886651>> accessed 7 June 2022.

The OCMC service is believed to be established on a needs-based approach with the focus on designing a new process that enables small claims creditors to seek justice through a user-friendly, expedited and simplified digital process.⁶³ User feedback on the pilot phase of the OCMC indicated that it is an easy-to-use online service. However, it should be noted that this assessment only covered the initial six-months of the pilot scheme. Therefore, further research is needed to determine the effectiveness of this digital process

2.2. British Columbia Civil Resolution Tribunal in Canada

The Civil Resolution Tribunal (CRT)⁶⁴, as Canada's first online tribunal, was established by the Civil Resolution Tribunal Act 2012 in British Columbia.⁶⁵ This administrative tribunal was established as an alternative to ordinary court proceedings.⁶⁶ The CRT provides citizens with a combined model of dispute resolution process including negotiation, facilitation and, if necessary, adjudication.⁶⁷ Currently, the CRT has jurisdiction over the majority of low threshold claims that fall under 5,000 Canadian dollars.⁶⁸

The CRT uses a multi-tier model of ODR to provide more convenient, cost-effective and facilitated access to justice for citizens.⁶⁹ Prior to beginning with the formal dispute resolution process, the system guides the applicant to use a solution explorer. This service is free and functions as a self-help tool which enables the applicant to use it without any necessity to get involved in a formal dispute resolution process with the counterparty. This web-based expert system assists the user – through asking a series of questions – in diagnosing the problem, and possibly finding tailored information in terms of legal rights to resolve the issue.⁷⁰ If the applicant is unable to find the answer to her/his

⁶³ Emma Jones, Hugh Mcfaul, and Francine Ryan, 'Clinical legal education in the United Kingdom: Origins, growth and the technological innovations and challenges of its future' (2017) 4 *German Journal of Legal Education* 107, 119-20 <<http://b-s-r-b.de/wp-content/uploads/2017/12/GJLE-2017-Vol.-4.pdf>> accessed 7 June 2022.

⁶⁴ 'Civil Resolution Tribunal' <<https://civilresolutionbc.ca/>> accessed 7 June 2022.

⁶⁵ Civil Resolution Tribunal Act, RSBC 2012, c C-25, [Bill 44].

⁶⁶ Anjanette H. Raymond and Scott J. Shackelford, 'Technology, ethics, and access to justice: Should an algorithm be deciding your case?' 35 (3) (2014) *Michigan Journal of International Law* 485, 505 <<https://heinonline.org/HOL/P?h=hein.journals/mjil35&i=503>> accessed 7 June 2022.

⁶⁷ Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 *Windsor Yearbook of Access to Justice* 112, 114 <<https://heinonline.org/HOL/P?h=hein.journals/windyrbj34&i=116>> accessed 7 June 2022.

⁶⁸ The CRT has also jurisdiction over specific types of traffic injury disputes; strata property (regardless of the amount of the claim); and disputes related to societies and cooperative associations of any amount. See Salter (n 67) 114; Rebecca Dickson, 'Does the Notice of Objection Mechanism Available to Civil Resolution Tribunal Small Claims Parties Enhance Access to Justice?' (2021) 54 *UBC L Rev* 119 <<https://heinonline.org/HOL/P?h=hein.journals/ubclr54&i=127>> accessed 7 June 2022.

⁶⁹ Shannon Salter S and Darin Thompson, 'Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' [2017] *Social Science Research Network* 116 <<https://heinonline.org/HOL/P?h=hein.journals/mgmdp3&i=115>> accessed 7 June 2022.

⁷⁰ See Dickson (n 68) 126; Dorcas Quek Anderson, 'Old ethics in new wineskins? Examining the ethical difficulties in court online dispute resolution' [2019] *Research Collection School of Law* <<https://>

issues in the solution explorer, she/he can file the claim with the CRT. At this stage, the applicant must pay an application fee that varies from 75 to 125 Canadian dollars depending on the amount of the claim.⁷¹ The parties can involve in an online negotiation process and try to reach a settlement. The negotiation phase is voluntary and aims to encourage the parties to find a solution in an amicable manner. As a result, parties can have an interest-based online negotiation and emphasise identifying their common ground through direct communications with each other to reach a possible agreement.⁷² The CRT model of online negotiation is optimised by a constructed direct party-to-party negotiation with particular emphasis on the parties' collaboration. This non-adversarial collaborative negotiation process facilitates a more amicable, cost-effective and expedited dispute resolution for the users.

During the negotiation process, the system provides parties with the possibility of using specific templates to form their statements and arguments. The process is, however, subject to short and strict timelines. Within the entire online negotiation procedure, the CRT's intervention is exclusively limited to monitoring the communications exchanged between the parties to ensure that communications are free from abuse or harassment.

If parties fail to reach a collaborative solution within their negotiations, the case will be referred to the next phase, namely facilitation. Parties are required to participate in facilitation processes where a neutral third party—as the case manager—assists them in reaching an agreement. In the event that facilitation fails, parties can escalate the case to adjudication as the final phase of the process. The system will appoint an independent CRT expert member to make a binding decision about the small claims dispute. In this phase, parties can submit their evidence and arguments to the CRT member before the process comes to an end.⁷³ The adjudication process is entirely conducted in writing unless the CRT decides it is necessary to hold an oral hearing or a combination of both. The oral hearings are, however, held by phone or videoconferencing.⁷⁴ Upon complete review of the case materials, the CRT member issues a decision about the dispute. If none of the parties raise any objection within 28 days of the small claim decision, it becomes binding and enforceable.⁷⁵

Today, CRT is indeed one of the most prominent examples of tiered ODR system designs that has successfully deployed technology to deliver justice for small claims. As indicated by Salter (2017), CRT is most notable for em-

ink.library.smu.edu.sg/sol_research/2920> accessed 7 June 2022.

⁷¹ Civil Resolution Tribunal (n 64).

⁷² Salter and Thompson (n 69).

⁷³ Dickson (n 68) 126-27.

⁷⁴ Civil Resolution Tribunal (n 64).

⁷⁵ The objection mechanism against a CRT decision is only available to small claims disputes. See Dickson (n 68) 126-27.

powering people and placing them at the heart of a dispute resolution process rather than focusing on the CRT and its relevant authorities.⁷⁶

2.3. Internet Courts and Small Claims in China

In line with China's ambitious judicial reforms in using new developments in information technology, the first Chinese Internet Court was established in Hangzhou in 2017.⁷⁷ As the e-commerce cross-border pilot zone of China, the primary focus of Hangzhou region has been on sales of consumer goods.⁷⁸ Many of these online transactions are low in monetary value. As a result, providing effective access to justice for low-value consumer claims has been of the utmost importance in the region.⁷⁹ Accordingly, Hangzhou Internet Court retains jurisdiction over certain types of disputes with emphasis on small claims disputes.

One of the principal objectives of this online court is to provide more effective access to justice to claimants of Internet-related minor cases.⁸⁰

Currently, the Internet Court has a rather limited scope of admissibility of subject-matter and jurisdiction. The eligible disputes include Internet-related small claims or cases submitted in the context of demand-for-payment that are at the first level instance.⁸¹ As pointed out by Guo (2021), the nature of these cases is more compatible with a fully digital process since they usually do not require complicated procedures and special means of remedy.⁸²

In terms of general territorial jurisdiction, Article 21 of the China Civil Procedure Law stipulates that the court in the place of domicile or the habitual residence—if it is different from the place of domicile—of the de-

⁷⁶ Salter (n 67) 129.

⁷⁷ 'Hangzhou Internet Court' <<https://www.netcourt.gov.cn/?lang=En>> accessed 7 June 2022.

⁷⁸ Lin Yang, 'China's Three Internet Courts' [2021] *The Journal of the Society for Advanced Legal Studies* 532 <<https://heinonline.org/HOL/P?h=hein.journals/amcrae2020&i=531>> accessed 7 June 2022.

⁷⁹ The Hangzhou Internet Court has extensive experience in dealing with e-commerce related claims in China. This region is the most developed e-commerce region in the country particularly as Alibaba's (the largest e-commerce company in China) headquarter is in Hangzhou. See Meirong Guo, 'Internet Court's Challenges and Future in China' (2021) 40 *Computer Law & Security Review* 8 <<https://doi.org/10.1016/j.clsr.2020.105522>> accessed 7 June 2022.

⁸⁰ Changqing Shi, Tania Sourdin and Bin Li, 'The Smart Court - A New Pathway to Justice in China?' (2021) 12 *IJCA* 1, 8 <<https://heinonline.org/HOL/P?h=hein.journals/ijca12&i=45>> accessed 7 June 2022.

⁸¹ In accordance with the Hangzhou Internet Court's Trial Rules of the Litigation Platform, admissible cases are: "1. *Contract disputes and product liability disputes arising from e-commerce relationships*; 2. *Disputes related to Internet service contracts*; 3. *Microfinance loan contracts with the value of up to RMB 500,000*; 4. *Specific Intellectual Property related disputes (i.e., copyright ownership infringements and domain names disputes)*; 5. *Disputes regarding Internet administration*; 6. *Certain types of Internet related civil and administrative disputes referred by higher instances of courts to the Hangzhou Internet Court.*" See Gianna Abegg and Felix Engelhardt, 'China Takes Online Dispute Resolution to the Next Level' (2019) 4 *Jusletter* 1, 4.

⁸² Guo (n 79).

fendant has territorial jurisdiction to deal with a lawsuit against him/her.⁸³ Thus, Hangzhou Internet Court has territorial jurisdiction over those who have their domiciles within this city. Despite this, the issue of geographical jurisdiction in the Internet Court remains a challenge to the general rules of territorial jurisdiction under the Chinese legal system, which requires in-depth scholarly discussions on the topic.⁸⁴

The Hangzhou Internet Court's Litigation Platform operates on a 24-hour basis allowing parties to have intermittent access to their case. This enables parties to freely submit or respond to a claim at their convenience. The entire dispute resolution process is held online on the Litigation Platform.⁸⁵ The Internet Court is equipped with the most advanced hardware facilities to assist the willing parties to attend live trials using these systems at the Court's premises in Hangzhou.⁸⁶

To file a claim, the claimant must register in the system and verify his/her identity either through using the Alipay application⁸⁷ or visiting the e-Court's premises and showing their identification documents to the clerk.⁸⁸ Upon identity authentication, the plaintiff must log into the Litigation Platform on the Hangzhou Internet Court's website to choose the type of claim and complete the online complaint form.⁸⁹ At this phase, electronic evidence can be uploaded and attached to the claim form. If the evidence is in hard copy, it must be scanned before submission to the system. The Internet Court uses encryption and blockchain technologies to ensure maximum security for electronic evidence and mitigate the risks of hacking or falsification of e-evidence.⁹⁰ Once the submission of the case is completed, the system will inform the defendant—via phone—about the case information. This notification contains a link to the website of the Hangzhou Internet Court Litigation

⁸³ According to Article 21 of China Civil Procedure Law: "A civil action instituted against a citizen shall come under the jurisdiction of the people's court in the place where the defendant is domiciled; if the defendant's place of domicile is different from the place of his or her habitual residence, the people's court in the place of his or her habitual residence shall have jurisdiction. A civil action instituted against a legal person or any other organization shall come under the jurisdiction of the people's court in the place where the defendant is domiciled.

⁸⁴ *if the places of domicile or habitual residence of several defendants in the same lawsuit come under the jurisdiction of two or more people's courts, each of those people's courts shall have jurisdiction.*" See Civil Procedure Law of the People's Republic of China 1991.

⁸⁵ See Lin Yifu, 'Rethinking the Territorial Jurisdiction of the Chinese Internet Courts' [2019] STL Law Review <<https://stllawreview.com/index.php/2019/04/17/rethinking-the-territorial-jurisdiction-of-the-chinese-internet-courts>> accessed 7 June 2022.

⁸⁶ Hangzhou Internet Court (n 77).

⁸⁷ Yang (n 78); Abegg and Engelhardt (n 81) 5.

⁸⁸ Alipay is an international online payment platform that was established in 2004 in Hangzhou, China by Alibaba Group. See 'Alipay' <<https://global.alipay.com/platform/site/ihome>> accessed 7 June 2022.

⁸⁹ Abegg and Engelhardt (n 81) 5.

⁹⁰ Huang-Chih Sung, 'Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China' (2020) 39 Computer Law & Security Review 1, 6 <<https://doi.org/10.1016/j.clsr.2020.105461>> accessed 7 June 2022.

⁹¹ *ibid* 3.

Platform. The defendant is then able to refer to the system to register, review the case, and submit any possible responses to the claim.⁹¹ According to the Hangzhou Internet Court website, the parties can agree on the pre-litigation mediation while their case is pending. If the parties agree to mediation, the system appoints an expert mediator to assist the disputants to reach an agreement within 15 days (or within any other mutually agreed timeframe).⁹² Where the parties reach a settlement, the case can be withdrawn from the system. On the contrary, if the mediation is not successful, the case will be escalated to the next level and it will be submitted to the Case Filing Division of the Internet Court.⁹³ The application will be then reviewed by an online Court's clerk to ensure the claim meets all the requirements.⁹⁴ Upon approval of the case, the claimant will be informed to pay the litigation fee within seven days from the notification date. The fees can be paid through e-wallets such as Alipay.⁹⁵

The court hearings are held entirely online and are recorded.⁹⁶ Where necessary, the online sessions can be transcribed using a speech recognition system to ensure the trial records are consistent and authentic. After the hearing, a transcript of the trial is uploaded into the system and the parties can suggest any necessary modifications to the text. The Internet Court uses an integrated artificial intelligence in the system that assists the judge to—partially or fully—generate the final judgement.⁹⁷ The parties can appeal against this judgement to the Hangzhou Intermediate People's Court.⁹⁸

According to the official statistics on the website of the Hangzhou Internet Court, approximately 14,700 claims have been registered into the system since the Platform establishment in 2017.⁹⁹ The acceptance rate of judgements by the parties has been 99.06%, which indicates the Internet Court is successful in delivering justice.¹⁰⁰ Further, the establishment of the two other Internet Courts in Beijing and Guangzhou—in 2018 and with the similar objectives—is another convincing indicator that the Internet Court has provided an innovative, expedited, cost-effective and more convenient model of access to justice for citizens.¹⁰¹ Nevertheless, there are still some concerns with the Internet Courts in China—e.g., territorial jurisdiction, and particu-

⁹¹ Abegg and Engelhardt (n 81) 6.

⁹² The parties are, however, free to appoint their preferred mediator. See *ibid* 7.

⁹³ *Ibid*.

⁹⁴ If the case review manifests that the claim is not suitable for online litigation, it will be transmitted to the ordinary offline litigation process. See *ibid*.

⁹⁵ *ibid*.

⁹⁶ Guo (n 79).

⁹⁷ Abegg and Engelhardt (n 81) 7.

⁹⁸ Sung (n 89) 9.

⁹⁹ Jianing Sang, 'Internet court on solving online consumer contract disputes: Case of China' (2021) 2 *Digital Law Journal* 23 <<https://doi.org/10.38044/2686-9136-2021-2-3-23-45>> Accessed 7 June 2022.

¹⁰⁰ Guo Wenli, 'The Four Major Judicial Innovations of China's Guangzhou Internet Court, China Guiding Cases Project' [2019] *Stanford Law School* <<https://cgc.law.stanford.edu/commentaries/clc-6-201909-29-guo-wenli/>> accessed 7 June 2022.

¹⁰¹ Shi, Sourdin, and Li (n 80).

larly the use of artificial intelligence in issuing judgements in relation to data privacy, fairness and efficiency of justice—which requires the need for detailed research.¹⁰²

2.4. Online Dispute Resolution and Small Claims in the United States

One of the principal objectives of embracing ODR as part of the civil justice system in the United States (U.S.) is to narrow the current ‘justice gap’ in the society. The aim was to specifically maintain an appropriate balance between civil legal needs of low-income citizens with available resources.¹⁰³ In this sense, over the past five years online civil dispute resolution, in particular for small claims, has gained significant momentum as part of the U.S. civil justice system reforms.¹⁰⁴ Many jurisdictions in the country have already established their specific ODR—e.g., online negotiation and online mediation tracks—models as part of their small claims proceedings. In some other jurisdictions, including Utah and California, the courts have taken a more serious approach towards launching ambitious ODR pilot projects to handle minor monetary cases.¹⁰⁵ According to Schmitz and Martinez (2021), ODR pilot programs are essential to learn from experiences. This is particularly helpful for court staff and lawyers who are key role players in identifying issues in civil justice system and working toward finding solutions to these deficiencies by using ODR.¹⁰⁶

One of the prominent examples of ODR pilots in the context of small claims started in Utah in September 2019.¹⁰⁷ Utah was the first state in the country to initiate a mandatory ODR Pilot Program to officially process small claims. This completely online track covers monetary claims of up to 11,000 USD.¹⁰⁸ The primary purpose of this ODR program was to promote access to justice for disputants without any necessity to be physically present in the court.¹⁰⁹ To achieve this goal, the Utah Court enables parties to benefit from

¹⁰² *ibid*; Guo (n 79).

¹⁰³ Legal Services Corporation, ‘The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (Washington DC Office 2017) 6 <<https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>> accessed 7 June 2022.

¹⁰⁴ Schmitz and Martinez (n 18) 2.

¹⁰⁵ Deno Himonas, ‘Utah’s Online Dispute Resolution Program’ (2018) 122 Dick. L. Rev. 875 <<https://heinonline.org/HOL/P?h=hein.journals/dknslr122&i=895>> accessed 7 June 2022. See also Paula Julianne Dardanes, ‘When Accessing Justice Requires Absence from the Courthouse: Utah’s Online Dispute Resolution Program and the Impact it Will Have on Pro Se Litigants’ (2021) 21 Pepp. Disp. Resol. L.J. 141 <<https://digitalcommons.pepperdine.edu/drlj/vol21/iss1/5>> accessed 7 June 2022.

¹⁰⁶ Schmitz and Martinez (n 18) 11.

¹⁰⁷ Hannaford Agor and others, ‘Impact of the Utah Online Dispute Resolution (ODR) Pilot Program: Final Report (State Justice Institute NCSC 2020) 2 <https://www.ncsc.org/_data/assets/pdf_file/0025/57823/NCSC-UT-final-2020.pdf> accessed 7 June 2022.

¹⁰⁸ See ‘Utah Court’ <<https://www.utcourts.gov/smallclaimsodr>> accessed 7 June 2022.

¹⁰⁹ Agor and others (n 107).

a self-education process, the evaluation of negotiations by a facilitator and access to an online hearing if necessary.¹¹⁰

To begin the process, parties must register into the court-run online platform developed by the State of Utah.¹¹¹ This system is accessible from both desktops and mobile devices. Prior to initiating the case, parties can go through education and evaluation phases to obtain accurate information about their claims and potential defences.¹¹² Educating self-representing litigants in small claims cases is a significant part of the Utah ODR Pilot.¹¹³ This initiative assists claimants and defendants to understand the process and court functions in relation to their case.¹¹⁴ Next, the parties can negotiate using the provided chat function to reach a settlement. All the shared data, documents, and communications remain confidential. At this stage, a system-appointed facilitator assists the parties in working towards reaching an agreement. If a settlement is not reached within 35 days from the start of negotiations, the facilitator prepares the parties for trial. The hearing can take place online; however, the court may consider the necessity for physical hearings based on the complexity of a case.¹¹⁵ Online trials can begin immediately after the parties submit all the evidence to the system. The online trial has no specified timeframe; nonetheless, the parties must abide by the specified deadline set by the judge. Once the decision is taken by the judge, this order will be posted on the same online platform where parties will have access to it.¹¹⁶

The Utah ODR pilot project demonstrated that digitalising small claims procedures can be an effective instrument in encouraging—specifically self-represented litigants and defendants—to actively engage in a more time-efficient and cost-effective dispute resolution process.¹¹⁷ As maintained by Schmitz and Martinez (2021), the Utah ODR pilot project proved that it is possible to reimagine civil court rules to adapt to new innovations in the judicial process to increase access to justice for low-income citizens.¹¹⁸

The lessons learnt from Utah's ODR program encouraged other States to embrace new technology to digitalise small claims procedures within their jurisdictions. In a recent example, the Superior Court of California, County of Los Angeles has introduced a free ODR program (LA-ODR) to deal

¹¹⁰ Melisse Stiglich, Utah Online Dispute Resolution Pilot Project: Final Report (National Centre for State Courts 2017), 7 <<https://ncsc.contentdm.oclc.org/digital/api/collection/adr/id/63/download>> accessed 7 June 2022.

¹¹¹ Himonas (n 105) 880.

¹¹² Stiglich (n 110) 8.

¹¹³ Due to the low threshold of claims, most parties – specifically claimants – are self-represented litigants that need legal assistance.

¹¹⁴ Stiglich (n 110).

¹¹⁵ *ibid* 11.

¹¹⁶ *ibid* 12.

¹¹⁷ Schmitz and Martinez (n 18).

¹¹⁸ *ibid* 12.

with civil monetary claims of up to 10,000 USD.¹¹⁹ The major purpose of this program is to provide accessible, timely and cost-effective digital access to justice for citizens. The LA-ODR uses an innovative and secure system to ensure maximum privacy and confidentiality for the users.¹²⁰ Similar to the Utah ODR pilot program, the LA-ODR platform provides precise step-by-step education for its users through simple questions about the dispute.¹²¹ This program guides plaintiffs and defendants by asking a series of questions—e.g., regarding the requested or offered amount of money; preferred payment dates; and any specific terms or conditions for payment—to assist them in planning their negotiations more effectively.¹²² Parties can use a chat function to negotiate and share documents. If they reach an agreement within two court days, the system automatically generates a form of settlement. This form must be approved and signed by parties prior to submission to a judge. However, if parties fail to reach an agreement, they must attend the scheduled court hearing.¹²³ It is to be noted that during the ODR process, parties can always request free assistance from a trained mediator. The mediator can chat with both parties in separate and joint chatrooms to help them reach a customised settlement for the dispute. Providing free expert mediation for small claims cases is an added-value of a court-connected ODR system, since it enables parties to reach an amicable and satisfactory settlement. Like the Utah ODR pilot, the LA ODR program aims at improving access to justice for claimants of small claims by using innovative technology. It should be, however, noted that the LA-ODR project is a quite recent establishment. Therefore, it is early to draw any conclusions from the efficiency, feasibility and benefits of this system for courts and citizens.¹²⁴

3. DIGITALISATION OF SMALL CLAIMS PROCEDURES IN THE EU

During recent decades, improving access to justice for citizens, and in particular consumers, has gained momentum in Europe. Considering that many consumer claims comprise a low amount of money, ordinary civil pro-

¹¹⁹ 'Los Angeles Court' <<http://www.lacourt.org/division/smalleclaims/SC0010.aspx>> accessed 7 June 2022.

¹²⁰ This system is designed and run by the *TurboCourt* Company. See 'Turbo Court Company' <<https://info.turbocourt.com>> accessed 7 June 2022.

¹²¹ Ariella Wasser, 'Online Dispute Resolution Services for Small Claims Now Live in Los Angeles County' (*TurboCourt* 24 February 2021) <<https://info.turbocourt.com/online-dispute-resolution-services-for-small-claims-now-live-in-los-angeles-county/>> accessed 7 June 2022.

¹²² 'LA-ODR Program FAQs' <<https://my.lacourt.org/odr/assets/ODR-SC-ProgramFaq.pdf>> accessed 7 June 2022.

¹²³ It is critical to note that the judge has no access to any of exchanged communications that took place on the LA-ODR platform. See 'Los Angeles Court' <<https://my.lacourt.org/odr/assets/ODR-SC-ProgramFaq.pdf>> accessed 7 June 2022.

¹²⁴ Stiglich (n 110) 16.

ceedings have not succeeded in meeting the justice needs of claimants.¹²⁵ This failure is mainly due to costly, time-consuming, and complex court proceedings. These barriers pose more serious challenges for consumers seeking legal redress for their cross-border cases. Consequently, access to justice for claimants of minor pecuniary claims does not properly meet the judicial protection standards of the right to an effective remedy and to a fair trial as envisaged by Article 47 of the CFREU, and also by Articles 6 (1) and 13 of the ECHR. To narrow this justice gap, digitalisation of small claims procedures is considered as an optimal solution for responding to the needs of creditors to facilitate their access to justice.¹²⁶ For this purpose, some regulatory initiatives have been launched by the EU and national policymakers to imbed technology – in both ADR and litigious procedures – into their judicial systems. The establishment of the ESCP Regulation (and its amendment) and the EU ODR Platform are amongst the most prominent examples at the Union level. At the Member State level, Estonia, Lithuania and recently Malta have attempted to move towards fully digitalising their civil justice systems. Nevertheless, with respect to small claims these efforts are still far from offering a tiered ODR system design as discussed in Sections I and II of this paper. In the sub-sections that follow, we discuss these regulatory initiatives for digitalising small claims procedures and analyse whether they have succeeded in promoting citizen access to justice for claimants.

3.1. At the European Cross-border Level

The Regulation on European Small Claims Procedure and its amendment were established by the EU Commission to encourage the use of simplified and digitalised civil proceedings for cross-border low-value claims. Currently, the ESCP Regulation covers transnational pecuniary claims of up to 5,000 euros within the EU.¹²⁷ As many small value disputes arise from e-commerce transactions, this instrument particularly intends to protect consumers against malpractices in the Digital Single Market.¹²⁸ With respect to digitalisation, the ESCP Regulation and its amendment explicitly encourage the Member States to use technology for reducing the time and costs of the proceedings. In this regard, Article 8 (1) of the Regulation stipulates that “*Where an oral hearing is considered necessary in accordance with Article 5(1a), it shall be held by making use of any appropriate distance communication technology, such as*

¹²⁵ See Xandra E. Kramer, ‘Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU’ in Karim Benyekhlef et al., *eAccess to Justice* (University of Ottawa Press 2016) 351.

¹²⁶ The 2021 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM (2021) 389, 4.

¹²⁷ With the exception of Denmark.

¹²⁸ See Hörnle (n 32) 5; Pablo Cortés, ‘Enforcing EU consumer policy more effectively: a three-pronged approach’ in Sara Drake and Melanie Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar Publishing 2016).

videoconference or teleconference, available to the court or tribunal, unless the use of such technology, on account of the particular circumstances of the case, is not appropriate for the fair conduct of the proceedings.” Likewise, the amending Regulation of 2015—within Recitals 7, 12, and 13—strongly emphasises the use of ICT facilities by the parties and the courts to reduce the costs and length of the ESCP proceedings.

Thus far, the ESCP has not been widely endorsed by creditors of small claims due to several obstacles. These barriers include the inadequate awareness of this procedure among citizens; excessive reference to national procedural and enforcement laws of the Member States; lack of centralisation; language barriers; and most significantly, the lack of adequate ICT facilities in courts.¹²⁹ Nevertheless, the current body of theoretical and empirical literature on assessing the effectiveness of the ESCP Regulation recognises the potential of this instrument in facilitating access to justice for transnational small claims.¹³⁰ Considering that the lack of sufficient digitalisation in national courts is one of the major hurdles to effective implementation of this instrument, scholars strongly suggest that Member States equip their courts with sufficient ICT facilities.¹³¹ Digitalisation of the ESCP proceedings will enable the courts to carry out the entire judicial process online. This will incentivise consumers to seek justice for their cross-border small claims—without the need to be physically present at the court—in a more cost-effective and expedited manner. Nonetheless, digitalisation will have the most significant impact on increasing consumer trust and confidence in the EU Digital Single Market.¹³²

¹²⁹ Marco Giacalone, Irene Abignente, and Sajedeh Salehi, ‘Small in Value, Important in Essence: Lessons Learnt from a Decade of Implementing the European Small Claims Procedure in Italy and Belgium’ (2021) 17 *Journal of Private International Law* 308.

¹³⁰ See Pablo Cortés, ‘Does the Proposed European Procedure Enhance the Resolution of Small Claims?’ (2008) 27 *Civil Justice Quarterly* 83; Xandra E. Kramer, ‘Small Claim, Simple Recovery? The European Small Claims Procedure and Its Implementation in the Member States’ (2011) 12 *Springer-Verlag* 119; Xandra E. Kramer, ‘European Procedures on Debt Collection: Nothing or Noting? Experiences and Future Prospects’ in Burkhard Hess, Maria Bergström, and Eva Storskrubb (eds), *EU Civil Justice: Current Issues and Future Outlook* (Hart Publishing, 2015); Elena D’Alessandro, ‘Choosing among the three regulations creating a European enforcement order (EEO regulation, EOP regulation, ESCP regulation): practical guidelines’ (2010) 1 *Int’l Lis* 39.

¹³¹ For a thorough analysis on the insufficiency or lack of digitalisation for ESCP cases refer to the published series of country reports that were conducted as part of Small Claims Analysis Net (SCAN) project in 2020. See Maksimilijan Gale and Katarina Zajc, ‘The Implementation of the European Small Claims Procedure in Slovenia’ (2020) 9 *EuCML* 262; Rimantas Simaitis, Vigitė Vebraitė, and Milda Markevičiūtė, ‘The Implementation of the European Small Claims Procedure in Lithuania’ (2020) 9 *EuCML* 267; Pablo M. Baquero and Matteo Winkler, ‘The Implementation of the European Small Claims Procedure in France’ (2021) 10 *EuCML* 36; Irene Abignente and Paola Chiara Ruggieri, and Flavia Rolando, ‘The Implementation of the European Small Claims Procedure in Italy’ (2021) 10 *EuCML* 40; Onntje Hinrichs and Jakob Thevis, ‘The Implementation of the European Small Claims Procedure in Germany’ (2021) 10 *EuCML* 75; Sajedeh Salehi and Marco Giacalone, ‘The Implementation of the European Small Claims Procedure in Belgium’ (2021) 10 *EuCML* 80.

¹³² Sara Hourani, ‘Mind the Gap? A Critical Analysis of the Recognition and Enforcement of Cross-Border Consumer ODR Outcomes in the EU’ [2022] *Revista Ítalo-española de Derecho procesal* 1 <<http://www.revistamarcialpons.es/rivitsproc/article/view/681/843>> accessed 7 June 2022.

In the context of online alternative dispute resolution for small claims at the Union level, the Commission adopted Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (the EU ODR Regulation).¹³³ One of the major objectives of this Regulation was to establish an EU-wide Online Dispute Resolution Platform to deal with C2B disputes.¹³⁴ According to Article 2 of the ODR Regulation, this Platform is designed to facilitate the use of effective, low-cost, expedited and fair non-litigious—in particular negotiation and mediation—dispute resolution mechanisms.¹³⁵

The Platform is in function since early 2016 as a central access point to connect EU-based consumers and traders with the nationally accredited ADR bodies.¹³⁶ These ADR institutions assist parties in settling the incurred disputes that have arisen from online purchases of goods and services.¹³⁷

The ODR Platform procedure comprises of four main phases. First, the consumer completes an online complaint form and submits it to the Platform.¹³⁸ This form is available in all the EU official languages. The users can also benefit from an integrated translation tool—in the system—to convert the exchanged messages and texts into the language of the recipient.¹³⁹ Given that language is one of the major impediments to access to justice for consumers in the EU, offering consumers gratis translation is a major step towards facilitating access to justice for them.¹⁴⁰

In the second phase, the trader will receive an e-mail that contains a link to the Platform. Once the trader has been notified about the complaint and provided with supporting information three possible scenarios can be imagined: i) to directly contact the consumer to resolve the dispute through negotiation; ii) to agree with the consumer to engage in the dispute settlement through an approved ADR body and pay the settlement fees, or; iii) to avoid responding to the consumer's complaint that closes the case within 30 calendar days since submission of the complaint.¹⁴¹ In the latter circumstance, according to

¹³³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

¹³⁴ Sciallis (n 13).

¹³⁵ It should be noted that the Platform is designed for consumers cases and not specifically to handle small claims. However, since most C2B disputes fall under the categories of low threshold claims, it is necessary to discuss the EU ODR Platform.

¹³⁶ Chung Yongkyun, 'Artificial Intelligence and the Virtual Multi-Door ODR Platform for Small Value Cross-Border e-Commerce Disputes' (2019) 29 *J. Arb. Stud.* 99, 104 <<https://heinonline.org/HOL/P?h=hein.journals/jarbstu29&i=530>> accessed 7 June 2022.

¹³⁷ Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 5.

¹³⁸ The Form is accessible via <<https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase>> accessed 7 June 2022.

¹³⁹ Emma Van Gelder and Alexandre Biard, 'The Online Dispute Resolution Platform after One Year of Operation: A Work in Progress with Promising Potential' [2018] *Social Science Research Network* 5 <<https://papers.ssrn.com/abstract=3169254>> accessed 7 June 2022.

¹⁴⁰ Cortés (n 1) 119.

¹⁴¹ *ibid* 121.

Article 9 (8) of the ODR Regulation, the consumer shall be informed by the Platform about the right to contact an ODR advisor to obtain information regarding other available remedies for seeking justice.¹⁴²

In the third stage, where the parties agree upon an approved ADR body to assist them in resolving their dispute, the Platform will automatically send the related information and details of the case to the chosen ADR entity. The dispute resolution body evaluates the dispute without delay and informs the parties whether it will handle the case. Upon refusal by the ADR body, the file will be closed, and the case will be treated according to the provisions of Article 9 (8) for contacting an ODR advisor.

In the final phase, the ADR entity has agreed to handle the case. It is critical to note that it is not mandatory to conduct the dispute resolution process on the EU ODR Platform. Thus, the ADR body can invite the parties to an external platform to proceed with the case. Upon completion of the process, the ADR body must issue the final decision within maximum 90 calendar days from the date it has completely received the case.¹⁴³ The ADR entity must transmit all the information regarding the case—including the date of receipt of the complaint, the subject-matter of the case, the closure date of the dispute resolution process and the result of the procedure—to the Platform.

Perhaps the Platform has had a major impact on raising citizens' awareness about the use of ODR methods for resolving C2B disputes. Citizen awareness is key in the success of an ODR instrument.¹⁴⁴ The data published by the Commission within the recent Statistical Reports on the function of the Platform reveals significant information on its recognition by consumers within the last three years.¹⁴⁵ According to these official statistics, 5 million in 2018¹⁴⁶, 2.8 million in 2019¹⁴⁷, and 3.3 million unique visits in 2020¹⁴⁸ have been registered for the Platform.

¹⁴² Article 9 (8) of the EU ODR Regulation on the 'Processing and transmission of a complaint' stipulates that: "*Where the parties fail to agree within 30 calendar days after submission of the complaint form on an ADR entity, or the ADR entity refuses to deal with the dispute, the complaint shall not be processed further. The complainant party shall be informed of the possibility of contacting an ODR advisor for general information on other means of redress.*"

¹⁴³ Cortés (n 1) 109.

¹⁴⁴ Maria Jose Schmidt-Kessen, Rafaela Nogueira, and Marta Cantero Gamito, 'Success or Failure? Effectiveness of Consumer ODR Platforms in Brazil and in the EU' (2020) 43 *Journal of Consumer Policy* 659, 668 <<https://rdcu.be/cMSXT>> accessed 7 June 2022.

¹⁴⁵ The 3rd Statistical Report of the European Commission on the Functioning of the European ODR Platform, December 2020 <https://ec.europa.eu/info/sites/info/files/odr_report_2020_clean_final.pdf> accessed 7 June 2022.

¹⁴⁶ The 2nd Statistical Report of the European Commission on the Functioning of the European ODR Platform, December 2018 <https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf> accessed 7 June 2022.

¹⁴⁷ The 3rd Statistical Report of the European Commission on the Functioning of the European ODR Platform (n 145).

¹⁴⁸ The 4th Statistical Report of the European Commission on the Functioning of the European ODR Platform, December 2021 <<https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>> accessed 7 June 2022.

From our perspective, the main shortcoming of the EU ODR Platform is that this online tool only functions as a referral point in connecting disputants to an ADR body. In this study, we have already discussed the effectiveness and greater compatibility of a tiered ODR design with small claims; in particular those arising from digital transactions. On this account, we suggest that the EU ODR Platform must be developed into a tiered ODR system with the possibility of hosting the entire dispute resolution process.

In this proposed system design, the Platform can play the role of a third-party in online negotiation. As the result, the disputants should be able to directly negotiate their issue without the need for any external intervention. The parties should have the possibility of recording all the exchanged communications and information between them.¹⁴⁹ If the parties cannot reach an agreement based on negotiation, they can request to go to online mediation. The mediator can be selected from a list of approved ADR bodies available on the Platform. At this stage, the mediator joins the process to assist disputants to reach a settlement. If mediation fails, and a party or both requests to go to litigation, the Platform should automatically refer the case to the competent court for online civil proceedings.

There is also a further possibility for connecting the EU ODR Platform with the ESCP proceedings.¹⁵⁰ This view was also echoed in a comprehensive study by Cortés and Maňko (2016) in which they emphasised establishing a synergic link between the ESCP and ODR systems.¹⁵¹ In this respect, there should be a pre-action mandate for parties to an ESCP case to first exhaust the possibility of settling their dispute using the EU ODR Platform.¹⁵² In the event that the parties fail to reach an agreement within the framework of the Platform, the case can be automatically referred to the competent court to follow with the ESCP proceedings in a fully online format.

Strengthening the link between these two significant EU initiatives can be an optimal solution to tackle the existing barriers to effective access to justice for creditors of cross-border low threshold claims. This synergy—in the capacity of a fully digital format—becomes a strategic necessity to respond to social emergencies such as the COVID-19 pandemic.

In a nutshell, the establishment of the ESCP and the EU ODR platform can be considered as initial steps taken by the EU in moving towards raising citizen awareness of online dispute resolution mechanisms. However, future improvements are crucial to develop efficient models of tiered ODR systems

¹⁴⁹ Cortés (n 1) 136-37.

¹⁵⁰ *ibid* 131.

¹⁵¹ Cortés (n 137) 56-60.

¹⁵² Mireze Philippe, 'ODR Redress System for Consumer Disputes' (2014) 1 *International Journal of Online Dispute Resolution* 68.

that provide creditors of small claims with a fully digitalised and trustworthy dispute resolution processes to be entirely conducted on a single platform.¹⁵³

3.2. At the EU Member State Level

The previous part discussed the recent digital developments in improving access to justice for claimants of small claims at the Union level. This part focuses on the status of digital small claims procedures within Member States. We will thus explore whether EU civil justice systems have already fostered any innovations related to digitalising small claims procedures within their respective jurisdictions.

During our investigations, we found out that there is limited progress regarding the digitalisation of small claims procedures at national level in Europe. The outbreak of the COVID-19 pandemic was a strong trigger for many Member States to adapt their court proceedings to the new physical mobility restrictions. The justice systems that were not well-prepared for the digital transformation of their proceedings had to deal with extreme delays in delivering justice to their citizens.¹⁵⁴

Nevertheless, there are a few Member States, such as Estonia and Lithuania, that have already taken well-documented measures in establishing e-justice systems. As a result, during the pandemic these States did not face major challenges in meeting the justice needs of their citizens including in small claims procedures. The widespread and well-established use of digital tools as integrated within their justice systems enabled these States to ensure the functioning of the courts continued during a time of uncertainty.¹⁵⁵

A prominent example of this can be observed in the case of Estonia and its advancements in delivery of digital civil justice. The Estonian e-File (e-

¹⁵³ For instance, as a solution the function of the EU ODR Platform can be enhanced through installations of some plugins into the already established system and increase capabilities of the system be a more user-friendly ODR service.

¹⁵⁴ For the 2021 progress reports of the EU Member States on the status of court digitalisation at national courts, see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report, The rule of law situation in the European Union*, 20 July 2021, COM/2021/700 final <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021DC0700>> accessed 7 June 2022.

¹⁵⁵ For Estonia, see European Commission: *Commission Staff Working Documents 2021 Rule of Law Report, Country Chapter on the Rule of Law in Estonia, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report, The rule of law situation in the European Union*, SWD/2021/708 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0708>> accessed 7 June 2022. For Lithuania, see European Commission: *Commission Staff Working Documents 2021 Rule of Law Report, Country Chapter on the Rule of Law in Lithuania, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report, The rule of law situation in the European Union* SWD/2021/717 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0717>> accessed 7 June 2022.

toimik)¹⁵⁶ system—in the form of a platform—was developed in 2005 with the aim to provide all citizens with effective, accessible and high-quality court services. Within the framework of low-value cases, Estonia has not introduced a distinguished and expedited online track. Hence, the claimants and defendants can use the e-File system to submit and respond to civil cases to the courts via this fully digital platform. This system also allows parties and courts to use a digital workflow to share relevant data and documents that are secured by digital signature or by encryption.¹⁵⁷ During the pandemic, the e-File platform enabled Estonia to be one of the best performing Member States in providing advanced digital justice to its citizens. By mid-2020, Estonia officially launched a virtual courtroom where civil cases can be dealt with in an entirely online format. All the stages of processing of a case from submission of the claim, responses, exchange of documents and data, submission of evidence and hearings are conducted completely online on this platform.¹⁵⁸ In general, the Estonian civil justice system has proven to be highly advanced in the digitalisation of civil proceedings.

Lithuania is another example that deploys advanced ICT facilities within its court system to provide more effective and accelerated access to justice for its citizens. The government has taken serious measures towards digital transformation of the country's justice system. The main core of these efforts is evident in developing a digital unified information system (*LITEKO*) in 2004.¹⁵⁹ The major aim is to automate the systematic collection, storage, and provision of data related to the courts' functions. *LITEKO* has been constantly upgraded with new ICT functions to expedite the procedures and provide high-quality access to public services for the courts and other users. This has improved public access to judicial activities.¹⁶⁰ In relation to digitalising court proceedings, Lithuania has adopted the rules on the use of ICT tools in courts to conduct virtual hearings through videoconference and teleconference in 2013. Prior to the pandemic, virtual hearings had not been frequently used in civil proceedings including small claims cases. Nonetheless, with the outbreak of the COVID-19 these already existing rules on the use of ICT for the hearings were sufficient to swiftly shift from physical to fully digital litigations.¹⁶¹

Within our investigations, we noticed that Malta has launched a fully digitalised court proceedings to handle small claims cases. To promote the effectiveness and quality of court proceedings, the Maltese government integrated the use of ICT tools into its civil justice system. The e-Court project

¹⁵⁶ 'E-File' <<https://www.rik.ee/en/international/e-file>> accessed 7 June 2022.

¹⁵⁷ Anett Numa, 'Artificial Intelligence and the New Reality of e-Justice' (*e-Estonia.com*, 27 April 2020) <<https://e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice>> accessed 7 June 2022.

¹⁵⁸ The Commission Report on the Rule of law in Estonia (n 155).

¹⁵⁹ 'Official Website of the Lithuanian Courts' <<https://www.teismai.lt/en/national-courts-administration/activities/competence-areas/685>> accessed 7 June 2022.

¹⁶⁰ *ibid.*

¹⁶¹ See Vīgita Vēbraité, 'Impact of the COVID-19 pandemic on court proceedings in Lithuania' (2020) 7 *Access to Justice in Eastern Europe* 156 <<https://heinonline.org/HOL/P?h=hein.journals/ajee3&i=158>> accessed 7 June 2022.

was implemented as part of Malta's first Digital Justice Strategy in 2020.¹⁶² The fundamental objective is to make justice accessible to the public, in particular in response to the pandemic-induced restrictions.¹⁶³

To initiate the online small claims tribunal procedure, the plaintiffs and defendants can submit and respond to the small claims complaints by referring to the e-Court system. This website provides direct links to necessary forms such as claim, response, counterclaim and appeal.¹⁶⁴ These forms are used at different stages of the dispute resolution process. The website also provides the users with brief information about the function of each form, the eligibility to use the specified form and the timeline of the submission process. Upon selecting the appropriate form, the user is directed to the main e-Court case management system for registration and filling in the form. Users are required to register through their e-ID prior to initiating the process.¹⁶⁵ The entire process is conducted on the single platform in a fully digitalised format. Given these features, the e-Court website does not provide sufficient information regarding the post-submission status of digital small claims. This is a new initiative in full digitalisation of small claims court proceedings in Malta. Therefore, it is early to provide a concrete analysis of the effective function of this platform and its impact on access to justice for citizens.

To conclude, despite these digital advancements in judiciary services, none of these Member States have offered a specific tiered ODR process for handling small claims cases within their respective jurisdictions.

4. SMALL CLAIMS, DIGITALISATION, AND THE EU'S POST-COVID PERSPECTIVE

4.1. The Lessons to Learn and the Opportunities to Take

The outbreak of the COVID-19 pandemic provided civil justice systems with an unexpected opportunity to experience online dispute resolution. Most significantly, virtual hearings were used for a wide variety of disputes, proving that the dream of digital justice can come true. Small claims are considered an appropriate candidate to be handled through an entirely digital process comprising of OADR and online litigation. Digitalisation of small claims procedures – through a tiered ODR design – can be a viable solution to tackle barriers of time, costs and complex civil proceedings. This is proved

¹⁶² See Malta's e-Court website <<https://ecourts.gov.mt/onlineservices>> accessed 7 June 2022.

¹⁶³ Government of Malta: Ministry for Foreign and European Affairs, 'Rule of Law: Malta's Input to the 2021 European Rule of Law Annual Report' (2021) 17 <<https://ec.europa.eu/info/sites/default/files/mt-input.pdf>> accessed 7 June 2022.

¹⁶⁴ See e-Court Website <<https://ecourts.gov.mt/onlineservices>> accessed 7 June 2022.

¹⁶⁵ See Government of Malta's website <<https://eid.gov.mt/auth/Account/Login/08d0bb129da54f-70be9c459def657f87?minLevel=1&forceFullLoginScreen>> accessed 7 June 2022.

by the successful implementations of online small claims dispute resolution models across the world, such as Utah ODR Pilot in the U.S. and CRT in Canada.

The situation, however, is different in Europe. At the Union level, most transnational small claims arise from malpractices by traders in the Digital Single Market. Thus, the EU has pursued this long-term objective of protecting consumers as the weaker position in any given trade by providing them with an expedited, cost-efficient and simplified access to justice for their low-value claims.

With the pandemic and its accompanying extreme delays in the delivery of justice, this objective was declared to be more important than ever to the EU. Therefore, it became a necessity to accelerate substantial reforms of judicial systems with new technologies and innovations. According to the EU Justice Scoreboard 2021, digitalisation of access to justice as a core element to improve effectiveness of justice systems in Member States is being monitored by the Commission.¹⁶⁶ In December 2020, the Commission manifested its strong willingness to speed up moving towards digital transformations in Member States by issuing a Communication.¹⁶⁷ This instrument proposes a toolbox of opportunities and targeted measures on digitalisation of justice in the European Union.¹⁶⁸ The ultimate objective of this Communication is to enhance access to justice and efficiency of justice systems in the Union. To achieve this, digital technologies are deployed to promote cross-border judicial cooperation among competent authorities of the member countries.¹⁶⁹

In the specific context of small claims, the Communication emphasises facilitating access to justice for claimants by promoting user-friendliness and efficiency of the ESCP. Effectiveness has been defined in the context of overcoming hurdles such as lengthy, costly and complex national civil procedures. As a solution, the Communication suggests that all the relevant—to the ESCP proceedings—information must be easily and directly accessible on the e-Justice portal as an entry point for the public. The Communication also proposes to establish a cross-border access point on this portal. This establishment will enable creditors of small claims to file their ESCP claims

¹⁶⁶ The 2021 EU Justice Scoreboard (n 126).

¹⁶⁷ According to the Staff Working Document accompanying the Communication on Digitalisation of justice in the European Union 2020, only 10 out of 26 EU Member States use ICT (videoconferencing) tools in handling civil and commercial cases. This statistical data indicates the considerable needs for digitalising justice systems in the EU. See the Commission Staff Working Document (2020) 540 final accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Digitalisation of justice in the European Union, a toolbox of opportunities COM (2020) 710 final, 7.

¹⁶⁸ This toolbox refers to a great range of legal, financial, and information communication technology tools to be used by various actors – i.e., plaintiffs, defendants, lawyers, judges, other judiciary staff, etc – in justice systems of Member States based on their needs. See *ibid.*

¹⁶⁹ *ibid.* 2.

directly on the portal and get electronically connected with national authorities of the competent jurisdiction.¹⁷⁰

The Communication embodies the strong and incentivised approach from the EU to accelerate digital transformations of justice systems on the continent. Despite these devoted efforts, there is not any significant progress in the context of promoting access to justice for claimants of small claims. From our viewpoint, this existing justice gap can be narrowed using a tiered ODR system design to handle small claims.

Digitalisation of small claims—as part of the general ODR regime—makes justice more accessible to everyone. As a result, citizens' fundamental rights of access to an effective remedy and to a fair trial are protected. Finally, future measures and time will prove whether digitalisation of civil justice systems provides effective access to justice for citizens, including claimants of small claims.

4.2. Digitalisation and the Risks to Avoid

There are indeed opportunities in fully digitalising small claims procedures. Nonetheless, there are also some concerns that are specifically expressed in terms of conducting virtual court proceedings either independently or in conjunction with OADR methods. Therefore, it would be necessary for the policymakers to primarily make a risk assessment prior to adopting ICT implementations into their civil justice systems.

In this respect, it is equally important to avoid overemphasising the advantages of fully digitalised dispute resolution models as it may lead to ignoring the potential barriers and risks.

It is crucial to note that there are real obstacles to launching fully digitalised court proceedings, including in small claims cases. Scholars have expressed serious concerns about online litigation and virtual hearings. They have explicitly referred to the public perception of equal access to justice and procedural fairness.¹⁷¹

In relation to access to justice, according to the Joint Technology Committee 2020 Report on virtual court processes, there is a common perception among the public that physical hearings are superior to online hearings.¹⁷²

¹⁷⁰ *ibid* 19.

¹⁷¹ See Legg (n 18); Elizabeth G. Thornburg, 'Observing Online Courts: Lessons from the Pandemic' [2020] SMU Dedman School of Law Legal Studies Research Paper No. 486 <<https://ssrn.com/abstract=3696594>> accessed 7 June 2022; Joe McIntyre, Anna Olijnyk, and Kieran Pender, 'Civil Courts and COVID-19: Challenges and Opportunities in Australia' (2020) 45 *Alternative Law Journal* 195 <<https://doi:10.1177/1037969X20956787>> accessed 7 June 2022; S.I Strong, 'Procedural law in a time of pandemic: Australian Courts' response to COVID-19' (2020) 20 *University of Sydney Law School* 2 <<https://ssrn.com/abstract=3639673>> accessed 7 June 2022.

¹⁷² Joint Technology Committee (JTC), 'Judicial Perspectives on ODR and Other Virtual Court Processes' (May 2020, ver. 1.0) <https://www.ncsc.org/_data/assets/pdf_file/0023/34871/2020-05-18-Ju

This is especially important in cases that involve people with disabilities or individuals from the most vulnerable groups in society. According to this approach, online litigation may deprive individuals with special needs effective access to justice. These special needs have been broadly defined in the context of the need for language translation, mental illness issues and physical disabilities. In addition, low-income citizens and those with limited access to ICT facilities are considered as vulnerable groups of society. As a result, the fundamental right of these vulnerable groups and people with special needs in accessing justice for their small claims might be infringed by virtual court proceedings.

On the other end, procedural fairness is referred to as another barrier that may arise with the implementation of virtual court proceedings. In terms of small claims virtual hearings, procedural fairness – as a main pillar of the rule of law – refers to the opportunity for receiving the claim notification and to be heard. In this sense, the main expressed concern is that online hearing may deprive or hinder a party from presenting or challenging arguments or evidence.¹⁷³

Safeguarding individuals' access to justice as a fundamental right and procedural fairness as a central concept to the rule of law are of crucial importance in the establishing of any online court proceedings. Therefore, policy-makers must take necessary and appropriate measures to ensure the rights of individuals are guaranteed while participating in virtual hearings. Broadly speaking, in designing any ODR system particular attention must be paid to ensure its compliance with existing judicial protection standards in guaranteeing effective access to justice.¹⁷⁴

CONCLUDING REMARKS

The main purpose of this study was to investigate the most recent developments in the establishment of completely online small claims procedures from the global and the European perspectives.

It was argued that an online dispute resolution system design plays a significant role in fulfilling the justice needs of claimants of small claims and safeguarding their effective access to justice. This study has shown that a tiered ODR system design—OADR methods in conjunction with online litigation—can be a highly suitable dispute resolution model for small claims cases. It was maintained that this design is compatible with the nature of e-commerce driven low-value claims, in particular where individuals are self-represented litigants.

dicial-Perspectives.pdf> accessed 7 June 2022.

¹⁷³ Legg (n 18).

¹⁷⁴ Fernando Esteban de la Rosa, 'ADR-Rooted ODR Design in Europe: A Bet for the Future' (2018) 5 *International Journal of Online Dispute Resolution* 154, 156.

This study reviewed the most prominent examples of tiered ODR systems for small claims from across the world, including Online Civil Money Claims in the U.K.; Civil Resolution Tribunal in Canada; the Internet Courts in China; and the Utah and the Los Angeles ODR Pilot projects in the U.S. The scope of application and functions of these systems were closely discussed. It was concluded that these ODR systems—in comparison to the ordinary civil proceedings—have generally delivered more expedited, simplified and cost-efficient justice to their users.

At the EU level, it was confirmed that despite the potential of the ESCP Regulation and the EU ODR Platform, they have not achieved considerable success in facilitating access to justice for citizens. One of the major reasons for this failure can be found in the lack of sufficient awareness among citizens about the existence and functions of these instruments. It was pointed out that creating a strong synergy between the ESCP and the Platform can promote their effectiveness and increase their use by claimants of low-value claims.

At the Member States level, it was stated that only a few jurisdictions – specifically Estonia and Lithuania – have implemented advanced ICT facilities for digitalising court proceedings. The evidence from these jurisdictions proved that during the COVID-19 pandemic these States faced far less barriers in making justice accessible to their citizens and meet their judicial needs. Nevertheless, none of the European jurisdictions have adopted a tiered ODR system design – like the discussed non-European models – for small claims.

The findings of this study indicated that the outbreak of the pandemic incentivised the EU and its member countries to improve digital access to justice. It was noted that a tiered ODR system design to deal with small claims can provide a timely response to the pandemic's negative impact on prolonging the (already) lengthy civil proceedings. Given this, the EU and its Member States' journey towards an entirely digitalised small claims procedures should be observed from a post-pandemic perspective.

Eventually, this paper emphasised a careful consideration of the possible risks to the equal access to justice and procedural fairness in designing fully digitalised small claims procedures. It was recommended that policymakers carry out risk assessments, for digitalising court proceedings specifically, prior to launching an ODR system.

