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From digitisation to digital transformation: A case for online courts in commercial disputes?

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For more information go to: <https://www.ebrd.com/what-we-do/sectors/legal-reform.html>.

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LIST OF ABBREVIATIONS

ADR – alternative dispute resolution

COOs – countries of operation of EBRD¹

CRT – Civil Resolution Tribunal

EBRD – European Bank for Reconstruction and Development²

E-ID – electronic identification

HMCTS – Her Majesty’s Courts and Tribunals Service

ODR – online dispute resolution

SME – small and medium enterprise

¹ EBRD, “Where we are”, <https://www.ebrd.com/where-we-are.html> (last accessed 15 September 2020).

² EBRD, “Who we are”, <https://www.ebrd.com/who-we-are.html> (last accessed 15 September 2020).

INTRODUCTION

Background

1. Technology has transformed the way individuals communicate, conduct business, make payments, work, and entertain. However, it has affected the way in which individuals defend their rights in courts only to a limited extent, usually through automation of redundant tasks. As one of the oldest institutions, courts have remained quite 'immune' to technological innovations. The obsolete nature of the manner in which they function in many jurisdictions has been recently emphasized by the COVID-19 pandemic.

2. The role of the judiciary, as a check on the executive power and upholder of the rule of law, has been particularly crucial during this time³. Courts had to reduce significantly the access to or even close at a time when they were already overburdened by backlogs. As a result, in an attempt to alleviate the impact of the crisis courts themselves with the support of the government took measures. In many jurisdictions, such as Belgium, Denmark, Greece, Portugal, Slovenia, these measures focused on the introduction of videoconferencing solutions, telephone conferences, increase in use of written procedures, and service of documents via emails.⁴ Similarly, some African, Asian and American jurisdictions adopted practices, proportional to their level of preparedness and digitisation⁵.

3. Policy reforms are a key priority of the European Bank for Reconstruction and Development (hereinafter, the EBRD). They promote well-governed institutions, appropriate regulatory environment for the business climate, help access investment opportunities and ensure the development of the private sector over the long term.⁶ The progress in this area has been, however, recently hindered by COVID-19. As a result, EBRD is now committing all its activity in 2020/2021 to helping counter the economic impact of the coronavirus pandemic.⁷ In line with that commitment, significant efforts are made towards addressing pandemic's effects, including with a view to preserving and promoting the investor-friendly, transparent and predictable legal environment in EBRD countries of operation (COOs). In light of these events, the EBRD would like to invite policymakers from its COOs to consider whether the necessity to make more profound transformations around the work of courts has gained momentum. This call is focused on potential transformation of how courts deal with commercial disputes. It suggests that the development of online courts is a promising option for such a transformation.

³ UNODC (2020) "Guidance Note: Ensuring Access to Justice in the Context of COVID-19" (available at: <https://bit.ly/3d1F8Ua>).

⁴ For more information on the measures taken by some jurisdiction, please check the E-Justice page of the European Commission "Impact of COVID-19 on the justice field" (available at: https://e-justice.europa.eu/content_impact_of_the_covid19_virus_on_the_justice_field-37147-en.do).

⁵ Somalia initiated criminal proceedings via video conference, Kenya implemented e-filings, video linked detention hearings and Lebanon accelerated its criminal investigation using virtual platforms; United Nations, Peacekeeping, Remote court hearings and judicial practices in response to COVID-19 in mission and other fragile settings.

⁶ EBRD, "Why policy reform", <https://www.ebrd.com/what-we-do/policy-reform/why-policy-reform.html> (last accessed 25 September 2020).

⁷ EBRD, "Why policy reform", <https://www.ebrd.com/what-we-do/coronavirus> (last accessed 25 September 2020).

Terminology and framework

4. There are many terms that circulate nowadays in the area of technological innovations in the justice sector and the judiciary, in particular. Among them - cyberjustice⁸, e-justice⁹, e-court¹⁰, online court¹¹, online dispute resolution (ODR)¹², e-litigation¹³, etc. While bearing some nuanced differences, many terms are frequently used interchangeably and all have in common the element of digital innovation in the judicial dispute settlement process.

5. As one can infer from its title, this discussion paper operates with five key terms: digitisation, digital transformation, online courts, commercial disputes, and small claims. By **digitisation**, in the context of the judiciary, we mean the transfer of information or processes to digital form.¹⁴ A simple example of digitisation is the scanning of claims or paper-based judgments and their storing in an electronic system. Another term that is frequently circulated is **digitalisation**. It has been defined in quite vague terms, including as ‘the way many domains of social life are restructured around digital communication and media infrastructures.’¹⁵ However, for the purpose of this paper, the terms digitisation and digitalisation will be used interchangeably.

6. The other key notion is **digital transformation**. This is a concept which entails not only the integration of technical innovations in the workings of the judiciary but the rethinking of court processes in their entirety to ultimately increase access to courts and court user satisfaction.

For the purpose of this paper, **online courts** shall refer to proceedings conducted entirely remotely: from the online submission of the claim to the delivery of a judgment through an online service available to the litigants or their representatives.¹⁶ Finally, **commercial disputes** refer to disputes of

⁸ European Commission for the Efficiency of Justice (CEPEJ) (2019), “Toolkit for supporting the implementation of the Guidelines on how to drive change towards Cyberjustice” (available at: <https://rm.coe.int/cepej-toolkit-cyberjustice-en-2019-7/168094ef3e>).

⁹ See WoltersKluwer (2018) “Impact of e-justice on law firms” (available at: <https://www.wolterskluwer.com/en-gb/expert-insights/impact-of-e-justice-on-law-firms>).

¹⁰ See World Bank (2014) “Improving court efficiency: the Republic of Korea’s e-court experience” (available at: <https://bit.ly/34sVdhU>).

¹¹ See Supreme Court of New South Wales (2007) “Practice Note No. SC Gen 12. Supreme Court – online court Protocol” (available at: <https://bit.ly/3nmJqKz>).

¹² See ABA Task Force on Electronic Commerce And Alternative Dispute Resolution (2002) “Addressing Disputes in Electronic Commerce. Final Report and Recommendations of The American Bar Association’s Task Force on Electronic Commerce and Alternative Dispute Resolution” (available at: <https://bit.ly/3daSqxS>), p. 1. For more information on ODR, see Ethan Katsh, Orna Rabinovich-Einy (2017) “Digital justice: technology and the internet of disputes”, Oxford University Press; Gabrielle Kaufmann-Kohler, Thomas Schultz (2007) “Online Dispute Resolution: Challenges for Contemporary Justice”, Kluwer Law International.

¹³ See Ahmad Tholabi Kharlie, Achmad Cholil (2020) “E-Court and E-Litigation: The New Face of Civil Court Practices in Indonesia”, International Journal of Advanced Science and Technology Vol. 29, No.02, pp. 2206-2213.

¹⁴ Jason Bloomberg (2018) ‘Digitization, Digitalization, And Digital Transformation: Confuse Them At Your Peril’ (available at: <https://bit.ly/2GGel3E>).

¹⁵ JS Brennen, D Kreiss (2016) “Digitalization”, The international encyclopaedia of communication theory and philosophy, pp. 1-11.

¹⁶ Richard Susskind (2019) “Online Courts and the Future of Justice”, Oxford University Press.

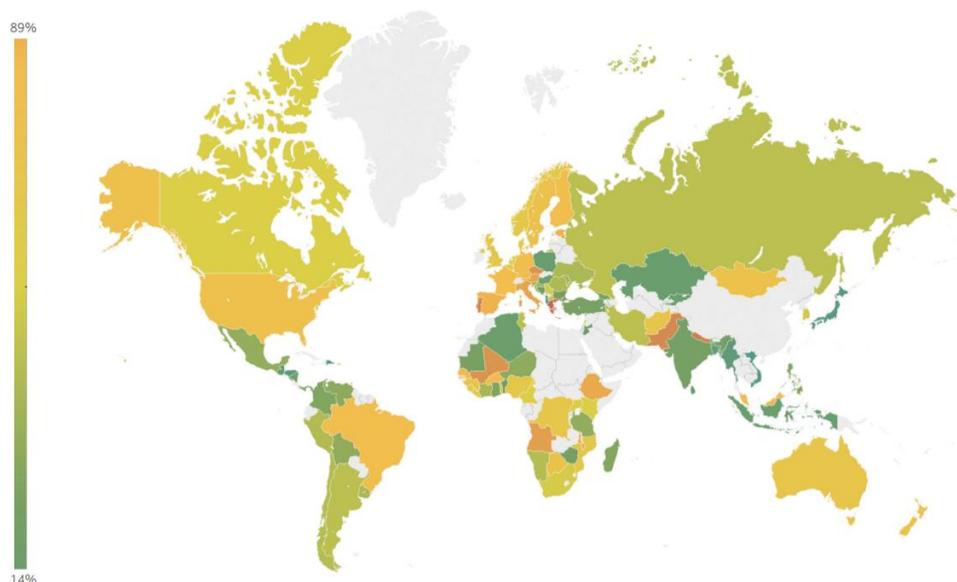
commercial nature, whether contractual or not¹⁷, while **small claims** refer to “any simplified or fast track procedure for claims up to a certain fixed monetary threshold, as specified under the law.”¹⁸

Scope and purpose

7. The release of this discussion paper is intended to provide a context and framework for public discussion about the **digital transformation** of courts.

8. The establishment of online courts should not be viewed as a means of prioritising efficiency over justice. While speeding up proceedings and reducing reliance on paper-based cases are desirable outcomes, the primary driver behind the establishment of online courts is need to ensure a better **access to justice**. The World Justice Project data shows that an overwhelming number of people are facing experience legal problems.¹⁹ More than half of the estimated 36% of people in the world who

Figure 2a. Proportion who Experienced Legal Problems in the Last Two Years



have experienced a non-trivial legal problem in the last two years cannot meet their civil justice needs.²⁰ But individuals are not the only ones who face significant limitations in access to justice. Cost associated with court proceedings are an important barrier for SMEs, for instance. While 51% of large enterprises reported that costs of court proceedings are satisfactory, only 24% of SMEs did so.²¹ That is significant given the fact that SMEs amount to 99% of the entire business community in the EU.

¹⁷ See, for example, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002) [accessed 2019-08-16], available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf, p 56

¹⁸ The World Bank Group, “Fast-Tracking the Resolution of Minor Disputes: Experience from EU Member States” (available at: <https://bit.ly/30Fshlw>), p. 11.

¹⁹ World Justice Project (2019) “Global Insights on Access to Justice 2019” (available at: <https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap>), p. 6.

²⁰ World Justice Project (2019) “Global Insights on Access to Justice 2019” (available at: <https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap>), p. 10.

²¹ European Commission (2012), “Business-to-Business Alternative Dispute Resolution in the EU”, Flash Eurobarometer 347.

9. Against this background, the commitment of the international community to implement the **Target 16.3 of the Sustainable Development Goal** to promote the rule of law at the national and international levels, and ensure equal access to justice for all has created an opportunity to start identifying best ways for improving access to justice by employing available technology and rethinking the judicial processes.

10. Another driving force behind the digital transformation of the judiciary is **increase in transparency** and the **fight against corruption**. Aside from its economic implications, corruption undermines the functioning of the governmental institutions, including the national courts²². Corruption in the COOs is often enhanced by bureaucratic stagnation and public sector arbitrariness. Naturally, this creates distrust of the public towards the judiciary and generates an obstacle to an impartial trial for both natural and legal persons. The digitisation of the court's functions and digital transformation offer automation and transparency in the procedural steps of the litigation, allow electronic evidence, produces efficiency and track records of the cases. Consequently, it minimizes the possibility for corrupt practices and by accountability and promoting transparency.

11. This paper focuses on the establishment of online courts in relation to **commercial disputes**. At the same time, disputes based on small claims in particular, seem a good terrain for transitioning to an online medium. There are several reasons for that, including the fact that in many jurisdictions these claims are often examined without court hearings and based on documents submitted by the parties. They present a rather straightforward legal problem; governed by a simplified set of rules of civil procedure.

12. As a result, the focus in this paper is on the digital transformation of courts through the development of online courts in commercial disputes, particularly those with a **small value**.

13. By issuing **this paper**, the Bank seeks input from COOs on experiences, lessons learned and suggestions that have not been mentioned here. It aims to accomplish the following:

- initiate a transparent and coordinated discussion about the digital transformation of courts with a focus on commercial disputes;
- identify the pre-requisites for, as well as the benefits and challenges that governments face in the process of digital transformation of courts;
- identify where and how EBRD and development institutions can make a meaningful impact on the courts' digital transformation process.

As illustrated above, the scope of the paper is limited. It is not a comprehensive overview of existing models of online courts, nor does it provide a roadmap for countries that consider introducing online courts.

14. This discussion paper will be mailed out to key stakeholders, and posted on the EBRD website for public comment in October 2020 to allow all interested parties to share their thoughts. Based on public input and stakeholder consultations scheduled to take place during an online event in October

²² Special Rapporteur Diego García-Sayán (2017) "Corruption, Human Rights, and Judicial Independence", United Nations, A/72/140 (available at: <https://www.unodc.org/dohadeclaration/en/news/2018/04/corruption-human-rights-and-judicial-independence.html>).

2020, the final paper will be published and EBRD LTT team may use this material in potentially developing projects aimed at assistance in the development of online courts.

Methodology

15. This paper provides a brief and general overview of the existing models of online courts and the level of digitalisation of the judiciary in several jurisdictions. It does not claim to be comprehensive. The paper relies on empirical research and is primarily based on the analysis of answers provided to a questionnaire developed by the EBRD LTT team and on a review of national legislation.

16. In May 2020, EBRD conducted a survey among 20 COOs²³ to obtain information about the most recent developments in their court digitalisation processes. All of the selected countries are jurisdictions where EBRD currently has operational projects, which facilitated significantly the collection of data. The information was provided by law firms from those 20 jurisdictions.²⁴ The questions focused on the risk of postponement and backlogs amid COVID-19, the availability of a case management system for courts and online information system available to litigants and attorneys, as well as the use of remote hearings by courts. The full list of questions may be found in Annex 1.

17. In addition, the authors also relied on an inductive approach to research all the jurisdictions mentioned, including those which have online courts or systems which contain some elements of an online court. The information systematized in this paper is based on open data, including reports of the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ),²⁵ EU Justice Scoreboard²⁶ and the World Bank Doing Business Country Reports.²⁷

Digitisation vs digital transformation and on-line courts in the context of COVID-19

18. COVID-19 has highlighted the out of date nature of existing courts. Faced with the risks associated with the pandemic, many courts had to close, allowing only urgent matters to be heard. No jurisdiction affected by COVID-19 could avoid postponements of some case hearings. While in some jurisdictions courts were left to decide on the appropriateness of court hearing postponement, an overwhelming majority of the jurisdictions which responded to the EBRD questionnaire reported that they had been directed to postpone commercial case hearings.

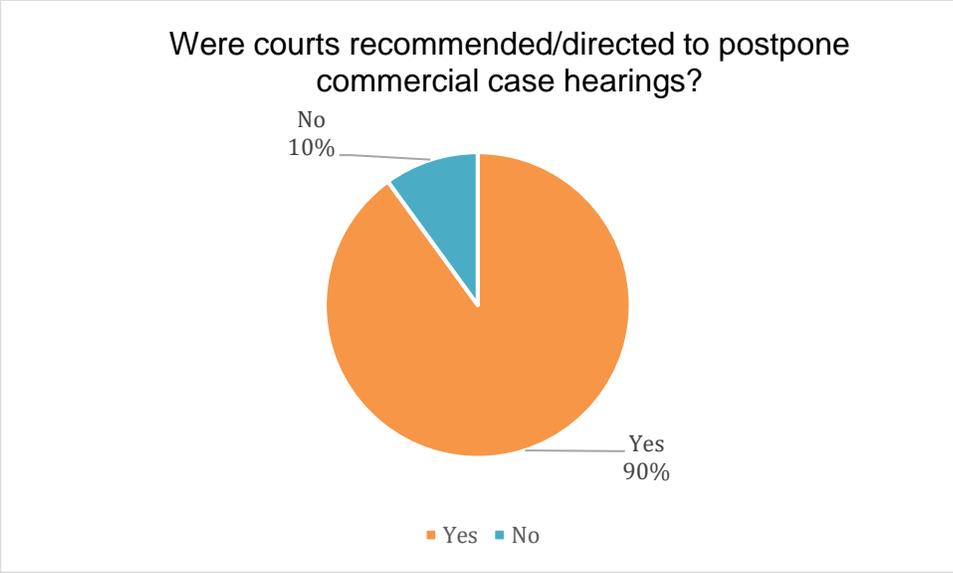
²³ Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Jordan, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Montenegro, Morocco, Romania, Serbia, Tajikistan, Tunisia, Turkey, Ukraine, Uzbekistan.

²⁴ TK&Partners (Armenia), CMS (Bosnia and Herzegovina, Croatia, Morocco, Montenegro, Serbia and Ukraine), Soiranen (Estonia), Kinstellar (Bulgaria, Romania and Turkey), Begiashvili & Co (Georgia), Ali Sharif Zu'bi Advocates & Legal Consultants, Eversheds Sutherland (Jordan), Gladei & Partners (Moldova), KhanLex Partners LLP (Mongolia), Ferchiou & Associés (Tunisia), Centil (Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan).

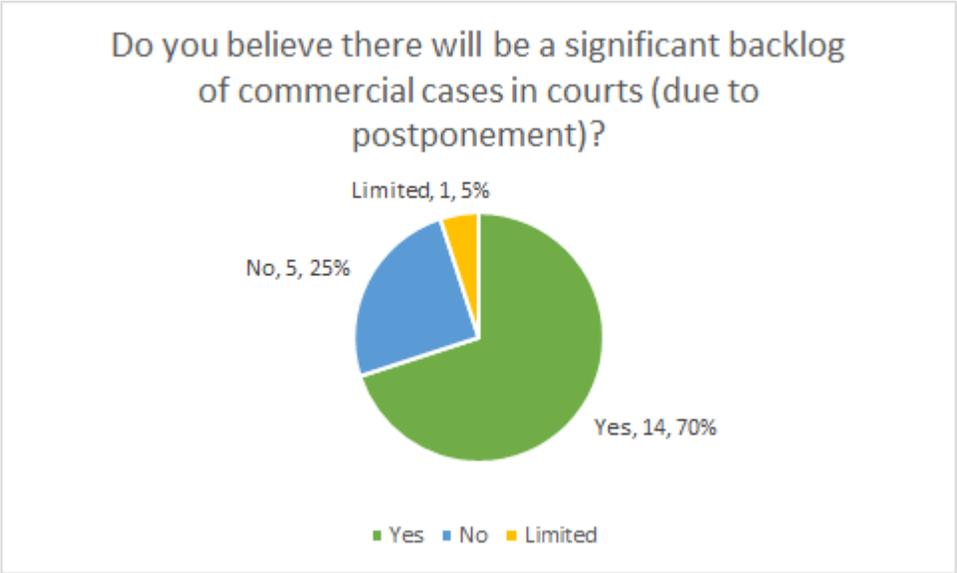
²⁵ See, for example, CEPEJ, 'European judicial systems Efficiency and quality of justice', <https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepei-stud/1680786b57>,

²⁶ European Commission, "EU Justice Scoreboard" (available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en).

²⁷ World Bank (2020) "Doing Business", <https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020>.



More concerning, 70% of the respondents expected a significant backlog in commercial courts because of the postponement.



19. Looking beyond the EBRD COOs, due to COVID -19 and the measures adopted at a global level, many courts have suspended or postponed the hearing of non-essential cases. Although the backlog cannot be estimated, the projections do not seem optimistic, as even short summer pauses have a negative impact on the efficiency of the courts. In a World Bank blog, Maksym Iavorskyi and Joseph Lemoine explained that in Rwandan courts commercial cases filed during the one month summer pause have suffered a six-month delay.²⁸ Such delays burden an already slow commercial litigation

²⁸ Maksym Iavorskyi, Joseph Lemoine, World Bank blogs Let's talk Development (2020), "Achieving commercial justice in the new COVID-19 world" (available at: <https://blogs.worldbank.org/developmenttalk/achieving-commercial-justice-new-covid-19-world>).

pace, as even before the pandemic, the global average for the enforcement of a commercial contract, that is resolving a commercial dispute through a local first-instance court,²⁹ was 650 days, with regional variations.³⁰

The COVID-19 pandemic has been a trigger that forced governments to swiftly rethink and readjust the digital government services to meet the demand on existing public services in every sector in the short term, resolve socio economic consequences in the mid-term and reinvent the structure of its services and tools in the long-term³¹. The justice sector, which holds a crucial social and functional role, has been no exception to this trend. In times of problematic access to justice, the pandemic has only augmented the issue and has driven certain key initiatives. Many jurisdictions started thinking about transferring some of the litigation processes online, replicating in digital form the existing offline processes. To minimize the risk of expected backlog and to deal with emergency cases, certain countries, including Ireland, Italy and Kazakhstan, introduced guidance for the judiciary on how to conduct hearings remotely.³²³³ Other jurisdictions, such as Bulgaria, developed legislative frameworks on remote hearings and digitisation of court proceedings. In July 2020, Bulgaria passed a bill that amended the civil procedure, providing parties the option to conduct their hearing online and offering a flexible way of gathering and introducing digital evidence and witness examination. These planned changes will also be introduced for criminal and administrative online proceedings³⁴.

20. Digitisation occurs usually as a result of external pressure,³⁵ such as litigants willing to access judgments online from anywhere, without having to go physically to a court. It adds another way of making such judgments available. The mere digitisation, even if it improves access to some judicial information and increases efficiency, may not be sufficient any more. Access to justice, lengthy proceedings and backlogs³⁶ are still an issue and with the ongoing pandemic have only exacerbated.³⁷ Changing the format (i.e. digitisation) cannot fully address these issues. So, is digitisation an adequate response in the long-run? Should court administration authorities take this opportunity to focus rather on how to rethink and transform the judicial process and how? This is the key question that this paper puts forwards.

21. This paper argues that the pandemic has further enhanced this necessity by creating an opportunity to entirely rethink the way such traditional institutions as courts function. This is where digital transformation comes in play. It is a continuous process that implies ‘a complete revision of the existing and the creation of new digital services’.³⁸ The ultimate scope of such transformation is to

²⁹ World Bank, “Doing Business, Enforcing Contract Methodology” (available at: <https://bit.ly/3iBTPio>).

³⁰ World Bank (2020) “Doing Business 2020” (available at: <https://bit.ly/3iwbOGp>).

³¹ United Nations Division for Public Institutions and Digital Government (2020) “UN/DESA Policy Brief #61: COVID-19: Embracing digital government during the pandemic and beyond” (available at: <https://bit.ly/2GudT90>).

³² Dentons (2020) “The impact of government provisions to tackle COVID-19 on the activity of tribunals. An overview of major European jurisdictions.” (available at: <https://bit.ly/2GmTqDb>).

³³ European Commission for the Efficiency of Justice (CEPEJ) (2020) “National Judiciaries’ COVID-19 emergency measures of COE member States” (available at: <https://bit.ly/34xX6tP>).

³⁴ CMS (2020) “Bulgaria passes bill for digitalization of judicial proces” (available at: <https://bit.ly/30Dyqi8>).

³⁵ Ines Mergel, Noella Edelmannb, Nathalie Hauga (2019) “Defining digital transformation: Results from expert interviews panel”, Government Information Quarterly Volume 36, Issue 4, 101385, p. 9.

³⁶ European Commission (2020) “EU Justice Scorbard” (available at: <https://bit.ly/33x2qh>), figure 14.

³⁷ United Nations Office on Drugs and Crime (2020) “Guidance Note Ensuring Access to Justice in the Context of COVID-19” (available at: <https://bit.ly/3izFWkg>) p. 36; International Commission of Jurists (2020) “The Courts and COVID-19” (available at <https://bit.ly/3ileOTg>) p. 6.

³⁸ Mergel et al. (n 34) p. 12.

meet user needs, to create new services and even expand the user base, i.e. ensure access to justice to those who had limited or no access whatsoever prior to the transformation process.

22. The starting point of such a transformation in the judiciary may be the introduction of online courts. As mentioned in the earlier sections, for the purpose of this discussion paper, online courts refer to litigation which takes place without in-court interaction. The entire process takes place online - the submission of claim, the serving of documents, the delivery of the judgment. This requires the entire rethinking of the delivery of justice. Such litigation proceedings would be characterized by pragmatism rather than formality. Because commercial disputes are also driven by pragmatism, developing online courts with a focus on such disputes seems to be a reasonable approach. Commercial disputes, and disputes based on small claims in particular, seem a good terrain for transitioning to an online medium. There are several reasons for that, including the fact that in many jurisdictions these claims are examined usually without court hearings, based on documents submitted by the parties; they present a rather straightforward legal problem and the litigants and their representatives are more familiarized with court proceedings; they are governed by a simplified set of rules of civil procedure, like shorter deadlines. As a result, the focus in this paper is on the digital transformation of courts through the development of online courts in commercial disputes, particularly those with a small value.

MODELS OF ONLINE COURTS

23. There are several notable models of 'online courts' and ODR mechanisms, which might serve as a source of inspiration for other jurisdictions. It is worth noting that the overwhelming majority of the models that are being promoted and publicly known come from common law jurisdiction. There are various drivers behind their development, including increasing access to justice, reducing costs and time for litigants, or increase efficiency of the dispute resolution process. In some jurisdictions, such as Canada, the solutions advocate for a reduced reliance on attorneys. The nature of the issues that these jurisdictions wanted to address by introducing online courts resulted in several different models - some within the public sphere but outside the judiciary, while others as an integrated part of a centralized court system. The discussion paper focuses on the following models of online courts: Small Claims Court and the HMTCS initiative in the UK; CRT in British Columbia, Canada; NWS Online Registry and Online Court in Australia; the Estonian E-File system, Smart Courts in China; and eLitigation in Singapore.

The UK:

24. UK showcases an impressive online court system, which has been radically developed throughout the past 4 years. The reform was introduced by the Lord Chancellor, Lord Chief Justice and Senior president of the Tribunals, who shared the common objective of reforming the UK courts and tribunals and taking the HMCTS in an era of modernization of courts and tribunals and of conducting hearings online³⁹. This joint announcement was followed by a consultation with its stakeholders who

³⁹ UK Government, Ministry of Justice (2016) "Transforming Our Justice System" (available at: <https://bit.ly/30FiOuz>).

offered their input in three key areas: assisted digital facilities, automatic online conviction and panel composition⁴⁰.

25. The concept of online courts and video conferences has been one of the main elements of the reform of the court service, along with automation of case management, new tools for online filling and uploading and estate consultations. The UK Government has invested in this project more than 1 billion⁴¹. This reform aimed to create a modern justice administration system, which would meet the needs of its users by providing easy navigation, offering targeted online solutions to professionals and the public and to overall promote the access to justice.⁴²

26. With a vision for an online adjudication system, the HMCTS developed a wide range of services and implemented hearings in digital environments for civil, family and criminal cases. Initially, it introduced online hearings for divorce, probate, small claims⁴³, social security appeals and online plea services. Since its launch in 2018, the service has seen more than 23,000 divorce applications and more than 40,000 civil money claims. In a second stage of development, virtual hearings became possible for public family law, immigration and asylum tribunals. In its first year of operation more than 41,000 online divorce applications and have been made. HMCTS also encourages parties to mediate for small claims, property, probate and family law cases, and even established an online mediation platform for small claims⁴⁴.

27. As the system matures, more services are becoming available online like the Personal Independence Payment, Employment and Support Allowances and additional customer service modules. In parallel, the HMCTS is investing in infrastructure like technology equipment, Wi-fi access and procurement/design work.

28. To complement this structural and technological reform, the Parliament voted on the Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020, a set of new, simplified rules on online services in civil, family and tribunal proceedings⁴⁵. These rules will enable the civil and family cases to be progressed more efficiently and allow financial savings across the judicial system.

Canada:

⁴⁰ UK Government, Ministry of Justice (2017) "Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals, Government response." (available at: <https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/results/transforming-our-justice-system-government-response.pdf>).

⁴¹ N. Byrom (2019) "Digital Justice: HMCTS data strategy and delivering access to justice" (available at: <https://www.thelegaleducationfoundation.org/>).

⁴² UK Government "The HMCTS reform programme" (available at: <https://www.gov.uk/guidance/the-hmcts-reform-programme#our-reform-programme>).

⁴³ A small claim procedure -often referred as money claim- is a procedure during which an individual who believes that a natural person or an organization owes him/her money, can request the claim amount by submitting an online form. Fees are paid online, and the recipient of the claim has a chance to respond. For claim amounts less than £10,000, the online service is called Civil Money Claim (CMC), whereas for amounts between £10,000 and £100,000, Money Claim Online (MCOL),

⁴⁴ UK Government, Small claims mediation service, <https://www.gov.uk/guidance/small-claims-mediation-service> (last accessed: October 2nd 2020)

⁴⁵ UK Government, Legislation Gov.UK, "The Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020", 2020 No. 889 (available at: <https://www.legislation.gov.uk/uksi/2020/889/made>).

29. The British Columbia Civil Resolution Tribunal (CRT) is the first online tribunal in Canada. CRT is not a court as such but an administrative tribunal. The disputes are not resolved by judges but by independent and neutral tribunal members.⁴⁶ The CRT is unique in several respects.

30. First, it is mandated to examine a series of disputes, including small claims of up to \$5,000. In addition to the latter category, CRT also examines motor vehicle accident and injury claims (MVI) of up to \$50,000, as well as societies and cooperative association disputes (Soc/Coop) and strata property (condominium) disputes of any amount.⁴⁷ Secondly, the CRT discourages the representation of parties by lawyers. The General rule provides that parties represent themselves, except for motor vehicle cases.⁴⁸ Thirdly, the focus of the CRT is to enable users to resolve disputes on their own first, and, if necessary, go through negotiation, facilitation and, as a last resort, have the dispute resolved by a member of the CRT. As a result, the CRT mandate is to provide dispute resolution services that are “accessible, speedy, economical, informal and flexible”.⁴⁹

31. Despite allowing applications by mail, fax or e-mail, the CTR incentivizes applicants to use the online platform by providing a discount on the regular application fee. The platform is available 24/7 and costs are significantly reduced because of CRT’s focus on self-representation. It ensures accessibility by providing free legal information and forms.

32. The CRT is based on two applications. It starts with a “Solution Explorer” that diagnoses the legal dispute, and provides free legal information and other resources such as dispute customized letter templates to help parties resolve disputes on their own. If they are not resolved, the Solution Explorer sends the application appropriate to the nature of the dispute to the Tribunal. The dispute moves to a Dispute Resolution application – initially a negotiation platform on which the parties can “discuss” and attempt to resolve their dispute. If it is not resolved, it provides an online facilitator to assist. A settlement reached at this stage can be registered as an enforceable court order. If not resolved, the dispute is then moved to a decision maker – a CRT member (lawyers appointed to the CRT) who will review the dispute from the information provided online and make a determination. To enforce the order issues by CRT, one has to file it with the BC Provincial Court or BC Supreme Court depending on the nature of the dispute, requesting execution of the order.

33. Since 2016, the CRT has shown impressive results. According to its 2019/2020 Annual Report, the average time to resolution was 79.3 days. Out of 5880 new CRT applications for dispute resolution in 2020, 4926 were small claims applications, 793 strata (condominium) applications, 125 MVI and 36 Soc/Coop.⁵⁰ In 2020, the CRT user satisfaction survey shows that 80% of the respondents would recommend the CRT and considered it handled their dispute in a timely manner.⁵¹

⁴⁶ CRT’s tribunal members are expert decision-makers. They are appointed after an extensive merit-based competition process.

⁴⁷ Civil Resolution Tribunal Act, [SBC 2012] CHAPTER 25 (available at: <https://bit.ly/33zC12H>).

⁴⁸ Ibid, section 20.

⁴⁹ Ibid, section 2(2)(a)

⁵⁰ CRT, “2019-2020 Annual report” (available at: <https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf>), p. 5

⁵¹ Ibid, p. 30.

Australia

34. The New South Wales initiative consists of two services - the Online Registry and the Online Court. The Registry was piloted in 2013 and officially launched in 2014.⁵² The Registry allows the filing of more than 80 forms for civil cases⁵³, the receipt of court-sealed documents via email, the verification of documents submitted for a certain case and the online payment of court filing fees.

35. Despite being called an “online court”, the second service of the New South Wales initiative provides a very specific solution to legal practitioners and *pro se* litigants to manage cases online. It allows users to make a certain request or to consent or counter a request made by the other party, once the case is listed.⁵⁴ Usually, such requests concern adjournments and allow users to seek other additional orders such as directions. Users can also attach documents or send messages through the system. The claims that are ‘eligible’ for the NSW Online Court include some categories of cases in the Supreme Court, Land and Environment Court, District Court and Local court if both parties are represented and the lawyer is registered with the NSW Online Registry. As one can see, the focus here is on the use of the solution by legal professionals rather than enabling *pro se* litigants to access court services online without representation.

Estonia:

36. Estonia is one of the world pioneers in introducing e-Justice solutions, having implemented complex systems allowing the online submission of claims as early as 2005. Fifteen years later, Estonia boasts with one of the fastest court proceedings in Europe⁵⁵ and fully automated court processes across all three court levels (first and second instance courts and the Supreme Court).

37. While not having an online court *per se*, Estonia is a clear example of a country that can offer online litigation through digitalisation of court processes. The rationale behind Estonia’s model was to move away from fragmentation and provide a single solution for professionals and *pro se* litigants alike, as well as a single platform for all court levels.⁵⁶

38. This model is based on the E-File system, which is the central information system, allowing an entirely digital workflow for each participant to the proceedings.⁵⁷ Litigants and their representatives submit claims, monitor cases, receive documents and file appeals via the public-facing system - Public E-File.⁵⁸ Courts are using the Case Management System (KIS), which receives information submitted by litigants on the Public E-File through the centralized system E-File. KIS allows the registration and automatic distribution of cases, registration of hearings, summonses, as well as automatic publication

⁵² New South Wales Online Registry Courts and Tribunals (2014) “Virtual Registry open anytime” (available at: <https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2014/Virtual-registry-open-anytime.aspx>).

⁵³ New South Wales Online Registry Courts and Tribunals “Available Forms” (available at: <https://onlineregistry.lawlink.nsw.gov.au/content/available-forms>).

⁵⁴ New South Wales Government Courts and Tribunals Service (2019) “User Guide Online Court” (available at: https://s3-ap-southeast-2.amazonaws.com/jol-orw-prod-flysystem-s3/docs/online-courts/JLUG_OnlineCourt_BAR_v1.6.pdf).

⁵⁵ European Commission (2020) “EU Justice Scoreboard” (available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf) pp. 11-13.

⁵⁶ See E-Estonia, available at: <https://e-estonia.com/solutions/security-and-safety/e-justice/>

⁵⁷ RIK, “E-File” (available at: https://www.rik.ee/sites/www.rik.ee/files/elfinder/article_files/RIK%20eFile.pdf).

⁵⁸ RIK, “Public E-File” (available at: https://www.rik.ee/sites/www.rik.ee/files/elfinder/article_files/RIK%20Public%20eFile.pdf).

of judgments.⁵⁹ KIS is interoperable with other systems, including the Police Information System, the Prison Information System, and the Criminal Case Management System managed by the Office of Public Prosecutor.⁶⁰

Singapore:

39. Singapore, as a pioneer in many public sector technological innovations, has been praised by international institutions and stakeholders for its technological sophistication and accessibility. Singapore's court modernization can be traced back to the early 90's, where major initiatives took place, aiming to deal with the court's backlog and lack of proper administration. The administration reform was led by specialists in management and administration that refined the models of justice by expanding alternatives to regular hearings, introduced accountability of the judiciary and leveraged technology to facilitate case management and emphasized on performance and results. In a decade, Singapore's court was again in the top of the Asia Pacific region courts, by investing in technology and automation.⁶¹

40. Currently in Singapore, remote hearings are available in State and Supreme Courts, through several available tools, which allow parties to file and litigate their case through a digital exchange of judicial documents. The navigation in the digital court environment is facilitated by the national E-Id which citizens use to navigate in e-governance services.⁶²

41. One of the most significant elements of its reform was the implementation of the Community Justice and Tribunal System, which was launched in 2017 as a case filing and online case management system for Small claims and later expanded to Community and employment disputes⁶³. The CJTS offers several online tools, including pre-filing assessment, filing system, case management, case tracking system. This platform offers a digital adjudication for small claims, community disputes and employment claims. At the Supreme Court level, the already existing Electronic Filing System (ESF) was further developed through the launch of the E-litigation module, which offered a modernized online court environment for case management system, online tools for litigants and a negotiation platform⁶⁴. The use of these tools in the Singapore courts have increased the efficiency of the litigation process, as according to its report, in 2019 the Supreme court achieved a clearance rate of 96% of all civil and criminal cases, thanks to these applications.⁶⁵

42. Based on the principle that the digital transformation of courts and institutions shall develop hand in hand with adoption of relevant technologies by the practitioners, the Law Society of Singapore has introduced SmartLaw Guide, which assists attorneys in the digital transformation of their practice.

⁵⁹RIK, "E-Court Information System" (available at:

https://www.rik.ee/sites/www.rik.ee/files/elfinder/article_files/RIK_e_Court_Information_System%2B3mm_bleed.pdf).

⁶⁰ Ibid.

⁶¹ Waleed Haider Malik (2007) "Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons, World Bank, Directions in Development, Public Sector Governance" (available at: <https://bit.ly/3d2AMw5>).

⁶² See SingPass, <https://www.singpass.gov.sg/spauth/login/loginpage> (last accessed on 5 October 2020)

⁶³ See State Courts Singapore, Community Justice and Tribunal Systems, <https://www.statecourts.gov.sg/CJTS/#!/index1> (last accessed on 18 August 2020).

⁶⁴ See Supreme Court of Singapore "E-litigation" (available at: <https://www.supremecourt.gov.sg/services/services-for-the-legal-profession/elitigation>).

⁶⁵ See Supreme Court of Singapore (2019) "One Judiciary, annual report" (available at:

<https://www.supremecourt.gov.sg/docs/default-source/default-document-library/2019-one-judiciary-annual-report.pdf>).

In May 2019, the Ministry of Law (MinLaw), the Law Society of Singapore (LawSoc), Enterprise Singapore and the Infocomm Media Development Authority (IMDA) launched a one-year support program of S\$3.68 million, that enabled firms to advance applications such as artificial intelligence (AI) to facilitate document review and digital discovery⁶⁶.

China:

43. The concept of 'Smart Courts' was first proposed by China's top court, the Supreme People's Court (SPC), in 2015-16. This court modernization strategy through the adoption of ICT, cloud technology and AI, was part of a plan for the reform of the judiciary, which aimed to enhance efficiency, transparency and anti-corruption and restore the public's trust to the judiciary⁶⁷.

44. Smart courts provide a multi-layered system, which covers all the steps of the dispute resolution process from online mediation, court hearings, issuance of the judgment, and enforcement proceedings. The process is simple: the claim can be filled by either litigants or lawyers, service of process is via text message, fax, email or WeChat messenger and all evidence can be uploaded online in word, video or audio form. Litigants and attorneys receive notification regarding the status and the progress of their case and may also track it and receive the judgment online⁶⁸. Online courts has enabled the judicial system to manage their increasing caseload⁶⁹

45. The most advanced online courts in China are the three internet courts in Hangzhou, Beijing and Guangzhou set up in 2017-2018. Their jurisdictional scope covers internet related disputes arising from e-commerce, including infringement of personal and property rights and product liability disputes. As they are the first courts that conducted the litigation process online, policy makers often use them as testing ground for new techniques and innovations, which are then adopted by local courts.

46. To support online litigation, the Beijing Internet court released in February 2019 a detailed protocol of 26 procedures for online court hearings, which provide specifications on issues regarding online identity, authentication of hearings in video rooms⁷⁰. Centralization of case management also has a key role in the Chinese judiciary as all the courts (3,520 courts, 9,277 tribunals and 39 maritime courts) are connected to a single database, which is being constantly updated with incoming cases and data⁷¹.

⁶⁶ Fiona Lam (2019) "Bigger S\$3.68m scheme launched to boost tech use by Singapore law firms", Business Times (available at: <https://www.businesstimes.com.sg/government-economy/bigger-s368m-scheme-launched-to-boost-tech-use-by-singapore-law-firms>)

⁶⁷ Zou, Mimi, 'Smart Courts' in China and the Future of Personal Injury Litigation (March 11, 2020). Journal of Personal Injury Law (available at: <https://ssrn.com/abstract=3552895>).

⁶⁸ Guodong Du 杜国栋, Meng Yu 余萌, China Justice Observer (2019) "How to Litigate Before the Internet Courts in China: Inside China's Internet Courts Series -02" (available at: <https://www.chinajusticeobserver.com/a/how-to-litigate-before-the-internet-courts-in-china>).

⁶⁹ From January to June 2019, there was an increase of 14.54% increase from the same period in 2018, http://www.xinhuanet.com/english/2019-07/31/c_138272989.htm (last accessed: October 4th, 2020)

⁷⁰ Hou Na, China boosts online litigation services amid coronavirus epidemic, (CGTN, April, 2019), <https://news.cgtn.com/news/2020-04-20/China-boosts-online-litigation-services-amid-coronavirus-epidemic-PQ00XDUFpQ/index.html> (last accessed on 30 August 2020).

⁷¹ Zou, Mimi (2020) "'Smart Courts' in China and the Future of Personal Injury Litigation", Journal of Personal Injury Law (available at: <https://ssrn.com/abstract=3552895>).

47. **In conclusion**, the examples provided above reveal that the IT solutions connected to litigation have all been developed and adapted to the specific needs of a certain jurisdiction. In the case of Canada, the CTR was created to offer a flexible and affordable solution to disputes. In Estonia, the E-File and KIS were developed to offer a single centralized solution for both litigants/legal practitioners and all court levels and fits into the greater E-Estonia concept. In Australia, the NWS Online Court was developed to streamline the processes around preliminary orders, reducing the time and costs associated with in-person appearance in courts.⁷²

48. While advocates of online courts are very vocal about their advantages, one should be mindful about the possible concerns that such solutions raise. To this date, except for some aspects of the CRT, there haven't been any comprehensive post-implementation reports on the qualitative and quantitative impact of such systems. In particular, the development and use of online courts raises questions about the "equality of arms" principle and the right to a fair hearing, computer illiteracy, access to internet and technology, privacy and data protection, cybersecurity, and establishing the identity of the litigants and their representatives.⁷³

49. Innovations in the above-mentioned jurisdictions have led to various benefits: Estonia managed to streamline judicial processes and eliminate data redundancy; the CRT in Canada achieved impressive user satisfaction results; smart courts in China led to significant reduction in case handling time; the solutions adopted in Singapore increased significantly the case clearance rate.

50. As shown above, access to justice and efficiency can be achieved through a wide range of models that jurisdictions can adopt if they are considering the development of online courts for commercial disputes. Some, such as Estonia, achieved the development of online-only litigation through the digitisation of various steps of the litigation process (from filing claims to receiving a judgment). The digitisation process there was conducted across the entire judiciary and did not focus on small claims in particular. Other jurisdictions, such as the UK, developed dedicated small claims online courts. Finally, jurisdictions such as Canada have completely reconsidered the way in which justice is delivered and created a tribunal outside the court system but in the public sphere, which empowers people to solve their disputes independently, through embedded negotiation and facilitation services. Ultimately, each jurisdiction is best suited to decide which of these models or a mixture of these models would serve better the litigants and would gain more support from the legal community.

Questions for discussion

- Is digital transformation contradictory to digitisation? Shall countries start with digitisation and gradually move into digital transformation or have digital transformation as goal from the outset? Which of the models described in this chapter are most relevant to your jurisdiction and why?

⁷² New South Wales Online Registry Courts and Tribunals "About online court" (available at: <https://onlineregistry.lawlink.nsw.gov.au/content/about-online-court>).

⁷³ Secretariat Directorate General of Human Rights and Rule of Law, Council of Europe, Technical Study On Online Dispute Resolution Mechanisms, Strasbourg, 1 August 2018, CDCJ(2018)5.

- What potential drawbacks do you envision for the chosen model?
- What are the key takeaways and lessons learned you think would be most beneficial for emerging market jurisdictions?
- Are there any areas of the judiciary where digitisation is a more appropriate solution than digital transformation?
- Where do you see digitisation processes cross-over with on-line courts and helping the case for on-line courts? Or do you believe that these should be completely separate and standalone processes?

TECHNICAL PREREQUISITES FOR ONLINE COURTS AND OTHER GOOD PRACTICES

51. In order to assess the potential of certain jurisdictions to develop online courts, one should first have an understanding of what are the constitutive elements of an online court. Is there a minimal number of elements that should be in place for one to consider that an online court exists? If so, which are those? For the purpose of this paper, the following elements are deemed essential: electronic filing, electronic service of process, online payment of court fees, and court case management system that allows for the random distribution of cases. In addition, some jurisdictions might consider embedding an online dispute resolution system that allows disputes to be settled via online negotiation, facilitation or mediation. Finally, from a legal standpoint, jurisdictions that are interested in developing online small claims courts should have a small claims procedure regulated their national legislation or specialized small claims courts. Data from Doing Business reports show that 138 jurisdictions have either a small claims court or a certain simplified procedure for small claims.⁷⁴ As a result, most jurisdictions do not require significant changes to their legal framework to start developing small claims online courts.

52. The digital tools employed by EBRD CoOs vary across jurisdictions. The main incentives behind introducing such tools are increase in efficiency, transparency (particularly in jurisdictions where corruption in the judiciary is an issue), but also the lack of court personnel. In the latter case, automation is used to fill in the existing human capital gap. While all states attempt to introduce innovations in the judiciary, there is still a great divide between them. The chart below depicts the extent to which the 20 jurisdictions surveyed by EBRD are incorporating digital innovations in the judiciary.

53. Online courts require countries to adopt a multi layered approach by initiating technical, political and legal reforms. The online courts models described in the previous chapter show that most of them share the same structural and technical prerequisites for the implementation of online hearings. These are: electronic filing, electronic service of process, online payment of court fees, court case management system that allows for the random distribution of cases.

Electronic Filing:

54. An important part of the functionality of a court's automation depends on the availability of an online platform through which the parties can file their judicial documents including: the initial complaint, counter claims, applications and supporting documentation/evidence. This service is often

⁷⁴ World Bank, the Ministry of Foreign Affairs of the Kingdom of the Netherlands (2017) "Fast-Tracking the Resolution of Minor Disputes: Experience from EU Member States", p. 7.

the first step towards a platform that gradually develops and offers extended court automation. For instance, through the Australian eLodgement⁷⁵ system, parties may file documents relating to existing matters, by entering the case's file number.

55. Apart from bringing efficiency, filing of judicial documents is a practice that limits bureaucracy and corruption.

56. From among surveyed EBRD CoOs, jurisdictions where there are online filing systems include Estonia, Georgia, Kazakhstan, Turkey, Ukraine and Uzbekistan⁷⁶. The adoption of this practice has been an overarching trend among the examined countries, as Georgia has adopted online filing in its courts in 2015, Kazakhstan in 2014. An advanced example is Turkish UYAP system, which was developed to ensure a reliable, fast and effective judicial system, and includes case management tools for judges and attorneys as well as functions for online filing, service of process, payment of court fees⁷⁷. Moldova is currently piloting this function by a limited group of attorneys in one first-tier court and appellate court and Croatia is also developing an e-filing system, as part of its initiative of upgrading the judiciary through the adoption of e-justice practices. Kyrgyzstan, Romania, Kosovo and Cyprus still need to progress in this area.

Electronic Service of process:

57. Online service of process is another essential part of a digital court function. It promotes time-efficiency, reliability and lowers the cost of the litigation⁷⁸. Electronic service may be performed directly by a party, by an agent of the party (who could be the party's attorney) or through an electronic filing service provider. The domestic legislation must provide for service of process and allow for e-signatures. Electronic service has been adopted by several jurisdictions in the EBRD regions such as Estonia, Georgia, Kazakhstan, Ukraine and North Macedonia.

Electronic payment of court fees:

58. An online process in courts can be performed as long as the court fees can be paid electronically and the parties don't need to perform any additional actions in the bank. Online payments are made possible in countries like Greece through functions that are embodied in platforms that serve for transactions with the public⁷⁹. From among 20 EBRD jurisdictions considered online payment of court fee is possible in Armenia, Bulgaria, Croatia, Uzbekistan, Serbia, Moldova, Kazakhstan, Jordan, Turkey. In some countries as for example in Kyrgyzstan litigants can pay on line but need to provide to the court the hard copy of the Bank's receipt.

Case management system – Assignment of cases:

59. Another essential element is the case management system for court staff and judges, which offers the automatic assignment of cases – essential for the transparency and independence of the judiciary. The case management system should be interoperable with the electronic filing and allow court staff and judges to access, add and exchange with parties case files. The complexity of the court

⁷⁵ Federal Court of Australia, "E-Lodgment" (available at: <https://www.fedcourt.gov.au/online-services/elodgment>).

⁷⁶ EBRD COO data collection.

⁷⁷ Ministry of Justice, "National Judiciary Informatics System" <http://www.e-justice.gov.tr/General-Information>

⁷⁸ Annie Chen (2016) "Electronic Service of Process: A Practical and Affordable Option", Cornell Law School J.D. Student Research Papers, 39 (available at: http://scholarship.law.cornell.edu/lps_papers/39).

⁷⁹ See E-Payment (available at: <https://www1.gsis.gr/sgsisapps/eparavolo/public/welcome.htm>).

case management system can vary and can also include an electronic statistics module that can support court performance improvement,

60. While most EBRD COOs have some form of case management system, Estonia stands out as a top performer in case management tools for the court's administrators, judges and attorneys. In addition to technical capacity for digitalization, the foundations of an online court equally lay on the countries' legislative frameworks, adequate budget allocation, political commitment and technical literacy and training. All the above can be enabled through institutional collaboration and adoption of good practices from countries with similar judicial structures and challenges.

Commercial courts, small claims courts/proceedings:

61. Having courts or divisions with a subject matter commercial jurisdiction, with judges who hear exclusively commercial cases, is an internationally recognized good practice. It is arguable that this development stems from the increasing specialization and growing complexity of the commercial topics litigated and the need for judge's increased need for expertise⁸⁰. Croatia stands out as one of the top performers in this area, since it has nine commercial courts spread in the largest business centres of the country⁸¹. Kazakhstan also has several inter-district economic courts, a financial court as well as a court for investment disputes⁸². Similar good practices have been established in Montenegro, Morocco and Serbia have specialized commercial courts in both first instance and in appeal level courts⁸³.

62. A different model that targets the objective of specialization is the creation of separate commercial division within the civil courts. Such a division can be established with less cost and formality than by special legislation, sometimes only by the adoption of administrative regulations of the court itself. Judges may be allocated to a special division either indefinitely, for a specific term of time to serve a specific need⁸⁴.

63. Positive steps have been taken by Georgia that adopted in 2012 a simplification and speeding up the proceedings for commercial disputes, by Jordan that established in 2009 a commercial court division. Reform efforts need to be made by Georgia, Azerbaijan, Moldova, Cyprus and Mongolia, that lack any form of special court structure or division for commercial matters.

64. Small claims court are the form of justice most likely to be encountered by the public, providing a mechanism for quick and inexpensive resolution of legal disputes involving small sums of money. Such courts are often ruled by simplified rules of civil procedure and lower court costs, therefore

⁸⁰ See Working Party of the CCJE, "Report of the 22nd Meeting", Strasbourg 26-28 March 2012, <https://rm.coe.int/168074733d>

⁸¹ See Ministry of Justice of the Croatian Republic, <https://pravosudje.gov.hr/pristup-informacijama-6341/ostale-informacije/pravosudna-tijela-rh/trgovacki-sudovi-6437/6437>

⁸² BakerMckenzie (2009) "Dispute Resolution Around the World, Kazakhstan", https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_kazakhstan_2009.pdf?la=en

⁸³ World Bank (2020) "Doing Business 2020", <https://www.doingbusiness.org/en/reforms>

⁸⁴ Dr. Heike Gramckow and Barry Walsh (2013) "Developing Specialized Court Services International Experiences and Lessons Learned" (available at: <http://documents1.worldbank.org/curated/en/688441468335989050/pdf/819460WP0Devel00Box379851B00PUBLIC0.pdf>).

meeting the modern objectives of efficiency and trust to the judicial system. These hearings reduce the backlog and play a special part in building public trust and confidence in the judicial system. Small claims courts usually use informal hearings, simplified rules of evidence and more streamlined rules of civil procedure—and typically allow the parties to represent themselves⁸⁵.

65. To align this trend across the EU jurisdictions, the EU has introduced the European Small claims procedure, which offers an alternative avenue to national legislation for claims under the amount of 5,000 euros on cross border claims. A judgment by the European Small Claims Procedure immediately recognizable and binding to member states⁸⁶.

66. Based on the principle of differentiated case management, different kinds of cases in terms of claim amount, subject matter and complexity need to be treated differently by the national court system⁸⁷. Croatia, Georgia, Jordan, Montenegro, Morocco, Serbia, Tunisia, Cyprus, Kosovo and North Macedonia are some of the examined countries that have small claims court. These courts are often governed by a set of simplified rules of civil procedure with shorter deadlines. In certain cases, like in Tunisia, Cyprus and Kosovo, parties may self-represent and resolve their conflict without resorting to an attorney's assistance in the hearing. Bulgaria, Estonia, Tajikistan still lack in this judicial structure, while Kazakhstan has adopted fast track procedures for small claims, although it lacks a separate small claims court⁸⁸. On the other hand, Armenia's seriously clogged court system would greatly benefit from such a method, since it has an excessive number of small claims⁸⁹.

E-IDs

67. The electronic ID is a key infrastructure element, which can be used as a basis for the development and expansion of multiple services of digital governance, including the judiciary. The logging in an online court and the use of its services -from paying court fee to attending a hearing and participating in an online auction- makes the safe digital navigation of the users an issue of outmost importance. Electronic identification, is a practice which has been adopted by several jurisdictions, enabling the navigation in the digital governmental and judicial environment with security and convenience. The EU, through its eID regulation and technical interoperability framework for the eID mechanism has provided the foundations for the intergovernmental cooperation and mutual recognition and technical specifications of eIDs.⁹⁰ E-IDs don't only serve the navigation of the online court system, but they enable citizens perform digitally all their interactions with the public through a sole portal, with secure stores essential information in a systematic manner.

⁸⁵ Heike Gramckow and Omniah Ebeid (2016) "Establishing small claims courts and the impact on service delivery in the justice system", Just Development, Issue 9.

⁸⁶ See European Small Claims procedure website: https://europa.eu/youreurope/business/dealing-with-customers/solving-disputes/european-small-claims-procedure/index_en.htm (last accessed on 7 September 2020)

⁸⁷ World Bank, "Fast-tracking the resolution of minor disputes experience from EU Member States" (available at: <https://bit.ly/30Fshlw>).

⁸⁸ World Bank (April, 2018), "Report No. 125611-KZA. New Growth model for Building a secure middle class" (available at: <https://bit.ly/33AgK9e>)

⁸⁹ European Commission (2017) "Assessment Mission On The Rule Of Law In Armenia (JHA IND/EXP 64029)" (available at: http://www.justice.am/storage/uploads/001.Final_Efficiency-Judiciary_Quintavalle-2.pdf).

⁹⁰ Commission Implementing Regulation (EU) 2015/1501 of 8 September 2015 on the interoperability framework pursuant to Article 12(8) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02015R1501-20150909>).

68. Estonia is the most well-known jurisdiction which issues digital identity to its citizens and residents. Approximately 98% of Estonians have electronic ID-cards, which allows them to access all the available e-services.⁹¹ In the context of online courts, eIDs are useful because they can provide secure access to online courts and ensure the identification of the litigant or attorney using the services of an online courts. Using logins and passwords makes online court users susceptible to security threats. At the same time, eIDs lift the requirement of sending copies of IDs or other identify proof to the court and allow a secure method of applying electronic signature. As a result, jurisdictions that consider introducing online courts should first assess whether they have the opportunity to introduce eIDs, which, in the long-run, may play a key role in the development of and access to governmental e-services.

Electronic Enforcement

69. As an integral part of the judicial process, a reliable and effective court enforcement system is important for an economy's good business climate and economic growth. With the digitisation of the judiciary and the creation of online courts, the shift to electronic enforcement of a judgment is a necessity and a natural continuation of the online litigation. CEPEJ, in its Good Practice gGuide on enforcement has expressly encouraged the countries of the council of Europe of adopt online methods that avoid physical possession to ensure the items as long as the rights of the debtor and the confidentiality of the parties are protected⁹².

70. Online auctions have been successfully implemented in certain jurisdictions and have been successful in decreasing the time of the auction, while increasing the countries and have provided economy of time and increases the in public auctions⁹³. Portugal⁹⁴, Greece⁹⁵, Croatia⁹⁶, Estonia⁹⁷, Hungary⁹⁸ are some of the jurisdictions where, pursuant to relevant legislation, all auctions are performed through an online auction hall, administered by bailiffs, notaries or other enforcement agents. To facilitate the end goal of enforcement, several economies have adopted good practices which allow for the quick and accurate location of the assets and the payment of the creditor. Certain countries have set up online registrars of movable and immovable assets, which are interlinked , comprising a centralized electronic system, through which enforcement agents can accurately and swiftly exchange information, see the totality of the debtor's assets and locate them. This serves in the attachment process of bank accounts, immovable property and vehicles in Armenia, Denmark, Georgia and the Czech Republic⁹⁹. A developed and sophisticated enforcement system is key to an online court's function, which promotes transparency trust to the judiciary.

⁹¹ E-Estonia, "E-Identity" (available at: <https://e-estonia.com/solutions/e-identity/>).

⁹² European Commission for the Efficiency of Justice (CEPEJ) "Good Practice Guide on Enforcement" (available at: <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>).

⁹³ UNIDROIT (2020) "Best practices of effective enforcement".

⁹⁴ See <https://www.e-leiloes.pt/>.

⁹⁵ See <https://www.eauction.gr/>.

⁹⁶ In accordance with the provisions of the Enforcement Act (*Ovršni zakon*) (*Narodne Novine* (NN; Official Gazette of the Republic of Croatia) Nos 112/12, 25/13, 93/14 and 55/16, hereinafter: the EA).

⁹⁷ See <https://www.oksjonikeskus.ee/>.

⁹⁸ See <http://arveres.nav.gov.hu/>.

⁹⁹ World Bank (2016) "GOOD PRACTICES FOR COURTS: Helpful Elements for Good Court Performance and the World Bank's Quality of Judicial Process Indicators" (available at: <http://documents1.worldbank.org/curated/en/465991473859097902/pdf/108234-WP-GoodPracticesforCourtsReport-PUBLIC-ABSTRACT-EMAILED.pdf>).

Data collection and Court Statistics reporting

71. Online courts can only evolve sustainably by making informed decisions, based on accurate and updated data. The collection and publication of this data is not only critical for developing the strategy for the judiciary; it serves to showcase results of the reforms, to encourage the adoption of modern practices and enhance transparency¹⁰⁰.

72. Countries with advanced online and digitisation systems have been systematically producing and heavily relying on accurate data reporting on court performance and the quality of the judicial system. Such data include the workload of judges and court staff of the different divisions of the courts, the duration for handling this load and the efficiency and the clearance rate of the different types of cases. The method of collection, presentation and reporting of this data shall be consistent and tailored to each branch of the judiciary. As crucial as recent data is key for strategic planning, data that was gathered in the past, is also used for the production to produce statistical time series¹⁰¹.

73. Countries that base their planning on statistical reporting have a valuable road map towards proper allocation of justice budgets, human resources and facilities. Also, since this data reflects the court's productivity, countries can strategize on implementing solutions to ensure effective timeframes¹⁰². It is by no surprise that jurisdictions with developed online courts systems have leveraged their functions based on evidence offered to their diligent statistical reporting and have pivoted their model according to data. As a result, through the publication of court statistics per se and the reporting procedure, the judiciary promotes transparency on its performance which provide a rationale to the jurisdiction's financial and policy decisions.

E-negotiations and online ADR:

74. Online Dispute resolution is a process of settling claims and delivering access to justice by using technology and alternative dispute mechanisms and may be the element that distinguishes digitised courts from courts which went through a genuine digital transformation. The UNCITRAL defines ODR as "a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology"¹⁰³. Their integration in the settlement of disputes may not only reduce backlog but also incentivize litigants to settle their dispute in a more flexible and autonomous manner. ODR initiatives first appeared in USA (Philadelphia, Villanova University) and soon expanded in Europe. In 2016 the Commission adopted the new legislation of the ADR Directive 2013/11/EU and of the ODR Regulation 524/2013 that sets as a primal goal the protection of consumers in their e-commerce transactions and encouragement of the use of ODR entities in case of relevant arising disputes.¹⁰⁴

¹⁰⁰ European Commission (2020) "EU Justice Scoreboard" (available at https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf).

¹⁰¹ N. Byrom (2019) "Digital Justice: HMCTS data strategy and delivering access to justice" (available at: <https://www.thelegaleducationfoundation.org/>).

¹⁰² Council of Europe (2020) "strengthening the efficiency and quality of the justice system in Albania (SEJ III). Data Collection, Case Management and IT Strategy in Albania" (available at: <https://rm.coe.int/report-court-statistics-al-mar2020-final-converted-eng/16809ebf41>).

¹⁰³ UNCITRAL (2017) "Technical Notes on Online Dispute Resolution" (available at: <https://bit.ly/3ljFLLF>).

¹⁰⁴ Cortes (2011) "Online Dispute Resolution for Consumers in the European Union", p.54; Morek (2013) "New legislation on ADR and ODR for consumer disputes adopted in the European Parliament" Kluwer Mediation Blog.

75. In several jurisdictions, ODR is an integrated practice of online courts and digitized justice sector, which was leveraged due to the COVID-19 pandemic, as it offers a simple and cost-effective solution for SMEs and companies with a high volume of low value cases. The functionality of such platforms is user friendly and the adjudication is performed by either judge or through AI software; in Singapore¹⁰⁵ and Canada¹⁰⁶ parties negotiate their claim through several structured rounds of disputes, via a dedicated platform which allows for the discussion and resolution of a claim with no court fees. The pandemic accelerated the pace of development and spread of use of ODR, which had already been establishing as a key component of digital transformation of the judiciary, offering an alternative to frequent postponements and heavy backlogs of cases in regular courts, which is a severe risk in the post COVID era.¹⁰⁷

76. Other aspect that may be considered is the possibility to conduct **remote/online hearings**. The default rule in many jurisdictions is that small claims proceedings do not envisage hearings. In some cases, however, at the request of a party or when the judge deems it appropriate a hearing may be scheduled.¹⁰⁸ As a result, for the online court to be fully functional, it should be possible to conduct such a hearing without the need for the litigants to go to the courtroom.

Other best practices:

77. There are several other best practices that either facilitate or result from the development of online courts. While not mandatory, these practices may prove very useful and should be considered by jurisdictions when developing online courts. Crucially, as the judiciary incorporates digital solutions to enable the effective function of all the stages of the litigation, such tools and services shall be structured on the basis of collaboration between stakeholders, stay flexible as technologies emerge, and improve judicial administration and access to justice¹⁰⁹.

78. These practices aim in creating a secure and transparent online court environment for litigants, attorneys and the judiciary for the entire process: from filling an online claim to the enforcement of the judgment. The implementation of technological innovations such as e-identification, electronic enforcement and generation of court statistic reports doesn't only automate certain processes—it introduces a system of centralized, digital governance in the public sector, driven by data oriented policy strategies.

Questions for discussion

- What are the key concerns/issues to be considered when embarking on a digital transformation path for the court system in your jurisdiction?

¹⁰⁵ State Courts, Singapore (available at: <https://www.statecourts.gov.sg/cws/SmallClaims/Pages/e-Negotiation.aspx>)

¹⁰⁶ Small Claims BC, Online dispute resolution (available at: <http://www.smallclaimsbc.ca/settlement-options/ODR>)

¹⁰⁷ Karan Singh (2020) "India: Online Dispute Resolution (ODR): A Positive Contrivance To Justice Post Covid- 19" (available at: <https://www.mondaq.com/india/arbitration-dispute-resolution/935022/online-dispute-resolution-odr-a-positive-contrivance-to-justice-post-covid-19>).

¹⁰⁸ For instance, in such jurisdictions as the UK, Estonia, Moldova.

¹⁰⁹ Judicial Council of California, "Tactical Plan for Technology 2019-2020" (available at: <https://www.courts.ca.gov/documents/jctc-Court-Technology-Tactical-Plan.pdf>).

- What do you think are the key technologies required for developing and progressing on-line courts?
- How would you assess the progress made in jurisdiction regarding each structural element of an online court? What recent developments have taken place in your jurisdiction that are not reflected in this analysis?
- Would you consider integrating e-negotiation and ODR service as part of the online courts? Why?

CHALLENGES IN THE DEVELOPMENT OF ONLINE COURTS FOR COMMERCIAL DISPUTES

79. There is a series of challenges that governments may face in an attempt to integrate more IT solutions for the judiciary. In this chapter, the paper draws attention to some of the key challenges that already exist or could be expected once any of these jurisdictions attempt to develop online courts. In particular, we focus on legislative and regulatory challenges, technological, budgetary and IT literacy challenges.

POLICY

80. From a policy perspective, the development of an online court should be envisaged as a part of a broader strategy of the justice sector.¹¹⁰ That is because such a court is only one chain in the judicial mechanism and needs to fit organically into the broader picture of the justice sector. Moreover, an online court has important implications for other areas, such as privacy and data protection, as well as e-government services such as online payments, etc. it is impossible to develop a well-functioning online court without understanding its interplay with other tools, services and concerns and understand the ultimate goals that shall be met through its implementation.

81. One of the key challenges that may be faced in the development of online courts for small claims is the reticence shown by legal professionals. On one hand, lawyers may fear that developing systems which empower litigants to settle their low value disputes without the service may lead to decrease demand of lawyers and, as a result, endanger their profession. In exploring this critique, Richard Susskind refers to “lawyerless courts”.¹¹¹ On the other hand, in jurisdictions with strong traditions and a legacy of paper-based case management, there may be judges who may find it more difficult to navigate and manage cases online. Finally, some may argue that a small claims court, despite focusing on commercial disputes which usually entail more flexibility, could lose their solemnity or ‘majesty’.¹¹² The key takeaways for countries which consider introducing small claims online courts should be that such resistance may occur and one of the ways to address these concerns is by engaging in a constant dialogue with the legal professions throughout the development of the system. It is well-known that early engagement will lead to more acceptance from users.

¹¹⁰ See Ministry of Attorney General BC, “Court Digital Transformation Strategy 2019-23,” (available at: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf>).

¹¹¹ Richard Susskind (2019) “Online Courts and the Future of Justice”, p. 235.

¹¹² Ibid, p. 207.

82. Of course, significant changes in status quo are not possible without leadership convincing all the stakeholders that change is necessary and that this is the proper way to do it. So-called ‘digital champions’ in the justice sector are thus essential to advancing the digital transformation agenda.

83. The responsibility of IT literacy and the creation of an effective online structure and toolset for the attorneys and the public, lays on the Courts, the MoJ and the relevant associations, which can be practices through education, public consultations and financial support. To monitor the engagement with all the newly integrated online applications and tools the HMCT conducts reviews of the reform progress by collecting and analysing data by stakeholders and users of all demographic, with the purpose of orienting its strategy towards inclusive and practical services¹¹³. The Law Society of Singapore, through the SmartLaw platform provides practical and financial support to lawyers who wish to get educated and leverage their practice¹¹⁴. This platform is based on peer to peer assistance and exchange of good practices.

LEGISLATIVE AND REGULATORY FRAMEWORK

84. Legislative reform is imperative for the legitimization and operation of any substantive reform in the judiciary. Such reforms vary according to the degree of legislative readiness of each state. The transformation of Kenya’s judiciary required the amendment of its constitution in 2010, which allowed the reconstruction of the case management system, tackle corruption, implement methods for accountability and take steps towards digitalization¹¹⁵. Many countries have introduced laws coupled with implemented systems like online payments, e-filing and case management by the court: Ukraine introduced legislation and implemented in 2016 and 2017 online payment of court fees, Armenia’s 2015 law provided for automated random case assignment, Greece has passed a decree on e-service of process; Germany is planning to fully convert its rules of civil procedure by 2026 to electronic filling¹¹⁶.

85. From a regulatory perspective, developing clear internal rules is crucial. Particularly in civil law countries or in those jurisdictions where preference is given to more detailed regulation and less leeway for individual consideration, the development of regulations, guidelines and instructions is a prerequisite. The need for a comprehensive regulatory framework is also driven by the fact that, usually, online courts encourage self-representation and litigants should have access to clear rules in plain language. At the same time, judges and court staff should be actively engaged in developing such regulations and instructions to increase user acceptance and ensure that all issues that they encounter on a daily basis are included.

86. Where there are no small claims procedure, determining an appropriate value of the small claim may be a challenging task. In the case of the UK, some were worried about the implications for unrepresented litigants of the planned expansion of OCMC to claims up to the value of £25,000,

¹¹³ N. Byrom (2019) “Digital Justice: HMCTS data strategy and delivering access to justice” (available at: <https://www.thelegaleducationfoundation.org/>).

¹¹⁴ See SmartLaw (available at: <https://www.lawsociety.org.sg/for-lawyers/smart-law-guild/>).

¹¹⁵ Judiciary Transformation Framework, 2012 – 2016 (available at: <http://kenyalaw.org/ki/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf>)

¹¹⁶ Tom Braegelmann (2018) “The Digital Judiciary The Digitization of Restructuring Law as a Case Study, The Legal Revolutionary” (available at: https://legal-revolution.com/images/pdf/The_Digital_Judiciary.pdf).

because of the risk of adverse costs if the claim failed. Richard Miller from the Law Society argued that start to talk about making it much easier for litigants in person to issue proceedings above the small claims limit, you are significantly increasing the risk that people who are insufficiently advised will bring ill-advised proceedings.¹¹⁷

87. Ensuring the consistent and cross sector application of the digitised tools is key. The OECD Recommendation on Digital Government Strategy mentions that governments wishing to use digital technologies to create public value should “[e]nsure that general and sector-specific legal and regulatory frameworks allow digital opportunities to be seized”.¹¹⁸ Indeed, sometimes, legal and regulatory frameworks do not only lag behind the technological developments¹¹⁹ but also hinder the use of existing digital solutions. For example, one of the primary reasons behind lawyers’ reluctance in participating in the piloting of the E-File in Moldova was the fact that the Civil Procedure Code still requires that the claimant submits paper-based copies of the claim in court.¹²⁰ As a result, despite having the opportunity to submit a claim online, lawyers were deterred from doing so because they still had to submit the copies in person, which defied the concept of online submission and increased their workload. Fragmented legislation is another concern to be mindful of. When adopting new laws or amending existing ones, particular attention should be paid to assessing their impact on other laws. Harmonization and uniform application is key

Questions for discussion

- What are the primary concerns in the area of legislative, regulatory frameworks or policy pertaining to the development of online courts in your jurisdiction?
- How have you determined the cap for the small claims procedure? Would you revise the amount when introducing an online court?
- Would you integrate ADR in the online court processes? Why?

TECHNOLOGY

88. It is interesting to note that some jurisdictions outsource IT development services and others, such as Estonia, have established a permanent institution that deals with such tasks - RIK. Developing an entire structure for the development and maintenance of justice-related IT systems may prove more expensive for the short and mid-term, whereas outsourcing is easier and perhaps cheaper.¹²¹ Nevertheless, IT systems with complex processes, which require detailed business analysis, are upgraded and improved in shorter time and better quality if there is a certain institutional memory. In this case, an established institution has a better competitive advantage. While substantive progress has been made, populations in many corners of the world -especially in low income countries – are

¹¹⁷ House of Commons Justice Committee Court and Tribunal reforms (2019) “Second Report of Session” (available at: <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf>), p. 11;

¹¹⁸ OECD Council (2014) “Recommendation of the Council on Digital Government Strategies” (available at: <http://www.oecd.org/gov/digital-government/Recommendation-digital-government-strategies.pdf>).

¹¹⁹ Mark D. Fenwick, Wulf A. Kaal Ph.D., Erik P.M. Vermeulen (2017) “Regulation Tomorrow: What Happens When Technology Is Faster than the Law?”, American University Business Law Review Volume 6 | Issue 3 Article 1 2017.

¹²⁰ Civil Procedure Code No. 225 of 30-05-2003, Published in the Official Gazette on 03-08-2018, No. 285-294 art. 436.

¹²¹ Moon et al. (2014) “IT outsourcing success in the public sector: lessons from e-government practices in Korea”, Information Development 1–19.

facing difficulties in accessing justice institutions due to the lack of access to technological means. According to the UN Global SDG database, about half of the world's population does not have Internet access¹²², while the global growth in the percentage of households connected to the internet was slower in 2019, rising only slightly to 54.8% from 53.1% in 2018¹²³. Such evidence of technological divide proves the need for a proportional adoption of digitisation of the judiciary according to the technological infrastructure of each jurisdiction.

89. It is often said that changes in the field of cyberjustice should be court-driven, not technology-driven.¹²⁴ This does not mean, however, that the digital processes should replicate the existing paper-based processes. That would lead to mere digitisation. Instead, the focus should be on identifying the needs and issues with the current system and choosing the kind of technology that addresses those issues. A good starting point may be the Checklist for “Driving Change Towards Cyberjustice” developed by CEPEJ.¹²⁵

90. In most jurisdictions where online courts exist, those courts were developed on separate platforms. Estonia opted, however, on a centralized solution. When considering the development of online courts for small claims, special attention should be given to existing systems that litigants or court staff and judges might already use. To avoid the use of parallel systems, which is not user-friendly and might trigger user reluctance, the envisaged system should be designed to become fully interoperable with existing systems.

91. *Access to internet.* Adapting technology to visual, health or mental impairments. Concerns over such issues have been raised in several jurisdictions. In the UK, for instance this was raised in the case of welfare appeals, where the overwhelming majority of the claimants have a mental or physical disability, which can hinder their ability to follow and benefit from online processes.¹²⁶ Of course, in the case of small claims the probability of having claimants with certain impairments is less but that does not diminish the necessity to adapt the technology to provide them with an appropriate user experience, including offering alternatives to audio and video content and speech read or text-to-speech service.

92. *Security.* The issue of security in the context of information systems needs to be handled pragmatically. As has already been mentioned, with the use of IT comes the fear of a rise in the number of security breaches that would jeopardise the integrity of the judicial system and the data it handles. While cyber threats are a very real danger for justice systems as for any other administration or private organisation, there are, of course, ways of preventing them (e.g. by reducing the risk of an attack occurring) and/or mitigating their effects (e.g. by planning in advance the right course of action in the

¹²² Mercedes García-Escribano (2020) “Low Internet Access Driving Inequality”, IMF blog (available at: <https://blogs.imf.org/2020/06/29/low-internet-access-driving-inequality/>, (last accessed on 18 September 2020).

¹²³ UNESCO (2019) “New report on global broadband access underscores urgent need to reach the half of the world still unconnected” (available at: <https://en.unesco.org/news/new-report-global-broadband-access-underscores-urgent-need-reach-half-world-still-unconnected>, (last accessed on 18 September 2020).

¹²⁴ European Commission for the Efficiency of Justice (CEPEJ) (2016) “Guidelines on how to drive change towards Cyberjustice Stock-taking of tools deployed and summary of good practices”.

¹²⁵ Ibid.

¹²⁶ House of Commons Justice Committee (2019) “Second Report of Session 2019” (available at: <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf>), para 34.

event of an attack). Less gravely, the shift to digital data has prompted concern that systems may be more vulnerable to theft and/or the editing or erasure of data as a result of unauthorised access by external hackers or malicious internal users. Although such risks are not, in themselves, unique to the digital age (in every country, there have been cases in the past where paper documents have been stolen or tampered with, or gone missing), the fear here is of a large-scale attack.

93. Throughout the development of online courts, it is required for justice systems to come up with pragmatic answers to the question of how secure information systems need to be. Firstly, digital systems are in many cases more secure than old-fashioned paper systems, where losses, thefts and/or destruction of data can be commonplace. Secondly, a balance needs to be found and clearly articulated in a policy that seeks to manage risks, rather than simply avoid them.¹²⁷ As pointed out earlier, the introduction of eIDs may be one of the solutions employed to minimize security risks as accessing the services comes with several layers of protection and any action can be traced.

94. *Data Protection and GDPR*: While the principle of open justice remains the cornerstone of judicial integrity, the judiciary has been called to protect and limit the use of personal data, by complying with national and EU regulations on data protection, such as the General Data Protection Regulation 2016/679. The advancement of technology and e-justice has made privacy and data protection a principle topic of consideration, in terms of the manner that personal data shall be shared, published, processed and stored by national courts¹²⁸.

95. In its Justice Programme (2014-2020), the EU has structured, financed and piloting several practices that address and safeguard data protection in a e-justice environment. It has also laid the foundations for the further developments of similar initiatives by states¹²⁹.

96. A point of practical consideration lies on the definition of data controlling stakeholders and their liability, during the various court operations. Further, good practices include anonymization and pseudonymisation by states in different court functions, that aim to ensure the protection of the data subjects, while safeguarding transparency and open justice. The GDPR allows countries to adapt the appropriate methods for the storage, processing and publication of their judgments and other means that may include personal data.

97. Several jurisdictions have adopted the anonymization of judgments before their publication. Bulgaria regulates the publication of judgments in the Law on the Judiciary. In addition, courts—administrative, civil, criminal, regional and city courts—have their own internal rules for preparing the judgments for publication (for example, which decisions or parts of the decision should be published, at what stage after rendering the decision). Anonymization is subject to special rules—what information is anonymized (such as names of litigants and their unique citizenship number; bank accounts; addresses; commercial and trade secrets) and how. A designated court clerk enters each judicial decision and runs an algorithm which automatically deletes the information which by law must be anonymized and the algorithm automatically replaces it with special symbols. In order for the algorithm

¹²⁷ See the checklist available at: https://rm.coe.int/16807482de#_ftn63.

¹²⁸ Giovanni Buttarelli, European Data Protection Supervisor (2013) “Data Protection in the Judiciary: The Challenges for Modern Management” (available at: https://edps.europa.eu/sites/edp/files/publication/13-10-24_speech-budapest_gbu-speaking-note-final_en.pdf).

¹²⁹ Introduction of the data protection reform to the Judicial System, Ref. Ares(2018)4165275 - 08/08/2018, <http://informproject.eu/wp-content/uploads/2018/05/D2.7.pdf>.

to correctly identify, delete and replace the information, there are rules on how such information should be entered in the judicial decision. In Denmark an anonymization tool for court orders was implemented using solely manually crafted grammar rules to find the named entities in the texts. The Cypriot Supreme Court has issued a circular by which it instructed Courts to refrain from anonymizing their judgments, if they contain elements and personal data that are deemed essential for the court's ruling, taking, however into account the proportionality principle.¹³⁰ Anonymization is essential for the publication of certain specific categories, including family law cases and the exclusion of sensitive data of data subjects.

98. Automatic and computer-aided pseudonymization is a widely used method in the judiciaries of several EU jurisdictions. In Finland and France and Austria, the judiciary focused in the automatic pseudonymization of court orders, with the use of machine learning-based methods¹³¹. Pseudonymization is also applied in various operations, mostly relating to court documents that are made accessible to the public, storage in internal data bases and access to authorization catalogues.

99. GDPR also recognizes the sensitivity of certain categories of data that include gender, biometric information, religious and political beliefs that may come up as part of the evidence. Record keeping shall be treated with special attention by the court, as they are closely linked to the data subjects¹³².

Questions for discussion

- Is there an internal IT-department at the MoJ or the authority in charge with court administration in your jurisdiction that has the capability to develop and maintain an online court? If not, how would you outsource such services?
- What technological challenges are you facing or expect to face in the process of developing online courts?

COSTS

100. Allocation of national and institutional resources is a key factor in judicial transformation through administrative and technical initiatives. Adequate resources maintain the needs of the judiciary and also fuel progress. During the past 20 years, many European Countries have moved from

¹³⁰ Privacy Minders (July 2018) "Supreme Court's circular on anonymizing judgments" (available at: <https://www.privacyminders.com/news/supreme-court%E2%80%99s-circular-on-anonymizing-judgments/>) (last accessed September 16, 2020).

¹³¹ A. Oksanen et al. (2019) "Anoppi: A Pseudonymization Service for Finnish Court Documents", Legal Knowledge and Information Systems, (available at: https://helda.helsinki.fi/bitstream/handle/10138/315951/FAIA_322_FAIA190335.pdf?sequence=1).

¹³² Court of Justice of the European Union, *Judgment in Case C-136/17 GC and Others v Commission nationale de l'informatique et des libertés (CNIL)*, (available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-09/cp190113en.pdf>).

the traditional line item budget, with a focus on the maintenance of the judicial status quo, to result oriented budget models¹³³.

101. One of the reasons behind the implementation of online courts is making dispute resolution affordable. Nevertheless, the development and maintenance of IT systems is a significant investment that not every country can commit to. It concerns not only the costs of the development and piloting of the system but also investment in user training, renewal or upgrading of IT infrastructure that can sustain the use of the system, as well as periodical upgrade and future system replacement.

102. In the countries that developed some forms of online courts or introduced important IT innovations in the judiciary, the budget allocated for IT developments was significant. The ambitious HMCTS reform programme in the UK launched in September 2016 estimates an investment of £1bn.¹³⁴ Out of the Canadian CRT total expenses of \$10,152,597 for the fiscal year 2019-2020, \$1,144,435 were spent on information systems and technology.¹³⁵ In 2018, the budget spent by Singapore of \$3,287,400 on e-Litigation Technology Refresh and \$809,400 out \$14,727,400 planned for the Courts of the Future program.¹³⁶ The New South Wales initiative in Australia costs about \$9.2 million.¹³⁷

103. According to the European Commission for the Efficiency of Justice (CEPEJ) reports on the Evaluation of the judicial systems (2016-2018 cycle), the annual public budgets implemented by some EBRD countries of operation for computerisation (equipment, investments, maintenance) are as follows: Armenia - €69,466¹³⁸; Bosnia and Herzegovina - €1,452,946¹³⁹; Bulgaria - €1,031,772¹⁴⁰;

¹³³ Federica Viapiana (2019) "Funding the Judiciary: How Budgeting System Shapes Justice. A Comparative Analysis of Three Case Studies", *International Journal for Court Administration* 10(1), Vol 9 No. 3.

¹³⁴ HMCTS (2018) "The HMCTS reform programme" (available at: <https://www.gov.uk/guidance/the-hmcts-reform-programme>).

¹³⁵ CRT (2020) "2019-2020 Annual report" (available at: <https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf>), p. 31.

¹³⁶ See https://www.singaporebudget.gov.sg/docs/default-source/budget_2019/download/pdf/15-Judicature-2019.pdf. For more information about the courts of future initiative see also <https://www.weforum.org/agenda/2018/11/what-we-can-learn-from-asia-s-courts-of-the-future/>.

¹³⁷ New South Wales Online Registry Courts and Tribunals (2015) "NSW pioneers online courts" (available at: <https://www.justice.nsw.gov.au/Pages/media-news/news/2015/NSW-pioneers-online-courts.aspx>).

¹³⁸ European Commission for the Efficiency of Justice (CEPEJ) (2018), "Evaluation fo the judicial systems. Armenia" (available at <https://rm.coe.int/armenia/16808d0248>).

¹³⁹ European Commission for the Efficiency of Justice (CEPEJ) (2018), "Evaluation fo the judicial systems. Bosnia and Herzegovina" (available at: <https://rm.coe.int/bosnia-and-herzegovina/16808d024d>).

¹⁴⁰ European Commission for the Efficiency of Justice (CEPEJ) (2018), "Evaluation fo the judicial systems. Bulgaria" (available at: <https://rm.coe.int/bulgaria/16808d024e>).

Croatia - €9,963,093¹⁴¹; Estonia- €118,352¹⁴²; Georgia- €154,407¹⁴³; Moldova- €379,144¹⁴⁴; Montenegro-€382,646¹⁴⁵; Romania-€2,557,371¹⁴⁶; Ukraine- €4,816,308¹⁴⁷.

Questions for discussion

- Do you believe that with the advancement of technology developing online courts will become more affordable?
- Are there ways to reduce the cost of developing online courts?
- What are some alternative sources of funding for the development of online courts?
- Are free commercial applications a viable alternative for introducing elements of an online court under budget austerity? If yes, how should privacy and data protection concerns associated with their use be addressed?

¹⁴¹ European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Croatia” (available at: <https://rm.coe.int/croatia/16808d024f>).

¹⁴² European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Estonia” (available at: <https://rm.coe.int/estonia/16808d025c>).

¹⁴³ European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Georgia” (available at: <https://rm.coe.int/georgia/16808d0260>).

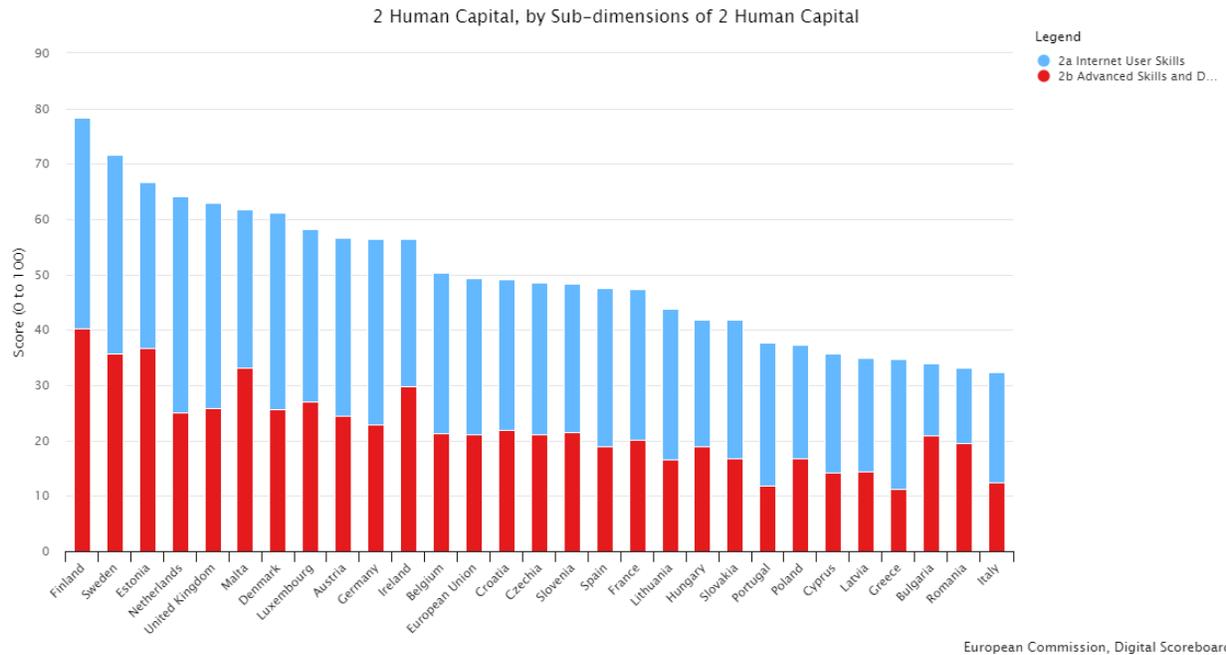
¹⁴⁴ European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Moldova” (available at: <https://rm.coe.int/republic-of-moldova/16808d028e>).

¹⁴⁵ European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Montenegro” (available at: <https://rm.coe.int/montenegro/16808d027f>).

¹⁴⁶ European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Romania” (available at: <https://rm.coe.int/romania/16808d028f>).

¹⁴⁷ European Commission for the Efficiency of Justice (CEPEJ) (2018), “Evaluation fo the judicial systems. Ukraine” (available at: <https://rm.coe.int/ukraine/16808d02b1>).

IT LITERACY OF POTENTIAL USERS



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104. The navigation of online courts and digital governance tools requires a basic degree of IT literacy by stakeholders and potential users. Although familiarity with such skills is the thread that ties the reform vision with the practical application by the public, the results have been far from encouraging: A 2017 research showcased that 9% of the UK population have no digital skills at all and that 21% lack basic technological skills (11.5 million people in total)¹⁴⁹. Therefore, establishment of the feedback mechanisms, educational structures and constant engagement are vital for a sustainable digital transition.

105. Effective communication with the stakeholders: Even the best designed digital applications can be rendered useless in the hands of staff members that are skeptical of their use and resist their implementation. Stakeholders, administrative staff, attorneys and judges may not understand their use and may feel that their job is being threatened by digitized processes. Training sessions by experts and peers would allow stakeholders to comprehend the capabilities of the new tools and make use of the new resources for a more effective judicial process¹⁵⁰.

106. The establishment of a feedback mechanism where citizens/end users and stakeholders may express their concerns is crucial in leveraging its refinement and allowing citizens participate in its progress and develop a sense of ownership on the digital tools.

¹⁴⁸ European Union (2020) "Digital Agenda" (available at:

¹⁴⁹ Lloyds Bank (2017) "Dot Everyone. Consumer Digital Index" (available at: <https://www.lloydsbank.com/assets/media/pdfs/lloyds-bank-consumer-digital-index-2017.pdf>).

¹⁵⁰ Logan Finucan (2018) "Smart Courts: Roadmap for Digital Transformation of Justice in Africa" (available at: https://pic.strathmore.edu/wp-content/uploads/2019/03/PIC_WP_Smart_Courts_Roadmap.pdf).

Questions for discussion

- How would you evaluate the IT literacy levels in your jurisdiction?
- What measures are taken to improve IT literacy?
- What other methods do you think could be applied to minimize the risk of reduced IT literacy in the context of online courts development and use?

CONCLUSION AND NEXT STEPS

107. Technology will continue to infiltrate in various sectors, including the more conservative ones such as the justice sector and the judiciary, in particular. In many jurisdictions, courts are functioning in frameworks and processes established tens of years ago. The COVID-19 crisis has only emphasized this anachronism and underlined its structural and budgetary inefficiencies: Already under-funded judicial systems struggle with resolving the challenges and new types of cases and grievances have been introduced.

108. On-line courts for small claims on commercial disputes appear to be an appropriate area to begin the digital transformation of courts due to the nature of the disputes, the need for fast and effective resolution, the professionalism of the litigants who can usually navigate easier the procedural requirements, etc.

109. The brief research conducted by the EBRD LTP team has revealed that, while no fully functional on-line courts can be identified in EBRD countries of operation, there are many jurisdictions where certain essential elements of on-line courts exist such as case management systems, online payments of court fees, etc. There is a lot of potential to be built on in that existing infrastructure.

110. This discussion paper aims to give a context and framework for a transparent and coordinated discussion about the digital transformation of courts with a focus on commercial disputes with the ultimate scope of identifying areas of intervention for EBRD and various donors in the process of setting on-line courts in selected EBRD countries of operation. The shortlist of such potential countries will depend on the answers received from the contributors.

111. Subject to responses to this paper, the EBRD will organize an on-line event, where key issues will be discussed more in-depth. The discussions during the event and the responses received from contributors will serve as a cornerstone for a follow-up paper with updated information and proposed next steps.

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ANNEXES

Annex 1

List of law firms that provided expertise for this paper:

Law firm	Country	Contact details
TK&Partners	Armenia	
CMS	Bosnia and Herzegovina. Croatia, Morocco, Montenegro, Serbia and Ukraine	
Soiranen	Estonia	
Kinstellar	Bulgaria, Romania and Turkey	
Begiashvili & Co	Georgia	
Ali Sharif Zu'bi Advocates & Legal Consultants	Jordan	
Eversheds Sutherland	Jordan	
Gladei & Partners	Moldova	
KhanLex Partners LLP	Mongolia	
Ferchiou & Associés	Tunisia	
Centil	Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan	

COURT DIGITALISATION QUESTIONNAIRE

Addressed query: “We are very grateful for your cooperation with the EBRD’s legal department and would be very grateful if you could help us with a few brief questions about court digitalisation in your jurisdiction, pro-bono. This information is for our internal use and policy dialogue in relevant countries. However, should we decide to publish any information on the basis of your answers we will make sure to indicate your law firm as contributor to this work.

These questions are in order to gather basic understanding of the courts system digital infrastructure in your country. The focus of the questions is on commercial law courts and cases. The current pandemic has brought to the fore the importance of digitalisation, hence the first question. Other questions are not related to the pandemic, but rather to map out the digital needs and preparedness. Yes/No answers are sufficient, and brief comments are welcome where you feel the need. There is no need to make reference to laws and regulations, or extensive description of exceptions.”

	Question
1.	Case postponement (yes/no) – brief comments are welcome
1.1.	Were courts recommended/ directed to postpone (move the hearing to a later date in the future) commercial case hearings?
1.2.	Do you believe there will be a significant backlog of commercial cases in courts (due to postponement and increase in the number of disputes)? If there are any relevant sources of data in this regard please include a link, for us to consult.
2.	e-case management system (yes/no) – include very brief comments only if you feel the need
2.1.	Is there a case management system which allows <i>commercial judges</i> to:
	access laws, regulations and court decisions?

	automatically generate a hearing schedule for all cases on their docket?
	send notifications (for example, e-mails) to lawyers/parties?
	track the status of a case on their docket?
	view and manage case documents (briefs, motions)?
	assist in writing judgments?
	semi-automatically generate court orders?
	view court orders and judgments in a particular case?
2.2.	Are there any technical/ legislative hurdles to the setting up /usage of e-case management platform by judges?
2.3.	Is there a case management system which allows <i>lawyers/ parties to the dispute</i> to:
	access laws, regulations and court decisions?
	access forms to be submitted to the court?
	receive notifications (for example, e-mails)?
	track the status of a case?

	view and manage case documents (briefs, motions)?
	file briefs and documents with the court?
	view court orders and decisions in a particular case?
2.4.	Are there any technical/ legislative hurdles to the usage of e-case management platform by lawyers/ parties to the dispute?
3.	1. Court automation (yes/no) – include very brief comments only if you feel the need.
3.1.	Can the claim be filed to the commercial court electronically (by law and in practice) through a dedicated platform (not e-mail or fax)?
3.2.	Can the initial complaint be filed through an email (by law and in practice)?
3.3.	Can the initial complaint be served on the defendant electronically, through a dedicated system or by e-mail, fax or SMS (by law and in practice)?
3.4.	Do the submissions require e-signature?
3.4.	Can court fees be paid electronically, either through a dedicated platform or through online banking (by law and in practice)? Are litigants required to follow-up with a hard copy of the receipt or produce a stamped copy of the receipt?
3.5.	Can further documents, relevant to the case, be filed to the commercial court electronically (by law and in practice) through a dedicated platform (not e-mail or fax)? Who can file and store these documents electronically (disputing parties, lawyers, experts)?
3.6.	Do all participants (disputing parties, lawyers, experts) have access to the documents that were filed electronically by other participants to the dispute (by law and in practice)?

3.7.	How are the participants' identities identified to access the documents online on a dedicated online platform?
3.8.	Are judgments made available to the general public through publication on the internet?
4.	4. Remote hearings (yes/no) – brief comments are welcome
4.1.	Are remote hearings (where parties are located outside of the court premises) allowed by law?
4.2.	Is videoconferencing (where parties are located at the court premises but in different courts) allowed by law?
4.3.	Is there the required software in place to hold online hearings?
4.4.	Are commercial courts sufficiently equipped to hold remote hearings?
4.5.	How are the participants' identities identified during remote hearings?

Country	Is there an external system which allows attorneys and litigants to							Is there an internal court system which allows to				Is there a public website	Remote Hearings	
	file a claim through a dedicated platform	pay court fees	send or receive notifications	access forms to be submitted to the court?	serve documents	track the status of a case?	receive judgments and court orders	assigns cases electronically and randomly among judges	allows judges to view and manage case documents	generate or semi generates orders	integrated electronic statistics module	where judgments from all level courts are publicly available?	Are remote hearings (where parties are located outside of the court premises) allowed by law?	Are commercial courts sufficiently equipped to hold remote hearings?
Armenia		✓				✓	✓	✓		✓	✓	✓		
Bosnia - Herzegovina				✓		✓	✓	✓		✓				
Bulgaria		✓	✓	✓		✓	✓	✓		✓	✓	✓		
Croatia		✓	✓			✓	✓	✓		✓	✓	✓		
Estonia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Georgia	✓			✓	✓	✓	✓	✓						
Jordan		✓		✓		✓	✓	✓						
Kazakhstan	✓	✓	✓		✓	✓	✓	✓		✓		✓		
Kyrgyzstan						✓	✓				✓			
Moldova		✓				✓	✓	✓		✓	✓	✓		
Mongolia							✓	✓			✓			
Montenegro						✓	✓	✓	✓		✓			
Morocco			✓	✓		✓	✓	✓		✓			✓	
Romania		✓	✓	✓	✓	✓	✓	✓	✓	✓				
Serbia		✓	✓				✓	✓		✓				
Tajikistan														
Tunisia			✓							✓				
Turkey	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			
Ukraine	✓		✓	✓		✓	✓	✓		✓	✓	✓		
Uzbekistan	✓	✓	✓	✓		✓	✓				✓		✓	