

The Metamorphosis of the Free Access to Justice: Balancing Efficiency and Equity in Online Dispute Resolution

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Abstract

Balancing between becoming an essential expression of free access to justice and an effective supplement in the sphere of the right to a fair trial, alternative dispute resolution (ODR) has become an increasingly commonplace in the digital era. However, this evolution encounters a paradox: on one hand, it bolsters faster access to justice, supporting the celerity component in the conflict solving, on the other, it complicates the access for vulnerable groups who do not use technology and cannot skillfully command its variances within the context of ADR. The paper calls for maintaining a balanced ecosystem in the virtual use of ADR, where efficiency does not erode the essence of equity. Furthermore, it aims to achieve the future goal of keeping technology as a mere means to achieve justice in any form, traditional or alternative, without digital justice branching off as a distinct entity. The article's conclusions seek to outline an answer to whether the technological use of ADR remains a facilitator of access to justice. Does it also encapsulate a realistic solution to the challenges concerning potential new rights, such as the right to be present online or the right to be served justice by a human being?

Keywords: digital justice, technology, fair trial, ODR.

JEL Classification: K10, K24, K38

1. Introductory aspects

Alternative dispute resolution (ADR) methods are extrajudicial procedures through which conflicting parties can seek an amicable solution of the conflict without resorting to traditional courts. This aspect offers various benefits, the most significant being the speed at which a resolution can be achieved.

ADR methods can be employed in almost all areas by individuals or legal entities, governmental or non-governmental organizations, as long as the involved parties can dispose of their rights, and the alternative procedure does not aim to affect public order and good morals.²

From these, we consider relevant for our analysis regarding the use of these methods both online and offline, negotiation, mediation, and arbitration.

Negotiation is one of the most effective methods when obtaining an optimal resolution of a dispute in court cannot be found in the foreseeable future, and resorting to arbitration is not a feasible option due to the high costs such a procedure would entail, being generally suitable for disputes between individuals.

In the case of complex disputes, a clear understanding by the parties of the objectives to be achieved and the limits of possible concessions, identifying agreed points and disputed points, addressing issues step by step, as well as conducting

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² Manuela Sirbu, *Metodele ADR in context european si international*, Ed. Universul Juridic, Bucharest, 2020, p. 15.

discussions in a transparent and good faith manner can at least lead to the conclusion of partial settlements, which simplify the subsequent litigation, reducing the resolution time and associated costs.

Mediation represents another method of amicable dispute resolution, with mediation activities being carried out by authorized mediators under the conditions of Law no. 192/2006 regarding mediation and the organization of the mediator profession. Through mediation, the parties engage in a tripartite dialogue, where discussions can occur directly between the parties or between each party and the mediator. During the procedure, the opinion of a specialist, a technical expert, or a lawyer might also be sought to ascertain facts or clarify unclear or controversial aspects.

Although mediation is purely voluntary, it has the characteristic that under certain conditions, a judge can request the parties during litigation to attend an information session regarding the benefits of mediation. This session is free.

Arbitration is a form of private justice, frequently used in practice for resolving commercial disputes, usually of a certain complexity. Unlike other ADR methods, arbitration concludes with the arbitrator(s) issuing a binding decision for the parties in dispute.

The choice of arbitration as a dispute resolution method is made through an arbitration agreement, which can be concluded as a separate contract or as a clause inserted into the commercial contract, referred to as an "arbitration clause." Parties can also agree to submit a dispute already arisen to arbitration through a compromise – an agreement that identifies the subject of the dispute and the method for its resolution.

Among these, the first three are amicable, informal, and non-binding methods of dispute resolution, which allow for greater procedural flexibility and do not involve the issuance of a binding decision that resolves the conflict. The only one that involves a formal, adversarial procedure and culminates in a binding decision is arbitration.³

2. Definition of terms

We move on to defining the concept of Online Dispute Resolution (ODR), a term that encompasses the alternative dispute resolution methods mentioned earlier, but also reveals other concepts beyond those already discussed.

In specialized doctrine, we learn that the term ODR can lead to confusion, necessitating clarification.

We find, for example, the definition stating that ODR is a subcategory of alternative dispute resolution methods that involves resolving disputes in an online environment, without direct contact between the parties, based either on the involvement of a real person acting as a mediator or on a working mathematical algorithm.⁴

We consider this definition to be overly restrictive from the perspective that it does not even include an exhaustive list of ADR methods transposed online, but rather it considers it a subcategory of these methods, revealing a part-to-whole relationship. We find a more comprehensive definition useful, like the one provided in Section 1, Article

³ Kodru Mansour, *Mijloace alternative de soluționare a disputelor în contextul supraaglomerării instanțelor* <https://hotnews.ro/mijloace-alternative-de-solutionare-a-disputelor-n-contextul-supraaglomerarii-instantelor-249180>, consulted on 1.09.2024.

⁴ Manuela Sirbu, *op. cit.*, p. 15.

2 of the Technical Notes on Online Dispute Resolution, developed by the United Nations Commission on International Trade Law (UNCITRAL), published on December 13, 2016. In our opinion, ODR is not limited just to alternative dispute resolution, but to any procedure that allows virtual participation by the parties. The interpretation offered by UNCITRAL outlines the same points: Such a mechanism is online dispute resolution ("ODR"), which can assist the parties in resolving disputes in a simple, quick, flexible, and secure manner, without the need for physical presence at hearings. ODR encompasses a wide range of approaches and forms (including, but not limited to, the institution of the ombudsman, complaints commissions, negotiation, conciliation, mediation, arbitration, and others), as well as the possibility to conduct proceedings in a hybrid manner, incorporating both online and offline elements.⁵

The definition of Online Dispute Resolution (ODR) incorporates global concepts, transcending national boundaries, which is significant in our view because the online environment eliminates borders concerning the core of certain concepts. A multilateral approach in this field is crucial for aligning Romanian legislation and its future implementation within the international legal framework by adopting an ODR concept with an extended scope, enriched by the challenges and lessons learned from countries more advanced in implementing technology in the judicial system.

In this regard, we can observe that ODR can also encompass special procedures existing within traditional justice, such as the adjudication of small claims⁶. This inclusivity allows ODR to adapt and integrate various legal practices from around the world, ensuring that it remains relevant and effective across different jurisdictions. By considering these global perspectives, Romania can enhance its legal system's efficiency, accessibility, and fairness, aligning with international best practices while addressing local needs, a procedure that already predominantly involves written elements, thus fitting well with the possibility of using a virtual environment for conducting the procedure.

We conclude by highlighting a particularity alongside the acronym ODR that better reflects the specificity of the selected procedures, namely: e-ADR for ADR in the virtual environment and Court-related ODR for judicial procedures that include at least one virtual component throughout the process. We will limit our analysis in this article to the use of ADR in the online environment (e-ADR).

3. The relationship between efficiency and equity in the context of using ADR

After providing clarifications regarding the definition of ADR/ODR, we proceed towards gaining insights into the relationship between efficiency and equity that arises from these.

The argumentation about the efficiency-equity relationship must start from the perception that citizens have of alternative dispute resolution methods, and by extension,

⁵ The technical notes on Online Dispute Resolution, developed by the United Nations Commission on International Trade Law, Section 1, Article 2, https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/v1700382_english_technical_notes_on_odr.pdf, consulted on 1.09.2024.

⁶ Civil Procedure Code, art. 1026 – 1033, <https://legislatie.just.ro/Public/DetaliuDocument/140271>, consulted on 1.09.2024.

of their use in the online environment. Unfortunately, the awareness and use of ADR by Romanians is very low, according to existing market studies. Thus, the conclusions of a study⁷ we consider relevant reflect the following:

- among the best known ADR methods (negotiation, mediation, arbitration), mediation is the most familiar and used, while arbitration is almost non-existent in the legal life of Romanians;
- Romanians show a generally open attitude towards amicable resolution of disputes rather than resorting to court, which presents moderate trust in resolving the conflict and also involves a long time until a solution is obtained, in their opinion;
- the lack of knowledge and use of ADR is caused by the lack of legal education on this subject, more precisely the absence of government campaigns in this area, as well as the lack of a proactive attitude from the courts to present the benefits of ADR and recommend their use;
- the primary source of information for Romanians regarding legal aspects, including ADR, is television.

Given these conclusions, we believe that the next step, namely the virtual use of ADR, shows an even lower trend of awareness and usage, under the guise of insufficient technological skills among the population and reduced confidence in the virtual system.

However, there is an encouragement and predominance in the use of ADR, including from the government, in relations between consumers and professionals, thus making it relevant to analyze the use of online platforms for reporting irregularities in this field to observe the positive aspects that can be adopted in other sectors.

First and foremost, at the national level, the National Authority for Consumer Protection (NACP) presents encouraging mechanisms in the context of ADR, being a public institution under the Government that coordinates and implements the government's strategy and policy in the field of consumer protection, acts to prevent and combat practices harmful to the life, health, security, and economic interests of consumers, having both control and amicable dispute resolution duties.⁸

The ADR procedure made available by NACP is straightforward, with several pre-existing conditions that must be met to be initiated: *a) the consumer has not attempted to contact the trader in question to discuss their complaint and has not sought, as a first step, to resolve the dispute directly with the trader; b) the dispute is brought forward with bad faith or is offensive; c) the dispute is or has been previously reviewed by another ADR entity or by a judicial court; d) the consumer did not submit the complaint to the ADR Division within one year from the date on which, as the case may be, they presented the complaint to the trader or from the date of the act that gave rise to the dispute, or in the case of continuous acts, from the date they ceased; e) handling such a dispute would seriously impair the efficient functioning of the ADR Division; f) the ADR Division is not competent to resolve the dispute; g) at the time of filing the Application, the consumer has submitted a complaint to another public authority or court.*⁹

⁷ Manuela Sirbu, *op. cit.*, p. 23.

⁸ Government Decision no. 700 of July 11, 2012 regarding the organization and operation of the National Authority for Consumer Protection art. 1, para. 1, <https://legislatie.just.ro/Public/DetaliiDocument/139751>, consulted on 1.09.2024.

⁹ ANPC Procedure for Alternative Dispute Resolution, art. 3, alin. 1, <https://anpc.ro/documente/legislatie/>

The last point is of interest from the perspective that, in general, ADR procedures can run concurrently with the solving of the conflict in court, an aspect that is not possible in the context of NACP's ADR procedure.

The use of technological means for initiating the procedure is also encouraged, fitting into the concept of ODR, through an online form that can be filled out on the specific platform.¹⁰

It is important to analyze the impact of ADR procedures on citizens and whether they actually benefit from them in practice. Upon reviewing the statistics, there is a noticeable increasing openness towards alternative dispute resolution in this area. In the latest activity report of NACP published for the year 2023, there was a significant increase in the use of ADR, with the institution, through its specialized department, handling a total of 2,162 requests, specifically 2,148 registered in the Regista system, received via the old ADR form, and 14 through the new Integrated Electronic ADR Platform.¹¹ The growth is significant when compared to 2022, where NACP received 359 petitions, which already represented a 500% increase over previous years. However, there was a noticeable decrease in the use of the online platform, with only 14 requests in 2023 compared to 59 in 2022.¹²

Thirdly, regarding the cross-border aspect concerning consumers, we highlight the importance of the European Consumer Centre in Romania, which operates within the NACP, with its primary activity being the provision of free legal advice on cross-border trade issues and the amicable settlement of complaints we receive from Romanian consumers, as well as from consumers in other member states. We do not find separate statistical data concerning the operation of this division, but we consider its mere existence in this field to be beneficial.

In conclusion, based on this brief analysis, there is an overall increase in the use of ADR by consumers who understand the benefits of these procedures, although challenges related to initiating these processes virtually are still present.

Therefore, regarding the efficiency of using ADR methods, both physically and online, we believe that their existence aligns with Romanians' general intentions to resolve conflicts amicably. However, national skepticism towards any form of justice to be done correctly, including ADR, along with a lack of understanding of how they work and the lack of promotion by the government and courts, significantly hinder these procedures.

These procedures are effective because they can run parallel to traditional judicial proceedings, they are confidential compared to traditional judicial proceedings which respect the publicity of the trial, and their mere existence reinforces the right to a fair trial by offering a broad range of options for conflict resolution. Moreover, online dispute resolution platforms can increase participation and engagement of the parties, allowing them more influence and independence over the process and outcome. Doing so increases the parties' trust, offering transparency, accountability, and security

ProceduraSAL2.pdf, consulted on 1.09.2024.

¹⁰ ANPC platform for ADR, <https://reclamatiiisal.anpc.ro/Formular-inregistrare/tippersoana/1>, consulted on 1.09.2024.

¹¹ Activity Report of ANPC for the Year 2023, <https://anpc.ro/wp-content/uploads/2024/08/RAPORT-ANPC-2023-2.pdf>, consulted on 1.09.2024.

¹² Activity Report of ANPC for the Year 2022, pag. <https://anpc.ro/wp-content/uploads/2023/03/RAPORT-ANPC-ANUL-2022.pdf>, consulted on 1.09.2024.

throughout the process. Additionally, through the automation of tasks like scheduling, document exchange, and case management, an e-ADR platform can speed up the conflict resolution process, providing immediate responses, live updates, and dynamic offers. Improving the quantity and type of information during the procedure.¹³

Regarding equity, things become more nuanced. Any initiative that primarily takes place online, such as informing about consumer rights, publishing rules regarding ADR procedures online, and not also through physical display at the institution's headquarters, or online information campaigns without corresponding physical campaigns, has the potential to impact equity. We encourage doubling the efforts in this field to ensure substantial coverage and not to disadvantage vulnerable groups of citizens, with the aim of strengthening the relationship between efficiency and equity.

4. The human component in the context of using ADR methods

In the context of providing the opportunity to access ADR methods online, discussions also arise regarding the exercise of certain rights in the virtual environment, which are derivatives of the right to a fair trial.

The first aspect worthy of debate pertains to the necessity of human decision in the context of dispute resolution, both through traditional and amicable means. We begin our research with a brief analysis of the need for the human component in the context of traditional justice, namely, the establishment of the court in the context of the right to a fair trial, where there are controversies regarding whether it is possible or obligatory to have a human judge, not a robotic one under the aegis of artificial intelligence (AI).

So, does the right to a fair trial, including here the ADR elements, might incorporate the right to a human judge? Or do we resume to at least having a human element in the process of the decision making, letting other parts of the trial to be automatized?

Where do we draw the line when calling for a human component? Are we entitled to it? These are all important questions to be raised when controlling the process of integrating the AI in the justice field. Moreover, the answers of these questions are relevant when penciling the legislative framework in this regard. We consider it necessary to explain how this right is manifested in traditional courts, then specifying how it applies to ADR methods.

We believe the starting point should be the analysis of the criteria required to belong to a profession. At this moment, AI cannot hold the position of a judge because the legal provisions for the profession can only be met by a human being (age, education, citizenship, etc.). We consider that this condition also applies, *mutatis mutandis*, to professions in the ADR field, such as a mediator, arbitrator, etc. In the same sense, the doctrine in the matter opines that there is no real danger in the replacement of any legal profession by AI, reducing the pompous presentation of initiatives in this regard to simple fake news.¹⁴

¹³ Dale E. Malick, *Five Major Advantages of Using an ODR Platform to Resolve a Dispute!*, May 3, 2024, <https://www.linkedin.com/pulse/five-major-advantages-using-odr-platform-resolve-dispute-malick-qducf>, consulted on 1.09.2024.

¹⁴ Ruxandra Bănică, „Fenomenul înlocuirii profesiilor juridice de către inteligența artificială – pericol real sau doar un mit?”, *Pandectele Române* no. 1/2023, p. 64-73.

Furthermore, we highlight the efforts of the European Commission outlined in the EU AI Regulation¹⁵, which is the world's first law on artificial intelligence, establishing harmonized rules regarding the limits of AI usage, including by judicial authorities, in the research and interpretation of facts, and in law enforcement. We also salute the effort to define of AI behaviors by risk type, as well as the prohibited practices, which pose a threat to safety, rights, or people's livelihoods. Among these are behavioral-cognitive manipulation, policing activities based on predictive analysis, emotion recognition in workplaces and educational institutions, as well as the assignment of a social score. The use of real-time remote biometric identification systems, like facial recognition by law enforcement in public spaces, is also prohibited, with some limited exceptions.¹⁶

Continuing on our golden path to defining the boundaries to be set for using AI in the judicial field, we propose analyzing the following three general observations on why the AI is not capable of correctly appreciating and deciding alone when solving conflicts:

Firstly, as matters stand, AI seems unable to develop an interpretation of the law that adequately takes into account the ever-changing social landscapes surrounding the processes of “doing justice.” Ignoring this obstacle and pressing ahead with AI-driven judgment risks an algorithm applying the law correctly from a strictly formal point of view, yet completely missing the mark when it comes to the societal sense of fairness and justice (the risk of an overly positivistic AI judge). This sense of fairness and justice relies heavily on perceptions of various societal phenomena. Let us take the example of “socially acceptable criticism and exaggeration” as a concept that comes into play when competing interests are weighed against each other, – in this case the right to respect for personal dignity vs. freedom of expression. On numerous occasions, the ECtHR has been confronted with complaints about the judicial application of national laws limiting freedom of expression in cases of “exaggerated” criticism. It has become consistent case-law of the Court that national authorities are under a duty to assess whether the “generally accepted limits of exaggeration” were exceeded. So far, it seems unlikely that an AI judge would be able to appreciate the subtleties of a particular expression in a way that would ensure these accepted limits are adhered to. This would require a very nuanced knowledge of what is accepted by the general public, while taking into account various current social developments. It should be noted that when the ECtHR scrutinise the proportionality of state interventions (even when the classic elements of a proportionality review – i.e. adequacy, reasonability, and necessity – are not explicitly referred to by the Court⁴³), it assesses the measures applied against the legitimate aims pursued, and takes into account what is perceived to be fair and just in a process of judicial appreciation.

Secondly, defining a norm deduced from the provisions of a given legal system, while considering not only its provisions but also scholarly writings and the jurisprudence, seems a task perfectly tailored to artificial intelligence. After all, it involves the analysis of complex databases, which are closed sets of data with a predetermined scope. Yet appraising the body of evidence is something inherently

¹⁵ <https://artificialintelligenceact.eu/ai-act-explorer/>, consulted on 1.09.2024.

¹⁶ EU Artificial intelligence act, <https://www.consilium.europa.eu/ro/policies/artificial-intelligence/#rules>, consulted on 1.09.2024.

different because evidence may vary according to factual circumstances. In turn, these factual circumstances cannot reasonably be predetermined in most cases (except maybe for relatively simple cases of unpaid invoices etc.). Again, falling back on AI when deciding cases that present more complicated evidence may compromise the duty – rooted in the right to a fair trial – to carefully, thoroughly, and seriously analyse particular pieces of evidence and their interconnections against the general background of a case. The assessment of evidence, as a whole, must be “fair and proper”,⁴⁴ and this remains a task that many humans are unable to accomplish, let alone artificial intelligence.

Thirdly, as things stand, AI justice appears unsuitable as a classic branch of government. The primary role of the judiciary is, of course, to decide individual cases and apply justice. However, administration of justice goes way beyond specific cases. It is also a part of the checks and balances formula characterising modern democratic societies. As a consequence, the judiciary’s interpretations sometimes need to be more extensive when the political branches of the government plainly fail to respond to society’s needs, or when these political branches turn dysfunctional. Judging when the time has come for the judiciary to quickly respond to state failure or dysfunctional government (or, conversely, when it should demonstrate more self-restraint) entails careful consideration of very complex socio-political processes and, almost physically “feeling” them. Given AI’s reliance on predetermined and available definitions and datasets, this seems still unachievable for an AI judiciary.¹⁷

We believe that all the mentioned aspects are relevant to ADR as well, although alternative methods are not under the pressure of being a public service or a state power. However, AI is still facing the same limitations here. Moreover, we could mention that ADR requires additional creativity and empathy to facilitate consensus, a task which we believe is too challenging for AI at this current stage. *AI cannot properly decide cases regarding legal disputes, since a brief analysis of the legal decision-making process in detail shows that even simple cases cannot be the subject of robots’ judgment.*¹⁸ Furthermore, the aspects prohibited by the EU Act remain relevant in the context of ADR.

We further opine that the issue of public trust in ADR persists, especially when AI is involved. This same issue was noted by experts at a recent Harvard conference, highlighting three barriers in this regard:

a) **Capability-Based Trust:** *"Does the AI have the ability to help me with this issue, or should I seek help from a human?" "Algorithmic aversion" describes the common tendency not to trust information provided by an algorithm. At the same time, paradoxically, people might be more willing to trust an AI agent to handle sensitive issues like divorce, debt, or housing problems.*

b) **Benevolence-Based Trust:** *"Do I believe this agent is trying to help me, or is it working against me?" People might fear that AI will use the information they provide against them, especially if the alternative dispute resolution (ODR) platform is operated*

¹⁷ Marcin Górski, „Why a Human Court? On the Right to a Human Judge in the Context of the Fair Trial Principle”, *Eucrim*, Issue 1/2023, pp. 83-88, <https://eucrim.eu/articles/why-a-human-court-on-the-right-to-a-human-judge-in-the-context-of-the-fair-trial-principle/>.

¹⁸ Eugen Hurubă (ed.), *Tehnologizarea și digitalizarea procesului civil și a executării silite*, Ed. Universul Juridic, Bucharest, 2024, p. 73.

by their adversary.

c) **Integrity-Based Trust:** *"Will the AI keep its promises or betray me?" When we reveal our preferences to the other party, we might fear that we cannot trust the algorithm to accurately evaluate what we prefer.*¹⁹

5. Is there a right to be present online in the context of resolving a dispute?

The use of ADR in the online environment also raises the issue of communication efficiency, closely linked to the fragile trust surrounding the virtual use of procedures, which leads us to the last point for discussion in this article, namely, the right to be present online. Is this an independent right or merely an expression of the right to be present, a right well emphasized in criminal law where the presence of the defendant is also an expression of the constitutional right to defense in the context of providing the right to a fair trial? *In a broad sense, in criminal cases, the right to defense refers to all the procedural rights and rules that allow the parties involved in the process to formulate defenses against the accusations brought against them, at the same time to challenge them, to prove their innocence and justice own affirmations; in civil cases, this right consists in the possibilities of the parties to prove the groundlessness of the claims of the opposing party.*²⁰

Extending the discussion to other branches of law and to the presence of other parties in court proceedings, we ask whether offering someone the opportunity to be present online in a trial (or an ADR procedure) equates to the benefits of physical presence?

A presence online is different from a presence in court. Both the defendant as well as other participants depend on the technique that connects them. Off course it is a pre-condition that the link is secure and that there is no doubt on the identity of the defendant. However, other than when present in court himself, the defendant may not be able to see and hear everything that occurs in the courtroom and only have access to what the camera and the microphone transmits. This is off course the same for those that are present in the courtroom: they will only see and hear what the camera and microphone at the location of the defendant allows them to note. It is basically these two elements on which real presence differs, the participant can determine himself where to give attention to, but will also be confronted with what happens in the courtroom. One cannot unhear what is being said and cannot unsee what happens in the courtroom. That is different online, it is possible to mute the audio and to switch off the camera. This dependence also makes clear that online presence is not the same as presence in the courtroom and that this goes both ways. Both for what the defendant can observe as well as how the defendant can be observed by all other participants in the courtroom.

Having established that interaction through online presence is not the same as physical presence the logical question is whether that needs to be so. Does online presence have to be equal to physical presence? I do not think that the law requires this.

¹⁹ Katie Shonk, *Advanced Negotiation Techniques: Online Dispute Resolution*, July 27, 2020, <https://www.pon.harvard.edu/daily/negotiation-skills-daily/advanced-negotiation-techniques-online-dispute-resolution/>, consulted on 1.09.2024.

²⁰ Ioan Muraru, Elena Simina Tanasescu (coord.), *Constitutia Romaniei. Comentariu pe articole*. 3rd. ed., Ed. C.H. Beck, Bucharest 2022, p. 198.

What counts is not whether things are the same, but whether the values, rights and interests at stake are properly served. The comparison with real presence as the standard is a non-starter for any debate. (...)

For the design of the trial with online presence all kinds of questions come up that demonstrate that an encompassing rethinking is needed. It is interesting to see that various innovations need some time to adjust to the new circumstances. Hundred years ago the first cars had the shape of a carriage. Now we see that digital files look the same as paper files of the past, even to the extent that information that initially is available in digital format, is printed, sent to another official, scanned and uploaded in a digital system again.²¹ The same applies to the legal proceedings of today; we believe there is a long way to go before we can move a trial entirely online. Only time will tell whether technology will be able to imitate the physical trial to a satisfactory degree and—even if we can—whether we want to ‘settle for’ the virtual version.²²

Secondly, from a legal perspective, are we talking about the right to be present online in any circumstance, or only in specific situations where physical presence is not possible and a court has decided this? We would like to mention relevant jurisprudence from European Court of Human Rights: *“The right of an accused person to appear in person at the trial is a right of the defendant. He may completely waive the right and decide that proceedings can continue without him. Does the defendant also have the right to determine that he will be present online, not physically in the courtroom? (...) In other words, there may be right to be present online, subject to certain conditions determined by the national court that need to safeguard the interests of justice. Some defendants for instance may not be fit to stand trial online as they cannot cope with the technique. In such a situation an online trial would not do justice to the defendant. The defendant must be fit to stand trial digitally. It is an assessment of the rights at stake and the interests of justice that will develop criteria on what kind of trials can only be done in the physical presence of the accused.”²³*

Also relevant is the case of Bivolaru, where the authorities offered online presence as the only available option, the defendant refusing to participate in a video conference, arguing that it was not equivalent to physical presence, while he was abroad. The European Court of Human Rights (ECtHR) did not rule in his favor in this regard: *In this context, the Court notes that, considering the physical absence of the defendant from the trial, the High Court resorted to international judicial assistance. Under the framework of international judicial assistance in criminal matters, Law no. 302/2004 provided the judicial authorities with two methods for hearing a defendant who is abroad and cannot be brought before the court: videoconferencing and rogatory commissions (points 103-105 above). In this respect, the Court notes that the High Court offered the claimant the opportunity to interrogate him through videoconferencing - a form of participation in the procedure that is not, in itself, incompatible with the notion of a fair and public trial (Sakhnovsky v. Russia, 2010). Furthermore, the person in question, assisted by his lawyers, knowingly refused to be interrogated via videoconference, on the*

²¹ André Klip, „The Right to be Present Online”, *European Journal of Crime, Criminal Law and Criminal Justice* 32, 1 (2024): 1-14, doi: <https://doi.org/10.1163/15718174-32010001>.

²² D. L. F. de Vocht, „Trials by video link after the pandemic: the pros and cons of the expansion of virtual justice” *China-EU Law J* 8, 33–44 (2022). <https://doi.org/10.1007/s12689-022-00095-9>.

²³ Ibidem.

*grounds that domestic law allowed him not to consent to such a hearing. Although it is true that domestic law did not require a person who refuses to consent to an interrogation via videoconference to justify their position, the fact remains that, in this case - where the claimant criticizes the court for ruling without his presence - this method of interrogation could be, in the Court's view, an appropriate means to ensure the direct and diligent hearing of the person concerned by the High Court.*²⁴

Thirdly, considering that having both physical and virtual proceedings is not mandatory by law, we believe that the right to be present online does not currently exist *per se*, neither in court nor when using ADR. It is merely an expression of the right to be present, with its implementation left to the discretion of the judge and the necessities of the circumstances. If this right cannot be justified as standalone in the context of the rigid criminal law framework, which strictly aims to ensure the right to defense and the right to a fair trial, then it certainly cannot exist in the context of alternative dispute resolution methods involving the use of online platforms. Its online expression is indeed more useful when we talk about ADR, as it supports the speed of the process, makes the distance between parties irrelevant, and further reduces costs, already lowered by the inherent nature of most ADR methods, but it remains optional.

6. Conclusion

Therefore, some conclusions are in place. First, ADR methods will always represent an area where people can solve their conflicts faster, cheaper, closer to their will, remaining an important piece of the puzzle when consolidating the right to a fair trial.

Secondly, in order to keep their efficiency and equity, ADR methods must maintain access to them both physically and virtually, in order to help the vulnerable groups to access these services too. Moreover, more information is needed in this area in order for the people to find out about ADR benefits and to meet the longing of the citizens to rather solve conflicts amicably, without going to court.

Finally, given the fact that ADR does not imply limits as rigid as the court, the exercise of different rights in this area is not subject to any limitation, having the chance to expand to new realms of utility.

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