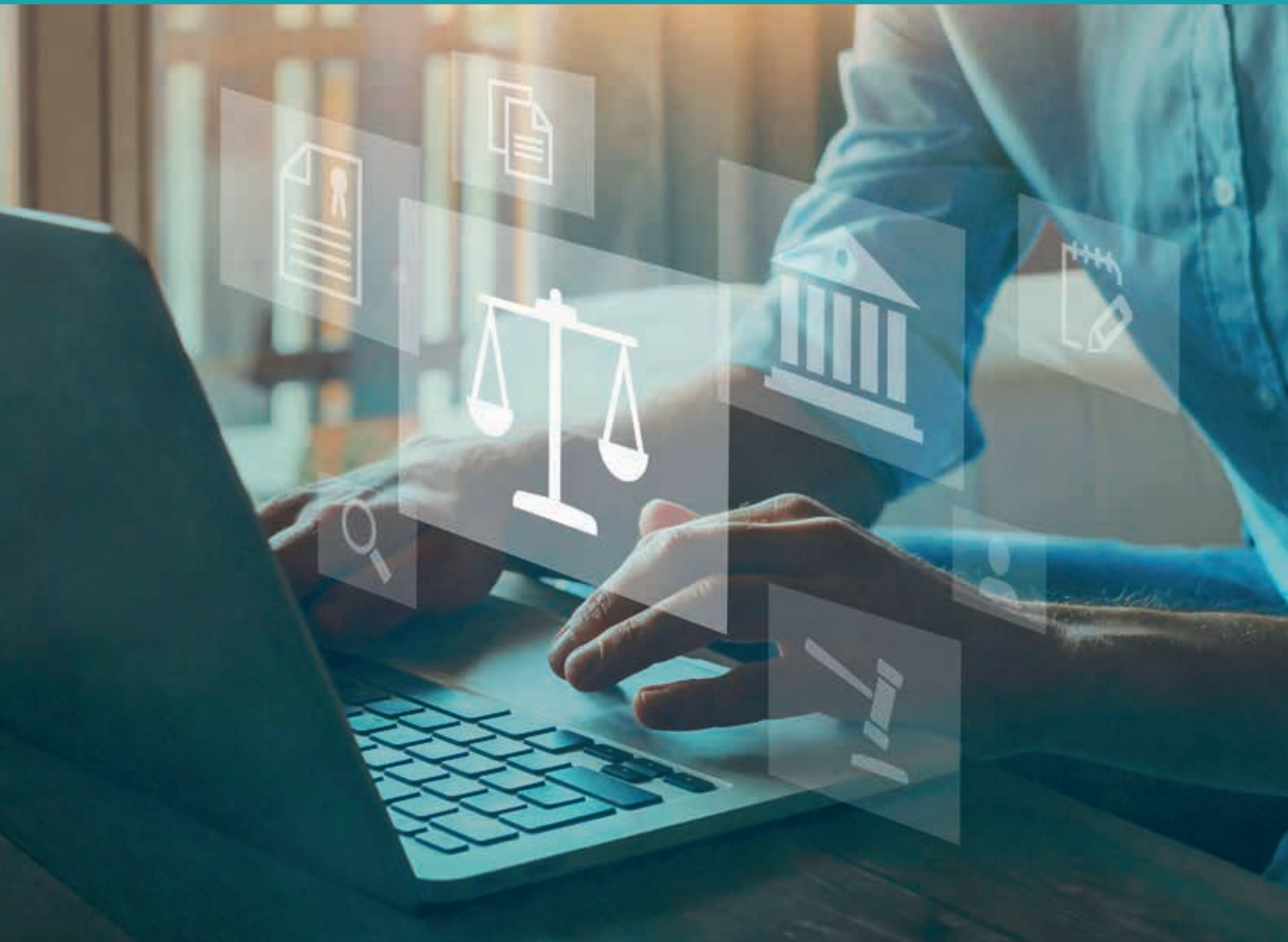




EMERGING MARKETS EMBRACING ONLINE COURTS – COMMERCIAL COURTS FOR SMALL VALUE CLAIMS



“The Covid-19 crisis has highlighted how much we rely on the paper-based, out-of-date and inefficient processes of existing courts.”



WHAT DO WE MEAN BY ONLINE COURTS?

What was once the subject of science fiction movies and books – “AI Justices” and “robocops” – is moving a step closer to reality, spurred on, surprisingly, by a pandemic. We now rely on technologies to shop, meet and visit museums, and all we need for that is a computer and internet connection. These changes were slower to come to the courts, which have had a tendency to resist change; however, the pandemic is forcing the judicial sector to go digital as well.

The Covid-19 crisis has highlighted how much we rely on the paper-based, out-of-date and inefficient processes of existing courts. According to an EBRD survey in May 2020,² because of the pandemic, courts in many countries had to close and postpone case hearings, limiting consideration to urgent matters (see Chart 1).



- ¹ The authors would like to thank Patricia Zhibarta, Consultant, EBRD, and Christina Heliotis, Consultant, EBRD, for their research and drafting of the EBRD discussion paper on the same subject matter, which the authors used in part for the information and data for this article. Special thank you to Patricia for her help with the data and data sources for this article.
- ² In May 2020 the EBRD conducted a survey among 20 of the economies where it invests to obtain information about the most recent developments in their court digitalisation processes. The questions focused on the risk of postponement and backlogs amid Covid-19, the availability of a case management system for courts and an online information system for litigants and attorneys, as well as the use of remote hearings by courts. The information was provided by law firms from the following jurisdictions: Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Jordan, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Montenegro, Morocco, Romania, Serbia, Tajikistan, Tunisia, Turkey, Ukraine and Uzbekistan.



1



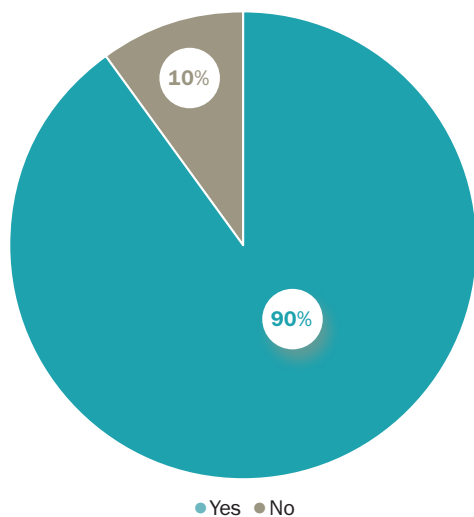
2

¹
MICHAEL STRAUSS
GENERAL COUNSEL, EBRD
straussm@ebrd.com

²
VERONICA BRADAUTANU¹
PRINCIPAL COUNSEL, EBRD
bradautv@ebrd.com

Chart 1: Postponement of commercial cases in 20 EBRD economies

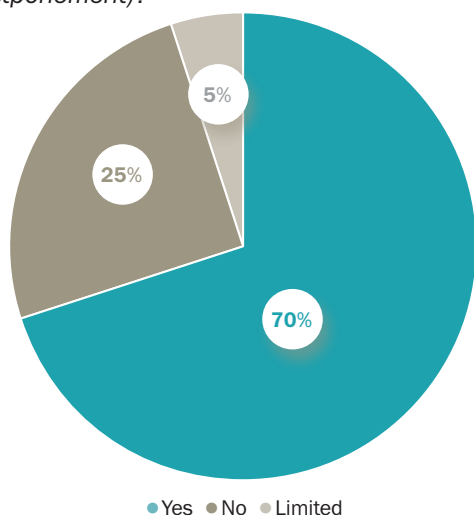
Were courts recommended/directed to postpone commercial case hearings?



Source: EBRD survey of law firms in 20 jurisdictions, May 2020.

Chart 2: Perception of eventual backlog of commercial cases in 20 EBRD economies

Do you believe there will be a significant backlog of commercial cases in courts (due to postponement)?



Source: EBRD survey of law firms in 20 jurisdictions, May 2020.

More concerning was that 70 per cent of the responding jurisdictions, including Armenia, Bulgaria, Georgia, Jordan, Moldova, Montenegro, Tunisia and Ukraine, expected a significant backlog in commercial courts because of these postponements. Interestingly, countries where remote hearings and written procedure could be rapidly employed, such as Estonia, did not envisage a significant backlog.

To counter the effects of the pandemic and continue their work, courts are making efforts to move online. Initially, this has been achieved by using emerging communication platforms, such as Zoom, Skype, Microsoft Teams, as well as pre-existing video equipment, to conduct court hearings. Case management systems, online payments for court fees, online submission of claims and remote access to case files for parties and judges – each plays a role in this transition. However, not many jurisdictions have all the elements of digital operations in place to ensure fully remote proceedings, hence the degree of preparedness to shift online varies.

Given that the transition has been in many ways *ad hoc* and partial, distinguishing remote court proceedings from the traditional ones involving physical presence has led to imprecise terminology. It may well be that in the future “traditional” proceedings will soon refer to both in-person processes and a hybrid of the physical and the virtual. In the meantime, there is often confusion as this new format has been called “online courts”.

Before the pandemic, the term **online courts** primarily meant court proceedings conducted based on document submissions (submitted electronically) and usually without court hearings.³ In this article we will follow that meaning for “online courts”. Consistent with the work of experts in this field, we will label the current process – driven by the exigencies of the pandemic – of courts moving existing processes online as **remote courts**.⁴



³ For example, 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> (last accessed 13 January 2021) or see definition by R. Susskind (2019), *Online Courts and the Future of Justice*, Oxford University Press, Oxford.

⁴ Professor Richard Susskind refers to several forms of “remote courts”, such as audio hearings (largely by telephone), video hearings (for example, by Skype and Zoom), and paper hearings (decisions delivered on the basis of paper submissions). For more information, see <https://remotecourts.org/> (last accessed 13 January 2021).

WHY TRANSFORM THE COURTS? REMOTE COURTS VERSUS ONLINE COURTS

The innovative idea behind **online courts** is the opportunity to revisit the way court services are delivered and consider new approaches that would ease access to justice. Transferring existing proceedings to online and remote formats, though, is not enough (**remote courts**).

We believe there is a strong public consensus among those accessing justice that courts and court proceedings are complex, expensive (be it for the parties or for the state), slow and, overall, an intimidating endeavour. Data show that, while access to justice (civil and criminal) is a human right, roughly 50 per cent of the population can exercise that right.⁵

This also applies to the business communities, where small companies and individual entrepreneurs tend to avoid the courts at the expense of not being able to enforce their rights. For example, in Ukraine, businesses indicate that breakdown in the rule of law and the lack of law enforcement are major challenges to doing business.⁶ In the Western Balkans, foreign-owned firms similarly perceive courts as one of the major obstacles in conducting business.⁷

As a consequence, policymakers should take this opportunity to consider ways to make court proceedings more effective and efficient. In particular, court services need to be made suitable and user-friendly for the litigants, beyond focusing on improving processes for judges, lawyers and court staff.⁸

“The innovative idea behind online courts is the opportunity to revisit the way court services are delivered and consider new approaches that would ease access to justice.”

HOW CAN THE COURTS BE TRANSFORMED?

Court reform may take various forms. The EBRD's countries of operations (CoOs) have long sought to reform their courts to minimise corruption, increase court efficiency (that is, make them faster), and improve the quality of decisions.⁹

Perhaps the current crisis offers a rare opportunity to approach court reform from a different perspective. For example, the United Kingdom and Canada¹⁰ took the view that courts should deliver better public service and be more user-friendly and accessible, in particular, to litigants in person (for some categories of cases). The EBRD's Legal Transition Programme (LTP) organised a virtual discussion on 20 October 2020¹¹ where panellists offered ways to transform court proceedings.

- 
- ⁵ See OECD, 'Towards Inclusive Growth - Access to Justice: Supporting people-focused justice services' (available at: <http://www.oecd.org/gov/access-to-justice-supporting-people-focused-justice-services.pdf> last accessed 13 January 2021).
 - ⁶ EBRD (2020), *Transition Report 2019-20: Better governance, better economies*, p76 (available at: <https://2019.tr-ebrd.com/>)
 - ⁷ See A. Krešić, J. Milatović and P. Sanfey (2017), "Firm performance and obstacles to doing business in the Western Balkans: evidence from the BEEPS," EBRD, London available at: <https://www.ebrd.com/documents/occe/firm-performance-and-obstacles-to-doing-business-in-the-western-balkans-evidence-from-the-beeps.pdf> (last accessed 13 January 2021).
 - ⁸ See Richard Susskind's book *Online Courts and the Future of Justice* (OUP) exploring the idea of court as a service and ways in which such a service can be redesigned to enable laypeople a structure and to resolve their disputes.
 - ⁹ A. Colman, "Court decisions in commercial matters: an EBRD assessment" in *Law in transition 2011: Towards better courts*, EBRD, London, pp 20-37.
 - ¹⁰ B. Henderson, "Is access to justice a design problem?", available at <https://www.legalevolution.org/2019/06/is-access-to-justice-a-design-problem-099/> (last accessed 13 January 2021).
 - ¹¹ For more information on the EBRD event on 20 October 2020, Developing Online Commercial Courts For Emerging Markets, description, agenda, related documents and recording please visit: <https://ebrd.glueup.com/event/developing-online-commercial-courts-for-emerging-markets-27964/> Direct link to the recording of the event can be found [here](#). The EBRD has also developed a draft discussion paper, exploring existing best practices and potential challenges in developing online courts in the economies where the Bank invests.

Panellists suggested that throughout the transformation process, policymakers should also consider several reforms:

- **Simplifying the court proceedings** is one of the first steps to consider, independent of the need for digitalisation. Lawmakers and the courts should consider court processes in detail and identify bottlenecks, redundant rituals and unnecessary parts of proceeding, such as mandatory court hearings for small claims disputes or loopholes allowing delays as a result of suspension of court proceedings. These could be excluded or reformulated for certain categories of cases, creating a separate more streamlined procedure (online court).
- **Unifying court practice** through commentaries and guidance for judges and the legal profession will increase the predictability of outcomes. It will also help guide litigants when deciding to file a claim in court.
- **A preliminary mediation or negotiation step** is obligatory in many jurisdictions before parties may file an action in court. This allows the resolution of many cases without court intervention. Technology also makes this easy to carry out.
- **Including templates, guidance and other tools to assist the litigants** is essential in saving costs and time for the parties, as well as providing parties with the confidence to act on their own and navigate court proceedings.
- **User-friendly and intuitive technical solutions** are another essential ingredient in the transformation of court processes aimed at

improving access to justice. For example, in Canada, the reformers modelled the online court with a user-centric approach in mind (that is, the public comes first) to achieve simplicity and familiarity for the users.¹² In Singapore, they offered pre-filing assessments to help litigants structure their disputes,¹³ while in China, service of documents was enabled via text messages, emails and WeChat messenger.¹⁴

During the aforementioned EBRD event in October 2020¹⁵ there was consensus among the experts that to achieve better courts and public service the policymakers need to consult the public and understand their concerns. The best way to do this is to map out litigants' experience by asking parties to provide feedback on each step of the process, including during piloting stages.

It is worth noting that improving access to justice through online, user-friendly processes may have a significant impact on access to justice for the more vulnerable categories of the population and the businesses they run (such as women, people with disabilities), although, so far not much data have been gathered to back this claim. In countries that set up online courts, there is a perception that women users outnumber men, and women access online courts at a proportionally higher rate than traditional courts. The EBRD study on access to justice of women entrepreneurs in Jordan¹⁶ and the discussions during the Regional Forum for Women Judges in SEMED¹⁷ revealed there are cultural barriers to women's appearance in courts in some jurisdictions.



¹² S. Salter and D. Thompson (2017), "Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal", *McGill Journal of Dispute Resolution*, Vol. 3, 2016-2017, Osgoode Legal Studies Research Paper No. 44, Available at SSRN: <https://ssrn.com/abstract=2955796> (last accessed 13 January 2021).

¹³ See Supreme Court of Singapore "E-litigation" (available at: <https://www.supremecourt.gov.sg/services/services-for-the-legal-profession/elitigation>) (last accessed 13 January 2021).

¹⁴ G. Du and M. Yu (2019), China Justice Observer, "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>) (last accessed 13 January 2021).

¹⁵ For more information on the EBRD event on 20 October 2020, Developing Online Commercial Courts For Emerging Markets, description, agenda, related documents and recording visit: <https://ebrd.glueup.com/event/developing-online-commercial-courts-for-emerging-markets-27964/> (last accessed 13 January 2021).

¹⁶ Visit the EBRD's Economic Inclusion page: <https://www.ebrd.com/what-we-do/projects-and-sectors/economic-inclusion.html> The Study 'Women Entrepreneurs' Access to Justice. Study findings: Jordan' (2019) is available at: <https://www.ebrd.com/cs/Satellite?c=Content&cid=139528822273&pagename=EBRD%2FContent%2FDownloadDocument> (last accessed 13 January 2021).

¹⁷ EBRD (2019), *Law in Transition 2019: Better laws for better economies*, see at: <https://www.ebrd.com/publications/law-in-transition-2019-gender-balance.pdf>, pp. 58-61.



“As any reform in any jurisdiction, creating online courts will encounter resistance and a series of challenges.”

FOCUS ON COMMERCIAL DISPUTES AND SMALL VALUE CLAIMS

Taking on the reform of the entire court system would be a gargantuan task. It may also prove not very efficient, as various parts may need differently tailored approaches, depending on the type of case – criminal, family, commercial, labour, and so on. Most jurisdictions implementing online courts started with limited categories of cases. In Canada, the Civil Resolution Tribunal started with small claims of up to US\$ 5,000, motor vehicle accident and injury claims of up to US\$ 50,000, as well as societies and cooperative association disputes (Soc/Coop) and strata property (condominium) disputes of any amount.¹⁸ The Singaporean Community Justice and Tribunal System opted for small claims, community disputes and employment claims.¹⁹

¹⁸ Civil Resolution Tribunal Act, [SBC 2012] Chapter 25 (available at: <https://bit.ly/33zC12H>) (last accessed 13 January 2021). According to its 2019-20 Annual Report, out of 5,880 new CRT applications for dispute resolution in 2020, 4,926 were small claims applications. For more information, see “2019-2020 Annual report” (available at: <https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf> <https://civilresolutionbc.ca/about-the-crt/presentations/>) (last accessed 20 January 2021).

¹⁹ See State Courts Singapore, Community Justice and Tribunal Systems, <https://www.statecourts.gov.sg/CJTS/#!/index1> (last accessed 13 January 2021).

Commercial disputes, and disputes based on small claims in particular (€5,000 to €10,000), seem a good target for transformation and transitioning online. There are a number of reasons for this, including the need to ease access to justice for small and medium-sized enterprises. In small claims, the costs and time delays are often disproportionate compared with the value of the claim. According to World Bank data, the cost of resolving a commercial dispute through a local first-instance court in Serbia amounts to 39.6 per cent of the claim value, in Ukraine – 46.3 per cent, and in the Kyrgyz Republic – 47 per cent.²⁰ In addition, many jurisdictions often already have a separate court procedure for small value claims.

This may mean that reform will require fewer changes to the law. Moreover, in many jurisdictions cases involving small value claims are generally examined without court hearings, based on documents submitted by the parties, making them particularly suitable for shifting online.

WHAT ARE THE CHALLENGES IN ESTABLISHING ONLINE COURTS IN EMERGING MARKETS?

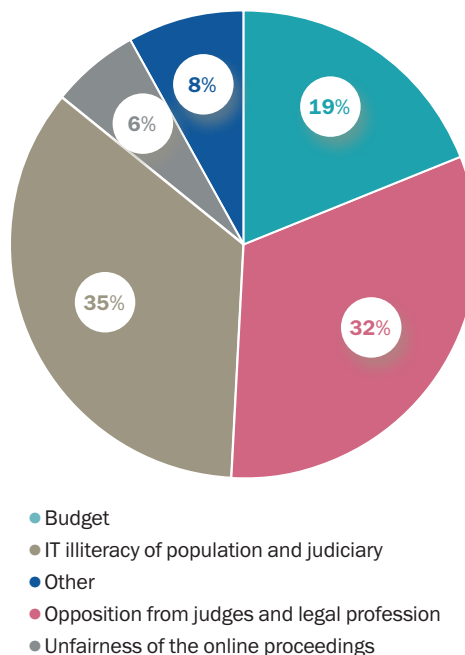
As any reform in any jurisdiction, creating online courts will encounter resistance and a series of challenges. Many challenges, though, will be more prominent in the emerging markets.

Political instability and government turnover are a particular challenge in the EBRD's CoOs. Reform of courts typically requires investments of financial resources and time. Hence political commitment, as well as leadership, is essential. In Ukraine, the new president came to power with the slogan: "A state in a smartphone". But momentum must be maintained even as governments change: it is also important that the champions of reform have sufficient time to progress these reforms, or at least make them difficult to reverse through approved strategy commitments – or better still, by advancing them far enough for the people to realise and fight to keep the benefits of these reforms.

Insufficient information technology (IT) literacy of the judiciary and the public is another major concern in any jurisdiction. When polled during the LTP's 20 October event, and a similar event during the World Bank Group's Law, Justice and Development Week (LJDW) in November 2020 participants and experts in the field clearly indicated this as a major challenge to setting up online courts.²¹

Chart 3: Example of poll results on challenges to establishing online courts (LJDW)

What do you think is the biggest challenge for establishing online courts in your jurisdictions?

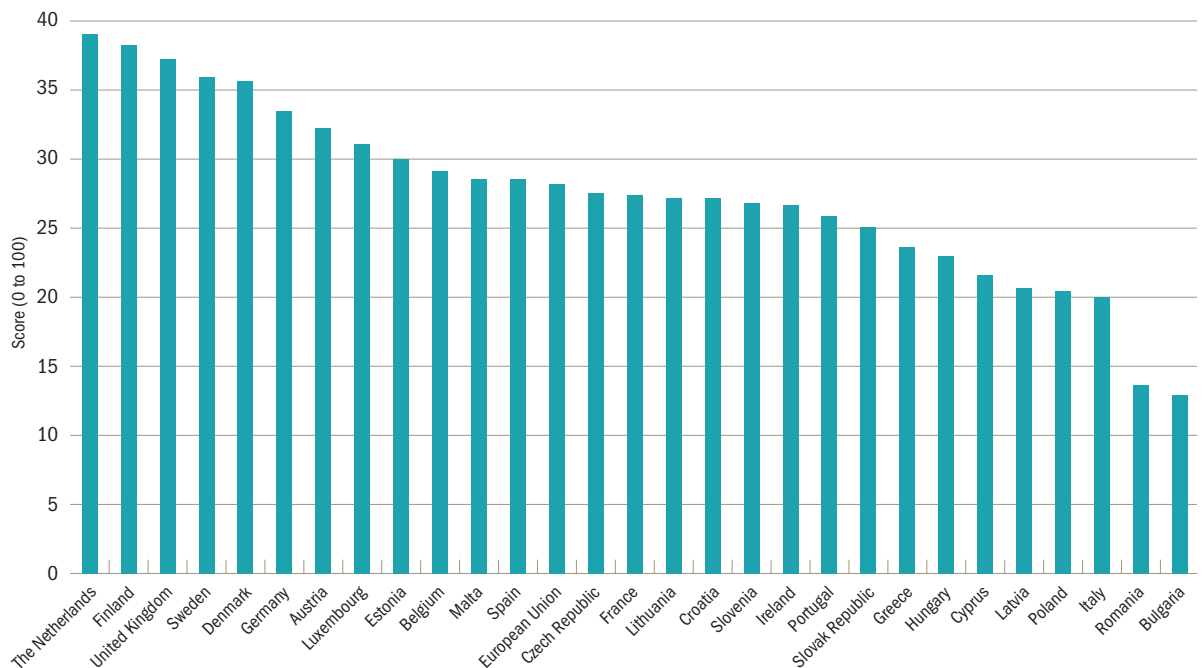


Source: Online poll conducted during LJDW 2020: Urgency of Online Courts for Commercial Disputes.

Insufficient IT skills should not be regarded as a deterrent, but should nevertheless be considered when planning and designing such courts. In particular, a hybrid approach may be a solution, giving the public access to physical courts and/or guidance by court clerks as needed. Below is a snapshot of digital skills in the EU countries.

²⁰ The World Bank (2020), "Doing Business. Enforcing Contracts" (available at: <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts>) (last accessed 13 January 2021).

²¹ During the *Law, Justice and Development Week 2020 - Legal Responses to the COVID-19 Pandemic* event organised by the World Bank in November 2020, 59 out of 167 respondents mentioned IT illiteracy as the biggest challenge for establishing online courts in their jurisdiction. For more information about the LJDW, visit <https://www.worldbank.org/en/events/2020/05/29/law-justice-and-development-week-2020> (last accessed 13 January 2021).

Chart 4: Internet User Skills Score (DESI, European Commission)

Note: The Internet User Skills Score indicates a combination of the number of individuals residing in EU member states with the skills they possess to use digital devices and/or the internet. The highest score indicates the higher number of individuals with basic internet and other digital user skills. The score is part of the European Commission's Digital Economy and Society Index (DESI). To learn more about DESI, please visit <https://ec.europa.eu/digital-single-market/en/digital-economy-and-society-index-desi>.

Source: European Commission, 2020.²²

The significant financial resources necessary to put in place online courts pose another major challenge. While some jurisdictions that have developed online courts have deployed impressive resources to this end, the advice is to learn from their experience, as well as consider finding more affordable IT solutions. In particular, many EBRD jurisdictions have access to highly sophisticated IT resources, which may be used at a fraction of the cost of counterparts in developed markets. One of the most relatable experiences in digitising court systems for EBRD countries is the example of Estonia, which since early 2005, fully digitised its court system, offering online submission of claims. According to its experts in digital transformation, the investments in IT solutions may be recovered within two months of implementation.²³

To put such savings into perspective and ascertain the potential investment required, one need only review the European Commission for the Efficiency of Justice (CEPEJ) reports on the Evaluation of the judicial systems. According to the latest report (2016-18 cycle), the annual public budgets implemented by some EBRD CoOs for court computerisation (equipment, investments, maintenance) are as follows: Armenia: €69,466; Bosnia and Herzegovina: €1,452,946; Bulgaria: €1,031,772; Croatia: €9,963,093; Estonia: €118,352; Georgia: €154,407; Moldova: €379,144; Montenegro: €382,646; Romania: €2,557,371; and Ukraine: €4,816,308.²⁴ Note Estonia's extremely reasonable court maintenance budget, which clearly indicates a reduced financial burden after the initial development investment.



²² European Union (2020), "Digital Agenda" (available at: <https://digital-agenda-data.eu/> and <https://digital-agenda-data.eu/datasets/desi/visualizations>) (last accessed 20 January 2021).

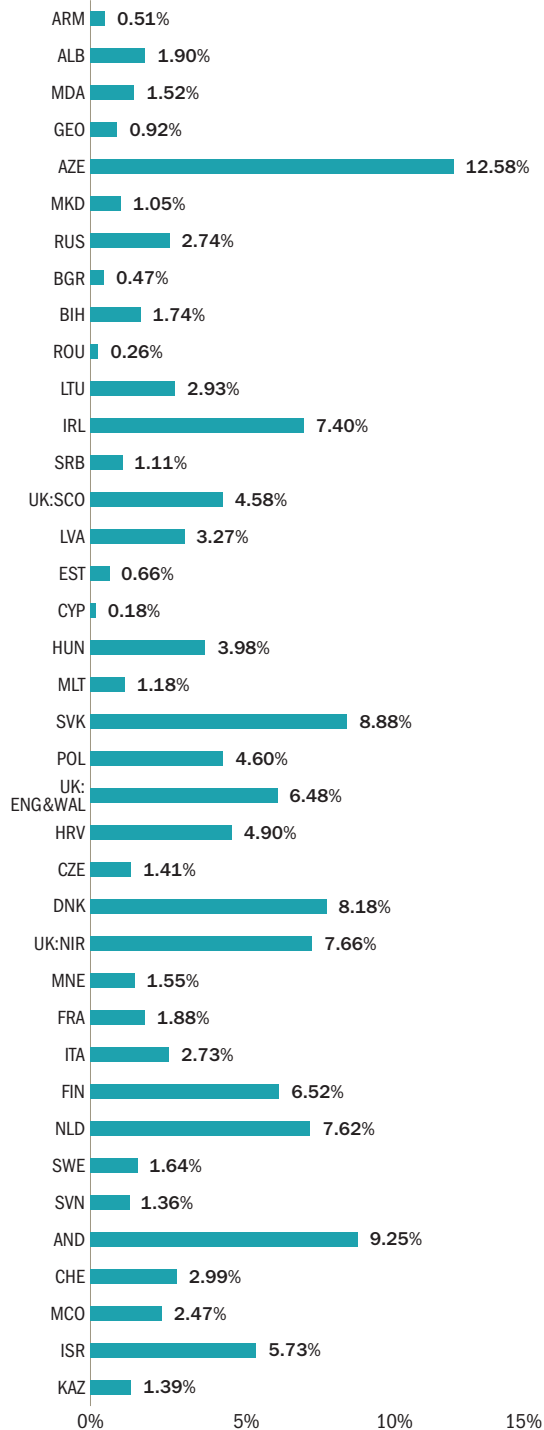
²³ Annet Numa, Digital Transformation Adviser at e-Estonia Briefing Centre, EBRD webinar "Developing online courts for emerging markets", 2020.

²⁴ European Commission for the Efficiency of Justice (CEPEJ) (2018), "Evaluation for the judicial systems. Ukraine" (available at: <https://rm.coe.int/ukraine/16808d02b1>) (last accessed 13 January 2021).

Opposition from the judiciary and lawyers is another oft-cited challenge to online courts. The legal profession may perceive online courts as taking away their livelihoods by providing direct, easy access for litigants. In exploring this critique, Richard Susskind refers to “lawyerless courts”.²⁵ However, depending on the type of cases deferred to online resolution, this concern may be overplayed. It is well recognised that small-value cases rarely reach the courts or, if they do, rarely require formal legal representation, due to their simplicity. Increasing access to courts may in fact raise the demand for legal services, for a smaller fee and simpler advice. As for the opposition from the judiciary, a constant dialogue and adequate training must be in place to help the transition.

“The Covid-19 crisis has only emphasised the structural and economic inefficiencies of the judiciary and will thus create a greater impetus for change.”

Chart 5: Average participation of the implemented ICT budget in the budget of courts, annually, 2014-2018



Source: European judicial systems CEPEJ Evaluation Report 2020 Evaluation cycle (2018 data), available at <https://rm.coe.int/evaluation-report-part-1-english/16809fc058>. The three digit codes are ISO 3166 country codes.





CONCLUSION

Technology will continue to disrupt and enhance the work of various sectors, including more conservative areas such as the justice sector and the judiciary. The Covid-19 crisis has only emphasised the structural and economic inefficiencies of the judiciary and will thus create a greater impetus for change.

Online courts are a viable solution for the highlighted issues. Advocates suggest that they increase access to justice for those who are otherwise deterred from resorting to court services because of the cost, duration and difficulty in navigating legal proceedings. This can be successfully addressed by adopting a user-centred approach.

With the onset of the Covid-19 pandemic, the time finally arrived to gradually reform our courts, but reform must be carried out while being mindful of the purpose of transformation and goals pursued – be it access to justice, efficiency of justice or simply modernising the justice system. We advocate for first embracing expanded and online access to justice as a goal, then designing the solutions appropriately.

