Part I
Due Process Guarantees and Online Dispute Resolution

A Judge's Perspective: Guarantees of a Fair Trial and Online Dispute Resolution

António Santos Abrantes Geraldes

1. The simple idea that a dispute can be resolved online still raises eyebrows, especially among those justice professionals (judiciary and legal counsel) whose training was based on the classical paradigm involving in-person proceedings conducted according to rules contained primarily in the Code of Civil Procedure (CCP). The centrepiece of these proceedings, which start with the submission of pleadings and the discovery phase, is the final trial, featuring the oral proceedings in which statements are heard from parties, expert and witnesses.

Despite this, these are changing times and although the administration of justice is an area naturally more conservative than others, we are nonetheless seeing changes driven by technological progress to which everyone, willingly or otherwise, finds themselves adapting. This can be seen especially in the increasingly routine and mandatory use of an online platform (CITIUS) on which the lawyers acting for the parties, judges and court officials now expedite procedural acts, providing a record of all the documents and information relevant to the resolution of cases.

The current situation created by the pandemic has also affected how courts operate and has added fresh impetus to the growing use of online resources, bringing about procedural changes in the form of widespread use of videoconference systems, not just for trial proceedings in the lower courts, in which participants are not physically present at the court, but also for the deliberations of the higher courts, with judges communicating with each other online.

Force of circumstance has meant that lawmakers have had to institute arrangements that allow justice to be done despite the adverse conditions, permitting the use of online means for remote communications. Whilst temporary in character, these steps will inevitably influence future decisions in response to the foreseeable need for faster-moving and more effective procedural instruments.

These measures will necessarily result in an apparatus more accepting of further legislative changes currently being pursued at European Union

level with a view to online dispute resolution (ODR), especially in cases arising from commercial relations exclusively or preferentially established online.

2. The resolution of private law disputes using channels that offer an alternative to the justice administered by state courts is now firmly established in most European legal systems.

In consumer law in particular, a need has long been felt to establish mechanisms to settle disputes involving mediation, conciliation and arbitration, as the traditional judicial response has frequently proved wanting and, in other cases, too cumbersome and expensive, in view of the nature of those disputes and the sums of money at issue.

Globalisation of the economy and growing consumption of goods and services purchased from different locations has fed into an upsurge in low density litigation in the field of consumer law, putting huge pressure on the apparatus of state courts that have long faced a shortfall in the human and material resources needed for a swift response to other demands.

On the other hand, the traditional procedural model has been shown to be too cumbersome for needs of these litigants, whilst also hampering a swifter and more effective response to other disputes.

In this context, a new network of arbitral tribunals in the field of consumer law was a natural option, providing an alternative way of settling the disputes better suited to their nature and scale, and offering a less expensive channel for prospective litigants.

3. In the meantime, the system has evolved to allow disputes to be settled online, keeping up with the trend for online trading in goods and services. This trade is not tied to specific territories and tends to be global in reach, creating a need for solutions that match this reality.

Here too, we can point to two distinct styles of response:

a) One where disputes are settled through online platforms that serve to receive complaints, which are assessed by the system administrators, sometimes using artificial intelligence, without however offering guarantees of independence from the entities against which the complaints are directed;
b) Another where online dispute resolution seeks to offer users guarantees similar to those provided by the use of alternative means of dispute resolution and by the bodies empowered to handle mediation, conciliation and arbitration proceedings, leading in this case to an award with effects equivalent to those of a court ruling.

This second approach has been the subject of recent legislation in the European Union, in the form of Regulation (EU) No 524/2013, relating to

Directive 2013/11/EU on alternative dispute resolution for consumer disputes which, in Portugal, was transposed by Law 144/15, of 8 September.

At issue here are essentially disputes resulting from online cross-border transactions, within the European Union, albeit without ruling out the possibility of including disputes arising from online transactions within a single country.

However, this is a system that only caters for situations where the goods or services are acquired by a consumer, i.e. a natural person who has acquired them outside or predominantly outside the scope of his business, industrial, trade or professional activities. And although the Regulation also provides for complaints brought by traders against consumers, it is naturally a channel that will be sought out most by consumers, allowing them to file complaints and claims against online vendors or service providers, leading to settlement of disputes through acceptance, mediation, conciliation or arbitral award.

For this purpose, the Regulation has made provision for an interactive online platform allowing for procedures to be conducted electronically and offering connection to an organisation qualified to offer alternative forms of dispute resolution.

So it is not the platform itself that responds to the complaints submitted, acting instead as a facilitator of access to alternative means of dispute resolution for those seeking to exercise their rights arising from online trading in goods and services.

Although it is not mandatory for complaints to be handled online by alternative disputes settlement bodies, all communications to the parties concerned and their interactions with the procedures take place through the platform, without needing in-person appearances.

Another highly important aspect is that the use of this procedure is not obligatory, meaning that the possibility of reaching online settlements to disputes does not preclude exercise of the right of action through the traditional justice administration system offered by state courts.

4. But there is one crucial point regarding any dispute resolution promoted through national or supranational legislative measures: it must be ensured that such resolution is fair.

This requires the existence of functional rules that safeguard what is called fair trial, both in the sense accepted in domestic law, and in that emerging from the vast body of case law of the European Court of Human Rights.

According to this case law, a fair trial implies several requirements, which include:

a) the right to adversarial process, meaning that the parties are able to participate effectively and on an informed basis;
b) the need to ensure equal treatment of the parties; and, as an especially important aspect of any adjudicative activity,
c) conditions that objectively and subjectively ensure the independence and impartiality of those judging the case, be they the judges in a state court, or arbitrators in disputed submitted for alternative dispute resolution, whether in person or online.

Fair trial is not to be confused with the use of criteria of equity in the resolution of disputes. It is more than that. Notwithstanding the application of criteria of equity, when applicable, respect for a fair trial is furthered by the necessary association between dispute settlement and the entities to which powers are granted to settle disputes.

As regards online dispute resolution (ODR), arrangements must be in place that make it possible to assert the independence and impartiality of the arbitrators, both as regards the persons managing the alternative dispute resolution bodies, and as regards those responsible for medication, conciliation and arbitration activities.

This means that the persons responsible for dispute resolution:

a) must not receive instructions from the parties or their representatives;
b) must enjoy a minimum level of stability in exercise of their duties;
c) must be remunerated on a basis not tied to the outcomes reached; and, where applicable,
d) must declare their interests when any circumstance calls their independence and impartiality into question.

The arrangements must also ensure:

a) the transparency of the rules and procedures; and
b) the effectiveness of the procedure, so that it is resolved in a necessarily short space of time, in view of the nature and origin of disputes arising from the online sale of goods and services.

All this must come together to ensure users have confidence in the system.

5. Steps to introduce online dispute resolution should therefore be viewed as the natural way forward, insofar as they constitute further progress towards effective consumer protection.

Although this is still a relatively recent measure, data from the European Consumer Centre shows that all European Union countries have

provided access to the online dispute resolution platform, which is linked to alternative dispute settlement bodies.

According to the figures published, consumer demand for these services arises largely from disputes relating to air travel, sales of clothes and goods and hotel stays.

In conclusion: the facilitation of complaints through online platforms which are easy for the interested parties to use, the transparency of procedures, the independence and impartiality of the persons who will examine the facts in a procedure with a due adversarial element and reduction of costs, in view of both the value of the goods and services in question, and the comparative costs of using traditional channels - all these are factors that not only make it safer to trade online, but also offer effective, simple and swift protection for consumer rights in an increasingly globalised society.

6. As already stated, the guarantee of a fair trial is fundamental to the resolution of any disputes through voluntary arbitration, whether national and international, or through the ordinary state courts. This requirement is all the more pressing when electronic means are used in those disputes, either for the submission of pleadings, or else for discovery phase or trial.

In arbitral proceedings, the greater freedom enjoyed by arbitrators in mapping out the procedural rules and the combined efforts of both parties and their legal representatives with a view to securing swift and fair settlement of the dispute increases the scope for harnessing new technology.

In the state courts, where procedural rules are more rigid, it is naturally more difficult to make technological innovations, but ordinary civil procedure has nonetheless evolved to do so.

We will cite some important examples:

After some initial hesitation, Portuguese legislation moved decisively to enshrine online procedures in the state courts, as now provided for in Article 132 CCP, as amended by Decree-Law 97/19, of 26 July: "the case file is electronic in nature, comprising structured information contained in an information system supporting the activity of courts and of electronic documents".

In practice, this means the CITIUS system, through which cases are processed, from the submission of the parties' pleadings and applications, to notifications between parties, court orders and judgments, and all the acts of the court clerks. This may also include communications with external bodies provided the information systems are interoperable, on terms regulated in Ministerial Order (*Portaria*) 280/13, of 26 August.

It is in this system that, under Article 144 CCP, parties represented by lawyers or *solicitadores* must carry out all procedural acts, including the

submission of documents, unless, in view of their nature or size, they cannot be processed online.

The only exception to this rule is in situations where representation by a lawyer is not mandatory and parties opt to represent themselves, in which case other means may be used (submission to the court clerks, by email or fax), under the terms of Article 144 para. 7.

This integrated system also records hearings and, in particular, oral evidence produced to the judge, under Article 155 CCP, providing the parties with access for the purpose of challenging the decision on the matter of fact proven and not proven, and also ensuring that the Appeal Court has access to this when necessary for forming its conviction concerning the matter of fact, in the light of the principle of free appraisal, in accordance with the provisions of Article 662 CCP.

As is obvious, this new technological resource must guarantee the integrity, authenticity and inviolability of the system (Art. 132 para 4 CCP). These requirements together with respect for the fundamental principles of adversarial process, equality of the parties and the independence of the judge, combine to ensure a fair trial.

Experience now makes it possible to point to the advantages of online proceedings over physical or material proceedings insofar that, when those guarantees are in place, they represent significant progress in terms of procedural simplification, the celerity of proceedings and increased convenience for all participants, especially for lawyers, as they do away with unnecessary travel and facilitate procedural acts. For judges, it means they can monitor the course of proceedings more directly and access the case file from wherever they may be.

Observation of the system as currently implemented and functioning has revealed no procedural issues that undermine the right to a fair trial, because all the fundamental principles of civil procedure, most notably adversarial process and equality of the parties, are upheld in a way equivalent to the model based on the existence of a physical case file (Art. 3 and 4 CCP), and the transparency of proceedings is ensured, both at first instance, and at the Appeal Courts or the Supreme Court of Justice.

7. But online procedure is also compatible with other technological advances capable of bringing greater efficiency and celerity to the settlement of disputes, which involve the possibility of using means of remote communication to facilitate the taking of oral evidence; this can reduce costs, although supplementary safeguards need to be adopted.

We may here point to the increased powers given to judges to direct the proceedings, on terms made very clear in Article 6 CCP, which provides for a pro-active approach to ensuring swift progress is made in proceed-

ings, by taking all the steps needed to ensure the process runs smoothly and adopting such measures as may be appropriate to simplify and speed up proceedings, geared essentially to the central objective to be pursued in all proceedings, which is to arrive at a just settlement of the dispute within a reasonable time.

This power of direction attributed to the judge must be exercised in keeping with the principle of appropriate form established in Article 547 CCP, whereby "the judge must adopt the procedural stages appropriate to the specific features of the cause and adapt the content and form of procedural acts to their intended purpose, ensuring a fair trial".

All these powers exist alongside rules and traditions that point to adherence to a certain procedural ritual that ensures a standard of predictability and certainty for all those involved and, at the same time, offers the solemnity appropriate to the activity of resolving disputes or settling conflicts of interests through judicial channels.

It is these guiding concepts - celerity and efficiency on the one hand, and certainty and solemnity on the other - that we find throughout the procedural rules, and especially in those governing the discovery phase and the final hearing, with the aim of producing a final decision that is the result of compliance with fundamental principles that include adversarial process and equality, both essential features of a fair trial.

It follows that all acts whereby evidence is produced must comply, in material terms, with the principle of an adversarial process; this entails ensuring that no evidence is admitted and evaluated without both parties having the chance to challenge it (Art. 415 CCP).

The adversarial principle is especially important in the case of evidence not yet in existence, such as in the case of party depositions, expert testimony and witness depositions, where each party has the right to intervene in the preparation and production of that evidence, under the first part of Article 415 para. 2 CPC. These requirements apply even when the early production of evidence is needed in the circumstances provided for in Article 419 CCP: in these cases too, evidence must be admitted and produced in a setting that allows for effective exercise of adversarial process.

8. It so happens, however, that the system has been evolving towards facilitating and expediting the production of this evidence, which now does not necessarily have to take place in the presence of the judge and the parties' legal representatives at the final trial hearing.

Well before the courts and lawmakers came under pressure from the epidemiological circumstances that arose as from early 2020, giving rise to a temporary legislation governing, among other things, the holding of trial hearings by video link (Law 1-A/20, of 19 March, in successive versions

responding to the changing situation), legislators had felt the need to tackle a number of factors that held up the taking of oral evidence.

For example, instead of the sending of letters of request for the hearing of witnesses resident outside the court's area of jurisdiction, the system had already moved to allow oral evidence to be taken using technological equipment permitting real time communication using audiovisual means. In the first instance, this required the witness to attend the court in his or her area of residence, but the change made to Article 502 CCP by Decree-Law 97/19, of 26 July, allowed witnesses to be heard not just from the premises of a court, but also from other public premises belonging to municipalities or civil parishes, or other public buildings. In these circumstances, using a videoconference link, witnesses depose in just the same way as they would if present at the hearing.

These rules on the production of oral evidence also apply to party depositions, under Article 456 para. 2, and even to clarifications requested from certain expert witnesses, under Article 486 para. 2 CCP.

It is nonetheless true that, in the case of persons resident in other countries, the procedure resulting from instruments of international law (e.g. The Hague Convention, of 18-3-1970, on the taking of evidence abroad in civil or commercial matters) or European law (Council Regulation No. 1206/2001 of 28 May 2001, on the taking of evidence in the European Union using teleconference facilities) must be followed.

For the purpose of the questioning of witnesses within the European Union, this Regulation contains rules on requests for taking oral evidence by the courts of the country of residence of the deposer and provides the possibility of the deposition being taken directly by the court of the requesting country, including by video link, albeit in all cases on a voluntary basis and with the intervention of a judge or judicial personnel of the country of residence (Art. 17). Under the convention mentioned, provision is made only for the issue of letters of request to the judicial authorities of the country of residence or requests for the taking of oral evidence from citizens of the requesting State.

Whilst neither of these instruments provides for the possibility of taking oral evidence directly using technological means, the internal rule contained in Article 502 para. 5 CCP allows for this possibility, on the decision of the judge, under his power to direct proceedings, in accordance with Article 6 CCP and after first consulting the parties; this may be especially justified when the institutions of the country of residence are unable to guarantee a swift response to any other request entailing the use of other channels.

This possibility presents the particular feature of not requiring deponents to present themselves to any other entity and permitting them to depose from any location abroad, as was admitted in the Judgment of the Lisbon Appeal Court, of 19-11-2019, 28325/17, *www.dgsi.pt*, in a case where the judge at first instance issued the following order:

Notify the claimant that it may not be possible to establish a videoconference link between Portugal and Mozambique for the questioning of the witnesses he has listed, and that he should therefore clarify, within ten days, whether he wishes a connection using other technological means ("Whatsapp"; "Facetime", "Skype" or other) for which purpose he must provide the contact number of the witnesses and make available the equipment to be used to this end or else to send, as originally envisaged, a letter of request indicating the alternatives of questioning by videoconference, failing which questioning by conference call, and failing which questioning by a Mozambican Judge.

If he opts, as originally envisaged, for the sending of a letter of request to Mozambique, in view of the existing constraints, he must indicate, within ten days the questions he wishes to be put to each of the witnesses, in the eventuality of the sole means of international cooperation available being questioning by a Mozambican Judge.

The following order was subsequently issued:

Considering that the claimant does not object to his witnesses resident abroad (*in casu*, in Mozambique) using "*Skype/Whatsapp*" and in view of the constraints in the procedures for international cooperation on the use of videoconference links, for reasons of procedural economy I hereby determine that his witnesses be questioned in this way, under the terms of Article 502 para. 4 CCP.

9. Nonetheless, in spite of the growing importance that has been given to depositions made remotely, beyond the direct reach of the judge and the parties' legal representatives, the practical arrangements are only thinly regulated, especially as regards measures to ensure the possibility of control over factors influencing how depositions are made, challenged by the parties' legal representatives and evaluated by the judge.

Article 504 para. 4 CCP limits itself practically to certifying that persons presenting themselves to depose are actually those indicated for this purpose, and it is for this that the persons identifies him or herself to the court clerk or public servant at the place attended by the deponent.

Greater concern has been shown for situations where failure to appear is due to impossibility or serious difficulty, under the terms of Article 520 CCP, in which case it is established that the person may be questioned by telephone or other means of direct communication between the court

and the deponent, specifying that the court must take all possible steps to ensure the authenticity and full freedom of deposition, sending a court official to the remote location to accompany the deponent.

Irrespective of any specific regulations, the guarantees of authenticity and freedom must apply to any deposition, regardless of the circumstances, and it is important to this end that the deponent be distanced not only from the judge but also from the attorneys of each of the parties, ensuring that oral evidence is provided in a way that is effectively close to what would happen at a trial fearing. This will be easier to evaluate when audiovisual means are used, but perhaps more difficult to confirm when merely employing an audio link.

This is what happened in the case that was assessed in the Judgment of the Guimarães Appeal Court, of 28-2-19, 2281/17, *www.dgsi.pt*, concerning an issue relating to confirmation of the identity and credibility of a witness who was questioned on *Skype*, where it was observed that:

We believe it was the legislator's intention to enable the courts to expedite the questioning of witnesses, in particular when resident abroad, in order to avoid that questioning from being an added factor in delaying the conclusion of proceedings, both by eliminating the need for sending a letter of request and, in some instances, of the actual questioning by conference call which, as it must comply with specific formal requirements, involving the necessary translation, as well as contacts with the foreign judicial authority, also entails added delays.

This is the view taken by António Geraldes, Paulo Pimenta and Luís Filipe Pires de Sousa (CCP annotated., vol. I,559) who, in an annotation to this provision, write that "in an era of technological globalisation and continuous mobility of the workforce, it makes no sense for the questioning of witnesses resident abroad to continue to constitute a factor adding to delays in concluding proceedings (…) We believe that the changes to this provision, now headed "Questioning by technological means", point towards this process being expedited.

…

We also consider that the legislator has in fact permitted the use of technological means, such as *Skype* and not just conference calls, for the questioning of witnesses resident abroad and that those technological means, namely *Skype*, must be considered as reliable means which, being at the court's disposal, must be used instead of others that can cause delays in concluding trials and consequently in reaching the close of proceedings.

And we do not consider that the legislator has established that conference calls are in any way the first preference of the various electronic options referred to in Article 502 CCP, so as to require at present that

witnesses resident abroad be questioned using that particular electronic means, with recourse to others only to be contemplated when a conference call is impossible.

On the contrary, the principle of procedural management established in Article 6 CCP requires the judge to take active steps to direct the proceedings and ensure their celerity, adopting mechanisms to simplify and expedite the proceedings such as ensure a fair settlement of the dispute within a reasonable time, safeguarding at all times the guarantee of the parties' rights which, in our view, are not affected by the use of these technological means, because the parties are still able to pursue the proceedings in relation to the witnesses and to raise all the procedural issues they deem relevant to the defence of their interests.

For this reason, the question of possible risks in the identification of the witnesses should not be raised in relation to the admissibility of questioning by *Skype*, but in the context of the actual questioning carried out in each case and the precautions that can be taken in each instance. For example, we may point to the countless situations in which the identity of a witness is not even open to question, as he or she is personally or professionally know to both parties, meaning their identity is unquestionable, without prejudice, of course to the identification by the court referred to in Article 513 para. 1 CCP.

…

In any case, the court's identification of the witness was exhaustive, as we confirmed by listening to the recording, going far beyond that which is usually done and implied in the said Article 513 para. 1 CCP, namely with the witness replying as to his place and date of birth, his parents' names, his wife's name and the names of his two children, and exhibiting his citizen's card in a way that left the lower court in no doubt as to his identity.

10. It is clear that all these mechanisms call into question aspects traditionally regarded as relevant in lending credibility to depositions.

In the first place, they lack the solemnity of a deposition in the setting of a trial hearing. Whilst form is not to be confused with content, the two are not unrelated, especially in situations where depositions are given under oath, implying an awareness of the importance of the act to the outcome of the dispute.

Secondly, the greater physical distance of the witness from the court may aggravate the chronic problem of perjury, a risk that is all the greater when we consider that the idea that testimony must be provided in strict obedience to the truth, for the sake of justice, independently of the party calling the witness, is not truly rooted in our community.

We may also note that our system is based on the orality principle, that is to say, that the depositions of witnesses or parties are provided orally before the court. Recent legislation permitting the submission of written depositions, on the terms established in Article 518 CCP, has failed to bear fruit, as has the introduction of the model of questioning as agreed by the parties, provided for in Article 517 CCP, and frequently employed in the French courts.

In these circumstances, special importance continues to be attached to the principle of immediacy emerging from Articles 459 to 462 CCP and to the principle of free assessment of evidence produced orally (Art. 607 para. 5 CCP), as in the case of witness depositions (Article 396 Civil Code) or even in that of party depositions, in the situations provided for in Article 358 para. 4 Civil Code. Both these principles unavoidably suffer when it is decided to take oral evidence using remote means communication, whether in the form of videoconference or, even more so, in the form of a mere audio link.

In reality, despite the technological advances made over time, oral evidence obtained by technological means, even when this involved transmission and recording of both sound and images, still fails to transmit all the details which, as we are taught by judicial psychology or even the rules of experience, customarily come into play when assessing the credibility of a witness. In particular, this procedure can undermine the ability of the judge and legal counsel to perceive effectively elements of non-verbal communication, which are sometime as or more important than that which is put into words.

11. Despite this, however, it would be wrong to attach too much importance to these issues because, as we have seen, the traditional ways in which oral testimony is given to courts has very frequently failed to prevent false depositions, with a direct influence on the settlement of disputes and without those responsible suffering any effective penalties.

What is more, irrespective of how it is provided, the scrutiny of oral evidence in order to verify the deponent's claim to first-hand knowledge and truthfulness must entail not just active efforts on the part of the judge, but also the endeavours of the parties' legal counsel, who will have access to information beyond the reach of judicial control.

Moreover, there is no reliable data to tell us which aspects are truly relevant in order to assess the credibility of depositions, because factors that might point in one direction for a particular deponent may not be applicable to another.

The same can be said as regards the solemnity of oral testimony, which cannot be held up as exemplifying an absolute standard that all other

elements necessarily fail to meet. Whilst it is clear that the authority of the State is also manifested in court ritual, it should not be overlooked that, alongside this value, there are also the interests of procedural efficiency and celerity in the administration of justice, which are important to keeping the social peace, which depends on the settlement of disputes or the resolution of conflicts of interests.

There is no doubt that, as far as possible, material truth must be pursued in keeping with the general principles inherent in any judicial procedure, ensuring that, alongside the equality of the parties and the independence and autonomy of the judge, the adversarial principle is truly respected, especially at the stage of the production of evidence, before or during the final hearing.

It is the sum total of all these principles and rules that makes it possible to ensure that the right to a fair trial is upheld; in view of the importance that is still assigned to evidence provided orally and of the fact that other, more objective evidence is often lacking, a fair trial cannot do without rigorous, albeit less solemn or formal, handling of how oral evidence is provided, challenged and evaluated by the judge.

12. These are issues that unavoidably also arise in arbitration proceedings.

Given that, in this channel for judging disputes, more weight is attached to the parties' shared interest in the goal of arriving at settlement of a dispute through the intervention of the arbitrators, following through a procedure that must be truly instrumental to that ultimate end, the way in which evidence is gathered, and in particular how the depositions of the different persons involved, namely the parties, experts and witnesses, are provided, obtained and evaluated, is of no little consequence to the fairness of the final outcome.

Because of the high value of the economic interests at stake, arising from legal relationships of great complexity, the process of establishing the relevant matter of fact is commonly dependent on obtaining and evaluating the depositions of persons living or working in different places, often in different countries.

It is clear that, within the greater freedom enjoyed by arbitrators in setting the procedural rules, there are no absolute impediments to submission of written depositions, but a measure of resistance may also be discerned here, arising from misgivings as to whether the duty of truthfulness will prevail or when it has to be ensured that the depositions are free of any pressures arising from professional loyalty or closeness to one or other of the parties.

Less difficulties exist in relation to the option of depositions being provided by electronic means, which is especially justified in cases involving persons living abroad; in addition to offering a more convenient form of making depositions, this option allows parties to reduce arbitration costs by limiting travel to the arbitration venue.

The circumstances created by the pandemic also highlighted the utility or even the necessity of altering the traditional paradigm, leading to examinations and cross-examinations that would otherwise have taken place in the physical presence of the arbitrators being conducted online, albeit surrounded by the precautions needed to verify the authenticity of depositions, for the sake of fair and equitable resolution of the arbitral dispute.

13. Consequently, neither in litigation proceedings in state courts nor in those following national and international arbitration rules should the use of technological resources appropriate to the specific circumstances be ruled out.

In the case of depositions by parties, experts or witnesses, it is of pressing importance to tighten the procedures for verifying the identity of deponents, checking their claim to first-hand knowledge and controlling how oral testimony is given, thereby reducing the risk of deponents being manipulated on the basis of their dependence on one or other of the parties.

It is common for persons who come forward to depose to have a working relationship with the parties themselves, which may increase the likelihood of partial testimony, the evidential value of which must necessarily be assessed, on pain of vitiating the final outcome.

This means that, in addition to giving advance notice of how oral evidence will be provided, there are objective requirements for ensuring that examination and cross-examination by the parties' lawyers, or the questioning by judges or arbitrators, is carried out in an environment that allows the deponents and the place from which they speak to be seen, so that their claim to first-hand knowledge can be freely assessed, along with the quality of their deposition and its impact on the decision on the matter of fact which is, of course, the essential element on which the settlement of disputes depends.

In a system such as that in Portugal where, in both the state courts and arbitral tribunals, a strong influence on the decision on the matter of fact is still exerted by evidence subject to free evaluation, such as the testimony of witnesses or even party depositions without the effect of confession, the guarantees of a fair trial imposed by Article 20 para. 4 of the Constitution necessarily require proper grounds for that decision, in which the judge or arbitrators trace the methodological pathway that led to a given result.

This is the meaning of the rule in Article 607 para. 4 CCP, with regard to ordinary civil procedure, whereby in setting out his grounds for the decision on the facts he deems proven and not proven the judge must examine 'critically the evidence, indicating the inferences drawn from instrumental facts and specifying the other grounds which were decisive in forming his conviction', as well as drawing "from the established facts the presumptions imposed by law or by the rules of experience".

To this end, it does not suffice to merely reproduce portions of the oral testimony; instead, there must be a critical examination of the evidence produced, in particular that which is subject to free evaluation, under Article 607 para. 5, enunciating the essential reasons which, in the light of varied and often contradictory elements, proved to be crucial in forming his conviction as regards the facts deemed proven and not proven.

This, of course, amounts to complying with the duty to state grounds, requiring judges or arbitrators to set out and explain the reasons for their decision, declaring why, without forfeiting the freedom of decision guaranteed by the continued applicability of the principle of free evaluation of evidence, certain conclusions of the expert witnesses were judged relevant or irrelevant, whether the evidence resulting from exhibits was deemed satisfactory or otherwise, or whether greater credibility was assigned to some depositions and not to others.

If this task is already difficult in the light of depositions made in the presence of the judge or arbitrators, subject to intensive cross-examination and to the principle of immediacy which makes it possible for the judge or arbitrator to take a pro-active approach to seeking out the material truth, the fact that the oral evidence is taken by videoconference or other means of remote communication must not serve to justify less rigorous treatment of the factual elements relevant to the free formation of the judge's (or arbitrators') conviction.