



# Guarantees in the Use of Telecommunications Technology in Litigation before UAE Civil Courts and Its Compliance with International Standards



## ACADEMIC ARTICLE

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## ABSTRACT

In 2005, the United Arab Emirates (UAE) legislature authorized the use of telecommunications technology into the delivery of government services. Such use was extended to the judiciary in (i) 2017 in amendments to the Civil Procedures Law, (ii) 2018 by issuing the Civil Procedure Regulation, and (iii) 2019 by a Ministerial Decision regulating its use. Deployment of this technology has guaranteed the fulfilment of swift justice in the UAE's courts through the advantages of simplicity, swiftness, low cost, equality between the litigants. In addition, it supports the State's policy of implementing modern technologies to more efficiently process everyday transactions. However, major questions remain about the guarantees offered to litigants when using this system, whether these guarantees actually improve traditional (i.e. non-electronic) litigation process, and the extent to which these guarantees comply with international standards related to principles and rules of litigation. The paper argues that the recent legislative amendments provide similar and more advanced guarantees for remote litigation, such as the lack of objections by litigants; records of remote litigation being confidential and protected; information security policies; the principles of publicity and confrontation between the litigants being fulfilled; and, the right of defence being guaranteed. In the conclusion, the paper suggests additional amendments to UAE law so that litigation guarantees are fully assured when using technology in litigation before the civil courts.

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The UAE legislature authorized the use of telecommunications technology in the field of litigation after passing Federal Law No. (28) of 2005 regarding the Personal Affairs Act,<sup>1</sup> and the amendment to Article (8) of the Civil Procedure Act by virtue of Federal Law No. (10) of 2014.<sup>2</sup> However, the UAE judicial system witnessed a breakthrough in the use of telecommunication technology after passage of Federal Law No. (10) of 2017, which amended provisions of the Civil Procedure Act.<sup>3</sup> This Federal law addresses two main issues: first, the law states that the Ministers' Council shall issue a new regulation called the Civil Procedure Regulation; second, it confirms the use of telecommunications technology with civil procedures in Articles (332) to (343).<sup>4</sup>

With these modifications, Federal law (No. 10) paves the way for the use of telecommunications technology in litigation procedures before the civil courts. Moreover, the executive regulation of the Civil Procedure Act also provides more detail and applications regarding this new use.<sup>5</sup> In addition, the Minister of Justice issued Decree No. (260) of 2019 concerning the procedural guide for the regulation of litigation through the use of telecommunications and electronic means in civil procedures.<sup>6</sup>

Effectively, the UAE legislature has approved the use of this technology to validate litigation procedures completed entirely or partially within the framework of an electronic environment. Naturally, this expansion has raised questions. What is

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1 Article (14/1) of the Personal Affairs Act stipulates the following: 'The respondent or the notified party shall be notified personally with a copy of the judicial notice in his domicile, place of residence, workplace, elected domicile, or wherever he exists; thus, if it is not possible to notify him in this way, the court may notify him via fax, email, registered mail with acknowledgement of receipt, or any other equivalent means'.

2 Before its annulment by virtue of Article (3) of the Federal Decree-Law No. (10) of 2017, Article (8/1) of the Civil Procedure Act stipulated the following: 'A copy of the judicial notice shall be delivered to the notified party personally wherever he exists, his domicile, his place of residence, his elected domicile or his workplace'; thus, if it is not possible to notify him in this way or if he refrained from receiving the notice, the Claims Management Office may notify him or declare his notification legally via registered mail with acknowledgment of receipt, fax, email, or any other equivalent modern means of technology (specified in this regard by virtue of the Decree issued by the Minister of Justice), or via any other means agreed upon by both parties.

3 Issued on September 18<sup>th</sup> 2017, Federal Official Gazette, Year 47, Issue 622 (Appendix), September 18<sup>th</sup> 2017, P. 9.

4 Issued by virtue of the Ministers Council's Decree No.: (57) of 2018, Federal Official Gazette, Year 48, Issue 643 (Appendix), December 16<sup>th</sup> 2018, P. 9; and amended by virtue of Decree No. (33) of 2020.

5 Some use the term 'Remote Litigation'; see the following:

- A. F. Mandil, Remote litigation: A Legal Study. *Al-Koufa Journal for Legal & Political Sciences, Iraq*, 1(21), 2014, P. 100.
- H. H. Alkaabi & N. J. Mohamed, Remote litigation. *Al-Mouhakiq Al-Hilly Journal for Legal and Political Sciences, University of Babylon, Iraq*, 1 (8), 2016, P. 278.

Others use the term 'Electronic Litigation'; see the following:

- L. Asmani, The Electronic Litigation System: A Mechanism for Successful Development Plans. *Al-Mofaker Journal*, 13, Faculty of Law and Political Sciences, Biskra University, Algeria, P. 215.
- O. L. Aloubidi, Electronic Litigation and its Application Mechanism: A Comparative Study. *Tikrit University, Faculty of Law Journal*. Year 1, Vol. 1, (2/ 1), Iraq 2017, P. 509.

6 Issued on March 27<sup>th</sup> 2019, Federal Official Gazette, Year 49, Issue 651, April 14<sup>th</sup> 2019.

the concept of using telecommunication technology in litigation? What are the advantages of using this system? What guarantees are extended to litigants that assure fair and transparent justice? Does this system provide guarantees similar to traditional (i.e. non-electronic) litigation procedures? Are these guarantees compatible with international standards related to principles and rules of litigation, in particular, with ALI/UNIDROIT Principles of Transnational of Civil Procedure,<sup>7</sup> ELI/UNIDROIT Model European Rules of Civil Procedure,<sup>8</sup> the Bangalore Principles of Judicial Conduct<sup>9</sup> and the UN Basic Principles on the Independence of the Judiciary.<sup>10</sup>

This article adopts an analytical methodology to evaluate the provisions of the UAE Civil Procedures Law and its regulation in light of international standards of principles and rules of civil procedures to answer these questions. The article illustrates the use of telecommunications technology in litigation before civil courts, the justifications for this use, and finally, the guarantees of this use. At the end of the article, the author proposes suggested modifications to existing law for consideration by the UAE legislature to ensure that existing litigation guarantees are preserved when using technology in the field of litigation before civil courts.

## 2. THE CONCEPT OF USING TELECOMMUNICATIONS TECHNOLOGY IN LITIGATION BEFORE THE CIVIL COURTS

The Civil Procedure Act determined what is meant by the use of telecommunications technology in litigation before the civil courts. The same issue was addressed in a more obvious way by the Minister of Justice's decree concerning the procedural guide for the regulation of litigation through telecommunications and electronic means in civil procedures.

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7 The ALI/UNIDROIT Principles of Transnational Civil Procedure were adopted in 2004 by the American Law Institute (ALI) and the International Institute for the Unification of Private law (UNIDROIT). The Principles provided a model of balance between different legal families and traditions. Available at: <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/> [Accessed 06 April 2022]; Also available at: <https://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> [Accessed 06 April 2022].

8 The ELI/UNIDROIT Model European Rules of Civil Procedure were adopted in 2020 by the European Law Institute (ELI) and the International Institute for the Unification of Private law (UNIDROIT). The Rules were approved by the ELI Council in summer 2020 and the UNIDROIT Governing council on 23-25 September 2020. Available at: [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/200925-eli-unidroit-rules-e.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/200925-eli-unidroit-rules-e.pdf) [Accessed 06 April 2022].

9 "In July 2006, the United Nations Economic and Social Council (ECOSOC) adopted a resolution recognizing the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary. ECOSOC invited States to encourage their judiciaries to take into consideration the Principles when reviewing or developing rules with respect to judicial conduct". The Bangalore Principles of Judicial Conduct, United Nations, Vienna 2018. Available at: <https://www.unodc.org/documents/jji/training/bangaloreprinciples.pdf> [Accessed 08 April 2022].

10 These principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26-8-1985 to 6-9-1985 and endorsed by General Assembly resolutions 40/32 of 29-11-1985 and 40/146 of 13-12-1985. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> [Accessed 08 April 2022].

## 2.1 DEFINITION OF USING TELECOMMUNICATIONS TECHNOLOGY IN THE CIVIL PROCEDURE ACT

Pursuant to Article (332) of the Civil Procedure Act, the use of telecommunication technology with civil procedures refers to “using the visual and audible means of communication between two or more parties, in order to enable the remote attendance and the exchange of documents; which may include filing the claim, as well as the different procedures of notification, trial and execution that could all be completed through the use of this technology’. In this light, it is obvious that the provision does not clearly specify the visual and audible means of communication that could be used in this regard, and whether the procedure is limited to closed-circuit television (i.e. video-conference), or includes other means such as email or mobile phone text messages.

In the executive regulation, on the other hand, the language specifies the visual and audible means of communication. For example, regarding the methods of notification, the executive regulation permits the use of recorded voice or video calls, mobile phone text messages, emails, fax or any other equivalent modern means of communication specified in this regard by virtue of a decree from the Minister of Justice (Article 6/1/A of the Regulation). Clearly, this last phrase refers to the legislature’s future vision which anticipates new developments in communications technology and does not attempt to constrain their use. Hence, it is permissible to use any other means of communication that may appear in the future and which could be usable in the field of litigation procedures.

In the same way, Federal Law No. (5) of 2017 was issued regarding the use of telecommunication technology in the penal procedures. The First Article of this law defines telecommunications technology as ‘a visual and audible conversation made between two or more parties through direct contact with each other via the modern means of communication, in order to enable remote attendance’.<sup>11</sup> This definition is broader than its counterpart for penal procedures; the latter limits the idea merely to making a conversation, provided that this conversation is both visual and audible at the same time, and that it is made through direct contact between the concerned parties without a mediator, as the purpose is limited to just fulfilling remote attendance.

## 2.2 DEFINITION OF USING TELECOMMUNICATIONS TECHNOLOGY IN THE MINISTER OF JUSTICE’S DECREE NO. (260) OF 2019

The First Article of the Minister of Justice’s Decree No. (260) of 2019 defines telecommunications technology as ‘[...] the visual and audible means of communication between two or more parties in a remote trial’. In addition, the Article describes electronic media as smartphones, tablets, computers, fax machines, and any other media that deploy modern technological means of electronic communication, and which involve any of the following features and capabilities: electrical, digital, magnetic, wireless, visual, electromagnetic, automated, audio, *inter alia*.

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<sup>11</sup> For more information about the use of the ‘Video-Conference’ technology in remote penal trials and investigation, see the following:

- S. M. Shodaifat, Remote Penal Trial and Investigation via the Video-Conference Technology. *Journal of Law & Sharia Sciences’ Studies*, University of Jordan, Jordan, 42 (1), 2015, P. 353.

Hence, the concepts and details stated in the First Article of the Minister of Justice's Decree are clearer than those stated in Article (332) of the Civil Procedure Act, as they particularly mention the electronic media that can be used with remote litigation.

## 2.3 DEFINITION OF A REMOTE TRIAL

The First Article of the Minister of Justice's Decree No. (260) of 2019 defines a remote trial as '[...] the civil litigation procedures (i.e. non-penal) made through the use of means of telecommunication or via the electronic media, in order to fulfil remote attendance, as well as the exchange of documents and memoranda, which may include —within the context of this decree —filing claims, completing the procedures of notification, completing the trial proceedings before the Claims Management Office, as well as the competent court, and issuing the court rulings'. In this regard, we believe that such a definition of a remote trial is contradictory to what is set forth in Article (17/3) of the executive regulation, which states: 'The Claims Management Office shall prepare and manage the claim before reaching the trial stage, including the following procedures: filing the claim, making its judicial notice, and exchanging the documents, memoranda and expert reports between the litigants'. Consequently, this provision has explicitly affirmed the separation of the preparation stage from the following stage of hearing the claim (i.e. the trial stage).

Therefore, we believe that the phrase 'completing the procedures remotely' would be more comprehensive and general than the term 'remote trial', as the first phrase includes the stage prior to the trial stage (e.g. filing the claim and making the judicial notice), as well as the following stage (e.g. the forced execution).

## 3. THE IMPORTANCE OF USING TELECOMMUNICATIONS TECHNOLOGY IN LITIGATION BEFORE CIVIL COURTS

The use of telecommunications technology in litigation procedures before the civil courts plays a major role in achieving what is known as swift justice. In addition, this use further supports the policy of the UAE towards the use of modern technologies in the field of transactions.

### 3.1 ACHIEVING SWIFT JUSTICE

Swift justice means achieving quick and proximate justice for litigants (i.e. a justice characterized by simplicity and swiftness), and it is a justice of lower cost that aims to achieve balance and equality between the litigants.

Adjudication of the case at an appropriate time is emphasized by Principle No (7.1) of ALI/UNIDROIT Principles of Transnational Civil Procedure, which states that: "the court should resolve the dispute within a reasonable time".<sup>12</sup> In addition, according to the principle of Competence and diligence of the Bangalore Principles, the "judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness".<sup>13</sup>

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<sup>12</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, *supra* note 7.

<sup>13</sup> The Bangalore Principles of Judicial Conduct, *supra* note 9, p. 16.

To achieve swift justice, Principle No. (11.2) of ALI/UNIDROIT Principles of Transnational Civil Procedure states that: “the parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence”.<sup>14</sup> Additionally, parties, their lawyers and the court must cooperate to promote the fair, efficient and speedy resolution of the dispute (Rule 2, ELI/UNIDROIT Model European Rules of Civil Procedure).<sup>15</sup>

The use of telecommunications technology in litigation before the civil courts provides several advantages:<sup>16</sup>

- It grants the litigants their wish for ‘proximate justice’, taking into consideration that the justice’s proximity here refers to both spatial proximity and the judiciary’s capacity to achieve justice through certain procedures characterized by simplicity, precision, speed and cost effectiveness;<sup>17</sup> for example, making a judicial notice via email provides the advantages of ease of use, speed and performance accuracy regarding the transfer of messages.<sup>18</sup>
- It guarantees the litigants swift justice, as the use of these technologies saves the time previously wasted in making the judicial notice, as well as attending court sessions (whether in person or represented by an attorney), in order to complete all of the required procedures. Thereby, the use of these technologies leads to the quick resolution of the dispute as well as the legal obligations of the litigants. On the other hand, conventional (i.e. non-electronic) judicial procedures leave the dispute unsettled before the judiciary for lengthy periods of time due to the complexity and extension of these judicial procedures, hence promoting legal instability and turmoil until a final ruling is issued.<sup>19</sup> On the contrary, the use of telecommunications technology is available all the time, a great advantage for its use in the field of litigation. That is to say, it is possible to receive e-requests (e.g. filing claims before Dubai Courts) around the clock every day, including official holidays, not to mention that the transaction can be completed within minutes.<sup>20</sup> The UAE legislature has described this principle as “a way that facilitates litigation procedures”, as Article (335) of the Civil Procedure Act permits the electronic completion of all procedures ‘at every stage of the civil claim, in a way that facilitates the litigation procedures’.

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14 ALI/UNIDROIT Principles of Transnational Civil Procedure, supra note 7.

15 ELI/UNIDROIT Model European Rules of Civil Procedure, supra note 8, p. 36.

16 Aldhebi, A. (2009) *The Legal Limits and Guarantees of Applying the Modern Techniques*. Conference of the Modern Techniques used in the Notification of Judicial Documents: Between Consideration and Application, Kuwait 10–11 April 2006, Kuwait Institute for Judicial and Legal Studies, p. 56; Pandu, P. (2018) Technological courts and speedy justice. Available at: [https://districts.ecourts.gov.in/sites/default/files/Technological%20courts%20and%20speedy%20dispose%20-by%20Sri%20P%20Pandur%20Rangareddy\\_0.pdf](https://districts.ecourts.gov.in/sites/default/files/Technological%20courts%20and%20speedy%20dispose%20-by%20Sri%20P%20Pandur%20Rangareddy_0.pdf) [Accessed 21 April 2022].

17 R. Perrot, Justice de Proximité: Conciliation et Médiation. *Procédures*, Avril 1995, P. 1.

18 A Manual for Dubai Courts, under the title ‘Leadership in the Works of Courts’, on the official website of Dubai Courts: [http://www.dubaicourts.gov.ae/portal/page/portal/public\\_files/MenuIcons2/DCbrochure2011AR.pdf](http://www.dubaicourts.gov.ae/portal/page/portal/public_files/MenuIcons2/DCbrochure2011AR.pdf) [accessed on 20 June 2020].

19 Mandil, Supra note 5, P. 108.

20 M. Ashour, *Studies in the Civil Procedure Act of the United Arab Emirates*, Second Book, Dubai Police Academy, Second Edition, 2015, Clause 759, P. 110.

- It guarantees the litigants incur reasonable expenses in pursuing justice; use of telecommunications technology speeds up the resolution of the dispute, hence reducing administrative costs incurred by the parties to the dispute. In addition, the use of this technology facilitates the secure online payment of all judicial fees and expenses via the relevant website.<sup>21</sup>
- It reduces the burden of judges and their assistants, as well as all parties dealing with the different courts; thus, the use of telecommunications technology in litigation procedures contributes indirectly to easing the procedures performed by judges and their assistants, and hence disputes can be settled quickly and with minimum effort, in addition to saving the time of court clerks and litigants, which in turn achieves the optimal exploitation of both human resources and technology.<sup>22</sup>

### **3.2 SUPPORTING UAE POLICIES TOWARDS THE USE OF MODERN TECHNOLOGIES IN THE FIELD OF TRANSACTIONS**

The use of telecommunication technology in litigation procedures supports the policy of the UAE of maximizing their use in transactions, whether the parties concerned are governmental or non-governmental. In addition, expansion of this new use will result in the replacement of hardcopy documents with e-documents, hence facilitating the electronic exchange of documents and memoranda, and raising the administrative and judicial efficiency of the courts.<sup>23</sup>

This is evident from the objectives formulated by the legislator in Article (3) of the new Federal Law No. (46) of 2021 regarding Electronic Transactions and Trust Services,<sup>24</sup> which entered into force on January 2, 2022.<sup>25</sup> According to this article, the law aims at: (1) enhancing trust, encouraging and facilitating electronic transactions of all kinds, and protecting of customers' rights; (2) Keeping pace with technological development to enhance electronic transactions in all sectors, (3) encouraging digital transformation, investment, and providing electronic services to the public. Undoubtedly, using remote communication technology in litigation before civil courts is an application of these goals.

## **4. GUARANTEES WHILE USING TELECOMMUNICATIONS TECHNOLOGY IN LITIGATION PROCEDURES BEFORE CIVIL COURTS**

Rule No. (18) of ELI/UNIDROIT Model European Rules of Civil Procedure authorises appropriate use of electronic communication and recording such as electronic communication between the court and the parties, and among parties, video-conferencing or audio transmission in hearings and evidence-taking, disclosure and production of electronic data, video-recording of hearings, electronic platforms in

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<sup>21</sup> Aloubidi, *Supra* note.5, P. 515.

<sup>22</sup> Mabrouk, *Supra* note 14, Clause 759, P. 110.

<sup>23</sup> Alkaabi & et al., *Supra* note 5, P. 299.

<sup>24</sup> Federal Official Gazette, Year 51, Issue 712 (Appendix 1), September 26<sup>th</sup> 2021, P. 9.

<sup>25</sup> This law replaced Federal Law No. (1) of 2006 Concerning Electronic Transactions and Commerce.

collective proceedings, etc.<sup>26</sup> The court must make sure that using such techniques provides parties with an equal opportunity to present their case by securing equality of arms and equal treatment.<sup>27</sup>

The UAE legislator has indeed acknowledged the validity of the litigation procedures completed entirely or partially through the use of telecommunications technology. However, this use shall be based on providing the litigants with several guarantees similar to that of conventional (i.e. non-electronic) litigation procedures.

#### **4.1 THE ABSENCE OF OBJECTIONS BY THE LITIGANTS AGAINST COMPLETING THE JUDICIAL PROCEDURES REMOTELY**

Pursuant to Article (335) of the Civil Procedure Act, the court president, circuit president, competent judge or any of their delegates may complete procedures through the use of telecommunications technology, whenever it is deemed necessary at any stage of the civil litigation, hence facilitating the litigation procedures.<sup>28</sup> This provision is very explicit regarding the discretion of the competent authority, when it comes to completing any procedures through the use of telecommunications technology. However, this provision fails to clearly address the following questions: (i) how much such action will be dependent on the desire of the litigants; (ii) to what extent the decision maker shall consider the litigants' approval or disapproval on completing the procedures remotely; and, (iii) is it advisable to inquire about the litigants' approval on 'completing the procedures remotely' including all stages and procedures of the litigation, or is it limited to their approval at 'a remote trial, only? In other words, is the competent authority's discretion to decide completing the procedures remotely limited only to the fact that such action facilitates the litigation procedures, without taking into consideration the interests or preferences of the litigants? Should their approval or non-objection be considered?

In spite of the legislature not mentioning the issue of inquiring whether the litigants approve or disapprove, it is advisable to make such inquiry when it comes to conducting a remote trial. We believe that the purpose of such an inquiry is to avoid surprising the litigants, as the use of telecommunications technology may not be in their interest, or in the interest of only one of them. In addition, one or more litigants may lack sufficient material, technological or even cognitive potential. Therefore, we have to take into consideration that the phrase 'completing the procedures remotely' is more comprehensive and general than the phrase 'conducting a remote trial'. The first phrase includes the stage preceding the trial, when it is advisable to inquire about the litigants' position before taking the decision to conduct the trial remotely, in order to ensure they do not object.

As a matter of fact, this point of view is affirmed by the Civil Procedure Act which permits litigants to request that the trial be conducted in person, i.e. to request a

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<sup>26</sup> According to Rule No. (18/4), "in so far as appropriate, proceedings may be conducted using any available means of information and communication technology". ELI/UNIDROIT Model European Rules of Civil Procedure, supra, note 8, p. 73.

<sup>27</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, supra, note 8, pp. 31–32.

<sup>28</sup> Article (3) of the Minister of Justice's Decree also stipulates: 'The competent authority – each within its jurisdiction when deemed necessary – may remotely complete the trial's procedures partially or entirely at each stage of the civil claim stages, hence facilitating the litigation'. As for the 'competent authority', pursuant to the First Article of this Decree, the legislator means 'the court president, the circuit president, the competent judge in charge of hearing the claim, the supervising judge, or any of their delegates'.



transfer from a remote trial to a conventional one with personal attendance (Article 337). In addition, the Minister of Justice's Decree has permitted litigants and their attorneys to request the partial application of a remote trial system, regarding one or more procedures of the trial, and it has also permitted them to agree on full application.

On this basis, we believe that the legislator should have stipulated that the competent authority may not initiate a remote trial, unless it has inquired about the litigants' position on the matter, to avoid wasting time or prolonging the litigation period, which might be the result of initiating the procedures of a remote trial; then, one of the litigants submits a request to conduct the trial with personal attendance.

The competent authority's exercise of discretion should be informed by stated preferences the litigants; otherwise, there could be a violation to the right of defense, which could in turn constitute a basis for repealing the court ruling through the appellate review process. Therefore, if an objection by either litigant against the application of the remote trial system is met by the competent authority's insistence on such an application, the competent authority's decision shall prevail.

As for the non-objection, on the other hand, this does not need to be explicitly expressed, as it may be implicitly deduced based on any positive behaviour, such as the litigants' use of email to complete the different transactions between them. This shall be considered the litigants' approval of the electronic completion of any litigation procedures, such as filing the statement of claim or appeal, and the respondent's submission of documents and memoranda. Furthermore, the litigants' position toward conducting a remote trial can be elicited explicitly or implicitly, before referring the claim to the competent court. This opinion can be verified during the preparation stage before the Claims Management Office, either explicitly by signing a form, or implicitly by exhibiting a positive attitude indicating their non-objection to conducting the trial remotely.

#### **4.2 THE LITIGANTS' RIGHT TO REQUEST THE TRANSFER FROM A REMOTE TRIAL TO A TRIAL WITH PERSONAL ATTENDANCE**

As previously mentioned, it would have been better had the legislature stipulated that the competent authority should inquire about the non-objection of the litigants before initiating the remote trial; thus, the legislator has overlooked this issue. However, at the same time, the legislature paid attention to another issue, the litigants' capability of submitting a request to conduct a trial in person, i.e., submitting a request to transfer from the remote trial to a trial with personal attendance. Hence, based on this assumption, the trial will be conducted through the use of telecommunications technology unless a litigant submits a request to conduct the trial in person.

In this regard, the legislature has stipulated the following conditions in Article (337) of the Civil Procedure Act and Article (8/2) of the Minister of Justice's Decree, in order to approve the transfer of a remote trial to a trial with personal attendance:

- The trial is already being conducted remotely
- A litigant submits a request to conduct a trial in person, instead of the remote trial; thus, the applicant illustrates their justifications in this regard
- This request may be submitted at any stage of the trial
- The other litigant(s) shall be notified of this request electronically, as one or more of them may have an objection to such a request based on their interest in proceeding with the litigation remotely; and

- The competent court shall decide on the submitted request after examining the position of the other litigants.

In this sense, to avoid any suspension of the litigation procedures, the legislature confirms that, when the submitted request is accepted, the circuit venue and the hearing date are determined in order to appear before the court in person.

### **4.3 RECORDING, SAFEKEEPING AND CONFIDENTIALITY OF THE RECORDS OF REMOTE LITIGATION**

In order to offer the litigants a warranty upon the use of the telecommunications technology for litigation, it is necessary to emphasize both the importance of safekeeping the records of the remote litigation and their confidentiality; without these guarantees, the litigants will not be motivated to use such technologies.

In this regard, the records of remote litigation are recorded and saved electronically, whether they are partially or entirely completed pursuant to the stated procedures. These records have the legal capacity of confidentiality, as they may not be circulated, reviewed, copied or deleted from the electronic information system, unless by virtue of a permit issued by the competent court based on the circumstances of each case (Article 338/1 of the Civil Procedure Act and Article 25 of the Minister of Justice's Decree).

Taking into consideration the two provisions of Article (338) of the Civil Procedure Act and Article (25) of the Minister of Justice's Decree, we note the following:

- All procedures completed remotely are recorded and preserved electronically, in addition to the possibility of having and keeping a hardcopy of these records. (Article 338/1). However, the court may dispense with recording if the remote litigation procedures were immediately written during the session in the electronic case file and approved by its president (Article 338/2).<sup>29</sup>
- These records shall be considered confidential and may not be circulated, copied or deleted from the electronic information system, unless by virtue of a permit issued by the competent court.
- The legislature uses the phrase 'the competent court' but it would have been better to use the phrase 'the competent authority', as the remote litigation procedures could also be completed before the Claims Management Office.

According to Rule No. (97/2) of ELI/UNIDROIT Model European Rules of Civil Procedure, "any hearing where evidence is taken shall be video recorded, provided that the necessary technical equipment is available. The video recording must be kept under the court's direction".<sup>30</sup>

Remote litigation records are also subject to the principle of the professional secret stated in national laws and international principles. We recall from this that Principle No. (15) of UN Basic Principles on the Independence of the Judiciary states: "the judiciary shall be bound by professional secrecy with regard to their deliberations and

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<sup>29</sup> Article (338/2) was added by Federal Law No. (15) of 2021 amending some provisions of the Civil Procedures Law. The Federal Law No. (15) of 2021 was issued on August 29<sup>th</sup> 2021. Federal Official Gazette, Year 51, Issue 710, September 2<sup>nd</sup> 2021, P. 9.

<sup>30</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, pp. 2016–217.

to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters”.<sup>31</sup>

Maintaining litigation records remotely and ensuring the credibility and integrity of these records over time is achieved through the court’s electronic information system, which includes a set of programs and devices designed to process and manage data and information, and to create, extract, send, receive, store or display case statements, notes, documents, letters and notices electronically etc. (Article 1 of the Minister of Justice’s Decree).

In order to further ensure the credibility and integrity of the information stored in this electronic information system, the litigants and their agents’ access to all electronic files related to their lawsuits is enabled using the encrypted secret number that allows them to enter this system (Article 9/4 of the Minister of Justice’s Decree).

#### **4.4 APPLYING INFORMATION SECURITY POLICIES TO REMOTE LITIGATION PROCEDURES**

The technology used for litigation procedures is subject to the adopted regulations and policies of information technology in the UAE (Article 339 of the Civil Procedure Act and Article 26 of the Minister of Justice’s Decree).<sup>32</sup>

In this regard, the information security here refers to providing protection to the content of data and information for the remote litigation procedures against any attempts to change, modification or forgery during the different stages of exchanging the judicial documents and papers electronically. In other words, no third parties may have access to any of this information, as access to the electronic information system shall be limited only to authorized persons, such as judges and their assistants, lawyers, and the litigants. This restricted access may be applied by providing those authorized persons with passwords, so that they have access to the most accurate details in their claims, hence preventing any unauthorized persons from hacking the electronic information system and gaining access to the documents of the claim.<sup>33</sup>

Moreover, information security also refers to, in another aspect, the privacy of all involved personnel. Their privacy must be maintained. The involved personnel here may refer to (but not limited to) judges, lawyers, litigants, etc. Their privacy can be ensured by having private accounts, with valid credentials, for those who need access to such personal data from one aspect. From another aspect, all retrieved data, when requested, should be kept secret. This can be achieved by encryption. Encryption guarantees that when the data are sent, no one can disclose and hence read them. In fact, all remote litigation procedures should be secured via encryption to ensure

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31 UN Basic Principles on the Independence of the Judiciary, *supra* note 10, Principle No. )15).

32 The Telecommunications Regulatory Authority in the United Arab Emirates has set the ‘Cyber Security Strategy – National Cyber Security Strategy (NCSS)’, visit the following websites: the official portal of the government of the United Arab Emirates and the official website of the Telecommunications Regulatory Authority:

<https://www.government.ae/ar-ae/about-the-uae/strategies-initiatives-and-awards/federal-governments-strategies-and-plans/national-cyber-security-strategy-of-the-uae> [accessed on 21 June 2020].

<https://www.tra.gov.ae/ar/cyber-security-strategy.aspx>. [accessed on 21 June 2020].

33 M. E. Eltersawi, *The Judicial Claim’s Deliberation before the Electronic Courts*, Al-Nahda Al-Arabia (Arabic Uprising) Publishing House, Cairo, Egypt, 2013, P. 109.

that all retrieved and provided data are only disclosed and read by the authorised personnel. This will ensure the confidentiality of the data as well as the whole litigation system. Another aspect of information security in litigation processes is the ability to inspect all operations (here all operations are considered to be done online) and ensure that all operations are valid and legitimate. This inspection can be achieved by inspecting all traffic and classifying it as malicious or normal. If any traffic is suspected to be malicious, it will be analysed to determine whether it is malicious or not. If it is determined to be malicious (such as maliciously modifying private data), it should be immediately reported, and corrective actions should be taken immediately.

According to Article (6/4) of the Minister of Justice's Decree, once the case is electronically recorded, the Case Management Office sends to the litigants and their agents an encrypted secret number by any available electronic means that enable them to enter the information system and to view all the electronic files related to their claim directly in the system.

In this regard, Rule No. (74) of ELI/UNIDROIT Model European Rules of Civil Procedure which regulates service guaranteeing receipt, allows "service via a designated electronic information system using appropriately high technical standards attested to by an acknowledgement of receipt that the system generates automatically where the addressee has a legal obligation to register with that system".<sup>34</sup>

#### **4.5 THE TRANSCRIPTION OF REMOTE LITIGATION PROCEDURES INTO ELECTRONIC OR HARDCOPY MINUTES OR DOCUMENTS**

It could be required to transcribe the remote litigation procedures into the hardcopy form, such as printing a hard copy for a judicial request, or should the concerned parties request a hard copy of the claim documents. In addition, these procedures may be transcribed into the electronic form (on an electronic medium), such as the case of creating e-files for the judicial requests, or case of the litigants' access to the claim file on the system or by sending them the file, pursuant to Article (21/1) of the executive regulation.

Therefore, the legislator has confirmed that the competent authority shall transcribe the remote litigation procedures into electronic or hardcopy documents or minutes that could be approved, without the need for any authorizing signatures by the concerned parties (Article 340/1 of the Civil Procedure Act and Article 52/3 of the Minister of Justice's Decree). Pursuant to these two provisions, the remote litigation procedures may be transcribed into electronic or hardcopy documents or minutes by the competent authority (i.e. the Claims Management Office, the authority in charge of making the judicial notice, the competent court, etc.); these documents or minutes shall be approved by this competent authority, without the need for signatures from the concerned parties.

According to Article 340/2 of the Civil Procedures Law added by Federal Law No. (15) of 2021, the court may consider the minutes of remote litigation procedures sufficient if they are recorded directly during the session in the electronic case file and are approved by its president.

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<sup>34</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, supra note 8, p. 181.

According to Rule No. (111/3) of ELI/UNIDROIT Model European Rules of Civil Procedure “documents that a party maintains in electronic form must ordinarily be submitted or produced in electronic form, unless the court orders otherwise”.<sup>35</sup>

#### 4.6 ACKNOWLEDGING THE VALIDITY OF E-DOCUMENTS AND E-SIGNATURE DURING THE REMOTE LITIGATION PROCEDURES

To use the telecommunications technology for litigation procedures, it is required to have the litigants’ signatures or to exchange the documents electronically. Therefore, the legislature has granted both the e-signature and e-documents the same validity as a conventional signature or the official and customary documents, as stated in Federal Law No. (10) of 1992 concerning the verification in the civil and commercial articles (Article 342 of the Civil Procedure Act and Article 12/1 of the Minister of Justice’s Decree).<sup>36</sup>

The first article of Federal Law No. (46) of 2021 concerning Electronic Transactions and Trust Services defined an electronic document as an electronic record, an electronic message, or an informational statement that is created, stored, extracted, copied, sent, communicated or received using information technology, on any medium, and must be understandably retrievable.

As for the electronic signature, it is – according to the same article – a signature consisting of letters, numbers, symbols, any voice, a fingerprint, or a processing system in an electronic form, logically attached or linked to an electronic document, that would verify the identity of the person signing it and his acceptance of the content of the data associated with it.

In this regard, the requirements of the e-signature’s validity are as follows: (i) The e-signature must be linked to the signatory in a way that allows distinguishing him/her from others; (ii) The e-signature must be sufficient to identify the signatory adequately; (iii) The signatory alone shall have full control over the electronic medium; (iv) The e-signature must be tightly bound to the e-document; and (v) The certified authentication shall be fulfilled, to ensure the e-signature’s validity and integrity.<sup>37</sup>

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<sup>35</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, supra, note 8, p. 235.

<sup>36</sup> A. H. Yassin, *An Explanation of the Substantive Rules of Verifying the Civil and Commercial Transactions: Conventional and Electronic*, Dubai Police Academy, Third Edition, 2008, P. 92.

In this regard, the requirements of the e-signature’s validity for its verification are as follows: 1) The e-signature shall be related to its signatory personally in a way that enables his differentiation from all other persons; 2) The e-signature shall identify the signatory personally and adequately; 3) The signatory alone shall have full control over the electronic medium; 4) The e-signature shall be closely related to the e-document; and 5) The certified authentication shall be fulfilled, in order to make sure of the e-signature’s validity and integrity; see the following:

- A. B. Hegazi, *The Legal System of the e-Signature: A Fundamental-Comparative Study*, Legal Books Publishing House, Cairo, Egypt, 2007, P. 443.
- A. N. Alzohiri, *Provisions of Verification*, Al-Afak Al-Moshreka (Bright Horizons) for Publishing and Distribution, United Arab Emirates, 2012, P. 135.

<sup>37</sup> Article (19) of Federal Law No. (46) of 2021; Hegazi, A.B. (2007) *The Legal System of the e-Signature: A Fundamental-Comparative Study*. Legal Books Publishing House. Egypt, p. 443; Alzohiri, A.N. (2012) *Provisions of Verification*. UAE: Bright Horizons for Publishing and Distribution, p. 135.

According to Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, “electronic signature means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication”.<sup>38</sup> The same Directive defined an advanced electronic signature as “an electronic signature which meets the following requirements: (a) it is uniquely linked to the signatory; (b) it is capable of identifying the signatory; (c) it is created using means that the signatory can maintain under his sole control; and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable”.

Rule No. (111/2) of ELI/UNIDROIT Model European Rules of Civil Procedure defined a Document as “anything in which information is recorded or maintained in any form, including but not limited to paper or electronic form. Information may be recorded in writing, pictures, drawings, programmes, voice messages, or electronic data, including e-mail, social media, text or instant messages, metadata, or other technological means. It may be maintained electronically on, but not limited to, computer, portable electronic devices, cloud-based or other storage media”.<sup>39</sup>

Finally, according to Rule No. (112/2) of the previous model rules, electronically recorded authentic instruments have the same probative force as those recorded on paper.<sup>40</sup>

#### **4.7 THE CAPABILITY OF DENYING THE E-DOCUMENTS OR E-SIGNATURE DURING THE REMOTE LITIGATION PROCEDURES**

The legislature has confirmed that it is permissible to accept photocopies of any documents in the litigation procedures completed through the telecommunications technology. This does not exclude the court’s right to demand the original copies of any documents, if it is deemed necessary to decide on the case (Article 343/1 of the Civil Procedure Act). On this basis, a denial by a litigant against the documents submitted by the other litigant on the grounds that they are photocopies shall be dismissed, unless this denial provides evidence for the invalidity of these documents, or for not being issued by the alleged party (Article 343/2 of the Civil Procedure Act). Hence, in case of any denial by a litigant concerning the documents submitted by the other litigant or any claim of their invalidity, the provisions stated in the Civil Procedure Act and the Evidence Law (in civil and commercial articles) shall be applied (Article 343/3 of the Civil Procedure Act).

Nonetheless, based on the legislature’s desire to overcome the phenomena of slow litigation as well as malice and wickedness in the dispute, the legislature has confirmed in Article (343/4) that:

If the documents that were denied or challenged for not being issued by the alleged party, were proven to be valid, and it was found out that such denial or claim of invalidity was unsubstantiated, resulting in delaying the issuance of a ruling in the case or incurring additional and unjustified expenses by the litigant who has submitted these documents; then, the court may fine the litigant who denied these documents

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<sup>38</sup> This directive is available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0093&from=EN> [Accessed 21 April 2022].

<sup>39</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 234.

<sup>40</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 236.

or claimed their invalidity with a fine of no less than (1,000 Emirati dirhams) and no more than (10,000 Emirati dirhams). This does not exclude the court's right to address the authority in charge of regulating the practice of law in this regard, if the court deems it necessary.

According to Rule No. (111/4) of ELI/UNIDROIT Model European Rules of Civil Procedure, each party can challenge the authenticity of any document submitted as evidence. Then, the competent court must order the parties to take the necessary procedures to prove the document's authenticity.<sup>41</sup>

#### 4.8 APPLYING THE PRINCIPLE OF PUBLICITY TO THE REMOTE LITIGATION PROCEDURES

During the performance of the judiciary, the principle of publicity is considered one of the most important principles on which modern judicial organizations (including the Emirati judiciary) are based. That is to say, anyone shall be allowed to check and be assured of the integrity of judiciary in performing its function.<sup>42</sup> Hence, the judicial organization requires the publicity of judicial performance in several aspects, such as the public hearings, the verbal pleadings and the sufficient substantiation.<sup>43</sup>

In this regard, the principle of publicity requires, on the one hand, that the claim shall be heard and deliberated in public hearings where every person has the right of attendance, and where the verdicts shall be announced publicly; on the other hand, it also requires informing the public opinion of the claim by publishing the issued judicial rulings.<sup>44</sup>

In this context, in Article (334) of the Civil Procedure Act, the legislature has permitted the use of telecommunications technology to fulfil the principle of publicity. In addition, the Minister of Justice's Decree permits the use of telecommunications technology to fulfil the litigants' attendance before the Claims Management Office or before the Court (Article 8), as well as the exchange of documents and memoranda (Article 9), hiring a translator (Article 14), and investigating the claim and the interrogation (Article 13), eventually leading to fulfilling the principle of publicity. Moreover, the decree has affirmed that hearings conducted through the telecommunication means shall be public hearings (Article 8/3/H).

The application of the principle of publicity in remote litigation procedures, as in traditional litigation procedures, is consistent with ALI/UNIDROIT Principles of Transnational Civil Procedure. Principle No. (20) of these principles regulates public proceedings as follows: all oral hearings must be open to the public. After consulting

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<sup>41</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, supra, note 8, p. 235.

<sup>42</sup> A. Moslem, *The Foundations of Pleadings: Judicial Regulation, Procedures and Rulings in the Civil, Commercial and Personal Articles*, Al-Fekr Al-Arabi (Arabic Thought) Publishing House, Cairo, Egypt, 1977, Clause 45.

<sup>43</sup> N. I. Omar, *Substantiation of the Judicial Rulings in the Civil and Commercial Pleadings Law*, Al-Gamaa Al-Gadida Publishing House, Alexandria, Egypt, 2008.

- A. Abdelfattah, *Substantiation of the Rulings and Works of Judges in the Civil and Commercial Articles*, Al-Fekr Al-Arabi (Arabic Thought) Publishing House, Cairo, Egypt, 1983.

<sup>44</sup> A. Abouelwafa, *Civil and Commercial Pleadings*, Monshaat Al-Maaref (Knowledge Establishment) Publishing House, Alexandria, Egypt, 15<sup>th</sup> Edition, 1990, Clause 39.

the parties, the court can order that all or some hearings be kept confidential in the interest of public safety, justice or privacy (Principle 20.1). For the same reasons, if the proceedings are public, the judge can order part of them to be conducted in private (Principle 20.3). Files and records of the court must be public or accessible to persons with a legal interest or making a responsible inquiry (Principle 20.2). Finally, all Judgments, including supporting reasons, and other orders, should be accessible to the public (Principle 20.4).

This principle is also confirmed by Rule No. (17) of ELI/UNIDROIT Model European Rules of Civil Procedure.<sup>45</sup> In addition, Rule No. (12) of the same model rules provides that all decisions issued by the court must include the reasoning concerning substantial issues.<sup>46</sup>

#### **4.9 FULFILLING THE PRINCIPLE OF CONFRONTATION AND GUARANTEEING THE RIGHT OF DEFENSE DURING THE REMOTE LITIGATION PROCEDURES**

The right of defense requires completing all procedures while confronting the litigants; in addition, it also requires fulfilling the principle of equality between all litigants and granting them equal opportunities. In this regard, to guarantee the fulfilment of the right of defense when using the telecommunication technology in the litigation procedures, Article (8/3) of the Minister of Justice's Decree stipulates the following obligations on (the competent judge, the Claims Management Office, the hearing secretary, the competent technical officer, and the litigants' attorneys), when using the telecommunication technology in order to verify the attendance and the pleading:

- The competent judge in charge of hearing the claim shall determine the hearing's date and hour accurately, as they shall conduct the hearing's procedures entirely via the electronic media at the specified time;
- Before the date of the first hearing, the Claims Management Office or the competent secretary (as the case may be) shall inform the concerned parties electronically of the remote hearing's date and hour;
- Before initiating the hearing, the competent technical officer shall prepare all devices used in the remote trial; in addition, they shall be able to respond quickly in any cases of technical malfunctions or interruption during the hearing;
- The appointed attorney shall be fully prepared regarding the necessary technical knowledge as well as the use of different devices which enable him/

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<sup>45</sup> According to Rule No. (17), "1- Hearings and court decisions, including their reasoning, must, as a general rule, be public. 2- The court may order the proceedings, or parts thereof, especially oral hearings and the taking of evidence, to be in private (in camera) for reasons of public policy, including national security, privacy, or professional secrets, including business confidentiality, or in the interests of the administration of justice. Where necessary the court may make suitable protective orders to maintain the privacy or confidentiality of hearings held or evidence taken in private. 3- Judgments and their reasoning shall be accessible to the public to the extent that proceedings are open to the public. When hearings have been in private, publicity of the judgment may be limited to its operative part. 4- Court files and records shall be publicly accessible at least to persons with a legal interest in them and to those making a legitimate inquiry. 5- The identity of parties, witnesses and other natural persons mentioned in the judgment may be private where strictly necessary". ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 67.

<sup>46</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 55.



her to communicate with the supervising judge or the competent court (as the case may be); thus, the image and sound shall be fully clear, and the attorney's venue shall be appropriate to the prestige of judiciary;

- During the hearing, the attorneys shall provide a verbal summary of their memoranda, requests and pleadings;<sup>47</sup>
- The hearing proceedings shall be recorded;
- The hearing secretary shall write down what is dictated by the judge or the litigants during the hearing.

The Bangalore Principles of Judicial Conduct emphasises equal treatment to all parties before the court, as an essential requirement for the judicial office's due performance.<sup>48</sup> This is also confirmed by Principle No. (2) of the UN Basic Principles on the Independence of the Judiciary, according to which, the court must decide all issues before it "impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".<sup>49</sup>

Principle No. (3.1) of ALI/UNIDROIT Principles of Transnational Civil Procedure emphasises the procedural equality of the parties by providing that the court must guarantee "equal treatment and reasonable opportunity for the litigants to assert or defend their rights".<sup>50</sup> In addition, Rule No. (4) of ELI/UNIDROIT Model European Rules of Civil Procedure imposes an explicit obligation on the court to secure procedural equality between the parties.<sup>51</sup>

ALI/UNIDROIT Principles of Transnational Civil Procedure include several principles that emphasise respect for the right to defence, such as: right to engage a lawyer (Principle No. 4), due notice and right to be heard (Principle No. 5) and structure of the proceedings (Principle No. 9). In addition, the principle (No. 1) regulates the

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<sup>47</sup> According principle No. (11.3) of ALI/UNIDROIT Principles of Transnational Civil Procedure, "in the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding". ALI/UNIDROIT Principles of Transnational Civil Procedure, *supra* note 7.

<sup>48</sup> The principle of equality requires that: "a judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds; a judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties". The Bangalore Principles of Judicial Conduct, *supra* note 9, pp. 14-15.

<sup>49</sup> UN Basic Principles on the Independence of the Judiciary (Principle No. 2), *supra* note 10.

<sup>50</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, *supra* note 7. According to comment (P-3A), the term "reasonable" is used throughout the principles and signifies "proportional," "significant," "not excessive," or "fair," according to the context. It can also mean the opposite of arbitrary.

<sup>51</sup> "The court must ensure that parties enjoy equal treatment". This Rule grants all parties the same procedural rights without illegitimate discrimination. ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 43.

independence, impartiality of the court and its judges<sup>52</sup> and confrontation between parties.<sup>53</sup>

The principle of confrontation between parties is also confirmed by Rule No. (13) of ELI/UNIDROIT Model European Rules of Civil Procedure, which provides that the court must not communicate with any of the parties in the absence of the others. Also, whenever a party communicates with the court, the other party must be provided by it at the same time. Otherwise, the court must immediately provide the party with the content of this communication.<sup>54</sup>

Principle No. (19) of ALI/UNIDROIT Principles of Transnational Civil Procedure regulates the oral and written presentations, emphasising the right of defence. According to this principle, parties should initially present pleadings, formal requests (motions), and legal arguments in writing. However, they may present oral arguments on important substantive and procedural issues (Principle 19.1). “The court should specify the procedure for presentation of testimony ...” (Principle 19.3).<sup>55</sup>

The right of defence was also emphasised by Rule No. (18) of ELI/UNIDROIT Model European Rules of Civil Procedure, which regulates oral and written proceedings.<sup>56</sup> Finally, Rule No. (11) of the same model rules confirmed respect for the right of defence. According this Rule, the court must guarantee that “parties have a fair opportunity to present their case and evidence, to respond to their respective claims and defences and to any court orders or matters raised by the court.”<sup>57</sup>

## 5. RESULTS

First, it is true that Federal Law No. (10) of 2017 concerning the amendment of some provisions in the Civil Procedure Act has introduced the first breakthrough in the use of telecommunications technology in the litigation procedures before the civil courts. However, the executive regulation of this law includes more details and applications regarding this new use. In addition, the Minister of Justice’s Decree No. (260) of 2019 sets the mechanisms for applying this executive regulation, regarding the procedural guide for the regulation of litigation through the use of telecommunications and electronic means in civil procedures.

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<sup>52</sup> “The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence” (Principle 1.1). “The court should be impartial. A judge or other person having decisional authority must not participate if there is reasonable ground to doubt such person’s impartiality. There should be a fair and effective procedure for addressing contentions of judicial bias” (Principle 1.3). ALI/UNIDROIT Principles of Transnational Civil Procedure, *supra* note 7.

<sup>53</sup> Principle No. (1.4) stipulates that “neither the court nor the judge should accept communications about the case from a party in the absence of other parties, except for communications concerning proceedings without notice and for routine procedural administration. When communication between the court and a party occurs in the absence of another party, that party should be promptly advised of the content of the communication”. ALI/UNIDROIT Principles of Transnational Civil Procedure, *supra* note 7.

<sup>54</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 59.

<sup>55</sup> It is worth noting that Principle No. (19.4) stipulates that “Oral testimony may be limited to supplemental questioning following written presentation of a witness’s principal testimony or of an expert’s report”.

<sup>56</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 72.

<sup>57</sup> ELI/UNIDROIT Model European Rules of Civil Procedure, *supra*, note 8, p. 54.

Second, the definition of telecommunications technology regarding the civil procedures is broader than that regarding the penal procedures. As the latter has limited the idea to just making a conversation, provided that it is visual and audible at the same time, it is conducted through the direct contact rather than a mediator, and its purpose is limited to verifying the remote attendance.

Third, the use of telecommunications technology in the litigation procedures could achieve what is known as the swift justice. In addition, this use supports the policies of the UAE regarding the use of modern technologies for transactions, particularly after issuance of Federal Law No. (1) of 2006 Concerning Electronic Transactions and Commerce, which was replaced by Federal Law No. (46) of 2021 regarding Electronic Transactions and Trust Services.

Fourth, the UAE legislator has permitted the use of telecommunications technology in the litigation procedures before the civil courts, and acknowledges the validity of these procedures, whether completed partially or entirely through this technology. Nonetheless, several guarantees are provided for this new use, as follows: (i) there shall be no objections by the litigants against completing the judicial procedures remotely; (ii) the litigants are entitled to request a transfer from the remote trial to a trial with personal attendance; (iii) the remote litigation records and their confidentiality are saved; (iv) information security policies are applied to remote litigation procedures; (v) the remote litigation procedures are transcribed into electronic or hardcopy documents; (vi) the validity of the e-documents and e-signature is acknowledged; (vii) the denial of the e-documents and e-signature during the remote litigation procedures is regulated; (viii) the principle of publicity is applied; (ix) the principle of confrontation between the litigants is fulfilled; and, (x) the right of defense is guaranteed during remote litigation procedures.

## 6. RECOMMENDATIONS

- Article (335) of the Civil Procedure Act shall be amended to include a provision stipulating the absence of any explicit or implicit objections by the litigants against conducting the trial remotely; thus, the final provision of this Article shall be as follows: ‘The Court President, Circuit President, competent judge or any of their designees may decide to complete the procedures remotely whenever they deem it necessary at any stage of the civil claim, hence facilitating the litigation procedures, unless there is an objection by one or more of the litigants to conducting the trial remotely, in which case, the court’s decision to conduct a remote trial shall be substantiated’.

In connection to the above proposal, we also recommend the amendment of Article (19) of the executive regulation of the Civil Procedure Act, as follows: ‘After paying the stated fees, the Claims Management Office shall file the claim in the relevant record – whether it is done electronically or on paper – as the following details shall be recorded: (i) the date of filing, (ii) the claimant’s knowledge of the hearing’s date, and (iii) the claimant’s objection or non-objection against conducting the trial remotely; in this case, the claim shall be considered as duly filed with its full legal effects as of the date of depositing the statement of claim’.

- Article (20/2) of the executive regulation of the Civil Procedure Act shall be amended, as follows: ‘The respondent shall deposit electronically or by paper

a memorandum of his/her defense and signed copies of any accompanying documents, as well as his/her objection or non-objection against conducting the remote trial; this is within the period of ten (10) days as of the date of their notification of the claim’.

- In Article (338/1) of the Civil Procedure Act and Article (25) of the Minister of Justice’s Decree No. (260) of 2019, the phrase ‘the competent authority’ shall replace the phrase ‘the competent court’, as the former is more comprehensive and general than the latter; the remote litigation procedures may also be completed before the Claims Management Office.
- The legislature has stipulated the provision of Article (340) of the Civil Procedure Act under the title ‘Minutes of the Remote Procedures’; however, this title does not fully express the provision of the Article, as this provision is not just limited to the minutes. Rather, it includes transcribing the remote litigation procedures into both minutes and documents, thus it is preferable to use the title ‘Transcription of the Remote Litigation Procedures’.
- In the provision of Article (338) of the Civil Procedure Act, the legislator used the phrase ‘recording and safekeeping of the remote litigation’s records’, while this provision came under the title ‘Keeping the Records of Remote Procedures’; thus, this title does not indicate the provision’s content concerning the ‘capacity of confidentiality’ of these records; therefore, we recommend that (i) the words used in the title shall be more consistent with those used in this provision, and (ii) the provision’s title shall be ‘Recording, Safekeeping and Confidentiality of the Records of Remote Litigation’.

## COMPETING INTERESTS

The author has no competing interests to declare.

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