



**Access to Justice for Turkish Consumers in the Digital Age: The
Need for Enhancing Consumer Dispute Resolution Through
Online Dispute Resolution**

A Thesis Submitted for the Degree of Doctor of Philosophy

by

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Abstract

In the digital age, with development of information communication and technology (ICT), consumer spending dominates the Gross Domestic Product (GDP). The continuously increasing consumer spending raises the probability of consumer disputes. The traditional litigation used for resolving consumer disputes is often inconvenient, impractical, time-consuming, complex and expensive. In Turkey, there has been a continuous attempt to harmonise the Turkish consumer law with the European Union (EU) legislation to meet the requirement of our digitalised society, however there is still a need for enhanced consumer redress. The present Thesis discusses the strengths and weaknesses of the Turkish Consumer Redress System and questions the judicial approach to the implementation of consumer access to justice. This Thesis evaluates the resolution of consumer disputes and analyses the EU consumer Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) regime seeking for lessons to be learnt by Turkey. The study of ODR and its application in consumer disputes aims to lead to recommendations for designing a new legal framework and establishing an efficient ODR platform for the resolution of consumer disputes in Turkey.

Keywords: ADR, Consumer Disputes, EU ODR Platform, ODR, Turkish Consumer Redress System

Declaration

I declare that the work presented in this thesis is my own and has not been submitted for any other degree or professional qualification.

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List of Abbreviations

AAA:	American Arbitration Association
ABA:	American Bar Association
ACR:	Association for Conflict Resolution
ADR:	Alternative Dispute Resolution
B2B:	Business to Business
B2C:	Business to Consumer
CCJE:	Consultative Council of European Judges
CDCJ:	Council of Europe European Committee on Legal Co-operation
CEPEJ:	Council of Europe's European Commission for the Efficiency of Justice
CIArb:	UK Chartered Institute of Arbitrators
CIETAC:	China International Economic and Trade Arbitration Commission
CJEU:	Court of Justice of the European Union
CLI:	Cyberspace Law Institute
E-commerce:	Electronic Commerce
ECC-Net:	European Consumer Centre Network
ESCP:	European Small Claim Procedure
EU:	European Union
FAA:	Federal Arbitration Act
GDP:	Gross Domestic Product
GZAC:	Guangzhou Arbitration Commission
HMCTS:	HM Courts & Tribunals Service
HTTP:	Hyper Text Transfer Protocol
ICANN:	Internet Corporation for Assigned Names and Numbers
ICT:	Information and Communications Technology

MIAM:	Mediation Information & Assessment Meeting
NCAIR:	National Center for Automated Information Research
NTD:	Notice and Takedown
OECD:	Organization for Economic Co-operation and Development
ODR:	Online Dispute Resolution
SCP:	Small Claim Procedure
T&C:	Terms and Conditions
UCTA:	Unfair Contract Term Act
UDRP:	Uniform Domain Name Dispute Resolution Policy
UK:	United Kingdom
UN:	United Nation
UNCITRAL:	United Nations Commission on International Trade Law
US:	United States
UTCCR:	The Unfair Terms in Consumer Contracts Regulations
VeRO:	Verified Rights Owner
VMP:	Virtual Magistrate Project
WIPO:	World Intellectual Property Organization
WTO:	World Trade Organization

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Publications

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Chapter 1: Introduction

1.1 Introduction

Electronic commerce (e-commerce) is one of the most growing markets in the world. It offers users a vast choice of goods and services without limitations of time and geography. Every day, millions of e-commerce transactions are completed in the world. The continuously increasing numbers of transactions in e-commerce raise the probability of disputes and parties sometimes residing in different regions are faced over low-value claims. Traditionally, when people face problems regarding transactions, they usually bring disputes to courts for resolution. Nevertheless, traditional litigation system is a time-consuming and expensive method for resolving disputes. This is obvious for low-value disputes, which cannot usually be solved in courts, because the court fee is frequently not proportionate and sometimes even higher than the amount claimed. Moreover, traditional dispute resolution is complex to resolve transnational disputes since it is not easy to determine which court will handle the case and which law will apply to the case.

Recently, consumer spending dominates the Gross Domestic Product (GDP). In the European Union (EU), consumer expenditure accounts for 54.4% of the total GDP¹, while in the United States of America (USA) consumer spending is 68%² and 59% in Turkey³. Thus, there are increasing developments on the regulation of consumer protection in these countries. The reasoning behind regulation on consumer protection is supported by the belief that to some extent consumer policies are necessary for well-functioning markets.⁴ Albeit it can be said that Turkey has adopted a paternalist or interventionist method with the extension of consumer protection rights, as a practical matter these rights are important in relation to the consumer's ability to execute them, which is a challenging issue especially in the e-commerce context. Accordingly, legal certainty and consumer confidence in the market can simply be increased

¹Statistics Explained, (Eurostat 2018) 'Household consumption by purpose' <https://ec.europa.eu/eurostat/statisticsexplained/index.php/Household_consumption_by_purpose> accessed 30 April 2019

² Bureau of Economic Analysis (U.S. Department of Commerce 2018), <https://www.bea.gov/system/files/2018-10/SNTables_0.pdf> accessed 30 April 2019

³ Turkish Statistical Institute 'Household Consumption Expenditures', <<http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=27840>> accessed April 2019

⁴ Mark Armstrong, 'Interactions between Competition and Consumer Policy' (2008) 4(1) Competition Policy International 97–147.

when there is a system that ensures compliance with consumer protection laws, and therefore consumer rights can be taken into consideration.

When business to consumer disputes (B2C) are left unresolved, parties are usually unwilling to consider traditional litigation for resolving their disputes, especially when the value of the claim is proportionately low, as litigation is costly, slow and complicated.⁵ Other reasons include the observed intricacy of a court process and the problematic issue of legal aid, because legal representatives cannot guarantee that the outcome of the trial will be successful for consumers; in this case, they may encounter the risk of having to pay litigation fees in the absence of any assurance of winning the case. Extra-judicial redress is usually the favoured choice for most disputes, since it can offer a less formal, cost-effective, fast and effective solution. This is the reason why consumer disputes have increasingly been directed to Alternative Dispute Resolution (ADR) entities, which are taking the place of courts and have become a popular dispute resolution method in commercial matters, such as insurance and finance and benefits.⁶ It should be noted here that the terminology in the field of consumer redress law may be puzzling, as it embraces several different meanings. The meaning of consumer redress used in this Thesis covers not only ADR or extra-judicial process, but also regulatory and judicial processes when they are designed for consumer disputes. Although the consumer redress law may be adopted as a generic name to define the policy and the regulation concerning not only public and private enforcement systems as well as judicial and ADR redress, the main objective of this Thesis is to contribute to the examination of the transfiguration of consumer ADR methods increasingly supported by Information and Communication Technology (ICT) -this combination is referred to Online Dispute Resolution (ODR)-, which are assumed to replace traditional litigation methods and become the preferred redress method for online consumers.

In our digital age, society is increasingly interacting online, and consumers prefer to use an online forum for addressing their complaints. Currently, most consumer redress mechanisms for internet-related disputes utilise electronic communication means. These can be as basic as e-mails and phone communications to handle consumer inquiries and complaints. Dispute

⁵ European Commission Staff Working Paper, Impact Assessment Accompanying the document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes SEC (2011) 1408 final 29 November 2011, 5.

⁶ Christopher Hodges, 'Consumer Ombudsmen: Better Regulation and Dispute Resolution' (2015) 16 ERA Forum, 593, 605.

resolution methods that enable parties to settle a dispute through distance communications are often referred to as ODR. ODR benefits from the speed and ease of the Internet and aims to become the most suited method for resolution of consumer disputes and building consumer trust in e-commerce.⁷ ODR alters the standard of traditional litigation procedures, as it can assist or supersede the role of the neutral third party (e.g. mediator, arbitrator), for example allowing parties to negotiate through software and reach an agreement at an early stage without neutral third parties' participation.

The establishment of effective consumer redress systems has two main purposes. The first is to provide consumers with access to justice easier and in a more effective way than traditional litigation.⁸ Secondly, effective redress mechanisms build consumer trust and assist in developing a reliable and competitive market. The success of large online marketplaces, such as eBay, Amazon and Alibaba, in providing effective ODR mechanism has been exemplified by their own dispute resolution centres which act as a neutral third party. The eBay dispute resolution centre resolves over 60 million disputes, while Alibaba resolves more than 100 million disputes between sellers and buyers every year.⁹ These are significant numbers, especially if it is considered that Turkish courts receive more than 2 million civil cases every year.

The dispute resolution methods are improved when supported by ICT, because the parties do not need to travel, which in turn decreases costs, saves time and increases access to justice. ODR largely combines ADR processes with ICT and the Internet, which are better fitted to the necessities of e-commerce. ODR offers an alternative method for the resolution of low-value and transnational disputes, which could not easily be resolved by traditional litigation. Also, regarding B2C disputes, ODR has a positive impact on building consumer trust, which encourages consumers to shop online, not at the local stores.

⁷ Pablo Cortés, *Online Dispute Resolution for Consumers in the EU* (Routledge, 2011); Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001); Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution* (Kluwer Law International, 2004); Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press, 2009); Mohamed Abdel Wahab, Ethan Katsh, and Daniel Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2012).

⁸ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press, 2017) 8.

⁹ Cortés, *ibid*; Jungong Sun, 'Intellectual Property and E-Commerce: Alibaba's Perspective' [2018] *WIPO Magazine* <https://www.wipo.int/wipo_magazine/en/2018/05/article_0004.html> accessed 18 April 2019.

In the EU, building consumer trust in online purchases has become one of the political goals of the European Commission. For building trust and providing effective dispute resolution system for consumer, the European Parliament and the Council adopted EU Directive on Consumer ADR¹⁰ and EU Regulation on Consumer ODR¹¹ on 21 May 2013. The EU Directive on Consumer ADR requires Member States to ensure the availability for consumers of quality ADR entities that observe procedural standards.¹² In February 2016, the EU Regulation on Consumer ODR established a web-based platform (EU ODR Platform), which enables the online submission of complaints and their transmission to the nationally approved ADR entities in the Member States. These two pieces of legislation have started a process that institutionalises and professionalises consumer ADR, becoming the main pillar of EU consumer redress law.

In Turkey, courts are still considered as the main dispute resolution forum for civil disputes. Evidence of this is the exorbitant number of pending civil cases (approximately 2 million cases), which take an unreasonable time (around 540 days including appeals) to reach a final judgement.¹³ Regarding consumer disputes, the average duration of a case in a consumer court is 411 days.¹⁴ To date, many procedural reforms have been adopted and the consumer redress system and other legislative instruments have obtained positive results. However, there are still challenges ahead. In order to provide adequate legal protection for consumers in the modern digitalised world, it is not only necessary to make the traditional litigation system more effective, but also to establish and develop an extra-judicial system through which consumers can access justice.

This Thesis attempts to evaluate the resolution of consumer disputes in the digital age and analyse the EU ODR regime seeking for lessons to be learnt by Turkey. The study of ODR and its application in consumer disputes aims to make recommendations for designing a new legal

¹⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (hereinafter Directive on Consumer ADR), OJ L165/63, 18 June 2013

¹¹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (hereinafter Regulation on Consumer ODR), OJ L165/1, 18 June 2013.

¹² EU Directive on Consumer ADR 2013 Articles 6-11

¹³ Republic of Turkey Ministry of Justice Statistics (2018), <<http://istatistikler.uyap.gov.tr/>> accessed 30 March 2019

¹⁴ Republic of Turkey Ministry of Justice Statistics (2018), <http://www.adliscil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf> accessed 25 April 2019

framework and establishing an efficient ODR platform for resolution of consumer disputes in Turkey. Such a framework will hopefully contribute to increasing consumers' access to justice, which will improve the level of trust and confidence of millions of Turkish consumers in internet transactions.

1.2 Scope, Aims and Objectives of Research

This Thesis explores how ADR, when combined with ICT, can help in resolving consumer disputes online. Consumer ADR rules and principles as well as extra-judicial processes (e.g. Turkish consumer arbitration board process) are utilised as most of these principles are also implemented in ODR processes. It is worth noting here that this research focuses more on the development of an ODR method for resolving consumer disputes emerging from online transactions as a starting point. This method could be extended to any consumer disputes in the future. The scope of this research is narrowed to only a few better suited ODR methods, namely online negotiation, online mediation and online arbitration, because these methods have the potential to resolve consumer disputes more efficiently.

This Thesis provides an overview of the contemporary performance and potential of ODR for consumer disputes and aims to identify legal challenges to make ODR more effective for online transactions. In this context, the law should meet the requirements of vulnerable parties, who do not have equal negotiating power, to provide an easily accessible and cost-effective ODR system. The fundamental focus of this research is to identify the challenges of the current Turkish consumer redress system that hinders access to justice and creates delays. This Thesis, therefore, substantiates to enable Turkey to benefit from the long-standing experience of the European Union in this area, to identify the legal amendments needed in Turkey to establish and expedite the growth of ODR to consumer disputes, which may help in solving problems and offering more secured solutions, thus building consumer confidence and trust.

1.3 Contribution to Knowledge

Even though the research on the use of ODR for consumer disputes is not novel, most of the legal studies in this area originate from developed countries, such as the EU and US.¹⁵ To date, there have not been any comprehensive studies on consumer ADR and ODR in Turkey.

¹⁵ Daniel Rainey, 'Selected Bibliography: Online Dispute Resolution', < <http://odr.info/recent-publications/>> accessed 30 March 2019

Moreover, there is evidence that ODR is still at an early stage of evolution in Turkey, as it faces legal and cultural challenges. With the development of ICT, there is an increasing concern from the Ministry of Justice and Ministry of Trade in relation to the use of ICT and its incorporation in the current legal system to resolve disputes in the Turkish market.¹⁶ This research will contribute to the knowledge by filling the gaps in the literature on the establishment and development of ODR methods for consumer disputes in the Turkish legal context. The Thesis identifies what can be learned from various jurisdictions concerning consumer ADR and ODR and how these can be used in Turkey, so that an effective redress system can be offered to Turkish consumers.

Most of the available research is based on the EU and US and there is a gap in the existing Turkish legal literature. It is evident that there are some differences between these legal systems, the concept of e-commerce, the approach of traders towards consumers and the expectations of consumers. Turkey has a different legal, social and economic culture compared to the EU Member States. In Turkey, there has been a continuous attempt to harmonise the regime of consumer protection law with EU legislation. In this regard, the current Law on Consumer Protection No. 6502 (CPL) has been based on the content of several related EU Directives and Regulations. For example, EU Directive 2015/2302 on package travel and linked travel arrangements¹⁷, Directive 2011/83 on consumer rights¹⁸ and Directive 2002/65 concerning the distance marketing of consumer financial services¹⁹ have influenced the Turkish legal framework in these respective areas. However, full harmonisation, especially in the area of dispute resolution, has not been achieved to date. For example, Turkish domestic legislation is still not compatible with the EU Directive on Consumer ADR²⁰ and the Regulation on

¹⁶ `Ministry of Justice Strategic Plan 2015-2019` published by Republic of Turkey Ministry of Justice, Directorate for Strategy Development (2015) <<http://www.judiciaryofturkey.gov.tr/pdfler/plan.pdf>> accessed 30 March 2019

¹⁷ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11 December 2015

¹⁸ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22 November 2011

¹⁹ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9 October 2002

²⁰ EU Directive on Consumer ADR 2013

Consumer ODR 2013²¹. Therefore, the present Thesis aims to consider ways to enforce those dispute resolution systems in Turkey.

Moreover, this Thesis will provide a detailed evaluation of consumer ADR and ODR under Turkish law and propose an ODR model, based on lessons from the EU and international jurisdictions. This Thesis is essential, not only because it is one of the first focusing on Turkey, but also since it is the first extensive piece of study in English about the feasibility of ODR in Turkey. Moreover, this Thesis is essential for developing countries which ODR is still its early stages. Finally, the success of this ODR model will affect the level of confidence of over forty million Turkish online consumers. In the event that greater online user trust is accomplished, it will contribute to making the digital market more competitive.

1.4 Research Methodology

The research in this Thesis is based on multiple approaches but is mainly conducted through two main methodologies. Firstly, this research uses the doctrinal legal analysis methodology, by asking ‘what the law states about the special area’,²² for the purpose of enriching the subject matter of the study and in order to cover all perspectives, issues, features, and the most current advancements in the area under examination. There are no widely accepted principles of doctrinal legal analysis. However, it is seen that most doctrinal studies have some common features. According to Rob van Gestel and Hans Micklitz, there are three core features of legal doctrinal analysis; firstly, the contention of the doctrinal approach is procured by authorised sources, such as existing laws, principles and academic publications.²³ Secondly, the law represents a system. Through the generation of general theories, which are capable of being annulled or voided, the legal doctrinal approach tries to present the law as a consistent set of principles, rules, and exceptions, in varying degrees of consideration.²⁴ Lastly, decisions in individual cases are assumed to pass arbitrariness because as they must comply with the system.²⁵

²¹ EU Regulation on Consumer ODR 2013

²² Mike McConville and Wing H. Chui (eds), *Research Methods for Law* (Oxford University Press 2007) 3-4, 18-19.

²³ Aleksander Peczenik, ‘A Theory of Legal Doctrine’ (2001), 14 *Ratio Juris* 75, 76.

²⁴ *ibid*

²⁵ Rob van Gestel and Hans-W. Micklitz, ‘Revitalising doctrinal legal research in Europe: What about Methodology?’ (2011), EUI Working Paper LAW 2011/05, 26.

Due to the different legal systems of the jurisdictions examined in this Thesis, the research also uses a comparative law methodology by comparing “between two or several more or less distinct and different legal 'systems' or the laws of those systems on the same particular issues”.²⁶ It is worth mentioning here that this research does not intend to claim that one of these jurisdictions is better than the other. This is due to the fact that currently there is no specific law or rules governing consumer ADR and ODR in Turkey. Accordingly, it would not be fair making a comparison between Turkey, a developing country, and a developed region, such as the EU, and especially developed countries, such as the UK or the US in the field of resolution of consumer disputes. Notwithstanding, there will be some comparison, where there are relevant rules in the chosen jurisdictions with view to identify variations and similarities. The benefit of examining developed countries` jurisdictions is to draw lessons from them concerning filling the existing gap in Turkey. Accordingly, this research intends to learn from the EU experience and the well-established practices in the field of ADR and ODR internationally that could thereafter be adopted by the Turkish legislature in order to ensure more effective resolution of consumer disputes.

The choice of EU legislation is based upon the wide scope of ADR and ODR provided for by several Directives and Regulations.²⁷ In addition, the choice of the EU legal system is based on three reasons. Firstly, the EU has a very developed legal framework that provides a high level of access to justice for consumers compared to other legal systems. Secondly, in comparison to other countries, consumer ADR and ODR is relatively developed in the EU. Last but not least, Turkey has a Custom Union agreement with the EU since 1995 and has long, since 1999, been trying to become a Member State of the EU.²⁸ Accession negotiations between the EU and Turkey started in October 2005. Turkey wishing to join the EU has to meet the requirement of `Copenhagen Criteria`. ²⁹ Within the framework of accession negotiations

²⁶ Pier G. Monateri (ed), *Methods of Comparative Law: Research Handbooks in Comparative Law* (Edward Elgar Publishing 2012) 145.

²⁷ EU Directive on Consumer ADR 2013 and EU Regulation on Consumer ODR 2013

²⁸ See Delegation of the European Union to Turkey, `EU and Turkey's History` <<https://www.avrupa.info.tr/en/eu-and-turkeys-history-711>> accessed 17 October 2019 and European Commission, `European Neighbourhood Policy and Enlargement Negotiations` <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en> accessed 17 October 2019

²⁹ Copenhagen criteria is a) stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; b) a functioning market economy and the capacity to cope with competition and market forces in the EU; c) the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union. See European Commission, `Accession criteria` <<https://ec.europa.eu/neighbourhoodenlargement/policy/glossary/terms/accession-criteriaen>> accessed 17 October 2019

between the EU and Turkey³⁰, sixteen chapters have been opened so far and one of these was provisionally closed.³¹ Several efforts have been made by Turkish governments to achieve the goal of joining the EU. Thus, Turkish legislation has been influenced by the EU legal system as part of the accession conditions and requirements. Furthermore, this Thesis examines what are the approaches of the EU and Turkish legal systems towards to same consumer issues and how they deal with problematic issues in order to achieve their objectives.

The primary material used in this study is to analyse and evaluate the current primary and secondary sources at EU, Turkish and International level on issues concerning consumer ADR and ODR. In this context, this Thesis mainly analyses the existing rules, such as the EC Directive on Mediation 2008³², the Directive on consumer ADR and the Regulation on consumer ODR 2013, Recognition and Enforcement of Foreign Arbitral Awards 1958³³, the UNCITRAL Technical Notes on ODR, and related case law. Moreover, this research deals with a number of Turkish laws in relation to ADR, such as the Code of Civil Procedure 2011³⁴, the Law on Mediation for Civil Disputes 2012³⁵, the Code of International Arbitration 2011³⁶, the Consumer Protection Law 2013³⁷ and the Attorneyship Law 1969³⁸. The secondary sources analysed include scholarly publications in the field of ADR and ODR, which are relevant to the research. This analysis aims to better understand the EU and International best practices as well as Turkey's legal system, their strengths, and shortcomings regarding consumer ODR, so that it becomes possible to propose the best-suited model for Turkish consumers to access justice through the use of ICT in the digital age.

³⁰ There are totally 35 different policy fields (chapters), such as justice, freedom and security, energy, consumer and health protection, etc., each of which is negotiated separately. See all chapter European Commission, `European Neighbourhood Policy and Enlargement Negotiations` <https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en> accessed 17 October 2019

³¹ European Commission `Commission Staff Working Document Turkey 2019 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 Communication on EU Enlargement Policy, COM(2019) 260 final 3.

³² Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L136/5, 24 May 2008

³³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 21 UST 2517, 330 UNTS 38 (entered into force 7 June 1959)

³⁴ The Code of Civil Procedure 6100/2011

³⁵ The Law on Mediation in Civil Disputes 6325/2012

³⁶ The Code of International Arbitration 4686/ 2001

³⁷ The Consumer Protection Law 6502/2013

³⁸ The Attorneyship Law 1136/1969

It is worth noting that most of the statutory provisions in the Turkish legislation concerning the resolution of consumer disputes and the academic publications examining the consumer redress system in Turkey are written in Turkish. Hence, the Turkish texts have been translated into English by the writer of this research.

Notably, this Thesis does not employ an empirical research on the data of ODR for consumer disputes. Instead, it uses statistics provided by international and national commissions, groups and centres, such as the European Commission's reports entitled 'Consumer Conditions Scoreboard', the European Consumer Centres Network (the ECC-Net) statistics, the Turkish Statistical Institute's statistics and the Republic of Turkey Ministry of Justice and Ministry of Trade's Statistics. However, since this research does not use a quantitative method to evaluate the problem of resolution of consumer disputes, obtaining accurate numbers, although important, is not the central objective of this Thesis. Instead, the premise of this research gives particular attention to the examination and the effectiveness of Turkey's legislation in resolving consumer disputes to demonstrate the need for a legal framework, which complies with the EU ADR Directive and ODR Regulation.

1.5 Structure of the Thesis

The present Thesis is divided into seven chapters as follows:

This chapter presents the introduction to this Thesis by dealing with the scope, aims, objectives, significance and research methodology of the research. This chapter also includes the structure of the Thesis.

The second chapter evaluates the current ODR practice and legislative developments at both international and EU level and looks at the development of legal certainty in the use of ODR methods to resolve internet-related disputes. This chapter begins by introducing the concept of ODR and its theoretical framework and continues with the critical factors of developments of major ODR methods. Then, due to the complexity of online arbitration procedures, it examines some essential substantive legal issues of online arbitration. Finally, the role of preliminary regulatory initiatives and fundamental principles relating to ODR are discussed.

The third chapter focuses on consumer access to justice from a European perspective. After examining the characteristics of consumer disputes arising from e-commerce, the current EU consumer enforcement and dispute resolution processes, such as small claim procedure and

consumer ADR/ODR, are evaluated. Then, this chapter critically examines the functioning of EU ODR platform and makes some suggestions for the re-design and revision of the EU ODR Platform, such as problem diagnosis and online negotiation tool to encourage parties to resolve their disputes themselves without third party intervention at an early stage. Finally, the chapter gives some successful examples of global technologies, in particular advanced technologies, for supporting dispute resolution.

Chapter 4 evaluates the critical question of what legal and technological principles are needed for the establishment of both public and private ODR service providers. The first section of this chapter examines the focus principles, such as impartiality, transparency, security, fairness and accreditation for the establishment and operation of an ODR system and its policies to improve the consistent quality standard of ODR services around the world. The second section of the chapter focuses on the principle of enforceability of consumer arbitration and evaluates the question of what standards in relation to the arbitrability of consumer disputes should be taken into consideration, in order to strike a balance between contractual autonomy and the protection of the vulnerable party.

Chapter 5 evaluates the critical question of whether a legal framework is needed for developing ADR and ODR for consumer disputes in Turkey. This chapter explores the efficiency of the existing legal mechanisms and the need for upgrading and designing a Turkish legal framework in the field of ODR. After a brief account of the key substantive provisions in the field of dispute resolution, the focus of the chapter moves to the specific characteristics of the Turkish enforcement framework. This chapter discusses the role of particular actors in that regard, most notably the consumer courts, consumer arbitration boards and consumer organisations as well as private regulators and alternative dispute resolution bodies. Finally, this chapter attempts to answer the question of whether Turkey is ready to have an ODR Platform to resolve consumer disputes.

The sixth chapter evaluates the feasibility of ODR for Turkey and attempts to explore the legal and technical challenges that would not allow the use of ODR for consumer disputes in Turkey. The chapter begins with the discussion of the challenges, such as cultural, regulatory and technological challenges that hinder the growth of ODR in Turkey. Then, the chapter considers various options that the Turkish legislature can use to prevent disputes or resolve disputes at

an early stage. Finally, this chapter proposes a Turkish legal framework in the field of ODR and an ODR model for resolution of consumer disputes.

The last chapter concludes the Thesis, offering an overview of the findings of the Thesis and the recommendations put forward for Turkey in relation to the need for a new legal framework in the area of ODR for consumer disputes.

Chapter 2: The Theoretical Framework of ODR

2.1 Introduction

Since the early 2000s, the number of internet users around the world has grown by 1066% as a result of the rapid evolution of ICT.¹ Over four billion people are using the internet internationally², while only in the EU the number of internet users is over seven hundred million in 2018.³ With the rapid growth of technology and the increasing use of the Internet has increasingly affected the concept and characteristic of business. As a result of this development, a complementation e-commerce transaction may last a second with the click on a button on a mouse. Cyberspace eliminates the traditional barriers between buyers and sellers. It has consequently created a new area of commerce with several kinds of transactions utilising acronyms, such as consumer to consumer (C2C), business to consumer (B2C), business to business (B2B), consumer to business (C2B) or mobile to business (M2B).⁴

The emergence of cyberspace has increased the probability of disputes arising. To resolve these disputes though traditional litigation is not convenient, cost-effective and time efficient. Especially, at international level, disputes usually arise between parties, who reside in different states. Due to the different rules and redress systems between countries there are several challenges regarding the resolution of cross-border disputes.

While technology has affected modern society quite considerably, dispute resolution mechanisms should be modernised and keep up with the technology advancements. During the past decades, technological developments significantly changed the dispute resolution mechanisms in terms of litigation, practise and procedures. In today's globalised world, a new culture of dispute resolution and a new model has become a necessity to reduce or remove various difficulties of cross-border litigation. ODR is a modern process and is likely to become

¹ 'World Internet Users Statistics And 2018 World Population Stats' (Internetworldstats.com, 2018) <<https://www.internetworldstats.com/stats.htm>> accessed 17 April 2019.

² *ibid.*

³ *ibid.*

⁴ Aura Esther Vilalta, 'ODR and E-Commerce' in Mohamed S. Abdel Wahap and others (eds), *Online Dispute Resolution: Theory and Practice 'A Treatise on Technology and Dispute Resolution'* (Eleven International Publishing 2012) 125.

a frequently used and effective mechanism to cover the needs of our globalised society, which is vastly mobile and commonly engaged in cross-border transactions.

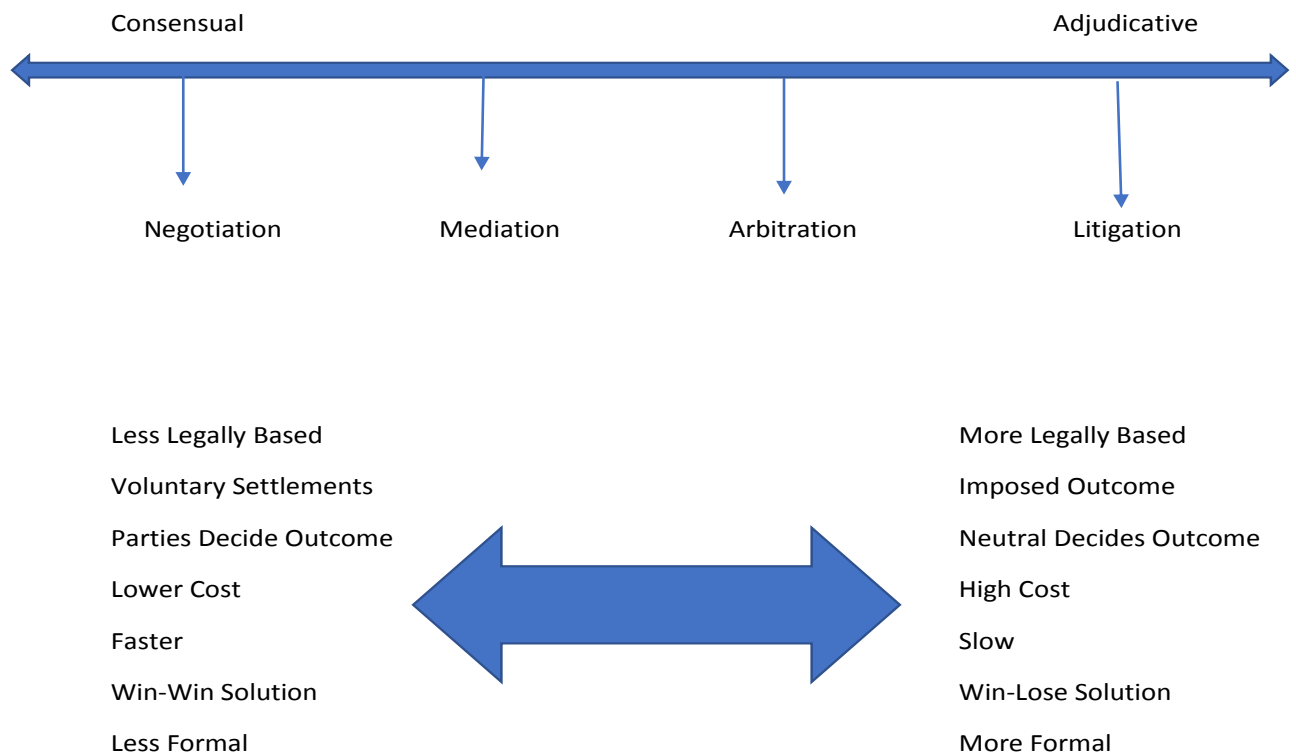
This chapter begins with the notion of ODR systems by introducing ODR and its theoretical framework and continues with the development of major ODR methods. Then, due to the complexity of online arbitration procedures, it examines some essential substantive legal issues of online arbitration. Finally, the role of preliminary regulatory initiatives and their fundamental principles relating to ODR are discussed.

2.2 The Popularity and the Need for Modernisation of ADR

ADR can be considered to be an essential method in dispute resolution, a structured process with a third-party intervention (in mediation and arbitration but not in negotiation) and avoidance of traditional litigation. As seen in the following diagram (See Figure 2.1)⁵, parties can use ADR methods, which usually provide effective, adjustable, confidential and less costly solutions, in comparison to court litigation, to avoid lengthy court proceedings for transnational disputes concerned with conflicts of jurisdiction and determination of law. International laws have been developed in a way to harmonise international ADR applications, such as the New York Convention , and the UNCITRAL Model Law on International Commercial Arbitration 1985.

⁵ Terence Lau and Lisa Johnson, *The Legal and Ethical Environment of Business* (Saylor Foundation 2011) 109.

Figure 2.1 The Dispute Resolution Continuum



While ADR provides significant advantages for parties compared to court litigation, parties may face difficulties, such as travelling and having F2F meeting for resolving disputes by using ADR systems. With the development of ICT and the growth of digitalised economies, traditional ADR systems may be left behind to some extent because of the limits of the jurisdiction and the various prohibitive costs of legal proceedings in particular jurisdiction, such as the challenge of the determination of the place of business. Therefore, for meeting the legal, economic and social requirement of the globalised world, there is a need for modernisation of ADR to provide a cost-effective, but more practical solution to resolve e-commerce disputes.

2.3 The Advent of Online Dispute Resolution

In order to create a fast, cost-effective, simple and more efficient resolution system for Internet-related disputes, the modernisation of ADR started through an ODR pilot project entitled ‘Virtual Magistrate’ at Villanova University in 1996.⁶ Due to the failure of this project, this ODR system was not considered to be very beneficial. However, day after day, the notion of ODR has been strengthened and used by well-established and non-profit organisations, such as

⁶ This project was developed by the National Center for Automated Information Research (NCAIR) and the Cyberspace Law Institute (CLI).

the American Bar Association (ABA), the American Arbitration Association (AAA) and the World Intellectual Property Organisation (WIPO).

Even though ODR (otherwise called ‘e-ADR’, ‘online ADR’ and ‘Internet Dispute Resolution’) has been used in developed countries in the EU and the US and discussed by many scholars since the 1990s.⁷ The definitions of ODR already used in the literature is an obstacle for having a more precise and broadly accepted definition of ODR. For example, Kaufman-Kohler and Schultz define three perspectives, namely cyberspace, non-adjudicative ADR and arbitration.⁸ These authors additionally recognise that the essential feature of a practicable description of ODR is that it focuses on the issues raised by its overarching feature, being operated online.⁹ The ABA Task Force on E-Commerce and ADR defines ODR as follows:

“ODR is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the internet, websites, e-mail communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online.”¹⁰

As described by the ABA Task Force, ODR is not only a combination of ADR with ICT, but also includes court proceedings (even it is not an ADR method) and ICT.

The newest definition of ODR was offered by the UNCITRAL in the Technical Notes on ODR 2016. Article 24 stipulates that ‘ODR is a mechanism for resolving disputes facilitated through the use of electronic communications and other ICT.’¹¹ In the digital age, with the development of technology, ICT has been continuously combined with methods of traditional litigation and ADR. The appearance of ODR has expanded with the development of dispute resolution technologies. This technology has been characterised as the ‘fourth party’.¹²

There are some misunderstandings about the concept of ODR and particularly that it applies to low value claims or that it can only resolve disputes arising online. The reality is that ODR has

⁷ Pablo Cortes and Arno R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-Of-Court Redress' (2014) 21 (1) Maastricht Journal 13, 14.

⁸ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004) 7.

⁹ *ibid.*

¹⁰ American Bar Association Task Force on E-Commerce and ADR Executive Summary of Final Recommendations, Final Report August 2002, 1.

¹¹ UNCITRAL Technical Notes on ODR, Article 24

¹² Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*. (Jossey-Bass, 2001), 93.

proven to be successful in resolving offline and large-value disputes, as for instance in the cases of CyberSettle and the Internet Corporation of Assigned names and Numbers (ICANN) and WIPO.¹³ Today, ODR is mainly used in labour, family, commercial and consumer disputes. Each day millions of disputes are settled online and hundreds of ODR providers offer their service around the world. Every year only on Alibaba more than one hundred million disputes are settled through ODR.¹⁴

2.4 The Main Online Disputes Resolution Methods

ODR, in its broader sense, may involve several methods. It basically includes any extrajudicial mechanisms that settle disputes by the use of ICT and especially the internet. However, there are currently three most commonly used methods of ODR systems, namely negotiation, mediation and arbitration. They shall be discussed below.

2.4.1 Online Negotiation

Negotiation is one of the most common and basic forms of dispute resolution. Most people do not even realise that they are negotiating in their day-to-day life. The efficiency of negotiation may be considered in a formal situation for instance in a business meeting or when buying a car. The basis of negotiation is that no third party is actually involved in any communication between two or more people, when they try to resolve their dispute.¹⁵ In a pure negotiation, disputants try to reach an agreement without a neutral body helping or guidance.¹⁶

In the internet era, negotiation has developed and the use of ICT tools and software has increased the possibility of resolution of disputes through negotiation. With the help of online negotiation (also called ‘e negotiation’ or ‘cyber negotiation’), the courtrooms and law firms move online, which has resulted in the advancement of the idea of electronically based e-negotiations.¹⁷ In contrast to traditional negotiation, the online environment enables the parties

¹³ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union*, (Routledge, 2011) 68

¹⁴ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*, (Oxford University Press, 2017) 15.

¹⁵ Arno R Lodder and J Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 2; Julio César Betancourt and Elina Zlatanska, 'Online Dispute Resolution (ODR): What Is It, And Is It the Way Forward?' (2013) 79 *International Journal of Arbitration, Mediation and Dispute Management*, 256, 259.

¹⁶ Colin Rule, *Online Dispute Resolution for Business* (Jossey-Bass 2002) 38.

¹⁷ Betancourt and Zlatanska (n.15).

to make their negotiation easier. For example, in order to reach an agreement, the parties do not need to travel for each meeting.

There are two significant negotiation methods available to resolve a dispute over the internet: automated (also called blind-bidding) and assisted negotiation (also called facilitated negotiation). In automated negotiation, the parties successively submit to a computer a monetary figure as a settlement proposal. The computer then compares the offer and the demand and reaches a settlement for their arithmetic mean. In assisted negotiation, the parties communicate with one another over the internet, using for instance e-mails, web-based communication tools or video conferences.¹⁸

While there are significant differences between these two methods, the characteristic feature of both is that human intervention cannot be seen in the process.¹⁹ In the automated negotiation, the process usually commences with the submission of offers by both parties. Each party does not know the other party's offer. After the submission of the secret offers, the offers that fall within a calculated range are taken into account and the computerised technology resolves the dispute at the median amount between the offers through the use of algorithms.²⁰ For example, if the settlement range is 20% and one party offers £80 and the opposing party asks for £100, the dispute is 'automatically' settled for £90.²¹ It is worth noting that software drives the process and no human intervention takes place.

Currently, websites, such as Smartsettle²² and Cybersettle²³, offer services that are completely conducted online and focus on resolving disputes by online negotiation settlement.²⁴ Cybersettle is a guide in online negotiation and has patented 'double-blind' technology. In order to exchange settlement offers, these websites work as a neutral arena. Usually, an

¹⁸ Faye Fangfei Wang, *Online Dispute Resolution* (Chandos 2009) 32.

¹⁹ Ernest Thiessen, Paul Miniato and Bruce Hiebert, 'ODR and eNegotiation', in Mohamed S. Abdel Wahap and others (eds), *Online Dispute Resolution: Theory and Practice 'A Treatise on Technology and Dispute Resolution'* (Eleven International Publishing 2012), 341.

²⁰ Trish O'Sullivan, 'Developing an Online Dispute Resolution Scheme for New Zealand Consumers Who Shop Online—Are Automated Negotiation Tools the Key To Improving Access To Justice?' [2015] *International Journal of Law and Information Technology*, 22, 29.

²¹ Thomas Schultz, 'The Roles of Dispute Settlement and ODR' in K Ingen-Hosz (ed), *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer 2011) 137.

²² 'Smartsettle ONE – Ican Systems Inc.' (*Smartsettle.com*, 2018) <<https://smartsettle.com/products/smartsettle-one/>> accessed 11 April 2019.

²³ 'Cybersettle' (*Cybersettle.com*, 2018) <<http://www.cybersettle.com/>> accessed 11 April 2019.

²⁴ These examples will be further discussed in chapter three.

aggrieved party submits a claim by signing in the website and setting a time limit for the settlement that is usually 30 to 60 days.²⁵ Then, the service contacts the opposing party to inform that the settlement offer is submitted and gives them access to the service. The opposing party is completely free either to accept or decline the invitation to participate in the process. If the opposing party accepts to participate, the aggrieved party initiates a demand. If the opposing party accepts to participate, the aggrieved party initiates a demand. The demand and the settlement offers are automatically compared by web-based technology, which informs both parties whether they are within the 'range' of resolution or whether there has been any movement towards a resolution. The parties can freely either accept or reject to settle the dispute. It is undeniable that automated negotiation is cost-effective and efficient as a method for settling disputes compared to traditional litigation.²⁶ However, it has shortcomings, such as the fact that it is limited to merely monetary disputes excluding non-monetary issues.

With regard to assisted negotiation, the parties negotiate via online facilities, such as emails, web-based communication tools or video conferences. The services assist the parties through providing certain services, such as 'developing schedules, identifying and evaluating standard settlements, and writing agreements, as well as storage means and protected sites'.²⁷ While automated negotiation only settles disputes where the parties agree on a median amount, in assisted negotiation disputes an array of settlement choices are usually offered.

There are also some successful examples of global ODR services such as eBay, PayPal and SquareTrade, which use information management to facilitate communication in assisted negotiation.²⁸ Rabinovich-Einy describes SquareTrade as a technological hybrid of negotiation and mediation.²⁹ Moreover, Rabinovich-Einy explains how this product is used by intervening in the negotiations between the aggrieved and opposing parties and, by allowing them to give a formulation of the emerged problem and the possible solution, plays part of what would be a

²⁵ Joseph W. Goodman, 'The Pros and Cons of Online Dispute Resolution: An assessment of Cyber-Mediation Websites' (2003) 4 Duke Law and Technology Review, 1, 3.

²⁶ "The fees for automated negotiation are usually determined on the basis of the settlement amount and split between the two parties. The fees for assisted negotiation are often covered by annual membership or trustmark fees or are charged on an hourly basis." See Thomas Schultz, *Online Dispute Resolution: An Overview and Selected Issues* (United Nations Economic Commission for Europe Forum on Online Dispute Resolution Geneva 2002), 5.

²⁷ *ibid.*

²⁸ These examples will be further discussed in chapter three.

²⁹ Orna Rabinovich-Einy, 'Technology's Impact: The Quest for A New Paradigm for Accountability in Mediation' (2006) 11 Harvard Negotiation Law Review, 253, 258.

mediator's role, namely to change the parties' position from an unresolved point to a settlement method.³⁰

2.4.2 Online Mediation

Mediation is another method for resolving disputes out of courts. The main aim of mediation is to offer parties a platform to settle their disputes in a sustainable and self-determined way. In the past years, mediation was often used more in family and labour conflicts. Nevertheless, due to advantages, such as procedural flexibility, cost-efficiency and time-efficiency compared to other both judicial and extra judicial methods of dispute resolution, it has been used in small claim disputes, consumer conflicts, commercial disputes, tax disputes and bankruptcy.

The European Union introduced the EC Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (hereafter 'EC Directive on Mediation') defines 'mediation' as: "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State."³¹

According to the above definition, it can be said that mediation is an extrajudicial method through which a mediator attempts to assist two or more disputants in resolving their dispute. Parties are free not to continue the process at any time. The neutral third parties or mediators do not have the authority to enforce a final binding decision on parties. Mediation is based on the voluntary participation of the parties.

Online mediation (also called 'e- mediation' or 'cyber mediation') is web-based, as opposed to a 'F2F based', mechanism.³² One of the essential differences between offline and online mediation is that the parties and the mediator communicate via the internet, usually over sophisticated communication platforms.³³ The e-mediation method follows a standard route or

³⁰ *ibid.*

³¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L136/5, 24 May 2008, Article 3.

³² Betancourt and Zlatanska (n. 15)

³³ Wang (n.18) 32; Schultz, (n. 26), 5; Sarah Rudolph Cole and Kristen M Blankley, 'Online Mediation: Where We Have Been, Where We Are Now, And Where We Should Be' (2006) 38 University of Toledo Law Review 193.

a set of stages typically subjected to deadlines, recording of events, flow processes and complicated schemes with computerised algorithms that assist in optimising offers.³⁴ Electronic systems help the disputants come up with informal offers or suggestions, and disputants are supported by a neutral third party that is involved in the process via online. Communications can be simultaneous, i.e. video conferencing or asynchronous, i.e. via e-mail. It is also possible to have private chats and neutral meetings organised and common areas where each party may offer their thoughts without revealing their identity.³⁵ These platforms usually have complimentary phone assistance.

The first research project related to online mediation aimed at examining the effectiveness of online mediation in settling internet-related disputes, especially those arising from eBay transactions, and it was conducted towards the end of 1998.³⁶ This project was improved 'based on the premise that mediators could modify at least some skills and tactics used in F2F practices to the online mediation process'.³⁷ Currently, there are several ODR providers, such as Square Trade and WebMediate that provide online mediation.³⁸

A typical online mediation process commences when an aggrieved party visits the website of the online mediator or mediation service and completes an online form that identifies the problem and expected solutions. Then the mediator examines the form and informs the opposing party and asks them to participate in the process. If the opposing party agrees to participate, they can complete their form or reply to the form completed by the aggrieved party via e-mail. This initial exchange of viewpoints may assist the disputants to understand better the dispute and or even settle the dispute. If the dispute is not resolved at the first stage, the mediator will assist in determining the issues that created the dispute and assess possible solutions. The fee for the online mediation service is commonly calculated on an hourly basis, and it may vary according to the type of disputes and the length of the required sessions.³⁹

³⁴ Aura Esther Vilalta, 'ODR and E-Commerce' in Mohamed S. Abdel Wahap and others (eds), *Online Dispute Resolution: Theory and Practice`A Treatise on Technology and Dispute Resolution`* (Eleven International Publishing 2012), 129.

³⁵ *ibid*

³⁶ Betancourt and Zlatanska (n. 15) 26.

³⁷ Ethan Katsh, Janet Rifkin, and Alan Gaitenby, 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'Ebay Law' (2015) 15 (3) Ohio State Journal on Dispute Resolution, 705, 713.

³⁸ Some of these examples will be further discussed in chapter three.

³⁹ For example, the fee of a civil mediation service starts with £190 per hour, shared between the disputants. See 'Start Civil Mediation - Our Expertise and Fixed Civil Mediation Prices Will Help You Resolve Your Dispute Quickly and Inexpensively.' (Startmediation.co.uk, 2018) <<https://www.startmediation.co.uk/civil-mediation-prices/>> accessed 14 April 2019.

It is noteworthy that online mediation offers parties greater flexibility, more creative solutions and faster resolution. Particularly, asynchronous online communication allows greater flexibility because of the 24-hour access to the service.⁴⁰ Intelligent filing forms available on the website of the service provider, take advantage of the experience gained in specific types of disputes and offer the disputants to submit their claims and defend online. Such online forms are simpler to complete than traditional forms as they are adapted depending on the information recorded.⁴¹ For example, if the party submits the type of dispute as ‘undelivered goods’, the questions in the online form are tailored to this unique type of dispute.⁴²

2.4.3 Online Arbitration

Arbitration is an out-of-court method that a neutral third party, called ‘arbitrator’, gives a final decision, which binding for both parties. This method has been increasingly chosen by parties for resolving disputes, especially in international disputes due to jurisdictional complexity. Parties (in most cases businesses) usually prefer to use arbitration for their disputes because an arbitral award can be efficiently recognised and enforced in 159 signatory countries to the New York Convention.⁴³

Online arbitration also called e-arbitration, electronic arbitration, cyber-arbitration and virtual arbitration) is often referred to as an online version of traditional arbitration. Online arbitration commences with a valid online arbitration agreement and is concluded with a final online arbitral award.⁴⁴ In online arbitration, the disputants, the arbitral tribunal, experts and related parties are supposed to make use of electronic devices, including sophisticated software and hardware devices, to participate in the online proceedings.⁴⁵

Arbitration is notably simpler to be performed online than the mediation methods, because arbitrators or other related parties do not have to work so closely with the disputants.⁴⁶ Notwithstanding, online arbitration is probably the least used ODR method for the resolution

⁴⁰ Karolina Mania, 'Online Dispute Resolution: The Future of Justice' [2015] *International Comparative Jurisprudence* 76, 79.

⁴¹ Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009) 79.

⁴² *ibid.*

⁴³ The New York Convention 1958

⁴⁴ Betancourt and Zlatanska (n. 15) 262.

⁴⁵ Dusty Bates Farned, 'A New Automated Class of Online Dispute Resolution: Changing the Meaning of Computer-Mediated Communication' (2011) 2 *Faulkner Law Review*, 335.

⁴⁶ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union*, (Routledge, 2011) 68.

of consumer disputes, especially for cross-border disputes.⁴⁷ This is because it is difficult to secure the consent of the other party after the arising of the dispute.

The resolution of cross-border disputes related to electronic transactions is unavoidably more complicated than in a paper-based scenario, because related circumstances, such as the place of domicile, the place of business and performance, are challenging to be identified in the online context.⁴⁸ Due to the lack of specific legislation on online arbitration for commercial disputes, even though there are some related legislative initiatives by the EU and UNCITRAL, it is difficult to determine the jurisdiction and applicable law in online arbitration proceedings.

2.4.3.1 Substantive Legal issues of Online Arbitration

Online arbitration is one of the most complicated methods of ODR processes, because the residence of parties in different countries may create challenges regarding the determination of the online arbitration agreement, the seat of the arbitration and the place of an arbitral award, as there are differences compared to traditional arbitration. The lack of specific regulation concerning online arbitration creates legal uncertainty in relation to the validity, jurisdiction and applicable law, and enforceability of the arbitral awards. The following section examines some substantive legal issues of online arbitration.

2.4.3.1.1 The Recognition of Forming Arbitration Agreements via Electronic Communications

There is no doubt that the primary premise for any arbitration is to have a valid arbitration agreement between the parties either before or after a dispute arises. The UNCITRAL Model Law on International Commercial Arbitration defines an arbitration agreement as “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.⁴⁹ Thus, an online arbitration can be described as an arbitration agreement which is formed via electronic communications.

⁴⁷ *ibid*

⁴⁸ Faye Fangfei Wang, *Online Arbitration*, (Informa Law from Routledge, 2017) 8.

⁴⁹ UNCITRAL Model Law on International Commercial Arbitration 1985, Article 7

Traditionally, an arbitration agreement shall be recognised in writing. Regarding the requirement of a written arbitration agreement, Article II of the New York Convention states:

“(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship.

(2) The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams [...]”⁵⁰

The requirement of a written arbitration agreement under the New York Convention has been underlined in several occasions.⁵¹ For example, in the case of *Sphere Drake Insurance PLC v Marine Towing, Inc.*, ‘a written arbitration agreement’ was interpreted by the Court of Appeal that either an arbitration agreement or an arbitration clause in a contract must be signed both parties or included in an exchange of letters or telegrams.⁵² Similarly, in the case of *Compagnie de Navigation et Transports S.A. v. MSC Mediterranean Shipping Company*, the Swiss Federal Tribunal confirmed that “when the arbitration agreement is contained in an exchange of documents, the signature requirement does not apply.”⁵³ Recently, the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵⁴ also interpreted the scope of ‘the agreement in writing’.⁵⁵ The Guide on New York Convention states that ‘under article II (2), an agreement will also meet the “in-writing” requirement if it is contained in an exchange of letters or telegrams.’⁵⁶ As noted by a German court, the essential factor in the exchange of documents requirement under the New York Convention is mutuality;

⁵⁰ The New York Convention 1958, Article II

⁵¹ Wang (n. 48) 109.

⁵² *Sphere Drake Insurance PLC v Marine Towing, Inc.*, [1994] 16 F.3d 666 5th Cir. In Turkey, Turkish Supreme Court stated that the arbitration agreement in the package holiday tour is not valid because it was not signed by parties. An arbitration agreement that is not signed is not valid. See decision of the Court of Cassation 13th Civil Chamber, dated 20 Oct 2008 (E. 2008/6195 K. 2008/12026)

⁵³ *Compagnie de Navigation et Transports S.A. v. MSC Mediterranean Shipping Company S.A.*, Federal Tribunal, Switzerland, 16 January 1995

⁵⁴ The Guide on the New York Convention does not constitute an independent authority indicating the interpretation to be given to individual provisions but rather serves as a reference tool collating a wide range of decisions from a number of jurisdictions. The purpose of the Guide is to assist in the dissemination of information on the New York Convention and further promote its adoption as well as its uniform interpretation and effective implementation. In addition, the Guide is meant to help judges, arbitrators, practitioners, academics and Government officials use more efficiently the case law relating to the Convention. See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016)

⁵⁵ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), 50.

⁵⁶ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), 47.

that is, reciprocal transmission of documents.⁵⁷ The Guide on New York Convention also tried to make clear the meaning of an `exchange`. It is stated that although Article II (2) only states “an exchange of letters or telegrams”, it is believed that Article II (2) is not limited to letters and telegrams and can be expanded to any exchange of documents.⁵⁸ The Guide on New York Convention claims that `most courts recognize that an arbitration agreement contained in an exchange of documents or other written communications, whether physical or electronic, satisfies the requirement of Article II (2)`.⁵⁹ Lastly, the Guide on New York Convention confirms that ‘where the arbitration agreement is contained in an exchange of documents, the text of Article II (2) does not, on its face, require the parties’ signature on the agreement to arbitrate’.⁶⁰

It is quite understandable that the New York Convention was adopted before the digital age in 1958. Therefore, it was not possible to realise its potential. In order to adapt and modernise the concept of ‘in writing; to the legal requirements of the digital age and e-commerce, the Model Law on Arbitration took a significant step. The Model Law on Arbitration states:

‘The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; electronic communication means any communication that the parties make by means of data messages; data message means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.’⁶¹

It is clearly accepted that Article 7 of the Model Law on Arbitration aims at clarifying the meaning of the ‘in writing’ requirement broadly and not to be subject to formalistic

⁵⁷ Oberlandesgericht [OLG] Frankfurt, Germany, 26 June 2006, 26 Sch 28/05; Bayerisches Oberstes Landesgericht [BayObLG], Germany, 12 December 2002, 4 Z Sch 16/02 cited from UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), 47.

⁵⁸ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016),

⁵⁹ “For an exchange of telexes and faxes, see *Compagnie de Navigation et Transports S.A. v. MSC Mediterranean Shipping Company S.A.*, Federal Tribunal, Switzerland, 16 January 1995; *C S.A. v. E. Corporation*, Court of Justice of Geneva, Switzerland, 14 April 1983, 187. For an exchange by e-mails with a confirmation by fax, see *Great Offshore Ltd. v. Iranian Offshore Engineering & Construction Co.*, Supreme Court, Civil Appellate Jurisdiction, India, 25 August 2008, Arbitration Petition No. 10 of 2006”. See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), 52.

⁶⁰ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), 56.

⁶¹ UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 7(4).

interpretations.⁶² A similar development can be seen at EU level, as the Electronic Commerce Directive requires Member States to ensure that each State's law permits a contract to be concluded by electronic means.⁶³ It is also stated in the English Arbitration Act 1996 that the 'writing' requirement includes 'being recorded by electronic means'.⁶⁴ As seen in the case of *Toyota Tsusho Sugar Trading Ltd v Prolat SRL and Midgulf International Ltd v Groupe Chimique Tunisien*, the provisions in the Act has a broad understanding of the written form requirements.⁶⁵

Article 4 of the Turkish International Arbitration Code regulates the form of the arbitration agreement. In accordance with this Article, an arbitration agreement shall be in writing.⁶⁶ "In order to comply with the written form requirement, the arbitration agreement shall be contained in a written document signed by the parties or in an exchange of letters, telex, telegrams, fax or other means of telecommunication or in computerised form or an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other."⁶⁷ It should be noted here that the first two paragraphs of Article 4 of the International Arbitration law are based on the translation of Article 7 of the UNCITRAL Model Law.⁶⁸ However, when Article 7(2) of the Model Law is examined, it can be seen that while Model law requires that means of communications must be capable of recording arbitration agreement in writing⁶⁹, Turkish International Arbitration Code does not require it. According to Ziya Akıncı, in order to determine whether means of communication meet requirement of 'in writing', it is necessary to look at the criteria of 'providing a record of the agreement' which Model law states.⁷⁰

⁶² Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015), 73; It is argued that electronic arbitration agreements and arbitral awards shall be treated as types of 'electronic contracts' in that their validity will be automatically recognised by the UN Convention on the Use of Electronic Communications in International Contracts and other national electronic contract laws. See Wang (n. 47) 109.

⁶³ Article 9(1) of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ (L 178), 17 July 2000

⁶⁴ UK Arbitration Act 1996, Article 5(6)

⁶⁵ *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649; *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66

⁶⁶ See Article 4 of the International Arbitration Code

⁶⁷ See Article 4 of the International Arbitration Code

⁶⁸ Ziya Akıncı *Milletlerarası Tahkim/ International Arbitration* (Vedat Press 2016) 119

⁶⁹ UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 7

⁷⁰ Akıncı (n 68) 119

Regarding the form of an online arbitration agreement, the online arbitration agreement, which is generated, sent, received, stored by electronic means meets the requirement of 'in writing'.⁷¹

It is worth noting that not only online arbitration, but also traditional arbitration has been challenged as to whether the arbitration agreements can meet the requirements of 'in writing' under the New York Convention. Thus, there is a need for harmonised rules regarding the determination of valid technological means for an online arbitration clause or agreement is consistently underlined around the world.

2.4.3.1.2 The Incorporation of an Arbitration Clause or Agreement via Electronic Means

Regarding a valid arbitration agreement or clause, traditionally there are three accepted ways to incorporate contractual terms that may be interpreted for the determination of the incorporation of arbitration clauses.⁷² These are the following: incorporation by signature, incorporation by notice/ reference and incorporation by course of dealing.⁷³ In the digitalised economy, in complementation contracts via electronic means legal challenges may arise because of the need for evaluating the reasonableness and fairness in the circumstances and for considering the proper technical measures to give adequate notice and approval for the incorporation.⁷⁴ The evaluation of the concept of the incorporation of terms in the digitalised economy consists of three ways (the availability of terms, the provision of unambiguous consent and the content of terms) in contrast to the traditional two-way evaluation (methods of incorporation and protection against unfair terms).⁷⁵ The reassessment, therefore, requires to consider these three factors, namely a) with regard to the rule as to the availability of terms and reasonable awareness b) concerning learned consent c) regarding the scope of terms as to the fairness and reasonableness.⁷⁶

EU Regulations and Directives dealing with issues arising from online transactions include provisions on the availability of contractual terms, such as the EC Directive on Electronic

⁷¹ *ibid*

⁷² Wang (n. 48) 111.

⁷³ The UK Arbitration Act 1996 Section 5(2) states that there is an agreement in writing "(a) if the agreement is made in writing (whether or not it is signed by the parties); (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing."

⁷⁴ Wang (n. 48) 111.

⁷⁵ *ibid*

⁷⁶ *ibid*

Commerce 2000 and the EC Directive on Consumer Rights 2011.⁷⁷ However, there is still no substantive provision in those instruments governing the incorporation of contractual terms. Contrary, ‘the Proposed Common European Sales Law 2011’⁷⁸ included special provisions, such as ‘pre-contractual information’ for the availability of contractual terms and ‘unfair contract terms’ for the assessment of unfairness for the incorporation of contractual terms.⁷⁹

Regarding technical measures for, agreeing on a valid arbitration agreement or clause by using electronic communications, there are various electronic means that allow terms and conditions, including an arbitration clause, to be included in a contract, even though their suitability and legal effects are controversial.⁸⁰ Nowadays, it is an emerging trend that a website, which sells goods and services, may have an offer, containing an arbitration clause in the T&C, and request to accept the T&C by clicking on the ‘I accept’ or ‘I agree’ or ‘Yes’ button or a tick box to complete the transaction.⁸¹ An empirical research conducted in 2013 stated that most arbitration clauses appear towards end of the terms of service and 40% of arbitral clauses do not even mention that rights are waived.⁸² The parties usually have to fill out a pre-formulated standard form agreement or fill in a few empty fields if they want to complete their transactions. In the case of *I.Lan systems, Inc. v. Netscout Service Level Corp*, the court reasoned that by clicking on ‘I agree’, box I.Lan explicitly agreed to the clickwrap terms.⁸³ However, the ‘agree’ or ‘accept’ or ‘yes’ icon must be visible and the user must be compelled to tick on it and start the download. This requirement can be seen in the case of the *Specht v. Netscape Communications Corp*⁸⁴. In this case, the court holds that, even though the plaintiffs were able to download the software by clicking the ‘download’ button without clicking on the ‘accept’ icon, the downloading software did not consent to be bound by the terms of the license agreement.⁸⁵

⁷⁷ The Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ (L 178), 17 July 2000; Directive 2011/83/EU of the European Parliament And of the Council Of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council L 304/64, 22 November 2011

⁷⁸ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final – 2011/0284 (COD), Brussels, 11 October 2011

⁷⁹ *ibid*, Articles 10, 13, 23 and 24.

⁸⁰ Wang (n. 48) 116

⁸¹ James R II Bucilla, ‘The Online Crossroads Of Website Terms Of Service Agreements And Consumer Protection: An Empirical Study Of Arbitration Clauses In The Terms Of Service Agreements For The Top 100 Websites Viewed In The United States’ (2014) 15 Wake Forest J Bus & Intell Prop L 101, 119-121

⁸² *ibid*

⁸³ *i.LAN Systems, Inc. v. NetScout Service Level Corp.*, [2002] 183 F. Supp. 2d 328 D. Mass .

⁸⁴ *Specht v. Netscape Communications Corp.*, [2002] 306 F.3d 17 2nd Cir.

⁸⁵ *Specht v. Netscape Communications Corp.*, [2002] 306 F.3d 17 2nd Cir.

Because of the changing technology and its influence on e-commerce practices, there is a pressing need for adopting consistent and fair global standards for 'making T&Cs available online' and 'incorporating T&Cs into the electronic agreement' considering the characteristics of electronic communications and the nature of cross-border transactions. The existence of effective international and national legislation, including the consistent interpretation of justice may assist in filling the gap of traditional international standards, tackling the increasing challenges that modern technologies place upon the assessment of the fairness and reasonableness to the availability and incorporation of contractual terms.⁸⁶

2.4.3.1.3 Process of Commencement of Online Arbitration Proceedings

Before starting the examination of the process of commencement of online arbitration proceedings, it is necessary to clarify that there are no restriction or obstacles in the New York Convention, the European Convention on International Commercial Arbitration 1961, UNCITRAL Model Law on International Commercial Arbitration 1985, the Turkish Code of International Arbitration Numbered 4686 and the Turkish Code of Civil Procedure Numbered 6100 for the parties and arbitrators to conduct the online arbitration proceedings.⁸⁷ However, there are two core principles that are relevant in particular to online arbitration procedures.⁸⁸ The first principle is party autonomy, which allows disputants to choose the arbitral procedure. The second principle is equal treatment of the parties which means 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'⁸⁹. According to this principle, the parties have the right of equal access to the information and facilities in arbitration.⁹⁰ In this context, if a party has less access to facilities or has less knowledge about how to use the technology in online arbitration proceeding, this will not be

⁸⁶ Wang (n. 47) 116

⁸⁷ Since 2010 there have been two major developments of general ODR procedures by international and regional organisations across the world: one is the UNCITRAL Draft ODR Procedural Rules and the other is the EU Regulation on Consumer ODR 2013. There are also online arbitration rules provided by public national arbitration organisations or institutes such as the China International Economic and Trade Arbitration Commission (CIETAC) Online Arbitration Rules which was first adopted in 2009 and amended in 2014 and came into force in 2014. (See CIETAC Online Arbitration Rules, <<http://www.cietac.org/index.php?m=Article&a=show&id=2770&l=en>> accessed 15 October 2019). For more discussion see Wang (n.47) 51-54

⁸⁸ Olivier Cachard, *International Commercial Arbitration: Electronic Arbitration* (United Nations Conference on Trade and Development 2003), UNCTAD/EDM/Misc.232/Add.20, 32, <http://www.unctad.org/en/docs/edmmisc232add20_en.pdf> accessed 3 December 2018

⁸⁹ UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 18. For detailed discussion on 'the principle of equal treatment' see Maxi Scherer, Dharshini Prasad and Dina Prokic, 'The Principle of Equal Treatment in International Arbitration' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377237> accessed 10 October 2019

⁹⁰ Armağan Ebru Bozkurt Yüksel, 'Online International Arbitration' (2007) 4 Ankara Law Review, 83, 88.

acceptable.⁹¹ For example, if a party states that he or she does not have the equal opportunity for reading CD-ROMs, it would not be agreeable to require the sending of documents via CD-ROM.

There are two common forms for the commencement of the online arbitration process. The first is that one party contacts the other party regarding choosing the arbitrator via electronic communication means. If parties reach an agreement on the selection on the arbitrator, then the process will start. The second form is the use of a web-based arbitration. In this form, a party submits a request for arbitration to an ODR provider, and then the provider informs the other party and requests the submission of statements, documents and materials related to the arbitration. After the selection of the arbitrator, the first hearing of the arbitration is an administration meeting conducted between arbitrators and disputants for the discussion of the dispute and agreement on a scheduling order. In recent years, there has been an increasing interest towards ICT tools, such as chat rooms, video conference or conference calls for the hearings of the online arbitration proceedings. Throughout the hearing, the disputants usually work with arbitrators to determine the required procedural actions in the arrangement of the evidentiary hearing and set a timetable for those steps and the rest of the hearing process.

Rules on hearings are similar in all online arbitration services, even though there may be differences regarding calendars and fees. For example, in the Hong Kong International Arbitration Centre (HKIAC) Arbitration Rules, the claimant and the respondent are required to pay a deposit for the cost of reasonable expenses, such as arbitration fee, arbitral tribunal expert fee within 30 days before the commencement of the hearing.⁹² At the preliminary hearing, the arbitrator may require the disputants to exchange all relevant documents and prepare those documents for submission.⁹³ After the exchange and submission of the documents, the hearing can start. The hearings usually are conducted in five stages: opening of the hearing, opening statements, hearing of witnesses and expert witnesses, closing arguments and closing of the hearing.⁹⁴

In the online arbitration context, the pre-hearing of an online arbitration via video call or conference may present challenges, compared to a F2F pre-hearing. Video conference

⁹¹ Rafal Morek, 'Online Arbitration: Admissibility within the Current Legal Framework' (ODR.INFO, 2003) 26, <<http://www.odr.info/Re%20greetings.doc>> accessed 10 April 2019

⁹² HKIAC Administered Arbitration Rules 2018, Articles 41 and 34

⁹³ AAA Commercial Arbitration Rules and Mediation Procedures 2013, Article 22

⁹⁴ Wang (n. 48) 73.

applications must overcome possible technical problems of video or call, which may reduce the quality and affect the reliability of the hearings. For example, during a video conferencing, an audio drop-out of a meaningful word or sentence may change the understanding of the disputants. It is, therefore, necessary to use specially designed and integrated video call services for ODR methods.

2.4.3.1.4 Selection of the Seat of Online Arbitration

It is not easy for the online arbitration procedure to be conducted in a single place. In online arbitration, not only the disputants but also arbitrators, witnesses and other relevant parties may be involved in the hearing from different locations. If the arbitration procedure is conducted entirely online, it seems difficult to determine the seat of arbitration which is also known as the location and place of arbitration. It is worthy to note here that the seat of online arbitration refers to the legal place and location of arbitration proceedings conducted via electronic communications.⁹⁵ The seat of online arbitration differs from the place where the arbitral tribunal conducts the hearing of witnesses, experts or other relevant parties. In the case of *PT Garuda Indonesia v Birgen Air*, the Singapore Court of Appeal stated that the legal seat of the arbitration is different from the venue decided to conduct arbitral hearings or meetings as a matter of convenience.⁹⁶ The seat of arbitration has a pivotal role in determining the jurisdiction and applicable law for online arbitration proceedings.⁹⁷

Traditionally, according to the principle of party autonomy, parties are free to choose the seat of arbitration based on either ‘the seat theory’⁹⁸ or ‘the theory of delocalization’⁹⁹. The UNCITRAL Model Law on International Commercial Arbitration supports this principle in

⁹⁵ In the case of *Angela Raguz v Rebecca Sullivan & Ors*, the court stated that the seat of arbitration is not necessarily where it is conducted, even though where the disputants have failed to choose the law governing the conduct of the arbitration. The court also noted that the legislature concerns with the legal not physical seat of arbitration. See *Angela Raguz v Rebecca Sullivan & Ors* [2000] NSWCA 240

⁹⁶ *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393

⁹⁷ Nicolas De Witt, ‘Online International Arbitration: Nine Issues Crucial to Its Success’ (2001) 12 *The American Review of International Arbitration*, 441, 451.

⁹⁸ “‘The seat theory’, which has been recognised and popularly adopted in the national arbitration laws and practices, the related matters of the arbitration procedures such as oral hearings and private deliberations of the arbitral tribunal over the dispute may be resolved in a country other than the seat of arbitration, yet the seat of arbitration remains unchanged, which is the place of arbitration agreed by the parties.” See Wang, (n. 18) 82.

⁹⁹ “Delocalizing the arbitral procedures refers to removing the supervisory authority of the *lex fori* and the national courts where the arbitration is conducted. As far as a delocalized arbitral award is regarded, it means eliminating the power of the courts at the seat of arbitration to make an internationally effective declaration of the award’s nullity. Accordingly, the delocalisation theory can be practised at two stages of the arbitration procedures. One is delocalizing the arbitral procedures from the controls of the *lex fori*. The other one is delocalising arbitral awards.” See Hong-lin Yu and Motassem Nasir, ‘Can Online Arbitration Exist within the Traditional Arbitration Framework?’ (2003) 20 *Journal of International Arbitration*, 455, 463.

Article 20, which stipulates that the disputants are allowed to agree on the seat of arbitration.¹⁰⁰ The question may arise when parties fail to choose the seat of online arbitration. In the online arbitration context, some scholars¹⁰¹ claim that without such agreement concerning the seat of online arbitration, the seat of arbitration can be considered “the place of the servers could be utilised as a lead, or the place where the computer is based which supports the electronic communication such as video call or conference might consider relevance or the place from where parties send the emails to arbitrator and where they receive the emails.”¹⁰² It is not possible to agree with this approach regarding the seat of online arbitration since it is complicated and causes more legal challenges.

On the other hand, it is suggested that if parties fail to agree on the seat of the online arbitration, the seat of arbitration shall be determined by the residence of the chairman of the arbitral tribunal, the place of the main server or the location of the business of the ODR services.¹⁰³ It seems that the location of the chairman of the arbitral tribunal may be more convenient and effective as a criterion for determining the seat of arbitration than the place of main serve or ODR services.

The last criterion contrasts with the underlying logic of the determination of the location of the party in cyberspace, which may be transplanted as the determination of the seat of arbitration, under Article 6 of the UN Convention of the Use of Electronic Communications in International Contracts.¹⁰⁴ The UN Convention provides the rules on how to determine the place of business as follows a) a party’s place of business is considered to be the location shown by that party, unless another party prove the contrary b) If a party does not show a place of business due to having more than one, which has the closest relationship to the relevant contract is considered as the place of business c) If a natural person does not have a place of business, the person’s permanent residency may be presumed as the place of business d) a place cannot

¹⁰⁰ UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006), Article 20.

¹⁰¹ M.H.M. Schellekens, 'Online Arbitration and E-Commerce' (2002) 9 *Electronic Communication Law Review*, 113, 122; Daniel Girsberger and Dorothee Schramm, 'Cyber-Arbitration; (2002) 3 *European Business Organization Law Review*, 611, 623; Arnold Vahrenwald, 'Out-Of-Court Dispute Settlement Systems for E-Commerce: Report on Legal Issues.' (2000), 87 <<https://tbplaw.com/data/part4.pdf>> accessed 22 April 2019

¹⁰² *ibid*

¹⁰³ Gerold Herrmann, 'Some Legal E-lections on Online Arbitration', in R. Briner, L. Fortier, K. Berger and J. Bredow (eds.), *Law of International Business and Dispute Settlement in the 21st Century* (Carl Heymanns Verlag KG, 2011) 267, 273.

¹⁰⁴ UN Convention on the Use of Electronic Communications in International Contracts 2005

be considered as a place of business since that is where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or where the information system may be accessed by other parties e) using a domain name or email address connected to a particular country does not make parties place of business.¹⁰⁵

Instead of following both approaches mentioned above, specific legal standards should determine the seat of online arbitration. The UNCITRAL Model Law on International Commercial Arbitration states that “Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.”¹⁰⁶The UNCITRAL Arbitration Rules also provide that the arbitral tribunal shall determine the seat of arbitration if parties failed to agree on.¹⁰⁷ Moreover, some arbitration institutions, such as the International Chamber of Commerce Rules of Arbitration¹⁰⁸, and national laws, such as the UK¹⁰⁹, provide that the arbitral tribunal should determine the seat of arbitration if failing such agreement.

2.4.3.1.5 The Challenges of Determination of Applicable Law for Online Arbitration

The issue of applicable law in online arbitration is quite challenging for a number of reasons. More specifically, in relation to a) the online arbitration agreement or clause, b) online arbitral proceedings, c) choice of law rules and d) substance issues. Traditionally, similar to the choice of the place of online arbitration, within the scope of party autonomy, parties are free to agree on the choice of applicable law on several matters mentioned above, if such a choice will not violate the mandatory rule or public policy of the country. In the case of an agreement on applicable law, arbitral tribunals have to comply with rules chosen by the parties since power exceeding and procedural irregularity are both grounds for setting aside or refusal to enforce an arbitral award¹¹⁰, according to both the UNCITRAL Model Law on International

¹⁰⁵ *ibid* Article 6(1)

¹⁰⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006), Article 20.

¹⁰⁷ UNCITRAL Arbitration Rules (updated 2013), Article 18.

¹⁰⁸ “The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. The arbitral tribunal may deliberate at any location it considers appropriate.” See the International Chamber of Commerce Rules of Arbitration, Article 18

¹⁰⁹ UK Arbitration Act 1996 Section 3

¹¹⁰ Giuditta Cordero-Moss, ‘Arbitration and Private International Law; (2008), 11(4) International Arbitration Law Review, 153, 163.

Commercial Arbitration and the New York Convention.¹¹¹ Without such an agreement on the choice of applicable law by the parties, the arbitral tribunal may apply the law as it determines to be appropriate.¹¹² In this case, the arbitral tribunal may resort to private international law and the selected rules will be used for determining the fitting jurisdiction and substantive applicable law. It is recommended that the disputants may determine the rule of private international law that the arbitral tribunal may not use vague statements and create legal certainty, as failing any reference to private international law, there is no evidence that the arbitral tribunal will certainly apply a conflict rule to identify the appropriate law.¹¹³ In the meantime, if the arbitral tribunal applies a conflict rule, it will encounter the similar difficulties in choosing the applicable law of e-contracts as if the case was decided by the normal judicial procedure.¹¹⁴ Regarding the selection of an arbitral procedure, the procedure of arbitration may be directed by the procedural rules which parties agree on. If parties fail to reach such agreement, the arbitral tribunal may apply the rules which it considers more appropriate.

2.4.3.1.6 Legal Requirements Concerning the Format and Issuance of Online Arbitral Awards

An arbitral award is the final decision made by the arbitrator or arbitral bodies in the arbitration proceedings.¹¹⁵ Most of arbitration institutions and national laws require similar standards regarding the format and issuance of an arbitration award. The New York Convention also states the basic form of arbitral awards that parties shall have a ‘duly authenticated original award or a duly certified copy’ for obtaining recognition and enforcement.¹¹⁶ It is worth noting that the New York Convention does not explicitly state that an award must be signed and in writing. However, in practice, many arbitration institutions and national laws require writing and signatures for arbitral awards. For example, the UNCITRAL Model Law on International Commercial Arbitration provides on Article 31 that the arbitral award shall be made in writing and signed by the arbitrators.¹¹⁷ On the other hand, a few national arbitration laws, such as the

¹¹¹ UNCITRAL Model Law on International Commercial Arbitration 1985, Article 34(2); New York Convention, Article 5(1)

¹¹² “The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.” See International Centre for Dispute Resolution Article 31(1)

¹¹³ Giuditta Cordero-Moss (n. 94) 163.

¹¹⁴ Wang (n. 48) 138.

¹¹⁵ The New York Convention 1958, Article 1 (2)

¹¹⁶ *ibid*, Article 4

¹¹⁷ The UNCITRAL Model Law on International Commercial Arbitration provides in Article 31 (1); for national laws see the Dutch Arbitration Act 1986 Article 1057(2), the French Code of Civil and Commercial Procedures Articles 1513 and 1515.

English Arbitration Act 1996, do not require any form on arbitral awards and emphasise that parties are free for having an agreement on the form of award.¹¹⁸

With regard to online arbitration award, (otherwise called ‘e-award’), there may be further legal obligations concerning the format and issuance of e-awards compared to offline arbitration awards. Recently, the UNCITRAL Draft ODR Procedural Rules (Track I) provided that, in order to be recognised and enforced, e-awards shall be in writing and recorded on the ODR platform.¹¹⁹ The Draft Article 7 of the UNCITRAL Draft ODR Procedural Rules states that “The neutral shall evaluate the dispute based on the information submitted by the parties (and having regard to the terms of the agreement,) and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be **recorded** on the ODR platform. The award shall be made in **in writing** and **signed** by the neutral and shall indicate the date on which it was made and the place of arbitration.”¹²⁰

Regarding the ‘writing’ requirement for an e-award, the UNCITRAL Draft ODR Procedural Rules also stipulates that“(a) The award to be **in writing** shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and (b) The award to be **signed** shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.”¹²¹

E-awards have the same effect and bear the same consequences as offline awards in that a valid arbitral award is recognisable and enforceable.¹²² In offline arbitration, the original signed award would be sent to the parties; thus the sending acknowledgement could be considered as evidence in either setting the award aside or enforcing the awards.¹²³ In the contemporary arbitration system, the majority of arbitration rules still need the original signed award.

¹¹⁸ The UK Arbitration Act 1996 in Article 52(1) states: “the parties are free to agree on the form of the award”, while the Swiss Private International Law 1987 in Article 189(1) states: “The arbitral award shall be rendered according to the procedure and in the form agreed upon by the parties.”

¹¹⁹ A/CN.9/WG.III/WP.133 – Online dispute resolution for cross- border electronic commerce transactions: draft procedural rules, United Nations Commission on International Trade Law, Working Group III (Online dispute resolution), 31st session, New York, 9–13 February 2015 (hereinafter ‘UNCITRAL Draft ODR Procedural Rules 2014’), Article 7(3) and (4).

¹²⁰ UNCITRAL Draft ODR Procedural Rules 2014, Article 7 (3) and 7(4)

¹²¹ *ibid* Article 7(4)

¹²² The New York Convention 1958, Article 4; The UNCITRAL Draft ODR Procedural Rules 2014 in Article 7(7) note that “the award shall be final and binding on the parties and the parties shall carry out the award without delay.”

¹²³ Wang (n. 48) 131.

Sometimes where e-communication is permitted, the original awards shall still be sent to the other party.¹²⁴ In this context, the legal challenge of an e-award is that an online arbitral award is usually delivered online, which means that it could either be an e-record of a paper award, for instance a scanned document of an original signed award, or an award delivered in an electronic form and electronically signed.¹²⁵ Concerning the originality of an e-award, the latter type of e-award brings to mind a question of ‘whether an online award of that format would be considered an original’ If so, would it remain an original if it has been printed or reproduced in paper format?¹²⁶ Thus, there is a need for both international and national law to eliminate such variations in different countries and increase the effectiveness of arbitral awards delivered by electronic means.

Another essential point related to online awards that should be examined is the reasoning for e-awards. Traditionally, it is questionable whether arbitrators should present their reasoning along the same lines as the judges in courts.¹²⁷ It is discussed that the character of an arbitrator is different from a judge in court, who usually reaches a verdict in accord with the concept of fairness applicable to society or establish a precedent for future cases.¹²⁸ As stated by the UNCITRAL Model Law on International Commercial Arbitration, the arbitral awards shall indicate the reasons upon which the awards are based, unless the parties decide that no reason will be provided or the award is an award given as provided under Article 30.¹²⁹ The UK Arbitration Act 1996 also states that the arbitral tribunal may be required to give the reasons for its award in satisfactory detail if a court finds during an application or an appeal that there is no justification provided for the arbitral award or the arbitral award is not sufficiently justified or not enough detailed for the court to take into account the application or appeal.¹³⁰ In the case of *Bremer Handelsgesellschaft mbH v Westzucker*, a reasoned award was defined by the English Court of Appeal as “all that is necessary is that the arbitrators should set out

¹²⁴ Jason Fry, Simon Greenberg and Francesca Mazza, ‘The Secretariat’s Guide to ICC Arbitration’, (ICC Publication No. 729E, 2012), 341. It suggests that under the ICC Rules sending the award by electronic communication does not establish official notification of an award and official notification is considered to emerge when a party obtains the hard copy original signed award.

¹²⁵ Mohamed S. Abdel Wahap, ‘ODR and E-arbitration’ in Mohamed S. Abdel Wahap and others (eds), *Online Dispute Resolution: Theory and Practice ‘A Treatise on Technology and Dispute Resolution’* (Eleven International Publishing 2012) 424.

¹²⁶ *ibid.*

¹²⁷ Wang (n. 48) 74

¹²⁸ Simon Greenberg, Christopher Duncan Kee and J Romesh Weeramantry, ‘International Commercial Arbitration: An Asia-Pacific Perspective’, (Cambridge University Press, 2011), 385.

¹²⁹ UNCITRAL Model Law on International Commercial Arbitration 1985, Article 31(2)

¹³⁰ UK Arbitration Act 1996, Article 70

what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is”.¹³¹ The Victorian Court of Appeal, in the case of *Oil Basins Ltd v BHP Billiton Ltd*, approved the decision to annul the arbitral award on the grounds of insufficient reasons.¹³² Regarding the requirement of reasoned arbitral awards, major arbitration institutions provide practical guidelines on the proper reasoning of arbitral awards. For example, the UK Chartered Institute of Arbitrators (CI Arb) notes that the inclusion of reasons is necessary to explain to the parties why they have won or lost.¹³³

Furthermore, regarding reasoned e-awards, the UNCITRAL Draft ODR Procedural Rules states that “the award shall state brief grounds upon which it is based”.¹³⁴ This suggested that the requirement of reasoned e-awards appears to be rather uncomplicated, in comparison to the requirement of a traditional reasoned award as per the English leading case of *Bremer Handelsgesellschaft* mentioned above. The requirement of a brief reasoned e-award is understandable when considering the features and purpose of online arbitration, which intends to offer low-cost, time efficient, less complicated and more effective services. Nevertheless, a speedy, low-cost and effective online arbitration process does not mean that the quality and standard of needs to be taken into consideration. With the development of computerised algorithms supporting the delivery of e-award decisions, a comprehensive and well-reasoned e-award may be given in a short period.¹³⁵

¹³¹ *Bremer Handelsgesellschaft mbH v Westzucker* [1981] 2 Lloyd’s Rep 130, 132

¹³² *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255

¹³³ The UK Chartered Institute of Arbitrators (CI Arb) in the International Arbitration Practice Guideline on Drafting of Arbitral Awards states the requirements of ‘reasons’ for an arbitral award in detail as follows: a) All arbitral awards should contain reasons, unless otherwise agreed by the parties or where the award records the parties’ settlement. The inclusion of reasons is necessary to demonstrate that arbitrators have considered the parties’ respective submissions and to explain to the parties why they have won or lost. Most national laws and arbitration rules expressly require arbitrators to include reasons in their awards. Even where they are silent on the matter, it is good practice to provide reasons, unless the parties agree otherwise or where the award records the parties’ settlement. b) Arbitrators have a wide discretion to decide on the length and the level of detail of the reasons, but it is good practice to keep the reasons concise and limited to what is necessary, according to the circumstances of the dispute. In any event, arbitrators need to set out Chartered Institute of Arbitrators their findings, based on the evidence and arguments presented, as to what did or did not happen. They should explain why, in the light of what they find happened, they have reached their decision and what their decision is. c) Arbitrators should also consider whether it is appropriate to include a statement that the parties have had a fair and equal opportunity to present their respective cases and deal with that of their counterparty. See Chartered Institute of Arbitrators (CI Arb) International Arbitration Practice Guideline on Drafting of Arbitral Awards, 2015, 16.

¹³⁴ UNCITRAL Draft ODR Procedural Rules 2014 (A/CN.9/WG.III/WP.133), Article 7(5).

¹³⁵ Wang (n. 48) 132

Generally, an ODR platform should show a common place for users to, where feasible, conduct the whole dispute process. Parties should be verified with valid credentials and submitted documents should be versioned and have time and date stamping. Parties should be allowed read-only or read/write access depending on purposes. A case controller will be responsible for adjusting the access privileges of the parties. All activities should be recorded and be trackable by providing a chronologically accurate audit trail, which should be accessed only by the administrator.¹³⁶ In addition, in the platform, there should be the option to upload or change any submitted documents and evidence. When an arbitrator makes a final decision, the award should be sent simultaneously to both parties.¹³⁷

2.5 The Current Legal Environment of ODR

2.5.1 International Regulatory Development

In the digitalised era, due to legal, social, political, technical, economic and cultural differences, it has been difficult to introduce an ODR system. When considering the diversity in the countries' legal systems, judicial complexity has been an obstacle for the establishment of an international treaty-based ODR system.¹³⁸ The recent UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018¹³⁹, existing the New York Convention¹⁴⁰, the UNCITRAL Model Law on International Commercial Arbitration¹⁴¹, the UN Convention on the Use of Electronic Communications in International Contracts¹⁴² and the UNCITRAL Arbitration Rules¹⁴³ do not provide any specific rules concerning ODR, but offer some useful guidance for dealing with international disputes via ODR methods. Since the beginning of the new millennium, scholars have emphasised the need for international co-operation and agreements on harmonised ODR rules.¹⁴⁴

¹³⁶ *ibid* 76

¹³⁷ *ibid* 77

¹³⁸ American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution in Cooperation with the Shidler Centre for Law, Commerce and Technology, University of Washington School of Law, 'Addressing Disputes in Electronic Commerce: Final Recommendations and Report', (2002), 58 *Business Lawyer* 415, 450.

¹³⁹ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

¹⁴⁰ The New York Convention 1958

¹⁴¹ UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006

¹⁴² United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

¹⁴³ UNCITRAL Arbitration Rules (with new Article 1, para. 4, as adopted in 2013); UNCITRAL Arbitration Rules (as revised in 2010); and UNCITRAL Arbitration Rules (1976).

¹⁴⁴ Wang (n. 17) 43.

2.5.1.1 The UNCITRAL Technical Notes on ODR

In 2010, in its 43rd session the UNCITRAL decided to establish a working group, the Working Group III, due to the need for an effective dispute resolution and for a set of general principles in the field of e-commerce.¹⁴⁵ The initial aim of the working group was to establish detailed rules on the use of ODR to resolve disputes arising in e-commerce.¹⁴⁶ There is not yet any international legislation on ODR for resolving cross-border consumer disputes and this is why the UNCITRAL requested a study setting out the basic rules about ODR. More specifically, the Working Group III was concerned with the use of ODR in resolving cross-border disputes arising from e-commerce and the preparation of detailed rules of procedure related to ODR. It is worth noting that the Working Group III focused not only on ODR for B2C disputes but also for B2B disputes. The Working Group III started its activities in order to create international legislation. The Working Group envisaged a three-tiered ODR procedure, which would start with negotiations between the parties and, if parties do not reach an agreement through negotiation, parties would go to mediation. The final stage would entail arbitration.¹⁴⁷ However, the Working Group faced difficulties and struggled to achieve its mandate. These difficulties occurred in the context of the binding arbitration award, which was the last step in the stages of the specially designed ODR procedure, and ultimately changed the direction of the work of the Working Group III.

While aiming to prepare detailed rules of procedure for use in resolving disputes in the field of e-commerce, the idea of establishing detailed rules of procedure was abandoned as a result of the legal validity of pre-dispute consumer arbitration agreements is treated differently in the various jurisdictions..¹⁴⁸ For example, while the EU member states and other countries did not allow for such binding procedures, the United States allowed for enforcement of pre-dispute arbitration agreements.¹⁴⁹ The basis of these disagreements was the regulation of consumer

¹⁴⁵ United Nations Commission on International Trade Law, 44th session, 'Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session', A/CN.9/716, 27 June-15 July 2011

¹⁴⁶ United Nations Commission on International Trade Law, 49th session, 'Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session', A/CN.9/868, 27 June-15 July 2016

¹⁴⁷ Amy J. Schmitz, 'There's an "App" for That: Developing Online Dispute Resolution to Empower Economic Development', (2018) 32 *Notre Dame Journal of Law, Ethics and Public Policy*, 24.

¹⁴⁸ Clara Flebus, 'Report: UNCITRAL Working Group III on Online Dispute Resolution - A Change of Focus In The Outcome Document' (2016) 29 *New York State Bar Association International Law Practicum* 60.

¹⁴⁹ Noam Ebner, John Zeleznikow, 'No Sheriff in Town: Governance for Online Dispute Resolution' (2016) 32 *Negotiation Journal*, 297; Mireze Philippe, 'ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR', (2014) 1 *International Journal of Online Dispute Resolution*, 54; Amy J. Schmitz, 'There's an "App" for That: Developing Online Dispute Resolution to Empower Economic Development', (2018) 32 *Notre Dame Journal of Law, Ethics and Public Policy*, 23

protection in national law and, in particular, the approaches that limit the arbitrability of consumer disputes. In order to deal with this issue, the Working Group developed two different tracks; one track of which would end in arbitration, and one track of which would not.¹⁵⁰ The United States favored Track One whereas the EU member states and other countries championed Track Two.¹⁵¹ In 2014, the Working Group proceeded to consider the draft text of the track of the rules that did not end in a binding arbitration phase which means Track Two.¹⁵²

As a result, the UNCITRAL determined in its 48th session in July 2015 that there is no consensus in terms of ODR rules and requested from the Working Group III to prepare a non-binding document, which would only include elements of the ODR process that were previously agreed upon by the Working Group.¹⁵³ Finally, the Working Group III, acting under these instructions, prepared a guide document by excluding the arbitration stage which was considered as the final stage of ODR. The text was adopted at the 49th session of UNCITRAL in July 2016, under the name ‘UNCITRAL Technical Notes on ODR’.¹⁵⁴

The Technical Notes consist of 12 sections. For the purposes of the present Thesis, instead of examining the whole document in detail, it is sufficient to explain the generally accepted principles concerning ODR. First of all, as stipulated in Section 4, the rules apply to disputes arising from cross-border, low-value e-commerce transactions.¹⁵⁵ Moreover, the Technical Notes state that an ODR process may apply to disputes arising from both B2B and B2C transactions.¹⁵⁶ In the first section, general information about ODR is provided along with the purpose of the Technical Notes.¹⁵⁷ In this section, it is stated that ODR can be used as an effective method to resolve disputes arising from cross-border e-commerce transactions. By using ODR, disputes can be resolved in a simple, fast, flexible and secure manner without the parties having to be physically present at a meeting or a hearing. In the same way, in Article 4, it is stated that the ODR systems are based on the principles of impartiality, independence,

¹⁵⁰ United Nations Commission on International Trade Law, 30th session, ‘Report of Working Group III ‘Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II) ‘ A/CN.9/WG.III/WP.130, 20-24 October 2014

¹⁵¹ Ebner (n 149) Philippe (n 149), Schmitz, (n 149)

¹⁵² United Nations Commission on International Trade Law, 30th session, ‘Report of Working Group III ‘Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track II) ‘ A/CN.9/WG.III/WP.130, 20-24 October 2014

¹⁵³ United Nations Commission on International Trade Law (n. 128)

¹⁵⁴ *ibid*

¹⁵⁵ UNCITRAL Technical Notes on ODR, Section 4

¹⁵⁶ *ibid* Section 4(22)

¹⁵⁷ *ibid* Section 1

efficiency, effectiveness, due process, fairness, accountability and transparency.¹⁵⁸ As stated in Article 2, the purpose of the Technical Notes is to assist the development and diffusion of ODR mechanisms that can be performed in many types, such as negotiation, mediation and arbitration. At this point, it is emphasised that Technical Notes is not a binding, but a descriptive document. It aims to resolve the low-value disputes arising from cross-border e-commerce transactions. For this purpose, the Technical Notes were intended to assist to third parties, ODR platforms and institutions that offer ODR services.

2.5.1.2 The Council of Europe’s Work on ODR (Technical Study on Online Dispute Resolution Mechanisms 2018)

To date, the Council of Europe has mainly focused its work on ADR. Yet, the potential of ODR in facilitating individuals’ access to justice, by assisting in resolving disputes in a cost-effective, less formal, flexible and time-efficient manner than traditional litigation has been recognised. Most notably, The Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ) carried out a thorough evaluation of the use of information technology in the judicial systems of the Council of Europe’s Member states as part of the CEPEJ’s 2014-2016 cycle.¹⁵⁹ In 2011, the Consultative Council of European Judges (CCJE) adopted an Opinion entitled “Justice and Information Technologies” which deals with the application of modern ICT in courts and more focuses on the opportunities that IT offers in relation to, and its impact on, the judiciary and the judicial process.¹⁶⁰ In 2015, the Committee on Legal Affairs and Human Rights emphasises the significance of overcoming existing difficulties to individuals’ access to justice and states that innovative use of modern ICT within courts on the one hand, and ODR procedures on the other, can play a crucial role in this effort in a report on “Access to justice and the Internet: Potential and Challenges”.¹⁶¹ The Parliamentary Assembly of the Council of Europe encourages Member States to promote and further develop ODR methods, acknowledging the potential of ODR procedures for resolving disputes more in a cost-effective, less formal, flexible and time-efficient manner than traditional litigation.¹⁶² The Assembly calls on the Council of Europe member States to: “a) make voluntary ODR

¹⁵⁸ *ibid* Section 1(4)

¹⁵⁹ European Commission for the Efficiency of Justice (CEPEJ) “European judicial systems, efficiency and quality of justice: Use of information technology in courts in Europe”, CEPEJ Studies No. XX, 2016 edition (2014 data)

¹⁶⁰ Consultative Council of European Judges (CCJE), Opinion No. 14(2011), “Justice and information technologies”.

¹⁶¹ Parliamentary Assembly of the Council of Europe, Resolution 2054 (2015), “Access to justice and the Internet: potential and challenges”, Report: Doc. 13918 of 10 November 2015

¹⁶² *ibid*

procedures available to citizens in appropriate cases; raise public awareness of the availability of, and create incentives for the participation in such procedures, including by promoting the extrajudicial enforcement of ODR decisions and by enhancing the knowledge of legal professionals about ODR; b) ensure that existing and future ODR procedures contain safeguards compliant with Articles 6 and 13 of the European Convention on Human Rights, which may include access to legal advice; c) ensure that parties engaging in ODR procedures retain the right to access a judicial appeal procedure satisfying the requirements of a fair trial pursuant to Article 6 of the Convention; d) undertake to develop common minimum standards that ODR providers will have to comply with, inter alia in order to ensure that their procedures do not unfairly favour regular users over one-time users, and strive to establish a common system of accrediting ODR providers satisfying these standards; f) continue to monitor technological developments in order to promote the use of ICT within courts to improve judicial efficiency, while guaranteeing fair and transparent proceedings, data security, privacy, as well as the adequate and continuous training of court staff and lawyers on the lawful and effective use of ICT in judicial proceedings.”¹⁶³

Recently, the Council of Europe European Committee on Legal Co-operation (CDCJ) commissioned the ODR expert Prof Julia Hörnle to prepare a report on an initial analysis of the due process issues connected to ODR and examined the feasibility and possible scope of a CDCJ activity on ODR.¹⁶⁴ A recent study titled “Technical Study on Online Dispute Resolution Mechanisms” was conducted by experts to analyse the compatibility of ODR with the right to a fair trial both in terms of the challenges to the right of a fair trial as well as opportunities afforded by ODR to provide greater access to justice and enhanced due process and examine whether ODR could open new avenues of redress for infringements of ECHR rights.¹⁶⁵ The study contains three distinct elements a) literature review on ODR and the right to a fair trial; b) interviews with experts in the field of ODR; c) responses to a Questionnaire by the experts

¹⁶³ *ibid*

¹⁶⁴ The Council of Europe European Committee on Legal Co-operation, “Technical Study on Online Dispute Resolution Mechanisms”, CDCJ (2018)

¹⁶⁵ The Council of Europe European Committee on Legal Co-operation, “Technical Study on Online Dispute Resolution Mechanisms”, CDCJ (2018)5

in the Council of Europe Member States¹⁶⁶ including Turkey.¹⁶⁷ The study summarised ODR in the Council of Europe Member States and recommended that states pay attention to some issues¹⁶⁸ when implementing ODR.¹⁶⁹

2.5.2 EU Framework

One of the fundamental aims of EU law is to ensure the free circulation of goods and services by establishing a common market between the Member States.¹⁷⁰ One of the essential tools for the realisation of this objective is the establishment and smooth functioning of an EU single digital market. However, a survey carried out in 2016 revealed that the consumers in the EU, who buy goods or services through the internet, may refrain from seeking their rights if they encounter a problem.¹⁷¹ In order to find a solution to this problem, the European Commission has adopted several pieces of legislation to resolve disputes arising between the Member States. ADR and ODR have been discussed at EU level for the past two decades, especially in the context of B2C and B2B transactions. All adopted EU legislation related to ADR and ODR will be examined in detail below.

¹⁶⁶ The Study had responses from 23 Council of Europe Member States: Belgium, Bosnia Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Moldova, Montenegro, Netherlands, Poland, Portugal, Slovakia, Sweden, Switzerland and Turkey. See The Council of Europe European Committee on Legal Co-operation, “Technical Study on Online Dispute Resolution Mechanisms”, CDCJ (2018)

¹⁶⁷ *ibid*

¹⁶⁸ Some of them are: An issue with ODR and access to justice is that those who are computer illiterate or have no access to technology might be side-lined in the process. Increased high internet access reflects social and generational change of how people now lead their lives, but what of the vulnerable users and those without access? Requiring parties to use technology to resolve disputes could inhibit access to justice if there is a great discrepancy between the parties and their access to technology. The move to online and virtual justice also threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and, as some argue, make justice less open. If some litigants do not have access to, or the ability to use, technology and the internet, these litigants will be excluded from the administration of justice. Therefore, if ODR is implemented, there should (a) either be an alternative paper-based traditional means of having a dispute resolved for parties who do not have this access to technology and the internet or (b) a comprehensive system of legal representation made affordable. See The Council of Europe European Committee on Legal Co-operation, “Technical Study on Online Dispute Resolution Mechanisms”, CDCJ (2018)

¹⁶⁹ The Council of Europe European Committee on Legal Co-operation, “Technical Study on Online Dispute Resolution Mechanisms”, CDCJ (2018)

¹⁷⁰ Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26 October 2012

¹⁷¹ DG Justice and Consumers, ‘Consumer Conditions Scoreboard: Consumers at home in the Single Market-2017’, Publications Office of the European Union, 2017, 8.

2.5.2.1 EC Directive on Mediation 2008

The European Union adopted EC Directive on Mediation on 23 April 2008¹⁷² for the resolution of both commercial and civil matters that came into force in June 2008¹⁷³. The main aim of the Directive was to facilitate access to ADR and promote the use of mediation by considering a well-adjusted relationship between mediation and court proceedings.¹⁷⁴ The Directive contains five substantive rules: a) It requires each Member State to boost the training of mediators and to ensure high mediation quality. b) Every judge is given the right to ask the disputants for using mediation first to resolve the disputes c) It ensures that mediated settlement agreements can be recognisable and enforceable if both parties request it. d) It provides that mediation takes place in a confidentiality environment. It ensures that the mediator does not impose an obligation to present evidence in court about what happened during mediation in a post-dispute between the disputants to that mediation. e) It ensures that the parties will not miss the opportunity for bringing a case to court as a result of the time spent on mediation.¹⁷⁵ In 2017, the European Parliament adopted a ‘Resolution’ on the implementation of the Mediation Directive.¹⁷⁶ Based on the 2016 report drawn up by the Commission, the Resolution made recommendations¹⁷⁷ to increase the effectiveness of mediation in civil and commercial cases throughout the EU.¹⁷⁸

¹⁷² EC Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, Brussels, 28 February 2008, 15003/5/07 REV5.

¹⁷³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L136/5, 24 May 2008.

¹⁷⁴ EU Press Release Reference: Mediation in Civil and Commercial Matters, MEMO/08/263, Brussels, 23 April 2008.

¹⁷⁵ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L136/5, 24 May 2008

¹⁷⁶ European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the ‘Mediation Directive’) (2016/2066(INI)), C 337/2, 12 September 2017

¹⁷⁷ The European Parliament made the following recommendations: a) Member States to increase their efforts to encourage the use of mediation in civil and commercial disputes through appropriate and comprehensive information campaigns, improved cooperation between legal professionals and exchange of best practices among jurisdictions. b) Assess the need for the Commission to develop EU-wide quality standards for the provision of mediation services. c) Consider the need for Member States to create and maintain national registers of mediated proceedings. d) The Commission should undertake a detailed study on the obstacles to free circulation of foreign mediation agreements and options to promote the use of mediation. e) Upon review, the Commission should find solutions to effectively extend the scope of mediation, where possible, to other civil and administrative matters. See European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the ‘Mediation Directive’) (2016/2066(INI)), C 337/2, 12 September 2017,

¹⁷⁸ Report from The Commission To The European Parliament, The Council And The European Economic And Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2016) 542 final, 26 August 2016

2.5.2.3 The ADR Directive and the ODR Regulation 2013

The European Parliament and the European Council adopted two innovative pieces of legislation on consumer dispute resolution on 21 May 2013. The ADR Directive and the ODR Regulation came into force in July 2013.¹⁷⁹ The main aim of the new rules was to resolve B2C disputes out of court, faster, cheaper and in a more straightforward way than the courts can offer.¹⁸⁰ More specifically, Article 5 of the ADR Directive states that it is a requirement for Member States to provide ADR entities to resolve both domestic and cross-border online contractual B2C disputes, excluding disputes related to health service and higher education.¹⁸¹ Even though the legislation is called as ‘ODR Regulation’, there is no description of what ODR is and we have to rely on the work of researchers, academics and other experts.¹⁸² The main aim of the ODR Regulation was to boost the use of ADR entities for the resolution of both national and cross-border consumer disputes arising from purchasing good or services online.¹⁸³ Accordingly, the Directive ensures the quality of ADR schemes by establishing a certain level of minimum standards¹⁸⁴ and launched the EU ODR Platform to offer a platform for the resolution of online disputes with the speedy assistance of advanced technologies. The ODR Platform is described in Article 5 (2) as “a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by this Regulation. It shall be an interactive website which can be accessed electronically and free of charge in all the official languages of the institutions of the Union.”¹⁸⁵

The ODR Platform has the potential to provide cost-effective, and time-efficient resolution for the dispute, increase the confidence of consumers in e-commerce and enable sellers to reach the consumers in the other Member States easily. The legal framework for the functioning of the Platform and its legal challenges will be further examined in the next chapter.

¹⁷⁹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, L 165/63, 18 June 2013

¹⁸⁰ EC Directive on Consumer ADR 2013, Article 5

¹⁸¹ *ibid*

¹⁸² Graham Ross, 'The Possible Unintended Consequences of the European Directive on Alternative Dispute Resolution and the Regulation on Online Dispute Resolution' (2014) 10 *Democracia Digital e Governo Eletrônico* 211.

¹⁸³ EU Regulation on Consumer ODR 2013

¹⁸⁴ Expertise, independence and impartiality, transparency, effectiveness, fairness, liberty and legality are the main principles by means of ADR proceedings must comply under ADR Directive. See ADR Directive on Consumer, Articles 6-11.

¹⁸⁵ EU Regulation on Consumer ODR 2013, Article 5(2).

2.6 Conclusion

ODR is a process of dispute resolution incorporating ICT. No doubt that ODR offers many advantages to its users, but essentially it eliminates the need to travel and reduces costs by enabling remote communication. Additionally, it enables the use of asynchronous communication, which provides a more suitable and manageable choice for settling disputes. Consequently, it has significant potential regarding increasing access to justice. In this context, ODR can be a mechanism that provides access to justice rather than an alternative to courts. Nevertheless, the use of ODR has also several drawbacks, such as the lack of F2F communications, technical difficulties as well as legal limitations.

Since 2010 there have been two significant legal improvements in the area of ODR systems by international and regional organisations. The first one is the UNCITRAL Technical Notes on ODR, which gives recommendations on the legal and technical process regarding the resolution of cross-border B2B and B2C disputes and the second one is the EU Regulation on Consumer ODR, which presents specific process rules to settle B2C disputes in the EU via EU ODR platform. There are also online arbitration rules provided by arbitration institutions, such as CIETAC. Even though the Technical Notes provides general principles about the ODR methods, the fact that it is not a binding document and it is not international legislation or a model law with detailed rules can reduce the international impact of this document. Due to the lack of binding international legislation governing the substantive issues of online arbitration, related national and international rules regulating traditional arbitration and e-commerce have been used to determine the validity of online arbitration agreements or clauses, the place of arbitration and enforceability of arbitral e-award.

Chapter 3: ODR for Consumer Internet-Related Disputes under EU Law

3.1 Introduction

Nowadays, in the age of the internet, businesses and consumers can engage in electronic commercial transactions simply with the click of a mouse anywhere around the world without boundaries of time and jurisdiction. In 2018, approximately 1.79 billion people bought goods and services online.¹ Approximately 69% of the EU population shopped online and more than 35% of consumers in the EU purchased goods or services from retailers across borders.² B2C transactions in the EU reached €534 billion with a growth rate of 11% in 2017.³ eBay reached 175 million active users, one billion live listings and 414 million applications downloads by the last quarter of 2017.⁴ The amount of gross merchandise volume sold on eBay reached \$ 88 billion in 2017.⁵ Amazon has more than 310 million active customer accounts worldwide and it is one of the market leaders in the U.S with approximately 178 billion U.S. dollars in 2017 net sales.⁶

There is no doubt that e-commerce offers an enticing universe of possible connections for consumers. However, it also poses some challenges. As opposed to businesses, consumers are the weaker party in electronic transactions. In reality, consumers often have problems with regard to understanding contract terms, insufficient information disclosure, unfair contract terms, transaction confirmation, fraud and deception, delivery, payment, privacy and so on. In B2C contracts, the terms of a contract, which are usually non-individually negotiated, are formulated by the businesses. This means that the consumers have no opportunity to be involved in the formulation of the contract terms or influence the content of the contract.

Even if consumers retain the right to take legal action against the other party, it is still quite challenging to exercise this right for a number of reasons related to time, costs, lack of

¹ 'Number of Digital Buyers Worldwide from 2014 to 2021' (Statista, 2019) <<https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide/>> accessed 6 March 2019

² 'E-commerce Statistics for Individuals' (Eurostat, 2018) <https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals> accessed 6 March 2019; DG Justice and Consumers, 'Consumer Conditions Scoreboard: Consumers at home in the Single Market-2017', Publications Office of the European Union, 2017, 93.

³ European B2C Ecommerce Report 2018, (Ecommerce Europe 2018)

⁴ 'Who We Are – eBay' (eBay, 2018) <<https://www.ebayinc.com/our-company/who-we-are/>> 6 March 2019.

⁵ 'eBay Inc. Reports First Quarter 2018 Results', (eBay, 2018) <<https://www.ebayinc.com/stories/news/ebay-q1-2018-results/>> accessed 6 March 2019.

⁶ 'Statistics and Facts about Amazon' (Statista, 2018) <<https://www.statista.com/topics/846/amazon/>> accessed 6 March 2019.

knowledge and expertise. For low-value claims, due to the difficulty of having F2F processes, the lack of time, money, knowledge, and patience, it is often not worthwhile to go to court. If consumers have to deal with such difficulties, they are most likely to give up on proceeding claims. Moreover, the courts are still attached to geography and jurisdiction. In order to decide how to resolve a dispute, the first issue to be addressed is the applicable law. The same dispute may have a very different outcome depending on which law is used during the resolution process. To illustrate, if a consumer in Turkey buys an item from an US company located in the UK and the item is exported directly to the consumer from a depot in Pakistan, which law applies should a problem occur? And if the item is only worth £50, which lawyer would be willing to handle the dispute to settle the complicated jurisdictional issues? Which judge in which country should hear that dispute?

All these questions show that the traditional litigation is often not suitable for consumer disputes, particularly cross-border ones. Thus, it is time to bring a new approach to consumer redress for cross-border disputes at both regional and international level. This chapter examines appropriate mechanisms to resolve disputes arising from B2C transactions.

3.2 An Overview of Electronic Commerce

The term of e-commerce can be described as “commerce conducted in a digital form or on an electronic platform” or purchasing goods or services through the Internet.⁷ In the EU, the European Initiative in Electronic Commerce defines e-commerce as: “Any form of business transaction in which the parties interact electronically rather than through physical exchanges. It mainly covers two types of activities: One is the electronic ordering of tangible goods which are delivered physically by traditional channels such as postal services or commercial couriers; and the other is direct electronic commerce including the online ordering, payment and delivery of intangible goods and services such as computer software, entertainment content, or information services on a global scale.”⁸

⁷ Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US, and China* (2nd edn, Routledge 2014), 7. According to Reed, it is very hard to determine a definition for e-commerce because “the technology is so flexible that a wide variety of commercial activities are possible. Chris Reed and John Angel, *Computer Law: The Law and Regulation of Information Technology* (6th edn, Oxford University Press, 2007) 198.

⁸ A European Initiative in Electronic Commerce, COM (1997) 157 final of 16.4.1997, at I (7); The Organisation for Economic Cooperation and Development (OECD) further describes electronic commerce from an economic and social point of view as: “All forms of commercial transactions involving both organizations and individuals, that are based upon the electronic processing and transmission of data, including text, sound and visual images. It also refers to the effects that the electronic exchange of commercial information may have on the institutions and

It is noteworthy that not only the Internet, but also the phone⁹, fax machine, electronic payment methods and money transfer systems all make it easy to complete transactions in one or more respects electronically.¹⁰ For example, PayPal is one of the world's largest Internet payment companies which has reached 267 million active users and it is available in over 200 markets around the world.¹¹

Electronic commercial transactions are an important part of e-commerce and refer to agreements made by private persons or commercial entities. Electronic commercial transactions presume the occurrence of a business transaction and provide a more effective business environment by using electronic means.¹²

In the US, the Census Bureau of the Department of Commerce announced on 19 November 2018 that “the estimate of U.S. retail e-commerce sales for the third quarter of 2018 totalled \$121.5 billion, an increase of 0.8% from the second quarter of 2018. The third quarter 2018 e-commerce estimate increased 14.3% compared to the third quarter of 2017 while total retail sales increased 4.9% in the same period. E-commerce sales in the third quarter of 2018 accounted for 9.1% of total sales.”¹³

In the EU, the European E-commerce Association stated that the European e-commerce turnover increased by 12.75% to €540 billion in 2017.¹⁴ In order to participate in electronic commercial transactions, there are various methods which can be used by an interested party. In practical terms, it is widely accepted that there are two major types of electronic commercial transactions, namely B2B and B2C.¹⁵ B2B transactions are transactions between different

process that support and govern commercial activities.” See Organization for Economic Co-operation and Development, *Electronic Commerce: Opportunities and Challenges for Government* (OECD 1997), 11.

⁹ There is a linkage between m-commerce and e-commerce. This relationship exists mainly because both involve electronic transactions that are conducted over computer-mediated networks via telecommunication networks. Furthermore, m-commerce exhibits all the different types of e-commerce, depending on the buyer and the seller involved, namely B2B, B2C, C2B and C2C. Although m-commerce delivers e-commerce over mobile devices, there are some features that are unique to m-commerce transactions or applications.

¹⁰ Yun Zhao, *Dispute Resolution in Electronic Commerce* (Martinus Nijhoff Publishers 2005) 13.

¹¹ See PayPal, 'Who We Are' (2019) < <https://www.paypal.com/us/webapps/mpp/about> > accessed 10 March 2019.

¹² Wang (n.7) 8.

¹³ The US Department of Commerce, (2018) 'Quarterly Retail E-Commerce Sales 3rd Quarter 2018' <https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf> accessed 28 April 2019.

¹⁴ Ecommerce Europe (2018), 'European Ecommerce Report 2018 Edition' <<http://www.outofseo.com/wp-content/uploads/2018/09/e-commerce-europa-report-2018.pdf>> accessed 28 April 2019.

¹⁵ According to Rule: “All e-commerce is normally put into one of two categories: business-to-consumer or business-to-business. While both deal with basically the same thing, the transfer of goods from one party to

businesses or entities. Generally speaking, in this type of transactions, parties are in a roughly equivalent position regarding money, power, and business savvy.¹⁶ It is beyond the scope of this Thesis to examine the full extent of B2B electronic commercial transactions. B2C are transactions conducted between a business and a consumer. It is worth mentioning here that in a B2C transaction, one of the parties should be a consumer. Generally speaking, while B2B transactions usually provide goods or services to businesses, B2C transactions aim to provide goods or services to consumers. In the EU, the European Ecommerce Report 2018 stated that “online retail has continued its double-digit growth. With a growth rate of 11%, the European B2C e-commerce reached €534 billion in 2017. For 2018, it is forecasted to increase by 13% to €602 billion.”¹⁷

B2B and B2C are not radically different regarding their contract elements. However, the differences involve the terms of parties’ protection. According to Wang, “..., B2C contract is identical to B2B contract in terms of the determination of the validity of electronic contract, the time and place of dispatch and receipt of electronic communications and the location of the parties. However, the differences arise in the two types of contracts because consumers are the weaker parties in commercial transactions and they need particularised rules to protect their rights.”¹⁸

As mentioned earlier, in contrast to businesses, consumers are weaker parties in electronic transactions. They do not have the same power as businesses in the market and they often have problems regarding understanding contract terms, insufficient information disclosure, unfair contract terms, transaction confirmation, fraud and deception, delivery, payment, privacy and so on. In B2C contracts, usually the terms of a contract are drafted by firms. Most of these

another, they are very different in practice.” Colin Rule, *Online Dispute Resolution for Business* (Jossey-Bass 2002) 95.

¹⁶ *ibid* 96.

¹⁷ Ecommerce Europe (2018), ‘Press Kit for the European B2C Ecommerce Report 2018’ <<https://www.ecommerce-europe.eu/app/uploads/2018/07/Press-Kit-European-B2C-Ecommerce-Report-2018.pdf>> accessed 28 April 2019.

¹⁸ Wang (n.7), 18; A similar viewpoint pointed out by Hornle and Riefa: “Distinguishing between consumers and businesses is crucial because the law typically applies a far greater standard of protection to consumers than to business in transactions. Business is assumed to contract inter se ‘at arm’s length’ – ie with equality of bargaining power – while this is not in B2C transactions.” See Christine Riefa and Julia Hornle, ‘The Changing Face of Electronic Consumer Contracts’ in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd ed, Hart Publishing, 2009) 96.

contracts are non-individually negotiated. It means that any options are not given to the consumer to involve to a contract or influence the content of the contract.¹⁹

3.3 Characteristic of Consumer Disputes Arising from E-commerce

E-commerce presents fantastic opportunities for electronic businesses to grow their marketplaces and provide services to ever greater groups of online consumers. At the same time, consumers take advantage of e-commerce, since it enables them to buy items or services at the click of a mouse unhindered by geographic boundaries or time. However, in any given transaction be it sale of goods or services, problems and disputes may arise. This applies equally to both the online and offline worlds. In practice, disputes can occur at any stage of the e-commerce transactions.

In order to find appropriate mechanisms to resolve disputes, it is notable to look into the different types of disputes arising from e-commerce. For example, disputes can be categorised based on the existence of norms, such as interest disputes and rights disputes. It is widely accepted that disputes can be either contractual or non-contractual disputes. Contractual disputes can be defined as disputes related to or contained within a contract or a contractual relationship. Typically, B2C disputes may occur due to “non-payment for goods or services, non-performance of contractual obligations, poor performance of contract, misrepresentations, breach of the privacy policy, and breach of security of confidential information.”²⁰ On the other hand, non-contractual disputes usually include copyright, data protection, the right of free expression and so on.

According to the European Consumer Centres Network (ECC-Net) statistics, in the last decade the ECCs had over 850 000 direct contacts with consumers.²¹ In 2017 only, the ECC-Net dealt

¹⁹ “In B2B transactions, both parties probably have lawyers they can consult on legal issues, as well as resources to pursue the matter should it escalate. Sometimes small businesses are really little more than individuals with a corporate identity, so it’s not wholly accurate to say that every B2B transaction involves parties with equal stature and resources, but in most cases B2B transaction partners are on equal footing.” See Rule, (n.15) 96.

²⁰ Zhao (n.10), 27.

²¹ The ECC-Net is a network of 30 offices in the EU Member States, Norway and Iceland, providing free of charge help and advice to consumers on their cross-border purchases, whether online or on the spot within these 30 countries. They are co-financed by the European Commission and national governments in order to make sure that everyone can take full advantage of the Single Market, both material and digital, wherever, whatever or however they buy. See European Consumer Centres Network (European Commission 2019) < https://ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint/european-consumer-centres-network_en#relatedlinks> accessed 10 March 2019

with almost 100 000 consumers, who wanted clarification or advice on their rights.²² It seems that internet purchases are the main source of consumer cross-border complaints. Almost 75% of the complaints in 2017 concerned an online purchase. While 19% of consumers in the EU buy some form of goods and services online from another EU Member State, only 9% of EU companies sell cross-border.²³ This number is also reflected in the complaints to ECCs. The main types of issues consumers face are the following: product and service, delivery, contract terms, price and payment, selling techniques, unfair commercial practices and redress. In 2017, in a report published by the European Commission entitled ‘Consumer Conditions Scoreboard: Consumers at home in the Single Market-2017’ a fifth of consumers in the EU had a problem with their purchase over the past 12 months.²⁴ The three most common problems were late delivery (25%), faulty or damaged goods (12%) or items not delivered at all (6%).²⁵ Another survey carried out in 2016 revealed that a third of the consumers, who had experienced a problem purchasing online goods or services, did not take any action to resolve the problem.²⁶ The survey showed that the main reasons for not taking action were that the value of goods or services is too low (34%), it would take too much time (33%), and that a satisfactory solution cannot be reached (20%).²⁷ All these statistics show that even though action has been taken to protect e-commerce consumers, disputes are inevitable in the course of business. The value of a claim in these disputes is often low and this is why traditional methods for dispute resolution are often inconvenient, impractical, time-consuming and too costly. Therefore, this part of the Thesis focuses on better suited methods to resolve disputes arising from B2C transactions.

3.4 Consumer Access to Justice

It is necessary to point out that, in this section, the historical development of the concept of access to justice with particular reference to consumer disputes is not examined. The main focus of this section is to explain the notion of access to justice and the use of procedural legal mechanisms to provide justice to e-commerce consumers whose level of justice has been quite problematic in comparison to B2C parties.

²² *ibid*

²³ European Commission, (Digital Single Market 2018), ‘E-Commerce in the EU: How You Can Make the Most Out of It As A Consumer’ < <https://ec.europa.eu/digital-single-market/en/news/e-commerce-eu-how-you-can-make-most-out-it-consumer>> accessed 10 March 2019

²⁴ DG Justice and Consumers, ‘Consumer Conditions Scoreboard: Consumers at home in the Single Market-2017’, Publications Office of the European Union, 2017, 8.

²⁵ *ibid*, 10.

²⁶ *ibid*, 9.

²⁷ *ibid*

Under international and European human rights law, the concept of access to justice requires Member States to guarantee each individual the right to go to court and, in some instances an ADR body, to get a remedy when individuals' rights are infringed. It is therefore also an enabling right that encourages individuals to enforce other rights.²⁸ The European Union Agency for Fundamental Rights defines the access to justice as “a concept with many nuances which includes, first and foremost, effective access to an independent dispute resolution mechanism coupled with other related issues, such as the availability of legal aid and adequate redress.”²⁹ The Agency also points out the core elements of these rights are as follows: the right to effective access to a dispute resolution body, fair proceedings, a timely resolution of disputes, adequate redress and the principles of efficiency and effectiveness.³⁰

With regard to access to effective dispute resolution process, if consumer disputes emerge from breach of contracts or defective/hazardous products, consumers should be offered efficient and fair redress by the private law system, which is also a primary channel for the protection of consumer rights.³¹

Unfortunately, the current consumer redress system has been criticised for its ineffectuality in coping with B2C disputes. The high cost and long time required for low-value claim disputes linked with a lack of awareness and trust towards the dispute resolution process is among the numerous barriers for consumers to access justice via traditional litigation.³² As long as the claimant makes his or her decision based on a cost-benefit analysis and considers that the dispute is not worthy of pursuing, the consumer's legal right will be undefended.³³ In the cases where the consumers do not even make an attempt to get redress, this effectively results in injustice to them.

²⁸ European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice*, (Publications Office of the European Union, 2016) 16.

²⁹ European Union Agency for Fundamental Rights and Council of Europe *Access to justice in Europe: An Overview of Challenges and Opportunities*, (Publications Office of the European Union, 2011) 9.

³⁰ European Union Agency for Fundamental Rights (n.28), 17.

³¹ Stefan Wrška, 'European Consumer Protection Law: Quo Vadis? Thoughts on the Compensatory Collective Redress Debate', in Stefan Wrška, Steven Van Uytsel, and Mathias M. Siems (eds.), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interest?* (Cambridge University Press, 2015) 37.

³² Katalin J. Cseres, 'Harmonising Private Enforcement Of Competition Law In Central And Eastern Europe: The Effectiveness Of Legal Transplants Through Consumer Collective Actions' (2015) 8(12) *Yearbook of Antitrust and Regulatory Studies*, 33, 42.

³³ Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International Publishing 2015) 94.

For those reasons, many laws and measures have been proposed in order to provide an effective dispute resolution for consumers who wish to defend their rights. It is worth noting that making dispute resolution more accessible and more effective is related to striking the right balance between fairness and due process, which ensures that parties are treated fairly, and that dispute resolution is a rational, accurate and regular process.³⁴

3.4.1 Small Claims Procedures

When a dispute arises between a consumer and a trader, the first logical step is to resolve it amicably, through what is known as negotiation. If an agreement cannot be reached, the consumer may wish to attempt alternative solutions: either proceeding their rights in a court or waiving the claim. Due to the cost of litigating, the complexity and length of civil procedure concerning small claims, many legal systems have provided special, simplified and cheaper forms of expeditious judicial process, usually named a Small Claims Procedure (SCP) or Small Claims Court, to resolve low value claims. The SCP aims to resolve small value disputes through less formal and more expeditious judicial process. The SCP is usually accessible as an extra-judicial system to the conventional civil procedure. The principal purpose of the SCP is to offer a means of dispute resolution where the cost and the timescale are proportionate to the value of the claim.³⁵

According to Baldwin, even though the SCP might vary from country to country, there are five basic characteristics.³⁶ Firstly, SCP is usually much simplified and less formal than the customary procedure before the civil courts. Secondly, the legal representation of litigations is discouraged. In some legal systems, disputants are not mandated to require legal representation and make any legal argument to defend their claims. Thirdly, the judge or whoever acts as adjudicator has a vital role in intervening about assisting the unrepresented litigations concerning procedural issues. Fourthly, due to the flexibility and the simplified nature of proceedings, litigants feel free to present their evidence and judges have great discretion in conducting the hearing and reaching the decision. Last but not least, the litigants pay their legal costs, whether or not the judgment is in their favour.

³⁴ Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press, 2009) 18.

³⁵ Pablo Cortés, *Online Dispute Resolution for Consumers in The European Union* (Routledge, 2011) 17.

³⁶ John Baldwin, 'Is There a Limit to Expansion of Small Claims?' in Michael Freeman(ed), *Current Legal Problems Vol 56*, (Oxford University Press, 2014) 313, 317.

As mentioned above, national SCP exists in many countries. For example, the current Civil Procedure rules in England and Wales provide for three ‘tracks’: small, fast and multi-track.³⁷ In some cases with a value greater than £10,000, the case can be heard under the SCP after both litigants have offered their consent to this.³⁸ As for the Spanish Civil Procedure Act, it regulates two different civil procedures: the Ordinary Procedure and the Oral Procedure.³⁹ The oral proceedings are used for claims up to €6000. Although this procedure seems as a SCP, it has some differences. For example, if the amount of the claim exceeds €2000, it is not allowed to attend the court without a lawyer and public prosecutor.⁴⁰

With regard to cross-border e-commerce disputes, the European Small Claims Procedure (ESCP) was introduced through a Regulation on 11 July 2007 and came into force in all Member States on 1 January 2009, with the exception of Denmark.⁴¹ The ESCP is a simplified and accelerated civil procedure aimed at resolving small value cross-border civil and commercial disputes up to €2000 (the economic threshold has been recently increased from €2000 to €5000 on 14 July 2017)⁴² without the need for legal representation.⁴³ The ESCP is planned to be carried out totally in writing, using standard forms available online in all languages.⁴⁴ This procedure is available to litigants as an available option to the procedures existing under the laws of the Member States.⁴⁵ Particularly, national small claims tracks in civil procedure are in place and quite frequently resorted to in England and Wales, Scotland, Sweden, and Poland.⁴⁶

³⁷ In the UK, the current SCP in England and Wales is same one that differs from Ireland.

³⁸ See European e-Justice, ‘Small Claims: England and Wales’ (2017) <https://e-justice.europa.eu/content_small_claims-42-ew-en.do?member=1> accessed 2 January 2019.

³⁹ Cortés, (n.35), 22.

⁴⁰ See European e-Justice, ‘Small Claims: Spain’ (2017) <https://e-justice.europa.eu/content_small_claims-42-es-en.do?member=1> accessed 2 January 2019.

⁴¹ Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199, 31 July 2007

⁴² Article 2(1) of the ESCP as amended by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure OJ L 341, 24 December 2015.

⁴³ Regulation (EC) 861/ 2007 establishing a European Small Claims Procedure, OJ L 1999/. The ESCP Regulation was amended on 16 December 2015 and it entered into application on 14 July 2017— See Regulation (EU) 2015/ 2421.

⁴⁴ Pablo Cortés and Rafał Mańko, ‘Developments in European Civil Procedures’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution*, (Oxford University Press, 2016), 41, 50.

⁴⁵ Rafał Mańko, ‘European Small Claims Procedure: Commission proposal to remedy weaknesses in the current system’ European Parliamentary Research Service, In- depth analysis’, PE 542.137 (November 2014), 7.

⁴⁶ Cortés and Mańko (n. 44) 50.

The ESCP aims to reduce the cost of litigation, speed up and simplify the procedure, remove the intermediate proceedings and enable recognition and enforcement.⁴⁷ The European Commission states that on average the ESCP has decreased the cost of litigating cross-border low-value disputes up to 40% and the length of litigation from 2 years and 5 months down to five months.⁴⁸ However, it is still not cheap and takes long time for so many small claims' litigants who need faster and less formal resolution. More than six out of ten of those who used it were satisfied with the procedure.⁴⁹ One of the most noticeable advantages is that the ESCP proposes a fast track process for litigants with strict deadlines which is, in principle, the same in every Member State.⁵⁰

The ESCP has been intended to considerably increase claimants' access to justice for low-value disputes. Nevertheless, at first it has not been as much used as expected: only an estimated 3,500 cases in 2012.⁵¹ The European Commission reported that there are three essential barriers to the litigation of cross-border small claims that do not allow the ESCP to reach its full efficiency: (i) limited awareness about the ESCP; (ii) disproportionate costs (including translation costs, court fees, costs of servicing documents and oral hearings) and time in litigating small claims; and (iii) the lack of clarity concerning the fees of litigation and the payment system.⁵²

In order to remove or minimise these barriers and succeed in reducing the cost of litigation regarding low-value claims with a cross-border element, including clarifying and accelerating the process, enhancing transparency concerning the costs of litigation, shortening searching time and raising awareness about the related actors of the ESCP,⁵³ the current ESCP was

⁴⁷ Deloitte, 'An Assessment of the Socio-Economic Impacts of the Policy Options for the Future of the European Small Claims Regulation' Final Report (19 July 2013), 5.

⁴⁸ European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 861/2007 of the European Parliament and the Council establishing a European Small Claims Procedure COM (2013) 795 final, 2.

⁴⁹ Special Eurobarometer 395, 'European Small Claims Procedure' (April 2013), <http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf> accessed 2 January 2019.

⁵⁰ Cortés and Maňko (n. 44) 51.

⁵¹ Deloitte (n. 47)v; The Deloitte Report also stated that every year, the number of problematic cross-border transactions with a value below 2,000 euro is 14.7 million.

⁵² *ibid*; According to EEC-Net, 47% of the courts and judges in all Member States are not aware of the existence of the ESCP, while 53% had knowledge regarding the application of this procedure.

⁵³ *ibid*, vii.

amended on 3 December 2015 and the amended Regulation entered into effect on 14 July 2017.⁵⁴

The main reform introduced through the ESCP Regulation was increasing the threshold from €2000 to €5000.⁵⁵ This increase of the threshold was a considerable reform, but the estimated cost of claim of €5000 is similar to the cost of a claim of €10,000, which may justify another increase when the Regulation is revised again in 2021.⁵⁶ The €2000 threshold was too low and restricted the availability of the procedure in particular for SMEs. Approximately 30% of the claims of businesses have a value between €2000 and €10,000. As a result, these businesses may litigate through national small claims procedures and thus are more likely to encounter unbalanced litigation expenses and long proceedings.⁵⁷

In order to reduce the cost and duration of the procedure, the amended Regulation requires the use of electronic communications when it is required. The ESCP is essentially in principle a written procedure, but in some cases it is difficult to reach a verdict on the basis of the written evidence or if a disputant so demands, an oral hearing may be needed.⁵⁸ According to the Commission, the cost of traveling to join an oral hearing is between €300 and €700 on average, and the travelling time is at least nine hours.⁵⁹ Because of this, the amended Regulation restricts the use of oral hearings and requires to benefit from any proper distance communication technology, such as video conference or teleconference.⁶⁰ Moreover, the Regulation allows parties to lodge their claims with the court or tribunal directly by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State of the competent court.⁶¹

⁵⁴ Regulation (EU) 2015/2421 of the European Parliament And Of The Council Of 16 December 2015 Amending Regulation (EC) No 861/2007 Establishing A European Small Claims Procedure And Regulation (EC) No 1896/2006 Creating A European Order For Payment Procedure.

⁵⁵ Article 2(1) of the ESCP as amended by Regulation 2015/ 2421.

⁵⁶ Deloitte (n. 47)10. These thresholds vary greatly in all the Member States, from €600 in Germany to €25,000 in the Netherlands. See European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 861/ 2007 of the European Parliament and the Council establishing a European Small Claims Procedure COM (2013) 795 final, 3.

⁵⁷ Alexia Maniaki-Griva, 'European Small Claims Procedure: Initial Appraisal of the Commission's Impact Assessment, European Parliamentary Research Service', PE 514.109 (March 2014), 1.

⁵⁸ Article 5(1a) of the ESCP as amended by Regulation 2015/ 2421.

⁵⁹ Maniaki-Griva (n. 57) 5.

⁶⁰ Article 8(1) of the ESCP as amended by Regulation 2015/ 2421.

⁶¹ *ibid* Article 13.

Currently, the 2007 ESCP Regulation requires Member States to provide assistance to parties about which courts or tribunals have jurisdiction to reach a verdict, the feasibility of appeals, the acquired languages for enforcement and practical assistance for parties to fill the forms.⁶² However, in practice, most of that information was not available. The ECC-Net Report stated that such assistance was not provided to the parties in 41% of the courts of the Member States.⁶³ In addition, Eurobarometer 395 reported that 17% of the parties were not aware of the system and 16% had difficulties in filling out the forms, and 10% requested help while filling out the application form but did not receive it.⁶⁴ The amended Regulation, therefore, extends the obligation of Member States to provide information concerning the court fees and payment methods and the competent authorities or organisations for providing practical assistance.⁶⁵ Before the amendment, some Member States refused to accept the payment of the court fee by electronic means, such as credit cards. Parties even had to pay in person at the cash desk of the court or by taking out financial stamps.⁶⁶ Currently, the amended text also shows that Member States must offer at least one of the three options of electronic payment: (i) bank transfer; (ii) credit or debit card payment; and (iii) direct debit from the claimant's bank account.⁶⁷

Another essential barrier for the use of the ESCP in some Member States was the disproportionate cost of court fees of the claim. High court fees may cause parties to decide not to defend their rights in court. The amended Regulation states that the court fees for the ESCP shall be proportionate and less than the court fees charged for the simplified domestic procedure. Article 15 of the ESCP as amended by Regulation 2015/ 2421 states as follow: "Court fees vary among the Member States depending on the calculation methods in place. Court fees of more than 10% of the value of the claim can be considered as disproportionate."⁶⁸

⁶² *ibid* Article 25.

⁶³ ECC- Net, 'European Small Claims Procedure Report' (2012) 22.

⁶⁴ Special Eurobarometer 395, 'European Small Claims Procedure' (April 2013), <http://ec.europa.eu/public_opinion/archives/ebs/ebs_395_en.pdf> accessed 2 January 2019.

⁶⁵ Article 25 of the ESCP as amended by Regulation 2015/ 2421

⁶⁶ Rafał Mańko, 'Reform of the European Small Claims Procedure System', European Parliamentary Research Service, PE 557.014 (May 2015), 2.

⁶⁷ Article 15(2) of the ESCP as amended by Regulation 2015/ 2421

⁶⁸ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) 861/ 2007 of the European Parliament and the Council establishing a European Small Claims Procedure* COM (2013) 795 final 7.

3.4.2 The Potential of Consumer ADR

As mentioned earlier, some civil court systems, including SCP, aim at facilitating and speeding up the resolution for small claims; however, a considerable number of consumers believe that it is still not cost-proportionate for small claims to go through the traditional court system.⁶⁹ A survey carried out in 2016 revealed that 20% of consumers, who had experienced a problem purchasing goods or services did not take any action to solve the problem.⁷⁰

In comparison with the court system and SCP, the consumer ADR (CADR) has enormous potential to provide less formal, low cost, time efficient and flexible resolution, but the use of CADR is far below its potential. Only about 4% of consumers have brought their issue to an ADR body⁷¹ and this is mainly due to their lack of awareness about this option.⁷² The European Commission also reported that problems with bought goods or services are usually left unresolved because the access to ADR across the EU is not consistent and adequate.⁷³ Moreover, the Commission has forecasted that if EU consumers refer to well-operated and transparent CADR entities, considerable savings will be made.⁷⁴

An important preliminary point is that some countries' litigation systems are expensive in comparison with other alternative dispute resolution options.⁷⁵ According to a study conducted by the CMS Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies at the University of Oxford (hereinafter the Oxford study), the cost to the claimant is not proportionate to the sum in dispute in a significant number of countries.⁷⁶

⁶⁹Christopher Hodges, 'Making Consumer ADR Work', Oxford CDR Conference (2013) <https://www.law.ox.ac.uk/sites/files/oxlaw/the_first_oxford_annual_consumer_adr_conference_lecture_notes.pdf> accessed 26 January 2019, 1.

⁷⁰ DG Justice and Consumers (n 24) 56.

⁷¹ *ibid.*

⁷² Approximately 45% of consumers do not know any ADR entities and not surprisingly, nearly seven out of ten consumers who had used ADR mechanisms expressed their satisfactions See DG Justice and Consumers, (n. 25)59.

⁷³ European Commission Staff Working Paper, 'Impact Assessment Accompanying the Document of the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and the Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes', SEC(2011) 1408 final, 7.

⁷⁴ *ibid.*

⁷⁵ Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, 'The Oxford Study on Costs and Funding of Civil Litigation' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *The Costs And Funding Of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010),4.

⁷⁶ *ibid.*, 35.

A recent report entitled ‘Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System Final Report’, which aims to evaluate the impact and effectiveness of ADR and the courts in resolving B2C disputes, published by the Department for Business, Energy and Industrial Strategy in 2018 and stated that 64% of claims made to the ADR entities involved claims under £500, and over 80% were under £5,000.⁷⁷ According to the report, 59% of the consumers who used ADR awarded sums lower than £100 and in 92% of disputes, the value of compensation or refund awarded to consumers was under £500.⁷⁸

According to the Oxford Study, in France, the French Insurance Federation (Fédération Française de l’Assurance – FFA) handled many claims of around €100 and some as low as €5. The average award of the national energy mediation (mediateur) was €373, while the average value in dispute in the cases of the mediation of EDF was €1,120. In Germany, 86% of cases brought to the Insurance Ombudsman (Versicherungsbundsmann e. V.) involved claims under €5,000, and over 90% were under €10,000. The value of a typical dispute handled by the Conciliation Body for Public Transport (Söp Schlichtungsstelle für den öffentlichen Personenverkehr e. V.) was between €10 and €200. In Netherlands, the average value of disputes handled by the Dutch Foundation for Consumer Complaints Boards (De Geschillencommissie) varies from sector to sector and was €206 for taxis and €5,980 for housing guarantees. In the UK, the average value claimed in cases before the UK’s Ombudsman Service was £587, and the average value of compensation or refund awarded was £198.⁷⁹

The majority of dispute resolution bodies listed on the EU ODR Platform site do not charge consumers. In the UK, Germany and France, consumers do not pay any fee, and this applies to almost all dispute resolution bodies in most of Member States. In contrast, in the Netherlands, consumers have to pay a fee to Foundation for Consumer Complaints Committees (Stichting Geschillencommissies voor Consumentenzaken) depending on the sector, and usually ranges between €25 and €125.⁸⁰

⁷⁷ The UK Department for Business, Energy and Industrial Strategy, ‘Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System Final Report’, 11 April 2018, 35.

⁷⁸ *ibid*, 34.

⁷⁹ Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012), 381

⁸⁰ See ‘Dispute Resolution Bodies in Netherlands in the EU ODR Platform’ <<https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2>> accessed 2 January 2019

With regard to the length of procedure, CADR entities can provide faster resolution than courts. The average length of consumer cases handled by courts is more than four years in almost one third of the Member States.⁸¹ It also seems that in most Member States, a first instance judgement is obtained in less than a year.⁸² Proceedings seem extremely lengthy in comparison with not only CADR procedures but also with civil court proceedings in general. On the other hand, the ADR Directive stipulates that the maximum CADR procedure time shall be 90 calendar days, extendable in very complicated disputes.⁸³

For those reasons, CADR mechanisms have emerged in many countries. Many governments are interested in developing CADR as an out of court system for enhancing access to justice, and overcoming the issues of costs, time and formality of traditional litigation mechanisms.

In many EU Member States, the number of ADR services has increased considerably. The EU Consumer ADR Directive and ODR Regulation aim to improve the availability of high-quality CADR entities as well as to promote their use. As mentioned earlier, the ADR Directive ensures the availability of quality ADR schemes for resolving both domestic and cross-border consumer disputes. While the Directive does not make the use of ADR mandatory, traders are obliged to inform consumers about these certified ADR schemes. The ODR Regulation, which was implemented in January 2016, enables to resolve online consumer disputes, whether domestic or cross-border. As in the other Member States, CADR is incredibly developed in the UK.⁸⁴ The main CADR form is a private Ombudsman scheme. Ombudsmen are usually financed by the sector in which they operate, and they give feedback to the belonging traders and enforcement bodies. The process is free of charge for consumers and they help consumers to get not only redress but also advice service.

The largest Ombudsman scheme in the UK is the Financial Ombudsman Service (FOS), which was set up under the Financial Services and Markets Act 2000 for resolving B2C disputes.⁸⁵

⁸¹ Ana Keglević, *Pilot Study on the Functioning of the National Judicial Systems for the Application of Consumer Protection Law Rules*, (Centre for Strategy & Evaluation Services 2014) 27.

⁸² *ibid.*

⁸³ EU Directive on Consumer ADR Article 7

⁸⁴ According to Cortes, in the UK it is possible to group ADR schemes into two fundamental classes; first, the ADR schemes operating in regulated sectors, secondly, ADR schemes are operated in unregulated sectors, where there is no legal requirement for businesses to participate in an ADR scheme. See Pablo Cortes, 'The Impact of EU Law In The ADR Landscape In Italy, Spain And The UK: Time For Change Or Missed Opportunity?' (2015) 16(2) ERA Forum, 125, 138.

⁸⁵ See Financial Ombudsman Service, 'About the Financial Ombudsman Service' (2019), <<http://www.financial-ombudsman.org.uk/about/index.html>> accessed 2 January 2019.

According to its latest annual review, FOS had around 3,996 employees and operated on a cost base of £257.9 million.⁸⁶ FOS addressed almost 1.4 million initial enquiries and complaints from consumers and resolved more than 400,000 complaints.⁸⁷

3.5 Contemporary Trends of ODR in the Case of Consumer Disputes

The Consumer Conditions Scoreboard Report shows that the level of consumer protection differs among the Member States. Half of EU consumers regularly buy goods and services online and almost 18% of them purchase them from other EU countries.⁸⁸ In 2016, approximately 28% of consumers across the EU did not feel confident that retailers and service providers respected their rights as consumers when shopping online from their own countries and slightly over 42% of consumers were not confident when buying online from other EU countries.⁸⁹ This leads us to conclude that online consumers have a limited trust in cross-border transactions. At the same time, around 20% of consumers, who did online cross-border purchases had at least one problem in 2016.⁹⁰ As was shown in the 2017 report, many online consumers are not aware of consumer rights, particularly the legal procedure for dispute resolution in the event of non-conformity of the goods with the contract terms.⁹¹

In order to offer an effective redress to the consumer and boost consumer confidence in the internal market, a number of EU initiatives have been introduced. One of the EU initiatives on consumer dispute settlement is the European Small Claim Procedure (ESCP).⁹² The ESCP is an alternative method of commencing and speeding up low-value cross-border cases within the EU. In addition, the European Consumer Centres Network (the ECC-Net) has started to provide consumers with information on consumer rights and help them to resolve their disputes with the traders who are based in other Member States. Recently, the EU rules have allowed consumers to resolve both their domestic and cross-border contractual disputes with the traders out of court using ADR entities and ODR Platform procedures.

⁸⁶ 'Annual Reviews 2017/2018' (The Financial Ombudsman Service, 2018) <<https://www.financial-ombudsman.org.uk/publications/directors-report-2018.pdf>> accessed 2 January 2019, 10

⁸⁷ *ibid*

⁸⁸ DG Justice and Consumers (n 24) 10.

⁸⁹ *ibid* 89

⁹⁰ *ibid*, 8.

⁹¹ *ibid*

⁹² Regulation 861/2007/EC of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

Over the last decade, new developments in the area of access to justice are frequently combined with ICTs, particularly on dispute resolution between consumers and businesses, where a number of online processes have appeared. Companies, such as eBay, have successfully introduced ODR for e-commerce and soon several other ODR processes came out. Recently, another successful example of an e-commerce company is Ali Baba, which handles approximately 1 million disputes each day.⁹³ Surprisingly, 70% of those disputes are resolved without any human intervention.⁹⁴

ODR has also been introduced in other regions around the world. Outside the EU, in British Columbia (Canada), the Civil Resolution Tribunal (CRT) introduced an online tribunal in July 2016, which allows residents to resolve civil disputes. This is the first online tribunal in Canada and the first of its type in the world.⁹⁵ The CRT started to accept low-value disputes of maximum \$5,000 as of 1 June 2017 and will start on 1st April 2019 to resolve motor vehicle accident claims of \$50,000 and under.⁹⁶ Moreover, a digital ‘cyber-court’ has been established in China to assist in handling a rise in the number of internet-related disputes.⁹⁷ Recently, the Connecticut Judicial Branch implemented a voluntary ODR pilot program, which has been become operational from 2nd January 2019, in the Hartford and New Haven judicial districts to resolve contract collection disputes.⁹⁸

The Judiciary of England and Wales has started to reform procedures regarding modernisation of court proceedings to move on to ODR. The Prisons and Courts Bill proposed using ‘online procedure rules’ in civil and family courts and tribunals.⁹⁹ In the UK, HM Courts & Tribunals Service (HMCTS) introduced a pilot programme to evaluate an online claims process called “the Online Court”, which deals with claims of a specified amount of money not exceeding

⁹³ Giuseppe De Palo and Leonardo D’urso, ‘Achieving a Balanced Relationship between Mediation and Judicial Proceedings’ in Monika Laura Lazaruk (ed), *The Implementation of the Mediation Directive Workshop* (Policy Department C: Citizens' Rights and Constitutional Affairs, 2016), 98, PE 571.395 (November 2016)

⁹⁴ Giuseppe De Palo and Leonardo D’urso, ‘Achieving a Balanced Relationship between Mediation and Judicial Proceedings’ in Monika Laura Lazaruk (ed), *The Implementation of the Mediation Directive Workshop* (Policy Department C: Citizens' Rights and Constitutional Affairs, 2016), 98, PE 571.395 (November 2016)

⁹⁵ Shannon Salter and Darin Thompson, ‘Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal’ (2016) 3 McGill Journal of Dispute Resolution, 113, 114.

⁹⁶ CRT Accepting Small Claims at 8:30 AM, June 1, 2017 (Columbia Civil Resolution Tribunal 2017)

< <https://civilresolutionbc.ca/crt-accepting-small-claims-june-1-2017-830/> > accessed 4 January 2019.

⁹⁷ BBC, ‘Chinese ‘Cyber-Court’ Launched for Online Cases’ (2017) <<http://www.bbc.co.uk/news/technology-40980004>> accessed 2 January 2019.

⁹⁸ State of Connecticut Superior Court, ‘Online Dispute Resolution (ODR) Pilot Program in the Judicial Districts of Hartford and New Haven’, <<https://jud.ct.gov/webforms/forms/CV169.pdf>> accessed 4 January 2019

⁹⁹ Prisons and Courts Bill 2016-2017 (As Amended in Public Bill Committee) Article 37(3)

< <https://publications.parliament.uk/pa/bills/cbill/2016-2017/0170/17170.pdf> > accessed 4 January 2019.

£10,000.¹⁰⁰ Since August 2017, over 1,400 parties have used the pilot Online Court system and over 80% of the users, including individuals and businesses, found the online service very good and easy to use.¹⁰¹

3.5.1 Suitability Parameters of Online Negotiation to Consumer Disputes

It is very hard to single out an ODR system that could become suitable for all kinds of consumer disputes. However, it is possible to select specific parameters from successful ODR providers that could inform how ODR methods are improved so as to be more effective, efficient and inexpensive. Due to the low cost of online transactions, often the consumer does not spend time or energy in getting redress because this is not justified economically. Therefore, to build consumer confidence and provide an efficient and inexpensive ODR scheme for the consumer, the consumer should be encouraged to settle the dispute before applying to a neutral third party.¹⁰² Hörnle points out that “an ADR/ODR system is only economically practicable if the great majority of cases are resolved early through negotiation with little third party intervention.”¹⁰³ Settlement of disputes without referral to a third party significantly reduces costs as the cost of resolving a consumer dispute with a third party is too high. For example, the case fee of the Financial Ombudsmen Services in the UK is £550 per case, while the fee of Consumer Arbitration Scheme is over £400 for each case.¹⁰⁴ These costs show that the use of third parties to settle dispute is not sustainable for many consumer disputes. In 2015, Del Duca et al. stated that the annual average value of online claims handled by eBay is \$70-\$100¹⁰⁵ and quite often less than \$20.¹⁰⁶ Colin Rule claims that it seems difficult to convince a party to pay

¹⁰⁰ Practice Direction 51r Online Court Pilot Section 2(2) <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot#2>> accessed 11 March 2019

¹⁰¹ HM Courts & Tribunals Service Quicker way to resolve claim disputes launched online’ (2018), <<https://www.gov.uk/government/news/quicker-way-to-resolve-claim-disputes-launched-online>> accessed 3 January 2019

¹⁰² Trish O’Sullivan, ‘Developing an Online Dispute Resolution Scheme for New Zealand Consumers Who Shop Online—Are Automated Negotiation Tools the Key To Improving Access To Justice?’ [2015] *International Journal of Law and Information Technology*, 22, 28.

¹⁰³ Julia Hörnle, ‘Encouraging Online Alternative Dispute Resolution in the EU and Beyond’ (2013) 38 *European Law Review* 187.

¹⁰⁴ ‘Funding and case fees’ (The Financial Ombudsman Service, 2018) < http://www.financial-ombudsman.org.uk/publications/technical_notes/QG1.pdf > accessed 3 January 2019, 24; See also Pablo Cortes, ‘A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward’ (2015) 35 *Legal Studies* 129.

¹⁰⁵ Louis F. Del Duca, Colin Rule and Brian Cressman, ‘Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume’ (2015) 4 *Penn State Journal of Law & International Affairs* 242, 244.; Amy Schmitz and Colin Rule, ‘The New Handshake: Online Dispute Resolution and the Future of Consumer Protection’ (American Bar Association 2017) 33

¹⁰⁶ Colin Rule and Chittu Nagarajan, ‘Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of ODR’ [2010] *ACResolution Magazine* 4, 4.

a cost to resolve a dispute, which is not significantly less than the value of the item in question.¹⁰⁷

For these reasons, the use of automated and assisted negotiation tools is essential to encourage early settlement. The benefits of the use of these negotiation tools are stated by Cortes and Lodder, who argue that “research has shown that an effective redress mechanism for low-value consumer disputes will need to rely on effective automated negotiation tools. This is because early settlement without the intervention of independent third parties will be the most (if not the only) cost-effective way to resolve low-value consumer disputes.”¹⁰⁸

The achievement of automated methods for resolution of B2C disputes depends on the character of the dispute, the accuracy of the information given, and the capacity of the software or the fourth party in evaluating the dispute.¹⁰⁹ Cortés and De Le Rosa point that automated negotiation is likely to be workable if it is implemented to manageable fact-based cases with limited specific headings and basic remedy options.¹¹⁰ The majority of consumer complaints regarding online shopping are about delivery, price, shipping, repair and so on. Thus, some of the large online marketplaces, such as eBay and Amazon, have limited the type of claims: ‘item not received’, ‘wrong item was sent’, ‘description on website was not accurate’, ‘unauthorised purchase’. With the help of these types of claims, consumers can choose the type of dispute that is relevant to their case and then choose from a broad range of options that may efficiently resolve that kind of conflict.

3.5.2 The Notion of Online Mediation

Participation in mediation on voluntary basis and the parties’ autonomy, are the notable features of the online mediation process, as mentioned above. These specific features are recognised as the foremost benefits of online mediation, particularly in disputes arising from online B2C transactions. The role of the mediator in online mediation does not differ from offline mediation, but the chosen methods may vary. The main key to providing an efficient

¹⁰⁷ Colin Rule, ‘Making Peace on Ebay: Resolving Disputes in The World’s Largest Marketplace’ [2008] ACResolution Magazine 8, 11.

¹⁰⁸ Pablo Cortés and Arno R. Lodder, ‘Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-Of-Court Redress’ (2014) 21 (1) Maastricht Journal, 13, 31.

¹⁰⁹ Pablo Cortés, ‘Online Dispute Resolution for Consumers’ in Mohamed S. Abdel Wahap and others (eds), *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing 2012) 157.

¹¹⁰ Pablo Cortés and Fernando Esteban De La Rosa, ‘Building A Global Redress System for Low-Value Cross-Border Disputes’ (2013) 62 International and Comparative Law Quarterly, 407, 413.

online mediation process is to design an appropriate ODR software or fourth party which will assist in performing an issueless mediation. Moreover, like traditional mediation, the ability of the mediator and the parties affect the performance of process concerning resolving their disputes.

In comparison to offline mediation, online mediation has a number of advantages; it provides more flexibility, availability and accessibility, and it is less costly and time efficient. For these reasons, recently online mediation has increasingly been used to resolve easy transactional disputes, particularly when parties are in different geographical places and the value of the dispute is not adequately high to justify face to face meetings.

To promote the amicable settlement of disputes by boosting the performance of mediation and providing a well-balanced relation between mediation and judicial processes, the European Parliament and European Council adopted the Mediation Directive 2008/52/EC in May 2008. All Member States transposed this Directive into national law by May 2011.¹¹¹ Although it has been over eight years since its adoption, the use of mediation and ADR in Europe is still extremely underutilised. A 2016 European Parliament-commissioned study, entitled ‘The Implementation of the Mediation Directive Workshop’¹¹² (The Workshop), confirms that mediation is not being utilised to its full potential in the majority of the Member States.¹¹³ Both the Rebooting Study and the Workshop recommended the Member States to provide for ‘the parties to participate in an initial mediation session with a mediator before a dispute can be brought to the courts in all civil and commercial disputes’.¹¹⁴ The Rebooting Study claims that, in order to provide a direct and efficient mechanism, the Directive needs to be changed. A proposed rewrite of Article 5(2) could read as follows: ‘Member States shall ensure that a mediation session is integrated into the judicial process for civil and commercial cases, except for such cases as Member States shall determine are not suitable for mediation. The minimum

¹¹¹ Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 OJ (L 136).

¹¹² De Palo and D’urso (n. 93) 96.

¹¹³ Similarly, it is confirmed by a study called ‘Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non- Legislative Measures to Increase the Number of Mediations in the EU. See Giuseppe De Palo and others, ‘Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non- Legislative Measures to Increase the Number of Mediations in the EU’ PE 493.042 (January 2014) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOLJURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOLJURI_ET(2014)493042_EN.pdf)> accessed 3 January 2019 (hereinafter called The Rebooting Study).

¹¹⁴ De Palo and D’urso (n. 93) 96. See also The Rebooting Study (n 111) 7.

requirements for such a mediation session are that the parties must meet together with a mediator, subject to the condition that the procedure shall be non-binding and swift, suspend the period for time-barring of claims, and be free of charge or of limited cost if any party decides to opt out at the initial session.”¹¹⁵ At first glance, it seems that the amendment would only apply to cross-border disputes, but the whole mediation process could be affected by this type of regularity encouragement.¹¹⁶

Mediation in the UK is based on the voluntariness of the parties. In 2014, the legal possibility of compulsory mediation was proposed for the Children and Family Act 2014 in the UK. Section 10(1) of this Act states that the parties must attend a family mediation information and assessment meeting (MIAM) before making an application. With regard to civil claims, the Minister of State for Justice, Lord Faulks, stated that a similar compulsory MIAM system could be introduced for civil mediation by the Ministry of Justice.¹¹⁷ Lord Neuberger, the then President of the Supreme Court, also supported that the MIAM scheme must be extended to smaller civil cases.¹¹⁸

With regard to online mediation, a survey carried out in 2013 revealed that in half of Member States, online mediation is not presented as an option, while it is present but with minimal use in the other Member States.¹¹⁹ Besides, in some Member States, the public is either not aware of online mediation or they are aware of it but it is still not widely accepted.¹²⁰

3.5.3 Online Arbitration for Consumer Disputes

Online arbitration is rationally and operatively different from other ODR mechanisms. Two fundamental features make online arbitration different from other forms of ODR. First, a neutral third-party (the arbitrator) imposes a final binding decision on both parties. Second, the arbitral award is recognisable and enforceable.

¹¹⁵ De Palo and D’urso (n. 93) 96.

¹¹⁶ Giuseppe De Palo and Romina Canessa, ‘New Trends for ADR in the European Union’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution*, (Oxford University Press, 2016) 407, 420.

¹¹⁷ Lord Faulk QC, Minister of State for Justice, keynote speech at The Civil Mediation Conference: ‘Mediation and Governance’, (2014) <<https://www.gov.uk/government/speeches/mediation-and-government>> accessed 3 January 2019.

¹¹⁸ Lord Neuberger, President of the Supreme Court of the United Kingdom, keynote speech at the Civil Mediation Conference: ‘A View from On High,’ (2015) <<https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf>> accessed 3 January 2019.

¹¹⁹ The Rebooting Study (n. 111)

¹²⁰ In some Member States, such as Austria, Belgium, Bulgaria, Denmark, France, Portugal and Sweden, even though online mediation does exist, the public is not aware of this option.

A number of authors have highlighted the advantages of online arbitration even in comparison with other ODR mechanisms, particularly for B2C e-disputes.¹²¹ One of the recent thoughts is that online arbitration is likely to help build consumer trust and provide consumers with faster access to a real remedy since this process is concluded with a final arbitral award.¹²² As Schmitz states, “online arbitration also has more potential than other ODR processes to satisfy consumers with substantive answers on their claims’ merits and fast access to justice because it culminates in a final third-party determination.”¹²³ The principal characteristics of using online arbitration are once again related to saving cost, improving speed and the fact that the parties do not have to be present at the same place.

In order to resolve e-commerce disputes, the CIETAC promulgated the Online Arbitration Rules in 2009 and these rules were later revised in 2014 and came into force in 2015.¹²⁴ CIETAC also established the “CIETAC Online Dispute Resolution Center”¹²⁵ and the “CIETAC Online Dispute Resolution Center Website”¹²⁶ and authorised it to accept cases submitted for arbitration according to these Rules.¹²⁷ The CIETAC Online Arbitration Rules have been formulated for the arbitration of online e-commerce disputes where the concerned parties have agreed to use these Rules for dispute resolution.¹²⁸ Another innovative effort regarding online arbitration was made by Guangzhou Arbitration Commission (GZAC), which shifts online arbitration in China.¹²⁹ GZAC published its own online arbitration rules in 2015 and become the second Chinese arbitration commission to adopt online arbitration rules.¹³⁰ In 2017, slightly less than 90000 cases were submitted online and approximately 80% of them

¹²¹ Dafna Lavi, ‘Three Is Not A Crowd: Online Mediation-Arbitration In Business To Consumer Internet Disputes’ (2017) 37(3) *University of Pennsylvania Journal of International Law*, 871, 899; Haitham A. Haloush and Bashar H. Malkawi, ‘Internet Characteristics and Online Alternative Dispute Resolution’ (2008) 13 *Harvard Negotiation Law Review*, 327, 328; Amy J. Schmitz, “‘Drive-Thru’ Arbitration in the Digital Age: Empowering Consumers Through Binding ODR” [2010] *Baylor Law Review* 178, 183.

¹²² Haloush and Malkawi, *ibid*

¹²³ Schmitz (n. 121)183.

¹²⁴ China International Economic and Trade Arbitration Commission Online Arbitration Rules (adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on November 4, 2014. Effective as from January 1, 2015).

¹²⁵ CIETAC Online Arbitration Rules, Article 2(4)

¹²⁶ The CIETAC Online Dispute Resolution Center website refers to a specialized website developed by the CIETAC Online Dispute Resolution Center to resolve online disputes. See CIETAC Online Arbitration Rules, Article 2(5); ‘CIETAC Online Dispute Resolution Center’ (<http://www.cietac.org/?l=en>) accessed 7 January 2018.

¹²⁷ See CIETAC Online Arbitration Rules, Article 53

¹²⁸ *ibid*, Article 1

¹²⁹ Guangzhou Arbitration Commission (GZAC) Online Arbitration Rules 2015

¹³⁰ *ibid*

were heard online throughout the entire process.¹³¹ “The GZAC Online Arbitration Rules are more radical than the CIETAC Online Arbitration Rules in setting out innovative rules for the needs of flexibility and efficiency in online arbitration.”¹³² GZAC established an online arbitration platform to resolve cases.¹³³

Another successful ODR service providers regarding online arbitration are the American Arbitration Association’s (AAA) and International Centre for Dispute Resolution (ICDR).¹³⁴ The AAA and ICDR introduced a Manufacturer/Supplier Online Dispute Resolution Program (MSODR Program) that is governed by the ICDR Protocol.¹³⁵ The MSODR Program helps manufacturers and suppliers to settle low value claims. The claims are filed online in a paperless process via the AAA Web File. There are two phases; online automated negotiation and arbitration.¹³⁶ The whole process takes no longer than 66 days.¹³⁷

3.6 The EU ODR Platform Resolving Consumer Disputes

As mentioned earlier, the ODR Regulation sets an ‘ODR Platform’ that that is intended to facilitate an independent, impartial, transparent, effective, fast and fair out-of-court resolution

¹³¹ Chen Zhi, ‘The Path for Online Arbitration: A Perspective on Guangzhou Arbitration Commission’s Practice’, Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2019/03/04/the-path-for-online-arbitration-a-perspective-on-guangzhou-arbitration-commissions-practice/>> accessed 10 November 2019

¹³² Jie Zheng, ‘The recent development of online arbitration rules in China’ (2017) 26(2) Information & Communications Technology Law, 135, 136

¹³³ Guangzhou Arbitration Commission, ‘File Arbitration Online’ <<https://www.gzac.org/caseserch.gzac.org>> accessed 10 November 2019

¹³⁴ See American Arbitration Association, <https://www.adr.org/aaa/faces/home?_afLoop=102473541471553&_afWindowMode=0&_afWindowId=nul l#%40%3F_afWindowId%3Dnull%26_afLoop%3D102473541471553%26_afWindowMode%3D0%26_adf.ctrl-state%3Dwkglezg9f_4> accessed 9 February 2017; International Centre for Dispute Resolution, <https://www.icdr.org/icdr/faces/icdrservices/msodr?_afLoop=101934912712854&_afWindowMode=0&_af WindowId=16bdt35a17_47#%40%3F_afWindowId%3D16bdt35a17_47%26_afLoop%3D101934912712854 %26_afWindowMode%3D0%26_adf.ctrl-state%3D16bdt35a17_107> accessed 29 April 2019.

¹³⁵ ICDR Protocol for Manufacturer/Supplier Disputes

¹³⁶ See American Arbitration Association, <https://www.adr.org/aaa/faces/home?_afLoop=102473541471553&_afWindowMode=0&_afWindowId=nul l#%40%3F_afWindowId%3Dnull%26_afLoop%3D102473541471553%26_afWindowMode%3D0%26_adf.ctrl-state%3Dwkglezg9f_4> accessed 9 February 2017; International Centre for Dispute Resolution, <https://www.icdr.org/icdr/faces/icdrservices/msodr?_afLoop=101934912712854&_afWindowMode=0&_af WindowId=16bdt35a17_47#%40%3F_afWindowId%3D16bdt35a17_47%26_afLoop%3D101934912712854 %26_afWindowMode%3D0%26_adf.ctrl-state%3D16bdt35a17_107> accessed 29 April 2019.

¹³⁷ ICDR Protocol for Manufacturer/Supplier Disputes

¹³⁷ See ICDR Manufacturer/Supplier Online Dispute Resolution Program, Frequently Asked Questions, <https://www.icdr.org/icdr/faces/icdrservices/msodr?_afLoop=101934912712854&_afWindowMode=0&_af WindowId=16bdt35a17_47#%40%3F_afWindowId%3D16bdt35a17_47%26_afLoop%3D101934912712854 %26_afWindowMode%3D0%26_adf.ctrl-state%3D16bdt35a17_107> accessed 2 January 2019.

of disputes between consumers and traders.¹³⁸ Since 15 February 2016, in order to achieve an increase of consumer trust in online sales, the ODR Regulation mandates that all online traders and intermediaries, which are established in the EU or Norway, Iceland or Liechtenstein, must provide an electronic link to the ODR platform on their websites.¹³⁹ When a consumer has a problem with the product or services, s/he clicks on the electronic link to access the ODR Platform and fills out a form, which is passed on to an online ADR service. The ODR Platform is available online at the ‘Your Europe’ website.¹⁴⁰ It is an interactive website, which can be accessed electronically and free of charge in 23 EU languages plus Norwegian and Icelandic. Therefore, the parties can submit their complaint(s) in their own languages on the Platform, which in turn can use a tool to translate what the party submits.

According to the ODR Regulation, the ODR platform shall be a single point of entry for consumers and traders seeking out-of-court resolution of their disputes.¹⁴¹ The ODR platform offers, free of charge, an electronic case management tool, which enables dispute resolution bodies to conduct the dispute resolution procedure with the parties.¹⁴² However, this does not mean that ADR is generally free of charge. A dispute resolution body may ask a consumer or a trader to pay a fee if it agrees to handle their case. There is no fixed fee as each dispute resolution body sets and charges a different fee.

3.6.1 The Theoretical Framework (Administrative Functionality) of the EU ODR Platform

Since the ODR Platform is only used for consumer disputes, in order to use the platform, a dispute has to arise between consumers and traders. In other words, the Platform is accessible for complaints arising from transactions between these two. Moreover, it is worth noting that the ODR Platform does not offer solutions to disputes arising from offline transactions.¹⁴³ So, the ODR Platform is only able to handle disputes arising from online sales and services. Not only disputes arising in cross-border online transactions but also disputes arising from domestic

¹³⁸ EU Regulation on Consumer ODR 2013, Article 1.

¹³⁹ *ibid*, Article 14

¹⁴⁰ The Commission shall make the ODR platform accessible, as appropriate, through its websites which provide information to citizens and businesses in the Union and, in particular, through the ‘Your Europe portal’ established in accordance with Decision 2004/387/EC. See at EU Regulation on Consumer ODR 2013, Article 5; ‘Online Dispute Resolution’ (2017) <<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>> accessed 7 January 2019

¹⁴¹ EU Regulation on Consumer ODR 2013, Article 5(2)

¹⁴² *ibid* Article 18 of the Preamble to the Regulation.

¹⁴³ *ibid* Arts 2, 8 and 15 of the Preamble to the Regulation.

online transactions benefit from the ODR Platform.¹⁴⁴ The Platform does not accept complaints about higher education and healthcare services, even if the dispute arises from online transactions.

The ODR Platform can only be used if a consumer lives in the EU or in Norway, Iceland or Liechtenstein and the trader is based in the EU or in Norway, Iceland or Liechtenstein. As such, if either the trader or the consumer does not live in the EU, resolving their dispute through the platform would not be possible. In some countries (recently in Belgium, Germany, Luxembourg, Poland), traders can submit a complaint against a consumer. If a trader is not based in any of the Member States in the list, the trader cannot use the Platform to complain about a consumer. It should be noted that the Platform does not allow a consumer to complain about another consumer or a trader to complain about another trader.

There is no obligation on consumers or traders to use the ODR Platform, unless the parties have agreed, or some countries' legislation stipulates so. Moreover, in order to achieve an increase of consumer trust in online sales, the ODR Regulation mandates all online traders and intermediaries, which are established in the EU, must provide an electronic link to the ODR platform on their websites.¹⁴⁵ When a consumer has a problem with the product or services, he/she can click on the electronic link to the ODR Platform and fill out a form which is passed on to an online ADR service. However, there is a possible unintended consequence of Article 14, which is that the participation of online traders and intermediaries in ADR/ODR is non-mandatory when a consumer requests it. In other words, when a trader rejects to join an ADR/ODR process, the consumer complaint will be left unresolved. Because of this, the consumer would feel misled and lose their trust.

When a consumer fills in the complaint form and submits it to the platform, the complaint form is without delay referred to the relevant trader, who proposes an ADR entity to the consumer.¹⁴⁶ Then, the relevant trader has 10 calendar days to respond to the consumer. If the trader agrees to take part in the process, s/he suggests one of the approved dispute resolution bodies detailed in the ODR Platform.¹⁴⁷ Once the consumer and the trader reach an agreement on choosing the

¹⁴⁴ *ibid* Art 11 of the Preamble to the Regulation.

¹⁴⁵ *ibid* Article 14

¹⁴⁶ In the event that the complainant party is a trader, the complainant form is sent to the relevant consumer.

¹⁴⁷ Sometimes, there is an obligation to use one particular dispute resolution body. If so, the platform explains this to the parties; Dispute resolution bodies are currently not available on the platform for some sectors and in the

ADR body to settle their dispute, the ODR platform automatically communicates the complaint to the body.¹⁴⁸ Then, the ADR body settles the case completely online and reaches a decision in 90 days. It is worth noting that if the trader is not willing to use an approved ADR provider, the consumer does not reach agreement with the trader on which body will handle the complaint within 30 days after submitting the complainant or the ADR entity refuses to deal with the dispute, then the Platform will not be able to process the complaint any further.¹⁴⁹ If the consumer does not accept the suggested ADR entity, s/he can propose a different resolution body. If the other party accepts the suggested body, the process goes further, otherwise the complaint is closed.

Since launching the EU ODR Platform, all EU Member States, Liechtenstein and Norway have identified a number of dispute resolution bodies and a total of 399 ADR bodies can be accessed via the ODR platform (the highest number of them is in France with 71 and 45 in the UK). Since February 2016, the Platform has received approximately 100,000 complaints, and, while 42% of these complaints are cross-border, the rest are national complaints.¹⁵⁰ While Germany and the UK are the countries where consumers lodged the most complaints on the platform, followed by France, Spain and Italy, most traders, against whom consumers submitted a complaint, are established in Germany, the UK and Spain, followed France and Hungary. (See table 3.1)

following countries: Croatia, Luxembourg, Poland, Romania, and Spain. As a consumer you might not be able to use this site to solve your dispute with traders in these countries.

¹⁴⁸ The dispute resolution body has three weeks to decide whether it is competent or not to deal with the dispute and inform the parties thereof.

¹⁴⁹ EU Regulation on Consumer ODR 2013, Article 9(8).

¹⁵⁰ European Commission (Online Dispute Resolution 2018), 'Reports and statistics' <<https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>> accessed 5 January 2019

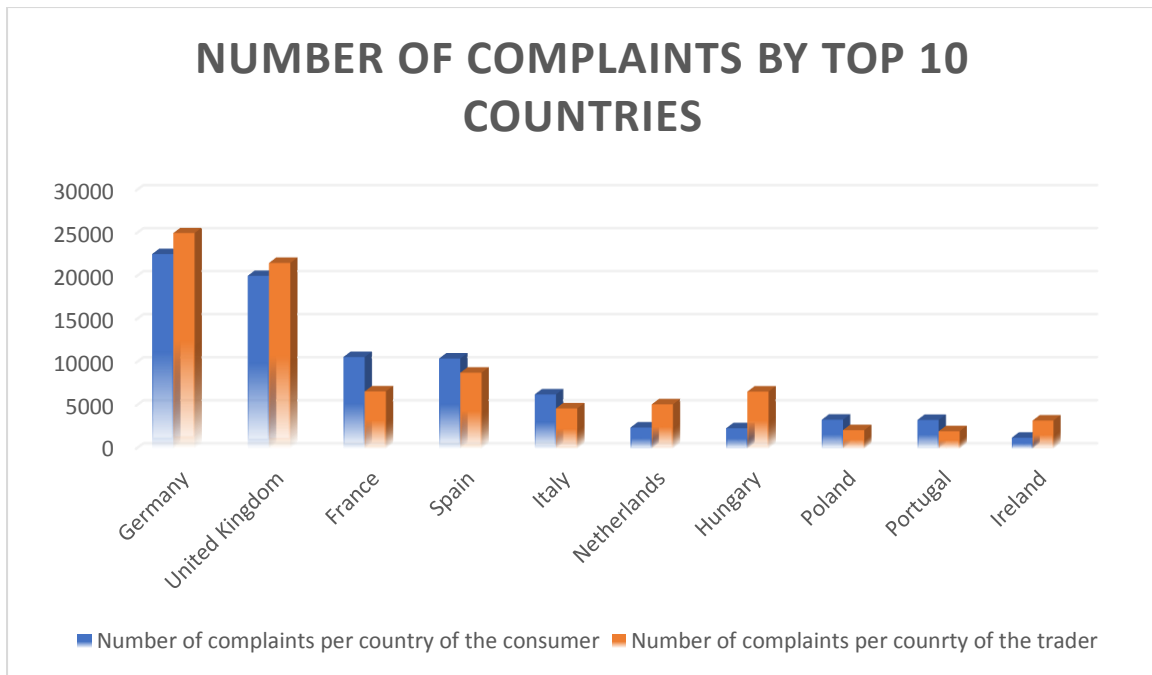
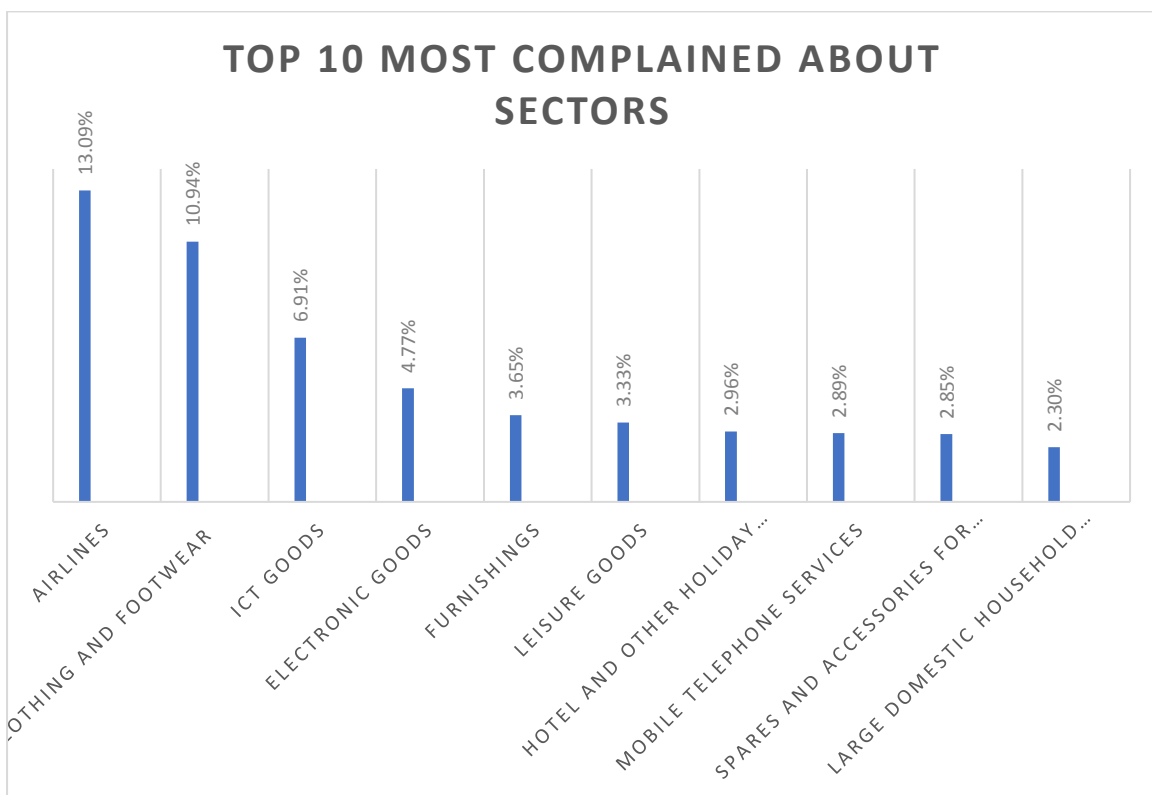


Table 3.1: Number of complaints by top 10 countries¹⁵¹

According to the statistics given by the EU ODR Platform, up to date the retail sectors with the highest number of complaints were airline with 13,9%, clothing and footwear with 10,9% and ICT goods with 6,91%. (See table 3.2)



¹⁵¹ European Commission (Online Dispute Resolution 2018), 'Reports and statistics' <<https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>> accessed 5 January 2019

Table 3.2: Top 10 most complained about sectors¹⁵²

3.6.2 The Unintended Consequences of the EU ODR Platform

The EU ODR Platform has potential for raising the awareness of consumers and increasing their access to justice as unawareness of their rights could discourage consumers from getting redress in low-value cross-border disputes. However, due to some essential limitations of the EU ODR Platform, it has not reached its own full efficiency and a number of criticisms have been expressed. One of the limitations of the ODR Platform is that, even though the Regulation makes providing a link to the Commission's website on traders' website mandatory for online traders, it is not mandatory for traders to participate in any ADR process. So, if a consumer submits a complaint against a trader, the trader is totally free to choose whether to participate in the ADR or refuse to consider the complaint. Moreover, when the trader refuses to participate, the consumer is not notified by neither ODR platform nor the trader. Consumers may only guess that the case is closed when they do not receive communication from the platform after 30 days of the complaint submission. The statistics, as given in the table below (table 3.3), show that 2% of the complaints reached a dispute resolution body after an agreement between the consumer and the trader and 81% of cases were automatically closed after the 30 days legal deadline.¹⁵³ It is worth noting here that, in order for the EU ODR Platform to be more efficient, it should be proposed that traders have to make either the platform or consumers aware by email whether or not they will participate in any ADR process. It will help the consumers know whether the case will proceed through ADR or not.

¹⁵² European Commission (Online Dispute Resolution 2018), 'Reports and statistics' <<https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>> accessed 5 January 2019

¹⁵³ A recent survey conducted by the commission indicated that in the case which the process closed automatically, 37% of consumers had been successfully contacted directly by the trader to try and settle the dispute rapidly. Also, 13% of complaints were not automatically closed by the system but traders actively showed they did not want to engage in the process on the platform. Finally, approximately 4% of cases the parties withdrew from the procedure, which also indicates that they are likely to have reached a solution. See European Commission (2018), 'Functioning of the European ODR Platform: Statistics 2nd year' <https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf> accessed 5 January 2019

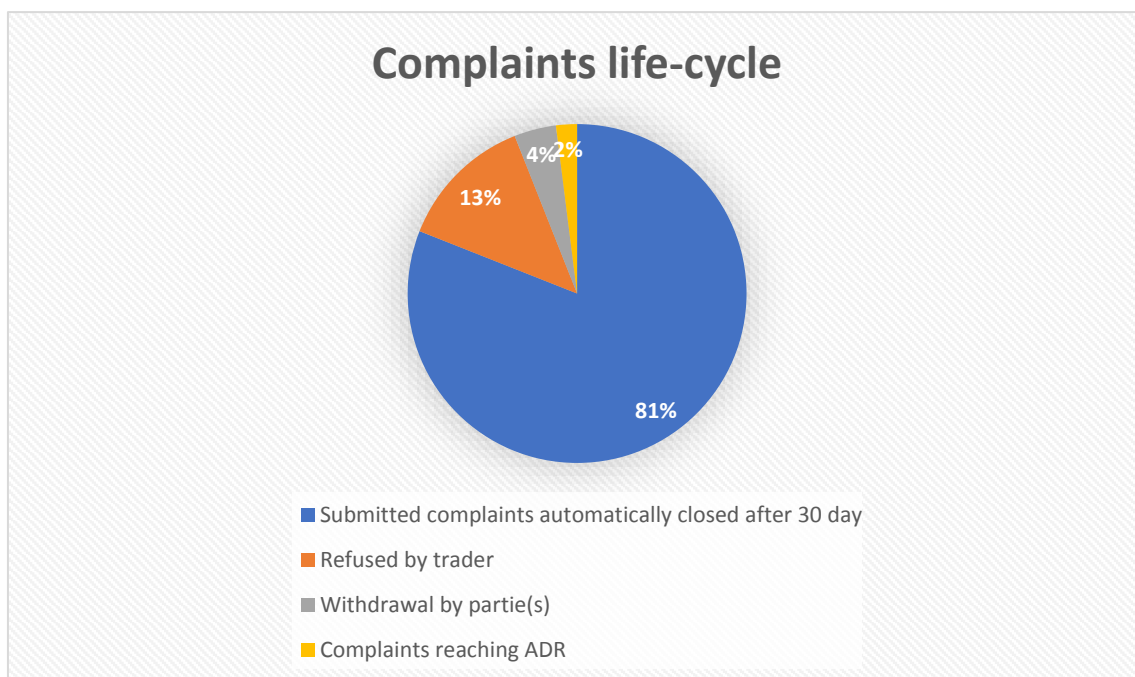


Table 3.3: Complaints life-cycle¹⁵⁴

Another issue is that the platform requires filling the trader’s email address which may be the only way to contact trader about the submitted complaint. However, consumers may encounter challenges in finding the correct trader’s email address. Most of the times, the email addresses, which are used in the transactions are not appropriate email addresses to contact the traders (they are often ‘please do not reply’ emails. Thus, it will be essential facility for consumers if the regulation requires traders to use the same email address used in the transactions.

The EU ODR platform should be more than just a referral site and present the following functions. Firstly, the issue identification and dispute prevention function should encourage early settlement by automatically providing custom-made information about the rights and obligations of the consumers. Secondly, the platform should offer an online negotiation tool that provides consumers and traders with a forum to handle complaints before dispute resolution bodies participate in the process. Finally, a full referral function should be designed not only to send an invitation to both parties to choose a dispute resolution body, but also to automatically escalate the dispute to resolution body when the parties fail to reach an agreement

¹⁵⁴ European Commission (Online Dispute Resolution 2018), ‘Reports and statistics’ <<https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show>> accessed 5 January 2019

through online negotiation and the trader is signed to an ADR process. In the event of an unresolved dispute, the consumer should be assisted in referring the case to the courts.

Moreover, the platform requires all consumers and traders to submit a complaint only for goods or services they bought online. In other words, the platform is not used for complaints about goods or services bought physically in a shop. Considering that the aim is to overcome physical barriers and boost consumer confidence in online transactions, in particular cross-border transactions, the use of the platform on only online transactions seems absolutely reasonable and justified. However, it should be proposed that the platform should allow users to submit a complaint even when they bought something offline at least for domestic disputes.

Last but not least, the use of the platform is totally free, but a dispute resolution body may ask consumers and traders to pay a fee for handling their disputes. Generally speaking, the dispute resolution bodies usually state that no fee has to be paid by the consumers. However, the traders may have to pay a fee, which varies depending on the case. This pecuniary obligation may be one of the strongest reasons that traders implicitly or explicitly do not participate in any ADR process. Thus, it should be proposed that the platform should offer consumers and traders to resolve their dispute by using online negotiation.

3.7 Lesson Learned from the well-established ODR practices

3.7.1 eBay and SquareTrade

eBay was founded in 1995 and has developed to a robust online marketplace for low value and high volume C2C, B2C, and B2B e-commerce. Part of its success is that it includes a fast-track ODR system in order to resolve disputes arising within its marketplace. Currently, eBay has 177 million active buyers in 190 markets and more than a billion total listings.¹⁵⁵

Unlike face-to-face transactions, the parties to a contract do not have a chance to physically meet each other. Even though online retailers try to guarantee consumer satisfaction, people are still hesitant to shop online, particularly high-value items.¹⁵⁶ eBay has contributed significantly in removing barriers, while promoting customer confidence when doing business or using services online.¹⁵⁷

¹⁵⁵ eBay, 'Who we are' < <https://www.ebayinc.com/our-company/who-we-are/> > accessed 4 January 2019

¹⁵⁶ Anjanette Raymond, 'Yeah, But Did You See the Gorilla? Creating and Protecting' (2014) 18 Harvard Negotiation Law Review, 129,145.

¹⁵⁷ Wang (n. 7)281.

eBay started the use of ODR in March 1999 as a pilot project to evaluate the feasibility of mediation for disputes between buyers and sellers.¹⁵⁸ At the first stage, instead of communication F2F, an email service was used, and two hundred disputes were handled in the first two weeks.¹⁵⁹ eBay was determined to continue the use of mediation by its users and selected SquareTrade to be its preferred dispute resolution provider. SquareTrade is a private company, was leading ODR provider for eBay but currently continues providing warranty services and Trustmark services.¹⁶⁰ In 2008, eBay stopped using SquareTrade for dispute resolution but between 1999 and 2007 SquareTrade resolved over 2 million eBay disputes.¹⁶¹ The eBay - SquareTrade collaboration was built on two basic stages. At the first stage, in the event of a dispute, the parties first contacted each other using a free web-based platform and tried to negotiate and reach an agreement on a commonly accepted solution. If the parties failed to reach an agreement through online negotiation, the second stage would encourage the parties to find a solution by taking advantage of a professional and impartial online mediation service provided by SquareTrade. The cost for or the consumer to access the resolution system was set to \$15 regardless of the value of the goods. The rest of the mediation fee would be subsidised by eBay.¹⁶² It was also stipulated that the mediator would give his opinion on the dispute within a period of about ten days, although this opinion was not binding on the parties. In order to resolve typical e-disputes (usually of about \$70-\$100 in value) arising from transactions on eBay's marketplace, the eBay Resolution Centre was created in 2007 and replaced SquareTrade.¹⁶³ The eBay Resolution Centre annually handles around 60 million disputes through ODR¹⁶⁴ and it is one of the most well-known examples of ODR schemes. In comparison with some other ODR providers, eBay only handles e-disputes that arise from online transactions through eBay. eBay is not principally an ODR service provider, but a company that has incorporated an ODR service into its service portfolio for boosting user

¹⁵⁸ The National Center for Technology and Dispute Resolution was asked to conduct a pilot project. See Orna Rabinovich-Einy and Ethan Katsh, 'Technology and The Future Of Dispute Systems Design; (2012) 17 Harvard Negotiation Law Review, 151,169.

¹⁵⁹ Ethan Katsh, Janet Rifkin, and Alan Gaitenby, 'E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'Ebay Law' (2015) 15 (3) Ohio State Journal on Dispute Resolution, 705, 708.

¹⁶⁰ SquareTrade, 'About us' <<https://www.squaretrade.com/about-us>> accessed 11 March 2019

¹⁶¹ Rule (n. 105) 9.

¹⁶² eBay, 'Dispute Resolution Overview', < <https://pages.ebay.com/services/buyandsell/disputeres.html>> accessed 7 January 2019

¹⁶³ Rule and Nagarajan (n. 106) 4. Amy Schmitz and Colin Rule, 'The New Handshake: Online Dispute Resolution and the Future of Consumer Protection' (American Bar Association 2017) 31

¹⁶⁴ Colin Rule, 'Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost/Benefit Case for Investing in Dispute Resolution' (2012) 34 UALR Law Review 767, 768

satisfaction and confidence. Since the development of the automated internal online negotiation system, eBay has further improved its ODR mechanism, for instance through using PayPal¹⁶⁵, which is one of the largest online financial transaction brokers.¹⁶⁶

Finally, eBay realised that a number of issues and problems kept appearing several times and disputes mainly occurred as a result of miscommunication. For these reasons, the eBay Resolution Centre provides both buyers and sellers a guided process to resolve their disputes through specific categorised claims, such as 'I haven't received it yet', 'I received an item that does not match the seller's description' (where the buyer is the complainant), 'I haven't received my payment yet', 'The buyer and I agree to cancel a transaction' (where the seller is the complainant).¹⁶⁷

The eBay ODR process commences when the claimant submits a complaint by filling out a web-based standard claim form that allows them to choose the type of dispute and offers a list of possible solutions. The other party is then informed about the complaint via email and is invited to participate in the process. Most times, both parties are really keen to participate because this is the only way in which the buyer can get redress and the seller can get a positive feedback.¹⁶⁸ When the both party agree to participate in the process, they start by attempting to resolve their differences on their own. If parties fail to reach an agreement, they are placed into a negotiation environment.¹⁶⁹ eBay usually encourages the parties to negotiate directly through its messaging platform. If the buyers and sellers cannot reach an agreement through eBay's ODR Platform, then the Resolution Services team, which is operated by eBay's Customer Support team, handles the claim and makes a decision on who is right and who is wrong. While this ruling does not have a 'res judicata' effect, the parties will generally voluntarily accept it.¹⁷⁰

¹⁶⁵ PayPal was established in 1998 as a security software company for handheld devices. PayPal had its Initial public offering in 2002. Later that year, PayPal was owned by eBay. However, eBay spun off PayPal in July 2015. See PayPal, 'Who We Are', < <https://www.paypal.com/us/webapps/mpp/about> > accessed 7 January 2019

¹⁶⁶ Anjanette H. Raymond and Abbey Stemler, 'Trusting Strangers: Dispute Resolution in The Crowd' (2015) 16 *Cardozo Journal of Conflict Resolution*, 357, 380.

¹⁶⁷ eBay, 'eBay Resolution Center' < <http://resolutioncentre.ebay.co.uk/> > accessed 5 January 2019.

¹⁶⁸ Pablo Cortes, 'Online Dispute Resolution Services: A Selected Number of Case Studies' (2014) 6 *Computer and Telecommunications Law Review*, 172, 174.

¹⁶⁹ *ibid.*

¹⁷⁰ Del Duca, Rule and Cressman (n. 105) 249.

3.7.2 AAA and Cybersettle

The American Arbitration Association (AAA), founded in 1926, is a not-for-profit public service organisation and a global leader in dispute management that provides services to individuals and organisations seeking to resolve disputes out of court¹⁷¹. It also provides preference services for education, training, and publications for those interested in having a broader or more profound understanding of ADR. Cybersettle¹⁷², is a private company holding a patent on its process of ‘blind binding’ that was established in 1996. Initially, Cybersettle focused on the resolution of disputes between insurance companies and their clients, but later extended its services to other types of claims, assisting in the settlement of disputes between citizens and municipalities.¹⁷³

In 2006, AAA and Cybersettle announced a strategic alliance that would enable both companies to offer their dispute resolution services to their customers exclusively. This strategic collaboration not only fully utilises the reputation of both companies, but also benefits from their different successful experiences. For example, while AAA offers a wide range of dispute resolution services to company executives, lawyers, individuals, management, consumers and communities, Cybersettle handled more than 200.000 claims and resolved cases of a total amount of \$1.9 billion.¹⁷⁴

AAA, as a successful public organisation, collaborates with Cybersettle, a growing private company, which can be a model or a good strategic plan for the advancement of the ODR sector. The well-known AAA framework, such as the Consumer Arbitration Rules, can be integrated into the self-regulatory system of private Online Dispute Resolution bodies and assist them in developing an adapted standard of ODR practice. On the other hand, Cybersettle can also work with AAA in promoting other services, where appropriate, and in making joint offers and business presentations in specific situations.

¹⁷¹ AAA, ‘About us’, < <https://www.adr.org/about>> accessed 5 January 2019

¹⁷² About Cybersettle, < <http://www.cybersettle.com/>> accessed 5 January 2019

¹⁷³ Cortes (n. 168)173.

¹⁷⁴ *ibid.*

3.7.3 Modria

Modria was founded in 2011 by Colin Rule and Chittu Nagarajan. Colin Rule was the first ODR Director of eBay and PayPal, which processed over 60 million disputes per year, from 2003 to 2011.¹⁷⁵ The principal aim of Modria is to offer ODR services for any size and type of dispute, such as debt, landlord/tenant, small claims, divorce, and custody. Modria provides several ODR methods: a) diagnosis, which identifies the problems in the dispute and helps in filtering out the complaints, b) negotiation, which summarises the problems, requires parties to make proposals for settlement, and allows the software to propose solutions that the parties can accept, c) mediation which an impartial third party will be appointed to facilitate a friendly agreement, and d) arbitration, where a neutral third party resolves disputes by giving a final binding award.¹⁷⁶ Modria, same as eBay, claims that most of the disputes will be settled through either diagnosis or negotiation without any human intervention, but parties will need to have strong incentives to cooperate and function effectively.¹⁷⁷ Moreover, Modria provides a case management and workflow system that manages case intake, document generation and management, scheduling, reporting, and status messaging.¹⁷⁸

In 2014, Modria announced that AAA has chosen Modria as the ODR platform to manage its New York No Fault case load. It is expected that more than a hundred thousand cases, particularly road traffic accident cases, will be handled by the platform on an annual basis.¹⁷⁹ Furthermore, in the State of Ohio, tax assessment disputes are handled by Modria's dispute resolution system, automating a subset of the tax court and in the Netherlands Modria's system automates divorce proceedings.¹⁸⁰ Modria has resolved more than a million cases in the US and around the world.¹⁸¹

3.7.4 The Rechtwijzer

The Dutch Legal Aid Board created a website called Rechtwijzer in 2007; its role was to help parties in conflict to find a lawyer and other legal assistance. The latest version of Rechtwijzer

¹⁷⁵ Modria, 'About Us' <<https://www.tylertech.com/about-us>> accessed 7 January 2019

¹⁷⁶ *ibid*

¹⁷⁷ *ibid*

¹⁷⁸ Modria, 'Deliver Fast and Fair Online Dispute Resolution', < <https://www.tylertech.com/products/modria>> accessed 7 January 2019

¹⁷⁹ Cortes (n. 168)176.

¹⁸⁰ Modria, 'The Operating System for ODR Publications' (Courts and Tribunals Judiciary, 2015) <<https://www.judiciary.uk/publications/modria-the-operating-system-for-odr-video-extract/>> accessed 7 January 2019

¹⁸¹ Modria <<https://www.tylertech.com/products/modria>> accessed 11 March 2019

was launched in 2014, as part of a joint project between the Dutch Legal Aid Board and HiiL.¹⁸² The platform enables parties with various problems, such as separation of families and consumer disputes, to communicate through distances means. The parties can ask for an online mediator to participate and, if no agreement is reached, a judge can get involved in the online process. The ODR process can be divided into seven stages:

- a) Diagnosis and information, which is designed to be given free of charge.
- b) Intake, which is a fee-based service (approx. €500 fixed fee). This stage enables the parties to utilise the platform to settle the dispute with or without the participation of a neutral third party.
- c) Dialogue between the parties; this is free, but the rest of the process, in which a third party gets involved, involves a fee.
- d) Trialogue, which requires hiring a mediator following a pay-as-you-go system.
- e) External online review
- f) Online adjudication by a judge, if the parties ask for it.
- g) After care stage, parties this mechanism enables to return to the process if a dispute re-arises.

The whole method tries to keep the parties motivated to reach a friendly agreement, while showing regard to the consequences of not doing so.¹⁸³

3.7.5 Youstice

Another example of ODR providers is Youstice, which was established in 2014.¹⁸⁴ The focus of this ODR service is to assist in communicating and handling low-value, high-volume customer complaints. The platform is accessible to customers from many traders' websites and allows customers to communicate their complaints directly to the traders. Youstice operates the work-flow of discussions and enables parties to reach an agreement through online negotiation. If parties fail to reach an agreement, then they can forward their disputes to a neutral dispute resolution body accredited by Youstice. There are two stages offered by Youstice to settle the disputes: negotiation through amicably and intuitive online methods, and participation of neutral third parties in the process.

¹⁸² Modria has been drafted to advice on the technology and dispute system design. The new platform is based on a 2.0 technology that operates not only as a diagnosis and referral tool, but also as a fully fleshed dispute resolution tool. See Hill, Who We Are < <https://www.hiil.org/who-we-are/>> accessed 8 January 2019

¹⁸³ Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press, 2017) 54.

¹⁸⁴ Youstice, 'About Us', < <https://www.youstice.com/en/about-us>> accessed 9 January 2019

Retailers, who want to be part of Youstice, are required to reach an agreement with their consumers concerning their complaints in at least 80% of cases and implement at least 98% of the agreements or decisions made by neutral dispute resolution bodies.¹⁸⁵ Currently, Youstice handles disputes arising from purchasing good or services either online or offline, and has recently started to resolve specific sectors' disputes, such as transportation, gambling and car rental. This platform is free for consumers to file the claim and negotiate with the trader, but consumers might be asked to pay a nominal fee only when the case is escalated to the neutral third party.

3.7.6 Other established ODR services

The Uniform Domain Name Dispute Resolution Policy (UDRP) was adopted under the leadership of ICANN for all ICANN-accredited registrars in 1999.¹⁸⁶ WIPO is accredited by ICANN as a domain name dispute resolution service provider.¹⁸⁷ UDRP is a mechanism that resolves disputes between domain name owners and trademarks holders. Moreover, the UK Financial Ombudsman Service, which resolves disputes between consumers and UK-based financial businesses, the Resolver, which assists in handling consumer complaints with traders, the UK Traffic Penalty Tribunal, the Online Schlichter¹⁸⁸, which offers mediation services in B2C e-commerce and direct selling disputes, and the Canadian Civil Resolution Tribunal are all well-established ADR/ODR services in specific industries.

3.8 Conclusion

This chapter highlights the need for greater efficiency in consumer dispute processes and an increase in the level of access to justice for consumers. This is not a time for consumers to involve in F2F processes against businesses concerning everyday shopping. It is occasionally not worth the cost and stress of tracking these processes when the expected return is low. Consumers will inevitably lose their trust in e-commerce that lacks reasonable remedy systems for these low-value claims. Consumer ADR and ODR create a new desire for these consumers

¹⁸⁵ Youstice, 'Our Satisfaction Guarantee', , <<https://www.youstice.com/en/our-satisfaction-guarantee>> accessed 9 January 2019

¹⁸⁶WIPO, 'Frequently Asked Questions' <<http://www.wipo.int/amc/en/center/faq/index.html>> accessed 10 January 2019.

¹⁸⁷ WIPO, 'Report of The Director General to the WIPO Assemblies' (2015) <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1050_15.pdf> accessed 10 January 2019.

¹⁸⁸ Online-Schlichter <<https://www.evz.de/en/alternative-dispute-resolution/online-schlichter/>> accessed 11 March 2019

by acting speedily and out-of-court, exempting procedural complications and choice of law issues. Moreover, the resolution process can be integrated straight into the websites of traders where purchases come true.

It is obvious that the EU ambitiously seeks to consolidate the use of ADR and impose criteria for a commissioned manner through the labyrinth. The relevant Directive and Regulation propose a basic framework, which is supported by the development of current actions, such as the ESCP and a potential link to the EU ODR platform. By amending the ESCP in this way, the intended outcome was to promote a mind-set that views this procedure as an alternative to national methods for resolving disputes. The EU ODR Regulation on Consumer creates the EU ODR platform, which provides as a signposting service, referring online B2C contractual disputes to ADR bodies. However, there is still lack of some elements, which have made the EU ODR platform a referral site. Thus, in order to make the Platform more effective, there is a need for redesigning and revision of the Platform, such as providing problem diagnosis and online negotiation tool to encourage parties to resolve their disputes themselves without third party intervention at an early stage. Finally, this chapter examines the operation of a number of well-established ODR providers, namely eBay and SquareTrade, AAA and Cybersettle, Modria, Rechtwijzer and Youstice.

Chapter 4: Fundamental Principles for the Establishment and Continuation of an ODR System

4.1 Introduction

The fact that all successful examples of ODR services may point that ODR services and technologies have developed significantly and online traders nowadays can create and successfully integrate basic ODR programs in their marketplaces without having to heavily rely on ODR professionals' cooperation. Well-established private ODR services, such as Smartsettle and Modria, as well as the public ODR services, such as the EU ODR platform, are tailored with different features and specific functions to generate particular market usage. Other strategic partnerships, such as ICANN and WIPO, AAA with Cybersettle and CIETAC and HKIAC, maintain their cooperation as they are still dependent upon each other's clients and sectorial dispute resolution services.

At present, the preponderance of ADR services, such as arbitration institutions or mediation centres, have not provided any specific ODR rules but may give an ODR user guide or protocol as an additional guidance to their traditional ADR-related rules. Internationally, the UNCITRAL Technical Notes on Online Dispute Resolution promote the principles of fairness, transparency, due process and accountability.¹ In China, the International Economic and Trade Arbitration Commission adopted specific institutional rules concerning Online Arbitration Rules, which came into force in 2015. The principles of CIETAC Online Arbitration Rules are intended to assist in resolving disputes independently, impartially, efficiently and in a cost-effective way.² In Russia, the Russian Arbitration Association adopted an Online Arbitration Regulation, which came into force in 2015.³ This Regulation aims to promote the independent, impartial and efficient resolution of commercial disputes.⁴ In the US, in 2002 the American Bar Association (ABA) Task Force on E-Commerce and ADR issued a set of

¹ UNCITRAL finalised and adopted the Technical Notes on Online Dispute Resolution at its 49th session in 2016. The Technical Notes on Online Dispute Resolution are non-binding, and take the form of a prescriptive document, which aims at reflecting on several elements in relation to the online dispute resolution process. See UNCITRAL Technical Notes on Online Dispute Resolution 2016 <http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf> accessed 13 April 2019

² CIETAC Online Arbitration Rules, Article 1. In China the Guangzhou Arbitration Commission also published its own online arbitration rules in 2015. See Guangzhou Arbitration Commission (GZAC) Online Arbitration Rules 2015

³ Russian Arbitration Association Online Arbitration Rules 2015, <http://arbitrations.ru/upload/medialibrary/21a/arbitraj_block_01_20_fin.pdf> accessed 12 April 2019

⁴ *ibid*

standards/principles for all ODR service providers, such as transparency, minimum necessary disclosures, impartiality, confidentiality, privacy and information security, accountability of ODR providers and neutrals, enforcement.⁵ In 2009 the Advisory Committee of the National Centre for Technology and Dispute Resolution proposed the ODR Standards of Practice, aiming to offer ‘guidelines for practice across the spectrum of ODR’.⁶ The recommendation included therein promote the principles of accessibility, affordability fairness, transparency and fairness in the ODR system. Later, the ODR Standards of Practice were modernised and extended by the International Council for Online Dispute Resolution based on the ‘Ethical Principles for Online Dispute Resolution’.⁷ In Canada, the Civil Resolution Tribunal Rules were introduced on 12 July 2017) and re-affirmed the importance of fairness, accessibility, affordability, cost-effectiveness, simplicity and enforceability.⁸

At EU level, the ODR Regulation also utilises the principles of confidentiality and security, trust, efficiency, independence, impartiality, transparency, effectiveness and fairness.⁹ In 2015, the Amending Regulation of the European Small Claim Procedure, which uses ICT for hearings to further promote the principles of fairness, efficiency and accessibility.¹⁰ In the UK, in 2015 the Civil Justice Council analysed the weaknesses of the civil justice system and searched for ways to provide a court-based dispute resolution service for low-value claims, that would be in

⁵ American Bar Association (ABA) Task Force on E-Commerce and ADR, ‘Recommended Best Practices for Online Dispute Resolution Service Providers 2002’, <<https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/BestPracticesFinal102802.authcheckdam.pdf>> accessed 12 April 2019

⁶ National Centre for Technology and Dispute Resolution, ‘Online Dispute Resolution Standards of Practice’ (2009), <www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf> accessed 12 November 2018

⁷ The Ethical Principles for Online Dispute Resolution are designed to enhance the quality, effectiveness, and scope of dispute resolution processes with technological components. Taken together they can provide a touchstone for best practices, standards, rules, qualifications, and certification efforts in dispute resolution and related fields that address dispute resolution processes and practices. This document builds on previous work by the National Center for Technology and Dispute Resolution on principles and standards of practice as well as the growing body of literature and the standards of numerous professional, governmental, and commercial bodies concerning ODR and dispute resolution more generally. See Leah Wing, ‘Ethical Principles for Online Dispute Resolution: A GPS Device for the Field’, (2016) 3 International Journal of Online Dispute Resolution 12.

⁸ Canadian Civil Resolution Tribunal Rules (2017), <<https://civilresolutionbc.ca/wpcontent/uploads/2017/07/CRT-rules-effective-July-12-2017.pdf>> accessed 12 April 2019

⁹ The EU Regulation on Consumer ODR 2013

¹⁰ Regulation (EU) 2015/2421 Of the European Parliament and of The Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure

line with the principles of affordability, accessibility, intelligibility, appropriateness, swiftness, consistency, trustworthiness, proportionality and fairness.¹¹

As pointed out earlier, both private and public ODR entities have set up and promoted a set of minimum standards and principles for devising an ODR system. Since ODR has become popular in resolving both cross-border and domestic disputes, there is a rising need for harmonised rules and procedures to ensure the quality of ODR services. The quality of ODR services has a significant impact on the disputants' trust and confidence to this dispute resolution system. Therefore, this chapter discusses the main principles for the establishment and continuation of a strong and successful ODR system that will improve the quality of ODR services around the world.

4.2 Impartiality, Independence and Expertise

Independence, impartiality and expertise are fundamental elements of ADR in general which are also applicable to ODR methods.¹² These principles are at the heart of civil justice as ADR/ODR service providers, individual arbitrators and mediators must be and must be seen as independent and impartial and having adequate expertise.¹³ Article 6 of the EC Directive on Consumer ADR requires that “Member States shall ensure that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial.”¹⁴

Independence means that ADR/ODR providers perform their functions in a fair environment, being unbiased towards the parties. Independence refers to the lack of any financial and personal relationship between the dispute resolution service providers and the disputants. In the event that the service providers become too closely related with one of the parties, questions will be raised about their independence. If the ODR providers receive finance by an organisation that may lead to bias, then independence is not guaranteed. The EC Directive on Consumer ADR requires that “the dispute resolution entity does not have any hierarchical or

¹¹ Civil Justice Council ODR Advisory Group, ‘Online Dispute Resolution for Low Value Civil Claims’ (2015) <<https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>> accessed 13 April 2019

¹² ‘Impartiality in the context of judicial decision-making has been given the meaning ‘absence of actual bias’ (subjective), whereas independence has been taken to mean ‘absence of appearance of bias’ (objective), or ‘absence of a relevant conflict of interest’. See Julia Hornle, *Cross-border Internet Dispute Resolution*, (Cambridge University Press 2009) 113.

¹³ Julia Hörnle, ‘Online Dispute Resolution in Business to Consumer E-Commerce Transactions’ (2002) 2 *Journal of Information Law Technology*

¹⁴ EU Directive on Consumer ADR 2013, Article 6 (1)

functional link with the trader and is clearly separated from the trader's operational entities and has a sufficient budget at its disposal, which is separate from the trader's general budget, to fulfil its tasks."¹⁵

It is worth noting here that in practice it is difficult to deny that ODR providers have no purely financial relationship with certain organisations. Business usually pay directly (subscription fees) or indirectly (membership fee) for the dispute resolution service. Accordingly, it is inevitable for a relationship to exist. This relationship should be neutralised by taking all the necessary measures; for example, an independent third party overseeing the system and representing the interests of the consumers on the board of the scheme.

While independence refers to the decision-making of the dispute resolution entity, the principle of impartiality or neutrality usually refers to the neutrals¹⁶ appointed by the service provider to work closely with the parties. The neutrals must not have any conflict of interest in the disputes in question and/or any professional or personal connection with the disputants. Nowadays, it is also important to note that software algorithms must also be created in such a way that no systemic advantage is provided to one disputant over another.

The EC Directive on Consumer ADR states that for ensuring the independence of the neutrals, they are granted a period of office of a minimum of three years.¹⁷ The Directive also requires that neutrals are not allowed to work for the trader or a professional organisation of which the trader is a member for a period of three years after the neutrals' term in the ADR entities has been concluded.¹⁸

Last but not least, ODR entities and neutrals shall meet a certain level of education and training before being involved in ODR. The Directive highlights that the neutrals must have the necessary knowledge and skills in the field of ADR, ODR or judicial resolution of consumer disputes as well as a general understanding of law.¹⁹ In order to improve the quality of online

¹⁵ *ibid*, Article 6 (3) (d)

¹⁶ The term "neutral" is described by Colin Rule as follows: the role of an individual (a mediator, arbitrator, evaluator, facilitator, or any other dispute resolver who is playing the dispute resolution role in a particular dispute. See Colin Rule, *Online Dispute Resolution for Business: B2B, E-commerce, Consumer, Employment, Insurance, and other Commercial Conflicts*, (Jossey-Bass 2002) 278.

¹⁷ EU Directive on Consumer ADR 2013, Article 6 (3) (b)

¹⁸ *ibid* Article 6 (3) (c)

¹⁹ *ibid*, Article 6 (1) (a)

practitioners in ADR and ODR entities, the entities are expected to use very strict selection criteria and offer adequate training.

In the US, the Association for Conflict Resolution (ACR), the American Bar Association (ABA) and the American Arbitration Association (AAA) prepared a report in 2005 that established the minimum standards for mediators.²⁰ In a similar manner, in 2007, the ABA's Section of Dispute Resolution published a report entitled 'ABA Section of Dispute Resolution Task Force on Improving Mediation Quality'.²¹ The report evaluated the feasibility of setting uniform mediation standards and investigated ways to achieve high quality mediation practice. Online mediators and online arbitrators, same as ADR practitioners should be accredited to meet a certain level of education, training, performance and ethical standards.²² These requirements can be controlled by certified ADR entities or by governments and international institutions. Compared to ADR, in order to manage the whole process, online neutrals should also have specific knowledge on online culture, technology, online communication and all online dispute procedures.

The recent version of the UNCITRAL Technical Notes on Online Dispute Resolution has not directly set an accreditation system for neutrals, but it states that the ODR entities should set rules of conduct and a code of ethics for their neutrals, so that conflicts of interest are avoided.²³ Moreover, the UNCITRAL Technical Notes require that the entities may establish standards for the selection and training of neutrals.²⁴

4.3 Effectiveness and Efficiency

The principle of effectiveness implies that an ADR and ODR process should be accessible online and offline and be both timesaving and cost-effective. According to this principle, in relation to consumer disputes, ODR services should be free of charge or of moderate cost. The

²⁰ The Model Standards of Conduct for Mediators was prepared in 1994 by these three associations. The original version was revised by the Model Standards in 2011. See 'Model Standards for Mediator Certification Programs Association for Conflict Resolution' (2011) <https://www.acrnet.org/ACR/Resources/ACR_Stand/ACR/Resources/Standards_of_Practice.aspx?hkey=5f21719d-8d65-4ced-8931-2a31d6b676a9> accessed 5 January 2019.

²¹ 'ABA Section of Dispute Resolution Task Force on Improving Mediation Quality' (2008) <<https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalTaskForceMediation.authcheckdam.pdf>> accessed 5 January 2019

²² Melissa Conley Tyler and Jackie Bornstein, 'Accreditation of On-Line Dispute Resolution Practitioners' (2006) 23(3) Conflict Resolution Quarterly 383; Faye Fangfei Wang, *Online Arbitration*, (Routledge, 2017), 44.

²³ UNCITRAL Technical Notes on ODR (2017) Article 13

²⁴ *ibid* Article 15

EU Directive states that ‘the ADR procedure is free of charge or available at a nominal fee for consumers’.²⁵ This is an understandable provision due to the nature of consumer disputes, which are usually low value, so it is important to have a dispute resolution process that is either free or costs less than the value of the claim. If a consumer is required to pay a high or a disproportionate fee for the ADR or ODR scheme, this would undermine its success and overall effectiveness. However, questions have been raised about the cost effectiveness of ODR schemes. When the majority of consumer disputes are considered as low value, it is understandable why a consumer should not pay at all or should only pay a nominal fee for ADR schemes. One question that needs to be tackled is what happens in the case of high value consumer transactions, for example buying a car or expensive furniture or jewellery. It can be argued here that a monetary threshold may be determined; all claims under this threshold may be totally exempted from a charge, while in disputes above the threshold a moderate fee will be charged. Similar to the European Small Claims Procedure, a calculation method can be introduced for determining the proportionality of fees, for example, ODR entities’ fees of less than 15% of the value of the claim can be considered as proportionate.

Another question about the fees is if ODR schemes are free of charge for consumers, who will pay for the process? As mentioned above, while a few ADR entities require consumers to pay a fee, others state that all fees must be paid by the traders. Needless to mention here that if all the fees of the process are to be paid by the traders, then traders will be unlikely to participate in the process and they will probably refuse any request. It is therefore necessary to find alternative solutions in order both to make the use of the ODR effective and to encourage traders to participate in the process. It is suggested that the use of artificial intelligence software, such as case profiling and knowledge management which automatically examine the characteristics of individual claims, can not only reduce the cost but also enhance the actual quality and consistency of resolutions.²⁶

With regard to the effectiveness of ODR, the Directive also states that dispute resolution process should be fast. More specifically, “the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has

²⁵ The EU Directive on Consumer ADR 2013, Article 8

²⁶ Graham Ross, ‘The Possible Unintended Consequences of the European Directive on Alternative Dispute Resolution and the Regulation on Online Dispute Resolution’ (2014) 10 *Revista Democracia Digital e Governo Eletrônico*, 206, 217.

received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time period. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute."²⁷

It must be noted that, when we look at the purpose of the EC ADR Directive and EC ODR Regulation which is to provide more effective, speedier, less costly, and more consistent resolutions, the abovementioned time period may be considered extremely excessive for specific types of consumer disputes, especially low-value disputes arising from e-commerce.²⁸ For example, a consumer submits a complaint about a pair of shoes worth £35 through the EU ODR Platform, it will take up to a month to agree on the ADR entities, provide of course that the trader agrees to participate, then the ADR body will have resolve the dispute in 90 days. The above example shows that a dispute will be handled and resolved in 120 days through the ODR Platform, which may discourage consumers to use the Platform for low-value disputes, if it is compared to the length of time taken by some accomplished ODR schemes, such as eBay's Resolution Centre or Modria, where the expected period of time for handling and resolving disputes is less than 10 days. Empirical research conducted with eBay users showed that effective consumer redress systems that help users in resolving their disputes have a favourable effect on the capacity of business of those users who utilise the ODR. That is to say, these users, who were given an efficient redress had increased their activity afterwards compared to those users, who did not have any claims.²⁹ The only exception was cases that the disputes were resolved in more than six weeks, then the users subsequently reduced the number of transactions they entered into.³⁰ The rationale behind this is that online users have fast transaction and fast resolution anticipation. According to Rule, if ODR providers offer an effective dispute resolution system and customers have satisfactory resolution experience, this will help traders build customer loyalty.³¹ Such empirical results clearly show that for low value disputes, 120 days is an extremely long period for dispute resolution.³²

²⁷ The EU Directive on Consumer ADR 2013, Article 8

²⁸ Ross (n. 26) 218.

²⁹ Colin Rule, 'Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution' (2012) 34 University of Arkansas Little Rock Law Review 767, 776.

³⁰ *ibid* 773

³¹ *ibid* 777

³² *ibid*

4.4 Fairness

The principle of fairness states that the parties have the opportunity to express their own views, access the related documents provided by the ADR entities, the other party or the experts involved and to comment on these documents. With regard to principle of fairness, the ADR Directive requires that “The parties have the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them.”³³

It is necessary to be stated that parties should know the nature, content and implications of the ADR methods before they apply to ADR entities to resolve their disputes. In processes which give jurisdiction to adjudicate, such as arbitration, arbitrators must be assured that the disputants are conscious of their legal rights and the legal effect of their involvement in the process. In arbitration processes, where the arbitrators impose the arbitral award, the arbitrators must ensure grounds for the awards for strengthening the perception of the ADR process as a fair system of dispute resolution. If it is reached an agreement, the settlement itself will likely compose the ground on which the award is based.³⁴ In consensual processes, disputants, before participating must be given the opportunity to offer about their views on the offered solution, while they should also be informed as to their right to get legal advice from a lawyer, the legal effect of reaching an agreement and their right to express their consent before settling for an amicable resolution. The ADR Directive also states that parties usually have the right of withdrawal from the process in the event that they are not satisfied with the procedure.³⁵

It is worthy to note that in *Halsey v Milton Keynes General NHS Trust*, the court stated that even the parties cannot be forced to participate in any ADR process or reach an agreement on ADR methods, however, parties should have reasonable grounds to refuse to enter into ADR.³⁶ Likewise, in *PGF II SA v OMFS Company 1 Limited*, the Court of Appeal found that the party’s

³³ The EU Directive on Consumer ADR 2013, Article 9

³⁴ Pablo Cortés, ‘The New Landscape of Consumer Redress: The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution’, in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution*, (Oxford University Press 2016), 17 and 26.

³⁵ The EC Directive on Consumer ADR 2013, Article 9

³⁶ *Halsey v Milton Keynes General NHS Trust* (2004) 1 WLR 3002. The Court stated six factors to accept the reason for refusing the ADR: the nature of the dispute, the merits of the case, other settlement methods have been attempted, the costs of mediation would be disproportionately high, whether the mediation had a reasonable prospect of success and delay.

silence did amount to unreasonable refusal to mediate and penalised the party in costs.³⁷ The Court in this case extended the principles and guidelines set out in the *Halsey* case regarding unreasonably refusing the use of mediation.

4.5 Accountability (Transparency) versus Confidentially

Another essential feature of ODR is the principle of transparency for enhancing trust in ODR services. Transparency means ‘the quality of being done in an open way without secrets’.³⁸ The main reason why the principle of transparency is of utmost importance in the context of consumer disputes is that it ensures information equality between businesses and consumers. Businesses are more familiar with the procedures and this can give them an advantage over consumers who may use the procedure for the first time. In general, transparency aims to strike a fair balance between businesses and consumers.

Comparing traditional litigation and ADR, parties are unaware or have limited knowledge about the concept and processes of ODR. Apart from legal terminology about ADR procedures, parties must be fully informed about technology so that they understand how online procedures are conducted. The EC Directive on Consumer ADR requires that sufficient information must be provided by ADR entities through their websites and such information must be clear, easily accessible and understandable. More specifically, the information includes:

- “(a) their contact details, including postal address and e-mail address;
- (b) the fact that ADR entities are listed in accordance with Article 20(2);
- (c) the natural persons in charge of ADR, the method of their appointment and the length of their mandate;
- (d) the expertise, impartiality and independence of the natural persons in charge of ADR, if they are employed or remunerated exclusively by the trader;
- (e) their membership in networks of ADR entities facilitating cross-border dispute resolution, if applicable;
- (f) the types of disputes they are competent to deal with, including any threshold if applicable;
- (g) the procedural rules governing the resolution of a dispute and the grounds on which the ADR entity may refuse to deal with a given dispute in accordance with Article 5(4);

³⁷ *PGF II SA v OMFS Company 1 Limited* (2013) EWCA Civ 1288

³⁸ Cambridge Dictionary < <https://dictionary.cambridge.org/dictionary/english/transparency>> accessed 15 May 2019

- (h) the languages in which complaints can be submitted to the ADR entity and in which the ADR procedure is conducted;
- (i) the types of rules the ADR entity may use as a basis for the dispute resolution (for example legal provisions, considerations of equity, codes of conduct);
- (j) any preliminary requirements the parties may have to meet before an ADR procedure can be instituted, including the requirement that an attempt be made by the consumer to resolve the matter directly with the trader;
- (k) whether or not the parties can withdraw from the procedure;
- (l) the costs, if any, to be borne by the parties, including any rules on awarding costs at the end of the procedure;
- (m) the average length of the ADR procedure;
- (n) the legal effect of the outcome of the ADR procedure, including the penalties for non-compliance in the case of a decision having binding effect on the parties, if applicable;
- (o) the enforceability of the ADR decision, if relevant.”³⁹

Likewise, the UNCITRAL Technical Notes on Online Dispute Resolution specify that all relevant information should be available on the entities’ website.⁴⁰ Through this information, ADR and ODR users will be aware of the process they get in and they can determine which of the available methods is more effective and suitable for them and they can assess whether these methods meet their expectations in terms of cost and time effectiveness.

Another core element is confidentiality. This principle encourages users to express their arguments in an honest way and assures them that anything they say will not be published or used against them in judicial proceedings. The lack of confidentiality may discourage disputants from participating particularly in the context of commercial transactions, as businesses may not agree with the publication of their disputes because it may undermine their reputation, their reliability and may even expose their trade secret. It should be stated that disputes arising from online B2C transactions are commonly monetary disputes over low-value purchases. “These disputes tend to be less emotionally charged and disputants tend to be relatively indifferent to confidentiality.”⁴¹

³⁹ The EC Directive on Consumer ADR 2013, Article 7

⁴⁰ UNCITRAL Technical Notes on Online Dispute Resolution (2017) Article 10,11,12

⁴¹ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 156.

The EC Directive on Consumer ADR supports the enhancement of confidentiality during the procedures by encouraging the Member States to protect the confidentiality in civil or commercial judicial proceedings or arbitration.⁴² Likewise, the EC Regulation on Consumer ODR requires that “ODR contact points shall be subject to rules of professional secrecy or other equivalent duties of confidentiality laid down in the legislation of the Member State concerned.”⁴³

Finally, it is necessary to mention that the principle of transparency aims to inform parties about all required information concerning the dispute resolution procedure, however, the disclosure of information must not violate confidentiality. At the same time, for boosting confidence and increasing participation in ODR services, ADR and ODR entities should be authorised to publish mediation settlements or arbitral awards. Thus, it is necessary to achieve the right balance between transparency and confidentiality. One of the best examples is SquareTrade. A fundamental part of SquareTrade’s accountability policy was its substantial database on resolution applications. SquareTrade managed to collect extensive data on the services it provided, which remained available for SquareTrade, the mediators, and the parties for up to one year.⁴⁴ SquareTrade also recorded all relevant information which was disclosed in seal applications and participants’ registration forms.⁴⁵ At the end of each process, SquareTrade recorded “Resolution Behaviour Information,” which was composed of information on whether a disputant involved in the process had reached an agreement and/or whether the disputants agreed with the mediators’ recommendation.⁴⁶ SquareTrade created internal operational accountability by establishing formations for (1) collecting a vast amount of information on mediator interventions and disputant demands and on continuous attempting to assess the quality of services rendered; (2) monitoring and evaluating neutrals’ performance level; (3) developing its standard of confidentiality; (4) creating incentives for neutrals to

⁴² The EC Directive on Consumer ADR 2013 Article 4 and Recital 29

⁴³ The EC Regulation on Consumer ODR 2013 Article 13

⁴⁴ ‘Accountability can be internal, external, or both. Internal accountability typically promotes self-evaluation and organizational development and enhances management practices and strategic planning through internal measures and review, while external accountability usually involves evaluation of performance and outcomes by a credible external entity (private or public) in the context of predetermined boundaries’. See Orna Rabinovich-Einy, ‘Technology’s Impact: The Quest for A New Paradigm for Accountability in Mediation’ (2006) 11 Harvard Negotiation Law Review, 253, 261-270.

⁴⁵ *ibid*

⁴⁶ *ibid*

achieve good performance and for the system to identify insufficiencies and accomplishments and profit from them.⁴⁷

4.6 Accessibility

Accessibility is an important component for the development of ODR and plays a key role in access to justice in general. The meaning of accessibility⁴⁸ was described by the International Chamber of Commerce (ICC) as “a relevant correspondence relating to a transaction should be easily accessible and made available to the customer upon request”.⁴⁹ It is also suggested that “users should have access to the system 24 hours a day, seven days a week and all year round to file a new case or to view their existing case information.”⁵⁰ Moreover, the EU ODR Regulation emphasizes on accessibility of ODR platform as follows:

*“the electronic complaint form to be submitted to the ODR platform shall be accessible to consumers and traders in all the official languages of the institutions of the Union. The complainant party shall be able to save a draft of the electronic complaint form on the ODR platform. The draft shall be accessible and editable by the complainant party prior to submission of the final fully completed electronic complaint form. The draft of the electronic complaint form that is not fully completed and submitted shall be automatically deleted from the ODR platform six months after its creation.”*⁵¹

In addition, ODR advisors and other ODR contact points shall also have access to all necessary information. The Commission requires that *“ODR advisors who have access to information concerning a dispute including personal data shall grant access to this information to advisors in other ODR contact points in so far as it is necessary for the purpose of fulfilling the functions referred to in Article 7(2) of Regulation (EU) No 524/2013.”*⁵²

⁴⁷ *ibid* 282

⁴⁸ The consent upon the principle of accessibility has been built during the Federal Trade Commission and Department of Commerce conference on B2C ODR; see FTC and Department of Commerce, 'Summary of the Public Workshop of 6-7 June 2000; Joint Conference of The OECD, 'Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution', 11-12 December 2000.

⁴⁹ International Chamber of Commerce, *Resolving Disputes Online: Best Practices for Online Dispute*, (2003)

⁵⁰ *ibid*

⁵¹ Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, Article 2

⁵² *ibid*, Article 9(3)

Regarding accessibility, the attempts to ensure that consumers have easy access to these methods is evident in almost all relevant initiatives.⁵³ For instance, Article IV of EC Recommendation 98/257/EC states that the consumer has access to the procedure without being obliged to use a legal representative.⁵⁴ However, recent recommendations guarantee access to both sides, namely consumers and traders. For example, a list of all ADR entities needs to be accessible to both parties at any time as the Commission requires “*The parties shall at any time have access to the list of all ADR entities registered with the ODR platform pursuant to Article 5(6) of Regulation (EU) No 524/2013. A search tool, offered by the ODR platform, shall help the parties to identify the ADR entity competent to deal with their dispute among the ADR entities registered with the ODR platform.*”⁵⁵

According to Kaufmann and Schultz, the ODR process must be easy to be found and easy to use.⁵⁶ Amy J. Schmitz stated that ODR platform must be very user-friendly and straightforward for the consumer so that consumers are not disadvantaged by their lack of prior experience.⁵⁷ Amy J. Schmitz also claimed that as compared to consumers, traders usually are repeat players in dispute resolution processes, and therefore collect information that puts them in advantage position in resolving disputes toward their favour.⁵⁸ Moreover, these repeat player traders usually have more considerable legal and economic sources than consumers, again making the system to tilt in the trader’ favour.⁵⁹ In order to make it easy for parties to access ODR providers, the existence and availability of ODR needs to be made known through Trustmark or authorisation, or by reference on commercial websites.⁶⁰ For this reason, the ODR Regulation mandates all online traders and intermediaries, which are established in the EU, to provide an electronic link to the ODR platform on their websites.⁶¹

⁵³ See Alternative Dispute Resolution Guidelines. Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce (2003)(“Customers should receive maximum guidance in filling in and filing submissions); FTC and Department of Commerce, ‘Summary of the Public Workshop of 6-7 June 2000; Joint Conference of The OECD, ‘Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution, 11-12 December 2000: (“participants agreed that dispute resolution programs should be easily accessible to consumers”)

⁵⁴ See Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, Article IV

⁵⁵ Commission Implementing Regulation (EU) 2015/1051 (n. 51) Article 4(2)

⁵⁶ Gabrielle Kaufmann-Kohler and Thomas Schultz, *Online Dispute Resolution* (Kluwer Law International 2004), 116.

⁵⁷ Amy J. Schmitz, A Blueprint for Online Dispute Resolution System Design, (2018) 21(3) *Journal of Internet Law*, 3-4.

⁵⁸ *ibid*

⁵⁹ Amy Schmitz and Colin Rule, ‘The New Handshake: Online Dispute Resolution and the Future of Consumer Protection’ (American Bar Association 2017) 75

⁶⁰ *ibid*.

⁶¹ EU Regulation on Consumer ODR 2013, Article 14

On the other hand, in order to make the use of ODR easy, there are several elements that need to be considered: first, the use of ODR should be free of charge (or low cost) for the consumers.⁶² For example, the interactive website of ODR Platform can be accessed electronically and free of charge in the 23 EU languages.⁶³ Moreover, the Platform allows the parties to submit their complaints in their own language and the platform will translate it accordingly. However, it is worth mentioning here that the free use bears the risk of creating frivolous litigation. Thus, in order to discourage frivolous claims, a refundable low fee may be requested. Secondly, the ODR process should be created in such a way that would allow users to participate in the process without a legal counsel even in the case of arbitration.⁶⁴ For doing this, consumers should be provided with maximum help and information about the procedures. Thirdly, technical barriers for accessing to ODR should be removed. It is important to bear in mind that when ODR is designed to be accessible, the ‘digital divide’ with regard to users’ different technical skills and access to the internet should be considered. As a matter fact, nowadays despite an increase in internet access, the digital divide persists based on education, age, and income.⁶⁵ In 2013 the Pew Research Center reported that, even though smartphones do not give the equivalent service to consumers as a home broadband, the smart devices have actually helped in narrowing the digital divide among vulnerable groups.⁶⁶ Thereby, governments, policymakers and businesses should consider new methods to offer simple and free or low-cost Internet access to various groups.⁶⁷ They should also adopt educational

⁶² The ODR platform offers, free of charge, an electronic case management tool, which enables ADR entities to conduct the dispute resolution procedure with the parties through the ODR platform. However, this does not mean that ADR is free of charge. A dispute resolution body may ask a consumer or a trader to pay a fee if it agrees to handle their case. There is no exactly amount for fee that each dispute resolution body charges different. See EU Regulation on Consumer ODR 2013, 18 of the Preamble to the Regulation

⁶³ EU Regulation on Consumer ODR 2013, Article 5(2)

⁶⁴ The EU Directive on Consumer ADR in Article 8 (b) states that the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor, but the procedure shall not deprive the parties of their right to independent advice or to be represented or assisted by a third party at any stage of the procedure. The EC Recommendation 2001/310/EC in Article II (4) states that the parties should have access to the procedure without being obliged to use a legal representative. Nonetheless the parties should not be prevented from being represented or assisted by a third party at any or all stages of the procedure

⁶⁵ Thom File and Camille Ryan, *Computer and Internet Use in the United States* (US Census Bureau 2013); Kathryn Zickuhr and Aaron Smith, ‘Digital differences’ (Pew Research Center, 2012) <http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Digital_differences_041312.pdf> accessed 5 April 2019; Kathryn Zickuhr and Aaron Smith, ‘Home Broadband 2013’ (Pew Research Center, 2013) <http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Broadband%202013_082613.pdf> accessed 5 April 2019

⁶⁶ *ibid*

⁶⁷ For example, Tom Wheeler, Chairman of the Federal Communications Commission, will circulate a plan to his fellow commissioners suggesting sweeping changes to a \$1.7 billion subsidy programme charged with ensuring that all Americans have affordable access to advanced telecommunications services. See Rebecca R. Ruiz, ‘FCC Chief Seeks Broadband Plan to Aid the Poor’ *The New York Times* (28 May 2015) <<https://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html>> accessed 5 April 2019

programs to support those with insufficient knowledge of using the Internet for dispute resolution.⁶⁸

4.7 Security

Security is another crucial principle for the development and acceptance of ODR. Especially, in the field of computing and online communications, numerous forms of threats to systems and data have appeared, and this has resulted in a never-ending circle of security measures and breaches. Security is a prevailing factor in protection of not only users` identity but also confidential information. For an ODR procedure to be successful, users should be confident that their documents and communications will be securely collected by their proposed receivers and will be safely stored on an assigned site or portal.⁶⁹

While a variety of definitions for the term ‘security’ have been suggested in the literature, the main focus of security in the world of computer science as well as in the context of ODR is to protect the transmission and the storage of information. According to Schultz et al., the transmission and the storage of information require different means of protection but are exposed to considerable risks: unapproved third parties must not access the data (which means protection of the confidentiality) and, *a fortiori*, must not change this information (which means keeping records safely with integrity).⁷⁰

One of the more practical ways of participating to ODR safely and securely is using a web-page communication rather than the non-secure or less secure e-mail communication, since only the parties have access through a valid password and username, which does not allow unapproved access in the web-page communication.⁷¹ Another effective way currently used for securing confidentiality and integrity of information is secure mail communication.⁷² For

⁶⁸ Amy J. Schmitz, ‘Consumer Redress in the United States’ in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution*, (Oxford University Press 2016),325, 341.

⁶⁹ Amy J. Schmitz, ‘Building on Oarb Attributes in Pursuit of Justice’ in Maud Piers and Christian Aschauer (eds), *Arbitration in the Digital Age: The Brave New World of Arbitration*, (Cambridge University Press 2018),182 and 201.

⁷⁰ Thomas Schultz and others, ‘Electronic Communication Issues Related to Online Dispute Resolution System’, (2002) *Proceedings of Hewlett-Packard OpenView University Association Workshop* < <http://www2002.org/> > accessed 10 April 2019.

⁷¹ Colin Rule claims that there is no fool proof way to prevent parties from copying information off of their screen for later use. Even if the parties are prevented from cutting and pasting text, they can still take a screen capture of the text. In a face-to-face dispute resolution process, it is much harder to surreptitiously capture communications through the use of voice recording devices or similar techniques. See Rule, (n. 16) 80.

⁷² Wang, (n. 22) 46

example, the Secure Multipurpose Internet Mail Exchange Protocol (S/MIME) makes it possible to confirm the source of the email, and to secure the confidentiality and integrity of the information.⁷³ If S/MIME is accurately managed, the risk of successful repudiation by the sender during the process is very low, as S/MIME provides a receiver with sufficient evidence of the origin or content of information.⁷⁴ Lastly, in order to ensure confidentiality in the ODR systems, encryption also secures communications and exchange information.⁷⁵ The Hypertext Transfer Protocol (HTTP) is most commonly-used in ODR systems.⁷⁶ Secure Sockets Layer (SSL) - secured HTTP provides protection of confidentiality and keeps all electronic records safe. SSL is indicated by a domain name preceded by “https” and displaying a lock symbol in the corner of the user’s screen.

Policymakers should focus on providing confidentiality and protection of integrity of information in ODR systems, especially, when the system is managed by private entities for resolving consumer disputes. In this regard, in the EU, the Regulation requires that “the ODR platform should enable the secure interchange of data with ADR entities and respect the underlying principles of the European Interoperability Framework adopted pursuant to Decision 2004/387/EC of the European Parliament and of the Council of 21 April 2004 on the interoperable delivery of pan-European eGovernment services to public administrations, businesses and citizens (IDABC)”.⁷⁷

Likewise, the Regulation states that “the Commission shall take the appropriate technical and organisational measures to ensure the security of information processed under this Regulation, including appropriate data access control, a security plan and a security incident management, in accordance with Article 22 of Regulation (EC) No 45/2001.”⁷⁸

⁷³ Pretty Good Privacy (PGP) is another security enhancement which is a message-protection software which is popular within various niches of the Internet community and available from the Massachusetts Institute of Technology (MIT). See Schultz and others (n. 70).

⁷⁴ Schultz and others (n. 70).

⁷⁵ Encryption basically involves running a readable message known as ‘plaintext’ through a computer program that translates the message according to an equation or algorithm into unreadable ‘cyphertext.’ Decryption is the translation back to plaintext when the message is received by someone with an appropriate ‘key.’ See Orna Rabinovich-Einy, ‘Going Public: Diminishing Privacy in Dispute Resolution in The Internet Age’ (2002) 7(4) *Virginia Journal of Law and Technology*, 7

⁷⁶ See ‘HTTP - Hypertext Transfer Protocol’ (2017) <<https://www.w3.org/Protocols/>> accessed 12 April 2019.

⁷⁷ EU Regulation on Consumer ODR 2013, Recital (20)

⁷⁸ EU Regulation on Consumer ODR 2013 Article 13(2)

At the same time, efforts should focus on encouraging private entities to work in cooperation with governments in developing global ODR systems. For example, Modria has established ODR systems for a large number of disputes and uses comprehensive security features to protect users` identity and confidential information.⁷⁹

4.8 Enforcement

As pointed out above, ODR entities make proposal and recommendations for the building of effective and efficient ODR systems. The principle of enforceability has not been adequately mentioned by the majority of ODR entities, except for ODR services in particular areas, such as domain names disputes.⁸⁰ Some public ODR entities, such as the Civil Resolution Tribunal, may provide final and binding decisions that are enforceable.⁸¹ Enforceability of ODR decisions refers to the enforcement of awards of arbitration or mediation settlement agreements. It may be argued that ‘the enforcement in a court of mediation and negotiation differ from the enforcement of arbitral awards. Briefly stated, one can assume that the enforcement of the mediation and negotiation settlement agreement needs a court action, while the enforcement of the arbitral award can be carried out without a discussion of the merits of the award’.⁸² Regarding the enforceability of mediation settlement agreements, it should be noted that a settlement agreement is considered as a contract that cannot be enforced. Disputants may need a court action to enforce the settlement. In Turkey, if the parties reach an agreement and the mediator signs the settlement agreement, the parties may request an annotation on the enforceability of the agreement document from court.⁸³ If mediation has been resorted before filing the suit, annotation on the enforceability of the agreement may be requested from the court of peace where the suit is filed of duty. If the mediator is resorted during the case, the annotation on the enforceability will be requested from the court in which the case is heard.⁸⁴ The agreement containing this annotation shall be deemed as a writ.⁸⁵ In the EU, the EC Directive on Mediation states that “Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the

⁷⁹ See ‘Comprehensive Security Features’ (*Tyler Technologies*, 2017) <<https://www.tylertech.com/solutions-products/infinite-visions-product-suite/performance-features/security>> accessed 12 April 2019.

⁸⁰ Wang (n. 22) 37.

⁸¹ Canadian Civil Resolution Tribunal Rules (2017), <<https://civilresolutionbc.ca/wpcontent/uploads/2017/07/CRT-rules-effective-July-12-2017.pdf>> accessed 12 April 2019

⁸² Kaufmann-Kohler and Schultz (n. 55) 211.

⁸³ The Law on Mediation in Civil Disputes, Article 18

⁸⁴ *ibid*

⁸⁵ *ibid*

content of a written agreement resulting from mediation be made enforceable.”⁸⁶ “The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability”⁸⁷ It also specifies that the settlement agreement “may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument under the law of the Member State where the request is made.”⁸⁸

With regard to the enforceability of arbitral awards, there are legal and procedural challenges, which will be discussed in detail in the following section.

4.8.1 Arbitrability of Consumer Disputes

In the era of globalisation, many companies often put pre-dispute arbitration clauses in their contracts for resolving disputes usually confidentially and efficiently, especially in cross-border B2B and B2C contracts. On this point, it is difficult to claim that the resolution of disputes arising from B2C contracts in court would be more effective than arbitration. Also, there is no supporting evidence to confirm that consumers do better in court rather than in arbitration.⁸⁹ Generally speaking, it can be stated that for such types of international consumer disputes, arbitration is the only form of ADR that provides the contract with enforcement authority and provides due regard to basic legal obligations internationally. In terms of international enforcement of arbitration awards, the New York Convention has been adopted by 159 countries. This Convention usually imposes rigorous recognition of enforcement of both international arbitration agreements and arbitration awards, subject to limited grounds focused on procedural improprieties or lack of a valid arbitration agreement.⁹⁰ However, the Convention authorises nations to reject the recognition or enforcement of an award based on ‘non-arbitrability of the subject matter’ or where enforcement ‘would be contrary to public policy’.⁹¹ On this point, the UNCITRAL Model Law, (as amended in 2006) also stipulates that an arbitral award may be set aside by the competent court, as well as being refused recognition and enforcement, if “the court finds that (i) the subject-matter of the dispute is not capable of

⁸⁶ *ibid*

⁸⁷ EC Directive on Mediation 2008, Article 6(1)

⁸⁸ *ibid* Article 6(2)

⁸⁹ Sarah R. Cole and Kristen M. Blankley, ‘Empirical Research on Consumer Arbitration: What the Data Reveals’ (2009) 113 Penn State Law Review 1051, 1052-1053.

⁹⁰ Amy J. Schmitz, ‘American Exceptionalism in Consumer Arbitration’ (2012) 10 Loyola University Chicago International Law Review 81, 82.

⁹¹ The New York Convention Article V

settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.”⁹²

As a general rule, any dispute may be referred to arbitration. However, even though a dispute arises, this may not be adequate to be the subject of arbitration, because the dispute must be arbitrable.⁹³ For example, Article 2059 of the French Civil Code states that “all persons may enter into arbitration agreements concerning rights of which they have the free disposal”.⁹⁴ However, Article 2060 further provides the limitation that parties may not enter into arbitration agreements in all matters in which public policy is regarded (particularly in the fields relating to divorce and judicial separation).⁹⁵ Similarly, in Turkey, Article 408 of the Civil Code states that parties may not settle disputes concerning to “*rights in rem*” on immovable property placed in Turkey and matters that are not subject to the wills of the two parties.⁹⁶ This rule has been interpreted in a very restrictive way by Turkish courts.⁹⁷

The New York Convention, on the issue of arbitrability, provides that the dispute must not concern a subject matter which is ‘capable of settlement by arbitration’. The term ‘capable of settlement by arbitration’ is not meant as an adverse reflection on arbitrators or the arbitral process.⁹⁸ Arbitrators should be as capable’ as a judge for determining a dispute. However, national laws may identify particular disputes as more appropriate for determination by the courts rather than by a private dispute resolution system.⁹⁹

With regard to arbitrability, several concerns may still be arising in particular types of disputes, such as consumer disputes, especially in international consumer disputes where there can be variations in relation to the legal systems of the parties (including legal norms, rules and

⁹² UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) Article 34 (2)(a) (i), 34 (2)(b) (i and ii),

⁹³ It is necessary to note here that arbitrability differs from contractual validity of arbitration agreement. On this point, Article 2 of New York Convention states this distinction that a court seized of a dispute brought in breach of an arbitration agreement must refer the parties to arbitration unless it finds that the arbitration agreement was null, void, inoperative, or incapable of being performed. The validity of consumer arbitration is discussed more fully in further section.

⁹⁴ The French Civil Code Article 2059

⁹⁵ *ibid* Article 2060

⁹⁶ The Turkish Civil Code Article 408

⁹⁷ See decision of the Court of Cassation 15th Civil Chamber, dated 31 May 1979 (E. 1979/1195, K. 1979/1330)

⁹⁸ Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 19.

⁹⁹ Nigel Blackaby and others, *Redfern And Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 20.

requirements concerning the contractual autonomy rules and the protection of the vulnerable party). The question that may arise concerning the arbitrability of cross-border consumer disputes is upon which standards the arbitrability of consumer disputes should be decided so that a balance is found between contractual autonomy and the protection of the vulnerable party. In order to answer this question, a critical analysis is required on the application of the relevant rules regarding the arbitrability of consumer disputes and when such disputes should be arbitrable internationally.

In order to do this, it is necessary to recognise which disputes are ‘arbitrable’ and which are not. It is also essential to clarify the concept of ‘arbitrability’, as used in legal theory and in international conventions, such as the New York Convention and national laws, such as English law and American federal law.

4.8.1.1 The Concept of Arbitrability

Even though there is no widely recognised definition of arbitrability internationally and neither do the domestic laws nor the specific protecting statutes discuss arbitrability for different types of commercial disputes, the concept of the arbitrability has been discussed for some time in the academic literature.¹⁰⁰

Brekoulakis focuses on the contractual and jurisdictional concepts of arbitration for determining the issue of arbitrability and argues that “arbitrability is a specific condition pertaining to the jurisdictional aspect of arbitration agreement and, therefore, it goes beyond the discussion on validity. Thus, arbitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (contractual requirement).”¹⁰¹

¹⁰⁰ Charalambos Pamboukis, ‘On Arbitrability: The Arbitrator AS A Problem Solver’, in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009),121; Laurance Shore, ‘The United States Perspective on Arbitrability’, in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009),69; Domenico Di Pietro, ‘General Remarks On Arbitrability Under The New York Convention’, in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009), 85

¹⁰¹ Stavros L. Brekoulakis, ‘On Arbitrability: Persisting Misconceptions and New Areas of Concern’ in Mistelis and Brekoulakis (n. 100) 39.

Youssef highlights that the notion of arbitrability concerns where the parties can settle their disputes that “an objective notion, arbitrability is also the fundamental expression of freedom to arbitrate. It defines the scope of the parties` power of reference or the boundaries of the right to go to arbitration in the first place.”¹⁰² Finally, Carbonneau notes that “arbitrability establishes the respective domains of law and arbitral adjudication. It is the essential dividing line between public and private justice.”¹⁰³

In the context of national laws, different jurisdictions have different approaches towards to meaning of arbitrability. In the UK, for example, certain types of disputes may be reserved to the particular domain of the courts, because of public policy or the public interest.¹⁰⁴ On the other hand, the U.S concept of arbitrability is broader and refers to whether particular categories of disputes are excluded from arbitration due to their subject matter. There is also a jurisdictional tension between arbitrators and the courts concerning who should decide on issues such as the validity of an agreement.¹⁰⁵

It is worth noting here that the above definitions and perspectives concerning the meaning of arbitrability may create confusion. In order to make the issue of arbitrability clear, this research addresses the issue of arbitrability in a wider sense that all critical factors are taken into consideration. Unsurprisingly, it is not easy to create a general concept of arbitrability to apply to all law jurisdictions, but determining arbitrability assists to guide the examination of what arbitrability forms are related to national and particularly international consumer disputes and the various standards that are implemented in defining the arbitrability of such disputes. Additionally, it is essential to distinguish between subjective and objective arbitrability, the various aspects of national law and the territories of the legal necessity of consumer to clarify non-arbitrability.

4.8.1.2 Positive and Negative Aspects of the Notion of Arbitrability

As it was mentioned in the previous section, an international arbitration agreement and award can be efficiently enforced in any of national legal systems which are signatory states. The

¹⁰² Karim Youssef, ‘The Death of Inarbitrability’, in Mistelis and Brekoulakis (n. 100) 49.

¹⁰³ Thomas E. Carbonneau, ‘Liberal Rules of Arbitrability and The Autonomy of Labor arbitration in the United States’ in Mistelis and Brekoulakis (n. 100) 143.

¹⁰⁴ Julia Hörnle, ‘Legal Controls on the Use of Arbitration Clause in B2C e-Commerce Contracts’ (2008) Masaryk University Journal of Law and Technology, 23, 27.

¹⁰⁵ Laurance Shore, ‘The United States Perspective on Arbitrability’, in Mistelis and Brekoulakis (n. 100), 82

national laws and conventions allow parties in particular types of disputes to go to an arbitral tribunal to settle their disputes and prohibit resorting to arbitration for other disputes. This is predicated on political, economic, legal, cultural and social factors depending on the states or regions. These criteria may differ from one state to another and ‘be contingent upon the judgment of the respective community at a particular time.’¹⁰⁶ The clarification of these standards is usually made by reference to national law.¹⁰⁷ On this point, arbitrability is related with whether a dispute is suitable to be resolved by arbitration. Legal and cultural differences may create a number of issues regarding the determination of which disputes should be settled by the courts rather than through arbitration. Therefore, the determination of arbitrability plays a vital role in resolving disputes internationally. It is important to note here that, if a dispute is arbitrable in a country, it must be taken consideration that that dispute must also be arbitrable not only according to the law of *lex arbitri*, but that it also corresponds to the governing laws of the contract and those states where an arbitration award is enforced.¹⁰⁸

Consumer disputes are usually arbitrable. For example, in the English Arbitration Act 1996, even though it is not explicitly stated that consumer disputes are arbitrable, the Act points out that an arbitration agreement is binding on a consumer if the value of the claim is more than GBP 5,000.¹⁰⁹ Hence, it is discussed by Hanotiau that arbitrability is admittedly a state of validity of an arbitration agreement and the arbitrators' jurisdiction.¹¹⁰ In the meantime, it is also discussed by some scholars that “arbitrability is one of the issues of international arbitration where contractual and jurisdictional natures collide.”¹¹¹ Carbonneau and Janson state that “arbitrability determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins.”¹¹² The present Thesis asserts that arbitrability differs from the validity of an arbitration agreement: while the validity of the arbitration

¹⁰⁶ Douglas Jones, ‘Arbitration and Party Autonomy: How free is the Choice to Arbitrate?’ in Geoffrey M. Beresford Hartwell (ed), *The Commercial Way to Justice* (Kluwer 1997), 121, 149 (as cited in Karim Youssef (n. 100) 47-48)

¹⁰⁷ Ilias Bantekas, ‘The Foundations of Arbitrability in International Commercial Arbitration’ (2008) 27 *Australian Year Book of International Law*, 193.

¹⁰⁸ *ibid.*

¹⁰⁹ See Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167); in contrast, in Turkey domestic law does not allow consumers to settle their disputes by arbitration, see decision of the Court of Cassation 13th Civil Chamber, dated 20 Oct 2008 (E. 2008/6195 K. 2008/12026)

¹¹⁰ Bernard Hanotiau, ‘What Law Governs the Issue of Arbitrability?’ (1996) 12(4) *Arbitration International* 391

¹¹¹ Loukas A. Mistelis, ‘Arbitrability-International and Comparative Perspective: Is Arbitrability a National or an International Law Issue?’ in Mistelis and Brekoulakis (n. 100) 3.

¹¹² Thomas E. Carbonneau and Francois Janson, ‘Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability’ (1993) 2 *Tulane J. of Int'l & Comp. Law* 193, 194

agreement is a problem of either national or international procedural rules, arbitrability is a jurisdictional problem.¹¹³

Additionally, the main reason to support this view is that arbitrability has various characteristic functions, which may affect any stage of the arbitration procedure. In other words, there is a negative and a positive effect of arbitrability. The positive effect is expressed by Pamboukis in that it confers jurisdictional power to an arbitral tribunal.¹¹⁴ It is essential to mention here that this jurisdictional power should have a universal effect and be observed by the national courts of all states. On the other hand, the negative effect is connected with the admissibility of the arbitration agreement by other legal orders.¹¹⁵ The latter effect requires the state courts to recognise and provide protection to the jurisdictional power of an arbitral tribunal. In contrast to the positive one, the negative function does not confer jurisdictional power, it recognises it.¹¹⁶

In essence, it is clearly seen that arbitrability plays an important role in determining either to enable or restrict the power of both an arbitral tribunal and the disputants as to what subject matter can be arbitrated. On this point, Redfern and Hunter state that “whether or not a dispute is arbitrable under a law is a matter of public policy for that law to determine.”¹¹⁷ Inherently, the determination of the limitations may arise from a national law which aims to protect its own general legal, social, cultural and economic interests. The limitations can concern the capacity of the disputants to go to arbitration; this is called subjective arbitrability or arbitrability *rationae personae*, or can concern the subject matter of the dispute which is capable to be resolved through arbitration; it is called objective arbitrability or *rationae materiae* which are examined in detailed in below.

¹¹³ It is further discussed in the following sections.

¹¹⁴ Pamboukis (n. 100)122

¹¹⁵ *ibid*

¹¹⁶ In the case of *Fulham Football Club (1987) Limited v Sir David Richards*, the Court of First Instance considered that unfair prejudice dispute stayed in favour of arbitration. The court of appeal stated that “there is no express provision in either the Arbitration Act 1996 or the Companies Act 2006, which excludes arbitration as a possible means of determining disputes of this kind. The determination of whether there had been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour was plainly capable of being decided by an arbitrator, and a tribunal established under F’s or the FA Rules would have power to grant the relief sought by X; the arbitrator would not therefore be asked to grant relief of a kind within the court’s exclusive jurisdiction. See *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855

¹¹⁷ Blackaby and others (n. 99)

4.8.1.3 Subjective Arbitrability of Consumer Disputes

In general, subjective arbitration concerns the capacity of states and public entities to submit disputes to arbitration.¹¹⁸ In other words, it involves determining who can or cannot go to arbitration by reason of their capacity. In some legal systems, public entities are not authorised to resolve disputes by arbitration.¹¹⁹ For example, Article 2060 of the French Civil Code states that disputes concerning public bodies and institutions may not be referred to arbitration.¹²⁰

In regard to consumer disputes, because of characteristics of consumers, the legal capacity of consumers, which means the capability and power under law of a consumer to occupy a particular status or relationship with another or to engage in a particular undertaking or transaction,¹²¹ to submit disputes to arbitration may be a point of dispute. In order to analyse the legal capacity of the consumer, it is important to recognise the scope of consumer protection and the approach of determining the legal capacity of the consumer to enter into arbitration agreement.

Regarding international arbitration, the issue of the legal capacity of consumer plays a pivotal role as it may cause refusal the enforcement of an arbitral award. As mentioned earlier, Article V (1) of the New York Convention allows nations to refuse the recognition and enforcement of an arbitral award where the parties are ‘under some incapacity’.¹²² Likewise, Article 34 of the Model Law states that an arbitral award may set aside in the case of a party is under capacity.¹²³

With respect to consumer disputes, due to the unique features of consumers in particular in international e-commerce, the term of ‘legal capacity’ may be controversial. While at

¹¹⁸ Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), 313

¹¹⁹ With regard to the capacity of states and states-owned entities, the Article 2 of The European Convention on International Commercial Arbitration of 1961 states that “legal persons of public law” have the right to conclude valid arbitration agreements. Some commentators claim that a state’s right to involve in an arbitration agreement is an issue of capacity to be analysed by reference to its personal law. See Gaillard and Savage,(n. 118), 316.

¹²⁰ The French Civil Code Article 2060

¹²¹ See Dictionary by Merriam-Webster, <<https://www.merriam-webster.com/dictionary/legal%20capacity>> accessed 25 October 2019

¹²² The New York Convention 1958, Article V

¹²³ Model Law on International Commercial Arbitration, Article 34

domestic level, it is possible to provide fundamental standards of rights on a legal relationship between the parties to a contract for providing special protection under subjective arbitrability regarding the arbitration agreement, it is not easy to impose such standards on international consumer disputes. In fact, the level of parties' protection based on how a natural or legal person is recognised as a consumer, and how subjective arbitrability of the consumer determines which consumer can or cannot go to arbitration. Whilst most legal systems define the concept of a consumer and consumer contract, because of the different national approaches, there is no widely accepted definition of a consumer and consumer contract internationally that would allow us to draw a clear line between B2B and B2C contracts.¹²⁴ Accordingly, some definitions of the consumer refer to a natural person acting outside a business¹²⁵, while other definitions mention legal persons as a consumer.¹²⁶

In the EU consumer acquis, the notion of consumer refers to a natural person as emphasized by the Court of Justice of the European Union (CJEU). In the case of *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v. OMAI Sri*, the Court held that Article 2 of the UTCCD is to be interpreted as meaning that the term 'consumer' covers only a natural person.¹²⁷ This definition was supported in case of *Patrice Di Pinto* that the CJEU interpreted the term consumer in a narrow sense as "a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by the directive."¹²⁸ The Court decided that consumer refers only to natural persons that have protection as a consumer under the directive.¹²⁹

¹²⁴ Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 2.

¹²⁵ While some Member States, such as Austria and Belgium, follow this terminology that the act must be outside of his business, several other Member States, such as Finland, Sweden and Denmark, stated that it should be looked at the principal purpose of use. See Margus Kingisepp and Age Värvi, 'The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive — a Significant Change of Paradigm?' (2011) 18 *Juridica International* 44, 46.

¹²⁶ In some Member States, such as in Belgium and Spain, it is defined as a legal person. See Hans-W. Micklitz, Jules Stuyck, and Evelyn Terryn, *Ius Commune Casebooks for a Common Law of Europe: Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 29.

¹²⁷ Joined Cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v. OMAI Sri*, ECR [2001] I-09049

¹²⁸ Case C-361/89, *Patrice Di Pinto v. France* [1991] I-01189, 19; See also Reiner Schulze, Hans Schulte-Nolke and Jackie Jones, *A Casebook on European Consumer Law* (Hart Publishing 2002), 131-132.

¹²⁹ In a recent case named *Costea v SC Volksbank România SA*, the CJEU held that a natural person who practised a commercial lawyer in a firm entered into a bank agreement that was not related to his profession, may be regarded as a consumer. See Case C-110/14 *Horățiu Ovidiu Costea v. SC Volksbank România SA*, [2015] EU:C:2015

The narrow definition of consumer under EU law and the CJEU shows that there are two main criteria to be fulfilled; first, the consumer must be a natural person, and, secondly, the act must be outside their professional activities. When these criteria are met, the objective notion of consumer is taken into consideration. In this respect, the CJEU does not accept the subjective notion of consumers and does not aim to protect the really weak party in contracts. The CJEU stated in the case of *Francesco Benincasa v Dentalkit* that "...in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned."¹³⁰ Therefore, if inequality arises between parties, then special protecting rules would not be applied the vulnerable party predicated on the subjective reasons, but preferably the particular protecting rules would apply only the natural person who is a consumer in the contract.

It is essential to emphasise here that the narrow definition of the consumer may cause some problems particularly in international consumer transactions. The reason behind this is that in each national law consumers are given a different level of protection that affects the determination of their capacity. It is also difficult to determine the consumers' capacity based on objective reasons in online transactions. For example, if a natural person purchases goods or services online, how the purpose of the contract will be determined whether they are bought for personal use or professional activities. Thus, an objective approach is not enough to determine the legal capacity of consumers. For that reason, national courts should take the nature and purpose of the contract and other related circumstances into consideration.

Under the law of England and Wales, before the Consumer Act 2015 came into effect, the definition of the consumer in UTCCR was as wide as under EU law.¹³¹ It provided that consumer must be a natural person.¹³² On the other hand, the Unfair Contract Terms Act 1977(UCTA) stated that a party of a contract may deal as a consumer if "a) he neither

¹³⁰ Case C-269/95, *Francesco Benincasa v. DentalkitSrl*, [1997] ECR, I-3767, para 16

¹³¹"Consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession. See The Unfair Terms in Consumer Contracts Regulations 1999, Article 2

¹³² However, Section 90 of the Arbitration Act 1996 extends the definition of consumers to include legal person. The Part applies where the consumer is a legal person as it applies where the consumer is an individual. See Arbitration Act 1996, Section 90.

makes the contract in the course of a business nor holds himself out as doing so, and (b) the seller does make the contract in the course of a business.”¹³³ Furthermore, Section 12(1) (c) UCTA states that the goods must be of a type ordinarily supplied for private use or consumption.¹³⁴

In the light of these sections, a legal person (it might be a company) could be protected as a consumer.¹³⁵ In *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd*¹³⁶, the plaintiff *R & B Customs Brokers* was a small company that purchased a car for private and business use. The essential question in this case was whether the claimant purchased that car ‘in the course of a business’. The Court of Appeal held that buying a car was not integral to the plaintiff company’s business as a freight forwarding agent.¹³⁷ Therefore, the company was found to be dealing as a consumer. This decision may be criticised as, with regard to UTCCR, a legal person cannot be a consumer. With the interpretation of dealing as a consumer, more protection may be given to the companies.

The Consumer Rights Act 2015 has replaced both UCTA and UTCCR in relation to B2C contracts. In the Consumer Rights Act 2015, the notion of consumer is construed in a wider sense as “an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.”¹³⁸ This definition is different from the definitions stated in former UK and EU law that it may apply to individuals’ contracts for a combination of business and personal purposes. It is worth noting here that this definition was derived from the description of ‘dealing as a consumer’ under section 12 UCTA 1977.¹³⁹ This means, for instance, that if a person purchases a microwave for his or her home and works from home two days a week and uses it during the days that is working from home, he or she would be still the consumer. In contrast, if he or she uses it mainly for the purpose of his business, in other words four days a week, he would not be seen as a consumer.¹⁴⁰

¹³³ UCTA 1977 Section 12

¹³⁴ *ibid*

¹³⁵ Neil Andrews, *Contract Law* (Cambridge University Press 2011), 438.

¹³⁶ *R&B Customs Brokers Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321

¹³⁷ Jill Poole, *Textbook Oo Contract Law* (12th edn, Oxford University Press 2014), 253.

¹³⁸ Consumer Protection Act 2015, Article 2(2)

¹³⁹ It also seems that this meaning extends beyond transactions which are an integral or regular part of the trader’s activities. See Janet O’Sullivan and Jonathan Hilliard, *The Law of Contract* (7th edn, 2016) 203.

¹⁴⁰ Eric Baskind, Greg Osborne and Lee Roach, *Commercial Law* (2nd edn, Oxford University Press 2016), 222

4.8.1.4 Objective Arbitrability of Consumer Disputes

As opposed to subjective arbitrability, objective arbitrability involves determining what type of disputes can or cannot be resolved by arbitration and it is outside the will of the parties. As described above, both the New York Convention and the Model Law state that some disputes may not be settled by arbitration because of the subject matter in the disputes not being ‘capable of settlement by arbitration’.¹⁴¹ The parties cannot agree to submit to arbitration disputes that are non-arbitrable. Thus, the parties’ consent does not play any role in determining arbitrability.¹⁴²

Although party autonomy supports the right of parties to go to arbitration for any disputes, domestic laws usually provide limitations or restrictions on what type of disputes can or cannot be settled by arbitration.¹⁴³ In general, legislation or judicial decisions state that certain disputes should be resolved by the state court and not arbitration.¹⁴⁴ While non-arbitrable disputes may differ under national laws, non-arbitrable disputes involve sensitive public policy issues.¹⁴⁵ According to Emmanuel, for examining the arbitrability of a dispute, a court must use its conception of public policy.¹⁴⁶ Several jurisdictions do not allow arbitrating of certain issues concerning criminal law, securities law, intellectual property and those which affect the status of an individual or a corporate entity.¹⁴⁷

With regard to consumer disputes, different jurisdictions have different perspectives towards the arbitrability of consumer claims. U.S law, for example, recognises the arbitrability of both existing and future consumer disputes. Under the Federal Arbitration Act 1925 (FAA), there are only two criteria for referring a dispute to arbitration: a dispute has to arise from commercial transactions and the agreement has to be in writing.¹⁴⁸ The

¹⁴¹ Christoph Liebscher, ‘Insolvency and Arbitrability’ in Mistelis and Brekoulakis (n. 96) 167; It is essential to mention here that both the dispute and the matter capable of settlement are component parts of an arbitration agreement, but they are different from the question of validity of an arbitration agreement. See Pilar Perales Viscasillas, ‘Arbitrability of (Intra-) Corporate Dispute’ in Mistelis and Brekoulakis (n. 100) 274.

¹⁴² Andrea M. Steingruber, *Consent in International Arbitration* (Oxford University Press 2012), 43

¹⁴³ Mistelis (n. 100) 4.

¹⁴⁴ *ibid*

¹⁴⁵ Gary B. Born, *International Commercial Arbitration: Law and Practice* (2nd edn, Wolters Kluwer 2016), 87

¹⁴⁶ Gaillard and Savage, (n. 118), 330

¹⁴⁷ Redfern and others, (n. 98), 165

¹⁴⁸ FAA 1925 Section 2 states: ‘A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable,

U.S Supreme Court broadly construes the commerce power, subjecting arbitration clauses to the FAA not only in B2B contracts but also in B2C contracts.¹⁴⁹ The FAA governs many consumer arbitration agreements.¹⁵⁰ Section 2 of the FAA states: ‘a written provision in any maritime transaction or a contract evidencing a transaction involving commerce...’.¹⁵¹ As in *Green Tree Financial Corp.-Ala. v. Randolph*¹⁵² and *Allied Bruce Terminix Companies v. Dobson*¹⁵³, the U.S. Supreme Court broadly interpreted the arbitrability of consumer disputes. If the FAA does not apply, state arbitration law governs.¹⁵⁴ Even when the general rule of enforceability applies (under either the FAA or state arbitration laws), there remain two grounds on which courts may reject or bring limitation on the enforceability of pre-dispute consumer arbitration agreements.¹⁵⁵ First, for federal statutory claims, even if the dispute is one that generally is subject to arbitration, a court may allow the dispute to be brought to court if the procedures in arbitration “preclude [the] litigant... from effectively vindicating her federal statutory rights in the arbitral forum.”¹⁵⁶ For example, if the cost of resolution of disputes through arbitration is not cost-effective or if the arbitration agreement attempts to waive a legal remedy which cannot waive, the enforcement of arbitration agreement may be refused by courts.¹⁵⁷ Second ground is that “parties can raise general contract law defences to defeat the enforceability of agreements to arbitrate”.¹⁵⁸ Both ground show that there is no certain

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ It is worthy noted here that even though the section does not mention about consumer disputes, the word ‘involving commerce’ as wider sense, should be interpreted as ‘affecting commerce’, which also includes B2C transactions. In *Allied Bruce Terminix Companies v. Dobson* case, the court interpreted the section as including to transactions between consumers and traders. See *Allied Bruce Terminix Companies v. Dobson*, 513 US 265 (1995)

¹⁴⁹ See Christopher R. Drahozal , Raymond J. Friel, Consumer Arbitration in the European Union and the United States, (2002) 28(2) North Carolina Journal Of International Law And Commercial Regulation 357, 375 ; James R II Bucilla, 'The Online Crossroads Of Website Terms Of Service Agreements And Consumer Protection: An Empirical Study Of Arbitration Clauses In The Terms Of Service Agreements For The Top 100 Websites Viewed In The United States' (2014) 15 Wake Forest J Bus & Intell Prop L 101, 127

¹⁵⁰ Christopher R. Drahozal , Raymond J. Friel, Consumer Arbitration in the European Union and the United States, (2002) 28(2) North Carolina Journal Of International Law And Commercial Regulation 357, 375

¹⁵¹ FAA 1925 Section 2

¹⁵² *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000)

¹⁵³ *Allied Bruce Terminix Companies, Inc., and Terminix International Company, Petitioners v. G. Michael Dobson et al*, 513 US 265 (1995)

¹⁵⁴ *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956); See Christopher R. Drahozal , Raymond J. Friel, Consumer Arbitration in the European Union and the United States, (2002) 28(2) North Carolina Journal Of International Law And Commercial Regulation 357, 375

¹⁵⁵ *ibid*

¹⁵⁶ *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) cited from *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956); See Christopher R. Drahozal , Raymond J. Friel, Consumer Arbitration in the European Union and the United States, (2002) 28(2) North Carolina Journal Of International Law And Commercial Regulation 357, 375

¹⁵⁷ *ibid*

¹⁵⁸ Christopher R. Drahozal , Raymond J. Friel, Consumer Arbitration in the European Union and the United States, (2002) 28(2) North Carolina Journal Of International Law And Commercial Regulation 357, 375

rule that makes pre-dispute consumer arbitration agreement enforceable. Instead, the fairness of consumer arbitration agreements is examined on a case-by-case basis.¹⁵⁹

On the other hand, other legal systems prohibit or regulate that either existing or future consumer disputes cannot be arbitrated.¹⁶⁰ Under the EU's Unfair Terms in Consumer Contracts Directive, a clause in a consumer contract is invalid if it "requires the consumer to take disputes exclusively to arbitration not covered by legal provisions."¹⁶¹ The CJEU stated in the case of *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, the national courts of the Member States must require an investigation on the fairness of the arbitration clause.¹⁶²

The criteria used when determining the arbitrability of consumer disputes may differ from one Member State to another. It is noticed that "the Member States converge and diverge on the reception of consumer arbitration for reasons that are not based on contractual fairness alone, but which find themselves in the very essence of public policy."¹⁶³

In France, an arbitration clause in consumer contracts is invalid and cannot be enforced against consumers. The justification is that arbitration clauses in consumer contracts may create a detriment to consumers, as it creates inequality between the rights and obligations of the disputants.¹⁶⁴ Article L132-1 of the Consumer Code points out that "[i]n contracts concluded between a business and a non-business or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair."¹⁶⁵

Surprisingly, the approach of French law towards international consumer disputes differs from national disputes. The French Cour de Cassation in *Renault v. Societe V 2000*¹⁶⁶

¹⁵⁹ *ibid*

¹⁶⁰ Legislation in Ontario, New Zealand and Japan provides for unenforceability of arbitration agreements in consumer contracts. See Born, (n. 145), 89.

¹⁶¹ EU Council Directive 93/13/EEC, O.J.L 95/30, 21/04/1993, Annex 1(q)

¹⁶² Case C-168/05 *Mostaza Claro v Centro Móvil Milenium SL* [2006] E.C.R. I-1042, para. 25

¹⁶³ Youseph Farah and Leonardo V.P. De Oliveira, 'Releasing the Potential For A Value-Based Consumer Arbitration Under The Consumer ADR Directive' (2016) 24 *European Review of Private Law* 117, 123

¹⁶⁴ *ibid* 124.

¹⁶⁵ France Consumer Code Article L132-1, The Commission de clauses abusives (Commission of abusive clauses) determines that what types of clauses are abusive, see France Consumer Code Article L132-2

¹⁶⁶ 4 *Revue de L'Arbitrage* 1997, p 537, Cour de Cassation, 21 May 1997.

stated that an arbitration clause may be valid in cross-border B2C contract because of its independence in international law that the arbitration clause was not considered to be contrary to international public policy.¹⁶⁷

In England and Wales, the Arbitration Act 1996 does not include any provisions about the arbitrability of disputes. According to Rubino-Sammartano, even though the Act does not provide a general rule on what types of dispute can or cannot be arbitrable, this can be decided on a case-by-case basis.¹⁶⁸ On the other hand, the Act stipulates that the parties can freely agree to have their disputes resolved by arbitration, subject only to such safeguards that are necessary for the public interest¹⁶⁹ and either an existing or future contractual or non-contractual dispute can be arbitrable.¹⁷⁰ In other words, with regard to consumer disputes, the arbitrability of consumer disputes is permitted unless disputes are subject to public interest considerations.

Section 91(1) states that an arbitration clause in a consumer contract is unfair, where a modest amount sought, as has been regulated in the Unfair Arbitration Agreements (Specified Amount) Order 1999 is £5,000.¹⁷¹ Therefore, if the value of a consumer contract is less than £5,000, an arbitration agreement in that contract will be unfair and hence unenforceable. The potential problem concerning the threshold for the modest amount is that the parties to a consumer contract may not be aware whether the arbitration clause is valid until a dispute arises.

Regarding international consumer disputes, determining the arbitrability or inarbitrability of cross-border consumer disputes is still questionable. Under EU law, regarding arbitrability of cross border consumer claims, the Rome I Regulation and the Rome Convention deal with this issue. The Article 5(2) of the Rome Convention 1980 states: “if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract”¹⁷²

¹⁶⁷ Farah and Oliveira (n. 163) 123.

¹⁶⁸ Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3th edn, Juris Publishing 2014), 154

¹⁶⁹ UK Arbitration Act 1996, section 1(b)

¹⁷⁰ *ibid*, section 6(1)

¹⁷¹ *ibid*, section 91(1)

¹⁷² The Rome Convention 1980 Article 5(2)

Nevertheless, Articles 6(1)(a),(b) of the Rome I Regulation provides that“(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country,”¹⁷³

As can be seen from the above articles, while the Rome Convention provides protection which targets consumers, the Rome I Regulation applies the protection to the country where the consumer habitually resides.

For non-EU countries, the New York Convention provides that any arbitration clause in a contract or an arbitration agreement in writing shall be enforced by the court of a contracting state.¹⁷⁴ Unfortunately, in cross-border consumer disputes, the rules and legal norms concerning arbitrability or inarbitrability of those disputes, are not clear enough and remain uncertain.

4.8.1.2 The Validity of Consumer Arbitration Clauses

Arbitrability is usually held to be a necessity for the validity of the arbitration agreement. Indeed, the conventional belief is that inarbitrability of the subject matter of an arbitration agreement renders the arbitration agreement null and void.

Arbitration is usually used to resolve disputes arising from B2B contracts. However, it has been increasingly used to resolve disputes arising from the B2C transactions. In typical B2C contracts, in particular e-commerce contracts, standard terms that may include an arbitration clause are often formulated by businesses and are not negotiable. In fact, consumers do not have the bargain power to change the content of the contract and they have to operate on a ‘take it or leave it’ basis.

According to the doctrine of separability, arbitration clauses in most cases remain the nullity or the termination of the contract. Hence an arbitration agreement in a contract is to be approached as a different agreement. In other words, the invalidity of the arbitration agreement in a contract will not have an impact on the validity of the main contract. The

¹⁷³ The Rome I Regulation, Article, 6

¹⁷⁴ The New York Convention 1958, Articles I and II

main contract will not be void, voidable or unenforceable because of any invalidity of the arbitration agreement.¹⁷⁵ In *Mason on Premium Nafta Products Limited v. Fili Shipping Company Limited*, the House of Lord emphasised the separability of arbitration clauses from the main contract that are aimed to arbitrate disputes as provided by the underlying contract, including disputes as to whether the main contract itself is valid or invalid.¹⁷⁶ Generally speaking, the validity or invalidity of arbitration clauses is determined by the arbitrator under the kompetenz- kompetenz principle¹⁷⁷, by which the arbitrator is authorised to conclude whether the clause is valid or not and therefore has the ability to determine how to resolve the contractual dispute. Nevertheless, there are both national and international laws that limit the validity of arbitration clauses in consumer contracts.¹⁷⁸ The main reason behind this is that, as seen in *Mostaza Claro v Centro Movil*¹⁷⁹, consumers do not read the T&Cs and consumers are not aware that there is an arbitration agreement in the contract. Even when consumers read such clauses, they may not fully appreciate their significance in the event that they have to rely on their national courts to enforce the contract. In 2014, an empirical study reported that less than half of the respondents recognised that the sample contract included an arbitration clause, and surprisingly less than 9% realised that the meaning of the arbitration clause was to bar consumers from bringing a claim in court.¹⁸⁰

Therefore, it is essential to make a distinction between pre-dispute and post-dispute arbitration agreements before examining the legal status of consumer arbitration under EU and international law.

¹⁷⁵ See UNCITRAL Model Law on International Commercial Arbitration 1985 and its adoption, Article 16(1); Arbitration Act 1996 Section 7;

¹⁷⁶ *Premium Nafta Products Ltd v Fili Shipping Co. Ltd* [2007] UKHL 40

¹⁷⁷ The kompetenz- kompetenz principle refers to allow an arbitral tribunal to decide its own jurisdiction to arbitrate over a dispute. See Blackaby (n. 100)

¹⁷⁸ See UNCITRAL Model Law (n. 161) Article 16(1); See also Arbitration Act 1996 Section 7

¹⁷⁹ Case C-168/05 *Mostaza Claro v Centro Movil* [2007] 1 CMLR 22 (ECJ) para 25

¹⁸⁰ Jeff Sovern, Elayne E Greenberg, Paul F Kirgis. And Yuxiang Liu, “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements’ (2014), St. John’s Legal Studies Research Paper 3

4.8.1.2.1 Legal Framework Governing Pre-Dispute and Post-Dispute Consumer Arbitration Agreements

Different jurisdictions have taken different approaches towards the validity of arbitration agreements in B2C contracts. Most national regimes have set forth a special system for consumer to protect the weaker parties of contracts.

In the EU, while each Member State's law differs, EU law mainly takes into consideration the interests signified by the CJEU as to the conscious choice of consumers to enter into an arbitration agreement and hence sets some special provisions in this regard. In relation to pre-disputes agreement in consumer contracts, there are three approaches usually followed by the Member States: the first one is not to allow consumers to enter into arbitration agreements at all. Under this approach, consumers cannot go to arbitration before or after a dispute arises. If a consumer enters into an arbitration agreement, the arbitration clause will be null and void. In France, for example, Article 2061 of the French Civil Code states that 'an arbitration clause is valid in the contracts concluded by reason of a professional activity'.¹⁸¹ This provision excludes all contracts between businesses and consumers.¹⁸² Secondly, in some Member States, such as Sweden, Austria, Lithuania, Denmark, Finland, Slovenia and Ireland, even though consumers are prevented from making an arbitration agreement before the dispute arises, it is possible to enter into an arbitration agreement once a dispute arises. Lastly, in other Member States, consumers are free to make an arbitration agreement before the dispute arises, but the arbitration clause has to be individually negotiated. In Czech Republic, for instance, an arbitration clause is valid if a consumer is fully informed about the legal consequences of consenting to arbitration.¹⁸³ This approach was derived from Article 3 of the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts that stipulates: "A contractual term, which has not been individually negotiated, shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."¹⁸⁴

¹⁸¹ French Civil Code Article 2061

¹⁸² Some scholars argued that provision that this provision concerning arbitration agreements was negotiated before the new law came into force. See Alexander J Bělohlávek, *B2C Arbitration Consumer Protection in Arbitration* (Juris Net 2012), 292.

¹⁸³ *ibid*, 179

¹⁸⁴ The Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, Article 3

This approach has been confirmed in the case of *Elisa María Mostaza Claro v Centro Móvil Milenium SL*¹⁸⁵ where reference was made to the case of *Océano Grupo Editorial v Roció Murciano Quintero*¹⁸⁶. More specifically, the Court held that “the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.”¹⁸⁷

Regarding the law in England and Wales, an arbitration clause in consumer contract is considered to be unfair, if the claim does not exceed £5,000.¹⁸⁸ Therefore, if the amount of the claim is less than £5,000, pre-dispute arbitration clauses are automatically not binding applying the Unfair Contract Terms Directive. If the amount of the claim exceeds the abovementioned amount of money, the test in the Consumer Rights Act 2015 determines whether the clause is unfair or not.¹⁸⁹ Before the implementation of the Act, the test was determined by the Unfair Terms in Consumer Contracts Regulation that Schedule 2(1) of the Regulation includes a list of examples of unfair terms for guidance as to the fairness test.¹⁹⁰ The test may differ to determine whether the clause is binding on the consumer.¹⁹¹ For example, English courts in cases, such as *Allen Wilson v Buckingham*¹⁹² and *Westminster Building Company v Beckingham*¹⁹³, have held that an arbitration clause is fair when the consumer has been professionally counselled. Currently, arbitration clauses in B2C contract regarding claims over £5,000 may be regarded as unfair under the Consumer Rights Act 2015.¹⁹⁴

By contrast, in the U.S, arbitration clauses in written consumer contracts are usually enforceable. The Federal Arbitration Act states that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for

¹⁸⁵ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (2006) n

¹⁸⁶ Case C- 240 *Océano Grupo Editorial SA v Roció Murciano Quintero* (1998)

¹⁸⁷ *ibid*,

¹⁸⁸ UK Arbitration Act 1996, section 91(1)

¹⁸⁹ The UK Consumer Rights Act 2015

¹⁹⁰ The Unfair Terms in Consumer Contracts Regulations 1999, Article 5. Section 5(5), schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

¹⁹¹ Pablo Cortés, *The Consumer Arbitration Conundrum: A Matter of Statutory Interpretation or Time for Reform?* in Pablo Cortés (n. 34) 69.

¹⁹² *Allen Wilson v Buckingham* [2005] EWHC 1165 (TCC), para 43.

¹⁹³ *Westminster Building Company v Beckingham* [2004] BLR 508 (QB) para 45

¹⁹⁴ Paragraph 20 of Schedule 2 and s.63 (a) of the Consumer Rights Act 2015 states “... excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions”.

the revocation of any contract.”¹⁹⁵ As mentioned above, the FAA does not provide any special rules applicable to consumer disputes, however U.S courts have interpreted the absence of any special rules applicable to consumer disputes as a recognition that the FAA refers to consumer disputes.¹⁹⁶

Arbitration clauses are extensively used in B2C contact in the U.S. Recently the American Arbitration Association, which resolves a great number of consumer disputes, applied the Consumer Arbitration Rules that applying to arbitration clauses in B2C contracts where the business has a standardised, systematic application of arbitration clauses with customers and where the T&C of the purchase of standardised, consumable goods or services are not negotiable or essentially non-negotiable in most or all of its T&C or choices.¹⁹⁷

Even though the general rule is that arbitration clauses are valid in consumer contracts in the U.S, there are two limitations on their validity. First, the U.S courts have held that an arbitration clause may be invalid in a particular case if the cost of the arbitration is unreasonably high and hence discourages the consumers from exercising their rights.¹⁹⁸ In other words, if the cost of the proceedings is too high or the arbitration agreement ends up forcing the consumers to waive their remedy rights, the courts may refuse to enforce the arbitration agreement.¹⁹⁹ Secondly, parties may raise general contract law defences to defeat the enforceability of arbitration agreement.²⁰⁰ In the recent case of *Lee v. Intelius, Inc.*, the Court held that “even an exceptionally careful consumer would not have understood” that clicking the button would mean agreeing to an arbitration clause.²⁰¹ Possible unconscionability is examined under the general principles of contract law, not the specific rules of consumer protection law. Concerning unconscionability, in many

¹⁹⁵ FAA 1925 Section 2

¹⁹⁶ For example, in *Allied-Bruce Terminix Co. v. Dobson*, the court held that “the Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.” See *Allied Bruce Terminix Companies, Inc., and Terminix International Company, Petitioners v. G. Michael Dobson et al*, 513 US 265 (1995)

¹⁹⁷ 'Consumer Arbitration Rules' (American Arbitration Association, 2016) <<https://www.adr.org/sites/default/files/Consumer%20Rules.pdf>> accessed 22 April 2019.

¹⁹⁸ See *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); Clinton COLE, *Appellant, v. Burns International Security Services, et al.*, Appellees, 96-7042 (1997)

¹⁹⁹ For example, in *Brower v Gateway Inc* case, the amount of claim was \$4000, while the fee of the International Chamber of Commerce Court of Arbitration was \$2000 which was non-refundable. See *Brower v Gateway2000 Inc* 676 N.Y.S. 2d 569, 572 (1998)

²⁰⁰ Christopher R. Drahozal and Raymond J. Friel, 'Consumer Arbitration in The European Union and The United States' (2002) 28(2) North Carolina Journal of International Law, 357, 376.

²⁰¹ *Lee v. Intelius Inc.*, No. 11-35810 (2013)

cases, the courts in the U.S have recently applied a restrictive approach and held that arbitration clauses are invalid.²⁰²

Finally, with regard to U.S law, after the New York Times have published numerous articles²⁰³ criticising consumer and employment arbitration, there have been proposals to restrict the use of the arbitration clause in consumer contracts. For instance, the Consumer Financial Protection Bureau proposed a rule in May 2016 that would prevent providers of certain consumer financial products and services from applying an arbitration agreement between the parties.²⁰⁴ Likewise, the U.S. Department of Labor and the Federal Acquisition Regulatory Council, the Centres for Medicare and Medicaid Services, the U.S. Department of Defence and the U.S. Department of Education have also proposed or restrictions or prohibitions of arbitration agreements in consumer contracts in order to protect consumers or workers.²⁰⁵

4.9 Conclusion

ODR service providers are established in different ways across the globe. Some can be private companies, which either build ODR systems or buy ODR systems to provide dispute resolution services. Others may be state-owned organisations, such as the EU ODR Platform. There are no harmonised international standards as to the minimum technological and legal requirements for the establishment of ODR service providers. This chapter examines the legal and technical standards of ODR service providers. The second

²⁰² See the decisions in the following cases: *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844 (9th Cir. 2013); *Doctor's Associates Inc. v. Edison Subs, LLC*, No. 3:13-CV839 JCH, 2014 WL 29128 (D. Conn. Jan. 3, 2014); *Dodeka, L.L.C. v. Keith*, No. 2011-P-0043, 2012 WL 6738479 (Ohio Ct. App. Dec. 31, 2012); *Larkin v. New Century Auto Sales Inc.*, No. 12-13917, 2014 WL 29119, 2014 U.S. Dist. LEXIS 350 (E.D. Mich. Jan. 3, 2014); *Walton v. Johnson*, 66 A.3d 782 (Pa. Super. Ct. May 7, 2013).

²⁰³ Adam Liptak, 'Justices Will Hear Challenges to Mandatory Employee Arbitration' *The New York Times* (2017) <<https://www.nytimes.com/2017/01/13/us/politics/scotus-mandatory-employee-arbitration.html?mcubz=1>> accessed 22 April 2019;

Jessica Silver-Greenberg and Robert Gebeloff, 'Arbitration Everywhere, Stacking the Deck Of Justice' *The New York Times* (2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0> accessed 22 April 2019;

Jeff Sobern, 'How Debt Collectors Avoid Consumer Lawsuits' *The New York Times* (2015) <<https://www.nytimes.com/2015/12/30/opinion/how-debt-collectors-avoid-consumer-lawsuits.html?mcubz=1>> accessed 22 April 2019.

²⁰⁴ Arbitration Agreement (Bureau of Consumer Financial Protection, 2016) <http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf> accessed 22 April 2019

²⁰⁵ Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses* (Center for American Progress 2016) < <https://www.americanprogress.org/issues/economy/reports/2016/08/02/142095/the-case-against-mandatory-consumer-arbitration-clauses/>> accessed 2 May 2019

section of this chapter evaluates the question of whether there is need for clarification arbitrability of consumer disputes and the validity of consumer arbitration clauses.

As noted above, different legal regimes have different approaches towards to arbitrability of consumer dispute and validity of arbitration agreement in consumer contracts. While some national laws allow parties to opt for arbitration in consumer contracts, other laws prohibit or restrict the use of arbitration in disputes arising from B2C contracts. In the UK, for example, certain types of disputes may be held to the exclusive domain of the courts, due to public policy or public interest considerations.²⁰⁶ By contrast, the U.S interpretation of arbitrability is broader and is used to determine whether certain types of disputes are excluded from arbitration due to the nature of the subject matter and includes a sort of jurisdictional tension between arbitrators and the courts regarding who should decide issues, such as the validity of an agreement.²⁰⁷ With regard to the validity of an arbitration agreement, under the EU Directive on Unfair Terms in Consumer Contracts, pre-dispute agreements in consumer contracts are invalid. On the other hand, in the U.S, pre-dispute arbitration agreements are valid, unless some other provision in the arbitration agreement renders it unenforceable.

In cross-border consumer contracts, the issues of arbitrability, enforceability and validity of arbitration clauses are most likely to be decided under the New York Convention. However, Article 2 of the Convention is a source of uncertainty for parties regarding those matters. Thus, it is time to put forward better solutions for these issues at both regional and international level. For EU law, the law of consumer arbitration in the context of e-commerce should be harmonised and become more uniform. Moreover, it is necessary to revise the EU Unfair Terms Directive and subsequently Member States law.²⁰⁸ For international law, a new Convention should be introduced especially regarding online

²⁰⁶ Hörnle (n. 104).

²⁰⁷ Laurance Shore, 'The United States Perspective on Arbitrability', in Mistelis and (n.100) 82.

²⁰⁸ Currently there is a proposal to amend Directive 93/13/EEC on unfair terms in consumer contracts, Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, Directive 2005/29/EC regarding unfair B2C commercial practices and Directive 2011/83/EU on consumer rights. This proposal aims to enhance the enforcement and modernising EU consumer legislation in light of market developments, in particular the digital economy. See European Commission, Proposal for a Directive Of The European Parliament And Of The Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018) 185 final, Brussel 11 April 2018

cross-border consumer arbitration. New rules should stipulate an informed standard of consent to arbitration clauses for consumers before they decide to accept the contract.

Chapter 5: Access to Justice for Turkish Consumer: Handling Consumer Disputes in Contemporary Turkey

5.1 Introduction

The Internet is one of the most important inventions of today`s world and has caused significant changes in many areas of human society. Nowadays, almost every part of the society has access to the Internet through computers, tablets or smartphones. It is stated that initially the architects of the system aimed to use the Internet only for the creation and dissemination of knowledge and that commercial activities would not be allowed in the Internet.¹ However, since mid-1990s, in addition to the creation and dissemination of knowledge, it has been used for many other purposes, including commercial activities.² A similar process can be observed in terms of Internet usage in Turkey. The internet, which started to be used only in universities in 1993, has become more and more popular and, according to the Turkey Statistical Institute data, in Turkey the internet penetration rate is slightly less than 73% in 2018 (about 59 million users out of 81 million).³

A recent survey carried out by the Turkish Statistical Institute in April 2018 shows that the percentage of shopping online was slightly less than 30% in Turkey in 2017.⁴ Nevertheless, more than one out of five consumers faced problems when purchasing good and services over the internet in the last 12 months in 2017. This figure shows that the spread of the internet and the expansion of its use has brought with it many legal problems and regulation requirements, especially in the field of consumer protection.

Over the past 20 years, since the beginning of the process of accession of Turkey to the EU, the Turkish Republic has developed its policy of consumer protection. Turkey is a member of the OECD since 1961 and has a Custom Union agreement with the EU since 1995, thus it has

¹ Scott Cooper, Colin Rule and Louis Del Duca, 'From Lex Mercatoria To Online Dispute Resolution: Lessons from History In Building Cross-Border Redress Systems' (2011) 43(3) *Uniform Commercial Code Law Journal* 749, 750.

² *ibid*

³ Turkish Statistical Institute 'Information and Communication Technology (ICT) Usage in Households and by Individuals' (2018) <http://www.turkstat.gov.tr/PreTablo.do?alt_id=1028> accessed 26 October 2018

⁴ *ibid*; The report, entitled 'Turkey B2C E-Commerce Market 2018' published by yStats.com stated that more than 50% of digital buyers in Turkey made purchases through mobile devices in 2017 and approximately half of them placed orders through social media, mainly through Instagram and Facebook. See yStats, 'Turkey B2C E-Commerce Market 2018' (2018) < https://www.ystats.com/wp-content/uploads/2018/08/2018.08.16_Product-Brochure-Order-Form_Turkey-B2C-E-Commerce-Market-2018.pdf> accessed 23 January 2019

harmonised its national consumer law with EU legislation and the OECD policies. The Turkish Parliament enacted the current Law on Consumer Protection No. 6502 (Hereinafter CPL), which is in line with EU legislation. Besides, EU Directives, such as Directive 2015/2302 on package travel and linked travel arrangements, Directive 2011/83 on consumer rights and Directive 2002/65 concerning the distance marketing of consumer financial services have been translated in Turkish and have entered into force through national regulations.⁵ However, full harmonisation, especially in the area of dispute resolution, has not been achieved to date. For example, Turkish domestic legislation is still not compatible with the ADR Directive and ODR Regulation 2013. The purpose of this chapter is to provide a general overview of the enforcement of consumer law and evaluate whether there is a need for a legal framework in the field of consumer dispute resolution in Turkey.

The present chapter firstly describes the national legal system of consumer redress system and seeks to evaluate its effectiveness. After a brief account of the key substantive provisions in the field of dispute resolution, the focus of the chapter moves to the specifics of the enforcement framework. It discusses the role of particular actors in that regard, most notably the courts, consumer arbitration boards and consumer organisations as well as private regulators and alternative dispute resolution bodies.

5.2 An Overview of Turkish Legal System

Before starting the analysis of the national legal framework for consumer protection and the evaluation of the enforcement mechanism and the effectiveness of consumer law in Turkey, it will be practical to provide an overview of the Turkish legal system. Turkey is a republic with a parliamentary system of government based on a Constitution. Article 2 of the Constitution of the Republic of Turkey states that

“The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”⁶

⁵ Ece Baş Süznel, and Evrim Erişir. Enforcement and Effectiveness of Consumer Law in Turkey. in: Micklitz HW., Saumier G. (eds) Enforcement and Effectiveness of Consumer Law. *Ius Comparatum - Global Studies in Comparative Law*, (27 Springer, 2018)

⁶ Constitution of the Republic of Turkey, Article 2

The Turkish legal system is based on civil law that is mainly influenced by the German civil system, where is usually a written constitution based on specific statutes. For example, the Civil Code of the Republic of Turkey was mainly influenced by the Swiss Civil Code and the German Commercial Code. As mentioned above, the prospect of the accession of Turkey and the establishment of the Custom Union agreement with the EU have brought fundamental changes to Turkish legal system as part of the harmonisation process of Turkey with the EU acquis.

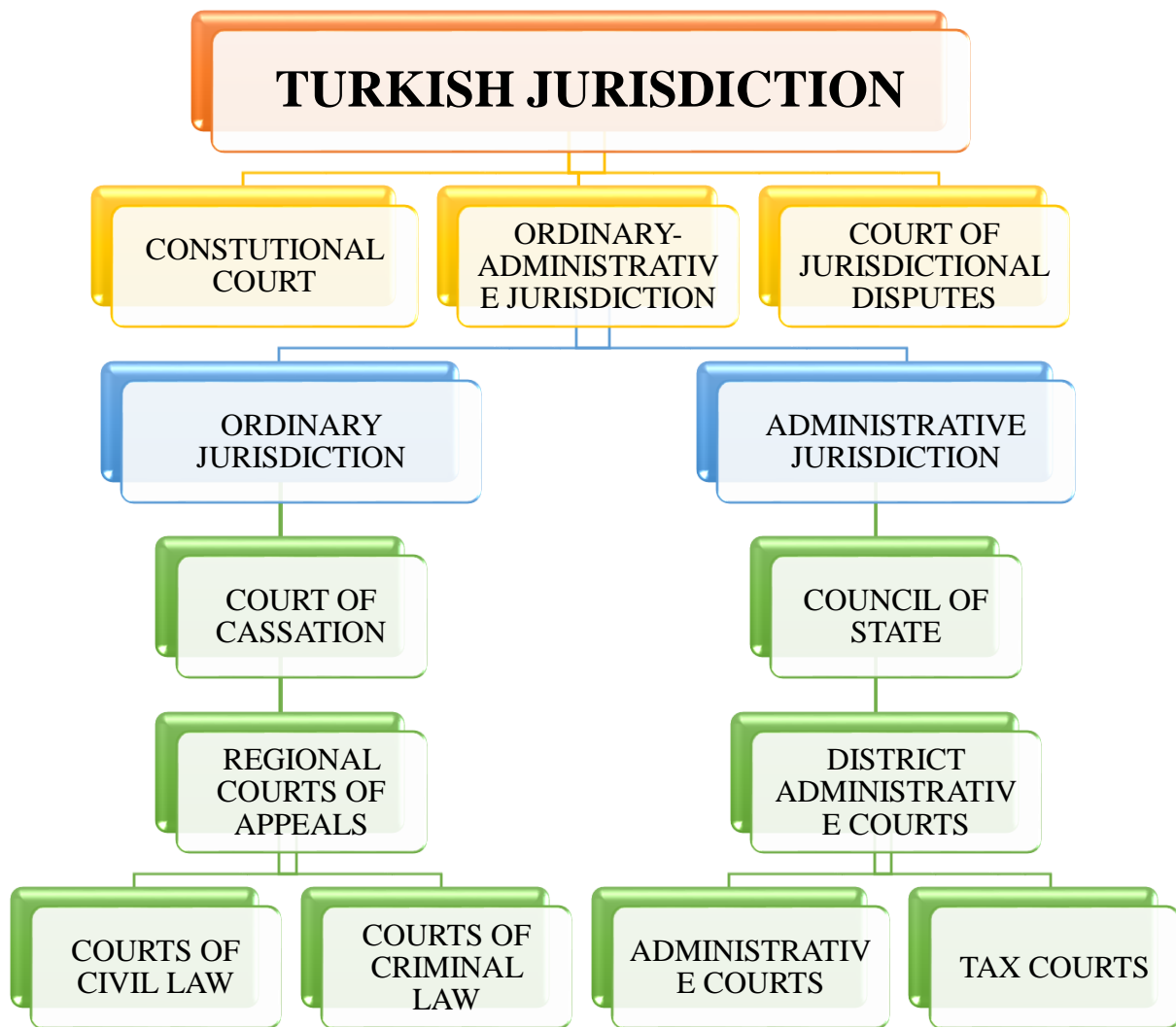


Figure 5.1 Turkish Judiciary

With regard to the Turkish Jurisdiction system, there are four branches of judiciary: constitutional jurisdiction, ordinary jurisdiction, administrative jurisdiction and court of jurisdictional disputes. (See Figure 5.1) The primary duty of the Turkish Constitutional Court is to inspect the constitutionality of laws, decree laws and the Rules of Procedure of the Grand

National Assembly of Turkey in terms of form and substance.⁷ Moreover, following the amendment of 2010, the Constitutional Court examines individual applications and decides on them. The Article 148 of the Constitution states that:

“Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to apply to the Court, all ordinary legal remedies must be exhausted.”⁸

In regard to ordinary jurisdiction, it is the branch that deals with all types of cases, which do not fall into another jurisdiction. In the ordinary jurisdiction, there is a three-tier judicial system, namely First Instance Courts, District of Appeal Courts and the Court of Cassation. In this jurisdiction, courts settle not only civil but also criminal disputes. While the main duty of regional courts of appeal is to examine appeal applications against first instance court decisions, the court of Cassation is the last instance court for examining decisions and judgments rendered by regional courts of appeal and conducting the appellate review for the decisions finalised by the regional courts of appeal and in some cases the decisions of first instance courts.

The Courts of Ordinary Jurisdiction are divided into criminal law courts and civil law courts. (See Table 5.2) While some of these courts are courts of general jurisdiction, others are specialised courts. In the civil side, civil courts are the basic trial courts, which resolve the disputes arising in the area of private law, such as divorce, personal action, insurance cases. Civil courts may be divided into civil courts of general jurisdiction and specialised courts. While the civil courts of general jurisdiction resolve disputes arising which are covered by the jurisdiction of a specialized court, specialised courts are established for resolving the disputes which need expertise and special knowledge, such as commercial law, family law and intellectual property rights. It is worth noting that in the case of specialised courts do not exist in a province or sub province, the civil courts of general jurisdiction handle the cases.

⁷ Constitution of the Republic of Turkey, Article 148

⁸ *ibid*

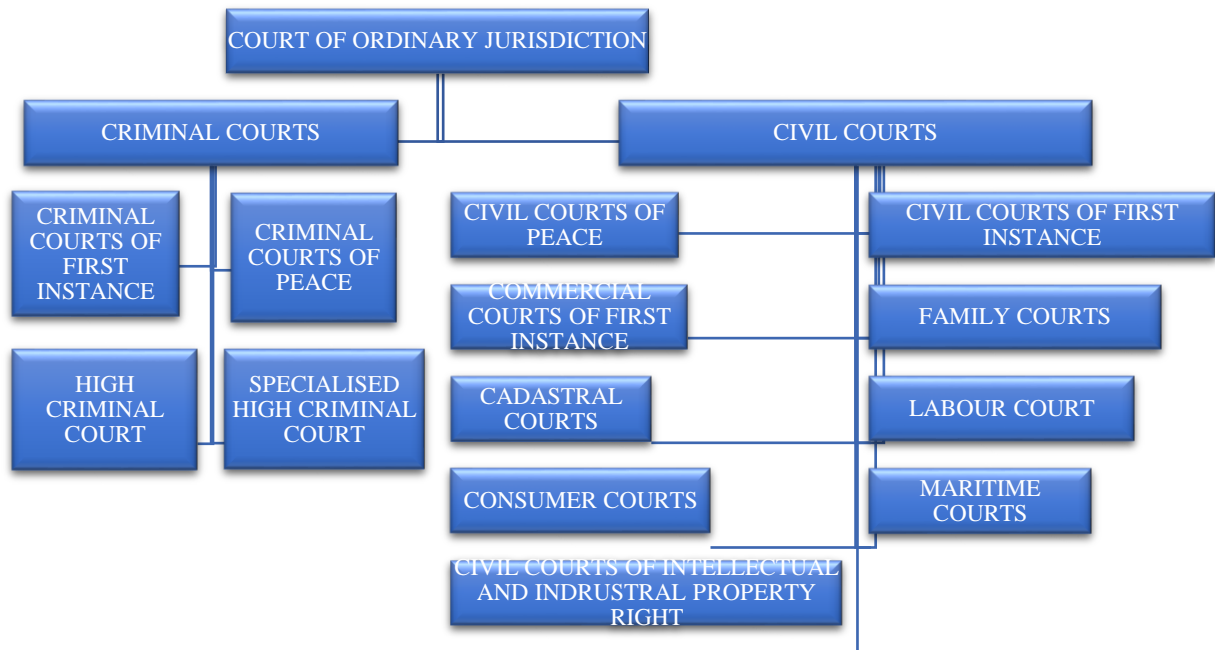


Figure 5.2 Court of Ordinary Jurisdiction in Turkey

5.3 The Need for Alternative Dispute Resolution in Turkish Legal System

One of the most important problems faced by the Turkish judiciary is the excessive workload of the courts. Justice delay and the long duration of trials are two of the most urgent problems awaiting solution in Turkey as well as elsewhere around the world. Excessive workload placed on the courts results in the courts having to unnecessarily deal with too many disputes and they do not have time to perform their essential tasks. Evidence of this is exorbitant number of pending civil cases (over 2 million cases), which take an unreasonable period of time to reach a final judgement (around 540 days), as evidenced below in Table 5.3.

Court types	Number of cases transferred last year	Number of cases brought this year	Number of cases reversed by the Supreme Court	Total	Number of cases judged during year	Number of court cases postponed to next year	The average duration of the case
Commercial court of first instance	139 284	87 660	4 136	231 080	92 864	138 216	541
Civil court of first instance	558 130	479 854	35 482	1 073 466	477 285	596 181	419
Labour court	313 040	227 449	17 497	557 986	206 469	351 517	530
Civil Enforcement Court	83 292	192 845	6 558	282 695	197 136	85 559	153
Court of peace	169 492	632 150	4 827	806 469	612 363	194 106	105
Land Registration Court	19 684	4 395	1 211	25 290	7 859	17 431	992
Consumer Court	132 071	63 101	1 817	196 989	119 074	77 915	411
Family Court	133 207	269 526	6 224	408 957	266 020	142 937	183
Civil courts of intellectual and industrial property right	5 520	5 505	240	11 265	5 904	5 361	336
Total	1 553 720	1 962 485	77 992	3 594 197	1 984 974	1 609 223	283

Table 5.3 Number of cases at the civil courts by types of court in 2017⁹

⁹ Republic of Turkey Ministry of Justice Statistics (2018), <http://www.adliscil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf> accessed 30 March 2019

Complaints about the slow process of judicial mechanisms are usually emphasised both in government programme and development plan. In order to overcome this problem, various suggestions have been made and amendments to the law of procedure have been put forward. In the reports prepared for the Commission of the European Union on the functioning of the judicial system in Turkey, it was stated that it is mandatory to improve the efficiency and effectiveness of the judiciary in Turkey due to the high number of cases, the fact that the average duration of the case is longer than necessary and judges and prosecutors are suffering under the heavy work load.¹⁰ Following advisory visits made to Turkey by delegations commissioned by the EU Commission, these issues were pointed out and it was stated that the development of ADR methods is one of the measures to be taken to increase the effectiveness of the Turkish judicial system.¹¹ During the visits, several complaints had been received about the majority of the cases which are submitted or are pending in the civil courts in Turkey are low value disputes or involve minor issues arising between individuals or between individuals and the administration, such as landlord-tenant disputes regarding rental, student objections relating to marks in examinations.¹² It appeared that the main reason why that kind of cases went to court was the lack of any form ADR mechanism for civil disputes.

Likewise, in several European Recommendations, it was suggested that if an appropriate resolution of a dispute in amicable ways outside the judicial system or before or during the proceedings is one of the most effective measures for preventing and reducing the excessive workload of the courts.¹³ In this respect, the following measures were proposed: a) in order to settle disputes, providing of conciliation procedures or other methods out of court before or after the judicial procedure and encouraging these procedures, b) make it one of the principal duties of the judge to have the responsibility to seek an amicable solution in all appropriate cases at the beginning of the dispute or at any stage of the legal proceedings, c) to make it a

¹⁰ Paul Richmond and Kjell Björnberg, 'The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit 11 – 19 July 2004' (European Commission, 2004), <<https://ingel.home.xs4all.nl/ankara/advisory%20report%20II.pdf>> accessed 12 March 2019

¹¹ Bert van Delden, 'Effectiveness of the Judicial System: Report of a peer-based assessment mission to Turkey 17-21 November 2008' European Commission, 2008), <https://www.avrupa.info.tr/fileadmin/Content/Downloads/PDF/EFFECTIVENESS_OF_THE_JUDICIAL_SYSTEM.pdf> accessed 12 March 2019; Luca Perili, Effectiveness Of The Judiciary And Criminal Justice System, 2011 European Commission, 2011) <http://www.abgm.adalet.gov.tr/avrupabirligi/turkyargisi/istisariziyaret/en/turk_yargisinin_etkinligi_ceza%20adleti_en.pdf> accessed 12 March 2019; Richmond and Björnberg (n. 10)

¹² van Delden *ibid*; Perili, *ibid*; Richmond and Björnberg (n. 10)

¹³ Recommendation No. R (86) 12 of the Committee of Ministers to Member States Concerning Measures to Prevent and Reduce The Excessive Workload In The Courts, 16 September 1986

duty of lawyers to try to reconcile with the other disputants before applying for legal proceedings and at an appropriate stage of such proceedings. Besides these measures, some bodies can be created for resolving small claim disputes and minor disputes arising from some specific areas of law and steps can be taken to make ADR methods more easily accessible and more effective.¹⁴

In the light of this information, it can be said that, in order to reduce and prevent the excessive workload of the courts, reduce the amount of judicial costs, save time, to make access to justice easier in the digital age, it is clear that it is essential to develop and implement ADR schemes in the Turkish legal system.

5.4 Developments and Legal Framework of ADR in Turkish Law

It is essential to pursue a justice reform that will ensure the restructuring of the judiciary and the justice system in Turkey. For a long time, there have been debates on the expectations of lawyers from the Turkish judicial system and the necessary reforms in international symposia and reference was made to the development and implementation of ADR schemes.¹⁵ Thus, in most judicial reform strategies when touching upon the issue of making the justice system more effective and efficient with a modern understanding, it is usually stated that there is a need for developing ADR. In many official reports and publications containing proposals for increasing effectiveness in justice systems, as for example the recent report entitled ‘Ministry of Justice Strategic Plan 2015-2019’ published by the Directorate for Strategy Development of the Republic of Turkey’s Ministry of Justice, it is mentioned that it has become increasingly inevitable to promote ADR methods and enhance their effectiveness in practice.¹⁶

¹⁴ Recommendation No. R (86) 12 of the Committee of Ministers also states the following objectives: I.) Not increasing but gradually reducing the non-judicial tasks entrusted to judges by assigning such tasks to other persons or bodies. II.) Generalising, if not yet so, trial by a single judge at first instance in all appropriate matters. III.) Reviewing at regular intervals the competence of the various courts as to the amount and nature of the claims, in order to ensure a balanced distribution of the workload. IV.) Evaluating the possible impact of legal insurance on the increasing number of cases brought to court and taking appropriate measures, should it be established that legal insurance encourages the filing of ill-founded claims.

¹⁵ Mustafa Serdar Ozbek, *Alternatif Uyuşmazlık Çözümü / Alternative Dispute Resolution* (Yetkin Press, 2016), 812.

¹⁶ The ‘Ministry of Justice Strategic Plan 2015-2019’ was published by the Republic of Turkey’s Ministry of Justice, Directorate for Strategy Development (2015) <<http://www.judiciaryofturkey.gov.tr/pdfler/plan.pdf>> accessed 17 March 2018. Moreover, in 2010 the Judicial Reform Strategy and the Strategic Plan of Ministry of Justice and recently the Tenth Development Plan (2014-2018) was prepared by the Grand National Assembly of Turkey, stating that ADR mechanisms will be given priority.

With regard to the legal framework of ADR, there is not a single and general regulation in Turkish Law that regulates ADR with all its principles. The Code of the Civil Procedure 2011 and the Code of International Arbitration 2011 have included only the most commonly used alternative dispute resolution method: arbitration. Additionally, in the Turkish legal system, there are several instruments, such as the Attorneyship Law 1969, the Consumer Protection Law 2013, the Code of Labour Court 2017, the Code of Criminal Procedure 2004, the Code of Tax Procedure 1961, the Code of Civil Procedure 2011 and the Law on Mediation in Civil Disputes 2012, which include provisions that are directly related to ADR.

Regarding arbitration under Turkish law, the main legislation related to international arbitration is the Code of International Arbitration numbered 4686. This Code applies arbitration when the dispute has a foreign element and the place of arbitration is determined to be in Turkey or where the arbitrating parties or arbitrators choose as per the applicable law.¹⁷ The Code is essentially based on the UNCITRAL Model Law.¹⁸ Regarding domestic arbitration, the first provision supporting ADR can be found in the Attorneship Law. Article 35 of the Law allows lawyers to go to conciliation.¹⁹ In this way, lawyers are encouraged to settle disputes between the parties through conciliation. According to Article 35 of the Law, either before bringing an action to court or before starting a trial, lawyers may invite the other party to conciliation in cases where the parties are entitled to discretion. If the other party accepts conciliation, and, if, at the end of the conciliation process, both parties reach an agreement on the dispute, the parties and the lawyer sign a written agreement called ‘conciliation protocol’ that settles the dispute. The issue of disputes, the date and the obligations owed by both parties must be written in the protocol. This protocol is binding and enforceable same as court decisions.²⁰ Another example regarding conciliation is Article 253 of the Code of Criminal Procedure and Article 73 of the Code of Criminal it is stipulated that depending on the decision of the judge and the prosecutor, the offender and the victim may go to conciliation in offences prosecuted on complaint.²¹

¹⁷ The Code of International Arbitration, Article 1; Article 1 of the Code states that Articles 5 and 6 of this Code are applicable even if the place of arbitration is determined to be a place not in Turkey.

¹⁸ Turkey is a contracting state of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention 1966) and European Convention on International Commercial Arbitration 1961

¹⁹ The Attorneyship Law , Article 35

²⁰ The Code of Execution and Insolvency, Article 38

²¹ The Code of Criminal Procedure, Article 253 and the Code of Criminal, Article 73.

The Code of Turkish Civil Procedure numbered 6100 states that the judge before the trial or during the preliminary examination must encourage both parties to amicably settle their disputes themselves or go to mediation in cases where the parties are entitled to discretion.²² This is not a discretionary authority given the judge, it is a duty that the judge must perform compulsorily. If the judge thinks that the dispute will be settled amicably, he/she will be able to assign a new date for the hearing.²³ According to Article 139 of the Code, the parties are informed about the necessary preparations for peace in the invitation sent to them for the preliminary hearing.

The Law on Mediation in Civil Disputes numbered 6325 came into force as the first law governing mediation in Turkey. The Law regulates the procedures and principles to be applied in the resolution of civil disputes through mediation. The Law also regulates the rights and obligations of mediators, mediation service, the requirements for registration of mediators and mediation training and training institutions. This Law may only apply for the resolution of disputes where the parties are entitled to discretion, arising from civil matters and proceedings, including those containing a foreign element.²⁴ Article 2 of the Law defines the mediation as a method of voluntary dispute resolution system carried out with the inclusion of an impartial and independent third party; who is specially trained to convene the relevant parties by way of systemic techniques and with a view to help such parties mutually understand and reach a resolution through a process of communication.

Parties can agree to apply for mediation either before or during the hearing. Additionally, the court may also encourage the parties to apply for mediation. Unless otherwise specified, if a party does not respond to the invitation of another party regarding going to mediation within thirty days, this invitation is considered to be rejected.²⁵

The scope of the agreement reached at the end of the mediation is determined by the parties; in the event of having an agreement document, this document shall be signed by the parties and the mediator.²⁶ If the parties reach an agreement at the end of the mediation, the parties may

²² The Code of Civil Procedure, Article 137

²³ *ibid*, Article 140

²⁴ The Law on Mediation in Civil Disputes, Article 1

²⁵ *ibid*, Article 13 (2)

²⁶ *ibid*, Article 18

request an annotation on the enforceability of the agreement document.²⁷ If the parties have applied to go to mediation before the case is filed, annotation on the enforceability of the agreement may be requested by the court of peace at the mediator's places of duty. If the mediator is appointed during the hearing of the case, the annotation on the enforceability will be requested by the court before which the case is judged.²⁸ The agreement containing this annotation shall be deemed as a writ.²⁹

The Code of Labour Courts numbered 7036 was published in the Official Gazette on 25 October 2017 and its principle provisions came into force on 1 January 2018.³⁰ The Code aims to decrease the excessive workload of labour courts by making mandatory for parties to apply for mediation in disputes arising from the employee or employer receivable and compensation re-employment, based on individual and collective labour agreements before bringing an action to court.³¹ According to 3(2) of the Code, it is a precondition to apply for mediation before taking a case to court. In the event that parties do not apply for mediation before they bring the case to court, the court shall reasonably refuse the application without any action due to the absence of cause action.³² In other words, the plaintiff has to attach the original file, which shows that both parties did not reach an agreement at the end of mediation. If this obligation is not respected, the court will send an invitation to the plaintiff, stating that the protocol must be presented to the court within one week, otherwise the case will be dismissed. If the parties reach an agreement, the annotation on the enforceability will be requested by the court of peace where the mediator is registered.³³ The agreement, which is signed by parties or their lawyers and the mediator, shall be deemed as a writ without any annotation.³⁴ After the entry into force of the Code, from January 2018 until December 2018, the number of mandatory mediation for employment disputes reached approximately 355,000, out of which 238,000 ended in an agreement.³⁵ The number of employment cases brought to court in 2018 has fallen by 70%

²⁷ The Law on Mediation in Civil Disputes, Article 18

²⁸ *ibid*

²⁹ *ibid*

³⁰ Code of Labour Courts, < <http://www.resmigazete.gov.tr/eskiler/2017/10/20171025-8.htm>> accessed 4 March 2019

³¹ In the Preamble of the Code, it is stated that 'the dispute between employee and employer takes an important place in both the agenda labour life and the jurisdiction. By the end of 2016, approximately 15% of the more than 3.5million with over 500 thousand legal disputes in the first instance courts and labour courts are labour law originated'. Moreover, the average duration of labour cases was 434 days in 2016.

³² The Code of Labour Court, Article 3 (2)

³³The Law on Mediation in Civil Disputes, Article 18 (2)

³⁴ *ibid*, Article 18 (4)

³⁵Republic of Turkey Ministry of Justice Statistics, < <https://www.aa.com.tr/tr/turkiye/355-bin-uyusmazligin-yuzde-70ini-arabulucular-cozdu/1379862>> accessed 4 March 2019

compared to the same period in 2017, according to the Turkish Ministry of Justice.³⁶ These statistics show that Law 7036 provides the parties with access to an effective mediation mechanism to resolve their disputes while providing the legal system with a filter to reduce the number of court cases.

Recently, after the implementation of the mandatory mediation provisions for employment disputes, the Turkish Parliament passed Law numbered 7155 proposing compulsory mediation for commercial disputes concerning receivables and claims for compensation. The new law was published on December 19, 2018 in the Official Gazette and came into force on January 1, 2019. With the new legislation, as a precondition for litigation, approximately 250,000 commercial disputes are expected to go through mediation.

In 2015, the Istanbul Arbitration Centre was launched as an independent arbitration centre.³⁷ The main aim of the Centre was to provide an effective and efficient way of ADR for commercial disputes in both national and international areas. However, it can be said that while Istanbul Arbitration Centre has potential to help Turkey becoming or at least being viewed as an arbitration friendly jurisdiction, it has not reached its full efficiency yet.

5.5 Turkish Consumer and Consumer Protection Law

Consumer protection as a public policy was first recognised by Article 172 of the 1982 Constitution, which granted the State the authority to take all necessary measures for the protection of consumers and to encourage initiatives for protecting them.³⁸ This Article firstly created the basis for state protection of consumers, and secondly it offered related persons the right to establish consumer organisations.

The current Consumer Protection Law has been enacted in 2013 to replace the Consumer Protection Law No. 4077 and entered into force in 2014. It aimed at modernising the Turkish Commercial law and Obligation law, while eliminating practical problems and complying with EU Regulations and Directives. More specifically, it responded to the change of sales methods and the emergence of new sales types and recognising that the

³⁶ *ibid*

³⁷ The Law on the Istanbul Arbitration Centre numbered 6570

³⁸ Constitution of the Republic of Turkey, Article 172

existing punishment methods do not achieve the prescribed purpose, instead of punishment, it highlighted the importance of adequately informing the consumers.³⁹ Similar to the UK Consumer Protection Act 2015, the term ‘consumer’ was defined by CPL as ‘a natural person or legal entity acting with non-commercial or non-professional purposes’.⁴⁰ It is worth mentioning that, while UK Consumer Protection Act 2015 uses the term ‘wholly or mainly outside of individual’s professional’, CPL provides that if a natural or legal entity act with commercial or professional purposes, it is not considered as a consumer. Based on this description, all contracts and legal transactions, for example contracts of employment, contracts of carriage, brokerage contracts and insurance contracts between consumers and natural or legal entities, including public entities, who act for commercial or professional purposes in the goods or services markets, are considered consumer transactions and are covered by the CPL.⁴¹ It is also stated in Article 83(2) of CPL that transactions in which consumers are one of the parties, even if regulated by other laws, they can still be considered as consumer transactions and are covered by the CPL.⁴²

When the system of the CPL is examined, section 2 of CPL states the fundamental legal principles of consumer contracts. Article 4 emphasises the basic principles as follows: the substantive content of consumer contracts and their form, the conditions envisaged in the consumer contract cannot be amended to the disadvantage of the consumer during the term of the contract, prohibition of compound interest and prohibition of unfair terms in consumer contracts. Moreover, the CPL stipulates what kind of rights consumers have in case they have any problems related to unfair terms in consumer contracts, refusal to sell, unordered goods or services, defective goods and services.

It is worth mentioning that, in order to provide more protection to consumers, there are several related and subordinate legislation, such as

- No. 6563 Electronic Commerce Law⁴³

³⁹ The CPL contains provisions in favour of consumers on: credit cards, early payment of house and consumer loans, complex contracts, interest rate in consumer transactions, right of retraction, timeshare property sales, real estate sales on the basis of architectural models, door-to-door sales, defective goods, online shopping and distance contracts, distance sales of financial services, termination of subscriptions, promotional campaigns organised by newspapers and journals, and pyramid sales.

⁴⁰ CPL, Article 3

⁴¹ *ibid*

⁴² *ibid*, Article 83(2)

⁴³ Electronic Commerce Law Numbered 6563 was published in the Official Gazette on 5 November 2014 <<https://www.resmigazete.gov.tr/eskiler/2014/11/20141105-1.htm>> accessed 19 October 2019

- No. 5411 Banking Law⁴⁴
- Regulation on Warranty Deed⁴⁵
- Regulation on After-Sale Services⁴⁶
- Regulation on Propectus and Instruction for Use⁴⁷
- Regulation on Unfair Terms in Consumer Contracts⁴⁸
- Regulation on Travel Agencies⁴⁹
- Regulation on Price Tags⁵⁰
- Regulation on Consumer Arbitration Board⁵¹
- Regulation on Consumer Arbitration Board Rapporteur⁵²
- Regulation on Pre-Paid Housing Sales⁵³
- Regulation on Distance Contracts⁵⁴
- Regulation on Board of Advertising⁵⁵

⁴⁴ Banking Law Numbered 5411 was published in the Official Gazette on 19 October 2005 <<https://www.resmigazete.gov.tr/eskiler/2005/11/20051101M1-1.htm>> accessed 12 October 2019

⁴⁵ Regulation on Warranty Deed was published in the Official Gazette and entered into force on 13 June 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/06/20140613-2.htm>> accessed 12 October 2019

⁴⁶ Regulation on After-Sale Services was published in the Official Gazette and entered into force on 13 June 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/06/20140613-3.htm>> accessed 12 October 2019

⁴⁷ Regulation on Propectus and Instruction for Use was published in the Official Gazette and entered into force on 13 June 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/06/20140613-4.htm>> accessed 12 October 2019

⁴⁸ Regulation on Unfair Terms in Consumer Contracts was published in the Official Gazette and entered into force on 17 June 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/06/20140617-8.htm>> accessed 12 October 2019

⁴⁹ Regulation on Travel Agencies was published in the Official Gazette and entered into force on 5 October 2017, <<https://www.resmigazete.gov.tr/eskiler/2007/10/20071005-7.htm>> accessed 12 October 2019

⁵⁰ Regulation on Price Tags was published in the Official Gazette and entered into force on 28 June 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/06/20140628-2.htm>> accessed 12 October 2019

⁵¹ Regulation on Consumer Arbitration Board was published in the Official Gazette and entered into force on 27 November 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/11/20141127-8.htm>> accessed 12 October 2019

⁵² Regulation on Consumer Arbitration Board Rapporteur was published in the Official Gazette and entered into force on 27 November 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/11/20141127-9.htm>> accessed 12 October 2019

⁵³ Regulation on Pre-Paid Housing Sales was published in the Official Gazette and entered into force on 27 November 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/11/20141127-7.htm>> accessed 12 October 2019

⁵⁴ Regulation on Distance Contracts was published in the Official Gazette and entered into force on 27 November 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/11/20141127-6.htm>> accessed 12 October 2019

⁵⁵ Regulation on Board of Advertising was published in the Official Gazette and entered into force on 3 July 2014, <<https://www.resmigazete.gov.tr/eskiler/2014/07/20140703-4.htm>> accessed 12 October 2019

- Regulation on Commercial Advertising and Unfair Trade Practices⁵⁶
- Regulation on Outside-of-Work Contracts⁵⁷
- Regulation on Package Tours⁵⁸
- Regulation on Instalment Sales Contracts⁵⁹
- Regulation on Subscription Agreements⁶⁰
- Regulation on Distance Financial Services Contracts⁶¹

5.6 Current Consumer Enforcement and Dispute Resolution Processes in Turkey

It is obvious that access to justice and having appropriate mechanisms for resolving disputes are fundamental rights of consumers.⁶² In the Turkish legal system, the Code of Civil Procedure is the primary law, which determines the redress system for resolving disputes and states the scope, subjects and procedure of resolution of disputes. The procedural rules and principles regarding the consumer disputes can be found in the CPL.⁶³ Articles 66 to 72 of the Law regulate consumer arbitration boards, which are established by the Ministry Trade that have the authority to resolve disputes up to a certain economic threshold⁶⁴ and make binding decisions in these disputes. Articles 73 and 74 set the consumer courts, which are authorised to

⁵⁶ Regulation on Commercial Advertising and Unfair Trade Practices was published in the Official Gazette and entered into force on 10 January 2015, <<https://www.resmigazete.gov.tr/eskiler/2015/01/20150110-5.htm>> accessed 12 October 2019

⁵⁷ Regulation on Outside-of-Work Contracts was published in the Official Gazette and entered into force on 14 January 2015, <<https://www.resmigazete.gov.tr/eskiler/2015/01/20150114-3.htm>> accessed 12 October 2019

⁵⁸ Regulation on Package Tours was published in the Official Gazette and entered into force on 14 January 2015, <<https://www.resmigazete.gov.tr/eskiler/2015/01/20150114-5.htm>> accessed 12 October 2019

⁵⁹ Regulation on Instalment Sales Contracts was published in the Official Gazette and entered into force on 14 January 2015, <<https://www.resmigazete.gov.tr/eskiler/2015/01/20150114-5.htm>> accessed 12 October 2019

⁶⁰ Regulation on Subscription Agreements was published in the Official Gazette and entered into force on 24 January 2015, <<https://www.resmigazete.gov.tr/eskiler/2015/01/20150124-2.htm>> accessed 12 October 2019

⁶¹ Regulation on Distance Financial Services Contracts was published in the Official Gazette and entered into force on 31 January 2015, <<https://www.resmigazete.gov.tr/eskiler/2015/01/20150131-11.htm>> accessed 12 October 2019

⁶² This point was stated by the “Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy OJ 1975, No.C92/1”. The 1975 Preliminary Programme identified four more basic rights of consumers as follow: the right to protection of health and safety, the right to protection of economic interests, the right to information and education, and the right of representation.

⁶³ Consumer protection as a public policy was first recognised by the Article 172 of the 1982 Constitution which granted the State the authority to take all necessary measures for the protection of consumers. In 1995, Law on Consumer Protection, No 4077, which was specifically addressed consumer protection, was entered into force.

⁶⁴ This monetary threshold is determined and announced each year in the Official Gazette by the Ministry of Custom and Trade. See CPL Article 68, and the Regulation on Consumer Arbitration Board Article 6.

resolve disputes above the threshold and operate as the appeal authority for the decisions of the consumer arbitration boards. These two dispute resolution methods are examined below before moving to other alternative dispute resolution methods.

5.6.1 The Nature of Consumer Arbitration Boards under the New Turkish Consumer Law

As mentioned earlier, the CPL sets a monetary threshold and grants judicial power to consumer arbitration boards and consumer courts. Accordingly, for disputes exceeding 8480 Turkish Lira (approximately €1300), the consumer courts are authorised. Lower disputes are typically taken to consumer arbitration boards. If the dispute is under the monetary threshold, it is mandatory to apply to the board before applying to the Consumer Court. Similarly, if the claim is over the limit, it has to be taken to the consumer courts.⁶⁵ According to the CPL, both consumer arbitration boards and consumer courts are authorised to resolve disputes arising from consumer transactions and implementation of the CPL.⁶⁶

Before the discussion of the nature of consumer arbitration boards, it is necessary to examine and determine the legal character of them as this is disputed from a doctrinal point of view.⁶⁷ Indeed, the dispute settlement method of the consumer arbitration boards seems to be an extra-judicial (out of court) method of dispute resolution since it is not conducted by individuals vested with the authority and the independence of judges. It is thus open to discussion whether this method of extra-judicial dispute resolution can be considered as arbitration or ADR.⁶⁸

The answer to this question is of practical importance for determining which resources can be used for the interpretation of the provisions on consumer arbitration committees and filling in

⁶⁵ CPL Article 68.

⁶⁶ CPL Articles 2 and 66.

⁶⁷ For a detailed review of this discussion see Evrim Erişir, 'Tüketici İşlemlerinden Doğan Uyuşmazlıkların Çözümü Usûlü', Yeni Tüketici Hukuku Konferansı, Derleyen: M. Murat İnceoğlu, On İki Levha Yayıncılık, İstanbul, 2015; İbrahim Ermenek, 'Yargı Kararları Işığında Tüketici Sorunları Hakem Heyetleri ve Bu Alanda Ortaya Çıkan Sorunlara İlişkin Çözüm Önerileri / Arbitration Committees for Consumer Problems in the Light of Judicial Decisions and Recommendations for Problems that Arose in this Field', (2013) C 17 Gazi Üniversitesi Hukuk Fakültesi Dergisi 574; Bilgehan Yeşilova, '6502 sayılı Yeni Tüketicinin Korunması Hakkında Kanun'a Göre Tüketici Uyuşmazlıklarının Çözümü Usulü ve Yargılama Kuralları / Dispute Resolution Procedure and Jurisdictional Issues in Consumer Matters Under the New Law of Consumer Protection No:6502, (2014) C 9 Terazi Hukuk Dergisi

⁶⁸ Hakan Pekcanitez, 'Tüketici Sorunları Hakem Heyeti/ Arbitration Committee for Consumer Problems' (1996) İzmir Barosu Dergisi, 41-42; Mehmet Akif Tutumlu, *Tüketici Sorunları Hakem Heyetlerinin Yapısı, İşleyişi, Sorunları ve Çözüm Önerileri / Structure, Functioning of Arbitration Committee for Consumer Problems and Problems and Solutions*, (Seckin 2006), 37-39; Özbek (n. 15), 837.

the gaps.⁶⁹ According to some scholars, consumer arbitration boards set an example for the compulsory arbitration.⁷⁰ The basic stance of this opinion is that the decision of the consumer arbitration boards is binding and enforceable.⁷¹ Other scholars claim that Consumer Arbitration Boards can be considered part of ADR methods.⁷² The main arguments supporting this view are that the CPL regime does not guarantee the principle of fair trial in the operation of consumer arbitration boards. A third view argues that Consumer Arbitration boards are neither courts nor part of the compulsory arbitration system nor an ADR mechanism, it is a *sui generis* dispute resolution method.⁷³ In the writer's view, since it is not voluntary to apply to the boards and parties are not authorised and are not given the opportunity to choose arbitrators, consumer arbitration boards cannot be considered as arbitration widely construed. Due to being affiliated to the Ministry of Trade, which establishes and finances the boards, the boards cannot be considered as independent. As it is discussed below, the activities of the Consumer Arbitration Boards bear some resemblance to the judicial proceedings of state courts in that they are a *sui generis* dispute resolution method and they are extra judicial. In this respect, it would be appropriate to use the provisions of the judicial proceedings of the state courts for filling the gaps in the legislation concerning the operation of the boards.

Returning to the scope of the consumer arbitration boards, Article 66 of the CPL states that the Ministry Trade is obligated to establish at least one Consumer Arbitration Board in the capital of each province and district in order to handle disputes that may arise from consumer transactions and consumer-oriented implementations.⁷⁴ Currently, there are 81 provincial and 921 district Arbitration Board for Consumers in Turkey. Provincial Consumer Arbitration Boards are granted authorisation to resolve consumer disputes up to 8480 TL, while district Arbitration Boards are authorised to handle consumer disputes up to 5650 TL.⁷⁵ The

⁶⁹ For example, Article 30 (23) of the Insurance Law entitled 'Arbitration in Insurance' states that in cases where there is no provision in the Insurance Law concerning arbitration, the provisions of the Civil Procedure Code related to arbitration also apply to the arbitration in insurance disputes.

⁷⁰ For a detailed review of this discussion, see Aydın Zevkliler/Murat Aydođdu, *Tüketicinin Korunması Hukuku*, Seçkin Yayıncılık, Ankara 2004, s. 426; Ermenek (n. 67), 574, 580 Yahya Deryal, *T Tüketicisi Hukuku/ Consumer Law*, (Seçkin Yayıncılık 2008), 208

⁷¹ *ibid*

⁷² Melis Taşpolat Tuğsavul, *Türk Hukukunda Arabuluculuk / Mediation in Turkish Law*, (Yetkin Yayıncılık 2012)344; Erişir (n. 67) 56

⁷³ Ali Cem Budak, '6502 s. TKHK'ya göre Tüketicisi Hakem Heyetleri/ Consumer Arbitration Board According to The Turkish Consumer Law Numbered 6502' (2014) 16 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 80.

⁷⁴ CPL Article 66. Moreover, the principles and procedures regarding the establishment and management of Arbitration Board for Consumers are included in the Regulation on Consumer Arbitration Committee for Consumers. See the Regulation on Consumer Arbitration Boards Article 1.

⁷⁵ CPL Article 68. See also the Regulation on Consumer Arbitration Boards Article 6.

application of consumer disputes under the limit of 8480 TL is compulsory to submit to Consumer Arbitration Board. In the case, if the case which is under that limit is filled in the consumer court, this case will be rejected because of the cause action.⁷⁶ According to the 2018 report, 590,303 complaints submitted to the Consumer Arbitration Boards in 2017⁷⁷ (See Table 5.4). The Consumer Arbitration Boards resolved 636,916 consumer disputes and in 75% (478,137) of the disputes the boards ruled in favour of the consumers in 2017.⁷⁸

⁷⁶ CPL Article 68

⁷⁷ In 2017, 37260 consumer complaints were also submitted to the Directorate General of Consumer Protection and Market Surveillance. Moreover, the Ministry of Customs and Trade received 347.485 calls via dialling 175 concerning consumer complaints in 2017.

⁷⁸Consumer Complaints going to Consumer Arbitration Board in 2017 <<http://tuketici.ticaret.gov.tr/data/5a8be01eddee7d952cbd7918/8tuketici%20hakem%20heyetlerine%20ulaşan%20tuketici%20şikayeti%20istatistikleri.pdf>> accessed 3 May 2019

Areas of Complaints	Number	Percentage
Consumer loan contracts	199 891	33.9
Defective goods	169 095	28.6
Defective services	74 558	12.6
Subscription agreement	23.484	4
Housing finance agreement	11 980	2
Distance contracts on financial Services	9 200	1.6
Warranty certificate	9 108	1.5
Distance contracts	8 901	1.5
After sales services	4 878	0.8
Out of office contracts	3 534	0.6
Insurance contracts	1 896	0.3
Timeshare vacation and Long-Term Vacation Service Agreements	954	0.2
Hire purchase agreements	835	0.1
Packet tour contracts	711	0.1
Prepaid house sales contracts	98	0
Price tag	63	0
Introductory and user guide	15	0
Promotional Implementations in Periodical Broadcasting Organizations	11	0
Others	71 091	0
Total	590 303	100

Table 5.4 Consumer Complaints going to Consumer Arbitration Board in 2017⁷⁹

⁷⁹ See Consumer Complaints going to Consumer Arbitration Board in 2017 <<http://tuketici.ticaret.gov.tr/data/5a8be01eddee7d952cbd7918/8tuketici%20hakem%20heyetlerine%20ulaşan%20tuketici%20şikayeti%20istatistikleri.pdf>> accessed 3 May 2019

Pursuant to the Regulation on Consumer Arbitration Boards, the application to the boards is made by submitting the application form with all relevant documents and evidence to the boards, where the consumer resides or where the consumer transactions were made. The application may be made electronically by using a secure electronic signature or mobile signature through the electronic government gateway portal.⁸⁰ The boards, same as state courts, must accept duly submitted applications and do what is necessary.⁸¹ After the submission of the dispute, the boards shall deliver a judgement within six months.⁸² The Boards resolve disputes through a written procedure and not use oral hearings.⁸³ The applications to the consumer arbitration boards are free of charge for the consumers. In general, the litigation costs, expert and representation fees are imposed on the losing party. However, in the event of consumer disputes, if a consumer is unsuccessful, the legal and expert fees are paid by the Ministry of Trade. If a trader is unsuccessful, these legal costs are imposed to him/her.⁸⁴

The Arbitration Boards consist of five members, including the president. The parties do not have the right to choose these members. It should be noted that only one of the five members of the consumer arbitration boards is a lawyer.⁸⁵ The boards regularly meet at least twice a month. Nevertheless, at the request of the President, the boards may also meet whenever the need arises.⁸⁶ The boards convene with at least three members, including the President, and reach a verdict with the majority of votes of the attendants.⁸⁷

⁸⁰ The Regulation on Consumer Arbitration Boards Article 11

⁸¹ CPL Article 68(2).

⁸² However, in some cases (taking into account such factors as the nature of the application and the nature of the goods or services) the period can be extended for a maximum of six months. For instance, in the case of the claimant is foreign. See the Regulation on Consumer Arbitration Committee for Consumers Article 23.

⁸³ The Regulation on Consumer Arbitration Boards Article 14

⁸⁴ CPL Article 70(7).

⁸⁵ Rules and producers of appoint of members are stated in the Article 66(2) of the CPL:

- a) One member to be appointed by the Mayor from among the expert municipal personnel in the field.
- b) One member to be appointed by the Bar, from among its members.
- c) One member to be appointed by the chamber of trade and industry in disputes where the seller is a merchant, or by the chamber of commerce where such are organized separately; where the seller is a merchant and craftsmen, by union of chamber of merchants and craftsmen in provinces, by the merchant and craftsmen chamber with the most members in towns.
- d) One member to be appointed from among the consumer organizations. The substitutes for the president and the members possessing the qualities set forth in this paragraph are also determined.

⁸⁶ The Regulation on Consumer Arbitration Board Article 13.

⁸⁷ Members cannot abstain from a vote. In the case of the vote are equal, it is assumed that the verdict is based on the opinion of the members in which the president joins. See the Regulation on Consumer Arbitration Board Article 15.

The awards of the Boards are binding upon the parties and enforceable in accordance with the provisions of the Code of Enforcement and Bankruptcy.⁸⁸ The parties may appeal against the award of the Boards to the consumer courts within fifteen days of the notification.⁸⁹ The appeal does not stop the execution of the award. However, parties may request a stay of the execution.⁹⁰

Finally, consumer courts are authorised as special courts of first instance, which handle consumer disputes over the economic threshold stated in the Regulation on Consumer Arbitration Boards or disputes where an appeal has been made against the arbitration board award. Currently, there are consumer courts in the ten provinces.⁹¹ In other provinces, the civil courts of first instance are provisionally authorised to adjudicate until the establishment of specialised consumer courts.⁹² It should be noted here that a full discussion of consumer courts is outside the scope of the present Thesis examined.

5.6.2 The Suitability of Mediation and Arbitrability of Consumer Disputes under Turkish Law

As mentioned above, the procedural rules and principles regarding the consumer disputes can be found in the CPL.⁹³ Articles 66 to 72 of the Law regulate consumer arbitration boards that have the authority to resolve disputes up to a certain economic threshold⁹⁴ and make binding decisions in these disputes. Articles 73 and 74 set the consumer courts, which are authorised to resolve disputes above the threshold and operate as the appeal authority for the decisions of the consumer arbitration boards. Regarding resolving consumer disputes through ADR methods, Article 68 (5) of the CPL clearly states that ` this article shall not prevent the consumers from applying to alternative resolution authorities in accordance with the relevant legislation`.⁹⁵ In doctrine, while most scholars agree that consumer disputes can be resolved through mediation

⁸⁸ CPL Article 70.

⁸⁹ CPL Article 70 (3)

⁹⁰ CPL Article 70(3).

⁹¹ Baki Kuru, *Civil Procedure Law*, (Yetkin Press 2019) 632

⁹² *ibid*; See also decision of the Court of Cassation 13th Civil Chamber, dated 30 November 2017 (E. 2015/41826, K. 2017/11816)

⁹³ Consumer protection as a public policy was first recognised by the Article 172 of the 1982 Constitution which granted the State the authority to take all necessary measures for the protection of consumers. In 1995, Law on Consumer Protection, No 4077, which was specifically addressed consumer protection, was entered into force.

⁹⁴ This monetary threshold is determined and announced each year in the Official Gazette by the Ministry of Custom and Trade. See CPL Article 68, and the Regulation on Consumer Arbitration Board Article 6.

⁹⁵ CPL Article 68(5)

under Turkish legal system, going to arbitration to resolve consumer disputes is still debatable.⁹⁶

As discussed in chapter 4, arbitrability plays an important role in determining either to enable or restrict the power of both an arbitral tribunal and the parties as to what subject matter can be arbitrated.⁹⁷ In general, the scope and concept of arbitrability is regulated in Article 1(4) of the Code of International Arbitration numbered 4686 and Article 408 of Code of the Civil Procedure. Pursuant to Article 408 of the Code on Civil Procedure, disputes arising from ‘rights in rem’ on immovable property and disputes governed by areas of law that are not subject to the will of the parties, such as family law disputes, are non-arbitrable. This provision has been interpreted in a very restricting manner by Turkish courts.⁹⁸ The Code of International Arbitration also includes a very similar statement that ‘this Code shall not apply to disputes concerning in rem rights of immoveable properties located in Turkey or to disputes that are not subject to the parties’ wills’.⁹⁹

With regard to the arbitrability of consumer disputes, according to some scholars¹⁰⁰ and established case-law¹⁰¹, the term ‘disputes are not subject to parties’ choice’ refers to disputes concerning public interest and therefore consumer disputes, which are related to public interest, are not capable of settlement by arbitration. In 2008, the Turkish Court of Cassation gave a verdict confirming this view. In the case of `CC.13/CD, 25.09.2008, D.2008/3492, F.2008/11120, due to the former Law No. 4077, a special law on public policy which aims to protect consumers, the establishment of Arbitration Board Committee by Article 22 of the Law No.4077, Article 23 of the Law which states that any kind of disputes concerning the application of this law must be strictly settled by either consumer courts or arbitration board committees depending on the amount of the claim, the lawmaker implicitly does not allow

⁹⁶ Ozbek (n 15) 976-977; Seda Özmumcu, 6502 sayılı Tüketicinin Korunması Hakkında Kanun’un Hükümleri ve Yargıtay Kararları Çerçevesinde Tüketici Mahkemelerinin Görev Alanına Giren Uyuşmazlıklara Genel Bir Bakış / Provisions of Consumer Protection Law and in the Light Of The Court Of Cassation’s Decision, An Overview Of Disputes Fallen into Consumer Courts Remit’, (2014) 16 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi; See Ziya Akinci, *Milletlerarası Tahkim/ International Arbitration* (Vedat Press 2016) 86

⁹⁷ See Chapter 4

⁹⁸ See decision of the Court of Cassation 15th Civil Chamber, dated 31 May 1979 (E. 1979/1195, K. 1979/1330)

⁹⁹ The Code of International Arbitration, Article 1

¹⁰⁰ Gülen Sinem Tek, ‘‘Tüketici Mahkemelerinin Görevi, Yetkisi ve Tüketici Mahkemelerinde Yapılan Yargılamanın Usulü / Jurisdiction and Competency of Consumer Courts and Procedure of Consumer Courts’ Proceedings’, (2015) *Kazanıcı Hukuk Araştırmaları Dergisi*, 138

¹⁰¹ Decision of the Court of Cassation 13th Civil Chamber, dated 20 October 2008 (2008/6195 K. 2008/12026)

private arbitration for consumer disputes. The court held that the dispute arising out of a package tour holiday contract is covered by this law and, since consumer courts are responsible for resolving the dispute, the arbitration clause in the contract is invalid.¹⁰² The main legal argument behind this view is that Article 1 of CPL stated that the purpose of this law is to take measures to protect the health, safety and the economic interests of the consumer in accordance to the public interest.¹⁰³ In other words, it is considered that in B2C contracts there is inequality in bargaining power, and consumers are vulnerable parties, thus consumers should be more protected.¹⁰⁴

Before continuing the discussion on the arbitrability of consumer disputes, an important issue that needs to be addressed. In particular, in the abovementioned decision of Court of Cassation in 2008, the court held that the package tour contract was a standard contract, including general terms and conditions, which were prepared by the trader.¹⁰⁵ The fact that the issue relating to the arbitration clause was individually negotiated and mutually agreed with the consumer was not claimed and proved. For this reason, Article 19 of the contract, which removed the competence of consumer courts to resolve the disputes arising between consumers and traders, was not valid and binding for the consumers.¹⁰⁶ As it was seen, the court stated that one of the primary justifications for the non-arbitrability of consumer disputes is the invalidity of an arbitration clause, which was put by the trader in the terms and conditions of the contract. In other words, when the court gave the verdict, it was considered that the invalidity of the arbitration agreement in consumer contracts and the arbitrability of consumer disputes was the same legal issue. However, the arbitrability of consumer disputes and the validity of arbitration clauses in consumer contracts are completely different legal issues, which have different legal consequences.¹⁰⁷ Therefore, the court should have taken these two legal issues into consideration separately and then justify its decision accordingly.

¹⁰² Decision of the Court of Cassation 13th Civil Chamber, dated 20 October 2008 (2008/6195 K. 2008/12026); Decision of the Court of Cassation 13th Civil Chamber, dated 25 September 2008 (E.2008/3492, K.2008/11120)

¹⁰³ CPL Article 1

¹⁰⁴ Similarly, in order to protect employees, the Turkish Supreme Court held that labour disputes were not arbitrable. See decision of the Court of Cassation 9th Civil Chamber, dated 14 September 1964 (4938/5429); Baki Kuru, *Civil Procedure Law*, (Yetkin Press 2019) 671; Ziya Akinci, *Arbitration Law of Turkey: Practice and Procedure*, (Juris 2011) 40

¹⁰⁵ Decision of the Court of Cassation 13th Civil Chamber, dated 20 October 2008 (2008/6195 K. 2008/12026); Decision of the Court of Cassation 13th Civil Chamber, dated 25 September 2008 (E.2008/3492, K.2008/11120)

¹⁰⁶ Decision of the Court of Cassation 13th Civil Chamber, dated 20 October 2008 (2008/6195 K. 2008/12026); Decision of the Court of Cassation 13th Civil Chamber, dated 25 September 2008 (E.2008/3492, K.2008/11120)

¹⁰⁷ Ziya Akinci also deals arbitrability as a matter different from the validity of arbitration agreement. See Akinci, (n 96) 114. These two issues are further discussed in chapter 4. Under Turkish law, the determination and clarification of the validity or invalidity of the arbitration clause are of utmost importance. In the context of

Returning to the arbitrability of consumer arbitration, it should be questioned how accurate it is to expand the category of disputes which are not ‘subject to the will of the parties’ to include disputes concerning the ‘public interest’. Disputes, which are not subject to the will of the parties, mean the kind of conflicts that are not related to with an issue within the free disposition of the parties and thus they cannot reach a mutual agreement on and lastly they are closely concerned with the public interest.¹⁰⁸ For example, the paternity suit or family law disputes, such as the annulment of marriage, or criminal law disputes are not subject matters that are not at the parties’ disposal, therefore these disputes are not capable of settlement by arbitration because they do not satisfy the criteria of the Code of International Arbitration and the Code of the Civil Procedure concerning arbitrability.¹⁰⁹ With regard to the arbitrability of consumer disputes, how accurate is the adoption of the same outcome directly in terms of consumer disputes deemed to concern public order? In seeking the answer to this question, Article 70 of the Code of the Civil Procedure which regulates ‘cases in which the public prosecutor is involved’ can be a guide.¹¹⁰ In the third paragraph of the aforementioned Article, it is mentioned that parties cannot freely reach an agreement regarding cases that a public prosecutor involved. This provision implicitly provides a distinctive criterion for disputes relating to an issue within the free disposition of the parties. Therefore, parties cannot agree to arbitrate these disputes. However, in the case of consumer disputes, there is no obstacle for the parties to agree to negotiate disputes concerning fairness that they may freely settle.

On the other hand, Article 68(5) of CPL states that this Article, which regulates applications to Arbitration Boards for consumers, does not prevent consumers from applying to private ADR entities. One of the issues that emerge from this Article is that some scholars claim that it is clear that with this Article the legislator provides a new opportunity for consumers to apply to

consumer contracts, in order to harmonise Turkish law with EU law, since 2003 the control of unfair terms and conditions have been maintained. Unfair terms and conditions, especially in consumer contracts, are regulated in accordance with Turkish obligation law (Articles 20-25) and CPL (Article 5). According to CPL, as a result of a contract term being considered unfair, this term shall be deemed null and void; the rest of the contract will be valid. According to the definition of unfair terms and condition given in Article 5 of the CPL, it is not enough that a contract clause has not been negotiated in order to qualify as an unfair. The Article also states that a contract clause can be deemed unfair if the clause of the contract creates imbalance in relation to the consumers’ rights and obligations. Regulation of unfair terms in consumer contracts also states that a term is unfair if it specifies a remedy for consumers, which has not been declared in legal regulations, limits the evidence that the consumer can show, increases the burden of proof for the consumer or removes or restricts the consumer’s ability to go to court or rely on alternative remedies.

¹⁰⁸ Gökçe Kurtulan, ‘Türk Hukukunda Tüketici Uyuşmazlıklarının Tahkime Elverişliliği/ The Arbitrability Of Consumer Disputes Under Turkish Law’, (2017) 131 Türkiye Barolar Birliği Dergisi, 253.

¹⁰⁹ See also Akinci (n. 96) 77, 78. Kurtulan, *ibid* 253.

¹¹⁰ Code of the Civil Procedure, Article 70

alternative dispute resolution bodies, primarily mediation and the Arbitration Boards, which accept disputes that are under the economic threshold mentioned above.¹¹¹ However, this is only a limited provision for consumer disputes which basically results in the Arbitration Boards not being competent for disputes that fall within the remit of consumer courts.¹¹² This view is supported by Seda, who writes that with regards to the disputes covered by the jurisdiction of consumer courts, due to the necessity of protection of consumer and public policy, it does not seem possible to mediate and arbitrate those disputes in accordance with the Code of the Civil Procedure and Law on Mediation in Civil Disputes.¹¹³

In the light of the abovementioned rules and their interpretation, it could be said that the dominant view is that the competent authority for the resolution of consumer disputes is either the Arbitration Boards for consumers or the Consumer courts depending on the amount of the dispute.¹¹⁴ It is also widely accepted that, except arbitration, all other ADR methods may be used for the settlement for consumer disputes.¹¹⁵ However, all the previously mentioned views suffer from some serious weaknesses. That is to say, it is clear that there is no legal obstacle in the Turkish legal system, apart from the Court of Cassation's case-law, that does not allow to resort to private arbitration for consumer disputes.¹¹⁶ It is observed that the criteria of the 'subject to the will of the parties' in the context of the suitability of mediation for civil disputes are also accepted under Article 1 of Law on Mediation in Civil Disputes which deals with the purpose and scope of this law.¹¹⁷ Pursuant to this Article, it is questionable that, while the lawmaker explicitly allows the use of mediation for consumer disputes, how it is implicitly prohibited to use arbitration for consumer disputes, even though it adopts the same criteria for determining whether the subject is within the free disposition of the parties. In other words, although the law adopts the same criteria for determining the suitability of mediation and arbitration for consumer disputes, in practice, due to the existing case-law, the parties cannot go to arbitration but they can use mediation for resolving their disputes. Another problem with this approach is that a) if the parties go to mediation and reach an agreement, which has an annotation on the enforceability of the agreement document, or b) their disputes are resolved through private arbitration, both cases have the same legal consequences regarding the binding

¹¹¹ Özmumcu, (n 96)

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ Yesilova (n.67);Erisir (n.67); Ermenek (n.67); Deryal (n. 70); Budak (n.73); Özmumcu (n. 96)

¹¹⁵ Ozbek, (n 15) 976; Özmumcu (n. 96)

¹¹⁶ Kurtulan (n. 99) 254

¹¹⁷ Law on Mediation in Civil Disputes, Art 1.

character and the enforceability of the arbitral awards or the agreements, however the consumer disputes can be resolved through mediation but not arbitration.

Another serious weakness with the abovementioned argument related to the non-arbitrable of consumer disputes in Turkey is that, although it is argued that due to the nature of the arbitration boards and consumer courts, to resolve consumer disputes exclusively through arbitration boards and consumer contracts is in favour of the consumer, the consumer courts already have over a barrel as other civil courts have compared with ADR.¹¹⁸ One of the main disadvantages of using consumer courts for consumer disputes is the excessive workload of the courts, which is the basic cause of delays in the award of justice as it results in the undue extension of the duration of the cases.¹¹⁹ Evidence of this is the exorbitant number of pending civil cases (over 110,000 cases), which take an unreasonable period of time until a final judgement is made (around 411 days).¹²⁰ Unfortunately, the same disadvantage exists in relation to the arbitration boards for consumers. As a result of the increase in the applications made to consumer arbitration boards since 2012, the decision-making period of the consumer arbitration committees has also been extended as a matter of course.¹²¹

Undoubtedly, going to private arbitration for low-value disputes may also not be an option for the consumers due to the cost which is higher compared to the dispute resolution method offered by the CPL. However, when considering the scope of consumer disputes, especially expanded by the CPL, it is not possible to accept this argument, which may be applicable to low value disputes, for all consumer disputes. For example, in the case of a dispute arising from a contract of sale a house or flat¹²² which may well be regarded as a consumer transaction if the conditions exist,¹²³ even though it is costlier to go to a private arbitration body rather than bring it in consumer courts, it is worth taking the dispute to private arbitration for settlement.

¹¹⁸ Yesilova also states that it is difficult to justify why and how a regulation on the functioning of state courts may or may not affect arbitration, which is an out of court settlement procedure. See Yesilova (n.67) 117

¹¹⁹ Kurtulan, (n.108) 254.

¹²⁰ Republic of Turkey Ministry of Justice Statistics (2018), <http://www.adlisicil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf> accessed 30 March 2019

¹²¹ According to a report, which was published by Ministry of Custom and Trade, while the total number of consumer complaints made to consumer arbitration committees in 2012 was approximately 446 thousand, it reached 3.2 million in 2015, however, the figure dramatically dropped to less than 1.5 million in 2016 and recently the number of consumer cases, which arbitration committees are handling, is slightly under 600 thousand in 2017.

¹²² Kurtulan gives an example of a contract of sale or construction of specially designed car worth 1,5 million Turkish Lira. See Kurtulan, (n.108) 254.

¹²³ In order to consider selling of a flat or house as a consumer transaction, this flat or house must be for dwelling or for vacation purposes. See CPL Article 4 h. The Court of Cassation states that if the norm of the law contains immovable property for housing and holiday purposes and one of the parties to the dispute is a consumer, the

To sum up, the Court of Cassation's case-law indicates that the consumer disputes are in close relation with public policy, therefore these disputes are not arbitrable. Moreover, it has been claimed that consumer disputes are not the subject matter of arbitration, based on the precise criteria set by the Code of the Civil Procedure and Law on Mediation in Civil Disputes. However, it should be reminded that in the Turkish legal system the term of validity of an arbitration agreement is confused with the arbitrability of consumer disputes. This Thesis asserts that there is no legal obstacle to validity of post-disputes consumer arbitration agreements or pre-dispute arbitration clauses, which the parties have individually negotiated. Thus, consumer disputes should be arbitrable if this is in line with the consumer's will and it has been individually negotiated with the trader.

5.7 Other Public ADR Entities

5.7.1 The Banks Association of Turkey Retail Customer Arbitration Board

The Retail Customer Arbitration Board is established as a part of the Bank Association to resolve disputes arising from banking products and services, such as debit cards, credit cards, consumer loans and insurance transaction between banks and their retail or individual customers. It is essential to be mentioned here that the activities of the arbitral tribunal cover only retail or individual banking transactions and only natural persons' applications are assessed. Both applications of legal entities and applications of natural person related to commercial, agriculture etc. activities are rejected. The complaint must be submitted to the Arbitration Board for examination within a period of 2 years following the date of occurrence of the transaction or action underlying the complaint. Services provided by the Arbitration Board are free of charge. The awards of the Arbitration Board with regards to disputes of an amount up to TL 3.692¹²⁴ must be enforced and executed by the banks.

Customers must apply to their bank regarding their disputes before applying to arbitration board. If the bank does not resolve the dispute, then customers can apply with a fully completed application form and all related documents to the arbitration board via e-the Government

dispute must be brought the consumer courts. See Decision of the Court of Cassation 13th Civil Chamber, dated 05 April 2005 (2005/ 15271 K. 2005/ 5679); Decision of the Court of Cassation 14th Civil Chamber, dated 20 September 2012 (2012/ 9109 K. 2012/ 10689). For more discussion and Decision of the Court of Cassation see Özmumcu (n. 96) 846-852; Tutumlu (n. 67) 353; Tek (n.100) 146.

¹²⁴ This amount is valid for the year 2019 and is amended on the basis of the rate of variation in the annual consumer price index published by the Turkish Statistics Institute in January every year.

Gateway or by ordinary mail, fax or electronic mail. Applications made personally to the Banks Association of Turkey are not accepted.¹²⁵

The Association published its annual report in 2017 that showed that slightly less than 14.000 applications were submitted to the Arbitration Board.¹²⁶ Compared to the previous year, the applicants increased by 102%. The main reason of this increase is that the Board started to accept applications through the e-Government Gateway online platform. 58% of these applications were not accepted due to outstanding documents, incomplete applications and missed deadlines. Surprisingly, only 17% of the applications handled by the Board are resolved in favour of customer. Moreover, 26% of those applications were decided in favour of customers without having to be discussed by the Board because the banks satisfied their customers' demands before any discussions.

5.7.2 Information and Communications Technologies Authority

The Telecommunication Authority, which was established with the Law No. 4502 to carry out the regulation and supervision function of the telecommunication sector by an independent administrative authority, established a competitive telecommunication sector and can observe effectively and productively the developments within this industry which is influenced by the rapid emergence of globalisation. It is a special budgeted institution with administrative and financial autonomy, which has a public legal personality to perform the duties given by the law.

The Electronic Communication Law numbered 5809 authorises the Authority to operate the resolution of disputes, especially through the conciliation method which is one of the non-judicial remedies.¹²⁷ In this context, Article 2(1) of Electronic Communications Law states that the implementation and execution of resolution procedures are performed under this Law.¹²⁸ In addition, Article 6 of this Law explicitly points to the competence of the Authority to settle

¹²⁵ The Banks Association of Turkey Customer Complaints Arbitration Panel, <https://www.tbb.org.tr/en/Content/Upload/Dokuman/148/BMHH_Brosuru_31_Ocak_2017_Internet_Ingilizce.pdf> accessed 3 May 2019

¹²⁶See <https://www.tbb.org.tr/Content/Upload/Dokuman/7512/Bireysel_Musteri_Hakem_Heyeti_Yillik_Faaliyet_Raporu_2017.pdf> accessed 4 March 2019

¹²⁷ Electronic Communications Law No. 5809, Article 2.

¹²⁸ *ibid*

the disputes between the operators when necessary and to take the measures required that are binding on parties, unless otherwise agreed by parties.¹²⁹

In 2012, the Authority launched an ‘Online Complaint Notification System’ to enable consumers to submit their complaints electronically and monitor all procedures and steps of applications. Thanks to this system, the Authority is able to analyse the complaints and carry out necessary audit activities on the areas which the claims are submitted. The system transmit consumer complaints to service providers within one working day, records the applications submitted and consumers receive a response within an electronic environment. It is worth noting here that the system only accepts complaints related to the information sector, such as broadband, land line mobile line, mobile phone, satellite platform.

Consumer complaints can be transmitted to the Authority through the Online Complaint Notification System with a username and password created at "tuketici.btk.gov.tr" website. The Authority analyses the responses and the ones that comply with the legislation are delivered to the consumer. Inadequate responses are sent back to the relevant service providers or taken back to the Authority for further evaluation. If the recorded complaints cannot be resolved, an examination, or even an investigation, about service providers can be initiated.

Lastly, in addition to the ‘Online Complaints Notification System’, since 1 July 2014 all service providers are obliged to establish their own ‘online consumer complaints systems’.

5.7.3 The Istanbul Metropolitan Municipality Police (Zabita)

In order to protect the economic interests of consumers, making an audit on the tariffs and price tags of goods and services offered for sale, informing consumers and raising awareness of consumers are one of the essential tasks of the Istanbul Metropolitan Municipality Police. Customers can submit their complaints regarding products or services provided by the Istanbul Metropolitan Municipality Police by either calling 153 or filling an online form.

The Istanbul Metropolitan Municipality Police (Zabita) usually publishes a report on consumer rights every year. The recent report shows that it received more than 16,000 complaints in 2018.¹³⁰ While about 90% of those complaints were resolved, the rest were forwarded to the

¹²⁹ *ibid*, Article 6.

¹³⁰ This number dramatically decreased from 24000 in 2013. See < <https://zabita.ibb.gov.tr/tuketici-haklari/>> accessed 4 March 2019

relevant departments for settlement.¹³¹ Complaints were mostly submitted through the 153 telephone number, then via filling an online form, then by making an application personally and lastly by email.¹³²

5.8 The Role of Private Entities to Resolve Consumer Disputes in the Turkish System

Sikayetvar is a private company that helps consumers for seeking solutions to their complaints about the companies which they shop from, informs website users about companies before shopping, provides data for the companies to produce solutions to the complaints in order to regain the customers and protect the brand reputation. Sikayetvar has 3.2 million members and have received approximately 6 million complaints from consumers. Last 30 days, 6.6 million people visited this website due to the 74K registered trademark to reach to a decision before purchasing a good or service by reading consumer complaints and brand answer.¹³³

Against the possibility of people complaining with non-existent profile information, Sikayetvar sends an SMS containing the "verification code" to the complainants to identify fake users. In order for the complaint to be processed, the issue of the complaint must arise from purchasing of goods and services and problems that cannot be resolved. Complaints that do not comply with the terms and conditions are filtered at this stage. In order to protect the person who submits the complaint and to prevent tarnishing the image of the institution or company, complaints are forwarded to editors working in line with the legal advisor instructions. Editors control whether the complaint is against trade and competition law and trademark rights. In addition, by correcting the spelling mistakes to lift incomprehensibility of complaints, if any, to make the complaint ready for publication by removing the offending words. The complaint, which went through a series of procedures not exceeding 24 hours, it is forwarded to the institution or company in question so that it can present a solution as soon as possible. In the meantime, the complaint will be published on the website and reach thousands of followers. The agency or company to which the four-stage complaint is addressed either writes a reply to be published on the website or communicates with the proprietor of the complaint.

www.sikayetim.com is another social media portal where consumers can access all the "Consumer Rights" information and submit complaints about the good or services they

¹³¹ ibid

¹³² ibid

¹³³ Sikayetvar is on Facebook (136.5K followers) and Twitter (29.2K followers), and has a smartphone application and a YouTube channel.

purchase to the relevant organizations companies. It is established in 2004 for settlement of consumer awareness at EU standards in Turkey. Consumer complaints to be submitted to site are forwarded to the "customer relations department" of the companies before they are published. As a company official, if there are "positive" or "negative" statements related complaints (maximum of five business days) will be published along with complaint on the website.

Besides those, there are several Non-governmental consumer protection associations and federation to inform consumers regarding their rights and help them to access to justice as the following: Tüketici Derneği (TD) – Consumer Association, Tüketiciler Birliği (TB) – Consumer Union, Tüketici Örgütleri Federasyonu (TOF) – Federation of Consumer Organizations, Tüketici Bilincini Geliştirme Derneği (TUBİDER) – Association for the Development of Consumer Awareness, Tüketiciyi Koruma ve Dayanışma Birliği Derneği (TÜKO-BİR) – Consumer Protection and Solidarity Association, Tüketici Hukuku Enstitüsü – Consumer Law Institute, Tüketicinin ve Rekabetin Korunması Derneği (TÜRDER) – Association for Consumer Protection and Competition, Tüketici Dernekleri Federasyonu (TÜDEF) – Federation of Consumer Associations, Tüketiciler Derneği (TÜDER) – Consumer Association, Tüketici Hakları Merkezi – Consumer Rights Centre, Tüm Tüketicileri Koruma Derneği – Consumer Protection Association, Tüketiciyi Koruma Derneği (TukoDer) – Consumer Protection Association, Tüketici Hakları Derneği (THD) – Consumer Rights Association.

5.9 Online Access to Consumer Arbitration Boards and Consumer Courts

The Turkish Ministry of Justice has developed a “National Judiciary Informatics System (UYAP) since 1998 to perform a particularly driving information system between the courts and all other judicial institutions, including prisons to improve the speed, reliability and performance of the judicial service offered to citizens in digital age. UYAP has been implemented these institutions with ICT and gives them access to all the legislation, the judicial decision of the Cassation Court, judicial records, police and military record judicial data. In this way, UYAP builds a computerised system incorporating all courts, prosecutorial offices, and law enforcement agencies, along with the Central Organization of the Ministry of Justice. Thanks to UYAP, both lawyers and citizens who can connect to UYAP Lawyer or Citizen

Portal with using their e-signature or mobile signature¹³⁴, can file a suit in civil courts, examine all their judicial and administrative cases, pay their case fee, commence execution proceedings, submit any related documents and question the situation of the cases in the Court of Cassation and Council of State through online. The latest data shows that the number of active users of the portal has reached the significant amount with more than 4.2 million, approximately 16 million cases fees have been paid by online, more than 12 million successful transactions regarding either filling cases or execution proceedings have occurred, and lastly over 125 million documents have been submitted to courts though using that online portal.¹³⁵

With regards to consumer disputes fall within the remit of consumer courts, consumers can file a suit to consumer courts through online by using their e-signature or m-signature since 2015. Citizens who want to submit or follow their case in electronic environment can access UYAP Citizen Portal Information System at <https://vatandas.uyap.gov.tr/vatandas/index.jsp>. Consumers who want to log in to the Portal via e-signature or m-signature, can access the cases and enforcement proceeding in consumer courts, examine the contents of all the submitted documents in the case, calculate the fees and expenses to be paid related to the lawsuit. Citizens who do not have an e-signature or a mobile signature can use the e-government gateway to only view the main safeguard information of the case files in the consumer courts under UYAP and cannot submit a case to courts through Internet. Thus, e-signature or m-signature is required in order to file a suit or take action online.

Lastly, previously, applications to Consumer Arbitration Boards that can be made by personally or by mail can now also be easily done electronically since 2017.¹³⁶ It has become possible for consumers to submit their applications from the relevant screen after logging in with the e-Government passwords. Users can go to "Consumer Complaints Application" and go to "Consumer Complaints Applications" step. As a result of this application, consumers are not obliged to apply to courts or Arbitration Boards in person for low value claims anymore, and they can make their applications online. This possibility encourages consumers who think that it is not time efficient to go to court in person for low value claims, to defend their rights.

¹³⁴ While electronic signature is presented by Electronic Certificate Service Providers approved by Information Technologies and Communication Authority, mobile signature is serviced by mobile network operators in Turkey.

¹³⁵ See (*UYAP Bilişim Sistemi*, 2018) <<https://avukat.uyap.gov.tr/main/avukat/index.jsp?v=3015>> accessed 12 September 2018.

¹³⁶ The Regulation on the Amendment of the Law on Consumer Arbitration Boards was published in the Official Gazette and entered into force on 11 August 2017, <<http://www.resmigazete.gov.tr/eskiler/2017/08/20170811-1.htm>> accessed 4 March 2019.

5.10 Conclusion

In this chapter the existence of Turkish legislation on consumer redress mechanisms has been analysed. That analysis shows that although in general it may be said that the consumer redress system and other legislative instruments have obtained positive results, the truth is that there are still new challenges ahead. Some urgent improvements are needed to provide an easy-to-use mechanism for resolution of consumer disputes and to enhance the level of the effective enforcement of consumer ADR in practice. It is not recommended that courts are not necessary; indeed, the courts cannot be replaced by extra-judicial mechanisms while handling specific cases, such as criminal case. However, for many cases that occur online, where the value of the claim is less than court expenses and both parties get involved in the contract in good faith, different options are required. An effective mechanism for resolving online consumer disputes can help to settle complaints and build consumer trust, thereby make e-commerce more reliable.

Lengthy proceedings, both judicial and administrative, are the main obstacle on a consumer's path to redress. Hence, non-judicial mechanisms of dispute resolution such as ODR are gaining in importance. The difficulties consumers face in seeking redress, particularly in relation to use of ADR and ODR for low value goods and services, will be highlighted in the next chapter.

Chapter 6: Legal Challenges of Establishing Turkish ODR System and Legal Solutions for Turkey

6.1 Introduction

As discussed in the previous chapter, in Turkey courts are still considered as the main dispute resolution forum for civil disputes. Evidence of this is the exorbitant number of pending civil cases (approximately 2 million cases), which take an unreasonable time (around 540 days) to reach a final judgement (including appeals).¹ Regarding consumer disputes, the average duration of a case before a consumer court is 411 days.² Delays in the award of justice and the long duration of trials are factors that have led to the emergence of ADR and ODR methods; at the same time they are urgent problems awaiting solution in Turkey as well as elsewhere around the world. To date, many procedural reforms have been adopted and the consumer redress system has improved. For example, consumer arbitration boards, an out-of-court system, are authorised to resolve disputes, which do not exceed 8480 Turkish Lira, within a period of six months. However, the existing mechanisms that include the consumer arbitration boards and the consumer courts are not effective in resolving the huge number of consumer disputes arising from online transactions; thus, in order to enhance consumers' access to justice modern, fast, less formal and cost-effective mechanisms supported by ICT are undoubtedly needed in Turkey.

Developed nations, such as the US and the EU, have long established ODR systems and currently have advanced systems in place to handle disputes arising in many different fields. Emerging countries, such as Turkey, are several steps back in the area of ODR, not taking full advantage of the developments in information communication technology. This chapter analyses the suitability of ODR for Turkey and explores the policymaking and regulatory challenges of ODR in Turkey ahead of being recognised as a method for the resolution of online consumer disputes; it is an interesting option to explore as it may help in redressing complaints, increasing consumer trust and building more secure e-commerce environment in Turkey.

¹ Republic of Turkey Ministry of Justice Statistics (2018), < <http://istatistikler.uyap.gov.tr/>> accessed 27 April 2019

² Republic of Turkey Ministry of Justice Statistics (2018), <http://www.adliscil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf> accessed 27 April 2019

Finally, the chapter provides recommendations for the development of consumer ADR and ODR in Turkey.

6.2 Challenges of ODR Development in Turkey

6.2.1 Cultural Challenges

Before starting an analysis of the cultural challenges of establishing ODR in Turkey, it is necessary to provide a clear definition of culture for the purposes of this research. Culture can be described as “[t]he way of life, especially the general customs and beliefs, of a particular group of people at a specific time.”³ Turkish society has not yet fully adopted the idea of utilising ICT for activities, such as purchasing goods or services or settling disputes. Regional characteristics give priority to personal relations rather than objective treatment. For example, instead of purchasing goods or services at home on the Internet, most Turkish consumers find it more convenient to go to the shopping centre.⁴ This means that consumers can see, touch, test, or try on what they will purchase, while having F2F contact with the sellers. In addition, they can meet with other families and friends, and enjoy a coffee or a meal. This cultural perspective has a significant influence over e-commerce, ADR and ODR.

Changing the habits of individuals is quite difficult. Even if people know something is not true, they may be reluctant to abandon their habits. Bringing a case to court, even if it is laborious, costly and takes a long time, is an example of the abovementioned habits that people find hard to abandon. This habit is referred to in the literature as litigiousness.⁵ Turkey is one of the most litigious society in the world. As the transition towards urban life accelerates and the effect of individualism, as a natural consequence of this, is obvious, people can still prefer to take a case to court, instead of negotiating the disputes or using alternative methods, which can be easier and more convenient. Turkey, even though it is not the biggest country in the world, has the largest courthouses in the world and this does not help with changing the habit of being litigious.⁶ This is to some extent a question of how societies evaluate living together, how they search for quality life, and most importantly, during the transition from an agricultural society

³ Cambridge Dictionary, <<https://dictionary.cambridge.org/dictionary/english/culture>> accessed 27 April 2019.

⁴ Turkish Statistical Institute, ‘Information and Communication Technology (ICT) Usage in Households and by Individuals’ (2018) <http://www.turkstat.gov.tr/PreTablo.do?alt_id=1028> accessed 22 April 2019

⁵ Carol J. Greenhouse, ‘Interpreting American Litigiousness.’ In *History and Power in the Study of Law: New Directions in Legal Anthropology*, edited by Starr June and Collier Jane (Cornell University Press, 1989); Leon Wolff, ‘Litigiousness in Australia: Lessons From Comparative Law’ (2013), 18(2) *Deakin Law Review*, 271

⁶ Daily News, ‘Biggest’ courthouse to open in January (2012) < <http://www.hurriyetdailynews.com/biggest-courthouse-to-open-in-january-31981>> accessed 8 May 2019

towards urban life how they perceive interpersonal trust. To some extent, it is about how leaders are guided by society. For example, in 1850 Abraham Lincoln, one of the first Presidents of the United States, a country where mediation has years of history, famously said “Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”⁷

The level of prosperity in a country directly affects the access to professional services, including ADR. It is true that individuals, who find it difficult to meet their basic needs, such as housing, nutrition, transportation, education, should be reluctant to apply for professional services. The legal services sector is also directly affected by the overall statement. On the other hand, prosperity also increases life expectancy. Individuals, who survive such a failure to meet their basic needs, want to resolve their problems faster, less costly and less formally. Therefore, the increase in the level of welfare and the fact that people have money to spend on things other than their basic needs will increase the tendency towards the legal services sector, such as applying ADR methods to resolve their disputes.

Additionally, it is worth mentioning that legal culture in a country is one of the most significant factors that affect the developments of ODR. Legal culture of society creates public knowledge of and behaviour patterns regarding the law and legal system.⁸ Lawrence Friedman, a well-known proponent of the idea of legal culture⁹, defines legal culture as “the idea, values, attitudes and opinions, people in some society hold with regard to law and the legal system”.¹⁰ To analyse any legal rules separately from culture is inadequate for understanding the consequences occurred in adjudication in any legal system. The reason for this is that the same legal rules have different results in different countries. For example, in both the UK and Turkey pedestrians have priority on a pedestrian crossing. Nevertheless, while pedestrians are most of the time safe when using the pedestrian crossing in the UK, the same walkers might be injured by cars in Turkey. Therefore, it can be argued that, certain legal rules that are in line with the social structure and culture of a state, can be understood and applied differently in another state.

⁷ Abraham Lincoln, ‘Abraham Lincoln’s Notes for a Law Lecture’ (1850) <<http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> > accessed 19 April 2019.

⁸ Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture*, (Harvard University Press 1998)

⁹ Susan S Silbey, ‘Legal Culture and Cultures of Legality’ in John R Hall, Laura Grindstaff, and Ming-Cheng Lo (eds) *Handbook of Cultural Sociology* (Routledge 2010) 471

¹⁰ Lawrence M. Friedman, ‘Is there a Modern Legal Culture’ (1994), 7(2) *Ratio Juris*, 117, 118.

As such, the culture of countries as well as the attitudes and character of human being are essential for understanding how rules laws operate and are applied in each country.

Looking at the Turkish history, since the Ottoman Empire ADR methods have been used as an alternative to traditional litigation. For example, in 1414 the contract that was signed by Turks and Genoese included an arbitration clause.¹¹ Even though ADR was not legalised before the 1850s, it seems that ADR has been part of the legal culture of Turkey for many years. However, in practice, it has not reached its full capacity until today, although it is not at all foreign with culture of Turkey.

6.2.2 Information Communication and Technology Challenges

In Turkey, there is a notable growth in ICT. According to the Turkish Statistical Institute, the penetration rate is slightly less than 73% in 2018 (about 59 million users out of 81 million).¹² There has been a significant increase of more than 300% in Turkey internet users in the last ten years, i.e. between 2008 and 2018.¹³ A recent survey carried out by the Turkish Statistical Institute in April 2018 shows that approximately 84% of households had access to the Internet.¹⁴ Unquestionably, the growing number of Turkish internet users and the increasing penetration of the internet shows that ICT is rapidly developing in Turkey. Moreover, the Turkish government has endeavoured to raise the awareness of users in relation to ICT. However, it is worth mentioning that internet users in Turkey use the internet mostly for social media and video platforms. (See Table 6.1)

¹¹ Kate Fleet, *European and Islamic Trade in the Early Ottoman State: the Merchants of Genoa and Turkey* (Cambridge University Press 1999) 172.

¹² Turkish Statistical Institute, 'Information and Communication Technology (ICT) Usage in Households and by Individuals' (2018) <http://www.turkstat.gov.tr/PreTablo.do?alt_id=1028> accessed 26 April 2019

¹³ *ibid*

¹⁴ *ibid*

Purposes	Total
Sending / receiving e-mails	44.8
Telephoning over the internet / video calls over the internet	69.5
Participating in social networks (creating profiles, posting message etc)	84.1
Finding information about goods and services	67.8
Listening to music	61.4
Watching internet streamed TV (live or catch up)	40.0
Watching video on demand	4.4
Watching video content from sharing services	78.1
Playing or downloading game	35.3
Seeking health-related information	68.8
Making an appointment with practitioner via website	34.7
Selling goods or services	21.3
Internet banking	39.5

Table 6.1 - Internet activities of individuals who have accessed the Internet, by private purposes, 2018¹⁵

The survey also states that the percentage of shopping online is slightly less than 30% in Turkey in 2017.¹⁶ Nevertheless, more than one out of 5 consumers faced problems when purchasing goods and services over the internet in the last 12 months in 2017. (See Table 6.2) These existing statistics show that concerning legal infrastructure, there is a lack of rules which weakens consumer confidence, especially the inadequacy of a consumer protection legal framework which is recognised as one of the main challenges of development of e-commerce in Turkey.

¹⁵ ibid

¹⁶ ibid

Types of Problems	Total
Technical failure of website during ordering or payment	20.1
Difficulties in finding information concerning guarantees or other legal rights	13.6
Speed of delivery longer than indicated	46.5
Total cost higher than indicated (unexpected delivery cost or transaction fee)	9.8
Wrong or damaged goods or services delivered	49.1
Problems with fraud faced (misuse credit card or undelivered)	15.0
Complaints and redress were difficult or no satisfactory response after complaint	19.5
Cross border retailer did not sell the country	7.3
Other	1.8

Table 6.2 - Individuals who encountered problems when buying or ordering goods or services over the Internet in the last 12 months and type of problems in 2017¹⁷

Confidence in e-mobile and e-commerce raises the individuals' eagerness to subject disputes to ODR methods. Additional factors that may support the reliance to ODR schemes are the accessible and affordable Internet and high-quality broadband. A set of practical courses is required to increase the level of competence of those using computers and ensure cyber literacy, especially for professional activities. The Turkish government has a critical role to perform in developing and implementing education programs that would provide national access to computers and improve the level of IT proficiency. The government has already taken action towards the direction of providing access to the internet, but bridging or decreasing the digital divide is still pending. Furthermore, participation in ODR procedures by disputants and neutral third parties presupposes that they all have an adequate level of digital knowledge. For instance, a tech-savvy party can make the most of the opportunity to use the ODR system, while another party, who is not familiar enough with online schemes, may start with having over a barrel.

6.2.3 Lack of Consumer Awareness concerning ADR and ODR

The first step to benefit from ADR is to feel the need for a mediator or arbitrator. It is natural that the parties see themselves as the people who know about the conflict best and therefore can find a satisfactory solution. However, the pressure from the dispute can get on disputants' nerves and consume their patience. In the course of time, the dispute may prevent the parties

¹⁷ ibid

from thinking clearly and find a good solution for them. Moreover, the parties can ignore or not accept that they have lost the ability to manage the dispute wholesomely at any stage.

If there is no cultural tendency in the society to seek help from professional services, this is directly reflected in the behaviour of the disputants, and, as seen in the Turkish society, parties prefer to get a lawyer to file a case. Not having hopes for resolving disputes through ADR methods to push parties to go to court for disputes.¹⁸ When filing a case, in order not to make mistakes and avoid any further loss, the necessity to use a lawyer is unquestionable. In doing so, the idea of resorting to any ADR methods does not come to the disputants' mind.¹⁹

Even if parties go to ADR methods for resolution of their disputes, the uncertainty about how the ADR methods will help the parties is the second major obstacle to be overcome. Overcoming these barriers requires extensive information on mediation or arbitration, including what is their role and how the mediator or arbitrator can help the parties.

In order to develop the consumer ADR and ODR in Turkey, it is necessary to raise awareness and understand the notion of ADR and ODR.²⁰ If users are unaware of the fact that they can use ADR and ODR and how to access it, then ADR and ODR are impractical. If a consumer submits a complaint to an ADR or ODR service, it will be important to persuade the party to be involved in the procedure. This is especially challenging when there is an imbalance of power between the disputants, but it depends on the preferred ODR method. If arbitration is chosen, it will be simpler to set the mechanism when participants have an arbitration agreement before the dispute occurs. Nevertheless, legal issues may occur in Turkey regarding the validity of a consumer arbitration agreement before the dispute arises. In the event of mediation, it will be easier to convince disputants to mediate for not serious disputes especially if there is no serious power difference between them, in which case there is a tendency to continue the relationship. Katsh and Rifkin state that companies may be unwilling to consider ODR services, hence there is need for raising their accountability.²¹ They also recommend that parties must be notified not only about their rights, but also be ensured that they can use alternative

¹⁸Ersin Erdoğan, Nurbanu Erzurumlu Hukuk Uyuşmazlıklarında Türkiye'nin Arabuluculuk Tecrübesi Ve Zorunlu Arabuluculuk Taslağı/ Turkey's Mediation Experience in Civil Disputes and Draft on Compulsory mediation (SETA 2016) < <https://setav.org/assets/uploads/2016/12/Turkiyenin-Arabuluculuk-Tecrubesi-PDF.pdf> > accessed 8 May 2019

¹⁹ ibid

²⁰ United Nations Conference on Trade and Development, E-Commerce and Development Report 2003 'Online Dispute Resolution: E-Commerce and Beyond' < https://unctad.org/en/docs/ecdr2003ch7_en.pdf > accessed 15 May 2019, 177, 193.

²¹ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (JosseyBass 2001)

remedies, which are enforceable.²² ODR can establish trust, but this can be achieved with the proper promotion. Lawyers, consumer unions, organisations or associations, may lead disputants to resort to or utilise the existing alternative methods. Besides, ODR is usually proposed as part of associateship schemes, such as Trustmark. Businesses are frequently inclined to use these programmes on a self-imposed basis for raising consumer trust. This is why it was argued before that the main function of ODR schemes is not only to resolve disputes but also to build trust and raise the confidence of disputants.²³

To increase consumers' confidence in ODR, holding a balance between confidentiality and transparency is essential.²⁴ Nevertheless, the notion of confidentiality and transparency may vary from ODR methods to ODR methods as mentioned. In the case of online arbitration, it may be required to disclose an arbitration award to the third party unlike other consensual methods, such as mediation, by reason of precedent, anxiety about bias and conflicts of interest are further declared.

Finally, an establishment of the ODR Platform in Turkey could play a fundamental role in raising awareness for the arbitration board for consumers. By doing so, the ODR Platform could holistically increase consumer access to justice. This will happen, firstly, by inviting disputants to do some research on the efficiency of ADR methods, and secondly, when ADR methods are not available, by encouraging parties to use the arbitration board for their disputes. Increased consumer awareness will also have a positive impact on traders' level of awareness concerning the arbitration board.

6.2.4 Regulatory Challenge

Another challenge for the development of ODR in Turkey, as recognised in the previous chapter, is the regulatory challenge. Even though ODR is not limited to online transactions, e-commerce is a good field where ODR can reach its full potential. Indeed, the Turkish government requires an extensive legal framework to establish trust in e-commerce, ADR and ODR. With regards to e-commerce, UNCITRAL Model Law on Electronic Commerce of 1996 was as a focal point for numerous countries, including Turkey that have used it to enact national law on e-commerce. Nevertheless, in attempting to use this statute as a guide, lawmakers were not always careful to achieve harmonisation with the existing national law and avoid conflicts

²² *ibid*

²³ Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 156

²⁴ The EC Directive on Consumer ADR 2013, Article 7; UNCITRAL Technical Notes on ODR (2017) Articles 10-12.

with it. Such unintended consequences could create more issues than the ones that they solve. Law No. 6563 on Regulation of Electronic Commerce, which is the first regulation in the area of e-commerce, came into force on 1 May 2015 with the purpose of establishing the legal infrastructure of e-commerce in Turkey.²⁵ The aforementioned regulation regulates issues related to goods and services in the electronic sphere, contracts and orders made over the internet, rules to be followed in commercial communications and commercial electronic messages and e-commerce enterprises. In spite of notable efforts to create a legal framework for e-commerce, including B2C, the desired level of consumer protection, particularly in online shopping, has not been reached.

Regarding ODR, currently there is no applicable national or international law in Turkey mainly regulating ODR. Therefore, at this stage we should look at the rules of ADR and examine whether they apply to ODR as well. For example, it should be examined whether some issues related to online arbitration, such as the format of the online arbitration agreement, the e-seat or e-place of online arbitration, the applicable law on online arbitration procedures, also apply to the New York Convention. Likewise, there is a need to analyse whether the rules and principles of the Law on Mediation in Civil Disputes apply to online mediation. This might cause some difficulty to an ODR administrator, mediator or arbitrator, who is opposed to enacting criteria using a flexible approach. From this aspect, encountering the regulatory challenge requires further research on the efficacy of introducing special rules for ODR or, in the case of relying to the existing ADR laws, on how to incentivise mediation centres, arbitration institution, judges and other legal participants so that they consider using ODR.

6.3 Legal Solutions for the Development of ODR

6.3.1 Preventing Dispute

Although ODR has significant advantages, such as avoiding travel, reducing costs as compared to traditional litigation, there are still some challenges. In order to remove the barriers for the prevalence of ODR, this chapter proposes that ODR might be divided into two parts: dispute prevention and dispute resolution. Dispute avoidance refers to the use of ICT to prevent the

²⁵ In addition to the Regulation of Electronic Commerce, the Regulation on Commercial and Commercial Electronic Messages published in the Official Gazette dated 15/07/2015 and numbered 29417 and the Regulation on the Service Provider and Service Providers in Electronic Commerce published in the Official Gazette dated 26/08/2015 and numbered 29457 came into force.

existence of disputes between parties and the resolution of disputes at an initial stage without requiring from the disputants to be entirely involved in the dispute resolution process. Dispute resolution involves the use of ICT in the settlement of disputes. This Thesis concentrates on dispute resolution mechanisms, although it is required at a minimum summarily to apply to some methods to escape from disputing as they make contribution to a preferable recognition of the potential of ICT for settling disputes. The mechanisms can assist parties to mitigate the need for external resolution bodies, saving time and money for the parties. There are several types of dispute avoidance methods, and those are addressed to below.

6.3.1.1 Interior Complaint-handling Services

These might also be named internal dispute settlements, in-house customer satisfaction systems, call centres or consumer complaint services. Empirical research shows that interior complaint-handling services are the most common and favoured way to prevent the emergence of B2C disputes.²⁶ The OECD has issued the Recommendation of the Council on Consumer Protection in E-commerce in 2016, where it was emphasised the necessity to utilise these internal complaint-handling mechanisms efficiently due to the fact that it is a practical procedure for granting consumers and businesses with fast and low-priced solutions. It is also stated that these mechanisms should be used at an early stage without any cost.²⁷ In this sense, it has been recommended that businesses should establish and develop their customer complaint-handling mechanisms before applying to external ODR bodies.²⁸ The Global Business Dialogue on e-commerce, the Transatlantic Business Dialogue, the Electronic Commerce and the Consumer Protection Group also suggest that merchants should provide internal procedures to handle consumer problems.²⁹ Recently, Article 63 of China E-commerce Law 2019 states that 'e-commerce platform business operators may establish online dispute resolution mechanisms, formulate and display dispute resolution rules, and settle disputes fairly and justly according to the principle of voluntariness.'³⁰

²⁶ European Commission, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings' (17 January 2007), Health and Consumer Protection Directorate-General Directorate B Consumer Affairs Study Centre for Consumer Law, Centre for European Economic Law Katholieke Universiteit Leuven, Belgium '9

²⁷ OECD Recommendation of the Council on Consumer Protection in E-commerce (March 2016) 16

²⁸ *ibid* 17

²⁹ Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices*, (Routledge 2017)

³⁰ China E-commerce Law 2019, Article 63

Similar to the requirements of the Australia Corporation Act,³¹ the Turkish E-commerce and Consumer Protection Law 2013 can make it obligatory for online businesses to establish their internal complaint-handling services. Since 2014, service providers in telecommunication sector have been obliged to have their online consumer complaints systems by the Electronic Communication Law. This provision can be expanded in E-commerce and Consumer Protection Act and apply to all online traders. It is worth noting here that, when applying this provision, some significant principles should be set out according to which the systems should be visible and freely accessible, easy to use with fairness and consistency.³²

6.3.1.2 Escrows and Online Payment Providers

Another conflict avoidance mechanism is the escrow service, which is an alternative e-payment system that requires an independent trusted third-party, keeping funds on behalf of the buyer and the seller to ensure that these funds are issued only when determined states are convinced. After the agreement to the terms of the transaction, when the buyer collects and validates the goods or services, the money is transferred to the seller's account. In other words, the seller is not paid until the buyer receives the items and take them in his/her possession. This system assists in building and strengthening fraud protection. Online payment systems, such as PayPal, Shopify, WorldPay, Amazon Pay and Alipay, increase the confidence of the consumers to complete their transactions online. Recently, AliExpress has launched Alipay, which has more than half billion users. Thanks to Alipay, it has been provided that consumers are protected against unauthorised transactions, loss from non-delivery or misrepresentation.³³ Alipay Member Protection guarantees that the buyers will receive their items on time and as described. In the event that the buyer or the seller is not satisfied from the transaction, parties will try to negotiate. If they cannot reach an agreement on a satisfactory result, the buyer may submit a claim within 15 days after his order. After the submission of the claim, the parties have 30 days to negotiate. Within these 30 days the buyer may either ask Alibaba.com to resolve the dispute or may continue to negotiate with the seller. When the seller replies, the buyer should respond within 7 days, otherwise the case will be closed. If the parties cannot reach an agreement or do

³¹ Australia Corporation Act 2001, Section 119

³² These principles are also stated by International Chamber of Commerce, see ICC, 'Putting it Right: Best Practices for Customer Redress in Online Business' (November 2003).

³³ 'Alipay' (Intl.alipay.com, 2018) <<https://intl.alipay.com/ihome/user/protect/memberProtect.htm>> accessed 22 April 2019.

not ask alibaba.com to be involved in the dispute, Alibaba will act as an online arbitrator after the case escalates.³⁴

Similar to eBay, Amazon and Alibaba, Turkish online companies should offer consumers a secure online or mobile payment system to feel confidence when doing their shopping online. Currently some companies have already started to use secure online payment systems in Turkey. For example, `Gittigidiyor` has started to offer a secure payment system called Sifir Risk (Meaning zero risk) to consumers that money will be transferred to the sellers' account after the buyers receive the items.³⁵ It is worth noting that this system is not used much, but its use should be extended and be encouraged.

6.3.1.3 Online Shopping Assistants

Another way to avoid disputes is online shopping assistants, which provide information to the consumers about the seller before making a purchase on the internet. Thanks to the online shopping assistants, consumers may check whether a website is secure, or an online trader is reliable or not. Recently the European Consumer Centre has set up a software tool, which is called 'Howard', which researches websites on behalf of the consumers and helps them decide whether to purchase goods or services from it or not.³⁶ If a consumer types the name of a website, Howard will study when the website was created and how long it has been running for. Howard also helps consumers avoid fraudulent websites, find trusted e-shops, know their rights when buying on the Internet and see the feedback or the comment from other consumers. Howard is of great help, especially if the site is new, offers low prices or asks for prepayment.

There is no software tool similar to Howard in Turkey yet. However, there is a private company called Sikayetvar that helps consumers when seeking solutions to their complaints in relation to the companies they shop from. Sikayetvar informs website users about companies before shopping, provides data about the companies and assists in finding satisfactory solutions to complaints so that companies maintain or regain their customers and protect their brand reputation.

³⁴ *ibid.*

³⁵ 'Sifir Risk Sistemi Ile Dokunarak Alisveris Gittigidiyor'da' (*Gittigidiyor.com*, 2018) <<https://www.gittigidiyor.com/sifir-risk-sistemi/>> accessed 25 April 2019.

³⁶ This tool was created by Denmark in 2007, then it has become accessible in most EU Member States.

It is worth noting here that the establishment of a software tool similar to Howard by the Directorate General of Consumer Protection and Market Surveillance will provide significant benefits for the consumers to avoid fraudulent websites in Turkey.

6.3.1 4 Reputation and Feedback Systems in Online Shopping

Dissimilar to physical sales in stores, where consumers can touch, feel and taste the goods or services they purchase, this close touch is absent in e-commerce, and the buyers may not be able to verify the seller's identity. For an online business to grow, hence, it is essential that buyers and sellers of online transactions feel at ease and trust each other, and for that they require having protections that mitigate the obstacles created by asymmetric information. Reputation and feedback systems are one of the more practical ways of increasing the buyers and sellers' confidence by providing them previous users' recommendations, information and experience. It is commonly accepted that eBay's success is not only due to the integrity and transparency of its auction system, but also the use of a reputation and feedback system which is a distinguished figure employed first by eBay that was later reproduced and adopted in another format by most online traders. After the completion of purchases on eBay, buyers have 60 days to give either a positive, negative, or neutral feedback for the seller of goods or services. If buyers on eBay want to find out the history of the seller's transactions, they can see the feedback score of the seller in the feedback profile page. The buyers can learn how many positive/neutral/negative feedbacks the seller has got in the last month, six months or a year.³⁷

On other e-commerce companies, feedback is usually formulated through a star rate system (usually between 1 and 5), and the buyers can click on the rate to learn more about the seller and what the most recent ones are, what is the breakdown of feedback, and whether there are any noteworthy complaints. It is critical to highlight here that reviews or feedback may be about the goods or services rather than the seller, such as the product reviews on Amazon.

A recent survey entitled 'Local Consumer Review Survey 2017' showed that 85% of the consumers trust online reviews as much as personal recommendations before purchasing items.³⁸ It was also indicated that 93% of the consumers look at the reviews to determine if a business is reliable or not and 68% of the consumers read four or more reviews before deciding

³⁷ While the feedback score is computed by applying all past activities, the per cent positive only seems back at the last one year of a transaction for a seller and except repeat feedback from the same buyer for completed transactions within the same calendar week.

³⁸'Local Consumer Review Survey 2017' (BrightLocal, 2018) <<https://www.brightlocal.com/learn/local-consumer-review-survey/#q1>> accessed 26 April 2019.

upon the trustworthiness of a business.³⁹ Similarly, an empirical research conducted by Nosko and Tadelis showed that buyers, who have a better experience on eBay, continue to purchase items on eBay again.⁴⁰

It may be possible for retailers to obtain unfairly a reputation that they do not have merit in some cases where this practice happened on eBay.⁴¹ Similarly Xu et al. demonstrate the growth of a centralised market for fake reputations for retailers on the Alibaba Platform in China.⁴² Recently, the Taiwan Fair Trade Commission started an investigation in 2013 into allegations that Samsung paid students to leave negative feedbacks and poor start reviews about HTC phones.⁴³ Samsung was also purportedly paid the students to leave positive feedback and five stars reviews about Samsung phones. After investigation, Samsung was fined \$340,000 for fake reviews and feedbacks.⁴⁴ Similarly, in 2014, the Italian Competition Authority fined TripAdvisor half a million Euros for fake reviews.⁴⁵ Hence, designers of the platform must be mindful of such practices and take necessary precautions to disclose and punish this kind of activities.

With regards to Turkey, it can be said that some large online companies, such as Hepsiburada, Gittigidiyor, N11 and Amazon, have a review or feedback system, however medium-sized companies have not launched such a system for their customers or such system is not used effectively. Gittigidiyor has established a Seller Development and Badge System, which is involves the classification of sellers on the basis of an evaluation and rating of the quality of the products and services offered to the buyers.⁴⁶ A seller, who has been a member of GittiGidiyor for at least 30 days and has made at least 20 sales transactions in the last 3 months, can benefit from this system. In this system, the products, service quality and sales performance

³⁹ibid.

⁴⁰ Chris Nosko and Steven Tadelis, 'The Limits of Reputation In Platform Markets: An Empirical Analysis And Field Experiment' [2015] The National Bureau of Economic Research Working Paper, 2.

⁴¹ Jennifer Brown and John Morgan, 'Reputation in Online Auctions: The Market for Trust' (2006) 49 California Management Review 61.

⁴² Haitao Xu et al, 'E-commerce reputation manipulation: The emergence of reputation-escalation-as-a-service' (2015), Proceedings of 24th World Wide Web Conference <<https://www.eecis.udel.edu/~hnw/paper/www15.pdf>> accessed 25 April 2019

⁴³ 'Samsung Must Pay \$340,000 After Paying People to Write Bad Reviews' (*Mail Online*, 2013) <<https://www.dailymail.co.uk/sciencetech/article-2476630/Samsung-ordered-pay-340-000-paid-people-write-negative-online-reviews-HTC-phones.html>> accessed 7 April 2019.

⁴⁴ ibid

⁴⁵ Jone Stone, 'Tripadvisor Fined Half A Million Euros For Fake Reviews' Independent' (2014) <<https://www.independent.co.uk/news/world/europe/tripadvisor-fined-half-a-million-euros-for-fake-reviews-9942151.html>> accessed 27 April 2019.

⁴⁶ Satici Gelisimi ve Rozet Sistemi (Gittigidiyor.com, 2018) <<https://www.gittigidiyor.com/satici-bilgi-merkezi/basarili-saticinin-rehberi/satici-gelisimi-ve-rozet-sistemi.html>> accessed 25 April 2019

offered by the sellers are evaluated and scored. Sellers are classified as sub-standard, standard, successful and very successful according to their conduct.⁴⁷ At the end of each month, the performance level of all sellers and the successful or unsuccessful elements are indicated by the Seller Service Scorecard. In this way, by giving feedback to sellers, they aim to increase their product and service quality to reach the desired result. Sellers, who are successful in service and sales performance, are rewarded with successful and very successful badges which are displayed on their profile page, product pages, search result pages, and next to their products. The advantage of having these budgets is that successful and very successful sellers' products are brought to the fore and buyers are more likely to make purchases from those sellers with high service quality.

As mentioned above, review and feedback systems are not provided and used effectively in Turkey. Turkish consumers usually submit their feedback, reviews or complaints about the seller or products to consumer complaint websites, such as Sikayetvar, not to sites from which they purchase the products from. Reviews and feedbacks on consumer complaint websites play a major role in whether or not consumers purchase these goods or not. Hence, in order to not only increase consumer confidence but also to have a better reputation, online shopping platforms should establish and develop feedback and rating systems for Turkish consumers for building trust between sellers and buyers.

6.3.1.5 The Establishment of Notice and Action (or Takedown) Procedures

Another measure for reducing or preventing consumer disputes is to encourage online intermediaries to implement notice and takedown (NTD) procedures in response to the notification of illegal content. It is possible that incorporating ODR mechanisms into the NTD system and merging the NTD system with the data breach notification mechanism will most likely increase fairness and efficiency of consumer protection online.⁴⁸ The NTD procedures commence when a user reports a hosting service⁴⁹ about illegal content on the internet and end

⁴⁷ Criteria for success are calculated according to the seller's last 3 months performance based on the following criteria: percentage of products shipped in the last three months, percentage of completed sales with no problems, such as refund or return, and percentage of recommendations by other buyers.

⁴⁸ Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contemporary Issues In The EU, US And China* (2nd edn, Routledge/Taylor & Francis Group 2014), 423

⁴⁹ Hosting service providers can be identified as one type of online intermediary. Defining the hosting service provider can be questioning as it is a relative term. For instance, the social network provider can be considered as hosting service provider if it owns and runs its server consisting of 'the storage of information provided.' See EC Directive on Electronic Commerce 2000, Article 14

when an online intermediary takes action by blocking or deleting the alleged illegal content.⁵⁰ The NTD procedures are considered to be necessary measures in the aggression against the sale of counterfeit goods via the internet.⁵¹ It is also usually applied to battle against other Intellectual Property rights' infringement, defamatory content, terrorism-related content, illegal gambling, child abuse content, misleading advertisements etc.⁵²

Online intermediaries may get 'actual knowledge' of illegal activity or information upon the receiving a notification of illegal content. A notification of illegal content is usually expected to be in a designated form to make the online service providers aware of the alleged illegal content.⁵³ The Court of Justice of the EU in the case of *L'Oréal and Others v. eBay* stated that if notifications of allegedly illegal activities or information turn out to be inadequately precise or insufficiently substantiated, the online service providers may not be able to recognise the illegality and take action expeditiously to remove or disable access.⁵⁴ In the US, in the case of *Hendrickson v. eBay Inc.*, it was ruled that it was inadequate to provide eBay with the movie's title without naming the eBay item number listings.⁵⁵ In other words, information concerning the claimed illegal content should be adequately precise and sufficiently substantiated for online service providers to obtain 'actual knowledge' and 'awareness' of illegal activities.

In practice, some online service providers have put their own technical systems into action for the NTD process. For instance, it may be remarked that eBay has improved its NTD system, named 'VeRO Programme' (Verified Rights Owner) which is a self-regulated, filter program designed to provide IP owners with support in removing or blocking infringing listings from the online marketplace.⁵⁶ The complainant fills out a Notice of Claimed Infringement (NOCI) form identifying the allegedly infringing listings and infringed works, signs and emails it to

⁵⁰ European Commission, 'Commission Staff Working Document Impact Assessment: Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Preventing the Dissemination of Terrorist Content Online' COM (2018) 640 final

⁵¹ European Commission, 'Commission Staff Working Document Overview of The Functioning of The Memorandum Of Understanding On The Sale Of Counterfeit Goods Via The Internet Accompanying Document to the Communication From the Commission to the European Parliament, the Council and the European Economic and Social Committee: A Balanced IP Enforcement System Responding To Today's Societal Challenges' COM (2017) 707 final

⁵² European Commission, 'A Clean and Open Internet: Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries', 4 June 2012,

⁵³ Wang (n.48) 429

⁵⁴ Case C-324/09, *L'Oréal and Others v. eBay*, [2011], para. 122.

⁵⁵ *Hendrickson v. eBay Inc.*, [2001], 165 F Supp 2d 1082

⁵⁶ 'Vero Programme: Notice of Infringement' (*eBay*, 2018) <<https://pages.ebay.co.uk/vero/notice.html>> accessed 7 April 2019.

eBay.⁵⁷ Amazon also created its NTD procedures to handle rights infringements.⁵⁸ Unlike eBay, Amazon has up separate forms for different rights infringement, such as ‘notice and procedure for notifying Amazon of defamatory content’ and ‘notice and procedure for making claims of right infringements’.⁵⁹

In the EU, the EC Directive on Electronic Commerce stated that once the notified illegal content and its nature of infringement have been confirmed, the online service provider is required to act ‘expeditiously’⁶⁰ to unload or disable access to information.⁶¹ In the US, the responsible online intermediates are also expected to reply ‘expeditiously’ to a notification.⁶²

Similar to the EU and the US, the Turkish Electronic Commerce Act should regulate ‘notice and takedown’ procedures on the Internet and encourage the online provider services to voluntarily create self-regulated NTD procedures to fight against counterfeit products and misleading advertisements.

6.4 Development of an ODR System in Turkey

In the current digitalised society, there is a strong possibility that ODR will become a significant dispute resolution mechanism to resolve disputes. Turkey should take legal action and practice upon promoting a proper ODR system for low-value disputes. The advancement of an ODR system for resolving disputes regarding online B2C sales would be a good starting point. Subsequently, such a system could be adopted for any consumer disputes, including arising from offline transactions.⁶³ Developing an ODR system for online transactions is suitable given that the purchases are performed online, the value of consumer transactions is usually low, online buyers inspire confidence in the online retailer by transferring money

⁵⁷ *ibid*

⁵⁸ Amazon, Report Infringement’ <<https://www.amazon.co.uk/report/infringement>> accessed 8 April 2019.

⁵⁹ *ibid*

⁶⁰ There is no clear definition of ‘expeditiously’ or of the specific actions required so as to ‘remove or disable access’. In practice, as the consultation indicated, some service providers may send the notice party a confirmation of receipt when they receive a notice and inform the notice party when the requested action has been taken. This measure bears some similarity to that of the ‘without undue delay’ principle for data breach notification discussed earlier. For example, it was proposed that the controller shall inform the data subject without delay and, at the latest within one month of receipt of the request, whether or not any action has been taken. See European Commission, ‘A Clean and Open Internet (n. 44)13; European Commission, Proposal for A Regulation Of The European Parliament And Of The Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), SEC(2012) 73 final; Wang (n. 48) 433.

⁶¹ EC Directive on Electronic Commerce, Article 14(1)

⁶² Copyright Act Title 17 USC (1976): §512(b)(2)(E) and §512(c)(1)(c).

⁶³ Conclusively, disputes arising from offline transactions should have been resolved by the same systems that are available to consumers who have disputes arising online.

before receiving the items, and they cannot usually return them to a store when problems appear.

Instead of reinventing the wheel, Turkey can utilise the initiatives made by the EU and UNCITRAL, such as the EU ODR Platform and take them forward. The schemes developed by the EU and UNCITRAL need the founding of an ODR platform which would serve as an entry point for disputes and inform disputants. Any ODR platform established in Turkey should include a tiered system, which, as recommended by the UNCITRAL Technical Notes on ODR, would encourage disputants to negotiate for reaching an agreement before their disputes are referred to mediation or arbitration. In the event that the trader and consumer cannot resolve their disputes amicably using assisted negotiation, the second step would be to forward disputes to the ADR schemes to be resolved.

6.4.1 A Proposal for Creating Non-Profit ODR Platform: How could ODR Platform operate in Turkey?

The ODR platform in Turkey is set in a way comparable to the ODR Regulation 2013 and the UNCITRAL Technical Notes and it should follow the steps below:

- 1. Problem Diagnosis and Conflict Prevention Function:** Problem diagnosis should help parties identify the type of disputes they have.⁶⁴ The Platform should assist in understanding what are the parties' legal rights and liabilities. For example, summaries of decisions in similar disputes can help. A useful knowledge tool should organise the content according to different types of disputes and serve as a diagnostic or information management tool that would prevent unmeritorious disputes. This function will be more effective if Turkish consumer advisory centres and another related department connect to the ODR platform. In addition, universities, consumer unions and associations can collaborate with advisory centres to provide support for consumers who have difficulties using the ODR platform. One advantage of handling high-volume e-commerce disputes is that these disputes can simply be categorised and settled when disputants reach an agreement concerning the applicable law on their disputes that is unambiguous. Most disputes arising from the purchase of items regard non-delivery, late delivery or not matching the seller's description and payment.

⁶⁴ Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press, 2017) 125

The platform should categorise disputes into a well-organised taxonomy so that when the information is processed, it should be shared with related traders and competent authorities that will be able to evaluate what is going on in the markets. Based on this shared information, legislators and traders would respond to market difficulties that require to be tackled. Although regulators will control law compliance and reduce the cost of public enforcement, traders will benefit from this information by improving their market standards and preventing future consumer disputes.

2. **Submit Complaint and Response:** The consumer submits a complaint against the online trader via the ODR platform by filling a form and providing the detail of the disputes, such as the name of traders, traders' email address, and description of the dispute. At this stage, some satisfactory solutions for the consumer may be offered by the Platform. It is worth mentioning that the consumers should contact the traders themselves to resolve their disputes before applying to the Platform. If not, the Platform may refuse their applications and ask them to contact the traders first. A fully completed complaint form would be forwarded automatically to the relevant trader by the Platform and the traders would be expected to respond to the consumers with proposed solutions. The relevant trader should have seven calendar days to reply or offer a solution to the consumer.
3. **Negotiation Stage:** The negotiation stage can be improved by automated negotiation tools, which recognise areas of agreement and dispute. The computerised machines then help in creating a conversation between the disputants which aims to push them towards a satisfactory agreement through facilitating an exchange of views, insulating issues of controversy and classifying proposed solutions.
4. **Referring the Dispute to the Convenient Dispute Resolution Bodies:** If parties do not resolve their disputes by negotiating within 10 calendar days, the dispute may be referred to be settled by other ADR entities. It is worthy note here that the proposed Platform does not prescribe a specific type of ADR methods. Any convenient ADR methods (including arbitration) allowed by national law may be utilised for settlement or resolving consumer disputes. Because of the characteristic of consumer disputes (usually are low-value), online negotiation and online mediation are better to fit the B2C context.⁶⁵ Complexities of arbitration, cost of arbitration and continual debate

⁶⁵ Mireze Philippe, 'ODR Redress System for Consumer Disputes: Clarifications, UNCITRAL Works & EU Regulation on ODR, (2014) 1 International Journal of Online Dispute Resolution ,54; Amy J. Schmitz, There's an

regarding the arbitrability of consumer disputes in Turkey may make arbitration less preferred ADR methods for consumer disputes. This platform can benefit from the well-established ODR practices such as (eBay), mechanisms for matching problems and solutions (SquareTrade), automated negotiation support systems (SmartSettle), blind bidding tools (CyberSettle) online arbitration (AAA and CIETAC Online Dispute Resolution Center).

5. **Enforcement:** Decisions of ADR entities could be binding and enforced through the Consumer Courts similarly to the decisions of the consumer arbitration boards, which are binding and enforceable.
6. **Escalating the Dispute to An Online Judicial Process:** If parties do not settle their disputes through ADR entities within 30 days, as a final stage the dispute should be referred to either online consumer arbitration boards or consumer courts depending on the value of claim. The platform should minimise the number of disputes referred by trying to resolve them at early stages.

The cost of establishing and conducting the ODR Platform as a starting point for online consumers, would require to be supported and financed by the government and could be supervised by the Ministry of Justice and Ministry of Trade. The Ministry of Justice will have the task of improving and providing an effective redress system that would keep pace with the needs of the citizens living in the current globalised and digitalised era for.⁶⁶ The cost of establishing an ODR platform can be sustained because the goal of the ODR system is to increase consumers' access to justice and provide a cost-effective and time-saving method of dispute resolution. When the ODR platform starts to run, online businesses could be obliged to pay a fee to promote the platform, and online consumers may be asked to be charged a small fee (perhaps 1-5% of the value of the claim) to submit their complaints online. If disputants do not resolve their disputes at the negotiation stage, the trader could be charged with a fee which would cover the cost of selecting an ADR entity to settle the dispute. It is worth noting that

"App" for That: Developing Online Dispute Resolution to Empower Economic Development,(2018) 32 Notre Dame Journal of Law, Ethics and Public Policy, 23

⁶⁶ In many official reports and publications containing proposals for increasing effectiveness in justice systems, for example the recent report entitled 'Ministry of Justice Strategic Plan 2015-2019' published by the Republic of Turkey's Ministry of Justice (Directorate for Strategy Development), it is mentioned that it has become increasingly inevitable to improve the ADR methods and to enhance the effectiveness in practice. See 'Ministry of Justice Strategic Plan 2015-2019' published by Republic of Turkey Ministry of Justice, Directorate for Strategy Development (2015) <<http://www.judiciaryofturkey.gov.tr/pdfiler/plan.pdf>> accessed 17 April 2019; moreover, in 2010 the Judicial Reform Strategy and the Strategic Plan of Ministry of Justice and recently the Tenth Development Plan (2014-2018) have been prepared by the Grand National Assembly of Turkey, state that ADR mechanisms will be given priority.

going to consumer arbitration boards and consumer courts is free of charge.⁶⁷ Thus, it will more likely be discouragement for submitting the complaint to ODR Platform if consumers are asked to pay a fee. At the same time, requesting the fee of the process to be paid by traders can result in traders not accepting to participate in the process and simply refuse the request.⁶⁸ In this case, it is necessary to find alternative solutions to both make the use of the ODR effective and encourage traders to participate in process. It is suggested that the use of artificial intelligence software, such as case profiling, knowledge management which automatically examine the characteristics of individual claims, would not only reduce the cost but also enhance the actual quality and compatibility of resolutions.⁶⁹

Another funding possibility is EU projects. For example, the recent project entitled the ‘Technical Assistance for Strengthening Consumer Protection’ which is funded under the EU's Instrument for Pre-Accession, has started to provide effective consumer protection in line with the EU acquis and Member States’ best practices.⁷⁰ One of the objectives of the project is to increase the effectiveness and applicability of Consumer Arbitration Boards, remodel the consumer arbitration boards’ system and establish efficient ADR entities under a clear regulatory regime by conducting surveys, organising campaigns, preparing workshops, seminars, evaluation reports and giving training.

As a starting point, a launched ODR platform should be accessible for consumers, who live in Turkey, against online traders who are based in Turkey. The main reason to restrict it to traders based in Turkey is that jurisdiction problems will occur regarding traders based outside Turkey if it is allowed to submit complaints against them as well. It does not seem easy to force such traders to be involved with this ODR platform.⁷¹

⁶⁷ In Turkey, in accordance with the Consumer Protection Law any consumer disputes are taken to consumer courts by the consumers, consumer associations and Ministry of Trade are exempted from case fees. However, they may be charged for post and expert fees. It is important to mention that bringing disputes to consumer arbitration boards are totally free of charge for consumers. If consumer arbitration boards need an expert, the fee for this expert is paid by the Ministry of Trade.

⁶⁸ A proportionate fee can be requested from the traders for the platform. Similar to the European Small Claims Procedure approach concerning the fee, a calculation method can be established to determine the proportionality of fees, for example ODR entities fees of less than 15 % of the value of the claim can be considered as proportionate.

⁶⁹ Graham Ross, ‘The Possible Unintended Consequences of the European Directive on Alternative Dispute Resolution and the Regulation on Online Dispute Resolution’ (2014) 10 *Revista Democracia Digital e Governo Eletrônico* 206, 217.

⁷⁰ The project has a total budget of 2 million euros, out of which 1.8 million euros are provided by the EU. See ‘Consumer Protection, A Common Priority!’ (EU Delegation to Turkey, 2018) <<https://www.avrupa.info.tr/en/pr/consumer-protection-common-priority-7765>> accessed 4 April 2019.

⁷¹ These jurisdiction issues are beyond the scope of this chapter. Legal challenges of international consumer disputes are examined in detail in chapter 4.

6.4.2 The Need for a Policy and Regulation

Similar to the provisions of the ODR Regulation 2013, online merchants should be obliged by law to inform consumers concerning the ODR Platform and give a link to connect to the ODR platform's website. It is worth noting here that the provided link should be visible in the website.⁷² If the ODR platform is intended to be successful in Turkey, the law should make it mandatory for disputants to join and use this process. In this way, there will be awareness about the Platform and ODR procedures will be promoted and become more popular. In other words, parties will learn and observe what the ODR itself is and how it works. A significant shortcoming of the EU ODR Regulation is that traders can refuse to participate in or ignore the ODR procedure. Similar to the UNCITRAL Technical Notes on ODR⁷³, law may stipulate that if the disputants fail to resolve their disputes themselves and choose an ADR entity within reasonable time, then the ODR manager can select an ADR entity for reaching a settlement. In the event of failure to choose an ADR entity, the ODR administrator is expected to determine as to whether the entity shall be replaced. As a practical matter, the law should also require online businesses to provide a contact email address on their websites and use the same email address used in their transactions with customers. Some of them only allow communication via filling online forms and do not provide an email address. Moreover, most of times the email addresses, which are used in their transactions, are not proper email addresses that can be used to contact the traders (they are often 'please do not reply' emails). If consumers submit a complaint via the platform, they should be given a contact email address of the traders so that the Platform can forward the complaint to the trader.

6.4.3 The Need for Establishment of Private Independent ADR Entities as Third Party

A neutral third party that is either appointed by the ODR administrator or chosen by the disputants can help in settling or resolving the disputes. Neutrals should have relevant practical knowledge as well as dispute resolution experience to qualify for handling any disputes. In this context, the ODR Platform should have a system in place that ensures that careful and thorough checks are performed regarding the choice, education and training of neutrals. The existing Istanbul Arbitration Centre and Department of Mediation in Turkey could be utilised to identify and select persons incompetent to be selected as neutral third parties under the ODR scheme. These third parties may be entrusted with the duty of assisting the disputants to settle their

⁷² Although the European Union has made it a legal requirement to provide the link in the websites, there is no arrangement on how this link can be shown to users. Most of times, it is not visible in their websites.

⁷³ The Technical Notes recommends that the ODR administrator should choose a neutral that interacts with the litigants in an attempt to resolve the disputes. See UNCITRAL Technical Notes on ODR, Article 20

disputes utilising ADR methods. The Centre and the Department may be required to establish methods of listing qualified persons as neutral third parties concerning disputes arising from online transactions through the ODR platform. It should be noted that the neutral third parties, who will settle consumer disputes via the ODR Platform, will not have to be qualified lawyers.

Currently, the necessary conditions for being enrolled in the register of mediators in Turkey are the following:

- a) to be a Turkish citizen,
- b) to be a graduate of a faculty of law with at least five years of experience in the profession
- c) to be fully competent,
- ç) to have no criminal record for committing an intentional offence,
- d) to complete the training on mediation and succeed in the written and practical examination held by the Ministry.⁷⁴

Article 20 (2) of the Law on Mediation in Civil Disputes states that for being a mediator it is required to be at least 5 years a qualified lawyer. It is understandable that the criteria for being a mediator in commercial disputes should be high, as professionalism and experience are required, it is questionable to expect mediators to have the same qualifications for consumer disputes, which are less complicated than commercial disputes. It is suggested that the mediators, who will settle consumer disputes via the ODR Platform, do not have to be qualified lawyers but should complete the training on mediation and succeed in the written and practice examination of the Ministry.

Another initiative for the involvement of ADR entities in ODR procedures can be by the Department of Mediation that should establish or at least support the establishment of private ADR entities in Turkey. There are no private mediation centres in Turkey as the EU ODR platform provides. The inadequacy of all existing mediation centres, which are public, makes the establishment of private mediation centres unavoidable.⁷⁵

⁷⁴ Law on Mediation in Civil Disputes, Article 20 (2)

⁷⁵ It is emphasised that with the establishment of private mediation centres, an important boost to employment will be given. It is also highlighted that call centres can be opened within the private mediation centres and these centres can provide employment opportunities for 45-50 thousand people together with the assisting personnel. See the Project on the Development of Mediation in Civil Disputes (2017) <<https://rm.coe.int/mediation/168075fa4c>> accessed 25 April 2019

Last but not least the factor that prevents the development of mediation is fees for mediation services in Turkey, which commences from 340 Turkish Lira for up to the first three hours.⁷⁶ This cost shows that the use of third parties to settle dispute is not sustainable for the many consumer disputes. Del Duca, Rule, and Cressman stated that the annual average value of online disputes handled by eBay is \$70-\$100⁷⁷ and quite often less than \$20.⁷⁸ Colin Rule claims that it seems difficult to convince a disputant to pay a cost to resolve a dispute, which is not significantly less than the value of the item in question.⁷⁹ Thus, the mediation fee should be proportionate to the value of submitting complaints via the ODR Platform. Similar to the eBay- SquareTrade practice, it is suggested that the consumers should pay a small part of the mediation fee and online traders may subsidise the rest of the cost.

6.4.4 The Need to Raise Awareness of Consumer Regarding ADR and ODR

A difficulty encountered by Turkish consumers is to familiarise themselves with the notion of ADR and ODR as well as with ADR entities. A recent report entitled ‘the Project on the Development of Mediation in Legal Disputes’⁸⁰ has surprisingly stated that the court officers’ awareness about mediation is only less than 4%.⁸¹ The other astonishing figure is that only 24% of the members of the Confederation of Turkish Tradesmen and Craftsmen and Turkish Union of Chambers and Commodity Exchanges admitted that they have knowledge about mediation.⁸² The Department of Mediation has created a website with the links of the public mediation centres and the lists of individual mediators.⁸³ It is essential to emphasise that there is no evidence that all the officially launched public mediation centres and Istanbul Arbitration Centre provide ODR services.

⁷⁶ This fee is determined and announced every year in the Official Gazette by the Ministry of Justice. See ‘Minimum Mediation Fee Tariff for 2018’ published by the Ministry of Justice in the Official Gazette Numbered 30286 and dated 30 December 2017, < <http://www.resmigazete.gov.tr/eskiler/2017/12/20171230-9.htm>> accessed 21 April 2019

⁷⁷ Louis F. Del Duca, Colin Rule and Brian Cressman, ‘Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume’ (2015) 4 Penn State Journal of Law & International Affairs 242, 244.

⁷⁸ Colin Rule and Chittu Nagarajan, ‘Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of ODR’ [2010] ACResolution Magazine 4, 4.

⁷⁹ Colin Rule, ‘Making Peace on Ebay: Resolving Disputes in The World’s Largest Marketplace’ [2008] ACResolution Magazine 8, 11.

⁸⁰ This project is co-funded by the Swedish International Development Cooperation Agency and the Republic of Turkey and implemented by the European Council.

⁸¹ The Project on the Development of Mediation in Civil Disputes (2017) <<https://rm.coe.int/mediation/168075fa4c>> accessed 25 April 2019

⁸² *ibid*

⁸³ According to the Mediation Department statistics, there are currently 107 active mediation offices in 46 provinces in Turkey.

The disputants, traders and consumer unions and associations, such as the Confederation of Turkish Tradesmen and Craftsmen and Turkish Union of Chambers and Commodity Exchanges or arbitration institutions, meditation centres, government agencies, particularly the Department of Mediation, may refer disputes to certified ODR entities. When this takes place through the ODR entities' website, the principal scheme practised is synchronise with Trustmark. Nevertheless, Turkey does not have the required state Trustmark; hence it is a necessity for the identification and establishment of a framework of Trustmark in Turkey.

6.4.5 Building Trust

Trust is a necessary element for the improvement of ODR.⁸⁴ Raising trust for e-commerce and having a reliable ODR system is significant in the effort which all concerned parties should be required. Government, businesses, consumers and ODR providers each have their part of the liability in stablishing confidence. Turkey needs a comprehensible legal framework to build trust in e-commerce and ODR.

Recently, in an attempt to build trust in e-commerce, the Communiqué on Trust Stamp in E-Commerce ("Communiqué") was published in the Official Gazette numbered 30088 and came into force on 6 June 2017.⁸⁵ The main aim of the Communiqué is to set the procedures and principles regarding the Trust Stamp to be used in e-commerce and implement specific requirements concerning the trust and standard of service of service providers or intermediary service providers, who are willing to have the Trust Stamp. Trust stamp is defined in the Communiqué as the electronic sign given to the service providers or intermediary service provider that meets the minimum safety and service quality standards foreseen in this Communiqué.⁸⁶ It is essential to mention here that the recently launched Trust Stamp system is not mandatory for online companies. However, when an e-commerce company decides to obtain the trust sign, it must comply with the requirements and obligations set out in the Communiqué. The primary criteria of the Trust Stamp can be summarised as follows: a) any transaction involving personal data and payment information shall be carried out with the home secure sockets layer ("SSL") on desktop and mobile websites, and with SSL in the application b) take all necessary measures by performing regular infiltration testing to prevent the

⁸⁴ Melissa Conley Tyler and Jackie Bornstein 'Accreditation of On-line Dispute Resolution Practitioners' (2006) 23(3) Conflict Resolution Quarterly 383, 394

⁸⁵ See 'Communiqué on Trust Stamp in E-Commerce' published by the Turkish Ministry of Custom and Trade in the Official Gazette Numbered 30088 and dated 6 June 2017, <<http://www.resmigazete.gov.tr/eskiler/2017/06/20170606-12.htm>> accessed 21 April 2019

⁸⁶ The Communiqué on Trust Stamp in E-Commerce 2017 Article 4(f)

possession of the information held on the site by malicious persons c) design processes by following the relevant laws and regulations such as Law on Consumer Protection, Law on E-commerce, Law on Personal Data Protection and administrative decisions d) take measures against having content in the e-commerce environment that may adversely affect the physical, mental, moral, psychological and social development characteristics of children e) inform consumers about their orders, content, warranty, cargo, delivery time and the details of service providers who provide mentioned services f) provide the possibility of communication with the customer service in order to communicate consumer requests and complaints regarding the order through at least one of the internet-based communication methods and through the telephone g) ensure that the requests and complaints are effectively managed and settled.⁸⁷

In the Communiqué, it is stated that the Trust Stamp Providers will be authorised by the Ministry of Trade.⁸⁸ In other words, e-commerce companies that want to obtain a stamp of trust will apply for it to a private organisation, which is authorised to issue a stamp in exchange for a fee, not directly from a government institution. The Trust Stamp Providers will continue their activities under the supervision of the Ministry. In addition, the Trust Stamp Providers will have an audit authority after the trust stamp is issued.

The provision of a stamp of trust by a private institution, not by the state, raises a separate issue of trust. Since there are no accredited Trust Stamp Providers, it is not possible to apply for a stamp of trust at the moment, and it will be necessary to wait for the Trust Stamp Providers to be accredited. It is obvious that meeting the requested criteria and paying the fee for renewing the stamp every year will create a financial burden on e-commerce sites. In addition, as the Trust Stamp Providers have the authority to audit, additional costs will arise due to these audits by the Ministry, as well as the audits by these companies.

Although the Trust Stamp system is not mandatory, it has the potential to become an industry standard once it has been heavily used by well-known websites. Therefore, it can begin to see this stamp on most e-commerce sites, although not necessarily by law. On the other hand, e-commerce sites that do not fulfil their obligation under the Trust Stamp, there is the possibility that they lose their function.⁸⁹

⁸⁷ *ibid* Article 5

⁸⁸ *ibid* Article 4

⁸⁹ Before starting to propose model to raise the effectiveness of consumer redress system, it is worthy to mention here that there are another steps should be taken for development of ODR as follows: a) to provide legal and financial benefits to encourage application to ADR b) to create a mediation training module for increasing the

6.5 A Proposed Model to Raise the Effectiveness of Current Turkish Consumer Redress System

In the previous chapter, an overview of the legal framework of Turkish consumer redress system is given. As mentioned above, consumers in Turkey generally go to consumer arbitration boards or consumer courts for resolving their disputes.⁹⁰ Even though the consumer redress system and other legislative instruments have had positive results, there are still problems in the use of current system, which do not allow it to reach its full efficiency. One of these is the unpredictability of the time employed for resolving low-value disputes. The Law on Consumer Arbitration Boards stated that after the submission of the dispute, the boards shall start to resolve the dispute within six months.⁹¹ Similarly, the report carried out by Ministry of Justice stated that the average duration of a case in consumer courts is 297 days. This time period may be considered excessive for specific types of consumer disputes, especially low-value disputes arising from e-commerce.⁹² In the event that a consumer submits his/her complaint about a pair of shoes worth 100 Turkish Lira through the Consumer Arbitration Board, the Board has to resolve the dispute within 180 days. Therefore, the fact that a dispute will be handled and resolved in 180 days by the Board may discourage consumers to use this system for low-value disputes. When it is compared to the length of time taken by some accomplished ODR schemes, such as eBay's Resolution Centre or Modria, where the expected period for handling and resolving disputes is less than 10 days, it becomes apparent that the difference is substantial.⁹³ Thus, the Consumer Protection Law should be amended so that the board and the courts shall resolve disputes within maximum 90 days.

efficiency of mediation training c) to make studies on public awareness raising and training members of the judiciary, employees and public to increase awareness regarding mediation d) to set up arbitration institution and mediation centres in courthouses and bar associations for its effectively implementation e) to increase the number of registered mediators to the Registry f) to promote peer arbitration and mediation in cooperation with the Ministry of National Education to create an ADR culture from primary school.

⁹⁰ For disputes exceeding 8480 Turkish Lira (approximately €1300), consumer courts have jurisdiction. Lower disputes are typically taken to Consumer Arbitration Boards. If the value of the dispute is under the monetary threshold, it is mandatory to apply to board before applying to Consumer Court. Similarly, if the claim is over the monetary limit, it has to be taken to the consumer courts.

⁹¹ However, in some cases (taking into account such factors as the nature of the application, the application, the nature of the goods or services) the period can be extended for a maximum of six months. For instance, in the case of the claimant is foreign. See the Regulation on Consumer Arbitration Committee for Consumers Article 23.

⁹² Ross (n. 60) 218.

⁹³ Empirical research conducted in eBay users showed that the existence of an effective consumer redress system helping users in resolving their disputes has a favourable effect on the activity of users. That is to say, these users, who had claimed and were given efficient redress, had increased more activities afterwards than those who did not have any claims. See Colin Rule, 'Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution' (2012) 34 University of Arkansas Little Rock Law Review 767, 776.

Another problem with the system is that the Turkish Consumer Protection Law states that the Board consists of five members.⁹⁴ Having so many board members for resolving low-value disputes may cause delays in the award of justice. Larger boards tend to meet less often because it is not easy to coordinate all members' busy calendars. Board discussions are generally longer and less focused than those of smaller boards, which typically results in slow decision-making.⁹⁵ While, in practice, the number of arbitrators in commercial disputes is usually one or two, it is questionable to expect that five board members deal with submitted consumer disputes which are less complicated than commercial disputes. It is suggested that the number of board member should be reduced and be limited to a maximum of three members.

Another obstacle identified by research is the lack of awareness about the way of applying to consumer arbitration boards and consumer courts. As mentioned in the previous chapter, complaints to the Consumer Arbitration Boards can be easily submitted electronically since 2017 and consumers can file a suit to the consumer courts online since 2015. Parties usually encounter difficulties regarding the time required for travelling, and there is a lack of transparency about the details of the procedure. As a consequence, not only vulnerable consumers, but a large part of society may not understand the system as an accessible redress option. In order to raise the awareness of the consumers regarding the use of electronic communications in submitting complaints to either the boards or courts, similar to the ODR Regulation 2013, online merchants should be obliged by law to inform consumers about the consumer arbitration boards and consumer courts and give them a link to connect to the Consumer Information System and Citizen Portal.

6.6 Conclusion

It can be stated that ODR can develop successfully in Turkey. In this chapter, the scenery of ODR was introduced and explored, with reference to its the main difficulties it requires to overcome for becoming more prevalent in Turkey. Despite its incomplete development, ODR has demonstrated its potential adaptability by accommodating to national contexts. This is an

⁹⁴ According to Article 66(2) of the CPL, "a) One member to be appointed by the Mayor from among the expert municipal personnel in the field, b) One member to be appointed by the Bar, from among its members, c) One member to be appointed by the Chamber of Trade and Industry in disputes where the seller is a merchant, or by the Chamber of Commerce where such are organized separately; where the seller is a merchant and craftsman, by union of chamber of merchants and craftsmen in provinces, by the merchant and craftsmen chamber with the most members in towns, d) One member to be appointed from among the consumer organizations. The substitutes for the President and the members possessing the qualities set forth in this paragraph are also determined."

⁹⁵ Marcia Blenko, Michael C. Mankins and Paul Rogers, "Decide and Deliver: Five Steps to Breakthrough Performance in Your Organization" (Harvard Business Review Press 2010)

essential feature because the aim is not to blindly transfer a dispute resolution system from other jurisdictions, but to habilitate it to the national cultural features as well as social limitations, especially those regarding ICT infrastructure. ODR has also showed its great potential in Turkey, may provide an affordable and speedy alternative to the usually unsatisfying traditional litigation system and may allow the resolution of disputes to be completed time-efficiently and cost-effectively. As stated above, some empirical researches clearly show that an effective consumer redress system helping users in resolving their disputes has a favourable effect on the activity of users. If Turkish manufacturers or service providers provide an effective consumer redress system through ODR, which means buyers will have a better experience on manufactures, consumer may continue to purchase items on manufactures again. In other words, in order to build consumer trust and assist in developing a reliable and competitive market, manufactures should provide an effective redress system.

Chapter 7: Conclusion

In the digital age, the continuously increasing number of transactions between consumers and traders raises the probability of consumer disputes. In the meantime, in order to minimise the number of consumer disputes, substantive consumer rights are developing, especially for online consumers, who paradoxically have much more comprehensive protection than traditional offline consumers. However, if consumers do not have an effective method to ensure their compliance, these rights can only be considered as a wet paper.¹ In other words, consumer rights are effective, only when they are enforceable. In our digitalised society, the resolution of disputes through traditional litigation is less cost-effective, time-efficient and fast but also much more complicated compared to ADR. This Thesis examines consumer access to justice in Turkey, when it is combined with ADR and ICT, and makes suggestions for reducing the obstacles that consumers may encounter when enforcing their rights. Moreover, this Thesis evaluates the growth of ODR in resolving low-value consumer disputes and the need for designing a model that would prevent disputes at an early stage before reaching either consumer arbitration boards, courts or ADR entities. It also aims to develop a better understanding of the potential of ODR in being used more extensively in settling consumer disputes in Turkey. In addition, this Thesis has explored how EU law and international best practices can offer consumers in Turkey more effective methods for resolving their disputes, including public practice (e.g., the role of the Ministry of Justice, the Ministry of Trade and policymakers), private enforcement mechanisms (e.g. ADR schemes) and business methods (e.g. internal complaint-handling services, escrows and online payment providers, online shopping assistants, reputation and feedback systems and the establishment of notice and action procedures).

This Thesis offers suggestions and recommendations for enhancing the consumer dispute resolution system under the current Turkish Consumer Law, which entered into force in 2013 with the aim of establishing a modern consumer protection system, but there is still room for substantial improvements in the legal framework of the country following line with the recent technological developments. The Thesis has shown that, even if consumer disputes can be resolved through either consumer arbitration boards or consumer courts, this traditional litigation system does not meet the needs of our digitalised society in terms of time, cost and

¹ Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press, 2017) 272.

flexibility. In this context, this Thesis has highlighted the deficiencies and weaknesses of the Turkish consumer redress system, stating that the current Turkish legal framework does not provide an effective redress system for consumers to access to justice, it is not of the same standard as the EU system and there is need for moving away from traditional litigation towards ODR.

7.1 Summary and Findings

Chapter 2 has analysed and evaluated the current ODR practices and legislative developments at international level, with emphasis on the potential for ensuring legal certainty through the use of ODR methods in resolving internet-related disputes. The first section started by defining ODR and the related concepts, such as ADR and online ADR, and looked at the recent developments in the area of ODR. As analysed in the chapter 2, the notion of ODR methods (online negotiation, online mediation and online arbitration) is the same with traditional ADR methods, however the actual operation of ODR may differ in particular in a smart/advanced ICT system where the system may automatically produce agreements and settlements for the parties. This is clearly seen in the online arbitration process. Online arbitration is one of the most complicated methods among the ODR processes, because the residence of parties in different countries may create problems regarding the determination of the online arbitration agreement or clause, the seat of the arbitration and the place of an arbitral award, issues that are not present in traditional arbitration. The lack of a specific regulation concerning online arbitration creates uncertainty regarding the validity, jurisdiction and applicable law, and enforceability of the arbitral awards. Albeit online arbitration procedure rules can comply with traditional arbitration procedural rules, the core element of online arbitration process, namely technology, is not affected by offline arbitration procedures. In other words, the traditional arbitration rules can be partly adapted to online arbitration, however some substantive legal issues of online arbitration, such as the validity, jurisdiction and applicable law, and enforceability of the arbitral awards, need to be regulated separately. Therefore, there is a need for reforming or upgrading the existing arbitration rules to enhance legal certainty and achieve uniformity in the conduct of online arbitration.

Since 2010 there have been two significant legal initiatives by international and regional organisations in relation to ODR systems: the first one is the UNCITRAL Technical Notes on ODR, which give recommendations on the legal and technical process of resolution of cross-border B2B and B2C disputes and the second one is the EU Regulation on Consumer ODR,

which provides specific process rules for the settlement of B2C disputes in the EU via the EU ODR platform. As a result of the UNCITRAL Technical Notes, ODR is promoted as an effective solution, considering that the internet is becoming widespread and indispensable in our life, even though there are still some problems with the resolution of consumer disputes through ODR. The fact that the Technical Notes is a non-binding 'guidance' document reduces its international impact and makes its adoption by national laws optional. It is also noted that one of the obstacles to the consumers' access to justice is the cost of the proceedings. The Technical Notes do not include a specific provision on this issue; they only state that the costs of ODR should be proportionate to the value of the subject matter of the dispute and that unnecessary costs should be avoided. For any ODR method to be useful in resolving consumer disputes, it should be free of charge for the consumer or at least the cost of litigation should be proportionate to the value of the goods or services depending on the case and in general reasonable for the consumer.

Chapter 3 considered ODR and access to justice for consumers from an EU perspective. It analysed the recent reform of the ESCP, which was enacted in 2015. It also examined the existing EU legal framework for the resolution of consumer dispute. The ADR Directive and the ODR Regulation are considered to be significant steps forward in the direction of building an adequate EU legal framework for consumer disputes and fulfilling the requirements for the operation of the EU internal market. These legal instruments significantly affect cross-border disputes and, as a result, it is necessary to examine not only how each Member State has implemented them and whether harmonisation can be achieved, but also evaluate their effectiveness with regard to cross-border disputes which may appear within the Single Market. Chapter 3 also evaluated the functioning of the EU ODR Platform. While this chapter identified the positive aspects of the legal developments made so far, it argued that there are still some objectives, which are set out by the Commission that should be met in order to enable the EU ODR Platform to reach its full efficiency. For example, online traders, who have been established in the EU, are obliged to inform consumers about the EU ODR Platform by providing a link on their websites, however they are not obliged to get involved in the process and in most cases disputes with consumers are left unresolved. Thus, consumers, who have submitted a dispute that has not been resolved through online negotiation, should be able to refer it to the relevant dispute resolution body to be resolved. The Thesis has suggested that the EU ODR Platform should be more than just a referral site and have the following functions: First, issue identification and dispute prevention function, which should encourage early

settlement by automatically providing custom-made information about the rights and obligations of the consumers. Second, the Platform should offer an online negotiation tool that would provide consumers and related traders with a forum to handle complaints before dispute resolution bodies get involved in the process. Finally, a full referral function that should be designed not only to send an invitation to both parties to choose a dispute resolution body, but also to automatically escalate the dispute to a resolution body, when the parties fail to reach an agreement through online negotiation. In the case of unresolved disputes, consumers should get help in the process of referring the case to the court.

Chapter 4 has evaluated the critical questions of what minimum legal and technological principles are needed for establishing both public and private ODR service providers. This chapter found that there are no harmonised international standards that have identified the need for the establishment of ODR services. The majority of ADR services, such as arbitration institutions or mediation centres, have not been equipped with any specific ODR rules, apart from an ODR user guide or protocol as a supplementary guideline to their traditional ADR methods rules. At international level, the UNCITRAL Technical Notes on ODR promote the principles of fairness, transparency, due process and accountability, while in the EU the ODR Regulation supports the principles of confidentiality and security, trust, efficiency, independence, impartiality, transparency, effectiveness and fairness. Moreover, some well-established private ODR services, such as CIETAC and HKIAC, have adopted the ODR Regulation's rules to promote the independent, impartial and efficient resolution of commercial disputes. This chapter identified a pressing need for adapted national and international rules and procedures for ODR to assure the quality of ODR services. The quality of ODR services has a significant influence on the disputants' trust and confidence, as these are crucial factors that can affect the future of the ODR services.

The second section of this chapter examined the principle of enforceability, which is more complicated than the other principles. As it was demonstrated in chapter 4, even the determination of arbitrability and the validity of the arbitration agreement may vary from one national law to another, which means that the arbitrability and validity of consumer arbitration agreements is unlikely to be problematic for domestic disputes. Regardless of whether national law allows arbitration for consumer disputes or not, as national law will most likely clarify the concept of arbitrability and validity of pre-or post-dispute arbitration clauses. However, in international consumer disputes, particularly online ones, the rules and legal norms concerning

those matters are not clear enough. Generally speaking, arbitration is an option for cross-border disputes, due to the fact that an arbitral award is efficiently enforceable in a foreign jurisdiction. However, it is not easy to argue that consumer arbitration is usually used for cross-border claims. Furthermore, it is not certain to what extent the binding nature of arbitral awards would make a notable difference in low-value consumer claims since parties are unlikely to seek court enforcement.² Uncertainty about the arbitrability of consumer disputes, the enforceability and validity of an arbitration clause in consumer contracts may discourage both parties from resorting to arbitration. In cross-border consumer contracts, the issue of arbitrability, enforceability and validity of arbitration clauses are most likely to go under the New York Convention. However, Article 2 of the Convention creates further uncertainty to the parties instead of being a source of clarity. Thus, it is time to bring clearer solutions for these issues at national, regional and international level. At EU law level, the law of consumer arbitration in the context of e-commerce should be harmonised to become more international. Moreover, it is necessary to revise the EU Unfair Terms Directive and Member States law that adheres to it. At international level, a new Convention should be introduced, especially regarding online cross-border consumer arbitration. New rules should stipulate an informed standard of consent to arbitration clauses for consumers before they decide to accept or refuse the contract. The general conclusion of this chapter was that there is need for clarity in relation to the principles of establishing an ODR system, the arbitrability of consumer disputes and the validity of consumer arbitration clauses.

The fifth chapter of this Thesis has dealt with the critical question of whether a legal framework is required for the establishment and the operation of ODR in Turkey. This chapter examined consumer protection and access to justice in the digital age from a Turkish perspective. This chapter has shown that traditional litigation is not sufficient to enforce consumers' rights and thus alternative methods, such as ADR and ODR, are necessary to give access to justice to consumers in Turkey. The chapter firstly considered the need for ADR in the Turkish legal system for low-value disputes. The chapter also examined the Turkish consumer protection framework and analysed the current consumer redress mechanisms, which are used to resolve consumer disputes. This section of the chapter examined and determined the legal personality of consumer arbitration boards, which is disputed in doctrine. According to the findings of this

² Pablo Cortés, 'The Consumer Arbitration Conundrum: A Matter of Statutory Interpretation or Time for Reform?' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution*, (Oxford University Press 2016), 75.

chapter, consumer arbitration boards should not be considered as a traditional ADR method, but as a *sui generis* dispute resolution method, which is extrajudicial. In this respect, it would be appropriate to use the provisions of the judicial proceedings of the state courts to fill in the gaps in the legislation concerning the procedure of boards. Regarding resolution of consumer disputes through ADR methods under current Turkish Consumer Law Framework, CPL clearly states that to resolve consumer disputes thorough either consumer arbitration board or consumer court does not prevent the consumers from applying to ADR methods. However, as discussed in Chapter 5, since there is inequality in bargaining power between consumer and businesses, the Turkish Court of Cassation³ and some scholars⁴ claimed that consumer disputes are not arbitrable. According to the findings of this chapter, inequality in bargaining power should not be a sufficient reason to hold that arbitration agreements are never enforceable in the B2C context. Moreover, there is no legal obstacle in the Turkish legal system, apart from the Court of Cassation's case-law, that does not allow to resort to private arbitration for consumer disputes.⁵

Chapter 5 also analysed both public and private entities involved in settling consumer disputes and examined some examples of how consumer arbitration boards, consumer courts and other private entities are incorporating ICT into their operation. The chapter found that a reform that would allow the online submission of complaint to consumer arbitration boards and courts goes, in general, towards the desired direction, but there is still need for greater synergy between the consumer arbitration boards, the consumer courts and ICT. Up to now, the Turkish legal framework has not identified ODR as a redress mechanism. However, it is open to the prospect of developing an extrajudicial system which also involves ICT. The general conclusion of this chapter was that the existing mechanisms of the consumer arbitration boards and consumer courts are not adequate to resolve the numerous B2C disputes arising from online transactions; thus, in order to enhance consumers' access to justice, a modern, fast, practical and cost-effective mechanism supported by ICT is undoubtedly needed in Turkey.

³ Decision of the Court of Cassation 13th Civil Chamber, dated 20 October 2008 (2008/6195 K. 2008/12026); Decision of the Court of Cassation 13th Civil Chamber, dated 25 September 2008 (E.2008/3492, K.2008/11120)

⁴ Mustafa Serdar Ozbek, *Alternatif Uyuşmazlık Çözümü / Alternative Dispute Resolution* (Yetkin Press, 2016) 976; Seda Özmumcu, 6502 sayılı Tüketicinin Korunması Hakkında Kanun'un Hükümleri ve Yargıtay Kararları Çerçevesinde Tüketici Mahkemelerinin Görev Alanına Giren Uyuşmazlıklara Genel Bir Bakış / Provisions of Consumer Protection Law and in the Light Of The Court Of Cassation's Decision, *An Overview Of Disputes Fallen into Consumer Courts Remit*, (2014) 16 *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*

⁵ Gökçe Kurtulan, ' Türk Hukukunda Tüketici Uyuşmazlıklarının Tahkime Elverişliliği/ The Arbitrability Of Consumer Disputes Under Turkish Law', (2017) 131 *Türkiye Barolar Birliği Dergisi*, 254

Chapter 6 addressed the critical questions of what legal obstacles do not allow ODR to be widely used for consumer disputes in Turkey. The first section of this chapter discussed the challenges, such as cultural, regulatory, information and communication technology challenges that hinder the growth of ODR. The second section of the chapter suggested various mechanisms, such as interior complaint-handling services, escrows and online payment providers, online shopping assistants, reputation and feedback systems and the establishment of notice and action procedures, which aim to minimise disputes arising from online consumer transactions. In preventing disputes, ODR can be used by online traders to prevent complaints to escalate to disputes. Preventing dispute involves consumer empowerment, which involves informing consumers about their rights, duties and how to prevent disputes in the course of consumer protection. If disputes are not prevented and not resolved through online negotiation between the parties without any third party's participation in the process at an early stage, ODR systems should be offered as an ultimate solution to resolve disputes before escalating to courts. A good illustration is eBay's resolution centre that resolves 60 million disputes every year. Online traders should receive support from well-established ODR providers, such as Modria, to build effective interior complain-handling services. In the most complex cases, the resolution of disputes through external ODR providers guarantees neutrality and builds trust between traders and consumers. In order to improve and enable this mechanism to prevent disputes in Turkey, it is recommended that the regulatory framework in the area of consumer law stipulates that all online traders should establish effective interior dispute resolution services. This suggestion would encourage online traders to form strategic alliances with external ODR providers.

This chapter has explored the need for designing a Turkish legal framework in the field of ODR. This section suggested the creation of an ODR scheme, which can be modelled on the work done by well-functioned ODR providers. The core element to develop a cost-effective, efficient and successful ODR mechanism will be the incorporation of automated negotiation tools in the ODR process to resolve disputes at an early stage before escalating to either dispute resolution bodies or consumer arbitration boards or consumer courts. The cost of establishing and operating the ODR platform should be supported by the government under the supervision of the Ministry of Justice and Ministry of Trade. In order to raise awareness of consumers, online merchants should be obliged by law to inform consumers about the ODR platform and provide a visible link for them to connect the ODR platform website. The law should make the participation to the ODR platform mandatory for disputants. Through such a regulatory

framework that would oblige parties to consider the ODR procedure at least for some of their cases, ODR will be promoted and become more popular. The chapter suggested that the Department of Mediation should establish the legal ground of or at least support the establishment of private accredited dispute resolution bodies in Turkey. Finally, the chapter emphasised that the consumer unions and associations, such as the Confederation of Turkish Tradesmen and Craftsmen and Turkish Union of Chambers and Commodity Exchanges, or arbitration institutions, mediation centres, government agencies, particularly the Department of Mediation, should make strategic alliances with the Ministry of Trade to raise the awareness of ODR and channel disputes to certified ODR providers.

7.2 Recommendations

The above findings have led the Thesis to propose to the Turkish legislature that a comprehensive model is designed to specifically promote ODR for consumer disputes. The interface of ODR in Turkey will work more efficiently through the following recommendations:

1. Legislative Aspects in the Field of ODR

The recommended framework should promote the out-of-court resolution of disputes arising from not only online but also offline sales or service contracts between consumers, who reside in Turkey, and traders, who are established in Turkey. At the beginning, the platform could be used to resolve only online B2C disputes at national level until the functionality of the platform is tested. Then, depending on the success of the platform, it can be extended to deal with offline consumer disputes and all other civil disputes at both national and international level.

The appropriate government department (a collaboration between the Ministry of Justice and the Ministry of Trade) should establish and develop the ODR platform. The department should be responsible for the platform's operation, maintenance, funding and security. The ODR platform should be user-friendly and accessible by all online consumers and traders, including vulnerable consumers, and its use should be free of charge.

As discussed in Chapter 5, there is not a single set of rules that regulates ADR in Turkish Law. Thus, this Thesis also suggests that Turkish legislature should introduce a comprehensive legislation in the field of ADR, including negotiation. The legislation should ensure that ADR procedures are applied for all consumer disputes. It should encourage the creation of specific

dispute resolution bodies in most important retail sectors, such as insurance, bank and finance. The legislation should also require ADR entities to comply with the principles of accessibility, impartiality, transparency, independence, expertise, effectiveness and fairness, which were discussed in chapter 4. Dispute resolution bodies, which will report to the competent authority in compliance with the proposed legislation on ADR, will be listed electronically with the ODR platform. The competent authority should ensure that disputes covered by the suggested legislation can be submitted to the dispute resolution bodies, which meet the requirements, as set out in the proposed legislation. The competent authority should be responsible for monitoring the quality and functioning of the ADR entities.

2. Establishment and Functioning of the Turkish ODR Platform

Online merchants should be obliged by law to inform consumers about the ODR platform and give a link, which should be easily accessible and visible to connect the ODR platform's website. The consumer should submit a complaint against the online trader using the ODR platform by filling a form with the details of the dispute, such as the name of the trader, the trader's email address, and a description of the dispute. A fully completed complaint form should be automatically forwarded to the relevant trader by the platform. This Thesis recommends that the Turkish ODR Platform should resolve consumer disputes through a tiered system:

- A) The first stage will involve a problem diagnosis and conflict prevention function. Problem diagnosis should assist parties in identifying the type of dispute they have. The platform should help consumers understand the legal rights and responsibilities of both parties. A useful knowledge tool should organise the content of complaints, according to various types of disputes, in such a way that it would effectively prevent unmeritorious disputes.
- B) The second step should be online negotiation. The Turkish ODR Platform should allow for early settlement without third party anticipation. The ODR platform should use a negotiation tool that would propose computerised settlements adapted to the complaints submitted. As discussed in Chapters 2, 3 and 6, different types of online negotiation, such as assisted negotiation and automated negotiation, can be used depending on the nature of the disputes. It is worthy note here that regarding ADR methods, this platform can benefit from well-established ODR practices such as Modria, eBay, SmartSettle and GZAC Online Arbitration which are analysed in Chapter 2, 3 and 4.

- C) The third step involves the referral of the dispute to the appropriate dispute resolution bodies. If the parties do not resolve their disputes via online negotiation within 10 days, the platform should refer it, if the parties agree, to the dispute resolution bodies. As mentioned in chapter 6, this proposed platform does not exclude any ADR methods (including arbitration). Any convenient ADR methods can be used to resolve consumers disputes. Because of complexities of arbitration, cost of arbitration and continual debate regarding the arbitrability of consumer disputes in Turkey may make arbitration less preferred ADR methods for consumer disputes.
- D) The final step should be escalating the dispute to an online judicial process. If parties do not resolve their disputes through ADR entities within 30 days, as a final stage the dispute should be referred to either online consumer arbitration boards or consumer courts depending on the value of claim. The platform should minimise the number of disputes being referred by trying to resolve them at an early stage.

3. Legislative Amendments and Additions to the Turkish Consumer Protection Law

Firstly, in order to raise the awareness of the consumers regarding the use of electronic communications and the ways that they can submit complaints to either the consumer arbitration boards or consumer courts, the example of to the ODR Regulation 2013 can be used. More specifically, online merchants should be obliged by the Turkish Consumer Law to inform consumers about the consumer arbitration boards and consumer courts by providing a link to connect to the Consumer Information System and Citizen Portal website. Secondly, as discussed in chapter 6, the consumer arbitration board, which consists of five members, causes delays in the award of justice. This Thesis suggests that the number of board members should be reduced to a maximum of three members. Finally, the Consumer Protection Law states that, after the submission of the dispute, the board shall start to resolve the dispute within six months. This means in practice that a dispute will be handled and resolved in 180 days through the board, which may discourage consumers to use the board for low-value disputes. Thus, the Law should be amended to provide that the board shall resolve disputes within maximum 90 days.

4. Legislative Additions to the Turkish E-Commerce Code

The best dispute resolution strategy is either to prevent disputes or resolve them at an early stage. Thus, the Turkish E-Commerce Code should include measures to prevent future disputes. In this regard, the Code should encourage online markets use escrow services, establish and

develop feedback and rating systems. Moreover, the Turkish Electronic Commerce Code should regulate ‘notice and takedown’ procedures on the internet and encourage the online provider services to voluntarily create their self-regulated NTD procedures to fight at least against counterfeit products and misleading advertisements. Furthermore, similar to China E-commerce Law 2019, the Turkish Electronic Commerce Code should regulate that online business may establish ODR mechanisms, ‘formulate and display dispute resolution rules, and resolve disputes fairly and justly according to the principle of voluntariness.’⁶ Finally, as discussed in chapter 6, the Turkish Electronic Commerce Code should make it compulsory for online businesses to establish their internal complaint-handling services. Since 2014, service providers in the telecommunication sector have been obliged to have their online consumer complaints systems under the Electronic Communication Law 2008.⁷ This provision can be extended or replicated in the E-Commerce Code to apply to all online traders.

7.3 Future Study

As mentioned above, this Thesis considered the resolution of consumer disputes arising from online transactions under EU law for extrapolating lessons that can be used by the Turkish legislator to improve the consumer dispute resolution process through the use of ICT. Following the foregoing analysis, it is clear that the issue of consumer access to justice through ODR in Turkey covers only a small part within the area of online consumer protection system. Therefore, further research should be carried out on specific topics regarding online consumer protection in Turkey.

Furthermore, there is no empirical study on how ICT can be pivotal in ensuring the success of consumer ADR system. Hence, it would be useful to measure the effectiveness of ODR through an empirical study. Finally, this Thesis focuses more on the use of ODR for consumer disputes arising from online transactions. This research could be extended to not only any consumer disputes but also most low-value disputes in the future.

⁶ China E-commerce Law 2019, Article 63

⁷ The Law on the Regulation of Electronic Commerce numbered 6563 amended provisions of Article 50 in the Electronic Communications Law 5809/2008

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