

# BRICKS AND CLICKS: ONLINE DISPUTE RESOLUTION MECHANISMS AND IMPLEMENTATION OF ONLINE ARBITRATION IN TURKEY FOR CROSS-BORDER BUSINESS TO CONSUMER E-COMMERCE DISPUTES

*Çevrimiçi Uyuşmazlık Çözüm Yöntemleri ve Sınır Ötesi İşletmeden Tüketicilere Elektronik Ticaret Uyuşmazlıklarında Çevrimiçi Tahkimin Türkiye’de Uygulanması*

**Cemre Çise KADIOĞLU\***

## **Abstract**

The lack of effective legal remedies builds barriers before business to consumer (hereinafter B2C) electronic commerce. In this regard, online dispute resolution (hereinafter ODR) mechanisms remedy this need through offering alternative ways to craft a more reliable market by increasing the confidence of consumers to enter into cross-border electronic commerce. With this feature, ODR mechanisms accord Turkey valuable opportunities to attract more businesses and consumers. Particularly, within the ambit of arbitration, online arbitration may be more easily implemented in Turkey because the current arbitration regulations of the country satisfy the necessity international standards that are sought for efficient and efficacious arbitration procedure. There are, of course, some challenges to online arbitration, such as arbitrability, enforceability, and determining a *lex arbitri*. These issues mainly

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\* Georgetown Üniversitesi Hukuk Fakültesi Yüksek Lisans Öğrencisi, cemrekadioglu@gmail.com, ORCID: 0000-0002-9573-777X.

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arise out of courts' efforts to interpret laws in a way most favorable to consumers. As an initial step to promote online arbitration, arbitral institutions may incentivize this mechanism *via* their rules. Further, to broaden the scope of Turkish institutions' availability to cross-border users, negotiations for Turkey's accession to ODR platform provided within the European Union should be furthered.

**Keywords:** Online Dispute Resolution, Online Arbitration, Business to Consumer, Electronic Commerce, Cross-Border.

## Öz

Tarafların başvurabilecekleri etkili hukuki yolun bulunmaması, işletmeden tüketiciye elektronik ticaretin gelişmesine engel olmaktadır. Çevrimiçi uyuşmazlık çözüm yolları tüketicilerin sınır ötesi elektronik ticarete olan güvenlerini artırarak daha güvenilir bir pazar oluşturmak adına seçenek sunmaktadır. Çevrimiçi uyuşmazlık çözüm yollarının benimsenmesi, dünyada en çok internet kullanıcısının olduğu ülkelerden biri olan Türkiye'nin daha çok işletme ve tüketiciyi çekmesini sağlayabilecektir. Diğer çevrimiçi uyuşmazlık çözüm yollarına kıyasla Türkiye'de çevrimiçi tahkimin uygulanması tahkim kanunlarının uluslararası standartlara uygun olması; diğer yöntemlerin benimsenmesini zorlaştıran kültürel ve teknolojik engellerin olması nedeniyle daha kolay olacaktır. Çevrimiçi tahkimin önünde de tahkime elverişlilik, tenfiz ve tahkim yerinin belirlenmesi gibi sorunlar bulunmaktadır. Bu sorunlar mahkemelerin kanunları tüketici yararına yorumlamaya çalışmalarından kaynaklanmaktadır. Çevrimiçi tahkim, tüketici yanlısı bir yöntem olduğundan Türk mahkemelerinin yorumlarını ve bakış açılarını değiştirmelerini gerektirmektedir. Bu uyuşmazlık çözüm yöntemini teşvik etmek için tahkim kuruluşları kendi kuralları uyarınca çevrimiçi tahkimi destekleyebilirler. Sınır ötesinde bulunan tüketicilerin bu kurumlara erişimini artırmak için Türkiye'nin Avrupa Birliği'nin sağladığı çevrimiçi uyuşmazlık çözüm platformuna katılımını sağlamak yönünde müzakerelerin ilerletilmesi gerekmektedir.

**Anahtar Kelimeler:** Çevrimiçi Uyuşmazlık Çözüm Yöntemleri, Çevrimiçi Tahkim, İşletmeden Tüketiciye, Elektronik Ticaret, Sınır Ötesi.

## I. INTRODUCTION

High accessibility to the internet, availability of more options for every budget, and its easiness in modern lifestyle increase the number of individuals engaging in electronic commerce (hereinafter e-commerce). Various goods and services for architecture, medicine, education, justice, travel, or accounting are purchased and supplied through the internet. For instance, a student may order a pair of sneakers, enroll in an online certificate program for vocational training, or book a flight for a winter break. From a different perspective, however, the student's engagement in these transactions carry a concomitant risk for her, such never getting the sneakers or getting the wrong ones, not benefitting from the online classes. When she efforts to reach out the customer service, they may never respond. At the end, she might be destined to file a lawsuit or have recourse to alternative dispute resolution.

Things get more complicated when the company and the student are located in different countries. Now, she has to deal with traveling or hiring an attorney in that country. Language barriers, territoriality, jurisdictional questions, and the evidentiary matters will also be added to the increased cost and duration. At the end, the absence of effective legal remedies that would overcome these obstacles builds barriers around international trade and obstructs its harmony. To make the market more reliable and to increase the confidence of the consumers to enter into cross-border e-commerce, an effective dispute resolution mechanism becomes a necessity.<sup>1</sup>

ODR refers to the alternative dispute resolution (hereinafter ADR) methods that are facilitated by technology and conducted through the internet.<sup>2</sup> ODR amalgamates the advantages of out-of-the-court resolution mechanisms with technology and accordingly

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<sup>1</sup> Veijo Heiskanen, "Dispute Resolution in International Electronic Commerce," *Journal of International Arbitration* 16, no. 3 (1999): 38.

<sup>2</sup> Maria Mercedes Albornoz, and Nuria González Martín, "Feasibility Analysis of Online Dispute Resolution in Developing Countries," *University of Miami Inter-American Law Review* 44, no. 1 (2012): 46.

provides a quick and effective remedy for the disputes that could arise out of international e-commerce.<sup>3</sup> ADR has gained significant importance, especially in international commercial disputes as it provides autonomy, flexibility, expertise, and confidentiality for businesses. Despite all the advantages of it, ADR does not respond to the needs of consumer disputes, which are generally in small amounts. In this respect, ODR has potential not only to eliminate the relatively high legal costs of cross-border ADR and litigation,<sup>4</sup> but also to minimize the legal risks. Particularly, in terms of e-commerce disputes, which are generally cross-border in nature, ODR is far more reasonable and better adaptable.<sup>5</sup> ODR is more suitable for B2C disputes. As far as business-to-business (hereinafter B2B) transactions are concerned, ODR may not be a viable option because businesses prioritize confidentiality and the preservation of their trade secrets. Thus, parties to B2B disputes predominantly prefer the physical aspects of conventional methods in terms of evidence-taking, witnesses, and holding hearings.

This article examines how ODR may be implemented, particularly for B2C disputes in Turkey. Turkey is an emerging market for international e-commerce platforms with its high internet penetration<sup>6</sup> and its highest mobile usage rates in the world.<sup>7</sup> An ODR mechanism that effectively integrates with national law would supplement international commerce as developed countries could attract more customers from Turkey. At the same time, with the increased reliability of e-commerce, Turkey may invite more businesses and foreign consumers. The article demonstrates that among other ODR mechanisms,

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<sup>3</sup> Heiskanen, "Dispute Resolution," 38.

<sup>4</sup> Heiskanen, "Dispute Resolution," 39.

<sup>5</sup> Albornoz, and Martin, "Feasibility Analysis," 48.

<sup>6</sup> The rate of internet penetration in Turkey is 46.3% as of December 2013, the world average is 54.9%. "Usage and Population Statistics," Internet World Stats, accessed December 11, 2018, <https://www.internetworldstats.com/top20.htm>.

<sup>7</sup> Turkey is the eighteenth out of the top twenty countries with highest number of internet users as of December 31, 2017. The number of internet users in Turkey is approximately 56 million. Internet World Stats, "Usage and Population Statistics."

Turkey should give more attention to online arbitration because it may be implemented more easily compared to other ADR mechanisms in terms of cultural and technological challenges, and existing arbitration laws that are aligned with international regulations.

Summarily, this paper, first, discusses different types of ODR mechanisms and suggests that online arbitration is the most suitable method to resolve cross-border B2C disputes, second, articulates upon the operation of online arbitration works, third, discusses challenges to online arbitration, and, finally, concludes by demonstrating how online arbitration may be the best fit for B2C disputes under Turkish law.

## II. TYPES of ODR MECHANISMS

ODR is a post-dispute resolution method that consists of mechanisms using either automated systems or technology-assisted mechanisms.<sup>8</sup> Automated systems are the online platforms that deal with monetary disputes with the assistance of technology. Automated systems help parties save money and circumvent complex jurisdictional problems, while demanding high-level technological investment and raising questions regarding cybersecurity. Furthermore, automated systems do not address non-monetary claims.<sup>9</sup> Addi-

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<sup>8</sup> E-commerce disputes may be prevented before they arise by online dispute prevention mechanisms. This article does not address pre-dispute methods for avoiding disputes. See Suatip Yuthayotin, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms* (Switzerland: Springer International Publishing, 2015), 229 for more information on online prevention.

<sup>9</sup> Mohamad Salahudine Abdel Wahab, "The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution," *Journal of International Arbitration* 21, no.2 (2004): 150. Artificial intelligence eliminates the human involvement. Platforms offer various solutions. For instance, the parties bid and try to find a common ground (e.g. Cybersettle, MARS, Intersettle, SmartSettle, Dispute Manager, Esettle.co.uk, WeCanSettle, and SettleOnline); the platform offers optimization programs that proposes solutions and mathematically provides the optimum one after it is exchanged between parties (e.g. Computer Aided Negotiation-Web International Network (CAN-WIN) offered by the Resolution Forum) or the platform works through solution sets where the parties answer a set of questions. The program provides possible solutions and parties may agree on that. The database evolves with each dispute entered into the system (e.g. SquareTrade used by Ebay).

tionally, it should not be disregarded that a dispute that is not resolved by a human adds a psychological barrier between physically-distant parties.<sup>10</sup> At the outset, it may be more plausible for Turkey to espouse legally and technically more available technology-assisted mechanisms, rather than embracing automated systems as part of its implementation of ODR.

Unlike automated systems, in technology-assisted mechanisms, the human factor is not eliminated. The parties and neutral, who is the person deciding on the dispute, are actively involved in the dispute resolution process. The technology is used to provide adequate and appropriate means of communication.<sup>11</sup> The procedures follow the traditional rules to a larger extent. Some examples of technology-assisted mechanisms are as follows: online negotiation, mediation, arbitration, mediation-arbitration ("Med-Arb"), online ombudsmen proceedings, and cyber courts.

Technology-assisted mechanisms consensually bring parties together. Online negotiation and mediation are preferred as they enhance party autonomy and arrive at conclusions that are satisfactory for both parties.<sup>12</sup> These ODR methods, however, ineffective because they are enforced as regular contracts or settlement agreements and their outcomes are not final and binding. This adds an additional step if the parties do not voluntarily comply with the results. In the face of these downsides of online negotiation and mediation, online arbitration becomes the crown jewel of the ODR methods.

Online arbitration makes the dispute resolution process more operative by eliminating territoriality questions of the courts and conforming to the global character of the cyberspace.<sup>13</sup> Not only

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<sup>10</sup> Joseph W. Goodman, "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites," *Duke Law and Technology Review* 4 (2003): 11.

<sup>11</sup> Wahab, "The Global Information Society," 147.

<sup>12</sup> Dafna Lavi, "Three is not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes," *University of Pennsylvania Journal of International Law* 37, no. 3 (2016): 893.

<sup>13</sup> Gabrielle Kaufmann-Kohler, Thomas Schultz *Online Dispute Resolution: Challenges for Contemporary Justice*, (The Hague: Kluwer Law International, 2004), 27.

does it promote efficiency and efficacy, but also overrides automated systems by not taking human element of the dispute resolution process out of the equation.<sup>14</sup> Finally, the escalating number of institutions that offer online arbitration leads to infer that online arbitration is gaining ground among the users.<sup>15</sup>

The pioneers in ODR arena, such as Katsh and Rifkin, state that online arbitration is not yet the best ODR mechanism mainly because of the legal framework and formalities that should be followed.<sup>16</sup> Online arbitration responds to these criticisms by introducing an instrument called “non-binding online arbitration” that brings arbitration and flexibility of non-adjudicative procedures together.<sup>17</sup> Non-binding online arbitration is more frequently preferred over binding online arbitration as it is not subject to strict procedural requirements.<sup>18</sup> Although this sounds paradoxical, non-binding online arbitration may indicate either referral of a dispute to arbitration or outcome of the process.<sup>19</sup> Regardless of its legal classification, non-binding online arbitration is adopted by institutions and users.<sup>20</sup> Depending on the nature of the outcome, it can be enforced as either an arbitral award or a settlement agreement.

Binding online arbitration is preferred to have a certain level of the procedural framework; increased formality enables predictability.<sup>21</sup> The legal certainty and the predictability increase the trust in

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<sup>14</sup> Ayelet Sela, “Can Computers Be Fair: How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration,” *Ohio State Journal on Dispute Resolution* 33, no. 1 (2018): 115; See Mohammed Salahudine Abdel Wahab, *ODR and E-arbitration*, in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishing, 2012), 390.

<sup>15</sup> Wahab, “The Global Information Society,” 153.

<sup>16</sup> Ethan Katsh, and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco (CA): Jossey-Bass Publishers, 2001), 56.

<sup>17</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 33.

<sup>18</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 153.

<sup>19</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 154.

<sup>20</sup> Uniform Domain-Name Dispute-Resolution Policy and Chartered Institute of Arbitrators offer non-binding arbitration systems with different adjustments.

<sup>21</sup> See Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 82.

the system and attracts more consumers.<sup>22</sup> Either binding or non-binding, online arbitration is attractive for the parties who would like to tailor the procedure and the outcome.

### III. THE FUNCTIONING OF ONLINE ARBITRATION

There are different stakeholders of ODR, such as governments, businesses, consumer organizations, and dispute resolution organizations. Their motives behind supporting ODR differ. Governments would like to promote access to justice and e-commerce and to decrease burden on the courts; businesses would like to build up consumer confidence by implementing such mechanisms that expedite dispute resolution; consumer organizations want ODR to enforce consumer rights, and, finally, dispute resolution institutions consider ODR as a new service to provide in the competitive market.<sup>23</sup>

Online arbitration is facilitated by private and public institutions that provide platforms for the parties. United Nations Commission on International Trade Law (UNCITRAL) Technical Notes on Online Dispute Resolution (Technical Notes) provides non-binding guidelines for ODR stating that ODR services should be provided by a “technology-based intermediary” and no *ad hoc* basis should be involved.<sup>24</sup>

There are several government initiatives, such as those in Mexico,<sup>25</sup> Canada,<sup>26</sup> and the Republic of Korea,<sup>27</sup> that provide ODR me-

<sup>22</sup> See Yuthayotin, *Access to Justice in Transnational B2C E-Commerce*, 22-25.

<sup>23</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 83.

<sup>24</sup> “UNCITRAL Technical Notes on Online Dispute Resolution (2017), Section V, para.26”, accessed December 11, 2018, [http://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf).

<sup>25</sup> See generally Gustavo Alcocer Lugo, and, Abraham Diaz Arceo, “Digital Business in Mexico: Overview,” *Thomson Reuters Practical Law*, accessed November 3, 2018, [https://uk.practicallaw.thomsonreuters.com/w-012-0309?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-012-0309?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1). (“The Federal Bureau of Consumer Protection (PROFECO) offers an ODR service (CONCILI-ANET), but suppliers of goods and services must have in place an existing agreement with PROFECO to allow their customers to use the ODR service. So far, only a limited number of companies have executed the agreement with PROFECO.”).



chanisms. The advantages of government involvement in ODR is dubious. On the one end of the spectrum, the public sector may not meet the high-level sophistication of the technologies, but, on the other end of the spectrum, private providers may hamper the justice as they may have “legal, privacy, budgetary, accessibility, and logistical demands.”<sup>28</sup> Most importantly, these national mechanisms are not suitable for cross-border disputes.<sup>29</sup>

On the private side, there is a limited number of institutions that offer online arbitration. For instance, China International Economic and Trade Arbitration Commission (CIETAC) adopted Online Arbitration Rules in 2009 and these Rules became effective in 2015.<sup>30</sup> These Rules are applicable to the resolution of e-commerce disputes. Online Arbitration Rules of Russian Arbitration Association (RAA) became effective in 2015 to facilitate independent, impartial, and efficient resolution of commercial disputes arising out of contractual and non-contractual relations, by electronic means of transfer and storage of information.<sup>31</sup>

The regional organizations developed an interest in the area of ODR as well. The primary rationale behind their interest is to accord consumers protection. Organization of American States (OAS) considers establishing regional ODR platform with the rules aiming to regulate procedures, including online arbitration, and drafted a model

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<sup>26</sup> See Shannon Salter, “Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal,” *Windsor Yearbook of Access to Justice* 34 (2017): 112-129.

<sup>27</sup> See E-Commerce Mediation Committee. E-Commerce Mediation Committee that is established under Chapter 6 of Framework Act on Electronic Documents and Transactions offers only mediation for disputes arising out of e-transaction or e-documents.

<sup>28</sup> Salter, “Online Dispute Resolution,” 128.

<sup>29</sup> Yuthayotin, *Access to Justice in Transnational B2C E-Commerce*, 96.

<sup>30</sup> “CIETAC Online Arbitration Rules, 2015”, accessed December 11, 2018, <http://bj.cietac.org/index/rules/4760665e7716e27f001.cms>.

<sup>31</sup> See generally Russian Arbitration Association (RAA), accessed November 3, 2018, <https://arbitration.ru/en/>. website\_for reasons behind adopting online arbitration rules.

law/cooperative framework.<sup>32</sup> In 2016, Inter-American Juridical Committee of OAS adopted the resolution for the protection of consumers in cases of online disputes arising from cross-border transactions and decided to focus on mechanisms for online settlement of disputes.<sup>33</sup> Asia-Pacific Economic Cooperation (APEC) has a work plan to promote ODR to enhance e-commerce. Accordingly, APEC aims to continue promoting harmonization of the pertinent laws with respect to ODR through using existing international instruments, such as the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention),<sup>34</sup> UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law),<sup>35</sup> UNCITRAL Model Law on Electronic Commerce (E-commerce Model Law),<sup>36</sup> UN Convention on the Use of Electronic Communication in International Contracts (E-communication Convention),<sup>37</sup> and UN Convention on Contracts for the International Sale of Goods

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<sup>32</sup> Organization of American States, "Draft Electronic Resolution of Cross-Border E-Commerce Consumer Disputes," accessed November 3, 2018, [http://www.oas.org/dil/esp/CIDIPVII\\_proteccion\\_al\\_consumidor\\_united\\_states\\_guia\\_legislativa\\_anexo\\_A.pdf](http://www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_A.pdf).

<sup>33</sup> The Inter-American Juridical Committee Res. CJI/ RES. 227 (LXXXIX-O/16) (Oct. 3-14, 2016). See generally Rule, Colin, Vikki Rogers, and Louis Del. Duca "Designing Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims – OAS Developments." *Uniform Commercial Code Law Journal* 42 (2010): 221-264 for analysis of the proposed solution by the OAS.

<sup>34</sup> "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958," UNCITRAL, accessed December 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>35</sup> "Model Law on International Commercial Arbitration 2006," UNCITRAL, accessed December 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

<sup>36</sup> "Model Law on Electronic Commerce 1996," UNCITRAL, accessed December 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html).

<sup>37</sup> "Convention on the Use of Electronic Communication in International Contracts, 2005," UN, accessed December 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html).

(CISG).<sup>38</sup> Finally, UNCITRAL's Technical Notes on Online Dispute Resolution of 2016 lays out the principles that may be followed by States and other stakeholders while designing and implementing ODR systems for cross-border commercial transactions.<sup>39</sup>

The EU established ODR platform in January 2016 with the intention to be an interactive and user-friendly website that is open to any customer or trader in the EU and is available in all EU official languages for free of charge.<sup>40</sup> The platform brings consumers and businesses together and offers consumers to choose an arbitration provider from a list to resolve their dispute between parties from EU member states, and Lichtenstein, Iceland and Norway.<sup>41</sup> This system also necessitates all European businesses to integrate online arbitration clause into their contracts.<sup>42</sup>

Government initiatives at a national level do not respond to the complications arising out of cross-border disputes, such as increased costs, duration, and communication disturbances due to the long distance.<sup>43</sup> It is difficult to establish a global ODR system considering

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<sup>38</sup> "Convention on Contracts for the International Sale of Goods, 1980," UN, accessed December 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html)

<sup>39</sup> "UNCITRAL Technical Notes on Online Dispute Resolution 2016."

<sup>40</sup> Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), O.J. (L 304/1); Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests O.J. (L 304/1).

<sup>41</sup> See "Online Dispute Resolution," European Commission, accessed November 11, 2018, <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show> website to observe how the platform works.

<sup>42</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests O.J. (L 304/1) para 30. ("In order to ensure broad consumer awareness of the existence of the ODR platform, traders established within the Union engaging in online sales or service contracts should provide, on their websites, an electronic link to the ODR platform.")

<sup>43</sup> See Yuthayotin, *Access to Justice in Transnational B2C E-Commerce*, 97; See Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 71.

the technological gaps amongst jurisdictions. The regional agreements and partnerships may be the solution for promoting ODR as they resolve multinational disputes and accommodate the advanced technology that is needed for the proper operation of ODR.

Striking a balance between consumers' right to access to justice and courts' workload is a difficult task to accomplish. As a step towards striking this balance, Turkey initiated an online platform for applications lodged for consumer to consumer arbitration in 2018.<sup>44</sup> Consumers upload their documents to system, agree on the procedure and applicable law, and notification process.<sup>45</sup> Turkey's this attempt to simplify the resolution of the disputes between consumers illustrate its volition to promote access to justice while simultaneously relieving courts from their heavy workload.<sup>46</sup>

The participation in the EU's ODR platform may be another plausible step for Turkey in course of achieving the aforementioned goals of the country. Turkey is a signatory of the EU's Customs Union Agreement, which is in effect since 1995.<sup>47</sup> The agreement provides a free circulation of goods. Turkey and the EU have been seeking ways to improve bilateral relations. In this respect, there have been efforts to facilitate e-commerce and introduce a digital agenda that establishes free movement of digital data.<sup>48</sup> To fulfill these efforts, focusing on

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<sup>44</sup> T.C. Gumruk ve Ticaret Bakanlığı Karar No: 77002794-405 Konu: Tüketici Hakem Heyetlerinin Yeniden Yapılandırılması, 9.07.2018 [Republic of Turkey Ministry of Customs and Commerce Decree No: 77002794-405 Subject: Restructuring Consumer Arbitral Tribunals, July 9, 2018][Restructuring Decree].

<sup>45</sup> The consumers can file their complaints through the e-government system.

<sup>46</sup> Uyp Bilisim Sistemi, accessed December 13, 2018, <http://istatistikler.uyp.gov.tr/>. Restructuring Decree. There are approximately two million new civil law disputes before the courts each year. In 2017, 590,736 and in the first half of 2018 272,933 small-value consumer disputes were brought before the consumer arbitral tribunals.

<sup>47</sup> Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Customs Union O.J. (L 35).

<sup>48</sup> Opinion 2017/C 075/22 of the European Economic and Social Committee on Enhancement of EU-Turkey Bilateral Trade Relations and Modernization of the Customs Union O.J. (C 75) 1.12.

ODR mechanisms and increasing consumers' and businesses' confidence in these mechanisms may be a good place to start. This may be done by Turkey's inclusion in EU's ODR platform. For this inclusion, as a first step, Turkey is required to appoint an institution for ODR in its jurisdiction. Turkey's newly established Istanbul Arbitration Center (hereinafter ISTAC) may be a possible candidate in this regard and the existing arbitration regulations will be sufficient until the institution or the government finds it necessary to reform the rules and the legislation or incorporate online arbitration rules.

#### **IV. CHALLENGES TO ONLINE ARBITRATION**

The challenges to online arbitration could be cultural, technological or regulatory. For instance, in Middle Easterner or Asian countries that represent collectivist cultures, the process is expected to be more relationship-based compared to individualist countries like the US.<sup>49</sup> This puts emphasis on the importance of the human involvement in online arbitration within the framework of Turkey. The technological challenges are related to information and communication technologies that the platforms should provide assistance to the procedure. This article focuses on the main regulatory challenges that may come up regarding online arbitration in Turkey, leaving other categories aside for further research.

##### **A. Arbitrability of E-commerce Disputes**

Arbitration is a dispute resolution mechanism that predominantly revolves around freedom of contract. Accordingly, arbitration does not come alive unless parties consent to submit their dispute to arbitration. This prerequisite naturally exists for online arbitration as well. As a general rule, the parties may agree on arbitration before or after the occurrence of the dispute as a separate contract or in a clause integrated

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<sup>49</sup> Daniel Rainey, *ODR and Culture*, in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, eds., Mohammed Salahudine Abdel Wahab et al. eds. (Eleven International Publishing, 2012), 189.

into the main agreement. In practice, arbitration agreements are most frequently concluded as a clause of main agreement and before any dispute arises.<sup>50</sup> In e-commerce disputes, while arbitration agreements that are concluded after the dispute are generally allowed, pre-dispute arbitration agreements are greeted with suspicion as they impact the arbitrability of the dispute under different national laws.<sup>51</sup>

While in some jurisdictions, such as the United States, the United Kingdom, Germany, Portugal, and Spain, consumer disputes are arbitrable, in some other jurisdictions, such as Italy, Finland, and Switzerland,<sup>52</sup> national laws do not allow consumer disputes to be submitted to arbitration for the sake of protecting the interests of consumers in the face of stronger adversaries. Whilst the European Union countries have different approaches, under the European Council Directive on Unfair Terms in Consumer Contracts, the pre-dispute arbitration agreements may be considered unfair<sup>53</sup> due to the possibility that a consumer is coerced to enter into the arbitration agreement. Under Turkish law, the status of the pre-dispute arbitration agreements is debatable.<sup>54</sup>

Under Turkish law, non-arbitrable issues are broadly defined as the “issues that are not at parties’ disposal.”<sup>55</sup> As far as the arbitrability of consumer disputes is concerned under Turkish law, the Tur-

<sup>50</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 173.

<sup>51</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 172.

<sup>52</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 171.

<sup>53</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts O.J. (L95/29) para Q of the annex; Contra De Boissésou, Matthieu, and Thomas Clay. “Recent Developments in Arbitration in Civil Law Countries.” *International Arbitration Law Review* 1 (1998): 151 citing resolution of European Parliament encouraging resolution of consumer disputes by arbitration.

<sup>54</sup> Tuketici Sozlesmelerindeki Haksiz Sartlar Hakkinda Yonetmelik [Regulation on Unfair Terms in Consumer Contracts], Resmi Gazete [RG] [Official Gazette] 29033, Jan. 17, 2014 Annex 1, para. 1(n). Parties cannot agree on going to an arbitration other than mandatory arbitration in their contract before the dispute. Such provisions are considered as unfair terms.

<sup>55</sup> 6100 Hukuk Muhakemeleri Kanunu[Code of Civil Procedure], Art. 408, 4686 Milletlerarası Tahkim Kanunu [MTK] [Code of International Arbitration], Art.1, para.4. Disputes that are not subject to parties’ discretion are non-arbitrable.

kish Court of Appeals held that consumer disputes are related to public policy; therefore, parties cannot freely submit to the arbitration.<sup>56</sup> On the other hand, some of the ADR mechanisms are explicitly accepted as a viable means to resolve consumer disputes. For instance, mediation is defined as a mechanism that the parties may opt for resolution of disputes that are on their disposal.<sup>57</sup> It is argued that arbitration should not be treated any differently if a consumer can freely submit its case to any other ADR method.<sup>58</sup> It should not be forgotten that, as a cost and time efficient method, online arbitration is a more convenient solution than court litigation for the consumers.

In light of these advantages, it is suggested that the concept of arbitrability should be interpreted in a broader context by Turkish courts and consumer disputes should be deemed to be arbitrable. Here, it should also be noted that judgments of courts are only binding for the parties. There is no *stari decisio* under Turkish legal system. They may constitute a persuasive authority, but the courts are

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<sup>56</sup> Yar. 13. HD, E. 2008/6195, K. 2008/12026, 20.10.2008 [13<sup>th</sup> Civil Chamber of Court of Appeals, Application No 2008/6195, Decision No 2008/12026, Oct. 20, 2008]. Consumer claims under certain amount is subject to "mandatory arbitration" that is resolved before a tribunal composed of lawyer and non-lawyer members. Parties do not have autonomy and do not decide on procedure or applicable law. Claims above the threshold is resolved by courts specialized in consumer disputes. Here, the Court of Appeals reasons that because the jurisdiction of mandatory tribunals are bestowed by law, parties' voluntary arbitration agreement is against public policy. The legal status of consumer arbitration is ambiguous. The procedure is *sui generis* and cannot be categorized as ADR or litigation. Yar. 13. HD. 2008/3492, K. 2008/11120, 25.09.2008 [13<sup>th</sup> Civil Chamber of Court of Appeals, Application No 2008/3492, Decision No 2008/11120, Sept. 25, 2008]. In this case, the Court of Appeals held the arbitration agreement between a consumer and tourism agency invalid for the public policy concerns.

<sup>57</sup> 6325 Hukuk Uyumazlıklarında Arabuluculuk Kanunu [Code of Mediation in Law Civil Disputes], Art. 1, para. 2.

<sup>58</sup> Yesilova, Bilgehan. "6502 sayılı Yeni Tüketicinin Korunması Hakkında Kanun'a Göre Tüketici Uyumazlıklarının Çözümü Usulu ve Yargılama Kuralları [Resolution Procedure and Rules for Consumer Disputes under the Code of Protection of Consumer numbered 6502]." *Terazi Hukuk Dergisi* 9 (2014): 118.

not obliged to embrace rationale of adopted by another court.<sup>59</sup> This allows courts to embrace an innovative role and enforce online arbitration agreements until the statutes are amended and recognizes the arbitrability of consumer disputes.

## B. Online Arbitration Fees

Upon agreeing on submitting their dispute to arbitration, parties should figure out how fees will be dealt by the platform. It is important to eliminate obstacles originating from fee to increase user-friendliness and popularity of online arbitration. There are different mechanisms to finance online arbitration. Both parties may bear the costs (bilateral), only one party, which is generally the business, may bear the costs (unilateral),<sup>60</sup> or the process may be financed *via* public funds.

Bilateral funding would discourage consumers to bring their small claims. But, if the quantum of claims is medium to large, bilateral funding would also prevent frivolous claims.<sup>61</sup> The most common fee allocation model that is adopted for B2C commerce is the unilateral model.<sup>62</sup> This model provides that a business party bears the full costs. The business can make annual contributions to the institution or pay for each case individually. This may create a risk

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<sup>59</sup> See generally 2797 Code of Court of Appeals [Yargıtay Kanunu]. A chamber should follow the same precedence. If the court wish to rule otherwise creating conflict with the precedence, the General Assembly of the Civil Chamber [Hukuk Genel Kurulu] shall decide. The conflicting decisions between the chambers are resolved by the General Assembly on the Unification of Judgements [İctihadi Birleştirme Kurulu]. Its decisions have the same effect as a law. There is no unified judgement on the arbitrability of the consumer disputes.

<sup>60</sup> Unconventionally, CIETAC Online Arbitration Rules requires small fee to be paid by the claimant that is generally the consumer.

<sup>61</sup> Pablo Cortés, *Online Dispute Resolution for Consumers*, in *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution*, Mohammed Salahudine Abdel Wahab et al. eds. (Eleven International Publishing, 2012), 145.

<sup>62</sup> Karim Benyekhlef, "Online Dispute Resolution," *Lex Electronica* 10, no. 2 (2005): 82; Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 66.



of bias in favor of the businesses that finance the proceedings and may lead potential consumers, who are inclined to submit their dispute to online arbitration, to have recourse to litigation.<sup>63</sup> In this respect, it is important to promote transparency to ensure impartiality and neutrality.<sup>64</sup> As an external financing, public funds may be transferred to online arbitration platforms. This model will probably reduce institutional partiality concerns and yet, will put extra pressure upon taxpayers.<sup>65</sup> Online arbitration providers may consider a combination of public and private funds to make use of the best sides of each method.<sup>66</sup>

Another solution is the deduction of fee from the final outcome once the dispute is resolved.<sup>67</sup> This would discourage the frivolous claims and, at the same time, does not prevent the consumers from bringing their claims. There are some jurisdictions like Spain, where all dispute resolution services ought to be non-profit.<sup>68</sup> Turkey does not disallow for-profit ODR mechanisms, but there are certain rules for legal fees in consumer cases before the courts.

Consumer disputes that are below 6,860 TL should be resolved before consumer arbitral tribunals.<sup>69</sup> Only consumers can bring claims before these tribunals; sellers/providers are not entitled to apply.<sup>70</sup> The consumers are exempt from any legal fees.<sup>71</sup> Both the

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<sup>63</sup> See Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 66.

<sup>64</sup> Cortés, *Online Dispute Resolution*, 145.

<sup>65</sup> Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford Private International Law Series, 2008), 318.

<sup>66</sup> Benyekhlef, "Online Dispute Resolution," 83; see Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 65 suggesting that public funding can be used in combination with other models.

<sup>67</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 65.

<sup>68</sup> Cortés, *Online Dispute Resolution*, 145.

<sup>69</sup> 6502 Tüketicinin Korunması Hakkında Kanun [Code on Consumer Protection] Art. 68.1.

<sup>70</sup> Tüketici Hakem Heyetleri Yönetmeliği [Regulation on Consumer Arbitral Tribunals], Resmi Gazete [RG] [Official Gazette] 29188, Nov. 27, 2014 Art. 11.

<sup>71</sup> Tüketici Hakem Heyetleri Yönetmeliği [Regulation on Consumer Arbitral Tribunals], Resmi Gazete [RG] [Official Gazette] 29188, Nov. 27, 2014, Art. 30.

consumers and seller/provider may object the decision of the tribunal at the consumer courts.<sup>72</sup> The consumer is again exempt from legal fees, but the seller/provider has to deposit the fees.<sup>73</sup> Since litigation is free of charge for consumers in Turkey, online arbitration may not attract consumers if it compels them to pay fees. Online arbitration should be publicly funded or the hybrid solution should be adopted. The businesses should pay the fees even if it is the consumer who complains to increase accessibility and reputation of online arbitration among consumers.

### C. Lex Arbitri

The seat of arbitration does not lose its significance for online arbitration. It affects arbitrability, determination of the governing law, whether substantive or procedural and determination of the place for the annulment proceedings of the arbitral award.<sup>74</sup> Parties can determine the seat of arbitration in their agreements<sup>75</sup> as part of the party autonomy principle and flexibility of online arbitration. However, from time to time the parties, especially the consumer as the weaker party may end up with the seat that they do not have any connection.<sup>76</sup>

Determining the seat of online arbitration by traditional means is challenging. The arbitrators may consider the enforceability of arbitration agreement under national laws, the nationality of the parties and physical convenience on a case-by-case basis.<sup>77</sup> Some

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<sup>72</sup> See Code on Consumer Protection Art. 73.1.

<sup>73</sup> Code on Consumer Protection. 73.2.

<sup>74</sup> Alexander J. Belohlavek, "Importance of Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth," *ASA Bulletin* 31, no. 2 (2013): 262.

<sup>75</sup> UNCITRAL Model Law, *supra* note 36, Art. 20 (1); MTK, *supra* note 57, Art.9.

<sup>76</sup> Maurice Schellekens, "Online Arbitration and E-commerce." *Electronic Communication Law Review* 9 (2002): 123.

<sup>77</sup> Arnold Vahrenwald, "Joint Research Centre of the EC Report on Out-of-Court Dispute Settlement Systems for E-Commerce," *Report on Legal Issues: Part IV—*

scholars suggest other criteria such as the location of the servers, place of the computers or where the emails of the arbitrator are sent and collected.<sup>78</sup> This makes online arbitration delocalized and detached from a physical place of arbitration.<sup>79</sup> This seems to be far-fetched given the traditional legal framework that is drawn by the New York Convention.<sup>80</sup>

CIETAC Online Arbitration Rules give precedence to parties' agreement, in the absence thereof seat of online arbitration shall be the location of CIETAC.<sup>81</sup> RAA Online Arbitration Rules provides the seat of arbitration to be in Moscow, Russia unless parties agree otherwise.<sup>82</sup> Both sets of rules do not mention the discretion of the arbitrators; however, it is generally accepted that in the absence of an agreement, the arbitrators should have the discretion to determine the seat.

Turkey does not have an online arbitration legislation. As suggested, online arbitration may become applicable by Turkey's participation to the EU ODR platform that does not require Turkey to enact online arbitration rules right away. The seat of online arbitration under Turkish law would be determined per arbitration rules that are in force.<sup>83</sup>

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*Arbitration. Out-of-Court Dispute Settlement Systems for E-Commerce (Italy: 2000), 89.*

<sup>78</sup> Wahab, "The Global Information Society," 163.

<sup>79</sup> See Hong-Lin Yu, and Motassem Nasir, "Can Online Arbitration Exist Within the Traditional Arbitration Framework?" *Journal of International Arbitration* 20, no. 5 (2003): 464 for more information on delocalization.

<sup>80</sup> Yu, Nasir, "Can Online Arbitration Exist," 464.

<sup>81</sup> "CIETAC Online Arbitration Rules," Art. 8.

<sup>82</sup> "RAA Online Arbitration Rules," Art. 1.4.

<sup>83</sup> MTK, *supra* note 57, Art.9. The seat of arbitration shall be determined by the parties or the arbitration institution selected by the parties. In the absence of an agreement, the seat of arbitration shall be determined by the arbitrators with regards to the relevant circumstances.

## D. Applicable Law

Applicable law is another murky area with respect to online arbitration. Parties are free to choose the law applicable to the procedure and substance of their dispute. If the parties fail to determine the applicable law, arbitrators are vested with broad discretionary authority that may be used to fill the voids that are left by the parties.<sup>84</sup> A consumer may not possess sufficient knowledge to know or decide the applicable law. This is another advantage of online arbitration over other dispute resolution methods as arbitrators are able to decide the applicable law in accordance with the circumstances of each case.<sup>85</sup>

Another advantage is the involvement of human effect in the process. Implementation of UNCITRAL instruments is suggested for identification of e-business usages and interpretation purposes.<sup>86</sup> If there is no choice of law, arbitrators should observe the equality of the parties while determining the applicable law.<sup>87</sup> They may supplement applicable rules *via* the International Institute for the Unification of Private Law (UNIDROIT) principles. For instance, the *contra proferentem* rule suggests that unclear terms be interpreted against the party that supplied the terms.<sup>88</sup> It is unlikely for an e-commerce

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<sup>84</sup> See "RAA Online Arbitration Rules," Article 4.1.1.

<sup>85</sup> Sela, "Can Computers Be Fair," 115. ("Indeed, the idea of "machine made justice" typically evokes inherent resistance, because it is at odds with the perception that fairness and justice are distinctly human traits that cannot be generated even by the most advanced artificially intelligent software.").

<sup>86</sup> Ujjwal Kacker, and Saluja Taran, "Online Arbitration For Resolving E- Commerce Disputes: Gateway To The Future," *Indian Journal of Arbitration Law* 3, no.1 (2014): 34.

<sup>87</sup> See for example UNCITRAL Model Law, *supra* note 36, Art. 28 (2), UNCITRAL Arbitration Rules (2013) [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html) Art. 17(1) for the generally accepted principle.

<sup>88</sup> UNIDROIT Principles (2016) <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> Art. 4.6. UNIDROIT Principles recognizes the significance of e-commerce contracts and reviews rules to include issues that may arise in connection with them.

consumer to supply the terms. In case of any ambiguity, the choice of law can be interpreted in favor of the consumer. This balance should be struck by online arbitrators as it would require human judgment within the context of fairness.

### **E. Effective Remedy and Enforcement of an Online Arbitration Award**

Arbitrators should render an award within the time limits set by online arbitration platforms. Generally, the duration for rendering an award varies between a few days and two weeks, but time extension may be granted if an award is not rendered within the time limit.<sup>89</sup> After parties receive an award, they may want to enforce it if the counter-party does not comply with the award voluntarily.

Online arbitration is preferred over other ODR mechanisms due to its relative simplicity in enforcement in jurisdictions that are signatory to the New York Convention. For recognition and enforcement, written arbitration agreement and duly authenticated arbitral award should be provided. These two requirements will be addressed as they may restrict online arbitration since everything is carried out by electronic means.

#### **1. Written and Signed Arbitration Agreement**

Article II of the New York Convention requires arbitration agreements to be in writing and signed by the parties. This is to ensure that the parties have consented the arbitration agreement after having full knowledge of its existence. Online arbitration agreements are, however, not written on a paper, nor hand-signed by physically-distant parties. For instance, they may agree on arbitration by clicking the box "I agree to the terms and conditions".<sup>90</sup> They may exchange

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<sup>89</sup> Kaufmann-Kohler, Schultz, *Online Dispute Resolution*, 59.

<sup>90</sup> The validity of pre-determined arbitration agreements and the arbitrability of the disputes are affected as discussed above under the section III.A.

emails and insert electronic signatures. The New York Convention accepts the exchange of letters,<sup>91</sup> but does not mention electronic communications. This requires interpretation of the treaty.<sup>92</sup>

It may be inferred that non-inclusion of e-communications was not intentional as electronic communications did not exist at the time when the New York Convention was drafted in 1958.<sup>93</sup> The rationale behind the written agreement is to prove parties' consent to arbitrate. With this rationale in mind, electronic agreements should be sufficient to demonstrate parties' intent to arbitrate their dispute.<sup>94</sup> As far as the consent is explicit, parties should meet the formal requirements of the arbitration agreement by clicking the box or indicating their names under the statement that they agree to submit their dispute to final and binding arbitration.<sup>95</sup> If the terms and conditions including the arbitration agreement are only accessed by a hyperlink, there is no indication of agreement.<sup>96</sup> The student buying the sneakers goes online only for shopping. She does not think about committing herself to a dispute resolution mechanism. She may click the box without reading the terms or she may never notice the hyperlink. Thus, in order for such agreements to be

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<sup>91</sup> The New York Convention, Art. II/2.

<sup>92</sup> Vienna Convention on the Law of Treaties Art.31, 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The articles set rules for the interpretation of treaties. First, ordinary meaning of the terms in their context and in light of their purpose and object is considered. If there is still obscurity, the circumstances of its conclusion should be taken into account. Here, the time of the conclusion is the relevant circumstance while interpreting its applicability on electronic means. Both the US and Turkey are not a party to the convention but the rules are closely observed under Turkish law. The Constitution of Turkey gives precedence to international agreements over national laws and they become part of the legal system. Rules for interpretation of laws require the evaluation of ordinary meaning, purpose and relevant circumstances.

<sup>93</sup> Wahab, "The Global Information Society," 154.

<sup>94</sup> Haitham A. Haloush, "The Authenticity of Online Alternative Dispute Resolution Proceedings," *Journal of International Arbitration* 25, no. 3 (2008): 361.

<sup>95</sup> Haloush, "The Authenticity of Online Alternative Dispute Resolution Proceedings," 362.

<sup>96</sup> Jeffrey H. Dasdeel, "Consumer Click Arbitration, A Review of Online Consumer Arbitration Agreements," *Arbitration Law Review* 9 (2017): 4.

valid, the consumer should be given proper notice about the existence of an arbitration agreement.<sup>97</sup>

In addition to Article II of the New York Convention, most of the jurisdictions require an arbitration agreement to be in writing. In terms of online arbitration agreements, courts generally consider whether there is a consent of the consumer, if so how it is taken. The US case law requires case-by-case analysis to determine the validity.

In *Specht v. Netscape Communications Corp.*, the Court found that reasonably prudent user of the website would not have known the terms and conditions that are given on the next scrollable screen.<sup>98</sup> The users cannot be considered consented to the terms of the agreement. In *Nicosia v. Amazon.com, Inc.*, the Court investigated the layout of the website and how user agreed to the terms. The Court stated that the design of the website is important to bind customer by the agreement.<sup>99</sup> The plaintiff asserted that conditions of use that contain arbitration provision are not enforceable because he did not consent.<sup>100</sup> Amazon claimed that the plaintiff was bound by the agreement because he was given the notice "By placing your order, you agree to Amazon.com's privacy notice and conditions of use" before placing the order and conditions of use were hyperlinked.<sup>101</sup> The Court held that hyperlink was a conspicuous warning and the plaintiff is bound by the agreement because the plaintiff could not place the order without first clicking the terms.<sup>102</sup> The Court draws the distinction with the *Specht* case, where there was no reference to terms and conditions.<sup>103</sup> In another case, the Court deemed arbitration agreement to be null because the consumer was not asked to agree on anything although there was a hyperlink to the conditions

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<sup>97</sup> Dasdeed, "Consumer Click Arbitration," 5.

<sup>98</sup> *Specht v. Netscape Communications Corp.* 306 F.3d.17, 33 (2d Cir. 2017)(United States).

<sup>99</sup> *Nicosia v. Amazon.com, Inc.* 84 F. Supp.3d 142, 153 (E.D.N.Y. 2016) (United States).

<sup>100</sup> *Nicosia v. Amazon.com, Inc.*, 150.

<sup>101</sup> *Nicosia v. Amazon.com, Inc.*, 150.

<sup>102</sup> *Nicosia v. Amazon.com, Inc.*, 150.

<sup>103</sup> *Nicosia v. Amazon.com, Inc.*, 151.

at the end of each page.<sup>104</sup> Under the US law, there is no clear rule to determine whether the user is bound by the agreement or not. The courts decide case-by-case basis. They look at whether the consumer could have known the existence of the arbitration agreement.

UNCITRAL Model Law also requires an arbitration agreement to be in writing. The Model Law defines what is meant by being in a written form and includes “electronic communication if the information contained therein is accessible so as to be usable for subsequent reference”.<sup>105</sup> Turkey has enacted its international arbitration legislation based on the Model Law in 2001 and recognized electronic communication as a written form.<sup>106</sup> The Turkish Court of Appeals addressed the writing requirement in a case that is not related to an electronic arbitration agreement. The Court by referring to the arbitration law stated that arbitration agreements in electronic documents shall be valid and binding.<sup>107</sup> This decision suggests that the consumer and the business representative do not have to come together to hand-sign the arbitration agreement. They may use e-mails and electronic signature to agree on online arbitration.

Turkish cases are silent on e-commerce arbitration agreements. As mentioned above, the case law addresses the arbitrability of the consumer disputes, rather than the validity of the electronic arbitration agreements. One of the objectives of the Code on Electronic Commerce is to set rules on informing consumers about the ADR mechanisms.<sup>108</sup> When the laws are read together, consumer disputes should be resolved by online arbitration as an alternative or out-of-court method. The online arbitration agreement as a type of contract should be handled as other terms and should be valid if the consumer is properly notified.

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<sup>104</sup> *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (United States).

<sup>105</sup> UNCITRAL Model Law, *supra* note 36, Art. 7(4).

<sup>106</sup> MTK, *supra* note 57, Art.4.

<sup>107</sup> Yar. 11. HD., E. 2015/1687, K. 2015/6696, 11.05.2015 [11<sup>th</sup> Civil Chamber of Court of Appeals, Application No 2015/1687, Decision No 2015/6696, Nov. 11, 2015].

<sup>108</sup> 6563 Elektronik Ticaretin Duzenlenmesi Hakkinda Kanun [Code on Regulation of Electronic Commerce] Art. 3, para.ç.



## 2. Authenticated Original Award

For recognition and enforcement of an award under the New York Convention, a duly authenticated original award or its certified copy should be supplied.<sup>109</sup> A document is authenticated if it bears the signature indicating that it is genuine. Signature formality impedes online arbitration. In a digital and paperless era, signing documents becomes redundant.<sup>110</sup> Echoing this view, E-Commerce Model Law sets out rules for an electronic signature to function and fulfill in a same way with traditional signatures.<sup>111</sup> E-communication Convention is another international document addressing this issue. Recognizing the restrictions under the New York Convention, it interprets the term contract in a manner that covers arbitration agreements that are concluded by electronic means.<sup>112</sup> Another document that works in harmony with these texts is the UNCITRAL Model Law on Electronic Signature that provides equivalence of hand-written and electronic signatures.<sup>113</sup>

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<sup>109</sup> The New York Convention, Art. IV/1/a.

<sup>110</sup> Haloush, "The Authenticity of Online Alternative Dispute Resolution Proceedings," 362.

<sup>111</sup> UNCITRAL, "Model Law on Electronic Commerce", Art. 7. ("1) Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.").

<sup>112</sup> "United Nations Convention on the Use of Electronic Communications in International Contracts, 2005," accessed November 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html), Art.1. Only 11 countries are party to the Convention whose main objective is to promote electronic communications in international contracts by overcoming the formal obstacles set by some treaties such as the New York Convention and the CISG.

<sup>113</sup> "UNCITRAL Model Law on Electronic Signature, 2001," accessed November 11, 2018, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html) html. Legislation based on or influenced by this Model Law has been adopted in 32 States.

Similarly, EU Directive on e-commerce<sup>114</sup> and e-signature<sup>115</sup> establishes that electronic contracts and signatures shall be given same legal status as paper contracts and hand-written signatures respectively. There is no explicit reference to arbitration agreements and awards however cross-border arrangements, development of international e-commerce and interoperability of the contracts are the reasons behind the e-signature rules.<sup>116</sup> The rules aim at increasing consumer confidence in e-communication and e-commerce.<sup>117</sup> The aim and the wording of the rules indicate that online arbitration agreements and awards are valid under EU law.

Institutional rules have different approaches. The CIETAC requires an arbitral award to be in writing and signed without detailing the signature requirements.<sup>118</sup> The RAA rules explicitly allow digital signature.<sup>119</sup>

Turkey is not a party to the E-communication Convention and did not adopt the model laws *verbatim*, but enacted parallel legislation. The law on e-signatures gives e-signature the same legal effect as the hand-written signature. The transactions that require official form or proceeding cannot be done by e-signature.<sup>120</sup> Arbitration agreement and award are not among them.<sup>121</sup> The laws and regulations on e-commerce and e-communications enacted pursuant to EU

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<sup>114</sup> 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'), O.J. (L 178) (EC).

<sup>115</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, O.J. (L13/12) (EC).

<sup>116</sup> Directive 1999/93/EC, at Preamble para 23.

<sup>117</sup> Directive 1999/93/EC, at Preamble para. 24.

<sup>118</sup> "CIETAC Online Arbitration Rules," Art. 39.

<sup>119</sup> "RAA Online Arbitration Rules," Art. 5.1.4.

<sup>120</sup> 5070 Elektronik İmza Kanunu [Code on Electronic Signatures], Art. 5.

<sup>121</sup> Some transactions are subject to official form that should be carried out before a public officer as named by law. For instance sale of immovable property should be done before land registrar.

directives as a part of harmonization policy particularly mention the consumers and provide additional protection.<sup>122</sup>

Written form and authentication are the main challenges to online arbitration since they attack its most significant advantage, enforceability. Current international, regional and national rules try to address the issue in multiple facets and it seems like there is a convincing evidence that online arbitral awards are enforceable regardless of the formal requirements. These formalities are not considered as a factual obstacle for online awards anymore since arbitrators can always print out the award, sign, and send it to the parties even if it would be impractical.<sup>123</sup> Hybrid solutions bringing offline and the online world together should be accepted for online arbitration awards. Regardless of the abovementioned obstacles, if existing traditional legal rules are broadly interpreted harmoniously with modern technological advances, online arbitration is most likely to survive.<sup>124</sup>

## V. CONCLUSION

Notwithstanding the challenges to online arbitration, Turkish law mechanisms show great adaptability to it. The most important challenge to overcome is the arbitrability of consumer disputes under Turkish law. The laws do not explicitly prohibit voluntary arbitration of consumer disputes. When the laws are read together, arbitration as one of the ADR mechanisms should be applicable to consumer disputes. Most and foremost, if the laws aim to protect the consumers, online arbitration should be made available for consumer disputes as it provides effective, quick, and budget-friendly remedies.

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<sup>122</sup> See Code on Regulation of Electronic Commerce; see 5809 Elektronik Haberleşme Kanunu [Code on Electronic Communication]; see also Ticari İletişim ve Ticari Elektronik İletiler Hakkında Yönetmelik [Regulation on Commercial Communication and Commercial Electronic Correspondence] Resmi Gazete [RG] [Official Gazette] 29417, Jan. 15, 2015 for reasons of legislation.

<sup>123</sup> Haloush, "The Authenticity of Online Alternative Dispute Resolution Proceedings," 362.

<sup>124</sup> Wahab, "The Global Information Society," 168.

The questions regarding the remaining challenges, such as writing requirement and authentication of agreements and awards are not answered under Turkish law. Approaches of courts from other jurisdictions, where online arbitration is practiced, may be taken as guidelines. The rules on e-communication, e-signatures, and e-commerce are in harmony with modern jurisdictions. To establish an online arbitration practice, Turkey does not necessarily have to enact additional legislation. However, in order to avoid conflicts and ambiguity, the statutes can be renovated to allow online arbitration for consumer disputes.

Being a part of a regional organization with established practice would minimize the precedence or regulation-related problems. The regional organizations offer a better solution since they address cross-border disputes for the countries that have necessary national legislation to establish online arbitration. Therefore, Turkey's accession to the EU ODR platform would make resolution of cross-border disputes within the region easier. Being a part of the platform, Turkey can provide services *via* ISTAC. ISTAC need not to implement new rules, as the EU ODR platform will cover the electronic management of the cases. The disputes can be resolved by current rules. By following the arbitration institutions that currently offer online arbitration rules, ISTAC may implement or reform its rules in the future if it finds appropriate.

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