

**ISTANBUL MEDENİYET UNIVERSITY  
INSTITUTE OF GRADUATE STUDIES  
SECTION OF PRIVATE LAW**

**ONLINE DISPUTE RESOLUTION AND ITS APPLICABILITY  
IN TURKEY**

**Masters of Law (L.L.M.) Thesis**

**MARIA MELİS HALICIOĞLU**

**OCTOBER 2019**

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**MARİA MELİS HALICIOĞLU**

**Supervisor**

**PROF. DR. ÜMİT GEZDER**

**OCTOBER 2019**

## İMZA SAYFASI

Maria Melis HALICIOĞLU tarafından hazırlanan '**Online Dispute Resolution and Its Applicability in Turkey**' başlıklı bu yüksek lisans tezi Özel Hukuk Anabilim Dalında hazırlanmış ve jürimiz tarafından kabul edilmiştir.

### JÜRİ ÜYELERİ

#### Tez Danışmanı:

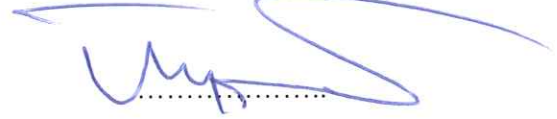
Prof. Dr. Ümit GEZDER  
İstanbul Medeniyet Üniversitesi

#### Üyeler:

Doç. Dr. M. Deniz YENER  
Marmara Üniversitesi

Dr. Öğr. Üyesi Özgür ARIKAN  
İstanbul Medeniyet Üniversitesi

### İMZA



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Hazırladığım tezin tamamen kendi çalışmam olduğunu, akademik ve etik kuralları gözeterek çalıştığımı ve her alıntıya kaynak gösterdiğimi taahhüt ederim.

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## **ABBREVIATIONS**

ADR – Alternative Dispute Resolution

ADR Directive - the 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

Attorney Code – the Turkish Attorney Code

B2B – Business to business

B2C – Business to consumer

C2C – Consumer to consumer

Civil Procedure Code – the Turkish Code of Civil Procedure

Consumer Code – the Turkish Law on Consumer Protection

Directive on Electronic Commerce - 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

E-commerce Code – the Turkish Regulation of Electronic Commerce

EU – European Union

Mediation Code – the Turkish Mediation Code in Legal Disputes

Member States – Member states of the European Union

ODR – Online Dispute Resolution

ODR Platform – Online Dispute Resolution Platform of the European Commission

ODR Regulation - the 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

OECD - the Organisation for Economic Co-Operation and Development

TOBB - Union of Chambers and Commodity Exchanged in Turkey

Trustmark Communiqué - the Turkish Communiqué relating to the Trustmark in E-commerce

TUIK - Turkish Statistical Institute

TÜBİSAD - Turkish Informatics Industry Association

**ÖZET:** Online uyuşmazlık çözümü, alternatif uyuşmazlık çözümünün online versiyonu olarak uluslararası nitelikleri olan uyuşmazlıkların düşük maliyetli, daha hızlı ve daha kolay olarak çözümlenmesi için doğmuştur ve birçok ülke tarafından uyuşmazlık çözümüne makul bir alternatif olarak tanınmıştır. 21. yüzyılın başı, alternatif uyuşmazlık çözümünün ana türleri olan uzlaşma, arabuluculuk ve tahkimi de içeren online uyuşmazlık çözümünün dönüm noktası olmuştur ve e-ticarete ilişkin faaliyette bulunan şirketler tarafından kullanılmaya başlanmıştır. Bu uyuşmazlık türü, teknolojinin yeniliklerinin avantajları ile gelişmekte ve bu yeniliklerle doğan uyuşmazlık türlerinin yeni tipleri oluşmaktadır. Bu çalışmada online uyuşmazlık çözümünün türleri ile Avrupa Birliği'nin buna ilişkin mevzuatı açıklanacak, bu çözüm türlerinden hangilerinin daha etkili olduğu tartışılacak, Türkiye'deki alternatif uyuşmazlık çözüm yöntemleri açıklanacak ve online uyuşmazlık çözümlerinin mevcut Türkiye Cumhuriyeti mevzuatı uyarınca uygulanıp uygulanamayacağı tartışılacaktır.

**ANAHTAR KELİMELEER:** Online uyuşmazlık çözümü, otomatik uzlaşma, destekli uzlaşma, arabulucuk, tahkim

**ABSTRACT:** Online dispute resolution was born as the online version of alternative dispute resolutions for disputes with international character to be solved cheaper, faster and easier and has been determined in many countries as an applicable alternative for settling disputes. The beginning of the 21st century was the milestone of online dispute resolution, where types of alternative dispute resolution which are typically negotiation, mediation and arbitration, were starting to be used in companies relating to e-commerce. This system of dispute resolution is developing with the novelties of technology and new ways of resolving disputes are arising from these novelties. In this study, types of online dispute resolution, which types are more efficient as well as the legislation of the European Union regarding such mechanisms will be explained and the types of alternative dispute resolutions of Turkey will be also explained as well as whether online dispute resolution may be applicable in Turkey as per the current legislation.

**KEYWORDS:** Online dispute resolution, automated negotiation, assisted negotiation, mediation, arbitration.



## INTRODUCTION

The fast evolution of e-commerce in the 1990s<sup>1</sup> brought a number of problems and therefore, it was seen that solving such problems needed to be as quick and as efficient as possible. This issue generated the necessity to adapt the alternative dispute resolution methods to comply with the internet environment, the complication of cross-border transactions and the fast pace of electronic transactions. The outcome that the parties want from goods and services ordered online with an electronic message is that they would like to execute an agreement online.<sup>2</sup> Thus, the traditional alternative dispute resolution types failed to satisfy the parties using online tools, especially consumers, with regards to disputes occurring from their online transactions due to the idiosyncrasy of the internet.

As small and middle-tier firms, especially in developing countries, are able to access different markets easier with the internet, consumers are able to attain products anywhere in the world which has augmented the number of disputes as well as complicate them, notably when a foreign element is added. Thus, these international conflicts ultimately led to conflicts of law which prompted nations to adopt their own e-commerce laws to deal with disputes relating to e-transactions of global websites.<sup>3</sup> In principle, online dispute resolution procedures facilitate access to justice, and therefore overcome some of the problems associated with the use of the traditional methods of dispute resolution mechanisms.<sup>4</sup> As a result, technology was used in order

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<sup>1</sup> Julio César Betancourt and Elina Zlatanska, *Online Dispute Resolution (ODR): What is it, and is it the Way Forward?*, 79 International Journal of Arbitration, Issue 3 (2013), p.256

<sup>2</sup> Ümit Gezder, *Elektronik Sözleşmelerde Tüketicinin Korunması* ["Protection of the Consumer in Agreements Executed Electronically"], (Doctorate Thesis, Istanbul University Law Faculty, 2003), p.43

<sup>3</sup> Kodchakorn Na Nakornphanom, *The Use of Online Dispute Resolution under the United Nations Dispute Resolution Framework*, International Journal of Crime, Law and Social Issues, Vol:4, No.2 (2017), p.59

<sup>4</sup> Thomas Schultz and Gabrielle Kaufmann-Kohler, *Online Dispute Resolution: Challenges for Contemporary Justice*, International Arbitration Law Library Series, Kluwer Law International (2004), p.68

to settle customer complaints and online dispute resolution was sought to support negotiation, mediation and arbitration electronically.<sup>5</sup>

The tool to satisfy the need of consumers shopping internationally has become online dispute resolution: procedures in which the parties do no longer travel to meet in courtrooms or where they resolve the problems in front of arbitrators or mediators.<sup>6</sup> In such case, the parties are behind computer screens and are communicating electronically. The aim of such parties is to settle their dispute by an agreement executed online or, depending on which online dispute resolution type they choose, by submitting their disagreement to an online arbitral tribunal or a cyber court.

Within the types of online dispute resolution mechanisms; negotiation, mediation and arbitration seem to be the most commonly practiced globally which are also the main tools present in online dispute resolution. However, as the online environment is different to offline dispute resolution mechanisms, the architecture of the institutions is different, the procedural rules vary thereof.<sup>7</sup>

Since the beginning of the 21<sup>st</sup> century until today, online dispute resolution initiatives have evolved and over fifty organizations are currently offering these services globally.<sup>8</sup> The existing online dispute resolution procedures are based on the *sui generis* dispute resolution format which focuses on the needs of Internet users or on the dispute resolution types already developed by the alternative dispute resolution movement on online platforms.<sup>9</sup> However, only China has launched a court exclusive to internet related cases which is the Hangzhou Internet Court and such courts' jurisdiction is limited as only being a lawsuit which may be filed only if the defendant's domicile is in the People's Republic of China.<sup>10</sup>

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<sup>5</sup> Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts*, Australasian Dispute Resolution Journal, Vol:27, Part: 4 (2016), p. 227

<sup>6</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*, E-Com Research Project of the University of Geneva (2001), p.1

<sup>7</sup> Ibid p.2

<sup>8</sup> The list of online service providers may be obtained from <http://odr.info/provider-list/> (Accessed on February 2019).

<sup>9</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.2

<sup>10</sup> More information regarding such court may be found at <https://barandbench.com/cyber-court-with-love-from-china-to-india/> (Accessed on February 2019).



In Turkey, the internet service was introduced in 1993, mainly at universities, but it has become more popular every year. As per the current statistics of the Turkish Statistical Institute (TUIK), it was determined that more than 72 percent of the Turkish population uses the internet regularly and that almost 84 percent of households in Turkey have access to the internet in 2018.<sup>11</sup> Furthermore, it was estimated that the e-commerce market value in Turkey is 19.2 billion TRY for non-retail related matters and 23 billion TRY in the retail sector in 2017 with an annual growth of 37 percent.<sup>12</sup>

Even though there are numerous e-commerce websites in Turkey, all disputes regarding these topics are currently solved offline via consumer arbitration committees or courts, depending on the type of conflict and the amount subject to the dispute. A great step with regards to alternative dispute resolution in Turkey was that in the year 2010, the Turkish law-maker recognized mediation, arbitration and negotiation. Furthermore, since the second half of the 2010's, discussions have arisen with respect to the implementation of the alternative dispute resolution mechanisms online as clearing up the conflicts in courts has become time consuming with not enough courts and judges to solve these conflicts.

The fact that every case was needed to be settled by the traditional manner of dispute resolution by filing lawsuits until recent years caused the Turkish courts to face excessive workload and the proceedings that lasted for many years. In addition, since a lot of judges were dismissed due to political reasons and the attempted coup which took place in 2016, there were not enough courts with judges that heard the trials continuously and hearings were suspended further. Such situation made it contrary to the principle of trial in a reasonable period which is one of the basic principles of a fair trial.<sup>13</sup>

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<sup>11</sup> Turkish Statistical Institute (TUIK) (August 2018). Household Information Technologies (IT) Usage Research Obtained from: <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=27819> (Accessed on March 2019).

<sup>12</sup> Turkish Informatics Industry Association (TüBiSAD)(May 2018). E-commerce in Turkey 2017 Market Size, p.11-12. Obtained from: [http://www.tubisad.org.tr/en/images/pdf/tubisad\\_2018\\_e-commerce\\_in\\_turkey\\_en.pdf](http://www.tubisad.org.tr/en/images/pdf/tubisad_2018_e-commerce_in_turkey_en.pdf) (Accessed on March 2019).

<sup>13</sup> Yasemin Durak, *Alternatif Uyuşmazlık Çözüm Yöntemi Olan Arabuluculuk ve Medeni Hukukta Görünümü* ["Mediation as an Alternative Dispute Resolution Method and its View in Civil Law"], Akdeniz University Law Faculty Journal, Vol. 3, No:2 (2013), p.55

3.20 İBBS 3. düzeyde, mahkeme türüne göre hukuk mahkemelerindeki dava sayısı, 2017  
Number of cases at the civil courts by types of court at SR, level 3, 2017

| İBBS 3<br>SR 3 |                                                                     | Gelen dava - Cases brought |                                                                                 |                                  |                                                           |                                               | Gelecek<br>yıla devir<br>Postponed<br>until next<br>year |
|----------------|---------------------------------------------------------------------|----------------------------|---------------------------------------------------------------------------------|----------------------------------|-----------------------------------------------------------|-----------------------------------------------|----------------------------------------------------------|
|                |                                                                     | Toplam<br>Total            | Geçen<br>yıldan<br>devir <sup>19</sup><br>Cases from<br>last year <sup>19</sup> | Yıl içinde<br>gelen<br>New cases | Bozularak<br>gelen<br>Reversal by<br>the Supreme<br>Court | Karara<br>bağlanan<br>dava<br>Cases<br>judged |                                                          |
| TR             | Türkiye - Turkey                                                    | 3 584 197                  | 1 553 720                                                                       | 1 962 485                        | 77 992                                                    | 1 984 974                                     | 1 609 223                                                |
|                | Asliye Hukuk - Basic Civil Court                                    | 1 073 466                  | 558 130                                                                         | 479 854                          | 35 482                                                    | 477 285                                       | 596 181                                                  |
|                | Asliye Ticaret - Basic Commercial Court                             | 231 080                    | 139 284                                                                         | 87 660                           | 4 136                                                     | 92 864                                        | 138 216                                                  |
|                | İcra Hukuk - Court of Civil Enforcement                             | 282 695                    | 83 292                                                                          | 192 845                          | 6 558                                                     | 197 136                                       | 85 559                                                   |
|                | Sulh Hukuk - Civil Court of Peace                                   | 806 469                    | 169 492                                                                         | 632 150                          | 4 827                                                     | 612 363                                       | 194 106                                                  |
|                | İş - Labour Court                                                   | 557 986                    | 313 040                                                                         | 227 449                          | 17 497                                                    | 206 469                                       | 351 517                                                  |
|                | Kadastro - Land Registration Court                                  | 25 290                     | 19 684                                                                          | 4 395                            | 1 211                                                     | 7 859                                         | 17 431                                                   |
|                | Tüketici - Consumer Court                                           | 196 989                    | 132 071                                                                         | 63 101                           | 1 817                                                     | 119 074                                       | 77 915                                                   |
|                | Aile - Family Court                                                 | 408 957                    | 133 207                                                                         | 269 526                          | 6 224                                                     | 266 020                                       | 142 937                                                  |
|                | Fikri ve Sınai Haklar Hukuk<br>Civil Literary and Industrial Rights | 11 265                     | 5 620                                                                           | 5 505                            | 240                                                       | 5 904                                         | 5 361                                                    |

Table 1: Workload of Civil Courts in Turkey in 2017

Although in some cases, especially with reemployment lawsuits, mediation has become compulsory since the end of the year 2017 as per the Labour Court Code and some disagreements are being resolved through mediation, workload of the courts has not decreased much due to the limited application of compulsory mediation. Thus, the government should find other ways to encourage citizens to seek alternative dispute resolution in order to resolve disputes within a reasonable term.

Alternative dispute resolution methods are not enough for settling conflicts with regards to consumer transactions online. Furthermore, with regards to such issues, current alternative dispute resolution methods have not been able to meet with the problems of e-related disputes due to the nature of the internet.<sup>14</sup> Thus, it is vital for some disputes to be resolved with online dispute resolution.

In this thesis, the common types of online dispute resolution (e-negotiation, e-mediation and e-arbitration) will be explained which are considered to be distinctive features arising from specific needs due to the electronic environment and compare them by stating which one is currently more used and which one would be more beneficial, especially with relation to cross-border e-commerce related disagreements.

<sup>14</sup> Arzu Yıldırım and Gökbüke Deren Vercep, *Mechanisms of Online Dispute Resolution*, GSI Articleletter (2018), p.121

Such analysis will be beneficial as the problems online dispute resolution faced globally will be similar when and if the alternative dispute resolution types branch out to be electronic. The second chapter of the thesis will introduce the legislation enacted in the European Union as such legislation is important for Turkey to model its own online dispute resolution mechanism. Third chapter will present a broad explanation of the current alternative dispute resolutions types which are used in Turkish law. Finally, the current Turkish legislation will be applied to these types of alternative and online dispute resolution tools and it will be argued wherever online dispute resolution may be used in Turkey in the near future. However, one must bear in mind that the main goal of online dispute resolution is not to settle a conflict but is to provide services to help solve the disagreement with the parties losing as little as time and money as possible.

## CHAPTER 1: TYPES OF ODR AND THEIR ADVANTAGES AND DISADVANTAGES

### 1. E-NEGOTIATION

Fundamentally, negotiation can be defined as any type of communication between two or more people in order to reach an agreement.<sup>15</sup> This means that negotiation can be seen as an amicable and desirable way of settling a conflict. However, e-negotiation is executed with computer-mediated communication which aids interaction between the parties with use of electronic means such as computers. When 235.6 billion e-mails are sent and received globally every day in 2018 and with 111.1 billion e-mails are consumer related e-mails,<sup>16</sup> a big portion of e-mails will be either accepting or negotiating transactions.

| Daily Email Traffic                                     | 2015         | 2016         | 2017         | 2018         | 2019         |
|---------------------------------------------------------|--------------|--------------|--------------|--------------|--------------|
| <b>Total Worldwide Emails Sent/Received Per Day (B)</b> | <b>205.6</b> | <b>215.3</b> | <b>225.3</b> | <b>235.6</b> | <b>246.5</b> |
| % Growth                                                |              | 5%           | 5%           | 5%           | 5%           |
| <b>Business Emails Sent/Received Per Day (B)</b>        | <b>112.5</b> | <b>116.4</b> | <b>120.4</b> | <b>124.5</b> | <b>128.8</b> |
| % Growth                                                |              | 3%           | 3%           | 3%           | 3%           |
| <b>Consumer Emails Sent/Received Per Day (B)</b>        | <b>93.1</b>  | <b>98.9</b>  | <b>104.9</b> | <b>111.1</b> | <b>117.7</b> |
| % Growth                                                |              | 6%           | 6%           | 6%           | 6%           |

Table 2: Worldwide Daily Email Traffic (B), 2015-2019

Pursuant to Mr. Schultz's distinction,<sup>17</sup> I have chosen to separate e-negotiation into two categories, (1) automated e-negotiation and (2) assisted e-negotiation as there are some differences between the two and thus, their advantages and disadvantages differentiates from one another. However, their common disadvantage is that parties

<sup>15</sup> Julio César Betancourt and Elina Zlatanska, p.259

<sup>16</sup> More information regarding number of e-mails sent may be obtained from <https://www.campaignmonitor.com/blog/email-marketing/2018/03/shocking-truth-about-how-many-emails-sent/> (Accessed on February 2019).

<sup>17</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.2



may end up misreading and misinterpreting each other's e-mails and messages as face-to-face communication is more comprehensible than electronic communication.<sup>18</sup>

#### **a. Automated E-Negotiation**

In automated negotiation, the party, which is usually the claimant, approaches the relevant organization or institution and files its request online. The online service provider of this dispute resolution mechanism contacts the counter party who can either accept or refuse to grant jurisdiction to such service if there is no agreement executed with the party regarding online dispute resolution.<sup>19</sup> Subsequently, the parties commence a procedure called "blind-bidding"<sup>20</sup> which works with advanced artificial intelligence (such as machine learning, big data and algorithms) where each party offers something, usually a certain amount of money, and such bids are strictly confidential.

Such offers may be limited or unlimited depending on the guideline of the relevant e-negotiation service provider. When the demand is close to the offer, the online service provider of e-negotiation calculates the arithmetic of the two amounts. However, some e-negotiation providers state that the difference between these two figures must be at least a percentage which is stated in their guidelines and the bidding process continues with the offering and demands until the maximum difference percentage is met. The system obtains from the parties on how they rank or value the matters in the conflict and then combine these results to propose a solution.<sup>21</sup>

Moreover, most of these service providers may have a time limit for the parties to settle the disagreement and when the time limit is exceeded, the dispute resolving mechanism is lapsed.

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<sup>18</sup> Noam Ebner, *Negotiation via Email*, Journal of Public Law and Policy (2017), p.120

<sup>19</sup> In such case, the jurisdiction in the executed agreement between the parties shall be applicable to the conflict unless they state in writing that the relevant online dispute resolution provider shall have jurisdiction to settle the conflict.

<sup>20</sup> Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, Harvard Negotiation Law Review, Vol:21 (2015), p.118

<sup>21</sup> Michael Legg, p. 228

The scope of this type of e-negotiation is limited to the answer of how much is owed instead of wherever something is owed which is a limit used similarly in e-mediation where the mediator at the very end of the process sometimes discusses wherever something is owed with the parties.<sup>22</sup> However, the field of activity subject to the conflicts and the types of parties are very broad.

#### **i. Advantages**

This type of online dispute resolution is uncomplicated as there is no need to schedule a meeting and the parties just have to offer a figure in order to settle the conflict. Thus, automated negotiation also makes the procedure of negotiating budget friendly and time efficient as the parties do not have to make arguments regarding why they have offered or demanded such figure. Furthermore, such online dispute resolution is easy to use and transparent in the sense that it is not complicated which is great for B2C related disputes.

As an example regarding the success of automated e-negotiation is that, from millions of negotiations conducted by the Electronic Consumer Dispute Resolution and eBay regarding disputes arising from buyers and sellers, %70 of disputes were settled successfully. Therefore, it can be said that automated negotiation has been successful in resolving disputes regarding e-commerce transactions.<sup>23</sup>

#### **ii. Disadvantages**

With automated negotiation, there is no human emotion. In face-to-face meetings, the parties can observe each other's body languages. Non-verbal impressions play a crucial role in understanding the counter-party's interests, wishes and objectives which is a key element to settle the conflict as quickly as possible.<sup>24</sup> The parties are more likely to bluff with automated negotiation as no emotion can be seen behind the computer screen and in such case, it may take longer to solve the discord.

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<sup>22</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.5

<sup>23</sup> Kodchakorn Na Nakornphanom, p.61

<sup>24</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.6



### **b. Assisted E-Negotiation**

In assisted e-negotiation, the online dispute resolution provider solely provides a secure website where the parties have a reach an accord without external body and thus they resolve the aforementioned disagreement themselves which automated e-negotiation has. In this type of online dispute resolution method, the online service provider provides software for the parties to communication between only themselves.<sup>25</sup>

Most of the assisted e-negotiation service providers limit their services to commercial issues and typically e-commerce related conflicts, sometimes solely for consumer related matters. However, there are also service providers which offer aid for all types of disputes. The type of parties also varies in connection to the type of disagreement the service provider seeks to conclude, some of the online dispute service providers only limit their services to be used by consumers.

Even though there is no *a priori* reason that assisted e-negotiation should be exclusively used for only some types of conflicts (unless the relevant legislation states that the dispute is forbidden to be solved through negotiation), it can be assumed that assisted e-negotiation is primarily used for e-commerce related conflicts and may be available solely for consumers to use. One of the reasons that assisted e-negotiation would be more successful in settling commercial matters than automated e-negotiation is that the parties are likely to succeed in a negotiation by communication, whereas no communication is used in automated e-negotiation.<sup>26</sup>

The role of technology in such alternative dispute resolution type resembles mediation as the assisted e-negotiation platform transmits a safe website for parties to negotiate but the technology does not assist parties with regards to settling the conflict.<sup>27</sup>

### **i. Advantages**

Similar to the advantage of automated e-negotiation, assisted e-negotiation is also very simple and it is sufficient for the parties to leave messages on the software provided by the online dispute resolution mechanism in order to terminate the conflict as

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<sup>25</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.5

<sup>26</sup> Ibid p.24

<sup>27</sup> Arzu Yıldırım and Gökbüke Deren Verap, p.127

assisted e-negotiation is almost always only conducted via e-mails. Due to the simplicity, it is again very cost-efficient and offers convenience for the parties who do not have to travel and enforce a court decision or execution proceeding in another jurisdiction.

When compared with automated e-negotiation, the parties are able to express their opinions to each other which help the parties to solve their disagreements efficiently. Such advantage means that, with communication, parties will be able to know what the other party wants out of solving the conflict and negotiate accordingly which will most likely mean that the matter will be resolved quicker than when automated negotiation is used.

## **ii. Disadvantages**

This type of online dispute resolution is less popular due to the fact the parties do not have a separate external entity which provides aid to solve the conflict and thus has the capacity to decide for the parties themselves. In such case, especially consumers who most likely need guidance with regards to how the disagreement will be solved quickly and who will probably think with their emotions more than their logic in comparison to representatives of companies, it might take longer to resolve the matter than it normally would if there was an independent third party to help them.

Another disadvantage of assisted e-negotiation is that, similar to automated negotiation, the parties are not able to read each other's emotions and body languages through a computer screen. In such case, the process of settling the matter might take longer than it should as parties will be negotiating without knowing what the other party would like benefit out ending the conflict.

Furthermore, with assisted e-negotiation, there might a problem with regards to impartiality. Technology is not unbiased and a specific software design reflects a preference for certain values compared to others, therefore depending on the design, the algorithm may favour one party over the other.<sup>28</sup> An example for this argument is platforms like eBay who have adopted "the customer is always right" policy where

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<sup>28</sup> Michael Legg, p. 232

buyers are able to demand a refund as well as keep the item bought from the platform which is subject to the dispute.<sup>29</sup>

## 2. E-MEDIATION

E-mediation can be defined as a system-based mechanism by which an impartial third party, a mediator, who is in some ways similar to a judge, listens to the parties in order to settle their conflict.<sup>30</sup> A judge is someone appointed by the government and works in a courtroom whereas a mediator is independent and impartial. The mediator does not have the capacity to decide for the parties however the mediator's extent to intervene may differ significantly. The mediator can intervene as little as possible and only intervene when the parties request him to do so or may almost have the authority to force an agreement upon the parties.<sup>31</sup>

The mediator should not express an opinion or recommend a solution to conclude the dispute as such mechanism merely aims to assist parties to have their own opinions and eventually make their interests meet. However, litigation requires that the judge advises on the facts, evidence and applicable law and finds a solution which may be acceptable to the parties and then tries to persuade the parties to take this resolution.

The characteristic of the e-mediator plays a crucial role in ending the disagreement as it needs to firstly understand what the parties want which can sometimes be observed from numerous factors such as age, gender and their ethnic and cultural background.<sup>32</sup> Therefore, it may be argued that e-mediators with good typing skills and those who use videoconferencing instead of teleconferencing or only using chat-rooms would be more successful in settling the dispute.

There are generally three sessions in offline mediation. First of all, the parties submit the facts, express their opinions regarding the facts and their interpretation of the law.

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<sup>29</sup> You may find eBay's policy regarding refunds addressed to the sellers from <https://www.ebay.com/help/selling/managing-returns-refunds/handle-return-request-seller?id=4115> (Accessed on April 2019).

<sup>30</sup> Thomas Schultz and Gabrielle Kaufmann-Kohler, p.22

<sup>31</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.7

<sup>32</sup> Ibid p.36



Afterwards, the mediator arranges private sessions with the parties where it discusses confidentially the disagreement with the parties. Finally, a closing session is held where the parties communicate with each other and affirm that they have reached a settlement or that they have made progress regarding solving the conflict. The only difference with online mediation and offline mediation is that the sessions in online mediation are replaced with cyberspace where the online service provider has discussion rooms and private communication tools.<sup>33</sup>

E-mediation is more commonly used to settle conflicts as the parties generally wish to involve a third-party neutral which mostly increases trust in the dispute resolution process.

Similar to assisted e-negotiation, there is no *a priori* conflict subject which cannot be resolved with such type of dispute resolution unless the applicable law states otherwise, however it is safe to say that emotional related conflicts such as personal injury which may not be amenable to solve with e-mediation as it is difficult to give a judgment with such type of matters. However, this type of online dispute resolution mechanism is available for all parties, which means it clearly applies to a broader scope of claimants.

#### **a. Advantages**

E-mediation aims to aid the communication between the parties. This is why communication and its varied methods are the basis of shaping the different stages of mediation.<sup>34</sup> The e-mediation service providers mostly offer various types of communication such as “shuttle diplomacy” strategy where the e-mediator goes from one private discussion with a party to another or “constant triangular discussions” where the parties and e-mediator leave messages in a common chat room.<sup>35</sup>

As the range of available communication methods and tools is very broad, this makes this type of online dispute resolution flexible. Flexibility is always an advantage where there is a range of people who may use the internet very efficiently to those who may only be able to execute the simplest tasks online. As an example, out of e-mediation

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<sup>33</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.9

<sup>34</sup> Ibid p.8

<sup>35</sup> Ibid, p.38

processes conducted by the Electronic Consumer Dispute Resolution and eBay regarding disputes arising from buyers and sellers, 95% of conflicts were resolved successfully.<sup>36</sup>

The quality of justice is much more efficient than e-negotiation (especially automated negotiation) as there is an intervention of a third-party who is neutral. Furthermore, it may be argued that it is less intrusive than binding arbitration as the decision of the mediator only binds the parties like a contract.<sup>37</sup> It is up to the parties' discretion which regards to the enforceability of the mediator's decision and they do not have to apply it if either party is not happy with the decision.

As most e-commerce related cases are small claims which have small damages and awards, it is difficult and challenging for consumers to file lawsuit regarding these as they will be paying hefty attorney fees and other expenses in order to proceed with the case.<sup>38</sup> As e-mediation is cheaper and does not have such fees, it is much more approachable for consumers to seek claim their rights against sellers, especially when they are big companies.

An important decision regarding all of the advantages set herein held that "*an online mediation clause is enforceable when a number of conditions are met, namely that (1) online mediation does not cause substantial delay in the process, (2) online mediation must be inexpensive for the consumer, (3) online mediation should suspend the limitation period, (4) the right to bring an action before courts must be maintained, (5) the parties have access to online mediation on an equal and fair footing (no digital exclusion) and (6) interim measures are not excluded (such as an injunction).*"<sup>39</sup>

#### **b. Disadvantages**

With some online service providers, e-mediation is simplified to the extreme and this means that high-technological tools are not used as efficiently. However, highly developed and innovative technology and software is needed for e-mediation to be

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<sup>36</sup> Kodchakorn Na Nakornphanom, p.61

<sup>37</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.25

<sup>38</sup> Kodchakorn Na Nakornphanom, p.59

<sup>39</sup> Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08), the Court of Justice of the EU Judgement on March 18, 2010, para. 68



resolved as efficiently as possible. Such disadvantage may be changed easily if online service providers using e-mediation invest in such tools.

As the main aim of the mediator is to meet the mutual interests of the parties and not to arbitrate the parties' legitimate rights, this may be an issue for the parties depending on the ruled decision. Furthermore, substantive state law application is limited to the extent that some types of agreements are prohibited and there is generally no rule which detects or controls the validity of the submitted evidence.<sup>40</sup>

It may be argued that as the decision of the e-mediator is only binding as a contract, its enforceability will be much less than arbitration awards and court decisions and thus parties may not want to use such type of online dispute resolution as they may think "what is the point of using such mechanism if it is not enforceable?". They may also believe that mediation is time consuming as well as there is no point of investing in such dispute resolution mechanism if the outcome of the decision is not binding.

### **3. E-ARBITRATION**

Arbitration is a process used when the parties execute an agreement in order to resolve their disputes. In arbitration, conflicts are solved privately, with a binding effect, by a judicial authority, rather than applying to a national court of law that would have jurisdiction. However, online arbitration is different from traditional arbitration. E-arbitration is a process where parties give their consent with an agreement to submit a case to a non-governmental decision maker to render a binding or non-binding decision solving the conflict in an impartial manner. The online arbitration process may be executed entirely or partially online by using the internet.

As per the study conducted by Queen Mary University and PricewaterhouseCoopers in 2006, 73% of the attendees chose arbitration as their preferred dispute resolution type while only 10% of them chose to resolve their conflict by filing a lawsuit.<sup>41</sup>

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<sup>40</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.8

<sup>41</sup> You may find more information about the study from the link [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy\\_2006.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf) (Accessed on February 2019).

There are two types of arbitration: binding and non-binding arbitration. Binding arbitration is where the arbitration award is binding and therefore the parties may enforce such judgement instead of a legal judgement given by courts. Such type of arbitration is the traditional type of alternative dispute resolution mostly used offline and the disagreement is terminated with an enforceable decision where state authorities such as courts impose the arbitral award.<sup>42</sup> The functions of a judge and an arbitrator is the same however their origin is different as the arbitrator<sup>43</sup> is also a third-party neutral which also decided upon the case according to the applicable law whereas a judge is appointed to a by the government.

Non-binding arbitration is when the arbitral judgement is not enforceable by itself but such clause regarding arbitration may be part of a settlement agreement<sup>44</sup> or in some cases, especially regarding e-commerce, may be enforced by the online dispute resolution provider in order for the parties to keep using the relevant website. In such case, the arbitral judgement shall be self-enforceable without being binding per se.<sup>45</sup>

Depending on the arbitration clause of the agreement related to the conflict, the parties may decide that the arbitrator may be chosen by the dispute resolution service provider though an appointing authority or in other cases the parties may agree upon the arbitrator's qualifications, provided that the arbitrators are independent and impartial.

One of the main differences between e-mediation and e-arbitration is that e-mediation aims to improve communication between the parties and thus needs practical communication tools, whereas arbitration decides on cases with respect to the parties' rights and thus has different necessities to settle the disagreement.<sup>46</sup>

In e-arbitration, the parties use web-based communication mechanisms such as e-mails and video conferences. If e-arbitration intends to offer services that will bind the parties like offline arbitration, various requirements need to be met which varies

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<sup>42</sup> Thomas Schultz, *Online Arbitration: Binding or Non-Binding?*, ADR Online Monthly (2002), p.3

<sup>43</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.12

<sup>44</sup> Thomas Schultz, (2002), p.3

<sup>45</sup> For instance, if the relevant website offering online arbitration states that the trust mark of the losing party will be removed if it does not abide by the decision of the non-binding arbitration judgement, the losing party will most likely comply with the arbitral judgement and thus such judgement shall be self-enforceable.

<sup>46</sup> Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer and Vincent Bonnet, p.8

according to the substantive state law. The parties must have a separate agreement or a clause in their agreement which states that only arbitration may be used to end their disputes.

While some e-arbitration service providers do not limit the types of conflicts it settles, some of these service providers restrict their service to commercial disputes and disagreement relating to e-commerce or online activity. Generally, online arbitration is only available involving consumers and businesses therefore e-commerce related consumer-to-consumer (C2C) agreements and business-to-consumer (B2C) agreements are when e-arbitration is commonly used to resolve conflicts relating to cross-border transactions.<sup>47</sup>

One of the greatest and widely-recognized e-arbitration may be found in miscellaneous internet auction websites whereby eBay is the most commonly known.<sup>48</sup> Such websites have acknowledged that the users of the online marketplaces need other options than applying to courts in order to resolve their conflict. However, prior the amendment in the eBay user contract, the arbitration clause in eBay contracts for disputes arising from the auctions executed between the buyer and the seller was voluntary in the sense that there is no legislation enforcing the parties to settle with e-arbitration, such clause was also mandatory up to the discretion of eBay as it states that *"Disputes between you and eBay regarding our services may be reported to eBay Customer Support. We encourage you to report disputes between users to your local law enforcement body. However, any controversy or claim arising out of or in connection with this Agreement may at our discretion be settled by binding arbitration by reference to an arbitration tribunal designated by eBay. You agree to be bound by the ruling arbitrator."*<sup>49</sup> Such clause has been criticised as such clause implemented that the online service provider the unilateral right to choose the type of dispute resolution and thus forced the user to be bound by the arbitral award given by the online service provider. PayPal, which is a subsidiary of eBay, was found

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<sup>47</sup> Ibid, p.27

<sup>48</sup> Andres Guadamuz-Gonzalez, *Ebay Law: The Legal Implications of the C2C Electronic Commerce Model*, Computer Law & Security Report, Vol:19, No:6 (2004), p.468

<sup>49</sup> Article 16 of the User Agreement of eBay used in 2004.



in a case that such arbitration clause used in their own user agreement was unconscionable.<sup>50</sup>

Nonetheless, the current clause determined in Article 17/B of the User Agreement of eBay effective from September 21, 2018 states that arbitration will be mandatory for both parties, unless the new user states that it does not want arbitration within thirty days of signing up to eBay, as follows: *“You and eBay each agree that any and all disputes or claims that have arisen, or may arise, between you and eBay (including any disputes or claims between you and a third-party agent of eBay) that relate in any way to or arise out of this or previous versions of the User Agreement, your use of or access to the Services, the actions of eBay or its agents, or any products or services sold, offered, or purchased through the Services shall be resolved exclusively through final and binding arbitration, rather than in court. Alternatively, you may assert your claims in small claims court, if your claims qualify and so long as the matter remains in such court and advances only on an individual (non-class, non-representative) basis. The Federal Arbitration Act governs the interpretation and enforcement of this Agreement to Arbitrate.”*

#### **a. Advantages**

It is argued that other alternative and online dispute resolution types are not as adequate as arbitration as these other types of alternative dispute resolutions are not legally binding enough.<sup>51</sup> There is also a view that arbitration is the most common method for terminating multinational related conflicts. Out of all the common online dispute resolution types, it can be argued that as e-arbitration applies legal rules more than the others, it provides the most formal type of justice.

Another reason why parties prefer e-arbitration is due to the fact that the arbitrator may most likely resolve the conflict pursuant to the authoritative standards of the applicable law as well as apply equitable considerations unlike litigation where the ruling of the court is less flexible and determined as per the requests of the parties.<sup>52</sup>

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<sup>50</sup> Craig Comb, *et al. v. PayPal, Inc.* Cases No. C-02-1227 and C-02-2777 JF (N.D. Cal., August 30, 2002)

<sup>51</sup> Thomas Schultz, (2002), p.1

<sup>52</sup> Julia Hörnle and Pablo Cortes, *Legal Issues in Online Dispute Resolution*, ODR Supporting Papers, Courts and Tribunal Jury (2014), p.1



Some authors believe that the problem of arbitration is its validity and enforceability, especially due to the conditions regarding recognition thereto<sup>53</sup>. In e-arbitration, this especially raises issues to the accessibility, visibility and incorporation of the arbitration clause. Some international treaties and conventions such as the New York Convention<sup>54</sup> as well as national laws still state that the arbitration agreement should be in writing.<sup>55</sup> However, I agree with the opinion of the United Nations Commission on International Trade Law which states that Article 2/2 of the New York Convention may be applied and interpreted to arbitration agreements and awards executed online and that such documents will be sufficient for them to be valid "*recognizing that the circumstances described therein are not exhaustive*".<sup>56</sup>

#### **b. Disadvantages**

A disadvantage of e-arbitration is that the parties need to give up their rights to resolve their dispute with other methods and this does not motivate the parties to trust the system.<sup>57</sup> The parties may not trust arbitration as much as the traditional sense of dispute resolution as it is newer and much more private, which means the parties will not be able to easily see the advantages of such mechanism as well as believe they are not able to see its disadvantages.

As explained in the other online dispute resolution types, e-arbitration is also faster than offline arbitration due to the electronic communication speed. However, this means that the faster the procedure is the simpler it is, the simpler it is the less formal it is and therefor e-arbitration may not comply with the fundamental procedure rules and thus there may be a jeopardy to due process.

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<sup>53</sup> Thomas Schultz, (2002), p.5

<sup>54</sup> Article 2/2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention dated 1958 determines that the arbitration agreement/agreement including the arbitral clause should be signed by the parties via telegrams or letters. Such wording does not include agreements executed online.

<sup>55</sup> Thomas Schultz, (2002), p.5

<sup>56</sup> Recommendation regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph I, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, Adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its 39th Session, Obtained from: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a2e.pdf> (Accessed on April 2019).

<sup>57</sup> Thomas Schultz, (2002), p.1

As e-arbitration is a fairly new concept of settling conflicts, choice of arbitrators may be limited and thus the parties may not want to choose this method when deciding upon the jurisdiction of solving disputes. Furthermore, in online arbitration, the parties of arbitration (as well as witnesses, experts and the arbitral tribunal) are expected to use electronic devices, which need to be sophisticated software and hardware devices,<sup>58</sup> in order to take part in the proceedings and in such case, online arbitration may on be able to deal with restricted disputes.

Furthermore, when arbitrating a dispute for a smaller amount, the parties may not want to submit such case to as the arbitration fee will be higher compared to other alternative dispute resolution types. Approximate decision-making is the best we can get in the online arbitration of small cross-border disputes in terms of rough correspondence between the facts in the decision and the facts in reality.<sup>59</sup>

Therefore this thesis argues that for such disputes with small amounts, online arbitration may not be the best process for seeking the truth for commercial and interstate disputes.

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<sup>58</sup> Julio César Betancourt and Elina Zlatanska, p.262

<sup>59</sup> Thomas Schultz, *Internet Disputes, Fairness in Arbitration and Transnationalism: A reply to Dr. Hörnle*, International Journal of Law and Information Technology, Vol:19, No:2 (2001), p.156

## CHAPTER 2: REGULATORY FRAMEWORK FOR ADR AND ODR IN THE EUROPEAN UNION

The first online dispute resolution scheme was realized in the United States of America on May 1996 where the institution of Virtual Magistrate ruled its first and last decision regarding the then-popular web portal and online service provider AOL.<sup>60</sup> However, the first time that online dispute resolution was recognized, it was in Europe in 1999 when the Organisation for Economic Co-Operation and Development (“OECD”) published the “Guidelines for Consumer Protection in the Context of Electronic Commerce”<sup>61</sup> which encouraged consumers, businesses and governments to work together in order to aid consumers to access fair and timely alternative dispute resolution that were also cost-efficient. Special emphasis was placed on the contemporary use of information technologies in alternative dispute resolution systems which could possibly apply to cross-border transactions regarding e-commerce occurring rapidly due to the unity of currency in Europe.

As the Europe Union’s aim is to stimulate the Internal Market through the development of consumer transactions that would enhance confidence in a more competitive and integrated cross-border market, it has been trying to regulate such transactions with several recommendations since the end of the 20th century.<sup>62</sup>

In this chapter, it will be explained how the European Union has given recommendations and enacted laws regarding alternative dispute resolution and online dispute resolution for Member States to comply thereof in order to facilitate consumers with their cross border and e-commerce related conflicts. Afterwards, some examples will be provided regarding the application of online dispute resolution of the ODR

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<sup>60</sup> More information regarding the Virtual Magistrate and the decision, see George H. Freidman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities* (1997), Hastings Communications and Entertainment Law Journal Vol:19, No:3, p.700-705

<sup>61</sup> The guideline may be obtained from <http://www.oecd.org/sti/consumer/34023811.pdf> (Accessed on April 2019).

<sup>62</sup> Eda Beğen, *Consumer E-Dispute: Online Dispute Resolution in Turkey*, (Master Thesis, Tilburg University Law Faculty, 2018), p.27



platform which Turkey will benefit from modelling its own online dispute resolution mechanism.

## 1. RECOMMENDATIONS OF THE EUROPEAN COMMISSION

The first recommendation of the European Commission to facilitate and implement out-of-court procedures for settling consumer disputes was given with 98/257/EC: Consumer Recommendation of 30 March 1998 on the principles applicable to bodies responsible out-of-court settlement of consumer disputes.<sup>63</sup> In such recommendation, the European Commission has recommended the principle of independency and the principle of transparency which play very important roles with alternative dispute resolution methods.

As per the principle of independency “*the independence of the decision-making body is ensured in order to guarantee the impartiality of its actions*” which means that independence of such body is crucial for the establishment of justice. Furthermore, as per the principle of transparency, the decision-making body is obliged to give information regarding the cost and rules regarding the dispute as well as the decision and description of the dispute, to anyone who requests such information.

The second recommendation of the European Commission regarding cross-border consumer transactions was given with 2001/301/EC: Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.<sup>64</sup> Such recommendation was given as the European Commission thought that the first recommendation “*did not concern procedures that merely involve an attempt to bring the parties together to convince them to find a*

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<sup>63</sup> Commission Recommendation of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-Of-Court Settlement of Consumer Disputes (Text with EEA Relevance). Such text may be obtained from <https://publications.europa.eu/en/publication-detail/-/publication/0c096a7b-99f5-4794-93e6-e2bc374308ff> (Accessed on June 2019).

<sup>64</sup> Commission Recommendation of 4 April 2001 on the Principles for Out-Of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes (Text with EEA Relevance). Such text may be obtained from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001H0310:EN:HTML> (Accessed on June 2019).



*solution by common consent.*” This second recommendation implemented that Member States should encourage electronic measures in order to have effective procedures to resolve cross-border disputes and that Member States should “*promote access to alternative dispute resolution systems*”. Furthermore, such recommendation states that “*Electronic commerce facilitates cross-border transactions between business and consumers. Such transactions are frequently of low value and therefore the resolution of any dispute needs to be simple, quick and inexpensive. New technology can contribute to the development of electronic dispute settlement systems, providing a mechanism to effectively settle disputes across different jurisdictions without the need for face-to-face contact, and therefore should be encouraged through principles ensuring consistent and reliable standards to give all users confidence.*” Thus, online dispute resolution was first recognized with such recommendation.

In this second recommendation of the European Commission, it has added four principles to ensure that consumers have a greater choice and flexibility.<sup>65</sup> These principles are impartiality, transparency, effectiveness and fairness. With the principle of impartiality, the decision-making body should not have a relation or a conflict of interest with the parties involved with the dispute. The principle of transparency is very similar to the principle of transparency set out with the first recommendation of the European Commission however it is broader as it states that the decision-making body must give information on the performance of the procedure including the number and types of complaints it resolves as well as how long it will take to resolve such complaints. This is a very important step to ensure the timeliness of solving the conflict of the consumers involved in e-commerce relationships as it will show and thus encourage the consumer to apply to the relevant body.

The third principle stated in the second recommendation of the European Commission is the principle of effectiveness whereby “*the conduct of the parties should be reviewed by the body responsible for the procedure to ensure they are committed to seeking a proper, fair and timely resolution of the dispute.*” Such principle states the main reason why alternative dispute resolution should be used in cross-border disputes. The final principle determined in the recommendation is the principle of fairness. This means that the consumer should be able to understand the procedure and the language used

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<sup>65</sup> Eda Beğen, p.24

in the procedure should be not complicated. Furthermore, it should be easier for the parties to submit their evidences, claims and arguments.

## 2. REGULATIONS OF THE EU REGARDING ADR

In July 2015, the 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 (“ADR Directive”)<sup>66</sup> was implemented which requires Member States to provide alternative dispute resolution mechanisms for B2C contracts.

As per Article 2 of this directive which determines the scope thereof, it “*shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the European Union and a consumer resident in the European Union through the intervention of an alternative dispute resolution entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.*” However, such directive will not apply to non-economic services, dispute between traders, procedures initiated by traders to consumers, disputes which are already being resolving by judges, health services, public providers of further or higher education or complaints being resolved by the trader’s consumer complaint-handling systems.

Pursuant to this ADR Directive, Member States are obligated to provide consumers access to an alternative dispute resolution mechanism regardless of the service or product bought. Furthermore, all the alternative dispute resolution bodies must also be accessed online and must be applicable for all consumer related disputes both offline and online.<sup>67</sup> The Member States need to submit an annual report regarding the

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<sup>66</sup> 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. Such text may be obtained from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011&from=EN> (Accessed on June 2019).

<sup>67</sup> Eda Beğen, p.30

organization of their alternative dispute resolution bodies and information regarding the cases they resolve.

The principles stated in the ADR Directive is in compliance with the principles determined in the two recommendations of the European Commission stated in the previous section of this thesis, however they are explained in much more detail. The first principle is that the alternative dispute resolution body of the relevant Member State must be accessible for consumers and such body must deal with cross-border disputes as well as domestic disputes but such bodies may use its own procedural rules, provided that it does not contradict with the provisions of the ADR directive. Thus, such directive determines that the provisions therein should not prevent Member States from applying their own national legislation; however such domestic legislation should be in compliance with this directive.

The second principle is that the alternative dispute resolution mechanism must be possess the necessary expertise and must be independent and impartial. Furthermore, in compliance with the recommendations of the European Commission, the alternative dispute resolution entity must be transparent and thus have certain information provided in a clear and easily understandable manner which should include the rules and maximum, minimum or approximate length of the procedure, the languages that may be used in the process as well as the cost that will be borne by the parties.

Another principle of the ADR Directive is the effectiveness of the alternative dispute resolution procedure, which this thesis argues that is the most important principle. The ADR directive states that the procedures for resolving disputes should be free-of-charge or at least have a nominal fee for consumer wanting to apply to such procedure.<sup>68</sup> Furthermore, as per this principle, such procedure should easily be accessible offline and online and the parties (especially for the benefit of the consumer) should be able to have access and understand the process of the alternative dispute resolution mechanism without need to retain a lawyer. Another principle stated in the ADR Directive which conforms with this principles is the principle of fairness

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<sup>68</sup> Amy J. Schmitz, *There's an 'App' for That: Developing Online Dispute Resolution to Empower Economic Development*, Notre Dame Journal of Law, Ethics and Public Policy, Vol:32 (2018), p.25



whereby the parties have the choice as to whether or not agree with the solution proposed by the alternative dispute resolution body.

The final principle which is important with regards to the legal effectiveness of such procedure is that what will happen if there is a conflict of laws, which is particularly important if such dispute has a cross-border element thereto. If there is a conflict of laws, *“the solution imposed by the ADR entity shall not result in the consumer being deprived of the protection afforded to him by the provisions that cannot be derogated from by agreement by virtue of the law of the Member State in which he is habitually resident”* and thus the consumer is protected with such principle. However, a disadvantage of alternative dispute resolution (as explained in the previous chapter), the decisions of the alternative dispute resolution bodies are generally not legally binding. In such case, the relevant alternative dispute body may have a clause stating that the trader must accept the decision of such body<sup>69</sup> which may be beneficial as the trader is able to choose the alternative dispute resolution body (as will be explained in the next section of this thesis).

Enactment of this ADR Directive is important for the realization of the single market in the European Union and for the harmonization of laws applied in the Member States. Such directive as well as the ODR Regulation which will be explained further in the next section of this thesis, has enabled the procedure to provide consumers to have access to have options for resolving their disputes with traders. With the evolution of technology and the growth of cross-border transactions, having a law which generally covers the principles which all Member States should comply with is beneficial for the effectiveness of resolving disputes internationally.

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<sup>69</sup> Christopher Hodges and Naomi Creutzfeldt, *Implementing the EU Consumer ADR Directive*, The Foundation for Law, Justice and Society (2013), p.7



### 3. REGULATIONS OF THE EU REGARDING ODR

On January 2016, the 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 (“ODR Regulation”)<sup>70</sup> was implemented on Members States. Such regulation should be used in conformity with the provisions of the ADR Directive as such regulation has been enacted for the alternative dispute resolution mechanism to be used online and thus fills in the gaps the ADR Directive has not covered with regards to resolving conflicts online.<sup>71</sup> Thus, even though the ODR Regulation has the same principles as the ADR Directive, the scope of the ODR regulation is narrower than the ADR Directive as it only concerns cases regarding online services and sales contracts.

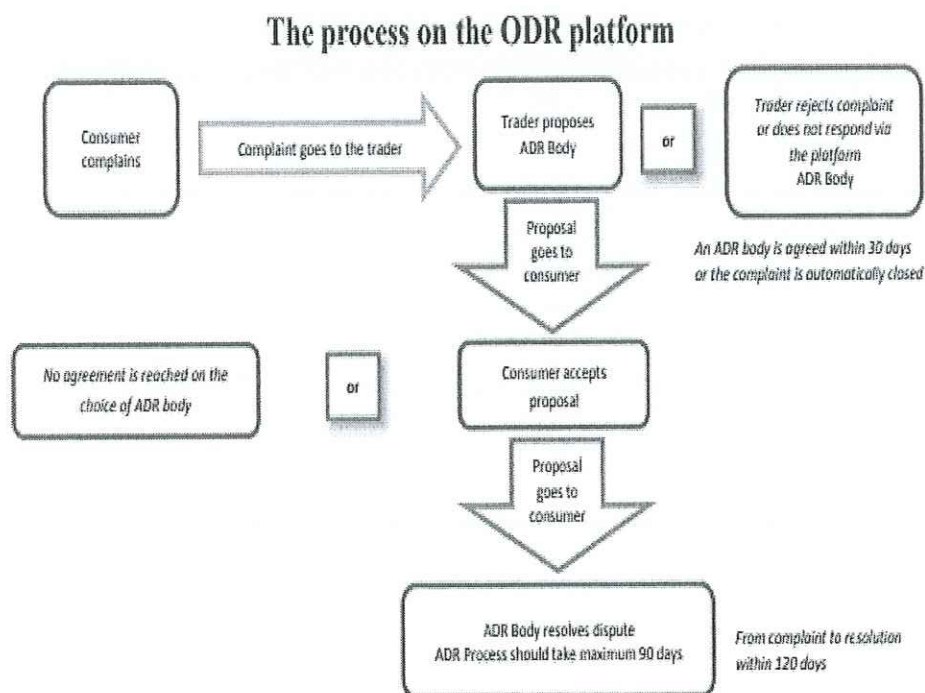
The European Commission enacted an online dispute resolution platform (“ODR platform”)<sup>72</sup> which has been operational since February 2016. Such platform is user-friendly and is completed in four simple steps. The first step of the ODR platform is the consumer filing an online complaint form and uploading it on the ODR platform. Afterwards, such complaint is transmitted to the relevant seller and such seller offers which alternative dispute resolution mechanism should resolve the conflict. After the parties mutually agree to a body to handle the conflict, the ODR platform submits such complaint to the relevant body. In such case, the chosen alternative dispute resolution body has three weeks to reject to resolve such conflict. The final step of such process is the dispute to be resolved by the chosen alternative dispute resolution mechanism and such body should reach a decision within 90 days following the application was made it.

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<sup>70</sup> 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. Such text may be obtained from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF> (Accessed on June 2019).

<sup>71</sup> Eda Beğen, p.27

<sup>72</sup> The ODR platform may be accessed from <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN> (Accessed on June 2019)



**Table 3: Process on the ODR Platform**

The ODR Regulation states that the complaint form of the ODR platform should have the following information: (1) whether the complainant party is a consumer or a trader; (2) the name and e-mail and geographical address of the consumer; (3) the name and e-mail, website and geographical address of the trader; (4) the language of the complainant party and respondent party (if known); (5) the type of goods or service to which the complaint relates; (6) the price of the goods or service purchased; (7) the date on which the consumer purchased the goods or service; (8) whether the consumer has made direct contact with the trader; (9) whether the dispute is being or has previously been considered by an ADR entity or by a court; (10) the type of complaint; and (11) the description of the complaint.<sup>73</sup>

One of the great uses of the ODR platform is that there are over 400 dispute resolution bodies which have all been approved by the EU for quality standards relating to accessibility, efficiency and fairness. On the platform, it will show which dispute resolution bodies will be suitable in accordance with the country the seller is based in

<sup>73</sup> Annex of the ODR Regulation

and what the complaint of the consumer is about.<sup>74</sup> Furthermore, the ODR platform has an easy to use user guide whereby the consumer may easily learn about the platform.<sup>75</sup>

As per the European Commission report regarding the ODR platform executed in 2017<sup>76</sup>, all Member States (apart from Spain) has given a report to the European Commission that they have fully enacted the ADR Directive and revised their legislation regarding alternative dispute resolution in compliance with this directive. Moreover, *“the alternative dispute resolution bodies registered on the ODR Platform have been assessed (and are being monitored) by the national competent authorities for their compliance with the quality requirements established by the ADR Directive.”* Furthermore, such report states that in 2017, *“1.9 million people visited the platform. On average the website received over 160.000 unique visitors per month, more than 2.000 complaints were submitted per month on average”* and that 71% of the consumers are satisfied with regards to how their complaint has been handled with the ODR platform. Moreover, 44% of the overall numbers of complaints were resolved successfully with negotiations between the seller and the consumers with 85% of the complaints have been resolved within 30 days following the submission of such complaint.

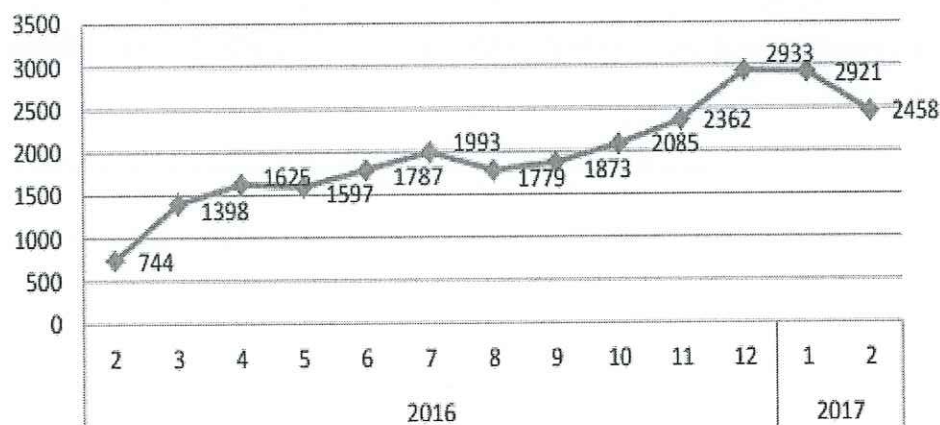
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<sup>74</sup> The part regarding the choice of alternative dispute resolution on the platform may be found at <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2> (Accessed on June 2019).

<sup>75</sup> Such guide may be found at <https://ec.europa.eu/consumers/odr/userguide/pdf/MA/userguide-en.pdf> (Accessed on June 2019).

<sup>76</sup> Report From The Commission To The European Parliament And The Council On The Functioning Of The European Online Dispute Resolution Platform Established Under Regulation (EU) No 524/2013 On Online Dispute Resolution For Consumer Disputes. Such report may be obtained from [https://ec.europa.eu/info/sites/info/files/first\\_report\\_on\\_the\\_functioning\\_of\\_the\\_odr\\_platform.pdf](https://ec.europa.eu/info/sites/info/files/first_report_on_the_functioning_of_the_odr_platform.pdf) (Accessed on June 2019).





**Table 4: Complaints submitted per month to the ODR platform**

One of the disadvantages of this ODR platform is that it may only be used by certain consumers and traders and therefore the applicability thereof is limited. To use this ODR platform, the consumer and trader both have to be based in the EU or Norway, Iceland, and Liechtenstein. However, it is a model which other countries (such as Turkey which will be explained in detail in the following chapter of this thesis) may follow as an example for their own platform regarding online dispute resolution.

Another disadvantage of such platform is that the consumer and the seller need to agree on an alternative dispute resolution body within 30 days following the acceptance by the seller to resolve the dispute with ADR, otherwise the complaint may not be resolved with the ODR platform. However, when looking at the numbers of the European Commission Report executed in 2017, it seems that the ODR platform has been very successful even though it has not been operating for a long time.



## CHAPTER 3: E-COMMERCE AND TYPES OF ADR IN TURKEY

### 1. E-COMMERCE AS PER TURKISH LAW

Special provisions in Turkish law were needed in order to prevent the abuse of the opportunities offered by the electronic commerce of some malicious people in e-commerce and to put an end to arbitrary applications especially for sending unsolicited commercial electronic messages to consumers.

The government of Turkey has regulated e-commerce with different laws in order to create a transparent and accessible e-commerce environment.<sup>77</sup> E-commerce was first legally recognized with the enactment of the Turkish Law on Consumer Protection (“Consumer Code”) dated 28/11/2013 which sets out the principles and procedures regarding consumers under the title distance contracts. Thereafter, the Turkish Regulation of Electronic Commerce (“E-Commerce Code”) dated October 23, 2014 was enacted which sets out the principles and procedures with relation to electronic commerce.

One of the objectives of the Act is to ensure the harmonization between 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”) used in the European Union and Turkish law.<sup>7879</sup> The market therefore manages; (i) trade relations; (ii) obligations of online service providers; (iii) agreements to be made through electronic devices; (iv) the obligation to provide information and (v) sanctions.

As per Article 2/1-a of the E-Commerce Code, e-commerce is defined as all kinds of online financial and commercial activities which are carried out through the electronic

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<sup>77</sup> Eda Beğen, p.58

<sup>78</sup> Ufuk Ünlü, *Elektronik Ticaret Kanununun Ticari Hayata Getirdiği Yenilikler* [“The Innovations Brought Into Business Life by E-Commerce Law”], *Terazi Law Journal*, Vol:11, No:113 (2016), p.141

<sup>79</sup> Ümit Gezder, *The Right of Withdrawal in Distance Contracts*, *Yaşar University Law Faculty Journal*, Present For Prof. Dr. Aydın Zevkliler, Vol:2 (2013), p.1187

media, without physically coming face-to-face.<sup>80</sup> Generally, e-commerce occurs by people accessing websites and applications for shopping via electronic tools such as computes, smartphones and tablets.

E-commerce related agreements are deemed as “distance contracts” which are defined as “agreements which are executed with distant communication instruments relating to the marketing of products or services from afar without any physical contact of the seller or provider with the consumer” as per the Distance Contracts Regulation. Such regulation has been based on the ADR Directive.<sup>81</sup> Thus, it can be said that distance contracts are a special type of contract as it only appears when parties do not come together physically to execute the transaction subject to the contract and therefore in such case, parties do not come face-to-face.<sup>82</sup>

When we look at the reasoning of the Consumer Code, it states that this definition also includes situations when a consumer negotiates and establishes a contract through remote communication which is when he visits the seller’s or provider’s website to collect information about the goods or services.<sup>83</sup>

It is debatable in the Turkish doctrine as well as the German doctrine. Please see Prof Gezder’s thesis for more information regarding such discussion in the German doctrine<sup>84</sup> wherever an offer executed online is considered as an offer to execute a distance contract online. According to the minority view, when the sellers and providers display their products on their web pages, such act is an invitation for the consumer to make an offer as the sellers and providers are not always able to know wherever the consumer has the ability to pay and whether the products ordered are present in the warehouses.<sup>85</sup> According to the majority view and the view we agree with, if the orders submitted online are considered as an offer, the parties will enter in

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<sup>80</sup> Ümit Gezder, (2003), p.54

<sup>81</sup> Eda Beğen, p.52

<sup>82</sup> Ümit Gezder, *Consumer Protection in Turkey and Distance Contracts*, Annales de la Faculté de Droit d’Istanbul, Vol:38, No:55 (2006), p.196

<sup>83</sup> Mustafa Topaloğlu, *Mesafeli Sözleşmeler* [“Distance Contracts”], Beykent University Law Faculty Journal, Vol:2, No:3 (2016), p.14

<sup>84</sup> Ümit Gezder, (2003), p.112-114

<sup>85</sup> Mehmet Demir, *Mesafeli Sözleşmelerin İnternet Üzerinden Kurulması* [“Distance Contracts Executed Online”], (Turhan Publishing House, 2004), p.211

a contract with the approvals of their orders.<sup>86</sup> As per such opinion, those operating the website and selling the products will have to refund the consumer in the event where the product is not in stock which is in line with the principle of the protecting the consumer embarked by the Consumer Code. Such principle used similarly in the national legislation of member states of the European Union.<sup>87</sup> However, as the Distance Contract Regulation states that such communication between the parties may be made “or other means of communication”, we believe that the law-maker has specifically written such phrase in order to show that the types of communication are non-exhaustive.<sup>88</sup>

Even though the word “consumer” is defined differently in different national legislations, as per Article 3/1-k of the Consumer Code, a consumer is defined as the natural person or legal entity acting without commercial or occupational purposes. Thus, this means that businesses such as retail companies are not within the scope of the term “consumer”.<sup>89</sup> However, e-commerce contracts are agreements where at least one of the parties is a consumer and which are executed partially or fully via the internet. Thus, B2C e-commerce related contracts will be indeed considered as and applicable to the Consumer Code if it does not involve any foreign element.

In such case, when will it be considered that an e-commerce related conflict has a foreign element or when will the internet be considered as a foreign element? In order for an e-commerce related disagreement to have a foreign element “the execution place of the contract, the place of performance of the deed or the workplace of the interlocutor must be in a different country than the habitual residence of the consumer.”<sup>90</sup> Turkish websites that provide international delivery may easily have a contractual relation with a foreign consumer and therefore an e-commerce related conflict may gain a foreign element. This is particularly important for the applicability of online dispute resolution in Turkey as in recent years, e-commerce related websites

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<sup>86</sup> Ümit Gezder, (2003), p.104

<sup>87</sup> Ümit Gezder, (2006), p.194

<sup>88</sup> Ümit Gezder, (2003), p.59

<sup>89</sup> Ümit Gezder, (2006), p.198

<sup>90</sup> Mehmet Polat Kalafatoğlu, *Yabancı Unsurlu E-Tüketici Uyuşmazlıklarının İnternet Üzerinden Çözülmesi (Online Dispute Resolution) Konusunda Görüş, Düşünce ve Öneriler, [“Online Dispute Resolution of Cross-Border E-Consumer Disputes: Views, Opinions and Propositions”]*, Banking and Commercial Law Journal, Vol:34, No:2 (2018), p.305



are gaining popularity and some of these websites do not have a Turkish legal entity or websites who are used in Turkish companies ship internationally. Thus, the law applied will differentiate with respect to wherever the disagreement has a foreign element or not as well as the competent authority the parties will approach.<sup>91</sup> However, provided that the contract does not state another jurisdiction, as per Article 26 of the Turkish Code of International Private and Civil Procedure Code dated December 17, 2000, foreigners who reside in Turkey and who have bought a product from a Turkish websites or Turkish consumers who bought a product from a website operating in another country will be able to resolve their dispute with Turkish law and thus, apply to Turkish courts.

Currently, there is no special court in Turkey that only looks at e-commerce or internet related conflicts and there is no cyber court in Turkey. Therefore, the parties have no other choice to solve their e-commerce related disputes in traditional manners such as applying to courts and enforcement offices or settling such discord via alternative dispute resolution, if the law permits as such. Furthermore, as per Article 68/5 of the Consumer Code, it is permitted that the parties can resolve conflicts with alternative dispute resolution, however it is acknowledged that such decisions will not bind third parties and thus the parties may not want to use such way to conclude the matter, unless stated otherwise in the law.<sup>92</sup>

When determining which provisions of the Turkish legislation will apply to contracts and disputes relating to e-commerce, there is the issue of wherever the Consumer Code or E-Commerce Code will apply in case these codes contradict with each other. As the Consumer Code is a much specific code in comparison with the E-Commerce Code, the Consumer Code's provisions shall be superlative.<sup>93</sup> Furthermore, as per the principle of the Consumer Code is to protect the consumer rather than companies or sellers, the provisions relating to the consumer's rights shall be applied first.

Currently, in the traditional manner of solving disagreements, e-commerce related disputes fall under the jurisdiction of Consumer Arbitration Committees located in districts, municipalities and provinces in Turkey or Consumer Courts in courthouses

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<sup>91</sup> Ümit Gezder, (2003), p.163

<sup>92</sup> Mehmet Polat Kalafatoğlu, p.318

<sup>93</sup> Mustafa Topaloğlu, p.17



depending on the monetary value of the said conflict. In 2019, disputes under the value of TL 5.650 are resolved as per District Consumer Arbitration Committee and disputes up to TL 8.480 are solved by Provincial Consumer Arbitration Committees depending on the type of region and any dispute which has a value of TL 8.480 or more are solved by the Consumer Courts.

Complaints are made in writing according to the Consumer Arbitration Commission Regulation. Consumers may use the form specified in the Consumer Arbitration Commission Regulation or give the name, ID number and address of the violator and other information about the complaint. The complaint can be made electronically via the e-government application which also includes an electronic signature function.<sup>94</sup>

As per the Consumer Arbitration Committee Regulation, the dispute must be resolved within six months following its submission and such timeframe may be extended six months in exceptional cases. Even though such dispute resolution is settled much quicker and cheaper than going to a court, in the first half of 2018, 272.933 applications were made and there are only 211 Consumer Arbitration Committees in Turkey.<sup>95</sup> Therefore, as the workload of these committees is very high, it is not clear how efficient and how attentive the decisions of the committees may be. The decision of the Consumer Arbitration Committee may be appealed to the relevant consumer court if the law permits as such, however the decision of the consumer court is final.

Unfortunately, although Consumer Arbitration Committees are working effectively, 84 percent of Turkish consumers do not prefer to solve their complaints via consumer support centres and 61 percent of Turkish consumers do not know anything about consumer arbitration committees.<sup>96</sup>

As per the Distance Contracts Regulation there are matters where the seller or provider needs to inform the consumer. One of these matters is that in the event where there is a dispute with regards to the contract, the consumer has the right to submit such

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<sup>94</sup> Eda Beğen, p.54

<sup>95</sup> <http://www.zafergazetesi.org/haber/Tuketici-Hakem-Heyetleri-nin-sayisi-1011-den-211-edusuruldu/67092>

<sup>96</sup> Naomi Creuzfeldt, Petra Mahy, Jana Kazaz, Emre Çalışkan and Yin Yin Lu, *Consumer Protection in Turkey: Law, Informality and the Role of the Media*, Monash University, Workplace and Corporate Law Research Group, Working Paper No:21 (2016), p.17

complaint the Consumer Arbitration Committee. However, pursuant to Article 6 of the Consumer Code, the matters that need to be informed to the consumer prior, regardless of where the contract is executed on, such information needs to be written in at least 12 pt and must be written in a simple and legible way in a way where the consumer will be able to clearly understand such information. Furthermore, there must be a system confirming that the consumer understands such information.<sup>97</sup> Such confirmation may be executed where the consumer clicks on "I accept" box or signing an agreement electronically with a secure electronic signature, however such acceptance is debateable. The majority of the doctrine states that such act of acceptance shall be valid.<sup>98</sup> If the seller or provider does not get the consumer's confirmation, it shall be deemed that the distance contract has not been executed.<sup>99</sup> However, this might also be not beneficial for the consumer as the consumer will be bound by a contract even if the consumer has clicked on the "I accept" button by mistake.<sup>100</sup> In such case, such click should only be for the acceptance or rejection by the seller and not add new conditions after such act of the consumer, otherwise such event shall be considered as a new offer.<sup>101</sup>

Another benefit of distance contracts executed with the consumer in comparison with other contracts, as per Article 7 of the Consumer Code, the consumer has the right to withdraw from the contract within seven days without any need to give any reason. However, in other contracts, the buyer is not able to withdraw from the contract and as per the principle of *pacta sunt servanda* the buyer is bound by the contract.<sup>102</sup> Thus, as per the principle of the Consumer Code, the consumer has superlative rights when compared with the consumer and such right executed by the consumer has an *ex tunc* effect.<sup>103</sup>

It is disputed in the doctrine wherever Consumer Arbitration Committees is a type of alternative dispute resolution. Some authors argue that it is a mandatory arbitration

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<sup>97</sup> Ümit Gezder, (2003), p.147

<sup>98</sup> Ümit Gezder, (2003), p.137

<sup>99</sup> Mustafa Topaloğlu, p.27

<sup>100</sup> Ümit Gezder, (2013), p.1189

<sup>101</sup> Ümit Gezder, (2003), p.123

<sup>102</sup> Ümit Gezder, (2013), p.1196

<sup>103</sup> Ibid p.1198

type as it is mandatory to apply to such committees if the monetary value of the disagreement is lower than the determined amount and that the decision of such committee is binding and enforceable.<sup>104105</sup> However, we agree with the other opinion in the doctrine which is that Consumer Arbitration Committees are a special type of alternative dispute resolution as their activities are similar to courts and the parties cannot choose those who will settle the conflict.<sup>106</sup>

## 2. NEGOTIATION AND SETTLEMENT

Negotiation<sup>107</sup> is not a widely utilized alternative dispute resolution type in the Turkish legal system in the sense of negotiation used in online dispute resolution and therefore this thesis will not touch upon such tool as much as other types of alternative dispute resolution types. Negotiation is currently only used in criminal law cases or situations where the judge or competent authority has decided that the perpetrator will pay a fine or will be sentenced. In cases where a perpetrator has acted incongruously towards a public legal entity, the ruling given by such entities may not be reduced and therefore may not be subjected to negotiation. Furthermore, in order to settle a conflict, there must be a provision in the law expressly stating that negotiation may be used.<sup>108</sup>

The conciliator communicates with the injured party and the perpetrator in order to resolve the dispute, he may not directly decide upon a case. The proposal must be given by the conciliator after obtaining the parties' opinions. The conciliator is obliged

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<sup>104</sup> Mehmet Polat Kalafatoğlu, p.329

<sup>105</sup> Gülgün Ildır, *Alternatif Uyuşmazlık Çözümü* ["Alternative Dispute Resolution"], (Seçkin Publishing House, 2003), p.137

<sup>106</sup> Ali Cem Budak, *6502 Sayılı Tüketicinin Korunması Hakkında Kanuna Göre Tüketici Hakem Heyetleri* ["Consumer Arbitration Committees as per the Law on Consumer Protection numbered 6502"], Dokuz Eylül University Law Faculty Journal, Vol:16 (2014), p.80

<sup>107</sup> *Uzlaşma* is the Turkish word corresponding to negotiation.

<sup>108</sup> Ümit Çelebi, *Alternatif Uyuşmazlık Çözümü Işığında Uzlaştırma* ["Negotiation as Alternative Dispute Resolution Type"], Bursa Bar Association Journal, Vol. 42, No: 103 (2018), p.64



to take the necessary measures to ensure that the negotiation process is conducted in a safe environment and that the meetings are not disclosed to third parties.<sup>109</sup>

One of the advantages of negotiation is that there is a time-limit with regards to when such process expires. As per Article 253/12 of the Turkish Criminal Procedure Code, the conciliator has to obligation to finalize this type of alternative dispute resolution method within thirty days following the date he has been assigned with resolving the conflict.<sup>110</sup> This means that, if the law permits that the parties may apply to settle their dispute with negotiation, if such process is successful, they will be able to come to an agreement much quicker than they would when they apply to a court or use any other alternative dispute resolution type. If the parties cannot reach an agreement with negotiation, the lawsuit will continue following the expiry of such process.

The conciliator helps to establish communication between the parties through systematic communication skills and he contributes to the dialogue process as well as keeping such dialogue alive. By creating a comfortable and non-bias negotiation environment, it helps the parties to find their own solutions entirely at their own discretion.

As per Article 77/A of the Turkish Consumer Code determines that those who have been given an administrative fine, except for those given by the Turkish Board of Advertisement, may negotiate with the government in order to decrease the administrative fine amount at the Negotiation Committee. However, the application of negotiation is limited as it is only regarding administrative fines arising from the application of the Turkish Consumer Code.

However, another dispute resolution type is settlement (*sulh*) which may be part of a litigation process. Unlike negotiation, which is an alternative dispute resolution type, as per Article 137/1 of the Turkish Code of Civil Procedure (“Civil Procedure Code”) courts encourage parties to settle on disputes that can dispose freely upon which shows that such process is part of the lawsuit. Furthermore, as per Article 35/A of the Turkish Attorney Code (“Attorney Code”), lawyers may summon their clients and the counter party to settle. Parties choose a third party to moderate the sessions and mediate the

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<sup>109</sup> Ümit Çelebi, p.66

<sup>110</sup> Such time frame may only be extended for a maximum of twenty days.



parties.<sup>111</sup> In both cases, the settlement is written in a document and the parties sign this instrument. Both these settlement documents constitute as decisions and are binding for the parties.

Settlement is where the parties resolve the dispute by a mutual agreement.<sup>112</sup> Settlement is the method which requires the minimum with regards to procedural rules and is much easier for the parties to express their raw opinions and requests.<sup>113</sup> In such cases, the parties may resolve the conflict themselves with a settlement agreement or with a judge or attorney. The former is a settlement executed out of courts and the latter is when the decision of the court is ruled with an agreement between the parties. It is necessary for the judges of the relevant court to ask the parties at the beginning of the first trial wherever the parties would like to settle. In such case, one party, which is generally the plaintiff, waives some of its rights while the other party, which is generally the defendant, partially agrees to the requests of the other party.<sup>114</sup> However, the parties may settle until the final verdict of the lawsuit.

If the parties state in the trial that they wish to settle, the judge will state in the meeting minutes the settlement the parties execute during such trial and the parties will sign the meeting minutes. If the parties do not sign such meeting minutes, then such agreement shall be void.<sup>115</sup> If the parties state that they would like to settle between the trials, they will submit a settlement agreement that they have signed and executed and such agreement shall be noted in the next meeting minutes of the trial.<sup>116</sup>

One of the disadvantages in Turkey is that almost always the parties do not want to use such option as they wrongly believe that if they have applied to a court, there is no chance to mutually agree with a party and that if they could settle, they would have before filing the lawsuit. Thus, this thesis argues that settlement agreements executed before a trial is a type of dispute resolution which may be beneficial for parties and

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<sup>111</sup> Süha Tanrıver, *Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk*, [“Alternative Dispute Resolution with respect to Legal Disputes and Especially Mediation”], Union of Turkish Bar Associations Journal, No:64 (2006), p.164

<sup>112</sup> Baki Kuru, Ramazan Arslan and Ejder Yılmaz, *Medeni Usul Hukuku Ders Kitabı*, [“Civil Procedure Law Course Book”], (Yetkin Publications, 2014), p.513

<sup>113</sup> Arzu Yıldırım and Gökbüke Deren Verem, p.120

<sup>114</sup> Baki Kuru, Ramazan Arslan and Ejder Yılmaz, p.513

<sup>115</sup> Ibid p.514

<sup>116</sup> Ibid

that unfortunately, an settlement agreement executed while the trial is continuing between the parties will not be successful in Turkey as the common opinion of the claimants and counter-claimants is that decisions of the courts is the best and most reliable way of resolving the conflict. Furthermore, it is a cheaper, faster and simpler method of settling disputes rather than a court resolving the lawsuit.<sup>117</sup> This thesis urges e-commerce websites to settle with the consumers whereby they listen to the consumers and sign an agreement with them, online or offline.

### 3. MEDIATION

The main legislation regulating mediation in Turkey, wherever it is a conflict containing a foreign element or not, is the Mediation Code in Legal Disputes numbered 6325 ("Mediation Code"). As per the Mediation Code, the parties are able to resolve disputes if they can dispose freely on the matter.<sup>118</sup> As e-commerce is a subject where the parties are able to freely dispose on, the parties may determine that the disagreement between them regarding such matter will be solved with mediation.

Mediation is defined as an alternative dispute resolution method which helps the parties to discuss and negotiate by applying systematic techniques, which establishes the communication process between the parties to make them understand each other and encourage them to find a solution themselves.<sup>119</sup> In the event where the parties cannot resolve such problem by themselves, an independent and impartial third party who has received special training, namely a mediator, will propose a solution beneficial for both parties. However, it must be noted that, as per Article 1 of the Mediation Code, only private parties are able to use this method of alternative dispute resolution and therefore mediation cannot be applied to disputes regarding public legal entities.

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<sup>117</sup> Baki Kuru, Ramazan Arslan and Ejder Yılmaz, p.513

<sup>118</sup> An example of a matter which the parties may not freely dispose on is family related matters.

<sup>119</sup> Nesibe Kurt Konca, *Ticari Uyuşmazlıklarda Dava Şartı (Zorunlu) Arabuluculuk* ["Cause of Action of Commercial Disputes: (Mandatory) Mediation"], *Perspektif Journal of the Foundation for Political, Economic and Social Research*, No:225 (2018), p.1

As stated above, Turkish law that the parties may resolve conflicts with alternative dispute resolution and thus with mediation, however it is acknowledged that unless stated otherwise, such decisions will not bind third parties and thus the parties may not want to use such way to settle the matter.<sup>120</sup>

As per the statistics of the Department of Mediation of the first half of 2018, 97% of voluntary mediation cases have been resolved in Turkey with an accord however only 240 cases out of 15.655 cases are consumer related conflicts.<sup>121</sup> Furthermore, 1.102.715 of lawsuits have been filed (excluding administrative and criminal cases) in Turkey in the first half of 2018<sup>122</sup> which means that only 13 cases in 1.000 cases are disagreements resolved with mediation. Therefore, it is clear that mediation is not the most popular way of settling commercial disagreements. However, when the intensity and speed of current commercial relations are taken into consideration, especially when looking at e-commerce related transactions; it is evident that the resolution of commercial conflicts with mediation is a more effective alternative dispute resolution method with respect to dispute resolution in the traditional sense.<sup>123</sup>

In mediation, the parties and their subjective approach to the problem are most likely quite different. The mediator focuses on the interests of the parties rather than their legal and emotional situation. In mediation, the mediator tries to investigate the parties' common ground and provides different solutions in order to settle the conflict between the parties. With mediation, the common balance of the parties' interest and earnings needs to be preserved and the decision reached should help with the protection and development of mutual relations.<sup>124</sup>

As there are differences between the steps needed in order for a valid mediation process, it will be beneficial to briefly compare what will happen if the mediation is

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<sup>120</sup> Mehmet Polat Kalafatoğlu, p.318

<sup>121</sup> Statistics have been obtained from <http://www.adb.adalet.gov.tr/Sayfalar/istatistikler/istatistikler/ihtiyari.pdf> (Accessed on April 2019).

<sup>122</sup> Statistics have been obtained from <http://www.microdestek.com.tr/acilan-dava-dosyalarinin-dagilimi-2017.html> (Accessed on April 2019).

<sup>123</sup> Zeynep Tuncer, *Arbuluculuğun Ticari Uyuşmazlıkların Çözümüne Sunduğu Avantajlar ve Bu Avantajların Etkin Kullanımına İlişkin Öneriler* [“Advantages Granted to the Resolution of Commercial Disputes with Mediation and Advices on the Efficient Use of these Advantages”], Kadir Has University Law Faculty Journal, Vol. 4, No:2 (2016), p.70

<sup>124</sup> Yasemin Durak, p.59



mandatory or arbitrary. Mediation has been a mandatory step in order for the parties to resolve labour related disputes and conflicts regarding commercial receivables in 2017 and 2019 respectively. This thesis will briefly explain mandatory mediation with respect to disputes regarding commercial receivables as such application is very new in Turkey.

As per the new Article 5/A of the Turkish Commercial Code, from January 1, 2019, it has been mandatory for parties to use mediation to resolve their commercial disputes before filing a lawsuit. There is no need for an agreement between the parties that they will resolve the conflict with mediation as it is mandatory. After the mediation process, the parties and the mediator will sign a document which states the outcome of such process.

The party who is not satisfied with the outcome of the mediator's resolution and who wishes to file a lawsuit must submit the original or an approved copy of the final report regarding the failure to reach an agreement at the end of the mediation. In case of failure to comply with such obligation, the court will send an invitation to the party who wants to file the lawsuit and states that if he does not submit such document within one week; their application will be rejected without any trial. Similarly, if it is understood that the case was filed without applying to the mandatory mediation process, the case shall be also denied without any trial.<sup>125</sup>

There is a discussion whereby some authors state that mandatory mediation is contrary to the parties will to act voluntarily. However, this thesis argues that mediation is just the start of the process to resolve the conflict and as the party who is not content with the mediator's decision may still apply to courts. As per the Turkish Constitutional Court decision, *"it cannot be said that the necessity to apply to the mediation does not hinder the parties' rights to seek legal remedies unless it causes an ineffective and inconclusive process that makes it impossible or extremely difficult for them to seek such right. As a consequence of mandatory mediation, applying to resolve the dispute with the mediation is a necessity, but such obligation is limited to the application to settle the conflict with mediation and it is evident that the will of the parties on the outcome of the mediation process and the mediator's decision is and the outcome of the mediation process is unobstructed. The law does*

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<sup>125</sup> Nesibe Kurt Konca, p.3



*not contradict the principle of proportionality since it is seen that legal indemnifications are used to ensure the use of such restriction to apply to courts in a proportionate and proportionate manner and that such restriction has a reasonable balance between the objective and the implement thereto.*"<sup>126</sup>

It is also possible for a case to be reopened after the completion of the deficiency of the fava requirement due to the absence of the case because the absence of the mediator is not applied. In this respect, the fact that the case was rejected once because the case requirement was not fulfilled does not prevent the dispute from being brought to justice.

With voluntary mediation, which has been applicable in Turkey since fall 2013, before they start such process, the parties must sign an agreement stating that they wish for the dispute to be settled with mediation. This agreement executed to identify the parties and their proxies as well as determining the role and responsibilities of the mediator.<sup>127</sup>

The mediator has the legal obligation to keep the information and documents obtained or submitted confidential. Such obligation is so important that, pursuant to Article 7 of the Mediation Regulation, even if a lawsuit is filed which is also subject to the conflict resolved by the mediator, the mediator cannot testify regarding the information and documents used during the mediation process and the mediator may not act as an expert witness, judge, referee or attorney at any stage of the dispute resolution process.<sup>128</sup>

#### **a. Advantages**

Compared to the traditional sense of dispute resolution (litigation), mediation is solved much quicker and is relatively cheaper.<sup>129</sup> Mediation is also cheaper than arbitration in the traditional sense as in arbitration (offline arbitration) as the parties are able to choose the arbitrator whose fee varies in accordance with his experience and the place

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<sup>126</sup> Turkish Constitutional Court Decision dated 11/07/2018, E. 2017/178, K. 2018/82

<sup>127</sup> Gülgün Ildır, p.93

<sup>128</sup> Zeynep Tuncer, p.83

<sup>129</sup> Necla Öztürk, *Arbuluculuğun Milletlerarası Özel Hukuk Boyutu: Genel Bakış* ["International Private Law Aspect of Mediation: An Overview"], *Banking and Commercial Law Journal*, Vol. 31, No:2 (2015), p.206

of arbitration which will be very expensive, even more so than when the disagreement is settled in front of the courts, if there is a foreign element involved in the conflict.

In the mediation process, the disputes are resolved in a much shorter period of time than in the courts.<sup>130</sup> Furthermore, the mediator cannot rely on tools such as expert witnesses or discovery which will make the process of resolving the conflict easier and faster as in litigation, the court needs to determine dates to utilize such tools.

Even though decisions of mediators are not binding in cases where mediation is voluntary, as per Article 17/2 of the Mediation Code, the parties are able to request from the competent Civil Court of Peace an annotation of the mediation agreement signed by the parties and the mediator in order to enforce the decision.<sup>131</sup>

As the mediator executes a contract with the parties, he has a contractual and therefore a legal responsibility towards the parties. Therefore, if the mediator breaches his confidentiality obligation, he will be legally liable as well as criminally responsible unlike judges who have no contractual liability.<sup>132</sup> Furthermore, pursuant to Article 6/4 of the Mediation Regulation, the mediator may be erased of the mediation registry. Therefore, the parties will be more likely to confide with the mediator as the mediator has immense liability if he breaches his confidentiality obligation.

Contrary to the traditional method of filing a lawsuit, with mediation, unless the parties and the mediator determine otherwise, the parties do not pay any duties or expenses before starting the mediation process.<sup>133</sup> In the event where advance payment has been requested by the mediator at the beginning of the process and it has not been paid by the parties, this does not hinder the mediator to proceed with the case, however if such expense is not paid before filing the lawsuit the lawsuit will be rejected due to absence of cause of action (*dava şartı*).<sup>134</sup> Furthermore, as mediation is an alternative dispute

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<sup>130</sup> Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* [“Fundamental Steps and Tactics in Dispute Resolution with Mediation”], (Adalet Publishing House, 2016), p.83

<sup>131</sup> Zeynep Tuncer, p.71

<sup>132</sup> Çiğdem Yazıcı Tıktık, *Arabuluculukta Gizliliğin Korunması* [“Protection of Confidentiality in Mediation”], (On İki Levha Publishing, 2013), p.206

<sup>133</sup> Süleyman Dost, *Arabuluculuk Ücreti ve Masrafları Hakkında Karşılaştırmalı bir Değerlendirme* [“Comparative Evaluation regarding Mediation Fees and Expenses”], Union of Turkish Bar Associations Journal, No:115 (2014), p.115

<sup>134</sup> Zeynep Tuncer, p.75

resolution which its rules are formed with the parties' and mediator's wishes, it will be determined differently for every case wherever an advance payment will be made or what the sanction will be if such payment has not been made.

When filing a lawsuit, the party who files the lawsuit pays the initial expenses and duties and if the decision is ruled to their benefit, it will be able to reimburse such expenses. Furthermore, the party who "loses" the case will have to pay his attorney fees as well as the attorney fees of the other party. As there is no "plaintiff" and "defendant" in mediation, there are just "parties", the mediation expenses are paid equally by each party. Furthermore, the fee regarding the mediation process is determined as per the Minimum Tariff of Fares in effect the year the process ends and therefore there is no surprise in which party pays what expense.<sup>135</sup>

Instead of resolving conflicts in front of the courts in the state jurisdiction, using amicable methods to do so will contribute to the formation of a culture of reconciliation as well as socially reconciliation. Thus, the parties have the opportunity to correct their damaged business relation and maintain their commercial connection. Court decisions may final but the dispute between the parties may not end in some cases. The decision of the court does not necessarily mean a fundamental settlement of the dispute.<sup>136</sup> Furthermore, as stated above, the court's decision rules that one of the parties is right and the other is not. However, in mediation, a decision is executed where the interests of all parties of the disagreement are generally protected and the process carried out in mediation is based on a "win-win" principle.

Furthermore, certain requirements need to be fulfilled by the lawyer wishing to become a mediator. As per Article 20 of the Mediation Code, the lawyer must be registered as a lawyer for at least 5 years in Turkey. Furthermore, the mediator candidate must attend all legal courses imposed by the Ministry of Justice as well as pass all the exams needed to be passed in order to be qualified. When comparing a mediator to a judge, especially when seeing that there are younger judges every day

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<sup>135</sup> The mediation fee for monetary related cases are determined with a percentage whereas payment for cases with no monetary value are calculated according to how many hours the mediation process lasts. The tariff for the year 2019 may be found at <http://www.resmigazete.gov.tr/eskiler/2018/12/20181231M4-13-1.pdf> (Accessed on May 2019).

<sup>136</sup> Nesibe Kurt Konca, p.2



when comparing to judges 10 years ago, the lawyer must have at least some experience before becoming a mediator. Therefore, it can be argued that a lawyer must be more qualified and has more experience with dealing with disputes.

Mediators have a confidentiality obligation and as a rule, unless agreed otherwise by the parties, no one else other than the parties, their representatives and the mediator are able to join in the mediation sessions.<sup>137</sup> Thus, the parties are able to solve their conflict privately unlike when the lawsuit regarding the disagreement between the parties is held publicly in courthouses where, unless stated otherwise, anyone can be present in the court during the hearings. The exception to this rule is when it is necessary to have the hearings in private when it is necessary for public morality or public safety. Legal entities, especially companies, might prefer mediation instead of the dispute resolution due to the fact that their commercial secrets will not be disclosed and they will be able to settle the conflict privately.

Another advantage of mediation is that parties may meet with the mediator separately. Such sessions are held in strict confidence. Thus, the communications held between the parties are not expounded and the trust with regards to the communication between the parties will be ensured.<sup>138</sup> As stated in the explanations above, mediation has much stricter confidentiality regulations than those of the national courts. Thus, people, especially businessmen, may easily settle the dispute reluctantly without having any qualms about harming their commercial image and reputation.

#### **b. Disadvantages**

One of the disadvantages of mediation is that, unlike judges and arbitrators<sup>139</sup>, even though a mediator needs to be qualified as a lawyer for a certain amount of time before he becomes one, the mediator does not have the authority to make a decision with regards to the conflict and furthermore, the mediator does not need to have to be expertise in the matter he is resolving.<sup>140</sup> The mediator cannot give legal advice to the parties, his job is only to help with the parties communicate efficiently and reach an

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<sup>137</sup> Çiğdem Yazıcı Tıktık, p.77

<sup>138</sup> Elif Kısmet Kekeç, p.78

<sup>139</sup> Nesibe Kurt Konca, p.2

<sup>140</sup> Zeynep Tuncer, p.78



agreement themselves<sup>141</sup>. Only if the parties cannot solve the conflict by themselves, the mediator may intervene by suggesting a solution which may benefit both parties as equally as possible.<sup>142</sup> The parties may not want to apply to mediation due to the fact that the mediator cannot give legal advice and push them in the right direction, especially if the parties do not have a power-of-attorney to help them express their demands.

Another disadvantage of the mediation process is that the mediator is leading the dispute resolution process by himself. It is crucial for the mediator to lead the process and set an environment whereby the parties are comfortable during such process. The mediator must listen very carefully to every word of each party in order to ensure proper understanding of the facts and claims of the conflict. While being the leader of the mediation process, the mediator must also retain an objective perspective. All of these tasks mean that the mediator must remain alert and equitable throughout such process and thus, that the mediator needs to juggle different responsibilities of opposite natures at the same time. Otherwise, the parties might feel that they do not want to use such alternative dispute resolution method due to the fact that the mediator is not professional and capable to resolve the conflict between them.

#### 4. ARBITRATION

As per the Civil Procedure Code and the International Arbitration Code, there is no legal obstacle with regards to the parties not being able to use arbitration as a dispute resolution mechanism. However, as the main principle of the Consumer Code is to protect the consumer, it is considered that the arbitration clause stated in consumer agreements is deemed invalid and that there must be a provision in the law stating that the parties must resolve the disagreement with arbitration.<sup>143</sup>

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<sup>141</sup> Gülgün Ildır, p.100

<sup>142</sup> Zeynep Tuncer, p.78

<sup>143</sup> Mehmet Polat Kalafatoğlu, p.320

Some authors of the Turkish doctrine further argue that the only exception to this rule is an arbitration agreement signed after a dispute arises.<sup>144</sup> This thesis does not agree with such opinion as the Turkish legislation regarding arbitration specifically states in the contract that the parties will conclude the conflict with arbitration and if the conditions determined in the law are met, the arbitration provision or agreement will be valid and binding. Moreover, Article 68/5 of the Consumer Code clearly states that the parties may apply to alternative dispute resolution mechanisms if they wish. This thesis further argues that the principle of protecting the consumer should not be applied in such extent where it is interpreted that arbitration agreements in B2C contracts will be automatically invalid if signed before a conflict arises as such principle does not mean that the consumers do not know the law. Even though, the Turkish Supreme Court decisions (ruled before the enactment of the current Consumer Code) states that arbitration clauses are deemed invalid if *“the arbitration clause was determined in the agreement without negotiating with the consumer, is to the detriment of the consumer and therefore is not binding for the consumer”*<sup>145</sup>, following the effective date of the Turkish Consumer Code in 2013, there has been no Supreme Court decisions which state that arbitration clauses in B2C contracts are invalid.

Another discussion in the doctrine is whether arbitration is a type of alternative dispute resolution or not. As per one of the opinions, even though arbitration has been created as a substitute to apply to courts to resolve the conflict, as the fees of arbitration are high and as the courts are able to audit the decisions of the arbitrators, it is also a type of judicial activity.<sup>146</sup> However, I agree with the other opinion of the doctrine<sup>147</sup> which states that as the arbitrators are not appointed by the government and they are impartial, even though it is the type of alternative dispute resolution that is most similar to litigation, it is a type of alternative dispute resolution procedure.

The law applicable to arbitration in Turkey is different depending on whether the decision was made in Turkey or not. If the arbitral award has been given in Turkey,

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<sup>144</sup> Mehmet Polat Kalafatoğlu, p.320

<sup>145</sup> Supreme Court 13th Civil Division dated 22/09/2006 and numbered 2006/7789 E., 2006/12275 K

<sup>146</sup> Gülgün Ildır, p.27

<sup>147</sup> İnci Biçkin, *Genel Olarak Alternatif Uyuşmazlık Çözümü* [“Alternative Dispute Resolution Generally”], Legal Perspective Journal, No:7 (2006), p.34

the decision is enforceable and valid. However, if such decision has not been given in Turkey it needs to be ratified by the competent Turkish court. As there are a lot of states that have signed the New York Convention, recognition is made pursuant to such convention instead of the provisions of the International Arbitration Code.<sup>148</sup>

As per Article 5 of the New York Convention the conditions for enforcement of an arbitral award is as follows: (1) there needs to be a valid arbitration agreement under the law of the country where the arbitral award has been given, (2) the party whom the award is invoked has been treated equally and was given a reasonable opportunity to present its case, (3) the dispute subject to arbitration may be solved with arbitration as is not regarding public policy and (4) the decision has not been cancelled or suspended in accordance with the law of the country in which the arbitral award has been issued.

Pursuant to the interpretation of Article 412 of the Civil Procedure Code and Article 4 of the International Arbitration Code, if the parties of the arbitration have expressly stated their consent to solve the conflict online, such arbitration agreement will be deemed duly executed if it executed in writing online and thus executing such agreement online shall be not considered as violation of the condition of written form.<sup>149</sup> Article 412/3 of the Civil Procedure Code determines that *“the arbitration agreement shall be concluded in writing. The defendant's response to the written claim signed by the parties or to a communication medium such as letters, telegraphs, telexes, faxes or electronic means exchanged between the parties, or to claim the existence of an arbitration agreement in the petition, in order to be deemed to have fulfilled the written form requirement. It is sufficient that there is no objection. An arbitration agreement shall also be deemed to have been concluded if a document is sent to an arbitration clause in order to be made part of the original contract.”* Such clause is parallel to Article 7/4 of the UNCITRAL Model Law on International Commercial Arbitration which states that *“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;*

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<sup>148</sup> Ceren Eyüboğlu, *Türk Hukukunda Tahkim Anlaşmasının Geçerliliği* [“Validity of Arbitration Agreements in Turkish Law”], Ankara Bar Association Journal, No:3 (2017), p.232

<sup>149</sup> Ceren Vurgun, *E-Tahkim* [“Online Arbitration”], Academic Computing Conference at Akdeniz University (2013), p.807



*“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.”*

However, the main issue as per Turkish legislation is whether terms and conditions on websites including an arbitral clause where the user accessing the website clicks the “accept” button shall be deemed as the user’s express consent or not. It may be argued that the person has given not its express consent as most users do not read such documents and thus such matter would fall within the scope of standardized terms (*genel işlem şartı*). In the event where the clause/agreement is a standardized term and such clause/agreement is to a detriment to the party who has not unilaterally determined it (i.e. the user), pursuant to Article 21 of the Turkish Code of Obligations, such term shall be deemed invalid and non-binding if the party determining such standardized term has not informed the other party, has not provided an opportunity to obtain information about the content of the standardised term or the other party has not acknowledged standardized term knowingly and wilfully. Furthermore, as per Prof. Dr. Ümit Gezder’s opinion, it may not be beneficial for the consumer as the consumer will be bound by the contract even if the consumer has pressed such button by mistake.<sup>150</sup> This thesis argues that the user having the opportunity to read the agreement and accepting such arbitral clause by clicking on the “accept” button should not be contradictory to such arbitral clause stating that such action of the consumer is a standardized term in events where such clause is clear and comprehensible (such as stating such clause in bold letters in the agreement).

#### **a. Advantages**

One of the most important reasons why the parties want to settle their dispute with arbitration is the reason that the arbitrator is someone who has expertise in the matter.<sup>151</sup> Even if the arbitrator has the knowledge to solve the conflict, in order to understand the disagreement further or to obtain missing information, he may still apply for additional processes such as requesting an expert witness report or hearing witnesses. Thus, the parties will most likely believe that their dispute is being resolved

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<sup>150</sup> Ümit Gezder, (2013), p.1189

<sup>151</sup> Zeynep Tuncer, p.78

in the “best possible way” and the arbitrator’s decision is the “right decision”. Some may argue that the judges of some national courts (i.e. commercial courts) have expertise in matters. However, when looking at other courts (especially with courts with non-commercial related cases such as civil court of first instance), the judges are required to know all kinds of laws which this thesis argues that their expertise are not as specialized as those of arbitrators. Furthermore, as the parties have the right to choose their own arbitrator, the parties may decide whether they believe that such arbitrator has enough skill and knowledge for the case. However, the parties are not able to choose a judge for their conflict as the judge resolving the dispute is the judge to the court which the case has been randomly appointed by the courthouse system.

With the adoption of the UNCITRAL Law Model in Turkish comparative law, it has become easier to conclude an arbitration agreement regarding the written form of the arbitration agreement as well as the rules on eligibility for arbitration. Moreover, to extend the scope of arbitration, the ability to enter into arbitration agreements have been softened in accordance with the principle of *favor arbitri*.<sup>152</sup>

Furthermore, out of all the alternative dispute resolution mechanisms, arbitration is the process which the decision is more legally binding when compared to other types of alternative dispute resolutions as if the arbitration agreement and clause is binding as per the legislation, the arbitral award shall be binding without a doubt.

#### **b. Disadvantages**

In traditional arbitration (offline), if the arbitration award is given anywhere else other than in Turkey, such decision needs to be recognized and ratified in Turkey. In such case, in order to recognize or ratify the decision, the party where the arbitration award was given in favour of will need to apply to a civil court of first instance which will slow down the enforceability of such decision.<sup>153</sup> Furthermore, as a national Turkish court will need to intervene in the arbitration process due to recognition and ratification of the arbitral award, as the workload of courts in Turkey is very high and therefore resolving disputes via litigation is much slower, such process will not be quick for the parties and therefore will not be beneficial anymore.

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<sup>152</sup> Ceren Eyüboğlu, p.233

<sup>153</sup> Zeynep Tuncer, p.74

Furthermore, depending on the case and conditions of arbitration, the fees and duties may be much more expensive than the parties settling the disagreement in court.<sup>154</sup> The fee of arbitration is generally invoiced hourly, unlike litigation where the fees are attorney fees as well as duties and levies needed to file the lawsuit. If the dispute subject to the arbitration process is complicated, the process of resolving the conflict with arbitration may be much higher than using other methods of dispute resolution. As stated in the chapter regarding e-arbitration, as the fees and duties are much more expensive than the traditional method of dispute resolution and as the parties (especially consumers) are not familiar with arbitration, it is safe to say that arbitration may not be first choice of the parties when they want to settle a conflict.

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<sup>154</sup> Zeynep Tuncer, p.75



## **CHAPTER 4: REGULATIONS REQUIRED FOR APPLICABILITY OF ODR IN TURKEY**

As stated in the previous chapter, citizens and businesses in Turkey are involved with e-commerce related transactions and the numbers of such transactions are growing every year. Furthermore, Turkey has stated to use alternative dispute resolution types and some of these mechanisms have become mandatory. However, online dispute resolution mechanisms have still not been legally recognized in Turkey. For online dispute resolution to be applicable in Turkey, there are some regulations in the Turkish legislation which will enable such mechanisms to commence. However there are still a few obstacles in the law whereby it would hinder for such process to run as smooth as possible.

In this chapter, the regulations in the Turkish legislation are important for the application of online dispute resolution in Turkey will be presented firstly. Afterwards, the thesis will discuss on which provisions and mechanisms in the legislation which might prevent the application of online dispute resolution in Turkey.

### **1. REGULATIONS IN TURKISH LAW IN ORDER FOR THE CONSUMER TO RELY ON E-COMMERCE**

In e-commerce, the customer is not able to encounter the other party who sells the goods online and the customer may not have enough information with regards to the quality, manufacturing or details of the good and must only rely on the picture of such product. The contract between the seller (mostly the company) and the buyer (mostly the consumer) is executed without the consumer inspecting the good and generally the buyer pays for the product before its delivery. Thus, the customer may not want to buy the product online, especially when it might have complications when the good bought needs to be returned and the process of getting a refund might take longer than returning a product in store.

In Turkish law, regardless of the type of relationship, most of the time the relevant code has the principle of the vulnerable party is protected much more than the other party. For instance, as stated in detail in Chapter 3 Section 1 of this thesis, the Consumer Code has a lot of articles where the consumers have additional protective measures in their relationship with businesses. Such protection is further necessary in e-commerce as the consumer has a higher risk with regards to the product bought is within the consumer's standards or more importantly that such product is in compliance with the characteristics it is marketed as. Furthermore, as there is distance between the buyer and the seller in e-commerce relationships, the payment made by the buyer (most likely the consumer) is executed quicker and in absence of inspection, the consumer needs to be protected further.<sup>155</sup>

For such reasons, the Turkish lawmaker has enacted various legislations in order to increase the consumer's trust in online transactions as well as enhance the development of e-commerce. For example, the Turkish Communiqué relating to the Trustmark in E-commerce ("Trustmark Communiqué") was enacted June 6, 2017 which determines the minimum security and service standards of electronic platforms such as websites and application which operate in the e-commerce sector. As per Article 4 of the Trustmark Communiqué a trust mark is an "electronic mark given to the service provider and intermediary service provider which complies with the minimum security and service quality standards determined in the Communiqué". As there is only one trust mark<sup>156</sup> service provider which is a well-known union, namely the Union of Chambers and Commodity Exchanged in Turkey ("TOBB") and may only be appointed by the government with a protocol, the consumers are able to confide in such system and thus, be more confident in shopping online. On the website of TOBB, the consumer can see which e-commerce websites uses trust marks as well as e-commerce websites activities have been suspended or cancelled which provides transparency.

Furthermore, with the Electronic Signature Law, a secure electronic signature is deemed equivalent to a manual signature. Therefore, a document signed with an

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<sup>155</sup> Yılmaz İ. Aslan, *Tüketici Hukuku* ["Consumer Law"], (Ekin Publishing House, 2015), p.456

electronic signature shall have the same legal effects as one signed manually and an agreement signed with regards to the manner of solving dispute resolution may be executed and signed electronically.<sup>157</sup>

Some argue that if the agreement is not signed with a secure electronic signature the agreement will be invalid and that in such case there is no need for agreements to be signed with such signatures. However, we believe that same complications may occur with fax transmissions or when someone signs an agreement without checking the signature circular of a company. Furthermore, as per Turkish legislation, electronic data occurring from using a valid e-signature shall be deemed as proof, unless proved otherwise.<sup>158</sup> Therefore, the parties may obtain a secure electronic signature quickly from an e-signature company authorized and permitted by the government and re-sign the agreement quickly.

Furthermore, as the parties do not need to send the document to each other to get it signed, signing with a secure electronic signature will be faster and the agreement shall be deemed valid and binding much quicker and easier. However, currently in Turkey, is that trust marks or digital signatures are not commonly used by citizens which means that having a valid and binding contract with a signature and which may be executed online is not widespread. This issue may be easily solved in the Turkish government makes it aware to its citizens that such tool is beneficial to ease e-commerce processes as well as judicial procedures.

Another innovation of the government to resolve disputes online was the establishment of UYAP (National Judiciary Informatics System), which is an e-justice system where any Turkish citizen may use if they have the e-government application, which ensures a fast, reliable, healthy way to operate and provide an accurate judicial system. Such system includes all Courts, Public Prosecutors' Offices and Law Enforcement Offices. Users can use their e-signatures to review all of their files, pay for legal fees and submit any documents or file a lawsuit against any court over the Internet. The Technical Study on Online Dispute Resolution Mechanisms of the European Committee on Legal

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<sup>157</sup> Ümit Gezder, (2003), p.151-152

<sup>158</sup> Ibid p.158



Co-operation<sup>159</sup> determined that “the proceedings for the mediation are carried out through UYAP. ADR// mediation practices in Turkey are carried out through the recommendation of a judge or the individual application of the parties. The infrastructure of UYAP system is used for this purpose.”

Moreover, the e-government applications allow consumers to file an online complaint through the Consumer Arbitration Committees. Furthermore, the 2007 OECD E-government Studies determined that “Turkey is making strong progress in implementing e-government and has achieved application thereof by prioritizing projects that make the application more accountable, efficient, effective and transparent.”<sup>160</sup>

## 2. REGULATIONS NECESSARY FOR THE APPLICABILITY OF ODR IN TURKEY

The enforceability of decisions arising from online dispute resolution methods is similar to those of traditional dispute resolution methods. In such case, there is a provision on the web site which determines that the parties will accept these methods in accordance with the contract. With such contract, the right of the party to other dispute resolution processes do not disappear; the party still may apply to litigation or, if it agrees with the other party, use other alternative dispute resolution methods.<sup>161</sup> However, if the parties decide to resolve the dispute with methods other than online dispute resolution, the parties are more likely to spend more time and effort on the conflict. Contrarily, if the parties determine to resolve the conflict online, regardless of the type of the online dispute resolution method, the parties to benefit from technology and it will be more cost effective and time-efficient.

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<sup>159</sup> Such document may be obtained from <https://rm.coe.int/cdcj-2018-5e-technical-study-odr/1680913249> (Accessed on June 2019).

<sup>160</sup> Eda Beğen, p.58

<sup>161</sup> Armağan Ebru Bozkurt Yüksel, *Elektronik Ticarete Elektronik Alternatif Uyuşmazlık Çözümü* [“Online Dispute Resolution in E-Commerce”], Legislation Journal, No.123 (2008), p.7

Another obstacle for e-commerce to apply online dispute resolution methods is when the conflict has a foreign element. Regardless of the fact that the parties resolve the dispute with electronic or traditional dispute resolution methods, enforcement and recognition of a foreign decision is currently only a process that will be executed with courts. If the foreign decision/arbitral award is not recognized or enforced, the parties may not be able to force the party to fulfil its obligations under the instrument resolving the matter and there will be no point of resolving the dispute in the first place. This thesis argues that such obstacle may be cleared if the Republic of Turkey recognizes more international agreements, especially conventions and model laws such as those of UNCITRAL, namely UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). Currently, the Republic of Turkey has only recognized three model laws of UNCITRAL, the New York Convention (1958), CISG (1980) and UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. In such case, the Republic of Turkey may execute a communiqué which gives exceptions to judicial bodies of certain countries and accepts such decision or arbitral award. In such case, the parties may directly enforce such decision with a simple notarized translation and apostille of the relevant country where such decision or award was given.

As stated in Chapter 3 Section 1 of this thesis, the quick confirmation of entering into an e-commerce based relationship with the consumer clicking the “I accept” button may be beneficial for an easy transaction may be problematic as the consumer may not read the terms and conditions stated in the pop-up and thus the consumer may not be able to realize the consequences of such action. Therefore, this thesis argues that the Turkish lawmaker needs to execute some kind of regulation (similar to the Consumer Code which states that the articles in contracts executed with a consumer needs to be at least 12 pt and that such articles needs to be clear for the consumer to understand) stating that such type of information has to be up to a standard whereby the consumer understands what will happen when he clicks the “I accept” button of the e-commerce website.

## CONCLUSION

In order to eliminate the conflict and re-establish the relationship between the parties, the first solution that comes to mind is the application of the claimant to the judicial bodies and filing a lawsuit. However, it must be noted that application to national judicial bodies is not the only method of resolving the dispute and in fact, such solution should be the last method to be used. All traditional dispute resolution types, irrespective of wherever they are executed online or offline, lack of communication may jeopardize the due process which will lead to lack of quality of justice and finally the reduction of trust of the parties regarding the dispute resolution process. As may be seen from the number of cases resolved in Turkey every year<sup>162</sup>, the process of solving disputes via the traditional method of applying to courts (especially Turkish courts, particularly in cities such as Istanbul, Ankara and Izmir) is very time-consuming as the workload of the courts is very high. In such case, the parties do not want to solve the conflict and their trust with respect to the justice system becomes tarnished.

Even though, there are no out-of-court alternative dispute resolution mechanisms in Turkey which the complainant is required to use by law and which result in binding decisions not subject to judicial review, it can be seen that the Turkish law-maker is preparing itself to implement alternative dispute resolution and online dispute resolution schemes following the European Union's ADR Directive which means that the Turkish government is aware of the European Union's developments regarding to consumer disputes.<sup>163</sup> However, as stated above, the Turkish consumers are not aware that they are able to resolve their disputes with Consumer Arbitration Committees which aid to reduce the workload of courts. As a type of alternative dispute resolution, the government should advertise such committees to its citizens and make them aware of the accessibility and effectiveness thereof.

In addition, when filing a lawsuit in courts, the dispute that was a disaccord between the parties will become more serious and complicated with judges. In such process,

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<sup>162</sup> Please see Chapter 3 Section 3 and Table 1

<sup>163</sup> Eda Beğen, p.59



strictly regulated proceedings will come into force, the mutual struggle of the parties will arise and the parties will face a method of resolving a legal conflict which cannot be predicted in advance. In addition, the relationship between the parties in the form of continuous controversy may be irreparably impaired.

It cannot be denied that online dispute resolution methods play an important role in settling conflicts with an international characteristic rapidly and at a low cost as they can be used without any geographical limitation. However, such advantage is also a disadvantage as confidentiality of the parties or the decision and protection of personal data cannot be executed efficiently as tracking such violations internationally may be difficult, especially if the tools to track such violations are not developed enough or if the relevant national laws subject to the transaction with an international characteristic does not permit the other national law to give sanctions. Such problem is more evident with online dispute resolution procedures as data security is always a concern of Internet users and evidence may be transformed without the necessary protection of data.

Another obstacle for the parties to settle their disputes which have foreign elements is that the party whose conflict has been resolved in favour of himself has to get such decision recognized or enforced in order for such decision to be applicable in Turkey. In such case, such party must apply to the Turkish courts which is another obstacle, even though the conflict has been resolved.

It can be said that developments with regards to alternative dispute resolution methods in Turkey is not very extensive. The biggest reason for this is the idea of citizens that alternative dispute resolution methods, especially arbitration, is seen as a competitor of the judgement of local courts and that such procedures will diminish the efficiency and effectiveness of courts.<sup>164</sup> Furthermore, as there are not a lot of lawyers who are not as familiar with alternative dispute resolution compared to litigation, due to the fact that such methods are novel in Turkey, there are not a lot concrete examples to show that these procedures are more beneficial than litigation. However, this thesis argues that the government's policy to introduce more courts is incorrect as such policy

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<sup>164</sup> Arzu Yıldırım and Gökbüke Deren Verap, p.116

does not aid for the dispute to be settled faster.<sup>165</sup> This thesis suggests that it is much more efficient to settle disputes with alternative dispute resolution methods rather than increasing the number of courts for access to justice as more advantageous results are obtained from such processes in terms of time, cost and efficiency.

Another problem for online dispute resolutions in Turkey is that trust marks or digital signatures are not commonly used by natural persons or legal entities. However, trust marks or digital signatures authenticating the author/message content shall render that the judgement arising from the online dispute resolution is legitimate. Therefore, the government of the Republic of Turkey should inform its citizens with respect to the advantages of such tools.

A website or application used for online dispute resolution must be user friendly in such a way that disputants, especially consumers, are able to easily use such mechanism and therefore attention must be paid to navigation, functionality, content and design.<sup>166</sup> However, it will be more beneficial if a website is used to give such service than an application as users may not have a smartphone which is compatible with the application. Well known internet-based international companies such online marketplaces (eBay), large merchants (Amazon) and payment processors (PayPal), which are also active in Turkey under the same name or with subsidiaries, realized that the trust problem was preventing many consumers from moving their sales to online marketplaces. Such companies found that addressing this trust issue by creating online dispute resolution mechanisms could provide a valuable market advantage.<sup>167</sup> Therefore, if larger commercial sites in Turkey such as Trendyol or Lidyana, which have disputes with smaller claims and operate B2C when comparing conflicts between commercial companies, such websites may cover the cost of the online dispute resolution used as part of its customer experience.<sup>168</sup> As explained in Chapter 2, Section 3 of this thesis, the ODR Platform is a great type of online dispute resolution method used by the European Union's Member States in order to resolve conflicts between the trader and the consumer.

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<sup>165</sup> Nesibe Kurt Konca, p.1

<sup>166</sup> Michael Legg, p.231

<sup>167</sup> Amy J. Schmitz, p.20

<sup>168</sup> Suzanne Van Arsdale, p.118

To conclude, this thesis argues that when examining the legislation of the Republic of Turkey, it is possible for parties to use online dispute resolution methods. However, there is still a need for the Turkish lawmaker to enact a code especially for online dispute resolution as the principles and procedures of such mechanisms need to be clear for the parties and their attorneys. Out of all the online dispute resolutions methods, this thesis argues that mediation is currently the best choice with regards to application and enforcement of an online dispute resolution mechanism as the Turkish lawmaker has recently stated that some cases need to firstly be resolved with mediation. This thesis argues that settlement is always a choice and executing such decision online is possible, however negotiation in the sense of automated negotiation or assisted negotiation is not possible for e-commerce related cases as these tools are only use in public law in Turkey. E-arbitration is also a possibility to resolve disputes, however as it is a more complication online dispute resolution process when compared with the other mechanisms; it may be beneficial to use such process solely for conflicts with a foreign element or for conflicts which have a high monetary value. Mediation and thus e-mediation is a simpler process where consumers are able to understand and which is much more cost efficient and quicker. If mediation sessions were held electronically, commercial related disputes would be solved faster and cheaper since the parties will not have to travel and there will no additional expenses such as renting a conference room. Even though the current legislation regarding mediation does not expressly prohibit for such sessions to be held electronically,<sup>169</sup> as altered in the Turkish Commercial Code, an expression stating that the sessions may be held electronically may be beneficial for the commencement of e-mediation.

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<sup>169</sup> Elif Kısmet Kekeç, p.161



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## ÖZGEÇMİŞ

### KİŞİSEL BİLGİLER

Adı Soyadı: Maria Melis HALICIOĞLU

Uyruğu: T.C.

Doğum Tarihi ve Yeri: 17 Nisan 1993, İstanbul

Elektronik Posta: melishalicioglu89@gmail.com

### EĞİTİM

| Derece        | Kurum                                        | Mezuniyet Yılı |
|---------------|----------------------------------------------|----------------|
| Lisans        | Yeditepe Üniversitesi, Hukuk Fakültesi,      | 2016           |
| Yüksek Lisans | İMÜ, Lisansüstü Eğitim Enstitüsü, Özel Hukuk | 2019           |

### İŞ TECRÜBESİ

| Tarih     | Kurum                  | Görev          |
|-----------|------------------------|----------------|
| 2018-     | Bilgili Holding        | Avukat         |
| 2017-2018 | YK Avukatlık Şirketi   | Avukat         |
| 2016-2017 | Üler Avukatlık Şirketi | Stajyer Avukat |

### YABANCI DİLLER

İleri düzeyde İngilizce ve Fransızca

### YAYINLAR

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### HOBİLER

Müzik, sinema, seyahat

**ISTANBUL MEDENİYET UNIVERSITY  
INSTITUTE OF GRADUATE STUDIES  
SECTION OF PRIVATE LAW**

**ONLINE DISPUTE RESOLUTION AND ITS APPLICABILITY  
IN TURKEY**

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**MARİA MELİS HALICIOĞLU**

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