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Alternative Dispute Resolution System in an Information Society  

Research paper  

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INTRODUCTION

This research paper is a group work exercise in the IT Law Lab in University of Tartu. The task was to propose a system which enables a provider of information society services (hosting services and the like) to choose an alternative for dispute resolution. There are various ways of settling disputes alternatively – for example arbitration, conciliation, mediation, negotiation. We chose arbitration and in the current paper we propose an online arbitration system called Online Dispute Arbiter.

Arbitration is a dispute resolution mechanism in which parties agree to have their dispute resolved by a private third-party decision-maker, rather than through litigation in public courts. The parties agree in advance that the decision-maker’s ruling will be binding on them, rather than merely advisory. In today’s world due to ICT development and the growth in using ICTs many arbitration providers allow parties to carry out online some part of arbitration process – for example submitting some documents through email or downloading claim forms from arbitration provider website etc. But the idea of full online arbitration is that the whole venue of arbitration moves into the “world of internet” – all arbitration proceedings are conducted exclusively online, end-to-end. That is also the goal of our proposed system in this paper.

The format of the task and the aim of the paper is to provide a description of the system in terms of legal aspects – principal characteristics, arbitration rules, concerns that can arise with proposed system, legal obstacles, an analysis of the need to amend the existing law and other aspects that we thought to be relevant. We won’t provide the physical part of the system – working web platform etc. – but as it is an IT Law Lab, we will also bring out some relevant technologies used in our proposed online arbitration system.

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1 European Parliament Policy Department, Legal Instruments and Practice of Arbitration in the EU, page 8
1. The System – Online Dispute Arbiter

1.1 General description

This paragraph outlines the parameters for a system which enables a provider of information society services to choose an alternative for dispute resolution. The proposed system is an online adjudication scheme based on the Estonian Code of Civil Procedure\(^2\) named Online Dispute Arbiter (henceforth ODA). ODA is an online arbitration panel that provides adjudication services for voluntary participants in civil law cases. ODA is applicable to broadly two kinds of Internet disputes where one party is a corporate entity and the other an individual, or where both parties are individuals. Internet disputes encompass issues directly resulting from one party’s activities or both parties interaction on the internet, if at least one party is an individual. This system does not concern disputes where both parties are corporate entities, because corporate actors have the possibility to use traditional arbitral institutions and usually have better means to solve their disputes in litigation. ODA has two main purposes:
1) help consumers and traders resolve their contractual disputes about online purchases of goods and services;
2) resolve intellectual property disputes.

The advantages before litigation would be speed and versatility of judicial proceedings. This means the court proceedings would be faster than Estonian court litigation and the adjudicating panel would consist of experts from various fields of IT law (e.g trademark, copyright, privacy, e-commerce). The advantage before regular arbitration panels would be the use of stricter due process rules because of a potential power imbalance situation. Without strict due process rules the party wielding greater resources or influence (usually business entities) could have an advantage in arbitration proceedings with lax rules.

1.2 Principal characteristics of ODA

Firstly, participation in ODA is consensual. ODA arbitration procedure takes place if both parties have agreed to it. The arbitration clause has been added to the terms and conditions provided by the initial service provider. Both parties are obliged to commit to ODA proceedings when a dispute arises. This does not exclude litigation afterwards.

\(^{2}\) Estonian Code of Civil Procedure. In Estonian: Tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197 ... RT I, 22.06.2016, 28
Secondly, the parties choose the arbitrator(s). ODA enables a sole arbitrator to solve a case (either solving the dispute in the fast track system or when the parties select a sole arbitrator together). When the parties do not select a sole arbitrator, each party appoints one arbitrator. Those two arbitrators agree on the third, presiding arbitrator. Alternatively, an ODA administrative commission can suggest arbitrators with relevant expertise or appoint members of the arbitral tribunal. In cooperation with the Estonian Bar Association, ODA maintains an extensive roster of arbitrators.

Thirdly, arbitration is neutral. Arbitration proceedings take place solely on the internet. All ODA proceedings are executed on the specialized ODA website. Arbitrators can be removed from the tribunal when doubt in his or her impartiality arises.

Fourthly, ODA arbitration is inquisitorial. The tribunal is in charge of managing the evidence and submissions. ODA provides stricter rules, excluding many agreements about procedural rules. This limits possible power imbalance situations, where an individual is against a repeat player business entity. Inquisitorial procedure rules also limit the scope of agreeable rules between the parties.

Fifthly, arbitration is a confidential procedure. ODA rules protect the confidentiality of the existence of the arbitration, any disclosures made during that procedure, and the awards. Materials provided to the tribunal during proceedings are destroyed afterwards.

Sixthly, the decision of the arbitral tribunal is final and easily enforceable. Enforcement in Estonia would be improved through amendments of law proposed in chapter 4.

1.3 Arbitration rules for ODA

Here are given the main arbitration rules for ODA. This subparagraph is largely based on the Arbitral Tribunal part of the Estonian Code of Civil Procedure (chapters 72 to 75).

1.3.1 General principles (based on § 732)

The parties shall be treated as equal in arbitration proceedings. Both parties shall be granted an opportunity to present their positions. In accordance with the principal characteristics of ODA and equal treatment, the parties have the right to agree on the procedure for the proceeding or refer to the rules and regulations of an arbitral tribunal. If the parties have not agreed on the
procedure for the proceedings and such a procedure is not provided by the arbitration rules for ODA, the procedure for the proceeding is determined by the ODA tribunal. The tribunal has the right to decide on the admissibility of evidence, to examine evidence and to be free in its evaluation of the outcome of giving evidence.

1.3.2 Place of conduct of arbitration proceeding

The proceeding of ODA take place on the internet, within the specialized website (www.oda.com). Physical contact between the parties and the tribunal may happen only under extreme circumstances, when the use of the specialized website is impossible and the necessary proceeding at hand demands instant action from the tribunal. Legal representatives are with their respective clients.³

1.3.3 Language of proceeding (§ 734)

The language of the proceeding is determined by the tribunal. The petitions of the parties, the decision of the tribunal and other notices of the tribunal shall be prepared and the sessions of the arbitral tribunal shall be held in the language prescribed by the tribunal.

1.3.4 Commencement of arbitration proceeding (§ 735)

An arbitration proceeding commences and the action is deemed to have been filed on the date on which the defendant receives the statement of claim for resolution of a dispute by ODA. Claims can be submitted through the ODA website. Claims will be forwarded by the administrative panel of ODA to the defendant via electronic means.

1.3.5 Action and response to action (§ 736)

A statement of claim sets out:
1) the data of the plaintiff and defendant;
2) the claim of the plaintiff;
3) the circumstances on which the claim is based and evidence in proof of such circumstances which the plaintiff is submitting or intends to submit;
4) a list of annexed documents in electronic and readable form.

³ Due to the nature of ODA and possible cross-border disputes, it would be more logical to keep the representatives and clients in the same space to avoid misunderstandings between the representative and client and to lower travelling costs.
The defendant must present a position concerning the action within the term prescribed by the arbitral tribunal. Standard term is 14 days. The tribunal may deviate from the standard term with motivated grounds.

A party may amend or supplement its action in the course of the arbitration proceeding unless the parties have agreed otherwise. The tribunal does not permit amendment or supplementation of an action if this would cause an unreasonable delay in the proceeding. In case of unconditional admission by the defendant, the tribunal gives a decision without substantiation. If the defendant fails to respond to the claim, the tribunal gives a decision without substantiation in favour of the plaintiff.

1.3.6 Session of arbitral tribunal and written proceeding (§ 737)

The tribunal organises a proceeding in audiovisual or written form. Audiovisual form means the tribunal and participants interact in a video conference session using the program provided by the ODA portal. Written form means all non-audiovisual contact through the ODA portal. If the holding of a session is not precluded by the parties, the arbitral tribunal holds a session at a suitable time in the course of the proceeding based on the petition of one of the parties. The parties are immediately notified of a session of the tribunal organised for the examination of evidence. If a party submits a document, the arbitral tribunal immediately informs the other party of such document and sends a copy of the document to the party. Both parties shall be informed and sent transcripts of expert opinions and other digital documents which the tribunal may consider upon making the decision.

1.3.7 Consequences of failure to perform acts (§ 738)

If the defendant fails to respond to the action by the prescribed due date, the tribunal continues its proceedings. The defendant’s failure to respond is not deemed to be admittance of the claim. If a party fails to appear at a session or fails to submit documentary evidence by the prescribed due date, the tribunal may continue the proceeding and make a decision based on the facts already established. If the tribunal considers the failure to perform a previously specified act sufficiently justified, the tribunal disregards the failure to perform such act. Regarding other acts, the parties may agree on different consequences of failure to perform the acts.
1.3.8 Expert appointed by tribunal (§ 739)

The tribunal may appoint one or several experts to provide an expert opinion on questions prepared by the tribunal. The tribunal may demand that a party provide an expert with relevant information and with the documents or audiovisual material necessary for the expert assessment.

An expert who has provided an expert opinion must participate in a session if a party submits a request to such effect or the tribunal so demand. A party has the right to question an expert in a session and to invite the party’s own expert to present an opinion on the disputed matter.

An expert appointed by the tribunal may be removed and a corresponding petition for removal may be submitted to the tribunal pursuant to the same procedure which regulates the removal of arbitrators.

1.3.9 Assistance of court in attestation acts and other court activities (§ 740)

If the tribunal is not competent to perform an attestation act or to conduct another court activity, the tribunal or a party, with the consent of the tribunal, may request the assistance of a court. Arbitrators have the right to participate in an attestation proceeding conducted by a court and to pose questions. The tribunal may suspend arbitration proceedings until a court activity has been conducted.

1.3.10 Confidentiality requirement (§ 741)

Unless the parties have agreed otherwise, an arbitrator is required to maintain the confidentiality of information which became known to him or her in the course of performance of his or her duties and which the parties have a legitimate interest in keeping confidential. The administrative commission preserves the decisions made by tribunals in a secure server. All other materials submitted to ODA will be destroyed after the decision has been made.

1.3.11 Applicable law (§ 742)

The tribunal applies the legislation of which has been agreed upon by the parties. In making a reference to the law of a state, an agreement is not presumed to include the conflict of laws rule of such state unless the parties have expressly agreed otherwise. The tribunal applies Estonian law if the parties have not agreed on applicable law and applicable law does not arise from an Act. The tribunal may resolve a dispute based on the principle of justice if the parties have
expressly agreed on it. Such agreement can be made until the time the tribunal makes its decision. When the tribunal solves a dispute using the law of a state, it takes account of the terms and conditions of the contract and of customary practices regarding contracts in so far as this is possible under the legislation which is applied.

1.3.12 Making of decision by ODA tribunal (§ 743)

If three arbitrators participate in a proceeding, an arbitral tribunal has made its decision if the majority of the arbitrators vote in favour of it, unless the parties have agreed otherwise. If one of the arbitrators refuses to participate in making a decision, the rest of the arbitrators may make the decision without him or her. The parties shall be informed beforehand of the intention to make the decision without the arbitrator who refused to participate. Regarding individual procedural matters, decisions may be made or orders may be given by the presiding arbitrator if he or she holds an authorisation to such effect given by the parties or the other members of the arbitral tribunal.

1.3.13 Compromise (§ 744)

The tribunal terminates a proceeding if the parties reach a compromise. The tribunal prepares the compromise based on a petition of the parties in the wording agreed upon by the parties in the form of a decision of the arbitral tribunal unless the content of the compromise is contrary to public order or good morals. The decision is also digitally signed by the parties. Such decision of the tribunal has the same legal force as an ordinary decision of the tribunal.

1.3.14 Format and content of decision (§ 745)

The tribunal determines the time for making a decision and notifies the parties thereof. The tribunal prepares a decision in writing and an arbitrator digitally signs the decision. In case a decision is made by several arbitrators, it is sufficient that the majority of them sign. The dissenting opinion of an arbitrator who maintained a minority position in voting is set forth after the signatures if the arbitrator so requests, and it is signed by the arbitrator who maintained the minority position. Unless the parties agree otherwise, the decision is based on a compromise or unconditional admission, the reasons for a decision of an arbitral tribunal shall be provided. The decision of the tribunal shall set out the date of making the decision. The tribunal serves a digital

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4 This enables ODA to solve non-proprietary claims set in the Estonian Code of Civil Procedure § 718 subparagraph 1.
transcript of a decision on the parties on the working day following the day on which the decision is made.

1.3.15 Entry into force and effect of decision (§ 746)
A decision enters into force on the date on which the decision is made. A decision of the tribunal has the same effect on the parties as a court judgement which has entered into force.

1.3.16 Termination of ODA proceeding (§ 747)
ODA proceeding ends after the tribunal makes a decision on the merits of the matter or a decision specified as follows:
1) the plaintiff withdraws the action, except in the case the defendant contests the withdrawal and the tribunal recognises the defendant's legal interest in the final resolution of the dispute;
2) the parties agree on the termination of the proceeding;
3) the parties fail to participate in the proceeding;
4) the tribunal finds that continuation of the proceeding is impossible due the termination of the arbitral agreement or for another reason.

Upon termination of ODA proceeding, the competence of the arbitrators also ends. Terminated ODA proceeding cannot be reopened, except when the conditions of impossibility cease to exist.

1.3.17 Death of party (§ 748)
The arbitral agreement or the ODA proceeding does not end in the case of the death of a party, unless the parties have agreed otherwise. In the case of the death of a party, the tribunal suspends the proceeding for a term determined by the tribunal. The term may be extended based on a petition of the legal successor of the deceased party. A proceeding which has been suspended is continued at the point it was suspended unless the parties have agreed otherwise.

1.3.18 Decision on costs (§ 749)
The decision of the tribunal provides for the division, between the parties, of the costs of the arbitration proceeding and of the necessary costs incurred by the parties as a result of the arbitration proceeding, unless otherwise agreed by the parties. If the size of the costs has not been determined or cannot be determined before the end of the ODA proceeding, the costs are
provided for in a separate decision of the tribunal.

1.3.19 Correction, supplementation and clarification of decision (§ 750)

Based on the request of a party, the tribunal may:
1) correct calculation and typing errors and other such mistakes in a decision of the tribunal;
2) clarify a decision to the extent requested;
3) make a supplementary decision concerning a claim which was submitted in the course of the arbitration proceeding but was not resolved by the decision.

The request may be submitted within 30 days after service of the decision. The tribunal sends a request for supplementation or clarification of the decision to the other party for information. The tribunal makes an initial decision on the correction or clarification of a decision within 30 days after the receipt of the request, and in the case supplementation was requested, within 60 days after the receipt of the request. The tribunal may also correct a decision without a request of a party. The provisions concerning the format and content of tribunal decisions apply to correction, supplementation and clarification of a decision.

1.4 Technologies used in ODA system

ODA is an arbitration system that works solely online under normal circumstances. ODA uses ICT for communication and information processing.

1.4.1 Electronic file management

All documents connected to the case in question are stored electronically in a systematic order. Electronic file-management software permits individual documents or passages to be easily retrieved, displayed, browsed, cross-referenced, compared, annotated and searched for keywords. Cross-referencing allows the linking of text to evidence or law. It may also be combined with diary-management functions, such as automatically sending out notices of filing deadlines, and can be integrated with word processing functions so that the database generates procedural documents, notices, etc.5

www.oda.com is a website for document management, which creates one central, unified case database, allowing the parties, the arbitrators and the administrator to upload, view, browse,

search and retrieve documents.

The platform also contains an electronic diary, which automatically records the filing of documents and automatically sends out certain notices. The platform allows electronic payment of arbitration fees by credit card or bank payment. Online filing entails security risks. Precautions are taken against unauthorised access, meaning encryption for transmission, passwords for authentication, virus protection and firewalls.

1.4.2 Communication applications

The main communication means are email and video-conferencing. ODA proceeding does not rely purely on text-based communication, because it has significant disadvantages, such as the assessment of non-verbal cues (i.e. body language). This is particularly significant for cross-examination procedures.\(^6\) Means of visual distance communication are used to replace traditional hearings. The advantage of audio-visual tools is that it enables easy access to tribunal procedures without the need to travel. One problem is the credibility of witnesses giving testimonies. This can be overcome with high quality audio-visual technologies and high-speed internet connections. High quality video enables arbitrators to detect the physical demeanor and tone of voice of the witness. To avoid the coaching of a witness, the picture has to cover the whole room at the witness end. This necessitates the use of two cameras or one camera with 360 degree field of view.

ODA also incorporates a graphic interface, where a multitude of people see the same objects simultaneously. This can be a document, photograph, screenshot, 3D image or a drawing board used for graphical illustration. It can be used to enable the participants to view pieces of evidence or illustrate an argument. The objects in the graphic interface can be temporarily manipulated for the argumentation and illustration of statements.

1.4.3 Signing of documents

Estonian citizens can sign documents and log in to ODA portal with the Estonian ID-card. The same applies to foreigners who have Digi-ID. The Estonian ID-card and Digi-ID card allow the identification or authentication of the card owner. A secret key, an authentication certificate and PIN1 are used for the identification of the user. The PIN1 is an PIN code that gives access to

\(^6\) *Ibid.*, page 84
the authentication key that is on the ID-card chip. Mutual authentication of TLS (or SSL) is used to authenticate an ID-card owner.\(^7\) To give digital signatures for documents one must access the signing key that is inside the ID-card chip, signing certificate and PIN2. PIN2 gives access to the signing key.\(^8\)

People who do not have an ID-card must prove their identity by sending a copy of the identification documents their respective countries have provided them with (e.g passport). When the party is identified, the ODA portal provides them with a username and randomly generated password that they must change. This enables them to access the proceedings and sign documents.


\(^8\) Ibid.
2. Non-legal obstacles concerning ODA

2.1 Concerns that arise or can arise with Online Dispute Arbiter

In careful observation of the proposed system named ODA, the following concerns arise and could arise over the use and implementation.

2.1.1 Language of the Proceedings (Language Difficulties): 9

The proposed system says it is to be determined by the Tribunal. However, that effectively raises an issue as both parties could speak different languages or in the alternative, the Tribunal could speak the language of one of the parties. That automatically sends a signal to the party who does not speak that particular language. A provision for multi-language entry or possibility can be added to facilitate the proceedings where a foreigner is a party.

2.1.2 False flag on Doubt and Impartiality

Either of the parties to the proceeding could decide to thwart the effort and progress of the ODA by raising an allegation of impartiality with no actual evidence. This necessitates the need for substantiation of impartiality claim. The administrative panel of ODA would make the final decision about impartiality of the arbitrator.

2.1.3 Amendment of Statement of claim and filing of additional evidence

A party to the proceedings can attempt to prolong the proceedings by altering or amending its pleadings and/or by bringing in additional evidence. There should be a provision that states that after a particular point during the proceedings, such amendment is no longer possible. Otherwise this continues to delay the proceedings from reaching a final step leading to a decision. The ODA allows for amendment except it will cause unreasonable delay. This particular provision should not be subject to a wide and general interpretation by the parties to the proceedings. It should be strictly defined (e.g maximum duration for submitting evidence and statements could be 3 months after the filing of claims).

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2.1.4. Required and recognizable timeframe for defendant to file his Statement of Defence and reply

Since the Tribunal can allow a deviation with motivated grounds, there is a high likelihood that the proceedings will suffer as many delays as could be possibly envisaged. The Online Dispute Resolution system is expected to be speedier thus, the exchange of pleadings should be within the stipulated time frame and deviations from the rule should be exceptional.

2.1.5 Poor support system by parties will invalidate the power of such online system

The attitude of the parties is extremely important to the success of the ODA. Parties have to trust the system and be willing to submit to the proceedings chaired by the Tribunal and the decision of the Tribunal. Inasmuch as the ODA is voluntary, once parties have agreed to submit themselves to it, only formally recognized methods of Termination of proceedings may end their participation in the proceedings. If the parties do not trust ODA as an alternative for court litigation, then they will not set their claims to the court or may avoid proceedings as a defendant. This kind of side-lining would damage the reputation of ODA and minimize the number of cases ODA has to solve.

2.1.6 Inaccessibility to individuals

In countries with highly developed economies, a larger percentage of people have access to the Internet. Meanwhile, it would be easier to implement ODR solutions in countries with a higher level of ADR use. Nations that do not have a confidence towards alternative forms of dispute resolution, with a belief in the primacy of the common judiciary over out-of-court forms, have more difficulty adopting new methods – and this slows down the creation of a European network of ODR providers.\(^\text{10}\)

2.1.7 The impersonal nature of the system

Many people would argue that settlements and Alternatives to litigations are best carried out and highly effective when the parties are seated face-to-face. Using ODA, the personal touch, the expressions by parties and the usual nuances are lost in an online platform. Computer

programmes constitute a barrier that cannot be accepted. This can be overcome with video-conferencing to a certain degree, but not fully equalized to face-to-face communication. Non-verbal nature and lack of direct contact also is an issue.

2.1.8 Availability of internet access

The constant internet access required for the online presence to participate in ODA may constitute an obstacle for people with limited internet access. The Tribunal would try to overcome

2.1.9 Storage of decisions and assurance of continued confidentiality

After proceedings have been closed, the ODA provides that decisions are kept in a secure server. Access to the servers should also determined ab initio. Strict rules of operation should be a priority. Access to the decisions should be limited to specified individuals in the administrative panel.

2.1.10 Limited scope of issues

Fully automated cyber-mediation can only be used to resolve specific types of disputes and, even then, can only handle disputes where the amount of the settlement is the only unresolved issue. In fact, for fully automated cyber-mediation to work properly, it would seem that the parties would need to have undertaken initial discussions, agreed to the basic facts surrounding the dispute and have determined that one of the parties is responsible for damages. The parties would then seemingly have to have agreed to limit further discussions to the single issue of an appropriate amount of monetary compensation.12

2.1.11 Credibility and reliability of evidence taken remotely

As technology has evolved, there have arisen the constant requirement to have evidence given without necessarily being physically present. As Wallace rightly said “…the need to find ways

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11 Ibid.
to bring information and expertise to a courtroom from a witness located at a distance which makes physical attendance expensive or particularly inconvenient.\textsuperscript{13} 
The use of technology in litigation requires that the laws of evidence recognize and provide for the various methods of taking and presenting evidence electronically.\textsuperscript{14} 
Videoconferencing is improving constantly. State-of-the-art “telepresence” installations can almost duplicate being in a room with a distant participant. At some point, it will be difficult even to realize that a law firm colleague, opposing counsel at a settlement meeting, or remote hearing participant, isn’t within a few physical feet. We are in a transition stage in which our legal system has not yet fully adapted to even the present realities of videoconferencing, let alone what is to come. At some point we will have to decide when, if ever, physical presence is truly mandated and, as technology improves, why.\textsuperscript{15} 

2.2 ODA as an online platform

With the massive increase of online presence all over the world, there is an urgent need for an online Alternative Dispute Resolution method, system or application. Virtually all manner of business and transactions can now be carried out online.

Now, there is the need for a system to reduce the influx of litigation in courts. Matters that arise from online disputes and even those from normal offline actions and transactions can be effectively settled by ODA which is an online platform.

The method approached could also either be fully online or partially online and offline depending on the parties.

The ODA is a web-based settlement or resolution system that seeks to resolve and bring settlement to disputes emanating in the course of e-commerce and intellectual property disputes. It is a consensual system where both parties can choose the arbitrator. There are also two models, either fast track or a slightly more involved process of both parties selecting individual arbitrators and the two appointed arbitrators go ahead to select a third administrator. Alternatively, the ODA administrative commission can suggest competent arbitrators. This

\textsuperscript{13} Anne Wallace, Virtual Justice in the Bush: The use of court technology in remote and regional Australia \url{http://www.jlisjournal.org/content/Wallace19.pdf}, page 10 (7.12.2016) 
\textsuperscript{14} P Perrit, Video Depositions, Transcripts and Trials, Emory Law Journal 1994, 43, pages 1071, 1078 – 1081, 1092 – 1093 

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system is fully user-friendly and easily administered. It provides a fair system with equal treatment of parties involved.

Already, there exists a functional web-based platform: ODR developed by the European Commission which allows consumers submit their disputes online and aims to help consumers and traders resolve their contractual disputes about online purchases of goods and services.

This method will facilitate a speedier and faster means of arriving at settlement. It will also reduce the cost associated with litigation and as the world is a global community, the use of an online resolution system is an innovative way as it is user-friendly and fully interactive. It is neutral and assures of confidentiality.

Consequently, in light of the above, the ODA can function as a working online system to achieve its purposes.
3. Legal obstacles

Arbitration as way of alternative dispute resolution itself obviously does not have any legal obstacles – it’s a widespread way of resolving a dispute by a private third-party decision-maker, rather than through litigation in public courts, as pointed out in the introductory part of the project. But when to implement it to an online platform – in the “world of internet” – then many legal questions will arise from it. Such problems and questions or in other words – legal obstacles – will be addressed subsequently.

3.1 Venue of online arbitration and applicable law.

Usually, arbitration proceedings are subject to the arbitration law (lex arbitri) of the state, in which the arbitration is seated. The existing national laws governing private arbitration have in fact been harmonized to a great extent by the UNCITRAL Model Law on International Commercial Arbitration first drafted in 1985 ("UNCITRAL Model Law"), which may be regarded as a point of reference for the differing national arbitration laws. In case of European Union, a "European" law governing private arbitration so far does not exist.16

So therefore in European Union the general principle is that the legal framework applicable to arbitration includes the laws of one or more States connected to the proceedings or to the parties, as well as the 1958 New York Convention and several other international and transnational sources of law. However, national law, particularly that of the “seat” of the arbitration (i.e. the State in which the arbitration is legally located) is the cornerstone of any arbitration.17 That means, that in most jurisdictions, venue of international arbitration plays a very significant role regarding e.g. applicability of mandatory rules and principles of lex fori, including issues of arbitrability and validity of arbitration agreement, extent of intervention and support by state courts. For the purpose of various national arbitration laws setting the requirements for recognition and enforcement of awards, venue of arbitration is the determinative element in deciding whether the award is national or foreign.18

It should be noted, that there is also the question of applicable substantive law when dealing with arbitration proceedings and other international and cross-border disputes even settled in ordinary courts. For example, Pursuant to the Estonian law (§742 subparagraph 2 of Code of

16 Rainer Lukits, Private arbitration and European Union law, page 3
17 European Parliament Policy Department, Legal Instruments and Practice of Arbitration in the EU, page 8
18 Slavomir Halla, Arbitration Going Online – New Challenges in 21st Century?, page 218
Civil Procedure), in cases in which the parties have failed to agree on the applicable law in their arbitration agreement, and the applicable law has not been determined by a legal Act, Estonian substantive law should be applied, even with respect to foreign parties. The answer to applicable substantive law varies between the fields of law and is in most cases regulated by international law, but in general the rule is freedom of choice. In EU, for example Regulation No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations article 3 states, that A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.\(^{19}\) The freedom of choice is more limited for example in the case of family law – for example divorce matters.\(^{20}\)

As is apparent, the question of applicable substantive law is not inherent to online arbitration specifically, but is a general question/matter that applies to all cross-border proceedings.

So only the question of venue remains concerning the matter of applicable law. A strong connection with the seat of arbitration may be spotted in current international legal framework, which is essential element of the success of modern international arbitration.\(^{21}\) In legal literature, the idea and discussion on “delocalized arbitration” is brought out.\(^{22}\) Proponents of a “delocalized” view of arbitration in particular would regard a tribunal as not bound by the law of the seat in such a situation.\(^{23}\) That’s also supported by modern arbitration laws, either international or national, which give the parties freedom to determine the seat of arbitration, and such determination is standard and frequent supplement to the arbitration agreement. If parties fail to provide the seat, the failsafe are still in place. Either, the rules of institution call for a specific seat, usually the seat of the arbitration institution itself, or the in jurisdiction based on the model law, arbitrators shall designate such place themselves.\(^{24}\) So as does also the study of policy department of European Parliament state - restrictions of this type are becoming far less common.\(^{25}\) In Estonia for example, the parties have the right to agree on the procedure for the proceeding or refer to the rules and regulations of an arbitral tribunal to the extent that the

\(^{19}\) Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), Article 3.
\(^{20}\) Council Regulation (EU) No 1259/2010 on implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Article 5.
\(^{23}\) European Parliament Policy Department, Legal Instruments and Practice of Arbitration in the EU, page 228.
\(^{25}\) European Parliament Policy Department, Legal Instruments and Practice of Arbitration in the EU, page 228.
parties are treated as equal in arbitration proceedings and both parties are granted an opportunity to present their positions.

Therefore the best solution would be to have the servers and manpower administrating the online arbitration system in one state that is also arbitration friendly, to avoid any legal problems that might arise. Estonia would be a great option.

3.2 Requirement of Formalism

In traditional arbitration, almost all national laws and international agreements require that the arbitration clause or agreement must be in writing and must be signed by the parties involved.\(^{26}\) The main problem of online arbitration with regards to the enforcement issues are mainly formal requirements in conventions. New York Convention of 1958 anticipates arbitration agreement to be in writing, but in a wider scope as provided in a separate definition. Therefore, arbitration agreement may be concluded even by the "exchange of letters or telegrams".\(^{27}\) In academic literature, using liberal interpretation, it has been argued, that there is an internal similarity between telegram and email and that such liberal interpretation would be fully in line with the original intent of the drafters. Subsequent history of the international legal framework certainly proves so.\(^{28}\) To this day, the basic legal instrument, New York Convention of 1958, remains unaltered, even though several discussions took place as to the amendment of the Convention. Although the backbone remains still the same (New York Convention of 1958), recent means of communication are generally recognized in the arbitration community.\(^{29}\) As for example in Estonia – pursuant to Code of Civil Procedure, An arbitral agreement must be entered into in a format which can be reproduced in writing. An arbitral agreement may also be contained in a written confirmation.\(^{30}\) According to the General Part of the Civil Code Act explains, if the format which can be reproduced in writing is prescribed for a transaction by law, the transaction shall be entered into in a format enabling repeated written reproduction and shall contain the names of the persons entering into the transaction, but need not contain hand-written signatures.\(^{31}\) Section § 80 states, that a transaction in electronic format is deemed to be equal to a transaction in written format unless otherwise provided by law and also it should be

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\(^{26}\) Sami Kallel, Online Arbitration, page 348
\(^{27}\) Slavomir Halla, Arbitration Going Online – New Challenges in 21st Century?, page 222
\(^{28}\) Ibid., page 222
\(^{29}\) Ibid., page 221
\(^{30}\) Code of Civil Procedure, section § 719 (1)
\(^{31}\) General Part of the Civil Code Act, section § 79
emphasized, that in order to comply with the requirements for the electronic format, a transaction shall be electronically signed by the persons entering into the transaction.\textsuperscript{32}

As appears, in Estonia, an arbitral agreement can be made in an electronic form. But the key point is, that it must be electronically signed. Therefore, the arbitration clause or agreement can’t be replaced by the "click-wrap contract" where an arbitration offer is included in a virtual adhesion contract and the user's acceptation of this contract is simply expressed by clicking on the "click here if you accept" icon. Electronic signing is needed, as brought out in our project.

3.3 Arbitral Award

As pointed out previously, at present, international commercial arbitration laws and most national commercial arbitration laws recognise the legal validity of arbitration agreements in electronic form, unfortunately, arbitral awards are still required to be in writing.\textsuperscript{33} In many national and international laws the award is not required to be in writing; however, in case of an enforcement claim, the claiming party should provide the original of the award or a certified copy of it. In legal literature, it has been said that this condition does not seem to be possible on the Web since virtual arbitration lacks written support. In order to overcome this difficulty, it has been recommended that the arbitrator who has electronically rendered his decision sends the text of the decision in writing to both parties with his signature on it.\textsuperscript{34} Enforcing a court decision or in case of arbitration – an arbitral award – electronically is not something unusual or new in Estonia. Thanks to the fully automated court processes and electronic communication tools between courts and parties, Estonia has one of the most effective court system in the World. The e-Court system is fully comprehensive system for the court proceedings management from the beginning until the end. The solution is implemented for the Estonian courts under the Ministry of Justice and since 2015 all of the proceedings can be held paperless.\textsuperscript{35} Therefore in Estonia, an electronic arbitral award would be all that is needed to enforce the claim. But in other cases/countries that don’t accept court decisions and arbitral awards in electronic form, the ODR would issue a written and signed decision, as suggested above.

\textsuperscript{32} General Part of the Civil Code Act, section § 80
\textsuperscript{33} Chinthanka Liyangae, Online Arbitration Compared to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature, page 186
\textsuperscript{34} Sami Kallel, Online Arbitration, page 349
3.4 Pros and cons when comparing offline arbitration to an online platform

Although there is a difference between ADR and online ADR dispute resolution mechanisms, which is obviously the use of the internet as a medium to conduct the proceedings of the former, such difference should neither be overestimated nor underestimated.36 It should not be overestimated because OADR is essentially a change in venue rather than in approach. The online ADR process does not differ very much from the offline process, except for the fact that another form of communication, i.e. the internet, is used rather than face-to-face procedures. ADR has evolved with the development of commerce, and online ADR will refine ADR rather than making any radical new departures. Online ADR would thus not represent a major shift, and the choice for the parties between online ADR and ADR would be dictated by considerations of economics and convenience, informed by the relative importance that they ascribe to face-to-face interaction.37 Therefore the pros and cons of online arbitration arise from the fact that the arbitration process takes place in the virtual world.

While the characteristics of the space in which parties meet is not very integral to the success of ADR, the nature and design of virtual space in which online ADR occurs is extraordinarily important if not critical. This is due to the fact that the nature of the online space will shape how expertise is delivered and the manner in which the parties will be able to interact.38 Therefore the virtual space in which the online arbitration system operates must be secure and trusted by the parties. That is obviously a technical question, not a legal question. Basically it comes down to the part of concerns that arise or can arise with online dispute arbitration that have been addressed in the current paper.

There also is a clear legal question or a problem that can arise – it’s the question about fair trial. The concept of a fair trial comprises the fundamental right to adversarial proceedings. According to the European Court of Human Rights, the desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle as the right to adversarial proceedings. The right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service,

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36 Haitham A. Haloush & Bashar H. Malkawi, Internet Characteristics and Online Alternative Dispute Resolution, page 332
37 Ibid., page 332
38 Ibid., page 333
with a view to influencing the court’s decision.  

Although arbitration is largely a process in which information is obtained and evaluated unlike mediation, which generally involves a complicated series of interactions between neutrals and parties-arbitration is a much less complex communications process. Arbitration proceedings may be based only on the exchange of pleadings, evidence, and other written stages. The human factor may not be important in online arbitration as the face-to-face hearing may not even be necessary. Besides, whereas mediation seeks to improve communication between the parties and therefore requires sophisticated tools of communication, adequate software that allows positions to be stated and documents to be shared may provide a sufficient frame for online arbitration. That said, it is important to recognize that, if the appropriate tools of communication in arbitration are unavailable and the relevant arguments and evidences cannot be adduced by other appropriate means, the arbitration runs the risk of violating fair process. Therefore the technical design and the structure of our proposed ADR system – Online Dispute Arbiter – is essential to the successful realization of it. If those requirements are not met, then it clearly is a serious negative aspect when comparing such system with offline arbitration. The other drawback recognised in the ODR literature is the vulnerability of consumers in terms of knowledge and experience compared with powerful business people: online business people are termed 'repeat players'.

As mentioned previously, the principal difference between offline and online ADR (online arbitration) is the use of internet as a medium to conduct the proceedings. The pros of this are evident: less time-consuming, faster, easy to use (presupposes that the online platform is user-friendly) and less expensive – to name the main arguments.

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40 Haitham A. Haloush & Bashar H. Malkawi, Internet Characteristics and Online Alternative Dispute Resolution, page 342
41 Chinthaka Liyanage, Online Arbitration Compared to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature, page 188
4. Amending existing law

4.1 Permanent arbitral tribunals in Estonia

The decisions of ODA should be final and easily enforceable. One obstacle concerning enforceability is in the Estonian Code of Civil Procedure. Paragraph 753 subsection one of the aforementioned code, where is stipulated, that a decision of an arbitral tribunal is recognised in Estonia and enforcement proceedings based on the decision of the arbitral tribunal are carried out only if the court has recognised the decision and declared the decision to be subject to enforcement. A decision made in a proceeding of a permanent arbitral tribunal operating in Estonia is subject to recognition and enforcement without separate recognition and declaration of enforceability by the court. The supreme court of the Republic of Estonia has found in a decision made in the civil case no 3-2-1-142-15\(42\), that there is no state system in Estonia, which would enable to verify the courts that operate on a permanent basis. Estonian legislation does not contain criteria for permanent arbitration courts. This excludes the possibility that the court bailiff could decide which decisions are made by a permanent arbitration court. [p15]

Since ODA is proposed as a permanent arbitration court, that provides easily enforceable decisions for the parties to its proceedings, then it is proposed that the Estonian Code of Civil Procedure would be amended and a regulation would be issued by the Minister of Justice. Firstly, § 753 subsection one of the Estonian Code of Civil Procedure would be amended in accordance with § 34 of Rules for Good Legislative Practice and Legislative Drafting. An additional third sentence would be added after the current provision: “The naming procedure and list of permanent arbitral tribunals shall be established by a ruling of the minister responsible for the area.”\(43\)

The minister responsible for the area is the Minister of Justice. The ruling would contain two main subparts. It would contain the list of permanent arbitral tribunals (including ODA) and the criteria for including an arbitral tribunal to the permanent arbitral tribunal list.

\(42\) RKTKo 3-2-1-142-15

\(43\) In Estonian: “Alaliselt tegutsevate vahekohtute nimetamise korra ja nimekirja kehtestab valdkonna eest vastutav minister määrasega.”
4.2 Arbitral agreement

As mentioned previously in the paper, the Estonia’s legislation does not support our proposed "click-wrap contract" system. Firstly, the relationship between the European jurisdiction regime and arbitration in general is one of the areas generating confusion and disputes. The Brussels I Regulation clearly excludes arbitration from its scope to avoid conflicts with the New York Convention, but arbitration-related issues, such as the validity of arbitration agreements, either as an independent claim or an incidental question, frequently arise in courts.\textsuperscript{44} Secondly, the New York Convention itself is not an obstacle for click-wrap contracts. For example in the United States of America, it is fairly well established that such agreements can be enforced and are also often used.\textsuperscript{45} So it clearly shows, that this question is a matter of national law and EU law, because the parties are allowed to challenge an arbitration agreement in any Member State. Subject to national law, parallel proceedings may exist not only between courts but also between courts and arbitral tribunals.\textsuperscript{46} Therefore Estonia’s Code of Civil Procedure needs to be amended and also there has to be a European Union level regulation to eliminate all kinds of confusions and disputes that the current relationship between the European jurisdiction regime and arbitration in general has generated.

In order to enable a “click-wrap contract” system, § 719 subsection 2 of the Estonian Code of Civil Procedure must be abrogated, because the subparagraph stipulates, that if a consumer is a party of an arbitral agreement, such agreement shall be set out in a document bearing the handwritten or digital signature of the consumer. “Click-wrap” agreements are not in accordance with this requirement, because they do not constitute a hand written or digitally signed agreement. There would be a hypothetical issue, that the abrogation would be abused to involve third parties in bad faith, but that can be overcome with an establishment action brought by the third party to the civil court.

\textsuperscript{44} Neil Dowers and Zheng Sophia Tang, Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal, page 125
\textsuperscript{45} Steven C. Bennett, Is Binding Arbitration Just A Click Away: The Use of Click-Wrap Arbitration Clauses in E-Commerce, page 124
\textsuperscript{46} Neil Dowers and Zheng Sophia Tang, Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal, page 145
CONCLUSION

In this IT Law Lab project we proposed an online arbitration system – Online Dispute Arbiter – which enables a provider of information society services (hosting services and the like) to choose an alternative for dispute resolution. We established, that ODA’s purpose is to help consumers and traders resolve their contractual disputes about online purchases of goods and services and to resolve intellectual property disputes. We laid down the principles and guidelines how this system would operate and work in legal aspects. This project’s aim was not to propose the technical solution for such online arbitration system (working web platform for example), but to propose and analyse the system from a legal point of view. We concluded, that such system can be executed and there are no major or fundamental legal obstacles – although, as we pointed out, some amendments to the existing laws has to be made.
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