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Enforcement, Recognition, and Compliance with OADR Outcome(s)

HAITHAM HALOUSH

ABSTRACT   Electronic commerce is important, and perhaps, inevitable. Thus to consider the legal implications of enforcement, recognition and compliance with online alternative dispute resolution (OADR) is essential. However, in analysing enforcement, recognition and compliance with OADR, one must contemplate primarily the value of fair process which OADR solutions are subject to, and the value of efficiency which OADR solutions are seen to achieve. Without which the OADR outcome(s) will be cast in doubt.

Clearly, there is no point in discussing applicable remedies to internet disputes without promoting at the same time appropriate enforcement mechanisms. From this perspective, OADR could be viewed as an exercise in futility if there is no efficient mechanism in place to enforce the outcome(s). Indeed, access to justice is only meaningful where the outcome(s) of the OADR proceedings can be enforced.

Enforcement of OADR outcome(s) poses no problem when it is in the interest of both parties to fulfil their agreement. However, the enforcement difficulties associated with global networks may suggest that enforcement can be best achieved through technological measures. In fact, where small amounts of money are involved, as it is the case in most internet disputes, and where an e-business, most probably, will have no assets within the jurisdictional reach of the internet user, providing some other means to minimise the problem of enforceability, such as technological measures, becomes pressing. In advancing this issue, this article will find out whether the internet itself, without governmental back up effort, can be viewed as an effective enforcement tool in cyberspace. However, accountability in OADR may be based around institutional arrangements and not the medium, i.e., the internet. Consequently, where appropriate, this article will proceed to discuss the
governmental role in OADR enforcement through its court system, since enforcement in OADR schemes might depend on having a contract or award that would be recognised by a court of law.

This article concludes that at present, enforceability of outcome(s) is the weakest point of OADR procedures. Thus, it is important to recognise that in the modernisation of the ADR procedures in the form of OADR, one must take care not to diminish its legality.

Introduction

With international e-commerce growing constantly, stability of expectation in both the resolution and enforcement of electronic disputes is critical. Clearly, there is no point in discussing applicable remedies to internet disputes without promoting at the same time appropriate enforcement mechanisms. From this perspective, online alternative dispute resolution (OADR) could be viewed as an exercise in futility if there is no efficient mechanism in place to enforce the outcome(s). Indeed, access to justice is only meaningful where the outcome(s) of the OADR proceedings can be enforced.

Enforcement of OADR outcome(s) poses no problem when it is in the interest of both parties to fulfil their agreement. It may be suggested therefore that OADR requires no enforcement mechanisms because its enforcement comes from the willingness of the parties to abide by it.

Enforcement of OADR agreements is somewhat artificial because the essence of OADR is that the parties agree to the solution and that in most cases this in itself gives force to the solution agreed. In actual fact, the flexibility of OADR overcomes many of the difficulties associated with enforcement. In OADR, parties can set out their relevant rules of enforcement depending on their needs and interests. Structures through which the parties reach their own resolution, such as OADR, reduce the need for complicated enforcement mechanisms. Indeed, the primary purpose of an online alternative dispute resolution model is to help disputants reach amicable, consensus building and value creating agreements on their own without need of sanctions or enforcement.

However, the enforcement difficulties associated with global networks may suggest that enforcement can be best achieved through technological measures. In fact, where small amounts of money are involved, as it is the case in most internet disputes, and where an e-business, most probably, will have no assets within the jurisdictional reach of the internet user, providing some other means to minimise the problem of enforceability, such as technological measures, becomes pressing.

In advancing this issue, this paper will find out whether the internet itself, without governmental back up effort, can be viewed as an effective enforcement tool in cyberspace. This will become of particular importance in the analysis of OADR enforcement because of the internet’s enforcement capabilities as a medium to conduct the proceedings of alternative dispute resolution (ADR). Therefore, entirely new concepts regarding the enforcement of OADR outcome(s) could be effectuated within the internet itself, such as, the employment of online codes of conduct as an enforcement tool of OADR outcome(s) and the employment of online disconnection or exile of the rule breakers as enforcement tool of OADR outcome(s). This paper will discuss these two issues separately.

However, accountability in OADR may be based around institutional arrangements and not the medium, ie the internet. This is particularly true in complex societies engaging
in large scale exchange such as online marketplace. Without institutional constraints, the enforcement of OADR outcome(s) might pose severe problems. Besides, the enforceability of an OADR outcome(s) might be a problematic issue if procedures are not fair and do not comply with fair process.\(^1\)

Consequently, where appropriate, this paper will proceed to discuss the governmental role in OADR enforcement through its court system, since enforcement in OADR schemes might depend on having a contract or award that would be recognised by a court of law.

**Online Codes of Conduct as an Enforcement Tool of OADR Outcome(s)**

A seal or trust mark is displayed by companies or individuals that meet the standards of a code of conduct, to be awarded by respected self-regulation organisation. This organisation initially and then periodically performs quality control on the compliance with its code of conduct. In this scenario, OADR schemes are linked to the seal displayed at the trader web site, and the organisation which has awarded the seal will immediately take away the seal if a company does not comply with the outcome of OADR. This fact could be made a part of the seal company’s reliability report and made available to consumers making pre-purchase inquiries. Indeed, if disputes do occur, the connection of an OADR mechanism to a code of conduct will ensure the implementation of OADR outcome(s) because the incentive is in this case created by the possible removal of the trust mark.\(^2\)

For example, the Better Business Bureau (BBB) Online Reliability Program includes over 4300 trust mark holders engaged in online commerce, encompassing almost 6000 web sites. This is the largest trust mark program on the internet. The subscribers are contractually committed to a set of standards, which require among other things that the online company must conform to BBB dispute resolution mechanisms that utilise OADR schemes. The BBB Online Reliability Program will immediately take away the seal if a company does not comply with the outcome of the OADR mechanisms.\(^3\)

Similarly, the ‘Squaretrade’ seal program commits a merchant to participate in OADR process if a problem occurs. It costs around US$7.50 per month and currently attracts several thousand new members each month.\(^4\)

In actual fact, legal adjudication and sanctions play an important role in the formation of trust, but it is at most a subsidiary role. Legal sanctions rarely make a significant contribution to the construction of trust and the invocation of the legal process can damage perceptions of trustworthiness. It is when trust based on reputation or course of dealing initially is absent or breaks down that legal sanctions can provide indispensable security.\(^5\)

Codes of conduct are multiplying rapidly on the internet in order to ensure good business practices and thus help to safeguard consumer interests and build their confidence.\(^6\) In actual fact, by its nature, a code of conduct is a means of preventing disputes from occurring in the first place because it could serve as a governance mechanism capable of assuring trustworthy behaviour.

Article 16 of the European Directive on Electronic Commerce urges national governments to encourage the drawing up of these codes by trade, industry, professional and consumer organisations. Article 16 reads as follows:

(1) Member States and the Commission shall encourage: (a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or
organisations, designed to contribute to the proper implementation of Articles 5 to 15; (b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission; (c) the accessibility of these codes of conduct in the Community languages by electronic means; (d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce. (2) Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1 (a).

That said, it must be pointed out that there are several drawbacks with codes of conduct as an enforcement tool of OADR outcome(s). Henry Perritt argues that online self-enforcement models that employ social pressure, such as online codes of conduct, cannot be completely successful because these mechanisms have not contemplated the lack of person-to-person contact and the scope of the electronic marketplace. Self-enforcement models that employ social pressure are likely to work only when attributes of real social communities exist. Such attributes do not exist on the internet.

Ethan Katsh, Janet Rifkin and Alan Gaitenby have reached the same conclusion by stating that the argument that codes of conduct in the internet that seek to implement OADR programs can amount to enforcement efforts is flawed.

The significance of the removal of the trust mark, as an incentive for the implementation of OADR outcome(s), would actually be difficult to assess because the value of a trust mark for a web site is not easy to evaluate. Besides, several online businesses might provide different seals. This may result in confusing the consumers. This is duplicated by the fact that there is no set of benchmarks by which the consumers can judge the relative merits of such initiatives. As a result, there is a risk that general acceptance of codes of conduct will be undermined by substandard codes of conduct.

In actual fact, control is necessary in codes of conduct. It is important to create a mechanism which ensures that a seal is not artificially placed on a web site and to ensure no fraudulent reuse of the seal. However, it is not difficult, by using available technology, to imitate the appearance and behaviour of trust marks, and displaying a code subscriber’s membership of a code, both by non-members and by members whose status has lapsed. Overcoming the problem of initial trust is one of the greatest barriers for merchants, especially small and medium-sized enterprises (SMEs), to successfully enter the online market. Codes of conduct cannot overcome the problem of lacking initial trust in online businesses, because they usually require a merchant to be in business for a certain time before it can be considered for the reliability seal. For example, BBB Online requires a merchant to be in business for at least a year before it can be considered for the reliability seal.

Online Disconnection as an Enforcement Tool of OADR Outcome(s)

Henry Perritt argues that control over a valuable resource by private persons or entities can become a source of private regulation because such a private entity has the authority to exclude others from a resource and to regulate the access and use of the resource. In other words, resource control generates a self-enforcing regime. For example, the authority of the Internet Corporation for Assigned Names and Numbers (ICANN) over
domain name holders does not derive so much from its legal status than from the control by ICANN of the resource that is valuable to the domain name holders, ie the access of the web pages of a domain name.  

Similarly, Colin Rule argues that one of the reasons for the success of the ICANN uniform domain name dispute resolution policy (UDRP) is the fact that it is self-executing, ie the UDRP provides for its own mechanism for enforcement of the final panel’s decisions. ICANN possesses the electronic enforcement tool for decisions rendered by arbitrators due to its control of the database that converts domain names into Internet Protocol (IP) addresses. This enforceability is uniquely achievable because the parties who wish to use domain names cannot do so without accepting the terms and conditions of UDRP which utilises OADR. Indeed, given the character and the subject of domain name disputes, the possible solution of the conflict, which would be either the rejection of the complaint or the transfer of the respective domain name, can be enforced quite easily because the enforcement would be carried out by private authorities without the intervention of public authorities.  

As a result, although the online disconnection as an enforcement tool of OADR outcome(s) lacks the binding force from a legal standpoint because it does not result from the command of a sovereign as it has not been enacted by Parliament or endorsed in an international convention, it has a mechanism of coercion to obtain compliance with the rules from a technical standpoint.  

That said, online disconnection as an enforcement tool of OADR outcome(s) must be viewed in a wider context than ICANN policy. Generally speaking, the internet has participated largely in the globalisation of trade practices in the form of e-commerce, but it is impossible to take advantage of the context of online marketplace and the rules for participating in this marketplace to enforce compliance. For example, in a large marketplace such as E-bay, it may be important that eviction from the business of the marketplace would carry heavier economic consequences than abiding by an unfavourable decision of an OADR provider. This solution, however, would hardly work with one-shot players who are always capable of changing their online identity.  

Besides, there is less control and less conformity in the online world. For example, exclusion of the online world does not mean the end of the e-business. This can never be the case in an open commercial structure such as the internet. Electronic commerce is characterised by its high degree of autonomy. Online merchants can be manufacturers, marketers and distributors of their products or services at the same time. This is especially the case with regard to merchants providing services or information, which can be intangible and self-generated. Clearly, cyberspace reduces costs associated with the distribution of information, thus encouraging growth in information distribution activities. In actual fact, there is an inherent logic in using the internet to buy and sell such products that need never be more than digital bits. One of the unique aspects of electronic commerce is that, unlike transactions involving physical goods, delivery of digitised information products such as software, movies, music, can be accomplished entirely within the network itself. Already, the largest segment of B-to-C electronic commerce involves intangible products that can be delivered directly over the network to the consumer’s computer. There are five categories encompassing the range of intangible products in this segment: entertainment, travel, newspapers and periodicals, financial service and electronic mails. As a result, the dependency and interdependency on suppliers, distributors, trading partners, or entrance to physical trading places diminishes.
At this stage, it seems appropriate to discuss the role of internet service providers and domain name registration authorities in the online disconnection model as an enforcement tool of OADR outcome(s).

The Role of Internet Service Providers and Domain Name Registration Authorities in the Online Disconnection Model as an Enforcement Tool of OADR Outcome(s)

The history of dispute resolution in a given new territory often starts out as a right given to the owner of that territory. Internet Service Providers (ISPs) and Domain Name Registration Authorities could be perceived as the owners of cyberspace because the internet is a decentralised law making power model, where the ISPs and Domain Name Registration Authorities, rather than territorially-based states, become the essential units of governance. In effect, internet users consent via contracts with ISPs and Domain Name Registration Authorities to delegate the task of rule making to them and confer sovereignty on them. The aggregate of the choices made by ISPs and Domain Name Registration Authorities about rules to impose and internet users’ ability to move into and out of these distinct rule-sets is a powerful guarantee that the resulting distribution of rules is a just one. In this scenario, the Law of the Internet emerges, not from the decision of some high territorially-based authority, but as the aggregate of the choices made by ISPs and Domain Name Registration Authorities about what rules to impose, and by internet users’ ability to move into and out of these distinct rule-sets. In effect, the task of rule making is delegated by internet users to ISPs and Domain Name Registration Authorities where users can choose among these ISPs and Domain Name Registration Authorities.  

Besides, given that in very many cases where the law have to deal with large numbers of individuals, such as internet disputes, the attempt is made to require some third party to act in an intermediary category, and given that an individual wishing to obtain access to the electronic commerce world is generally required to act through the agency of an ISP or a Domain Name Registration Authority, it can be said that failure to comply with OADR outcomes could be a basis for those who facilitate the electronic business’ sales, such as ISPs, to deny future services to that business, and for those who facilitate the electronic business’ existence on the internet, such as domain name registration authorities, to place infringing domain names on hold status, which means the restraint of the use of the domain name and making it unavailable to either party, ie trademark owner and domain name holder, pending resolution of the dispute.  

In fact, ISPs can exile any party failing to comply with an OADR outcome(s) in domain name disputes because, in order to register a domain name with a domain name registrar, the applicant has to file an application which would state inter alia certain technical information about how internet traffic to that domain name will be handled. Typically this requirement is satisfied by listing an ISP who has agreed to receive internet traffic in the name of the applicant.  

ISPs can also restrict access to the challenged domain name, and failure to comply with OADR outcomes could be a basis for the transfer or revocation of the domain name. Clearly, ISPs could be the enforcing arm for a third party neutral decision, through temporary suspension or, preventing the domain name holder use of the domain permanently, or even through considering the disputed web site as not a valid internet connection. Indeed, ISPs have an extremely powerful enforcement tool at their disposal.
ISP can even serve as the functional equivalent of local government enforcement agencies to ensure that sanctions against wrong-doers are carried through.\textsuperscript{19}

In this regard, the \textit{Virtual Magistrate}, an OADR provider, has stated that any ISP may require users to refer complaints to the \textit{Virtual Magistrate} arbitration program and, as an ISP, to take actions consistent with the decision of the arbitrator(s) in order to support the enforcement of the decision.\textsuperscript{20}

Similarly, the World Intellectual Property Organization (WIPO) in its Final Report on the Management of Internet Domain Names and Addresses has endorsed direct enforcement of decisions by ISPs. It has provided that ISPs should take the necessary action to implement an OADR provider determination, eg cancellation of the domain name registration or its transfer to the trademark owner.\textsuperscript{21}

That said, there are three points that must be made clear in this context. First, ISPs are owners or managers of systems on which information distribution activities take place. They provide the accounts, software and other means that allow one to engage in such communicative activities. However, although they may not have any control over or involvement in these activities, they may be held liable for the action of their subscribers. ISPs face a difficult choice when their subscribers, or third parties, bring to their attention allegations of certain communications appearing on their system, such as, trademark infringement, and therefore, exposing them to possible liability. There is a risk of liability if they leave such communication appearing on their system unmodified, ie do nothing, where then complainant’s claim of injury turns out to be a valid claim. There is also a risk of liability if they delete such communication appearing on their system, where then the complainant’s claim of injury turns out to be an invalid claim. It would seem rather unjust to hold ISPs liable for any information that happened to pass through their system. The volume of internet traffic is such that no ISP could check the contents of all information without imposing a severe bottleneck on the system and effectively halt traffic. Indeed, were such an obligation to be imposed then the internet and e-commerce would cease to expand.\textsuperscript{22}

Equally, as domain names have become valuable properties, there has been growing conflict over the rights to these names, and over who has the rights to create them. Many of domain name disputes have involved the organisations responsible for the registration and administration of domain names, exposing them to potential liability and complicating their task of running the domain name registration process. Therefore, Domain Name Registration Authorities have devised policies in the attempt to limit their exposure in these disputes. For example, Article 3 (b) (xiv) of the Rules for Uniform Domain Name Dispute Resolution Policy (the “Rules”) states that:

Complainant agrees that its claims and remedies concerning the registration of the domain name, the dispute, or the dispute’s resolution shall be solely against the domain-name holder and waives all such claims and remedies against (a) the dispute-resolution provider and panelists, except in the case of deliberate wrongdoing, (b) the registrar, (c) the registry administrator, and (d) the Internet Corporation for Assigned Names and Numbers, as well as their directors, officers, employees, and agents.\textsuperscript{23}

Also, Article 6 of the ICANN Domain Name Dispute Resolution Policy (UDRP) states that:
We will not participate in any way in any dispute between you and any party other than us regarding the registration and use of your domain name. You shall not name us as a party or otherwise include us in any such proceeding. In the event that we are named as a party in any such proceeding, we reserve the right to raise any and all defences deemed appropriate, and to take any other action necessary to defend ourselves.  

However, Domain Name Registration Authorities’ dilemma is not distinctively different from that of the ISPs. If a name is retained following a challenge from a trademark owner, there is the possibility that the trademark owner may regard the Domain Name Registration Authority as jointly liable with the domain name holder, and if the name is withdrawn following a complaint, an action may be brought by the domain name holder alleging an intentional interference with a prospective business advantage through the potential usage of the disputed domain name.  

Second, insofar as a consensual based model of enforcement on the internet needs to obtain deference from local sovereigns, ISPs and Domain Name Registration Authorities must avoid fostering activities that threaten the vital interests of territorial governments. This is not feasible because effective enforcement regimes would be endangered when only technical standard setting is involved because linkage to state-based coercive power is needed in order to ensure fair process. For example, although ISPs can deny future service to a fraudulent electronic business, theoretically speaking, it cannot determine the legal aspect of a dispute. In the context of domain names disputes, the deployment of technical standards only would be limited to determinations of the status of the contested domain name registration through appropriate changes to the domain name database, and thus, domain name registration authorities are not concerned with the validity of trademark infringement. As a result, domain name registration authorities should not decide by itself when to cut off a domain name, instead, such decisions should come only from competent bodies. Indeed, given that an internet domain name is the personal property of a domain name owner, there should be fair process prior to its taking or placing it on hold because such practice could have disastrous consequences for successfully established e-commerce enterprises.  

Third, the emphases on the role of ISPs and Domain Name Registration Authorities, by contemplating the use of disconnection, denial or termination of access to the internet and/or domain names, will be ineffective because rule violators, due to technical nature of the internet, can find easily alternative internet access that is beyond the reach of the ISPs and Domain Name Registration Authorities. Henry Perritt, a leading author on OADR, has put it as follows: ‘It is as painless as calling one telephone number instead of another.’  

In the same context, the OECD has noted that:

The internet’s anonymity, mobility, and global reach, all worked to substantially increase the potential for harm because the identity and the actual physical location of the people behind it will generally be very hard to track.  

As a result, enforcement regimes that involve only technical standard setting will not, in practical terms, deter cyber disputes, and thus, undermine the trust in OADR solutions entirely. It must be borne in mind however that although technical measures obviously cannot resolve legal issues, they can help to enforce certain rules, constraints and responsibilities. Besides, it must be borne in mind also that although the crystallisation of such a route of technical measures of enforcement of certain rules, constraints and
responsibilities would require an extraordinary degree of co-operation that is not feasible at present, one must be careful not to dismiss the idea that this problem might be eased by some sort of technological improvement in the future.\textsuperscript{29}

In the meantime, it is clear that the concept of establishing a network of ISPs and Domain Name Registration Authorities and internet users who could exile any party failing to comply with an OADR outcome, as a route of enforcement, is at the present time aspirational rather than rational. What is certain at this stage is that the role of ISPs and Domain Name Registration Authorities in the online disconnection model as an enforcement tool of OADR outcome(s), without governmental back up effort, cannot be viewed as a sole guarantor to achieve accountability and bring enforcement in OADR schemes, and thus, encourage the growth of e-commerce.

The Role of the Court System in the Enforcement of OADR Outcome

Private groups are able to resolve disputes privately, but for enforcement, they usually rely on governmental effective enforcement mechanisms. For instance, the successful history of private arbitration shows that adjudication may be conducted by private entities but subject to governmental effective enforcement mechanisms, particularly, when the power of the state is sought to back up decisions by the private adjudicative bodies since arbitrators have very few coercive powers in the event of default in compliance with their orders. In fact, for the most part the arbitrators are dependent on the court’s exercise of its supportive powers to secure compliance with their orders. Clearly, the quality of the processing performed by the arbitration tribunal appointed by the parties is very important with respect to admissibility of the arbitration award by national judges. Enforcement in arbitration would depend on having an award that would be recognised by a court of law. On the one hand, the recognition of an award is a shield; this means that the arbitration ruling will operate as a \textit{res judicata} bar in subsequent national court litigation. The enforcement, on the other hand, is a sword—this means that a national court will treat the arbitration ruling as a valid judgement, for example, it would execute the judgement against the assets of a non-compliant party.\textsuperscript{30}

In cyberspace, enforcement in courts would require the legal recognition of OADR outcome(s). OADR schemes will not be acceptable in the long run unless they are backed up by governmental effective enforcement mechanism through court system because they present real protection.

Unless national courts recognise the OADR process as valid, the OADR is ineffectual and may be seen as an exercise in futility. A theoretical perspective based on academics’ views that confirms the importance of the courts’ recognition of OADR outcome(s) would ensure that OADR will not to be seen as an exercise in futility. Besides practical knowledge and experience with the importance of courts’ recognition of OADR outcome(s) would ensure that OADR will not to be seen as an exercise in futility.

The outcomes of an OADR process may constitute settlement proposals that have to be accepted by the parties, such as electronic mediation, or may be binding on the parties, such as electronic arbitration. By definition, electronic mediation is not binding and electronic arbitration is binding. As a result, one has to think in two different ways because there are two different kinds of electronic documents to be enforced; there are electronic mediation settlements and there are electronic awards. Both have to be dealt with differently in national and international settings.
In mediation, coercion plays no role whatsoever in the effort to resolve disputes. In the mediation process, at no point are participants obligated to do anything against their will and the process is voluntarily from beginning to end. Mediation needs the consent of all parties in order to be binding. As a result, it has been argued that the strength of mediation is that nothing is imposed on parties, which eliminates enforcement issues. The underlying theory of mediation is that parties who freely and equally come to mutually satisfactory and beneficial agreement will also be committed to carrying out the agreement. Indeed, mediation settlements are self-enforcing in the sense that the parties have agreed voluntarily to their implementation. Besides, it must be stressed that a resolution arising out of mediation is binding to the extent that the parties want it to be. This means that the parties can agree to certain enforcement mechanisms. They can even structure their deal to minimise opportunities for non-compliance. The neutral also can facilitate the structuring of an agreement with mutual incentives aimed at maximising compliance.

However, it must be borne in mind that if parties reach a settlement agreement in mediation, it can be legally binding as a contract and is enforceable in that capacity. In other words, if the parties agree to a settlement, where their consent may constitute a contract, such a settlement will, in general, be analysed as a contract. If an agreement made in mediation is breached this may give rise to another dispute which the parties may refer to mediation, arbitration, or litigation as they have agreed or as they see fit. For instance, where a party to a signed agreement of mediation fails to comply with its terms, the other party to the agreement may make a motion to a judge for judgement in the terms of the agreement, and the judge may grant judgement accordingly.

In arbitration, the enforcement could be generally easier than mediation. At a national level, arbitration, as an established legal practice, is recognised by many national jurisdictions. In the context of arbitration, the court intervention in arbitrator’s decision is one of the perplexed issues in arbitration because of the increased sensitivity of arbitral independence and finality. Consequently, a party’s ability to invoke the jurisdiction of the court in defiance of an agreement to arbitrate is undesired.

In England, there is a public policy in courts against reopening issues already determined by the arbitrators. The general view was that since the parties had entrusted their dispute to the adjudicator of their choice on issues of both fact and law they took the chance of error and should not be allowed further bites at the cherry. Besides, courts have an interest in avoiding the business of reviewing arbitration agreements. This goal is best accomplished by setting the precedent of upholding arbitration agreements that meet minimum standards of fair process. Generally, English courts respect arbitration agreements and see them as a way to avoid possibly unnecessary and costly litigation, and, therefore, they want to further arbitration goals of efficiency and cost effectiveness. If arbitral tribunals are too often required to resort to court upon indeterminate points of law, this practice may amount to a rehearing of the case already decided by the arbitrators and too often it necessitates the case being remitted to them for further findings of fact. This is obviously against the philosophy of arbitration, which is basically to lessen the courts burden. If this practice is inevitable in certain circumstances, it is highly recommended that the use of this procedure should be severely controlled.

In the Parliamentary debate over the Arbitration Bill 1996, which became the Arbitration Act 1996, MP John Taylor (the Minister for Competition and Consumer Affairs) said, while introducing the Bill’s purpose in the improvement of the Law of Arbitration in England:
We propose to curtail the ability of the court to intervene in that private arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward. At the same time, we must uphold the integrity of the arbitral process by allowing access to courts where there has been or is likely to be a case of manifest injustice.  

In *Sanghi Polyesters Ltd. (India) v The International Investor (KCFC) (Kuwait)*, it has been noted that the finality and confidentiality of arbitration are lost if an award comes before the court for judicial review. Similarly, in *Danae Air Transport ASA v Air Canada*, English judges have enforced arbitration despite contract provisions that set out the recourse in permissive rather than mandatory language.

At an international level, the recognition and enforcement of foreign awards are regulated by New York Convention and notions of private international law. Binding arbitral awards are dealt with as if they were final judgements of a court in the envisioned state of enforcement. If litigation is commenced after arbitration has taken place it may be defended on the basis that the issues which have been arbitrated are *res Judicata*, i.e. they have already been adjudicated upon and cannot be re-opened. In actual fact, the award is even more binding than a court decree because, generally speaking, arbitration awards are open to judicial review in limited circumstances.

In England, the Arbitration Act 1996 re-enacts previous legislation (the Arbitration Act 1975), which implemented the New York Convention by incorporating into English law the provisions for the recognition and enforcement of awards contained in the New York Convention. This gives effect to the United Kingdom’s obligations under the New York Convention to which it is a party.

The Arbitration Act 1975 gave effect in the United Kingdom to the 1958 New York Convention. Section 3(1) of the Arbitration Act 1975 provided for the enforcement of the convention awards either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950.

Before that, part II of the Arbitration Act 1950 gave effect in the United Kingdom to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Part II of the Arbitration Act 1950 provided for the enforcement of foreign awards either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of this Act.

At present, part III of the Arbitration Act 1996, which consists of sections 99–104, deals with awards to which the New York Convention applies. Section 99 preserves part II of the 1950 Act, which provides for the enforcement of Awards under the Geneva Convention 1927. It has no application to awards that are New York Convention awards, which must therefore be enforced under sections 100–104. Nevertheless, because nearly all parties to the Geneva Convention 1927 are now parties to the New York Convention 1958, few awards will fall to be dealt with under the provisions of Part II of the 1950 Act. In this regard, Article VII (2) of the New York Convention 1958 provides that the Geneva Convention only remains in force as between state parties which have not subsequently become parties to the New York Convention. The Article reads:

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between...
Contracting States on their becoming bound and to the extent that they become bound, by this Convention.\textsuperscript{43}

Sections 100–104 of the Arbitration Act 1996 replaced provisions formerly in the Arbitration Act 1975. Sections 101 and 103 are of particular importance in part III of the Act. On the one hand, the first part of section 101 of the Arbitration Act 1996 provides that a New York Convention Award is recognised under English law as binding on the persons as between whom it was made. The rest of the section specifies how a party may either enforce such an award or rely upon it as a defence, set off or otherwise in any legal proceedings in England and Wales or Northern Ireland. Generally speaking, the enforcement can be sought directly under the section by applying for leave of the court to enforce the award in the same manner as a judgement or order of the High Court or a county court.\textsuperscript{44} Section 101 reads as follows:

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland. (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.\textsuperscript{45}

On the other hand, the basic premise of section 103 of the Arbitration Act 1996 is that a party seeking recognition or enforcement of a New York Convention award must have its application granted unless one or more of the circumstances set out in this section apply. In such a case, the court may refuse to recognise or enforce the award.\textsuperscript{46} Section 103 reads as follows:

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases. (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4)); (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.\textsuperscript{47}

That said, it must be pointed out that the ICANN uses a non-binding arbitration to resolve disputes. Either party may appeal to a court of competent jurisdiction before the mandatory proceeding has commenced, after such proceeding has concluded, and during the proceedings, subject to the panel’s determination as to what to do, including
termination. Article 4 (k) of the ICANN Domain Name Dispute Resolution Policy (UDRP) reads as follows:

The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be cancelled or transferred, we will wait ten business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel’s decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3 (b) (xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. (See Paragraph 1 and 3 (b) (xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel’s decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.48

Also Article 18 of the Rules for Uniform Domain Name Dispute Resolution Policy (the ‘Rules’) states that:

(a) In the event of any legal proceedings initiated prior to or during an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, the Panel shall have the discretion to decide whether to suspend or terminate the administrative proceeding, or to proceed to a decision. (b) In the event that a Party initiates any legal proceedings during the pendency of an administrative proceeding in respect of a domain-name dispute that is the subject of the complaint, it shall promptly notify the Panel and the Provider.49

The non-exclusivity of ICANN policy was confirmed in Broad Bridge v Hypercd.com.50 In this case, the Southern District Court of New York ruled that a trademark owner may at the same time commence arbitration proceedings under UDRP and litigation proceeding under the US trademark law.

In actual fact, according to some authors, UDRP lacks the finality of international arbitration because of its non-binding character, which is by definition, excludes recognition and enforcement under the New York Convention. This, in turn, might cause legal uncertainty and undermine confidence in the whole process of the OADR, which is utilised in UDRP, and thus minimise the growth of e-commerce.51

Conclusion

At present, enforceability of outcome(s) is the weakest point of OADR procedures. OADR outcome(s) enforcement cannot effectively rely on either particular incentive to
perform, such as online codes of conduct, or on a mechanism that allows an enforcement of the decision by private authorities, such as online disconnection. Instead, online codes of conduct and online disconnection might be viewed as two viable techniques that work at first level stages of enforcement. Consequently, given that the issue of enforcement in ADR schemes might depend on having a settlement agreement in mediation that can be legally binding as a contract, or an arbitration award that would be recognised by a court of law, it is important to recognise that in the modernisation of the ADR procedures in the form of OADR, one must take care not to diminish its legality. Consequently, ICANN may need to consider the use of binding arbitration in order to deal with domain name disputes.

Notes and References

10 Noll, *op cit*, note 6, p 213.
14 Katsh *et al*, *op cit*, note 9.
18 Ibid, p 1379.
20 http://www.vmag.org/.
30 Bordone, *op cit*, note 19, p 205.
32 Ibid, 115.
34 Ibid.
41 Ibid, p 425.
44 Sutton *et al*, *op cit*, note 42, p 402.
45 Section 101 of the Arbitration Act 1996.
46 Merkin *op cit*, note 42, p 265.
47 Section 103 of the Arbitration Act 1996.
48 Article 4 (k) of ICANN Domain Name Dispute Resolution Policy (UDRP), op cit, note 24.
49 Article 18 of the Rules for Uniform Domain Name Dispute Resolution Policy, op cit, note 23.