THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE ENFORCEMENT OF
ONLINE CONSUMER ARBITRATION AWARDS: EVIDENCE FROM AUSTRALIA
AND SRI LANKA

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A thesis submitted in total fulfillment
of the requirements for the degree of
Doctor of Philosophy

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<tr>
<td>AA</td>
<td><em>Arbitration Act of 1995</em></td>
</tr>
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<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<td>ACL</td>
<td>Australian Consumer Law</td>
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<tr>
<td>AFC</td>
<td>Australian Federal Court</td>
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<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<td>ASIC</td>
<td>Australian Securities &amp; Investment Commission</td>
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<td>Australian Guidelines</td>
<td>Australian Guidelines for Electronic Commerce of 2006</td>
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<td>B2B</td>
<td>Business to Business</td>
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<td>B2C</td>
<td>Business to Consumer</td>
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<td>C2C</td>
<td>Consumer to Consumer</td>
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<td>CA</td>
<td>Court of Appeal</td>
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<td><em>Consumer Affairs Authority Act 1993</em></td>
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<td>CAV</td>
<td>Consumer Affairs Victoria</td>
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<td>CCA</td>
<td><em>Competition and Consumer Act 2010 (Cth)</em></td>
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<td>CCP</td>
<td>Commonwealth Court Portal</td>
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<td>DSCV</td>
<td>Dispute Settlement Centre Victoria</td>
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<td>EADR</td>
<td>Electronic Alternative Dispute Resolution</td>
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<td>eCourt</td>
<td>Government-Sponsored Electronic Court</td>
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<td>EODRS</td>
<td>‘European Online Dispute Resolution System’</td>
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<tr>
<td>AETA</td>
<td>Australian <em>Electronic Transactions Act 1999 (Cth)</em></td>
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<td>SETA</td>
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<td>EU</td>
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<td>FCR</td>
<td><em>Federal Court Rules of 2011</em></td>
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<td>FRAL</td>
<td>‘Family Relationship Advice Line’</td>
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<td>FRO</td>
<td>Family Relationships Online</td>
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<td>G2C</td>
<td>Government to Consumer</td>
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<td>IAA</td>
<td><em>International Arbitration Act (Cth) of 1974</em></td>
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<td>ICALF</td>
<td>International Commercial Arbitration Legal Framework</td>
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<td>ICANN</td>
<td>Internet Corporation for Assigned Names and Numbers</td>
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<td>ICPEN</td>
<td>International Consumer Protection and Enforcement network</td>
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<tr>
<td>iDR</td>
<td>internet dispute resolution</td>
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<td>ICT</td>
<td>Information and communication technology</td>
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<td>IFR</td>
<td>Independent Feedback Review</td>
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<td>MSB</td>
<td>Mediator Standards Board</td>
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<td>National Alternative Dispute Resolution Advisory Council</td>
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<td>NMAS</td>
<td>National Mediator Accreditation System</td>
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<td>New York Convention</td>
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<td>ODR</td>
<td>Online Dispute Resolution</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>Victorian Civil and Administrative Appeals Tribunal</td>
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<td>VEOHRC</td>
<td>Victorian Equal Opportunity and Human Rights Commission</td>
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<td>WIPO</td>
<td>World Intellectual Property Organisation</td>
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ABSTRACT

The success of offline international commercial arbitration is driven mainly by the presence of an effective cross-border mechanism for the enforcement of binding international commercial arbitral awards. Most importantly, there is a well-designed legal framework to sustain this enforcement mechanism in a firm and consistent manner. The recent phenomenon of online consumer arbitration awards (OCAA) via private online arbitration mechanisms operated by private online consumer arbitration (OCA) providers is challenging. The reasons are the lack of appropriate regulatory and institutional frameworks for the enforcement of OCAA from both the government and private sectors, and the impact of OCA on the rights of online consumers. These issues can raise questions as to the effectiveness of the use of online arbitration (OA) as a viable dispute resolution mechanism for the resolution of business to consumer cross-border electronic commerce disputes (B2C e-commerce disputes).

The consequent research question central to this thesis is: how can the enforcement of OCAA be made more effective? In addressing this question, it is argued that a supportive government-sponsored regulatory and institutional framework in each country is important for strengthening the enforceability of OCAA; online consumer arbitration can then be viewed as a viable mechanism for business to consumer cross-border electronic commerce disputes. In support of this argument, this thesis further explores the merits of the international commercial arbitration legal framework (ICALF) and the use of a government-sponsored electronic court room (eCourt room) from a government’s regulatory and institutional perspective as an appropriate option for strengthening the enforcement of OCAA. Accordingly, the purpose of the thesis is to examine the related regulatory and institutional frameworks adopted by the Australian and the Sri Lankan governments, and to suggest the use of a government-sponsored electronic court room (eCourt) supported by ICALF and a consumer protection regulatory framework, as a means of strengthening the enforcement of OCAA. The thesis adopts a triangular research methodological approach entailing a broad literature review, comparative law research method and two case-studies.
STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person’s work has been used without due acknowledgement in the main text of the thesis.

This thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

Date                                                    Signature
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Publications and conference papers during the candidature

- I was able to publish part of my research work in four refereed journals and one book chapter as a co-author (but only my own work is included in the present thesis).


- I presented the following conference papers based on the research work of the current thesis.


I wish to acknowledge that Alan Shanks, Centre Manager and researcher at the Australian Centre for Court and Justice System Innovation (ACCJSI), Monash University, prepared the transformation of statistical materials into the charts and table of statistics that I used in the third chapter of the thesis. I greatly appreciate, and am grateful for, his assistance. I received his assistance under the supervision of Prof. Tania Sourdin. The statistics on which these were based were those that I have collected from the website of World Intellectual Property and NetNeutrals.com, which are online consumer arbitration providers. Statistics collected from the World Intellectual Property Organisation are in the public domain. Statistics received from the NetNeutrals.com are confidential and received from the provider (de-identified statistics) under ethics approval from the La Trobe University.
CHAPTER ONE: INTRODUCTION

‘Most frequently the real problem is not in arriving at an answer in law, but in enforcing an answer in law.’

1. The focus of this thesis

The success of offline international commercial arbitration is driven mainly by the presence of an effective cross-border mechanism for the enforcement of binding international commercial arbitral awards. Most importantly, there is a well-designed legal framework to sustain this enforcement mechanism in a firm and consistent manner. The recent phenomenon of online consumer arbitration awards (OCAA) via private online arbitration mechanisms operated by private online consumer arbitration (OCA) providers is challenging. The reasons are the lack of appropriate regulatory and institutional frameworks for the enforcement of OCAA from both the government and private sectors, and the impact of OCA on the rights of online consumers. These issues can raise questions as to the effectiveness of the use of online arbitration (OA) as a viable dispute resolution mechanism for the resolution of business to consumer cross-border electronic commerce disputes (B2C e-commerce disputes).

The consequent research question central to this thesis is: how can the enforcement of OCAA be made more effective? In addressing this question, it is argued that a supportive government-sponsored regulatory and institutional framework in each country is important for strengthening the enforceability of OCAA; online consumer arbitration can then be viewed as a viable mechanism for business to consumer cross-border electronic commerce disputes. In support of this argument, this thesis further explores the merits of the international commercial arbitration legal framework (ICALF) and the use of a government-sponsored electronic court room (eCourt room) from a government’s regulatory and institutional perspective as an appropriate option for strengthening the enforcement of OCAA. Accordingly, the purpose of the thesis is to examine the related regulatory and institutional frameworks adopted by the Australian and the Sri Lankan governments, and to suggest the use of a government-sponsored electronic court room (eCourt) supported by ICALF and a consumer protection regulatory framework as a means of strengthening the enforcement of OCAA.

The objectives of this chapter are: i) to provide a background to the scope and objectives of the thesis and the methodological approach adopted, and ii) to give insights into discussions that are conducted in the rest of the chapters of the thesis. With the brief note on the central research question and argument of the thesis in this section, section two provides the context for the current research. It demonstrates the interconnectedness between e-commerce markets and online dispute resolution (ODR). Section three focuses on the strengths of ODR in general and OCA in particular. Section four focuses on the rationale behind the central argument of the thesis. Section five outlines the chapter breakdown, ancillary research questions and arguments designed in support of the central research question, and the argument of the thesis is followed by major objectives of the thesis in section six.

2. The context for the current research

The research work undertaken in this thesis is an attempt to assess the regulatory and institutional measures taken by the Australian and Sri Lanka governments for addressing issues associated with the enforceability of OCAA delivered by private online arbitrators in the resolution of B2C cross-border e-commerce disputes. For this purpose it is important to identify: i) the link between e-commerce and ODR, ii) the potential of ODR in general and OA in particular and iii) the issues that are associated with OCA as a starting point of this research journey.

2.1 The link between e-commerce and ODR

This section briefly demonstrates the interconnectedness between ODR and e-commerce. In doing so, it is intended to identify the scope of the B2C setting, types of B2C e-commerce disputes, the definition of the terms ODR and OA, and the types of private OA mechanisms adopted by private OA providers for the resolution of B2C e-commerce disputes. These areas are important for the assessment of the regulatory and institutional frameworks adopted by both government and private OCA providers in the rest of the chapters of the thesis.

2.2 B2C cross-border e-commerce market

At the outset it is important to identify the scope of electronic commerce. Wigand articulates this in the following terms:
Broadly speaking, electronic commerce includes any form of economic activity conducted via electronic connections. The bandwidth of ‘electronic commerce’ spans from electronic markets to electronic hierarchies and also incorporates electronically supported entrepreneurial networks and cooperative arrangements (electronic networks). The market coordination mechanism is their common characteristic. Services within the tourism, finance, or insurance industries, but also product distribution and customer services, are typical fields of application.  

It is evident that as ‘an e-commerce transaction is a means of performing commercial activities using the global digital e-commerce infrastructure,’ the Internet and related technological developments play a pivotal role in expanding its scope. Internet-driven the technology has created a number of vibrant e-commerce business settings, such as transactions that take place Business to Business (B2B), Business to Consumer (B2C), Consumer to Consumer (C2C) and Government to Consumer (G2C) in the online context. As far as the B2C electronic setting is concerned, online consumers transact with online businesspeople, ‘located far from each other.’ Until now mostly, small value items such as books, music, software and other consumer goods have been subject to B2C e-commerce.

The e-commerce market is, however, a growing phenomenon, which can be demonstrated by the statistics on the population of online consumers’ access to the Internet. At the end of March 2011 the world’s total population of Internet users was 2 billion (the world’s population being 7 billion in 2011). The world’s population of Internet users in December 2000 has been just

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4 Ibid.
8 Benyekhlef and Gélinas have stated that ‘with the emergence of virtual marketplaces, the dynamics of transactions between consumers and sellers has undergone a dramatic change.’ Karim Benyekhlef and Fabien Gélinas, ‘Online Dispute Resolution’ (2005) 10 (2) Lex Electronica 41 <http://www.lex-electronica.org/articles/s10.2/Benyekhlef_Gelinas.pdf> last accessed 19 September 2012.
The following graphic provides a global view of the regional populations of the Internet.

![Internet Users in the World Distribution by World Regions - 2011](chart.png)

Basis: 2,267,233,742 Internet users on December 31, 2011
Copyright © 2012, Miniwatts Marketing Group


In the first decade, the figures were: in Australia: in 2009, 1.5 million Internet users and in 2010, 1.7 million internet users. In Sri Lanka, Internet World Stats provides the following statistics on Internet usage during the same years: in 2009, Internet users 1.1 million and in 2010. By December 31, 2011, the number of Internet users was 2.5 million in Sri Lanka. These statistics indicate that even though there were fewer Internet users during the same years in Sri Lanka than in Australia, both countries showed a steep upward trend in the number of Internet users.

Another indication of the growth of the e-commerce market is the increasing tendency towards the use of mobile phones for online shopping. It was reported in early 2011 that ‘about 25% of mobile users are shopping online with their mobile, with eBay reporting that an item is bought from a mobile every 15 seconds.’ In the Asian region there has been equally fast e-commerce growth, especially in emerging economies such as China. Australian Communications and Media Authority notes that approximately 7.4 million Australians accessed online market places,

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10 Ibid.
11 Internet World Stats, above n 9.
13 Ibid.
both retail and auction sites, from their home during December 2010, compared to 2 million people during the same month in 2009.\textsuperscript{16} It further presents the figure of $143 billion worth of Internet orders from Australian businesses in the 12 months to June 2010, using figures from the Australian Bureau of Statistics.\textsuperscript{17} In this context it is reasonable to infer that there will continue to be a growing e-commerce market internationally and nationally. Even developing countries\textsuperscript{18} such as Sri Lanka have shown a tendency towards the use of the Internet which can be considered a sign of the potential of a growing B2C e-commerce market in the future.\textsuperscript{19}

\subsection*{2.3 Increase in B2C cross-border e-commerce disputes}

According to Conley-Tyler, there were more than 1.5 million online disputes by 2004.\textsuperscript{20} As far as the present situation is concerned, 60 million e-commerce disputes are handled annually by the eBay dispute resolution platform alone.\textsuperscript{21} The scale of the problems encountered by consumers in general in the EU has been identified in 2010 as follows: ‘[O]ne in five consumers in the EU encountered problems when buying goods or services in the single market, leading to consumer losses estimated at 0.4\% of the EU’s GDP.’\textsuperscript{22} It is further highlighted that only a small percentage of consumers had sought and received effective redress.\textsuperscript{23} Even though this information is generally published without specifying whether they are related only to offline disputes or online disputes, it shows that consumers have issues when they purchase goods and services.

There has been a continuous search for appropriate dispute resolution mechanisms to resolve B2C cross-border e-commerce disputes.\textsuperscript{24} Scholars have advocated the need for such e-commerce-friendly dispute resolution mechanisms. Patrikios rightly notes that ‘the

\begin{footnotesize}
\begin{itemize}
\item[17] Ibid.
\item[19] Even though there is a lack of information as to the volume of e-commerce market compared to Australia.
\item[20] Melissa Conley Tyler, More than 1.5 Million Disputes Resolved Online (July 2004) 7 (3) Article 5 ADR Bulletin 1; see also Julia Hörnle, Cross-Border Internet Dispute Resolution (Cambridge University Press, 2009); see also, Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow, José Neves, Online dispute resolution: an artificial intelligence perspective’ (2 January 2012) Artificial Intelligence Review \textlangle http://nlp.hivelire.com/articles/share/27433\rangle last accessed 14 July 2012.
\item[22] Europa, above n 6.
\item[23] Ibid.
\item[24] Carneiro et al, above n 20; see also Duca, Rule and Loebl, above n 21.
\end{itemize}
\end{footnotesize}
instantaneous, ubiquitous and truly international internet necessitates solutions…’. Carneiro, Novais, Andrade, Zeleznikow and Neves argue that ‘If a transaction occurs online, then disputants are likely to accept online techniques to resolve their disputes.’ And, in fact, an online dispute resolution mechanism recently emerged for facilitating resolution of conflicts, including as an appropriate dispute resolution mechanism for the resolution of B2C e-commerce disputes within the broader ADR landscape. The rationale behind this novel online aspect of ODR mechanisms is simply that the same medium which has contributed to the emergence of online disputes should be used to resolve those disputes which emerge out of electronic commerce activities.

The growth of ODR is further reflected in the availability of ODR providers as revealed by web searches. Tyler found 115 ODR sites in 2004. At the time of writing, 52 ODR providers have been listed on the ODR.info web site, dedicated to the development of ODR, but this is not an exhaustive list and there could be more which are not recorded on this website which include OA mechanisms and facilitative ODR mechanisms. Then the next question is: what is meant by ODR, and does it possess characteristics required by the online market?

2.4 What is ODR?

It is important to note that there is no specific definition in government-sponsored statutory instruments. However, there are developments through which its scope can be identified in the literature. Bygrave defines ODR as ‘a process whereby disputes are substantially handled (through negotiation, mediation, conciliation, arbitration or a combination of such) via electronic networks such as the Internet.’ Schultz notes that ODR is ‘a dispute resolution process that

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26 Carneiro et al, above n 20.
27 ‘Online Dispute Resolution (ODR) recently emerged as a set of tools and techniques, supported by technology, aimed at facilitating conflict resolution.’ Carneiro et al, above n 20.
operates mainly online. This encompasses both online versions of alternative dispute resolution. Calliess provides a broader scope of ODR as follows:

On the one hand, ODR relates to the resolution of disputes that result from online conduct, i.e. from communications and transactions which come about through the use of the Internet. Domain name disputes are a prominent example as are disputes related to e-commerce. On the other hand, ODR relates to the use of online communication technology in the resolution process, even if the dispute itself has an offline origin.

ODR is reflected in diverse phrases and acronyms. In the initial articles on ODR, the phrase ‘online dispute resolution’ was used. There have been several other acronyms, such as ‘E-ADR’ (electronic alternative dispute resolution), IDR (internet dispute resolution) and online ADR (online alternative dispute resolution). Overall, it is evident that dispute resolution mechanisms which are conducted entirely or partially by using technological tools can be termed ODR mechanisms. One striking element is the technology involved in the process of shaping the area of ODR and ADR, which, as Sourdin notes, are evolving with a flexibility that allows for further changes. This view can be supported by recent developments such as the use of holographic technology for facilitating the resolution of online disputes for which the writer uses the terminology ‘holographic dispute resolution.’

ODR is recognised as covering a multiplicity of techniques and used for the resolution of various types of disputes: as Lipsky and Avgar note, ‘ODR is not a single phenomenon but in fact an umbrella term for a wide array of dispute resolution procedures and technological tools.’ They

41 See, Special Editor Tania Sourdin, ‘Alternative dispute resolution and the courts’ (Federation Press, 2004).
include ‘blind-bidding negotiation,’ which is based on computer technology,\textsuperscript{44} online mediation, online arbitration\textsuperscript{45} and also government sponsored electronic courts. In regard to arbitration, some scholars note that ‘the notion of arbitration is, however, not clear cut.’\textsuperscript{46}

OA itself has been defined with similar characteristics as those of arbitration which exists in the offline dispute resolution setting.\textsuperscript{47} The definition of online arbitration entails a dispute resolution mechanism conducted online by a third party who resolves a dispute and delivers a binding decision by considering the merits of the arguments of both parties.\textsuperscript{48} The various types of arbitration mechanism as can be seen in the offline arbitration setting\textsuperscript{49} are evident in the online dispute resolution context in the form of OA.\textsuperscript{50} There are several categories of arbitration based on the binding element. For example, in ‘unilateral binding’ arbitration one party is bound not the other, in ‘non-binding online arbitration’ neither party is bound, while in binding arbitration both parties are bound.\textsuperscript{51}

ODR mechanisms including OA are used for disputes which emerge in both offline and online activities. At present, ODR is used in diverse environments, for example ‘domain names,’ ‘insurance,’ ‘privacy,’ ‘family,’ ‘employment’ and ‘commercial,’\textsuperscript{52} and in the traditional court setting in the form of government-sponsored electronic courts (eCourt).\textsuperscript{53}

\begin{footnotesize}
\begin{enumerate}
\item In blind bidding, the parties submit offers and demands in the form of a settlement bid to a computer, through a secure, password-protected web-based communication platform. If the bids come within a given percentage or figure, the computer settles the case for the median amount. If they are not, the parties go on to the next round of bidding.’ Thomas Schultz, ‘Connecting complaint filing processes to online resolution systems’ (2003) 10 Commercial Law Practitioner, 307, 312 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898609> last accessed 19 September 2012.
\item ‘it is similar to traditional arbitration, in the sense that a third party chosen by the parties, or nominated by the institution chosen by the parties, renders a decision on the case having heard the relevant arguments and seen the appropriate evidence.’ See, Cristina Coteanu, Cyber Consumer Law and Unfair Trading Practices, (Ashgate Publishing, Ltd, 2005) 92.
\item Building Trust in the Online Environment, above n 5, 37.
\item Tania Sourdin and Chinthaka Liyanage, ‘The Promise and Reality of Online Dispute Resolution in Australia’ in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), Online Dispute Resolution: Theory and Practice a Treatise on Technology and Dispute Resolution (eleven International Publishing, 2012) 471- 497; see also, National Alternative Dispute resolution Advisory Council, Dispute Resolution and Information Technology Principles for Good Practice (Draft) 2002.
\end{enumerate}
\end{footnotesize}
In view of the prevailing definitions of ODR and OCA, it is important to note that this thesis focuses on the OA mechanisms which are conducted entirely online and which deliver their final outcomes online, and on the use of OA for the resolution of B2C cross-border e-commerce disputes which emerge as a result of online cross border e-commerce transactions between online consumers and online businesspeople.

3. What are the strengths of ODR in general and OCA in particular?

ODR mechanisms have been praised as appropriate for the resolution of e-commerce-related disputes for several reasons when compared to the traditional offline dispute resolution mechanisms. They possess qualities which reflect similar characteristics found in the e-commerce market. They offer ‘inexpensive, fair and effective redress.’ Other positive elements of ODR include ‘speed, convenience, ease of access, efficiency, cost savings, easy storage of digital data and easily crossed international borders.’ Importantly, another underlying strength of ODR is its potential to avoid complex issues of jurisdiction and applicable law. Schmitz notes that online arbitration has the benefit that it ‘provides a new avenue for arbitration by moving the binding process online to make it cheaper, faster, and more user-friendly for consumers seeking to obtain remedies on their claims.’ OA has been recognised as a mechanism which entails benefits such as the promotion of ‘dynamism,’ ‘uniformity,’ ‘predictability’ and ‘legal certainty’ and it ‘reflects the nature of e-business.’

Most importantly, given the principles of flexibility, innovation and diversity embedded in both ADR and ODR philosophies, ODR is also exposed to the resolution of any form of disputes or to assist other formal dispute resolution mechanisms to deliver justice without much delay and complexity. Some writers have already noted that, ‘ODR, in its varied forms, is used to resolve a
It is also evident that disputes between online businesspeople and online consumers take place regardless of whether transactions are on a low value-high volume scale or alternatively of high value-low volume. It particularly has the potential to resolve B2C e-commerce small value disputes. The important thing is that there is no specific criteria developed to demarcate the above distinction and it appears that the ODR is a viable dispute resolution mechanism for both categories. As such, Patrikios emphasises that, ‘neither OADR nor online arbitration should be excluded from application to consumer disputes.’

OA therefore has a significant number of positive characteristics which are suited for the B2C cross-border e-commerce setting. Clearly it is a better mechanism than the proceedings involved in formal litigation. In other words, the use of OA for the resolution of B2C cross-border e-commerce disputes can offer many benefits to both online consumers and online businesspeople compared to other offline dispute resolution mechanisms, regardless of the amount involved in such a dispute. The next challenge is to establish whether OA can be effectively used for the resolution of B2C cross-border e-commerce disputes.

**4. What is the rationale behind the central argument of the thesis?**

This section identifies through a brief literature review three major issues which need to be taken into consideration if the OA can be made effective for the resolution of B2C cross-border e-commerce disputes. These three major issues are the lack of an appropriate regulatory and institutional framework for the enforcement of ODR outcomes in general and OCAA in particular and the impact of OA on the rights of online consumers.

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59 Lipsky and Avgar, above n 43.
61 Patrikios, above n 58, 136.
4.1 The lack of an appropriate regulatory framework

It must be noted that there is no specific statutory law governing ODR nationally and internationally. The lack of appropriate regulatory framework and also the need for an appropriate legal framework for the regulation of ODR have been recognised in the literature. For example, Schultz articulates this issue in the following terms: ‘How to create and enforce standards to regulate ODR remains one of the most important questions that stakeholders of ODR are struggling to answer.’63 Yuksel argues that ‘online arbitration should develop its own rules over the course of time.’64

There is also growing discussion about the need for an appropriate legal framework for ODR. Within the ODR-related literature Lodder and Bol are of the view that the drafting of legal principles for ODR is important because ‘not only legal principles like fair trial are put into a novel perspective, but also new principles specifically directed at the online environment are needed.’65 Morek argues that, ‘a solid legal framework is needed to allow for the proper growth of online dispute resolution with its norms, market and technology.’66 In examining hard law and soft law options for the regulation of ODR, Vilalta suggests that ‘model laws and legislative guides, due to their particular features, may be more suitable instruments than conventions for the progressive harmonization of practices and laws in ADR/ODR matters.’67 In relation to OA, J. Lanier notes that, ‘…before online arbitration can be readily accepted, it must be determined which basic rules will govern matters of proper administration, choice of law, jurisdiction, enforcement, and review.’68

The current situation is that, instead of making specific regulatory frameworks for OCA, the existing national laws and online consumer protection standards are used to cover this area by the government sector. This thesis argues that the existing government sponsored-regulatory framework has drawbacks when they are applied to enforcement of OCAA. At the same time self-regulation as a possible solution to the lack of national and international legal responses to

63 Schultz, above n 34, 93.
cover e-commerce disputes has been recognised. Accordingly, private OCA providers are allowed to make their own rules in relation to OA mechanisms without intervention from the governments. At present, OCA providers have developed their own rules in line with their business objectives for the resolution of B2C e-commerce disputes which may undermine the rights guaranteed in national consumer protection laws and standards. In the OCA scenario it is questionable whether this particular dispute resolution mechanism should be left solely in the hands of the private sector, given the impact of the use of OCA on consumers as noted below. As such, an appropriate regulatory framework for ODR in general and OCA in particular is important.

In the absence of a specific regulatory framework for ODR, and because of the drawbacks of the existing regulatory approaches adopted by the government and private ODR sector, there is growing attention to developing appropriate regulation in the form of co-regulatory methods, and international and regional regulatory frameworks in the form of model laws. All of these are discussed in detail, together with the effectiveness of the regulatory measures of both Australia and Sri Lanka, in the chapters of the thesis.

4.2 The lack of an effective enforcement mechanism
The second important issue associated with ODR in general and OCA in particular is the lack of an appropriate enforcement mechanism for the enforcement of their final outcomes. This is reflected in both non-binding and binding ODR mechanisms. Hornle argues that the disadvantage of online mediation is the lack of ‘teeth’ of the non-binding procedure.

The issue of the lack of an appropriate enforcement mechanism can be traced back to the initial OA mechanisms. The Virtual Magistrate is a good example in this regard as its enforcement mechanism was not successful. In the current context, the enforcement mechanism can also be problematic due to the fact that private OCA providers are allowed to enforce OCA awards by their own methods of enforcement without intervention from the government sector. The related literature and the OCA mechanism providers and government-sponsored institutional

69 For example Haitham Haloush, ‘Enforcement, Recognition, and Compliance with OADR Outcome(s)’ (2007) 21 (2) International Review of Law Computers & Technology 81, 82.
70 Hornle, above n 7.
frameworks further provide evidence for the lack of effective enforcement mechanisms for the enforcement of OCAA, which are discussed in the later chapters of the thesis.

The enforcement of final outcomes of ODR mechanisms is recognised as a fundamental element that needs to exist in a dispute resolution mechanism, regardless of whether it is in an offline or online setting.\(^{72}\) Pemmelaar is of the view that ‘the enforceability of awards is the backbone of arbitration and a guide for legal certainty.’\(^ {73}\) As far as arbitration is concerned, Stipanowich notes that ‘the promise of arbitration is choice, and in order to fulfill that promise, choice must be deliberatively and effectively exercised.’\(^ {74}\) However, in order for online consumers to choose arbitration as an effective mechanism for the resolution of B2C cross-border disputes, they must have confidence that the final decisions of the OA mechanisms are enforced in an effective and transparent manner. It is noted that ‘access to justice is only meaningful where the outcome of the dispute resolution proceedings can be enforced.’\(^ {75}\) The lack of such mechanisms can prevent justice being distributed to the people who are entitled to a redress. In this respect, enforcement plays a pivotal role in realising justice for online consumers as it constitutes a crucial aspect of the concept of the rule of law.

It must be noted that, ‘the enforcement of awards is hardly a new issue - it has been around for decades. Yet, it is an issue that needs to be revisited at regular intervals … enforcement is an issue of constant and major concern.’\(^ {76}\) This thesis reviews the suggested enforcement models in the related literature, enforcement mechanisms adopted by private OCA providers in practice, and the drawbacks of government sponsored institutional frameworks that can be used for the enforcement of OCAA. Then a cooperative approach is suggested which includes an eCourt room supported by ICALF and national consumer protection laws and online consumer protection standards as an option for the enforcement of OCAA. It is expected that such a mechanism can provide a platform for overcoming the lack of regulatory and institutional


\(^{76}\) Gabrielle Kaufmann-Kohler, ‘Enforcement of Awards - A Few Introductory Thoughts’ in A.J. van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, (Kluwer Law International, 2005) 287; Ponte and Cavenagh have pointed out clearly that ‘one of the challenges of international conflict resolution is enforcement of settlements and decisions. Most online arbitration awards are enforced by party compliance with the terms of their arbitration agreement or perhaps through the withdrawal of a trust mark or a seal for non complying businesses participating in certification programs.’ Lucille M. Ponte and Thomas D. Cavenagh ‘Cyber justice Online dispute Resolution (ODR) for E-Commerce’ (2000) 96.
frameworks for the enforcement of OCAA and have an impact on the use of OA for the resolution of B2C cross-border e-commerce disputes as discussed in the next chapter.

4.3 The impact on the rights of online consumers

Another related concern is the fact that ‘as a general rule the decisions of the arbitrators are to be final and binding’\(^77\) and carry res judicata effect,\(^78\) as a result, parties to the arbitration can be prevented from seeking redress from the judiciary\(^79\) and other remedies.\(^80\) Online arbitral awards may be based on a mandatory arbitration clause that can be embedded in online standard-from contracts\(^81\) before a dispute arises, or on binding OCA clauses made in consent with the online consumer after a dispute arises. In both these instances, online consumers’ rights can be undermined.

In the first case generally in the international arbitration setting an arbitration agreement includes two types of clauses: an ‘arbitration clause’ which refers to ‘disputes that may arise’ in the future, and an arbitration agreement, which deals with disputes that have already arisen.\(^82\) In the OCA setting there are similar OCA clauses designed for ‘pre-dispute’ and ‘post-dispute’ resolution clauses with similar effects.\(^83\) Accordingly, mandatory arbitration clauses appear in two forms: the first includes pre-dispute mandatory arbitration clauses which are made before a dispute arises, and the second relates to the post-dispute mandatory arbitration clauses which are made after a dispute arises.\(^84\)

In the online B2C e-commerce context, one area where, pre-dispute resolution clauses are incorporated is in the online standard form contracts, which have issues in terms of the validity of the formation of such contracts that are prevalent in various sectors of the sale of goods and

\(^79\) Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce 6  
\(^80\) Kevin R. Casey, Stradley Ronon Stevens & Young, ADR 2009  
\(^83\) See Rustad et al, above n 81, 12-18.
\(^84\) See, FreeAdvice, what is a pre-dispute arbitration agreement?  
the provision of services in the online market.\textsuperscript{85} The electronic market has also contributed to the development of various types of online standard form contracts; for example, there are online standard form contracts that are termed as ‘Clickwrap,’ ‘Browsewrap’ and ‘Shrinkwrap’ in the electronic market.\textsuperscript{86} The common features of these contracts are that they are prepared by one party (the business party) without negotiation with the other party (the consumer) to the B2C contract and that these terms are labeled as non negotiable (‘take it or leave it’).\textsuperscript{87} In the offline context they exist in the form of ‘standard-form’ or ‘contract of adhesion.’\textsuperscript{88}

The underlying rationale behind the development of this form of online contract appears to be driven by the market’s objectives, and operates as an exception to the general rule of a contract being the meeting of two minds on the terms of a contract.\textsuperscript{89} The concern associated with these standard form contracts is therefore the lack of mutual agreement between parties to the contract, and as a result some scholars argue that such contracts violate the fundamental requirement of consent from the consumer required for the formation of a valid contract.\textsuperscript{90} In this situation online consumers’ bargaining power, compared to that in the business-to-business (B2B) setting, can be reduced by the prevalence of online standard form contracts.

\textsuperscript{85} ‘These contracts are common to everyday transactions including credit card, cell phone, or long distance agreements, car leases/loans, apartment leases, and often include a mandatory arbitration clause.’ Consumer Guide to Mandatory Arbitration Clauses <http://www.citizenadvocacycenter.org/uploads/88/4/0/8840743/mandatoryarbitrationbrochure.pdf> last accessed 20 July 2012.

\textsuperscript{86} See Rachel Cormier Anderson, ‘Enforcement of Contractual Terms in Clickwrap Agreements: Courts Refusing to Enforce Forum Selection and Binding Arbitration Clauses’ (2007) 3 (3) Shidler Journal of Law, Commerce & Technology <http://www.lctjournal.washington.edu/Vol3/a011Cormier.html> last accessed 20 July 2012; see Mark A. Lemley, ‘Terms of Use’ (2006) 91 (1) Minnesota Law Review 459, 465-466; ‘In cases of “clickwrap,” a form of transaction common for on-line purchases and the on-line downloading of (free or paid) software. With “clickwrap” the transaction will not go forward unless and until the consumer clicks a button indicating “I agree” (or similar terms of express assent) after the statement of terms and conditions.’ “Browsewrap” involves a presentation of terms on a Web site with the statement that some further action (continuing use of a site, downloading software, etc.) would be construed as acceptance, without any need of express assent. The terms themselves may be displayed prominently in a way a user would be unlikely to miss, or the display page might merely mention, and perhaps not even in a prominent way, that terms can be found elsewhere on the site.’ Jane K. Winn & Brian H. Bix, ‘Diverging Perspectives on Electronic Contracting in the U.S. and EU’ (2006) 54 (1&2) Cleveland State Law Review 175, 176-178; Further, ‘The manufacturer normally places the terms and conditions of the software license inside a box with the software disk or CD shrink-wrapped in plastic. The customer is then able to see through the plastic or on the outside of the envelope some of the terms of the agreement. The customer is advised that by opening the envelope or the plastic wrap, he or she is deemed to have accepted the contract inside and is bound by its terms.’ Jiao Xue, ‘A Comparative Study of Shrink-Wrap License, (2009) 2 (2) Journal of Politics and Law 86, 86.


\textsuperscript{88} Ibid.


The second problematic scenario is that there are OCA clauses made in agreement with consumers. The use of binding online arbitration clauses agreed by both parties after a dispute between an online business and online consumers has arisen. Although it is noted that ‘online arbitration involving consumers should be procedurally fair, effective, and predictable,’ this may not always be the case. There are limitations associated with these OCA mechanisms in regard to the consumers’ right to other remedies, especially under the national consumer protection laws of a country.

The problematic aspects of the use of OCA clauses can be further explained through a very recent empirical study conducted on mandatory arbitration clauses used in ‘social media terms of service agreements,’ which examined the judicial response to the legal validity of mandatory online consumer arbitration (OCA) clauses in the US. This study reports the following important finding, that they ‘do not provide consumers with full and accurate information about arbitration,’ ‘the arbitration clauses do not give users adequate notice of the arbitration procedure and its consequences,’ and ‘many arbitration clauses require consumers to waive additional rights, further limiting their ability to obtain full compensation.’ The inclusion of these mandatory OCA clauses raises concerns because of the lack of consumers’ knowledge of the contractual arrangements, especially the use of OA for the resolution of disputes which may arise in the future. According to Budnitz, pre-dispute mandatory arbitration clauses have been rejected or criticised for reasons such as the excessive cost involved in the arbitration process, denial of access to justice and to the right of appeal.

Issues such as the lack of appropriate regulatory and institutional frameworks for OCAA and their impact on the rights of online consumers can affect the viability of OCA as an appropriate mechanism for the resolution of B2C e-commerce disputes. Therefore it is reasonable to note that these developments imply the need for appropriate government control over the protection of online consumer rights, including in the area of any OCA mechanism that is used for B2C cross-border e-commerce disputes by the affluent private sector. It can thus be argued that

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91 Stewart and Matthews, above n 60, 1126.
92 Rustad et al, above n 81.
93 Ibid 12-18.
95 See Schultz, above n 34, 94.
searching for and developing appropriate legal and institutional frameworks for overcoming such issues is the appropriate way forward. Unless the government sector develops an appropriate regulatory and institutional framework for OCAA in collaboration with the private sector, the potential of OCA for B2C e-commerce disputes will be undermined and this may result in losing an effective dispute resolution mechanism for both online business and online consumers.

On the basis of this brief theoretical discussion of the issues associated with the area of OCAA, the following sections outline the scope of the central research question-related sub-research questions together with sub-arguments, the methodological approach, followed by the boundaries of each chapter, the objectives expected to be achieved and the limitations of the thesis.

5. Contents of each chapter of the thesis and the research methodology adopted

5.1 Contents of the each chapter
The following sub-research research questions are designed in line with the central research question and the argument of the thesis, which will be addressed in chapters spanning the second to the seventh of the thesis. The following key sub-research questions are designed to map the existing legal framework and ask what drawbacks exist in the current system of legal and institutional frameworks and what options can be proposed to strengthen the enforcement of OCAA.

5.1.1 Chapter one
The first chapter has set out the framework of this research study by introducing the central research question and argument, the link between e-commerce and ODR, research issues that will be addressed in the thesis, the contents of each chapter with subordinate research questions and arguments, and the overall objectives and limitations of the thesis.

5.1.2 Chapter two

*Research question:* What are the theoretical underpinnings of the central research question and the argument of the thesis?
Arguments: i) There is a growing tendency towards the development of ODR in both Australia and Sri Lanka, but there is a lack of OCA-specific research addressing the three issues identified in the first chapter; ii) there is a lack of consensus in terms of a specific legal and institutional framework suitable for OCA and its final awards.

This chapter focuses on reviewing the theoretical underpinnings of the central research question in the current literature and the methodological approach adopted to address the research questions of the thesis. Within the literature review it is attempted to trace the development of ODR in general, and in the Australian and Sri Lankan contexts in particular, including ODR-specific scholarship in Australia and Sri Lanka. Through this review it is intended to highlight the gaps which exist in the current ODR literature in regard to OCAA and to review the merits of the suggested regulatory and institutional frameworks for the enforcement of OCAA. It is also intended to provide insight into the discussion of the effectiveness of the Australian and Sri Lankan legal and institutional responses and of selected private OCAA providers in relation to the enforceability of OCAA, and to see whether there are supportive thoughts for the development of a cooperative approach for the enforcement of OCAA combining both government and private OCA providers. Additionally, this chapter describes the methodology approach adopted, which is a triangular research approach entailing a broad literature review, comparative law research and two case studies.

5.1.3 Chapter three

Research question: Do private OCA providers comply with the ODR mechanism-related consumer protection standards?

Argument: The existing OCA mechanisms do not provide appropriate regulatory and institutional frameworks for the enforceability of OCAA because these mechanisms have problematic areas which are revealed when their mechanisms are assessed in regard to binding and non-binding ODR mechanism-related principles and standards.

Chapter three addresses the second research question, which involves the examination of the problematic aspects of the enforcement mechanisms adopted by two private OCA providers: Internet Domain Names and Numbers’ (ICANN) Uniform Dispute Resolution Policy (UDRP) conducted by the World Intellectual Property Organisation (WIPO), and that of NetNeutrals.com. It explores the level of compliance by both providers in terms of the ODR
mechanisms-related principles which reflect national consumer protection laws and online consumer protection standards. Two cases are discussed from both qualitative and quantitative perspectives. This discussion is designed to identify the strengths and weaknesses of the scope of OCA mechanisms adopted by private OCA providers in practice, by assessing their OA mechanisms against OA mechanism-related principles.

5.1.4 Chapter four

*Research question:* What is the effectiveness of the online consumer protection guidelines in terms of addressing the concerns associated with the enforceability of OCAA?

*Argument:* The online consumer protection standards embedded in the Context of Electronic Commerce developed by the Organisation for Economic Co-operation and Development in 1999 (OECD Guidelines) and the Australian Guidelines for Electronic Commerce of 2006 (Australian Guidelines) do not provide an appropriate regulatory and institutional frameworks for the enforceability of OCAA.

Chapter four focuses on research question three about the effectiveness of the online consumer protection OECD Guidelines and the Australian Guidelines in terms of the enforceability of OCAA. This chapter specifically examines problematic aspects of both instruments and also explores whether there are positive elements which can be used for the development of a cooperative mechanism for the enforcement of OCAA.

5.1.5 Chapter five

*Research question:* How effectively have national consumer protection laws addressed the concerns associated with the enforceability of OCAA?

*Argument:* The present consumer protection-related legal frameworks have several drawbacks when they are applied to the enforcement of OCAA in the cross-border context from both regulatory and institutional perspectives.

Chapter five addresses research question four, which involves examination of the national consumer protection laws in regard to the enforceability of OCAA. This chapter examines the Australian and Sri Lankan consumer protection laws applicable to unfair contract terms from a comparative perspective by drawing some inspiration from the legal positions of the European
Union and the United States. It is designed to highlight problematic aspects which exist in the present legal frameworks of Australia and Sri Lanka when they are applied to the area of the enforcement of cross-border OCAA. The related provisions of legal instruments such as the *Competition and Consumer Act* (2011) (CCA) in Australia and the *Consumer Affairs Authority Act* (2003) and *Unfair Contract Terms Act* (1997) in Sri Lanka are mainly examined.

5.1.6 Chapter six

*Research question:* Is there merit in embedding the existing international commercial arbitration–related legal framework to strengthen the enforcement of OCAA delivered by OA mechanisms adopted by the private OCA providers from a regulatory perspective?

*Argument:* There are some positive elements of the international commercial arbitration legal framework (ICALF) which might be considered useful for overcoming concerns associated with the enforceability of OCAA from regulatory perspectives.

Chapter six covers research question five, which discusses the possibility of using existing international commercial arbitration–related legal frameworks for the purpose of strengthening the enforcement of OCAA. It focuses mainly on the enforcement of the foreign arbitral awards-related legal framework, the ICALF, and highlights some of its merits that might be useful for strengthening the enforcement of OCAA delivered by private OA providers in the resolution of cross-border business-to-consumer electronic disputes. Through this discussion it supports the use of existing ICALF as an appropriate legal framework for the enforcement of OCAA through the use of government-sponsored eCourts.

5.1.7 Chapter seven

*Research question:* Given the potential of creating an eCourt room for the enforcement of OCAA from a technological perspective, how far do the existing legal frameworks of both Australia and Sri Lanka in relation to court proceedings allow the judiciary which has the jurisdiction to enforce foreign arbitral awards to enforce OCAAs through such an eCourt room?

*Argument:* In the absence of specific legal provisions which allow the judiciary to do so, this chapter argues that there is a promising legal framework which can be used by the judiciary to enforce OCAAs through an eCourt room.
This chapter examines the possibility of the enforcement of online consumer arbitration awards (OCAA) delivered by private online consumer arbitration providers through the mechanism of an eCourt room from the Australian and Sri Lankan regulatory and technological perspectives. In this examination specific attention is focused on the strengths and weaknesses of the existing regulatory frameworks in relation to the regulation of proceedings of the Australian High Court and the Sri Lankan High Court which have jurisdiction over foreign arbitral awards.

5.1.8 Chapter eight
This chapter concludes the thesis. It summarises the findings of each chapter of the thesis and provides an account of reforms that need to be brought to the existing legal and institutional framework. These reforms should focus on the development of appropriate legal frameworks for the development of OCA in both countries in order to use the ICALF, supported by eCourts, for making the OCA a viable dispute resolution mechanism for the resolution of B2C cross-border e-commerce disputes. In addition, it outlines the significance of this research project, and proposes future research directions, followed by final concluding remarks.

6. Major objectives of the thesis

In light of the discussion given in this chapter, it is evident that OA has been recognised as an appropriate mechanism for the resolution of B2C e-commerce disputes. It also has issues which are specially associated with the enforcement of OCAA that can undermine the potential of OA as a viable dispute resolution mechanism. If left without adequate attention, both online businesses and online consumers may be denied an important dispute resolution mechanism with the potential to offer many benefits to both online businesses and online consumers. Leaving OA to the private sector alone is not the solution. It can be argued that the responsibility for the development of OA for B2C e-commerce must rest on both private and government sectors, especially in the cross-border e-commerce market which is promoted by both sectors through various means, and that there is a need for protecting online consumers who are in a vulnerable position compared to online businesses in the cross-border e-commerce market. As such, the supportive role of governments’ legal and institutional frameworks needs to be part of this mechanism in the global context. In this prevailing context, while pursuing the central research question and the argument, the thesis is designed to achieve the following objectives:
First, it is expected to highlight the growing phase of the development of ODR, especially in Australia and Sri Lanka and that attention from the governments sector is important in order to provide appropriate support for the further development of ODR from both regulatory and institutional perspectives. Moreover, the growing ODR-related literature is reviewed in order to establish the currently available and suggested regulatory and institutional frameworks for the regulation of ODR, and enforcement mechanisms for the outcomes of ODR in general and OCAA in particular, and to determine whether there is a unified opinion for a specific regulatory and institutional framework for OCAA.

Second, two OCA providers (WIPO’s UDRP mechanism and NetNeutrals.com’s OCA mechanism) are assessed as to their compliance with the principles specifically applicable to binding OA mechanisms and consumer protection legal principles. This case study is conducted as supportive evidence to highlight the strengths and weaknesses of the regulatory and institutional frameworks adopted by the private OCA providers in practice, and to draw the attention of the governments to support the development of OA as a viable mechanism for B2C e-commerce disputes. This is because such mechanisms can be developed to support both the interests of online businesspeople, of online consumers who engage in cross-border e-commerce activities and of private OCA providers, and because there is a lack of internationally developed redress mechanisms for such disputes by the governments.

Third, an in-depth analysis of the three issues identified in this chapter is conducted from the Australian and the Sri Lankan legal and institutional perspectives in order to assess the level of response from both countries in relation to the development of OCAA as an appropriate dispute resolution mechanism for the resolution of B2C cross-border e-commerce disputes. Key research questions include mapping the existing legal frameworks and asking: what drawbacks exist in the current system? What are the contributory factors which impede the finding of legal solutions to these issues? And what are the reforms that can be brought forward for addressing the drawbacks of the existing legal and institutional frameworks of both countries?

Fourth, this thesis further supports the development of cooperative mechanisms for the enforcement of OCAA as the appropriate way forward for the development of OCA as a viable dispute resolution mechanism for B2C e-commerce disputes. In support of this proposition, the merits of the international commercial arbitration legal framework and the possibility of developing a government-sponsored electronic court room (eCourt room) are explored so as to
provide insights into the potential of using ICALF as the legal basis and eCourt rooms as the institutional framework, with required reforms tailored to the enforcement of OCAA, delivered by private OCA providers.
CHAPTER TWO: THEORETICAL UNDERPINNINGS AND METHODOLOGICAL APPROACH

1. Introduction

The first chapter outlined the scope and the objectives of the current thesis. This chapter addresses the question: what are the theoretical underpinnings of the central research question and the argument of the thesis? This question is pursued by arguing that i) there is a growing tendency towards the development of ODR in both Australia and Sri Lanka, but there is a lack of online consumer arbitration (OCA)-specific research on developing appropriate regulatory and institutional frameworks for the enforcement of OCAA and ii) there is a lack of specific attention to developing a specific regulatory and institutional framework suitable for OCA and its final awards in the ODR literature. These arguments are supported by referring to the theoretical underpinnings of ODR in both Australia and Sri Lanka and in the ODR-related literature.

Accordingly, this chapter is structured in the following manner: following the introduction in this first section, the second section reviews the theoretical underpinnings of the development of ODR in general and in Australia and Sri Lanka in particular. The third section reviews the theoretical underpinnings of the regulatory and enforcement frameworks suggested by ODR scholars in detail. The fourth section describes the triangular methodological research approach, designed in line with the central research question, the argument and the objectives of the thesis, as outlined in the first chapter. The fifth section concludes chapter two.

2. Development of ODR

At the outset, it is important to note that some of the elements involved in the development of ODR, such as types of disputes subject to ODR and types of ODR mechanisms together with their potentials can be considered part of the development of ODR. The following two sections of this chapter review the historical development of ODR, referring to ODR-related literature in general and that of Australia and Sri Lanka in particular. The developmental stages since its origin, the use of technology and trends in the development of ODR, mainly driven by the traditional ADR landscape, are reviewed in order to highlight the development of ODR in general and its use in diverse dispute resolution settings; both private and government sectors.
and scholarly contributions to the development of ODR in both Australia and Sri Lanka are reviewed.

2.1 Origin of ODR
Katsh notes that ‘the first, the May, 1996 conference on online dispute resolution sponsored by the National Center for Automated Information Research can be viewed as the beginning of the online dispute resolution movement.’¹ Scholars such as Lodder and Zeleznikow are of the view that, ‘the origin of the term ODR is not easy to trace exactly,’ but they are of the view that, ‘the history of ODR starts in the 1990s’ with the support of the ADR movement of the 1970s.² Since then, ODR has been a developing phenomenon which is reflected in the developmental categories of ODR and the absorption of technology for transforming the traditional dispute resolution mechanisms.

Katsh and Rifkin divide the developmental stages of ODR into three main periods: stage one refers to pre-1995, during which dispute resolution was applied informally to settle disputes. Stage two from 1995-1998 shows the emergence of experiments such as the Virtual Magistrate Project, the Online Ombudsman Office, and the Family Law Mediation Project, and the period from 1998 to the present includes significant entrepreneurial activities and interest and support by high level governmental and corporate bodies.³ There is another categorisation, which includes ‘hobbyist’, ‘experimental’ and ‘entrepreneurial’ and ‘institutional’ phases. The ‘institutional’ phase includes mainly government institutions, and is distinguished from other stages.⁴

2.2 The use of technology
The other important element in the development of ODR is the impact of technology on the transformation of traditional dispute resolution mechanisms. Research conducted by scholars

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such as Jeleznikow and Lodder regarding the use of artificial intelligence to make ODR a viable mechanism not only for electronic commerce disputes, but also for other disputes such as the resolution of family disputes can be cited as an example in this respect. Another example can be taken from online arbitration. There are three parties (namely the consumer, the business party and the arbitrator) in the offline arbitration scenario, but online arbitration (OA) operates with an additional two parties: ‘technology’ (fourth party) and ‘the provider of the technology’ (fifth party) which are neither present nor recognised in the offline arbitration process.

A question that can be raised in light of these developments is whether ODR can be differentiated from offline dispute resolution. Some positive answers can be found in the related literature. For example, Schultz, Kaufmann-Kohler, Langer and Bonnet observe that, ‘electronic communication is probably the first major difference between offline dispute resolution and ODR.’ Some writers identify the first difference between an online and an offline dispute resolution mechanism as the use of e-mail which has the facility to conduct ODR asynchronously.

The other recognised difference is the lack of face-to-face communication which has been termed a qualitative difference in the literature, reflecting the realisation of the need to make a change to the traditional offline face-to-face requirement in order to advance its viability in the current online cross-border market. In the OCA process, face-to-face meetings of the parties and

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5 Two parties to a dispute and an arbitrator or arbitrators.
9 Ibid 2.
10 Norman Solovay and Cynthia K. Reed, The Internet and Dispute Resolution: Untangling the Web (Law Journal Press, 2003) 2.01 and 2.06[1]. It is further highlighted that, ‘online arbitration is known predominantly in the Anglo-American legal realm. It differs from conventional arbitration in that communications are essentially carried out over the Internet’ and also ‘The main forms of ADR are negotiation, mediation and arbitration. These categories are also present in ODR.’<http://www.sefirot-gmbh.de/en/projekte/iosg/was_ist_OA.htm> last accessed 05 September 2012.
11 Solovay and Reed, above n 10.
procedural steps are facilitated by technological means, for instance, hearings conducted on papers or by using video-conferencing techniques. Video-conferencing has the potential for witnesses to be cross-examined, permits the avoidance of travel, and reduces cost and time. The powerful aspect of the use of video-conferencing technology has been acknowledged by many ODR scholars. For example, Sourdin argues that, ‘videoconferencing, teleconferencing and email communication can supplement and support face-to-face ADR approaches.’ This view can be further supported given the fact that technology is evolving and its usefulness can be extended with the improvement in quality of such technologies.

Accordingly, these developing trends in the transformation of traditional arbitration through technology can be considered as a positive element which reflects how ODR with the help of technology can be used to overcome some of the barriers encountered by the traditional offline dispute resolution mechanisms. This developing trend further raises the question of whether there is a tendency towards ODR being recognised as a different dispute resolution mechanism than offline traditional dispute resolution mechanisms.

2.3 Is ODR ‘sui generis’ or not?

In fact, with the impact of technology on traditional dispute resolution mechanisms and the emergence of ODR as a consequence, there is a debate as to whether ODR is ‘sui generis’ or should be considered to be ‘online alternative dispute resolution.’ In other words, is ODR distinct from the traditional dispute resolution mechanism or is it part of a broader ADR movement? As far as the ODR-related literature is concerned, it seems that there are no clear

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14 Ibid 6: ‘Online dispute resolution allows the dispute to be settled remotely, without requiring the parties or their legal representatives to be physically present. The parties merely have to connect from their workplaces to the site of the chosen organization and transfer documents and data messages for the cost of a local phone call.’; see also Rafal Morek, Online Arbitration: Admissibility within the current legal framework. 5 <http://www.odr.info/Re%20greetings.doc> last accessed 05 September 2012; see also Dr. Li Hu, Online Arbitration in China An Overview and Perspective (2007) <http://www.fabao365.com/zhuanti.php?action=onlinearbitration&item=shownews&id=294> last accessed 05 September 2012.
answers to these questions. Kaufmann-Kohler and Schultz provide a useful discussion of two aspects of ODR: ‘The sui generis approach of ODR focuses on the fact that new tools allow new dispute resolution procedures, while the online ADR perspective allows taking the developments of ADR into consideration.’17 They further note that ‘these two definitions are not entirely satisfying.’18 Hornle has expressed the following view in relation to the difference between traditional ADR and ODR:

From a superficial point of view … ODR replicates ADR online. This superficial observation is fallacious in the same way as the argument that, for all forms of motorised transport, the horse that drew the cart has merely been replaced by an engine, but that the transportation itself has not changed. To say that ODR is merely online ADR would similarly underestimate the transformative power of the technology.”19

Hornle goes on to argue that, ‘…new forms of ODR have been developed that have no offline equivalent.’20 Nevertheless, ODR is generally considered part of the traditional ADR movement. For example, Siburian notes that, ‘online arbitration and mediation mimic their traditional offline origin.’21 Victorio notes that, ‘iDR is not a replacement for ADR, but a subsidiary within traditional ADR’;22 and according to Benyekhlef and Gélinas, online mediation and online arbitration are transpositions of traditional mediation and arbitration into cyberspace;23 Cortes also notes that ‘ODR was born from the synergy between the ADR and ICT,’24 while Victorio is also of the view that, ‘iDR is not a replacement for ADR, but a subsidiary within traditional ADR.’25 Thiessen and Fraser maintain that ‘as online ADR matured, it also expanded to overlap with offline ADR.’26

18 Ibid.
19 See Julia Hörnle, Cross-Border Internet Dispute Resolution (Cambridge University Press, 2009) 86.
23 Benyekhlef and Gélinas, above n 4.
24 Cortes, above n 7.
25 Victorio, above n 22, 300.
Importantly, referring to ODR, Ross also asks, ‘can it embrace the courts and cyber court technology?’ The answer seems to be affirmative. ODR literature provides some evidence that ODR encompasses ‘eCourts’. Schultz provides a thoughtful explanation as to whether ODR encompasses electronic courts in the following terms:

They should be, and often are, considered to be part of the ODR movement, for two reasons. First, because the ODR movement emerged because of the clash between the ubiquity of the Internet and the territoriality of traditional, offline dispute resolution mechanisms. The term ODR is thus opposed to offline dispute resolution mechanisms, not to courts. Online ADR is only one part of ODR. Second, courts do not only provide litigation. As I said before, there also is court-based mediation and non-binding arbitration.

The first reason articulated by Schultz is evident from the use of technology in the eCourt setting. He notes that, ‘Cybercourts are simply court proceedings that use exclusively (or almost exclusively) electronic communication means.’ This technological element is further reflected in the terminology used ‘cybercourt’ and ‘eCourt’.

In view of these theoretical underpinnings, the literature of the development of ODR shows that ODR has passed several stages and developed in several directions since 1996. During this journey it is clear that technology has transformed such mechanisms to suit the resolution of online disputes which emerge from cross-border e-commerce activities. In fact, many ODR mechanisms developed so far seem to follow the fundamentals of traditional ADR mechanisms. On the other hand, it is also important to note that the scope of ODR goes beyond the traditional ADR notion, extending its scope to cover ‘eCourts’ as well. Katsh and Wing also rightly assert, by evaluating the evolution of ten years of ODR, that ‘Today, there is little doubt that there is an ongoing and growing need for ODR.’ Thus ODR is an evolving phenomenon, and can move with the need of the growing e-commerce market and phase of absorption of technology into the

dispute resolution landscape and the development of technological infrastructure can travel across the world by overcoming traditional territorial boundaries.

2.4 Development of ODR in Australia and Sri Lanka

Both countries are reviewed separately because Australia is much further developed in terms of ODR than Sri Lanka. At the outset it is important to note that ODR-related development in Sri Lanka is considerably lower than that of Australia; therefore, a limited review of ODR-related developments is provided in this section.

2.4.1 ODR in Australia

This section highlights the growing signs of ODR in Australia in diverse settings which are reflected in private, government and ODR-related writings by scholars.

2.4.1.1 Private Sector

ADR can be seen as appearing in the direction of the expansion of ADR service providers, some of which were oriented to the online environment itself, while others were traditional binding and non-binding ADR providers. It appears that many dispute resolution providers in Australia have developed their own websites with detailed information about their dispute resolution mechanisms and some use technology for the facilitation of their dispute resolution mechanisms. For example, the Australian Centre for International Commercial Arbitration uses online technology for the facilitation of its offline dispute resolution services.

There are some dispute resolution providers who offer ODR services along with their traditional ADR mechanisms. For example, the Technology Dispute Centre, which is considered to be a leading dispute resolution provider, conducts the resolution of disputes through ODR as well. On its website, it advertises that ‘the Centre offers Online Dispute Resolution and an online Virtual Courtroom with video-conferencing facilities.’ The other example is InterMEDIATE Dispute Management, which provides a telephone dispute resolution service that can be considered an

ODR mechanism.\textsuperscript{35} The resolution of domain name disputes with the use of technology by the firm Leadr is another example worth noting.\textsuperscript{36}

In spite of the fact that there are private dispute resolution providers who offer ODR or use technological tools, it is hard to determine whether the growth of ODR mechanisms in Australia is responding proportionately to the fast growing B2C cross-border e-commerce market, given the lack of adequate information given by private ODR providers in Australia. In fact, in the cross-border e-commerce market there could well be consumers who have disputes with foreign sellers over goods or services received from foreign businesspeople. In such cases there could be the possibility to use an ODR mechanism as part of their transactions. Again, specific conclusions cannot be drawn as to the number of disputes, disputants and ODR providers that are used, either locally established or located outside Australia, given the lack of up-to-date data. In fact with the increase of online shopping and website interactions with people living in foreign countries, they could be able to avail themselves of ODR providers operating in a foreign location when a dispute arises.

\textbf{2.4.1.2 Government sector}

There is a growing tendency towards the use of ODR in the government sector in Australia, which reflects the ‘institutional’ phase of the major developmental stages of ODR.\textsuperscript{37} The \textit{Alternative Dispute Resolution in Victoria: Supply-Side Research Project} identified institutions that applied the use of ODR or ODR-related elements, especially online technologies. These were Consumer Affairs Victoria (CAV), the Dispute Settlement Centre Victoria (DSCV), the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), and the Victorian Civil and Administrative Appeals Tribunal (VCAAT).\textsuperscript{38} Government-sponsored electronic court (eCourt)-related developments can be cited as promising developments within Australia. A brief note on DSCV, CAV, Victorian Civil & Administrative Tribunal (VCAT) and the eCourt setting is provided for highlighting the development of ODR in the government sector.

\begin{footnotesize}\begin{itemize}
\item \textsuperscript{35} InterMEDIATE Dispute Management, TDR - Telephone Dispute Resolution. Telephone Mediation by InterMEDIATE Dispute Management \url{http://www.intermediate.com.au/phone-online?gclid=CMPTy_O8tWECFQOZtpQodWh0AJA} last accessed 04 September 2012.
\item \textsuperscript{36} LEADR \url{http://www.leadr.com.au/domainnamedisputes.htm} last accessed 04 September 2012.
\end{itemize}\end{footnotesize}
2.4.1.2.1 DSCV, CAV and VCAT

One of the underlying rationales behind the development of the DSCV Scheme is to settle disputes by using a non-adversarial dispute resolution mechanism through communication. Types of disputes that can be administered by the DSCV can vary from complex disputes to small ones. There are ODR-related developments: for example DSCV ‘uses social networking sites to keep you more informed about dispute resolution and to better inform Victorian residents about their options and the services provided by the centre.’ Social networking sites such as Facebook and YouTube sites are used for the delivery of its services; they advertise the following:

- Information about what’s happening at the Dispute Settlement Centre of Victoria across the state
- Via Facebook, links to the services provided by the centre as well as conflict coaching strategies
- Our YouTube channel will promote videos and media footage pertaining to Appropriate/Alternative Dispute Resolution globally.
- Reminders of important events, changes to legislation and other news.

Another example is the CAV. For online dispute resolution the use of a ‘complaint email template’ can be cited. The organization also notes its use of the twitter service, claiming that, ‘our 850+ tweets have directed people to web content, court outcomes, consumer alerts, media releases, upcoming events and other useful content.’

The VCAT is another example that can be cited in this regard. One of the important dispute resolution services provided by the VCAT is the resolution of civil disputes. The extent of the

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39 ‘The Dispute Settlement Centre of Victoria (DSCV) is part of the Victorian Department of Justice and provides free dispute resolution services to all Victorians. DSCV offers dispute resolution advice, conflict coaching and mediation services.’ Dispute Settlement Centre of Victoria  [http://www.disputes.vic.gov.au/services] last accessed 04 September 2012.
44 ‘If you have a dispute in relation to goods you bought or sold or you hired someone (or were hired by someone) to supply a service in trade or commerce, the Civil Claims List at VCAT can probably hear your case’ - ‘There is no limit on the cost or value of the goods or services in dispute.’ Victorian Civil & Administrative Tribunal  [http://www.vcat.vic.gov.au/disputes/civil-disputes] last accessed 26 July 2012.
use of technology for the resolution of disputes by the VCAT is evident in the claim that ‘VCAT is the first justice institution in Victoria to develop the capability to manage cases on-line.’ It uses a case portal allowing parties to a dispute to have ‘24-hour’ access to the parties’ case, allowing documents to be filed electronically and publishing key information such as hearing dates online for disputes subject to hearing.\(^{45}\) The following benefits have been promoted as being offered through these online facilities of the VCAT to the parties to a dispute: ‘electronic assistance in lodging applications,’ ‘instant notification of hearing dates,’ ‘reduced costs of lodging documents,’ ‘improved access to VCAT information,’ and ‘greater speed in resolving cases.’\(^{46}\)

### 2.4.1.2.2 Government-sponsored courts

Another example is the use of ODR in the government-sponsored electronic court setting, and the influence of modernising the existing courts with recent technology can arguably be considered to be a result of ODR-related developments. The modernisation of courts such as the Family Court, Federal Court, Supreme Court and Magistrates Court can be highlighted. In the case of the Family Court, if parties to the dispute are in remote locations, they are allowed to access the Family Dispute Resolution via information and communication technology (ICT),\(^{47}\) which could be considered as a fundamental motivation behind the development of ODR.\(^{48}\) A similar development can be seen in the US, where online mediation is conducted in cases where ‘one parent has moved out of state and/or when there are concerns about past incidences of violence between the parties.’\(^{49}\)

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\(^{45}\) ‘The VCAT case portal provides parties with 24-hour access to their case and saves them time and money by being able to file documents electronically at any time. Key events, including hearing dates, are posted online and can be viewed by all parties, reducing confusion and avoiding delay.’ Victorian Civil & Administrative Tribunal <http://www.vcat.vic.gov.au/resources/document/transforming-vcat-through-technology-26-kb-2-pages-0> last accessed 26 July 2012.


\(^{47}\) ‘FDR services are provided by a range of individuals and organisations, for example, Family Relationship Centres, community organisations, legal aid commissions, and individuals such as lawyers, social workers or psychologists. If you are in a remote area, you may access FDR services, for example, via telephone.’ Australian Government initiative Family Relationships Online Helping Families Build Better Relationships-Family Dispute Resolution Brochure <http://www.familyrelationships.gov.au/BrochuresandPublications/Pages/Family-Dispute-Resolution-Brochure-09.aspx> last accessed 21 July 2012.

\(^{48}\) ‘Given the large geographic challenges faced in Australia, this factor alone is driving the use of this system. An ancillary benefit of using these technological systems is that the parties are not brought together in the same room at the same time; in disputes involving family violence, this is a major benefit of this system.’ Dave Bilinsky, Report from the ODR Conference in Buenos Aires, ODR Consumers 2010 in Vancouver <http://www.odrandconsumers2010.org/2010/06/03/report-from-the-odr-conference-in-buenos-aires/> last accessed 21 July 2012.

There are ODR-related developments in the resolution of family disputes which are noteworthy in Australia. For example, the Family Relationship Services System includes among other things ‘the Family Relationship Advice Line (FRAL),’ which is a national telephone service giving free information and advice on family relationship or separation issues, and the ‘Family Relationships Online (FRO)’ service. This service ‘provides individuals and families with information about family relationship issues, ranging from building better relationships to dispute resolution.’ The other important development is the use of online technology for the improvement of a negotiation support system for the resolution of family law disputes by bringing legally fairer negotiated outcomes by bodies such as the Integrated Multi-agent Online Dispute Resolution Environment. The use of ODR for the resolution of family disputes offers several advantages as discussed by Melissa (2006) and John (2010). Conley Tyler and McPherson also note the potential application of ODR for the resolution of family disputes.

Recent technological developments introduced into the national Federal Court System in Australia are also promising. The eCourt mechanism which exists in the Australian Federal Court includes facilities such as eLodgment and eCase Administration. Regarding the

50 Sourdin and Liyanage, above n 43.
52 Ibid.
55 ‘facilitating negotiations about property and maintenance issues’, ‘facilitating negotiations about parenting’, ‘assisting parties to develop their negotiation strategies’, ‘providing mediation and other primary dispute resolution services online’, ‘supporting face-to-face dispute resolution through the use of videoconferencing, teleconferencing and email’, ‘supporting face-to-face dispute resolution through document drafting and other collaboration tools’, ‘allowing for the exchange of information and the storage of data applicable to the settlement of property and financial interests or in order to manage ongoing parenting arrangements.’ Conley Tyler & McPherson, above n 4.
development of technology in the national courts, Sourdin notes that ‘the eCourt enables updated online conversations to take place and protocols have been developed to assist users and the court.’ This aspect is further addressed in detail from regulatory and institutional perspectives in chapter seven of the thesis.

2.4.2 ODR in Sri Lanka

There are at present some ODR-related developments that can be seen even though the spread and breadth of the development of ODR is at the initial stage, compared to that of Australia. In keeping this in mind, several ODR-related developments that have been taken place in Sri Lanka can be highlighted. They can be summarised as follows.

The growth of ADR and its expansion, which is reflected in diverse settings in the Sri Lankan dispute resolution landscape, can be considered a positive factor. Isvaran notes that ‘Sri Lanka has a rich tradition of dispute resolution going back to over two thousand five hundred years.’ This makes it clear that the Sri Lankan ADR-related history can be traced back to the ancient society, where informal methods of dispute resolution were commonly adopted to resolve disputes. At present, ADR serves in diverse sectors. These include both the government and private sector. In the government sector, the use of ADR for the resolution of disputes within government ministries and government-sponsored courts can be cited as examples. Alexander states that in litigation ‘there are a large number of commercial and civil disputes in Sri Lanka which are referred to arbitration.’

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60 Furthermore, ‘the Village Councils were then the forum for settlement of disputes. The Society at that time was highly influenced by religion and the administration of justice was directed to amicable settlement of disputes.’ K. Kanag-Isvaran, ‘Arbitration Law in Sri Lanka’ and Wijeratne, S.S (eds), Arbitration Law in Sri Lanka (The Institute for the Development of Commercial Law and Practice, 2006) 31.


63 ‘ADR programs face important limitations. They cannot substitute for the reform of corrupt or grossly inefficient judicial systems; they cannot establish precedents or establish rights; and they cannot reverse long-standing discrimination, although they can help increase access to justice for traditionally disadvantaged groups.’ Alternative Dispute Resolution Workshop, Workshop Report (2000) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ADRWorkshop.pdf> last accessed 19 September 2012.

64 ‘However, these proceedings are as lengthy and costly as litigation. Retired judges usually conduct the arbitrations at weekends or late evenings.’ Nadja Alexander, From communities to corporations: the growth of mediation in Sri Lanka (2001) 4 (1) ADR Bulletin 4.
The legitimacy of ADR has been ensured by various statutory instruments. For example, the Mediation Boards Act of 1988 was introduced with the following objectives to be achieved:

Finally, in 1988, the Ministry of Justice was empowered by Act 72 of 1988 to create the Mediation Boards for the voluntary settlement of minor disputes. Their purpose was to improve the quality of justice, reduce delays, stress and expense, increase accessibility, and improve awareness and confidence in the process. The first Mediation Board was established in 1990.\(^{65}\)

This Mediation Board resolved one million disputes in the last twenty years,\(^{66}\) which reflects the success of the legislation. In addition, the Arbitration Act of 1995 and the Commercial Mediation Centre of Sri Lanka Act 2000\(^{67}\) are examples worth mentioning in this regard.

These signs of developments in relation to the use of ADR in Sri Lanka can arguably pave the way for absorbing ODR into the ADR landscape. The other area of importance is the measures that have been taken to upgrade the technology infrastructure by the government, which brings ICT facilities further into even remote areas of Sri Lanka. As part of the broader e-governance programme, the development of ICT within the government court system has been commenced. A detailed discussion is given in chapter 7 of the thesis on the ODR-related developments in the government-sponsored court setting in Sri Lanka.

Another ODR-related development that deserves mention is the development of appropriate legal infrastructure to facilitate not only electronic commerce but also to use technology for the resolution of both offline and online disputes, for example the Electronic Transactions Act, No. 19 of 2006 and the Evidence (Special Provisions) Act, No. 14 of 1995 in Sri Lanka. These laws together with other related legal instruments are discussed in chapter six and seven of the thesis.

All these developments together with the growing signs of ODR-related literature as reviewed in the next section are promising trends for the development of ODR in Sri Lanka in the future.

### 2.4.3 ODR-specific scholarly contribution in both countries

The next question is whether adequate attention has been paid by the writers in ODR scholarship to the issues connected with ODR in general and more specifically the enforcement of OAA

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\(^{65}\) Mediation news in the World, above n 62.

\(^{66}\) Ibid.

\(^{67}\) Alexander, above n 64.
compared to offline ADR in both Australia and Sri Lanka.\textsuperscript{68} It can be argued that there is a distinct lack of attention to the area of OCAA in both countries.

\subsection*{2.4.3.1 ODR-related scholarly contribution in Australia}

It is evident that there is a considerable amount of literature and academic leadership regarding several aspects of ODR in Australia. Australian research scholars have paid attention to different aspects of issues connected with ODR, including legal issues,\textsuperscript{69} accreditation issues,\textsuperscript{70} effectiveness of non litigation-based redress methods,\textsuperscript{71} technological issues connected with ODR,\textsuperscript{72} online dispute resolution and family disputes,\textsuperscript{73} development of negotiation support systems\textsuperscript{74} and barriers to ODR,\textsuperscript{75} ODR and government sponsored courts,\textsuperscript{76} building client confidence in ODR,\textsuperscript{77} and issues associated with the enforcement of online arbitration agreements in the commercial arbitration context.\textsuperscript{78}

There are several government-sponsored national bodies which are involved in the development of ODR, including the Australian Law Reform Commission (ALRC), and other dispute resolution organizations.\textsuperscript{79} The National Alternative Dispute Resolution Advisory Council (NADRAC) is in the forefront of publishing reports which discuss ODR-related issues. For

\begin{thebibliography}{99}
\setlength{\itemsep}{0em}
\bibitem{68} ‘Most Australian research has concentrated on two aspects of ADR: the objective results of ADR and the subjective views of parties, practitioners and legal representatives. The former are mainly quantitative in nature, and the latter are mainly qualitative.’ Report to the Commonwealth Attorney-General A Framework for ADR Standards national Alternative dispute Resolution Advisory Council (April 2001) 25.
\bibitem{73} Conley Tyler and McPherson, above n 4.
\bibitem{75} Sourdin, above n 16.
\end{thebibliography}
example the *On-line ADR Background Paper* in 2001\(^{80}\) and the Resolve to Resolve—Embracing ADR to improve access to justice in the federal jurisdiction in 2009\(^{81}\) provide an overview of ODR, together with discussions of advantages, disadvantages and barriers to the development of ODR. There are also several specific research reports which focus on online ADR.\(^{82}\) ADR-related principles developed by NADRAC can be applied equally to ODR as well, as for example in the NADRAC report titled ‘A Framework for ADR Standards,’ which identifies the principles of ADR as ‘flexibility, cost effectiveness, diversity, inclusiveness, accessibility and creativity.’\(^{83}\)

As far as empirical research is concerned, initially NADRAC noted that ‘the paucity of (especially empirical) data in ADR generally is accentuated when it comes to on-line ADR.’\(^{84}\) In fact, there has been evidence of empirical research recently conducted in relation to several aspects of ODR. Scholarly papers such as on the digital divide, which refers to barriers that prevent some people accessing ODR options, by Sourdin,\(^ 85\) and a survey of ODR sites by Conley,\(^ 86\) can be cited as examples.

### 2.4.3.2 ODR-related scholarly contribution in Sri Lanka

Given the limited ODR-related literature in Sri Lanka, there is a considerable literature on e-commerce which could provide a boost for the development of an appropriate legal and institutional infrastructure for ODR in the future. For example there are several E-commerce related articles published in journals such as the Bar Association Law Journal, covering legal issues which include electronic signatures, authentication of electronic records and data

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83 Ibid 3.

84 Sourdin, above n 16.

protection ensuring the validity of electronic communications, the validity of offers and acceptance by electronic means, and other evidential issues.\textsuperscript{87}

The other positive trend is that there are several publications which consider ODR. For example, Abeyaratne, in the article entitled ‘Issues in E-commerce Law and Dispute Resolution,’ briefly refers to online dispute resolution by mentioning that negotiation, mediation and arbitration can take place across a network, cutting down cost and time.\textsuperscript{88} The other example in the move towards the development of ODR is the promotion of ODR for peace building purposes in Sri Lanka. Hottatuwa has produced several publications in this regard, focusing on the use of technology and ODR for conflict resolution and peace building.\textsuperscript{89} This writer has surveyed the confluence between ICT, conflict transformation and peace building.\textsuperscript{90} Additionally, the use of technology in developing ODR has been explored in his article entitled The Future of ODR: One Brief Glimpse.\textsuperscript{91}

In view of this, it is reasonable to observe that there has been a considerably greater contribution to the development of ODR in Australia than in Sri Lanka. ODR has been used and promoted as an important tool to ensure access to justice in and out of the court setting. Australia is slowly but steadily contributing to the enrichment of global ODR literature by addressing various aspects of ODR from both a local and global perspective. This is an area of significant potential growth into the future. In comparison, it is reasonable to note that Sri Lanka is still in the initial stage of embracing and developing ODR within its dispute resolution landscape, compared to that of Australia. A survey of the existing literature on ODR in Sri Lanka highlights that there is very little literature regarding ODR in general and OCA in particular.

In view of this brief literature review of both Australian and Sri Lanka, it is reasonable to note that there is little information or analysis in relation to online consumer arbitration (OCA) for the resolution of B2C cross-border e-commerce disputes and the enforcement of online consumer


arbitration awards (OCAA). Overall, the prevailing situation of the developing trends to embrace ODR as an appropriate dispute resolution mechanism within the existing dispute resolution landscape provides insights into the need for more research into both countries in relation to the enforceability of OCAA from legal and institutional perspectives.

3. Theoretical underpinnings of the proposed regulatory and enforcement frameworks

3.1 The regulation of ODR

3.1.1 An overview of the regulation of cyberspace

Before moving to a review of regulatory approaches to the regulation of ODR, it is important to review briefly the ongoing debate over the regulation of the Internet for two reasons: i) similar characteristics can be seen in the debate over the regulation of ODR and ii) ODR appears to be considered a subset of the broader debate over the regulation of the Internet.

The regulation of the Internet has been categorised into four periods: ‘open Internet period, from the network’s birth through about 2000’; ‘access denied, through about 2005’; ‘access controlled, through the present day (2010)’; and ‘access contested, the phase into which we are entering.’ There is an ongoing debate as to whether cyberspace should be regulated or not, and if it should be regulated what the appropriate regulatory models are that can be used for this purpose. One side of this debate advocates the regulation of cyberspace without the intervention of territorial or international regulation. In other words, cyberspace is a free territory which is ‘unregulable.’ The other side advocates the regulation of cyberspace through the existing laws or international legal framework made by governments, rather than letting the regulation of cyberspace be determined by market forces. The rationale behind each side of the debate over the regulation of cyberspace has been summarised as follows by Kurbalija.

First, the fundamental premise behind the first approach is that ‘a ‘cyber-law’ approach presumes that the Internet has brought about new types of social interaction in cyberspace.

Consequently, new ‘cyber-laws’ for cyberspace need to be developed.95 There are views expressed by scholars in favour of the need for ‘new cyber-laws’ for the regulation of cyberspace. Crawford holds the view that, ‘the time has come to develop a common cyberlaw for cross-border business to consumer transactions, reflecting both the Internet’s unique place in history and its future possibilities’ and this author further notes that, ‘this new body of law could transcend traditional notions of law and jurisdiction and hopefully, in some ways, improve upon it.’96 Some scholars have paid attention to the research of appropriate regulatory models for the regulation of cyberspace, for example Lessig, who argues that ‘code and market and norms and law together regulate in cyberspace …as architecture and market and norms and law regulate in real space.’97

Second, there is the ‘real law’ approach, which favours the application of ‘existing legal rules.’98 One reason is for this approach is that ‘the Internet is not conceptually different from previous telecommunication technologies, from smoke signals to the telephone.’99 There are many writers who support this approach.100 This approach is further reflected in the area of consumer protection in which government intervention through its existing national laws is advocated for the protection of consumers, given their vulnerability. Examples are provided in the review undertaken in the section on the regulation of ODR in this chapter and in chapter four of the thesis.

This debate is an evolving phenomenon and subject to more theoretical approaches being added, with the increased understanding of the potential of the Internet and its related technologies. For example, in commenting on the views of other scholars such as Lessig that the regulatory approaches should be based on cyberspace as a place, Mariotti suggests another new theoretical foundation to develop better regulatory approaches. He argues that ‘[t]he cyberspace-as-place argument is only one-third right, because cyberspace is also a good and a medium at the same

98 Kurbalija, above n 95.
99 Ibid.
time'\textsuperscript{101} and ‘the most interesting lessons cyberlaw has to offer will be found at the interstices of the three dimensions, at the places where these dimensions of cyberspace intersect.’\textsuperscript{102}

In conclusion of this brief literature review, it is appropriate to echo Mariotti’s questions: ‘what is cyberspace, anyway? What is cyberlaw? Why should it exist as a field of study? No one, it seems, has answers’\textsuperscript{103} and to recognise as he does that ‘Cyberlaw, as a field, is still in its infancy’\textsuperscript{104} and ‘Cyberlaw is a field struggling to find an identity.’\textsuperscript{105} Similar questions with no appropriate answers can be seen in the field of the regulation of ODR as well. When the regulation of ODR is considered, especially in the context of OCA, attention has to be paid to how to move through the challenges posed by cyberspace, mainly driven by constant changes in the Internet and its related technological tools, and also national consumer protection laws, which are designed with territorial application for the protection of consumers. In keeping these two challenging phenomena in mind, the regulation of ODR is reviewed next.

3.1.2 The regulation of ODR in light of the ODR-related literature

Whether ODR should be regulated is an ongoing debate in the ODR literature. This debate can be illustrated through the following options for the regulation of ODR as articulated by Gibbons:

First, governments may affirmatively regulate ODR by accrediting ODR providers and establishing de jure standards for B2C ODR services. Second, governments may elect a laissez-fair approach and permit e-commerce to create institutions that support a market for dispute resolution services and permit that market to define the standards for consumer dispute resolution. Between these two extremes, there is a third option, the hybrid approach.\textsuperscript{106}

It is evident that there are three fronts moving towards the regulation of ODR; they are government-sponsored regulatory measures, private self-regulatory measures and the hybrid approach, mixing elements from both the first and second. The three approaches are reviewed in support of the third argument set out at the beginning of this chapter. The following review shows that there has been no specific legal framework promulgated for OCA from government, and as a result the private sector has been moving forward by adopting self-regulatory

\textsuperscript{101} Ibid 253.
\textsuperscript{102} Ibid 283.
\textsuperscript{103} Ibid 292.
\textsuperscript{104} Ibid 299.
\textsuperscript{105} Ibid 251.
frameworks designed by itself. There is a lack of consensus as to the appropriate regulatory model for OCA among ODR scholars, but there is a promising tendency to favoring the adoption of a hybrid regulatory approach.\footnote{A detailed discussion over the effectiveness of the self-regulatory approaches adopted by the private ODR providers in chapter three and the Australian and Sri Lankan governments’ regulatory measures will be conducted in chapter five and six.}

\subsection{Governments’ moves in the B2C e-commerce context}

It is important to review the regulation of ODR by considering the different policy approaches adopted by some of the major trading countries in relation to the regulation of B2C e-commerce contractual activities. Referring to the EU, North America and Australia, Clark and Hoyle argue that ‘Europeans generally are not trusting of private regulation. They are accustomed to more government intervention to get these matters right.’\footnote{Eugene Clark and Arthur Hoyle, E-ADR: Online Dispute Resolution: Issues and Recent Developments <http://www.canberra.edu.au/ncf/publications/e-adr.pdf> last accessed 04 September 2012.} This view is supported by an example found in the contemporary regulatory measures taken by the EU in regard to ODR. This is the ‘Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes’ in 2011,\footnote{European Commission Brussels, Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) 2011/0374 (COD) <http://ec.europa.eu/consumers/redress_cons/docs/odr_regulation_en.pdf> last accessed 16 July 2012.} under which ‘EU countries will be free to create their national rules to make the participation of traders in ADR procedures mandatory or their outcome binding on traders.’\footnote{Europa, Alternative Dispute Resolution and Online Dispute Resolution for EU consumers: Questions and Answers <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/840> last accessed 15 July 2012; ‘The European Parliament and the Council have already expressed their commitment to adopting the legislative package on ADR and ODR by the end of 2012, as part of coordinated efforts to re-launch the Single Market.’ Europa, Alternative Dispute Resolution and Online Dispute Resolution for EU consumers: Questions and Answers <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/840> last accessed 15 July 2012.}

As far as the US and Australia are concerned, Clark and Hoyle further note that ‘there is much more faith in and reliance on industry to lead the way and govern itself.’\footnote{Clark and Hoyle, above n 108.} This is evident from the fact that the \textit{Arbitration Fairness Act} of 2011 of the US, which is designed to remove unfair aspects of binding arbitration, exists still in the form of a bill,\footnote{The Arbitration Fairness Act of 2011, Findings, 112th Congress 1st Session S. 987, To amend title 9 of the United States Code with respect to arbitration. In the Senate of the United States (May 2011) <http://thomas.loc.gov/> last accessed 04 September 2012.} and from the liberal approach adopted by the judiciary in regard to mandatory online consumer arbitration clauses.\footnote{Michael L. Rustad, Richard Buckingham, Diane D’Angelo and Katherine Durlacher, ‘An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements’ (2012) University of Arkansas at Little Rock Law Review <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2043199> last accessed 17 July 2012.} The recently proposed Model Law on ODR is an important move to regulate the area of OCA and can also be viewed as a sign of combining control by the private ODR sector and the
government, as state consumer protection authorities are proposed as one institution for enforcement purposes of OCA awards.\textsuperscript{114}

The interpretation of Clark and Hoyle in the case of the Australian government’s regulatory approach is confirmed by examples such as the development of non-binding standards for the regulation of ODR in the broader context of ADR, taking into consideration offline and online contexts. Examples are the standards developed by the NADRAC for ADR mechanisms,\textsuperscript{115} and online consumer protection standards embedded in the Australian Guidelines for Electronic Commerce.\textsuperscript{116} In fact, in light of the recent legislative developments which can be applied to the regulation of ODR in Australia, it can be argued that the Australian regulatory approach seems to favour more government involvement. For example, until the enactment of the \textit{Competition and Consumer Act} (CCA) in 2011 in Australia, there was no federally applicable unfair contract terms–related statutory framework. The CCA can be applied to the enforceability of ODR clauses. Unless such clauses cannot be satisfied with the provision of unfair contract terms of the CCA, ODR outcomes based on such ODR clauses can be declared void by the judiciary under the CCA.

As far as the government’s regulatory developments are concerned, there is no specific legal instrument nationally or internationally that is particularly designed for ODR. Instead, governments have developed general regulatory measures. From a national perspective, the Australian Guidelines Electronic Commerce (Australian Guidelines),\textsuperscript{117} national consumer protection laws, which include the Australian \textit{Competition and Consumer Act} (Cth) of 2010, and e-commerce–friendly laws such as the \textit{Electronic Transactions Act} (Cth) of 1999 in Australia and the Sri Lankan \textit{Electronic Transactions Act} of 2006 and \textit{Unfair Contract Terms Act} of 1997 can be cited as examples.\textsuperscript{118} In the international context, OECD Guidelines in the Context of

\begin{footnotesize}
\textsuperscript{114} See ‘The ODR Initiative is designed to be free for Buyers and inexpensive for Vendors. It is also structured so that Vendors and ODR providers are monitored as to compliance with the terms in this Model Law/Cooperative Framework.’ Colin Rule, Vikki Rogers, and Louis Del Duca, ‘Designing a Global Consumer Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims-OAS Developments’ (2010) 42 (3) Uniform Commercial Code Law Journal 221, 245 <http://colinrule.com/writing/ucclj.pdf> last accessed 30 July 2012.
\textsuperscript{117} Ibid.
\end{footnotesize}
Electronic Commerce for the protection online consumers can be mentioned (OECD Guidelines).  

In view of this prevailing situation, a question that is worth asking is: Should the governments make specific legislation for OCA? As far the ODR-related literature is concerned, Heuvel argues against the promulgation of statutes for the regulation of ODR for cross-border electronic disputes, on the basis that ‘it is still far too early to start worrying about whether legislation is necessary to regulate ODR for cross-border e-disputes.’  

It seems that affirmative legislations to regulate ODR may not be successful on their own, due to the changing nature of the technology and business models. Kleinsteuber notes that ‘laws cannot regulate the Internet in many cases’ and ‘the Internet as a global medium cannot be caged in by nation-states.’ As such, this author advocates the need for new concepts. The next question is whether the ODR market can regulate its dispute resolution proceedings by adopting its own regulatory framework? The next section provides an answer to this question.

### 3.1.2.2 The private sector in the B2C setting

In the international arena, the paper ‘International Policy on Industry Self-regulation’ recognises the importance of self regulation of e-commerce ‘as the only useful option because online trades are increasingly crossing jurisdictional boundaries.’ The next question is: what is the rationale behind these regulatory approaches? In referring to the OECD Guidelines with regard to online consumers, Calliess indicates that ‘the guiding idea behind this call for self-regulation was that the advent of the Internet enables cross-border b2c-e-commerce.’ The reason is that ‘multi-jurisdictional litigation involving very complicated questions of conflict of contract laws and applicable consumer protection regimes is not suitable for the relatively small values at stake.’

In practice, there are ODR providers which operate within a self-regulatory framework designed by themselves. This situation can be illustrated by looking at three examples of OCA providers.

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121 Ibid; Gibbons, above n 106, 5-6.

122 Kleinsteuber, above n 97.

123 Ibid.


126 Ibid 654-655.
First, the net-ARBitraion which provides online arbitration can be cited. Net-ARB is a private OA mechanism initiated in 2005 by Marty Lavine and located in the US. This mechanism is operated by using the Internet for the resolution B2C e-commerce disputes and termed as an online dispute resolution mechanism and a small claims court on their website. Parties can select one arbitrator or a three member panel of arbitrators for their disputes. Its website states that that ‘Arbitrators at net-ARB decide cases based solely on what they believe is fair.’ Its arbitrators make their final decisions following a set of guidelines:

- Determine a fair and reasonable outcome based on the evidence presented and application of the following:
  - General principles of equity and common law
  - Common sense analysis of circumstances and context
  - Personal experience & expertise

- Arbitrators must immediately request re-assignment for any of the following reasons:
  - Conflicts of interest, no matter how slight
  - Presence of bias, no matter how slight
  - Loss of neutrality at any stage of the hearing

It is evident that there is no reference to the application of any specific national laws, not even national consumer protection laws, in cases where OA is used for the resolution of B2C e-commerce disputes.

The second example is the Uniform Dispute Resolution Policy (UDRP) and the Rules for Uniform Domain Name Dispute Resolution Policy (UDRP Rules) of the Internet Corporation for Assigned Names and Numbers and supplemental rules adopted by UDRP providers for the resolution of domain name disputes. The third one, NetNeutrals.com, provides OA, and is regulated by ‘Rules and Guidelines.’ The second and third cases are discussed in the next

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128 Ibid.
130 Ibid; judge.me is another example where, ‘Our internet arbitration is ‘ex aequo et bono’, which means our arbitrators act ‘from equity and conscience.’” Small Claims Court on the Internet <http://www.judge.me/> last accessed 29 July 2012.
131 ‘Administrative proceedings for the resolution of disputes under the Uniform Dispute Resolution Policy adopted by ICANN shall be governed by these Rules and also the Supplemental Rules of the Provider administering the proceedings, as posted on its web site. To the extent that the Supplemental Rules of any Provider conflict with these Rules, these Rules supersede.’ Rules for Uniform Domain Name Dispute Resolution Policy as approved in 2009 by the ICANN (UDRP Rules) <http://www.icann.org/en/dndr/udrp/policy.htm> last accessed 15 September 2012.
chapter in detail as to their compliance with ODR-related regulatory principles. Does the lack of having such legislation mean that the ODR market should be allowed to regulate its dispute resolution proceedings by using self-regulatory frameworks? The related literature provides an answer to this question in the following terms: they ‘cannot be left exclusively to self-regulatory initiatives.’ This raises the question as to whether the ODR-litterature offers any appropriate approach for the regulation of ODR, including OA, and if yes what are the reasons given for such approaches? The next section reviews an answer to these two questions.

3.1.2.3 Moving towards a hybrid approach

It is evident that many writers favour the hybrid approach as the most suitable approach in this respect. They advocate the mixing of both self-regulatory measures and government sponsored legal instruments. For example, Gibbons seems to advocate a hybrid approach: ‘Regulatory models that provide voluntary safe harbour provisions, coupled with explicit incentives to encourage due process and fair play to ameliorate the repeat-player influence, may be the superior regulatory models.’ He gives two reasons for this approach: ‘These models are flexible and are more likely to keep pace with the evolution of e-commerce.’ In a similar vein, Morek argues in favour of a co-regulatory model which entails ‘a combination of both private and national and international mechanisms, working in a coordinated effort to provide the optimal regulatory framework of online dispute resolution.’ Perritt also notes that ‘it is especially appropriate to concentrate on developing hybrid systems for elephant-to-mouse commerce.’

However, what constitutes a hybrid approach is not entirely clear; instead various kinds of models are suggested as ingredients of the hybrid approach. For example, Schultz addresses...
three modalities: accreditation,\textsuperscript{138} clearinghouses\textsuperscript{139} and online appeals.\textsuperscript{140} Morek examines four modalities for the regulation of ODR,\textsuperscript{141} of which law and norms appear to bear similar characteristics to government regulation and self-regulation. The other two, namely the market and technology, can arguably be considered different models with respect to the above-mentioned regulatory models.\textsuperscript{142} Most significantly, by looking at the theoretical and practical foundation of international commercial arbitration, Patrikios argues that ‘the optimum solution is a truly international, decentralised, multi-stakeholder, multi-level and multi-instrument co-regulatory system based on ODR and centred on transnational online arbitration with the role of the courts limited to the guardianship of public policy.’\textsuperscript{143}

Patrikios further argues for the need for \textit{Lex informatica} (‘the body of transnational substantive rules of e-business law and usages, as well as the method of their application for the resolution of e-disputes by arbitration’)\textsuperscript{144} as an appropriate approach ‘to the proliferation of online arbitration and the co-regulation of cross-border e-business.’\textsuperscript{145} Examining hard law and soft law options for the regulation of ODR, Vilalta suggests that ‘model laws and legislative guides’ are more appropriate for ODR.\textsuperscript{146}

It is a striking feature of the ODR-related literature that there is growing support for co-regulatory approaches as the appropriate way to move forward. This review indicates the increasing interest in searching for appropriate regulatory frameworks for ODR and illustrates various views conceptualising ODR within an established legal framework, regardless of the fact that there is a distinct absence of appropriate regulatory approaches to ODR in general and to OCAA in particular.

\textsuperscript{138} ‘Furthermore, it permits regulation: The regulatory framework of a trustmark is made up of the conditions for granting it, and these conditions can be easily connected to a set of substantive rules.’ Schultz, above n 20, 94.
\textsuperscript{139} ‘A second modality of ODR regulation is control of access to ODR providers. I contend that this modality permits the regulation of ODR in different formats because it allows the control of different aspects of access to ODR providers.’ ‘Such a clearinghouse would be able to regulate in three ways: (1) by controlling information about ODR providers, (2) by controlling filing, and (3) by reputation set against the rules of the clearinghouse.’ Ibid Schultz, 97-98.
\textsuperscript{140} ‘The third modality of ODR provider regulation is control of the providers work on a case-by-case basis.’ Ibid Schultz, 100.
\textsuperscript{142} Ibid.
\textsuperscript{145} Ibid 272.
In fact, this literature review indicates the lack of consensus in regard to the regulation of ODR, while a well designed specific regulatory model for ODR is lacking both nationally and internationally. Of course conflicting legal approaches and the complex and changing nature of technology will not make it easy for lawmakers or ODR scholars to produce or suggest a stable regulatory framework for ODR.\(^{147}\) As such, it is reasonable to agree with the observation made by Morek that ‘it is still difficult to predict which trend in ODR regulation will prevail.’\(^{148}\) It is still questionable as to what is the appropriate legal framework applicable to the enforcement of OCAA.

Presumably this uncertainty will last until an appropriate regulation for ODR is achieved, perhaps by way of ODR-specific supportive legal frameworks with some binding force. The prevailing complex and unsettled territory of regulation of ODR still warrants the evaluation of existing regulatory models, so as to achieve better future regulation for ODR. This is the rationale for the present examination of the regulatory responses of both Australia and Sri Lanka in terms of the enforcement of OCA, and for a search for an appropriate regulatory and institutional framework for the enforcement of OCAA.

### 3.2 Suggested models for the enforcement of ODR outcomes

In the first chapter the lack of an effective enforcement mechanism for ODR outcomes and the need for such a mechanism in order to make ODR viable for the resolution of B2C e-commerce disputes were identified. This section further reviews the literature about the models or mechanisms suggested for the enforcement of ODR outcomes, with special attention to the enforcement of OCAA from theoretical perspectives. It is argued that there is a lack of sufficient attention to the design of a mechanism specifically tailored to strengthen the enforcement of OCAA. A review of suggested enforcement mechanisms in the literature follows a background note which provides insights into enforcement mechanisms for ODR outcomes.

ODR is evolving and the current phase of ODR is considered to be ‘an institutional phase.’ This phase includes the development of ODR within institutional frameworks. It is evident that the

\(^{147}\) ‘Cyberspace is an arena of experimentation and competition. It is not now, and probably never will be, a harmonious place, but it is a place of rapid change and, even today, of extraordinary achievements.’ Ethan Katsh, Janet Rfkih and Alan Gaitenby, ‘E-Commerce, E-Disputes, And E-Dispute Resolution: In the Shadow of ‘eBay Law’’ (2000) 15 (3) Ohio State Journal on Dispute Resolution 733


\(^{148}\) Morek, above n 14; see also Katsh, Rfkih and Gaitenby, above n 147.
existing literature has gone beyond the focus on mere institutions for the enforcement of ODR outcomes. It appears that the institutional phase is not limited to the existence of ODR in its own right. Scholars advocate connecting institutional arrangements. Katsh makes the important point that ‘the ongoing development of ODR is a history of the building of an online civic institution that can be linked to other online civic institutions in ways that were not possible when information was tied to physical objects and spaces.’\textsuperscript{149} This raises the questions of what could be regarded as appropriate civic institutions that could be used for connecting both government sponsored courts and private ODR providers in general, and OCA providers in particular.

From an arbitration perspective, enforcement of outcomes has to be secured not only by means of an appropriate legal framework, but also of an appropriate institutional framework. This is mainly due to the fact that arbitrators lack authority to enforce their outcomes, and to the binding nature of such outcomes, which may give parties little opportunity to appeal and may prevent access to court.\textsuperscript{150} Generally enforcement can take place through the use of government enforcement mechanisms or private enforcement mechanisms.\textsuperscript{151} In the literature, there are several enforcements mechanisms suggested for the enforcement of final outcomes of the ODR mechanisms, including online consumer arbitration awards. The followings sections review the suggested enforcement models for ODR outcomes.

3.2.1 Enforcement of ODR outcomes through an international ODR system

An important development is the interest in the development of a global network. Cortes argues that ‘a global ODR network is the best solution to deal with consumer disputes’\textsuperscript{152} due to the fact that courts do not provide an effective system ‘that will effectively meet the needs of consumers in the new global marketplace.’\textsuperscript{153} Rule, Rogers, and Duca have argued for the development of a global online dispute resolution system for cross-border small value-high volume claims rather

\textsuperscript{149} Ethan Katsh, Online Dispute Resolution: Designing New Legal Processes for Cyberspace (2009) \textsuperscript{150} Doris Liebwald, Online Dispute Resolution ODR in E-commerce (2006) 24 \textsuperscript{151} ‘an ODR enforcement mechanism could have two routes i.e. governmental enforcing tools or direct control in which ODR provider has authority to execute and enforce the outcome of the dispute.’ Mohamed Wahab, ‘Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement’ (2004) 12 (1) International Journal of Law and Information Technology 123, 151 \textsuperscript{152} Cortes, above n 7. \textsuperscript{153} Ibid.
than regional measures. The United Nations Commission on International Trade Law is considering the need for ‘a global online dispute resolution system.’ There is another recent ‘model of fair dispute resolution for Internet disputes’ (online arbitration and online ombudsmen) that has been suggested by Hornle. It entails elements such as ‘non-binding forms of ODR,’ ‘redress against online merchants provided by payment providers,’ ‘online arbitration provided by private schemes,’ ‘a statutory online adjudication or ombudsman scheme’ and ‘litigation.’

These international ODR systems are designed on the premise of recognising the characteristics of the cross-border e-commerce setting. This form of mechanism can of course be viable for non-binding ODR, but can be problematic in cases where mandatory OA is used for the resolution of B2C cross-border e-commerce disputes. For example, national consumer protection laws in most of the countries in the world could be a bar to such mechanisms.

3.2.2 Enforcement of ODR outcomes through government sponsored courts

The question is whether the existing government-sponsored courts in traditional form can be used for this purpose. Obviously, the answer to this question is negative as the traditional offline government courts have many drawbacks when they are used for the resolution of cross-border e-commerce disputes. These drawbacks are discussed in chapter five of the thesis. There are views in the related literature in support of the use of electronic courts for the resolution of cross-border e-commerce disputes. The following three developments can be cited.

First, some scholars have expressed support for a separate global cyberjurisdiction and thereby a cybercourt to resolve Internet disputes. For instance, Crawford contends that a new cyber jurisdiction needs to be created to resolve Internet disputes focusing on business to consumer transactions. He has further written a five step plan in order to build a global cyberjurisdiction and promote the idea of creating a cybercourt of last resort which will eventually eliminate

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154 See ‘The ODR Initiative is designed to be free for Buyers and inexpensive for Vendors. It is also structured so that Vendors and ODR providers are monitored as to compliance with the terms in this Model Law/Cooperative Framework.’ Rule, Rogers and Del Duca, above n 114, 245.


156 Hornle, above n 19, 255.

157 Crawford, above n 96.

158 Ibid.
choice of forum concerns, as the forum would be everywhere in cyberspace. Johansson is of the view that there needs to be ‘an internationally recognised [c]ybercourt’ which needs to work as an intergovernmental body.

In fact, if this cybercourt takes the form of an international cybercourt, it needs to be supported by an international legal instrument which includes the structure of the cybercourt, the appointment of judges, due process, final decisions and enforcement of final judgments similar to those of international courts which are already in operation in the offline context. It can be argued that such an international effort is far from becoming reality, given the fact of different legal approaches to B2C e-commerce disputes.

Secondly, with current modernisation of the government-sponsored courts with technology, some scholars have paid attention to making use of government sponsored electronic courts (eCourts) for the resolution of cross-border e-commerce disputes, and support the private ODR sector. For the enforcement of ODR outcomes, Schultz suggests the slow transformation of courts into cyber-courts, at least for B2C disputes, considering advantages of ‘speed, cheapness and access’ that could be accrued to the existing court system. Such cyber-courts could play two roles, one of which is that ‘they can facilitate the enforcement of agreements and they can provide agreements that are more easily enforceable.’ Schultz’s proposal of the transformation of the existing court system into cyber-courts seems to be limited to individual countries. Tang is another scholar who has paid attention to the possibilities and advantages of using online judicial proceedings for cross-border electronic disputes.

Thirdly, another important area of attention is that the literature provides evidence in regard to the potential of eCourts for creating networks between public and private dispute resolution providers. For example, Clark and Cho observe that ‘courts may work in tandem with e-ADR to provide everyone with sufficient alternatives to aid resolution of conflicts of any kind’ and

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159 Ibid.
160 Johansson, above n 30.
advocate the need for more research in this connection.\textsuperscript{164} They have also observed that courts themselves can be electronic participants: ‘As courts go online, perhaps there is greater scope, too, for courts to be better connected to the network of various dispute resolution mechanisms and players involved.’\textsuperscript{165}

By putting emphasis on the need of establishing a balance between a consumer’s right of access to courts and ADR mechanisms, Haloush notes that ‘an important task would be to design an OADR system in a way that has the potentiality to establish an appropriate linkage to the court system, but without harming the flexibility of the process.’\textsuperscript{166} This scholar further argues that: ‘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.’\textsuperscript{167} This approach is worth pursuing further to find out what is the appropriate regulatory frameworks that can be used for using eCourts for the enforcement of online arbitrators’ awards administered by private OCA providers.

3.2.3 Through an international commercial arbitration mechanism

At present there are OCA providers such as judge.me and net-ARB that have adopted an international commercial arbitration mechanism for the enforcement of their OCA awards. The judge.me is a private OCA provider and its OA mechanism has been developed for the resolution of B2C e-commerce disputes located in the US. Its website advertises itself as follows: ‘No need to sue the other party in a foreign country or in every country where he or she has assets. Just arbitrate once, our arbitral awards are recognized and enforced by courts in 146 countries.’\textsuperscript{168} A similar approach has been adopted by net-ARB which is also a private OA provider for the resolution of B2C cross-border e-commerce disputes.\textsuperscript{169} In fact, it seems that

\begin{itemize}
\item \textsuperscript{164} Clark and Cho, above n 69, 22; However, according to Perritt, ‘there is no obvious need here for government involvement, although designers of such private systems must recognise and design for the potential that unhappy participants may will jump out of the private mechanisms into local courts seeking resolution of certain disputes.’ Henry H. Perritt, Role and Efficacy of International Bodies and Agreements U. S. Perspectives on Consumer Protection in the Global Electronic Marketplace Federal Trade Commission Public Workshop Discussion Paper (June 9, 1999) 9
\item \textsuperscript{165} Clark and Hoyle, above n 108.
\item \textsuperscript{166} For example Haitham Haloush, ‘Enforcement, Recognition, and Compliance with OADR Outcome(s), (2007) 21 (2) International Review of Law Computers & Technology. 81,89.
\item \textsuperscript{167} Ibid 81–96.
\item \textsuperscript{168} Small Claims Court on the Internet <http://www.judge.me/> last accessed 21 July 2012: ‘If deemed necessary, either party may seek to confirm or enforce the award in any court of competent jurisdiction. After the arbitration award has been rendered, a notarized Affidavit of Arbitration can be requested at support@judge.me for the administrative fee of 35 USD.’
\end{itemize}
both providers have not specifically designed a mechanism to connect to the enforcement courts of final arbitral awards, but general information is provided on the use of the New York Convention in 1958 (NYC)\textsuperscript{170} with their positive elements adopted as the enforcement mechanism.

These trends in practice indicate that some OCA providers adopt the same mechanism as that for the enforcement of final awards delivered by international commercial arbitration providers. Of course the availability of more options or various types of enforcement mechanisms for the enforcement of OCA can be viewed as a positive trend. However, some writers raise concerns about the possibility of using the international commercial arbitration framework for the enforcement of OCAA. For example, Gibbons indicates that ‘the current commercial law model of arbitration is designed to resolve disputes between members of an industry and not between consumers and merchants.’\textsuperscript{171} Coteanu raises concern as to ‘whether an international legal framework would move ahead at a faster pace than technology to ensure effective consumer protection.’\textsuperscript{172}

Given the uncertainties associated with the international commercial arbitration legal framework, some scholars suggest reforms to the existing legal framework. For example, Gibbons is another scholar who has examined some of the difficult issues associated with the NYC when it is used for a B2C setting. This scholar further argues that the NYC needs to be revised for it to be used for online consumer arbitration.\textsuperscript{173}

Another development is the suggestion made by scholars for the enforcement of arbitral awards with the principles embedded in the international commercial arbitration legal framework. Patrikios’s proposed regulatory approach seems to argue for having ‘transnational online arbitration,’ which is conceptually similar to the international commercial arbitration model.\textsuperscript{174}

\textsuperscript{173} Gibbons, above n 106, 62.
\textsuperscript{174} ‘This article suggests that traditional legal solutions based on localisation and territoriality is inappropriate for cross-border e-business transactions. The instantaneous, ubiquitous and truly international internet necessitates solutions with similar qualities. The elements of a plausible solution can be found in three relatively recent developments: the Online Dispute Resolution (ODR) movement; the emerging principles of internet governance; and the concept of co-regulation. The catalyst, however, is a concept rooted in the theory and practice of international commercial arbitration. This article argues that the optimum solution is a truly international, decentralised, multi-stakeholder, multi-level and multi-instrument co-regulatory
The reference to the ICA model is evident from his reference to ‘the role of the courts limited to the guardianship of public policy’ as can be seen in the ICA mechanism. Further evidence can be found in the following statement:

In order to be equally effective, the ODR system must accommodate the basic functions which have led to the remarkable success of the private system of international commercial dispute resolution formed by ADR and arbitration. The evolution and typology of ODR point to its ability to match or even supersede this success.

In view of these theoretical underpinnings, the following trends can be identified. First, the use of ICALF in the current form does not provide an appropriate legal framework for the enforcement of OCAA. Second, the need for reforming the ICALF has been recognised. Third, the use of ICALF has not been excluded from the consideration of the enforcement of OCAA. Fourth, there is a need for developing ‘transnational online arbitration’ based on the fundamentals of the ICALF. Overall, the question of whether the OCAA can be enforced under the ICALF still remains open.

### 3.2.4 Enforcement of ODR outcomes through a regional ODR system

In the US, the proposed Draft Model Law for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes in 2010 was a development in terms of both the regulation of ODR and the enforcement of OA awards. For the latter, it proposes the enforcement of such awards through the national administrator established under the proposed model law or the consumer protection authorities of the state where the buyer resides. This mechanism can arguably be viewed as another layer of enforcement of OCA awards which may work as a shield for parties seeking such an award to be enforced through a government-sponsored court. Even though this approach has merits, it is designed for a particular region, not for the international setting.

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175 Patrikios, above n 143, 129.  
Patrikios, above no 144, 129; ‘Fourth, since international arbitration is dependent on the support of national courts, which in this context also police the observance of fundamental principles of substantive and procedural fairness, the proposed system administers justice through the combined operation of private transnational tribunals and public national courts or, potentially, an international court for the judicial support and supervision of international arbitration.’ Antonis Patrikios, *The role of transnational online arbitration in regulating cross-border e-business – Part II*<http://www.sciencedirect.com/science/article/pii/S0267364908000083> last accessed 21 July 2012.

176 Ibid.

177 See ‘The ODR Initiative is designed to be free for Buyers and inexpensive for Vendors. It is also structured so that Vendors and ODR providers are monitored as to compliance with the terms in this Model Law/Cooperative Framework.’ Rule, Rogers and Duca, above n 114, 245.

178 Ibid 239-240, 260.
The latest development is the proposed regulation on the development of an ODR mechanism for the EU region, that is, the proposed ‘online dispute resolution for consumer disputes (Regulation on consumer ODR)’ in 2011.\textsuperscript{179} Under the regulation, ODR providers in the EU will be registered with the new scheme, the ‘European Online Dispute Resolution System.’\textsuperscript{180} Under the proposed rules, such ODR schemes are required to: deliver their decision ‘within 30 days from the date of receipt of the complaint’ and to ‘notify to the platform some data in relation to the development of the dispute (date when the complaint was notified to the parties; date when the dispute was resolved; outcome of the dispute).’\textsuperscript{181}

It is also important to note that ‘the competent ADR scheme will seek the resolution of the dispute in accordance with its own rules of procedure.’\textsuperscript{182} The proposed regulation seems to be a significant development in terms of the regulation of ODR mechanisms and enforcement of such mechanisms within self-regulatory as well as consumer protection legal principles. In fact, it is not clear how far enforcement of ODR outcomes of such ODR providers delivered outside the EU countries can be subjected to the current mechanism. If an OA provider is outside the EU and delivers a decision which may deny the consumers’ rights, such as denial of consumers’ access to a government-sponsored court, it will most probably be refused enforcement in the EU countries. There is no mechanism proposed in the current document detailing the enforcement of OCAA delivered by an OCA provider located in the EU where enforcement of its final award is expected to take place outside the EU. As such, the effectiveness of such a regional mechanism with little attention to cross-border setting is questionable.

3.2.5 Enforcement through ‘sanctions based on reputation’

The other mechanism suggested is the enforcement of the final outcomes of online arbitrators through a reputational sanction. Dussan suggests this approach by asking the question: ‘Is legal enforcement the only means to compliance of online arbitration awards?’ and also this writer argues that there is a need ‘to take into consideration the possibility of legal enforcement being substituted by other kind of sanctions. One of those possibilities is sanctions based on reputation.’\textsuperscript{183} This method has been elaborated by referring to some of the characteristics of the


\textsuperscript{180} Ibid.

\textsuperscript{181} Ibid.

\textsuperscript{182} Ibid.

UDRP online arbitration mechanism. According to this writer, ‘the text of the decision could be posted on the website of the online arbitration provider, and the parties would send out information about the decision through an E-mail.’184

The next step is that ‘the online arbiter would closely follow the execution of his decision, and he also would be in constant contact with the managers of the e-commerce community, in the context of which the dispute arose.’185 If a party to the decision does not comply with the decision, the reputation of such a party is expected to be affected by the publication of the failure to comply with the decision by the managers of the e-commerce community.186 As a consequence of this information delivered to the community, the reputation of that person can be affected; if the party complies with the decision, the reputation can be increased.187

3.2.6 Enforcement mechanisms adopted by private ODR providers in practice

In addition to the theoretical approaches to the enforcement mechanisms of ODR outcomes, there are various types of enforcement mechanisms adopted by ODR providers in practice. For example, institutions such as banks have also adopted an enforcement mechanism within their parameters. For instance, using sui generis arbitration, banks have adopted and offered protections such as Chargeback or payment cardholder protections.188 In this mechanism, the bank plays an important role as it has control over the credit card payments. When there is a dispute between an online consumer and an online business and they use a credit card for the payment, the consumer can instruct the bank to delay payment until the dispute is settled.189

Other examples are ICANN’s OA mechanism which adopts a technology-driven enforcement mechanism for the enforcement of UDRP decisions over the resolution of domain name disputes.190 NetNeutrals.com also adopts an enforcement mechanism which entails removal of negative feedback received from the disputant over a transaction.191 The enforcement

184 Ibid.
185 Ibid.
186 Ibid.
187 Ibid.
188 See also Cortes, above n 7.
189 ‘It is regarded as very efficient for consumers because the speed, accessibility and lack of charge for this service for their clients, who would just have to notify their banks to cancel a transaction. By contrast the existing systems are considered largely inefficient for businesses.’ see also Cortes, above n 7; see also Louis Del Duca, Colin Rule and Zbynek Loebl, ‘Facilitating Expansion of Cross-Border Ecommerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)’ (2012) 1 (1) Penn State Journal of Law & International Affairs <http://elibrary.law.psu.edu/jlia/vol1/iss1/4/> last accessed 21 July 2012.
mechanisms adopted by these two providers are explored in detail in the next chapter of the thesis.

In light of the theoretical underpinnings of the enforcement mechanisms suggested for ODR outcomes, it is reasonable to note that the enforcement mechanisms suggested in the literature lack a specific regulatory and institutional framework for the enforcement OCAA delivered by online arbitrators operated by private OCA providers. Nevertheless, while there is a lack of an appropriate enforcement mechanism developed for the enforcement of ODR outcomes through linking both sectors, there is an appeal in the related literature for adopting a new model with a combination of the private ODR sector and the government sector. In recognising this growing attention, and drawing insights from the literature, this thesis advocates a cooperative approach (hybrid approach). Accordingly, this thesis further explores the merits of the international commercial arbitration legal framework and the government-sponsored electronic courts as an option for strengthening the enforcement of OCAA, mainly from the Australian and Sri Lankan perspective.

3.3 The related regulatory frameworks applicable to OCAA

The following regulatory instruments and the institutional frameworks embedded in these regulatory instruments are examined in the chapters from four to seven of the thesis. They are: online consumer protection Guidelines: Guidelines for Consumer Protection in the Context of Electronic Commerce of 1999 by the OECD\(^{192}\) and the Australian Guidelines for Electronic Commerce of 2006 by the Australian government.\(^{193}\) There are national consumer protection laws such as the *Competition and Consumer Act* of 2010 (Cth) in Australia and the Sri Lankan *Consumer Affairs Authority Act* of 2003\(^{194}\) and *Unfair Contract Terms Act* of 1997.\(^{195}\) The ICALF entails the *International Arbitration Act 1974* (Cth) (IAA),\(^{196}\) the Sri Lankan *Arbitration Act* of 1995 together with the New York Convention of 1958,\(^{197}\) and the relevant articles of the

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\(^{192}\) OECD Guidelines, above n 119.

\(^{193}\) Australian Guidelines, above n 116.


\(^{196}\) *International Arbitration Amendment Act No 97 2010* (Cth).


4. Methodological approach: the triangular research methodology

The ODR-related literature provides some guidance for the use of different types of methodologies when researching issues connected with ODR. Theoretical, comparative and empirical methods have all been used to research ODR. It appears that there is no specific limitation as to the types of research methodologies that can be applied to address issues in the field of ODR, as there have been no specific studies conducted about the particular research methodologies that need to be adopted in researching ODR. Arguably, this means that research on issues associated with ODR is an open field from a methodological perspective.

Accordingly, this thesis adopts the triangular research methodological approach. Olsen notes that, ‘triangulation means mixing approaches to get two or three viewpoints upon the things being studied.’ Risjord, Moloney and Dunbar state that ‘methodological triangulation is the use of two or more different kinds of methods in a single line of inquiry.’ Within the parameters of the present thesis, the triangular research methodology involves a literature review, the comparative legal research method and case studies.

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201 Wendy Olsen, Triangulation in Social Research: Qualitative and Quantitative Methods Can Really Be Mixed 4. <www.ccsr.ac.uk/staff/Triangulation.pdf> last accessed 13 October 2011; see also ‘Good research can be conducted utilising either qualitative or quantitative methodologies, but the triangulation of research through using a mixture of different methods from both methodologies can provide more conclusive and persuasive results.’ Marc Latham, Persuasive Research Uses a Triangular Approach Content Analysis is a Method for Quantitative and Qualitative Data <http://marc-latham.suite101.com/persuasive-research-uses-a-triangular-approach-a148739> last accessed 13 October 2011.

4.1 Literature review

It is worth outlining the way this research method is utilised through the thesis. Chapter two has the main literature review regarding the development of ODR, with special reference to Australia and Sri Lanka, and issues associated with the enforceability of OCAA which are subject to discussion in the thesis. A review of the literature is pursued in other chapters where relevant to the issues discussed in each chapter.

The literature review is based on available writing about ODR in general, and the enforcement of OAA in particular; reference to ODR literature is spread throughout the thesis. The survey of major sources includes scholarly articles, text books, reports and recommendations of relevant international organisations such as the EU and OECD. Resources are collected from both online versions and offline materials which have been published nationally in both Australia and Sri Lanka and in other jurisdictions.

4.2 Comparative legal research method

It is important to note that comparative law has been well established as an appropriate research method in legal scholarship. It will be of use to explore the scope of this research method and its relevance to the objectives of the current research project in this section. A brief literature review of comparative law is conducted for the purpose of giving an overview of the scope of the comparative legal method as a research method and to justify its appropriateness for examining the existing laws of both jurisdictions and suggesting required reforms to the existing legal frameworks in both countries.

It is evident that what comparative law is has been an ongoing question for a considerable period of time. Most importantly, the comparative legal research method has been recognised in the following terms: ‘The comparative method is sufficiently elastic to embrace all activities which,
in some form or other, may be concerned with the study of foreign law.\footnote{H.C. Gutteridge, \textit{Comparative Law: an Introduction to the Comparative Method of Legal Study} (1971) 1. 7.} Several aspects of comparative laws have been identified in the study of comparative law.\footnote{See Peter De Cruz Comparative Law in a Changing World (Routledge, 1999).}

Hey and Mak identify a number of elements of this research method, namely, first, ‘comparative legal methodology is used to acquire insight into foreign legal systems’; second, it is useful ‘to find solutions for problems of a specific legal system, or to promote the unification of law between national legal systems’; and third, ‘its methods consist of a comparison of different legal systems or legal traditions (external comparison), or of fields of law within national legal systems (internal comparison).’\footnote{Ellen Hey and Elaine Mak, ‘Introduction: The Possibilities of Comparative Law Methods for Research on the Rule of Law in a Global Context’ (2009) 2 (3) \textit{Erasmus Law Review} 287, 287.} Some of these features can be applied to the objectives of this thesis. It is reasonable to conclude that comparative law can be used as an appropriate research method to examine laws in different countries that are applicable to any form of issue, either offline or online. The next question relates to the reasons behind the application of this method in relation to the overall objectives of the thesis.

\subsection*{4.2.1 Reasons behind the selection of the two jurisdictions: Australia and Sri Lanka}

There are several reasons as to why the special focus is on two different jurisdictions. First, evidence is emerging that some other jurisdictions are also getting into this debate.\footnote{The UNCTAD secretariat, United Nations Conference on Trade and Development E-Commerce and Development Report 2003 Internet edition prepared (2003) 94.} For example, in Canada different judicial decisions have been given with contradicting legal positions, due to the lack of a clear legal position established by statutory law across the country.\footnote{Geneviève Saumier, ‘Consumer Arbitration in the Evolving Canadian Landscape’ (2009) 4 (113) \textit{Penn State Law Review} 1203, 1204.} As a result, there is a current discussion among ODR writers as to whether Canada should adopt or adapt the US approach in regulating OCA in Canada.\footnote{Ibid.}

This demonstrates that there is an increase in individual countries’ attention towards other jurisdictions in order to improve their legal position in relation to ODR. This thesis focuses on Australia as a developed country and Sri Lankan as a developing country, both of which are also parties to the global e-commerce market and currently face challenges in relation to the resolution of B2C e-commerce disputes arising from e-commerce activities. Therefore the
differences in geography, volume of trade and economic status between these two countries do not arguably matter in searching for solutions to common issues.

Second, Australia has had developments in regard to ODR which reflect regulatory measures (Australian Guidelines)\textsuperscript{212} and has recently introduced a list of unfair contract terms embedded in the CCA, as well as institutional measures such as a government-sponsored electronic court mechanism and also growing ODR-specific literature. These sources, especially with proposed reforms to the existing Australian regulatory and institutional framework applicable to the enforcement of OCA, provide valuable insights for the development of ODR-related literature, regulation and institutions in Sri Lanka.

Australian legal developments and jurisprudence can have an especially persuasive impact on Sri Lanka as both countries follow the common law tradition in terms of legislation and judicial interpretation of existing laws. It must be noted, as a result, that while comparisons between the two countries will be drawn in pursuing the research issues of the thesis, leaning heavily on the situation in Australia, some reference will also be made to relevant international developments in the US and the EU in particular. As a result, in some chapters more discussion is conducted only from the Australian perspective, in particular in chapters five and seven.

Third, the internet has changed the boundaries of sovereign countries and forced the search for collective legal solutions to online consumer cross border issues.\textsuperscript{213}\textsuperscript{213} This is due to the nature of internet related commercial activities. The growing tendency towards an increase in B2C e-commerce as demonstrated in the statistics above is evident. Issues generated through this growing e-commerce market are not limited to one country in the world; they are common issues for every country.

In finding solutions to issues driven by the growing access to, and therefore growth of the B2C e-commerce market, every country has to develop its own legal systems in line with the legal and technological developments taking place in the international trading environment. There is a lack of sufficient attention to developing OCA-specific legal and institutional frameworks in both countries. As such, analysis of the legal and institutional response of both countries is


\textsuperscript{213} OECD Guidelines, above n 119, Part Three Implementation.
undertaken so as to consider the drawbacks in both systems and finally to propose solutions for each country to address the issues associated with the enforcement of OCAA. Reforms need to be brought about through either legislature or the judiciary.

Fourthly, both countries are parties to the international commercial arbitration mechanism connected by the NYC. Therefore, exploring the merits of both the Australian and Sri Lankan ICALFs are worthwhile as part of the proposed cooperative mechanism for strengthening the enforcement of OCAA internationally. Reforms suggested in this thesis for the ICALF are equally applicable to both countries for the development of existing ICALF for the development of OCA.

4.3 Case–study approach
At the outset, Alan Shanks, Centre Manager and researcher at the Australian Centre for Court and Justice System Innovation (ACCJSI), Monash University prepared the charts and table of statistics that used in the third chapter of the thesis. The statistics on which these were based were sourced from the website of World Intellectual Property and NetNeutrals.com, which are online consumer arbitration providers. His work is greatly appreciated and I am grateful for his assistance. Statistics collected from the World Intellectual Property Organisation are in the public domain. Statistics received from the NetNeutrals.com are confidential and received from the provider (de-identified statistics) under ethics approval from the La Trobe University.

The two selected cases are the WIPO’s OA mechanism and OA mechanism adopted by the NetNeutrals.com. These providers are private ODR service providers for B2C e-commerce disputes and located in the US. As far as the first is concerned, WIPO is an approved dispute resolution provider by the Internet Corporation for Domain Names and Numbers (ICANN). ICANN has another three approved OA providers. They are Asian Domain Names Dispute Resolution Centre, National Arbitration Forum, and the Czech Arbitration Court Arbitration Centre for Internet Disputes. In fact, ICANN’s OA process adopted by WIPO is chosen as a representative of the ICANN’s UDRP mechanisms, it also has the most successful rate of dispute settlement, and there are materials focused on its performance from various aspects.

216 Internet Corporation for Assigned Names and Numbers <http://www.icann.org/en/dndr/udrp/approved-providers.htm> last accessed 15 September 2012.
ICANN is the main organisation established in 1999, and it designed its OA mechanism for the resolution of domain name disputes. One can gain a domain name through this registration process and it is offered ‘on a first come first served basis.’ Generic top level domain names include names together with terms such as .com and .org. The problematic aspect is the fact that these registrants can and sometimes do use the trademarks in bad faith for gaining financial benefits out of trademarks owned by trademark owners for their business purposes. Reasons behind such trends could be that the adoption of a simple process for the registration of these domain names and the expansion of the online market has led to an increase in disputes between domain name registrants and trade mark owners. Importantly, as a solution to cope up with the increasing cybersquatting or domain name registration in violation of trademark owners’ rights, ICANN introduced an online dispute resolution mechanism under a self-regulatory mechanism of UDRP.

NetNeutrals.com is an online dispute resolution programme operated by a private entity called DeMars & Associates Ltd which is a national dispute resolution consulting firm. This designs projects for ‘maximizing the mutual interests of the business and consumer communities, striving to build strong relationships in order to develop policy in the public interest.’ One of its projects is NetNeutrals.com which is specially for the resolution of disputes of eBay. It has many clients and provides dispute resolution services for various sectors. It consists of four ODR mechanisms: direct negotiation, mediation, independent feedback review and voluntary arbitration mechanism. The first two mechanisms have been designed for producing non-

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217 Kate McCormick, Domain Name Rights <http://www.legalcentre.co.uk/ecommerce/guide/domain-name-rights/> last accessed 17 February 2013; The role of the domain name has been articulated in the case of Tucows.com.co v. Lojas Renner S.A. in 2011 as follows: ‘The original role of a domain name was to provide an address for computers on the internet. As the internet’s role in facilitating the carrying on of commercial activity evolved and grew, a domain name, which is easy to remember, came to be used to identify and distinguish a business itself as well as to facilitate the ability of consumers to navigate the internet.’ Tucows.com Co. v. Lojas Renner S.A., 2011 ONCA 548 <http://www.ontariocourts.on.ca/decisions/2011/2011ONCA0548.htm#_ftnref3> last accessed 06 September 2012.


222 NetNeutrals.com, above n 215.

223 Ibid.

224 Ibid.


binding outcomes and the second and third mechanisms provide binding decisions that are mandatory.228

This case–study research approach is designed to explore and evaluate the compliance with the OA mechanisms adopted by the two providers with OA mechanisms-related principles, with a special focus on the enforcement of their final outcomes in terms of the ODR mechanisms-related regulatory standards. The assessment is conducted by using the ODR mechanisms-related regulatory principles and qualitative information and quantitative data gathered from both providers. The purpose is to understand the existing enforcement mechanisms of both OCA providers; to examine legal frameworks applicable to their enforcement mechanisms; to evaluate the success of the enforcement of OCA awards; and to explore the potential strengths and weaknesses of the two OA providers in general and their enforcement mechanisms in particular.

4.3.1 Reasons behind the selection of the two OA providers
There are two major reasons that can be cited for limiting the study to only two OCA providers. The first relates to different forms of online arbitration mechanisms, and the accessibility to both qualitative information and quantitative data, compared to the other OA mechanisms available on the websites.

First, ICANN’s UDRP process conducted by WIPO requires parties to a domain names dispute to go through a dispute resolution mechanism which has OA characteristics, under an agreement, but the final outcome lacks a binding element, and also both parties are allowed to take the same dispute to a court with sufficient jurisdiction.229 In contrast, NetNeutrals.com provides binding OA mechanisms with true characteristics of traditional binding arbitration, preventing access to other remedies.230

Second, there is limited availability of relevant information and data about OCA providers. As noted by NADRAC, ‘the paucity of (especially empirical) data in ADR generally is accentuated when it comes to on-line ADR.’231 Schultz rightly indicates that ‘comprehensive statistics on online arbitration …, are not available yet, which is probably due to the fact that the parties to

228 Ibid.
229 UDRP, above n 221.
arbitration and the institutions providing it consider such procedures private and confidential.”

In fact, in the case of NetNeutrals.com, while access to qualitative information was gathered freely from its website, quantitative data was only secured after lengthy discussions via electronic communication with the provider. In case of the ICANN’s UDRP process conducted by WIPO, there was little difficulty in seeking access to both qualitative information and quantitative data, as they are in the public domain. In the case of qualitative information, documented information from the two dispute resolution providers was able to be gathered. This includes information with regard to the rules, mechanisms, disputes and annual reviews of the system.

The combination of all these factors meant that these two mechanisms can be considered appropriate sources to explore in order to understand the effectiveness of their mechanism, especially their enforcement strategies, and to support the central research question and the argument of the thesis.

4.3.2 Qualitative information and quantitative data

Qualitative information was gathered by searching the websites of the two providers under study, which provide information on areas such as self-regulatory measures, information about the dispute resolution mechanisms and reports about the performance of the dispute resolution mechanisms. In the case of ICANN’s dispute resolution mechanism, reference is made to the literature about various aspects of its dispute resolution mechanism.

Information regarding the WIPO’s UDRP mechanism was collected from the website of the ICANN which is linked to WIPO’s website relating to qualitative information and quantitative data over its dispute resolution mechanisms. They are in the public domain. The WIPO’s website includes detailed information linked to various categories that deal with its dispute resolution mechanism. It is important to note that data was considered only for limited periods. Under the WIPO’s UDRP process, data entered in 1999 and 2012 is excluded, with a full dataset from 2000 to 2011 being taken into consideration for the purpose of analysis for two reasons: i) few data are available for 1999 (perhaps the cases were not reported throughout the

234 Ibid.
year) and the data base was still in progress for 2012, while there was a full data set for the period between 2000 to 2011.

In the case of NetNeutrals.com, only data available from 21.08.2008 to 15.07.2009 was taken into consideration. This is the year in which records were kept in full and which could be secured from NetNeutrals.com. In entering the data, there is a possibility that all the statistics relevant to the dispute resolution mechanisms have not been recorded. This may be due to reasons associated with the privacy or confidentiality agreements existing between the dispute resolution provider and the consumers.

4.3.3 Assessment criteria and their theoretical underpinnings

It must be noted that the assessment of these two providers are made based on common criteria developed in line with 1998 EU recommendation, OECD Guidelines, Australian Guidelines and national consumer protection laws. The 1998 EU recommendation is applicable to binding out-of-court dispute resolution mechanisms, but the other two online consumer protection standards are applied in common, irrespective of the binding element of the OA mechanism.

Therefore, it is important to note that the criteria are mainly developed by taking into consideration principles embedded in the 1988 EU Recommendation, which is applicable to a binding ODR mechanism, for several reasons. It includes transparency, accessibility, impartiality, procedural fairness, efficiency, effectiveness and access to court. There are several reasons for the selection of the criteria from the 1998 EU Recommendation.

First, they reflect the consumer protection principles adopted in Australia. There are also several regulatory instruments and other government-sponsored publications which recognise these principles, for example OECD Guidelines, the Australian Guidelines and the NADRAC’s recommendations, and some principles such as access to court also are also embedded in the


national consumer protection law in Australia. The NADRAC asserts that, ‘while standards vary in their content, detail and comprehensiveness, the key areas are common to most.’

All of these have a common focus on achieving the goal of access to justice through out-of-court dispute resolution mechanisms and also securing consumers access to government-sponsored courts. Second, the principles embedded in the 1998 Recommendation provide detailed information as to the scope of each principle, which is not found in the formation of the OECD Guidelines or the Australian Guidelines. Third, these principles can be applied to both offline and online mandatory out-of-court dispute resolution mechanisms even though the Recommendation was introduced in 1998. Importantly, these principle are embedded in the recently proposed ‘on online dispute resolution for consumer disputes (Regulation on consumer ODR)’ in 2011 as well.

One important research conducted in relation to ODR mechanisms from the perspective of their compliance with regulatory principles is worth noting, as the current case study is another attempt to assess specifically two OCA mechanisms conducted by private OCA providers. The following results are extracted from an the article written by Wentworth in 2001, referring to a survey conducted over 30 ODR providers by one writer in 2000, given the difficulty of gaining access to the original research paper:

(a) None of the 30 ODR service providers fully met the criteria;
(b) Few help consumers to deal with uncooperative merchants;

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238 Ibid.
240 OECD Guidelines, above n 119.
241 Australian Guidelines, above n 116.

For example, by referring to the case Rosalba Alassini et al. v. Telecom Italia C-317-320/08, Reich notes that: ‘The ADR/ODR must be so as to guarantee effective judicial protection, in particular by keeping up to the principles of Rec. 98/227 which thereby takes a quasi-binding nature; consumers not having access to the internet must be able to bring their complaint in writing or any other form; consumers may not be prevented from going to court if they are not satisfied with the result of the ADR/ODR procedure; the procedure should not cause a ‘substantial delay’ or cost on the claims of the consumer.’ Norbert Reich, The Role of the EU in Online Dispute Resolution (10 theses of a presentation at the Vienna Conference of March 29-30) <https://www.pace.edu/lawschool/files/iicl/odr/Reich.pdf> last accessed 15 September 2012; see also the case at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0317:EN:NOT> last accessed 05 September 2012.

For example, the Article I of the proposed regulation articulates that: one of the objectives is to achieve ‘a high level of consumer protection by providing a platform facilitating the impartial, transparent, effective and fair out-of-court resolution of disputes between consumers and traders online’ European Commission, Brussels, 29.11.2011 COM (2011) 794 final 2011/0374 (COD) Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) (SEC(2011) 1408) [SEC(2011) 1409] <http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm> last accessed 05 September 2012.
(c) Most are, as a practical matter, available only to speakers of English;
(d) Businesses enjoy a wider range of ODR services than consumers;
(e) Most of the ODR services available to consumers are disproportionately costly for typical retail transactions;
(f) Few ODR service providers give adequate assurance of their impartiality;
(g) Most ODR services offer inadequate information on their governing structure and their ODR officials or on the results of their ODR; and
(h) Most fail to provide adequate incentives for compliance with ODR results.\textsuperscript{244}

It view of this brief literature review, it is reasonable to note that the study undertaken in this thesis can be considered part of the ongoing research work in the literature by re-evaluating the compliance of two current OCA mechanisms so as to find out whether similar results or different results will be produced in the current ODR setting.

5. Concluding remarks

The theoretical underpinnings of the research undertaken in this chapter can be summarised in the following way. ODR is seen as a developing phenomenon within the broader dispute resolution landscape with some promising developments in both Australia and Sri Lanka. Australia especially is slowly but steadily contributing to the enrichment of global ODR literature by addressing various aspects of ODR when compared to the Sri Lankan ODR-related developments. Thus Australia provides a good example for reliance on the potential of ODR and the commitment towards the development of ODR as an effective mechanism for the resolution of various kinds of disputes, and can be an example for other countries such as Sri Lanka to develop ODR as an appropriate dispute resolution mechanism. In fact the literature in both countries is quite limited in terms of the need for the development of appropriate regulatory and institutional frameworks for the enforcement of OCAA.

While recognising the valuable contribution made especially by ODR scholars for developing appropriate legal and institutional frameworks for ODR, the following two conclusions can be drawn in light of the overall review conducted in this chapter. First, there is a lack of specific regulatory and institutional frameworks suggested for the enforcement of OCAA. Second, the existing literature provides evidence for the need to search for appropriate enforcement mechanisms for OCAA from a regulatory and institutional perspective. In light of these

\textsuperscript{244} Wentworth, above n 69, 29.
theoretical underpinnings, and drawing insights from the related literature as reviewed in this chapter, this thesis advocates the need for adopting a cooperative approach. For that purpose this thesis explores the merits of ICALF and regulatory frameworks applicable to the use of an eCourt room as an option for moving forward in the cross-border setting, especially for the enforcement of OCAA.

This thesis uses a triangular methodological approach which involves the research methods of theoretical and comparative legal research, and a case–study approach. This methodological approach is flexible and comprehensive enough to be used interchangeably in the course of the entire study. It provides the required platform on which to examine the strengths and weaknesses of the legal and institutional frameworks of both Australia and Sri Lanka in terms of the enforceability of OCAA. Additionally, this methodological approach can arguably assist in offering suggestions for producing an appropriate enforcement mechanism, backed by a well designed legal framework tailored to the online cross-border context, especially for strengthening the enforcement of OCAA.

The next chapter focuses on the effectiveness of the private OCA providers in practice. It attempts to measure compliance against the ODR-related regulatory measures designed for the protection of online consumers, and to advocate the need of embracing such principles in the design of private ODR providers.
CHAPTER THREE: AN ASSESSMENT OF THE PRIVATE ONLINE CONSUMER ARBITRATION MECHANISMS WITH ONLINE ARBITRATION MECHANISM-RELATED PRINCIPLES: A CASE STUDY

1. Introduction

The previous chapter reviewed the development of ODR in both Australia and Sri Lanka and the theoretical underpinnings of the regulatory and institutional frameworks suggested by scholars in the ODR literature. The purpose of this chapter is to explore the effectiveness of the regulatory and institutional frameworks adopted by private online consumer arbitration (OCA) providers for their OCA mechanisms. Specifically, this chapter addresses the research question: do private Online Consumer Arbitration (OCA) providers operate their OCA mechanisms in compliance with OA mechanism-related principles? This question is addressed by arguing that OCA providers should comply with the OA mechanism-related principles in order to ensure the viability of their OA mechanisms for the resolution of B2C e-commerce disputes.

As noted in the previous chapter, this study focuses on two OCA providers, namely the World Intellectual Property Organisation (WIPO) and NetNeutral.com and assesses them against principles such as transparency, legality, effectiveness, independence, liberty, representation and adversarial principles embedded in the EU Recommendation of 1988. An introduction to the scope of these two case studies and the OA mechanism-related principles together with reasons for their selection was given in the previous chapter. The assessment of these two cases is conducted in this chapter in the following manner. With the brief introduction in the first section, the second section reports the findings of the research conducted on the operation of OCA by the two providers, and assesses them in light of the OA mechanism-related principles. The third section concludes the chapter

2. Research findings and their assessment

Before moving on to assess the OCA mechanisms adopted by each provider, it is important to note the number of disputes that are referred to each of the providers as a starting point. The following charts demonstrate the relevant statistics in relation to the exact figures of the disputes received by each provider within specific periods of time.
In the WIPO’ OCA process at the initial stage, 1857 cases in 2000 and 1557 cases in 2001 were resolved. These figures represent a small number of cases compared to the number of cases resolved in 2010 (2696) and 2011 (2764). In the middle period, there was a decline and after that there was a gradual increase in the number of cases. The reason for this trend in the increase of cases is likely to be due to the continuous growth of e-commerce. In 2000 the number of reported cases was relatively high, perhaps due to the fulfillment of a backlog of cases, as the domain name dispute resolution mechanism had been initiated in 1999. The development of several approved OCA providers by the ICANN (Internet Corporation for Assigned Names and Numbers) could be the reason for the gradual decline from 2001 to 2004, but again the number of cases rose beyond the 2500 cases in both 2010 and 2011.

In a quite similar fashion a considerable number of cases have been referred to non-arbitration mechanisms in general, and a fairly high volume of cases was resolved via online arbitration under the NetNeutrals.com’s online dispute resolution mechanism between the limited time span of 01.07.2008 and 30.09.2009. Within the time span of almost one year, the total number of case referred to arbitration was 568 (10.1%) out of the total number of disputes, that is 5614 disputes, with 5046 (89.9%) having been settled without being sent to arbitration. Given the time frame, the total number of cases is considerable, with 568 cases representing a fairly high volume of cases going to binding arbitration.

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2 Data Set Received from NetNeutrals.com (Data Set), Number of Net Neutrals eBay matters sent to arbitration between 1 July 2008 and 30 June 2009.
Overall, WIPO’s OCA case statistics from 2002 to 2011, except for 2009, show a gradual increase in domain name disputes. Even though statistics available in the case of NetNeutrals.com are limited to nearly one year, the available statistics together with WIPO’s statistics portray the significant volume of e-commerce disputes received by only these two OCA providers within a particular period of time. This is an indication of the potential of the operation of OCA mechanisms for dealing with e-commerce disputes. The question is how effectively disputes that are referred to OA reflect compliance with the rules applicable to OA mechanisms. The following section assesses the compliance of these two OCA providers with the rules recognised in the 1998 EU recommendation for out-of-court dispute resolution mechanisms. The principles of transparency, legality, effectiveness, independence, liberty, representation and adversarial principles are used for the assessment.

2.1 Transparency
The principle of transparency requires OA providers to disclose their dispute resolution mechanisms so that disputants can make an informed decision in relation to an appropriate dispute resolution mechanism for their particular dispute. The major elements involved in transparency are areas such as the types of disputes, restrictions over territorial coverage, restrictions over the value of the dispute, and the rules applicable to procedures of the dispute resolution mechanism. Disclosure of information in relation to the areas of cost and the binding nature of OA are discussed under the principles of effectiveness and legality respectively, given their interconnectedness as described in these discussions.

2.1.1 Description of the types of dispute
OA providers are required to display ‘a precise description of the types of dispute which may be referred to the body concerned.’ The OA mechanism adopted by the WIPO is specifically designed for the resolution of domain name disputes that arise from disputes between domain name holders and a trademark owner. A domain name is an Internet address that can be used to find websites. Domain names are limited to ‘certain global top-level domains;’ they include

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5 ‘The UDRP defines how certain disputes over domain name registrations are resolved in certain global top-level domains.’ Internet Corporation for Assigned Names and Numbers (ICANN) <http://www.icann.org/en/dispute-resolution/#udrp> last accessed 10 September 2012.
.com, .net and .org. Domain name disputes can occur in several ways. Causes of disputes that are subject to the WIPO’s OA mechanism are clearly stated in section of 4(a) of the Uniform Dispute Resolution Policy (UDRP) in the following terms:

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
(ii) you have no rights or legitimate interests in respect of the domain name; and
(iii) your domain name has been registered and is being used in bad faith.

One example is that a person can register a domain name by using a name of a trade mark which belongs to another person for the purpose of gaining financial benefits. This act is termed cybersquatting. It seems that cybersquatters can register by exploiting the mechanism adopted by the ICANN for the registration of domain names, that is, the ‘first-come, first served nature of the domain name registration system,’ and registration takes place through a simple mechanism without inquiring into the validity of such a name. The responsibility of registering a domain name rests with the registrant (the domain name holder) not to violate rights of other people and laws or regulations. If a trademark owner (complainant) wants to challenge a registered domain name validity they can go through the OA mechanism embedded in the UDRP.

The following table also shows the various types of names registered within these domains which have been disputed under the WIPO’s OA mechanism. It includes broad areas of industry and commerce. The most frequent complainant activity is recorded in retail (a little above 10%) and the least in luxury items (close to 2%).

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8 WIPO FAQ, above n 4.
9 Ibid.
10 Ibid.
11 Ibid.
12 UDRP, above n 7.
13 Ibid section 4.
NetNeutrals.com provides several ODR mechanisms for various types of disputes such as direct negotiation, mediation, independent feedback review (IFR) and voluntary arbitration (VA) for the resolution of various types of disputes that arise between B2C and B2B relationships. Out of these mechanisms, IFR is specially designed for ‘eBay Motors users with disputes regarding negative or neutral feedback.’ The other mechanisms seem to be designed for the resolution of all the disputes depicted in the following chart. The table provides a breakdown of areas of dispute and percentages of each category of dispute within the period 01/07/08 to 30/06/09.
ASSESSMENT:

It is evident that both providers have disclosed sufficient information about the types of disputes that can be referred to their particular dispute resolution mechanisms. The ICANN’s website provides information about the types of domain name disputes that can be referred to the WIPO’s OA mechanism. Therefore it can be concluded that the WIPO’s OA mechanism complies with this requirement. In the case of NetNeutrals.com, its website clearly states that ‘negative or neutral feedback’ left on ‘eBay motor vehicle transactions’ should be referred to the IFR mechanism. However, it appears that NetNeutrals.com has not adequately disclosed whether other disputes can be referred to other ODR mechanisms. The question is whether the lack of such information amounts to non-compliance with the principle of disclosure of the ‘precise description of the types of dispute.’ It can be argued that the specific information regarding disputes over eBay motor transactions is sufficient to understand that other eBay disputes can be referred to the other ODR mechanisms.

2.1.2 Restrictions over territorial coverage

The second element of the transparency principle is that ‘any existing restrictions in regard to territorial coverage’ need to be displayed. WIPO’s website notes that ‘Any person or company in the world can file a domain name complaint concerning a gTLD using the UDRP Administrative Procedure.’\(^{20}\) There is no specific information published on the NetNeutrals.com in regard to restrictions on their dispute resolution coverage.

ASSESSMENT:

In the case of the WIPO’s OA mechanism, if there are domain name disputes, no matter where the complainant or the respondent resides, disputants have to go through the mandatory OA process, as parties are bound by contractual arrangements under the UDRP.\(^{21}\) No matter where the disputants reside, domain name-related disputes can be resolved through any of the approved UDRP providers. The following statistics of the WIPO’s OA mechanism support this argument.


\(^{21}\) UDRP, above n 7.
These charts detail the top ten countries and percentage of total claimants and respondents by country in which they resided. It is evident that a higher number of claimants and defendants were recorded in the USA than in other countries, no doubt because of the high volume of IT penetration and e-commerce activities there. However, these statistics further show that domain name disputes are not limited to developed countries. There are emerging economies such as China and India which also have domain name disputes.

The lack of information over any restrictions on NetNeutrals.com could be due to the nature of the dispute resolution mechanism adopted for the resolution of B2C e-commerce disputes, that is, an online dispute resolution mechanisms. Therefore, in the application of this rule to ODR mechanisms, it is important to understand the online setting without which these private mechanisms cannot survive, especially because of the global nature of e-commerce activities, where disputes can occur between people located in different jurisdictions. In this sense, NetNeutrals.com complies with this rule as it offers sufficient information on its online dispute resolution mechanism.

In fact, regardless of the fact that these dispute resolution mechanisms are designed for the resolution of disputes which emerge online, and that disputes are resolved online, it is worth having specific information as to whether they can be accessed from any part of the world. Such

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24 NetNeutrals.com’s FAQ, above n 17.
information would assist online consumers to find out if they can gain access to these mechanisms, which may in turn open up these services to wider online communities in the world. From OCA providers’ perspectives, it means that they can receive disputes from countries other than the country where these providers are located. On the basis of the availability of information from these providers on their websites, it is reasonable to note that both providers have no specific information referring to restrictions over their dispute resolution coverage.

2.1.3 The value of the dispute

The other principle is the disclosure of ‘the value of the dispute.’ There is no information displayed by either provider in relation to the value of disputes that can be referred to their dispute resolution mechanisms. In fact, in the case of NetNeutrals there is some information that can be used to understand the value of disputes based on eBay categories in the following box, in which the most disputed fifteen categories are demonstrated in the following table.

<table>
<thead>
<tr>
<th>eBayCategories</th>
<th>All</th>
<th>%</th>
<th>Sent to-Arb</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>eBay Motors</td>
<td>2062</td>
<td>37%</td>
<td>195</td>
<td>35%</td>
</tr>
<tr>
<td>Clothes, Shoes &amp; Access</td>
<td>617</td>
<td>11%</td>
<td>69</td>
<td>12%</td>
</tr>
<tr>
<td>Collectables</td>
<td>253</td>
<td>5%</td>
<td>30</td>
<td>5%</td>
</tr>
<tr>
<td>Cell Phones &amp; PDAs</td>
<td>202</td>
<td>4%</td>
<td>29</td>
<td>5%</td>
</tr>
<tr>
<td>Computers &amp; Networking</td>
<td>202</td>
<td>4%</td>
<td>24</td>
<td>4%</td>
</tr>
<tr>
<td>Home &amp; Garden</td>
<td>196</td>
<td>4%</td>
<td>19</td>
<td>3%</td>
</tr>
<tr>
<td>Jewellery &amp; Watches</td>
<td>192</td>
<td>3%</td>
<td>19</td>
<td>3%</td>
</tr>
<tr>
<td>Toys &amp; Hobbies</td>
<td>185</td>
<td>3%</td>
<td>19</td>
<td>3%</td>
</tr>
<tr>
<td>Electronics</td>
<td>169</td>
<td>3%</td>
<td>19</td>
<td>3%</td>
</tr>
<tr>
<td>Health &amp; Beauty</td>
<td>160</td>
<td>3%</td>
<td>17</td>
<td>3%</td>
</tr>
<tr>
<td>Sporting Goods</td>
<td>141</td>
<td>3%</td>
<td>14</td>
<td>3%</td>
</tr>
<tr>
<td>Video Games</td>
<td>136</td>
<td>2%</td>
<td>12</td>
<td>2%</td>
</tr>
<tr>
<td>Sports Mem, Cards &amp; Fan Shop</td>
<td>111</td>
<td>2%</td>
<td>8</td>
<td>1%</td>
</tr>
<tr>
<td>Books</td>
<td>94</td>
<td>2%</td>
<td>8</td>
<td>1%</td>
</tr>
<tr>
<td>Business &amp; Industrial</td>
<td>79</td>
<td>1%</td>
<td>8</td>
<td>1%</td>
</tr>
</tbody>
</table>

Chart 8: WIPO Data Set Received from NetNeutrals.com (Data Set), Number of Net Neutrals eBay matters sent to arbitration between 1 July 2008 and 30 June 2009.

In the case of NetNeutrals.com’s OA mechanism, disputes over the items put up for sale on eBay are referred to NetNeturals.com. Disputes can be seen in relation to items ranging from small value items to expensive ones. Based on these categories, one can infer that the value of a

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25 EU Recommendation, above n 3.
26 Data Set, above n 2.
dispute that can be referred to IFR and VA varies from a small value to a large value. Therefore, it can be further inferred that there is a mixture of items from valuable items to less valuable ones sent to such mechanisms. For example, in a dispute which arises out of ‘eBay Motors’, the value of a dispute may perhaps range from one-hundred US dollars to fifty thousand US dollars in value, given the varying prices on motor vehicles.

**ASSESSMENT:**

As far as their compliance with the principle is concerned, one can observe that there is no limitation given for the value of a disputed item that can be referred to such mechanisms. One reason for this move may be the way the dispute resolution mechanisms are designed. WIPO’s OA mechanism is designed for the resolution of disputes over domain names in common, rather than over the value that can arise over the registration of such a domain name. NetNeutrals.com provides ODR services for the resolution of disputes which arise from eBay categories on a contractual basis with eBay.27

However, information about the value of dispute items is important for two reasons. First, monetary limits are generally recognised in a formal dispute resolution setting, so that disputes can be resolved by appropriate government-sponsored dispute resolution institutions based on their true value. For example, small claims courts in several countries have adopted a monetary threshold, and if a value of a dispute goes below the monetary threshold they can be sent to the small claim courts, as for example in the UK and in the EU countries.28 This approach can benefit disputants as they can get the dispute resolved from the most suitable institution.

Secondly, the monetary limit for a dispute that can be referred to arbitration is a measurement which can be used to guide disputants to making an informed decision as to whether they should go for an informal or a formal dispute resolution mechanism. In the case of WIPO’s OA mechanism, there could be consumers who do not know the value of the domain names they hold. If there is a requirement as to the value of the dispute that can be referred to an OA mechanism, parties can find out the value of the dispute. They can also decide whether the dispute should be taken to a competent court rather than wasting money and time on following

27 ‘NetNeutrals has been contracted by eBay to review eBay Motors disputes involving recent transactions in the following vehicle categories: Passenger Vehicles, Motorcycles, Powersports, Other Vehicles. The item listing must still be available on eBay to be eligible for review.’ NetNeutrals.com’s FAQ, above n 17.

the OA mechanism. In the case of NetNeutrals.com, parties to a dispute can choose whether they go for a binding or non-binding ODR mechanism as a selection of the redress avenue is made on a contractual basis. If information is available on the value of the disputes that can be referred to an OA mechanism, the disputants can choose a non-binding dispute resolution mechanism. If such a mechanism does not resolve their dispute, they can go for a redress mechanism outside NetNeutrals.com, rather than ending up in getting a binding decision from an OA mechanism.

As such, it can be noted that both providers do not comply with the rule of disclosure of the ‘restriction-value of the dispute,’ as it is evident that attention to the disclosure of information over the value of disputes is not adequate for complying with the disclosure principle.

### 2.1.4 Decision making arrangements and publication of decisions

Another important principle is the disclosure of ‘the decision-making arrangements within the body,’ and ‘publication by the competent body of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified.’ All the ICANN’s approved dispute resolution providers publish arbitrators’ decisions and they are available on their respective websites, which can be accessed by the public. In the decision-making arrangement of WIPO’s OA mechanism, decisions can be made by one arbitrator or a panel of three arbitrators, depending on the request made by the parties to the dispute. In selecting a three member panel for the resolution of a domain name dispute, one arbitrator can be chosen by each disputant and the third one is selected by the dispute resolution provider. Under the WIPO’s OA mechanism, the following three decisions can be made by an online arbitrator or panel of online arbitrators:

Only three types of decisions can be made by the Administrative Panel:

(i) Decide in favor of the person or entity that filed the Complaint and order that the disputed domain name(s) be transferred to that person or entity;

(ii) Decide in favor of the person or entity that filed the Complaint and order that the disputed domain name(s) be cancelled;

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29 EU Recommendation, above n 3.
30 Ibid.
Publication of decisions of online arbitrators is pursued in accordance with the rules of ICANN’s UDRP, as publication of such decisions has been recognised as a requirement. The decisions under the OA mechanism adopted by WIPO are published over the Internet, making them publicly available, unless there is an exceptional case as determined by an administrative panel. Statistics relating to the number of cases filed and the number of final decisions made are also published and updated on a daily basis by the WIPO.

By contrast, in the case of NetNeutrals.com, either party is allowed to invite a neutral. The other information available is that ‘Neutrals are randomly selected from a pool of experienced professionals.’ NetNeutrals.com does not publish decisions of its dispute resolution mechanisms, which remain confidential.

**ASSESSMENT:**

The availability of a three member panel under the WIPO’s OA mechanism is a positive element, as each member has a separate voice, and the possibility for making biased decisions is limited. NetNeutrals.com has no such three member panel of arbitrators, its OA mechanism being conducted by one arbitrator. As such, it can be argued that the transparency rule is better complied with by the mechanism adopted by WIPO’S OA mechanism than that of NetNeutrals.com.

In relation to the publication of decisions by the arbitrators, it is obvious that the OA mechanism adopted by the WIPO complies with the requirements as expected under the transparency principle since WIPO has its own developed mechanism for publishing decisions as well as some reports based on their decisions with statistical information. In addressing the precedential value of the UDRP-related decisions, Christie and Rotstein note that:

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34 Ibid.
35 Ibid.
36 WIPO FAQ, above n 4.
37 NetNeutrals.com’s FAQ, above n 17.
38 Ibid.
39 Ibid.
The first lesson is that arbitrators, for wholly rational reasons, will desire to obtain the outcomes of a prudential system. That is, arbitrators rationally desire to operate a system that is transparently fair to the parties, that is efficient for them as decision-makers, and that maintains the integrity of the system. Consequently, arbitrators will voluntarily seek to comply with the principle of stare decisis, even when there is no formal requirement to do so let alone a mechanism to enforce such compliance. The second lesson is that arbitral service providers have a critical role to play in enabling arbitrators to achieve this outcome. While publishing arbitral awards is a necessary conduction for a de facto precedential system, it is most likely not a sufficient condition at least when there is substantial body of awards to form the corpus of precedents.  

As a result of the requirement of the publication of decisions of WIPO’s OA mechanism, information on cases and their reasons is in the public domain and access to such information obviously increases compliance with the rule of transparency. In fact, there are no guidelines explaining circumstances that can be considered by an online arbitrator when it determines not to publish a decision. As such, it seems that such decisions are made solely by an online arbitrator or panel of online arbitrators. If a few examples are provided, it can help understand the nature of exceptional cases for both online arbitrators for their future determinations and disputants.

Neutrals.com has specific information about how it can appoint a neutral for its OA mechanism. However, with NetNeutrals.com’s OA mechanism lacking the publication of their decisions, NetNeutrals.com does not comply with the requirement of Transparency. There could be several reasons which may be adduced by this provider to justify their non-publication of the decisions of an arbitrator. One such reason could be the commitment to preserve confidentiality. This requirement may be preferred by the disputants as well as the OA provider, given the fact that disputants know the commitment from the provider to confidentiality.

In fact the publication of NetNeutrals.com’s online arbitrators’ decisions would bring more transparency to their dispute resolution mechanism and it could lead to more discussion of the existing OA mechanisms and bring improvements accordingly. NetNeutrals.com therefore needs to take measures for the publication of decisions of their dispute resolution mechanisms in order to comply with the rule. Its decisions could be published with protective measures in relation to

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the protection of confidentiality. Otherwise, it can be accomplished with the consent of the parties to the disputes.

2.1.5 Rules applicable to procedures in the dispute resolution mechanism

2.1.5.1 Rules in relation to the referral of a matter to the body

Online arbitration providers are required to provide information in relation to ‘the rules governing the referral of the matter to the body.’\(^{41}\) The WIPO’s OA mechanism is regulated by three sets of rules: the Uniform Dispute Resolution Policy (UDRP),\(^{42}\) Rules for Uniform Domain Name Dispute Resolution Policy (UDRP Rules)\(^ {43}\) and Supplemental Rules that have been developed by each service provider in line with the UDRP.\(^ {44}\) The first two are designed by ICANN and the others by dispute resolution providers accredited by ICANN.\(^ {45}\)

Under the UDRP, an OA mechanism is generated through a registration agreement between a registrar who is accredited by ICANN and domain name applicants, named registrants.\(^ {46}\) It must be noted that ‘although ICANN has a quasi-governmental responsibility for and administration of the net, the UDRP is enforced through contract rather than regulation.’\(^ {47}\) Accordingly, the UDRP policy has been incorporated in this ‘registration agreement.’ The agreement has the following contents:

This Uniform Domain Name Dispute Resolution Policy (the ‘Policy’) has been adopted by the Internet Corporation for Assigned Names and Numbers (‘ICANN’), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you.\(^ {48}\)

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41 EU Recommendation, above n 3.
42 UDRP, above 7.
43 UDRP Rules, above n 32.
45 UDRP Rules, above n 32; WIPO Guide, above n 20.
46 UDRP, above n 7.
47 Caslon Analytics, above n 31.
48 UDRP, above n 7.
As a result, ‘the UDRP binds registrants through their contracts with registrars, such as VeriSign/Network Solutions and MelbourneIT, ‘to submit’ to ‘mandatory administrative proceedings’ initiated by third-party ‘complainants.’’\(^49\)

The dispute resolution mechanisms of NetNeutrals.com are regulated by rules and guidelines.\(^50\) ODR mechanisms operated by NetNeutrals.com are also based on an agreement which is embedded within the rules and guidelines. The scope of the agreement has been articulated in the following manner:

NetNeutrals.com is an informal dispute resolution program. By participating in NetNeutrals.com’s dispute resolution process (including direct negotiation, mediation, voluntary arbitration, and/or independent feedback review) you agree to act in good faith, which includes taking reasonable steps to achieve a fair and expeditious resolution of the dispute. Additionally, by participating in the process you agree to make a reasonable effort to complete the actions outlined in a completed and accepted Mediated Agreement. You also agree to abide by the Neutral’s decision in the case of Voluntary Arbitration or Independent Feedback Review (IFR). Voluntary Arbitration and IFR decisions are final and are not subject to negotiation or appeal.\(^51\)

These rules and guidelines stipulate that its dispute resolution mechanism is based on a contractual basis and parties have an opportunity to choose the dispute resolution mechanism. The availability of non-binding and binding dispute resolution mechanisms is a positive element of NetNeutrals.com. This provides opportunity for the disputants to make an informed decision about the appropriate disputes resolution mechanism. For example, if a disputant expects to take the dispute to a court, the disputant can choose a non-binding ODR mechanism. This possibility needs to be understood subject to the IFR in which feedback review is conducted.\(^52\)

**ASSESSMENT:**

Both providers are governed by self-regulatory frameworks, designed by themselves, depending on their market objectives and the disputes for which their OA mechanisms are designed. As such, rules in relation to the referral of a dispute to their OA mechanisms have to be understood in light of these self-regulatory measures. It can be argued that WIPO’s OA mechanism is

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\(^{49}\) Caslon Analytics, above n 31.

\(^{50}\) NetNeutrals.com, Rules and Guidelines, above n 16.

\(^{51}\) Ibid.

\(^{52}\) NetNeutrals.com’s FAQ, above n 17.
operated within a set of clear rules which govern the referral of disputes to its mandatory OA mechanism in the form of an agreement. In the case of NetNeutrals.com’s OA mechanism, a similar regulatory framework is evident, and referral of disputes to its OA mechanism takes place in accordance with their self-regulatory framework.

In terms of the rule applicable to time limits within which disputes should be referred to each provider’s OA mechanisms, WIPO’s OA mechanism has clear rules. When a complaint is lodged against a domain name with this provider, it should be sent to the respondent within 3 days by the provider. The respondent has to submit his answers within 20 days. If not, the decision is enforced by the relevant registrar. In the case of NetNeutrals.com, there are no rules which stipulate time limits within which eBay disputes can be referred to its ODR mechanism.

In light of this information it can be concluded that both have a clear set of rules in relation to the referral of disputes to the OA mechanisms in the form of self-regulatory and contractual forms. In regard to the rules applicable to time periods for referring to these mechanisms, WIPO adopts specific rules, but NetNeutrals.com does not have information on applicable rules.

2.1.5.2 Rules applicable to the procedures of OA

Under the transparency rule, two areas have been specifically identified that are applicable to the procedure of OA. They are: ‘Written or oral nature’ and ‘Attendance in person.’ Both providers conduct their proceedings by using online technological tools and therefore they are called online dispute resolution mechanisms. There are several rules relevant to WIPO’s OA mechanism. Some rules focus on procedural elements to be accomplished by electronic means. For example, under the UDRP Rules, a response from the respondent must be submitted via electronic means. WIPO has introduced technological means for filing relevant documents. WIPO provides two options: ‘i) Download and complete the model Response as a Word document to submit as an email attachment to domain.disputes@wipo.int; or ii) Complete and

53 UDRP Rules, above n 32, Rule 4.
54 Ibid Rules 5.
55 Ibid.
56 EU Recommendation, above n 3.
submit directly online to the Center as an electronic form of the model Response.” In addition, Rule 13 of the UDRP Rules stipulates that:

There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint.

WIPO’s OA mechanism adopts a flexible approach in terms of the filing of documents relevant to its dispute resolution process. UDRP Rules allow documents in hard copy can be submitted where applicable.

Under the rules and guidelines of NetNeutrals.com, ODR on its website has been defined as follows: ‘ODR stands for Online Dispute Resolution. NetNeutrals’ ODR system is a means of settling disputes between parties in an online setting. It’s quick, convenient, and simple to do.’ Accordingly, it is evident that NetNeutrals.com’s OA mechanism is conducted entirely online. It offers 24 hour service for the disputants to gain access to their case and states that ‘NetNeutrals.com’s ODR system is custom designed to offer you the opportunity to fully participate in dispute resolution.’ In addition, its website notes that as ‘NetNeutrals.com is done completely online, you can manage your claim anywhere and any time.’

ASSESSMENT:

The responses from these two providers are explored in a combination of both of these elements. Especially, ‘attendance in person’ has to be understood in the overall context of online dispute resolution, given the fact that they conduct their OA proceedings using technological tools and avoid physical attendance by the parties at the proceedings.

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60 WIPO FAQ, above n 4.
61 UDRP Rules, above n 32.
62 Ibid.
63 NetNeutrals.com’s FAQ, above n 17.
65 Ibid.
66 Ibid.
67 See UDRP 7.
The WIPO’s OA rules allow parties to present their case with a physical presence or to send paper documents where relevant, but with approval from the arbitrator.\(^68\) In the case of NetNeutrals.com, there is no information as to whether parties are allowed to appear physically in some circumstances of a case, either through an arbitrator’s request or a request made by either one of the parties or both together. In fact, the transparency requirement does not restrict the conducting of OA proceedings entirely or in part electronically or limit the types of technologies they should use. What is required is the presence of rules in relation to proceedings as to whether they are conducted in the form of ‘Written or oral nature.’ The rule in relation to ‘Attendance in person’ can be complied with by allowing parties to present their case adequately during the OA proceedings.

It can be argued that both providers are committed to disclosing some information about the nature of the procedure of the OA mechanisms and how disputants can attend the proceedings of such mechanisms that is sufficient to comply with the transparency rule which is reflected in the design of ODR mechanisms. The major reason is the fact that if proceedings are in person with hard copies of relevant documents, objectives of conducting speedy and efficient ODR mechanism would be undermined.

However, compliance issues with these rules can emerge in relation to the sufficiency of the technological tools that are used for OA proceedings. Under the WIPO’s OA mechanism, it has been recognised that ‘a panel may opt in exceptional cases to hold live or teleconference hearings.’\(^69\) In referring to UDRP, Brannigan argues that, ‘it ignores and virtually prohibits the use of video conferences, telephone conferences, or web conferences so that the arbitrator’s decision is based on written submissions and accompanying documents.’\(^70\) There is no information as to whether such technologies can be used in the OA mechanism under NetNeutrals.com as well. WIPO’s OA is mainly conducted through two communication methods: email and its Internet-based filing and administration system.\(^71\) It appears that NetNeutrals.com’s VA mechanism is also conducted by using email.\(^72\)

\(^{68}\) UDRP, above n 7; WIPO Guide, above n 20.
\(^{69}\) Caslon Analytics, above n 31.
\(^{72}\) UDRP Rules, above n 32 and NetNeutrals.com’s FAQ, above n 17.
In the case of NetNeutrals.com, attachments are not allowed when the IFR is conducted technologically with the use of a comment box, which is operated online.\(^73\) If parties want to send attachments, they have to copy the contents of such information included in the electronic communications and post them into the comment box.\(^74\) This limitation may deprive or discourage the disputant from presenting valuable documents which exist in hard copy.

2.1.5.3 Rules regarding the language of the procedure

The next component of the rule is the disclosure of rules applicable to ‘the languages of the procedure.’\(^75\) WIPO has the following rules in regard to the use of language. Rule 11 of the UDRP Rules notes that OA has to use the language agreed by the parties or the language mentioned in the registration agreement.\(^76\) If not, proceedings are to be conducted by using the language of the registration agreement subject to the online arbitrator’s authority to determine its language, depending on the circumstances of the case.\(^77\) If necessary, translation can be ordered by the online arbitrator.\(^78\)

The following languages used by the WIPO’ OA mechanism for the resolution of domain name disputes can be found from its statistics. Out of the ten main languages used for the proceedings of the OA mechanism, the following three major languages are highlighted as examples.

![WIPO: Top 03 case languages](chart9.png)

![WIPO: Top 03 case languages (non-English speaking)](chart10.png)

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\(^73\) NetNeutrals.com’s FAQ, above n 17.

\(^74\) Ibid.

\(^75\) EU Recommendation, above n 3.

\(^76\) UDRP Rules, above n 32; WIPO FAQ, above n 4.

\(^77\) Ibid; WIPO FAQ, above n 4.

\(^78\) UDRP Rules, above n 32.


\(^80\) Ibid.
In the case of NetNeutrals.com there are no specific rules mentioned in regard to language requirements. However, there is some qualitative information on the use of different languages when ODR mechanisms are conducted by NetNeutrals.com, but predominantly the English language is used.\textsuperscript{81} It must be noted that this provider does not restrict its mechanism to be conducted in the English language only.

**ASSESSMENT:**

There are specific rules embedded in the self-regulatory frameworks adopted by the WIPO’s OA mechanism, but not by NetNeutrals.com in relation to the disclosure of language. In light of the statistics considered, it is evident that the WIPO’s OA mechanism can be conducted in many languages, depending on the choice made by the parties to a domain name dispute. In fact, it is evident from the statistics that the English language is the main language used for domain name dispute resolution. Other major languages reasonably widely used are Spanish, French and German. One reason for this situation could be the availability of vast number of websites in English. Accordingly, WIPO’s OA mechanism complies with the language-related principle applicable to OA mechanisms.

The other could be due to the fact that a particular ODR mechanism is designed for its main target group. In the case of NetNeutrals.com, it appears that English is the main language used for the resolution of its disputes. In fact, as far as the eBay categories are concerned, disputants can be from various jurisdictions of the world, given eBay’s openness to the global electronic market. Therefore, adopting various languages for disputants to use is an area that could be considered worthwhile for NetNeutrals.com with specific rules on the use of language. NetNeutrals.com needs to pay attention to the use of diverse languages if expects to reach customers outside the USA. Even within the USA the use of different languages may help consumers and business people to receive a better service.

In relation to NetNeutrals.com, the other concern that can be raised is the lack of information as to whether there are translation facilities for disputants to be used when different parties do not agree on one language. If the main tool of communication is email and there are limits in relation to the use of other technologies such as video conferences, arbitrators have to rely on email texts. This situation can impact on the decision making process as arbitrator’s decisions could be based

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\textsuperscript{81} Data Set, above n 2.
on limited information. These concerns together with the lack of rules on languages can raise concerns about the need for a rule on the languages used for OA mechanisms.

2.1.5.4 Rules upon which decisions are taken

The EU recommendation stipulate that OA providers are required to disclose ‘the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.)'\(^{82}\) As far as the WIPO’s UDRP mechanism is concerned, the UDRP, the UDRP rules and the supplemental rules contribute to the final decisions of its OA mechanism,\(^{83}\) which can be termed as self-regulatory measures. Particularly, it seems that the UDRP is relevant for determining the rules upon which OA decisions are based. The UDRP states that ‘pursuant to paragraph 15(a) of the Rules, the Panel shall decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.’\(^{84}\) The dispute resolution mechanisms of NetNeutrals.com are regulated by ‘Rules and Guidelines.’\(^{85}\)

**ASSESSMENT:**

It can be argued that sources of regulatory measures are problematic. First, how far do they take into account the relevant laws that may apply to disputes that these providers handle? Both providers operate on self-regulatory mechanisms and have no reliance on or compliance with other national laws of a country or a place where a consumer is residing or is domiciled, especially with regard to mandatory consumer protection laws of the country where consumers reside. Cortés notes that ‘the UDRP is legally a mandatory administrative procedure that resembles a documents-only arbitration. Nevertheless, it does not follow the arbitration laws; panels are unaccountable...’\(^{86}\) In fact, it seems that these providers follow the standards

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\(^{82}\) EU Recommendation, above n 3.

\(^{83}\) ‘it is expected to base its decision on ‘the statements and documents submitted’ in accordance with the UDRP, the UDRP Rules, and any ‘rules and principles of law that it deems applicable.’” Caslon Analytics, above n 31.


\(^{85}\) ‘NetNeutrals.com is an informal dispute resolution program. By participating in NetNeutrals.com’s dispute resolution process (including direct negotiation, mediation, voluntary arbitration, and/or independent feedback review) you agree to act in good faith, which includes taking reasonable steps to achieve a fair and expeditious resolution of the dispute. Additionally, by participating in the process you agree to make a reasonable effort to complete the actions outlined in a completed and accepted Mediated Agreement. You also agree to abide by the Neutral’s decision in the case of Voluntary Arbitration or Independent Feedback Review (IFR). Voluntary Arbitration and IFR decisions are final and are not subject to negotiation or appeal.” NetNeutrals.com, Rules & Guidelines [http://netneutrals.com/rulesnn.asp] last accessed 15 August 2012.

\(^{86}\) Juan Pablo Cortés Diéguez, An Analysis of the UDRP Experience: Is it Time for Reform?
underpinning the international commercial arbitration related legal instruments when resolving
domain name disputes.\textsuperscript{87}

The application of national laws to domain name disputes is another concern that needs to be
discussed. The development of national laws in regard to anti-cybersquatting and trademark
infringement-related offences that exist in parallel to this ICANN’s UDRP mechanism is another
aspect that could make an impact on the viability of this mechanism. For example, under the
national laws of the US, this kind of dispute can be challenged in the national court under the
provisions of the \textit{Anticybersquatting Consumer Protection Act} of 1999.\textsuperscript{88} Asian countries also
follow a statutory approach applicable to this offence, or there is a possibility of using existing
trademark laws or laws applicable to other contractual or tort laws to this area.\textsuperscript{89} In this growing
influence of the application of statutory laws or other traditional legal principles that may be
relevant to domain names disputes, there is a need to preserve the ICANN’s UDRP process as an
appropriate dispute resolution mechanism for the resolution of both national and cross-border
disputes, particularly in the growing internet market.

In views of these concerns, the existing regulatory framework in relation to the referral of
disputes to the OA mechanism of NetNeutrals.com can arguably be considered insufficient to
satisfy the rule of transparency.

\subsection*{2.2 The effectiveness of the procedure: procedural fairness: impartiality}

The effective resolution of disputes is another principle that the ODR mechanism needs to
comply with. The scope of the principle of effectiveness encompasses several elements, such as
the right to be advised if required, the cost involved, timeliness, evidence, the right to present a
case and to listen to the other party.

\textsuperscript{87} ‘Service providers adhere to standards as understood in the U.S. Federal Arbitration Act and the New York Convention,
despite the fact that domain name dispute resolution proceedings are not considered arbitrations under those existing laws.’

\textsuperscript{88} See \textit{Diane L. Kilpatrick}, ‘Comment ICANN Dispute Resolution vs. Anticybersquatting Consumer Protection Act Remedies:
Which Makes More ‘cents’ for the client?’ (2002) 2 \textit{Houston Business and Tax Law Journal} 283, 285; see Haitham Haloush,
‘Enforcement, Recognition, and Compliance with OADR Outcome(s)’ (2007) 21 (2) \textit{International Review of Law Computers &
Technology} 81, 93.

\textsuperscript{89} See Peter Chan, ‘The Uniform Domain Name Dispute Resolution Policy as an Alternative to Litigation’ (2002) 9 \textit{Murdoch
September 2012; see Yeo Yee Ling, ‘Domain name Dispute Resolution within the Asian Region’ (2006) 38 \textit{University of
Toledo Law Review}. 
2.2.1 Right to present a case and listen to the other party and the right to be represented

The most fundamental principle is that the parties to a case should be allowed ‘to present their viewpoint before the competent body’ and also that disputants are entitled ‘to hear the arguments and facts put forward by the other party, and any experts' statements.’\textsuperscript{90} There is no specific rule in the regulatory framework applicable to WIPO’s OA mechanism in relation to the right to present a case and listen to the other party. Under NetNeutrals.com, fairness has been designated in the following terms: ‘The Neutral reviews both sides of the story. You can be sure that you’re being heard.’\textsuperscript{91}

The next principle is that consumers should be allowed to gain ‘access to the procedure without being obliged to use a legal representative.’ There is no rule in the regulatory framework of either provider imposing an obligation on consumers to be represented by a legal representative. Parties are free to use the OA mechanisms adopted by both providers. The other associated principle is the right to be represented. The principle of representation stipulates that, ‘the procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.’\textsuperscript{92} WIPO’s website notes that ‘While the assistance of a lawyer may be helpful, there is no requirement that the Response be prepared or submitted by a lawyer.’\textsuperscript{93} There is no similar information about this right on the respective website of NetNeutrals.com.

\textbf{ASSESSMENT:}

These principles also ensure ‘fair hearing’, which is a universally established principle,\textsuperscript{94} and is fundamental to the accomplishment of justice in any form of dispute resolution mechanism. It is important to note that the OA mechanisms of both providers have been designed to provide effective dispute resolution mechanisms in terms of time, cost and simplicity, and measures have been taken to ensure the fairness of the proceedings, depending on the nature of the disputes they administer.\textsuperscript{95}

\textsuperscript{90} EU Recommendation, above n 3.
\textsuperscript{91} NetNeutrals.com, An Innovative Approach to Dispute Resolution, above n 64.
\textsuperscript{92} ‘Principle of representation: The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.’ EU Recommendation, above n 3.
\textsuperscript{93} WIPO Guide above n 20.
Parties may present their case with the assistance from a third party in consultation with the arbitrator and the other party. The following findings in relation to the UDRP mechanism reflect one interpretation of compliance with the scope of the right to be represented:

The UDRP Questionnaire responses also reveal that in a large percentage of cases, respondents are not represented by counsel (approximately 86% for NAF, 80% for the Asian Domain Name Dispute Resolution Centre, and 70% for the Czech Arbitration Court). These statistics suggest that the simplicity of the UDRP allows respondents to defend themselves without incurring significant expense.

As the percentages in this statement are recorded in relation to the cases where respondents have not been represented, it would seem that respondents are represented by a third party in the remaining cases.

In fact, in the case of NetNeutrals.com, there could be good reasons as to why legal representation is not specifically mentioned on the providers’ websites. The first is the nature of the dispute resolution mechanism, which requires finishing the matter as soon as possible and without undue cost. The second could be the fact that such an arrangement would make the proceedings more complex. The third reason could be the fear that some parties may want to delay the proceedings purposely and make the other party give up trust and confidence in the dispute resolution mechanism.

In view of this it can be argued that the rights to present a case and to listen to the other party are complied with by both providers. The principle of the right to be represented has not been adequately covered by NetNeutrals.com compared to WIPO’s OA mechanism. It must also be noted that application of the rule of the right to be represented is not necessarily appropriate in this context, given the nature of disputes and the very purpose of the OA mechanism. Therefore non-compliance with this principle is not a significant issue that warrants further attention by either provider.

96. WIPO Guide above n 20.
2.2.2 Cost as part of the transparency rule and cost as part of procedural fairness

Under the transparency principle of the EU Recommendation, information about ‘the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure’ needs to be disclosed. The effectiveness principle ensures that the dispute resolution procedure is required to be conducted ‘free of charges or of moderate costs.’\(^98\) What is the regulatory principle developed by each provider? As far as WIPO is concerned, the UDRP has provisions in this regard. Section 4(g) of the UDRP\(^99\) and section 19 of the Rules for Uniform Domain Name Dispute Resolution Policy (UDRP Rules) do not provide how much the resolution of domain name disputes cost.\(^100\) It is left to the approved OA providers to determine the fee for the proceedings. The relevant website of WIPO’s OA mechanism for the resolution of domain name disputes provides fees currently applied for a single panelist and three panelists as follows:

<table>
<thead>
<tr>
<th>Single Panelist(^101)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NUMBER OF DOMAIN NAMES INCLUDED IN THE COMPLAINT</strong></td>
</tr>
<tr>
<td>1 to 5</td>
</tr>
<tr>
<td>6 to 10</td>
</tr>
<tr>
<td>More than 10</td>
</tr>
</tbody>
</table>

Chart 11: WIPO, Schedule of Fees under the UDRP (valid as of December 1, 2002).

The minimum is $1500 in the case of the 1-5 range of names, and if more than 10 domain names are involved the cost is not specified.

<table>
<thead>
<tr>
<th>Three Panelists(^102)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NUMBER OF DOMAIN NAMES INCLUDED IN THE COMPLAINT</strong></td>
</tr>
<tr>
<td>1 to 5</td>
</tr>
<tr>
<td>6 to 10</td>
</tr>
<tr>
<td>More than 10</td>
</tr>
</tbody>
</table>

Chart 12: WIPO, Schedule of Fees under the UDRP (valid as of December 1, 2002).

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\(^98\) EU Recommendation, above n 3.

\(^99\) UDRP, above n 7.

\(^100\) UDRP Rules, above n 32.


\(^102\) Ibid.
NetNeutrals.com’s website states that ‘NetNeutrals.com helps consumers and businesses quickly resolve disputes with its simple process and convenient online forum. Use our free direct negotiation forum, or request a skilled Neutral with technical expertise to join the discussion and help you reach resolution.’\textsuperscript{103} For the commencement of the IFR mechanism, a party who invites a neutral has to pay 130 US dollars.\textsuperscript{104}

**ASSESSMENT:**

One can question the amount charged for the dispute resolution mechanisms. Specifically, is the fee charged moderate or is it excessive? Answers to these questions depend on the value of the names under dispute. If the disputed domain names that are subject to challenge before WIPO’s OA mechanism are valuable, this fee structure can be considered moderate. In fact, given the lack of a mechanism to value such disputes before the OA mechanism is commenced, and the fact that they are not posted on its website, this fee structure can raise compliance issues with the principle of the EU recommendation.

In the case of NetNeutrals.com, the fee is fixed at 130 US dollars, which seems to be fair and reflects its policy approach to provide fair, inexpensive and effective dispute resolution.\textsuperscript{105} However, there is no specific rule or information available regarding the possibility of the waiver of the fee in circumstances where the respondent cannot afford expenses associated with the dispute resolution mechanism.

Overall, it is reasonable to note that both providers comply with the rules in relation to the cost of the dispute resolution procedure, given the difficulty of valuing the disputes in the market.

### 2.2.3 Timeliness

The rules of effectiveness further require of OA providers that in their OA mechanism ‘only short periods elapse between the referral of a matter and the decision.’\textsuperscript{106} There are rules such as that once a complainant lodges a complaint with one of the approved UDRP providers over a domain name dispute, the respondent is given 14 days to respond. ‘The Administrative

\textsuperscript{103} NetNeutrals.com, An Innovative Approach to Dispute Resolution, above n 64.
\textsuperscript{104} NetNeutrals.com’s FAQ, above n 17.
\textsuperscript{105} Ibid.
\textsuperscript{106} EU Recommendation, above n 3.
Procedure normally should be completed within 60 days of the date the WIPO Center receives the Complaint.\textsuperscript{107}

The OA or the panel of arbitrators, depending on their selection, should reach a decision within 14 days and it should be communicated to the provider to send to the respondent.\textsuperscript{108} In the case of NetNeutrals.com’s IFR mechanism, its website states that: ‘Once a case is sent for review the Neutral joins the forum within 24 hours of payment. The Neutral then asks both parties to post why the feedback does or does not meet the guidelines for feedback rating withdrawal within 6 days.’ In addition, NetNeutrals.com’s rules and guidelines note that ‘… you agree to act in good faith, which includes taking reasonable steps to achieve a fair and expeditious resolution of the dispute\textsuperscript{109} and that ‘NetNeutrals.com helps consumers and businesses quickly resolve disputes with its simple process and convenient online forum.’\textsuperscript{110}

**ASSESSMENT:**

WIPO’s OA follows a specific rule on timeliness in relation to the referral time and to reaching a decision, but there are no similar rules adopted by NetNeutrals.com. In the absence of specific information about the time taken by arbitrators to make their decisions, it is worth referring to the statistics of NetNeutrals.com in order to find out how much time OA mechanisms take in practice. In the case of WIPO’s OA mechanism, there are no statistics in this regard. In the case of NetNeutrals.com, there are recorded statistics regarding the duration between ‘claimant entry date’ and ‘date sent to arbitration’ as follows:

![Chart 13: Time elapsed (months) between ‘claimant entry date’ and ‘arbitration request’ for Net Neutrals matters sent to arbitration, 01/07/08 to 30/06/09 (n=568)](chart13.png)

\textsuperscript{107} WIPO Guide, above n 20.
\textsuperscript{108} UDRP Rules, above n 32, Rule 5.
\textsuperscript{109} NetNeutrals.com, Rules and Guidelines, above n 16.
\textsuperscript{110} NetNeutrals.com, An Innovative Approach to Dispute Resolution, above n 64.
The claimant entry date is the date on which a claimant has entered his claim to the system and the arbitration request date is the date on which arbitration has been requested by the parties.

The statistics demonstrate the time taken for referral to the arbitration mechanism from the date of the claimant entry date for the number of matters dealt with over a 12 month period between 1 July 2008 to 30 June 2009 (n=568). The chart shows that parties took nearly one month to refer 37 cases to arbitration. In 58 cases, two months were taken. Seven months were taken for 68 cases to be requested for arbitration, which is the highest number of cases recorded in one month during the overall twelve month period. In nearly 206 cases, a claimant took 8 to 12 months to make a request to arbitration. In nearly 21 cases, 12 months were taken.

Based on these statistics, several observations can be made. First, there are no data which reflect the time taken for referral of disputes to arbitration mechanisms; instead the claimant entry date and the arbitration request made by the parties are analysed to assess the timeliness of the process.

Second, it is clear that disputants took more than one month for making a request for arbitration in a large number of cases. The reasons for the time differences could be varied. The time could be spent for procedural steps because of administrative work by both disputants and the dispute resolution provider. Also time could have elapsed between the claimant’s feedback and the respondent’s feedback. Another reason is that there could have been a lack of interest of the disputants in selecting the type of ODR mechanism to be used for their particular dispute, or the lack of goodwill between claimant and respondent to go through the arbitration process. However, there are no statistical data to identify how long has been taken by an arbitrator for reaching his final decision.

Third, there are no specific statistics over the time taken for the resolution of disputes through the OA mechanisms of NetNeutrals.com. As such, a conclusive statement cannot be made about how far both mechanisms comply with this principle.

Data Set, above n 2, Time elapsed (months) between ‘claimant entry date’ and ‘arbitration request’ for Net Neutrals matters sent to arbitration, 01/07/08 to 30/06/09 (n=568).
In light of this available information, it can be stated that WIPO has rules in relation to the time taken from referral of disputes to the making of a decision. NetNeutrals.com has no such rules and the data do not present a clear picture of the time taken for making a decision from the time of referral of a dispute to its OA mechanism. Therefore a conclusive decision cannot be reached as to the compliance to the rule by NetNeutrals.com.

2.2.4 Evidence

The next principle is designed to ensure that a competent body is given an active role by enabling it to take into consideration any factors conducive to the settlement of a dispute.\textsuperscript{112} It must be noted that rules of evidence are not applied in strict manner in the area of alternative dispute resolution mechanisms, as such rules can undermine the very purpose of alternative dispute resolution mechanisms. However, as far as the arbitration mechanism is concerned, attention to the relevant evidence by the arbitrator is important because of the adjudicatory element of arbitration. In this context the response in relation to evidence that can be presented during OA proceedings from both OA providers needs to be explored.

Under the UDRP Rules it is noted that ‘Pursuant to paragraph 15(a) of the Rules, the Panel shall decide the Complaint on the basis of the statements and documents submitted and in accordance with the Policy, the Rules and any rules and principles of law that it deems applicable.’\textsuperscript{113} The complainant has to prove the following elements incorporated in 4(a) of the UDRP\textsuperscript{114} as outlined above as disputes of domain names in order to gain an outcome favourable to him. Out of those elements, the evidence as to the proof of 4(a) (iii), that is, ‘the domain name has been registered and is being used in bad faith’ is provided in the UDRP.\textsuperscript{115} Under Rule 12 of the UDRP Rules, online arbitrators have discretion to request additional documents apart from the complaint and the response.\textsuperscript{116} For NetNeutrals.com, there is no specific rule in relation to what sort of evidence can be taken into consideration by the online arbitrator. However, its information notes that ‘As an Independent Reviewer, the Neutral reviews the merits of the case and decides whether the disputed feedback meets the Guidelines for Feedback Withdrawal.’\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{112} EU Recommendation, above n 3.
\item \textsuperscript{114} UDRP, above n 7.
\item \textsuperscript{115} Ibid.
\item \textsuperscript{116} UDRP Rules, above n 32.
\item \textsuperscript{117} NetNeutrals.com, FAQ, above n 17.
\end{itemize}
ASSESSMENT:

There are some areas of concern in relation to the procedural aspects of the OA of both providers. First, in the recent case of *Tucows.Com Co. v. Lojas Renner S.A* regarding ICANN’s OA mechanism, it has been stated that ‘it is an ‘online’ procedure that does not permit discovery, or, in the absence of exceptional circumstances, the presentation of live testimony.’\(^{118}\) The limitation on discovery during the arbitral proceedings is acceptable to the extent that such a rule can undermine the purpose of the OA mechanism and access to a court is permitted under UDRP, especially in terms of time, cost and complexity that can be caused by the dispute resolution mechanism. However, it can be argued that limiting the presentation of live testimony is not appropriate, given the availability of technology for free or little cost, such as Skype technology.

Second, there could be evidence-related concerns as a result of the limited use of technological tools when the proceedings are conducted online. As discussed above, both providers mainly rely on email technology and have limitations on the use of other technological tools. From evidential perspective, these limitations can prevent the receipt of valuable evidence from the disputants by the decision maker. For example, the limitations may contradict the principle under discussion, as it may deny parties the right to send additional evidence, and there could be documents which cannot be turned into text and thus sent via email. Another situation is related to WIPO’s OA mechanism. Therefore, it is important to follow a liberal approach for the use of appropriate technological tools to gather evidence.

Third, it is important to establish the types of technologies that can be used, and to what extent such technologies can be used during the dispute resolution process, as this gives more options for the disputants to present their evidence. It appears that there are no specific rules detailing the types of technologies that can be used by disputants in the dispute resolution mechanisms of both WIPO and NetNeutrals.com. Therefore, due consideration must be paid by both providers to the use of various types of communication tools, including the cheaper technological tools, as these mechanisms are fundamentally based on technology. In the private ODR setting, online technology, which includes the internet, email, video-conferencing, the use of multi-media transcripts and mobile phone technology, is being used in all forms of the procedural stages of

Hence it is important to open more options for the disputants to participate in the dispute resolution mechanism.

Of course the types of technology used and the extent of the use of technology for a particular OA may depend on rules established by the parties, or the power given by the parties to the online arbitrator, in the absence of specific statutory rules applicable to this area. Importantly, given the lack of specific rules in regard to the types of technology to be used and the extent of the use of technology, Scultz suggests a useful common-sense approach in the following terms:

[T]he opportunities technology provides should never be used to gain or give advantages to one party only, to the detriment of the other party; a recourse to technology should not modify the balance of powers between the parties. Similarly, an arbitral tribunal may only use technology to simplify the procedure to a certain extent; simplification beyond a certain baseline may jeopardize the parties' fundamental rights.

In principle, online arbitrators are free to follow their proceedings and make decisions by paying attention to factors relevant to the matter in dispute. However, there are some concerns about the extent to which parties are allowed to present their evidence, mainly due to the limitations in methods of communications.

2.2.5 Rule against bias

The underlying principle behind the ‘Principle of independence’ is to ensure compliance with the rule against bias.121 The main elements embedded in the principle of independence can be listed as below:

the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function,

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119 ‘Furthermore, an interesting online technique is the use of multi-media transcripts at face-to-face hearings, allowing the participants to simultaneously see and hear the evidence but also to see the written transcript and case file on the screen in front of them almost instantaneously. The idea is that this enhances presentation and makes the evidence more comprehensible.’ Julia Hörnle, Online Dispute Resolution—The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration <http://egov.ufsc.br/portal/sites/default/files/anexos/18561-18562-1-PB.pdf> last accessed 15 September 2012; see also Gabrielle Kaufmann-Kohler and Thomas Schultz, The Use of Information Technology in Arbitration Jusletter 5, 2005 <http://www.lk-k.com/data/document/the-use-information-technology-arbitration-jusletter-5-december-2005-available-http-www.pdf> last accessed 15 September 2012.


121 EU Recommendation, above n 3.
the person appointed is granted a period of office of sufficient duration to ensure the independence of his action and shall not be liable to be relieved of his duties without just cause,

if the person concerned is appointed or remunerated by a professional association or an enterprise, he must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned. When the decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals or by complying with the criteria set out above.\textsuperscript{122}

It is evident that these standards are designed to persuade OA providers to make decisions impartially. In the case of ICANN’s UDRP mechanism, there are some provisions in this regard. According to the UDRP, its OA mechanism is conducted either by one arbitrator selected by the complainant or three online arbitrators. In case of the three arbitrators, one by the complainant, another one by the respondent and the third arbitrator is selected by the online arbitration provider.\textsuperscript{123} Arbitrators are said to be qualified.\textsuperscript{124} As far as NetNeutrals.com is concerned, there is a list of names of arbitrators from which parties can choose one. The listed arbitrators are said to be people who have experience in different areas, and parties are given an opportunity to find a suitable arbitrator depending on the nature of the dispute.

**ASSESSMENT:**

ICANN’s OA mechanism which is conducted by approved providers has been subject to criticism in the literature. One is the issue of partiality. Partiality has been raised as a concern in the number of decisions made in favour of trademark owners, and the percentage of cases decided by each provider accredited by ICANN.\textsuperscript{125} Under the UDRP, a domain name registrant cannot file a case against a third party.\textsuperscript{126} In order to avoid this situation, Miller suggests that:

ICANN should also consider amending the UDRP procedures to provide domain name holders with some form of a declaratory judgment. That is, domain name holders should be able to

\textsuperscript{122} Ibid.
\textsuperscript{123} WIPO Guide, above n 20; UDRP, above n 7.
\textsuperscript{124} Ibid; NetNeutrals.com FAQ, above n 17.
\textsuperscript{125} M Miller, ‘Rough Justice: A Statistical Assessment of ICANN’s Uniform Dispute Resolution Policy’ (2001) 17(3) The Information Society 151, 155.
\textsuperscript{126} WIPO Guide, above n 20; see also Miller, above n 125.
initiate a UDRP proceeding, using the dispute resolution service provider of their choice, to
obtain a binding statement that they have a “right and legitimate interest” in a name.\textsuperscript{127}

In the absence of such studies and also quantitative data in relation to NetNeutrals.com’s OA
mechanism, reference is made to the qualitative information available in regard to the
impartiality of its OA mechanism on its website. In light of the available qualitative information,
it can be argued that there is limited opportunity for the OA mechanism to be tainted by bias for
two reasons. The first is the fact that one arbitrator is selected for a particular dispute and is
accepted by mutual consent of both parties. The second is related to the opportunity given to the
parties to select professionals from ‘a pool of trained professionals located throughout the United
States with experience in various fields including electronics, collectibles and antiques,
automotive, and dispute resolution.’\textsuperscript{128}

However, a counter-argument can also be raised, given the scope of the principle of impartiality.
It can be argued that the selection is limited to a list of neutrals provided by the dispute
resolution provider but there is no information as to whether an arbitrator whose name is not
included in the list can be selected by the parties; and a party is allowed to select one arbitrator
only, with the other party having no opportunity to select a second arbitrator.

Overall, both providers have to take measures for the avoidance of situations that can lead to
biased decisions, as such decisions would undermine the whole basis of trust of the consumers.
Trust can be affected in situations in which consumers have to comply with unfair decisions.
Therefore, unless appropriate measures are taken to avoid these concerns and make the OA
mechanism impartial, the existing rules of both providers in relation to impartiality can counter
the principle of impartiality as expected by the OA mechanism-related principles.

2.3 Binding element and access to other remedies
The principle of transparency and the principle of legality need to be considered together, as they
have a connection as a result of the binding requirement and the application of mandatory
consumer protection laws. Access to a court has been recognised in most national consumer
protection laws, and a binding online consumer arbitration award may deny an online

\textsuperscript{127} Miller, above n 125, 161.
\textsuperscript{128} NetNeutrals.com, Rules and Guidelines, above n 16.
consumer’s right to access to a court where the consumer resides, as highlighted in the first chapter of the thesis.

One of the elements of the principle of transparency is the requirement of the clear disclosure of information as to ‘whether it is binding on the professional or on both parties,’ and also ‘if the decision is binding, the penalties to be imposed in the event of non-compliance shall be stated, as shall the means of obtaining redress available to the losing party.’\textsuperscript{129} The ‘principle of legality’ ensures the protection of consumers by allowing them to secure the mandatory consumer protection laws where the consumer resides. The principle of legality requires OA providers to ensure their mechanism is conducted in compliance with the mandatory national consumer protection laws which ensure the consumers’ access to a court where the consumer resides. As noted above, there are no specific rules or information given by either provider as to whether they conduct their proceedings subject to the mandatory consumer protection laws of the place where the consumer resides.

In the case of the WIPO’s OA mechanism, the binding element of its OA mechanism is incorporated in the registration agreement which is made between the registrar who is accredited by ICANN and the domain name applicant’s named registrants.\textsuperscript{130} The important element of ICANN’s OA mechanism is the fact that domain name registrants have to go through the arbitration process as a mandatory requirement when there is a dispute over the domain name, but the final outcome of the OA mechanism is not binding. Both parties can go to a competent court at any time of the arbitral proceedings. In case of NetNeutrals.com, the IFR and VA mechanism adopted is also based on an agreement. Under its rules, resort to these two mechanisms is voluntary and their decisions are binding on both parties and they have to comply with their decisions fully and such decisions cannot be appealed.\textsuperscript{131}

As far as the other remedies are concerned, remedies that can be sought from the both providers are limited. In the case of WIPO, it is noted that ‘There are no monetary damages applied in UDRP domain name disputes, and no injunctive relief is available.’\textsuperscript{132} In NetNeutrals.com,\textsuperscript{133}

\textsuperscript{129} EU Recommendation, above n 3.
\textsuperscript{130} UDRP, above n 7.
\textsuperscript{131} NetNeutrals.com, Rules and Guidelines, above n 16.
\textsuperscript{132} WIPO, FAQ, above n 4; UDRP, above n 7, section 4(i).
‘Voluntary Arbitration decisions cannot include compensation for time, pain and suffering, attorney fees, or other damages.’

**ASSESSMENT:**

The OA mechanism of WIPO is in compliance with the principle of transparency and the principle of legality, as its mechanism is a mandatory administrative process, but non-binding. As a result, access to a court is not denied. In the case of NetNeutrals.com’s OA mechanism, the arbitrator’s decisions are final and the final decisions do not allow consumers to access government-sponsored courts.

However, one important positive factor of this arbitration mechanism is that the OA mechanism is commenced in agreement with the consumer on the basis that the underlying principle underpinning the principle of liberty is to ensure the consumer’s access to a court, but is limited to pre-dispute arbitration clauses. Therefore they have to comply with the OA’s decision. The other supporting fact for this argument is the availability of diverse ADR mechanisms for both parties to seek redress, unlike UDRP which does not provide any other form of dispute resolution mechanism. Therefore it can be argued that its OA mechanism is designed in compliance with the principle of transparency as it articulates the binding element and also defines the scope of its online dispute resolution mechanism, and with the principle of legality, as its OA mechanism commences after consent from the consumer.

In fact, a counter argument can be raised to the preceding argument by taking into consideration the situation before consumers give consent to the OCA mechanism of NetNeutrals.com. The ODR mechanism has been developed by NetNeutrals.com for the resolution of disputes referred by eBay in agreement with NetNeutrals.com. It seems that parties to such disputes have to go through this ODR mechanism even though parties to such disputes are free to refer their disputes to a consensual ODR mechanism of binding OA. In this context it can be argued that even though OA takes place after a dispute arises and after an agreement with the consumer, consumers have to select any one of the ODR mechanisms offered by NetNeutrals.com, and they

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133 NetNeutrals.com, Rules and Guidelines, above n 16.
134 UDRP, above n 7, section 4(k); WIPO Guide 20.
135 ‘The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. The consumer’s recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.’ EU Recommendation, above n 3.
136 NetNeutrals.com’s FAQ, above n 17.
are not allowed to follow any other redress mechanism of its ODR mechanisms. In this situation it can be further argued that the OA mechanism adopted by NetNeutrals.com is a dispute resolution mechanism designed for the resolution of disputes which have not emerged, even though OA takes place in agreement with online consumers at a stage where the dispute has occurred. In this broader context both providers are expected to comply with the requirement that online consumers should be allowed to gain access to the courts.

The terminology of the OA mechanism is problematic, especially because of the mandatory element of WIPO’s OA mechanism. It can be argued that adopting a specific terminology is important so that consumers can gain an understanding of the type of dispute resolution mechanism they can use for their dispute, and that using different terminologies to describe dispute resolution mechanisms should be avoided. As Tillett points out, ‘the development of clear definitions and descriptions is essential…to ensure that potential and actual practitioners and consumers have adequate information on the basis of which to make decisions and to assess processes and practitioners.’ Unfortunately, some confusion remains over the definition of the OA mechanism, with a wide range of terminologies used in the literature adopted by ICANN.

Some writers use ‘UDRP proceedings’,138 ‘court’ of the UDRP’,139 ‘mandatory arbitration’,140 ‘UDRP Arbitration’141 and ‘non-binding’ arbitration.142 It is noted that ‘instead of the name of the arbitrator, UDRP uses a one member panel or a three member panel.’143 Some writers question whether ICANN’s arbitration mechanism, due to the lack of a binding element as mentioned earlier, reflects the traditional meaning of arbitration.144

The binding element of arbitration is recognised as one of the fundamental features that have led to the success of arbitration as a viable ADR mechanism, and the impact of the binding element

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138 Neil Batavia, ‘That Which We Call a Domain by any Other Name Would Smell as Sweet: The Overbroad Protection of Trademark Law as It Applies to Domain Names on The Internet’ (2002) 53 South Carolina Law Review 461, 474.
of arbitration is to distinguish it from other, non-binding ADR mechanisms and traditional litigation.\textsuperscript{145} Kaufmann-Kohler notes that: ‘The only binding method available on the Internet is arbitration.’\textsuperscript{146} In the related literature, two specific problematic aspects over the binding nature of ADR are recognised. First, ‘one could interpret ‘voluntary’ or ‘non-binding’ to mean that the consumer has an initial choice either to litigate in court or to submit a dispute to an ADR system.’\textsuperscript{147}

Second, ‘one could interpret it to refer to ADR systems which do not lead to a legally-binding decision that would foreclose the consumer from submitting the dispute to the court system, if he is dissatisfied with the results of the ADR procedure.’\textsuperscript{148} As a result, it is further mentioned that, ‘the binding nature of an ADR proceeding is not a black-or-white question, but rather one that has a wide variety of gradations along a continuum.’\textsuperscript{149} As a response to remedy this situation, there are writers who advocate making UDRP arbitration a binding arbitration process, including having an arbitration agreement and the award of the UDR arbitration being final and binding.\textsuperscript{150} This approach is arguably workable when enforcement of its outcomes is also subject to another institutional framework backed by an appropriate legal framework.

Another concern is the lack of specific criteria for deciding which dispute should go to OA and which should not. Under the current mechanism these cases are referred to the UDRP arbitral process regardless of the complexity of each case as a result of the binding arbitration requirement. For example, Chan notes as follows:

Complicated cases are best to still use litigation, especially those with multiple legitimate claimants, though straightforward cases should fully utilise the UDRP. Thus, depending on the

\textsuperscript{145} ‘Arbitral awards are more authoritative. They are binding like court judgments. They are final subject to an action to set aside the award for limited procedural grounds and violation of international public policy. Moreover, they can be enforced by way of procedures similar to the executary of judgments, and they carry \textit{res judicata}. Decisions which do not qualify as arbitral awards are either not enforceable or enforceable like contracts, so for instance settlements reached in mediation.’ Thomas Schultz, Gabrielle Kaufmann-Kohler, Dirk Langer, Vincent Bonnet, Online Dispute Resolution: The State of the Art and the Issues (2001) 70.


\textsuperscript{148} Ibid.

\textsuperscript{149} Ibid.

\textsuperscript{150} Soohye Cho, Reforming UDRP Arbitration: The Suggestions to Eliminate Potential Inefficiency 2006 Cornell Law School Inter-University Graduate Student Conference Papers 18.
circumstances of the case, traditional litigation would be a more appropriate solution than through the UDRP.\textsuperscript{151}

The rationale for this could be that arbitrators’ discretionary power to decide whether a dispute should be terminated or not, depending on the circumstances of each case. This situation can be illustrated with the views expressed by the judiciary in the case of Tucows.Com Co. v. Lojas Renner S.A. in which the following factors were listed to highlight the discretion offered to the arbitration panel to decide as to whether a domain name dispute should be terminated or not.

[15] The Panel decided to exercise its discretion to terminate the proceeding before it for a number of reasons. They include:

(1) The circumstances were almost indistinguishable from another case involving Tucows where the panel had decided to terminate the proceeding, and although prior UDRP decisions are not binding, conformity was desirable;

(2) The parties could afford the cost of litigating the dispute in court and had sufficient interest in doing so;

(3) There was no apparently great urgency to have the dispute resolved;

(4) The issues in dispute were not straightforward – Tucows had acquired the domain name <renner.com> along with other domain names from another company, Mailbank Inc., different Panels had reached different decisions in cases relating to domain names registered by Mailbank Inc. and acquired by Tucows and ‘…there does appear to be some disparity in approach which might be resolved by an authoritative court decision’; and

(5) The submissions of Renner had not focused on the critical issue of whether the domain name was originally registered by Mailbank Inc. or acquired by Tucows in bad faith: ‘If this proceeding is not terminated, the Panel would have either to find that the Complaint had not been proved or to invite the parties to make further submissions. In these circumstances, this proceeding could be said to be no further advanced than the claim commenced by the Respondent [Tucows]. Furthermore, a court will be in a better position to establish the facts on these critical issues.’\textsuperscript{152}

This discretionary element could result in a waste of time and money, as parties are delayed to a dispute in terms of the receipt a decision either from ICANN’s dispute resolution mechanism or

\textsuperscript{151} ‘Whilst the cases of other jurisdictions provide useful guidance to Australian courts, the lack of case law in Australia makes the litigious path a precarious one. The UDRP on the other hand, having resolved many disputes in this area, is definitely a useful method of settling such disagreements. The process is inexpensive and quick compared to traditional litigation, but it is also clearly flawed.’ Peter Chan, ‘The Uniform Domain Name Dispute Resolution Policy as an Alternative to Litigation’ (2002) 9 Murdoch University Electronic Journal of Law <http://www.murdoch.edu.au/elaw/issues/v9n2/chann92.html> last accessed 15 September 2012.

a competent court. If there is a criterion for deciding whether a case should be referred to court or to ICANN, then the resolution of such a dispute can be expedited. As such, it is important to prepare an indicative list of circumstances that can be followed by the arbitrators when their discretion is used.

In addition, there is no effective mechanism developed for the identification of the number of cases brought before courts over a domain name holder and a trademark owner. It is stated that ‘Court cases that are pending or for which no order/decision is available are not published on this list. Relevant court orders and decisions that are not listed may be brought to the attention of the Center.’ At the same time there is a statement that ‘While every effort is being made to keep this list complete and up-to-date, the Center cannot guarantee that it includes all relevant cases.’ So far only 24 court cases have been recorded.

Finally, it is important to note that there are concerns over the effectiveness of the government-sponsored courts, which are not effective in terms of cost, complexity and time consumption when it comes to the cross-border Internet setting. A detailed discussion in regard to the effectiveness of government-sponsored courts is given in chapter five of the thesis.

In addition, limitations on access to other remedies such as injunctions and seeking damages from these types of ODR mechanisms can be allowed, given the purpose for which these mechanisms are designed and the types of dispute they handle. Therefore, these limitations may not raise concerns over the compliance of OA mechanism-related principles.

2.4 Final outcomes and enforcement of such outcomes

There is no specific rule in relation to the enforcement of OA outcomes in the EU recommendation or in other online consumer protection standards identified in the second chapter of the thesis. Such an omission does not mean that enforcement of OA outcomes is not important to the effectiveness of OA mechanisms. As reviewed in the first chapter, it is clear that enforcement of OA outcomes is important for the effectiveness of ODR outcomes. In other words, if there is a lack of effective enforcement mechanism, the overall objectives of the

153 WIPO, Selection of UDRP-related Court Cases <http://www.wipo.int/amc/en/domains/challenged/> last accessed 16 September 2012: ‘This section offers a selection of court orders and decisions in relation to the UDRP or specific UDRP cases that have come to the attention of the WIPO Arbitration and Mediation Center. While every effort is being made to keep this list complete and up-to-date, the Center cannot guarantee that it includes all relevant cases.’

154 Ibid.

155 Ibid.
principles embedded in the EU Recommendation and also online consumer protection guidelines could be diminished. Therefore, it can be argued that the enforcement of the final decisions of the OA mechanisms needs to be considered in order to determine that the effectiveness of OA the entire OA dispute resolution mechanism is not undermined. In this sense, the effectiveness of the enforcement mechanisms adopted by these two providers is explored and answers to two questions are sought: first, who has the authority to enforce the online arbitrator’s decision? And second, what is the mechanism adopted for the enforcement of such decisions?

In regard to the first question it is evident that online arbitrators have no power to enforce their decisions. Then who has the authority to enforce such decisions? As far as ICANN is concerned, registrars who are approved by ICANN have the sole authority to enforce decisions delivered by an arbitrator or panel of arbitrators. ‘An Administrative Panel decision is implemented by the registrar with which the contested domain name is registered at the time the decision is rendered.’ This means that the WIPO which is the OA provider has no power to enforce arbitrators’ decisions. If a party has taken the case to a competent court, the registrar cannot enforce the arbitrator’s decisions when he receives official documents in relation to the commencement of a lawsuit in a competent court. In such a scenario, the enforcing registrar has no authority to enforce the decision until he receives satisfactory evidence that shows:

(i) Satisfactory evidence of a resolution of the dispute between the parties; or
(ii) Satisfactory evidence that the domain name registrant’s lawsuit has been dismissed or withdrawn; or
(iii) A copy of an order from the court in which the lawsuit was filed dismissing the lawsuit or ordering that the domain name registrant has no right to continue to use the domain name.

Upon receiving any of the information mentioned above, the registrar should enforce the court’s decision. Then the next question is: what is the enforcement mechanism followed by the registrar to enforce the arbitrators’ decisions? The registrar should enforce the decisions after ten days of the decision having been made by an arbitrator or panel of arbitrators, unless the registrar receives information about the commencement of a lawsuit over the matter subject to

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157 They include: ‘a copy of a complaint’ and ‘file-stamped by the clerk of the court’ WIPO Guide, above n 20.
159 ‘Once the court rules on who is entitled to the registration, the registrar will implement that ruling.’ Internet Corporate for Assigned Names and Numbers, FAQs <http://www.icann.org/en/about/learning/faqs> last accessed 16 September 2012.
the OA decision from an aggrieved registrant about taking legal action in a court of competent jurisdiction by him.\(^{160}\)

ICANN has developed a special technology-driven enforcement mechanism for this purpose, namely that the registrar enforces the decisions by transferring the registered domain name to the trademark owner, or by cancelling the domain name already registered by the domain name registrant, or denying the requested remedy by the trademark owner,\(^{161}\) depending on the arbitrators’ or court’s decision. This enforcement mechanism is efficient as it is speedy, simple, and no cost is involved due to the fact that the data base includes the domain name registration which can be controlled technologically.\(^{162}\) The following table of the OA mechanism adopted by WIPO in relation to the enforcement of its arbitrators’ decisions shows promising examples as to the success of the enforcement mechanism developed by ICANN.

![WIPO Case Outcome 2000-2011 (consolidated)](chart14)

This chart demonstrates that there is a high rate of success of enforcement of outcomes delivered by ICANN’s OA mechanism. Approximately 1250 decisions have been enforced by way of transferring domain names. The enforcement of decisions involving the denial of complaints remains between 0 to 500, and cancellation of domain names is very low, virtually zero.

The accredited domain name registrars - which have agreed to abide by the UDRP - implement a decision after a period of ten days, unless the decision is appealed in court in that time. The panel decisions are mandatory in the sense that accredited registrars are bound to take the

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\(^{160}\) UDRP, above n 7, section 4(k); Caslon Analytics, above n 31.

\(^{161}\) WIPO Guide above n 20; UDRP, above n 7, section 3.

\(^{162}\) See Haloush, above n 88, 85.

necessary steps to enforce a decision, such as transferring the name concerned. However, under the UDRP, either party retains the option to take the dispute to a court of competent jurisdiction for independent resolution. In practice, this is a relatively rare occurrence.\textsuperscript{164}

In the case of NetNeutrals.com, the rules and guidelines indicate the scope of online arbitration in the following terms:

Voluntary Arbitration decisions may include descoring negative feedback, a full or partial refund to one or both party for costs actually incurred (not to exceed 150\% of the purchase price of the item), replacement or repair of an item if feasible, and/or no additional action to be taken by one or both parties.\textsuperscript{165}

In view of this information, it can be inferred that the online arbitrators’ power ends with the delivery of their decisions. There is no specific information about the enforcement of its online arbitrators’ decisions on its website.

\textbf{ASSESSMENT:}

The enforcement mechanisms adopted by each ODR provider may vary depending on the purpose for which such mechanisms are designed.\textsuperscript{166} WIPO’s OA has a clear enforcement mechanism which is conducted by means of technology.\textsuperscript{167} The question is whether this enforcement mechanism is effective for the enforcement of its online arbitrators’ decisions. It can be argued that the existing enforcement mechanism has several concerns worth noting, regardless of the fact that their statistics show a high rate of success in enforcement of its arbitrators’ decisions.

One concern that can be highlighted is exemplified by the conduct of a registrar which took place when an award delivered by a WIPO panel of arbitrators was enforced. The concern is related to the conduct of ‘Lead Networks Domains Pvt. Ltd’, which is an ICANN accredited registrar. The alleged conduct of the registrar has been described by Wilbers, Director of WIPO, in his letter referring to a case decided by WIPO’s UDRP panel as follows:

\textsuperscript{164} WIPO FAQ, above n 4.
\textsuperscript{166} For example, Kohler has indicated three methods of enforcement of ODR such as ‘enforcement relying on money’ (‘financial guarantees, escrow accounts, insurance and charge-back agreements with credit card companies’), ‘technical control’ (‘The UDRP procedure for domain name disputes’) and ‘reputation’ (‘the suspension or removal of the trustmark’) Kaufmann-Kohler, above n 146, 545.
\textsuperscript{167} See Haloush, above n 88, 85.
It has been brought to the WIPO Center's attention that over a year after the Center's Notification of Decision, and despite multiple requests, no copy of an alleged court filing was provided to the UDRP complainant, and the WIPO UDRP Panel Decision remains unimplemented. Such behavior effectively places the WIPO UDRP Panel Decision in a period of potentially indefinite limbo, with the UDRP complainant having no effective means of recourse.\textsuperscript{168}

His letter further notes that:

Such conduct includes sometimes lengthy delays in registrar replies to the WIPO Center's requests for information, changes in registrant data in apparent contravention of the UDRP itself, perceived blurring of registrar and registrant roles, and difficulties or delays in implementation of WIPO UDRP Panel Decisions.\textsuperscript{169}

One positive element of the decision taken by WIPO to publish this sort of conduct of the registrars is its commitment to taking appropriate measures to rectify the current problem and to help prevent similar incidents from occurring in the future. There could be other similar incidents not brought to the attention of the OA provider or to the public. Then the question is: how can such types of conduct be brought to light? It is important to note that ICANN has developed some avenues for the disputants to report grievances against a decision they have received, which is called the Uniform Domain Name Dispute Resolution (UDRP) Intake Report System.\textsuperscript{170} This system ‘allows a party that has received a decision from an Approved Dispute-Resolution Service Provider to register a grievance, as well as any other parties interested in obtaining enforcement assistance regarding a UDRP decision.’\textsuperscript{171}

However, as is seen in the related literature, many writers have already addressed the lack of an effective mechanism to monitor the proceedings of dispute resolution processes and the enforcement of final outcomes of these OA arbitration mechanisms.\textsuperscript{172} Accordingly, more solutions have been suggested in the related literature to overcome some of the issues associated

\textsuperscript{169}Ibid 2.
\textsuperscript{170}Internet Corporation for Assigned Names and Numbers (ICANN), Have a Problem Dispute Resolution Options <http://www.icann.org/en/help/dispute-resolution> last accessed 16 September 2012.
\textsuperscript{171}Ibid.
\textsuperscript{172}For example See Haloush, above n 88, 82.
with the UDRP process. Some writers argue for an appeal mechanism to review UDRP dispute resolutions.\textsuperscript{173}

Unfortunately it must also be noted that until 2011 UDRP had not been revised since its inception in 1999, regardless of the identification of shortcomings of the current UDRP mechanism.\textsuperscript{174} In 2011 for the first time ICANN conducted a survey for the collection of information by addressing the question of whether the UDRP process needed to be reformed or not.\textsuperscript{175} The purpose of the report was twofold: first, ‘How the UDRP has addressed the problem of cybersquatting to date, and any insufficiencies/inequalities associated with the process,’ and second, ‘Whether the definition of cybersquatting inherent within the existing UDRP language needs to be reviewed or updated.’\textsuperscript{176} Unfortunately the lack of interest in addressing issues associated with the ICANN’s UDRP is also evident in the recently published report by ICANN.

Its report, by listing several substantive and procedural issues in summary form in Annex 2, notes that ‘This summary is meant to be illustrative, rather than exhaustive, of the issues raised by the UDRP and its implementation.’\textsuperscript{177} Furthermore, the report concludes that there is no need for the revision of the existing UDRP mechanism, justifying its conclusion through a literature review, one questionnaire,\textsuperscript{178} and views and comments raised during the research (such as the ‘ICANN community’, ‘Webinar’).\textsuperscript{179} Thus the administration of the UDRP process remains unchanged regardless of the extensive literature addressing problematic aspects of the current mechanism.

In the case of NetNeutrals.com there is no information about the actual enforcement mechanism adopted, or about who is responsible for the enforcement of an arbitrator’s decisions, such as can be seen in the case of ICANN’s UDRP arbitration mechanism. In light of the lack of


\textsuperscript{174} ‘The UDRP has not been amended since Board approval in October 1999.’ Milam, above n 97.

\textsuperscript{175} Ibid.

\textsuperscript{176} Ibid.

\textsuperscript{177} Ibid: ‘Over the years, numerous substantive and procedural issues have been raised with respect to the UDRP and its processes. Annex 2 includes a brief summary of the issues recently highlighted in the UDRP Webinar and in the Public comment Forum that could be addressed as part of a review of the policy and its procedures. This summary is meant to be illustrative, rather than exhaustive, of the issues raised by the UDRP and its implementation. Included in the responses to the Questionnaires found in Annex 3 is a list of resources and additional information regarding the UDRP and its administration.’

\textsuperscript{178} Ibid.

\textsuperscript{179} Ibid: ‘This recommendation mirrors the general sentiment of many in the ICANN community as highlighted in Section 3 of this Report, and in the Public Comment Forum, that commencing a PDP on the UDRP may ultimately undermine it, and potentially adversely affect the many Internet stakeholders who benefit from its current implementation.’
information, two concerns about the effectiveness of NetNeutrals.com’s OA mechanism can be raised. First, the lack of information forces the consumers to find out who is responsible for the enforcement of arbitrator’s decisions, unlike in the case of ICANN’s UDRP arbitration mechanism. It is not clear whether OA’s decisions are enforced by eBay or NetNeutrals.com or another body. Second, it also appears that there is no monitoring mechanism established by either eBay or NetNeutrals.com for the scrutiny of the OA mechanism, including its enforcement mechanism of OA’s decisions.

In view of this discussion, it is reasonable to note that WIPO’s enforcement mechanism adopted for the enforcement of the decisions of its OA mechanism is effective, but there are some drawbacks which need to be addressed in order to make it more effective. As far as NetNeutrals.com is concerned, adequate information detailing the enforcement mechanism that is applied to its arbitrators’ final outcomes is not incorporated in the rules and guidelines, or in the information available on its website. Given the binding nature of its OA mechanism, it is important to have more information about its enforcement mechanism and to have an effective mechanism for monitoring the enforcement mechanism of these OA providers. It is important to have an institution outside the private OA provider’s dispute resolution mechanisms, namely a government institution, as advocated in this thesis.

3. Concluding remarks

In view of the overall discussion, it is reasonable to note that there are some concerns associated with the OA mechanisms when they are assessed in relation to the OA mechanism-related principles. Many concerns arise from the regulatory frameworks, disclosure of information about the OA mechanisms, procedural aspects of the OA mechanism, access to court and enforcement mechanisms. The concerns identified in this case study need to be addressed in order to make OA a viable dispute resolution mechanism for the resolution of B2C e-commerce disputes. Two approaches can be adopted for fixing the concerns identified. First, OA providers have to take measures especially focusing on OA mechanisms in order to design and operate their OA mechanisms in line with the principles relating to OA mechanisms. Secondly, the use of a supportive government-sponsored institution for the enforcement of the outcomes of these online consumer arbitrators is necessary.
In the first scenario the development of a set of specific rules applicable to OA mechanisms is important, given the lack of a comprehensive regulatory framework addressing the principles applicable to OA mechanism-related principles. Such rules should be designed by the private OA providers in line with each component of the principles. ICANN has recently developed standards of practice which detail standards that need to be applied to ODR mechanisms. Unfortunately, those standards have been introduced in general and have no mandatory application to its dispute resolution mechanisms.

In addition, it is important for these providers to promulgate a detailed web instrument (a single web document) describing all major aspects of their ODR mechanisms in line with OA mechanism-related principles and online consumer protection standards, as there is a lack of appropriate information in relation to certain aspects of the OA mechanisms on their particular websites. In order to fulfill this requirement this instrument is required to incorporate rules in regard to all the types of dispute resolution mechanisms available, rules applicable to each in terms of definition of disputes, procedural rules applicable to each ODR mechanism, the role of the arbitrator, the rights of parties to the dispute, and the nature of the final outcome and enforcement mechanism. Additionally, a separate set of statements needs to be included in this particular instrument, regarding the effects of going through each of these mechanisms, especially regarding their right to pursue another action in the national court, by class action or class arbitration or in small value courts.

In the second scenario, it is important to use a supportive government-sponsored institution in order to avoid the concerns associated with the OCA mechanisms, as the private sector can be reluctant to adopt the first approach. Government also has a responsibility to find an appropriate solution to overcome these concerns, given the vulnerable state of online consumers, especially in the cross-border online context. As an appropriate way forward, the use of a government-sponsored eCourt room, supported by online consumer protection regulatory frameworks and ICALF for the enforcement of OCAA is advocated in this thesis. A detailed discussion of this mechanism is conducted in the remaining chapters of the thesis, with recommendations which can benefit not only online consumers, but also online business people and online arbitration providers.
CHAPTER FOUR: VIABILITY OF ONLINE CONSUMER PROTECTION GUIDELINES IN REGULATING APPROPRIATE REGULATORY AND INSTITUTIONAL FRAMEWORKS FOR ONLINE CONSUMER ARBITRATION AWARDS

1. Introduction

The previous chapter examined the effectiveness of the two OCA providers in relation to their compliance with the online dispute resolution (ODR)-related regulatory frameworks and identified concerns over the enforceability of their final outcomes. This chapter addresses the research question: What is the effectiveness of the online consumer protection guidelines in terms of addressing the concerns associated with the enforceability of OCAA? It is argued that the online consumer protection standards embedded in the Guidelines for Consumer Protection in the Context of Electronic Commerce developed by the Organisation for Economic Co-operation and Development in 1999 (OECD Guidelines)\(^1\) and the Australian Guidelines for Electronic Commerce of 2006 (Australian Guidelines)\(^2\) do not provide an appropriate regulatory and institutional framework for the enforceability of OCAA. Accordingly, the purpose of this chapter is to explore the effectiveness of these online consumer protection standards in connection with the binding element of online consumer arbitration, the regulation of ODR in general, and online consumer arbitration (OCA) in particular, and the institutional framework adopted for the enforcement of OCAA.

This examination is limited to these two instruments, given their special focus on the protection of online consumers, their application to the regulation of ODR which can be applied for the resolution of disputes that emerge from Business to Consumer cross-border e-commerce transactions (B2C e-commerce disputes), and given that the Australian Guidelines have been prepared in light of the OECD Guidelines. Both instruments are compared with each other, since there is no parallel set of guidelines dealing with online consumer protection in Sri Lanka, and so Sri Lanka’s position is not considered. Australia has developed a self-regulatory, consumer friendly guideline based on the OECD Guidelines of 1999. These instruments play an important

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\(<http://www.oecd.org/document/50/0,3343,fr_2649_34267_1824435_1_1_1_1,00.html>\> last accessed 17 July 2012.


role in the regulation of ODR internationally and nationally. As such, strengths and weaknesses of both instruments have been examined in line with the central research question and the objectives of the thesis as outlined in the Chapter One of the thesis. It is also important to note that these specific ODR guidelines could be examples for a country like Sri Lanka to adopt for the purpose of developing ODR from both a regulatory and institutional perspective.

This chapter is structured in the following manner: after this introduction in the first section, the second section outlines the scope of the two instruments. The third and fourth sections examine whether these guidelines provide appropriate regulatory and institutional frameworks for the regulation of OA and enforcement of OCAA respectively, from both regulatory and institutional perspectives. The fifth section presents a conclusion to the chapter.

2. The scope of the OECD Guidelines and the Australian Guidelines

The OECD Guidelines were promulgated by the OECD council in 1999 after consultation with member countries, business and consumer organisations. These guidelines were the product of ‘the OECD Committee on Consumer Policy,’ which ‘began to develop a set of general guidelines to protect consumers participating in electronic commerce without erecting barriers to trade…in April of 1998.’ The OECD Guidelines include many objectives. They contain ‘a framework and a set of principles to assist’ with bodies such as governments, business associations, consumer groups, self-regulatory bodies and individual businesses and consumers, with a view to providing effective consumer protection in the context of electronic commerce.

One of the objectives of the OECD Guidelines is to provide a framework and principles for governments to use when ‘reviewing, formulating and implementing consumer and law enforcement policies, practices, and regulations’ for the purpose of providing effective online consumer protection. Another objective is that business associations, consumer groups and self-regulatory bodies are provided with guidance for them to consider online consumer protection ‘in reviewing, formulating, and implementing self-regulatory schemes in the context of electronic commerce.’

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3 OECD Guidelines, above n 1.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
Importantly, the OECD Guidelines include a set of guidelines relating to jurisdiction, applicable law and dispute resolution mechanisms which have particular importance and relevance to the resolution of B2C e-commerce disputes as part of the broader objective of online consumer protection.\(^8\) Part Three and Part Four offer a framework for achieving these goals and recommend several ways to establish global co-operation with a view to providing effective online consumer protection.\(^9\)

The first major response of the Australian government as an OECD member country towards developing an e-consumer protection policy framework can be seen in the initial policy document, ‘the Australian E-commerce Best Practice Model’ of 2000.\(^10\) The Australian Guidelines were introduced in 2006 in response to the OECD Guidelines, which are still current, by repealing the Australian E-Commerce Best Practice Model.\(^11\)

In general, as far as the objectives of the Australian Guidelines are concerned with the regulation of ODR, the following are worth noting. The Australian Guidelines focus on online consumer protection and the promotion of the B2C e-commerce market by incorporating several principles. They include: the establishment of fair business practices; accessibility to the electronic delivery of goods and services; guidelines regarding advertising and marketing; and protective guidelines in regards to minors.\(^12\) Additionally, the Australian Guidelines encourage businesses to provide information about their business and contractual arrangements, which facilitates consumers’ awareness before any agreement between business and consumers takes place.\(^13\)

In line with these objectives, the Guidelines are available to provide ‘the law and forum for the resolution of contractual disputes’ and ‘the establishment of fair and effective procedures for handling complaints and resolving disputes.’\(^14\) It is clear that the Australian government’s policy approaches towards the regulation of appropriate dispute resolution mechanisms for B2C e-commerce disputes are reflected in the Australian Guidelines.

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\(^8\) Ibid.
\(^9\) Ibid.
\(^10\) Australian Guidelines, above n 1.
\(^11\) Ibid.
\(^12\) Ibid Guideline 10.
\(^13\) Ibid.
\(^14\) Ibid.
In common, both instruments provide a set of guidelines which lack binding force. The OECD states that ‘[t]hese guidelines represent a recommendation to governments, businesses, consumers, and their representatives.’\textsuperscript{15} A similar position in terms of its impact on ‘existing laws and regulation’ is reflected in the Australian Guidelines, as in the following:

11. The Guidelines are not a replacement for consumer protection laws or codes of conduct. Complying with the Guidelines does not exempt a business from compliance with obligations under such laws or codes.

12. Every effort has been made to avoid inconsistencies with existing laws. However, if there is an inconsistency, the law has precedence over the Guidelines.

13. Some parts of the Guidelines reflect legal requirements. Businesses should not rely on the Guidelines as a definitive statement of these requirements. Also, not all legal requirements relevant to electronic commerce are reflected in the Guidelines.

Basically, the rationale behind the development of these guidelines is to protect online consumers in transactions with online businesses over the Internet. It can therefore be said that there are standards embedded in both these OECD Guidelines and the Australian Guidelines reflecting the commitment of the OECD and the Australian government towards bringing ADR and ODR into a recognised legal framework to ensure online consumer protection, especially for those who encounter disputes in the B2C cross-border context. As such, it is worth identifying the regulatory models and their scope enshrined in the OECD Guidelines and the Australian Guidelines, as part of the debate over the regulation of ODR in the ODR-related literature.

3. Regulation of ODR

At the outset, it is important to note that there appears to be a lack of adequate attention towards the formal regulation of consumer arbitration by the Australian government. For example, the 2006 Report produced by the National Alternative Dispute Resolution Advisory Council (NADRAC) provides a guideline that could be followed when drafting a new law which incorporates ADR.\textsuperscript{16} Unfortunately, since arbitration falls under a determinative process which

\textsuperscript{15} OECD Guidelines, above n 1.
requires different policy considerations, no guidance is advocated by the NADRAC in the 2006 Report.\textsuperscript{17} The guide incorporated in the 2006 report applies only to ADR processes which include facilitative and advisory processes, except for arbitration which falls into the determinative process category. Interestingly, it is only in the footnote that the following conclusion is reached: ‘Arbitration has a longer history in both the Australian and international legal systems, and many of the issues are already settled. See for example, the International Arbitration Act 1974, the Commercial Arbitration Act 1986 (ACT), the Commercial Arbitration Act 1984 (NSW)…’\textsuperscript{18}

Thus there seems to be some neglect of consumer arbitration. For example, why do all the above statutes mentioned in the footnote only relate to commercial arbitration? What about the process of consumer arbitration? It seems that policy, principles and standards have been focused on other ADR processes such as mediation, conciliation and negotiation. Why is there such a narrow approach to areas such as consumer arbitration? This contradicts the overall policy objective of ADR, which is to reduce court litigation\textsuperscript{19} and to increase access to justice by ensuring fair and disputant friendly dispute resolution approaches. From the point of view of the consumers the irony is that they are left with only two avenues: the ‘soft’ avenue of negotiation, conciliation and mediation, and the ‘hard’ avenue of the national court. The ‘medium’ and arguably often preferred avenue of arbitration is usually denied to them. Consumers have lost a cheaper and more effective avenue for dispute resolution, and may wish to avoid the expensive last resort of the national court. Thus the original objectives of reducing court litigation\textsuperscript{20} and saving money are not honoured. Or rather, money is saved (through avoiding a national court) at the cost of consumer rights.

The Australian government relies on the regulation of ADR mainly from the presence of standards, which is reflected in the many reports produced by the NADRAC regarding the regulation of ADR in general.\textsuperscript{21} A similar approach is adopted in the Australian Guidelines for the regulation of ODR. In this prevailing context, it is necessary to consider the effectiveness of the OECD Guidelines and the Australian Guidelines by exploring the regulatory approaches towards ODR, which includes OCA as well. Both instruments contain several regulatory

\textsuperscript{17} Ibid 24.
\textsuperscript{18} Ibid 1.
\textsuperscript{19} Ibid 2.
\textsuperscript{20} Ibid 2.
approaches, such as self-regulation and territorial laws such as conflict of law rules and consumer protection laws and co-regulation.

3.1 Regulatory approaches embedded in the OECD Guidelines and Australian Guidelines

Before moving on to a discussion of these problematic aspects of the regulatory approach adopted in the guidelines, it is important to identify the regulatory elements embedded in these guidelines. It seems that there are three regulatory approaches within the parameters of these guidelines.

The first includes the promotion of a self-regulatory approach. The OECD Guidelines can be considered a source which allows self-regulation as an appropriate regulatory model. Most importantly, the OECD considers self-regulatory policy ‘a legitimate alternative to formal regulation…being embraced by member countries at different rates.’22 The OECD Guidelines have clear principles which promote the development of ‘fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints.’23

In contrast, it should also be pointed out that the self-regulatory approach has not been expressly incorporated into any of the Australian Guidelines, including dispute resolution mechanisms. In fact, however, it can be argued that Australian Guidelines do promote a self-regulatory approach. For example, the Australian Guidelines require business to provide ‘accurate and easily accessible information’ about ‘the relevant codes of practice of any relevant self-regulatory scheme’ to consumers.24 The development of the Australian Guidelines with their set of principles applicable to B2C e-commerce is one development that reflects a commitment towards the regulation of online cross-border activities.25 Moreover, its formation seems to be

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23 OECD Guidelines, above n 1.
24 Australian Guidelines, above n 2.
25 See also Elisabeth Wentworth, ‘Online Dispute Resolution: Global Issues and Australian Standards’ (2002) 21(2) the Arbitrator & Mediator, 21-37.
influenced by both the OECD Guidelines\textsuperscript{26} and Australia’s policy approach to the regulation of e-commerce.\textsuperscript{27}

The second regulatory approach deals with laws relating to applicable laws and jurisdictions, and national consumer protection laws. In order to protect online consumers, these oblige member countries to ensure online consumer protection ‘through their judicial, regulatory, and law enforcement authorities co-operate at the international level.’\textsuperscript{28}

The third approach seems to be a cooperative regulatory approach. It appears that the promotion of the self-regulatory approach, backed by a supportive legislative framework for the regulation of online consumer activities, including appropriate dispute resolution mechanisms which can be used for the resolution of B2C e-commerce disputes, could be valuable. The OECD Guidelines also advocate the development of co-operative self-regulatory programs. They state that:

\begin{itemize}
  \item[ii)] Businesses and consumer representatives should continue to establish co-operative self-regulatory programs to address consumer complaints and to assist consumers in resolving disputes arising from business-to-consumer electronic commerce.\textsuperscript{29}
\end{itemize}

However, it can be argued that the drawbacks associated with self-regulatory, statutory approaches and a cooperative regulatory approach could undermine the objective of promoting the self-regulatory approach backed by a supportive legislative framework, and so could diminish the viability of guidelines as a source of regulatory models for the regulation of ODR in the broader debate over the appropriate regulatory models for regulation.

\subsection*{3.1.1 Viability of the Self-Regulatory approach}

Arguably, the self-regulatory approach embedded in the current online consumer protection guidelines does not provide an appropriate regulatory foundation for the development of ODR. The viability of this self-regulatory approach can be questioned from several perspectives. The

\begin{itemize}
\item[\textsuperscript{28}] OECD Guidelines, above n 1, part four.
\item[\textsuperscript{29}] Ibid part two VI (B) (ii).
\end{itemize}
first question relates to the lack of definition of self-regulation, and such a lack can be considered a major drawback, as it impedes understanding of the scope of the self-regulatory framework. Neither the OECD Guidelines nor the Australian Guidelines provide a set of specific principles which could be useful when the private sector designs its own self-regulatory mechanisms. At the least, drafters of these guidelines could have clarified the consequences of applying self-regulation for the resolution of B2C e-commerce disputes.

The second question is as to whether the OECD Guidelines and Australian Guidelines have binding force. Unfortunately, these guidelines do not in fact, possess binding force, which could arguably render one of their objectives for the promotion of the self-regulatory approach for the protection of online consumers, futile. Does this mean that the OECD Guidelines and the Australian Guidelines have no influence over the sectors that come under these instruments? Vilalta’s view is that ‘[t]he fact that it is not a binding instrument does not constitute a real obstacle, but a value for the states that are competent in their internal strategies at a domestic level.’ This could be because governments are likely to develop appropriate laws in line with these guidelines as ‘there is a strong moral obligation for the Member countries to utilise and implement these policy recommendations, which they themselves have jointly drafted.’

Moreover, private online businesses and consumers could design their dispute resolution mechanisms to reflect these guidelines so that online consumers would then have some form of regulatory backing for their online activities with online businesses. However, according to some scholars, the self-regulatory approach which is reflected in these guidelines is not in fact effective, given its lack of binding force.

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30 Price and Verhulst indicate that, ‘[t]here is no single definition of self-regulation that is entirely satisfactory, and indeed, there should not be.’ Monroe E. Price and Stefaan G. Verhulst, *Self-Regulation and the Internet* (Kluwer Law International, 2005) 3. Furthermore, these two writers note that, ‘[s]elf-regulation … consists of a series of representations, negotiations, contractual arrangements, and collaborative efforts with government. Self-regulation on the Internet is a subtle and changing combination of all of these activities’ and ‘self-regulation can be seen as the range of activity by private actors undertaken to prevent more intrusive and more costly action by government itself. In that sense, self-regulation can be explained as a collective economic decision-an intersection of maximization of profit and expressions of public interest’: at 5.


32 Australian Guidelines, above n 2.


34 FAQ, above n 31.

The lack of binding force of these guidelines could lead to compliance problems. The NADRAC notes in this regard that ‘[s]ome ADR service providers, whether individuals or organisations, may choose to ignore accepted standards of ADR practice.’\(^{36}\) This potential for negative behaviour raises the question of whether the self-regulatory approach can in fact have a positive influence on the private sector, if it can ignore the standards of ODR.

The other drawback relates to the nature of the compliance mechanisms enshrined in the guidelines.\(^{37}\) In responding to the issue of non-compliance, Segal indicates that self-regulation ‘must have effective compliance monitoring and enforcement mechanisms, be underpinned by efficient dispute resolution processes.’\(^{38}\) Eijlander confirms this view within his definition of self-regulation, by maintaining that, ‘[s]elf-regulation in its pure form can be defined as regulation by organisations or associations in a field of society; not only do they create the rules, but they also monitor compliance with these rules and enforce them against their own members.’\(^{39}\)

It seems clear that there are principles in both the OECD Guidelines and the Australian Guidelines that support the development of an institution to monitor compliance with the guidelines as well as self-regulatory measures. The OECD Guidelines encourage member countries, ‘to review and, if necessary, promote self-regulatory principles to encourage development of effective self-regulatory mechanisms that contain specific, substantive rules for dispute resolution and compliance mechanisms.’\(^{40}\) The problem is that there is no formally recognised institution or any formal enforcement mechanism within these guidelines.\(^{41}\)

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\(^{37}\) See Rafal Morek, *Regulation of Online Dispute Resolution: Between Law and Technology*, (2005) 38 <http://www.ord.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc> last accessed 17 August 2012. See also Rafal Morek notes that ‘there would be no enforcing or supervisory body to ensure that an ODR provider really complies with these principles in practice.’


\(^{41}\) See also Smith, above n 35, 168; see also Shelly and Jackson, above n 35.
This lack of any specific enforcement mechanism raises the question of whether having a central authority which can operate nationally and internationally is important, or whether nationally available government-sponsored consumer protection enforcement mechanisms can be utilised in order to fill this vacuum. Some developments can be seen within the OECD framework, in national and international contexts, which could be considered promising developments in terms of improving the compliance mechanism for the principles embedded in these guidelines and national consumer protection laws. Three examples can be cited in this regard.

First, it must be noted that there is an existing compliance mechanism in the online consumer protection guidelines. The OECD hopes to achieve compliance through a peer review process.\(^\text{42}\) The OECD notes that “[t]hese ‘soft’ laws are nonetheless effective thanks to the OECD’s highly developed process of peer review.”\(^\text{43}\) This peer review process is termed ‘a tool for co-operation and change.’\(^\text{44}\) It has a long history.\(^\text{45}\) The core function of this review is to examine policy adopted by each country of the OECD in a particular area by the other members of the OECD, so that solutions can be found to certain issues with the developments taking place in other member countries.\(^\text{46}\) Reduction of unemployment\(^\text{47}\) and management of the environment are some of the examples that can be cited.\(^\text{48}\) It has the potential to develop a legal instrument which can be used to bind member states on some matters, one example being ‘the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.’\(^\text{49}\) However, it seems that such a peer review process has not been commenced in the area of ODR for the resolution of B2C e-commerce cross-border disputes.

Secondly, there are some further developments that could be utilised to enhance compliance with the guidelines in general and self-regulation measures in particular. For example in the Australian national context a recent development is the Mediator Standards Board (MSB), which

\(^{42}\) OECD, the OECD’s Peer Review Process a tool for co-operation and change <http://www.oecd.org/site/0,3407,en_21571361-37949547_1_1_1_1_1,00.html> last accessed 13 July 2012.

\(^{43}\) OECD Information Disclosure <http://www.oecd.org/document/26/0,3746_en_2649_34495_33945946_1_1_1_1_1,00.html> last accessed 03 August 2011: ‘The OECD, through its committees, facilitates the production of internationally agreed instruments, decisions and recommendations. Decisions and treaties negotiated within the OECD are legally binding whereas recommendations are not legally binding and are considered as ‘soft’ law.’


\(^{45}\) ‘Peer review has been used at the OECD since the organisation was created more than 50 years ago.OECD.’ The OECD’s Peer review process <http://www.oecd.org/site/peerreview/> last accessed 06 September 2012.


\(^{47}\) Ibid.


could play a pivotal role in this respect. The MSB, which was launched in 2010,\textsuperscript{50} as a main body reflects the sector-specific practical approach to the development of ADR in Australia, as ‘the MSB is responsible for the development of mediator standards and the implementation of the National Mediator Accreditation System (NMAS).\textsuperscript{51} This development can be evaluated as a promising development for the evolution of standards applicable to online mediation. However, it is still questionable whether this body has a mandate to cover the other ADR mechanisms, such as online conciliation and online arbitration.

Thirdly, in the international context, there are some developments that could be utilised to enhance compliance with self-regulation measures in general and the guidelines in particular. The European Commission plays a pivotal role in ensuring compliance to self-regulation:

As regards self-regulation, the Commission must scrutinise whether self-regulation practices comply with the provisions of the EC Treaty and it will also notify the European Parliament and the Council as to whether it regards this use to be compatible with the general criteria of representativeness and of added value. Here also, the Commission explicitly reserves the right to put forward a proposal for a legislative act, in particular at the request of the competent legislative authority but also where it deems that self-regulation practices have not been observed.\textsuperscript{52}

Even though it is a promising model that could be considered, it cannot be utilized in the current form for ensuring compliance to self-regulatory measures as this arrangement is limited in application to the EU region. It must also be mentioned that the proposed Online Dispute Resolution Proposal\textsuperscript{53} for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes by the UN Working Group provides a promising example for the resolution of cross-

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\textsuperscript{51} Ibid: ‘The creation of one central entity responsible for mediator standards and accreditation is a landmark development in the history of mediation in Australia.’


border e-commerce disputes which are small in value, but high in volume.\textsuperscript{54} It proposes a central clearinghouse which can operate internationally, and a consumer authority and national administrator both of which could operate nationally.\textsuperscript{55}

Accordingly, it is important to note that ‘self-regulation is not the answer to every market failure and all social policy objectives.’\textsuperscript{56} There is a need for the development of appropriate regulatory measures in order to ensure the appropriate functioning of the self-regulatory approach and to establish a compliance mechanism, giving due consideration to the drawbacks associated with the self-regulatory model in light of the changing e-commerce market.

\textbf{3.1.2 Conflict of law rules and consumer protection laws}

Drafters of both guidelines have paid attention to the use of existing conflict of law rules and the national consumer protection laws as part of the online consumer protection guidelines. In the case of the conflict of law rules, two major areas are involved: applicable law and jurisdiction. This section argues that the use of existing conflict of law rules and consumer protection laws undermines the broader objective of protection of online consumers who are engaged in B2C cross-border e-commerce activities.

\textbf{3.1.2.1 Applicable law and jurisdiction under the OECD Guidelines}

Both the OECD and Australian guidelines contain principles in regards to conflict of law rules. Conflict of law rules, otherwise called private international law rules, are utilised to resolve ‘conflicts between legal systems.’\textsuperscript{57} This may include one country where different laws are applied in different states, such as in Australia. As Svantesson notes, ‘each state makes its own private international law rules (i.e. the private international law rules are part of the domestic law of each state).’\textsuperscript{58}

\begin{itemize}
\item[Ibid.]
\item[M Davies, A S Bell and P L G Brereton, Nygh’s Conflict of Laws in Australia (LexisNexis Butterworth Eighth Edition 2010) 7; see generally ‘In Australia, other common law countries and civil law countries, private international law is concerned with these three issues: jurisdiction, the recognition and enforcement of foreign judgments, and choice of law.’ Reid Mortensen, Richard Garnett and Mary Keyes, Private International Law in Australia (LexisNexis Butterworths, Second Edition 2011) 4.]
\end{itemize}
As far as the OECD Guidelines are concerned, there are some guidelines that allow conflict of law rules which are nationally and internationally applicable to be applied to B2C cross-border e-commerce transactions. The following guideline of the OECD Guidelines that deals with applicable laws and jurisdiction is noteworthy in this respect: ‘Business-to-consumer cross-border transactions, whether carried out electronically or otherwise, are subject to the existing framework on applicable law and jurisdiction.’

It can, however, be argued that the viability of the Guidelines in regards to applicable law and jurisdiction is problematic because several drawbacks are embedded in these guidelines. For example, the phrase ‘the existing framework on applicable law and jurisdiction’ refers to the established conflict of law rules which exist nationally and internationally. This guideline is broadly designed to apply the existing applicable law and jurisdiction-related legal framework to B2C cross-border transactions which take place either electronically or otherwise. This approach seems to be fruitless and shows no sign of making any initial attempt to demarcate basic principles in relation to applicable law and jurisdiction with a focus on the B2C cross-border e-commerce disputes and ODR mechanisms.

Instead of adopting a targeted approach, the OECD encourages ‘governments, businesses, consumers and their representatives to participate in and consider the recommendations of ongoing examinations of rules regarding applicable law and jurisdiction.’ Guideline VI (A) of the OECD Guidelines notes that consideration must be given to modifying the existing legal framework in regards to applicable law and jurisdiction in order ‘to ensure effective and transparent consumer protection in the context of the continued growth of electronic commerce.’ Referring to modification of the existing legal framework relevant to applicable law and jurisdiction, VI (A) stipulates that, ‘governments should seek to ensure that the framework provides fairness to consumers and businesses, [and] facilitates electronic commerce.’

The next question is whether the OECD and its member countries have taken effective measures to overcome issues associated with conflict of law rules applicable to the B2C cross-border

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59 OECD Guidelines, above n 1, VI (A).
60 Ibid.
61 Ibid.
62 Ibid.
setting. In other words, can these obligations be fulfilled by OECD member governments in the situation of cross-border B2C e-commerce at present? The answer seems to be negative.

The OECD itself acknowledges that ‘rules regarding applicable law and jurisdiction in the consumer context could have implications for a broad range of issues in electronic commerce, just as rules regarding applicable law and jurisdiction in other contexts could have implications for consumer protection.’\(^{63}\) Moreover, it is mentioned under the OECD Guidelines’ Frequently Asked Questions that, ‘[t]he language on jurisdiction and applicable law within the Guidelines reflects the complexity and the current lack of international consensus on these issues.’\(^{64}\) It has been stated in an OECD Conference on Empowering E-consumers Strengthening Consumer Protection in the Internet Economy Background Report that ‘[o]ver the past decade, the 1999 Guidelines have been widely promoted and adopted by stakeholders through (i) new or adapted regulatory frameworks, (ii) private sector initiatives, and (iii) consumer education initiatives.’\(^{65}\)

Even though these developments have some merit in relation to online consumer protection, there is no committed approach to at least put forward a basic set of principles in relation to conflict of law rules on the resolution B2C electronic commerce disputes.

The lack of a harmonised approach to jurisdiction and applicable law is also reflected in the responses given to the survey conducted by the OECD.\(^{66}\) Unfortunately, the situation seems to exist without necessary changes being brought about by the OECD, as indicated in the statement made during the OECD conference in 2010 that ‘the various approaches to choice of law and rules on jurisdiction complicate the matter. Consumer rights and obligations may vary considerably from one jurisdiction to another.’\(^{67}\) As such, it can be argued that the OECD has not produced an internationally developed harmonised legal framework in terms of jurisdiction and applicable law relating to B2C cross-border e-commerce transactions.

\(^{63}\) Ibid.
\(^{64}\) FAQ, above n 31.
\(^{65}\) OECD Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy Background Report (December 2009) 14 <http://www.oecd.org/document/50/0,3746,en_21571361_43348316_43385778_1_1_1_1,00.html> last accessed 18 July 2012.
\(^{66}\) Ibid 17.
A similar situation is reflected in the enforcement of foreign judgments that can be delivered in B2C e-commerce disputes. In relation to the enforcement of judgments delivered by government-sponsored courts, the OECD Guidelines states that countries should ‘co-operate and work toward developing agreements or other arrangements for the mutual recognition and enforcement of judgments resulting from disputes between consumers and businesses.’ On the face of it, it seems that this guideline recognises the need for appropriate arrangements for the mutual recognition and enforcement of judgments resulting from B2C disputes. From the government perspectives, the failure of current attempts by governments to revise or make a set of internationally applicable modern conflict of law rules, even in the offline context, indicates the difficulty of bringing modifications to the existing legal framework.

International efforts are also failing to address the conflict of law rules applicable to consumer contractual settings. For example, the Hague Convention on Choice of Court Agreements in 2005 has excluded consumer disputes, even though ‘[t]he Hague Convention on Choice of Court Agreements is the counterpart for litigation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.’ The reasons for the exclusion of consumers are related to ‘the existence of more specific international instruments, and national, regional or international rules that claim exclusive jurisdiction for some of these matters.’ As such, a harmonised approach is advocated to overcome these conflicting and country- or region-specific regulatory measures taken by governments. From the Australian perspective, it is rightly noted by scholars such as Garnett in the following terms that

What is required to achieve this outcome is that governments and courts of nation states put aside their parochial, domestic interests in favour of the goal of multilateral harmonisation. It

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68 OECD Guidelines, above n 1, part IV.
72 The Hague Convention of 30 June 2005 on Choice of Court Agreements, Outline of the Convention (February 2012) 2
73 See ‘In an Internet environment, this means that any rights or penalties must be enforceable on a global basis. This in turn requires harmonisation of legal frameworks to better enable dispute resolution and redress in respect of breaches of the rights of intellectual property owners, consumers and other e-commerce participants.’ Moira Patterson, E-commerce Law (2001)
will be only then that the Convention may truly come to be seen as the counterpart to the New York Convention on arbitral agreements and awards.\(^{74}\)

When it comes to electronic commerce, it is natural that further complexities and challenges will emerge in the modification of existing rules of applicable law and jurisdiction.

The current enforcement of foreign judgments is based on the laws individually developed, or on regionally developed mechanisms; for example, the *Foreign Judgments Act* (Cth) in 1991 can be cited for the first,\(^{75}\) and the Council Regulation on Jurisdiction and the Recognition and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2000 for the second.\(^{76}\) This regulation has also excluded its application to ‘arbitration’ as well.\(^{77}\) In fact, it must be noted that some measures are being discussed towards developing harmonised legal approaches in the form of Model Laws for jurisdiction and applicable law for consumer contracts from regional perspectives.\(^{78}\)

Thus it is evident that the drafters of the OECD Guidelines have paid insufficient attention to producing a specific set of principles relevant to applicable law and jurisdiction which can be applied to B2C cross-border e-commerce disputes. Unfortunately, the drafters of the OECD Guidelines have left issues associated with applicable law and jurisdiction to be determined by traditional legal principles, which are largely irrelevant to B2C e-commerce disputes.

### 3.1.2.2 Applicable law and jurisdiction under the Australian Guidelines

As far as Australian conflict of law rules applicable to cross-border e-commerce are concerned, the most salient observation is that there is no specific legal framework in relation to the

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\(^{75}\) The *Foreign Judgments Act 1991* (Cth).


jurisdiction of Internet disputes, as Garnett makes clear: ‘There are currently no specific provisions on jurisdiction and applicable law in relation to electronic commerce disputes under Australian law.’

Unfortunately, it must be noted that the Australian guidelines do not provide any specific guidance in terms of jurisdiction and applicable law tailored to B2C e-commerce disputes. This can be seen by examining two important items in the Australian Guidelines, numbers 48 and 49, referring to applicable law and jurisdiction. It might appear that Guideline 48 deals with applicable law and jurisdiction to the B2C cross-border e-commerce disputes, and Guideline 49 governs applicable law and jurisdiction within Australia. Both of these principles need to be discussed. For clarity, each warrants a separate focus, as 48 applies to the international context, and 49 applies only to the Australian national context. Guideline 48 stipulates as follows:

48. Where a business specifies an applicable law or jurisdiction to govern any contractual disputes or a jurisdiction or forum where disputes must be determined, it should clearly and conspicuously state that information at the earliest possible stage of the consumer’s interaction with the business.

As far as the scope of Guideline 48 is concerned, businesses should specify information clearly and conspicuously in regards to the ‘applicable law or jurisdiction’ and dispute resolution mechanism at the earliest stage of interaction with the consumer. Under this principle, a business can choose the applicable law and specify which forum has the jurisdiction to determine disputes in case of a dispute which may emerge out of a B2C e-commerce contract.

It can be argued that this Guideline does not provide specific and clear information about the obligation of businesspeople to specify ‘an applicable law or jurisdiction.’ The wording of the Guideline appears to be unclear, reflected by the wording, ‘information at the earliest possible stage of the consumer’s interaction with the business.’ The concern is that it is left open at what stage of the interaction between businesses and consumers businesses should specify ‘an applicable law or jurisdiction’; is it sufficient to state such information on the website with which the consumer interacts, or before the formation of contractual obligations, or at the point where the business enters into an agreement with the consumer?

79 Richard Garnett, Report to the European Commission- Section 1: The Applicability of Private International Law to Online Transactions, 2: ‘It is therefore necessary to examine the general law principles of jurisdiction based on both ‘common law’ and statutory principles.’
80 Australian Guidelines, above n 2.
It can also be argued that this principle enables businesspeople to determine both the applicable law and forum for the resolution of disputes which may arise out of contractual arrangements between online businesspeople and online consumers. Online businesspeople thus have two options: the first is to apply self-regulatory rules as applicable laws to such disputes and ODR mechanisms as appropriate forums, both of which are designed by online business-people. The second option is the selection of the national court of a particular country as the forum and the laws of the same forum country or of another country as applicable laws.

As far as the first option is concerned, this principle adopts a flexible approach to the issue of the choice of applicable law and jurisdiction in the resolution of contractual disputes, given the cross-border dimension of B2C e-commerce disputes. Accordingly, it can be argued that such an approach is in compliance with the rationale behind the emergence of ODR. In this it is recognised that ODR mechanisms emerged as an appropriate solution to overcome the drawbacks associated with legal frameworks and with these traditional dispute resolution mechanisms. For example, Muñoz-López notes one important aspect of the rationale behind the development of ADR and ODR in the following terms: ‘ADR offline can be successfully used to evade the conflict of laws complicated process. The jurisdiction problem is immediately solved.’ This scholar further notes that, ‘ODR goes beyond as it not only solve the problem of the conflict of laws process but also is successful in reducing legal costs and time consumption for business disputants.’

Importantly, in the context of cross border B2C e-commerce disputes, the selected applicable law and forum will not provide a positive solution because of the problematic nature of the variation in national laws and courts in any particular country. Any applicable law or jurisdiction clauses which include those of another country could be problematic unless they comply with the Australian Competition and Consumer Act (Cth) (CCA). For example, if these clauses are embedded in standard form contracts between online businesspeople and Australian online consumers, which are known as ‘take it or leave it’, such clauses may be unfair and as a result they may become void if they do not comply with the fairness test of the CCA.

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84 Ibid.
In cases where such clauses are designed unilaterally by businesspeople, leaving no opportunity for consumers to be involved in the formation of such contracts, they could be declared void by the Australian judiciary. A similar result could be produced in a case where a mandatory OCA clause is incorporated in a B2C cross-border e-commerce standard form contract, as such a clause denies the consumer’s access to a government-sponsored court. As a result, it can be argued that the intended purpose of this guideline can be diminished.

At the same time, given the absence of court decisions that deal with ODR and access to courts, some insights into the problem can be drawn from the decisions delivered by the Australian courts in Internet disputes. In the absence of a clear legal approach to dealing with how to establish jurisdiction and applicable law in the case of B2C cross-border e-commerce disputes, Australia faces the challenge of either modernising the existing laws or introducing a new set of laws which address the issues associated with applicable law and jurisdiction over Internet disputes. Such progressive moves need to be in line with developments taking place in other countries and to have some flexibility in their structure in order to adjust to changing technology. Such an online jurisdiction-specific legal approach would enable the national courts to become an appropriate final redress mechanism for the online consumer. Importantly, Australia could develop specific model laws addressing issues associated with jurisdiction, applicable law and the enforcement of foreign judgments tailored to the B2C e-commerce setting in line with the developments taking place in the EU, USA, Canada and Brazil.

Guideline 49 stipulates that:

49. A business located in Australia that enters into a contract with a consumer whom the business believes is resident in Australia — for instance, because of the consumer’s address — should spell out which Australian jurisdiction’s law is the governing law of that contract. It should also make clear that any contractual disputes will be heard by Australian courts and tribunals.

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85 Ibid.
87 ‘(k) a term that limits, or has the effect of limiting, one party’s right to sue another party,’ Competition and Consumer Act 2010 (Cth) s 25.
88 See also Patterson, above n 73: ‘Law by its nature tends to evolve slowly but the exponential growth in the use of Internet requires rapid and well coordinated responses. This difficulty is magnified by uncertainty concerning the nature and implications of future technological developments.’
89 Australian Guidelines, above n 2.
This Guideline is designed to address both the governing laws of B2C e-commerce contracts and jurisdiction within Australia. Three features can be identified: i) the governing law of the contract must be an Australian jurisdiction’s law, which avoids the use of foreign law as the governing law of such contracts; ii) the appropriate forum for the resolution of any dispute arising out of such a contract is Australian courts and tribunals; and iii) this is an attempt to reduce the use of conflict of law rules. These elements can be considered positive developments from the online consumer protection perspective.

However, there are some drawbacks in regards to the Guideline, which states that, ‘it should also make clear that any contractual disputes will be heard by Australian courts and tribunals.’ Does this mean that the Australian Guidelines recognise both adjudicatory (binding arbitration) and non-adjudicatory ADR mechanisms (facilitative ADR mechanisms), or neither of these mechanisms? The answer favours the latter interpretation. All B2C online disputes which emerge between online businesses located in Australia and online consumers who are residents of Australia have to go to a national court for redress. This principle is arguably a rejection of mandatory online consumer arbitration. The other question is: will a consumer who has a small-dollar dispute seek remedy through a national court or undefined tribunal in Australia, where the cost of receiving redress can be higher than the actual cost suffered by the consumer?

Moreover, does this mean that a business located in Australia can go to a national court, public tribunal or private tribunal in case of a contractual dispute? What does ‘tribunals’ mean? This word is not defined in the definition section of the guidelines. This lack of definition makes the application of this guideline unclear and so basically worthless from the perspective of online consumer protection.

Ghoshray notes that, ‘in practice, parties are not bound to submit to a particular jurisdiction and choice of law. They are free to choose their own jurisdictions and laws.’90 However, it is evident that this freedom is restricted due to the compelling element of the choice of applicable law and jurisdiction in the Australian Guidelines.

The other question relates to whether consumers can oppose such a unilateral arrangement in cases where a business unilaterally determines an applicable law and a forum for the resolution

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of B2C e-commerce disputes. The Guideline’s approach seems to neglect the consumer’s right to refuse any arrangement of governing laws of contracts and forums for the resolution of any disputes arising out of their contract.

Another problematic aspect is that neither the OECD Guidelines nor the Australian Guidelines address the situation where a business omits the specification of an applicable law or a forum in which to determine any dispute which arises from a B2C contract. In other words, the question arises as to whether conflict of law rules can be applied or not. Both the OECD Guidelines and the Australian Guidelines are silent on this question.

3.1.2.3 National consumer protection law

It can also be argued that the OECD has not gone beyond national consumer protection laws. The OECD Guidelines make specific reference to the need to give priority to national consumer protection. Thus the OECD Guidelines drafters note that ‘nothing contained herein should restrict any party from exceeding these guidelines nor preclude Member countries from retaining or adopting more stringent provisions to protect consumers online.’

In contrast, the Australian Guidelines highlight the reliance of online consumer protection on existing national consumer protection laws. This approach can be justified from the consumer protection perspective, but when this is considered from both consumer protection and online business perspectives in combination, there are some drawbacks which can undermine the strength of these guidelines.

One such area is the current approach of the guidelines, which apply whatever position is taken by national consumer protection laws in regards to applicable law, jurisdiction and different types of online consumer arbitration scenarios. It is for example evident that there is a lack of express provisions in both Australian and online consumer protection guidelines in national consumer protection laws, which is discussed in detail in the next chapter, as to the validity of pre-dispute and post-dispute online consumer arbitration clauses. In addition, arguably, the guidelines can be interpreted broadly to mean that they allow B2C e-commerce arbitration

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91 OECD Guidelines, above n 1.
92 Australian Guidelines, above n 2.
93 Instead, such clauses are addressed through a contractual legal approach, subjecting their validity to being tested against the test of fairness, incorporated in the Competition and Consumer Act 2010 (Cth).
clauses as long as they comply with the principles of *reasonableness* and *fairness*. This means that mandatory OCA mechanisms with binding outcomes can exist as long as they comply with these reasonableness and fairness principles. In fact, these guidelines have seemingly not adopted a specific response as to which types of OCA clauses are valid and which are not. Instead, regulation of these issues has been left to the private online sector, subject to the above mentioned fairness principle and the principle of access to a court.

It must then be asked why appropriate guidelines were not introduced in the 2006 Australian Guidelines in line with the developments taking place in the field of dispute resolution in the B2C e-commerce context. In the absence of reasons given by the OECD or the Australian government, it can be argued that the area of OCAA should be governed by the guidelines applicable to ODR rather than to OCAA in particular, and also that traditional conflict of law rules and the national consumer protection laws can be an appropriate regulatory instrument, filling the gaps left in the online consumer protection guidelines, including those of OCAA. However, it is questionable as to how far the objectives of the guidelines, such as that they ‘are designed to help ensure that consumers are no less protected when shopping online than they are when they buy from their local store or order from a catalogue’ have been achieved nationally and internationally when it comes to conflict of law rules and the development of national consumer protection laws.

### 3.1.3 Attention to developing a cooperative regulatory approach

Instead of creating specific bench-marks to address issues associated with ODR in general and OCA in particular, these guidelines promote a cooperative approach to be followed for dealing with B2C cross-border e-commerce-related issues. It must be noted that the Australian Guidelines do not contain guidelines based on cooperative principle such as the OECD Guidelines of 1999, regardless of the fact that both instruments have been designed for the B2C cross-border e-commerce setting. As such, the following section deals with guidelines relevant to the cooperative principle of the OECD Guidelines in order to determine whether the OECD Guidelines promote a cooperative approach that can be applied to strengthening the enforcement of OCAA. It is argued that this instrument does not advocate a specific model for

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94 Australian Guidelines, above n 2.
96 Even though the Australian Guidelines are based on OECD 1999 guidelines, the Australian Guidelines are limited in scope compared to the scope of the OECD Guidelines.
such a purpose, and as a result the effectiveness of the guidelines is in doubt. The following guidelines are highlighted in this regard.

In relation to the cooperative aspect of the dispute resolution guidelines, VI (B) of the OECD Guideline recognises the obligation of business, consumer representatives and government:

Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.\(^{97}\)

Accordingly, Part Two VI B (ii) addresses the cooperative approach between business and consumer representatives in terms of establishing ‘self-regulatory programs to address consumer complaints.’\(^{98}\) Part Two VI B (iii) entails the obligation of business, consumer representatives and government to provide effective alternative dispute resolution mechanisms for the resolution of business to consumer e-commerce disputes.\(^{99}\)

Additionally, Part two VI B states that ‘further study is required to meet the objectives of Section VI at an international level’\(^{100}\) and Part two VI B (iv) is also important in this regard as it refers to the innovative use of technology: ‘In implementing the above, businesses, consumer representatives and governments should employ information technologies innovatively and use them to enhance consumer awareness and freedom of choice.’\(^{101}\)

As far as the cooperation principle is concerned in general, Part Four of the OECD Guidelines obliges members to facilitate cooperation and, ‘where appropriate, the development and enforcement of joint initiatives at the international level’\(^{102}\) among the three major groups: businesses, consumer representatives and governments.\(^{103}\) Part two of the OECD Guidelines provides that ‘[g]overnments, businesses, consumers, and their representatives should work together to achieve such protection and determine what changes may be necessary to address the

\(^{97}\) OECD Guidelines, above n 1.
\(^{98}\) Ibid.
\(^{99}\) Ibid.
\(^{100}\) Ibid.
\(^{101}\) Ibid.
\(^{102}\) Ibid.
\(^{103}\) Ibid.
special circumstances of electronic commerce.\textsuperscript{104} This includes the necessity of finding solutions to e-commerce issues through cooperation among these three stakeholders. If this guideline is interpreted broadly, resolution of e-disputes should be conducted with the support of each of these stakeholders.

It must therefore be noted that consumer protection is recognised through national as well as international co-operation, especially in the OECD Guidelines. For example, Part Four describes the need for ‘building consensus, both at the national and international levels, on core consumer protections to further the goals of enhancing consumer confidence, ensuring predictability for businesses, and protecting consumers.’\textsuperscript{105} In addition, interestingly, such consensus needs to be based ‘on core consumer protections.’ What does this mean? Given the absence of clarification of the scope of core consumer protection, it can be inferred that these can include basic consumer protection principles including effective redress mechanisms which are identified in the consumer protection literature. Hence these guidelines require consumer rights to be protected at both national and international level.

The OECD Guidelines do not provide a clear definition of the scope of the cooperative principle. This drawback has led to two questions. First, what is meant by cooperation? And, second, what are the cooperative measures that can be adopted in order to protect consumer rights? In regard to the first question, at the outset it is already noted that both instruments encourage a cooperative approach to achieving consumer protection. In a broader context, two inferences can be made. First, the drafters have intentionally left it to the government as well as the private sector to develop appropriate measures to protect online consumers without imposing any particular strategies that can undermine the growing online markets. Second, the purpose of the guidelines is merely to set a framework for the protection of consumers, which does not necessitate definitional provisions.

From a theoretical perspective, accordingly, the government’s cooperation has become imperative as there is a need for leadership and decision-making in response to problems such as: the inappropriateness of the application of offline legal frameworks; the lack of international consensus on producing international treaties; and the changing and complex nature of the technology involved in e-commerce activities. Most importantly, if the power imbalance is not

\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
adequately addressed and appropriate measures put in place, the progress of the online e-commerce market will be negatively affected and the rights of online consumers will continue to be adversely affected. As such, it should be noted that the government is obliged to develop appropriate methods to regulate the e-commerce environment in a committed and co-operative fashion.

It is also important to note that the underlying rationale behind the principle of cooperation enshrined in the OECD Guidelines seems to be based on several factors: the complex nature of technology; private sector involvement; the transnational dimension of B2C e-commerce disputes; and conflicting national consumer protection laws among countries. It is also evident that these guidelines do not explicitly provide a legal basis for the development of a cooperative mechanism such as enforcement of online consumer arbitration awards through e-courts, except for the general intention to guide government, the private sector and consumer groups to take appropriate measures for the protection of consumers through cooperation.

4. The viability of the guidelines applicable to appropriate dispute resolution mechanisms

This section is designed to explore the regulatory response adopted by the OECD Guidelines and the Australian Guidelines with regard to dispute resolution mechanisms for the resolution of B2C cross-border e-commerce disputes. Before moving to the questionable aspects of the guidelines applicable to dispute resolution mechanisms, it is worth noting the relevant guidelines in relation to dispute resolution. In the OECD Guidelines special attention has been placed on two dispute resolution sectors: first, internal mechanisms, and second, ADR mechanisms, all of which should comply with these principles and resolve online consumer disputes in a reasonable manner. For example, Part two, VI B (i) of the OECD Guidelines requires both business and consumer representatives to establish alternative dispute resolution mechanisms which they should operate in compliance with the principles of fairness, timeliness, avoidance of undue cost and undue burden.

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107 See further: ‘Businesses, consumer representatives and governments should work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including alternative dispute resolution mechanisms, to address consumer complaints and to resolve consumer disputes arising from business-to-consumer electronic commerce, with special attention to cross-border transactions.’ OECD Guidelines, above n 1.

108 Ibid.
Moreover, the OECD Guidelines provide that it is an obligation of the government to provide ‘meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden.’\textsuperscript{109} The three groups of government, the business sector and consumer representatives are required to develop and use a fair, effective and transparent set of: i) self-regulatory policies and procedures and ii) alternative dispute resolution mechanisms to resolve B2C e-commerce disputes.\textsuperscript{110}

The Australian regulatory approach to dispute resolution mechanisms bears similar characteristics to those of the OECD Guidelines. The Australian Guidelines attempt to develop a set of general rules applicable to the dispute resolution mechanisms for the resolution of B2C e-commerce disputes. There are several important principles operating in these guidelines which are to ensure fair and effective dispute resolution mechanisms for B2C e-commerce disputes, such as the following principles:

\textit{Internal complaint-handling}

43. Businesses should set up internal procedures to handle consumer complaints:
   \begin{enumerate}
   \item within a reasonable time;
   \item in a reasonable way;
   \item free of charge to the consumer; and
   \item without prejudicing the rights of the consumer to seek legal redress.\textsuperscript{5}
   \end{enumerate}

44. Businesses should provide consumers with clear and easily accessible information about complaints-handling procedures including any that may form part of an industry code of conduct to which the trader is a signatory.

45. If a consumer is not satisfied with the outcome of the complaints-handling mechanism, the business should provide the consumer with information about any external dispute resolution bodies to which it subscribes or any relevant government body, such as a Fair Trading Agency or the Federal Privacy Commissioner (in the case of privacy complaints).

\textit{External dispute resolution}

46. Businesses should provide consumers with clear and easily accessible information on any independent customer dispute resolution mechanism to which the business subscribes.

47. This independent method of dispute resolution should be:

\textsuperscript{109} Ibid.  
\textsuperscript{110} Ibid.
The Australian Guidelines advocate access to the courts, with sections specifically ensuring compliance with access to the courts. For example, each of the internal and external dispute resolution mechanisms of the Australian Guidelines entails provisions such as:

47.1 accessible;
47.2 independent;
47.3 fair;
47.4 accountable;
47.5 efficient;
47.6 effective; and
47.7 without prejudice to judicial redress.\textsuperscript{111}

These guidelines provide a set of criteria which can be used to assess the effectiveness of ODR providers as discussed in detail in chapter three of the thesis.\textsuperscript{112} Even though these ODR-related principles are a welcome development for establishing a secure ADR and ODR landscape in the offline as well online context, the principles are presented in an abstract form. A detailed elaboration of these principles, as can be seen in the EU context, is warranted for the reflection of the existence of the ODR-specific set of principles in the Australian dispute resolution landscape. In fact, it is evident that these guidelines recognise three major dispute resolution avenues: an internal dispute resolution mechanism;\textsuperscript{113} an external dispute resolution

\textsuperscript{111} Australian Guidelines, above n 2.
\textsuperscript{112} Australian Guidelines, above n 2. (Reference No 5 appeared at the end of 43.4 – ‘Australian Standard AS4269-1995 provides a guide to good practice in complaint-handling’ was omitted).
\textsuperscript{113} Wentworth has succinctly listed the following criteria which seem to take the form of principles relevant to ODR. They are: ‘Accessible’ ‘Independent’ ‘Fair’ ‘Accountable’ ‘Efficient’ ‘Effective’ ‘Without prejudice to judicial recourse’ ‘Visible’ ‘Responsive’ ‘Convenient’ ‘Voluntary for the consumer’ ‘Low cost or free’ ‘Transparent’ ‘Adversarial’ ‘Clear and accessible provision of information’ ‘Framework set by legislation’ ‘Trained personnel’ ‘Provision for translation and outside expertise’ ‘Requirement for reporting systemic issues’ ‘Right to representation’ ‘Legality (i.e. consumers can't be deprived of the protection of the laws including those of the consumers' own state)’ ‘Oversight’ and ‘Availability.’ Elisabeth Wentworth, ‘Online Dispute Resolution: Global Issues and Australian Standards Towards a global best practice model for B2C online dispute resolution’ (2001) 20 the Arbitrator and Mediator Journal 9-10.
\textsuperscript{114} Australian Guidelines, above n 2, 43, 2.
mechanism;\textsuperscript{115} and the courts.\textsuperscript{116} However, the existing online consumer protection guidelines have the following drawbacks.

4.1 The lack of specific attention to ODR mechanisms

One obvious observation is that none of these guidelines have been designed specifically for ODR mechanisms or OCA, but are general in nature and can arguably be applied to a range of dispute resolution mechanisms such as ADR, government internal dispute resolution bodies and courts in a broader sense. As far as the third redress mechanism through courts and tribunals is concerned, the preservation of traditional judicial redress is expressly recognised. Both internal and external complaint-handling mechanisms do not override a consumer’s right to seek judicial redress. The redress mechanism reflects the underlying rationale behind the Australian domestic consumer protection legislative framework, which is protection of consumers in whatever the consumer activity. However, given the broader openness of the dispute resolution mechanism, OCA can also be justified as a B2C e-commerce dispute resolution mechanism. Both the OECD Guidelines and the Australian Guidelines contain some guidelines which can be applied to OCA as well. Additionally, sections such as Part Two VI of the OECD Guidelines\textsuperscript{117} and 48 and 49 of the Australian Guidelines\textsuperscript{118} provide space for the inclusion of ODR mechanisms as discussed above in this Chapter.

Another problem is the lack of appropriate enforcement mechanisms in regards to OCA. There is a distinct lack of an appropriate self-regulatory approach to strengthening the enforcement of OA in general or OCAA in particular. The lack of attention to developing an effective enforcement mechanism for ODR outcomes can allow private OCA providers to develop enforcement mechanisms in line with their business interests rather than consumer protection. The mere statement of a set of principles that need to be followed by the ODR providers as noted above does not provide an effective solution to the issue of having an effective enforcement mechanism for ODR outcomes. As such, it can be further argued that the lack of provisions of appropriate enforcement mechanisms for the enforcement of OCAA contradicts the objectives of these initiatives as outlined above. It can be argued that a mere set of principle for the development of appropriate OCA mechanisms is not sufficient to achieve the objectives of the online consumer protection guidelines.

\begin{footnotes}
\item[115] Ibid 45 and 46, 13.
\item[116] Ibid 43(4), 12.
\item[117] OECD Guidelines, above n 1.
\item[118] Australian Guidelines, above n 2, 48 13-14.
\end{footnotes}
4.2 Ambiguous generality of some of the rules of the guidelines

One problematic aspect of these guidelines is arguably caused by the ambiguous generality of some of the rules of the guidelines. For example, in relation to internal dispute resolution in the Australian Guidelines, it is evident that the private sector is offered considerable freedom to develop its own internal dispute resolution mechanisms. Conditions such as: ‘within a reasonable time,’ ‘in a reasonable way,’ ‘free of charge to the consumer’ and ‘without prejudicing the rights of the consumer to seek legal redress’\(^{119}\) indicate such a broad freedom. Where external dispute resolution is concerned, the private sector is similarly given an extensive amount of flexibility and a wide range of powers, including principles such as the need to be ‘accessible’, ‘independent’, ‘fair’, ‘accountable’, ‘efficient’, ‘effective’ and ‘without prejudice to judicial redress’\(^{120}\). Overall, it seems clear that a set of requirements is in place for appropriate dispute resolution mechanisms under these guidelines, but both situations are arguably too broad and too vague in their scope, mainly due to the lack of specific limits to these principles. Such vagueness could undermine the confidence of online consumers as they can be denied effective, consistent and predictable regulatory measures.

These rules allow the private sector to assume full freedom to regulate the boundaries of dispute resolution mechanisms. This situation could be problematic as the guidelines allow the private ODR service providers to make their own rules in line with so-called market objectives and standards as they think fit. When rules are crafted by private entities they can be designed for private purposes and not for the protection of online consumers. Hence the ambiguity and incomplete existing self-regulatory framework can provide an opportunity for the online business sector to abuse the rights of online consumers, who are in a vulnerable position vis-à-vis online business people. This issue raises the need for an effective monitoring mechanism to overcome such possible malpractices.

Parties to any dispute resolution mechanism should be able to predict the consequences of going through an ADR mechanism, but such predictability can be undermined because of the misleading and confusing expression of principles of these guidelines. For example, terms such as fair, reasonable, disputant friendly, accessible are very flexible in meaning and difficult to determine in actuality. A further example of this: what is meant by legality? Does it refer to self-regulatory measures adopted by private dispute resolution providers, or does it attract existing

\(^{119}\) Ibid 43, 12.
\(^{120}\) Ibid 47, 13.
national laws which can affect the dispute resolution process? Does access to justice mean a total ban on binding consumer arbitration, or is it meant to ensure access to a national court?

4.3 The lack of definition in relation to ODR mechanisms and online consumer

The Alternative Dispute Resolution in Victoria: supply side research project report of 2007 clearly indicates that there is a lack of definition of ADR and also of the issues that surround ADR. This situation is also reflected in both the OECD Guidelines and the Australian Guidelines. This may be because the objectives of the guidelines do not go that far, or because it is considered to be up to the law makers. However, an appropriate definition is required at least in the context of a government-sponsored self-regulatory framework for several reasons. First, addressing definitional issues related to ODR and framing a set of ODR guidelines specifically focusing on online consumer arbitration is important in order to conceptualise OA within the existing dispute resolution landscape. Second, it is important to demarcate the boundaries of each ODR mechanism rather than creating a window to another debate over the definition of ODR similar to that over ADR. Third, such a definition will allow ODR to stand as an appropriate redress mechanism for the resolution of B2C e-commerce disputes within the broader dispute resolution landscape. Fourth, guidelines are a suitable place to develop appropriate definitions for ODR mechanisms as they can provide examples for the law makers intending to make laws for the development of ODR. Fifth, having a definition in these documents could lead to opening a more constructive debate among academics and the law and policy makers.

The current omission in both the OECD and the Australian Guidelines reflects a lack of commitment by government to the regulation of the B2C e-commerce sector, and undermines the overriding objective of having B2C e-commerce-specific guidelines. At the least, governments could have commenced a clear regulatory approach in these guidelines and created benchmarks for achieving appropriate legal frameworks in the time to come.

In the absence of guidelines dealing with the definition of ODR and its mechanisms, it is worth considering NADRAC’s work in regard to the development of an appropriate definition for ODR so as to establish how successfully ODR has been defined by NADRAC. It can be

122 NADRAC is a regulatory body plays a prominent role in defining the landscape of ADR and ODR in Australia. National Alternative Dispute Resolution Advisory Council Dispute Resolution Terms the use of terms in (alternative) dispute resolution (2003); see also ‘The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent
argued that NADRAC also adopts an ad-hoc approach which is not desirable in achieving the goals of ODR. NADRAC’s glossary of ADR terms includes expressions such as ‘on-line dispute resolution’, ‘ODR’, ‘eADR’ and ‘cyber-ADR’ as ‘processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially via e-mail.’ 123 It can be argued that these terms are too broad and lack specific focus. What exactly do these On-line dispute resolution, ODR, eADR, cyber-ADR terms mean? And what is meant by ODR having to be identified by looking at ‘processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically’? Most of their ODR terms are not actually defined and this can be extremely frustrating for consumers. The definitions that do exist refer to the way the dispute resolution is conducted and do not specify the boundaries of ODR mechanisms. For instance, there is no reference to a definition of OCA or the binding nature of OCA.

Why has this kind of broader approach been adopted by the NADRAC? The reasons could be: i) that this is an attempt to capture the broad view of the ODR literature in regard to the definition of ODR; ii) because attempting to define ODR comprehensively is a difficult task and it is prudent to leave it to the developing ODR literature to come up with an appropriate solution which is then established firmly in the dispute resolution landscape; and iii) because it is important to leave ODR broadly defined so that more innovation can lead to break-throughs, or else the evolving and changing nature of technology which applies to ODR and its vagueness makes it difficult or pointless to have an exact definition of ODR.

The next challenge is to see how each mechanism has been defined in its own territories so that the desired outcomes can be achieved. It is evident that the existing listing of terms contains no identification of the boundaries of each dispute resolution mechanism, which reflects the lack of an effective approach to the definition of ODR mechanisms. It defines the scope of automated dispute resolution as follows:

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123 Ibid NADRAC, 9.
Automated dispute resolution processes are processes conducted through a computer program or other artificial intelligence, and do not involve a ‘human’ practitioner. See also blind bidding and on-line dispute resolution.124

Thus NADRAC does have definitions in regard to ‘automated dispute resolution processes’ and ‘automated negotiation’125 that reflect the two internationally adopted forms of ODR mechanisms. This raises the question of why the other ODR mechanisms were not addressed at the same time that NADRAC was developing these two. It is even more puzzling given that there were some definitions available in the international arena that could have easily been borrowed or adapted. For example, the most fundamental ODR mechanisms such as online mediation and online arbitration and even government sponsored electronic courts could have been taken into consideration.

If only informal definitions are available, the parameters of ODR can shift and change. NADRAC states that its glossary could give an idea of common usage,126 but ‘The glossary is not intended to be used as a set of definitions. Agencies, practitioners and legislators may use these terms in different ways.’127 NADRAC is of the view that ‘while these definitions have been widely adopted, they are not applied universally or consistently and there remains considerable debate about definitional issues.’128

Another omission is the lack of definition for online consumer; though there are identifications of relationships such as B2B and B2C.129 The lack of definition for online consumers in ODR-related regulatory instruments may lead us to consider the use of definition of the consumer recognised in national consumer protection laws. As far as the Australian consumer protection laws are concerned, there is a definition for the consumer in Section 3 of the CCA without specific reference to online consumers.130 In light of section 3 of the Australian CCA, it can be argued that a person can be considered an online consumer when items are purchased from online business in values that do not exceed $40,000 or goods that are bought ordinarily ‘for

125 Ibid.
127 Ibid.
129 Australian Guidelines, above n 2.
130 Section 3 of the Volume 3, Schedule 2, Part 2-3 of the Competition and Consumer Act 2010 (Cth).
personal, domestic or household use or consumption’ and do not have a commercial purpose.\textsuperscript{131} Even though there is a lack of specific online consumer definition, the adaptation as per the national consumer protection laws would be better than allowing the judiciary to define it for reasons of consistency and predictability. Additionally, if this statutory definition is adopted, the online consumer could claim protective measures offered by the national consumer protection laws when enforcement of the OCAA is sought. It must also be noted that a similar definition is warranted in the online consumer protection-related guidelines and such a definition could be promoted for use by the private online consumer arbitration providers.

4.4 Reliance on government-sponsored courts
Instead of incorporating guidelines on a specific institution for the enforcement of OCAA, the current guidelines have linked the protection of online consumers to government sponsored courts. In other words, government-sponsored courts have been recognised as appropriate institutions for B2C cross-border e-commerce disputes. As far as B2C e-commerce disputes are concerned, it is doubtful whether the courts are an appropriate forum for the resolution of B2C e-commerce disputes as there are some compelling and salient reasons which make the national courts an inappropriate avenue of redress for the resolution of B2C e-commerce disputes. The existing traditional dispute resolution mechanisms have been subjected to criticisms for delay, cost and complexities.\textsuperscript{132}

Many writers have highlighted the fact that national courts are not well equipped to resolve small-claims disputes and technology-related disputes. National courts are considered inappropriate for several reasons, as for example by Schultz, noting that:

\begin{quote}
Courts are not likely to be the primary resolvers of most small- and medium-sized disputes occurring in cyberspace—which are the majority of e-commerce disputes involving ODR providers—because courts are too slow and expensive. This is a general problem caused by the ubiquity of cyberspace, which clashes with the territoriality of jurisdiction and judicial authorities.\textsuperscript{133}
\end{quote}

\textsuperscript{131} Ibid.
\textsuperscript{132} Katsh, evaluating the evolution of ten years of ODR notes that ‘Not surprisingly, traditional dispute resolution forums have also not been effective or responsive.’ Ethan Katsh and Leah wing, Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future (2006) 2.
Moreover, Cortes notes that, ‘[t]here is a clear consensus that our courts cannot provide a system that will effectively meet the needs of consumers in the new global marketplace, and that a global ODR network is the best solution to deal with consumer disputes.’

Parfitt rightly asserts that, ‘our court system is overwhelmed with disputes and it can take years and thousands of dollars in legal fees to get a judgment, only to have it appealed and the process starts over.’

In the recent OECD conference it was also indicated that ‘in those cases where e-commerce transactions involve small amounts of money, consumers tend not to go to court when things go wrong.’ As a solution, it is further recognised that, ‘effective, low-cost and adaptive online dispute resolution and redress mechanisms might help to address this.’

A detailed discussion of the problematic aspects of government-sponsored courts as an enforcer of online consumer rights is found in the next chapter, referring to Australian legal and judicial pronouncements.

Another pertinent question is why these guidelines did not take into consideration technological developments taking place in the government-sponsored electronic court (eCourt) setting, regardless of the fact that there has been increased attention to the development of eCourts with technology since 1990 in Australia in particular. These guidelines insist on the need of protecting consumers’ access to government courts. Unfortunately, a broader view has not been taken to make use of the eCourt mechanism for strengthening the enforcement of OCAA as an appropriate and e-commerce friendly institution. The Guidelines further promote the use of technology and the use of cooperative mechanisms for the development of appropriate dispute resolution mechanisms through which to protect the rights of online consumers. For example, the guideline mentioned above is placed together with the guideline which includes cooperation through ‘their judicial, regulatory, and law enforcement authorities’ at international level.

With such guidelines, the enforcement of OCAA through eCourts could arguably have been placed within the scope of these guidelines.

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134 Pablo Cortes, The Potential of Online Dispute Resolution as a Consumer Redress Mechanism (July 6 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998865> last accessed 15 August 2012; see also ‘Why do e-commerce customers not turn to the courts? Clearly, even conventional ‘high street’ consumer disputes are rarely if ever litigated, due to (i) consumer ignorance and apathy as to legal remedies, (ii) the typically low cost of the items in dispute relative to (iii) the high cost of access to legal advice and judicial resolution.’ Lilian Edwards and Caroline Wilson, ‘Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions’ (2007) 21 International Review of Law, Computers & Technology 315, 320.

135 Kelly Parfitt, Consumers Want to be in Europe; Corporations Want to be in the U.S.: How to Reform Mandatory Consumer Arbitration Agreements to be Fair to Both Parties, 2009, 26.


137 Ibid.

138 OECD Guidelines above n 1, 9.
5. Concluding remarks

In light of the overall discussion of the OECD Guidelines and the Australian Guidelines, it is evident that these guidelines provide promising developments for establishing a secure ODR landscape in its own right within the complex e-commerce market. However, the current regulatory approach advocated by both the OECD Guidelines and the Australian Guidelines is arguably vague and full of uncertainties, mainly driven by two major problematic aspects. First there is the lack of an appropriate regulatory approach for the regulation of ODR in general and OCA in particular. The existing regulatory approaches such as the self-regulatory, territorial laws, such as conflict of law rules and consumer protection laws and co-regulation and cooperative approaches, have several drawbacks when it comes to the B2C cross-border e-commerce setting. The second is related to the viability of the guidelines applicable to appropriate dispute resolution mechanisms. There is a distinct lack of a specific institutional framework developed for the enforcement of OCAA.

These problematic aspects embedded in these instruments could undermine their objectives and also undermine online disputants’ confidence, as an ordinary consumer expects an existing regulatory approach to comply with principles such as consistency and predictability, and to possess an adequate regulatory approach for online consumer protection. Unfortunately, these guidelines still apply to the B2C e-commerce platform and they provide an insufficient benchmark for the development of a B2C e-commerce friendly and focused regulatory approach to the regulation of ODR, internationally and nationally.

Therefore a fresh consideration at these guidelines to design a new set of rules tailored to ODR in general, and OCA in particular, is important, given the growing B2C e-commerce market. It is also timely to revise these online consumer protection guidelines, rather than to remain confined to making recommendations and mere encouragement for those such as ‘consumer representatives,’ ‘governments’ and ‘businesses and consumers’ to adopt cooperative measures for the protection of online consumers in the complex B2C e-commerce market. As such, it can be argued that the existing self-regulatory approach advocated in the OECD Guidelines and the Australian Guidelines needs to be amended by paying specific attention to ODR in general and OCA in particular.
CHAPTER FIVE: THE APPLICATION OF CONSUMER PROTECTION LAWS AND RELATED INSTITUTIONAL FRAMEWORKS TO THE ENFORCEABILITY OF ONLINE CONSUMER ARBITRATION AWARDS

‘The law is thus a tool that can be used to reassure cyber-consumers, and a tool that can reinforce confidence in the e-economy, if it respects its role of protecting the weakest among us.’¹

1. Introduction

The previous Chapter focused on online consumer protection guidelines from regulatory and institutional perspectives, especially in the context of their viability in respect of concerns associated with the enforceability of OCAA. This chapter addresses the question: How effectively have national consumer protection laws addressed the concerns associated with the enforceability of OCAA? It is argued that the present consumer protection-related legal frameworks have several drawbacks when they are applied to the enforcement of OCAA in the cross-border context from both regulatory and institutional perspectives. In support of this argument, a comparative examination of the relevant provisions of the Australian Consumer Law incorporated in the Competition and Consumer Act 2010 (Cth) (CCA)² and the application of the Consumer Affairs Authority Act 1993 (CAA)³ and Unfair Contract Terms Act 1997 (UCTA)⁴ in Sri Lanka is undertaken. The Australian and Sri Lankan legal responses are explored in light of the related literature and developments that are taking place in jurisdictions such as the European Union and the United States.

The purpose of this chapter is to examine the enforceability of online consumer arbitration clauses used in a business to consumer (B2C) cross-border e-commerce dispute setting related to unfair contract terms, within the legal frameworks of both Australia and Sri Lanka. In the area of enforcement of OCAA, the application of national consumer protection laws and other related

laws which deal with the validity of contractual clauses has to be examined. There are several major aspects of this. Firstly, as the first and second chapters showed, there are concerns associated with the enforceability of OCAA, especially when binding online consumer arbitration clauses (OCAC) are embedded in B2C e-commerce contractual settings. Secondly, there is the mandatory application of national consumer protection laws to online B2C arbitral clauses from the contractual perspective.\(^5\) Thirdly, the validity of OCAC is a vital factor in the enforcement of OCAA within the international commercial arbitration legal framework.\(^6\) This Chapter specifically examines the viability of the Australian and Sri Lankan consumer protection-related legal frameworks from a comparative perspective as they can be applied to the contractual basis of online consumer arbitration.

The chapter is structured as follows. Following the introduction in the first section, section two provides an outline of the existing legal framework which is applicable to the enforceability of OCAC in both countries. Section three examines the problematic aspects of the existing Australian and Sri Lankan legal framework, with special reference to the EU and USA as major countries which are dealing with online consumer arbitration clauses embedded in B2C e-commerce contracts, and with particular reference to standard form contracts. Section four explores the viability of the institutional framework embedded in the consumer protection laws in the context of the enforceability of OCAA delivered by private OCA providers. Section five concludes the chapter.

### 2. An outline of the existing legal framework

The CCA (formerly known as the *Trade Practices Act 1974* (Cth))\(^7\) is applicable to the regulation of OCAC in Australia. It has implications in respect of OCAA as the legal validity of an arbitral clause contained in a business to consumer agreement may depend on the fairness of the arbitral clause. The CCA, designed to establish a uniform consumer protection legal framework, includes some language which introduces new provisions in regards to the fairness

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\(^5\) ‘It is important that agreements reached at mediation and other ADR processes should be able to be enforced, subject to other statutory protections such as those given by, for example, the *Trade Practices Act 1974* and the *Fair Trading Acts* in relation to misleading and deceptive conduct and the protection available in cases of unfair contracts.’ *National Alternative Dispute Resolution Advisory Council* Legislating for alternative dispute resolution, A guide for government policymakers and legal drafters November (2006) 96.

\(^6\) This area will be discussed in detailed in the next Chapter.

of contractual clauses. This law applies to both offline and online contexts. It is designed to establish a uniform consumer protection legal framework and it is also recognised that ‘the Australian Consumer Law (ACL) is a key part of the regulatory reforms of the Council of Australian Governments (COAG) to deliver a seamless national economy.’ The objective of the new consumer protection law as outlined in the Trade Practices Amendment (Australian Consumer Law) Bill 2009 indicates that ‘the object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.’ The CCA has been welcomed as a positive step towards protecting consumer rights in Australia.

In comparison, Sri Lankan consumer protection law is mainly included in two acts: the CAAA and the UCTA. The purpose of the CAAA is to ‘Provide for the Establishment of the Consumer Affairs Authority; for the Promotion of Effective Competition and the Protection of Consumers; for the Regulation of Internal Trade; for the Establishment of a Consumer Affairs Council.’ The UCTA regulates the limitations of liability and exemption clauses in B2C contracts.

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3. Enforceability of OCAC under the related Australian and Sri Lankan legal frameworks

3.1 Enforceability of OCAC under the Australian legal framework

The application of the Australian CCA to the area of enforcement of OCAC can be discussed under two categories. The first relates to the enforceability of arbitration clauses embedded in B2C standard form contracts, and the second relates to the enforceability of arbitration clauses embedded in non-B2C standard form contracts. Under the CCA, contracts in each of these categories can be challenged. The fairness of the consumer arbitration clauses embedded in standard form B2C contracts can be explored in light of the sections from 23 to 28 of the CCA. Unfair consumer arbitration clauses incorporated in other B2C contracts under the statutory unconscionable conduct-related legal provisions can be discussed by referring to the sections from 20 to 22 of the CCA. The main differences in respect of unfair terms and the unconscionability-related areas are twofold. The first area provides ‘focus on substantive unfairness in consumer markets.’

The application of this legal framework has been recognised to the extent that: ‘A powerful aspect of the new laws is that [certain] terms like these may be unfair even if a consumer has read and agreed to their inclusion in the contract.’ The second focuses on ‘the process through which a trader deals with a consumer.’ The following sections highlight some uncertainties associated with each of those areas.

3.1.1 Enforceability of OCAA incorporated in B2C Standard Form Contracts

The question is how effectively the CCA has produced a balanced legal framework which suits the terms embedded in B2C cross-border e-commerce contracts. The determination of the validity of contractual terms remains unsettled and problematic when it is applied to the area of online consumer arbitration clauses incorporated in online B2C cross-border e-commerce contracts. The following sections discuss issues associated with the existing law.

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18 Australian Competition and Consumer Commission, above n 16.
19 Arno R. Lodder and John Zeleznikow, *Enhanced Dispute Resolution Through the Use of Information Technology* (Cambridge University Press 2010) 64.
3.1.1.1 Unfair contract terms

Under the CCA, the validity of a contract term can be challenged if two requirements are met: i) ‘the term is unfair’; and ii) ‘the contract is a standard form contract.’ The presence of these two elements can result in the term in question being void. Section 24 of the CCA articulates the scope of unfairness in the following terms:

24 Meaning of unfair

(1) A term of a consumer contract is unfair if:

(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Phrases such as ‘a significant imbalance in the parties’ rights and obligations arising under the contract’, ‘legitimate interests of the party’, and ‘cause detriment (whether financial or otherwise) to a party’ have not been defined. Some elements of the test of fairness, such as ‘significant imbalance’ and ‘cause detriment’ are not immune from controversy. However, Section 24 (2) has vested discretionary power in the court to determine fairness by taking it into consideration as the court thinks relevant in a particular case, but there are elements that the court has to pay attention to in this process, for example:

Section 24

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;
(b) the contract as a whole.

(3) A term is transparent if the term is:

(a) expressed in reasonably plain language; and
(b) legible; and

20 Competition and Consumer Act 2010 (Cth).
21 Ibid.
(c) presented clearly; and
(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1) (b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.23

Additionally, under the CCA, there is a list of examples which may fall into the category of unfairness.24 However, these examples are not an exhaustive list of unfair terms.25 It is also evident that this list is an indicative one giving examples, without having a mandatory obligation for the court to follow. The wording of Section 25(1) stipulates that, ‘without limiting section 24, the following are examples of the kinds of terms of a consumer contract that may be unfair.’26 In other words, these terms may or may not be considered unfair in any particular case in dispute.

3.1.1.2 Standard form contracts

A similarly vague approach can be seen in the scope of standard form contracts under the CCA. There is no clear definition of the phrase, ‘an effective opportunity to negotiate the terms of the contract,’ which comes under Section, 27(2)(d).27 Similar uncertainty has been recognised in some of the decisions made under the Fair Trading Act 1999 in Victoria, for example:

Section 32X requires me to consider whether or not the terms have been individually negotiated. Although no guidance on how this should be applied is found in the Act, it appears to me to reflect the commonsense view that terms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect

23 Competition and Consumer Act 2010 (Cth).
24 ‘(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract’, ‘(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract’, ‘(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract’, ‘(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract’, ‘(e) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract’, ‘(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract’, ‘(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning’, ‘(i) a term that limits, or has the effect of limiting, one party’s vicarious liability for its agents’, ‘(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party’s consent’, ‘(k) a term that limits, or has the effect of limiting, one party’s right to sue another party’, ‘(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract’, ‘(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract’ and ‘(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.’ Section 25 of the Competition and Consumer Act 2010 (Cth).
26 Competition and Consumer Act 2010 (Cth).
27 Ibid.
consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.28

Moreover, in the case of Director of Consumer Affairs Victoria v Backloads.com Pty Ltd,29 Justice Harbison states as follows:

I have suggested in previous cases that the question of whether the term was individually negotiated might be taken into account in the sense that if a term was in fact individually negotiated its apparent unfairness on its face may be discounted because of the knowledge that the parties had each voluntarily entered into the term after informed negotiation.30

The scope of standard form contracts has been outlined in the document titled ‘A guide to the unfair contract terms law’ in the following terms:

The unfair contract terms laws do not define ‘standard form contract’. However, in broad terms a standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties – that is, it is offered on a ‘take it or leave it’ basis. Standard form contracts are typically used for the supply of goods and services to consumers in many industries.31

This guide further lists several industries, such as ‘telecommunications’, ‘finance’, ‘domestic building’, ‘gyms’, ‘motor vehicles’, ‘travel’ and ‘utilities’. Brennan notes that ‘whether a contract is a standard form contract will be a question to be decided case by case.’ In other words, the CCA lacks a definition of standard form contracts. It is also important to note that the Australian Information Industry Association indicates the possible consequences of the uncertainty revolving around the meaning of ‘unfair’ and ‘standard-form’ by noting that ‘consumer costs will rise as risks and uncertainties are priced-in by business.’34

28 Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd (Civil Claims) [2008] VCAT 482 Paragraph 66.
30 Ibid.
31 Australian Consumer Law, above n 25.
32 Ibid.
33 Tom Brennan, the Australian Consumer Law (2010), 5.
This situation is further reflected in the provisions which list the circumstances for judges to consider in determining whether a particular contract is a standard form contract or not. Section 27(2) notes that ‘in determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant.’ Importantly, this provision has developed two avenues for scaling down the circumstances when determining the validity of a standard form contract where one party is a business person and the other party a consumer. The first part of the section lists several circumstances allowing the judiciary to use its discretion to decide whether a particular standard form contract can be invalidated based on such circumstances or not. The other part of the section limits its discretionary power and has listed several circumstances that must be considered by the judiciary in assessing the validity of a standard form contract. These are as follows:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction,
(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties
(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented
(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1)
(e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction
(f) any other matter prescribed by the regulations.

Can this list of circumstances be considered to be a list of minimum standards that could be applied to determining whether a particular contract is a standard form contract or not? The positive aspect of this list is that the court must take these circumstances into consideration, thus limiting its discretionary power to determine whether a particular contract is a standard form contract or not. This gives certainty to both online business people who can formulate standard

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35 Competition and Consumer Act 2010 (Cth).
36 ‘(a) whether one of the parties has all or most of the bargaining power relating to the transaction’, ‘(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties’, ‘(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented’, ‘(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1)’, ‘(e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction’ and ‘(f) any other matter prescribed by the regulations’ 27(2) of the Competition and Consumer Act 2010 (Cth).
form contracts in line with these standards, and online consumers that they are secured by consumer protection laws in these types of contractual settings.

Unfortunately, existing law does not list the categories of standard form contracts which are recognised in the e-commerce market. In the offline context there are agreements such as ‘standard-form’ or ‘contract of adhesion’, that are labelled non-negotiated contracts (‘take it or leave it’). 37 In the online context, online binding arbitration clauses also become part of online standard form contracts. Lemley notes that ‘In the online environment, these standard form agreements take the form of clickwrap licenses—agreements that visitors to a Web site sign electronically by clicking ‘I agree’ to a standard set of terms.’ 38 Online pre-dispute arbitration clauses are incorporated even in these online ‘clickwrap’, ‘browser wrap’ and ‘shrink wrap’ 39 agreements, which raises concerns about the validity of the online contracts and the possible disadvantages to online consumers. The CCA does not provide clear answers as to whether all these standard form contracts are covered by current law. In addition, there are no defined boundaries for each of these standard form contracts, although some guidance can be found in the ‘A guide to the unfair contract terms law’, this refers only to contracts which are made by, ‘clicking an ‘I agree’ button on a web page.’ 40

Both countries still lack specific legal frameworks for addressing issues connected with B2C e-commerce in general, and with resolution and enforcement of ODR outcomes based on the resolution of B2C e-commerce disputes. As far as the Australian legal response is concerned, Australian law has not adopted a ‘black list’ but only a ‘grey list’. 41 Legal Aid New South Wales recommends the development of such a ‘black list’ in the Australian legal framework as well. 42 Indeed, the incorporation of a ‘black list’ has the potential to prevent the testing of such terms before court as to fairness and also to provide some certainty for the complex and evolving electronic contracts in the broader e-commerce market. 43 Such an approach is important for the

40 Australian Consumer Law, Above n 25.
41 Downes, above n 22, 17.
43 Ibid.
sake of clarity and consistency of consumer protection laws to online arbitration agreements and such a step is also worthwhile for achieving globally recognised standing in regard to mandatory cross-border online consumer arbitration clauses.  

In fact, such an approach can be adopted through the existing CCA provisions rather than by bringing amendments to CCA through the legislature. For example the pre-dispute arbitration clause can be incorporated into the existing unfair contract terms list under the following provision of the CCA:

25 (2) Before the Governor-General makes a regulation for the purposes of subsection (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:

(a) the detriment that a term of that kind would cause to consumers; and
(b) the impact on business generally of prescribing that kind of term or effect; and
(c) the public interest.  

This provision places the authority with the relevant minister to introduce additional unfair contract terms. The minister has to exercise his/her power within the limits set under this provision. The incorporation of pre-dispute mandatory arbitration clauses under this provision can ensure that these kinds of clauses are not fair under the CCA; which can also persuade business people not to use this type of arbitration clause when making standard form contracts. By contrast, Sri Lanka lacks specific reference to unfair contractual terms which could be applied to both offline and online consumer arbitration clauses, except for the limited hope for a liberal interpretation of the existing UCTA that can arguably be made, as discussed above, by the judiciary through judicial pronouncements.

It must also be questioned why the drafters of this unfair-contract terms-related law have not paid attention to producing a simplified set of criteria for assessing the fairness of terms incorporated in B2C standard form contracts, even though such simplified approaches are adopted in other areas. For example, developed criteria can be seen under the

44 See also, Ibid.
45 Australian Consumer Law, above n 25.
Telecommunications (Standard Form of Agreement Information) Determination 2003, under the
Telecommunication Act of 1997, with regard to the disclosure of information relating to standard
form contracts which can be made between providers and their customers for the supply of
certain goods and services related to telecommunication. Under section 6 of the
Telecommunications (Standard Form of Agreement Information) Determination the provider
must publish a summary of a standard form of agreement which must include the following:

Under 6 (2) (a), a summary must include:

- general information about each matter specified in Schedule 1 that is the subject of a term or
  condition of the standard form of agreement; and

- if the provider offers a non-mobile standard telephone service on terms and conditions set out in
  the standard form of agreement — a statement about whether the provider offers priority
  services to particular regular customers; and

Under 6 (4), ‘the provider must, as far as practicable, prepare the summary’ as follows:
in language that is concise, clear and simple; and in a form that is:

- clearly legible; and not longer than 4 sides of pages in A4 format, whether or not the summary is
  printed in A4 format.

Example

If the provider prepares the summary in A4 format, the summary may be prepared as 2 double-
sided sheets or 4 single-sided sheets of A4 paper.

In view of this discussion, it can also be argued that current Australian law is not a barrier to the
existence of post-dispute arbitration clauses, even where the initial contract is a standard form
contract. This is mainly due to the fact that the validity of a contractual term depends on the
satisfaction of the fairness of such a term and the fulfilment of the requirements of a standard
form contract as recognised by the CCA. However, if there are online standard form contracts
which incorporate arbitration clauses even after the initial standard form contract, without notice

47 ‘Part 23 of the Telecommunications Act allows CSPs to use a standard form of agreement (SFOA) as a contract with their
customers for the supply of certain telecommunications related goods and services. SFOAs are pre-set contracts. Customers
do not sign SFOAs, but agree to them by the act of buying the service. If a CSP uses an SFOA, it is obliged to make the
SFOA available to their customers on request. CSPs that use SFOAs are required to provide customers with concise
summaries of the terms and conditions set out in the SFOA applying to their service. The summary must not exceed four
pages in length. Customers must be given reasonable notice of adverse changes of the terms and conditions.’ Australian
to the consumer, then such arbitration clauses can be challenged if such a term does not comply with the unfair contract terms law.\textsuperscript{48}

This openness, of course, has the potential to expand the scope of OCA with the changes taking place in the e-commerce market place. On the other hand, such an approach arguably could undermine the development of arbitration applying to new areas of dispute, or could affect the certainty of law and create frustration and uncertainty in the minds of both consumers and business people, especially in the cross border e-commerce market, as to the actual limits imposed by the law over unfair contract terms in Australia.

\textbf{3.1.1.3 Burden of Proof}

Burden of proof is another area of concern which affects the viability of existing laws for B2C cross-border contractual settings. Both Australia and the EU adopt a consumer friendly approach. For instance, there is a presumption in favour of the consumer when the validity of a B2C contractual term is challenged under the consumer protection laws.\textsuperscript{49} The CCA has incorporated a presumption in relation to standard form contracts that could be considered a positive element to reduce the burden of court proceedings.\textsuperscript{50} Under US law, the consumer has to prove that the terms of the B2C contract are unconscionable.\textsuperscript{51} In Sri Lanka, under section 10(5) of the UCTA the burden of proof rests on the party that is claiming that a term or a notice satisfies the requirements of reasonableness. The EU itself and some EU countries adopt different approaches. Under the EU law, any pre-dispute B2C consumer arbitration clause is automatically invalid.\textsuperscript{52} It is important to note that pre-dispute arbitration clauses in B2C

\textsuperscript{48} See the scope of the section 25 of the \textit{Competition and Consumer Act 2010} (Cth).

\textsuperscript{49} Under EU directives, it is mentioned that ‘...unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.’\textsuperscript{(q)} of the Annex of the 93 EU Directives; The section 24 (1) of the CCA stipulates that ‘A term of a consumer contract is unfair if:

\begin{itemize}
  \item[(a)] it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
  \item[(b)] it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
  \item[(c)] it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
\end{itemize}

\textsuperscript{(4)} For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.’

\textsuperscript{50} Section 27 (1) of the \textit{Competition and Consumer Act 2010} (Cth) states that: ‘If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.’


contracts are also automatically invalid in Sweden and France.\textsuperscript{53} The \textit{Unfair Contract Terms Act of 1977} in the UK imposes the burden on business to show fairness and reasonableness, but the \textit{Unfair Terms in Consumer Contracts Regulations of 1994} adopts a different approach and the burden of proof rests with the complainant.\textsuperscript{54}

In view of these legal approaches in regard to burden of proof, it can be argued that no matter where the burden of proof rests, a consumer has to present his case before the court. Such an exercise is questionable as far as B2C cross-border disputes are concerned as it involves cost and consumes time. As a result, will online consumers in small dollar cases, except in the UK, pursue a case against powerful business people? The answer would seem to be negative and arguably such a negative position discourages the bringing of such cases to the attention of the court as well. Arguably, this kind of situation could have been minimised had the drafters of the existing national consumer protection laws at least incorporated a black list of unfair terms, including pre-dispute arbitration clauses, in a standard form contract made in a B2C cross-border e-commerce setting.

\textbf{3.1.1.4 Technology neutrality of the CCA}

There are no specific legal provisions in regards to the technological neutrality of the CCA. As such, it is worth referring to the literature developed under the TPA. Despite the lack of any specific mention of the technology neutrality of the TPA, a Productivity Commission Inquiry Report states that, ‘the TPA and Fair Trading Acts are technology neutral in that they apply equally to online and offline consumer transactions.’\textsuperscript{55} Moreover, Shelly and Jackson note that ‘consumer protection legislation applies equally whether the sale occurs face to face, by telephone or over the Internet.’\textsuperscript{56} Arguably, a similar situation as that recognised under the TPA in terms of technology neutrality can be equally applied to the CCA as well, since the CCA also has no specific provision in this respect.

It is important to note that some evidence is available to justify the view that the CCA has adopted a technology-neutral approach: for example, a contract can be made by, ‘signing a

\textsuperscript{54} Iain Ramsay, \textit{Consumer Law and Policy: Text and Materials on Regulating Consumer Markets}, (Hart Publishing 2 Edition 2007) 179. Ramsay highlights several specific features compared to \textit{Unfair Contract Terms Act} by showing the broad application of UTCCR compared to \textit{Unfair Contract Terms Act}: they include ‘a broad standard of ‘good faith’ and ‘substantial imbalance’ coupled with disclosure obligations and a ‘grey list’ of terms.’
\textsuperscript{55} Australian Government Productivity Commission, above 9.
\textsuperscript{56} Shelly and Jackson, above n 8, 188.
document’, ‘agreeing over the phone’ or ‘clicking an ‘I agree’ button on a web page.’ These elements can be considered supportive evidence to show that not only contracts made in writing but also contracts made electronically can be considered valid under this legal framework. In this context, it is reasonable to conclude that the legislature has followed a technology-neutral approach when drafting CCA. However, this technology-neutral approach is not reflected in the mechanism adopted for the determination of the unfairness of a standard form contract term in the CCA. As such, the application of CCA to B2C cross-border e-commerce contracts which involve foreign online businesses and Australian online consumers is challenging.

The attention paid to the extra-territorial application of existing consumer protection legal frameworks is relevant in the context of the recognition of the application of these laws to B2C cross-border disputes. The scope of sections such as 131 and 6 highlight the scope of CCA’s application, which is mainly limited to Australian jurisdictions. The question is whether online business people who are resident outside Australia and have no connection with Australia by way of presence or assets can be subject to this law. It is evident that the new CCA has no provisions to cover such overseas business people. As such, CCA operates mainly within Australian territorial boundaries and lacks extra-territorial application. The Sri Lankan law, similarly, provides little support for the regulation of online consumer rights. There are no specific provisions in the Sri Lankan CAAA and the UCTA in regard to extra-territorial application of the law, and, in fact, ‘the absence of cross-border applications of the law is such that domestic laws have no extra-territorial applications. This has not been redressed in the CPA.’ This lack of territorial application not only relates to B2C activities which take place in the offline context, but also to the online B2C setting.

As such, the application of CCA provisions in regard to online consumer arbitration clauses for B2C e-commerce disputes can be problematic and as a result the protection offered to online

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57 Australian Consumer Law, Above n 25.
58 See generally ‘Technologically specific regulation is likely to fail as the types of services being delivered and their delivery mechanism is evolving rapidly.’ Rob Nicholls, Convergence: Benefits and risks to consumers and citizens, 2010.
consumers is ineffective. Additionally, it is important to note that there is a tendency to leave mandatory online consumer arbitration clauses unchecked and unchallenged if access to the court and its mechanisms is not designed in line with the B2C e-commerce disputes and online market realities. Until progressive approaches are adopted by the judiciary with appropriate and timely legislative backing for regulation of online consumer arbitration clauses in Australia, CCA will remain problematic.

3.1.2 The enforceability of OCAC embedded in other B2C contracts

Challenging the validity of OCAC in non-standard form B2C contracts under both contract law and the CCA is possible. Australian contract law is governed by laws made as ‘common law’ through precedents, and statutory law through legislation. The application of the test of statutory unconscionability under common law and the CCA could be the avenues for redress, depending on the circumstances of each case. However the law in Australia might also be used. As far as the common law is concerned, unconscionability has been recognised as one of the vitiating factors of a contract and so arguably this ground can be utilised by consumers to challenge the validity of OCAC as well. Among a plethora of cases which have dealt with the area of unconscionability, the Commercial Bank of Australia Ltd v Amadio is a useful example, being a landmark decision that sets out the scope of unconscionability. The judiciary in this particular case summarized unconscionable conduct in the following terms:

> Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of ‘unconscionable conduct’ is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g. a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink.

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63 Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447 (12 May 1983) High Court of Australia 461. It must be noted that there is a plethora of cases and literature in terms of the unconscianavbility. Given the scope of the thesis, a detailed discussion is not conducted.
As far as the certainty and predictability of law is concerned from the online cross-border consumers’ perspective, this statement does not provide clear boundaries for the test of unconscionability. Instead, vitiating factors of contract such as ‘fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct’ are considered ‘species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience.’ 64

Moreover, the court has the authority to determine unconscionable conduct depending on the circumstances of the case. The issue is: when could there be a situation when this legal position is applied to challenge terms embedded in a non-standard form contract in a B2C cross-border setting? It can be argued that the validity of such a clause will depend on proof of circumstances which can satisfy the finding of unconscionable conduct of business adopted during the process of negotiation and formation of such a clause. Then the question is: what are the circumstances which can lead to a finding of unconscionable conduct on the part of a business by the judiciary? The search for such court precedents would make it difficult for online consumers in terms of time and cost, as such an exercise requires the hiring of a lawyer.

Additionally, unconscionability can be substantive or procedural. However, the boundaries of each of these categories are uncertain 65 which also raises concerns. Paterson indicates that ‘the interaction between substantive and procedural concerns under the UCTL is not entirely clear.’ 66 Similar concerns are raised in terms of the test of unconscionability applicable in the US legal context. In some cases these two categories can be blurred. This position can lead to confusion, such as whether one category or both are required to invalidate a B2C contractual clause. In the US some states require both procedural and substantive unconscionableness to be established, while some states follow the approach of having one category as sufficient. 67

Importantly, the CCA can be considered to be a development which can prevent uncertainties arising that are associated with unconscionable conduct-related requirements developed by precedents in the courts. The CCA has established a statutory regime of unconscionability,

65 Commercial Bank of Australia Ltd v Amadio 1983 151 CLR or ALR.
67 Richard A. Lord, Williston on Contracts Database updated May 2011 Chapter 18. Unconscionable Agreements; Susan Schiavetta, Does the Internet Occasion New Directions in Consumer Arbitration in the EU?
making unconscionable conduct of business illegal. The part 2-2 –schedule 3- of the CCA (from 20-22) deals with the unconscionable conduct of business people and makes such conduct illegal. Section 20 (1) of the CCA (part 2-2 –schedule 3) provides that, ‘A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.’ Unconscionable conduct is defined as follows: ‘Unconscionable conduct is unfair or unreasonable conduct in business transactions that goes against good conscience. This can occur in transactions between businesses or in transactions between businesses and consumers.’

This raises the question of whether this legal framework provides an appropriate legal framework for the enforcement of OCAC embedded in non-standard form B2C cross-border OCAC. Where consumers’ rights are violated under the terms of a B2C contract other than a standard form contract, consumers can challenge such clauses on the basis that business conduct is unconscionable in that the clause violates the consumer’s right to go to court. However, it is questionable whether the existing law in regard to unconscionable conduct is clear enough for online consumers to make use of this law. Two factors are relevant. First, the denial of access to a court has not been expressly listed as a factor that could be considered when determining the unconscionable conduct of a business person in the CCA. Second, there is a lack of definition in the CCA regarding unconscionable conduct.

As far as the first factor is concerned, Section 21 (1) of the CCA states that ‘A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, engage in conduct that is, in all the circumstances, unconscionable.’ Section 21 (2) lists factors that the court may have regard to in terms of assessing whether conduct is unconscionable:

(2) Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a person (the supplier) has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (the consumer), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the consumer; and

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

68 Australian Competition and Consumer Commission, above 18.
(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier.

It must be noted that the CCA is also silent on providing a definition of required conduct, and also that finding a definition is a difficult task.\(^69\) In the absence of such a definitive approach, both the laws related to unfair terms and to unconscionability include a list of factors which can be considered by a court or tribunal when applying the test of fairness and unconscionableness in a given case, rather than strictly defining its boundaries through statutory exception or by giving examples. Importantly, the denial of access to courts has not been incorporated in the factors listed under the law of statutory unconscionable conduct in the CCA. As far as the second is concerned, it can also be argued that the law relating to statutory unconscionable conduct does not provide a clear and predictable legal framework for consumers who wish to challenge unfair contract terms embedded in non-standard form consumer contracts in a B2C cross-border setting. As a result, there is a tendency to retain these laws on record, with less possibility of making an impact on the injustices that can take place in the formation of OCAC in non-standard form contracts, especially in B2C cross-border e-commerce contractual settings.

3.2 Enforceability of OCAC under the Sri Lankan legal framework

As far as the Australian legal framework is concerned, it is evident that there is a possibility of using the CCA to challenge the validity of B2C contractual terms which are incorporated in both standard-form as well as non-standard-form contracts. By comparison, there is no specific legislation or judicial precedent in relation to the enforcement of mandatory OCAC in Sri Lanka. Further, there are no B2C e-commerce guidelines in Sri Lanka similar to those of Australia. From a consumer protection perspective, the mostly relevant authorities are the Consumer Affairs Authority Act\(^70\) and the Unfair Contract Terms Act\(^71\) in Sri Lanka. However, the Sri Lankan CAAA also does not deal with unfair contractual terms. These are regulated separately

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69 ‘Unconscionable conduct is difficult to describe or define as it varies on a case-by-case basis. As a general rule it is conduct that is so harsh that it goes against good conscience.’ Australian Competition and Consumer Commission, What is unconscionable conduct? [http://www.accc.gov.au/content/index.phtml/itemId/853159] last accessed 16 September 2012.

70 Consumer Affairs Authority Act.

under the *Unfair Contract Terms Act* which has general application to B2C contracts. In view of this, the possible application of the *Unfair Contract Terms Act* is more closely examined below.

The *Unfair Contract Terms Act* in Sri Lanka has a limited focus. The UCTA is ‘An act to impose limits on the extent to which civil liability for breach of contract, or for negligence or other breach [of] duty, can be avoided by means of contract terms and otherwise…’ The act is not directly concerned with the validity of consumer arbitration clauses. However, there are some provisions of the legislation that have relevance to the present discussion; for example, Sections 4, 10 and the 11 of the Act are relevant and are discussed below.

An initial issue is whether OCAC is covered by this law. This is not clear in the legislation. Section 11, that deals with the ‘extent of exemption clauses’, refers to arbitration as follows:

11. To the extent that the provisions of this Act prohibit the exclusion or restriction of any liability, is also prohibits:

(a) the making of the liability or its enforcement subject to restrictive or onerous conditions;
(b) the exclusion or restriction, of any rights or remedy in respect of the liability or the subjection of any person to any prejudice in consequence of his pursuing any such right or remedy ; and
(c) the exclusion or restriction of rules of evidence or procedure, and to that extent, sections 3, 6 and 7 also prohibit the exclusion or restriction of liability by reference to terms and conditions which purport to exclude the relevant obligation or duty:

Provided that an agreement in writing to submit future differences to arbitration shall not be regarded, for the purposes of this Act, as excluding or restricting any such liability.74

One objective of S 11 is to prohibit ‘the exclusion or restriction, of any rights or remedy in respect of the liability or the subjection of any person to any prejudice in consequence of his pursuing any such right or remedy.’ This sub-section seems to be applicable to contractual terms which can limit or exclude remedies available to consumers. If this interpretation is correct, one can argue that mandatory online consumer arbitration clauses incorporated by business people in a B2C online contract can be challenged, since such a contractual clause limits or excludes the

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72 Ibid.
73 Ibid.
74 Ibid.
rights of consumers to gain access to a court. However, these arguments have to be understood in light of the proviso provided in the same section of the Act. The proviso includes the statement that, ‘an agreement in writing to submit future differences to arbitration shall not be regarded, for the purposes of this Act, as excluding or restricting any such liability.’

What does this proviso mean? It is clear that this proviso is not limited to S 11 of the Act, but that it can be considered as a proviso to the whole Act, as it refers to the purposes of the Act; and the provision is also a mandatory one, as is reflected in the use of the word ‘shall’. Moreover, while the expression ‘future differences’ is not defined, it can be inferred that these two words refer to future disputes. In other words, future disputes are disputes which have not yet emerged out of the contractual arrangements. If this interpretation is correct, pre-dispute B2C mandatory arbitration clauses are prepared before disputes have emerged and are designed to address future disputes. Additionally, arbitration is not defined. It is not clear whether it includes different types of arbitration such as ‘pre-dispute non-binding arbitration’, ‘pre-dispute non-binding arbitration with exhaustion requirement’, ‘pre-dispute conditionally binding arbitration’, and ‘pre-dispute binding arbitration.’

Accordingly, in view of this proviso and the analysis of the proviso, it can be argued that pre-dispute mandatory arbitration clauses incorporated in B2C contracts are excluded from the application of this Act. As a result, the validity of such clauses in a B2C contract is not affected by the Act.

The second question is: can this law be applied to post-dispute mandatory arbitration clauses? One can argue that post-dispute mandatory arbitration clauses can be governed by this law on the basis of the argument that the proviso is applied only to arbitration of future disputes and the uncertainty of the application of the act is limited to standard form contracts.

If this argument is acceptable, then it can be further argued that the fairness of such a clause can be challenged by a consumer before the court. In such a case the court can determine the reasonableness of such a clause based on the guidance embedded in the second schedule of the Act and the circumstances of the case. S 10 (1) and (2) of the Act introduces the test of

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reasonableness in regards to the contractual terms which limit civil liability. In determining the reasonableness of a contractual term, the court has the authority to apply an objective test and decide the reasonableness of contractual terms in line with the guidelines of reasonableness of a contractual term listed in the second schedule of the Act. The second schedule includes five guidelines which may be considered by the court when the test of reasonableness is applied to determine the validity of an alleged contractual clause. It is considered that this list is not an exhaustive one, but rather a list of guidance to the national court. The court has the ultimate authority to decide the reasonableness of a contractual term. The circumstances embedded in the UCTA are for the determination of reasonableness, but the Act does not include a list of unfair terms as can be found in the Australian and EU unfair terms-related legal framework.

The third question is whether this law can be applied to standard form contracts. Article 4 of the Unfair Contract Terms Act is important in this respect; it provides that:

4. (1) This section applies as between parties to a contract where one of the parties deals as consumer or on the other's written standard terms of business.

(2) As against that party the other cannot by reference to any contract term

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of that breach; or

(b) claim to be entitled

(i) to render a contractual performance substantially different from that which was reasonably expected of him under the contract; or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (many of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.76

From the scope of Section 4(1), it is clear that this Act deals with B2C standard form contracts. However, there are several issues that can be raised as to the application of this section to the enforceability of OCAC embedded in standard form contracts. First, it seems that the reference to standard form contracts in this section is limited to the scope of section 4 of the Act. Second, the clarity of the phrase ‘written standard terms of business’ is not adequate; it lacks a clear definition of the scope of standard form contracts. At the least it could offer a general description

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of the scope of standard form contracts that exist in the related literature, or what types of standard form contracts can fall within the scope of standard form contracts.

Third, this phrase refers to ‘written standard form contracts,’ which means arguably online standard form contracts are not covered. This assertion can be supported by the fact that the word ‘written’ is not defined in the Act. As such ‘written’ in the Act can be interpreted to mean standard form contracts made in writing. However, a counter argument can be made on the basis that the meaning of ‘written’ could be either in writing or electronic form, due to the openness of the word, and courts could have the opportunity to define the scope of this word. Importantly, the UCTA of Sri Lanka can be applied to the formation of standard form contracts, given its general application to formation of contracts. There are no provisions dealing with this particular area in the CAAA in Sri Lanka.

The second Schedule of the UCTA in Sri Lanka provides the following ‘guidelines for application of reasonableness’, which could in turn be considered as criteria that assist the judiciary to determine the validity of terms embedded in standard form contracts:

(a) The strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;

(b) Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term:

(c) Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties):

(d) Whether the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.

(e) Whether the goods were manufactured, processed or adapted to the special order of the customer.77

Under this test, the relevant Sri Lankan courts have the authority to look at the bargaining strength of the parties, at freedom from inducement to agree to a term, customer’s knowledge about the existence of such a term and a term which excludes or restricts liability in a case where

77 Ibid.
a condition is not complied with. This test goes further and allows the court to determine whether the seller has manufactured, processed or adapted in accordance with the order made by the customer.

It is also evident that the legal framework embedded in this Act is complex and has not been designed to cover unfair B2C contract terms which may attract OCAC, as can be seen in Australia and the EU. Therefore it is reasonable to note that there is no clear picture as to whether these provisions can be applied to online B2C contractual terms embedded in B2C cross-border standard form contracts. The only positive aspect is the judicial role in expanding this law to the area of the enforcement of OCAC. If such a broad view is adopted by the court to the Act, especially in terms of these provisions of the Act, one can argue that B2C post-dispute arbitration clauses incorporated in standard form contracts which prevent access to a court can be challenged before the court. However, pre-dispute OCAC seems not to be covered as a result of the inclusion of the proviso to Section 11 of the Act.

Unfortunately no amendment or judicial intervention for the expansion of this law has yet taken place. There has been a recent attempt to revise the existing CAAA, but it does not focus on the fairness of online consumer arbitration clauses. Amendment to the existing law or a separate legal framework in relation to the fairness of contractual terms including arbitration clauses is required. In cases where these laws are not applicable, Sri Lankan common law applicable to contract law has to be applied. The contract-related common law in Sri Lanka is governed mainly by Roman Dutch law principles, and by English contractual law principles in some contractual arrangements, especially in the area of the commercial contracts.

It includes several vitiating factors on which B2C contracts can also be challenged before the relevant state-sponsored national court. This legal process is not conducive to addressing the fairness of cross-border B2C contractual terms including OCAC. A detailed discussion of contractual grounds recognised under Sri Lankan contract law is not pursued given the scope of the Chapter.

80 For example, section 58 of the Sale of Goods Ordinance No 11, 1896 can be cited.
It must also be noted that the concerns as discussed under the Australia law above, such as the inappropriateness of the use of traditional government sponsored courts as the enforcers of unfair contract terms, the lack of technology neutrality of the existing law, especially in terms of the B2C cross-border setting, and the lack of specific attention to regulate OCAC are common drawbacks that can be seen under the existing Sri Lankan consumer protection legal framework.

3.3 Experience in other countries

3.3.1 The European Union’s legal position

The European Union and the EU countries follow a restrictive approach where a pre-dispute binding arbitration clause is not valid or is restricted, in order to protect online consumers’ rights and provide procedural protection for them.81 Online consumers who are not satisfied with the outcome of arbitration can seek redress from the national courts.

2. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly, in the context of a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.82

One such term is ‘(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or

81 Schiavetta, above n 34, 2.
imposing on him a burden of proof which, according to the applicable law, should lie with another party to the consumer.\textsuperscript{83}

In the EU, under the 93/13/EEC on Unfair Terms in Consumer Contracts, unfair contract terms are listed under one category and are identified as ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair.’ One such term is one that is (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.\textsuperscript{84} Item 1(q) of the Annex lists ‘excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions…’\textsuperscript{85} Hornle questions the meaning of the phrase; ‘arbitration not covered by legal provisions’ as it gives an unclear picture.\textsuperscript{85} In fact, under EU law, ‘Legislation in EU for example mandates that consumer contracts entered prior to a dispute containing an arbitration clause are automatically invalid as unfair.’\textsuperscript{86} Moreover, it is important to note that unfair commercial practices are dealt with under the Directive on Unfair Commercial Practices 2005.\textsuperscript{87} Distance Selling Directives which are applicable to online consumer contracts are subject to the 93 EU Unfair Consumer Directives.\textsuperscript{88}

3.3.2 The United States Legal Position

When US law is compared with that in Australia and the EU, it is evident that there is no specific statutory legal framework to test the fairness of unfair contract terms.\textsuperscript{89} Nonetheless, under US law it is established that, ‘consumer arbitration clauses are usually enforceable.’\textsuperscript{90} This trend has


\textsuperscript{85} ‘This could distinguish private arbitration from public forms of ‘arbitration’, such as small claims procedures or a statutory Ombudsman scheme. On the other hand it could refer to a distinction between arbitration based on the applicable law and arbitration where the arbitrator does not base his or her decision on strict law.’ Julia Hörnle, ‘Legal Controls on the use of arbitration clause in B2C e-commerce contracts’ (2008) Masaryk University Journal of Law and Technology <http://mujlt.law.muni.cz/storage/1234798613_sb_03_hornle.pdf> last accessed 20 September 2012.

\textsuperscript{86} ‘Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount.’ José Edgardo Muñoz-López, Derecho Int. Ildi. Bogotá (Colombia) (2009) 14 enero-junio de 163, 178.


been developed by the US judiciary and has allowed jurisprudence to be established in regard to the enforcement of OCAC by applying two major legal instruments: the Federal Arbitration Act (FAA) and Uniform Commercial Code. Section 2 of the Federal Arbitration Act is also important in this respect. Section 2 of the FAA stipulates the contractual defenses which can be used to determine the validity of consumer arbitration clauses. The enforcement of OCAC incorporated in the standard form online agreements has to be challenged under contractual defenses such as unconscionability. The existing legal and judicial approaches in the US show a pro arbitration policy. This policy is reflected in the broader interpretation given to section 2 of the FAA and the scope of the unconscionability and fairness defenses.

To understand the current US legal position, a good example is AT&T Mobility LLC v. Concepcion 563 U.S. (2011) which shows that section 2 of the FAA has the force to overturn a previous California’s Supreme Court’s decision of the Discovery Bank. Laster v. AT & Mobility LLC, 584 (2009) (In this Discovery Bank case, the court ruled that an arbitration clause waiving class action, embedded in a standard form contract is generally unconscionable). Hence it is evident that pro-consumer arbitration policy has become an overriding principle in the assessment of consumer arbitration clauses in the US. In fact, recent research highlights the unsettled nature of the judicial approach adopted by the US judiciary in terms of the mandatory element of OCA clauses; some decisions favour OCA and other cases adopt an online consumer protection approach, especially in cases where binding OCA clauses are embedded in B2C e-commerce contracts.

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93 ‘The overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.’ AT&T Mobility LLC v. Concepcion 563 U.S. (2011) 9 <http://www.supremecourt.gov/opinions/10pdf/09-893.pdf> last accessed 05 September 2011.

The other element is the use of contractual defenses for challenging the validity of online consumer arbitration clauses. Section 2-302 of the Uniform Commercial Code regulates the fairness of contractual terms by introducing the unconscionable test. Accordingly, under the existing legal framework, OCAC are valid as long as they comply with principles of unconscionability and fairness. The court has to decide the unconscionable test by looking at the circumstances of each case that the judiciary thinks unconscionable, since there is a lack of definition of this test or a set of specific legal principles to decide the validity of such a clause.

The test of unconscionability therefore depends on the circumstances of the cases and judicial discretion. There are identified reasons for which the court may evaluate each case and decide the validity of such a clause. Reasons that can lead to B2C contractual terms being regarded as invalid have been developed by the judiciary through judicial pronouncements. According to Garnett, there are two main grounds for challenging the validity of online arbitration agreements: lack of notice and loss of legal advantage. The information given to consumers needs to include cost effective dispute resolution mechanisms. For example, the court in the *Donna M. Kinkel, v. Cingular Wireless LLC* case concluded that:

In sum, we hold that under the circumstances of this case, the waiver on class actions is unconscionable. It is not unconscionable merely because it is contained in an arbitration clause. It is unconscionable because it is contained in a contract of adhesion that fails to inform the customer of the cost to her of arbitration, and that does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or an arbitral forum. We further hold that the offending clause is severable from the arbitration clause.

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However, the US law is also not immune from definitional issues with the unconscionability test. For example, the recent 5-4 split decision entered in the *AT&T Mobility LLC v. Concepcion* 563 U.S. (2011) case illustrates the difficulty in defining the possible boundaries of the unconscionability test as four judges had a different conclusion on the application of the existing law to the same factual situation.

As a result, both business people and consumers have been put in an uncertain situation as to whether arbitration is the appropriate course to follow, or to opt for avoidance of arbitration, relying on state laws or judicial decisions which preserve access to the court through class action or individual cases. Ponte has examined the uncertainty created by the judicial pronouncement in terms of the application of unconscionability and public policy as a result of following different outcomes of judicial pronouncements in regard to these contractual grounds. As a solution to filling the lack of minimum standards for dispute resolution clauses embedded in electronic standard form contracts, this author has developed a set of minimum standards for business to follow when incorporating dispute resolution clauses in electronic standard form contracts, such as clickwrap agreements.\(^\text{100}\)

In contrast, other countries show a trend towards using statutory and regulatory frameworks for the regulation of unfair terms embedded in both offline and online standard form contracts. These are countries such as Australia, where statutory principles are embedded in the regulation of unfair terms embedded in standard form contracts with a ‘grey list’. The UK meanwhile has two mechanisms: one dealing with terms which are related to contractual liability and unfair terms with the broader scope of adopting a ‘grey list’, and a ‘black list’ of unfair terms in a legislative and regulatory framework. Sri Lanka has a framework of exclusion and a limitation of liability-related contractual framework within a legislative framework, which requires at least a ‘grey list’ and a ‘black list’. Overall, US courts enjoy much greater freedom to decide whether a particular contractual term incorporated in an online standard form contract is unconscionable than is found in the limited powers offered through legislative instruments in other countries, where for example, the judiciary in Australia under the CCA must look at the principles outlined in the Act when determining the fairness of a clause embedded in a standard form contract.

\(^{100}\) Ponte, above n 94. 30.
Most importantly, it should be noted that there is a growing demand in the US for a specific legal approach to pre-dispute binding arbitration clauses because of their unfair aspects for consumers. For example, the Arbitration Fairness Bills in 2011, that was brought in to amend the Federal Arbitration Act U.S. Code (Chapter I of title 9), can be cited as the latest attempt to ban binding pre-dispute consumer arbitration clauses.\textsuperscript{101} S 402 of the Bill stipulates that:

\begin{quote}
Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.\textsuperscript{102}
\end{quote}

One can argue that this specific amendment has been brought in to thwart the prevailing positive approach adopted by the US Supreme Court in regard to mandatory pre-dispute arbitration clauses, as they violate consumer rights against the powerful position of business people. Regardless of this view, it appears that the bill is designed to prevent only pre-dispute consumer arbitration clauses, not post-dispute B2C arbitration clauses. The intention to preserve post-dispute B2C arbitral clauses can be considered a positive move in favour of using OA for B2C e-commerce disputes as well. The interesting point is that the lack of will of the parliament seems to highlight the minimal effectiveness of banning pre-dispute online consumer arbitration clauses and the difficulty in stopping the evolving element of OCA in the broader e-commerce market.

Section 2 of the Bill shows some of the reasons behind this move and lists reasons in the following terms:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.


\textsuperscript{102} Ibid section 402 (a).
(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.\(^{103}\)

This Bill reflects the growing negative views of the use of mandatory arbitration for the resolution of B2C disputes, both offline and online, and attempts to ban only pre-dispute arbitration clauses. However, Varney challenges the rationale behind this legislative move in the following terms: ‘These bills are based on the assumption that litigation benefits consumers while arbitration does not. That assumption is wrong.’\(^{104}\) Varney asserts that, ‘Arbitration is a long-established, successful method of resolving disputes without having to take your case to court. It can help consumers resolve disputes with companies without the high costs and legal fees of a full-blown lawsuit.’\(^{105}\)

This 2011 Bill also has a limited purpose and it does not attempt to address issues which are associated with the due process element of OCA and enforcement-related issues. This is not about regulating the internet or broader e-commerce market, but about finding solutions through appropriate regulatory measures to overcome drawbacks as well as to strengthen the viability of online consumer arbitration as a viable dispute resolution mechanism for both online consumers and online business people. In fact, the US Supreme Court has the authority to determine the existence of OCAC rather than going through the intervention of the legislature. This could be perhaps because the Court is recognised as the best institution to remedy the unfair aspects of OCA and to enhance the online business environment, given that technological influence over dispute resolution mechanisms and changing online business activities and legislative involvement through legislative measures will not be suitable for addressing these issues.

If a similar situation arises in the EU and Australia, existing laws related to unfair standard form contract terms will be applicable.\(^{106}\) In view of this, it can be argued that the application of the

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\(^{103}\) Ibid section 2.


\(^{105}\) Varney, above n 104.

\(^{106}\) ‘The structure of sections 24 and 25 suggest that they are intended to apply to terms with asymmetrical effect only. It may be well be argued that the prohibition of participation in class proceedings is such a term: only the consumer is affected, the supplier will always be the respondent in such proceedings. If a challenge of the nature of that brought by the Concepcions arises under Australian law, it may be anticipated that it is these provisions that will be relied on.’ Paul Jammy, US Supreme
Australian law will depend on the interpretation of the scope of unfair contract terms as long as they are embedded in standard form contracts and satisfy the fairness test of the Act. It is also important to note that in comparing the US and the EU legal positions, it is noted that, ‘in the USA where companies see themselves more often than in Europe confronted with consumer (class) actions, the need to be able to exclude traditional courts is much more felt.’\(^\text{107}\) In contrast, the EU has adopted the approach of more consumer freedom\(^\text{108}\) and such pre-dispute mandatory consumer arbitration clauses can be found to be invalid under EU law\(^\text{109}\).

4. Institutional framework of both countries

It can be argued that there is a lack of effective institutional frameworks for specifically focusing on the enforcement of ODR outcomes delivered by private ODR providers by state-sponsored institutions in Australia. This argument is supported by exploring the Australian and Sri Lankan government sponsored courts, Australian Competition and Consumer Commission (ACCC)\(^\text{110}\), Australian Securities & Investment Commission (ASIC)\(^\text{111}\), International Consumer Protection and Enforcement Network (ICPEN)\(^\text{112}\) and the Sri Lankan Affairs Authority as enforcers of national consumer protection laws. The reasons behind this selection, among other considerations, are their increasing attention to the use of online technology for discharging their work, and the role they play in the protection of online consumers nationally and in the international context.

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\(^{109}\) ‘Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount.’ Muñoz-López, above 52.

\(^{110}\) Australian Securities & Investments Commission Act 2010 (Cth).


4.1 Australian institutional framework

4.1.1 Which tribunal is advocated by consumer protection laws?

A consumer who is not satisfied with the terms of a contract may take the matter to a tribunal under the consumer protection regulatory principles as discussed in chapters four and five. The legal position in relation to access to a tribunal or a court can be further elaborated by referring to the CCA as it is a binding authority compared to online consumer protection standards. The role of national court has been recognised as the major enforcer of B2C contractual terms in general and unfair contract terms embedded in the B2C standard form contracts under the CCA in particular.\textsuperscript{113} It provides discretionary power to courts that is reflected in the determination of the unfairness of a contract term and standard form contract.\textsuperscript{114}

Obviously, recognition of the access to courts through the unfair terms-related legal framework deserves a mention, as it has implications for the use of binding online consumer arbitration clauses. For example, Section 25(k) of the CCA stipulates, ‘a term that limits, or has the effect of limiting, one party’s right to sue another party.’ Importantly, this term encompass, ‘terms that require a consumer to bring legal proceedings in a foreign court may also be unfair.’\textsuperscript{115} In this sense, access to a court can be viewed as a protective mechanism for the development of the use of online consumer arbitration clauses, rather than as a barrier.

This developing trend does not contradict the overall intention of the consumer protection law which is embedded in Section 2 of the CCA: ‘The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.’ Thus, the role of the courts in regards to the determination of the fairness of contractual terms and the preservation of the right to access to courts is designed to protect vulnerable consumers against business people and to ensure the smooth functioning and development of a fair and competitive trading environment in Australia. Moreover, one can argue that the CCA has incorporated a presumption in terms of standard form contracts that could be considered a positive element to reduce the burden of court proceedings.\textsuperscript{116}

\begin{thebibliography}{9}
\bibitem{113} \textit{Competition and Consumer Act 2010} (Cth).
\bibitem{114} Ibid.
\bibitem{115} Australian Consumer Law, above n 25, 21.
\bibitem{116} Section 27 (1) of the \textit{Competition and Consumer Act 2010} (Cth) states that: ‘If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.’ \textit{Competition and Consumer Act 2010} (Cth).
\end{thebibliography}
However, legal position raises issues when it is applied to the B2C cross-border e-commerce setting. The first question is: can this access to court-related term be considered a barrier to the development of mandatory online consumer arbitration clauses in Australia? The answer depends on the interpretation that is given to the scope of this example, as this term is not considered mandatory in the CCA. Therefore, it can be argued that courts can decide the validity of online consumer arbitration clauses if they think it fair in the circumstances of each case, regardless of whether it is a binding online consumer arbitration clause that may deny the right of access to courts.

The second question is whether the court’s involvement will produce an effective outcome, especially in the enforcement of foreign judgments and foreign judgments based on arbitral wards delivered in the resolution of B2C cross-border e-commerce disputes. In general, the court’s inappropriateness as an effective redress mechanism in regards to B2C e-commerce disputes will remain unresolved in the future. For example, Justice Martin predicts that ‘the Australian legal system is generally perceived to be out of touch, expensive, slow, technical, complex, and in many respects incomprehensible. These are the areas of complaint which I think are most likely to be addressed over the next 12 years.’ In a similar vein, the Implementation Completion and Results Report under the Legal and Judicial Reform Project funded by the World Bank published in 2007 has recognised several deficiencies of the existing legal system of Sri Lanka. Some of these include outdated laws, access to justice, lack of technology and several deficiencies with regard to enforcement, and long delays in resolving disputes in both the courts and alternative dispute resolution mechanisms.

The growing recognition of the inappropriateness of the government-sponsored traditional courts for the resolution of B2C cross-border e-commerce disputes was reviewed in the previous chapter in general terms. The following section of this chapter focuses on its drawbacks, specifically focusing on enforcement of its decisions in the cross border setting. From an enforcement perspective, the consumer protection-related literature provides an appropriate example in this regard: ‘even if Australian consumer protection laws apply and an Australian


court has jurisdiction over an overseas trader, it may be too difficult and/or too expensive to enforce a judgment against a trader who has no assets in Australia.\textsuperscript{119} The other problematic aspect is the enforcement of courts’ judgments across jurisdictions which is reflected in the following judicial pronouncements.

4.1.2 Enforcement of judgments within Australia

Courts’ inappropriateness can be further outlined in regards to their effectiveness in the enforcement of their judgments and foreign judgments. Given the lack of Australian court cases on B2C e-commerce contracts, reference is made to the judicial response in terms of the enforcement of its judgments nationally and against foreign defendants, delivered in the resolution of Internet disputes in general. The cases referred to in the following section provide an insight into understanding the Australian courts’ inappropriateness in the cases where internet disputes are heard and decided, and a decision against a foreign defendant who has no physical presence in Australia is delivered. A similar situation can arguably result in the resolution of cases which are related to B2C cross-border e-commerce disputes by the Australian judiciary.

4.1.2.1 Enforcement of Australian Courts’ judgments against foreign defendants in Australia

As far as the enforcement of courts judgments against foreign defendants who have a presence in Australia is concerned, it is important to highlight the possibility of enforcement found in a judgment made by the Victorian Civil and Administrative Tribunal on standard form online contracts made within Australian jurisdiction. In this case, both parties to the dispute were domiciled in Australia. In this respect, \textit{Evagora v eBay Australia and New Zealand Pty Ltd},\textsuperscript{120} which was delivered by the Victorian Civil and Administrative Tribunal in the online auction context, is relevant. In this case, the plaintiff sued eBay, which has a presence in Australia and did not pursue the case against the defendant or the seller who was an overseas defendant and had no special connection with Australia. The court held eBay liable even though the plaintiff accepted electronically by pressing the ‘I accept’ button without reading the user agreement fully which contained disclaimers in favour of eBay.\textsuperscript{121} In this case, claiming jurisdiction and enforcing its final decision was effective due to the presence of parties in Australia.


\textsuperscript{120} \textit{Evagora v eBay Australia and New Zealand Pty Ltd} [2001] VCAT 49 (20 July 2001); see also Hand Book Victoria$^\textsuperscript{<http://www.lawhandbook.org.au/handbook/ch10s04s05.php#Ch97Se53371>}$ last accessed 16 September 2012.

\textsuperscript{121} See further, Kathleen L Harris, \textit{The Globalisation of the Consumer - How the Law is Responding}$^\textsuperscript{<http://www.ag.gov.au/Documents/BBKathleen%20Harris%203.pdf>}$ last accessed 16 September 2012.
4.1.2.2 Enforcement of Australian Courts’ judgments against overseas defendants

Given the lack of authorities in Sri Lanka in this regard, Australian literature and jurisprudence are discussed to highlight the problematic aspects of a foreign judgment enforcement-related legal framework. The recognition of the problematic nature of enforcement of Australian judgments against an overseas defendant in a case of internet dispute is reflected in both the related literature as well as by the Australian judiciary itself. For example, Garnett in his article entitled ‘Are foreign Internet infringers beyond the reach of the law?’ provides an analysis of *Macquarie Bank & Anor v Berg* and argues that the nature of enforcing a damages award in a situation where the defendant’s assets are not available in Australia is problematic.123

Another reason is that ‘some jurisdictions are notoriously reticent to recognise any foreign judgments.’124 In examining the drawbacks of the enforcement of the *Foreign Judgment Act* of 1991, Justices Einstein and Phipps argue that the enforcement of foreign judgments needs reform in order to be acceptable at present and in the future.125 Furthermore, Patterson argues that the *Foreign Judgments Act of 1991*, or common law principles of recognition and enforcement, are problematic on the basis of the lack of the recognition of consumer protection as a ground of indirect jurisdiction.126

Australian national courts also clearly accept the problematic nature of the enforcement of foreign judgments in cross-border Internet disputes. For example, part of the judgment of the Gutnick case includes: ‘Any rule adopted with respect to publication of defamatory matter on the Internet must eventually face the practical question concerning the enforceability of a judgment recovered in such proceedings.’127 The judiciary has recognised the difficulty in enforcing an injunction in the case of *ACCC v Chen* and *Macquarie Bank & Anor v Berg*.128 As far as the first one is concerned, the ‘effects’ test was applied for establishing jurisdiction over an overseas

123 Garnett, above n 122.
124 Ibid.
defendant. When issuing an injunction, the court focused on the fact that the alleged website activities had effects in the Australian jurisdiction. It is a positive development that Australian courts are in a position to prevent unlawful activities targeting Australians by issuing an injunction. The case is also important from a consumer protection perspective as courts are in a position to assess the alleged internet activities and grant an order which may be enforced to prevent foreign consumer protection law infringers within Australian territorial limits in the absence of cross-border arrangements for the enforcement of courts orders.

However, in the *Macquarie Bank & Anor v Berg* case, the issuance of an injunction was refused by applying national laws even though the disputed website could be accessed from the territory where a national court was located. This case highlights the fact that access to the alleged website was not sufficient to establish the jurisdiction over a foreign defendant. In addition, this decision seems to contradict the legal position of the Gutnick case, where access to a website from the Victorian state was sufficient to establish personal jurisdiction over a foreign defendant. Thus outcomes of the Internet cases seem to rest on the ability of individual judges to establish principles for individual cases. In a sense, each case is a test case and is fraught with more uncertainty than necessary.

In the Internet Defamation In-house Counsel Internet Defamation document, cases such as *Dow Jones & Company Inc v Gutnick, Moir & Datamation v Gladman* and *Ryan v Premachandran* which are related to online defamation, are analysed and pertinent questions are raised about how to enforce a court judgment in a case where the defendant is domiciled outside Australia. It is noted that ‘Such cases may provide additional layers of complexity, including jurisdictional issues concerning enforcement of orders and judgments in overseas jurisdictions…’

As far as judicial pronouncements in Australia are concerned in regard to cross-border internet-related cases where a foreign defendant is involved, it is useful to review three cases: *Dow Jones & Company Inc v Gutnick* (2002), *Macquarie Bank and Anor v Berg* (1999) and *Australian

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130 ACCC v Chen (2003) FCA 897; Harris above n 121.
131 Harris, above n 118.
133 Jaques, above n 129.
135 Ibid.
Competition & Consumer Commission v Chen (2002). All involved foreign defendants and disputes having a connection to the Internet from Australian territorial jurisdiction. In the absence of a legal instrument for determining ‘location’ in terms of Internet disputes, these cases indicate that it is left to the court to determine location on a case by case basis. This seems an inefficient way of resolving jurisdiction-related issues which exist in the area of the resolution of Internet disputes and can lead to inconsistencies of judgments. In fact, these cases have produced different outcomes.

In the first case, Gutnick filed a defamatory case in the Victorian court on the basis of the Victorians being able to read online the alleged defamatory materials about him by the defendant, Dow, a resident in the US. The Australian court accepted its jurisdiction over the matter by disregarding the arguments of the defendant as to the proof of an Australian court’s lack of jurisdiction to hear this case. By claiming jurisdiction, the Australian court applied the traditional jurisdictional and territorial defamation law in determining where the damage occurred or the tort was committed. The ‘location’ was a determining factor in establishing tort, since uploaded materials could be accessed in Victoria. Victoria was deemed the ‘location’ despite the material originating from America.

However, although in this case the ‘location’ was decided, the determination of location was not defined in any permanent way and so the different aspects of access to the website seem to be problematic in terms of definition in the international context. For example, the upload (where alleged defamatory materials are uploaded) and download (where alleged defamatory materials are downloaded) argument are still not settled in a formal legal instrument. Furthermore, the determination of place of publication entails another problem, that is, the multiple publication rule in Australia, as opposed to the single publication rule in the USA. Difficulties in finding the location of consumers are also a concerning factor given the complexities of technology, and as a result ‘a business would never know the law and forum to which it subjects itself.’

140 Ibid.
141 Garnett, above n 122, 108.
In view of this discussion, it is important to note that it is highly likely that national courts in almost all countries will encounter difficulties in enforcing foreign judgments of B2C e-commerce disputes across borders. Unfortunately there is a lack of committed approach for achieving a well developed legal framework for the enforcement of foreign judgments nationally and internationally. As such, the court’s inappropriateness as an effective redress mechanism in regards to B2C cross border e-commerce disputes will remain unresolved in the future as predicted by Justice Martin unless appropriate reforms are brought to the existing legal and institutional framework. Thus, reliance on the government-sponsored courts as the major enforcer of online consumer rights may not produce affirmative results as expected by the legislature.

4.1.3 ACCC

The ACCC has been established under the provisions of the *Competition and Consumer Act* 2010, with great powers to protect consumer rights and to operate as an enforcer of the consumer rights enshrined under the provisions of the CCA. It can also play an important role in protecting consumers against unfair contract terms embedded in B2C e-commerce contracts and in protecting online consumers from misleading, deceptive and unconscionable conduct of online business people under the CCA.

In a report prepared after surveying 1000 websites the ACCC notes that ‘The ACCC is responding to the concerns raised about online terms and conditions.’ Their responses include: ‘running an awareness campaign for business’, ‘implementing a consumer education campaign’, ‘monitoring websites’ and ‘conducting further investigations and taking possible future enforcement action in appropriate cases.’ Most importantly, the ACCC has the power to initiate court proceedings to challenge the validity of unfair B2C contract terms embedded in standard form contracts. In the recent case of the *Australian Competition and Consumer Commission v Google Inc*, the ACCC proved successfully that Google Inc violated Section 52 of *Trade Practices Act* 1974 (Cth). These precedents provide ample evidence for the ACCC playing an active role in bringing unfair OCAC to the attention of the courts.

144 *Competition and Consumer Act 2010* (Cth).
146 Ibid 20.
147 *Competition and Consumer Act 2010* (Cth).
148 *Australian Competition and Consumer Commission v Google Inc* [2012] FCAFC 49: Referring to the *Trade Practices Act* 1974 (Cth), the court noted that ‘The Act has now been replaced by the introduction of the Competition and Consumer Act
4.1.4 ASIC

ASIC is recognised as ‘Australia’s corporate, markets and financial services regulator’ and enforcer. ASIC protects the rights of online financial consumers under various laws by providing valuable information which is important for them to engage in safe and secure financial activities.

ASIC has not only the important power to sue over unfair contract terms, but also has the ‘powers to protect consumers against misleading or deceptive and unconscionable conduct affecting all financial products and services, including credit’ by online business people, in their respective powers conferred on this institution for the protection of consumers. This institution can play an active role regarding business people located within Australia, but the question arises as to whether their role will be effective in relation to online business and financial service providers that are located outside Australia and that have no connection with Australia except via online business through the Internet. Of course they can sue wrongdoers before the national court in Australia so as to protect the rights of Australian online consumers, but, in a case where a court delivers its judgment in favour of these online consumers, enforcement of such decisions will be problematic due to the cross-border element.

4.1.5 ICPEN

In the international context, there are existing institutional mechanisms such as the International Consumer Protection and Enforcement Network (ICPEN) which could be considered promising developments to its cross-border enforcement element, which suits the B2C e-
commerce cross-border environment. The ICPEN to which the Australian Competition and Consumer Commission (ACCC) belongs, could be developed to monitor the enforcement of the guidelines, but also as an effective enforcement mechanism for OCAA, especially in the B2C cross-border e-commerce context. This organisation has an international dimension which can be considered a significant strength for the B2C cross-border e-commerce setting. It is composed of an international network consisting of consumer protection authorities from almost 40 countries to ‘Protect consumers’ economic interests around the world’, ‘Share information about cross-border commercial activities that may affect consumer welfare’, and ‘Encourage global cooperation among law enforcement agencies.’

The question as to how to trace the off show online business people has been addressed in the coordinated framework of state-sponsored consumer protection agencies of some countries. If there is a complaint against overseas traders, consumers are offered the following procedure to be adopted:

Lodge a complaint with Econsumer. An initiative of the International Consumer Protection and Enforcement Network (ICPEN), E-consumer receives online shopping complaints relating to overseas traders.

Your report will go into a complaints database shared with consumer protection agencies in other countries, who can use it to investigate companies and individuals, and uncover scams. There is no guarantee that an international agency will follow up individual complaints—this will depend on its policies.

Contact the ACCC or the consumer protection authority in the seller’s country. They can provide you with information about your rights and how you can enforce them, and in some circumstances may be able to investigate.

However, the question is whether there are any arrangements specifically tailored to cross-border enforcement of OCAC. The possibility of using this mechanism is limited to the enforcement of OCAA delivered by private ODR providers. It appears that the uncertainty of this mechanism has been acknowledged by the ACCC as well, being indicated by the wording

154 Ibid.
that, ‘there is no guarantee that an international agency will follow up individual complaints—this will depend on its policies.’

4.2 Sri Lankan Consumer Affairs Authority

In Sri Lanka the Consumer Affairs Authority is established under the provisions of the CAAA, which is the main government-sponsored institution in operation for the protection of consumers. This Act has been promulgated to ‘provide for the establishment of the consumer affairs authority; for the promotion of effective competition and the protection of consumers; for the regulation of internal trade; for the establishment of a consumer affairs council.’ Accordingly, its Preamble states its policy basis, which underpinned the promulgation of this Act, as follows: ‘It is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade and the prices of goods and services and to protect traders and manufacturers against unfair trade practices and restrictive trade practices.’ The following objectives of the authority are embedded in section 7 of the CAAA:

(a) to protect consumers against the marketing of goods or the provision of services which are hazardous to life and property of consumers;
(b) to protect consumers against unfair trade practices and guarantee that consumers interest shall be given due consideration;
(c) to ensure that wherever possible consumers have adequate access to goods and services at competitive prices; and
(d) to seek redress against unfair trade practices, restrictive trade practices or any other forms of exploitation of consumers by traders.

In light of the above provisions it can be argued that the other important authority is the possibility for the council to bring actions on behalf of consumers in cases where consumers have difficulty in bringing their cases to the attention of national courts, and it is important for the council to move in this direction given the lack of class action in Sri Lanka. This can overcome the lack of effective dispute resolution avenues, or the fact that existing ones cannot be afforded, especially in B2C cross-border e-commerce disputes.

156 Ibid.
158 Ibid.
159 Ibid section 7.
Under Section 8 of the Act, the authority has been entrusted to control or eliminate ‘abuse of a dominant position with regard to domestic trade or economic development within the market or in a substantial part of the market’; to ‘investigate or inquire into anti-competitive practices and abuse of a dominant position’; to ‘promote and protect the rights and interests of consumers, purchasers and other users of goods and services in respect of the price, availability and quality of such goods and services and the variety supplied’; to ‘carry out investigations and inquiries, in relation to any matter specified in this Act’; to ‘promote the exchange of information relating to market conditions and consumer affairs with other institutions’ and to ‘do all such other acts as may be necessary for attainment of the objects of the Authority and for the effective discharge of the functions of such Authority.’160 This authority has broad powers to take effective measures for the protection of consumers who make online purchases or receive services either offline or online. This authority in combination with the ability to ‘promote the exchange of information relating to market conditions and consumer affairs with other institutions’161 can be utilised for connecting to international institutions such as ICPEN or OECD for the promotion and protection of online consumer rights.

While there is the lack of a well developed institutional framework for the protection of consumers from being exposed to exploitation by unscrupulous and powerful business people, the Consumer Affairs Authority and the national court in Sri Lanka are the main government-sponsored authorities to deal with consumer protection. As far as the role of the Consumer Affairs Authority in Sri Lanka is concerned, law makers have not empowered the Consumer Affairs Authority in terms of the protection of online consumers engaging in cross-border e-commerce activities.

Thus the government-sponsored institutions, other than government-sponsored courts, of both countries discussed in this section do not provide effective dispute resolution mechanisms for the resolution of B2C e-commerce disputes or enforcement of ODR outcomes delivered by private ODR providers. The next section reviews and discusses in detail the viability of the government-sponsored courts both as a forum for the resolution of B2C cross-border e-commerce disputes and the enforcement of foreign judgments.

160 Consumer Affairs Authority Act. section 8.
161 Ibid section 8(k).
5. Concluding remarks

In view of the overall discussion, it is reasonable to conclude that there is a lack of harmonised approach to the regulation of the enforcement of consumer arbitration clauses, and that the application of the existing laws in the cross-border B2C context could become problematic, as they are not tailored to the enforcement of online cross-border B2C arbitration clauses and lack the use of technologically equipped enforcement mechanisms. The reasons for this could be said to be related to the complex nature of these contractual arrangements, the difficulty of protecting online consumer rights and business interests in the cross-border e-commerce context, and the complex and changing e-commerce market driven by various technological tools. This lack of clarity is not desirable either for online consumers or for online businesspeople, who cannot adjust or prepare their online agreements accordingly. The lack of specific and targeted regulatory approaches can sustain a situation which leaves the dominant players in the electronic commerce market free to develop models which favour them at the expense of vulnerable online consumers.

As far as the Australian legal approach is concerned, it is also important to note that the online consumer arbitration clauses embedded in B2C e-commerce disputes can be challenged under the Australian CCA. This can be done through two avenues, as the Australian legal framework in regards to OCAC has two distinct statutory approaches to determine the validity of B2C contractual terms. The first relates to unfair contract terms which exist in standard form contracts and the second is the application of statutory unconscionability-related legal provisions. The CCA shows the commitment of the Australian government to addressing the rights of online consumers. Unlike the Australian legal developments, the Sri Lankan Consumer Affairs Authority Act is not updated in line with international legal developments or international online market realities. As such, the Sri Lankan legal framework shows a total neglect of the area of OCAC and this has resulted in leaving a legal vacuum that needs to be addressed in order to strengthen the enforcement of OCAC. Therefore it is reasonable to note that the existing legal frameworks of both countries as discussed in this chapter need to be reformed in line with the changes taking place in the B2C cross-border e-commerce market and the online dispute resolution mechanisms operated by the private entities.

The contribution of the government-sponsored enforcement mechanisms to the protection of online consumers who are engaged in cross-border e-commerce transactions is not productive
when their contribution is assessed in light of the enforcement of OCAA delivered by private OCA providers. The two major reasons are: they are mainly limited to the national boundaries, and they lack technology neutrality. In fact, some progress has been achieved as far as the Australian ACCC is concerned, as it has been linked to the ICPEN, which is an international organisation. This cooperative approach for the protection of online consumers is promising for the future, even though great outcomes have not been produced in relation to the enforcement of OCAA. In light of the positive developments identified in this chapter, this thesis searches for a better cooperative approach, which can link both government-sponsored institutions and private OCA mechanisms, in order to make OCA a viable dispute resolution method from both regulatory and institutional perspectives. Accordingly, the next two chapters focus on the possibility of using the ICALF and a government-sponsored eCourt room for the enforcement of OCAA.
1. Introduction

The previous chapter focused on the effectiveness of the Australian and Sri Lankan consumer protection laws together with the institutional framework applicable to the enforceability of online consumer arbitration clauses. The purpose of this chapter is to address the research question: Is there merit in embedding the existing international commercial arbitration–related legal framework to strengthen the enforcement of OCAA delivered by OA mechanisms adopted by the private OCA providers from a regulatory perspective? This chapter argues that there are some merits of the international commercial arbitration legal framework (ICALF) which might be considered positive strengths to move forward for the development of ICALF as an appropriate legal foundation for the enforcement of OCAA through a government-sponsored eCourt room. This argument is supported by addressing major legal principles embedded in the ICALF in relation to the enforcement of foreign arbitral awards.

Accordingly, this chapter is structured in the following manner. With the brief introduction in this section, the second and third sections outline the scope of the ICALF relevant to the discussion of this chapter and the rationale behind the examination of the ICALF respectively. The fourth section examines the legal principles embedded in the following areas of the ICALF in light of their application to the enforceability of OCAA. They are: definition of arbitration, location of arbitration, reservations on the grounds of reciprocity and commerce, formalities of the arbitration agreement and arbitration award, awards is not being binding on the parties, and arbitrability and public policy. In addition, application of evidentiary principles in relation to the enforcement of foreign arbitral awards is discussed. The fifth section concludes the chapter.

2. International commercial arbitration legal framework

In Australia there is already a body of established law which governs alternative dispute resolution, including international commercial arbitration. Each state and territory possesses commercial arbitration acts which deal with arbitration within each state, and the International
Arbitration Act of 1974 (Cth) (IAA)\(^1\) which deals with international arbitration. The development of online commercial arbitration within Australia is also supported by the recent International Arbitration Amendment Act 2010 (Cth)\(^2\) which introduced several amendments to the existing one, such as removal of the requirement to taking leave of the court prior to the enforcement of a foreign award.\(^3\) The amendments were also brought in line with the amendments to the 1985 UNCITRAL Model Law on International Commercial Arbitration in 2006,\(^4\) enabling contracting parties to make an International arbitration agreement in electronic form as well.\(^5\) In Sri Lanka, both domestic and international arbitration have been incorporated into the Arbitration Act of 1995 (AA)\(^6\) and there has been no amendment introduced since then.

In common, both Australia and Sri Lanka are parties to several arbitration and electronic commerce-related international legal instruments. The following international legal instruments are referred to in this discussion. The examination of the international aspect of online arbitration awards is primarily directed at the international arbitration related legal framework which is mainly based on the New York Convention of 1958 (NYC)\(^7\) and the relevant articles of the UNCITRAL Model Law on International Commercial Arbitration of 1985,\(^8\) the UNCITRAL Model Law on Electronic Commerce of 1996,\(^9\) the United Nation Convention on the Use of Electronic Communications in International Contracts of 2005,\(^10\) and the UNCITRAL Model Law on Electronic Signature of 2001.\(^11\) NYC has been recognised as an international legal document by 145 countries for the recognition and enforcement of foreign arbitral awards.\(^12\)

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1. International Arbitration Act 1974 (Cth).
2. International Arbitration Amendment Act No 97 2010 (Cth).
5. International Arbitration Amendment Act No 97 of 2010 (Cth) 114.
3. The Rationale behind the examination of the ICALF

Before moving to the discussion of major areas of the ICALF, it is important to outline several situations which suggest the need for an appropriate legal framework such as ICALF for strengthening the enforcement of OCAA delivered by private online consumer arbitration providers.

The previous chapter discussed the use of binding OCA for the resolution of B2C e-commerce disputes, the lack of appropriate legal mechanisms developed so far for the regulation of ODR, and the lack of effective enforcement mechanisms within the private sector as well as a supportive enforcement mechanisms from the government for OCAA. These concerns cannot be left unresolved if OA is to be developed as a viable dispute resolution mechanism for B2C e-commerce disputes. The major negative aspect of this trend is that those mechanisms can be used to favour online business people while disadvantaging online consumers. There is no government-sponsored legal framework for the enforcement of OCAA.

Unfortunately, it appears that adequate attention has not been paid to strengthening OCAA through the existing ICALF. As far as the literature is reviewed, referring to Article V of the Convention, Stewart and Matthews have given a commentary about the impact of Article V of the NYC, where defenses to enforcement of foreign arbitral awards are embedded so that it operates as a limit to the general goal of the NYC.¹³ The reason given is ‘because it gives power back to the national courts to decide whether they should be set aside... once in a national court, the loosing party may bring up defences to the enforcement of awards that are available under the national law.’¹⁴ This comment of Stewart and Matthews is based on the entire article, in which grounds for refusal of recognition and enforcement have been incorporated. More specifically they have concentrated on involvement of national courts in which ‘the losing party brings up defences to the enforcement of awards that are available under the national court.’¹⁵

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¹⁴ Ibid 1132-1133.
¹⁵ Ibid.
Possible reasons for this trend could include the complex nature of the cyber world, national consumer protection laws, and the nature of the international commercial arbitration-related legal framework, which is predominantly designed for business-to-business settings. The question is whether it is appropriate to discard the use of ICALF from using it for strengthening the enforcement of OCAA which lacks such an effective mechanism that combines both private arbitration and public courts. In this context the use of ICALF could arguably be considered a law that can provide a legal foundation for combining both private OCA providers and government sponsored courts, especially through the enforcement of OCAA by the government-sponsored courts.

The other important aspect of this situation is the developments taking place in the United States and Canada, which favour the use of arbitration for the resolution of consumer disputes. The application of the United States Federal Arbitration Act (FAA) has been expanded by the judiciary, allowing both offline and online consumer arbitration to be enforced through the FAA. As Saumier notes:

> The U.S. Supreme Court has consistently held that arbitration clauses in interstate consumer contracts are subject to the U.S. Federal Arbitration Act, which does not allow for different treatment according to the nature of the contract.

As a consequence of this liberal policy approach in favor of the development of consumer arbitration, both offline and online consumer arbitration have gained legal recognition. Indeed, the court has retained its ability to question arbitration clauses if they are unconscionable or unfair, thereby playing a supportive as well as a supervisory role. Most importantly, it seems that this legal position has been well established through a series of cases which are based on issues associated with online B2C e-commerce arbitration agreements. In view of this trend in OCA, it is evident that the US courts have played a supportive and supervisory role by adopting a liberal approach towards the FAA. Moreover, this development can also be considered as a

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significant move because this approach could be extended to international cross-border B2C e-commerce disputes as well. In this broader context it is reasonable to consider not only the ICALF but also the NYC for the enforcement of OCAA.

In addition, according to international commercial arbitration scholars, enforceability of arbitration awards has been recognised as an important element of arbitration. Shijian Mo notes that: ‘The enforceability of an arbitral award represents the major difference between arbitration and other non-judicial means of dispute settlement, such as negotiation and mediation.’\footnote{John Shijian Mo, \textit{Arbitration Law in China} (Sweet & Maxwell Asia, 2001) 401.} A detailed explanation was provided in the first chapter of the thesis. Accordingly, this important aspect of arbitration can equally be applied to the OCA mechanism as well, because of its similar characteristics to offline arbitration.

Nonetheless, the question still remains as to how far this mechanism could be expanded, given a lack of commitment from other countries to expand the scope of their ICALFs in regards to OCAA. However, there are signs of the spread of the US legal position on OCA into other jurisdictions. For example, the Canadian Supreme Court has reflected this trend and the involvement of the judiciary in this expanding process.\footnote{Geneviève Saumier, ‘Consumer Arbitration in the Evolving Canadian Landscape’ (2009) 113 (4) \textit{Penn State Law Review} 1203, 1204 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636402> last accessed 15 October 2010; see Shelley McGill, ‘Consumer Arbitration Clause Enforcement: A Balanced Legislative Response’ (2010) 47 (3) \textit{American Business Law Journal} <http://onlinelibrary.wiley.com/doi/10.1111/j.1744-1714.2010.01099.x/abstract> last accessed 15 October 2010.} This chapter focuses on the Australian and the Sri Lankan ICALF to assess whether there are any positive trends that can be used for support of the enforcement of OCAA.

4. Major areas of the ICALF applicable to the enforceability of OCAA

4.1 Definitions of Arbitration

At the outset it is important to note the view of ODR scholars such as Wahab, who claims that ‘many national arbitration laws and institutional rules do not exclude e-arbitration.’\footnote{Mohamed S. Abdel Wahab, ‘ODR and E-Arbitration Trends and Changes’ in Mohamed S. Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), \textit{Online Dispute Resolution: Theory and Practice a Treatise on Technology and Dispute Resolution} (eleven International Publishing, 2012) 392.} This view is reflected in the ICALF. Evidence can be found in both international arbitration-related legal instruments and international arbitration laws promulgated by arbitration-friendly nations in the world.
As far as the ICALFs are concerned, there is no clear definition of either offline arbitration or online arbitration in the international arbitration related legal frameworks. The first issue is whether the general definition of arbitration in ICALF can accommodate online consumer arbitration. Before moving to the legal response of ICALF, it is important to consider the definition adopted in regards to OCA. In principle, online arbitration has the same meaning as that recognised in the offline context. In the offline context it is well established that arbitration is a process in which a third party determines a dispute, after observing due process requirements, and delivers a final decision which is binding on both parties to the arbitration agreement. In the online context all these attributes are present, and additionally the medium of the arbitral proceeding from beginning to end, or most of the proceedings, can take place via technological means such as email, the Internet and related communication techniques.23

In view of this scope of online arbitration, it needs to be considered whether ICALF has embraced the technological aspect of arbitration. It is evident that there are no specific provisions referring to the online arbitration. However, it can be argued that provisions which define arbitration reflect the possibility of incorporating OCA into the ICALF, as there is the broader scope of the definition adopted for arbitration. For example, UNCITRAL Model Law Article 2 (a) stipulates that ‘(a)‘arbitration’ means any arbitration whether or not administered by a permanent arbitral institution.’24 The Australian IAA does not contain a definition of arbitration. In cases where Model law is applied, the definition of the Model Law can be applied, as it is part of the IAA. The Sri Lankan AA also states that ‘arbitration’ means any arbitration whether or not administered by a permanent arbitral institution.’25 From a definitional point of view, OCA can be incorporated into the phrase of ‘any arbitration’, as there is no specific limit as to whether arbitration is limited to paper-based arbitration. It means this definition can include even arbitration conducted via electronic means, either partially or entirely.


4.2 Reciprocity

It is equally relevant to examine the legal position in regard to the reciprocity principle embedded in the NYC, and its impact on the enforcement of OCAA. The reciprocity principle that has been incorporated in Article I (3) of the Convention stipulates the following:

When signing, ratifying or acceding to the Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State.  

This article gives the authority to the parties to the NYC, ‘which gives reciprocity access to 143 countries in the world for the recognition and enforcement of foreign arbitral awards,’ to limit the enforcement of foreign arbitral awards only to those that are made in another contracting state. Accordingly, under this provision contracting states have been given an option to follow either a limited approach or a liberal approach in terms of the enforcement of foreign arbitral awards. If a limited approach is adopted, this legal position can produce negative results as far as the application of NYC for the enforcement of OCAA is concerned. Two negative results can be highlighted. First, national courts of contracting parties to the convention can simply reject the recognition and enforcement of international foreign arbitral awards by stating the fact that the foreign award is from a non-contracting state. Second, this legal position gives an opportunity for the losing party to raise this element as a defense against the enforcement of an international arbitration award. Thus this requirement can operate as a limitation to the enforcement of international arbitral awards either offline or online.

However, there are countries that follow a liberal approach. For example, neither country under review has adopted the ‘reciprocity’ reservation. As a result, ICALF in both countries has given a wide recognition to the NYC in terms of the recognition and enforcement of foreign arbitral awards. This position is reflected in the legal provisions of their ICALFs. The liberal approach in terms of reciprocity responds positively to the philosophy of the arbitration, where parties to an arbitration agreement are free to decide the place of arbitration. This approach

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26 NYC, above n 7.
27 Onyema, above n 12.
should be helpful to the online cross-border context, as parties to an OCA can decide the location of arbitration and also the residences of the parties can be taken into consideration, as even though B2C e-commerce takes place online, the seller and the consumer have places of residence or business. It is recommended that a liberal approach such as adopted by Australia and Sri Lanka, should be adopted by other countries that follow a restrictive approach to the NYC through the use of its reciprocity element.

4.3 Location of arbitration

The location of arbitration is an important requirement for the recognition and enforcement of foreign arbitral awards under the ICALF. The following legal provision can be explored in this respect. The NYC stipulates that: ‘The Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.’

The corresponding provisions of the IAA are:

\[Foreign\text{ }award\text{ }\] means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.\]

There are several provisions of the ICALF which focus on the requirement of the place where arbitration takes place or the place where an arbitral award is made. This situation can be highlighted by referring to the IAA, as the Sri Lankan AA also contains similar provisions. In a case where the validity of an arbitration agreement is challenged on the basis of its validity at the enforcement stage of a foreign arbitral award, the validity of the agreement is determined based on a law agreed to by the parties to the arbitration agreement, or in the absence of such an agreement by the parties, under the law where the arbitration award is made. The other situation is related to a challenge over an arbitral award, based on the fact that composing the arbitral tribunal or conducting the arbitral procedure has not been accomplished as agreed by

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30 NYC, above n 7, Article I (1).
31 International Arbitration Act 1974, section 3 and section 8 (4) of the International Arbitration Act 1974 stipulates that ‘Where:

(a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and
(b) the country in which the award was made is not, at that time, a Convention country;

this section does not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.’

Part Three section 3: ‘Convention country means a country (other than Australia) that is a Contracting State within the meaning of the Convention.’ International Arbitration Act 1974.

32 Ibid.
parties. In the absence of such an agreement, the award debtor has to show that the arbitral composition or arbitral procedure has not been in compliance with the law of the country where the arbitration takes place.

In the offline context, the location of the arbitration where an arbitral award is issued is not difficult, given the possibility of identifying the physical borders of countries. IAA refers to countries other than the award enforcement country. In contrast, both NYC and Sri Lankan AA have adopted a wider approach. Article I of the NYC arguably allows arbitral awards delivered in any country other than the enforcing country. In a similar vein, the Sri Lankan AA defines a foreign arbitral award as ‘an award made in an arbitration conducted outside Sri Lanka.’ In addition, section 33 of the AA in Sri Lanka states that,

A foreign arbitral award irrespective of the country to which it was made, shall subject to the provisions of section ii be recognized as binding and, upon application by a party under section 31 to the High Court, be enforced by filing the award in accordance with the provisions of that section.

This provision has been recognised as a provision that can enforce arbitral awards which emanate from any country of the world. This position can be further supported by adducing the views of Wijayatilaka who notes that, ‘The Sri Lankan law has gone one step further and not limited the recognition of awards to arbitral awards made only in contracting countries but has opened its doors to all foreign arbitral awards irrespective of the country in which it was made.’

However, this broader approach adopted in both NYC and AA has limitations. For example, section 34 (1) (a) (i) of the AA refers to ‘under the law of the country where the award was made,’ and 34 (1) (a) (iv) of the AA, notes that the composition of an arbitral tribunal or the arbitral procedure is not ‘in accordance with the law of the country where the arbitration took place,’ where the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement between parties, and if there is no such agreement.

33 Ibid.
34 Ibid.
36 Ibid.
In the online context the next issue between offline and online arbitration is the place where arbitration actually takes place, given the difficulty in demarcating a physical location. There are some writers who highlight the difficulty of establishing the location of online arbitration. For instance, considering article I (1) of the NYC, Herboczková points out that, ‘It is very difficult to determine a seat of online arbitration. Under present national and international law the arbitration award has a substantial link with the jurisdiction in which it is made.’

One answer is that this ‘territorial principle’ can be overcome by choosing the place where arbitration takes place. Then the next question is: where is that place? Is it a country or a website on which online arbitration takes place via electronic tools? It can be argued that this requirement is not a barrier to the enforcement of OCAA. This argument can be supported through the offline and online arbitration-related literature. Theorists of localisation hold the view that an arbitral law of the place where arbitration is conducted is the procedural law of the arbitral proceedings. The theory of delocalisation focuses on the fact that the contractual basis of ICA is relevant, and not the location of arbitration for enforcement purposes of ICA awards.

Lew, Mistelis and Kroll argue that electronic online arbitration may be considered as a form of delocalised arbitration, since ‘in such arbitrations there are no physical hearings; the tribunal may have no physical or legal seat.’

Gaillard highlights three competing philosophies in relation to arbitration, out of which the second one can be cited, given its relevance to the current discussion:

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39 Jana Herboczková, Certain Aspects of Online Arbitration <www.law.muni.cz/edicni/dp08/files/pdf/mezinaro/herboczkova.pdf> last accessed 17 September 2012; Kuner notes that, ‘difficulties might arise with respect to the determination of the place of arbitration if the proceedings were conducted online.’ Kuner, above n 28.

40 Herboczková, above n 39: ‘The New York Convention provides that an award is considered to be made at the seat of the arbitration. The Model Law on Arbitration provides in its Article 31(3) that an award ‘shall state its date and place. The award shall be deemed to have been made at that place.’ This presumption applies regardless of where the hearings were held or where the award was signed and delivered by the tribunal.’

41 ‘In its most simplistic form, delocalization involves freeing an international arbitration from the constraints of the lex loci arbitri (procedural law of the place of arbitration), thereby leaving it to ‘float’ free of national jurisdiction, irrespective of where the arbitration takes place.’ Pippa Read, ‘Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium’ (1999) 10 (2) The American Review of International Arbitration <http://www.jurispub.com/cart.php?m=product_detail&p=11721> last accessed 17 September 2012: ‘The delocalization theory is an attractive one from the perspective of both arbitrators and parties to an arbitration. Very often the place of arbitration is selected for reasons of convenience or neutrality, with neither party desiring to submit the arbitration to the procedural norms of that forum, especially those that permit the intervention of the local court system. In addition, failure to comply with the local procedural law could result in the final award being set aside by a local court, which may jeopardize any chances of enforcement elsewhere. Delocalization of the arbitral process and the final award would mean that parties remain unaffected by unforeseen and undesired local procedural law, and do not face the risk that non-compliance with such law would render their award unenforceable.’

The second representation has operated a Copernican revolution vis-à-vis the first, in that it looks at the whole arbitral process through the end result, namely the fact that the award will be recognized in a number of countries if it meets the prescribed conditions in those countries. In that vision, the seat does not matter so much, the place or places of enforcement of the award do. In recognizing an award that meets certain criteria, the legal order of the place of enforcement legitimizes, a posteriori, the whole arbitral process.\(^{43}\)

Referring to the Swiss arbitration-related law, the following statement has been made:

It is not necessary that any person involved in the arbitration actually lives or works at the seat of arbitration, or that anyone has had any connection with it or even ever visited it. Nor is it necessary that any part of the arbitration proceedings - such as the hearings and meetings - actually takes place there. The seat simply functions as the jurisdiction that provides the legal framework for the arbitration.\(^{44}\)

In the online arbitration setting, there are scholars such as Stewart and Matthews who argue that the site of the seat of arbitration does not hinder the enforcement of online arbitration awards via the NYC.\(^{45}\) Tao argues that ‘If the theory that the website of an arbitration institution or the place of registration of the online arbitration website is, in fact, the place of arbitration, then the applicability of the New York Convention will be determined without any problem.’\(^{46}\) This view can be further supported by the fact that one side of the debate over the regulation of cyberspace has based their views on considering cyberspace as a place, as reviewed in the second chapter of the thesis. In examining several tests that have been suggested for the determination of the place of online arbitration, Wahab argues that ‘it seems more realistic to opt for the place where the e-arbitration provider is located, as the parties are using that provider’s services’\(^{47}\) in the absence of contractual arrangement for the place of arbitration.

This liberal approach can be considered a positive element for the use of ICALF for the enforcement of OCAA as it affects the borderless nature of online consumer arbitration.\(^{48}\) In other words, the liberal approach to reciprocity and place of arbitration will allow the

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\(^{45}\) See Stewart and Joseph, above n 13, 130, 1123.


\(^{47}\) Wahab, above n 22, 411.

enforcement of OCAA regardless of the place where the online arbitration is conducted and the award is delivered or where online consumers live, due to the inherent nature of the internet and online environment. In view of these prevailing flexible approaches to the requirement of the place of arbitration, it is reasonable to note that the legal principle embedded in the ICALF in relation to the location of arbitration does not pose a significant barrier to enforcement of OCAA, even if the OCAA are delivered online and without demarcating physical boundaries.

### 4.4 Commercial Reservation

The next question is whether the element of ‘commercial reservation’ of the NYC and the commercial element of international arbitration of the Model Law can be considered a barrier to the application of the ICALF for B2C arbitration. It is worth drawing attention to the legal response of the ICALF in this respect. Article I Subsection 3 of the NYC provides that when parties sign, ratify or accede to the NYC, they are free to decide whether they will apply the NYC ‘only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.’

Commercial reservation can be considered as one convincing example which reflects that approach. For example, Article I (3) of the NYC states:

> It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

The rationale behind this Article is to avoid disputes which do not fall within the scope of commercial matters and protection against the enforcement of pre-dispute consumer arbitration clauses.

In terms of the commercial reservation, some writers maintain that the NYC operates as an impediment to the enforcement of online arbitration awards in B2C disputes. For example, Stewart and Matthews hold the view that ‘the commercial reservation represents the general international antipathy towards consumer arbitration.’ One result of this article could be the

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49 Article I of the Schedule 1 of the *International Arbitration Act 1974* (Cth).
50 NYC, above n 7.
51 Stuart and Matthews, above n 13, 1111, 1136.
52 Ibid.
denial of the use of the NYC for Online Arbitration Providers engaged in the resolution of online consumer disputes. These two authors further maintain that ‘the commercial reservation represents the biggest hurdle to the use of online arbitration in cross-border B2C disputes.’ However, it is important to explore positive aspects of commercial reservation and make use of its potential to develop enforcement of OCAA. One such element is that both Sri Lanka and Australia have acceded to the NYC without commercial reservation. Such a move is desirable for other countries to follow. Moreover, even countries which adopt commercial reservation can adopt an OCA-friendly approach. For example, the NYC does not define the scope of ‘commercial’ element and it is left to the countries which adopt ‘commercial reservation’ to define the scope of the ‘commercial’ element.

It is also important to examine the definition of ‘commercial’ recognised under the Model Law. The second footnote to Article 1 of the Model Law refers to several areas indicating the scope of the commercial element:

The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

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53 Ibid.
Unfortunately, when this law is explored in the context of the online consumer arbitration that OCA applies to, drafters of the Model Law had suggested dropping the B2C setting from the scope of this list.\textsuperscript{58} It is worth asking why the drafters did not either remove the B2C setting expressly, or list it in an explicit manner, in order to avoid confusion. Given this difficulty of the exact parameters of the commercial area, it can be argued that this vague legal scenario has led to the determination of the boundaries of the commercial element on a sector-by-sector basis.

However, one can argue that such open scope is a positive element, as these terms allow the judiciary to interpret them so as to favour OCA. For this purpose, ‘the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.’\textsuperscript{59} The statement that ‘relationships of a commercial nature include, but are not limited to the following transactions’\textsuperscript{60} indicates clearly that the list is not an exhaustive one and it can therefore include B2C relationships. Garnett argues that ‘The use of the word ‘commercial’ was therefore intended to be a broad concept, covering almost all situations in international trade.’\textsuperscript{61} So it is reasonable to infer that B2C is embedded in the commercial setting, and therefore commercial reservation should not be construed as a barrier to the use of ICALF for the enforcement of OCAA.

It is also important to look at Section 2D of the IAA where its objectives are elaborated. They include facilitation of ‘international trade and commerce by encouraging the use of arbitration as a method of resolving disputes’, ‘the use of arbitration agreements made in relation to international trade and commerce’ and ‘the recognition and enforcement of arbitral awards made in relation to international trade and commerce.’\textsuperscript{62} Section 2D of the IAA needs to be examined in combination with Section 39 of the IAA, which stipulates that courts must have regard to these objectives of the Act and notes that ‘(i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and (ii) awards are intended to provide certainty and finality’\textsuperscript{63} when courts interpret the arbitration agreement and arbitral

\textsuperscript{58} Richard Garnett, ‘International commercial arbitration in Australia: Legal Framework and problems’ 19 (4) \textit{Australasian Dispute resolution Journal} 249 at 255.


\textsuperscript{60} Ibid.


\textsuperscript{62} \textit{International Arbitration Act 1974}.

\textsuperscript{63} The section 39 (2) (b) of the \textit{International Arbitration Act 1974}.

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award. As far as the Sri Lankan AA is concerned, there is no mention of the word ‘commercial’. However, this does not mean that the AA has no commercial purpose. For example, Kanag-Isvaran observes that AA addresses ‘the needs of the commercial community and the country's economic regeneration by making dispute resolution quicker, less expensive and less technical.’

Accordingly, the scope of section 2D, 39 and the policy approach to commercial reservation reflects not only the broader policy objectives behind the development of ICALF in both countries, but also the recognition of the fundamentals of arbitration. The question is whether these policy objectives can accommodate B2C online arbitration. An affirmative reply can be made, given the broader economic objectives of the two governments. It is a common feature that governments in both countries are increasingly promoting international trade, commerce and investment, all of which have trans-border elements. Governments strive to achieve their economic objectives and ensure broader access to the global electronic commerce market. In this process, technology is also being developed and used with the support of the private sector, which has led to the transformation of traditional international trade and business activities into the virtual world. These developments have also paved the way for an increase in B2C e-commerce activities. Therefore, it seems logical to incorporate online consumer arbitration into the broader objectives of these ICALF.

### 4.5 Formalities: Writing Requirement Under ICALF

The requirement of having the arbitration agreement in writing has been succinctly expressed by Meiners, Ringleb and Edwards as follows: ‘The purpose of requiring the arbitration agreement in writing is to prove with visual evidence that both parties voluntarily agreed to arbitrate a dispute.’ The rationale behind this requirement is to preserve the integrity, security and accuracy of the award. The question is: can the formalities-related legal provisions of the ICALF support the use of online consumer arbitration agreements and OCAA? The following sections address this issue in light of the ICALF and electronic commerce-related national and international legal instruments, with special attention to the related laws of both Australia and Sri Lanka.

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65 See Jingzhou Tao, *Arbitration Law and Practice in China*, 2004, 185: Further see ‘Online arbitration offers a rapid, flexible and economical solution which allows one to circumvent certain impediments of time or space.’ He further mentioned that online arbitration requires no physical requirement of travel and transport of bulky documents.’ at 185.
4.5.1 Arbitration Agreement

In relation to the NYC, it can be argued that the convention has not clearly defined the writing requirement relevant to arbitration awards, as compared to the writing requirement of arbitration agreements. Arbitration agreements are recognised as the basis of arbitration. Relaxing their formalities in the wake of the technological impact on the dispute resolution sector and the international commercial market sector is a positive element. Article II (1) stipulates that ‘each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration…’ Further, Article II (2) includes a broader explanation as to what constitutes ‘agreement in writing’, which ‘shall include an arbitral clause in a contact or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.’

UNCITRAL is striving to develop a harmonised approach to the writing requirement of arbitration agreements. The following two developments are worth mentioning in this regard as detailed by UNCITRAL in 2010. First, number one of the UNCITRAL’s recommendations made in 2006 in regards to Article II Subsection 2 of the NYC stipulates that ‘the circumstances described therein are not exhaustive.’ Second, in amending Article 7 of the Model Law, UNCITRAL has offered two options to countries which are willing to modernise international arbitration laws. The first includes ‘the agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded.’ The second option goes further in line with technological changes and ‘defines the arbitration agreement in a manner that omits any form requirement.’

By adopting the 2006 amendment to the UNCITRAL Model Law, Australia has recognised the validity of arbitral agreements in electronic form. In contrast, in Sri Lanka the Arbitration Act, No 11 of 1995 has adopted a technology-neutral approach to arbitral agreements. Section 3(2) stipulates:

67 Ibid.
An arbitration agreement shall be in writing. An agreement shall be deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement.  

This legal position can also be observed in most of the international commercial arbitration-friendly nations. For example, in the United States, ‘the Federal Arbitration Act follows a liberal approach; it does not set any specific conditions of form.’ Moreover, a progressive approach is evident in the judicial opinions in regards to formalities of agreements in general and arbitration agreements in particular.

It is clear that the ICALF reflects the needs of the online market and its provisions in terms of the writing requirements of arbitration agreements that are technology neutral and so create a legal foundation for the development of arbitration in the online settings as well. Indeed, such a move is desirable and timely, given the increase in B2C online arbitration agreements, especially in the fast growing B2C online market.

4.5.2 Arbitration Award

Unfortunately, some form requirements in relation to arbitral awards remain without fully embracing electronic means. Article IV Subsection 1 of the NYC requires an arbitral award to be ‘a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof.’ Section 39-(3) of the IAA states that: ‘arbitral award has the same meaning as in the Model Law.’ Again, Article 35 of the Model Law, which has reference to Part III of the IAA states:

1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

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72 International Arbitration Act 1974 (Cth).
In a similar fashion, Section 25 (1) of the Sri Lankan AA of 1995, in relation to the form and content of awards states: ‘The award shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal…’

The writing requirement of arbitral awards has not been defined in these legal documents, and such a lack of definition can lead to requiring the award to be in a physical rather than in an electronic form. Furthermore, one of the requirements of Section 31 of the Sri Lankan AA relating to an application to enforce an award is to provide ‘the original of the award or a duly certified copy of such award.’ Due to these requirements, the recognition of online arbitral awards depends on the definition given by the judiciary to the word ‘original’, and the phrase ‘a duly certified copy of such award.’

As far as the related literature is concerned, Kuner argues that a hard copy of the online arbitration award must be present according to the stipulation of ‘the duly authenticated original award or a duly certified copy thereof.’ Patrikios is of the view that certain discrepancies associated with online arbitration awards are related to practical requirements. Those requirements include:

Finally, certain discrepancies mostly of a practical nature triggered by national particularities remain unanswered. They include the occasional need to deposit or file the arbitral award with national courts that are unable to officially receive, file and process electronic documents; and the occasional need for official notification or service of the online award by official transmitting authorities that are not capable of officially serving the award in electronic form. At

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74 Section 31 of the Arbitration Act 1995 notes that:
   (1) A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the at award apply to the High Court for the enforcement of the award.
   (2) An application to enforce the award shall be accompanies by
      (a) the original of the award or a duly certified copy of such award ; and
      (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement.
      For the purposes of this subsection a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if
      i) it purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified ; or
      (ii) it has been otherwise certified to the satisfaction of the court.
      See further ‘Clause (ii) requires the High Court in each case, having regard to the facts of the case, to decide whether the document is certified to its satisfaction.’ Krisley (Pvt) Limited V The State Timber Corporation, [2002] 1Sri LR 239; see Marsoof, above n 54, 143; see also Celweera S.A. v Malship Bulkfert (Pvt) Ltd [2003] 1 Sri LR 33.
75 See also section 31 of the Arbitration Act 1995.
76 Kuner, above n 28: see further, Kuner has highlighted a Swiss Supreme Court decision which endorses the approach of liberal interpretation of the NYC. ‘The provisions of the New York Convention are to be broadly interpreted within the meaning of the UNCITRAL Model Law.’
present, conformity with such requirements seems to necessitate a hard copy of the online award.\(^77\)

However, Morek highlights several issues with regard to online arbitration awards by providing different views as to the admissibility of online arbitration awards within international commercial arbitration awards. This writer has explored the issue of the scope of ‘duly authenticated original award’\(^78\) of Article IV of the NYC and holds the view that:

> We doubt whether the revision of Article IV NYC is indeed required, because its flexible interpretation is perfectly legitimate in our view. Hence, we hold that secure electronic documents can be considered ‘originals’ within the meaning of the NYC. Also a requirement that an award has to be ‘duly authenticated’ is not considered as a stumbling block to admissibility of electronic awards under the NYC.\(^79\)

Morek also notes that ‘furthermore, Article 8 of the UNCITRAL Model Law on Electronic Commerce explicitly states that a requirement to present information in its original form can be met by an electronic data message.’\(^80\) Morek therefore concludes that ‘we doubt whether there is so much difference with respect to the fulfilment of arbitral awards in online or offline settings.’\(^81\)

Morek’s argument can be further explored by considering the scope of the section 9(2) of the IAA.\(^82\) The reasons are: first, a duly authenticated original award and a duly authenticated copy of an award or agreement can be valid if an arbitrator or officer of an arbitral tribunal

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\(^78\) Article IV of the NYC.


\(^80\) Ibid 37.

\(^81\) Ibid; see Julian D. M. Lew, Loukas A. Mistelis, Stefan Kröll, above n 42, 628; see also United Nations Convention of International Trade Law, 1885 – UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006: ‘The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.’ <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> last accessed 17 September 2012.

\(^82\) International Arbitration Act 1974 (Cth).
authenticates these documents. Second, if such documents have been authenticated to the satisfactions of the court. The question is associated with the words ‘authenticate’ and ‘certify’ of the IAA, as there are no definitions of these words in the IAA. In the absence of definitions, it is worth referring to the Oxford English Dictionary for the meaning. Oxford English Dictionary, includes under the meanings of the word authenticate (verb) the following:

trans. and refl. To invest (a thing) with authority; to render authoritative.
To give legal validity to; to render valid, establish the validity of.
To establish the title to credibility and acceptance:
a. of a statement
To establish the claims of (anything) to a particular character or authorship; to establish the genuineness of; to certify the authorship of. 83

In light of these meanings, it can be argued that the intention of the drafters of the IAA is to accept both an arbitration agreement and an arbitral award if they are credible and genuine, regardless of the form of such an agreement and an award. This situation can be further supported by the liberal approach adopted by the drafters of the IAA in relation to the arbitration agreement, namely that an arbitration agreement can be made in electronic form under the IAA as discussed above. Accordingly, it can be argued that the Australian IAA does not give restrictions over the formalities of an arbitration agreement and a foreign arbitral award for registration purposes. This argument can be equally applied to the legal position of the Sri Lankan AA, as it has also similar legal provisions. 84

In this context, it is reasonable to note that the future of the recognition of arbitral awards in electronic form depends on the interpretation of these legal provisions. If these articles are given a narrow definition it can be concluded that the ICALFs require the arbitration award in writing, presumably in a hard copy. If a liberal interpretation is given, as argued by some writers, OCAA can be considered valid under the ICALF.

4.5.3 Signature Requirement

From the legal point of view, it can be argued that there is no clear statement in relation to the scope of the signature requirement in the ICALF. The signature requirement is evident in other

international arbitration-related laws. For example, Section 25 (1) of the Sri Lankan AA of 1995 stipulates that for enforcement purposes an award must be in writing and ‘shall be signed by the arbitrators constituting the arbitral tribunal.’\(^{85}\) However, in referring to Article IV (1) (a), Horne points out that, ‘in order to fall under this convention an award must be duly authenticated (Article IV (1) (a)), which effectively means it must be signed at the time it was made or ratified on enforcement.’ Further, this writer argues in light of the NYC that as long as the electronic signature is identifiable it is sufficient to fulfill the requirements of the NYC.\(^{86}\) Polanski also notes that ‘the requirement of a signature is met if a method is used that identifies the party, indicates its intention and is as reliable and appropriate to its purpose (or proven in fact to have fulfilled the above functions).’\(^{87}\)

Moreover, a progressive approach is evident in the judicial opinion in regards to formalities of agreement in general and arbitration agreements in particular.\(^{88}\) Judicial views of signatures in an electronic document are flexible and e-commerce friendly. This trend is reflected in the recognition that a name in an email together with writing is sufficient to satisfy the signature requirement.\(^{89}\)

### 4.5.4 The E-Commerce-Related Laws as Gap-Filling Instruments

The next question is whether e-commerce-friendly laws, both national and international, can be gap-filling instruments.\(^{90}\) In other words, can the e-commerce-related laws be used so as to recognise online consumer arbitral awards as legally valid documents? An answer to this question is sought in the literature.\(^{91}\)

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\(^{85}\) Ibid.

\(^{86}\) Rob Horne, Electronic Contracts (part 4): Signatures and Legal Requirements.


\(^{88}\) Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC.


\(^{90}\) Stewart and Matthews, above n 13. (They have identified three options with comments).

\(^{91}\) Stewart and Matthews identify the literature in terms of the suggestions for the modernization of existing NYC; three suggestions are made in 2002. Three suggestions are ‘(1) draft a protocol amending the New York Convention; (2) preparation of a separate Convention; or (3) simply advocating that the New York Convention, which was drafted under the supervision of the United Nations, should be interpreted in light of the UNCITRAL Model Law on International Commercial Arbitration.’ Stewart and Matthews above n 13, 130, 1136-1137: ‘The UNCITRAL Model Law is itself ambiguous in many essential clauses and, therefore, reference to it for the purpose of interpreting the New York Convention would continue to lead to unpredictable results. Although the Model law clearly defines as writing electronic exchanges such as e-mail, it still requires the agreement for arbitration to be contained in an exchange of writing.’ 1138; The Article 7 of the UNCITRAL Model Law on International Commercial Arbitration expanded writing requirement of the arbitration agreement by including that the arbitration agreement can be made by any mean of telecommunication.
4.5.4.1 International Laws

There is a growing literature as to the applicability of the NYC to the enforcement of AA in both B2B and B2C settings, based on international laws such as the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on Electronic Commerce, the United Nations Convention on the Use of Electronic Communications in International Contracts, and the UNCITRAL Model Law on Electronic Signature. For example, Tao has cited the UNCITRAL Model Law on Commercial Arbitration, and Morek has cited the UNCITRAL Model Law on Electronic Commerce in order to support the idea that online arbitration agreement and online arbitration awards can be executed through the articles of NYC. Two directions can be highlighted. The first includes the adoption of an extensive interpretation of the existing legal provisions, and the second relates to the need for new legal instruments focusing on these formalities. For instance, in the context of international commercial arbitration, Morek notes that ‘we claim that although not all of the legal difficulties arising with regard to online arbitration may be easily resolved, there are no insurmountable obstacles to online arbitration within the current legal framework and regime of international commercial arbitration.’

Herboczkova argues that:

…..the New York Convention is widely accepted and thus represents a very strong legal instrument. Its requirements for enforcement of the arbitral award are irreconcilable with the specifics of the online arbitration. Although an extensive interpretation of its provisions can be of some help, its modernization and amendment is necessary in order to keep track with the developments of modern society.

This writer’s argument shows the need for an amendment rather than relying on an extensive interpretation of the NYC. His argument is based on the necessity for the modernisation of the NYC, as a modern society requires a document which reflects the huge transition that modern society has undergone compared to the time period within which NYC was promulgated.

Referring to the Article 9 of the United Nation Convention on the Use of Electronic Communication in International, Raghu argues that the situation requires no change:

Article 9(2) of that convention states that where a law requires that a contract (such as an agreement to submit to online arbitration) be in writing, the requirement is satisfied by an

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92 Morek, above n 79, 45.
93 Herboczková, above n 39, 11.
electronic communication. It is therefore probable that parties entering into an electronic agreement to arbitrate online will still satisfy the writing requirement of the New York Convention. Clearly this is important because the convention provides increased certainty to parties regarding the enforceability of agreements to engage in online arbitration and arbitral awards obtained from an ODR service.  

This technology neutral approach in regard to the enforcement of online arbitration agreements and awards is a very positive development. This move is further established under Article 20 of the United Nations Convention on the Use of Electronic Contracts in International Contracts 2005, due to the fact that this article states that the convention applies to the NYC as well. However, Article 2 (1) (a) of the Convention on the Use of Electronic Communication in International Contracts further states that ‘contracts concluded for personal, family or household purposes.’ Unfortunately, this article excludes its application to both offline and online business to consumer contracts.

As far as the legal response to the scope of electronic signatures is concerned, it is important to review the relevant articles of the UNCITRAL Model Law on Electronic Signature in this regard, as they provide an electronic signature-friendly legal framework. It is evident from the aim of the UNCITRAL Model Law on Electronic Signatures that, it ‘aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures.’

Importantly, the UNCITRAL seems to recognise the tendency towards the use of domestic electronic commerce laws and case laws, which favour ‘the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards,’ rather than that of the NYC. Even though these recommendations have been made in relation to arbitration agreements, this shows a favourable tendency towards the use of e-commerce-related

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95 Read, The Article 20 of the United Nation Convention on the Use of Electronic Communications in International Contracts, states that Article 20 applies to the Articles of the NYC as well. Polanski, above n 87.
national as well as international laws. Arguably, such a move can be expanded to the area of the enforcement of OCAA as well.

4.5.4.2 National Laws

From the national legal perspective, there are positive signs towards this end. Attention to e-commerce laws for liberalising form requirements is already found in the literature; for example, Ferriter indicates that:

Legal recognition for duly-authenticated digital signatures is emerging. It is submitted that the convention’s language will be sufficient to cover electronically-rendered awards in situations where the law of the country where the award is rendered (or the law chosen by the parties to govern the award) would accept the validity of the electronic record and signatures.\(^9^9\)

In the related literature, the writing requirement of the arbitration award has been noted as an impediment to online arbitration.\(^1^0^0\) Referring to the writing requirement, Stewart and Matthews argue that ‘the text of the Convention does not make clear whether the law at the seat of the arbitration or at the place of enforcement should determine if the writing requirement is met.’\(^1^0^1\) Furthermore, they argue that ‘a problematic situation arises whenever a contract for arbitration does not meet the writing requirement for either of the two countries.’\(^1^0^2\) As a result of this problematic situation, ‘when parties from countries with conflicting legislation become embroiled in a dispute, a party disfavouring online arbitration may use the law of either country as a defence on the grounds that an agreement for arbitration never existed.’\(^1^0^3\) Stewart and Matthews note that given the draft of the NYC in 1958, ‘it is therefore doubtful that the New York Convention can provide the predictable means of award enforcement required for the development of cross-border online arbitration.’\(^1^0^4\)

In this context it can be argued that it is also possible for courts in the award enforcement country to look at these developments when they interpret the ICALF in favour of OCAA. For example, s 17 of the Australian IAA provides for the ‘use of extrinsic material’ which comprises

\(^9^9\) Cian Ferriter, ‘E-Commerce and International Arbitration’ (2001) 1 University College Dublin Law Review 51, 64; Polanski suggests in terms of the arbitration agreement as follows: ‘The requirement of writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. In consequence, if terms of an electronic contract are capable of being re-produced they would be considered as being written down.’


\(^1^0^1\) Ibid 1134.

\(^1^0^2\) Ibid 1135.

\(^1^0^3\) Ibid.

\(^1^0^4\) Ibid 1130-1131.
the documents of the United Nations Commission on International Trade Law and its Working Group (for interpretation of the Model Law).\textsuperscript{105}

From the Australian and Sri Lankan legal perspective, both countries’ objectives in terms of international trade and commerce reflect the objectives of the electronic transaction-related laws. Some objectives of the \textit{Australian Electronic Transactions Act 1999} (Cth) (AETA) include that it ‘facilitates the use of electronic transactions’ and ‘promotes business and community confidence in the use of electronic transactions.'\textsuperscript{106} Another objective is that it ‘recognises the importance of the information economy to the future economic and social prosperity of Australia.’\textsuperscript{107} In contrast, it seems broader objectives are embedded in the Sri Lankan \textit{Electronic Transactions Act 2006} (SETA). Some of its objectives are ‘to facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty’, ‘to encourage the use of reliable forms of electronic commerce’ and ‘to promote public confidence in the authenticity, integrity and reliability of data messages, electronic documents, electronic records or other communications.’\textsuperscript{108}

Additionally, section 3 of the SETA stipulates that ‘no data message, electronic document, electronic record or other communication shall be denied legal recognition, effect, validity or enforceability on the ground that it is in electronic form.’ It is evident that this section is designed to incorporate electronic documents or records without limiting the scope to electronic transactions. The element of ‘in writing’ has been interpreted broadly, so that wiring can include electronic form as well.\textsuperscript{109} Arguably, if OCAA is construed as an electronic document or electronic record, there is the possibility of applying this law so as to remove the requirement of having the arbitral award in physical form. Moreover, arguably, parties to an arbitration agreement can incorporate e-commerce law as an applicable law, so as to determine the legal validity of the form of the arbitration award based on the principle of party autonomy. The other important point is that electronic transactions law exempts some areas of laws from its ambit.\textsuperscript{110}

\textsuperscript{105}\textit{International Arbitration Act 1974}; ‘Writing’ and ‘Written’ includes data messages in both physical and electronic form, so long as the information contained therein is accessible to the Parties and Arbitrator so as to be usable for subsequent reference. Colin Rule, Vikki Rogers, and Louis Del Duca, Designing a Global Consumer Online Dispute resolution (ODR) System for Cross-Border High Value Claims-OAS Developments, 42 (3) 254 Uniform Commercial Code Law Journal.

\textsuperscript{106} The \textit{Electronic Transactions Act 1999} (Cth), section 3.

\textsuperscript{107} Ibid.


\textsuperscript{109} See the \textit{Electronic Transactions Act 1999} (Cth), section 9; the Sri Lankan \textit{Electronic Transactions Act 2006}, section 5.

\textsuperscript{110} The \textit{Electronic Transactions Act 2006}, section 23.
In this sense, therefore, as long as the protection mechanism relating to identity and originality is preserved, there is no justifiable reason not to use electronic commerce-related laws in an appropriate manner to develop the arbitration landscape.

Moreover, the Sri Lankan legal framework, in terms of the admissibility of electronic documents, is sufficiently developed for the e-commerce market. This e-commerce friendly legal approach is reflected in the Evidence Ordinance, No 14 of 1895 in Sri Lanka with the amendment regarding the admissibility of computer evidence and the SETA of 2006. This trend is evident in the recent judicial decisions as well. For example, in the case of Marine Star (Pvt) Ltd. Vs Amanda Foods Lanka (Pvt) Ltd, SMS has been accepted as admissible evidence.\(^\text{111}\)

As far as the electronic signature-related laws of both countries are concerned, progressive developments have been taken statutorily. Signature laws have been developed from handwritten signature to electronic and digital signatures. For example, the Australian AETA and SETA provide legal recognition to electronic and digital signatures with appropriate requirements that need to be fulfilled.\(^\text{112}\) Most importantly, judicial views of the validity of signatures in electronic documents are flexible and e-commerce friendly. This trend is reflected in the recognition that a name in an email together with writing is sufficient to satisfy the signature requirement.\(^\text{113}\)

In the Australian context, there are several legislative developments that more generally support e-commerce and therefore the developing ODR environment. For example, the AETA which is mainly focused on providing legal solutions for issues connected with the formalities of electronic contracts is a useful legislative example.\(^\text{114}\) In addition, e-signature law is evolving in the electronic market-driven legal framework.\(^\text{115}\)


\(^{112}\) Two statutes of both countries.


In summary, adopting an arbitral award also in electronic form is desirable, given the technology-driven international market and contemporary dispute-resolution landscape. E-commerce-related legal frameworks can be considered one option that can be adopted by all the arbitrating nations. The other option is to bring specific amendments in relation to international arbitration by modernising arbitral awards-related laws in line with the changing commercial and consumer circumstances in the online market place and dispute-resolution landscape. The second option may be better that the first one, given the burden that can be placed by the first option on the enforcement country for the use of electronic commerce laws for liberalising the form requirements of arbitral awards in the ICALF.

4.6 Binding Arbitration Awards

The relevant article of the NYC in relation to the binding nature of arbitration awards is Article III of the NYC that states: ‘Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory when the award is relied upon...’ In addition, the lack of a binding arbitration award is incorporated as a ground that can be used for objecting to the recognition and enforcement of foreign arbitral awards under the convention. Article V (e) stipulates as grounds for objection: ‘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, that award was made.’ This situation is reflected in international arbitration friendly nations. For example, section 33 of the Sri Lankan AA notes that ‘A foreign arbitral award irrespective of the country to which it was made, shall subject to the provisions of section ii be recognized as binding.’ In the case of Lanka Orix Leasing Company LTD v. Pinto and Others, the court held that a ‘mere record of a settlement [is] not enforceable’ under the AA in Sri Lanka.

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116 Ferriter, above n 99.
117 NYC, above n 7.
118 Ibid.
119 Arbitration Act 1995; see also International Arbitration Act 1974, sections 3, 7, 8 (1).
120 Orix Leasing Company LTD v. Pinto and Others SC APPEAL NO. 67/2000: ‘In the course of an arbitration under the Arbitration Act, No. 11 of 1995, the appellants and the respondents - partnership arrived at a settlement on 18.11.1998 in terms of section 14 of the Act. That agreement was recorded and signed by the parties and the arbitrator. However, no arbitral award was made in terms of section 14 (3) and section 25 (1) of the Act pursuant to such agreement; nor was a copy of such award made and signed by the arbitrator delivered to the respondents as required by section 25 (4) of the Act. Thereafter, the appellant sought to enforce the settlement before the High Court of Colombo under section 31 of the Act ‘deeming it an arbitral award in terms of the provisions of sections 14 and 25 of the Act No. 11 of 1995.’’
Most importantly, the relevant sections of the ICALF in terms of arbitration agreement and arbitral awards do not recognise or differentiate between pre-dispute arbitration and post-dispute arbitration agreements or arbitral awards.

In fact, when the binding element is considered in the context of online consumer arbitration, it is important to examine whether this legal position can have an impact on the use of OCAA within the context of ICALF. When the binding element is considered in the context of online consumer arbitration, issues arise with regard to enforcement of online arbitration awards delivered in B2C disputes and the consumer’s rights, as reviewed in the first chapter and examined in the previous chapter. However, there is already an OCA mechanism, and such OCAA can fulfill this requirement without difficulty. As such, regardless of the fact that ‘there is little agreement to the extent to which various e-DR processes should be binding or mandatory,’ it can be argued that a binding element of arbitration as embedded in the ICALF does not pose a significant barrier to the use of ICALF for the enforcement of OCAA. Two major reasons can be cited in support of this argument.

First, it must be noted that Australian and Sri Lankan consumer protection laws do not impose a complete ban on the use of mandatory online consumer arbitration clauses in the formation of B2C contractual arrangements as long as they comply with the conditions recognised under such laws. Of course these laws play a major role in protecting online consumers’ access to courts, which can exclude the online consumers from seeking redress from a binding arbitral process. The recognition of the right to access to a court has produced an inconsistent approach to such binding B2C arbitration clauses, as explored at the outset of the chapter four and in chapter five of the thesis, due to the impact of domestic consumer protection laws found in some jurisdictions.

Second, the requirement of the enforcement of foreign arbitral awards through a national court under the ICALF can arguably be used to satisfy the legal requirement of access to a court of national consumer protection laws. However, it must be noted that by referring to Article V of the Convention that includes defenses to the enforcement of arbitral awards, Stewart and

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Matthews commented that it operates as a limitation to the general goal of the NYC. The reason for this is ‘because it gives power back to the national courts to decide whether they should be set aside... [O]nce in a national court, the losing party may bring up defenses to the enforcement of awards that are available under the national law,’ This argument can be challenged given the phase of the development of eCourt strategy in the current government sponsored-court setting, as it has the potential to play a speedy and efficient role in the enforcement stage of foreign arbitral awards.

4.7 Arbitrability and Public Policy

This section is designed to discuss whether the current legal response embedded in the ICALF in terms of arbitrability and public policy is favorable to the enforcement of OCAA, and its implications on the enforcement of OCAA. At the outset it is important to note that there is a considerable literature on the issues associated with the scope of arbitrability and public policy; as such some writers’ views are taken into consideration in this discussion, in support of the examination of the Australian and Sri Lankan legal approaches to the issue of arbitrability and public policy. It must also be noted that this section deals only with the relevant provisions of the ICALF applicable to arbitrability and public policy that come under the grounds available for opposing the enforcement of foreign arbitral awards, given the fact that the chapter deals mainly with the enforcement of foreign arbitral awards, and similar legal provisions can be found in relation to grounds for the setting aside of awards in the provisions of the ICALF. Moreover, consumer protection laws in both countries will also be examined in light of the issues of arbitrability and public policy that come under ICALF, due to the fact that national consumer protection laws have a direct relationship with the enforcement of OCAA and ICALF.

4.7.1 Arbitrability and Public Policy under the ICALF

With regard to the ICALF, the principles of arbitrability and public policy are embedded in several provisions of the NYC, IAA and Sri Lankan AA. It is evident that none of these legal instruments define the scope of arbitrability and public policy, and also do not exclude the use of B2C arbitration from the ambit of ICALF. Ironically, the NYC does not even provide

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122 Karen Stewart and Joseph Matthews above n 13, 1132.
123 Ibid 1132-1133.
125 NYC, above n 7, Article IV (2).
some guidance in regard to public policy, compared to Australian and Sri Lankan arbitration laws. For example, the Australian IAA provides some clarification on the scope of public policy grounds arising if ‘(a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.’ Similar provisions are incorporated in the Sri Lankan AA also. Section 4 of the Sri Lankan AA stipulates the scope of arbitrability in the following terms, that ‘any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration.’ The condition is that disputes are not arbitrable if they are ‘contrary to public policy or, is not capable of determination by arbitration.’

In the absence of appropriate definitions for these two areas, national courts have an important and challenging task in defining the boundaries of these areas of law. In order to overcome the uncertainties associated with the lack of definition of these two areas, Australian courts have developed several legal principles applicable to these two areas, in view of the ICALF and related literature. Recent Australian judicial pronouncements are mainly examined to illustrate the evolving nature of these two grounds in this respect. Recent Australian judicial authorities have recognised legal principles applicable to arbitrability when compared to the attention given by the Sri Lankan judiciary in regard to arbitrability and public policy. A brief discussion on such legal principles is warranted to understand the scope of law applicable to these two grounds before moving on to discuss the impact of the law on the enforcement of OCAA.

### 4.7.2 Legal Principles Applicable to Arbitrability from a judicial perspective

As far as Australian jurisprudence is concerned, there is no exact definition in regard to the principles of arbitrability and public policy. Instead, various measures have been suggested that can be applied in a case where an award debtor raises these principles as grounds for challenging the enforcement of a foreign arbitral award. Some of the important decisions are outlined and examined here.

The case of *Comandate Marine Corp v Pan Australian Shipping Ltd* introduced three elements of arbitrability that can be considered a test for the determination of arbitrability. First

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131 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (20 December 2006).
it included the question as to whether ‘there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate.’ The second was whether the ‘identification and control of these subjects was the legitimate domain of national legislatures and courts.’ The third dealt with the question as to ‘whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.’

In the recent Australian case of *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* NSWSC 268 of 2011, four legal principles were elaborated. The first includes a general principle that ‘any dispute or claim which can be the subject of an enforceable award is capable of being settled by arbitration.’ This principle accepts the broader scope of arbitrability. It seems that such a broad scope has the potential to cover a variety of disputes or claims as arbitrable.

The second principle relates to disputes that fall into the domain of national courts that are not arbitrable, ‘Some disputes are not susceptible to resolution by private arbitration because they are in the exclusive domain of a national court or other tribunal.’ This highlights a limit to the arbitrability of disputes or claims. The first principle also needs to be realised subject to this limitation.

The third refers to the recognition of a list of non-arbitrable disputes. Non-arbitrable areas are ‘criminal prosecutions’, ‘bankruptcy’, ‘divorce’, ‘the winding up of corporations in insolvency’ and some disputes that are related to ‘intellectual property such as whether or not a patent or trade mark should be granted.’ The reason behind this is that ‘these matters are plainly for the

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132 Ibid: ‘It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the travaux préparatoires was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws.’

133 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (20 December 2006).

134 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (20 December 2006).


137 In the case of *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 268, this lists has been articulated by the judiciary by referring to Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th ed (2009); several types of disputes which cannot be arbitrated have been recognised in the dispute resolution literature, for example see. AA de Fina
public authorities of the state. This principle can be considered an attempt to simplify the scope of arbitrability and make it easier for the court to follow criteria in determining the issue of arbitrability of any dispute or claim. A similar legal position can be seen in Sri Lanka as well.

The fourth legal principle is that ‘the modern trend both domestically and internationally is to facilitate and promote the use of arbitration and to minimise judicial intervention in the process.’ This highlights the pro-arbitration policy that courts are willing to pursue. It is reflected in the recognition of some disputes that have not been arbitrable in the past but are now arbitrable. Moreover, the list enshrined in the third principle is not an exhaustive one and it is open to add new disputes and new claims that can be subjected to arbitrability. For example, the other recent development is the acceptance of the arbitrability of copyright disputes. This evolving modern approach is also evident in recent judicial pronouncements as well.

It is evident that even the judiciary has not defined the exact boundaries of these two grounds and that the application of these grounds may depend on the circumstances of each case. The question is: are these legal and judicial approaches in regard to arbitrability and public policy favorable to the enforcement of OCAA?

4.7.3 Arbitrability and Public Policy-Related Laws in the Context of OCAA

Before moving on to examine the impact of the Competition and Consumer Act of 2010 (CCA) on the arbitrability and public policy grounds embedded in the ICALF, it is important to look at some of the conflicting judicial pronouncements delivered on the Australian Trade Practices Act.
of 1974 before the CCA. It seems that the arbitrability of consumer disputes must be determined by looking at how areas such as public policy and the validity of arbitral clauses which underpin arbitration laws and consumer protection laws are defined by courts in Australia. Judicial authorities on the arbitrability of claims that come under the Trade Practices Act of 1974, especially in the business to business setting, can be divided into two categories. One line of authorities adopts a liberal approach and holds the position that some claims under consumer protection laws can be arbitrated, in other words, to that extent, consumer protection laws are not mandatory. The other line of authorities recognises the fact that consumer protection laws are mandatory.

Public policy debate in Australia in terms of arbitrability of consumer disputes indicates the unsettled nature of judicial attitudes in relation to the arbitrability of consumer disputes under the legal framework of the International Arbitration Act. As such, it is worth noting different legal approaches adopted in two judicial pronouncements in regards to the issue of arbitrability under the Trade Practices Act. The case of Comandate Marine Corp v. Pan Australia Shipping Pty, the judiciary adopted a liberal approach and held the position that some claims under consumer protection laws can be arbitrated. Moreover, it is clear that not only does the arbitration of such claims not constitute an ouster of a national court’s jurisdiction, but also that remedies which are recognised under the Trade Practices Act 1974 (Cth) (TPA) can be granted by arbitrators. The judiciary in the case of Clough Engineering v Oil Natural Gas Corporation

144 See ‘Within the context of the New York Convention and of the Model Law it is generally accepted that arbitrability forms part of the general concept of public policy and that Article V(2)(a) of the New York Convention, which refers to objective arbitrability separately from public policy as referred to in Article V(2)(b), can be deemed superfluous.’ Fina, above n 137.


146 For example, ‘the remedy conferred by the Act, in respect to s 51 AA cannot be lost, whatever the parties agree in their contract.’ see Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd [2007] FCA 881, Paragraph 41, Luttrell above n 145, 140-141; see also Underdown, above n 145; see also Joachim Delaney and Katharina Lewis, ‘The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability - English Law Post Fiona Trust and Australian Law Contrasted’ (2008) 31 (1) University of New South Wales Law Journal.

147 See also Comandate Marine Corp v Pan Australia Shipping Pty [2006] FCAFC 192 and Underdown, above n 145; see Luttrell, above n 145; see also Sam Luttrell, ‘Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192’ (2007) 21 Australian and New Zealand Maritime Law Journal; see Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2009] VSC 553 (8 December 2009).

Ltd [2007] FCA 881 held the position that consumer protection laws are mandatory and that claims that come under consumer protection laws cannot be overridden by the choice of foreign law clauses and mandatory arbitration clauses.\(^{150}\)

One of the major concerns in regard to these two decisions raised by Luttrell is the fact that ‘the TPA can have a negative economic impact in that the public policy considerations that attach to it may be invoked by Australian parties seeking to avoid their commitments to arbitrate with foreign entities, and Australia’s reputation as an investment partner damaged.’\(^{151}\) Additionally,\(^{152}\) this author notes that,

> Australia holds itself out as a free market, but there is a gap between economic policy and adjudicatory trend on the issue of what can and cannot be settled by arbitration. Australian courts must follow fully the tenets of laissez faire policy and allow merchants to regulate themselves in their private dealings.\(^{153}\)

The question is: why have these kinds of judicial outcomes been delivered by the judiciary? One reason could be the lack of a legal position about the arbitrability of consumer disputes or the undefined scope of public policy embedded in the ICALF. The other reason could be the discretionary powers exercised by the judiciary when enforcement of foreign arbitral awards took place, especially when arbitrability and public policy grounds were raised by the party resisting the enforcement of foreign arbitral awards before the amendment to the IAA was brought down in 2010.

As far as the unfair contract terms-related legal provisions of the CCA of 2010 are concerned, it can be argued that there is no clear approach as to the arbitrability of online arbitration clauses embedded in a B2C contract under the CCA. This proposition can be supported by adducing several elements of the CCA. First, the CCA does not exclude online consumer arbitration


\(^{151}\) Luttrell, above n 145, 139: ‘But as the debate over the arbitrability of its horizontal force provisions shows, the TPA can have a negative economic impact in that the public policy considerations that attach to it may be invoked by Australian parties seeking to avoid their commitments to arbitrate with foreign entities, and Australia’s reputation as an investment partner damaged. The decision of the Federal Court in Clough Engineering Limited v Oil & Natural Gas Corporation Ltd shows this.’

\(^{152}\) ‘But times changed and both the Supreme Court of Victoria, in Stericorp Ltd v Stericycle Inc [2005] VSC 203, and the New South Wales Court of Appeal, in Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, have upheld the right to submit TPA claims to arbitration.’ Underdown, above n 145.

Second, there is no clear definition of the concept of arbitrability in either the CCA or arbitration-related laws in Australia in specific terms. Instead, the validity of such clauses can be tested against fairness and this has been incorporated within the CCA under a general contractual law-related legal framework. Third, the court is the institution which has been given the power to decide the validity of such online consumer arbitration clauses; in other words, the unfair contract terms-related legal framework under the CCA in Australia seems to confer jurisdiction on courts to decide the arbitrability of online consumer arbitration clauses. Additionally, it is worth mentioning that ‘the unfair contract terms laws do not apply to a contract to supply goods or services or financial products or services from one business to another for business use.’

In Sri Lanka, it appears that both Consumer Affairs Authority Act as well as the Unfair Contract Terms Act do not deal with the fairness of arbitral clauses. A detailed discussion was given in the previous chapter, so such a detailed discussion is not pursued here. It is generally accepted that consumer disputes can be arbitrated in Australia. Underdown has also indicated that ‘arbitration clauses extended to statutory causes of action.’ There are judicial pronouncements which show a similar trend. However, there are conflicting judicial responses to the claims that fall under the CCA (previously TPA in 1974). Arguably such a move is not desirable, as it can create another legal uncertainty over the scope of arbitrability and public policy debate.

In this context, arguably, the amendment to the IAA in 2010 and the court decision as outlined above provide an answer to the conflicting legal positions generated by the Clough and Comandate decisions in terms of arbitrability and public policy. The following developments can be cited in support of this argument.

First, there is a lack of definition of arbitrability and public policy. Such a vacuum is desirable for the enforcement of OCAA, as it enables parties to online consumer arbitration to get their OCAA through these two grounds.

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156 Ibid 7.
157 Underdown, above n 145.
158 ‘Several NSW authorities, including Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Limited (1996) 39 NSWLR 160, have established that claims under the Trade Practices Act may be submitted to arbitration and that arbitrators may grant the broad remedies that the Act provides.’ Arbitration of section 52 claims <http://www.mallesons.com/publications/update/2005/8151049w.htm> last accessed 07 April 2010.
159 This position has been largely discussed in the related literature. Mistelis and Brekoulakis, above n 130, 11.
Secondly, the existing law promotes a pro-enforcement policy in regards to the enforcement of foreign arbitral awards. This element is important as it can be used as supportive evidence for the use of ICALF for OCAA. Article V of the NYC in which the grounds for challenging the recognition and enforcement of an award are incorporated reflects the pro-enforcement approach intended by the drafters of the NYC. In addition, Article VII provides a mandatory requirement that the provisions of the NYC should not deprive any right accrued by an interested party of an arbitral award. These sections further ensure the free-flow of the arbitral awards. As far as these articles are concerned from the perspective of the use of the NYC for the enforcement of OCAA, the two Articles are further evidence to justify the use of ICALF for the enforcement of OCAA for two reasons. Firstly, pro-enforcement policy of the NYC can be a positive element to expand the use of ICALF for the enforcement of OCAA as grounds embedded in Article V of the NYC and can be interpreted in a favorable manner to enforce the OCAA as well. Secondly, the wording of Article VII further ensures that the enforcement of the arbitral awards should not be deprived by the provisions of the NYC. This pro-enforcement policy adopted by member states to the NYC has been highlighted in recent judicial pronouncements.

Thirdly, neither the ICALF nor national consumer protection legal frameworks of Australia and Sri Lanka have excluded the arbitrability of B2C disputes. The other striking feature is that there is no clear definition of the concept of arbitrability in either the CCA or arbitration-related laws in Australia in specific terms.

However, the CCA and the Sri Lankan unfair contract terms-related law can still create uncertainty in relation to the enforceability of OCAA through the ICALF. The framework embedded in the unfair contract terms-related legal framework under the CCA in Australia and the Sri Lankan Unfair Contract Law was discussed in the previous chapter and identified several drawbacks. In both the unfair related legal frameworks and ICALFs of the two countries the court is the institution which has been given the power to decide the validity of such OCAC and the arbitrability of OCA clauses.

160 Article V of the NYC, above n 7.
161 Ibid Article VII.
162 For example, Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131 has been discussed in the document entitled ‘Arbitration, Focus: Federal Court confirms Australia’s pro-arbitration policy’ (Arbitration) in 2011; see IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248.
As such, the judiciary has to play a pivotal role in shaping the enforcement of OCAA through the ICALF as the judiciary has been recognised as the major enforcer of the consumer protection laws of both countries. In fact, if a committed and consistent approach is not pursued by both the legislature and the judiciary, an unsettled legal position over the arbitrability of OCA clauses may exist and such a negative development can undermine the possibility of the enforcement of OCAA through the existing ICALF. Then both the legislature and the court can become sources of blurring the scope of arbitrability and public policy concepts.

4.8 Application of evidentiary rules

It is evident that the ICALF has adopted a liberal approach to the application of evidentiary rules both during the arbitration process and the enforcement process of foreign arbitral awards. As for the legal approach adopted for the evidentiary rules applicable to the enforcement proceedings of the foreign arbitral awards, it can be argued that there are no rigid rules incorporated in the ICALF. This argument can be supported by exploring the ‘The Two-Stage Model’ which entails exparte and inter partes proceedings, adopted in the ICALF in relation to the enforcement proceedings of foreign arbitral awards.

4.8.1 Exparte and inter partes proceedings (‘The Two-Stage Model’)

As far as the Australian law is concerned, an Australian court notes that the evidential burden is on the award creditor ‘of satisfying the Court, on a prima facie basis, that it has jurisdiction to make an order enforcing a foreign arbitral award,’ and has recognised two stages in regard to the award’s creditor’s evidential burden. At the first stage, according to the court’s view, he has to prove the following matters ‘on a prima facie basis’ to the satisfaction of the enforcement court as required under the IAA. The prima facie evidence has been outlined in section 9 of the IAA and it states that evidence that satisfies the requirements of section 9 is sufficient for the court to consider it as prima facie evidence. The court’s function at the first stage of the

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164 IMC Aviation Solutions Pty Ltd v Altair Khuder LLC [2011] VSCA 248.
165 ‘The two-stage model has been adopted in other Convention countries.’ IMC Aviation Solutions Pty Ltd v Altair Khuder LLC [2011] VSCA 248.
166 9 (1) of the International Arbitration Act 1974: ‘In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:
(a) the duly authenticated original award or a duly certified copy; and
(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.
(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:
(a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
(b) it has been otherwise authenticated or certified to the satisfaction of the court.
procedure takes the form of a summary procedure. If the judgment creditor is unable to satisfy the court, the court moves to the second stage, which is to conduct the enforcement proceedings on an inter partes basis after following the due requirements. 

The next question relates to the burden of proof vested in the party that is willing to challenge the enforcement of an arbitration award. This can be understood in light of the decision made in 2011 in the Victorian Supreme Court and the Victorian Court of Appeal in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*. The Supreme Court (SC) judge allowed the enforcement of the foreign arbitral award, but in the appeal the Court of Appeal (CA) quashed the decision of the SC. One of the contentious issues was the standard of proof resting on the award debtor, who raised grounds against the enforcement of foreign arbitral awards. In the SC, the onus expected from the judgment debtor was a heavy one, which was more than the balance of probability. CA summarised the conclusions made by Croft J, one of which was that ‘[t]he onus of proving any of the grounds listed in s 8(5) or (7) of the Act is a ‘heavy’ one, particularly in the light of the pro-enforcement and pro-arbitration environment that the Act and the Convention represent.’ The CA rejected this view and said that the standard of proof was the balance of probability. 

There is a similar legal position in Sri Lanka. Under 32 (1) (a) and 34 (1) (a) of the AA, a respondent has to prove the existence of any ground either to set aside an arbitral award or to resist the enforcement of a foreign arbitral award, but there is no such requirement under 32 (1) (b) and 34 (1) (b), where grounds of arbitrability or public policy are incorporated. In general, the Sri Lankan law also adopts the balance of probability in the proof of grounds enumerated in the AA against the enforcement of foreign arbitral awards. Accordingly, it is reasonable to note that there is no rigorous evidentiary burden on either party to foreign arbitration awards, both in the arbitral proceedings and the enforcement of such an award. This flexible approach can also be considered favourable to the enforcement of OCAA, as

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(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.; Section 3 of the Enforcement of foreign awards Part II Section 8 International Arbitration Act 1974. 

167 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248.
168 Ibid.
169 Ibid.
170 Ibid.
171 See also Marsoof, above n 54.
an evidentiary principle applicable to the enforcement proceedings that does not put online consumers or online business people who expect to enforce their OCAA through the ICALF under strict evidentiary rules. However, it is equally important to note that the conflicting judicial outcomes over the standard of proof need to be avoided, so as to maintain the application of the ICALF in a consistent manner.

5. Concluding remarks

In view of the above analysis, it is evident that the existing arbitration laws, which were originally designed for offline situations and B2B settings, have some merit and might be used to support their application to OCAA, despite the presence of some unclear legal provisions embedded in the ICALF and under judicial precedents when they are applied to online consumer arbitration. In fact, it must be noted that specific attention should be paid to remove some limitations embedded within the ICALF which may affect the use of it for the enforcement of OCAA. Such specific attention is required at both the national and international levels so as to expand the potential benefits of ICALF to the area of enforcement of OCAA. In the absence of initiatives from the legislature, the judiciary can play an important role by removing the unclear and contradictory areas associated with the ICALF so that the ICALF can be applied to the enforcement of OCAA until reforms are brought about by the legislatures of the international arbitration nations. One important element of the ICALF is that there are legal provisions applicable to the enforcement of foreign arbitral awards that are open for the judiciary to interpret in line with changes taking place in the dispute resolution landscape and online marketplace.

From legislative perspectives, this can be achieved by bringing reforms to the existing provisions of the ICALF or to a new OCA-specific legal instrument as an annex to the existing ICALF, making room for the enforcement of OCAA through a government-sponsored electronic court room specifically developed for the enforcement of OCAA. This approach will further make it easier for judges in Australia to reduce the burden of interpreting some areas which have not been defined in the statutory provisions of the ICALF and national consumer protection laws and to play their role in enforcing the laws in the new commercial contexts. Such a legally committed and focused approach to reform the existing ICALF has the potential to provide a legitimate foundation on which an eCourt can enforce the OCAA delivered by private online consumer arbitration providers. In line with the overall discussion, the next chapter focuses on
whether there is an appropriate legal and technological infrastructure for the development of a separate eCourt room for the enforcement of OCAA.
CHAPTER SEVEN: ENFORCEABILITY OF OCAA THROUGH A GOVERNMENT-SPONSORED ELECTRONIC COURT ROOM

1. Introduction

It is evident from the discussions in the previous chapters that the traditional government-sponsored courts have been recognised as important institutions to protect online consumer rights and enforce private online consumer arbitration awards and international arbitration awards by both the government sector and private sector through their regulatory frameworks. This reliance on the courts is based on various factors. These include the need for protecting vulnerable consumers and ensuring an efficient, impartial, cost effective and reliable enforcement mechanism for the enforcement of online and offline arbitration awards, combining both the private and government sector. It was further discussed that the courts in the current traditional form do not provide an appropriate mechanism for the resolution of B2C e-commerce disputes and also for the enforcement of online consumer arbitration awards (OCAA). Importantly, some writers suggest that government-sponsored electronic courts (eCourts) need to be used for the resolution of B2C e-commerce disputes and both private ODR and courts need to be integrated, and there is also a growing literature in relation to various issues associated with the use of eCourts for the resolution of traditional offline disputes.

In line with the objectives of the thesis, the purpose of this chapter is to discuss the possibility of using a tailored eCourt room for the enforcement of OCAAs delivered by private online consumer arbitration providers, and advocates the use of an eCourt room as an appropriate institution for the enforcement of OCAA. More specifically, the research question addressed in this chapter is: Given the potential of creating an eCourt room for the enforcement of OCAA from a technological perspective, how far do the existing legal frameworks of both Australia and Sri Lanka in relation to court proceedings allow the judiciary which has the jurisdiction to enforce foreign arbitral awards to enforce OCAAs through such an eCourt room? In the absence of specific legal provisions which allow the judiciary to do so, this chapter argues that there is a promising legal framework which can be used by the judiciary to enforce OCAAs through an

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2 Writer’s views were reviewed in the second chapter of the thesis.
3 See Agustí Cerrillo i Martínez and Pere Fabra i Abat (eds), E-Justice: Using Information Communication Technologies in the Court System (IGI Global Snippet, 2009).
eCourt room. This discussion is conducted by focusing on the existing legal framework applicable to court proceedings of the Australian Federal Court (AFC) as one of the enforcers of foreign arbitral awards, and the Sri Lankan High Court (SHC) as the only court which enforces foreign arbitral awards. This argument is developed by addressing relevant legal provisions of the Federal Court of Australia Act of 1976 (FCAA), the Federal Court Rules of 2011 (FCR), the Sri Lankan Supreme Court Rules made by the Supreme Court under the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, the Australian International Arbitration Act of 1974 (Cth) (IAA), the Sri Lankan Arbitration Act of 1995 (AA) and the electronic commerce-related laws in Sri Lanka. In this discussion brief reference is made to the eCourt-related technological developments so as to show that there is no barrier to creating such an eCourt room for OCAA from a technological point of view. It must be noted that an eCourt room is advocated in this discussion only for strengthening the enforcement of OCAA, given the need of an appropriate enforcement mechanism for such OCAAs.

Accordingly, this chapter is structured in the following manner: with the brief introduction in the first section, the second section provides an overview of the existing eCourt mechanism and its strategy. The third section examines the mostly relevant legal provisions of the related legal instruments to find out how far the judiciary is allowed to enforce OCAA through an eCourt room in detail in both Australia and Sri Lanka. The fourth section lists several perceived benefits of using an eCourt room for the enforcement of OCAA. The fifth section concludes the chapter.

2. An overview of the existing eCourt mechanism and its strategy

This section focuses on the identification of the scope of the eCourt, its objectives, and the technological tools developed under the eCourt strategy. It is important to note that this section is not a mere overview of the existing eCourt strategy but is intended for providing an appropriate foundation for addressing the major research question of this chapter. Accordingly, through this overview, it is expected to describe the development of the eCourt mechanism and

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7 International Arbitration Act of 1974 (Cth).
its potential for the development of an eCourt room, tailored to enforce OCAA from a technological point of view.

2.1 The scope of the existing eCourt mechanism

It can be argued that the current eCourt mechanism resembles the qualities embedded in the online consumer arbitration mechanism, and there is a possibility of integrating both institutions from a technological perspective. It must be noted that there is no statutory definition in regard to eCourts in either the Australian or the Sri Lankan legal frameworks. As such, attention is paid to the available sources, such as the eCourt-related websites and the related literature. As far as the existing eCourt websites are concerned, the Australia Federal Court’s website has descriptive information as to the scope of the existing eCourt. For example, there is the description that the ‘eCourtroom is a virtual courtroom that assists in the management of pre-trial matters, ex parte applications for substituted service in bankruptcy proceedings and applications for examination summonses by allowing directions and other orders to be made online, in general Federal Law matters.’ Instead of defining the eCourt, the Land and Environment Court describes the functions of an eCourt on its website as follows: ‘Initiate proceedings on line (using the internet)’; ‘Lodge documents on line’; ‘Obtain hearing dates and adjournments through eCourt's eCallover facility’; ‘Use the internet to check the record of activity in their matters’ and ‘Access any documents that were filed on line.’

Macdonald, Burdon and Jackson hold the view that ‘It may be a courtroom that has nothing more in it than some computers, linked to each other if possible, but at least linked to the Internet.’ In a similar fashion, Stanfield is of the view that ‘A virtual courtroom is one which need not exist anywhere but electronically. Using internet technology, a courtroom can be configured without requiring parties to spend a fortune on additional hardware and software.’ Schultz notes that ‘Cybercourts are simply court proceedings that use exclusively (or almost exclusively) electronic communication means.’ It is evident that the eCourt is a virtual entity

10 ‘As part of its LEC On Line strategy the Court implemented a new computer system called eCourt in November 2002. The objective of eCourt and other LEC On Line projects is to improve the services available to litigants and their representatives.’ What is eCourt? Land and Environment Court <http://www.lawlink.nsw.gov.au/lawlink/lec/fl_lec.nsf/pages/LEC_ecourt> last accessed 01 March 2013.
which can be operated entirely online with electronic means, while some parts of the proceedings can be conducted electronically with the rest in an offline procedure.

Accordingly, eCourts may include one court room or more rooms technologically equipped to conduct court proceedings. Such an eCourt basically allows parties to a dispute to file a case electronically, gain access to monitor the steps taken before the proceedings and the progress of the court proceedings electronically, and attend the court proceedings by using technological tools such as video conferencing and other eCourt-related technologies such as eLodgment and eCase Administration. Such eCourts can be used by the judiciary to conduct its proceedings online without the presence of parties or witnesses to a matter in dispute and to deliver their judgments online.14

Accordingly, it is reasonable to note that this sort of technology-driven eCourt resembles the qualities found in the online consumer arbitration mechanisms, as such mechanisms are designed to conduct all the steps from the initial complaint to the delivery of the final decision entirely or partly by using electronic means as defined in the first chapter of the thesis. In addition, the attention directed towards the development of online alternative dispute resolution mechanisms within the court system is also a promising trend.

The use of ODR in the government sector has been advocated.15 Katsh notes that ‘Technology-assisted dispute resolution should be considered to be an integral component of e-government.’16

2012: ‘They should be, and often are, considered to be part of the ODR movement, for two reasons. First, because the ODR movement emerged because of the clash between the ubiquity of the Internet and the territoriality of traditional, offline dispute resolution mechanisms. The term ODR is thus opposed to offline dispute resolution mechanisms, not to courts. Online ADR is only one part of ODR. Second, courts do not only provide litigation. As I said before, there also is court-based mediation and non-binding arbitration.’ 5.

See ‘It may be a courtroom that has nothing more in it than some computers, linked to each other if possible, but at least linked to the Internet. Opposing counsel and the judge would have computers and the court manager or associate would have access to a system that allows electronic documents to be displayed to the jury and witnesses on monitors or large screens. This system would also be linked to an electronic database that contains all the information that, in its primary form, is electronic information, suitably indexed, so it can easily be retrieved for viewing.’ Roslyn MacDonald, Mark Burdon, and Sheryl M. Jackson, Ensuring the integrity of the E-court process. In Proceedings Justice Environments Conference 2006, 1-12, Melbourne (2006); see also Harris Scarfe v Ernst & Young [2005] SASC 407; Einstein J indicates that: ‘The Technology Court is comprised of a number of features and functions that work together in an integrated and cohesive manner. The sum of the parts is equal to less than the whole, resulting in a powerful tool which has greatly enhanced the efficiency and fluidity of the trial process.’ Justice Clifford Einstein, Technology in the Court Room- 2001 - [Friend or Foe?]


Baoping Han, A Study on G2C ODR in E-Government


Ethan Katsh, Dispute Resolution and e-Government Panel Discussion 494 <http://dl.acm.org/citation.cfm?id=1509209> last accessed 17 September 2012:

‘Dispute resolution brings citizens into contact with government and online dispute resolution adds a new element to the government-citizen relationship. Some governmental dispute resolution activities involve government as one of the
Tamberlin notes that ‘It is worth mentioning that arbitration also lends itself to the eCourt type facilities, particularly where matters can be handled ‘on the papers’.’

A combination of the characteristics of both private online consumer arbitration mechanisms and eCourt mechanisms and the developing advocacy of ODR within the existing court setting can be considered a positive factor for the possibility of integrating private OCAA providers and their final OCAA.

2.2 The objectives of the electronic court mechanism

There are several objectives underpinning the eCourt strategy which are worth noting in this discussion as they provide broader insights into the potential, especially for a possible expansion of its service to the private online consumer arbitration sector. Most of the governments in the world are in the process of modernising the existing traditional systems with technologies in order to deliver speedy and effective justice to people, in line with the growing e-commerce market nationally and internationally. As a result, eCourts have already been developed in many developed countries and are also prevailing in developing countries as well, and are found, for example, in the USA, Italy, Belgium and Singapore. These countries are in the process of modernising their courts with technology, especially under the concept of e-governance. As far as Australia is concerned, the modernisation of courts is carried out under the eCourt strategy which is part of the broader e-governance. Major objectives of the eCourt strategy can be described as follows.

- complements traditional means of transacting with the Court;
- develops innovative approaches to meeting the needs of Court users and extends the choices available to those wanting access to services and appropriate information;
-...

20 ‘A typical experience is reported from Colorado where specific locations have made e-Filing mandatory in specific case types.’ New Hampshire e-Court Project, above n 18; Macdonald, Burdon and Jackson, above n 11.
21 See Martínez and Abat, above n 3.
23 See Martínez and Abat, above n 3.
24 ‘After a hesitant start, Australia’s court services are moving towards acceptance of information technology as an integral component of many court processes.’ Macdonald, Burdon and Jackson, above n 11.
improves and enhances access to justice, and reduces inconvenience and the cost of justice to parties, particularly those in outlying regional and country areas;

- focuses on the needs of the broad community (independent of geographic or socioeconomic circumstances);
- assists judges, regardless of location, to carry out their duties as efficiently and effectively as possible;
- enables the Court’s administration to support the judicial function and delivery of services to eCourt users, efficiently and with minimum disruption to the user; and
- makes better use of tried and tested technologies, such as telephone services and video-conferencing.25

In a similar vein, the Sri Lankan government has also developed a broader policy framework for the purpose of modernising government institutions, including the judiciary, with technology. The following objectives have been recognised under the e-Government policy:

- Improved efficiency and effectiveness of government organizations in Sri Lanka, thereby making each government organization’s budget go further.
- Ease and accessibility of government information and services for citizens, and other government organizations.
- Promotion of good governance.
- Development of ICT competence among government employees.
- Management of ICT resources in sustainable manner.26

A circular on the policy and procedure for the use of information and communication technology (ICT) in government organisations is one example. It includes several ICT-related actions to be taken by all government organizations, among which the allocation of required funds for the development of ICT by the relevant organisations, and the use of email as a method of official communication, can be cited.27 Importantly, the Sri Lankan government has taken several measures to improve the existing court mechanism as well as being in the process of creating an appropriate legal infrastructure to facilitate electronic commerce. One such measure is the commencement of eCourt-related projects, of which the e-Law project can be cited, with the following objectives:

The e-Laws project is intended to create the enabling legal environment for the development of Information and Communication Technology (ICT) in Sri Lanka, through the enactment of the required laws by Parliament in order to facilitate e-Government, e-Business as well as to attract ICT related foreign direct investment.\(^28\)

The common elements of these objectives are to make the government’s courts efficient and deliver justice without much delay and cost. In the face of these objectives, it can be observed that their underlying principle is to promote access to justice and to make the courts more flexible in regard to the handling of cases and to encourage the judiciary to make the proceedings of the courts convenient and user friendly and to remove the barriers embedded in the court’s proceedings in order to deliver quality justice. In order to achieve these objectives, many more technological tools have been developed by the Australian government compared to the Sri Lankan government’s commitment, as outlined in the following section.

### 2.3 Existing eCourt-related technology

There are several technological tools that have been added to the courts under the broader eCourt strategy in Australia. For example, the Australia Federal Court includes facilities such as eLodgment for sending the related documents of a case in electronic form.\(^29\) This facility allows parties to a dispute to check the documents already filed and to monitor the progress of measures taken by the court’s administration.\(^30\) The eCase administration is also designed to communicate between a chamber’s staff and practitioners or parties to a court case.\(^31\) Another facility is the development of an eCourtroom, which is specially developed for managing pretrial matters.\(^32\) Importantly, the Casetrac facility has been developed for managing the function of the eCourt.\(^33\)

The Commonwealth Court Portal which was launched in 2007 is a good example of an appropriate eCourt-related service. One of its objectives is to network some of the courts of Australia. The Commonwealth Court Portal (CCP) networks three courts, namely the Family Court of Australia, the Federal Court of Australia and the Federal Magistrates Court of Australia


\(^{32}\) FAQs- Getting Started, above 9.

by allowing ‘free web-based access to information about cases before these courts.’ CCP is designed to deliver the following services:

- a view of court information designed specifically to suit the users needs
- the ability to search for relevant information held by the three courts
- access for lawyers to case information from the convenience of their own office
- control and administration of this access by the law firm in which they work
- a customised home page which enables users to see what has changed since their last log on
- secure access to information for self represented litigants, and
- the ability to eFile applications for divorce, family law supplementary documents, initiating applications and response to initiating applications.

It seems that the eCourt strategy is not limited to introducing technology into court rooms and links with each government’s courts, but has broader objectives. For example, ‘In line with world-wide trends, the eCourt strategy makes use of the Internet to facilitate seamless and easy access to internal and external databases.’ This statement can be viewed as a sign of the possibility of linking eCourt strategy with the databases developed by countries as well as private online consumer arbitration providers which maintain data bases for the resolution of B2C cross-border e-commerce disputes. Moreover, it is recognised that ‘The eCourt strategy is technically and administratively flexible in order to accommodate future changes to the Court’s business.’

This flexibility is further reflected in the statements that ‘the system can be customized to fit the needs of a given court system and offers considerable flexibility in the different ways in which it can be used.’ At present, the electronic courts are designed for ‘electronically flexible’ and ‘integrated electronic trials’ and ‘with connection to the Court's network and the Internet, and the


38 About eCourt <http://www.igsr.umd.edu/eCourt/about.php> last accessed August 2012.
integration of audio, video and data communications and information. As such, this broader flexibility of using the technology is a positive factor for moving towards the development of a tailored eCourt room for OCAA by the judiciary.

Sri Lanka is also taking appropriate measures to introduce IT in order to modernise government service for the public under the broader e-governance. In this broader e-governance strategy, the eCourt is also being introduced into the formal dispute resolution setting by the Sri Lankan government. For example, measures are being taken to develop electronic case filing and management systems into the Sri Lankan Supreme Court and the Court of Appeal in order ‘to facilitate ease of access to information to the general public.’ At present, all judgments from the Court of Appeal and the Supreme Court and laws enacted by the parliament are electronically published and the public can gain access to these facilities via the Internet. Additionally, the use of video conferencing facilities during the court proceedings was recently allowed by the Sri Lankan judiciary.

2.4 The growing use of eCourt-related technology by the judiciary

There is a promising tendency towards the use of technology by the judiciary for the resolution of disputes. The Federal Court’s website states as follows:

The [c]ourt has made significant progress in enhancing existing courtrooms and developing new courtrooms that are electronically flexible and able to cater for integrated electronic trials, with connection to the [c]ourt’s network and the Internet, and the integration of audio, video and data communications and information.

The case of Peter de Rose v Fuller and the State of South Australia which is found on the Federal Court’s website is an excellent example of the capability of setting up a specific eCourt for the resolution of particular disputes. In this case a native title hearing was held entirely

39 Federal Court of Australia, above n 25.
41 ‘The Supreme Court of Sri Lanka is implementing an electronic case filing and management system as part of an effort to modernise the administration of the country’s Judiciary and to facilitate ease of access to information to the general public.’ Sri Lanka Embarks on e-Court System <http://www.futuregov.asia/articles/2011/jul/01/sri-lanka-embarks-e-court-system/> last accessed 10 August 2012.
42 Ibid.
45 Federal Court of Australia, above n 25.
46 Ibid.
47 Ibid.
online by using technological tools, and is an example of the capacity of conducting an entire hearing electronically.\footnote{48}

Cases such as \textit{Idoport Pty Ltd v National Australian Bank},\footnote{49} \textit{Harris Scarfe & ORS v Ernst & Young & ORS},\footnote{50} \textit{Australian Securities and Investment Commission v Macdonald}\footnote{51} and \textit{Richard Crookes Constructions Pty Limited v F Hannan (Properties) Pty Limited}\footnote{52} are examples where online court facilities were adopted. These cases reflect not only the growth in the use of electronic courts, but also as one way of legitimizing the eCourt strategy in Australia.\footnote{53}

The judiciary has also paid attention to the benefits that can be offered by the use of an eCourt strategy.\footnote{54} It is generally accepted that there are positive aspects of using eCourts for the resolution of disputes. In this respect, two major advantages of having e-court have been demonstrated by the case of \textit{Harris Scarfe & ORS v Ernst & Young & ORS}\footnote{55} that: ‘First and foremost is the reduction in trial time, which I consider is likely to be substantial.’\footnote{56} And also ‘The collective costs of each day that the trial continues, including the costs of senior counsel and at least one firm of principal instructing solicitors from interstate, will be substantial, and even a minor reduction in the length of the trial will deliver significant cost savings.’\footnote{57}

One can argue that the existing eCourt mechanism has been developed only for large scale disputes and is not appropriate for small dollar disputes. This argument can be challenged with the evidence that shows the use of eCourts for small dollar disputes. For example, \textit{Money Claim Online} and \textit{Possession Claim Online} in the UK\footnote{58} can be cited as they have been designed to

\begin{itemize}
\item \textit{In de Rose v Fuller and the State of South Australia (de Rose)} a native title hearing was held in an electronic bush courtroom. This trial sought to:
\item examine issues of standards and protocols for courtroom technology; and
\item \textit{Idoport Pty Ltd v National Australian Bank Limited 1} [1999] NEWSC 828.
\item \textit{Harris Scarfe & ORS v Ernst & Young & ORS (NO 3)} [2005] SASC 407.
\item \textit{Australian Securities and Investments Commission v Macdonald (No 2)} [2008] NSWSC 1020.
\item It is also important to note that as far as ODR is concerned, there is neither legal instrument nor court case which accepts the legal validity of ODR. However, the use of ODR has been recognised through e-commerce protection guidelines (2006) and reasonable contribution of ODR literature provides the necessary acceptance as a viable dispute resolution mechanism.
\item \textit{Harris Scarfe & ORS v Ernst & Young & ORS (NO 3)} [2005] SASC 407.
\item Ibid.
\item Ibid.
\end{itemize}
handle small dollar disputes. Accordingly, it important to note that the use of eCourts can be used irrespective of the complexity of the case in dispute, and small value as well as large value cases can be subject the eCourt mechanism.

This section shows the existence of the eCourt mechanism in Australia and also growing attention towards the modernisation of the existing courts with technology in order to deliver justice efficiently by absorbing the technology into the major dispute resolution arena. The judiciary can make use of the great potential that is embedded in the eCourt mechanism for the resolution of any disputes before the judiciary which has jurisdiction to hear and determine them, and the judiciary also has an obligation to make use of these technologies as long as existing laws allow them to do so, and depending on the nature of the disputes and parties involved. Even though the current focus of the eCourt strategy is to modernise the existing court setting and facilitate the resolution of offline disputes with technology, it is evident that these technology-driven developments are promising as they provide a solid potential for using an eCourt room tailored for the enforcement of OCAA from a technological perspective.

Importantly, this eCourt-related work is ongoing. With technological innovations, more flexibility, time saving and inexpensive technologies, the service of the eCourt mechanism can be broadened to encompass the private online dispute resolution sector, especially in the online consumer arbitration setting. In this sense, the development of an eCourt room, tailored to enforce OCAA, is not a barrier from a technological point of view. In fact, the next challenge is whether the judiciary is allowed to enforce OCAA through such an eCourt room from a legal point of view.

3. Does the existing law allow the judiciary to conduct enforcement proceedings of OCAA through a modified eCourt room?

This section examines whether the related legal frameworks of both countries have positive strengths for the judiciary to enforce OCAA through an eCourt room. Legal responses from both countries are separately discussed for clarity.

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59 ‘The management structure overseeing the implementation of the eCourt initiatives is committed to ensuring that the strategy’s progress is reviewed on an ongoing basis and will re-evaluate priorities and initiatives, if required, against emerging best practice’ Federal Court of Australia, above n 25.
3.1 Australian legal position

As far as the Australia legal framework is concerned, in the absence of any specific law which allows for the judiciary to enforce OCAA through an eCourt room, it is argued that there are positive authorities in the existing legal framework which can be used by the judiciary to conduct enforcement proceedings of OCAA through an eCourt room.

3.1.1 The jurisdiction of the Australian Federal Court in terms of its proceedings

The primary issue is the scope of jurisdiction conferred on the Australian Federal Court in terms of its proceedings under the FCAA. The AFC’s authority to conduct the enforcement proceedings of the OCAA can be commenced with the jurisdiction conferred on the judiciary to conduct its proceedings under section 17 of the FCAA. Section 17 of the FCAA stipulates that ‘except where, as authorized by this section or another law of the Commonwealth, the jurisdiction of the court is exercised by a Judge sitting in Chambers, the jurisdiction of the court shall be exercised in open court.’

Kellow has questioned the scope of section 17 of the FCAA as to whether the ‘court can exercise jurisdiction in proceedings conducted on the eCourt given that members of the public do not have real time access to a proceeding conducted on it.’ This scholar has further noted that, ‘the evaluation of the eCourt pilot will include consideration of whether the Federal Court of Australia Act should be amended to include a definition of a ‘judge sitting in chambers’ as including a judge using electronic communication to conduct a proceeding.’ Unfortunately, it appears that no reform has been introduced by the legislature so far. Therefore it is important to examine the scope of section 17 of the FCAA in light of the related provisions of the FCAA and FCR, together with related literature, so as to find out whether section 17 is still a barrier to the formation of an eCourt room for OCAA and to conduct enforcement of OCAA proceedings accordingly.

It is also important to pay attention to Fredric’s writing as to the issues which are connected to the constitutional principles that can arise when court trials are conducted online. Referring to the U.S. Constitutional principle embedded in the Sixth Amendment on the requirement for the

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60 ‘Except where, as authorized by this section or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court.’ Federal Court of Australia Act of 1976 (Cth) section 17.
61 Kellow, above n 36, 123.
62 Ibid.
need for conducting trials in relation to criminal prosecution in public, this writer raises the question: ‘How can a virtual trial be ‘public’? An answer is given in the following terms:

Presumably, the public receives access through the ability to view the proceeding electronically as it takes place. If a limited original intent/textual interpretation is applied, this may be inadequate, especially if not everyone has the means for easy and free electronic access. Critically, however, the traditional right to view a trial has never required the government to enable the public to travel to the courthouse. Similarly, today’s courthouses do not promise sufficient space for all interested attendees, first-come, first-served is usually the practice. Accordingly, if remote public access is sufficient under the Constitution, there is no current reason why all interested observers must have access.63

Similar provisions can be seen in the Australian64 and Sri Lankan legal frameworks.65 As far as the Sri Lankan Constitution is concerned, Article 106(1) of the Sri Lankan Constitution requires:

The sittings of every court, tribunal or other institution established under the Constitution or ordained and established by Parliament shall subject to the provisions of the Constitution be held in public, and all persons shall be entitled freely to attend such sittings.66

This provision applies irrespective of the nature of the disputes, whether they are criminal or civil, unless expressly mentioned areas listed in Article 106(2) of the Sri Lankan Constitution.67 In fact, both the Australian law and the Sri Lankan law require court proceedings to be conducted in open court. As such, even though the statement of Fredric was in relation to criminal prosecution, his answer can be equally applied to the legal position of both Australia and Sri Lanka, as it seems to favor online trials for such criminal cases as well. This prevailing approach in regard to an open court and electronic trials warrants further elaboration. It is important to look at the nature of court proceedings when the requirement of an open court or public hearing is applied. For example, criminal trials can be a primary concern when electronic trials are conducted, given their public interest. In civil cases this rule needs be applied in a flexible manner, given the fact that criminal liability is not involved, and also decisions can be made in most cases with minimum involvement of the parties.

64 Federal Court of Australia Act of 1976 (Cth).
66 Ibid.
67 Ibid.
When it comes to the enforcement proceedings of foreign arbitral awards and OCAA, the whole dispute resolution mechanism will have been conducted within a private domain and only the final decision is expected to be enforced through a government court. In most cases such awards are enforced on the basis of the documents which are required under the enforcement countries’ arbitration laws and in limited cases inter partes hearings are conducted. In case of the OCAA, the proceedings need to be conducted via technological means, as the lack of using such means can undermine the very purpose of online consumer ODR. In keeping these comments in mind, the following areas can be further cited in support of the possibility of the judiciary enforcing OCAA through an eCourt room without violating constitutional and national legal principles, such as section 17 of the FCAA, in relation to the proceedings having to be conducted openly, with examples from Australia.

3.1.1.1 Definition of ‘Open’ and ‘Court’

The first question is: can the word ‘open’ be merged with the word online? An affirmative answer can arguably be given by the fact that there is a lack of definition of the phrase ‘open court,’ and it has not been defined in the FCAA. The next question is: can the word ‘court’ be merged with the term ‘electronic court’? Again the answer is affirmative as there is a possibility to argue that the existing definition of court does not limit its scope only to a court in physical form, and it does not exclude the use of e-courts. The FCAA simply defines the court as follows: ‘Court means the Federal Court of Australia established by this Act.’ The IAA also defines it in a similar manner.69

3.1.1.2 Decision as to the place of sitting

There are positive rules that can be used by the judiciary to support the enforcement proceedings of OCAA through a specific eCourt. Under the FCR, ‘…the Court may sit at any place in Australia or in a Territory.’ These rules do not define the place, so that a place of sitting could be interpreted by the judiciary to include both a physical place and a virtual one.

In the case of Idoport Pty Ltd v National Australian Bank, it has been decided that the use of a technology court could be either with the agreement of the parties to a particular dispute, or the court itself could decide the use of eCourt or types of technologies that might be used for the

68 Federal Court of Australia Act of 1976 (Cth).
69 International Arbitration Act 1974 (Cth).
70 Federal Court Rules of 2011 (Cth).
proceedings.\textsuperscript{71} In the case of \textit{Harris Scarfe & ORS v Ernst & Young & ORS}, the court noted that ‘judges are still called upon occasionally to rule on the appropriate use of technology where the parties fail to reach agreement.’\textsuperscript{72} When delivering the judgment of this case, the court took into consideration inherent jurisdiction, Supreme Court Rules and the court’s obligation to follow the ‘overriding purpose to facilitate the just, quick and cheap resolution of the real issues in civil proceedings.’\textsuperscript{73}

Importantly, Kellow articulates the judicial power to take such a decision in the following terms:

The Court may, on its own motion or at the request of a party, direct that a matter, or part of a matter, be dealt with on the eCourt. Whether, and to what extent, a matter will be dealt with on the eCourt is for the Court to determine. In making this determination, regard will be given to such things as the nature and complexity of the issues to be resolved, the number of parties, the access of each party to email and the internet, the views of the parties, the nature and extent of any evidence that may be required, and the urgency of the matter or part of a matter. The Court will determine which issues will be dealt with on the eCourt, and may give directions as to the time in which parties must login to the eCourt and respond to messages. The Court may also set a timetable or deadline for when the issue is to be resolved. The Court may terminate the use of the eCourt for a matter or part of a matter at any time either on the Court’s own motion or at the request of a party.\textsuperscript{74}

In view of this situation it is reasonable to note that the judiciary has the potential to conduct enforcement proceedings of the OCAA in an eCourt room and the scope of section 17 of the FCAA and the 106(1) of the Sri Lankan Constitution do not arguably hinder the judicial power to do so.

\textbf{3.1.1.3 The scope of the ‘proceedings’ under the FCAA}

The next question is: can the judiciary use technological tools during the enforcement proceedings of the OCA? There are supportive legal provisions that can be used by the FCAA for the proceedings to be conducted online in a separate eCourt room. For example, the FCAA defines the scope of court proceedings as: ‘proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion

\textsuperscript{71} \textit{Idoport Pty Ltd v National Australian Bank}.
\textsuperscript{72} \textit{Harris Scarfe & ORS v Ernst & Young & ORS}.
\textsuperscript{73} \textit{Idoport Pty Ltd v National Australian Bank}.
\textsuperscript{74} Kellow, above n 36; See also Federal Court of Australia, above n 25.
with, a proceeding, and also includes an appeal.75 This definition has no limitation over the conducting of court proceedings being only in the form of traditional paper.

3.1.1.4 Documents required for the enforcement of OCAA

The next important issue is whether documents required for the enforcement of final arbitration awards can be presented in electronic form. Rule 28.44 of the Federal Court Rules 2011 (Cth) notes as follows:

28.44 Enforcing foreign awards
(1) A person who wants to enforce a foreign award under section 8 (3) of the International Arbitration Act must file an originating application, in accordance with Form 52.

(2) The originating application must be accompanied by:
(a) the documents mentioned in section 9 of the International Arbitration Act; and
(b) an affidavit stating:
   (i) the extent to which the foreign award has not been complied with, at the date the application is made; and
   (ii) the usual or last-known place of residence or business of the person against whom it is sought to enforce the foreign award or, if the person is a company, the last-known registered office of the company.

(3) The application may be made without notice to any person.

Note Without notice is defined in the Dictionary.76

The scope of these rules seems to be a reproduction of the rules embedded in the IAA in regard to the enforcement of final arbitration awards. These rules include the application of three important documents for enforcement purposes. The first states that ‘(1) A person who wants to enforce a foreign award under section 8 (3) of the International Arbitration Act must file an originating application, in accordance with Form 52.’ This includes the production of the arbitral agreement and the arbitral award which is embedded in section 9 of the IAA.77 The second entails ‘an affidavit.’ Then the question is: can these documents be presented to the AFC in electronic form? The answer is affirmative, given the following reasons.

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75 Federal Court of Australia Act of 1976 (Cth).
77 Section 9 of the IAA.
As far as the first is concerned, the rules do not define the form required to ‘file an originating application, in accordance with Form 52’ and has left it to the requirements embedded in the IAA of 1974. The court can make rules ‘for or in relation to: (q) the forms to be used for the purposes of proceedings in the [c]ourt.’ In terms of the second, documents mentioned in section 9 of the IAA of 1974 articulate the formalities of such documents in the following terms: ‘the duly authenticated original award’ or ‘a duly certified copy’ and ‘the original arbitration agreement under which the award purports to have been made or a duly certified copy.’ The possibility of these documents was discussed in the previous chapter and it was argued that not only an arbitration agreement but also an arbitral award can be made in electronic form as long as they are genuine to the satisfaction of the enforcement court.

The third document referred to is an affidavit. This rule does not define the form of the affidavit. It seems the designers of this requirement have deliberately left it for the court to decide. Otherwise the legislature could have adopted a similar approach to that of the definition given to the ‘notice’ embedded in subsection 3 of 28.44, where such a notice can be produced in electronic form. As such, it can be argued that the lack of definition provides an opportunity for the judiciary to accept an affidavit in electronic form as well, which in turn can also be considered as a positive element for the enforcement of OCAA through the eCourt. It is further allowed: ‘Using eCourtroom, the Court may receive submissions and affidavit evidence and make orders as if the parties were in a normal courtroom.’

This argument can be further supported by the fact that, under the current e-lodgment mechanism, parties to a case can submit their documents in electronic form. The Federal Court website notes that ‘Documents may be filed (lodged) at the Court either in person or by post or fax or by the Court’s electronic filing facility.’ The necessary documents related to the registration of OCAA for enforcement purposes can arguably be sent by using this facility, given the broader power vested in the AFC in regard to the regulation of its proceedings under section 59 of FCAA as discussed bellow.

78 Federal Court Rules of 2011 (Cth).
79 Federal Court of Australia, above n 25: ‘The eCourtroom includes an online User Manual and a public transcript facility. The User Manual provides access to a self-paced guide that explains how to use the eCourtroom. The public transcript area lists those matters that have been dealt with on the eCourtroom. The selection of a particular matter will provide access to the electronic transcript of that matter. The electronic transcript is the record of all messages posted by the presiding Judge and parties to the eCourtroom in the selected matter.’
It is clear that rule-making power does not allow changing the existing laws or disregarding such laws. One can argue that this kind of approach might disregard the rules established in the formal laws of a country by using technology. In fact, the technology is arguably used to change only the physical element of the requirement enshrined in the law, that is, to produce the same documents in electronic form. Such an approach does not intend to disregard the requirements of the formal laws. In view of this situation, it can be argued that the judiciary can allow an online award creditor to submit all the documents as required by the IAA and the Federal Court Rules as discussed in this section in electronic form for enforcement proceedings of an online arbitral award, having secured the authenticity of such documents.

3.1.1.5 The use of technology in Federal Court Proceedings

The relevant sections are sections 47(A) and 47(B) of the FCAA. It can be argued that these two provisions are not limited to a specific proceeding of the AFC. In other words, the judiciary can make use of the required technological tools for conducting OCAA-related proceedings of the OCAA online. Under sections 47(A) and 47(B) of the FCAA, the court or judiciary may allow testimony to be given and appearance or submissions to be made by using video, audio and other appropriate means respectively, subject to the conditions listed in section 47(C) of the FCAA. Moreover, in a case where an examination or appearance takes place under the law, the court or judge may direct or allow such disputants to put documents to a person by video link, audio link or other appropriate means, subject to conditions embedded in the same provision. Section 47(E) allows a remote person to swear an oath or to make an affirmation by video, audio or other appropriate means.

The following court rules can be cited in this regard. One important example is the rules in relation to video conferencing and related technologies for the facilitation of eCourt proceedings. Section 4 of the FCAA defines the scope of a video link as follows: ‘video link means facilities (for example, closed-circuit television facilities) that enable audio and visual communication between persons in different places.’ These rules also allow the judiciary to make rules in regard to the use of technology and what types of technologies can be adopted for the function of an eCourt strategy. For example, the judiciary has been empowered to make rules in relation to

81 Federal Court of Australia Act of 1976 (Cth).
82 Ibid.
83 Ibid.
84 Ibid.
85 Federal Court of Australia Act of 1976 (Cth) section 4.
‘the making or receipt of submissions by video link, audio link or other appropriate means’ which can be used by the judiciary not only for ‘video links’ and ‘audio links’, but also for related technologies which can be supportive for the proceedings of an eCourt under the phrase of ‘other appropriate means’.86

Importantly, accessible technologies have been developed which include ‘hearing loops, audio and video systems, voice reinforcement systems, teleconferencing and videoconferencing systems and CCTV linkage to other courtrooms and spaces to enable public viewing and media coverage.’87 Regarding the development of technology in the national courts, Sourdin notes that ‘the eCourt enables updated online conversations to take place and protocols have been developed to assist users and the court.’88

The court recognises the fact that such facilities are important for the parties to a dispute that live in remote locations to gain access to the court. ‘The [c]ourt recognises that video-conferencing facilities are increasingly relevant to ensure participation from rural and remote localities in matters before the court. The court is currently exploring opportunities for enhanced use of video-conferencing through the eCourt strategy,’ and also ‘The Court has issued a video conferencing guide for those wishing to use video conferencing in proceedings before the Court.’89 It is submitted that the admissibility of the use of video conferencing facilities for the people from rural and remote locations is recognised by the judiciary.90 The AFC implemented a national video-conferencing system which was considered as ‘the first of its kind in the world’ which brings benefits in terms of cost and time as evidence can be given by the witnesses and judges who are away from the normal place of sitting.91 Accordingly, these facilities can be used for connecting parties to the OCAA wherever they live.

3.1.1.6 Delivery of the final judgment and appeal against a final decision

These technologies together with emerging technologies can be used innovatively for the interaction between judges and the public, but ‘Web broadcasting of court proceedings’ is yet to

86 Rules embedded in the section 59 of Federal Court of Australia Act of 1976 (Cth) further provide: ‘(1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.’
87 Federal Court of Australia, above n 25.
89 Federal Court of Australia, above n 25.
91 Federal Court of Australia, above n 25.
start in the Australian eCourt setting. As far as the delivery of final judgment in electronic form is concerned, the possibility of achieving this can be supported by the recent developments taking place under the eCourt strategy. The e-Court concept enables the judge of a case to deliver the judgment in electronic form.

The AFC delivers its orders in electronic form. As such, ancillary orders or final judgments of the courts can be made in a case where OCAA is sought through such a specific eCourt room for OCAA. It is also important to note that the AFC was the first Australian court to broadcast a live judgment by means of video and audio technology on its home page on 3 August 1999. The case was Australian Olympic Committee Inc v The Big Fights Inc [1999] FCA 1042. A recent case which delivered its judgment by electronic means was: Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2) [2012] FCA 34 Justice Rares 1 February 2012 (10.24 mins). These services can be considered promising developments which can be used as examples to support the possibility of developing a specific court for the enforcement of OCAA.

Equally, the question arises as to whether an appeal against decisions of the SHC can be made in a case where an appeal is sought against a decision given by a specific eCourt in regard to the enforcement of OCAA. The existing eCourt strategy provides a positive answer. Under the existing eCourt strategy the concept of Electronic Appeals is being developed so as to facilitate appeal proceedings. The development of an electronic appeal book is one useful innovation which can also be a positive element in a case where a decision of the AFC is appealed. In this case this facility can expedite the appeal proceedings in an effective manner. The scope of the appeal is designed to be used in all appeals and it ‘involves the Court considering the

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97 ‘The Court will implement electronic appeal books in manageable stages, in much the same way that it successfully implemented electronic filing.’ Federal Court of Australia, above n 25.
implications of standardising the software to be used and providing appropriate technological assistance to those parties who would otherwise be unable to convert paper documents into electronic form.98 This appeal mechanism can also be considered a positive development which corresponds to the qualities of OCAA and can be used for appeals against decisions taken by the judiciary against the enforcement of OCAA.

3.1.2 Other positive areas to be taken into consideration

The previous sections discussed the possibility the FCR created in 2011 for using the existing eCourt for the enforcement of OCAA by the judiciary, and identified some uncertainties as well. These are associated with section 17 of the FCAA and the FCR applicable to the document-related formalities and with making appropriate rules to conduct the enforcement proceedings of OCAA in a separate eCourt room. It can be further argued that a combination of rulemaking power, the objectives of the FCAA, the Practice Notes and ADR and ODR-related developments in the Federal Court setting provide a reasonable foundation for the FCAA to remove the uncertainties existing in the current legal framework.

3.1.2.1 Rule-making power of the AFC

The first question is: can the judiciary make use of the rule-making powers vested in them by section 59 of the FCAA to use for the removal of uncertainties recognised above? This question can arguably be answered affirmatively by referring to legal provisions related to section 59 of the FCAA and IAA. It seems that there are no specific provisions under Section 59 of the FCAA (rules of Court)99 in regard to the enforcement of foreign arbitral awards. Section 59 of the FCAA notes that rules can be made by the AFC in relation to: ‘(j) the enforcement and execution of judgments of the Court.’100 However, the rules that have already been made in relation to the enforcement of foreign arbitral awards are not specifically designed for such a purpose.

A discretionary element embedded in section 59 of the FCAA: The scope of section 59 is outlined as follows:

(1) The Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in

98 Ibid: ‘The Court recognises that for electronic appeals to become the norm, it must take the lead as part of its eCourt strategy.’
100 Ibid.
the Court (including the practice and procedure to be followed in Registries of the Court) and for
or in relation to all matters and things incidental to any such practice or procedure, or necessary
or convenient to be prescribed for the conduct of any business of the Court. 101

The other important aspect of the rule-making power conferred by section 59 of the FCAA is
that Federal Court judges have the authority to make rules under section 59 of the Federal Court
of Australia Act 1976 in regard to court proceedings in line with the areas of disputes and their
complexity. Thus OCAA based on B2C e-commerce disputes can also be covered under this
broader scope of the power. The issue of costs can also be resolved by the court by making
appropriate rules as the court has already been offered the authority to make rules in terms of the
‗the costs of proceedings in the Court.‘ 102 The Report of the Working Group of Alternative
Dispute Resolution rightly indicates that ‗access to justice requires that the cost of resolution
should be proportionate to the amount at issue; and it is also noted that many consumer disputes
are factually straightforward.‘ 103

This section empowers the judiciary to regulate its proceedings for the purpose of delivering
justice effectively and efficiently. Importantly, the FCAA empowers the judiciary to make rules
in relation to the proceedings of such a court. Such procedural elements include ‗pleading,‘ ‗the
attendance of witnesses,‘ ‗the administration of oaths and affirmations,‘ ‗the costs of
proceedings in the Court,‘ ‗the forms to be used for the purposes of proceedings in the Court,‘
‗the administration of oaths and affirmations in respect of testimony to be given by video link,
audio link or other appropriate means‘ and ‗the making or receipt of submissions by video link,
audio link or other appropriate means.‘ 104 It seems that this list is not exhaustive; rules can be
made not only in relation to the listed areas of court proceedings but also other areas in relation
to the listed areas.

3.1.2.2 Objectives of the AFC

Courts are expected to deliver justice in accordance with the law and the changing circumstances
of the society. The following objectives reflect that broader scope which can be used by the AFC
for the expansion of access to justice and to deliver effective justice to a wider community,

102 Federal Court of Australia Act of 1976 (Cth), section 59.
either offline or online, who expect justice from the government sponsored courts. It is expected from the judiciary to resolve disputes effectively and efficiently. As far as the objectives of the AFC are concerned, they are intended to:

- decide disputes according to law - promptly, courteously and effectively and, in so doing, to interpret the statutory law and develop the general law of the Commonwealth, so as to fulfil the role of the a court exercising the judicial power of the Commonwealth under the Constitution;
- provide an effective registry service to the community; and
- manage the resources allotted by Parliament efficiently.\(^{105}\)

In view of these objectives, it can be argued that changes should be brought to the mode of communication and such changes do not change the fundamental obligation of the court that has to be exercised by the law. It is worth noting the fact that proceedings conducted online do not violate the scope of section 17 of the FCAA which deals with the jurisdiction of the AFC in terms of its proceedings or the power granted by the *International Arbitration Act* over the AFC to enforce international commercial arbitration awards.

Even though the first objective states that the court has to decide the disputes according to law, the rest notes that this should be accomplished ‘promptly, courteously and effectively.’ In the course of achieving these objectives, courts can take into consideration the broader objectives which are underpinned in the eCourt strategy when they discharge their duties effectively and efficiently, specifically when the existing eCourt is used for OCAA.

It is evident that the guiding principle behind the aims of the eCourt is to modernise court proceedings with new technology which increases access to justice, simplifies court proceedings and maintains an efficient and effective dispute resolution mechanism:

> The Future Courts Program aims to create a modern, innovative and effective courts system for Queensland. The program is developing relevant and easy to use on-line services for litigants, their legal representatives and the broader community. It is also improving registry operations by

promoting the more effective use of information, and implementing new technology and process innovations.106

These objectives can be used by the AFC when the enforcement of OCAA is expected to be made through the existing eCourt mechanism. Objectives such as ‘develops innovative approaches to meeting the needs of Court users and extends the choices available to those wanting access to services and appropriate information’ and ‘focuses on the needs of the broad community (independent of geographic or socioeconomic circumstances)’ show that courts can adopt innovative approaches for the delivery of justice to people with disputes irrespective of the location and types of disputes and with open access to any people who expect access to the judiciary, for example, to disputants who expect to enforce their OCAA through an effective mechanism which resembles OCAA from technological point of view.

It is clear that the court has an obligation to deliver effective justice. When it discharges its duties the court is entitled to iron out the drawbacks of the existing rules which can hinder the delivery of justice in both offline and online contexts without discrimination - ‘Fairness demands that, so far as practicable, authority to cure procedural defects and popular responsibility therefore should be with the same body. And obviously any suggested change should be workable, should promise improvement over the existing system and should be practicable of adoption.’107

Justice demands an approach from the courts which is fundamental to keeping the justice system in line with the changes that are taking place in both offline and online contexts, driven by technology. When interpreting these procedural rules, ‘the sole object of any procedure system should be the attainment of a just and speedy decision upon the merits, according to the principles of substantive law, at the lowest practicable cost, of all disputes between litigants.’108

The court also has the opportunity to adopt new changes to the existing rules or to interpret them purposefully, faster than the time taken for the legislature to bring such changes - ‘It would seem too clear for argument, that judges are in a much better position than legislators to know and


107 Edmund M. Morgan, ‘Judicial Regulation of Court Procedure’ (1918) II 2 Minnesota Law Review 81, 83.

108 Ibid.
appreciate the practical problems of administration of justice. The rules of pleading and practice are the tools of their trade.'

3.1.2.3 The scope of the practice notes

The next question is whether the Practice Notes (PN) developed in 2011 can be used for the support of the argument in this chapter. The reason is that these documents are designed to deal with the use of technology and to allow the court to integrate technology into the court proceedings in order to deliver effective justice. Practice Notes are made by the Chief Justice upon the advice of the Judges of the court for the purpose of controlling court proceedings and they are issued to ‘complement particular legislative provisions or rules of court’, ‘set out procedures for particular types of proceedings’ and ‘notify litigants and practitioners of particular matters which may require their attention.’

Unfortunately, Practice Notes made in 2011 for proceedings under the International Arbitration Act 1974 do not entail reference to the use of technology (Federal Court Australia, Practice Note ARB 1 proceedings Under the International Arbitration Act 1974 (Cth)). Then the question is whether the PN CM 6 ET in Litigation can be adopted for such proceedings. The purpose of the PN is outlined in the following terms:

2. Purpose

2.1 The purpose of this Practice Note and Related Materials is to encourage and facilitate the effective use of technology in proceedings before the Court by:

(a) setting out the Court’s expectations of how technology should be used in the conduct of proceedings before it; and

(b) recommending a framework for the management of documents electronically in the discovery process and the conduct of trials.

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109 Ibid: ‘Legislative control of the details of procedure is based upon the obviously erroneous theory that the courts can be furnished a set of rigid orders, devised in advance by a farseeing legislature, to fit every possible circumstance, so that in any case the court has but to select the particular rule designed therefore, which will automatically apply. This results in an absolutely rigid system. The courts can, of course, do much to soften the rigor by process of interpretation, if they be so inclined, but they cannot properly disregard or suspend positive statutory enactments, even to avoid an outrageous result.’

83.


The purpose is directed towards the encouragement of the use of technology for the proceedings of the court, but it is questionable as to how far the PN CM 6 ET can be used for the enforcement of OCAA as it lacks specific reference to international commercial arbitration proceedings. In fact, the success of the application of these notes seems to depend on how effectively these measures are applied to resolve concerns associated with the proceedings applicable to the enforcement of OCAA through an eCourt room. The judiciary can play an active role in making use of the rationale behind the development of these practice notes, which is to modernise the court proceedings and provide speedy justice, and the obligation rests on it to adapt the court proceedings in line with the commercial and societal needs in the fast growing electronic commerce market.

3.1.2.4 Development of ADR and ODR within the Federal Court Setting

The attention directed towards the development of online alternative dispute resolution mechanisms within the court system is a promising trend. The use of ODR in the government sector has been advocated.\(^\text{112}\) Sourdin also indicates that ‘the court and tribunal system is increasingly involved in determining how ADR processes are to operate.’\(^\text{113}\) She further pays attention to the important role played by both courts and tribunals to both determine and clarify ‘the guidelines, processes and structure used in ADR.’\(^\text{114}\) Moreover, the Australian Law Reform Commission articulates such developments in the following terms:

Such online ADR services might be suitable for certain types of disputes in federal civil jurisdiction. One possibility is in the area of family proceedings, for example, the resolution of minor disputes about contact arrangements or property settlements. An online family arbitration and/or early neutral evaluation system might be feasible where parties could submit information about their dispute electronically and this could be assessed by an experienced legal practitioner and, depending upon the choice of the parties, a binding or non-binding decision given. A similar service could also be provided by the use of facsimile and/or telephone. Services could employ multimedia options and combinations.\(^\text{115}\)

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\(^{113}\) Sourdin, above n 88, 258.

\(^{114}\) Ibid.

Another important step taken by the Australian government for the development of ODR within the court system is the recommendation for ‘a pilot ODR platform to assist resolution of disputes.’\textsuperscript{116} This project by the Australian government could be the starting point or the first step for linking eCourts and private OCA providers.

In light of this discussion, it is reasonable to note that the existing legal framework in relation to the regulation of AFC proceedings provides authority for judges to play a pivotal role in shaping eCourts in line with the technological changes for the delivery of justice. Especially, the court has to play an important role in removing the existing uncertainties in the current legal framework which can undermine the use of eCourts for the enforcement of OCAA and to promote the use of the existing eCourts for the enforcement of OCAA. Accordingly, it is reasonable to note that the full realisation of eCourts for OCA depends on the commitment of the judiciary from an institutional perspective and it should pay attention to promising legal and technological infrastructure in order to facilitate the enforcement of OCAA through an eCourt room.

### 3.2 Sri Lankan legal position

In line with the research question in this chapter, this section examines whether there is a promising legal framework which allows the SHC in which has been vested the power to enforce foreign arbitral awards to enforce OCAA through an eCourt room specifically tailored to OCAA.

At the outset it must be noted that there is no similar legislation to that of the \textit{Federal Court Act} that regulates proceedings of the SHC. The \textit{Judicature Act} No. 2 of 1978 entails the jurisdiction of SHC,\textsuperscript{117} but there is no provision in terms of the rule-making power of the SHC regarding its proceedings. As such, it is argued that there is a promising legal framework for the judiciary to enforce an OCAA through a specifically designed eCourt room within the SHC. The relevant provisions of the \textit{Arbitration Act 1995}, the \textit{Code of Criminal Procedure Act} No. 15 of 1979, the \textit{Constitution of the Democratic Socialist Republic of Sri Lanka} of 1978 and the \textit{Electronic Transactions Act 2006} and \textit{Evidence (Special Provisions) Act} No. 14 of 1995 are taken into consideration.

\begin{footnotesize}
\begin{itemize}
\item[116] \textit{‘Recommendation 5.2}\textsuperscript{5}\textsuperscript{5}
The Attorney-General’s Department work with the Federal Court to establish a pilot ODR platform to assist resolution of disputes. (The platform could provide a model for other ODR pilots by the Federal Government and others.)’ NADRAC the resolve to resolve —embracing ADR to improve access to justice in the federal jurisdiction, A Report to the Attorney–General September (2009) 77: ‘The Federal Court is well placed to provide a pilot ODR platform through its existing e-court initiative.’

\end{itemize}
\end{footnotesize}
The rule-making power of the SHC has been vested in the Supreme Court of Sri Lanka. For example, section 43 of the *Arbitration Act* No. 11 of 1995 has been subjected to the rules made by the Supreme Court of Sri Lanka. Section 43(a) of the AA provides that the Supreme Court of Sri Lanka has the power to make rules in relation to ‘any application or appeal made to any Court under this Act and the costs of such application or appeal.’ There is no statutory framework allowing the SHC to make its own rules in regards to its proceedings or a single statutory provision in another statute which empowers the SHC to make rules regarding its proceedings. This is reflected in another statute which entails the legal principle in regards to the criminal proceedings conducted by the SHC, but rule-making power has been entrusted to the Supreme Court of Sri Lanka. Examples are section 453 (1) and (2) of the *Code of Criminal Procedure Act* No 15 of 1979.

As such, it is important to search for the relevant provision of the Sri Lankan Constitution and whether there are rules developed by the Supreme Court in regards to the proceedings of the SHC which allow the SHC to make use of technological tools for conducting its proceedings. The rule-making power in relation to court proceedings is regulated under Article 136 of the *Constitution of the Democratic Socialist Republic of Sri Lanka*. Article 136 (I) provides that:

> (I) all matters of practice and procedure including the nature and extent of costs that may be awarded, the manner in which such costs may be taxed and the stamping of documents in the Supreme Court, Court of Appeal, High Court and Courts of First Instance not specially provided by or under any law.

This article provides that the Superior Courts are entrusted to make rules in relation to ‘all matters of practice and procedure including the nature and extent of costs that may be awarded’ of the SHC as well. Unfortunately there is no specific set of rules developed by the Supreme Court of Sri Lanka in relation to the proceedings of the SHC which allow the SHC to make use of technology for its proceedings. Therefore procedural rules embedded in the AA in 1995 have to be considered. The discussion in the previous chapter makes it appear that there are provisions in the AA in relation to the documents that should be filed and the formalities and time period

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119 Ibid.
121 Importantly, Sri Lankan Rs. 400 million have been allocated to upgrade the existing court mechanism under the recent budget in 2012, given the consideration to the backlog of around 650,000 cases and facilities available in the current court setting. Shanika Sriyananda, Backlog of 650,000 cases to be cleared, Sunday Observer <http://www.sundayobserver.lk/2012/02/26/new22.asp> last accessed 18 September 2012.
within which foreign arbitral awards have to be presented for enforcement. The Sri Lankan AA and the provisions of the *Electronic Transactions Act* of 2006 provide a supportive environment for the judiciary of Sri Lanka to accept documents required for the enforcement purpose of foreign arbitral award in electronic form as well. In addition to the discussion made in the previous chapter, it is important to consider whether there are any provisions of the ETA that can be used for the judiciary to enforce OCAA through an eCourt room.

Section 8 of the ETA can be used in this regard. This section provides for the ‘Use of electronic records and electronic signatures in Government institutions and statutory bodies’ and it further states as follows:

Use of electronic records and electronic signatures in Government institutions and statutory bodies

(1) Where any written law for the time being in force requires –

a) the filing of any form, application, or any other document with any Government department, office, body or agency owned or controlled by the Government or a statutory body in a particular manner;

(b) the issue of grant of any license, permit or approval; or

(c) the receipt of payment of money, procurement or other transaction to be effected in a particular manner.  

It can be argued that their objectives can be broadly interpreted so that these laws can be useful legal instruments for the facilitation of the effective enforcement of OCAA. The scope of the language used is sufficiently broad to include the government-sponsored courts, including eCourts. Accordingly, it can be argued that there is the possibility for the Sri Lankan judiciary to accept documents required under the AA for the enforcement of foreign arbitral awards in electronic form.

One of the obligations of the law enforcement authorities, such as courts, is to take into consideration these underlying objectives of the laws and to interpret them in line with the changes taking place in the electronic commerce market. Legislature is not in a position to make

122 Sri Lanka Consolidated Acts, above n 118.
laws on every issue that may come up in the constantly changing and complex technology-driven electronic commerce market. The judiciary as one organ of the government is in better place to adapt the existing old laws, especially the AA which was legislated in 1995, to make changes required by the e-commerce market. Of course there have been some progressive developments in the recent past in the judicial pronouncements in Sri Lanka.

There has been the use of video conferencing for the first time in the Commercial High Court of Sri Lanka. Thajudeen notes words expressed by the Chief Justice Sarath N Silva of Sri Lanka referring to the use of a video conferencing facility in the following manner: ‘The Chief Justice said this facility is a *sine qua non* in Commercial High Court cases which involve commercial transactions as by this method the litigants saved their time and money. It was encouraging to note that this will be the beginning of a new era.’¹²³ In this case, a foreign witness located in the UK was allowed to attend the proceedings via the video conferencing facility and was also cross-examined.¹²⁴ The reception of SMS under the provisions of Evidence Ordinance in 1876 and ETA 2006¹²⁵ is also another example which highlights the judicial commitment to take into consideration technology-driven communication tools.

These examples show the courts of Sri Lanka also in a progressive move towards embracing technology into the dispute resolution landscape within the existing e-commerce friendly legal framework. When the courts are in a position to interpret the existing laws in light of the overarching objectives of delivering justice underpinned in the existing legal framework in relation to court proceedings in light of the technology driven OCAA and referring to the developments in other countries such as Australia, the development of an eCourt for OCAA can be initiated.

4. **Benefits of adopting a specific eCourt room for the enforcement of OCAA**

The use of an eCourt room supported by ICALF and other related laws such as national consumer protection laws for the enforcement of OCAA may offer a number of benefits to both online consumers as well as online business people. The following positive benefits can be

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¹²⁴ Ibid.
¹²⁵ Jayantha Fernando, Commercial High Court Admits SMS as Evidence <http://www.itpro.lk/node/1273> last accessed 18 September 2012.
highlighted as examples which can also be part of justifying the need for having an eCourt room for OCAA.

First, both the eCourt room and online arbitration reflect the same kind of medium and provide cost effectiveness and speedy and simple procedures in terms of enforcement of OCAA. As discussed in Chapter one of the thesis, OA is recognised as a dispute resolution mechanism which is ‘efficiency, cost-effectiveness, and increased access to justice.’ ODR is mainly driven by technology and needs simple, user-friendly and speedy enforcement mechanisms. No matter what the dollar amount of the dispute involved is, or where the parties to the arbitration agreement reside, the eCourt room strategy, backed by an appropriate legal framework can operate effectively. It is evident the guiding principle behind the aims of the eCourt is to modernise court proceedings with new technology which increases access to justice, simplifies court proceedings and maintains an efficient and effective dispute resolution mechanism. By developing appropriate software for the integration of OCA with the eCourt room, enforcement of OCAA can be executed without cost to the consumers, as government is in a position to provide the necessary financial assistance. This is by allowing parties to an OCAA to gain access to the eCourt room from anywhere in the world through the Court facilities and other related technological tools such as email and telephone or Skype which are widely available. As such, the use of an eCourt room can respond to the qualities embedded in the ODR mechanisms.

Second, an eCourt room can play a supervisory role over the operation of private OCA processes at the enforcement stage and ensure compliance with the consumer protection laws of the enforcement country and the most fundamental principle of due process and fairness. Additionally, an eCourt has the opportunity to rectify the omissions left by the legislature in terms of consumer protection and to apply consumer protection principles in line with the


127 See Justice Einstein explains his personal experience as follows: ’My own experience has been that the Technology Court system in place has been of immense use both inside the courtroom as well as in chambers or at home when writing judgments or otherwise keeping a detailed note of the evidence or submissions.’ Justice Clifford Einstein, Technology in the Court Room- 2001 - [Friend or Foe?]
<http://www.lawlink.nsw.gov.au/lawlink/supreme_court/lc_sc.nsf/pages/SCO_speech_einstein_201101> last accessed August 2012; ‘The Future Courts Program aims to create a modern, innovative and effective courts system for Queensland. The program is developing relevant and easy to use on-line services for litigants, their legal representatives and the broader community. It is also improving registry operations by promoting the more effective use of information, and implementing new technology and process innovations.’ Future Courts Program, Creating a modern, innovative and effective courts system for Queensland <http://www.courts.qld.gov.au/4516.htm> last accessed August 2012; see also ‘The objective of eCourt and other Land and Environment Court on-line projects is to improve the services available to litigants and their representatives.’ McColl, above n 94.
developments taking place in the online market and the legal frameworks of the other jurisdictions by way of using the power of interpretation.\footnote{128}

Third, the eCourt room has the potential to operate as a filtering mechanism for the removal of unfair aspects of private online consumer arbitration clauses and fairness issues that emerge during online consumer arbitration proceedings. The eCourt room can be reviewed as a mechanism to reduce the imbalances between online sellers and online consumers. This can lead to reduced abuses and bring such kinds of behavior to the public notice. For example, when there is an arbitration clause in an online consumer arbitration agreement, the eCourts of the enforcement country are in a position to assess the fairness of the arbitral clause and to decide whether it can be enforced or not and also to find out whether OCA providers comply with OA mechanism-related principles as explored in chapter three of the thesis.\footnote{129} Thus the use of eCourts can be used not only to monitor the effectiveness of the ODR mechanism, but it can also act as an effective enforcer of online arbitration agreements and OCAA.\footnote{130} In addition, the use of the eCourt strategy can be a solution to those legal and practical concerns which can be easily overlooked until amendments are made to the existing consumer protection laws and until the existing traditional court mechanism is modified in line with the changing cross-border B2C e-commerce market.

Fourth, the other important positive characteristic of the use of an eCourt room for OCAA is the possibility of legitimising the operation of OCA providers. At present, private OCA providers gain their legitimacy from various sources. Among these the use of a self-regulatory mechanism is important and accepted by the governments as well. These measures need to be scrutinized, and the views expressed by Segal are worth noting in this regard:

\footnote{128}‘In addition, the court and tribunal system is increasingly involved in determining how ADR processes are to operate. In this respect courts and tribunals play an important role in determining and clarifying the guidelines, processes and structure used in ADR.’ Sourdin, above n 88, 258.


\footnote{130}NADRAC the resolve to resolve — embracing adr to improve access to justice in the federal jurisdiction A Report to the Attorney–General September (2009) 75.
regulation is working. If this occurs, the existence of self-regulation would be counter-productive.\(^\text{131}\)

However, at present such measures are promulgated by the private sector itself and lack a government-sponsored monitoring mechanism. Therefore their legitimacy can be challenged and by using an eCourt room the enforcement of OCAA self-regulatory measures can be scrutinised and the legitimacy of the self-regulatory approaches adopted by OCA providers can be ensured. Gibbons asserts that ‘if we allow pure market forces to hijack ODR, it may result in an ethical race to the bottom at the cost of legitimacy and fairness, and government or judicial intervention that could stifle ODR’s innovation and creativity.’\(^\text{132}\) The eCourt room discussed in this chapter is not operated as an institution to undermine the innovative dispute resolution approaches adopted by the private sector, but to act as a supportive institution to achieve the goals of ODR protection of the rights of online consumers and the interests of online business people.

Fifth, this mechanism provides the opportunity to develop binding precedents that can assist especially online consumers to understand OCA and its impact on their rights.\(^\text{133}\) Arguably, disclosure principles embedded in the online consumer protection guidelines should not be limited to the disclosure of information about the dispute resolution processes. Disclosure principles should encompass publication of OCAA that will inevitably increase the transparency of the OCA process adopted by OCA providers in a remote location from online consumers. It can be further argued that unlike in the B2B sector, in the B2C setting there is no such high risk of disclosure of commercially sensitive information to the public which could harm online business activities. This can further be justified on the basis that the two parties are different, with different interests and are mostly labelled as single transaction players, as opposed to repeat players in the B2B setting. Moreover, if online consumer arbitration is recognized legally, it offers an opportunity to develop a legal framework based on precedents of online consumer arbitration awards.


Sixth, the possibility of developing this eCourt system in any country and the potential of creating networks among such eCourts in the world is another positive element worth mentioning. Governments can afford the development of eCourt-related infrastructure within the existing court structure or can create a separate eCourt for the purpose of enforcement of OCAA. Given the reductions in the cost of technological tools and the introduction of technology into court rooms throughout the world, this net-work approach has the potential not only to ensure an international enforcement mechanism of OCAA delivered in the resolution of cross border B2C e-commerce disputes regardless of the location they operate in, but it can also be successfully applied in domestic as well as international arenas. Networking-related developments can be observed in EU countries to find an appropriate redress mechanism for consumers.

5. Concluding remarks

From an Australian perspective it is reasonable to note that conducting enforcement proceedings of OCAA through a tailored eCourt room is an achievable goal, given the promising legal framework, technological infrastructure already in place, and the growing judicial commitment for making use of technology for the litigation process, regardless of the nature of disputes for which it has the jurisdiction to hear and determine. Such a developed approach might also be a promising move towards achieving the Australian government’s long-term goals of ‘ensuring that Australians engaged in e-commerce enjoy a world-class consumer protection environment’ and develop Australia ‘as a centre of excellence for B2C e-commerce.’

As far as the Sri Lankan legal framework is concerned, there are some positive elements of the existing related legal framework which can be used by the judiciary to enforce OCAA through an eCourt room. As far as the eCourt-related technological developments are concerned, the modernisation process of the existing courts is slow and more work needs to be carried out in order to make sure the enforcement of OCAA can be enforced though the Sri Lankan eCourt mechanism. This does not mean that such a mechanism cannot be embarked upon by a country

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134 See Schiavetta, above n 22.
137 Ibid.
like Sri Lanka. From a technological point of view, especially for the purpose of enforcement of OCAA, a highly complex and highly expensive electronic court mechanism is not required. With government support, a specific room with computers connected to the Internet and technological tools such as video conferencing facilities can be sufficient for this purpose. Communication can take place with the email facility, and in a case where hearing is required, a video conferencing facility can be used. These technological tools are already absorbed into the existing court setting. As such, it is reasonable to conclude that Sri Lankan legal and eCourt-related technological developments as they exist today do not pose a significant barrier for the SHC to conduct enforcement proceedings of OCAAs through an eCourt room.

In common, both the Australian Federal Court and the Sri Lankan High Court can make use of the existing legal and technological infrastructures and they have an important role to play in achieving the enforcement of OCAA through an eCourt room by giving liberal interpretations to the related legal provisions discussed in this chapter. It is also evident that using an eCourt room can make the private OCA mechanisms more accountable to the protection of online consumers’ rights enshrined in the national consumer protection laws and can increase confidence in the minds of online consumers and online business people with the involvement of a government-sponsored eCourt. With the potential of developing an eCourt room within the existing government-sponsored court setting, all the arbitration favoured nations of the world can embark on the enforcement of OCAA through an eCourt room, not only by the judiciary alone but also by the governments and the private OCA providers, so as to ensure a viable dispute resolution mechanism which benefits online consumers, online business people, online consumer arbitration providers and governments.
CHAPTER EIGHT: CONCLUSION

POLICY DIRECTIONS FOR BOTH AUSTRALIA AND SRI LANKA FOR AN APPROPRIATE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE ENFORCEMENT OF OCAA

1. Introduction

The overall purpose of the thesis was to map and evaluate the Australian and the Sri Lankan legal and institutional approaches to the issues associated with the enforcement of OCAA as identified in chapter one and reviewed theoretically in the second chapter of the thesis. More specifically the central question addressed is: how can the enforcement of OCAA be made more effective? In addressing this question, it was argued that a supportive government-sponsored regulatory and institutional framework in each country is important for strengthening the enforceability of OCAA; online consumer arbitration can then be viewed as a viable mechanism for business to consumer cross-border electronic commerce disputes.

The objectives of the current chapter are to report the findings of the thesis, which were based on the three major issues addressed throughout the thesis from the Australian and Sri Lankan legal and institutional perspectives, and to propose possible reforms to be brought about by both government and private OCA providers. Moreover, it outlines the challenges that warrant attention, notes the significance of the research and suggests future research directions. Accordingly, the chapter is structured in the following manner. With the brief introduction in this section, the second section reports the findings from the overall discussion of the thesis, together with the reforms suggested for further consideration by both the government and the private OCA sectors. The third section outlines the challenges that might be encountered in the development of an appropriate cooperative mechanism as proposed in the thesis for the enforcement of OCAA. The fourth and fifth sections are a note on the significance of this research project and the areas of future research, followed by final remarks in the sixth section of the chapter.
2. Findings from the overall research project

Findings of the overall discussion conducted in the thesis can be summarised in three major categories: first, a summary of the findings derived from the substantive chapters of the thesis, covering the possibility of adopting a cooperative approach; second, the active role that can be played by an enforcement court of foreign arbitral awards (enforcement courts); and third, the problematic areas which require reforms from both the government and the private OCA sectors.

2.1 Summary of the findings derived from the substantive chapters of the thesis

2.1.1 Chapter two: Theoretical underpinnings

Chapter two provided theoretical underpinnings for the specific issues under consideration and the methodological approach adopted for the examination of the research questions of the thesis. A review of the theoretical underpinnings showed that there are positive developments in relation to ODR, as well as issues which are specially associated with the area of OA. These can be summarised in the following terms.

First, ODR is a developing global phenomenon and has been advocated and used for the resolution of e-commerce disputes as a viable dispute resolution mechanism with a history that can be traced back to the mid-1990s. Developing trends in ODR are noticeable in individual countries. There are promising developments relating to ODR within the existing broader dispute resolution landscape of Australia and Sri Lanka as well. As far as Australia is concerned, the development of ODR has been reflected in both the private and government sectors, with scholarly contributions addressing many aspects of ODR from diverse perspectives. In contrast, Sri Lanka only has some contributions from the government, especially in the making of e-commerce friendly laws for the development of ODR, and a small number of writings can be found focusing on these laws, while research into ODR is very limited.

Second, there is an evolving debate over the appropriate regulatory models and enforcement mechanisms for ODR. Hence it can be concluded that the search for an appropriate legal framework for ODR is still a continuing phenomenon. In a similar fashion, the search for an effective enforcement mechanism model for the enforcement of ODR outcomes is also an evolving phenomenon.
In summary, it can be concluded that there is growing attention towards the development of ODR within a secure legal and institutional framework which is reflected in the writers’ views as well as in initiatives by the government and private sectors. It is important to note that the theoretical underpinnings embedded in the discussion provide valuable insights into the consideration of regulatory approaches to OCA adopted by both Australia and Sri Lanka, and permit the exploration of the possibility of using a cooperative mechanism as an appropriate one for strengthening the enforcement of OCAA. In addition, chapter two also describes a triangular research approach, with a justification of its appropriateness for the study of the research issues.

2.1.2 Chapter three: case study
Enforcement of OCAA in practice was investigated by exploring the ICANN’s OA mechanism conducted by WIPO and NetNeutrals.com OA mechanism, especially by assessing the compliance of these two providers with the principles developed in relation to the validity of OA providers. This examination was conducted by using both qualitative information and quantitative data from both providers. In light of the discussion conducted in chapter 3, three major findings can be listed. First, the enforcement of final outcomes of these two mechanisms operates within a self-regulatory framework. Second, they have issues in fulfilling the assessment criteria used for their assessment in terms of the disclosure of information, procedural fairness, and access to other remedies, especially government-sponsored courts, and remedies such as injunctive relief, class action and appeal. Third, the enforcement mechanisms, which are controlled by the providers, have not been adequately regulated. The existing enforcement mechanisms are implemented without an appropriate supervisory body either internally or from the government sector.

2.1.3 Chapters four and five: regulatory and institutional responses to OCAC and OCAA
Chapters four and five discussed the impact of the application of online consumer protection guidelines and national consumer protection laws applicable to the enforcement of OCAA. Chapter four specifically focused on the OECD Guidelines and the Australia Guidelines and found that neither guidelines provide an appropriate regulatory framework for the enforcement of OCAA. As argued, their inappropriateness is due to reasons such as the lack of specific attention to the issues associated with OCA, the regulatory models suggested, the lack of a binding nature and the presentation of mere criteria for the assessment of ODR mechanisms without adequate details as to their scope. In fact, these standards advocate a cooperative approach from stakeholders for the development of appropriate dispute resolution mechanisms.
for B2C e-commerce disputes. As far as Sri Lanka is concerned, the Sri Lankan government has not taken appropriate measures for adopting these kinds of guidelines, even though these guidelines are open to non-member countries of the OECD.\(^1\)

Chapter five examined the enforceability of online consumer arbitration clauses under the national consumer protection laws of both Australia and Sri Lanka. It is evident that neither country has imposed a total ban on the use of arbitration for the resolution of consumer disputes. This reflects the fact that the current market realities do not allow such a total ban to take place,\(^2\) given the need of such a mechanism for the resolution of B2C cross-border e-commerce disputes. As far as the Australian experience is concerned, chapter five concluded that the existing national consumer protection laws have general application to the area of standard-form B2C e-commerce contractual undertakings, rather than having a specific legal framework clarifying the legal validity of pre-dispute arbitration clauses and post-dispute arbitration clauses.

As a result, mandatory consumer arbitration clauses embedded in other contractual settings have to be challenged under the common law principles of unreasonableness in Australia. In contrast, Sri Lankan national consumer protection laws do not provide adequate attention to the regulation of OCA clauses. Sri Lanka has not even introduced a similar legal framework to that of the CCA in Australia. Chapter five further found that the validity of OCA clauses may be challenged under the principle of unreasonableness of the Sri Lankan *Unfair Contract Terms Act* (UCTA), and that vitiating factors come under contract law in Sri Lanka.\(^3\)

From an international perspective, it is important to note that there is no specific statutory framework nationally and internationally in relation to the OCAC embedded in B2C cross-border e-commerce disputes. Countries have their own legal and judicial approaches for the regulation of OCAA. This situation is reflected in the study of the EU and the US legal approaches to OCA clauses in chapter five. As a result, it can be concluded that there is a need for specific attention towards developing a clear and specific legal approach to OCAC nationally and internationally, rather than having them left to be challenged under broader unfair terms-

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2. For example, the lack of an effective dispute resolution mechanism in the government sector and the failure of governments to develop an internationally enforceable dispute resolution mechanism and the fast growing e-commerce dispute transnationally.
related legal principles embedded in the national consumer protection laws, or unfair contract-related laws.

Neither online consumer protection guidelines nor national consumer protection laws provide an appropriate and effective institutional framework for the enforcement of OCAA delivered in the resolution of B2C cross-border e-commerce disputes. One important development has been the combined approach adopted between ICPEN and ACCC in Australia, but it also lacks a commitment for the enforcement of OCAA. Therefore the lack of an appropriate mechanism for the enforcement of OCAA demands the development of a targeted mechanism for such enforcement, which also has to bear similar technology-related qualities and underlying principles of OCA, such as simplicity, cost effectiveness and speediness.

2.1.4 Chapters six and seven: enforceability of OCAA through ICALF and eCourts

Chapter six and seven focused on the viability of ICALF and regulatory frameworks applicable to the proceedings of the enforcement courts respectively. From the discussion in the chapter six it was concluded that the existing arbitration laws, which were originally designed for an offline B2B setting, have some merits which might be used to support their application to OCA. Such merits are found in areas such as the definitions of arbitration, of foreign element, place of arbitration, reciprocity and commercial reservation, and formalities such as of writing requirements under ICALF, arbitration agreements, arbitration awards, signature requirements, as well as the use of e-commerce-related laws as gap-filling instruments, the binding element of arbitral awards, arbitrability and public policy and the application of evidentiary rules.

Chapter seven concluded that there is a promising regulatory framework applicable to the regulation of court proceedings of both Australia and Sri Lanka which could be used by the judiciary to enforce OCAA through an eCourt room tailored to such a purpose. In particular, the Australian Federal Court provides an example of the potential of using a tailored eCourt room for OCAA from both technological and regulatory perspectives. As far as the Sri Lankan experience is concerned, there is a possibility for the Sri Lankan judiciary to make rules in the interests of justice for modernising procedural aspects of an enforcement court in light of the existing e-commerce-friendly laws. In addition, there is growing attention to the introduction of technologies in to the existing court mechanism from the government sector in general, and the judiciary has also shown some positive signs of embracing technological tools for court proceedings.
2.2 The possibility of adopting a cooperative approach as an appropriate way forward

By drawing insights from the literature as well as the findings from the discussion in the previous chapters of the thesis, pursued in light of the mapping of the Australian and Sri Lankan legal and institutional responses and two case studies, another finding is the possibility of adopting a cooperative mechanism for the purpose of strengthening the enforcement of OCAA. This section provides an outline of the cooperative mechanism based on the findings of the previous chapters by using the following diagram.

This approach is offered as a recommended policy direction for the governments of Australia and Sri Lanka with the hope of developing it as an internationally applicable mechanism for the enforcement of OCAA in the future. This mechanism would entail the following elements. From a legal perspective, ICALF including the NYC has to be reformed so that OCAA can be enforced, giving due consideration to its virtual existence. This legal framework needs to be reformed allowing the enforcement of OCAA already delivered by the private online consumer arbitration providers.

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4 It is also important to note that some reference is made to the literature on eCourts in other jurisdictions due to the lack of research on eCourt highlighted by some of the leading scholars in Australia. Ros Macdonald, Mark Burdon, Sheryl Jackson, Justice Environments Conference Ensuring the Integrity of the E-court Process (2006) <http://eprints.qut.edu.au/8480/1/8480.pdf> last accessed 29 August 2012.
From the institutional perspectives, both private OCA providers and online arbitration award creditors should be allowed to enforce their OCAA awards through government-sponsored eCourts tailored to such a purpose with the use of ICALF. The eCourts of other countries could be linked with the private OCA providers as an additional step towards making the cooperative approach more convenient and productive. Such a networked approach could ensure an international enforcement mechanism even for OCAA.\(^5\)

2.3 Active role that can be played by an enforcement court of foreign arbitral awards

Another finding that can be highlighted is the active role that could be played by an enforcement court in the enforceability of OCAA through an eCourt room backed up by the existing consumer protection and ICALFs. Until legislative reforms are introduced, given the slow process of bringing new reforms to the existing ICALF,\(^6\) enforcement courts could adopt an expansive interpretation of the related provisions of the national consumer protection laws, ICALF and the legal frameworks applicable to proceedings of the foreign arbitral awards enforcement courts favouring OCAA, through a tailored eCourt room.

If a broad interpretation was given to the provisions of the ICALF and the existing legal frameworks in relation to proceedings of the enforcement courts, with the assistance of the e-commerce-related national and international legal instruments, it was found that there were no significant barriers within the current legal frameworks for the enforcement of OCAA through a tailored eCourt room. There are already examples on the horizon in this respect. The role that the US Supreme Courts play in relation to the expansion of the existing Federal Arbitration Act to the area of B2C setting, as discussed in chapter six, is a promising example. The Courts of each country in the world could play a similar role in defining the formalities existing in the ICALF and remove the existing document-related requirements, for example in relation to foreign arbitral awards.

However, as far as an enforcement court is concerned, there are some issues to be fixed by the judiciary itself. Otherwise the expected role from the judiciary for the enforcement of OCAA through an eCourt room, backed up by the existing applicable legal framework, could be undermined. As discussed in Chapter six, inconsistencies in judicial decisions as appeared in

\(^5\) Such networking strategy seems to be possible given the development of technology at present.

\(^6\) Section 3(2) of the Arbitration Act, No 11 of 1995 in Sri Lanka.
Comandate Marine Corp v. Pan Australia Shipping Pty\textsuperscript{7} and the case of Clough Engineering v Oil Natural Gas Corporation Ltd\textsuperscript{8} should not take place. This situation is equally applicable to countries where there are federal administrative mechanisms, such as Australia. In addition, different judicial views adopted on the same issues by the Supreme Court and the Court of Appeal in Victoria in the case of IMC Aviation Solutions Pty Ltd v Altain Khuder LLC\textsuperscript{9} need to be avoided in order to maintain legal certainty and confidence in the enforcement mechanism of foreign arbitral awards. As such, maintaining a consistent pro-judicial approach to the enforcement of OCAA and the application of legal principle favorable to OCAA is important. If not, the use of ICALF and also national consumer protection laws could become worthless.

2.4 Reforms to the problematic areas required from both governments and private sectors

The other important findings were the identification of problematic areas of the existing online consumer protection standards and national laws, ICALF and legal frameworks, in relation to the enforcement courts’ judicial proceedings. Governments have not introduced sufficient reforms for the existing legal framework to be used for the enforcement of OCAA. As such, this thesis further advocates that the legislature make appropriate reforms to remove the problematic areas as identified in the previous chapters of the thesis. The following section proposes reforms to such identified problematic areas that the governments could pay attention to and make the required reforms accordingly, and also notes areas where the private sector should reform in order to develop a long lasting enforcement mechanism for OCAA which is backed by an appropriate legal framework and a tailored eCourt room, as advocated in this thesis.

2.4.1 For the government law makers

Of course it is not an easy task to demarcate or encompass all the possible unfair aspects of contractual terms, as they can exist in simple as well as complex factual situations. As such, a comprehensive piece of legislation cannot be expected in regard to the scope of unfair contractual terms embedded in online standard form contracts. In fact, a more straightforward and focused approach is desirable to strengthen the use of online consumer arbitration clauses, given the complex nature of the e-commerce market, online consumers’ knowledge and their capacity to bargain with online business people located outside the consumers’ home countries,

\textsuperscript{7} Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192.
\textsuperscript{8} Clough Engineering v Oil Natural Gas Corporation Ltd [2008] FCA 136.
\textsuperscript{9} IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248.
and the need for a clear legal position for online business people when they draft online consumer arbitration clauses.

In the ODR literature, two extreme approaches are excluded,

The final option is to ban arbitration in cyberspace between merchants and consumers or aggressively regulate it. Banning arbitration would result in consumers losing the communicative advantages of cyberspace for the purposes of dispute resolution. Further, in a global medium absent some overarching treaty or governmental body to resolve disputes, arbitration may be the only practical choice for peaceful quasi-judicial dispute resolution. Aggressively regulating arbitration in cyberspace would deny arbitration the flexibility that is its greatest advantage and deny arbitral processes to grow and develop to take advantage of the constantly evolving technology. Either option will disadvantage consumers and business in cyberspace without necessarily creating any corresponding advantages.10

The question then is: what is the most appropriate way to regulate pre-and post mandatory online consumer arbitration clauses which are incorporated in online standard form contracts and OCA contractual arrangements made by private OCA providers? The following sections recommend that attention be paid to two specific areas that have the potential to produce more online business-friendly and online consumer protection mechanisms. The following changes are suggested so that the existing regulatory frameworks can be used to strengthen the enforceability of OCAA through an eCourt room and make the OCA a viable mechanism for the resolution of cross-border e-commerce disputes from the Australian and Sri Lankan regulatory perspectives.

2.4.1.1 Online consumer protection guidelines

This cooperative approach needs to be incorporated in the online consumer protection guidelines as a viable mechanism for the enforcement of OCAA. In doing so, a specific set of guidelines should be incorporated in relation to cooperative enforcement mechanisms, OCA clauses and OCAA. With the introduction of these specific elements into the consumer protection guidelines, uncertainties associated with the guidelines applicable to self-regulation, conflict of law rules, the application of mandatory consumer protection laws and vague cooperative regulatory measures can be overcome. The reason is that the use of eCourt rooms tailored for OCAA and the supportive consumer protection laws and ICALF have the potential as discussed in chapter

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six and seven of the thesis to provide the appropriate protection expected through these guidelines. If this kind of a targeted approach is not followed, the validity and usefulness of online consumer protection guidelines will become moot in the effort to provide an appropriate dispute resolution mechanism and regulate it for the resolution of B2C cross-border e-commerce disputes.

As far as Sri Lanka is concerned, there are no online consumer protection guidelines applicable to online consumer protection. This thesis suggests that it is important for the Sri Lankan government to adopt such online consumer protection guidelines with reforms suggested in this chapter. Given the view that ‘self-regulation is not the answer to every market failure and all social policy objectives,’ and the absence of an internationally applicable legal instrument that protects online consumers, a better approach might start with a stronger lead in the form of OCA-specific guidelines. This initiative can be considered a pragmatic option that could gain wider application until an internationally recognised legal instrument and nationally developed legislation, which are supportive for the development of OCA, are developed.

2.4.1.2 National consumer protection laws applicable to OCA Clauses

Given the problematic aspects associated with the existing national consumer protection laws in both countries as highlighted in chapter four and five, it is vital to introduce a clear legal approach to these two categories of arbitration clauses through consumer protection laws. Adopting a ‘Black List’ and ‘Grey List’ is advocated. Drafters of the CCA could have adopted a ‘black list’ within the ‘grey list’ currently adopted. A ‘black list’ of prohibited unfair terms of contracts is one improvement that can be suggested: the submission made by Legal Aid New South Wales recommends the development of such a ‘black list’ in the Australian legal framework as well. The incorporation of a ‘black list’ has the potential to prevent the testing of such terms before a Court as to their fairness, and also to provide some certainty to the complex

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and evolving electronic contracts in the broader e-commerce market. Such an approach may also be considered an important step towards approaching globally recognised standing in regards to mandatory consumer arbitration clauses.

The *Consumer Affairs Authority Act* (CAAA) in Sri Lanka also needs to be amended, ensuring the legal validity of online consumer arbitration clauses as noted above. In this amending process, the validity of pre- and post-mandatory arbitration clauses must be expressly stated, rather than leaving such clauses to be dealt with under the *Unfair Contract Terms Act* (UCTA). At the same time, the application of the UCTA to the area of OCAC should be abolished in order to prevent applying UCTA with the amended CAAA. Australia’s unfair contract terms law introduced in the CCA provides a useful legal framework for Sri Lanka to consider in amending the CAAA. However, when amending the CAAA, attention needs to be paid to the problematic aspects of the CCA as discussed in chapter seven of the thesis, and to the amendments suggested to the CCA in this chapter. Additionally, another possible avenue of bringing specific law to OCAC is through IAA, similar to that of the UK, where the Arbitration Act has a provision in regards to the validity of consumer arbitration. This is recommended to both Australia and Sri Lanka as well for consideration.

Additionally, the scope of the access to justice requirement needs to be expanded through national consumer protection laws, as such a specific approach has the potential to prevent the enforcement of unfair contract OCAC. Cortes also notes that:

> justice should be understood as the right to obtain redress through the most suitable mechanism, which for many disputes, such as those arising from e-commerce, may well be ODR, and not as the right to participate in an adversarial judicial process. It is necessary to clarify the extent to which courts can require participation in a mediation process or enforce its results.

The use and the development of an eCourt room could be an appropriate candidate for the fulfillment of the requirement of access to court. Given the inappropriateness of the existing

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14 Ibid: It is also important to note that the Australian and Sri Lankan legislatures also need to address other important issues such as “subject matter jurisdiction”, “class claims”, “costs”, “choice of law”, see Shelley McGill, ‘Consumer Arbitration Clause Enforcement: A Balanced Legislative Response’ (2010) 47 (3) American Business Law Journal; see also John Adams, ‘Digital Age Standard Form Contracts under Australian Law: Wrap Agreements, Exclusive Jurisdiction, and Binding Arbitration Clauses’ (June 2004) 13 (3) Pacific Rim Law & Policy Journal.

15 See also Gibbons, above n 10; see also McGill, above n 14.


government-sponsored courts in relation to B2C e-commerce disputes, governments should take the necessary steps to ensure the smooth functioning of ODR mechanisms, including binding arbitration, especially by scrutinising binding OCAA before enforcement of such final outcomes by the private body itself. Therefore the incorporation of a specific provision in the national consumer protection laws for challenging OCA clauses through an eCourt room is an important component in this respect, as such a reform would ensure the protection of online consumer rights, especially in the B2C cross-border e-commerce setting.

2.4.1.3 Reforms to the ICALF
The most powerful source to be promulgated would be the development of an OCA-specific legislative instrument that is internationally applicable. However, it seems too early for this kind of approach, given the lack of legislative approaches that have been adopted for the regulation of OCA. As such, attention to the use of existing legal frameworks is desirable, as they are already well established nationally and internationally as appropriate for the enforcement of international commercial arbitration awards. From the regulatory point of view, government support for the development of OCA can be provided by adopting or adapting appropriate reforms to the existing ICALF which would enable the enforcement of OCAA through an eCourt room. Recommended reforms include the inclusion of OCA within the definition of arbitration, adoption of a liberal approach to a reciprocity principle favouring OCA, expansion of the principle of commercial reservation to accommodate the B2C setting, removal of arbitral awards-related formalities by making such awards electronically available, and the amendment of registration-related legal provisions of the ICALF to enable such procedures to be conducted online.

2.4.1.4 From an institutional perspective
In order to make use of an eCourt room for OCAA, both Australia and Sri Lanka should produce a specific legal framework which enables the judiciary to develop such a mechanism for OCAA, given the uncertainties in the existing Australian legal framework, and the lack of appropriate legal framework for the development of an eCourt room for OCAA in Sri Lanka. Importantly,

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legislative developments in regard to the development of eCourt rooms can already be seen outside Australian jurisdiction. For example, the ‘Phenix Act’ of 2005 has been enacted for the development of an e-justice system from both technological and legal perspectives in Belgium.\textsuperscript{19} In the literature it has been suggested that enacting eCourt-related laws is important in some specific areas connected with eCourt mechanisms. Begum has noted that ‘Specific legislation on e-courts addressing all of its aspects from filing to overall management and the rights and obligations of all participants should be enacted.’\textsuperscript{20} Attention can be paid to these developments and appropriate legislative actions taken for developing an eCourt room enabling the judiciary to enforce OCAA through it, rather than allowing the judiciary to interpret the existing legal frameworks and bringing necessary reforms to them.

There is also a need for appropriate technological infrastructure, so that an eCourt room could be implemented in the foreign arbitral award enforcement courts. The Australian eCourts-related developments could play a leading role or become a place that can be initiated with the necessary legal requirements and infrastructure, and it needs to be designed specifically for this purpose. The Australian government is committed to develop IT infrastructure throughout the country with its National Broadband Scheme, and to the absorption of technology into the dispute resolution spectrum.\textsuperscript{21} It could therefore develop an eCourt room with the required technological infrastructure for the enforcement of OCAA.

In the case of Sri Lanka, the need is for introducing into their courtrooms new technologies: ‘case management systems, electronic databases, personal computers, network connections, electronic data interchange, and video and audio conferencing equipment’\textsuperscript{22} relevant to court proceedings. It is the responsibility of the government to increase the modernisation process of courts in a digital environment, as is becoming reality in other jurisdictions such as Australia,

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\textsuperscript{22} Susan Schiavetta, Online Dispute Resolution, E-Government and Overcoming the Digital Divide, Over-Commoditised; Over-Centralised; Over Observed: the New Digital Legal World? 20\textsuperscript{th} BILETA Conference: (April 2005), Queen’s University of Belfast 2-3 <http://www.bileta.ac.uk/content/files/conference%20papers/2005/Online%20Dispute%20Resolution%20E-Government%20and%20Overcoming%20the%20Digital%20Divide.pdf> last accessed 20 September 2012.
\end{flushleft}
Singapore and the USA. Required assistance could be provided by countries such as Australia, given its expertise and financial capabilities.

2.4.2 For the private sector

The private sector has also to play an important role in the process of making OCA a viable dispute resolution mechanism for B2C cross-border e-commerce disputes. The OCA providers need to streamline their regulatory and institutional framework by undertaking necessary self-regulatory and institutional reforms to enable online award creditors to obtain the enforcement of OCAA delivered via an eCourt room. This can be done in two ways. The first is by integrating a private OCA mechanism into the eCourt room. As discussed in chapter two of the thesis, there are convincing examples of OCA providers in existence at present that allow the enforcement of their OCAA through the ICALF. A similar approach can be adopted by other OCA providers as well. Secondly, online award creditors can be allowed to obtain OCAA through an eCourt room by using the revised ICALF, which is similar to that of international commercial arbitration mechanisms.

In this reforming process, OAA made during the ICANN’s UDRP process in particular needs to be binding, as suggested in the literature, as well as using the cooperative approach advocated in this thesis. Importantly, other OCA providers should also move in this direction so that they can ensure the protection of online consumer rights and those of business interests. Making the final outcomes binding does not arguably violate the national consumer protection laws, as the involvement of the judiciary is ensured in the enforcement process of the OCAA through an eCourt room.

3. Challenges ahead

One related question that can be raised in regard to this cooperative mechanism is whether it is achievable. The materialisation of this approach depends on how successfully governments overcome the following challenges.

First, bringing required reforms to the existing online consumer protection-related regulatory framework and also ICALF could be a challenge. This is because of factors such as the existence of the different regulatory approaches in relation to the enforceability of OCAA, and reluctance regarding the use of ICALFs which have mainly been developed with a focus on a B2B setting.
rather than on the B2C setting. In fact, as discussed in this thesis, it is reasonable to note that bringing reforms to the existing ICALF is achievable by adopting a committed and focused approach in light of the growing B2C cross-border e-commerce market, either by the legislature or the judiciary. However, there are challenges that have to be taken into consideration in developing the cooperative approach for the enforcement of OCAA.

Second, countries which are not parties to the NYC need to be considered, due to the fact that ‘many of the laws or doctrines in several of these non–New York Convention countries are anachronistic or present cumbersome obstacles to ADR actions in the area of international commercial law,’ and because of the broader scope of the e-commerce market. As such, the promotion of joining by countries which are not parties to the NYC and countries which do not have international commercial arbitration laws is important in making the proposed mechanism a globally applicable one as required by the cross-border e-commerce world. The proposed cooperative mechanism can be implemented irrespective of the nature of the country in terms of economic or technological development. One reason is that the international commercial arbitration model is already established and has been embraced by many countries in the world. This wider circulation and the benefits and positive elements of OCA that are suited to the B2C e-commerce disputes setting, as highlighted in chapter one, are promising elements to move forward the development of this proposed mechanism.

Third, there are further issues associated with the development of an eCourt tailored to the enforcement of OCAA. Issues in relation to the use of eCourts for the resolution of disputes have been succinctly articulated in the case of de Rose v Fuller and the State of South Australia, which can also arguably be proposed as relevant in designing an eCourt room for OCAA. They include the following areas:

- identification of consistent standards;
- security;
- speed of access;
- flexibility;

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• responsibility for conversion, compilation and management of electronic data;
• cost to the Court and to the parties;
• reliability of equipment, software and data integrity;
• technology capabilities; and
• technical support and maintenance.  

Of these issues, the cost associated with the use of electronic court facilities can be further elaborated on in light of the current situation in the eCourt mechanism. The current legal position as to the sharing of the cost for electronic court facilities by the parties to the disputes can be problematic, as the affordability of costs associated with the use of technology during the trial stage is unrealistic from an online consumer’s perspective, especially when enforcement of OCAA is concerned with small dollar disputes. As such, the use of an eCourt room for the enforcement of OCAA needs to be free, which may be used as a motivating factor for developing a cooperative approach between private OCAA providers, parties to the OCAA and the government.

All the issues listed in the case of de Rose v Fuller and the State of South Australia can be overcome by the involvement of government as it has an undeniable obligation to the protection of consumers who are vulnerable in the online setting. From an online consumer protection perspective, it is worth noting the view of Perritt who notes that ‘it is implausible, however, that governments will wash their hands altogether of disputes over electronic commerce. Political pressures for governmental involvement will be especially strong to protect consumers, especially respect to elephant-to-mouse transactions.’ As such, it should be noted that the government is obliged to discover appropriate methods to fix these issues with their financial strength. The search for appropriate solutions to these issues cannot be neglected as they have a responsibility to take proportional measures to protect online consumers to the efforts taken by

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26 Ibid; see also The Resolve to Resolve — Embracing ADR to Improve Access to Justice in The Federal Jurisdiction a Report to the Attorney-General (NADRAC Report) 2009 75.
27 See ‘Variable costs are to be borne by the parties on a “user pays” basis’ and also ‘These include the costs of supplying PCs, monitors and standard software; the costs of subscribing to a hardcopy transcript, or an electronic transcript, service; the costs of in-court connection to a real time transcript service; the costs of remote access to the electronic courtroom; and the costs of technical support for the individual benefit of a party.’ Australian Securities and Investments Commission v Macdonald (No 2) [2008] NSWSC Gzell J1020; see Sheryl Jackson, ‘Keeping it Simple: Court-Provided Technology Brings the ‘Electronic Trial’ to the Ordinary Litigant’ (2008) 20 (1) Bond Law Review 52 70-72.
28 Ibid; see Jackson, above n 27.
29 Federal Court of Australia, above n 25.
the government to promote cross-border e-commerce activities. If not, the very purpose of the development of e-commerce can be undermined.

Fourth, the next challenge could be the issues associated with the digital divide. This issue has been widely addressed by scholars focusing on developed and developing countries in the literature. Sourdin’s research studies on ‘digital divide issues,’ which was conducted in the Australian context, can be cited. This study includes areas such as culture and preference, broadband issues, age, disability, income, geographical factors and education, which have been noted as factors that contribute to the digital divide. By referring to several initiatives taken to overcome digital divide issues, she concludes that ‘there has been no systematic, broad infrastructure put in place to address the problem of the digital divide.’ It appears that digital divide-related issues are not limited to developing countries in the world, but exist in developed countries as well.

Wahab has made a detailed analysis of the situation in both developed and developing countries. According to Wahab, ‘The digital divide reflects a gap in the possession and utilization of ICTs between the technology ‘haves’ and ‘have-nots.’ It is a global phenomenon and exists on both international and domestic levels.’ This scholar has further articulated several associated issues encountered by the least developed countries, such as connectivity, infrastructure, accessibility, capacity constraints, literacy and knowledge and awareness. However, Krause notes that some technological tools such as Skype are freely available and also predicts that the availability of technology at low prices will reduce the technical barriers in the next few years. ‘All of this helps make online dispute resolution affordable at much reduced cost to the consumer.’

31 For example, promulgation of e-commerce-related laws and expansion of broadband facilities can be cited.
32 For example, Schiavetta, above n 22.
33 Tania Sourdin, Alternative Dispute Resolution, (Lawbook Co. 3rd ed, 2008) 2. 258.
34 Ibid.
35 Ibid.
37 Ibid.
38 Jason Krause, ‘Settling It On the Web- New Technology, lower costs enable growth of online dispute resolution’ (2007) ABA Journal <http://www.abajournal.com/magazine/article/settling_it_on_the_web/> last accessed 18 September 2012. ‘Teleconferencing is becoming increasingly cheap, even free. A service such as Skype or LiveOffice offers inexpensive calling with controls for multiple parties. Digital whiteboard technology lets users share even doodles and sketches over the Web so that they can diagram car crashes or compare figures. And free services like ScanR create PDFs out of photo images so users can share nondigital documents. And once an agreement is reached, parties can digitally sign documents with software such as Adobe Acrobat 8.’
the technological developments taking place in the current competitive world, it is reasonable to predict that affordable technological tools will be available in due course which can be accessed by those who engage in e-commerce transactions.

4. Significance of the research

Three major elements can be outlined in this respect. First, no research has been conducted especially in relation to the issues associated with the enforceability of OCAA delivered by private OCAA in Australia and Sri Lanka from a comparative perspective. As such, this research fills that particular gap. This contribution further provides an understanding about the strengths and weaknesses of the legal and institutional frameworks applicable to the enforceability of OCAA in both countries.

Second, this research provides potential guidance for both the Australian and Sri Lankan governments and private OCA providers to revisit the regulatory and applicable institutional infrastructure to OCAA and introduce proper reforms to problematic areas which exist in the current legal and institutional frameworks from individual countries’ perspectives.

Third, the possibility of using existing ICALF together with an eCourt room tailored for the enforcement of OCAA is discussed in the context of the Australian and the Sri Lankan legal and institutional frameworks. Importantly, the possibility of adopting this mechanism nationally and internationally is another promising contribution to the ODR landscape and it has the potential to make the OCA mechanism viable for the resolution of B2C cross-border e-commerce disputes. This mechanism can also be considered another step to the broadening of the concept of access to justice as it links the private OCA sectors and public eCourt rooms.

5. Future research directions

The following two major areas can be articulated in this regard. First, further research is advocated in other jurisdictions. Even though the current thesis is mainly focused on the

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that technology. For example, suggesting an ODR process that requires high-definition video-streams for a dispute involving disputants in remote communities will raise significant issues if the required infrastructure (large band-width internet connection) is not available to one party. However, if both parties have dial-up connections, non-synchronous text-based ODR may work well, would bridge the geographical divide and could lead to the resolution of the dispute.’ NADRAC Report, above n 26, 76.
Australian and the Sri Lankan legal and institutional frameworks applicable to the enforceability of OCAA, research into the legal and institutional frameworks of other countries is also required. The main reason is that issues arising when OCA is used for B2C e-commerce are no longer territorial and reforms cannot be restricted to one nation or a limited number of countries, given the global nature of B2C e-commerce disputes. As such, it is reasonable to suggest that the OCAA-related national consumer protection regulatory frameworks and ICALFs in other countries are possible territory for further research, especially from the point of view of the enforcement of OCAA.

Second, it is also important to research the eCourt-related institutional capabilities of each country of the world for the enforcement of OCAA through a tailored eCourt and the development of an appropriate technology-driven system for linking private OCA providers and eCourts in other enforcement countries. This system must be designed by paying attention to the fact that the use of eCourts should not hamper the qualities embedded in the OCA mechanism from technological perspectives. As such, further research is required for designing a tailored eCourt room which can be integrated with private online consumer arbitration providers in order to ensure the smooth circulation of OCAA around the globe from a technological point of view.

6. Concluding remarks

As far as the enforcement of OCAA is concerned, the thesis highlights both strengths and weaknesses of the existing applicable regulatory and institutional measures taken by Australia and Sri Lanka as governments and by two private OCA providers. It is evident that the governments have undertaken some regulatory and institutional measures for the development of the use of ODR within the private sector for the resolution of B2C cross-border e-commerce disputes. Private OCA providers also have developed and operated OCA mechanisms within a self-regulatory framework without much scrutiny from the government sector from both regulatory and institutional perspectives. In fact, both the governments and the private OCA sectors have not successfully addressed the issues associated with the enforcement of OCAA through their regulatory and institutional measures.

There is in fact no targeted and committed approach to the development of the use of OCA adopted by the private sector for the resolution of such disputes by integrating both private and OCA sectors. Arguably, as long as they continue in the current form as distinct branches, the
identified problems associated with the enforceability of OCAA will continue to exist in times to come. As a policy consideration, this thesis advocates a cooperative approach to strengthen the enforceability of OCAA. As such, in order to make the existing regulatory and institutional frameworks more appropriate for the enforcement of OCA, several reforms are suggested for consideration and action by both government and private sectors as being needed to move forward. Limiting the potential of ICALF only to a B2B setting and limiting the potential of the government-sponsored eCourts to offline disputes is arguably not the appropriate way to move forward in the fast-growing online B2C e-commerce market; it would be better to take the necessary steps to make use of both ICALF and eCourts for the enforcement of OCAA.

The challenge is whether the current legal systems, the judicial system of Australia, Sri Lanka, other arbitration nations and private ODR providers can move swiftly to make these well-considered changes to protect online consumers without undermining the interests of online business people and the online B2C e-commerce market. If changes are not introduced in a well-considered manner, online consumers can be disempowered by the lack of regulation or clear judicial guidelines in terms of the enforcement of online consumer arbitration clauses and online consumer arbitration awards. The existing legal framework can bewilder most potential users and deny the right of access to arbitration which has different characteristics, compared to consensual and traditional government sponsored courts. However, with the strengths embedded in the existing national consumer protection laws, the ICALFs, the eCourts-related regulatory frameworks and the eCourts, and with the suggested reforms that can be brought about by both sectors, it is reasonable to conclude that a tailored eCourt can be used for strengthening the enforcement of OCAA, backed up by the ICALF together with the related national consumer protection laws and regulatory frameworks applicable to the proceedings of the enforcement courts. Online arbitration can then be viewed as a viable mechanism for B2C cross-border e-commerce disputes. Such a mechanism would also best serve the protection of online consumer rights and online business interests, and promote trust and confidence, which are considered fundamental to the success of the B2C online market place.
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