The Evolution of Precedent in Mandatory Arbitration – Lessons from a Decade of Domain Name Dispute Resolution

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Abstract

In just over a decade, the international system for mandatory arbitration of domain name disputes has disposed of more than 30,000 disputes, between parties from more than 150 countries, in short timeframes and at low cost. Despite the absence of an appellate body and a doctrine of *stare decisis*, the system has evolved a comprehensive and largely non-controversial body of precedent, that provides clear guidance to parties on most of the legal and procedural issues involved in a domain name dispute. This paper explores both why and how, exactly, such a sophisticated precedential system has evolved voluntary, and identifies the lessons that may be drawn from this experience for other arbitration systems.

Introduction

The conventional view is that arbitration does not – indeed cannot – produce precedents, and hence arbitration is not a dispute resolution system to which the doctrine of precedent applies.[3] There is, however, a developing body of theoretical and empirical literature that suggests the conventional view is wrong – or, at least, is in need of substantial qualification.[4] According to that literature, some non-traditional arbitration systems display features typical of a precedential system.[5]

This paper considers the evolution of a precedential system in one particular non-traditional arbitration system: the domain name dispute resolution system implemented by the Uniform Domain Name Dispute Resolution Policy ('UDRP').[6] The paper begins by identifying the key features of the doctrine of precedent and the justifications for the doctrine. It then evaluates the decade of experience of mandatory arbitration under the UDRP, to determine the extent to which, and the reasons why and

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3 See, e.g., W. Mark C. Weidemaier 'Toward a Theory of Precedent in Arbitration' (2010) 51 William and Mary Law Review 1895, 1903.

4 See, e.g., Gabrielle Kaufmann-Kohler 'Arbitral Precedent: Dream, Necessity or Excuse? (2007) 23(3) Arbitration International 357; Jeffery Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24(2) Journal of International Arbitration 129; and Weidemaier, n 3.

5 The phrase 'non-traditional arbitration' is used here to mean arbitration other than traditional arbitration, where 'traditional arbitration' is defined as arbitration between private parties, pursuant to a provision in a contract between the parties (often referred to as 'commercial arbitration' or 'international commercial arbitration').

6 Uniform Domain Name Dispute Resolution Policy <www.icann.org/en/dndr/udrp/policy.htm> at 21 February 2011.

now, the doctrine of precedent applies under that system. The paper concludes by suggesting some lessons that may be drawn from the UDRP experience about the relevance of precedent to arbitration generally.

Precedent

Precedent in Law

(a) Doctrine of precedent

The doctrine of precedent has been described in various, and often conflicting, ways. According to one judge of the High Court of Australia, the doctrine of precedent is 'the hallmark of the common law';[7] but according to another judge of that court, the doctrine is 'eminently suitable for a nation overwhelmingly populated by sheep'.[8] The doctrine of precedent has, at its core, two components: the principle of *stare decisis*, and the concept of *ratio decidendi*. In simple terms, the principle of *stare decisis* is that a court must follow and apply the *ratio decidendi* of an earlier court decision where the earlier court is above the first court in the judicial hierarchy.[9] The *ratio decidendi* of a court decision is the legal reason that determined the outcome of the decision.[10] The decision of court containing a ratio decidendi that must be followed by virtue of the principle of *stare decisis* is called a 'precedent'.[11]

It can be discerned from this description that the doctrine of precedent is implemented by way of a number of features. First, there are past decisions (precedents) from which legal reasoning (*ratio decidendi*) can be discerned. Secondly, there is a rule (*stare decisis*) that past legal reasoning must be followed by lower courts. As a matter of practice, the reasoning of past decisions will be discernable only if the decision is in writing, contains reasons, and is published. Thirdly, the rule must be enforceable. As a matter of practice, such a rule will be enforceable only if there is a hierarchy of courts in which a decision of a lower court can be appealed to a higher court (an appellate court) for review. Where the lower court has failed to follow the precedent of a higher court, the appellate court will either reverse the lower court's decision to make it consistent with the precedent or will reverse or otherwise modify the precedent itself.

7 Anthony Mason, 'The Use and Abuse of Precent' (1988) 4 Australian Bar Review 93, 93.

8 Lionel Murphy, 'The Responsibility of Judges', opening address for the First National Conference of Labor Lawyers, 29 June 1979 in Gareth Evans (Ed), Law Politics and the Labor Movement (Legal Service Bulletin, Melbourne: 1980), cited in Michael Kirby 'Precedent law, practice and trends in Australia' (2007) 28 Australian Bar Review 243, 243-244.

9 Mason, n 7, 95. According to this commentator, at 98, the doctrine also applies to a court at the same level in the hierarchy as the earlier court: 'This doctrine [of stare decisis] expresses the proposition that a superior court is bound by its own previous decision or ought not depart from it' (emphasis added). This proposition is, however, debateable. It is noted, for example, that the High Court of Australia, the final court of appeal in Australia, has rejected the proposition that it is strictly bound by legal holdings contained in its past decisions: Attorney-General (NSW) v Perpetual Trustee Company Ltd (1952) 85 CLR 237, 244 (Dixon J).

10 Kirby, n 8, 245.

11 As economists Landes and Posner note, 'In ordinary language, a precedent is something done in the past that is appealed to as a reason for doing the same thing again. It is much the same in law.': William Landes and Richard Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) National Bureau of Economic Research Working Paper No. 146, 2.

(b) Justifications for doctrine

There are a number of commonly acknowledged justifications for the doctrine of precedent. One of these is fairness: like cases should be treated alike. In order to provide guidance to, and to satisfy the reasonable expectations of, parties to litigation, judicial bodies must apply rules and principles uniformly. As Sir William Blackstone noted in 1765:

> *For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion.*[12]

Another justification for the doctrine of precedent is efficiency. Without such a doctrine, the work of the judiciary would be enlarged exponentially. As Justice Cardozo of the United States Supreme Court noted in 1921:

> *... the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.*[13]

A third justification for the doctrine of precedent is that it contributes to the perceived integrity of the judiciary. The doctrine acts as a safeguard against the arbitrary exercise of judicial power, and thereby inspires public respect in the administration of justice. Public confidence in the judicial system depends on a perception that outcomes are determined by the principles of the law, rather than by the whims of the decision makers. As United States Supreme Court Justice Thurgood Marshall stated, precedent underscores the presumption that 'bedrock principles are founded in the law rather than in the proclivities of individuals.'[14]

2.2. Precedent in Arbitration

(a) Traditional arbitration

As was noted above, the necessary features of a system for implementing the doctrine of precedent are published past decisions containing reasons, a rule that decision-makers must follow past decisions, and an appellate body to enforce the rule. The first of these features – the availability of published past decisions containing reasons – is often not present in traditional (i.e. commercial) arbitration. Both privacy and confidentiality are common key features of arbitration,[15] making the procedure particularly appealing for the resolution of commercial disputes. As Reinisch notes:

12 William Blackstone, Commentaries on the Laws of England (1765), p. 69 quoted in Michael Sinclair, 'Precedent, Super-Precedent' 14(2) George Mason Law Review 363, 369-370, n 41.

13 Benjamin Cardozo, The Nature of the judicial process (1921), p. 149 quoted in Thomas Lee, 'Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court' 52 Vanderbilt Law Review (1999) 647, 652.

14 Vasquez v Hillery, 474 U.S. 254, 265-266 (1986).

15 The High Court of Australia has confirmed that, unless a contrary intention is evinced, arbitration is a private process 'in the sense that it is not open to the public': Esso Australia Resources Ltd & Others v Plowman & Others (1995) 183 CLR 10 at 26. Nonetheless, as soon as arbitral awards are challenged in a court of law, the matter becomes open to the public: National Alternative Dispute Resolution Advisory Council, The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General (2009), 132.

> *The fact that there is a legal dispute between two or more parties may be undisclosed not only during pending arbitration proceedings [but also] after an award has been rendered [and] this fact as well as the resulting award will often remain confidential. Many commercial arbitration institutions especially advertise the confidentiality of their proceedings as a distinctive advantage.*[16]

Even where an arbitration is not confidential there is not, generally, a strong need to publish the arbitral award because the outcome usually centres on 'a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs'.[17] It is not, therefore, surprising that the conventional view is that arbitration is not a precedential system.

(b) Non-traditional arbitration

With the growing diversity in arbitration practices, there is increasing evidence that the doctrine of precedence may be relevant to arbitration. One instance of this is international investment arbitration conducted by the International Centre for Settlement of Investment Disputes ('ICSID') regarding disputes between a state and a foreign investor in respect of a bilateral investment treaty ('BIT'). The awards in relation to these disputes are published on the ICSID website and in the ICSID Reports.[18]

Disputes handled by ICSID concern a public party (the respondent State), and thus involve interests that go beyond private interests. This, in turn, gives rise to an increased interest in scrutiny of these decisions by the wider public. Although ICSID tribunals are not formally bound to consider earlier decisions, many such tribunals often invoke previous decisions to support their reasoning.[19]

This practice has evolved organically, rather than as a result of a procedural requirement. The ICSID Convention states in Article 53(1) that an 'award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention'.[20] Thus, in relation to the awards given, Article 53(1) confers a binding effect on *parties* rather than ICSID tribunals.[21] Nonetheless, in order to contribute to the consistent development of investment law, ICSID tribunals have become increasingly apt at discussing earlier investment awards when delivering their decisions. For example, the relevance of earlier decisions interpreting BIT provisions was summarised by the ICSID tribunal in *ADC v Hungary* as follows:

16 August Reinisch, 'The Role of Precedent in ICSID Arbitration' (2008) Austrian Arbitration Yearbook 495, 495-496.

17 Kaufmann-Kohler, n 4, 376.

18 See <icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home> at 21 February 2011. Although awards are not published without the consent of the parties, ICSID is permitted to include in its publications excerpts of the legal reasoning of the Tribunal: ICSID, Rules of Procedure for Arbitration Proceedings 2006, Rule 48(4).

19 See, e.g., Reinisch, n 16, 499 to 507; and Commission, n 4, 142 to 148.

20 ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, Article 53(1).

21 This interpretation of Article 53(1) of the ICSID Convention is discussed by a range of commentators – see, e.g., Christoph Schreuer, The ICSID Convention: A Commentary, Cambridge University Press, Cambridge, 2001, p.1082; Weidemaier, n 3, 1904; and Kaufmann-Kohler, n 17, 368.

> *It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.*[22]

ICSID arbitration is not the only form of non-traditional arbitration in which arbitrators make reference to previous awards in their decisions. Most striking is the example of mandatory arbitration of domain name disputes under the UDRP. The evolution of a precedential system under the UDRP is considered in some detail next.

PRECEDENT UNDER THE UDRP

Features of the UDRP

The UDRP is a set of 'uniform rules of universal reach',[23] promulgated by the Internet Corporation for Assigned Names and Numbers ('ICANN')[24] for resolving disputes about the bad faith registration and use of a domain name that is the same or confusingly similar to another person's trade mark or service mark (often called 'cybersquatting'). The ICANN dispute resolution system provides the uniform application of the UDRP to all potential respondents to a cybersquatting action, and automatically executes an effective remedy for successful complaints under the UDRP.[25]

The system provides for the application of the UDRP to all potential respondents by ensuring that every contract between a domain name registrar and a domain name registrant contains a provision under which the registrant agrees to submit to arbitration under the UDRP in the event of a complaint by a trade mark owner. The system provides for automatic execution of a remedy in favour of successful complainants by ensuring that every contract between ICANN and an accredited domain name registrar contains a provision under which the registrar agrees to transfer to a successful complainant the domain name the subject of the arbitration under the UDRP.[26]

22 ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, paragraph 293.

23 Kaufmann-Kohler, n 4, 367.

24 ICANN is the not-for-profit public-benefit corporation that has responsibility for coordinating the unique name and number identifiers used to access computers via the Internet: <www.icann.org/en/about/> at 21 February 2011.

25 For a detailed description of the operation of the UDRP system, see Andrew Christie, 'The ICANN Domain-Name Dispute Resolution System as a Model for Resolving other Intellectual Property Disputes on the Internet' (2001) 1 The Journal of World Intellectual Property 105.

26 There are, in fact, two remedies available to a successful complainant under the UDRP: (i) cancellation of the domain name, and (ii) transfer of the domain name to the complainant. In practice, however, almost all complainants seek the remedy of transfer. This is because a cancelled domain name subsequently becomes available for registration by any person on a first-come, first-served basis – meaning it is possible for the unsuccessful respondent or any other person to re-register the domain name, and so further frustrate the complainant. See Christie, n 25, 111.

The parties to a domain name dispute are the complainant, who must be able to establish rights in a trade mark or service mark that is the subject of the dispute,[27] and the respondent who is 'the holder of a domain name registration against which a complaint is registered'.[28] The complainant is required to select the service provider from among those approved by ICANN,[29] by submitting the complaint to that provider.[30] Either party may elect to have the dispute resolved by a Panel of three members.[31] Where neither party to a dispute has chosen a three-member Panel, the service provider appoints a single-member Panel from its publicly available list of approved Panellists.[32]

The UDRP in Practice

The first case under the UDRP was filed on 2 December 1999, and the decision on it was delivered on 14 January 2000.[33] By any measure, the UDRP system has proved highly successful. In just over a decade, the system has disposed of more than thirty thousand disputes, between parties from more than 150 countries, with less than 0.1% of those decisions subsequently challenged in a national court.[34] These cases have been dealt with in short timeframes and at low cost. The typical time for resolution of a dispute, from filing of the complaint to rendering of the decision, is two months.[35] The typical filing fee is in the vicinity USD 1,500.[36]

27 UDRP, para. 4(a)(i).

28 UDRP, para. 1.

29 There are, as of 21 February 2011, four service providers approved by ICANN: the Arbitration and Mediation Center of the World Intellectual Property Organization, based in Geneva; the National Arbitration Forum, an international administrator of alternative dispute resolution services based in Minneapolis; the Asian Domain Name Resolution Centre, a joint undertaking by the China International Economic and Trade Arbitration Commission and the Hong Kong International Arbitration Centre, with offices in Beijing, Hong Kong, Seoul and Kuala Lumpur; and the Czech Arbitration Court Arbitration Center for Internet Disputes, based in Prague. The approved service providers are identified at <www.icann.org/en/dndr/udrp/approved-providers.htm> at 21 February 2011.

30 UDRP, para. 4(d).

31 Rules for Uniform Domain Name Dispute Resolution Policy ('UDRP Rules'), paras 3(b)(iv) and 5(b)(iv): <http://www.icann.org/en/dndr/udrp/uniform-rules.htm> at 21 February 2011.

32 UDRP Rules, para. 6(b).

33 The case was World Wrestling Federation Entertainment, Inc v Michael Bosman, WIPO Case D1999-0001, concerning the domain name worldwrestlingfederation.com: <www.wipo.int/amc/en/domains/decisions/html/1999/d1999-0001.html> at 21 February 2011.

34 The authors have calculated these figures, as at 19 July 2010, in the following manner. The website of the Arbitration and Mediation Center of the World Intellectual Property Organization ('WIPO') shows that the total number of cases filed with WIPO was 18,132: <www.wipo.int/amc/en/domains/statistics/cases.jsp> at 19 July 2010. The website of the National Arbitration Forum ('NAF') shows 13,311 records of cases filed with the NAF: <domains.adrforum.com/decision.aspx> at 19 July 2010. The WIPO website shows that the geographical distribution of parties to domain name disputes filed with it range across 155 countries: <www.wipo.int/amc/en/domains/statistics/countries_a-z.jsp> at 19 July 2010. The WIPO website identifies 50 cases in its selection of national court orders and decisions in relation to the UDRP or specific UDRP cases that have come to its attention: <www.wipo.int/amc/en/domains/challenged/> at 19 July 2010.

35 InterNic FAQs on the Uniform Domain Name Dispute Resolution Policy (UDRP): <www.internic.net/faqs/udrp.html> at 21 February 2011. Of this period, deliberation and decision writing by the Panel consume a mere 14 days. The UDRP Rules, para. 15(b), provides that "In the absence of exceptional circumstances, the Panel shall forward its decision on the complaint to the Provider within fourteen (14) days of its appointment."

36 This is for a dispute concerning up to five domain names, resolved by a single Panellist. Where a three-member Panel is chosen, the equivalent filing fee is USD 4,000: <www.wipo.int/amc/en/domains/fees/index.html> at 21 February 2011.

Despite the absence of an appellate body and a doctrine of *stare decisis*, the UDRP system of mandatory arbitration has evolved a comprehensive body of precedent, that provides clear guidance to parties on most of the legal and procedural issues involved in a domain name dispute. As Kaufmann-Kohler has noted: 'Out of 110 awards issued in the fall of 2006, 540 citations to prior domain name decisions were made in 85 cases'.[37] If this sample is representative of the population of UDRP decisions, it shows that a *de facto* doctrine of precedent is operating under the UDRP. In particular, it shows: that 77% of UDRP decisions cite other UDRP decisions; that for those decisions that contain citations, the average is more than six citations per decision; and that the overall average of citations per decisions (whether or not containing a citation) is just on five.[38]

The total volume of citations in UDRP decisions is truly incredible. A mere 25 decisions alone account for more than 18,000 case citations in the decided cases filed with the leading ICANN-approved dispute resolution service provider.[39] The utilisation of precedent by UDRP Panellists in reaching decisions is not lost on the parties to these disputes. Both complaints and responses invariably cite UDRP decisions in support of their contentions.[40] These facts put beyond doubt that the UDRP mandatory arbitration process operates a *de facto* system of precedent.

The intriguing questions that this observation raises are why, and how, has a precedential system emerged when two of the three necessary components for such a system – namely, a rule that Panels follow decisions of other Panels, and an appellate body to the enforce the rule – are not present? The following section seeks to answer that question.

Evolution of UDRP Precedent

Why

The question why a precedential system has evolved under the UDRP can be answered at two levels, one simple and one profound. The answer at the simple level is that the system has evolved because Panellists have chosen to follow past decisions that are reasoned persuasively. This answer, however, merely begs the question. The profound answer would appear to be that Panellists have chosen to do this because the justifications for the doctrine of precedent are compelling.

As discussed above, there are at least three commonly acknowledged justifications for the doctrine of precedent: fairness, efficiency and integrity. All three justifications provide motivations for UDRP Panellists choosing, voluntarily, to implement a precedential system.

37 Kaufmann-Kohler, n 17, 367.

38 The equivalent statistics for ICSID awards are similar. By conflating the figures in Tables 3 and 5 in Commission, n 4, of the 58 ICSID decisions and awards made in the period 1990-2006, it is observed: that 69% of these contained citations to other ICSID decisions/awards; that for those decisions/awards that contain citations, the average is more than five citations per decision; and that the overall average of citations per decisions/awards (whether or not containing a citation) is slightly less than 4.

39 The authors have calculated these figures, as at 18 July 2010, in the following manner. The WIPO website provides a list of the 25 decisions most cited in complaints: <www.wipo.int/amc/en/domains/statistics/cases_cited.jsp?party=C> at 18 July 2010. The case numbers of these 25 decisions were inserted into the facility for free text searching of WIPO decisions: <www.wipo.int/amc/en/domains/search/> at 18 July 2010. The number of results returned by each search was counted, and these counts were added together to give a total number of citations for these 25 decisions.

40 This is illustrated by the fact that WIPO generates lists of the 25 most cited decisions in complaints and in responses: <www.wipo.int/amc/en/domains/statistics/> at 21 February 2011.

The desire for fairness – to have like cases treated alike – is as applicable to dispute resolution under the UDRP as it is in litigation. Indeed, the very volume of UDRP cases may mean that this justification applies with greater strength to the UDRP than it does to litigation. This is because the chances of a case arising that is very similar to or the same as an earlier case is the greater the more there are cases. With, on average, 3,000 decisions issued per year in respect of the same cause of action, the desire of UDRP Panellists to treat like cases alike is understandably high.

The desire for efficiency – to avoid re-inventing the wheel every time an issue is argued – again applies with equal, if not greater, force under the UDRP as it does in litigation. UDRP Panellists have a mere 14 days from their appointment to issue a written decision on the case.[41] Such short time frames can only be met across a large volume cases if efficiencies are taken. The most justifiable form of Panellist efficiency is to adopt the persuasive reasoning contained in an earlier decision.

The desire for integrity – to have the system held in high regard – is also strongly present under the UDRP. Both the existence and the operation of the UDRP system are not uncontroversial. Some commentators have criticised structural aspects of system, on the grounds that it is not 'true' arbitration[42] or that it is inherently biased in favour of complainants.[43] Other commentators criticise the way in which specific issues have been decided under the system. Public scrutiny of the system is very high. The fact that the system concerns the ownership of addresses in cyberspace contributes to this high level of scrutiny – respondents (the owners of challenged domain names) are usually very adept at using the Internet to investigate outcomes from the system and to communicate grievances about those outcomes.[44] In this situation, it is not be surprising that Panellists seek to maintain the integrity of the system by following established precedents on contentious issues.

How

A search for the reasons how a precedential system emerged in the absence of a rule of stare decisis and an appellate body to enforce it must begin with an exploration of the express requirements of the procedural aspects of the system, as set out in the UDRP Rules.[45] Two requirements are particularly pertinent. The first is the requirement that the Panel's decision 'shall be in writing [and] provide the reasons on which it is based'.[46] The second is the requirement that the service provider 'shall publish the full decision … on a publicly accessible web site'.[47] These two requirements, together, satisfy the first feature necessary for a precedential system – namely, published past decisions containing reasons.

41 UDRP Rules, para. 15(b).
42 See, e.g., Konstantinos Komaitis, 'Cruel Intentions: ICANN's Uniform Domain Name Dispute Resolution and Arbitration' (2004) 56 Intellectual Property Forum 18.
43 See, e.g., Michael Geist, 'Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP' (2002) 27 Brooklyn Journal of International Law 903.
44 See, e.g., 'UDRP Wall of Shame', at <udrpwallofshame.com/> at 21 February 2011.
45 Rules for Uniform Domain Name Dispute Resolution Policy, at <www.icann.org/en/dndr/udrp/uniform-rules.htm> at 21 February 2011.
46 UDRP Rules, para. 15(d).
47 UDRP Rules, para. 16(b).

It is, however, unlikely that this feature alone would have been sufficient to enable evolution of a de facto precedential system under the UDRP. Although the past decisions are accessible, the huge volume of them – more than 30,000 in a decade – gives rise to the problem of information overload. With so many decisions, it is not possible for a complainant or respondent, let alone a Panellist, to read and understand them all. A precedential system could evolve only if there is a mechanism whereby the content of the decisions – or, at least, of the important decisions – are digested.

It is here that the particular contribution of the first, and leading, ICANN-approved service provider must be noted. The first service provider approved by ICANN was the Arbitration and Mediation Center of the World Intellectual Property Organization ('WIPO'). WIPO is the leading service provider, judged in terms of numbers of cases filed. WIPO, like the other service providers, offers a searchable database of its UDRP decisions. Unlike the other service providers, however, WIPO offers two other resources that have proved crucial to the evolution of a precedential system under the UDRP: a searchable index of decisions, and an overview of Panel views on selected issues.

The first of these resources, the 'Index of WIPO UDRP Panel Decisions', indexes decisions against more than 200 criteria. It thereby permits interested persons to search the decisions database to find cases dealing with very specific issues. The Index makes it possible, for example, to locate all cases that have considered whether the placing a disputed domain name on an online auction website constitutes circumstances indicating that the domain name owner registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant (that being evidence of registration and use in bad faith pursuant to paragraph 4(b)(i) of the UDRP).[48]

The second of the WIPO additional resources, the 'WIPO Overview of WIPO Panel Views on Selected UDRP Questions', is described rather modestly as an 'informal overview of panel positions on key procedural and substantial issues'.[49] In practice, the Overview amounts to a codification of the developed jurisprudence of the UDRP. It identifies the 'consensus view' reached by Panels on the most significant issues under the UDRP, summarises these consensus views in simple terms, and lists the leading decisions that provide persuasive analysis and reasoning on those issues. On the question of 'what deference should be owed to past UDRP decisions dealing with similar factual matters and legal issues?', for example, the WIPO Overview identifies the consensus view as follows:

> *The UDRP does not operate on a strict doctrine of precedent. However panels consider it desirable that their decisions are consistent with prior panel decisions dealing with similar fact situations. This ensures that the UDRP system operates in a fair, effective and predictable manner for all parties.*[50]

48 'Legal Index to WIPO Panel Decisions', index category II.C.5.b.ii.2: <www.wipo.int/amc/en/domains/search/legalindex.jsp> at 21 February 2011.
49 'WIPO Overview of WIPO Panel Views on Selected UDRP Questions': <www.wipo.int/amc/en/domains/search/overview/> at 21 February 2011.
50 WIPO Overview, question 4.1.

Without a doubt, the existence of the WIPO Overview has been instrumental in the UDRP eveloping the de facto system of precedent that the Overview so accurately describes.

onclusion: Lessons from The UDRP

The implementation of the doctrine of precedent in the curial system of dispute resolution requires ree features: published past decisions, a rule requiring decision-makers to follow past decisions, and appellate body to enforce the rule. Neither traditional arbitration nor non-traditional arbitration hibits all three features. At most, only the first feature is present in arbitration systems. Nevertheless, is undeniable that some non-traditional arbitration systems have evolved into de facto precedential stems. The UDRP, the mandatory arbitration system for resolving domain name disputes, is a paradigm this.

What lessons can be drawn from the decade of experience of the UDRP about the relevance of ecedent to arbitration generally? It is argued that two key lessons can be identified. The first lesson is at arbitrators, for wholly rational reasons, will desire to obtain the outcomes of a precedential system. nat is, arbitrators rationally desire to operate a system that is transparently fair to the parties, that is ficient for them as decision-markers, and that maintains the integrity of the system. Consequently, bitrators will voluntarily seek to comply with the principle of stare decisis, even when there is no rmal 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 achieve this outcome. While publishing arbitral awards is a necessary condition for a de facto ecedential system, it is most likely not a sufficient condition – at least when there is a substantial body awards to form the corpus of precedents. Once the body of awards becomes unmanageably large such at no individual could realistically expect to read and understand all the awards, it will be necessary r arbitral service providers to produce value-added resources for accessing the jurisprudence of the dy of awards. Ultimately, it may be necessary for the service provider to produce an 'informal' dification of that jurisprudence.