**Public Comment Review Tool – EPDPSPCR-IGO – Initial Report**

Updated 09 November 2021

# RECOMMENDATION 6

| **#** | **Comment** | **Contributor** | **EPDP Response / Action Taken** |
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| **Recommendation #6: Applicable Law in an Arbitration Proceeding**   1. Any arbitration will be conducted in accordance with the law as mutually agreed to by the parties.   *\*\* Note: The square bracketed text below describes two alternatives under consideration by the EPDP team, to apply in situations where the parties cannot agree on the applicable law:*  **[OPTION 1:**  Where the parties cannot reach mutual agreement, the arbitration will be conducted in accordance with the law of the relevant registrar’s principal office or where the respondent is resident at the election of the IGO Complainant.]  **[OPTION 2**:  Where the parties cannot reach mutual agreement, the arbitral tribunal shall determine the applicable law.]   1. [**POSSIBLE ADDITIONAL STEP UNDER CONSIDERATION**: If either party raises concerns to the arbitral tribunal about applying the law of the registrar’s principal office or the respondent’s place of residence, e.g., because it does not have a satisfactory cause of action related to the parties’ dispute, the arbitral tribunal may request submissions from the parties as to the suggested applicable law or principles of law (which may include UDRP case precedent) to be applied.] | | | |
|  | Regarding the choice of law question, it is common that the arbitral tribunal would make a determination in the absence of party agreement. Examples are found in the Arbitration Rules of numerous established institutions, such as the ICC7 and UNCITRAL.8  8 The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate. | WIPO | Concerns  Divergence Support New Idea  **EPDP Response:**  The EPDP Team has considered this comment. Based on its review of the comments submitted on this preliminary recommendation, the EPDP Team agrees to maintain a recommendation that mutual agreement remains the default for determining applicable law.  **Action Taken:**  The EPDP Team continues to discuss whether: (1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law (i.e., proceed to have the IGO elect the law either of the registrar or registrant’s location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action); or (2) recommend that, where there is no mutual agreement, determination of applicable law is to be made in accordance with the applicable arbitral rules (without any other specific requirement to be added from the EPDP Team.)    [**NOT COMPLETED**] – [Instruction of what was done.] |
|  | Should the GNSO proceed with revising the UDRP to provide for arbitration as proposed in the Interim Report despite the serious concerns as outlined above, Recommendation 6 in conjunction with Option 1, appears incrementally preferable since it is consistent with the current practice of enabling a complainant to specify one particular Mutual Jurisdiction, but in this case the complainant would be electing the laws of a particular jurisdiction for a subsequent arbitration. Nevertheless, such a procedure could in some instances nevertheless engender some unfairness and as such the “Possible Additional Steps” proposed under Subsection (ii) should also be considered in combination with Option 1.  With regards to the proposed “non-exhaustive general principles” to govern arbitration as set out at Subsection (iii), as aforesaid, any arbitral process should follow as close as possible, the robust procedures and safeguards available in a credible national court, including but not limited to oral hearing, cross-examination of witnesses, discovery of evidence, availability of motions, etc. The question of which panelists are accredited to hear such an appeal is a crucial one. To the extent possible, arbitration panelists should not be drawn from the rosters of current UDRP and URS providers and instead should be retired judges with extensive experience in intellectual property matters, drawn from the jurisdictions of the respective parties and/or the jurisdiction of the applicable law.  Furthermore, such matters are of such fundamental importance that they cannot be left to an Implementation Review Team as they are not a matter of implementation but rather a matter of substantive policy. | Internet Commerce Association | Concerns  Divergence  **EPDP Response:**  The EPDP Team has considered this comment. Based on its review of the comments submitted on this preliminary recommendation, the EPDP Team agrees to maintain a recommendation that mutual agreement remains the default for determining applicable law.  **Action Taken:**  The EPDP Team continues to discuss whether: (1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law (i.e., proceed to have the IGO elect the law either of the registrar or registrant’s location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action); or (2) recommend that, where there is no mutual agreement, determination of applicable law is to be made in accordance with the applicable arbitral rules (without any other specific requirement to be added from the EPDP Team.)  [**NOT COMPLETED**] – [Instruction of what was done.] |
|  | Digimedia supports Recommendation 6 in conjunction with subsection i, Option 1, as it aligns with the pragmatic flow of current post-UDRP procedure. Digimedia does not support section ii of Recommendation 6, as it is unclear what might be a “satisfactory cause of action” or who might make such a decision. Specific to section iii of Recommendation 6, Digimedia stresses that any arbitral process should follow, if not mirror, a court hearing, explicitly including but not limited to normal due process procedures and features including but not limited to oral hearing, cross examination of witnesses, the ability to depose, etc. | Digimedia.com, LP | Divergence Support  **EPDP Response:**  The EPDP Team has considered this comment. Based on its review of the comments submitted on this preliminary recommendation, the EPDP Team agrees to maintain a recommendation that mutual agreement remains the default for determining applicable law.  **Action Taken:**  The EPDP Team continues to discuss whether: (1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law (i.e., proceed to have the IGO elect the law either of the registrar or registrant’s location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action); or (2) recommend that, where there is no mutual agreement, determination of applicable law is to be made in accordance with the applicable arbitral rules (without any other specific requirement to be added from the EPDP Team.)  [**NOT COMPLETED**] – [Instruction of what was done.] |
|  | The BC supports Recommendation 6 in conjunction with Option 1, as it is consistent with the current practice of enabling a complainant to specify one particular Mutual Jurisdiction, but in this case the complainant would be electing the laws of a particular jurisdiction for a subsequent arbitration.  With regards to the proposed “non-exhaustive general principles” to govern arbitration as set out at Subsection (iii). the BC stresses that an arbitral process should follow as close as possible, the robust procedures and safeguards available in a credible national court, including but not limited to oral hearing, cross-examination of witnesses, discovery of evidence, availability of motions, etc. The question of which panelists are accredited to hear such an appeal is a crucial one. To the extent possible, arbitration panelists should not be drawn from the rosters of current UDRP and URS providers and instead should be retired judges with extensive experience in intellectual property matters and public international law, drawn from the jurisdictions of the respective parties and/or the jurisdiction of the applicable law, to the extent possible. | Business Constituency | Concerns Support  **EPDP Response:**  The EPDP Team has considered this comment. Based on its review of the comments submitted on this preliminary recommendation, the EPDP Team agrees to maintain a recommendation that mutual agreement remains the default for determining applicable law.  **Action Taken:**  The EPDP Team continues to discuss whether: (1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law (i.e., proceed to have the IGO elect the law either of the registrar or registrant’s location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action); or (2) recommend that, where there is no mutual agreement, determination of applicable law is to be made in accordance with the applicable arbitral rules (without any other specific requirement to be added from the EPDP Team.)  [**NOT COMPLETED**] – [Instruction of what was done.] |
|  | As for Preliminary Recommendation #6, we agree with #6(i) which is to allow the arbitral review to be conducted in accordance with the law that is mutually agreed to by the parties. We also support the add-on of Option 2 which is for the arbitral tribunal to decide on the issue of applicable law for an arbitral review where the parties themselves are unable to agree on that issue, but subject to the added step per #6(ii) to compel the arbitral tribunal to request submissions from the parties on suggested applicable law or principles of law to be applied in the event either party raises concerns to the arbitral tribunal on limits of applicable law affecting it. We also reserve our opinion on #6(iii) in respect of the non-exhaustive general principles that are proposed to be further developed by an Implementation Review Team. | ALAC | Concerns  Support  **EPDP Response:**  The EPDP Team has considered this comment. Based on its review of the comments submitted on this preliminary recommendation, the EPDP Team agrees to maintain a recommendation that mutual agreement remains the default for determining applicable law.  **Action Taken:**  The EPDP Team continues to discuss whether: (1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law (i.e., proceed to have the IGO elect the law either of the registrar or registrant’s location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action); or (2) recommend that, where there is no mutual agreement, determination of applicable law is to be made in accordance with the applicable arbitral rules (without any other specific requirement to be added from the EPDP Team.)  [**NOT COMPLETED**] – [Instruction of what was done.] |
|  | Since this Recommendation seems incomplete, the IPC will react to its constituent elements rather than to the Recommendation as a whole and, therefore, express no reaction to the Recommendation as a whole at this time.  i.  The IPC does not support either option. There is no reason to over-engineer the arbitration process to make it UDRP-like in nature. It appears that the selection of venue found in the UDRP is being forced to morph into a selection of choice of law. We do not need to create new things not in the UDRP and then try to push them into what is meant to be a de novo arbitration process. ICANN should not interfere in the arbitration process and leave it to the parties to decide what claims and defenses they wish to bring to the arbitrator under which set of laws they wish to bring them.  ii.  Please see our comments on subsection i. above. This additional step, or any variants of the same, would be necessary if the arbitration process is allowed to proceed without pre-manipulation by baking in a choice of law provision.  iii.  The IPC supports all of the concepts found within this subsection. In addition, the EPDP’s final report should be very clear that these concepts, and indeed the general principle of an added binding arbitration option for UDRP appeals, applies only to IGO Complainants and not to the UDRP in general. | IPC | Concerns  Support  **EPDP Response:**  The EPDP Team has considered this comment. Based on its review of the comments submitted on this preliminary recommendation, the EPDP Team agrees to maintain a recommendation that mutual agreement remains the default for determining applicable law.  **Action Taken:**  The EPDP Team continues to discuss whether: (1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law (i.e., proceed to have the IGO elect the law either of the registrar or registrant’s location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action); or (2) recommend that, where there is no mutual agreement, determination of applicable law is to be made in accordance with the applicable arbitral rules (without any other specific requirement to be added from the EPDP Team.)  [**NOT COMPLETED**] – [Instruction of what was done.] |