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| **Original Recommendation Text:** | **Suggested Change (Support/No-Support Indication)** |
| **Recommendation #4: Arbitral Review following a UDRP Proceeding** The EPDP team recommends that the following provisions be added to the UDRP to accommodate the possibility of binding arbitration to review an initial panel decision issued under the UDRP: | No Support:   * Lucas Fimeno * Leap of Faith – strongly against any imposed arbitration; issue with role-reversal; reference back to Notice of Objection * RrSG * Namecheap * TurnCommerce   Restatement of proposal made previously to the Curative Rights PDP:   * Leap of Faith – agent, assignee or licensee approach or consider applying policy change to only newly created domain names (i.e. grandfather already registered domains from any changes proposed here) |
| 1. When submitting its complaint, an IGO Complainant shall also indicate whether it agrees that final determination of the outcome of the UDRP proceeding shall be through binding arbitration, in the event that the registrant also agrees to binding arbitration. | WIPO:  “…as an alternative to court, at minimum an arbitration-as-a-default with an opt-out provision should be considered. Such option could be complemented by providing information about the benefits of arbitration as a party-driven process compared to the potential time and cost implications of court litigation (all the more when questions of immunities would be involved).”  GAC:  Arbitration should be the exclusive means of appeal. If arbitration is not the exclusive means of resolving appeals from a curative rights protection mechanism (in this context, the UDRP and/or URS):   * Arbitration should at least be the default option, with the registrant permitted to opt out within a limited time period * If registrants are permitted to appeal in court, they should not also be able to subsequently commence arbitration if unsuccessful – whether for substantive or procedural reasons – in court.   OECD:  Support WIPO & GAC  RrSG:  the wording used in recommendations 4 and 5 appear to imply that the complainant can utilize the appeal process, e.g. an IGO that loses a UDRP or URS could appeal that Decision or Determination. The recommendations should be clarified to ensure that the appeal process is for registrants only, and does not provide a new avenue for trademark owners to appeal UDRP Decisions or URS Determinations decided against them.  ALAC:  Supports  IPC:  The IPC does not believe this subsection has been fully thought through. What happens if the IGO does not so indicate its willingness to have the final determination through binding arbitration? It seems to us that the combination of this option for IGOs found in this subsection combined with the “opt out” concept in Recommendation 3 above could work together to give a registrant little or no recourse following an incorrect decision by a panelist. The IPC recommends the EPDP team take another look at this subsection and rework. For example, make it clear that if an IGO chooses not to submit to binding arbitration, the UDRP would be handled like a regular UDRP and the IGO would have to submit to the jurisdiction of either the registrar or registrant’s home location for any post-decision action that a losing registrant may file. Conversely, the EPDP could implement the IPC’s above-proposed compromise language in UDRP Rules Section 3(b)(xii) to address this issue. |
| 1. In communicating a UDRP panel decision to the parties where the complainant is an IGO Complainant, the UDRP provider shall also request that the registrant indicate whether it agrees that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules. The arbitral rules shall be determined by the Implementation Review Team which, in making its determination, shall consider existing arbitral rules such as those of the International Centre for Dispute Resolution (ICDR), the World Intellectual Property Organization (WIPO), the United Nations Commission for International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA). | ICA: The selection of an arbitration provider and the appointment of arbitrators are not minor features of an arbitration and can contribute to or even determine the outcome. The identification of an arbitration provider and the rules pertaining to the selection of an arbitration panel are therefore not minor details, and it cannot therefore be reasonably asked of stakeholders to provide an informed opinion on Recommendation #4 until such time as a complete proposal is in place. For example, if an arbitration procedure was fundamentally unfair  ALAC:  Supports  IPC:  The IPC does not believe this subsection has been fully thought through. What happens if the IGO does not so indicate its willingness to have the final determination through binding arbitration (as discussed in Subsection i. immediately above). Does the Provider still request that the registrant indicate its willingness to submit to arbitration? If the IGO hasn’t done so, why would the registrant? The IPC recommends the EPDP team take another look at this subsection and rework, as it is likely it only applies where an IGO has already indicated its willingness to have a final determination through binding arbitration. |
| 1. As provided in Paragraph 4(k) of the UDRP, the relevant registrar shall wait ten (10) business days (as observed in the location of its principal office) before implementing a UDRP panel decision rendered in the IGO Complainant’s favor, and will stay implementation if, within that period, it receives official documentation that the registrant has submitted a request for or notice of arbitration, as described further below. | ALAC:  Supports  IPC:  So long as the ten (10) business day delay and following stay of decision implementation is not exclusive to the filing of arbitration, i.e. the filing of a court action by the respondent also still triggers the stay of implementation, the IPC supports this subsection. The IPC recommends the EPDP team take another look at this subsection and enhance its clarity. |
| 1. If it receives a request for or notice of arbitration, the registrar shall continue to stay implementation of the UDRP panel decision until it receives official documentation concerning the outcome of an arbitration or other satisfactory evidence of a settlement or other final resolution of the dispute. | ALAC:  Supports  IPC:  The IPC express the same concerns regarding court actions also triggering the stay as it did for subsection iii. The IPC recommends the EPDP team take another look at this subsection and enhance its clarity. |
| 1. *\*\* Note: The square bracketed text below describes two alternatives under consideration by the EPDP team, as to whether the option to arbitrate will remain available to the registrant after it initiates court proceedings against an IGO that has prevailed in the UDRP proceeding and the court declines to hear the case on its merits:* |  |
| [**OPTION 1**:  Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, the original UDRP decision will be implemented by the relevant registrar within ten (10) business days from the court order declining to hear the merits of the case.] | ICA: No Support  ALAC:  As for Preliminary Recommendations #4(v) and #5(iii), we opine that from the end-users’ perspective the quicker the parties (i.e. IGO Complainant and losing registrant) can arrive at a final outcome, the sooner the question of risk of confusion (or harm) to end-users can be addressed in finality (more so for UDRP cases). For this reason, Options 1 in both #4(v) and #5(ii) are preferred, such that arbitration should not be sought to prolong a dispute for which a losing registrant has opted to initiate through a relevant court and has exhausted all recourse in that (court) route. |
| [**OPTION 2**:  Where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case, the registrant may submit the dispute to binding arbitration within ten (10) business days from the court order declining to hear the merits of the case, by submitting a request for or notice of arbitration to the competent arbitral institution with a copy to the relevant registrar, UDRP provider and the IGO Complainant. If the registrant does not submit a request for or notice of arbitration to the competent arbitral institution (with a copy to the registrar, UDRP provider and the IGO Complainant) within ten (10) business days from the court order declining to hear the merits of the case, the original UDRP decision will be implemented by the registrar.] | ICA:  No Support, but could support this option if Rec #3 is removed.  RySG:  Support; Where the avenue of judicial challenge to the UDRP decision is not available to the registrant as a result of the IGO’s refusal to submit to the jurisdiction of the Court, and the Court thereby declining to hear the action, then fairness would support the registrant being able to avail themselves of the proposed arbitration alternative.  Digimedia:  Conditional support; To the extent Recommendation 3 is decoupled from Recommendation 5, then similar to its support of Recommendation 4 in conjunction with Option 2, Digimedia would also support Recommendation 5 in conjunction with Option 2.  In the event Recommendation 3 is not decoupled from either or both of Recommendation 4 and/or Recommendation 5, Digimedia would support only Recommendation 4 or 5 in conjunction with Option 2.  Telepathy:  Conditional support; supports the ICA’s comment for the reasons given therein that Option 2 of Recommendation 4 is the least objectionable.  BC:  Support; in any event, either a court or an arbitration tribunal will be able to resolve all such disputes on the merits. In other words, a registrant can choose to arbitrate instead of litigate, or can choose to litigate instead of arbitrate. But if the court won’t hear the dispute due to IGO immunity, then arbitration is really the only option and that should proceed as otherwise there would be no avenue to effectively “appeal” a URS or UDRP decision.  RrSG:  the recommendations should be clarified to ensure that the default option for appealing a UDRP Decision or URS Decision is through a court proceeding initiated by the registrant. If the final recommendations include an arbitration appeal option, it should require informed and affirmative consent from the registrant, including an explanation of potential legal and financial impacts of accepting the arbitration appeal process (and foregoing the court proceeding). In no circumstances should arbitration be initiated without the consent of the registrant.  IPC:  Support:  v  The IPC can support OPTION 2 subject to a couple caveats. Option 2 seems to us to be a reasonable safeguard designed to prevent undue pressure for a losing respondent to seek relief from the courts (which is in many jurisdictions, a basic human right). That said, the IPC does not support any mandatory, automatic, de novo appeals mechanisms for UDRP cases filed by non-IGO Complainants. Moreover, any such appeal or arbitration mechanisms under the UDRP, such as under Option 2, must incorporate appropriate safeguards, like reasonable filing fees, to prevent gaming and abuse by respondents. The IPC recommends that the EPDP team take another look at this subsection to supplement it with such safeguards.  vi.  The IPC supports this subsection [referring to sub-section for the Registrar to maintain the lock on the domain] and believes that it makes much of subsection iii. and all of subsection iv. redundant and therefore confusing. The IPC recommends the EPDP team take another look at those subsections and enhance their clarity. |

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| **Topic Category not directly connected to Rec #4** | **Additional Considerations** |
| Immunities | WIPO:  Indeed, given their status under international law, IGOs are expected to invoke their recognized immunities when faced with attempts to involve them in national court litigation. The discussion of the issue of arbitration or courts in the context of the Initial Report should take account of the likelihood that IGOs prevail on this immunity defense. |
| Costs of Court vs. Arbitration | WIPO:  It is furthermore difficult to understand how, especially if provided with information about the time and expense of court and the IGO immunities issues involved (as illustrated in the flow chart in the Initial Report), a registrant which nevertheless tries its hand in court and fails, should be still permitted to then invoke arbitration.  RrSG:  the RrSG is concerned about the potential costs associated with the arbitration appeal process detailed in the Interim Report. Although the process is still to be defined, the Interim Report provides examples of four arbitration providers as guidance for their rules and processes. The costs associated with these processes are significant, and substantially exceed the resources available to almost every domain name registrant (with the exception of large corporations). Some require thousands of dollars for each hearing, and others charge over  $40,000 for a hearing (including the requirement that the loser pay for all costs). These enormous costs will severely prejudice domain name registrants, who are mostly individuals without unlimited resources for costly arbitration procedures (or multiple appeals to the highest court in the jurisdiction). Although court proceedings can have significant costs, certain jurisdictions (in particular those outside of North America or Europe) have significantly lower court costs. Although those costs may be significant compared to the median income in those jurisdictions, those costs are still substantially lower than the arbitration providers detailed in the Interim Report.  Namecheap:  See RrSG comment above.  TurnCommerce:  The cost and work and effort will certainly add up, and this seems stacked to disadvantage individual registrants. |
| Charts | RrSG:  The appeal process detailed in the charts in recommendations 4 and 5 appear to be incomplete and should be revised. Some deficiencies include (a) applying to a US-centric judicial system and not reflective of other jurisdictions around the world, (b) do not anticipate appeals by the registrant, (c) envisions domain disputes being appealed to the Supreme Court (which would be cost prohibitive for registrants), and (d) delay implementation until all appeals are exhausted (the UDRP allows implementation upon conclusion of the original court proceeding and does not extend to appeals). |