

JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2.1

Reviewed by:	Greg Shatan
Name of Case:	Commercial Connect, LLC v. ICANN and International Centre for Dispute Resolution (ICDR)
Parties: ¹	P = Commercial Connect, D = ICANN and ICDR
Citizenship of Parties:	Commercial Connect (CC) is incorporated and headquartered in Kentucky, USA. ICANN is a California corporation. ICDR is a subsidiary of the American Arbitration Association, a non-profit New York corporation
Court/Venue:	US District Court for the Western District of Kentucky. CC argued that W.D. Kentucky was the proper venue, because that is allegedly where “a substantial part of the events or omissions giving rise to the claim occurred. At all relevant times, the Plaintiff has conducted business and interacted with the Defendants from its principal place of business Louisville, Kentucky.”
Was a contract involved? Did it have a Choice of Law provision; if so, which jurisdiction?:	Yes – the 2000 Application and the 2012 Application. Neither had a choice of law provision.
Law used to determine conflict of laws issues (i.e., to determine which substantive law applies):	The question of which law applies did not arise in this case.
Substantive Law Governing the Dispute (i.e., which law applies to the dispute and/or interpretation of contracts):	ICANN cites to both Kentucky law and California law. ICANN tends to cite to W.D. Kentucky and Sixth Circuit cases, but cites to other courts as well.
Date Case Began:	January 6, 2016
Date Case Ended:	April 28, 2016
Causes of Action: ²	(1) Breach of contract, (2) fraudulent misrepresentation and (3) breach of the covenant of good faith and fair dealing.
Issues Presented/Brief Summary of Case:	CC applied in 2000 for the .shop TLD, paying \$50,000. CC claimed that ICANN neither approved nor rejected the application in 2000, instead allegedly informing CC that it would be held for consideration for the next round, in 2004. CC alleged that in 2004 ICANN told CC they lacked

¹ Show each party and their status (Plaintiff (P), Defendant (D), or other). Please list any non-party participants, such as Amicus Curiae (AC).

² For example, breach of contract, tortious interference with contract, violation of antitrust laws, etc. (state which laws)

	<p>the necessary “significant community sponsor” to be considered and CC would have to wait for the next round, which was supposedly to be in 2006. “Despite assurances to the contrary,” there was no 2006 round; instead “ICANN commissioned its GNSO to overhaul the TLD process.”</p> <p>CC applied in the 2012 round, paying the \$185,000 fee, but was granted an \$86,000 refund as a 2000 round participant, which required CC to sign a release. Its .shop application was a community application, which was not granted community status. As such, it was placed in a Contention Set. In May 2012, CC allegedly filed 21 String Confusion Objections. The String Similarity Disputes commenced in 2013, and CC paid \$179,850 in fees (\$6000/expert mediators and \$2850/admin fees x 21). CC claimed ICANN retained unqualified evaluators who failed to apply objective criteria, including ICANN’s pre-published criteria. CC also claimed that it should have had \$60,000 in fees refunded to it by ICDR where CC was the prevailing party. CC claimed that ICDR did not apply the proper criteria, which presumably would have resulted in more favorable decisions for CC. ICANN designated .shop for auction in January 2016.</p> <p>CC claimed that ICANN made claims in the AGB that were false and misleading, and which induced Plaintiff to apply in reliance on those claims. These claims were set forth in the Complaint, which was never served on ICANN.</p> <p>ICANN cites 3 releases signed by CC as the basis for denying the motion for a TRO. ICANN also argues that CC has submitted no evidence to support its motion and thus has no likelihood of success. ICANN cites to the <i>Name.Space</i> case, which upheld these releases.</p>
<p>Was Preliminary Relief Requested (and if so, was it granted)?:</p>	<p>On January 6, 2016, CC filed a motion for a Temporary Restraining Order (TRO) and a Preliminary Injunction requiring ICANN to postpone or cancel the .shop auction, scheduled for January 27. In the Complaint, CC demanded a preliminary and permanent injunction prohibiting ICANN from selling the rights to operate the .shop registry at auction. The Court denied CC’s motion and granted CC’s counsel’s motion to withdraw as counsel (because CC was pursuing a strategy counsel fundamentally disagreed with).</p>
<p>Relief Requested by Plaintiff:</p>	<p>For justifiable reliance on ICANN’s misrepresentations, “significant economic damages in excess of \$200,000.” For breach of contract and the covenant of good faith and fair dealing against</p>

	ICANN, no separate claim of damages. For breach of contract by ICDR, damages in excess of \$170,000. Injunctive relief (see above). Costs.
Outcome of Case and Relief Granted (if any):	After denial of CC's injunction motion and grant of CC's counsel's motion to withdraw, CC was given 30 days to find a new lawyer. It did not. At that point, ICANN requested dismissal of the case, citing both this failure and the failure to properly serve the papers on ICANN [perhaps CC wanted to serve ICANN in Kentucky if it could find some ICANN employee passing through]. A few weeks after this, with the 90 day deadline to serve papers past, the Court issued an Order to Show Cause why the case should not be dismissed. CC failed to respond to the Order to Show Cause, nor did it get a new lawyer. ICANN made a "special appearance" (preserving its argument that the court does not have jurisdiction over ICANN) to file a document in support of dismissal. That same day, the Court dismissed the case without prejudice (i.e., CC could refile).
Was Jurisdiction Contested, and if so, what was the outcome?: ³	<p>CC argued that subject matter jurisdiction was founded on diversity jurisdiction, and that personal jurisdiction over ICANN and ICDR was based on "minimum contacts" and the "effects of Defendants' conduct in the forum." CC based the latter on (i) ICANN "advertising its domain name application system and contracting with prospective registry operators in Kentucky," and on ICANN conducting business via a "highly interactive website;" and (ii) ICDR contracting with ICANN to provide ADR services to applicants and claims that ICDR "transacted with those parties [i.e., applicants] via its website," which is also noted as "highly interactive, requiring [applicants] to conduct any and all of its business with ICDR through its web-portal.</p> <p>ICANN opposed jurisdiction in the W.D. Ky. and any other court in Kentucky. ICANN notes that it has no facilities, assets, real estate, phone number or mailing address in Kentucky, does not sell goods or services or have bank accounts or employees there. The only contact is the same as with the rest of the world – ICANN operates a few websites providing information on ICANN. None are on servers in Kentucky and ICANN does not sell anything on its websites (or anything at all).</p> <p>"For personal jurisdiction to exist in a diversity case, "two factors be satisfied: the forum state long-arm statute, and constitutional due process." Here, the forum state is Kentucky. CC did</p>

³ For example, was there a challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of "choice of law" provision. Please describe the outcome as well as the challenge.

not say what subsection of the Kentucky long-arm statute applies, and ICANN argues that a brief review shows that no subsection does. Specifically ICANN doesn't "transact" any business in Kentucky or "engage in any other persistent course of conduct" in Kentucky. ICANN cites W.D.Ky. cases to show that a contract with a Kentucky company does not alone support long-arm jurisdiction over a non-resident defendant, that no negotiations took place in Kentucky (or elsewhere) nor was there any subject matter connection to Kentucky. ICANN goes on to argue that its website does not justify jurisdiction, noting that ICANN obtains no revenue from the site and does not advertise goods and services to Kentucky residents (citing a W.D.Ky. case where even significant revenue did not justify jurisdiction) (also citing two cases involving ICANN: *Economic Solutions* and *Moore v. Econ, Inc.*, as cases where ICANN's websites were insufficient to establish jurisdiction.

ICANN goes on to show that it does not meet Subsection (2) of the long-arm statute because ICANN has not contracted to supply goods and services in Kentucky, or Subsection (3) as ICANN has not committed a tort through actions or omissions in Kentucky

ICANN then argues that CC has not demonstrated that the court's jurisdiction meets the Constitutional test in the Due Process clause – that ICANN has sufficient "minimum contacts [with Kentucky] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." ICANN first demonstrates that the court does not have general jurisdiction over ICANN, which would require contacts in Kentucky so continuous and systematic as to render ICANN essentially at home in Kentucky. ICANN then demonstrates that the court lacks specific jurisdiction over ICANN, which would arise from ICANN activities in Kentucky "that are related to the cause of action alleged in the complaint." The Sixth Circuit (which includes Kentucky) applies a three prong test for specific jurisdiction: (1) defendant must "purposefully avail" itself of the privilege of acting in the state or cause a consequence in the state; (2) the cause of action must arise from defendant's activities in the state; and (3) defendant's acts or their consequences must have a "substantial enough connection" with the state to make jurisdiction "reasonable." Where contact is through a website, the website must be "interactive to a degree that reveals specifically intended interaction with residents of the state." ICANN's website is primarily informational and fails to meet that test, nor are any other

	<p>parts of the test met.</p> <p>It should be noted that the Court’s decisions relied on the failure to meet the preliminary injunction standard, primarily due to the releases ICANN put in the Applications, and on CC’s failure to serve papers on the defendants. It should also be noted that ICDR apparently did not appear at all.</p>
Relevance of the case to the Jurisdiction Subgroup mandate:	This case demonstrates that a court may find it does not have personal jurisdiction over ICANN where it does not have operations in the state or otherwise satisfy the applicable long-arm statute and the Constitution’s Due Process clause.
Impact of case on ICANN accountability/operations: ⁴	This case upheld and protected the operation of ICANN’s policies as embodied in the AGB. This case also shows that a plaintiff needs to either seek to litigate with ICANN in a forum where personal jurisdiction is not likely to be an issue or be prepared to argue over personal jurisdiction. In this case, plaintiff did neither. However, this did not affect the outcome of the case, which was decided on other grounds.
Impact if case were decided for the other party?:	If the motion had been decided for plaintiff that would almost certainly have meant that ICANN’s releases in its contracts with TLD applicants were found to be unenforceable. This would have opened the floodgates to litigation, or at least resulted in a conflict with other decisions. If the injunction had been granted, the .shop auction would have been blocked. The larger impact would be a finding that ICANN did not properly carry out its obligations under the AGB.
Did the Court comment on any jurisdiction-related matters?:	No.
Did the Court comment on the merit, lack of merit and/or frivolity of the plaintiff’s claims?:	In the Order granting counsel’s motion to withdraw, the Court noted that “good cause” is required to withdraw, and that “Good cause exists where an attorney’s continued representation of a client could subject counsel to Rule 11 sanctions,” e.g., where plaintiff was pursuing a course of action that counsel deemed “imprudent.”
Key Documents:	CC’s Complaint and Motion for TRO/PI, ICANN’s Special Appearance in Opposition to Motion, Court’s Order denying CC’s motion and allowing CC’s lawyer to withdraw as counsel.

⁴ Indicate whether the case had, will have or could have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies.