

JURISDICTION SUBGROUP ICANN LITIGATION SUMMARY v2

Handled by:	Raphael Beauregard-Lacroix
Title of Case:	Employ Media LLC v ICANN
Case No.:	Employ Media LLC (Claimant) ; ICANN (Respondent)
Place of Parties:	USA (Employ Media LLC is incorporated in Delaware, its main office is in Ohio; ICANN is incorporated and has its main office in California)
Venue:	International Chamber of Commerce (Arbitration rules) Los Angeles, California (Arbitration seat)
Choice of Law provision in contract; Which jurisdiction?:	None
Method used to determine conflict of laws (i.e., which law applies)	In the context of commercial arbitration: absent a choice of law, the decision on the applicable conflict of law rules is usually up to the Arbitral Tribunal's appreciation. ICC Rules go in that direction (Art.21). The Arbitral Tribunal is not bound by the conflict of laws rules of the arbitration seat, which here was California.
Applicable Law Governing the Dispute:	Unresolved (According to Claimant, either Ohio, California and/or "relevant principles of international law", although Claimant does not rely on any such principles in its actual statement of claims; according to ICANN, California)
Case Began:	3 May 2011 (Request for Arbitration submitted to ICC)
Case Ended:	11 December 2012 (Settlement)
Subject of Action:	Breach of registry agreement for .jobs
Issues Presented:	<p>It was claimed by ICANN that certain .jobs registrants did not comply with the requirements set out in the registry charter and that Employ Media, the registry, has proceeded with a unilateral broadening of the charter. Boiling it down, the dispute focused on how to interpret the list of requirements set out in the charter, as they were not all factually mutually exclusive (it was eventually possible to satisfy the satisfaction of some requirements from the satisfaction of some others)</p> <p>ICANN subsequently served Claimant with a "Notice of Breach:" "because .jobs is a sTLD, Employ Media must amend its Charter through a proper PDP and get ICANN approval..." (ICANN's answer request for arbitration, par. 50)</p>
Prayer for Primary Relief?:	None (settled)

Indicate whether each party is Plaintiff (P) or Defendant (D), or other status. Please also list non-party participants, such as Amicus Curiae

Requested by Plaintiff	Among others, a declaration that Claimant did not violate the registry agreement and that the Notice of Breach is invalid, in addition to costs and “any other relief the Tribunal may consider appropriate/Relief Granted:
Settled/Relief Granted:	Settled: ICANN and Employ Media settled on the basis of representations made by the sponsor of .jobs (the Society for Human Rights Management), to the effect that, among others, it would ensure that registrants provide the necessary representations with regards to their own compliance with requirements of the charter. The letter provided by SHRM states that it believes all currently registered names comply with the charter.
Jurisdiction Contested? ²	The parties had diverging views on applicable law. According to ICANN it was limited to California, while claimant asserted it could also be Ohio or “relevant principles of international law”
Challenge to WG mandate	It is interesting to note that registry agreements do not contain a choice of law provision. This raises the question regarding other standard form agreements entered into by ICANN or imposed on downstream providers. Not putting a choice of law in standard form contracts is peculiar and undeniably represents a <i>jurisdictional</i> risk, although it might be justified by other considerations; we can assume that there must be a good reason (?) for not having a choice of law clause.
Impact on ICANN stability/operations: ³	From the substantial elements of the case itself, none that is in the purview of this WG; otherwise see previous and next point.
What if case were decided for the plaintiff?	Regarding choice of law, we can imagine that claimant might have been successful in its claim that Ohio contract law applies. The practical consequences of that would be small in that case, but could have been bigger had the claimant been in a more “exotic” jurisdiction. It is worth noting that the claimant here relied on Ohio and California contract law (more precisely, the doctrines of “laches” and “estoppel”) to assert that ICANN’s Notice of Breach was invalid. These doctrines may or may not exist in other contract laws of other jurisdictions.
Request for Court comment on the lack of merit and/or frivolity of plaintiff’s claim?	No (settled)
Key documents:	ICANN’s answer to Request for Arbitration (22 July 2011) Terms of Reference (9 May 2012) Employ Media Statement of Claims (6 August 2012) Settlement Agreement (11 December 2012)

For example, challenge to venue, challenge to change of venue, challenge to governing law, challenge to application of “choice of law” provisions. Please describe the outcome as well as the challenge.

State whether the case had or will have an effect on ICANN’s accountability mechanisms or the operation of ICANN’s policies..

