

PROPOSAL FOR DISCUSSION ON WORKING GROUP CALL OF 7 SEPTEMBER 2017
Draft as of 6 September 2017

PART I: Example Combining Option 2 (Arbitration) with Elements of Other Options¹:

Step #1: IGO decides to file a UDRP or URS complaint

IGO must agree to binding arbitration – applicable only where (1) the registrant does not agree to the limited Mutual Jurisdiction clause (see Step #2); (2) the registrant loses the UDRP/URS proceeding and files an action in a national court; and (3) the IGO successfully pleads jurisdictional immunity in that national court.

- *Note – this will require an addition/amendment to the UDRP Rules*

In addition, IGO also has the option to agree to a limited Mutual Jurisdiction clause – this option will only apply where (1) the registrant has agreed to the same limitation (see Step #2); and (2) the registrant loses the UDRP/URS proceeding and files an action in a national court. For clarity, the limited Mutual Jurisdiction clause only applies to the limited purpose of deciding the ownership of the disputed domain(s).

- *Note – this will require an addition/amendment to the UDRP Rules*

Step #2: Registrant receives the IGO's complaint and decides to respond

Registrant has option to agree to the same Mutual Jurisdiction clause as the IGO in Step #1.

- *Note – this will require an addition/amendment to the UDRP Rules*

If Registrant does not agree to the limited Mutual Jurisdiction, Registrant has option to agree to the same binding arbitration clause as the IGO in Step #1.

- *Note – this will require an addition/amendment to the UDRP Rules*

Step #3: Initial UDRP/URS determination stage and subsequent events

If registrant agreed to the limited Mutual Jurisdiction clause, loses in the initial UDRP/URS proceeding, and then files a court action:

- The court action proceeds in accordance with the limited jurisdiction/scope (as mutually agreed).

If registrant did not agree to limited Mutual Jurisdiction clause but agreed to binding arbitration, loses in the initial UDRP/URS proceeding, files a court action and the IGO succeeds in claiming immunity:

- The dispute proceeds to binding arbitration in accordance with the criteria/requirements noted below.

If registrant did not agree to limited Mutual Jurisdiction clause and also did not agree to binding arbitration, loses in the initial UDRP/URS proceeding, files a court action and the IGO succeeds in claiming immunity:

- The dispute concludes; the original UDRP/URS decision stands.

¹ Please refer to accompanying flow chart for a visual depiction of the process and each alternative path.

If registrant did not agree to limited Mutual Jurisdiction clause and also did not agree to binding arbitration, loses in the initial UDRP/URS proceeding, files a court action and the IGO does NOT succeed in claiming immunity:

- The dispute proceeds to be decided by the national court in accordance with applicable law (i.e. status quo).

PART II: General Principles for Binding Arbitration:

Substantive law – arbitrator decides dispute under the national law under which the judicial appeal was originally brought, not the UDRP / both parties can mutually agree to proceed under another national law (this is the normal practice in arbitration cases).

Procedural rules – same as in the applicable judicial system / different rules can be mutually agreed to by both parties.

Venue – to be conducted in an arbitration forum certified to meet certain basic criteria, and cannot be an IGO (e.g., WIPO) or the arbitration forum that decided the underlying UDRP, to assure lack of bias and de novo review.

Panelist(s) – Default option is a three-member panel, the chair of which must be a retired judge from that jurisdiction; explore possibility of creating a standing panel from which to choose the two panelists other than the chair (i.e. parties cannot choose the chair of the panel.)

Language – same language to be used as in national judicial forum (alternate language can be selected by mutual agreement of the parties).

Discovery – same as in judicial case.

Interim remedies (e.g., domain locking)? – same as if court case had continued.

Remedies – same as in judicial case.

Costs – seek to be the same as or lower than in a judicial case.

Enforcement of award – decision to uphold UDRP determination would result in domain transfer or extinguishment; enforcement of any available monetary award against IGO needs to be considered, but at a minimum failure to pay could bar it from any future ability to file a UDRP or URS.

Precedential value of decision – While there's no way to fully replicate the precedent of a court decision, policy could state a distinct recommendation that any case shifted to arbitration should consider and seek to follow judicial precedent on similar cases brought under the same law, and also be consistent with prior arbitrations under that law (if any).

PART III: Original Text of Working Group Preliminary Recommendation #4 (as it appeared in the Initial Report, January 2017)²:

“In relation to the issue of jurisdictional immunity, which IGOs (but not INGOs) may claim successfully in certain circumstances, the WG recommends that:

- (a) no change be made to the Mutual Jurisdiction clause of the UDRP and URS;*
- (b) the Policy Guidance document initially described in Recommendation #2 (above) also include a section that outlines the various procedural filing options available to IGOs, e.g. they have the ability to elect to have a complaint filed under the UDRP and/or URS on their behalf by an assignee, agent or licensee; such that*
- (c) claims of jurisdictional immunity made by an IGO in respect of a particular jurisdiction will be determined by the applicable laws of that jurisdiction.*

Where an IGO succeeds in asserting its claim of jurisdictional immunity in a court of mutual jurisdiction³, the Working Group recommends that in that case:

Option 1 - the decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated;
or

Option 2 – the decision rendered against the registrant in the predecessor UDRP or URS may be brought before the [name of arbitration entity] for de novo review and determination.

The WG recommends, further, that the Policy Guidance document referred to in Recommendation #2 (above) be brought to the notice of the Governmental Advisory Committee (GAC) for its and its members’ and observers’ information.”

PART IV: Options suggested by Working Group members for discussion:

OPTION 1: “The decision rendered against the registrant in the predecessor UDRP or URS shall be vitiated.”

OPTION 2: “The decision rendered against the registrant in the predecessor UDRP or URS may be brought before the [name of arbitration entity] for de novo review and determination.”

Note: this option can incorporate elements of Option 3

OPTION 3: “Amend the Mutual Jurisdiction clause to clarify that, for IGOs, their agreement to submit to Mutual Jurisdiction is strictly and only in relation to the court’s disposition of rights in relation to ownership of the domain name(s) in dispute, and not in relation to any other claim or remedy.”

Note: elements of this option can be added to Option 2

OPTION 4: “Try out” Option #2, just for newly created domains, while preserving full legal rights under Option #1 for grandfathered domains. Then we impose the obligation upon ICANN, the UDRP/URS

² Note that the text of this recommendation is likely to change, possibly substantially, following the WG’s conclusion of its deliberations over the options noted in this document.

³ The WG notes that the determination in each case as to whether or not the IGO in question may successfully plead immunity is a question that each court decides according to its own law. It is not within the purview of ICANN to make any recommendations in respect of a judicial determination of this legal issue.

providers, and the arbitration providers (via the mandated open court principle) to provide a future “review working group” the ability to go back and double check that there were no negative consequences in the decision to “try out” Option #2 as an experiment.”

OPTION 5: ~~“Do nothing since the current UDRP requires that complainants waive any claim as against the ADR provider, but there is no similar provision for respondents. The result is that Complainants waive claims against that ADR provider. Respondents do not.”~~ (NOTE: removed from further consideration by agreement of the Working Group)

OPTION 6: “Change the text of the UDRP Rules to clarify coverage of in rem, in personam, and quasi-in rem actions”