

Co-Chairs' Paper on Recommended Resolution of Option 2 Issues

Updated by ICANN staff (16 July 2017)

PRELIMINARY NOTES:

This outline addresses identified issues with an Option 2 arbitration scenario (Domain registrant Respondent loses UDRP and files de novo judicial appeal; IGO Complainant successfully asserts immunity defense in judicial forum, resulting in appeal being shifted to arbitration forum).

None of the elements described below in relation to an arbitration scenario precludes either of the parties from going to a national court at any point in the dispute resolution process.

To implement this option, it is likely that the parties will need to agree to arbitration at some point in the dispute resolution process. This may require a modification to the existing UDRP/URS.

One additional consideration, should the Working Group decide to proceed with recommending this option, is whether or not this will apply to all IGOs or only to the IGOs on the GAC list (to minimize the risk of "fake" IGOs trying to use the process, and to limit its scope).

ELEMENTS FOR DISCUSSION:

Substantive law – arbitrator decides dispute under the national law under on 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

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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)