ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 15 November 2021 at 15:00 UTC

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TERRI AGNEW: Good morning, good afternoon, good evening. And welcome to the EPDP Specific Curative Rights Protections for IGOs Call taking place on Monday the 15th of November 2020.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please identify yourselves now?

Hearing no one, we have no listed apologies for today's meeting. However, Paul McGrady will be joining about 30 minutes into other meeting.

As a reminder, all members and alternates will be promoted to panelists When using chat, please change the selection from Host and Panelists to Everyone so attendees can see the chat.

Alternates not replacing a member are required to rename their lines by adding three Z's to the beginning of your name, and at the end the word "Alternate" which means you are automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click Rename.

Alternates are not allowed to engage in chat, apart from private chat, or use any other Zoom room functionalities such as raising hands, agreeing, or disagreeing.

As a reminder, the Alternate Assignment Form must be formalized by the way of the Google link. The link is available in all meeting invites.

Statements of Interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance, please e-mail the GNSO secretariat. All documentation and information can be found on the Wiki space.

Please remember to state your name before speaking. Recordings will be posted on the public Wiki space shortly after the end of the call. As a reminder, those who take part in ICANN multistakeholder process are to comply with the Expected Standards of Behavior.

With this I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you, Terri. Good afternoon, good morning, good evening, everybody. Welcome to our call today on the 15th of November. I

am slightly challenged in the sense that I'm traveling and I am [inaudible] this meeting on my iPad, which means that I may not necessarily be able to be quite as up to speed as I normally am with queues and chat. I'll do my best. Berry and the staff team will manage the queue for me, which is fantastic. Thank you.

The agenda's upon the screen. We're going to start with the review of Recommendation 2, and then move on to Recommendation 6. And assuming we can get through Recommendation 6, which is going to involve going through the staff comments that have been put into that document since we last met and trying to reach conclusion. Then once we reach a conclusion, we can then move on to Recommendation 3.

So that's it for me for now. I'm going to hand over to Berry to take us through what needs to be done next. Berry, over to you.

BERRY COBB: Thank you, Chris. So from, I think it was, two meetings ago when went through Recommendation 1, we went through the PCRT and we reconvened the small team to review through the input and try to come to agreement on some possible revisions for that recommendation. The small team did meet late last week. They are making progress.

Essentially, there are kind of three items, maybe four, that they're working through. The first was [IB] from input about the IPC to try to define a more clear scope around the definition of what an intergovernmental organization is. And I think we've made progress there, but we're still working on it.

The second issue, as it related to the use of the term “identifier” and the acronyms that are on the GAC list. We're still working through that, but I think we have a little bit more clarity around the use of the term “identifier” which, as kind of a reminder, that term is also used for a current consensus policy as it relates to the reservation of identifiers or terms. So a little bit more work to go there.

And then the third area was talking about whether, which I believe was also an IPC suggestion that relates to how this is consistent with some of the prior recommendations. And we still have a little bit more work to go there as well.

So, long of the short, we do have a working draft. Staff is trying to put some proposed language around the old Recommendation 2 part. We're going to send that back to the small team to work over the list. And we have another meeting scheduled this coming Friday to continue those discussions as needed, if we can't bring that up on the list.

So more to come, and we'll keep you notified when we get closer to the next version.

So moving on to the next agenda item, the substance of our agenda. So from our last call, we did review through the Public Comment Review Tool for Recommendation 2. You'll note that, out on a Wiki—which I’m posting the link here in the chat just for reference—we have revision history of modifications coming out of the review of the public comments. In particular, staff put together a next draft for Recommendation 2, which I’m now sharing on the screen.

We won't go through this in detail. Hopefully, members have reviewed this offline. We'll probably come back to it as we get closer to putting some of the proposals into the next version of the report on our way to the final report. But just from a highlight, there seems to be agreement about deleting Recommendation 2 altogether, but that there was an understanding that there still needed to be clear instruction provided to the GNSO Council on how they would deal with the old Recommendation 5 that was not approved by the GNSO Council.

So staff, in this particular document, put together a draft proposal of the language. And we do invite the EPDP here to take a look at that text, and if you have any edits or concerns to that text in the meantime, please send those over the list and we'll get those taken care of.

CHRIS DISSPAIN: Berry, if we could please, at the close of this meeting, send a note out to the list with that text and a note that says, "This will be taken as agreed if there is no input in the next week," because I can't see the point in spending time discussing it on a call if we can all agree. Or we can do a little bit of wordsmithing on the list if [there's a need to be done]. So perhaps we could take that step. Thanks.

BERRY COBB: Yes, sir. Will do. Okay, so that concludes Recommendation 2.

The next part of our agenda today is to continue on with the Public Comment Review Tool for Recommendation 6. You will recall from our last call that we did have a fair amount of discussion on

this particular topic. And I'm sharing the updated Public Comment Review Tool, and that staff had produced draft responses.

So if you reviewed these prior to our call, I think that, as you'll see here, nothing is marked completed. We didn't get to any definitive conclusions about the process, although for considering about which law of choice that would be used if arbitration was invoked, essentially the responses are all the same that are across all of the comments for now, until we get to better clarity. Essentially, the EPDP team continues to discuss whether:

1) to prescribe sequential steps in the event that the parties cannot agree on the applicable law. An example, to proceed to have the IGO elect the law either of the registrar or the registrant's location while allowing for either party to argue before the tribunal that neither law provides for an actionable cause of action, or;

2) to recommend that where there is no mutual agreement, the termination of applicable law is to be made in accordance with the applicable arbitral rules without any other specific requirement to be added from the EPDP Team.

So for now, the action taken is literally a copy/paste across all of the different comments until we can work a little bit more here on the call. Let me get you the link. Here's a link to the PCRTs. And specifically, this version was dated on November 9th, that we're looking at on the screen right now. So I don't think we need to go through each of the actual comments again.

As I noted, the action taken is literally the same across all of these, and there's still more work to do from us. So the idea here

is to continue the discussions about what agreement this group can come to for how the current Recommendation 6 can be amended so that we can get to the next iteration for the final report.

CHRIS DISSPAIN: So Berry, if I could, just a couple of points from me here. So it seems to me that there doesn't seem to be any issue with the starting position being that the relevant law will be where the registrant's principal office is or where the respondent's resident as your sort of starting point. And that the complaining party will choose one of those.

The question for us is if the complaining party believes there is a problem with that, then what happens after that? Losing that baseline is probably not sensible, given that we're trying to make as few changes as possible. But bearing in mind, however, that what we're talking about here is not what's covered in the current UDRP because the current UDRP is not about law but jurisdiction. And those two things are slightly different.

I do know that the point has been made. I mean, Paul McGrady's made it a couple of times. And I think it's been made by others from a legal point of view that, technically speaking, a court can choose to hear a matter using whatever law it decides. But I'm not convinced, personally, that that is a substantive point because at the end of the day, most courts are pretty much guaranteed to be hearing something under the law of the other jurisdiction in which they are experienced. And it would be a very unusual circumstance for them to not do that.

So it's not that it's not open to make an application. I understand that it is. But at the end of the day, we're talking about slicing the salami in finer and finer and finer slices. So for me, the starting point is that it is the law of the registrar or the law of the registrant unless there is a problem.

And where I think we're struggling is that there are some who say it's a simple choice. It's the law of the registrar or the law of the registrant. And others who say, “Well, there are circumstances where it's in no one's best interests to have that because there are circumstances where there is no cause of action in either of those two jurisdictions.

And again, to be fair, it’s not appropriate to assume that a registrant has made a conscious decision about choosing their registrar’s jurisdictional law or their law because of a possible future fight. So I acknowledge that there may be circumstances in which there is a challenge. And I think where we’d got to last week was considering the possibility of allowing either party to say to the relevant arbitrator …

So, Paul, I acknowledge that sophisticated registrants certainly will, but frankly we're not writing these rules for sophisticated registrants. We’re writing these rules for registrants’ circumstance. Whether we could consider the possibility of a circumstance where one of the parties does have an objection. And it could be either, but let's be clear. It's most likely to be that the complainant has an objection to using the law of the registrar or the law of the registrant, “Specifically because,” they say, “there is no relevant course of action.”

And whether we could counter [that that's a] possibility of going to an arbitrator, arguing that point; and if we could consider that as a possibility and that the arbitrator decided that it was correct to say that the jurisdiction did not have a cause of action, what the next step would be, and whether we could consider the possibility. That's, I think, in my mind kind of where we are. But I'm going to throw it open for discussion by everybody now. Please remember I can't actually see your hands up, so Berry or Terri or someone's going to have to do with the queue. Thanks.

BERRY COBB: Mary, please go ahead.

MARY WONG: Thanks, Berry. Thanks, Chris. I thought I saw Paul McGrady's hand go up a little while ago, so I don't know if he wants to speak to this. But let me start by saying that I think, Chris, your point about the choice of the IGO complainant being the law of [inaudible] the registrar's principal [inaudible] at the election of the IGO Complainant. The concern that we heard was that …

We all understand that, as you said, it is possible that there will be a situation where the IGO Complainant may say, "We can't choose either law because there is no cause of action. And so, one possibility was to restate or rewrite the second part of this recommendation to be clearer, to be briefer, and just to make it clear that there is a way out if that were to be the case. And we're happy to try to do that.

Our question, I think, is more for the group and the IPC, whether or not that does then still amount to the group writing in sequential steps that we had understood from the IPC comment that they felt to be undesirable.

BERRY COBB: Thank you, Mary. Jeff. please go ahead.

JEFF NEUMAN: Yeah, thanks. And this is not really a comment to the IPC, but it's a broader problem under the whole UDRP of what happens when the registrant and the registrar are in a location where there's no cause of action. So while I appreciate the discussion here, I just think that this issue is much better addressed by looking at the much broader issue. And that would be the Phase 2 of the UDRP if and when that kicks off.

But this has been a known issue for a long period of time, and I just think that we should move on from this one and then make a note of it so that the UDRP Phase 2 can review it.

CHRIS DISSPAIN: Jeff, I have two questions arising from that. My first question is, how does that problem manifest itself in the UDRP because there is no choice of law in the UDRP per se. There is a choice of jurisdiction. And then in that jurisdiction, you turn up and argue whatever you want to do. Which is not the same as we're saying here. What we're saying here is, we're telling the arbitration panel

which law to use. And that's not the same thing. There is a difference.

And secondly, if we did do what you said, which is to, [in essence], in shorthand, ignore it. Then what would happen? We would stick with—what—Option 1, in your view and leave it to the courts to decide? If they arrived at a point where we had said, “You must use the law of the registrant.”

Let's assume that the complainant says, “Well, we're going to use the law of the registrant” for the sake of discussion. And you arrive in court and you learn that there's no cause of action. What would happen then?

JEFF NEUMAN: Yeah. So under the UDRP right now, if the registrar were located in Australia and the registrant were located in Australia, and the registrant loses—or, actually, either party loses—and you have to bring an action in Australia, Australia is going to say, “We don't have a cause of action,” and they're not going to allow you to just say, “Well, let's just use U.S. law then.”

So I hear what you're saying. That there's a difference between jurisdiction and law. But it's not like the law. It's not like the courts of Australia are going to just go, “Oh, well, let's just apply U.S. law” because they have a cause of action for it. So it is a common problem.

The other question is that … Remember, the party that's most likely going to arbitration is going to be the domain name registrant itself. And so, if the domain name registrant is going to

have the cause of action, they're going to be motivated to try to agree with the original complainant as to a choice of law that doesn't include their jurisdiction if they know that there's no cause of action.

So my guess is that they'll be much more incentivized to do the mutual agreement, which is the first part of it, and then they won't get to the second part. But if they get to the second part, then again that's something that is a broader issue that I just think we should just punt to the full UDRP.

CHRIS DISSPAIN: Fair enough. Berry.

BERRY COBB: Thank you, Chris. Before we get to Paul and Susan that are in the queue, something that this group can consider … And of course, it's not anything to do with staff's decision, but I do think it would warrant additional information based on what Jeff is suggesting. I think first, the desire is to try to come up with a solution now and not punt anything to RPMs Phase 2. That's not off the table, of course.

But I'm curious, though, if there isn't some sort of interim solution that could be provided here that could perhaps be reviewed in the near-term future, maybe in RPMs Phase 2 or something else. And the reason why I'm saying this is because it's easy to say, yes, let's punt this to RPMs Phase 2, but at this point in time we have no idea exactly what the scope of that review is going to be. For those that aren't following the GNSO Council closely, there's a

decision that's been made for a policy status report created by staff that will hopefully be roughly delivered middle of next year, May time frame. We don't have an exact date just yet.

Once the Council considers that, then they of course will kick off a charter scoping team that I suspect will take at least six months, if no longer, to complete. So any start of an RPMs Phase 2 is in the considerable future. It's not happening next month or anything along those lines.

And again, we're not exactly sure what the scope of that's going to be. That does not prevent this group from making a specific recommendation here that this should be reviewed in Phase 2. But in in the spirit of trying to come to a solution, is there some kind of interim solution that can be created here that somehow gets reviewed six months or a year after implementation, assuming that the Council and the Board sign off onto these?

CHRIS DISSPAIN: Berry, but I think that's precisely the point. Unless I've misunderstood, I don't think Jeff is suggesting that we avoid making a decision. I think what Jeff is saying is that there's a bigger question, and that, therefore, we would make a decision. And I suspect what Jeff is suggesting is that we stick with Option 1. That's the recommendation that we would make. And we would acknowledge that there is a bigger discussion to be had about what to do in the event that operating under Recommendation 1 causes problems because the same problems occur in the existing UDRP.

I think that's what Jeff is suggesting. And, yes, I acknowledge that scope here is only in respect to IGOs, but the problem itself is the same, respective of whether it's IGOs or not.

I'm delighted to say that I've managed to figure out how to look at people's hands, Berry, so I can relieve you of that [and you can] concentrate on the slides.

Paul, go ahead.

PAUL MCGRADY: Thanks, Chris. So, yeah, I'm not for punting this to RPMs Phase 2. I think that could give the misimpression that somehow the arbitration process that we're building here is meant for the UDRP generally. And I don't think that's the case. There's been no work towards that. And so I'm hesitant to punt it.

I also think, again, not to keep beating the same drum, but the IPC position is that we shouldn't be doing this. If our solution is making us have to conjure up additional solutions to fix the problem we're causing by coming up with the solution, we really should look at whether or not we need the solution. In real arbitrations where ICANN is not sticking its nose into the substance of the outcomes by choosing law, which has never been done. It's not in the UDRP. This is brand-new. What we're suggesting is that ICANN develop a policy to impose a choice of law onto people. It's important. And if that's causing problems, we should really consider what the IPC is saying here, which is, "Let's walk away from it."

The solution that Berry is looking for is that we should remain silent on this. And if anybody actually uses the arbitration problem and if they do, if our silence on the choice of law is causing some sort of problem—and those are two great big "ifs"—then maybe this particular thing could be reviewed in three or four years—this one particular question—if it causes any problems. If it never causes any problem, then it may not need to be reviewed. But we are definitely in the space of over engineering this.

I'm really concerned. We were trying to find an elegant solution here, but by ICANN imposing substantive outcomes on appeals, it's a bridge too far. So I hope we can back away from this [inaudible].

CHRIS DISSPAIN: Paul, thank you. That's very clear, and I understand it. I just want to check in with you. If we followed your suggestion, what we would be doing is, in essence, we would be …

It doesn't matter whether we say it or not. In essence, what we would be doing is, we would have a situation where the matter went to the arbitrator and, effectively, the parties can make their own submissions as to the law that should be used. And the arbitrator would decide.

Is that the practical result of what you're saying?

PAUL MCGRADY: That's right. So whoever files the first document, a complaint in the arbitration … I don't know why a complainant would if they won. Right?

CHRIS DISSPAIN: Sure.

PAUL MCGRADY: So the losing respondent [inaudible] arbitrator and says, "I'm organized and reside in jurisdiction X. And under jurisdiction X, I have the following legal reasons why I should be allowed to keep this domain name [based on] whatever the local laws are. And therefore I should be able to keep it. And by the way, I [registered in] jurisdiction Y, and they have similar law. So that's another reason why I should be allowed to keep it."

And then the winning complainant would file answer and say, "Well, I'm organized under jurisdiction Z and I have these rights [inaudible] they should not be allowed to keep it."

And then that big old mess goes to the arbitrator. And these international arbitrators, this is what they do. [They figure out the mess]. But for ICANN to [inaudible], what we're going to do is end up putting [the sum] on the scale for one party or the other. And it may depend on where those parties are from.

So to me, I much like the idea of the neutral sorting this, instead of us trying to presort it. And in our attempts to presort it, we can already see that we're going to have to have staff come up with a boatload of exceptions or whatever. So [inaudible].

CHRIS DISSPAIN: That's fine. So again, just to check. And I understand completely what you're saying, and it makes sense in the sense that it's understandable. Is there a suggestion to go back …?

To go back to your example, if I'm making the application for arbitration, your example was I'm organized under this jurisdiction. So I'm the UK. Right? I'm organized under UK jurisdiction. Would it be open to me to say, "I would like you to consider this under the jurisdiction of somewhere else?" Presumably, it would. And I can argue that.

PAUL MCGRADY: For sure.

CHRIS DISSPAIN: But you, on the other side, would be able to say, "Well, no. You, the arbitration panel, should either decide it under Chris's actual jurisdiction which is where he registered the domain name in the UK, etc., or you should decide it under my jurisdiction which happens to be, let's just say, the U.S."

Is that what we're talking about?

PAUL MCGRADY: Yeah, that's right. And there are all kinds of places that a Losing Registrant could point the arbitrator to. Right?

CHRIS DISSPAIN: Yeah, I've got it.

PAUL MCGRADY: So you could say it's [the jurisdiction] where they're formed. It's the jurisdiction of the registrar. It's the jurisdiction of the host. And likewise, a winning complainant could also point to their jurisdiction, to where it's happened—

CHRIS DISSPAIN: Yeah.

PAUL MCGRADY: —to where you are. Right? To the host, to the registrar. They could also agree to the jurisdiction of the registrant or some other jurisdiction that makes sense. But the point is that it's complicated, and a neutral is in a better position to sort this out than we are.

CHRIS DISSPAIN: Super. Okay, thank you. Understood. I've got Susan next and then Jeff. But I also just want to say, before I go to Susan, I also want to hear from anyone else on this call who would be against what Paul is saying. And if you're against it, obviously I'd like to know why and the reasoning for being against it. So if you are, if you could get into the queue, that would be fantastic.

Paul, you need to put your hand down. Thank you very much. Susan, you're up.

SUSAN ANTHONY: Now I'm trying to figure out if I fully understand what Paul is arguing because I actually had raised my hand to say, no, we really can't punt this down the pike. I do appreciate what Jeff is saying. Very much so.

But the situation with the IGOs and the UDRP is different from the UDRP, generally. And I am much more in favor of let's try to find an elegant solution or perhaps an inelegant solution and move forward with it. And then if there, for some reason, has to be a reconnoitering, then we will do it at that time. But we're really under a very ambitious timeline to try to resolve this problem.

And I am speaking here from the perspective of the Governmental Advisory Committee. And I guess Brian is not with us today because, otherwise, I would have heard him chiming in, I'm sure.

But we do need to come up with a solution, and I'm not comfortable with the idea that we punt it down the line. A solution for the IGOs to address bad faith domains.

CHRIS DISSPAIN: Thanks, Susan. Understanding what you said, I think Paul's suggestion is a solution. And I want to be clear that, in essence, what he is saying is that we would not be defining, upfront, a specific law. We would be saying this matter goes to [arbitration]. In other words, there would be no recommendation in respectable to applicable law in arbitration [proceedings]. We would simply be saying that the matter goes to arbitration and it's a matter for the individual parties involved to make their proposals in respect to the law.

One assumes, going in, that mostly often the registrar would say, “I want this heard under my law,” whatever that may be. But to be clear, the problem that we’re faced with was that what was said by both sides of this debate was that it’s entirely possible that you might end up in a situation where defining the law actually causes more problems than merely arguing about it.

So that's the point. And personally I think what Paul is saying is the way it would normally be done, in essence. And I think Jeff has effectively said the same thing.

So Jeff, back to you. Then I’ve got Susan again.

JEFF NEUMAN: So, a little bit different take there, Chris, because I don't think that would be what normally would occur because, normally, two parties to a contract agree in advance as to what the law is and then they go to the arbitrator and they have to argue why that isn't the case or why that shouldn't be the case. There are some contracts, obviously, that don't define it.

But I think we have to take a step back and think about the broader implication here in the sense that the way it works today is if an IGO brings a complaint under the UDRP—which it can, although it's not ideal and they have to wave mutual jurisdiction—then the registrant is going to file in its location or where the registrar is located because it's the one that's going to appeal or re-hear this type of situation.

If we now all of a sudden have to force a set of briefings back and forth and arguments as to which law applies, we are making this

thing so much more expensive than it would be in a court of law where, generally, the court will apply its own law.

The other thing that I see as a potential unfairness to registrants is that the UDRP is—and I'll put it in quotes—"global in nature," whereas laws in general are usually local or national in nature. And it would be very unfair for a UDRP to be decided one way and then an "appeal" be filed in a complainant's jurisdiction because that's because the complainant was successful in making the argument for some reason that the tort happened, as Paul said, in its location.

So you can have a very weird result where someone who registered a domain the U.S. is now having to fight in Spain for a mark that may be in Spain but is not in the U.S. And it's going to cause so much more chaos.

The way I think it should be is that it should be Option 1 and then maybe you can add, at the end, "In the very unlikely circumstance that there is no cause of action in either of those jurisdictions, then the arbitrator could decide." I think [inaudible].

CHRIS DISSPAIN: [Who decides]?

JEFF NEUMAN: Right. [inaudible].

CHRIS DISSPAIN: [Who decides]?

JEFF NEUMAN: The arbitrator decides.

CHRIS DISSPAIN: No. Who decides there's not cause of action?

JEFF NEUMAN: That's what they're going to have to brief, and that's upon the complainant to brief why there's no law. I mean, it's got to convince an arbitrator that there's no law that applies. So I think that we're making this much more complex in the sense that we're forcing arguments and briefings back and forth in a situation where, today under the UDRP, the person who brings the cause of action, the registrant, would not have to make an argument as to which law applies.

So let's think about it from that end. I know what the IGOs want. And if I heard Brian last week correctly—and we can go back to the notes, we can ask—Brian said while he wasn't happy with the solution of Option 1, I did think he said that they could live with it. And if that's the case, then why are we extending this because of the IPC comment? That just makes no sense to me. But thanks. And I'm a member of the IPC, by the way.

CHRIS DISSPAIN: So Jeff, your recollection [tracks with] my recollection. Brian did say that. And in fact, I think what Brian was talking to is effectively

what Paul has put into the chat, if I can read it correctly. Which is that it's Option 1 plus the additional step in (ii).

But Susan, over to you. And then Alexandra.

SUSAN ANTHONY: I had thought that arbitration was a solution not only for the IGOs, but also for the registrants. While I appreciate that there is disagreement in this small group and in the community more generally, I think we have to take the IGOs who are at the table here at their word. That they can only use arbitration—and it's set up through agreement with their contractors—and that if a losing domain name registrant were to take the IGO to court, the IGOs argue that the registrant will be thrown out because of the jurisdictional immunity issue.

And that's probably going to happen more times than not. And I cannot imagine that any registrant or registrant representative would say, "Let's follow a potentially needless action and spend all of your good money needlessly."

So what we're trying to fashion here is something where the registrants do not need to go to court and lose at court. They can go into arbitration. I do understand what Jeff says, that most often arbitration is set by the parties in a contract and the applicable law is set in that provision. I've drafted many of those contracts myself in private practice. But in this situation …

Well, in today's world, increasingly people who work in ADR are trying to figure out, "How do we get parties into arbitration who didn't have a contractual relationship but they now need to go to

arbitration? And what do we do with that?" So I do think that there's a way forward.

I had thought that arbitration is potentially a win … Well, I won't say … I guess it's a win-win for both parties.

CHRIS DISSPAIN: Thanks, Susan. I agree with you, and I think we're at a point—and I hope I'm not overstepping the line here—that we've accepted that arbitration is the way forward as an "appeals" mechanism.

What we're talking about is the more specific finer point about under what process or what law that arbitration is conducted rather than arbitration itself. And it seems to me that we have two distinct … There's an awful lot of fluff around the edges, but fundamentally we have two distinct view. One distinct view is that it should be automatically the law of the registrant or the law of the registrar unless there is …

And I think there's an acceptance that there may be a small number of cases where the law of the registrant and the law of the registrar does not provide a cause of action. And in those circumstances, it would be open to either party to say to the arbitrator, "There's no cause of action and we should you choose another law."

And the alternative to that is that there is no choice of law per se, really, in these recommendations and the matter is dealt with by the arbitrator on hearing. And there's an assumption, in the conversations that we've had, that the registrar will go in and say they want their jurisdiction. And then there can be an argument if

there needs to be. That seems to me to be where we are. And I can see [large red] letters of suggestion, which we'll get to in a second.

Let's go to Alexandra first. Alexandra, go ahead.

ALEXANDRA EXCOFFIER: Hello, everyone. Alexandra Excoffier from the OECD. As I mentioned, Brian is ill so he could not make it. But he thought he would try to make it, but I guess that was not the case. So I'm speaking also on his behalf.

From the last time, what Brian said is that he would basically agree with what Paul was saying, but if need be, he would agree with Option 1 plus the additional step. And what Mary's proposing, I think, goes to that. So I will share it with Brian as well.

I did want to make one point that matt sent me just now, that UK courts regularly apply other laws than UK laws when they're dealing with an issue. So it does happen that courts apply laws which are not their own if it's more appropriate to the case at hand. So that goes to something Paul was saying, as well. And not just about venue, but also on substance.

So basically, to go towards what Mary suggested, I think that from the last time that this is something which Brian said that IGOs could live with as an option if Paul's option or WIPO's option—which is basically the same as Paul's option, I think—is not followed.

CHRIS DISSPAIN: Thank you, Alexandra. Understood.

Susan.

SUSAN ANTHONY: I was just curious about the last sentence in the red suggestion. "Where neither law provides for a cause of action, the arbitral tribunal shall make a determination in accordance with the applicable arbitral rules."

Stupid me, but I'm trying to figure out a determination as to what law could be appropriate or a determination that, "Too bad, so sad. There's not a cause of action under either law, so this matter is over."

CHRIS DISSPAIN: "Which law" I think is the intention, Susan.

SUSAN ANTHONY: All right. So if the "which law" … If neither of those options applies in the foregoing sentence, then they'll make a determination as to what law could apply it.

CHRIS DISSPAIN: Yes.

SUSAN ANTHONY: Okay. Thank you.

CHRIS DISSPAIN: That's my understanding. I don't think anybody is suggesting that if there is no cause of action in the law of the registrar or the registrant and the parties can't mutually agree, then that should be an ends to the matter and the status quo is so the winner continues to be the winner. I think the intention is that there would be a third option—a third law, if you will—that, "We can hear this under this law."

SUSAN ANTHONY: Then I suggest that the red language, the last sentence, needs just a little bit of refining to make it—

CHRIS DISSPAIN: It does. No, you're absolutely right. It does.

SUSAN ANTHONY: Thank you very much. I see it's coming. Thank you.

CHRIS DISSPAIN: It is, indeed. Thank you very much, indeed, Susan. Mary, go ahead.

MARY WONG: Yeah. Actually, I was just about to confirm, Susan, that our suggestion does go to the applicable law. And I noticed comments in the chat from Paul. So this is just a suggestion from staff to try

to accommodate the different concerns that were raised and still have a recommendation that's fairly clear without going into the specifics of briefings and sides.

And what we also suggested in the chat recently is that if there is a need to illustrate what we mean by this recommendation, that's better done in explanatory text rather than adding to the recommendation itself with all the different steps that we've been talking about.

CHRIS DISSPAIN: So thank you, Mary. And just to be clear, I didn't want to get into what it's [inaudible] right now. I think we all understand what it's meant to say. But use of the term "applicable law" in the last line isn't correct because it's not applicable. It's the law that they choose to apply, that should be applied as opposed to the law that is applicable which is a different thing. But don't worry about that too much for now.

Paul, go ahead.

PAUL MCGRADY: Sorry, double muted. In the spirit of … Without caving in on the other thing, which is that we should not mess with this, but in the spirit of moving things forward. So we have "Where neither law provides for a cause of action …" And I've read this in the chat, and the response is, "Well, we don't want to over engineer." But this doesn't say anything about defenses.

And maybe the domainers don't care. Right? Maybe they don't want defenses. Maybe they're okay with an IGO saying, “Okay, well I don't like the law where the domainer usually reside, habitually reside. Whatever that means. I don't know what that means. So I won't take that.

I’ll take registrar law because I happen to know in that jurisdiction where the registrar is that there are no defenses to this kind of thing. It's an absolute right. I assert a trademark and you lose. Maybe that's fine. And I keep raising the issue, but cause of action is only 50% of it. It’s cause of action and defenses. Thanks.

CHRIS DISSPAIN: I’m confused by that comment, Paul, because isn't it … Not by what you said. What you said is understandable. But is it not the case right now that in the normal course of a UDRP, you choose at the beginning—come what may—and it's the complainant that chooses?

So where does the defenses thing fit in right now?

PAUL MCGRADY: Chris, I’m sorry. I don’t understand your question.

CHRIS DISSPAIN: Well, you're talking about the ability to say … The complainant says, “I choose the registrar’s law” and for the registrant to be able to say, “No, no. It shouldn’t be the registrar’s law. It should be my law.”

Isn't that what you just said?

PAUL MCGRADY: No. I said the opposite of that, which is when we're reading Mary's suggested text, it says the parties will agree. Where they can't reach agreement, then the IGO Complainant gets to pick. They get to pick either [inaudible].

CHRIS DISSPAIN: But isn't that the case right now? Is what I'm saying. In a normal UDRP—

PAUL MCGRADY: No.

CHRIS DISSPAIN: —isn't it the case that the complainant gets to pick?

PAUL MCGRADY: No. There is no law provision in the UDRP.

CHRIS DISSPAIN: They get to pick jurisdiction, though. Yes?

PAUL MCGRADY: No. The complainant has to agree to submit to both the registrar and the registrant's home jurisdiction The Losing Registrant get to pick between the two of those.

CHRIS DISSPAIN: I apologize, then. That was my misunderstanding. Okay, so to be clear, what we're saying is that under the current process, as the complaint I would say, “I’m prepared to submit to the jurisdiction of the registrar and I’m prepared to submit to the jurisdiction of the registrant.” And then the registrant gets to pick which one of those is used. Is that correct?

PAUL MCGRADY: Right. Under usual UDRP, yes.

CHRIS DISSPAIN: Okay, cool. Thank you. I understand your point now.

So let's hear from anyone else specifically about the suggested redline text that's before us. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Paul, I’m a little bit confused now. I’m really just trying to understand. Can you speak a little bit more as to what you're trying to say as to causes of action versus defenses? Because these are situations where we've had a registrant who is looking to again, “appeal.” I realize it’s de novo, but take a losing situation and go … We flip flop. The registrant now becomes the complainant, so to speak, in this process.

So I’m trying to understand what you’re trying to distinguish here between cause of action and defenses. Thanks.

PAUL MCGRADY: Sure. So maybe I can better explain it through a scenario, if that's okay. So let's make one up. Let's have a domainer who is a U.S. citizen. So I guess that means that they habitually are resident in the U.S. And they have a German registrar. They go to arbitration. Right? The parties can't agree. And the party probably won't be able to agree. If an IGO sees that a particular jurisdiction is better than the other, why would they consent. Right? So they don't agree.

And then the IGO Complainant is in the driver's seat. Whenever the IGO Complainant doesn't reach agreement, it gets a leg up because now it gets to choose between the registrar's principal office or the respondent's habitual residence. And so if the registrant is in the United States, the ACPA has a reverse domain name hijacking cause of action. Right? And so the IGO would never pick that.

And the German law—I don't know—may or may not have any such thing. I've never heard of any such thing under German law. And so if I were the IGO, I would say, "Well, I'm going to go with the registrar." So now the U.S. registrant is out of luck and has bargained away their right to assert a reverse domain name hijacking account under U.S law. Maybe that's okay. Maybe the domainers don't care about that stuff.

But as long as we are allowing the IGO to make these decisions and as long as we are always focusing on their cause of action instead of the domainers defenses, it just doesn't seem [in

balance] to me. Which is why I think saying nothing is simpler and letting the neutral sort all this out.

But if we all really insist on saying something instead of nothing, I would at least think that the professional domainer folks would want a balanced provision. This thing is all IGO all the way. Thanks.

CHRIS DISSPAIN: Thanks, Paul. Jay.

JAY CHAPMAN: Okay. Thanks, Paul. I appreciate that. So I think we need a … I would like some clarification here because we have been going under the pretense, at least for a while here … And maybe it's just, I don't know. I don't know who can verify this [for sure. And, again,] not to say I don't trust you, Paul. But we've kind of been going under the assumption here, or the presumption, that the complainant in the UDRP situation gets to choose at the beginning of the UDRP whether or not it submits to the registrar or the registrant's location for any subsequent action.

If that's not the case and it's that they agreed to both and then the registrant gets to choose, that fundamentally does change, I think, what we're talking about here.

Okay, maybe I'm … I'm looking at Paul's … Okay.

CHRIS DISSPAIN: Okay.

JAY CHAPMAN: So if that's case, then there's a simple fix here. And the simple fix is that now the registrant gets to decide what the law is because that's what's consistent with the existing UDRP. Thanks.

JEFF NEUMAN: Can I just interject real quick? Just because that's not what the rules say. Right? The rules say that the complainant will submit to the jurisdiction in at least one specified mutual jurisdiction. So most complaints that I've seen have picked a jurisdiction where they're going to submit to mutual jurisdiction. It doesn't mean that the party that's having it reheard can't try to do the registrar if the complainant picked the registrant.

But in the rule, specifically the Subsection 3—or whatever, Subsection 13 or 12—says that they will submit to the jurisdiction of the courts in at least one. So the complainant can say, "I will only submit to where the registrar is or the registrant."

CHRIS DISSPAIN: Thanks, Jeff. That's certainly been my understanding, all along. I accept that we've shorthanded it technically by saying it's the complainant's pick. But my understanding has always been that the complainant technically—not technically. The complainant has a choice between which of the two jurisdictions will be used.

And of course, it could say either. I completely understand that the complainant could say either. what it can't say is neither. And it has to pick one of the two. So if that's the case, then leaving aside

anything else that may be objectionable, the current wording puts the parties back where they are at the beginning of the process, as of now, in my understand.

Go ahead, Paul.

PAUL MCGRADY: Thanks, Chris. So, Jeff, I apologize for overstating it. My point was just that the complainant doesn't have any choice. The complainant doesn't get to pick from any place that they may want to pick from. They have a choice. They can either submit to where the registrant is located—and that is a choice by the registrant—or where the registrant's registrar is located. And again, that's a choice by the registrant. Right?

So basically, it's offering up two options, both of which have already been preselected by the registrant. So sorry that I stated it too strongly. And you were right to call me out on my error. But it wasn't for any nefarious reason. My point simply is—

CHRIS DISSPAIN: Of course it wasn't, Paul.

PAUL MCGRADY: Thanks, Chris.

CHRIS DISSPAIN: Of course it wasn't. It would be pointless.

PAUL MCGRADY: Yeah. But my point remains the same, which is that we're basically … In that case, yeah, I guess the IGO selecting the law between the registrar and the respondent is vaguely analogous to the complainant picking which of the two jurisdictions that they want to pick in a regular UDRP. Although, as we said over and over again, law and jurisdiction are two different things.

But I still have concerns that we are focusing on causes of action only and not on defenses. But Jay doesn't seem bothered by that and he's representing the professional domain name owners. So if he doesn't care, I'm wasting everybody's time. Thanks.

CHRIS DISSPAIN: Thank you, Paul. So let see if I can set out what circumstances I think this redline is attempting to deal with and how it encompasses the wide range, the wide gamut of the discussion that we had on this point over the last two meetings.

The first sentence "Any arbitration will be conducted in accordance with the las as mutually agreed by the parties" covers a discussion that happened, I think, last week or maybe in the week before that about a circumstance where the parties may decide that they're quite happy for a third jurisdiction to be used [whereas they] have no difficulty whatsoever and everyone's perfectly happy for the arbitration to happen in a jurisdiction that—sorry, under a law, rather—that isn't the registrant's and isn't the registrar's.

And that's perfectly fine. Makes sense. It allows for the flexibility of both parties agreeing there. So that's the first thing that's covered.

The second sentence covers the circumstance of effectively putting the parties in the position that parties are currently in a respected jurisdiction in the current UDRP. So if they can't reach mutual agreement, then the complainant decides if they want to use the law of the registrar's principal office or the registrant. That is, in essence, what happens in the case of jurisdiction under the current rules.

What the third sentence is about is covering a point that we discussed at some considerable end, which is that there may be circumstances where both of those jurisdictions do not have a cause of action. And that therefore a third jurisdiction is—a third law, rather—is necessary, but that under the first sentence, the parties have not been able to agree.

And the point about that, and it was made … It's very specific. It's not that one party doesn't like one of the jurisdictions—one of the choices of law, I'm sorry. It's not that one party doesn't like it. It's a very specific law which says if there is no cause of action, then the tribunal can make a decision about what law to use.

So to me, whether one agrees it or not, I can say for sure that those three sentences cover off all of the areas of discussion that we've had as a group over the last couple of meetings.

Now there's wordsmithing. And I have no doubt that there's wordsmithing. And I have no doubt that there are words in there that may be problematic and need to be played with. I've already

mentioned the fact that where is “law to be applied.” There’s the “habitually resident” thing which Paul has just raised, and so on. I get all of that.

But I would be surprised if there is any doubt about what the import of these three things is meant to be. And on that basis, it's that which I’d like to see objections to. I’d like people to say they have a problem with and why.

Jay, go ahead.

JAY CHAPMAN: Okay. Well, thanks, Chris. And forgive me here for kind of backing up a little bit. Paul's put the relevant text specifically there, Clause 12. And I’m wondering …

And again, I guess I’m looking for clarification as opposed to anything else. It says, “state the complainant will submit to at least one.” It doesn't say that they choose which one. It just says that they'll submit to one of those two jurisdictions.

Paul, is that kind of what you're saying then when … Because it may actually be that Paul's right because if you don't … There's no commandment to choose. The mandate is just to say that you will submit to at least one. I’m just wanting to make sure we're clear on how this plays out in practice. Thanks.

CHRIS DISSPAIN: Thanks, Jay. I’m all happy to be corrected on this, but my understanding is that, in practice, what that means is that the

complainant can either say, “I agree and I will submit to at least one,” which would be that they would submit to both. Or they can say, “I agree to submit to one of these, being X.” That's certainly my understanding. But if I’ve got that wrong, I’m sure somebody will correct me.

Mary, go ahead.

MARY WONG: Thanks, Chris. I actually put my hand down because I was going to respond to Paul that we chose this language for your consideration because, as you said, we're now talking about choice of law versus choice of jurisdiction. There's no other reason for that. If the group prefers to mirror the language of the UDRP, we can do that. But in terms of habitual residents, we were thinking of choice of law rather than choice of venue.

CHRIS DISSPAIN: Sure, understood. And again, we can wordsmith this offline if we have an understanding that it is worth pursuing as a possible way forward.

I want to address, specifically, the point that Jay has made. Is anyone able to say that I’m wrong? Is anyone able to say that it's not correct that the complainant can choose one of the jurisdictions if they wish?

PAUL MCGRADY: Chris, I'll just jump in and say the way that it's written, it says that they have to agree to at least one. Right? Practically speaking, I've always put down the one that I like best. And it's never been [challenged] by a case manager and it's never come up in post-UDRP litigation. And I don't know if [inaudible]. I've done, I don't know, 700 or so of these, I think, at this point. So I think, in practice, most of us that are complainant lawyers pick the one of the two we like more.

CHRIS DISSPAIN: Okay. Well, that's fine by me. So to go back to Jay's point, I think we can say that, Jay, that is correct that they do get to choose. They may choose not to choose, but they can choose. And so I think my summary of what the three sentences is endeavoring to cover is accurate. And acknowledging completely that there may well be some wordsmithing that needs to be done, I think the fundamentals of the three steps are encompassed in this sentence.

And what I'd like to find out, what I'd like to know is if this redline is a redline for anybody, is a red flag, is going too far. Paul's already said his preference would be for it not to be there, but if there's an agreement amongst the group that we're okay with it, then it's bearable.

So is there anyone for whom this is not bearable?

Jay.

JAY CHAPMAN: Thanks. Well, perhaps we might, as opposed to being very specific here, maybe we should go with the language similar to what Paul posted from Subsection 12 about—

CHRIS DISSPAIN: Oh, I'm happy to do that. Absolutely.

JAY CHAPMAN: —instead of it being "may elect"—"An IGO Complainant may elect"—perhaps it's something about "shall submit to at least one of …"

CHRIS DISSPAIN: Yeah. Jay, apologies if I've dismissed that as wordsmithing. It's unintended to be in any way dismissive. But I think that's a really interesting suggestion and something that we could certainly look at.

So it would be "mutual agreement … one of … registrar or registrant." And then the third-bottom line being, in this very specific case of there being no cause of action, then "arbitrator" if the arbitrator found that.

So, yes. I don't think there's any problem with using words the same as or similar to the existing wording, in my view. Is that okay? So it's obviously, Jay, and I acknowledge it for everyone. We need to see the wording. But as a sort of general principle, if we're okay to proceed on that basis, we'll get the wording done and put out onto the list.

Does anybody have a problem with that? Jay, your hand's up again. Go ahead. Nope, it's down again. Cool.

JAY CHAPMAN: Thanks, Chris.

CHRIS DISSPAIN: No problem. Go ahead.

JAY CHAPMAN: I'm sorry. I was going to speak. Obviously, I think it makes sense to kind of think about this and come back. I mean, generally speaking, I think that looks like where we wanted to or where we need to end up. But I'd like to just take it under advisement, I think. Thanks.

CHRIS DISSPAIN: Oh, no, no. I completely understand. And please, I want to be clear with everybody that just because everyone says, "Let's reword it," and, in principle, we're okay with it, that doesn't mean that we're agreed yet. I5 just means that we'll get it reworded and we can look at it in the context of the whole [thing]. But I think we've achieved that at least, now.

The next question is—Mary, Steve, Berry—do you have an understanding of what it is that you need to work on and look at the wording of clause 12 from the UDRP, and so on and so forth?

MARY WONG: We think so, Chris. We'll do our best.

CHRIS DISSPAIN: Okay, all right. Not a problem. So Berry, back to you.

BERRY COBB: So I think based on the discussion here, what staff will do is at least start with this text. And I think Mary will make an edit or two based on the discussion. And just like what we'll do with Recommendation 2 that we'll send out to the list. We'll also post the proposed text for Recommendation 6 and get that sent out to the list so that the group can respond back over the list. And as we get closer to trying to conclude on Recommendation 6 and, of course, we'll update the action taken on the PCRTs for Recommendation 6.

CHRIS DISSPAIN: Okay. So I'm conscious that we've got 15 minutes left, we've got Recommendation 3 next on the list, and that we are light on numbers today. And I'm wondering if it would be sensible for us to wrap it at this point and hit the ground running next Monday with Recommendation 3. What do you think about that, Berry?

BERRY COBB: I agree with it mostly, with a slight revision. If you'll allow me to just kind of preview PCRT 3 but not go into any substance.

CHRIS DISSPAIN: I'm over the moon with excitement.

BERRY COBB: All right. So our next review is a mutual jurisdiction, Recommendation 3. To be frank here, I'm a little challenged how we're going to get through this in terms of the Public Comment Review Tool. I'm sure most of you have read the responses that were submitted in time. And it's a fair statement that there's a high degree of divergence around the current text as proposed in Recommendation 3 about relaxing the submission to mutual jurisdiction.

As we've done before, those that are somewhat supportive of the recommendation, those are easy for us to move on, acknowledge, and move along. Those where divergence is, disagreement is going to be more of the challenge. In particular, some of the comments are so long it will definitely not be worth our time for me to try to read it. And some of them are so substantive I'm not even sure that I can adequately provide a 90-second summary other than to say they were for or against it.

What I will say, though, in particular I want to focus in on the leap of faith financial services. What you're going to see in this PCRT is that there are about 10 or 15 pages of the response here. On one side of it, it's too long and it breaks the PCRT tool.

But on the other side, it's actually a very substantive response that somewhat should be modeled for other comments that should be submitted in the future because one is that it provides very good rationale for why they don't agree with the particular

recommendation versus what we received elsewhere. I just don't like it. So, I think that's a positive aspect about the response.

And what is also in consideration of the submission is, in particular, a new idea was also provided which is not what we've got anywhere else from other respondents in this proceeding for how to advance the recommendation forward.

So what I'd ask of the leadership team, as well as the full group, to maybe brainstorm how we might approach the review of these comments in a substantive way, but in a way where we can advance the deliberations to move the recommendation forward or amend it.

So I don't know whether to think about it as, do we spend time reviewing the divergence of the existing recommendation or are we better served to consider the new idea first and then consider …

And I don't think we need to answer this today, but we'll [inaudible].

CHRIS DISSPAIN: Berry, if I may, I think, actually for me it's relatively obvious. Yes, we should consider the new idea first because if the new idea … If everyone goes, "Oh, my God. That's brilliant," why would we have suffered through dealing with everything else only to discover that by going through the new idea, we've got a solution?

So my recommendation would be that we do consider the new idea first. And that we look at it and say, "Is this of merit? Should

we be discussing it in detail?" If the answer is, "Yes, this actually looks very interesting. We should be discussing it in detail," then we discuss it in detail. And only if we abandon it should we then be going back and looking at the rest, it seems to me. I can't see why you'd do it the other way around. It doesn't make any sense to me. But then I'm open to be persuaded. I just don't understand why you would.

BERRY COBB: I subscribe to that as well. Just to note that we still need to do it in a way that we're ensuring that we're covering any of the comments that were [inaudible].

CHRIS DISSPAIN: Yeah, but that's what happens later [inaudible]. Again, I'm not suggesting we can ignore the rest of it. What I'm saying is that I think we should focus in on the new idea.

BERRY COBB: Yep. So we'll plan accordingly.

CHRIS DISSPAIN: Well, let's do that. But also, and again, in order to try and focus people's minds, could we maybe extract the new idea text from this particular section and stick it in an e-mail to the list. And then we could perhaps have a bit of discussion on the list about what people think. That would be quite useful, I think. Yeah?

BERRY COBB: Will do.

CHRIS DISSPAIN: And if I could encourage everyone who's still on the call to make the effort to look at the at George's suggested new idea. I think looking at it in isolation is actually helpful because it stands alone as a proposal. And I would be really, really … It would be really encouraging even if you look at it and you go, "Well, it makes no sense to me for this reason" or "I don't like it for this reason," getting to it on the list would be immensely helpful because it gives us a bit more time and a little bit of an opportunity to continue to consider it, indeed.

Berry, if we can get that out as soon as possible, that would be fantastic.

BERRY COBB: Working on it now.

CHRIS DISSPAIN: Okay. Is there anything else that you want to cover, Berry?

BERRY COBB: Just to note that we're meeting again—same bat time, same bat channel—next Monday at 15:00 UTC.

CHRIS DISSPAIN: Okay. So just let me make sure there's nothing in the chat that I need to worry about. Nope, okay. Thanks, everybody.

Last call for any comments. Okay. There being none, let's wrap the meeting. Please take the time to read the e-mail when Berry sends it out. Please take the time to consider it and comment on the list.

See you all again next week.

BERRY COBB: Thank you, all. Take care.

CHRIS DISSPAIN: Cheery, everybody. Bye-bye.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. I will stop the recording and disconnect all remaining lines. Stay well.

[END OF TRANSCRIPTION]