ICANN Transcription

IGO Work Track

Monday, 12 July 2021 at 15:00 UTC

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JULIE BISLAND: Good morning, good afternoon, and good evening, everyone. Welcome to the IGO Work Track Call taking place on Monday the 12th of July 2021 at 15:00 UTC.

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 yourself now?

All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat, please select Panelists and Attendees in order for everyone to see your chat. Attendees will not have chat access, only View Chat.

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

Alternates are not allowed to engage in the chat, apart from private chats, or use any other Zoom room functionalities such as raising hands or agreeing or disagreeing. As a reminder, the Alternate Assignment must be formalized by way of a Google Assignment Form. The link is available in all meeting invite e-mails towards the bottom. Statements of Interest must be kept up to date. If anyone has any updates to share, please raise your hand now or speak up. And if you do need assistance updating your Statements of Interest, please e-mail the GNSO secretariat.

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

Thank you, and over to our Chris Disspain. Please begin.

CHRIS DISSPAIN: Thanks, Julie. I think you've got a few people in the attendees room that should be in the panelists room. I'm sure you're pulling them in one by one which is [nice].

JULIE BISLAND: I am. I'll get them over.

CHRIS DISSPAIN: So, hello. Good morning, good afternoon, and good evening, everybody. Welcome. I hope you all had a fantastic couple of weeks, are all rested and ready to strive forth together to get this sorted out.

We're going to spend a little bit of time now talking logistics because a number of things have happened that everyone needs to be up to date on. So we're going to go through that and then we can get back to our discussion.

So last week John and I had a call with the leadership of the GNSO Council to discuss three specific issues. In no particular order, the first one was to follow up on the discussion that we had on this group when we last met about how this work track can put out an initial report, given that it's charter basically says that it's supposed to be providing that report to the RPM Phase 1 Working Group which doesn't exist anymore.

So in respect to that, what we've agreed is that this particular matter—what to do about the deficiency in this work track's charter and the references to RPM Phase 1 Working Group—will be on the GNSO Council's agenda for its 22nd July meeting as a discussion item. The goal for that meeting is going to be to draw the full Council's attention to the issue, explain and discuss the context and possible paths forward.

Staff are developing or have developed a list of possible options for how the GNSO Council can proceed without, hopefully, the

need to convene the RPM Phase 1 Working Group which wouldn't be particular a useful or sensible thing to do. And they're going to work with the Council to figure out the best way forward to deal with the issue.

And obviously, ICANN legal is also going to need to confirm that what is being suggested is acceptable, but it's likely to involved changing some of the wording in the charter which makes reference to RPM Phase 1 Working Group and so in if necessary. So that's that one.

The second one is the fact that, again, as we discussed on our last call, there is going to be a moratorium on public comment. That means that if we stuck to our time frame—and Berry's going to go through this in a second—we would effectively complete our initial report for public comment and then it would sit on a desk for a month or so without going out for public comment.

And my judgment is that whilst we might not need the additional time, it certainly wouldn't do any harm to take the additional time. And in any event, even if we did meet the deadline because of the moratorium, the other end of our time frame would be thrown out and we'd still need to file a Project Change Request.

Berry, do you want to just explain how that works to everybody so that we can just get everyone up to speed and know what's going to happen?

BERRY COBB: Yes, sir. So the work track will have seen an e-mail that I sent last week which was the June version of our project package. As

noted before, it contains several work products just describing the status and health and where we're at from a timing perspective.

Within that package, or what you have seen several times now, our original target date was technically 3 August to deliver our initial report, go into public comment, review the comments, finalize the report, and deliver it by the 15th of November.

On the second work product in the package, and what I had listed in the e-mail, though, is that I did start to signal that we're likely going to miss our date for the initial report. As Chris just mentioned, we were caught a little bit off guard. There's going to be a moratorium on the public comment platform.

You may have heard from ICANN71 that they're migrating to a new ITI solution. And in terms of accomplishing that transition, they're in effect locking new data and new document being posted to the legacy forum so they can ensure they have a complete migration of all the legacy data onto the new platform.

So that moratorium is scheduled between 20 July and 30 August. That pushes us off about roughly four weeks. So even though it's external to our work here, or kind of a force majeure kind of aspect, we're still on the hook to inform the GNSO Council as managers of the PDP, and we need to give them what our new target dates are going to be. So in terms of this Project Change Request, which is part of the PDP 3.0 framework, it's really more of a formality. We certainly don't expect that the Council would reject our request for additional time.

But at any rate, this Project Change Request is a form that is required. Part of the project talks about the reason, what the impact is, and what our new schedule is going to be.

So, as with any project, there's always a risk for not meeting a particular delivery date. The new platform is schedule to be launched on the 31st of August, but we decided to also go ahead and add in an additional week just as little bit of buffer.

So ultimately what that will mean … So, the new updated timeline, what that will mean is that we're targeting the initial report for 7 September. We'll still submit for comment, I believe for 45 days. That will close just after ICANN72. There will be the time to review through the comments and prepare the final report. And our new target delivery date of a final report would be the 21st of December.

The final thing I'll say about this from a scheduling perspective is that I'll be submitting the Project Change Request Form as well as the June project package to the GNSO Council today to meet the Motion and Documents deadline. As Chris mentioned, this is a discussion item, or it's listed on the Council's agenda for the 22nd to not only discuss just the change of the timelines, but the other topics that Chris mentioned.

And I think most importantly, you never let a good crisis go to waste, so this does allow us a little bit more time to make sure we've got a complete and enhanced improved initial report before we do go to public comment.

Happy to answer any questions. Other than that, I think it's more or less straightforward. Thank you.

CHRIS DISSPAIN: Thanks, Berry. So before I go on, are there any questions for Berry or any questions for me on the first point? Okay, thank you.

The third thing we discussed with the Council leadership was that when we put out our initial report, we expected that some comments may come in to suggest that we were doing was out of scope. This is, again, something that we've discussed as we've gone along. And we wanted to give the Council a heads up and to say to them that we would get a draft.

Given that the goal for the initial report is now the end of August, effectively, we would get them an initial statement of where we're at, an initial draft, possibly by the time of their Council meeting on the 19th of August—so that's not the one coming up in July, but the next one in August—to give them the opportunity to have a look and to make sure that they feel comfortable.

What we're suggesting is an appropriate policy solution that's generally consistent with the four original Curative Rights PDP Recommendations as we've discussed all the way through this. I appreciate we're not finished yet. Having put all this work in, the last thing we want is to be told that the solution suggested is unworkable because it's outside of scope.

So we've mentioned that. We've talked about it to the Council leadership and they will, as I said, consider that in their meeting in August. It's something like the 19th of August, and by the time we

should have a relatively finalized, hopefully, initial report to get out there.

So that's that. That's the logistics and what's been going on for the last week or so. Does anybody have any comments or questions on any of that before we move on? No. Okay, good.

You will have seen e-mails bouncing backwards and forwards on the list—certainly a week ago and the week before last, and a couple ones just today. But one of the ones that came out at the end of last week at my request was that Mary and Berry and Steve send a summary of where they think we're at.

Now I know that Jay sent a note saying that the use of the term "agreed and there are no objections" is not correct. So I'm just going to put that to one side for a minute and I'll get back to it.

But leaving aside that for a second, we have discussed at some length, and there appears to be a significant number of people prepared to accept, we would recommend making amendments that would mean that an IGO Complainant, as defined—and that definition's been put together by a small group including IGOs and so on—would not be required to agree to the mutual jurisdiction clause under the UDRP when submitting a complaint.

Paul, did you comment straightaway on that one? You're very welcome to do so.

PAUL MCGRADY: Thanks, Chris.

CHRIS DISSPAIN: Go ahead.

PAUL MCGRADY: So I had raised a question here. What happens if the respondent chooses not to do the arbitration? Because it's the flipside of the IGO not having to agree to the jurisdiction issue. Right? Or do we want to [pick] that up later?

CHRIS DISSPAIN: Give me a little bit. I'm not sure I understand the relevance of it at this early stage in the funnel.

PAUL MCGRADY: Yeah. So if there's a general agreement that the IGO doesn't have to consent to jurisdiction in the location of the registrar or the registrant, fine.

CHRIS DISSPAIN: Yes.

PAUL MCGRADY: That's kind of the point of this. Right? On the other hand, what we've not settled and what's not in the staff e-mail is what happens if the respondent does not agree to the arbitration, in terms of is the UDRP not implemented right away. Or could the respondent file in a jurisdiction—and it could be the respondent's

jurisdiction or the registrar's—in order to stay the implementation? Agreeing that a respondent can file in those two traditional locations isn't the same thing as requiring the IGO to consent to them.

So I view that as the other side of this particular coin. But if we want to take it up downstream, that's fine, too. I just don't want it to get lost.

CHRIS DISSPAIN: Yeah, so I appreciate what you … Yes, I do want to take it up downstream once we've gone through the other two points. It is a critical part of, effectively, the "under consideration" stuff, although I acknowledge that it's not actually specifically mentioned. Let's come back to it because I think it's relevant to some of the next … It's a step-by-step process.

So as I said, heading towards general understanding and agreement, and acknowledging that there is at least possibly one person—and maybe more—who object that the mutual jurisdiction clause is not required.

Then the second one where we appear to have—or most of us—have coalesced around an idea is that both parties will have the ability to agree to binding arbitration.

So what Mary's notes say is that the IGO Complainant will have the opportunity to indicate its willingness to go to arbitration when filing its complaint while the registrant will have the opportunity to agree to arbitration in lieu of court proceedings after being informed for the outcome of the initial panel decision.

And I think that's as a result for not requiring a registrant to agree to arbitration early on but allowing them to assess the position—if they have lost and assess the decision, assess the reasoning, and so on, and then make a decision about whether they are prepared to have it reheard, if you like, in an arbitral setting on a binding basis.

Now those two things I think, as I said not completely agreed, but have sufficient numbers in this work track sort of accepting them as a possible way forward, acknowledging, of course, that the whole thing has to hang together. Saying "I accept this now" doesn't mean you'll accept it at the end because it depends on everything else—so I get that—for us to be able to move on to looking at the "under consideration" issues which will include the one that Paul has mentioned.

But before I do that, Jay, I wanted to give you an opportunity because of the email you sent. Don't feel you have to, but if you want to say anything specifically about those two matters as stand-alone items as opposed to, "I don't particular like them, but I'll see how it all looks at the end before deciding." That's one thing. I get that. But if you've got something specific to say as stand-alone times that you want to mention, please feel free to do so now. If [it's a matter] for you.

JAY CHAPMAN: Okay, Chris. Thank you. Can you hear me?

CHRIS DISSPAIN: I can, Jay. Just before you do start speaking, I can see that Brian Beckham is in the attendees room, so maybe somebody could bring him into the main room. That will be very helpful, please.

Sorry, Jay. Go ahead.

JAY CHAPMAN: No problem, thank you. Hello, everyone. Chris, generally, at least regarding the mutual jurisdiction suggestion, I think I'm just kind of at that general, let's continue to parse out the specifics and other things and get back to them.

As to the second bullet point, I think maybe this is a little bit similar to what Paul is suggesting. So again, I'm along the same lines that I don't want to jump ahead. If I am, that's fine. We can put it aside and come back to it. But the idea that the …

Hold on, I'm just pulling it up here.

CHRIS DISSPAIN: No problem.

JAY CHAPMAN: So this kind of coerced agreement to arbitration where the losing registrant either has to decide at that point if it's going to go to court or go to arbitration. And one removes the possibility of the other. Or at least that's the way I understand some of the suggestions here. It's a little bit puzzling to me that …

And I think Paul may have even alluded to this in a previous e-mail, just kind of discussing about the idea that pursuing a policy like that where you're making a registrant decide to go one direction or the other, you may actually end up in a situation where no registrant every gets to the end of the UDRP decision. As soon as something is filed …

And again, let me just back up before I keep going. I'm talking a specific situation where we're not talking about crooks or bad faith registrants or people who are looking to impersonate an IGO. I'm talking about the specific situations where there are a lot of extremely valuable three-letter domain names. And they're valuable to whoever owns them regardless it's an IGO or a large corporation enterprise or a small independent registrant.

I'm talking about a situation where there's something like that involved, where it's something that someone actually does want to protect because it is valuable to them. So in that situation, a registrant gets a UDRP complaint. More than likely, they're probably going to be … This sort of decision that's being proposed might ultimately just force registrants in that situation to go directly to court before the UDRP actually ever gets going.

And I think that's actually not necessarily something that is good for IGOs in the long run because, ultimately, if a registrar were to do that and to push and to say, "Look, here's the potential process, so I had no choice. I had to come to court," and then you get something where a court makes a decision on the in rem issue. If that's decided in a registrant's favor, that really takes the UDRP pretty much out of the picture at that point.

And I know that's not for everyone, but if you're creating policies that ultimately look so favorably towards one side and then the other one goes to court and says, "Look, there's not really a fair way for me to decide this," you're actually encouraging courts to find things like in rem and things like that, that I think could make it really hard and leave complainant/IGOs on the outside looking in.

And so I just think it's something that needs to be considered. So that's to that second bullet point. That's all I wanted to bring up, Chris. Thanks.

CHRIS DISSPAIN: Yeah. Can I ask you a question, Jay? No problem at all and I'm glad you did. It's an entirely appropriate time to do so. Maybe I'm misunderstanding you, or rather not understand you. If you have a choice, your choice could be, "I am going to say no to arbitration which means I can go to court."

Yes, the IGO can fight and say that they're not subject to the jurisdiction. As we—not you specifically but we as a group—have discussed at length backwards and forwards for some time, even in that circumstance, if an in rem procedures is available, that doesn't prevent that from happening.

So maybe I'm misunderstanding, but what is it that you're giving up other than the fact that you have to make a decision? In other words, you could say … If you said no to arbitration, you would be in no worse … What position are you in? You've got an alternative way to go. So maybe I'm just misunderstanding, as I've said.

JAY CHAPMAN: Well, it's been my position since the beginning … And this was even the suggestion, I believe, of Phil Corwin back when the prior working group was decided. It was Phil Corwin's position and argument that the way this should work is that the registrant loses … If it really wants to protect its property, it's domain name, then it's allowed to go to court and let the court figure that out.

And my suggestion would just be that's fine if that doesn't work. And when I say "doesn't work," just meaning the court decides that it doesn't have jurisdiction. So there really is no decision. It just says, "We're not the right place for this." Right? In that case, then the registrant should be able to go to arbitration at that point. And I'm saying the way it's been proposed right now, it's kind of a one or the other.

CHRIS DISSPAIN: I had misunderstood you. So you're reverting—if I can put it that way. You've said this before, and there's no criticism there. You've said this before. You're saying the decision of the panel; the registrant can go to court, and if the court says, "We can't hear it," then it goes to arbitration. Is that what you're saying?

JAY CHAPMAN: I'm just saying that should be the, yeah, there should be the ability for that to happen for the registrant.

CHRIS DISSPAIN: Yeah, I understand.

JAY CHAPMAN: Such that if there is ultimately a substantive, “appellate” decision.

CHRIS DISSPAIN: So there's no suggestion that you would go to court and have it heard, and lost the hearing and then say, “Oh, but hang on a second. I want arbitration.” What you’re saying is that if the court says, “We don’t have jurisdiction”—if the finding is, “We don’t have jurisdiction”—then you can say, “In that case, I’ll go to arbitration.” Is that right?

JAY CHAPMAN: Yes, sir. That's it. Thanks.

CHRIS DISSPAIN: Okay, super. Thank you. I understand completely. Paul, go ahead.

PAUL MCGRADY: Thanks. So maybe the conversation moved on, but I still think you need to deal with the specific point of what happens if the respondent does not agree to the arbitration. What happens to the implementation if that respondent goes to court? Is the implementation of the UDRP paused or is it not? Because if it’s not paused, then it’s not voluntary arbitration. It’s mandatory.

CHRIS DISSPAIN: No, I think, as Brian just put in the chat, that we previously discussed that it would stay the UDRP implementation.

PAUL MCGRADY: Right. We just need to write that down somewhere. Perfect, thank you.

CHRIS DISSPAIN: Sure. Leaving aside whether one agrees with it or not for a minute, if you take Jay's position then it would be something like, UDRP decision: registrant lost; complainant wins. Period of time for registrant to decide what to do next. If the registrar does nothing, obviously we know what happens then. Clearly, it all just [inaudible] gets transferred wherever. Whatever.

If the registrant agrees to go to arbitration, everything sits and waits for the arbitration. If the registrant says, "I don't want to go to arbitration at the moment"—and I'm just taking Jay's preferred way of doing it for a minute because that has the most number of choices in it. Registrant says, "Well, I want to go to court first." Again, nothing happens. Go to court, fight it out, court makes the decision. Clearly the decision has been made. Court says, "We don't have the jurisdiction.

Then, again, period of time for registrant to decide what to do next. Registrant says, "I want to go to arbitration." And, again, everything is stayed.

Now, I just want it to be clear to everybody that that's if you follow what Jay is saying which has the most number of choice sin it.

Paul, I know you've lost your connection, but I assume you can still hear from your computer. So hopefully you can. If not, then I can repeat it when you're dialed back in again. Are you back in?

PAUL MCGRADY: Yeah. I am, Chris. Thank you. Can you hear me?

CHRIS DISSPAIN: Yes. Did you hear my summary?

PAUL MCGRADY: I heard most of it, yes. I did.

CHRIS DISSPAIN: Good.

PAUL MCGRADY: And I don't go as far as Jay. I think that if a respondent chooses to try their hand at court instead of agreeing to arbitration, filing that court action should stay the UDRP. But ultimately, if the court decides they don't have jurisdiction and they dismiss the case, well that's bad news for the respondent. They should have picked arbitration. I don't think we should be giving two bites to the arbitration apple. I think the respondent [needs the pit], but I think they should have a right to choose.

CHRIS DISSPAIN: Yeah. Thank you. And I may be wrong, but I'm going to hazard a guess that the people on the call who sit as representatives of IGOs would agree with that position. And, indeed, Alexandra has already posted something in the chat that gives an indication that that's what you would expect.

And I'm not pushing one way or the other at all at the moment. I'm just saying that I understand what Jay is saying and I appreciate what you're saying, Paul. And I suspect that others will agree.

I'm not sure how we get over that hump, but I'm not going to worry about it for now. We need to address it, and maybe [there's an alternate] that we can put forward. I don't know yet.

But I think we've got an understanding, irrespective of that particular point which I completely understand. And I do understand what Jay has said, and I know I've summarized it properly because he said I have. I think, hopefully, that's in the record now and we're all clear.

Leaving that aside, we still have the mutual jurisdiction and arbitration. So that leads us now to questions that Mary had marked as "under consideration."

And again, I don't think it matters whether you take the Jay approach or what I'm going to call the Paul approach, just for the sake of this discussion. I think these questions would need to be answered because they're in respect to the arbitration. And whether the arbitration comes straight after the UDRP decision or after an opportunity to go to court, it doesn't much for the sake of answering the questions. And they are:

"Options as to what the applicable law should be should the dispute go to arbitration." And this is where we kind of got ourselves into a very deep discussion the last time around. So we have four suggestions here that have bubbled up from the last call that we had, and also from e-mails on the list.

First is, "the law where the relevant registrar is located or the law where the registrant is located," which is currently the case in respect to—if I understand it correctly—jurisdictions at the beginning.

Secondly, "either the law where the relevant registrar is located or the law where the registrant is located, unless the parties mutually agree to a different applicable law." I'm not sure I could think of a circumstance where that likely to happen, but I suppose it's possible.

Thirdly, "the law that the parties mutually agree will apply. And if the parties don't agree, then the arbitration panel will determine the applicable law."

And fourthly, "the arbitration panel will determine the applicable law."

I can't think of any other alternatives but those four. Paul says he can live with any of the four, but preferably not 4. So 1, 2, and 3 would be preferable, but 4 if necessary.

So I would like to ask others to tell me what they think and what sorts of suggestions they have. Waiting to see some hands up in the chat, or rather in the participants list. Or does nobody have a preference?

Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. I just want to reiterate. I think we put this in the e-mail chat—and maybe we're getting close to a couple of weeks ago now—about if ultimately the problem with all of this was just simply, from the IGO perspective, just not going to court, then we should maintain everything as consistently as possible.

And I can't remember who else spoke to this, but if in a typical situation the decision is made. And I think I used the example that if you've got a Florida registrant and they're going to go to court, they're going to go to a Florida courtroom. And the Florida court's going to apply Florida law, more than likely. And so if that's the situation, then I think it's just seems hand-in-glove reasonable to suggest that wherever the respondent is or the respondent's registrar is located, that that decision gets made by the losing registrant. Thanks.

CHRIS DISSPAIN: Yeah, thank you. I can see logic is what you've said and I can also see an argument for your point that we should change as little as possible whilst making the accommodation. That also has a level of sense to it. So thank you for that.

Alexandra, I can see your preference is for #3. And I wonder if anybody else would like to take her …

Brian, hello.

BRIAN BECKHAM: Yeah. Hi, everyone. For reasons we discussed on the prior call, I hear what Jay says. And just to be clear, I can definitely see that for a certain group of informed registrants, that makes sense. But I do think that there's a concern for registrants who might be caught out. And I appreciate the conversation on the list over the past week or two and Jeff's response.

I have to say I find it a little unsatisfactory, especially if it's based on merely a deference to the status quo, if we identify something in the current ruleset, maybe a gap that was not considered 20-some odd years ago when the UDRP was created. It seems to me that's something that merits addressing.

I would personally agree with Alexandra that option 3 would make the most sense. That, of course—to use Jay's example from Florida—certainly leaves the option open to the registrant to propose to the IGO that Florida law or United States law should apply. And then the arbitration panel can be the tie breaker if it comes to that.

I guess with the suggestion that it should match as closely as possibly the status quo, it feels to me like we're potentially, almost willfully, overlooking a problem down the road. And if there's an easier way through that, which is to allow the parties to agree or to allow the arbitrator to decide in the absence of an agreement by the parties, that seems to me—imperfect as it may be from some perspectives—to be the way forward that creates the least potential problems for parties who may not have their heads around all of the ins and outs of the things we're discussing here.

CHRIS DISSPAIN: Brian, thank you. Jay, I can see your hand, I'll get to you in a second. Brian, I understand your choice. But respectfully, we're not reviewing the UDRP rules and we're not looking for gaps that we can usefully change and things that we can amend on the way through. We very specifically aren't doing that. The UDRP itself—the rules, rather—are subject to review, then that's fine and that's the arena in which arguments about whether or not the registrant should have a choice of jurisdiction should be taking place.

I'm not speaking in favor, one way or the other, of which of those four choices is the best one, but I do think we need to be extremely careful that we don't build at argument for changing something—or a recommendation to change something, rather—around an argument that says, "Well, we were wandering past and it looked like it needed fixing, so we thought we'd fix it," because I don't actually think that's why we're here.

As a lawyer, I'm concerned about … So speaking now, I suppose with my chair's hat off, I'm just speaking as a lawyer. I'm concerned that, as you say, in cases where you might end up with a registrant who's accidentally in a jurisdiction that they don't like very much— acknowledged and accepted—but equally, IGOs will very quickly object to jurisdictions that they don't like and you'll end up with—in my view, 3 effectively amounts to 4 in most cases simply because unless the parties are happy with the jurisdiction jointly agreed, it effectively gives the power to object.

Which, again, if that's the choice of this work track, that's fine. But as a lawyer, I'm uncomfortable with that particular way forward. But that said, that's only me as a lawyer.

Jay, your hand's gone down again but if you'd like to speak, you're very welcome.

JAY CHAPMAN: Okay. Thanks, Chris. Well, you just kind of mentioned what I was thinking. And I appreciate and understand where Brian is coming from. So I guess really what I would just say is that I think I'm more along the lines of 2 with the adjustment that the registrant will actually make that decision. Just to be clear that the registrant makes that decision for either its own law where it's located or where its registrar is, unless—

CHRIS DISSPAIN: [inaudible] losing party. Yeah, sorry.

JAY CHAPMAN: You're right. Unless there's agreement. And there might well be reasons why a registrant would want to figure out a better place to have that decided, or the law. Thanks.

CHRIS DISSPAIN: Yeah. So I acknowledge that if you say it's the—so it's the losing [inaudible] circumstance where the registrant's lost—it's the registrant's choice of the law of the registrar or themselves or by mutual agreement somewhere else. That enables a registrant

who—to take Brian's example—has found themselves trapped, if you will, in a jurisdiction because they're not knowledgeable enough to at least offer a mutual agreement to go to a third—or a second jurisdiction—depending.

Alexandra, I can see your question. "Isn't it currently up to the complainant rather than the respondent to decide on jurisdiction, and up to the court then to decide on applicable law which could be argued by the parties?"

I'm not sure I understand. I mean, I understand the words but I'm not sure in what context. In the context of the UDRP, it's the registrant's choice. Isn't it? Not the complainant's choice. Have I got that wrong or is that correct?

Brian, your hand's up. Go ahead.

BRIAN BECKHAM: Yeah, thanks. It's kind of as Alex says. So basically what happens is that the complainant, when it's submitting its complaint, says that they would agree to the jurisdiction of either the location of the registrant or the registrar. So basically, they're given two choices based on facts that are out of their control, if that makes sense.

CHRIS DISSPAIN: So to be clear then, if a complainant doesn't … Assuming the two jurisdictions are different because, obviously if they're the same it wouldn't make any difference. So the two jurisdictions are different. The complainant does have a choice about which one of those jurisdictions to go for. Is that correct?

BRIAN BECKHAM: Right. So if a registrant based out of Florida used GoDaddy, for example, based out of Arizona, then the complainant could opt for either. It can also [leave options] for both of those open, but it could opt for either of those.

CHRIS DISSPAIN: Understood. Again, I can see that that makes sense. Again, we could have a circumstance where it's the law of the registrar or the law of the registrant at the choice of the complainant because that sits with the principle of doing as little as possible to change things. I, for one, wouldn't have an issue with that.

Brian, is that a new hand?

BRIAN BECKHAM: It is. I'm just thinking out loud, as I guess we're prone to do in these calls.

CHRIS DISSPAIN: It's what we're all doing, yes.

BRIAN BECKHAM: Again, I think there's a lot to be said for what Jay has proposed. I'm just wondering, obviously this is one of these questions where you're trying to address the unknowns. Right? So if you have the example of the Florida and the Arizona options where those are

known quantities and the parties could agree to that or a different location, then that's kind of a simple issue.

I'm just wondering if—without overcomplicating things, which may not be possible—if there's a way to somehow capture in here the idea that if there's a registrant who's not one of these Florida-based registrants using an Arizona-based registrar who may find themselves in an untenable position …

Of course the clause here says that the parties could agree, but the question is really, do the parties even know that this is something that they ought to agree on? So I'm just wondering if there's a way to kind of get in front of that to prompt the parties, if you will, to suggest that there's something to look at here. There's a decision to be made that potentially impacts them.

CHRIS DISSPAIN: Well, you could switch it around. Couldn't you? You could say that the jurisdiction is to be agreed between the parties, and in the event that it isn't agreed, then it would be.

So in other words, instead of putting the relevant registrar and registrant jurisdiction first—or rather law, it's not jurisdiction—law first, you say "The law is to be agreed between the parties. In the event that they can't agree …" because that implies a discussion. Does that help your point?

BRIAN BECKHAM: Yeah, I think it's slightly better. It still leaves it a little open, but maybe that sort of prompts the discussion, as you say, as opposed to potentially leaving it hanging.

CHRIS DISSPAIN: Yeah, okay. All right. Paul, if you're there … Or has Paul dropped? Yes, we seem to have lost Paul.

PAUL MCGRADY: Hi, Chris.

CHRIS DISSPAIN: Oh, no. You're still there. You're on your phone.

PAUL MCGRADY: No, [iPhone] only. Phone only.

CHRIS DISSPAIN: Oh, phone only. Did you have any other sort of points on your list, if you will, of things that you think needed to be addressed?

PAUL MCGRADY: No. I think we've hit them. And I really like your formulation, Chris, which is that if the parties can't agree, then the default setting is the location of the registrar or registrant I guess at the complainant's choice. Right? [inaudible]?

CHRIS DISSPAIN: Complainant. Yeah, that makes sense.

PAUL MCGRADY: Yeah. That makes sense to me. I think Brian's point is an interesting one, but I think it's an implementation detail, like how do we get that choice on the form with the parties still out? So I don't necessarily think we need to address it now, but we can present it—

CHRIS DISSPAIN: Yep, all right. Jay, I was just about to ask you a question. So you go first, and then I'll ask you the question. Go ahead.

JAY CHAPMAN: Thanks, Chris. My question, again, is very similar to what we asked before. Let's say we've got a Florida registrant whose registrar is, I don't know, somebody in Europe—[Saido] or somebody like that. Right? If the complainant gets to decide what law that's brought under, if that's not to the registrant's liking …

I mean, again, what you're doing is creating policies that are ultimately going to push … If we're trying to make sure these things get decided and are not pushed towards more expensive, longer—putting things in court where they can be in for longer—it just seems that this is not the direction you would want to go to try and get resolution on these things. It's just going to push more people towards court.

CHRIS DISSPAIN: Sorry, but isn't that the case now, in the sense that if you've got a registrant in Florida and a registrar in Europe. Then the complainant could choose which one of those?

JAY CHAPMAN: Yeah, I think [inaudible].

CHRIS DISSPAIN: That is the case now.

JAY CHAPMAN: Well, I'm not convinced of that. And maybe it's just my misunderstanding, and perhaps Jeff … Well, Jeff's not with us today, and I know he knows a lot about these things, too.

But my understanding is that if the Florida registrant … Let's say it is a Florida registrant. So if the Florida registrant is brought in, they decide they're going to court, I'm not sure that the complainant gets to decide that they have to go to wherever [Saido] is—Cologne or whatever it is.

CHRIS DISSPAIN: No, I don't think it's … Yeah, wherever. Sorry. I think that may well be right because I think, as a distinction, didn't we come to this last time around? That the distinction is not where you end up fighting the battle in court, but which jurisdiction … I've lost … There's a piece missing from the puzzle, so I think what you said may be true. And I'm wondering if Paul maybe could assist because I think it was Paul who brought it up last time about what

it is you're actually agreeing to jurisdiction for because at the end of the day, nothing can stop a registrant from going to court in their own jurisdiction anyway—was the point, I think.

Paul, did you want to just comment on that before I ask Jay the question I was going to ask him?

PAUL MCGRADY: Chris, I'm not sure that I understand what you're asking me to comment on, but I do agree that there, ultimately, is nothing stopping a respondent from going to their own court. But the question for us is whether or not that's sufficient to stay. I think we've determined that it is sufficient to stay, but that would be outside of the context of the voluntary arbitration. So it's not really the same question.

CHRIS DISSPAIN: So that's probably my fault. Let me try again. I'm a complainant and you're Jay's registrant. You're in Florida and your registrar is in Europe. I'm not an IGO, so I'm just a registrant and I say, "I agree to the mutual jurisdiction and I choose Europe." Wherever the Europe is. Right? What have I chosen Europe for?

PAUL MCGRADY: You've chosen Europe to be the place where a losing respondent can file a complaint in order to stay the arbitration—I'm sorry, in order to stay the implementation of the UDRP.

CHRIS DISSPAIN: But that's just to stay it. Where does the substantive argument take place?

PAUL MCGRADY: So the substantive arguments take place in that court and if you're just a garden-variety complainant, not an IGO, you've agreed to show up. Or at least you've agreed to waive a claim that that court doesn't have jurisdiction over you.

CHRIS DISSPAIN: So in essence, by me the complainant saying, "I choose Europe," you the registrant are—I'm going to use the word "forced" and I don't mean it in that way—forced to argue that the decision to award me the name should be permanently stayed. You're forced to argue that in the European court because that's what I chose of my two choices, Europe or Florida.

PAUL MCGRADY: Yeah. Chris, "forced" is the wrong word because it's the registrant's choice to use that registrar in Europe in the first place.

CHRIS DISSPAIN: Yes, I'm sorry. I appreciate that. I did say "forced" was the wrong word. What I mean is I've chosen it, therefore that is where you have to go.

PAUL MCGRADY: Yeah. It's kind of like putting out desert, putting out an apple pie and a cheesecake. And then when someone says, "We're going to have cheesecake," then you complain that we're having cheesecake. Right? The registrants gets to pick the two options and then the complainant gets to pick from the two.

CHRIS DISSPAIN: Got it. Okay, super. So, Jay, I have a question for you and before I ask you the question … And you don't have to answer the question straightaway, by the way. But on that score, if I could ask you to maybe think about what Paul has just said and maybe possibly reach out to Jeff and get some clarity about whether you're uncomfortable or comfortable, or what have you, on that point.

But my question for you was something that I would like you to consider. Given that you've said this is a discussion and you want to see all the pieces, etc., before you can make a decision on how you feel—which is completely acceptable and understandable—what is it that you now need to see? Should we now draft something that puts all the pieces together? Would that be a thing that would enable you to take a look at it and decide how you feel? Or is something else that you want at this stage?

And when I say draft something, I don't mean draft something to go out for comment. I mean draft something for us to discuss.

JAY CHAPMAN: Sure. That's a fair question, Chris. And I appreciate that. I'm not sure we're at that point. Right? I wasn't expecting to have this

discussion on choice of law either, so I'm not sure what else we have in front of us to decide. So I'll reserve judgment to say when that time is.

But as to how to resolve that, that seems like, yeah, once we have all the issues and we have all the information and the pieces to make those ultimate decisions, then sure. That's when we make that decision.

CHRIS DISSPAIN: Super. Thanks, Jay. I appreciate that. Brian.

BRIAN BECKHAM: Yeah, thanks. I think, Chris, yours is a good question. And I would like to know because I must confess, I was a bit floored when I read Jay's e-mail just prior to the working group call that there was not agreement or not objection on these two points. These feel very fundamental to the work. I appreciate that there are moving pieces and these are conversations that ebb and flow. But I was pretty taken aback to see that reaction.

And I guess it's—as you say, Chris—what do we need to answer to pull these puzzle pieces together? I know we've discussed at various points more, as some people would say, radical things like narrowing the scope of bad faith, and so on and so forth. But I, for myself, gave the very same question which is what do we need to do to pull all these puzzle pieces together and get agreement here?

I had the, perhaps, wrong impression that we were a lot further down the line on agreeing on some of these rather fundamental points. If not, then it would be great to know what are some lingering concerns that we could still address.

CHRIS DISSPAIN: So I think, to be fair to Jay, Brian, [and like I said] [what you said]—I don't think Jay is saying he doesn't agree. What he's saying is, "I want to see the whole thing hanging together" as to what it is that we're suggesting happen because it's piece by piece by piece. In other words—just as an example—you're asking me to agree that, as a principle, that IGOs should not have to agree to a mutual jurisdiction at the beginning of the process.

My response to that is, "Well, I'm not averse to agreeing that, but I'm not going to say I agree until I know what the rest of the piece is because by giving that up, what's happening further down the line?"

So I appreciate Jay's position, which is think is, "Let me see it all and I'll say what I think once I can see the pieces."

That said, I don't think it's as dark as you think or as I might have interpreted what you just said to mean from the point of view of we're not as far down the line as you thought we were. I actually think we're quite a long way down the line. At the end of the day, some people will agree and some people won't, and we'll just have to assess where we are with that when the time comes.

But I think that we had a proposed recommendation document that was drafted on the 15th of June. That needs work. Stuff needs

to come out of that. More stuff needs to go in. And I'm going to suggest that that is the next step, which is that we take the document. It's upon the screen now. It's got pink writing all over it. At least on my screen, it's got pink writing all over it.

I'm going to suggest that we take that away and know it into what we understand to be shape in the sense that it covers as much of the stuff as we think we've discussed.

The exercise of doing that, I think, is going to do two things. One, it's going to throw up missing bits that we haven't discussed yet. And then the discussion can be, are those missing bits that we haven't discussed yet important missing bits that we need to discuss? Or are they actually things we don't need to discuss at all and they should be dealt with in implementation? And then it's also going to provide, in essence, a flow of what happens.

So I'm going to suggest, given that we actually have more time on our hands now … I don't mean on this call. Just generally, we have more time than we otherwise thought we would. I'm going to suggest that staff do two things. We take this document and knock it into shape, covering all of the things that we've talked about and putting in where there are choices.

We haven't reached any form of agreement, consensus, or whatever—or even non-objection—as to which of those our choices that we would take on choice of law. We know that those are the four choices and we know what some people thin, but there will still be questions in there.

But we put that document together and we put a flow chart together that takes the flow and says, “This is how it would work. This is specifically for an IGO.” You come in, you do this. This is the next step. This is the next step. This is the next step. And it comes down and through. And then we can all look at that and we can all decide what questions we have, what we think is missing, what else needs to be decided.

And I’m going to suggest that we don’t have a call next week. That we take a week to put that document together. So we get it out to the work track by next Monday. And I’m looking to Steve, at least, and Berry to confirm since Mary’s not with us on the call. And that that document goes out.

And then on the list for the week between next Monday and the call, we say, “These bits are missing. I’m uncomfortable about this. I need these questions to be answered,” and so on and so forth. So that when we reconvene in two weeks’ time, we can start the process of seeing whether we have enough. And if we have, what else do we need to figure out whether we can put an initial report together.

I hope that makes sense. I know what I had in my head, and I’m not entirely sure I’ve expressed it properly. But hopefully I have. Open for comments and questions from anybody at this point if anybody disagrees. You don’t have to say you agree, but if anybody disagrees or if they think that has not covered everything, please say so.

I’m not seeing any hands which is encouraging. Steve and Berry, is that viable/feasible/acceptable to you guys since you’re the

ones who are going to have to do the work? And you can say yes for Mary.

BERRY COBB: Yes. So just to make sure we've got it all. First and foremost, we'll cancel next Monday's call. On or around that time, staff will have the next version of the document that I have shared on the screen, also taking into account today's conversations. We already have a working flow chart, but we can add on the components that align with this particular document.

I am assuming that we're not going to include Option A for this next draft. Right? We're totally working on Option B and binding arbitration. Correct?

CHRIS DISSPAIN: Yes, correct.

BERRY COBB: Got it. And then we'll get that to the list, circulated early next week. And over that time frame, the work track members will be responding over list until we meet on the …

CHRIS DISSPAIN: 26th.

BERRY COBB: 26th. Got it.

CHRIS DISSPAIN: Okay. Is everyone okay with that? Sorry, is anyone not okay with that? All right. So everyone is okay.

Berry and Steve, given that there are a number of people who are not on the call today, I would appreciate it if you could send a note out to the list today, or tomorrow at the latest, setting out what it is we're doing for the next few weeks so that everybody knows, those who aren't on the call. Is that all right?

BERRY COBB: Yes, we can do that.

CHRIS DISSPAIN: I'm assuming [it is]. Thank you very much. Yes, Brian, go ahead.

BRIAN BECKHAM: Thanks, Chris and Berry and Steve for the work that y'all undertake. I just wanted to ask, and maybe I'm kind of fresh off of [inaudible] being done for the EPDP Phase 2A. If there are particular topics or forks in the road that are worth, as the staff kind of pulls this together and given that we have a little time with the canceled call, if there are particular topics that it would be useful to discuss offline on a more one-on-one basis with people who have particular points they'd like to see covered, I just want to raise my hand to do that. I appreciate that, at some point in the not-to-distant future, we're going to be coming up again a little bit of a clock for a report and some public comments, and so on. So I

just wanted to make every effort to address any concerns that may be kind of fundament concerns in the air.

CHRIS DISSPAIN: Understood. Thank you. Anybody else got anything they want to cover? If not, I'm giving everybody back 20 minutes of time they didn't think they had. Okay.

Well, thank you all. Looking forward to getting this document out to you within a week and a discussion. See you all again on the 26th. With that, I'm going to close the call. We can stop the recording. Thanks very much, everybody.

JULIE BISLAND: Thank you, Chris. Thanks, everyone. This meeting is adjourned.

[END OF TRANSCRIPT]