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RE: Request for Public Comments on the Proposed Implementation of the IGO-INGO Curative Rights Policy Recommendations

The Asian Domain Name Dispute Resolution Centre (ADNDRC) welcomes ICANN's efforts to implement the IGO-INGO Curative Rights Protection Policy Recommendations. We appreciate the opportunity to comment on the Draft Updates to the Uniform Domain Name Dispute Resolution Policy (the "UDRP") and the Rules for Uniform Domain Name Dispute Resolution Policy (the "UDRP Rules"), as well as the Draft Updates to the Uniform Rapid Suspension (URS) Procedure and Rules.

Established in 2002, ADNDRC has administered more than 4,000 proceedings under the UDRP and URS. Among ICANN-approved dispute resolution service providers, ADNDRC is distinctive in operating through four regional offices across Asia: the Secretariat and Hong Kong Office, operated by the Hong Kong International Arbitration Centre (HKIAC); the Beijing Office, operated by the China International Economic and Trade Arbitration



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Commission (CIETAC); the Kuala Lumpur Office, operated by the Asian International Arbitration Centre (AIAC); and the Seoul Office, operated by the Internet Address Dispute Resolution Committee (IDRC) of the Korea Internet & Security Agency.

Three of our regional offices are operated by leading international arbitral institutions with their own arbitration rules. Based on our experience in domain name dispute resolution and international arbitration, ADNDRC respectfully submits the following comments, drawing on arbitration laws, jurisprudence, and practices across various Asian jurisdictions.

EXECUTIVE SUMMARY

1. We support, in principle, the introduction of a binding arbitration procedure as a final avenue of review for disputes involving Inter-Governmental Organization (IGO) complainants under the UDRP and URS. Such a mechanism may provide a workable solution, as an alternative to court litigation where an IGO's privileges and immunities prevent a court from hearing the merits of the dispute.
2. As an alternative to court proceedings, the arbitral proceedings should provide a comprehensive review comparable to judicial proceedings, rather than a limited, quasi-UDRP or quasi-URS procedure. As a final and binding form of review, the arbitral proceedings should not be subject to short timelines or other procedural limitations.
3. For arbitration to function as an effective substitute for court review, the arbitration agreement must be valid, binding, and sufficiently certain. In particular, it should clearly bind the IGO complainant, provide for a sufficiently broad scope of arbitration, and establish how the arbitration shall be conducted.
4. The current proposal raises several issues concerning the formation and enforceability of the arbitration agreement. These include whether consent can be established by the IGO's statement in the complaint form or the registrant's later commencement of arbitration, whether applicable form requirements are satisfied, whether the signatory of the complaint form has authority to bind the IGO, whether a non-mandatory arbitration mechanism creates sufficient certainty, and whether the asymmetrical nature of the mechanism would be accepted by courts and arbitral tribunals.
5. The proposed amendments also create practical and procedural concerns. In particular, the attempt to govern arbitration through the UDRP and its Rules or the URS and its Rules, while also applying institutional arbitration rules, may give rise to conflicts on matters including, *inter alia*,



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commencement, confidentiality, publication of decisions and timelines for communicating and implementing awards. Some amendments proposing to govern the procedural aspects of the arbitration may conflict with the procedural rules of an arbitral institution.

6. **We therefore recommend** a simpler approach: the amendments should focus on creating a clear and binding agreement to arbitrate disputes involving IGO complainants, while leaving procedural matters to the rules of the selected arbitral institution. Alternatively, when conflicts arise, the institutional rules should prevail.
7. This paper primarily focuses on the UDRP and its Rules, as the most widely used ICANN dispute resolution policy. For that reason, we do not consider it necessary to amend the URS to provide an arbitral pathway for IGO complainants; the availability of the UDRP should be sufficient. In addition, given the limited remedies available under the URS, arbitration may not provide a suitable appeal process. Nevertheless, if ICANN proceeds with amendments to the URS, our comments apply equally to the proposed amendments to the URS Procedure and Rules.
8. We note that the amendments do not address INGO complainants and therefore this reference should be dropped from further work.

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I. Arbitration Pathway Comparable to Court Litigation

The proposed arbitration mechanism is intended to reconcile two objectives: preserving an IGO complainant’s jurisdictional immunity while ensuring that a losing registrant continues to have an avenue to seek review of a UDRP decision or URS determination. If arbitration is intended to serve as a substitute for court proceedings where a court is unable to hear the merits of the dispute because of an IGO’s privileges and immunities, it should provide a process that is broadly comparable to court litigation.

If the arbitration is to function as a final and binding appeal process in place of court litigation, it must give the parties a comparable opportunity to put forward their case and be heard as they would before a court. The judicial process provides an important check and balance by allowing each party to participate fully in the proceedings. It gives parties a full opportunity to present their arguments, respond to the opposing party’s case, adduce relevant evidence, and have the dispute determined by an independent decision-maker.



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If arbitration is to replace that avenue of court review in cases involving IGO immunity, it should not be confined by short timelines or other procedural limitations that would prevent either party from fully advancing its case as it would have in court litigation. The resulting process should therefore remain fair and balanced and be capable of producing a decision equivalent in legitimacy to a judicial determination.

Arbitration is widely used in international and cross-border disputes because it combines procedural fairness with practical business needs. It allows parties to have their disputes determined by a suitable independent tribunal through a process that can be tailored to the nature, complexity, and urgency of the dispute, while preserving core judicial safeguards such as equal treatment, a fair opportunity to present one's case, and a reasoned final decision.

Different arbitral institutions operate under different rules, procedures, fee structures, and market reputations. Many institutions have administered arbitration cases for decades and have refined their rules and practices through substantial institutional experience. Against that background, ICANN's proposal to designate a limited number of approved arbitral institutions would provide respondents with a meaningful degree of choice, allowing them to select among recognized providers and applicable rules while maintaining an administratively workable framework. This approach balances flexibility for respondents with procedural certainty, and avoids the need for ICANN to prescribe detailed arbitral procedures itself.

The proposed mechanism should ensure a valid and binding arbitration agreement that clearly obliges both parties to participate in the arbitral proceedings and expressly addresses any necessary limited waiver of immunity. Meanwhile, procedural matters should, as far as possible, be governed by the applicable institutional arbitration rules, which are designed to give parties sufficient opportunity to present their case while enabling the dispute to be resolved in an efficient and commercially sensible manner. Where conflicts arise between the UDRP, the URS, or their respective Rules and the applicable institutional arbitration rules, priority should be given to the institutional arbitration rules.

Recommendation: We recommend that the amendments be limited to a simple operative agreement by the IGO complainant to submit to arbitration, without further stipulations on the conduct of the arbitration.

II. The Agreement to Arbitrate

For an arbitration agreement to be valid and binding, it should demonstrate a clear and unequivocal intention by the parties to submit an identified category of disputes to arbitration, rather than to ordinary court determination. The agreement should be sufficiently certain as to its essential



elements, including the parties bound by it, the disputes covered, and the mechanism by which the arbitration is to be commenced and administered. It should also satisfy any applicable form requirements, including any requirement that the arbitration agreement be recorded in writing or evidenced by an exchange of communications or conduct sufficient to establish consent. In addition, the subject matter of the dispute must be capable of settlement by arbitration, and the agreement must not be null and void, inoperative, incapable of being performed, or otherwise invalid under the law applicable to the arbitration agreement or the law of the seat.

A. The Formation of the Arbitration Agreement

How is the arbitration agreement formed, and at what point can it be said to exist? For example, would the IGO's confirmation of its status and consent to arbitration in the complaint form amount to an offer to arbitrate, which the losing registrant accepts by starting arbitration?

Alternatively, would the mechanism operate through a pre-existing arbitration clause incorporated into the domain name registration agreement by reference to the UDRP or URS, with the IGO expressing its consent to be bound by that arbitration clause in the complaint form?

Recommendation: We recommend that ICANN clarify when and how the arbitration agreement is formed under the proposed mechanism.

B. The Validity of the Arbitration Agreement

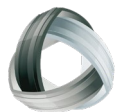
i. Formal validity

Under the more-favourable-right principle in Article VII(1) of the New York Convention,¹ it is well accepted that Article II(2) of the New York Convention² sets the maximum formal requirement for a valid arbitration agreement.³ In general, this means the agreement needs to be signed by the

¹ New York Convention, Article VII(1): "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

² New York Convention, Article II(2): "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

³ Gary B. Born, *International Commercial Arbitration (Third Edition)* §4.06[A][1], Kluwer Law International (database updated March 2024). See also, UNCITRAL, *1985 New York Convention Guide*, para. 37 (2016). ("In 2006, UNCITRAL confirmed that article VII (1) 'should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.' Since then, national courts have more consistently enforced arbitration agreements pursuant to the less stringent formal requirements available under their national laws or treaties as provided for by article VII with respect to arbitral awards.")



parties or recorded in an exchange of written communications. It is questionable whether the above formulation satisfies these requirements in jurisdictions where they are strictly applied.

a. Acceptance by conduct

If ICANN's proposal relies on the offer-and-acceptance-by-conduct approach, it is worth considering whether that approach is recognised under the applicable arbitration law. Jurisdictions differ on whether conduct alone is enough to accept an arbitration agreement and whether it satisfies any writing requirement. Many legal systems adopt the same approach as Option 1 under Article 7 of the 2006 UNCITRAL Model Law,⁴ under which an arbitration agreement satisfies the writing requirement if its content is recorded, including through conduct. However, in some cases, conduct may show consent to arbitrate but still fall short of the formal requirements under international conventions or national arbitration laws.⁵ Where "signature" or "exchange of documents" requirements are applied strictly, national courts may not regard such conduct as constituting valid consent to arbitration.⁶

b. Selection of arbitral institution

Draft Updates to the UDRP. Paragraph 10(b):

Selection of Provider. You may initiate an Arbitral Proceeding by selecting an Arbitral Institution designated by ICANN in accordance with the Rules of Procedure and the Arbitral Institution's applicable arbitral rules.

Although it is widely accepted that Article II(2) establishes a maximum requirement for formal validity, some legal systems still impose stricter form requirements under national laws, such as requiring arbitration agreements to contain certain essential elements. For example, the 2025 PRC Arbitration Law continues to require an arbitration agreement to designate the arbitral institution chosen by the parties.⁷ Although this requirement

⁴ 2006 UNCITRAL Model Law, Article 7, Option 1: "(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

⁵ See Born, *supra* note 3, §5.04[D][6][e] (database updated February 2025).

⁶ See UNCITRAL, Settlement of commercial disputes: preparation of uniform provisions on written form for arbitration agreements: article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): note / by the Secretariat (Dec. 14, 2005), paras. 12-13, <https://digitallibrary.un.org/record/572858?v=pdf>. ("In a series of cases, State courts strictly required express acceptance, either by signature or exchange of documents by both parties."). The UNCITRAL Secretariat Note cites decisions from a number of jurisdictions, including those of the Hålogaland Court of Appeal (Norway), the Court of Appeal of the Netherlands, and the Italian Supreme Court, illustrating that some courts continue to apply the formal requirements under Article II(2) for arbitration agreements strictly.

⁷ See Arbitration Law of the People's Republic of China (2025), Article 27: "An arbitration agreement shall contain the following elements: [...] (3) The selected arbitral institution."



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primarily serves to limit the availability of ad hoc arbitration in China, it may nevertheless be regarded as a formal validity requirement.⁸ If so, such a requirement may matter if the arbitration is seated in China or Chinese law applies to the arbitration agreement.

In that situation, if the arbitration agreement is formed when the IGO expresses its consent to arbitrate in the UDRP complaint, would ICANN's list of designated service providers be sufficiently certain to satisfy this requirement? Alternatively, if the losing registrant starts arbitration before an institution chosen from ICANN's list, can the arbitration agreement be treated as formed at that point, with that institution treated as the one chosen by the parties?

Recommendation: Once the formation of the arbitration agreement has been clarified, we recommend that ICANN assess whether the proposed mechanism satisfies the writing requirements under Article II(2) of the New York Convention and the applicable form requirements under different national arbitration laws.

ii. Authority of the signatory

While Article II of the New York Convention does not expressly address the issue of capacity, Article V(1)(a)⁹ allows a court to refuse recognition of an arbitral award where a party lacked the capacity to enter into the arbitration agreement.

Under the proposed mechanism, an issue related to capacity concerns whether the individual signing the complaint form has authority to bind the IGO to arbitration.¹⁰ The answer to this question will vary from IGO to IGO and depend on the constituent instrument, internal rules, and delegation of authority of the relevant IGO. This may make it more difficult for the dispute resolution service provider to conduct its administrative compliance review of the complaint and may also create uncertainty as to the validity of the arbitration agreement.

⁸ While Article 82 of the 2025 PRC Arbitration Law gives limited recognition to ad hoc arbitration, it does not go far enough to dispense with the requirement that an arbitration agreement designate an arbitral institution.

⁹ New York Convention, Article V(1): "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[.]"

¹⁰ See Born, *supra* note 3, §5.03[F] (database updated February 2025).



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Recommendation: We recommend that ICANN establish, under Paragraph 3 of the UDRP Rules, signature requirements applicable to IGO complainants to ensure that they are bound by the arbitration agreement, and provide policy guidance to facilitate administrative compliance review by service providers.

iii. Substantive validity

International arbitration agreements may be substantively invalid under Article II(3) of the New York Convention¹¹ and Article 8(1) of the 2006 UNCITRAL Model Law¹² when they are “null and void, inoperative or incapable of being performed.” The proposed mechanism raises questions as to whether its “non-mandatory” and “non-mutual” features would be recognised as valid under the New York Convention and national arbitration laws.

a. “Optional” or “Non-mandatory” arbitration agreement

Draft Updates to the UDRP Rules. Paragraph 20(a)(ii)(2)

The Respondent may request to initiate an Arbitral Proceeding [...] within 10 business days [...] of [...] [t]he date a court order is issued, in which the court declines to hear the merits of a case, brought by the Respondent in the administrative proceeding under the Policy, on the basis of the IGO Complainant’s privileges and immunities.

Draft Updates to the UDRP Rules, Paragraph 4(c)

[...] If the complaint was filed by an IGO Complainant, this Written Notice must inform the Respondent that if the Panel issues a decision in favor of the IGO Complainant:

- (i) the Respondent has the right to seek to challenge the UDRP decision canceling or transferring the domain name(s) by filing a claim in court, which the court may or may not accept jurisdiction over the IGO Complainant and/or the case;*

¹¹ New York Convention, Article II(3): “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

¹² UNCITRAL Model Law, Article 8(1): “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

- (ii) *that, in the event the Respondent chooses to initiate court proceedings, the IGO Complainant may assert its privileges and immunities with the result that the court may decline to hear the merits of the case on the basis of IGO privileges and immunities; and*
- (iii) *that the Respondent has the option to initiate an Arbitral Proceeding administered by an Arbitral Institution to resolve the dispute, including in lieu of initiating court proceedings or, if it files a claim in court, where the court has declined to hear the merits of the case.*

Under the proposed mechanism, a losing registrant is not required to arbitrate and may still go to court first. If the court refuses to hear the case because the IGO successfully claims immunity, the registrant may then start arbitration.

If the arbitration agreement operates through a pre-existing arbitration clause incorporated into the domain name registration agreement through the UDRP, with the IGO expressing its consent to be bound by that clause in its UDRP complaint, the arbitration agreement would provide the losing registrant with both litigation and arbitration options. This remains the case even if the litigation option subsequently becomes unavailable due to the IGO's successful invocation of immunity. On the other hand, whether an IGO can invoke immunity successfully before a court remains uncertain and may depend on the nature of the IGO's functions and the law of the forum.¹³

This appears to create uncertainty as to whether arbitration can be compelled under an optional arbitral clause. Some courts have held that provisions drafted in apparently “optional” terms constitute compulsory arbitration agreements.¹⁴ Once that option is exercised, both parties must arbitrate.¹⁵ Other courts require clearer consent to arbitration and may expect the agreement to show that the parties intended to give up court proceedings.¹⁶ In the worst case, there is a risk that some jurisdictions may find the arbitration agreement to be invalid if it does not evince a clear intention of the parties to resolve their dispute by arbitration.

¹³ Internet Corporation for Assigned Names and Numbers, *The Final Report on the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process* (2018), at 116, <https://www.icann.org/en/public-comment/proceeding/proposed-implementation-of-the-igo-ingo-curative-rights-policy-recommendations-30-06-2026>.

¹⁴ *Sidorek v. Chesapeake Appalachia*, 2014 WL 1218893, at *4 (M.D. Pa.) (“use of the word ‘may’ in arbitration clauses has been considered to be mandatory on the grounds that such language merely manifests the parties’ intent that arbitration be obligatory if either party so chooses”).

¹⁵ See Born, *supra* note 3, §5.04[D][5] (database updated February 2025); *Summit Packing Sys. Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 11 (1st Cir. 2001) (“the dispute will be submitted to arbitration ... or, if you prefer, submitted to the Courts of the State of New York”); *Price v. Carter*, [2010] EWHC 1451 (TCC) (English High Ct.) (contract containing both adjudication and arbitration clause read to provide claimant option to select dispute resolution mechanism, with this choice then binding counter-party); *G v. P*, [2023] HKCFI 2173 (H.K. Ct. First Inst.) (once option to arbitrate conferred on party has been exercised, other party is bound to arbitrate).

¹⁶ See The Supreme People's Court's Interpretation on the PRC Arbitration Law (2005), Article 7. See also, *A v. B*, [2020] 最高法知民辖终 283 号 (PRC Sup. Ct.). However, following the 2025 amendments to the PRC Arbitration Law, it remains uncertain whether a future judicial interpretation issued by the Supreme People's Court will adopt a different approach.



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In China, where optional arbitration clauses may be considered invalid, some courts in Beijing and Shanghai have upheld the validity of unilateral option arbitration clauses,¹⁷ reasoning that the exercise of a unilateral right of election results in a single and definite dispute resolution mechanism, avoiding uncertainty from conflicting elections or further negotiations. However, under the current mechanism, the election to pursue court proceedings is not final, as the losing registrant may still resort to arbitration if the court declines to hear the dispute due to the IGO's successful invocation of immunity. Asymmetrical arbitration clauses will be discussed in greater detail below.

Because courts take different approaches, there may be uncertainty about whether an arbitration agreement under the proposed mechanism would be valid and enforceable.

Recommendation: We recommend that ICANN consider whether it is necessary to retain the court route alongside an arbitration option, given the potential impact on the certainty and validity of the arbitration agreement.

b. “Asymmetrical” or “Non-mutual” arbitration agreement

Draft Updates to the UDRP Rules, Paragraph 20(c)(i)

The Respondent may request to initiate a binding Arbitral Proceeding to resolve an applicable dispute with any designated Arbitral Institution in accordance with the Policy, these Rules, and the applicable arbitral rules.

Draft Updates to the UDRP Rules, Paragraph 3(b)(xii)

[...] Where the Complainant is an IGO Complainant, the complaint shall state that the Complainant is an IGO Complainant and that, in the event the Respondent elects to submit the dispute to arbitration following the issuance of a decision in the administrative proceeding canceling or transferring the domain name, the IGO Complainant agrees to resolve such dispute through a binding Arbitral Proceeding in accordance with the Policy, these Rules, and the applicable arbitral rules, and agrees to be bound by the decision of the Arbitral Panel.

Draft Updates to the UDRP, Paragraph 10(b)

¹⁷ See *Fiber Optic Communication Network Co., Ltd. v. China Development Bank*, (2022) 京 74 民特 4 号 (Beijing Fin. Ct.); *Xiamen C&D Chemicals Co., Ltd. v. Albert Trading AG (Switzerland)*, (2016) 沪 01 民终 3337 号 (Shanghai No.1 Interm. Ct.).

Selection of Provider. You may initiate an Arbitral Proceeding by selecting an Arbitral Institution designated by ICANN in accordance with the Rules of Procedure and the Arbitral Institution's applicable arbitral rules.

The proposed mechanism gives only the losing registrant the right to start arbitration and choose the arbitral institution. This is known as an “asymmetrical” or “non-mutual” arbitration agreement. It allows one party to choose between arbitration and court proceedings, while the other party must follow that choice and does not have the same right of election.

Some courts have upheld asymmetrical arbitration clauses, reasoning that even where only one party has the right to elect the dispute resolution mechanism, the arrangement remains a bilateral agreement.¹⁸ Some courts, however, have found asymmetrical arbitration clauses invalid in certain situations, especially in standard form contracts, because they may be unfair.¹⁹ However, given the special status of IGOs with respect to privileges and jurisdictional immunity, an IGO may seek to invoke immunity if the losing registrant elects to pursue court proceedings. Against this background, the proposed mechanism may be seen as giving the registrant, who may be perceived as the weaker party, extra procedural protection to help balance the parties' positions. It is still uncertain whether arbitral tribunals and national courts would accept this arrangement.

Recommendation: We recommend that ICANN reassess the intended operation of the proposed mechanism, given the risk that an arbitration agreement containing asymmetrical terms may be regarded as invalid or unenforceable under national arbitration laws.

C. The Scope of Arbitration

Draft Updates to the UDRP, Paragraph 10(a):

Applicable Disputes. An Arbitral Proceeding is a hearing de novo on the criteria set forth in Paragraphs 4(a), 4(b), and 4(c) of this Policy.

Draft Updates to the UDRP Rules, Paragraph 20(g)(i):

¹⁸ See Born, *supra* note 3, §5.06[D][5][a] (database updated February 2025); *Pittalis v. Sherefettin*, [1986] 2 All ER 227, 231 (English Ct. App.) (“The fact that the option is exercisable by only one of the parties seems to me to be irrelevant. The arrangement suits both parties.”); *Anzen Ltd v. Hermes One Ltd*, [2016] UKPC 1, ¶15 (U.K. Privy Council) (“parties are entitled, if they so choose, to confer a unilateral right to insist on arbitration”).

¹⁹ See *Judgment of 19 June 2012*, N A40-49223/11-112-401 (Russian S. Arbitrazh Ct.) (“[B]ased on common principles for the protection of civil rights, the dispute resolution clause cannot give the right to refer a dispute to a competent state court only to one party (the seller) under the Contract and deprive the second party (the purchaser) of equal rights. If such clause is entered into, it will be invalid because it violates the balance of the rights of the parties”). See also, *Madame X v Banque Privée Edmond de Rothschild*, [2012] No 11-26.022, (French Sup. Ct. Cass.).

The Arbitral Proceeding is a de novo review of the merits of the claim raised in the administrative proceeding and will be conducted in accordance with the arbitral rules of the applicable Arbitral Institution.

Under the proposed mechanism, the scope of arbitration has been limited to the merits of the claim raised in the UDRP proceedings.

As noted in our overall position above, if the proposed mechanism is intended to take account of an IGO's jurisdictional immunity and provide the losing registrant with a substitute for court review, the arbitral proceedings should be comparable to court proceedings. In this respect, we support the proposed amendments in adopting a de novo review. Like court proceedings, the arbitration should not operate as an appeal of the UDRP decision. Accordingly, the scope of the arbitration should not be confined to reviewing the criteria under Paragraph 4(a) of the UDRP, but should extend to disputes relating to the ownership of the domain name. It is also worth considering whether the available remedies should extend beyond cancellation or transfer of the domain name to include monetary compensation.

In addition, given the costs, duration, and procedural complexity associated with arbitration, it may be more proportionate for the arbitration agreement to be framed more broadly to cover issues relating to ownership of the disputed domain name, including related matters such as trademark disputes or licensing arrangements that may affect the parties' rights in the domain name. While attempting to confine the scope of arbitrable issues has its own risks, including potential disputes over whether a particular issue falls within that scope, these risks should be weighed against the efficiency gained by limiting arbitration to a clearly defined category of disputes, particularly where there is no contractual relationship between the IGO and the domain name registrant.

Recommendation: We recommend that ICANN not limit the scope of arbitration to the merits of the UDRP or URS proceedings.

III. RULES GOVERNING ARBITRAL PROCEEDINGS

Institutional arbitration is supported by sophisticated procedural frameworks developed by arbitral institutions, which provide detailed rules governing different stages of the proceedings, including applicable procedures, timelines, and conditions. Further, arbitration rules vary among institutions. Three of our regional offices are operated by leading international arbitral institutions across different jurisdictions in Asia. In this section, we compare the rules of these arbitral institutions with the Draft Updates to the UDRP and the UDRP Rules to assess the feasibility of the proposed mechanism. The comparisons set out are illustrative to highlight identified issues and are not intended to be exhaustive.



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Draft Updates to the UDRP, Paragraph 10:

Arbitral Proceedings under Paragraph 10 of this Policy will be conducted according to Paragraph 20 of the Rules of Procedure and the Arbitral Institution's applicable arbitral rules.

Draft Updates to the UDRP Rules, Paragraph 3(b)(xii):

[...] Where the Complainant is an IGO Complainant, the complaint shall state that the Complainant is an IGO Complainant and that, in the event the Respondent elects to submit the dispute to arbitration following the issuance of a decision in the administrative proceeding canceling or transferring the domain name, the IGO Complainant agrees to resolve such dispute through a binding Arbitral Proceeding in accordance with the Policy, these Rules, and the applicable arbitral rules, and agrees to be bound by the decision of the Arbitral Panel;

Draft Updates to the UDRP Rules:

Arbitral Proceedings for the resolution of disputes initiated by IGO Complainants under the Uniform Domain Name Dispute Resolution Policy shall be governed by these Rules and the Arbitral Institution's applicable arbitral rules. To the extent that the Supplemental Rules of any Provider or applicable arbitral rules of an Arbitral Institution conflict with these Rules, these Rules supersede.

A. “Arbitral Institution’s Applicable Arbitral Rules”

An arbitral institution may administer arbitrations under different sets of rules. In addition to the institution’s own administered arbitration rules, it may also administer arbitrations under the UNCITRAL Arbitration Rules, special rules co-issued with other institutions, or rules designed for specific types of disputes. Therefore, the term “Arbitral Institution’s applicable arbitral rules” may be overly broad and could potentially create conflicts.

B. Conflicts between Proposed Amendments and Institutional Arbitration Rules

The proposed mechanism says that arbitration would be conducted under the UDRP, the UDRP Rules, and the relevant institutional arbitration rules. It also says that the UDRP Rules would prevail if there is any conflict. In some cases, institutional rules may allow the parties to agree to different procedures, for example on confidentiality. In other cases, however, the institutional rules may conflict directly with the UDRP Rules, such as on when arbitration starts. This raises a practical question: can an arbitral institution administer a case under both its own rules and a separate set of procedural rules?

i. Governing Rules

Some institutional rules may contain provisions preventing the simultaneous application of other rules. For example, Article 1.3 of the 2024 HKIAC Rules provides that the HKIAC Arbitration Rules do not apply where the arbitration agreement provides for arbitration under other rules, including other rules adopted by HKIAC. Although the UDRP and its Rules are not arbitration rules, it may be possible for HKIAC to administer IGO arbitrations under its institutional arbitration rules with appropriate adaptations. However, this may make it difficult, and potentially unworkable, for an institution to administer an arbitration where the parties' agreement incorporates both the institution's rules and another set of rules that takes precedence in the event of conflict.

Rule 1.1 of the 2026 AIAC Arbitration Rules provides that where the Parties have agreed to refer their dispute to the AIAC for arbitration, or to arbitration in accordance with the AIAC Arbitration Rules, the arbitration shall be conducted and administered in accordance with the AIAC Arbitration Rules. While there is no specific bar to other policies or rules applying, the provision makes clear that where the Parties agree to have AIAC administer the arbitration, the AIAC Rules shall govern the proceedings. This could create potential conflicts with the proposed amendments, which provide that the UDRP Rules shall prevail in the event of conflict.

A different approach is adopted under the CIETAC Arbitration Rules. Article 4 provides that, where the parties agree to refer their dispute to CIETAC for arbitration but have agreed to modify the CIETAC Arbitration Rules or apply other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or conflicts with a mandatory provision of the law applicable to the arbitral proceedings. This indicates that some arbitral institutions allow parties to agree on modifications to the application of their institutional arbitration rules.

Procedural Matter	Draft Updates to the UDRP and the UDRP Rules ("Updated Policy" and "Updated Rules")	2024 HKIAC Administered Arbitration Rules ("2024 HKIAC Rules")	2026 AIAC Arbitration Rules ("2026 AIAC Rules")	CIETAC Arbitration Rules
Governing Rules	The arbitral proceedings shall be conducted in accordance with <u>the UDRP, the UDRP Rules, and the Arbitral</u>	HKIAC Arbitration Rules <u>shall not govern</u> arbitrations where an arbitration agreement provides for <u>arbitration under other rules</u> .	Rule 1.1: "Where the Parties have agreed to refer their dispute to the AIAC for arbitration, or to arbitration in accordance with the AIAC Arbitration Rules, ... the	Article 4(3): "Where the parties agree to refer their dispute to CIETAC for arbitration but <u>have agreed on a modification of these Rules or have agreed on</u>

	<u>Institution's applicable arbitral rules.</u> <i>See Updated Policy, Paragraph 10; Updated Rules, Paragraph 3(b)(xii).</i>	<i>See Article 1.3</i>	arbitration shall be conducted and administered by the AIAC <u>in accordance with the Rules."</u>	<u>the application of other arbitration rules, the parties' agreement shall prevail</u> unless such agreement is inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. ..."
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ii. Timeline

The UDRP is designed to ensure efficient case progression and prompt implementation of administrative decisions, and therefore establishes relatively tight procedural deadlines. However, given the final and binding nature of arbitral awards, it remains uncertain whether these timelines would be practically feasible when the proceedings are administered as arbitration by an arbitral institution.

For example, arbitral proceedings usually commence on the date that the arbitral institution receives the notice of arbitration. In addition, arbitration fees are often paid in stages, and arbitral institutions may be entitled to withhold the release of an award until payment of the required fees has been completed. This may create practical difficulties for the prompt communication of the arbitral decision.

Procedural Matter	Updated Policy and Updated Rules	2024 HKIAC Rules	2026 AIAC Rules
Commencement	Upon receipt of a request to initiate an Arbitral Proceeding, the Arbitral Institution shall review the submission for administrative compliance with these Rules and the applicable arbitral rules and, <u>if in compliance, shall commence</u> the Arbitral Proceeding by	An arbitration shall be deemed to commence on the date on which the <u>arbitral institution receives the notice.</u> <i>See Articles 4.2</i>	An arbitration shall be deemed to commence on the date on which the <u>arbitral institution receives the notice.</u> <i>See Rule 5</i>

	transmitting a Notice of Arbitral Proceeding. <i>See Updated Rules, Paragraph 20(e)(i).</i>		
	The date of commencement of the Arbitral Proceeding shall be the date on which the <u>arbitral institution</u> completes its responsibilities under Paragraph 20(e)(i) in connection with <u>sending the Notice of Arbitral Proceeding</u> to the IGO Complainant <i>See Updated Rules, Paragraph 20(e)(iii).</i>	The Notice of Arbitration <u>does not comply with</u> these Rules or if the <u>Registration Fee is not paid</u>: If the Claimant <u>remedies the defect within the applicable time limit</u>, the arbitration shall be <u>deemed to have commenced on the date the notice was received</u> by HKIAC. If not, not commence. <i>See Article 4.6</i>	The Notice of Arbitration <u>does not comply with</u> these Rules if the requirements in Rule 5.4 [<u>Registration Fee etc.</u>] <u>are not paid</u> <i>See Rule 5.6</i>
Communication of Arbitral Decision	Within <u>three (3) business days</u> after receiving the decision from the Arbitral Panel, the Arbitral Institution shall communicate the full text of the decision to each Party, the Registrar(s), the UDRP Provider, and ICANN. <i>See Updated Rules, Paragraph 20(h)(i)</i>	<u>No time limit</u> on HKIAC to communicate the award from tribunal to parties. However, HKIAC is <u>entitled to have a lien</u> over any awards if <u>outstanding fees and expenses remain unpaid</u>. <i>See Article 35.6 & SCHEDULE 2 Article 7</i>	<u>No time limit</u> on AIAC to communicate the award from tribunal to parties. AIAC Rules also <u>do not permit release of awards</u> if there is <u>pending payment</u> of outstanding fees and expenses.

iii. Confidentiality



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Confidentiality is widely recognized as one of the cornerstone advantages of arbitration over court litigation and almost all arbitration rules provide a default position of confidentiality for the proceedings and outcome.

The proposed amendments require the service provider not only to communicate the decision to the parties, the registrar, the UDRP provider, and ICANN, but also to publish the full award and link the original UDRP decision webpage to the arbitral award. Although institutional arbitration rules generally allow party autonomy in relation to confidentiality, these publication requirements may conflict with the confidential nature of arbitration. Further, it remains uncertain whether the UDRP and its Rules can constitute the parties' agreement to waive confidentiality obligations. It would be helpful for ICANN to clarify the rationale for requiring the publication of IGO arbitral awards and communication of such awards to the UDRP Provider, and to consider whether merely indicating that an arbitration has been initiated or concluded on the original UDRP decision webpage would be sufficient, noting our recommendation that the scope of arbitration should not be limited solely to issues under the UDRP or URS.

Procedural Matter	Updated Policy and Updated Rules	2024 HKIAC Rules	2026 AIAC Rules
Confidentiality v. Publication	Within three (3) business days after receiving the decision from the arbitral panel, the arbitral institution shall <u>communicate the decision to each Party, the Registrar(s), the UDRP Provider, and ICANN.</u> Except if the arbitral panel determines otherwise, the arbitral institution shall <u>publish the full decision</u> and the <u>date of its implementation</u> on a publicly accessible web site. <i>See Updated Policy, Paragraph 10(f); Updated Rules, Paragraph 20(h)</i>	<u>Unless otherwise agreed by the parties, no party, party representative, arbitrator, or HKIAC may publish, disclose or communicate any information relating to the arbitration or an award or decision.</u> The above provision does not prevent the publication, disclosure or communication of information <u>by a party or party representative to enforce or challenge the award</u> or Emergency Decision; in <u>legal proceedings</u> before a court or other authority. <i>See Articles 45.1 to 45.3</i>	Rule 52.5 <u>Unless otherwise informed to the President in writing by any of the Parties or the Arbitral Tribunal</u>, before an Award is made, the Parties and the Arbitral Tribunal in an arbitration shall be <u>deemed to have consented</u> to the AIAC disclosing, producing or publishing the Award by any means as the AIAC deems fit after 2 years from the release of the Award to the Parties. Rule 52.6 The disclosure, production, or publication in the term of Rule 52.5 is made provided that the following confidential information and details as determined by the AIAC are redacted: (a) the names of the Parties; (b) the name of the Arbitral Tribunal; (c) details of the subject matter; (d) the amount in dispute;

		(e) the counterclaim or set-off amount; and (f) the awarded amount.
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Recommendation: We recommend that the list of arbitral institutions provided by ICANN should designate the applicable rules, where appropriate. We further recommend that the proposed amendments should either leave procedural matters to the rules of the selected arbitral institution or, where conflicts arise, the institutional arbitration rules should prevail.

C. Special Features of Institutional Arbitration Rules

Institutional arbitration rules are generally designed for disputes arising from commercial transactions and therefore often contain relatively sophisticated procedural mechanisms. Such mechanisms may not be suitable or proportionate for reviewing administrative panel determinations under Paragraph 4 of the UDRP or for determining disputes concerning ownership of a domain name.

i. Consolidation

The criteria for consolidation in commercial arbitration differ significantly from those applicable to domain name disputes, as they are largely shaped by considerations arising from commercial transactions. Specifically, if a registrant registered, in a single transaction with a registrar, a portfolio of domain names incorporating the acronyms of multiple IGOs, would this constitute the same transaction or a series of related transactions under the institutional arbitration consolidation mechanisms? It is questionable whether the existing criteria for consolidation can operate effectively in the context of domain name disputes.

Procedural Matter	Updated Policy and Updated Rules	2024 HKIAC Rules	2026 AIAC Rules
Consolidation	The applicable arbitral rules, as maintained by the Arbitral Institution, will set forth procedures governing <u>consolidation</u> in the event of multiple Arbitral Proceedings between you and an IGO Complainant.	HKIAC shall have the power, at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, to consolidate two or more arbitrations where: a. Parties <u>agree</u> ; OR	Rule 8.1: AIAC Court may consolidate where <u>parties agree</u> , claims arise under <u>the same arbitration agreement</u> , OR <u>compatible arbitration agreements</u> involve <u>common questions</u> and <u>related transactions</u> .



	See Updated Policy, Paragraph 10(c)	b. All of the claims are made under the <u>same arbitration agreement</u>; OR c. The claims are made under more than one arbitration agreement, 1) <u>a common question of law or fact</u> arises in all of the arbitrations, 2) the rights to relief claimed are in respect of, or arise out of, the <u>same transaction or a series of related transactions</u> AND 3) <u>arbitration agreements</u> are <u>compatible</u>. See Article 28.1	
Single Arbitration under Multiple Contracts	No specific provision	Claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that: a. <u>a common question of law or fact</u> arises under each arbitration agreement giving rise to the arbitration; AND b. rights to relief claimed are in respect of, or arise out of, the <u>same transaction or a series of related transactions</u>; AND c. <u>arbitration agreements</u> are <u>compatible</u>. See Article 29.1	Under Rule 5.3, where claims arise out of multiple contracts, the claimant may file a single Notice of Arbitration. Rule 8.3 A Consolidation Request shall also be submitted to the AIAC pursuant to Rule 8.2 where a single notice of arbitration is delivered to the Respondent(s) in respect of claims arising out of multiple contracts between the <u>same Parties</u>, as provided for in Rule 5.3.

ii. Expedited Procedure

On the other hand, although domain name disputes generally involve no monetary amount in dispute, they are likely the types of disputes – relatively simple, confined to limited issues – to which the expedited arbitration procedure would ideally apply. The proposed amendments are silent on the applicability of expedited procedures under institutional arbitration rules. ICANN should review the arbitration rules of different arbitral institutions and further consider whether such procedures are more suitable for IGO domain name arbitration.

Procedural Matter	Updated Policy and Updated Rules	2024 HKIAC Rules	2026 AIAC Rules
Expedited Procedure	Not provided	Party may apply for expedited procedure where: a. The amount in dispute does <u>not exceed the amount</u> set by HKIAC; or b. Parties <u>so agree</u>; or c. In case of <u>exceptional urgency</u> <i>See Article 42.1</i>	Fast Track Procedure: Rule 7.1 A Party may submit a request to the AIAC for the operation of the Fast Track Procedure (“Fast Track Request”), at the time of <u>initiation of arbitration</u> or any time <u>prior to the constitution of the Arbitral Tribunal</u> where one or more of the following applies: (a) the <u>Parties have agreed</u> to adopt the Fast Track Procedure, or any edition of the AIAC Fast Track Arbitration Rules; (b) the <u>amount in dispute</u>, as described in the notice of arbitration, is quantified at <u>less than USD3,000,000.00</u> for <u>international arbitration</u> or less than RM2,000,000.00 for domestic arbitration; or (c) there is <u>exceptional urgency</u>.

IV. Implementation of the Award

The proposed arbitration mechanism is premised on preserving IGOs' jurisdictional immunity while providing losing registrants with an alternative avenue for review. However, once a final award is rendered, the arbitral tribunal's mandate comes to an end.²⁰ Any subsequent matters relating to the award, including post-award proceedings, are primarily matters for the parties and, importantly, national courts.²¹ While the proposed mechanism seeks to address the implementation of arbitral awards through direct implementation by the registrar within a short timeframe, potential legal issues may still arise in connection with the implementation of awards and an IGO's jurisdictional immunities.

Draft Updates to the UDRP, Paragraph 10 (g):

Implementation of Arbitral Decision. We will implement the Arbitral Proceeding decision within five (5) business days of receiving the decision from the Arbitral Institution.

A. Waiver of Immunity from Execution

IGO jurisdictional immunity may not only prevent an IGO from being subject to court proceedings, but may also protect its property from enforcement measures. Under the proposed mechanism, an arbitral proceeding may still be commenced after the ten-business-day period following the UDRP or URS decision has expired. By that stage, as the decision has already been implemented by the registrar, the disputed domain name may have been transferred to the IGO or cancelled. The direct implementation of the arbitral award by the registrar appears to reduce concerns regarding enforcement against an IGO's property through court proceedings.

Nevertheless, immunity-related issues may still arise during and after the arbitral proceedings. For example, the arbitral tribunal may determine the allocation of arbitration costs and fees, which may require enforcement beyond the implementation of the domain name decision. In addition, a losing registrant may seek interim measures to lock or restore the disputed domain name during an arbitral proceeding, which may require involvement of a national court. If the IGO has already become the holder of the disputed domain name, questions may arise as to whether the IGO could invoke immunity in response to such measures.

²⁰ See Born, *supra* note 3, Part III: International Arbitral Awards (database updated September 2024).

²¹ *Id.*

Further, in light of our recommendation above that the scope of arbitration should extend beyond the remedies available under the UDRP and URS, and potentially include other remedies such as monetary compensation, an express and limited waiver of immunity from execution within the scope of the arbitration may be necessary to ensure the effectiveness of the arbitral mechanism.

B. Time Period for Challenging the Award

Under the proposed mechanism, an arbitral award will be implemented by the registrar within five business days of receipt from the arbitral institution. At the same time, national arbitration laws generally provide a period during which the losing party may seek to challenge an arbitral award. In jurisdictions adopting Article 34(3) of the 2006 UNCITRAL Model Law,²² the time period for setting aside an award is three months. Other jurisdictions may provide shorter periods, but such periods are commonly measured in months rather than days.²³

Accordingly, immediate implementation within five business days may create practical difficulties for parties seeking to exercise their statutory right to challenge the award before the implementation takes effect. Although an IGO may invoke jurisdictional immunity in related court proceedings, a five-business-day period may not provide fair and sufficient time for the losing registrant to identify the competent court, prepare the necessary application, and comply with applicable procedural requirements. ICANN should therefore consider whether implementation should be deferred until the expiry of the applicable challenge period or whether additional safeguards should be introduced.

Recommendation: We recommend that ICANN consider requiring IGOs to provide an express and limited waiver of immunity from execution in connection with the arbitration, and reconsider the five-business-day award implementation timeline in light of the time periods for challenging arbitral awards under national arbitration laws.

V. URS

²² 2006 UNCITRAL Model Law, Article 34(3): “An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.”

²³ For example, Section 70(3) of the English Arbitration Act 1996 provides that “Any application [to challenge the award] or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.” Article 1451 of the French Code of Civil Procedure provides that: “If no application [to set aside the award] is made within one month following notification of the award, recourse shall no longer be admissible.”



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The proposed amendments to the URS Procedure and Rules mirror those to the UDRP and UDRP Rules and so our detailed comments apply equally to the URS.

However, we suggest that additional consideration be given to whether any amendments are necessary for the URS, or whether amendments to the UDRP provide a sufficient pathway for IGO complainants, given their special circumstances.

Unlike the UDRP, where the remedies may include cancellation or transfer of a domain name, the URS only provides for suspension of the domain name. Such a remedy is more injunctive in nature, as it is intended to provide a rapid measure to restrict the use of a domain name without altering ownership rights. Given the more limited and temporary nature of the URS remedy, the costs, duration, and procedural complexity associated with institutional arbitration may not always be proportionate to the relief sought.

Recommendation: We recommend that ICANN not amend the URS to provide an additional pathway for IGO complaints, given that the UDRP provides an adequate mechanism and the likely small volume of complaints filed by IGOs.

RECOMMENDATIONS

In summary, ADNDRC makes the following recommendations on the proposed IGO-INGO Curative Rights Policy implementation:

1. We recommend that the amendments be limited to a simple operative agreement by the IGO complainant to submit to arbitration, without further stipulations on the conduct of the arbitration.
2. We recommend that ICANN clarify when and how the arbitration agreement is formed under the proposed mechanism.
3. Once the formation of the arbitration agreement has been clarified, we recommend that ICANN assess whether the proposed mechanism satisfies the writing requirements under Article II(2) of the New York Convention and the applicable form requirements under different national arbitration laws.
4. We recommend that ICANN establish, under Paragraph 3 of the UDRP Rules, signature requirements applicable to IGO complainants to ensure that they are bound by the arbitration agreement, and provide policy guidance to facilitate administrative compliance review by service providers.



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5. We recommend that ICANN consider whether it is necessary to retain the court route alongside an arbitration option, given the potential impact on the certainty and validity of the arbitration agreement.
6. We recommend that ICANN reassess the intended operation of the proposed mechanism, given the risk that an arbitration agreement containing asymmetrical terms may be regarded as invalid or unenforceable under national arbitration laws.
7. We recommend that ICANN not limit the scope of arbitration to the merits of the UDRP or URS proceedings.
8. We recommend that the list of arbitral institutions provided by ICANN should designate the applicable rules, where appropriate. We further recommend that the proposed amendments should either leave procedural matters to the rules of the selected arbitral institution or, where conflicts arise, the institutional arbitration rules should prevail.
9. We recommend that ICANN consider requiring IGOs to provide an express and limited waiver of immunity from execution in connection with the arbitration, and reconsider the five-business-day award implementation timeline in light of the time periods for challenging arbitral awards under national arbitration laws.
10. We recommend that ICANN not amend the URS to provide an additional pathway for IGO complaints, given that the UDRP provides an adequate mechanism and the likely small volume of complaints filed by IGOs.

