



# Comments on Revised Proposal of the ACDR to Serve as a UDRP Provider

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**Business Constituency Submission**

**GNSO//CSG//BC**

The Business Constituency (BC) bases this comment upon a prior position, with one important change relevant to the application of the Arab Center for Dispute Resolution (ACDR) to become an accredited UDRP provider.

In October 2010, the BC adopted a position on ICANN's Proposal to Recognize New Domain Name Dispute Providers. (see <http://forum.icann.org/lists/acdr-proposal/msg00004.html> and Appendix 1 of this document.)

The BC's 2010 Comment stated:

*The Business Constituency (BC) cannot support approval of this or any other UDRP accreditation application at this time on the grounds that no new UDRP providers should be accredited until ICANN implements a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities.*

Two and one half years have passed since the BC submitted that comment, yet there still is no "standard mechanism" for assuring uniform administration of the UDRP, nor even a process in place to develop such a mechanism.

The BC's 2010 comment stated the rationale for our concerns:

*ICANN appears to be transitioning from an environment in which the vast majority of UDRP cases (approximately 98%) were handled by two arbitration providers (WIPO and NAF) and in which significant gTLDs were based in a limited number of national jurisdictions to one in which the majority of gTLDs and UDRP providers may well be headquartered in a widely distributed group of jurisdictions.*

*In the future, business interests may well be investing substantial amounts in these new gTLDs, for both defensive, new branding, and other purposes. In this type of environment it is even more important that all UDRP providers be subject to uniform and enforceable responsibilities, as that is the only means of furthering the goal that UDRP decisions are consistent within and among UDRP providers, and that the UDRP remains an expedited and lower cost remediation for addressing cybersquatting.*

Since 2010, a number of ensuing developments – including applications for 1400 new gTLDs, as well as ICANN's announcement that it will divide its operations between Los Angeles, Singapore, and Istanbul – indicate that projected responsibilities are arriving at an accelerated pace. This in turn increases the need for a mechanism to ensure uniform implementation of the UDRP in all regions and among all arbitration providers.

To be clear, the BC is not opposed to increasing the ranks of accredited UDRP providers. The BC recognizes that relevant and high-quality legal expertise can be found in all regions of the world, and that businesses may well prefer to have UDRP cases handled by regional entities rather than the now-dominant providers located in Europe and the United States.

Yet the BC remains concerned that an expansion of UDRP providers in the absence of a standard mechanism may lead to a divergence of UDRP case law between various providers. That could erode uniform application of the Policy and increase business sector risk and uncertainty.

#### Current Position: Qualified endorsement of ACDR proposal

The ACDR has submitted an impressive proposal, and we recognize the need and legitimacy of regional UDRP providers as the DNS expands to encompass new gTLDs and IDNs across the globe. Yet ICANN has still failed to implement, or even begin to develop, “a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities”.

Principals of the ACDR are affiliated with the BC, and engaged in a teleconference discussion with BC members on March 28<sup>th</sup>. In that discussion ACDR made clear that they understand the need for a standard mechanism such as the BC has advocated and pledged that ACDR would adopt the standard when approved by ICANN. As importantly, ACDR acknowledged the legitimacy of process concerns, provided candid answers, and indicated a willingness to work closely with BC members during the anticipated six to nine month period after any ICANN approval that will be required to address administrative considerations, panelist training, and other relevant matters prior to initiation of their own UDRP arbitration activities. The call also highlighted that the ACDR despite its best efforts cannot, in the absence of a standard mechanism adopted across all UDRP providers by ICANN, independently ensure that the UDRP is uniformly implemented across all UDRP providers.

**Based upon that discussion, the BC now gives its qualified endorsement to the ACDR’s present application.**

**Our endorsement is “qualified” in that the BC continues to urge the ICANN Board to instruct ICANN staff to expeditiously develop improved standards for the approval of UDRP providers, as well as uniform and enforceable standards governing the administration of UDRP cases by providers.**

The BC believes such administrative standards should be in place and applicable to all UDRP providers no later than the time that the ACDR would initiate UDRP adjudication activities following Board approval, and in any event within nine months after the Board addresses the present application.

The BC believes that this is an implementation matter related to better assuring the uniform application of the existing UDRP policy and that it therefore does not require a PDP or other policy-related process. The BC envisions the contemplated process as one that is staff-driven but that solicits and is open to broad community input.

The uniform and enforceable standards developed for all UDRP service providers should address at least the following matters:

1. Initial training of UDRP panelists in UDRP case precedents, with a focus on the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Second Edition ("WIPO Overview 2.0") (<http://www.wipo.int/amc/en/domains/search/overview2.0/index.html>), to assure in-depth understanding of the standard approaches to issues arising in UDRP cases, and regularly required continuing education thereafter.
2. Adequate provider oversight of panelists' decisions, including procedures to address decisions that unreasonably depart from past precedents as well as procedures to discipline or de-accredit panelists in appropriate circumstances.
3. Procedures to ensure that cases are assigned on a random and dispersed basis among all of a provider's listed panelists.
4. Strong safeguards to ensure that panelists reach decisions that are not tainted by any real or perceived conflict of interest or institutional bias, particularly when panelists also represent clients in UDRP proceeding or provide other trademark-related legal services to clients. This should be accompanied by outreach efforts to recruit panelists from academia or the ranks of qualified retired attorneys and judges.
5. Safeguards to ensure that a UDRP provider's Supplemental Rules do not undermine or conflict with the UDRP, that supplemental filings provide additional details related to the original filing and do not constitute a new set of unrelated pleadings, and that all parties to a UDRP have adequate time to respond to such filings.
6. Restrictions on any UDRP provider actions or statements that actively or apparently encourage forum shopping by complainants.
7. Addressing the root issue of forum shopping that inevitably results when Complainants are empowered to select a UDRP forum and have multiple forums, each with its own characteristics, to select from.

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This comment was approved by BC membership in accord with our Charter on 12-April-2013. Phil Corwin acted as Rapporteur.

## Appendix 1 – BC Comment of October 28, 2010

### **BC Comment on ICANN Proposal to Recognize New Domain Name Dispute Provider**

Background: There is a pending request for comment regarding the application of the Arab Center for Domain Name Dispute Resolution (ACDR) to become a certified Uniform Dispute Resolution Procedure (UDRP) provider.

Summary: The Business Constituency (BC) cannot support approval of this or any other UDRP accreditation application at this time on the grounds that no new UDRP providers should be accredited until ICANN implements a standard mechanism for establishing uniform rules and procedures and flexible means of delineating and enforcing arbitration provider responsibilities.

Explanation: The BC notes that the voluntary registration or renewal of a gTLD domain must be undertaken via an ICANN-accredited registrar. All registrars are subject to a uniform contractual agreement with ICANN, the Registrar Accreditation Agreement (RAA). ICANN recently strengthened the RAA with additional amendments and the addition of flexible enforcement options, and a Final Report proposing additional RAA amendments has just been delivered to the GNSO for its consideration.

In stark contrast, the involuntary termination or transfer of a domain can be ordered under the authority of a UDRP provider that has been accredited by ICANN but which is not bound by any constraints on or requirements pertaining to the exercise of that delegated authority. This has led to increasing concerns about the lack of adequate procedural and substantive consistency in the UDRP process. Such concerns are likely to grow if additional providers are accredited in the absence of the uniform framework of a standard mechanism.

The BC strongly advocates that ICANN must first implement a standard mechanism with any and all UDRP arbitration providers that defines and constrains their authority and powers, and establishes regular and standardized review by ICANN with flexible and effective means of enforcement. The ultimate sanction of cancelling accreditation is an extreme sanction that ICANN has demonstrated a reluctance to initiate in other contexts.

ICANN appears to be transitioning from an environment in which the vast majority of UDRP cases (approximately 98%) were handled by two arbitration providers (WIPO and NAF) and in which significant gTLDs were based in a limited number of national jurisdictions to one in which the majority of gTLDs and UDRP providers may well be headquartered in a widely distributed group of jurisdictions.

In the future, business interests may well be investing substantial amounts in these new gTLDs, for both defensive, new branding, and other purposes. In this type of environment it is even more important that all UDRP providers be subject to uniform and enforceable responsibilities, as that is the only means of furthering the goal that UDRP decisions are consistent within and among UDRP providers, and that the UDRP remains an expedited and lower cost remediation for addressing cybersquatting.

The BC notes that the issue of whether UDRP providers should be under a standard mechanism with ICANN is almost entirely separable from the question of whether the UDRP evaluation standards for determining the existence of cybersquatting should be reformed. There is no need to debate the substantive elements of the UDRP in order to address the fundamental issue of whether UDRP providers should be under a standard mechanism.