

Jurisdiction, Choice of Law and Dispute Resolution in International E-Commerce

Boston Bar Association
International Arbitration Committee

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Why are these problems greater for e-commerce than for offline commerce?

- Likely to be a far greater number of international e-commerce transactions, now that Internet has created a single world market, at least for some products
 - resolves many communications problems
 - resolves time-zone differences
- Likely to be a far greater number of international e-commerce transactions involving consumers

Why are these problems greater for e-commerce than for offline commerce?

- Less likely to be negotiated contracts
 - parties reacting only remotely
 - emphasis on automated, mass market solutions on the Internet
- Sellers won't necessarily know where their customers are located
- Buyers face greater risks, dealing with potentially invisible sellers

E-Commerce Jurisdictional Issues

- General issues in Internet jurisdiction
- Developments in U.S. jurisdictional law
- European Commission approach
- International Chamber of Commerce Task Force on Jurisdiction

General Issues in Internet Jurisdiction

- Assertion of jurisdiction by more countries as e-commerce spreads
- What is enough to create jurisdiction in another country:
 - web site only
 - web site plus interactive component
 - clear effort to do business there
- Problems beyond commerce: national laws against pornography, political content, etc.

Developments in U.S. Jurisdictional Law

- Each state and federal district may have different rules
- Some initial decisions have found that a website alone justifies jurisdiction, while other decisions have required more
- American Bar Association is trying to propose standardized guidelines

European Commission Approach

- Different countries have different rules on jurisdiction
- Council of Ministers working group is in process of revising 1968 Brussels Convention on Jurisdiction
 - Article 15 would say that a company which directs its activities to another EU country can be sued in that country

European Commission Approach

- since e-commerce could be considered to be directed at all 15 EU countries, in theory an e-commerce company could be sued in all 15 countries
- Counterarguments to being directed to other countries
 - passive website only
 - certain languages only
 - disclaimers that products not offered in particular countries

European Commission Approach

- European Commission is also considering changes to Rome Convention on Non-Contractual Obligations, which governs such things as defamation and unfair competition
 - jurisdiction would exist where impact is felt
 - could subject an e-commerce company to jurisdiction of all EU countries
- Business community concerned because European Commission approach seems heavily pro-consumer

International Chamber of Commerce Task Force on Jurisdiction

- Business organization which seeks to harmonize rules and minimize barriers to expansion of e-commerce
- Task Force includes members from North America and Europe
- Will propose recommendations to governments and courts at a time when jurisdictional issues are still in their infancy -- so as to maximize opportunity for impact
- Emphasizes creation of efficient dispute resolution mechanisms on-line to mitigate consumer and governmental concerns

Traditional Approach to Choice of Law and Dispute Resolution in Offline Transactions

- Executed agreement between the parties
- choice of law provision, typically choosing Seller's home jurisdiction and excluding United Nations Convention on Contracts for the International Sale of Goods
- dispute resolution provision
 - arbitration or litigation
 - location of chosen forum

Why Traditional Approaches on Choice of Law and Dispute Resolution Do Not Work for E-Commerce Transactions

- Is a valid contract formed between the parties?
- Are there grounds for resisting the choice of law?
- Are there grounds for resisting the dispute resolution provision?

Is a valid contract formed between the parties?

- Are formalities followed?
 - China: must be in writing
 - France, Germany and Italy: advisable to require double click, in order to confirm buyer wants to enter into contract on stated terms
 - European Union Distant Selling Directive (Articles 5 and 6): buyer must receive written confirmation or confirmation “in another durable medium”; 7-day right of return runs from receipt of confirmation
- Has there really been a meeting of the minds?
 - Legal counsel in non-English speaking countries recommend that terms be shown in local language

Is a valid contract formed between the parties?

- Have adequate procedures been followed with respect to buyer's click and accept?
- (1) Terms shown in full in advance of click and accept
- (2) Acceptance necessary step to download and again to installation/use
- (3) Reminders that use subject to license
- (4) Electronic copy of license readily accessible

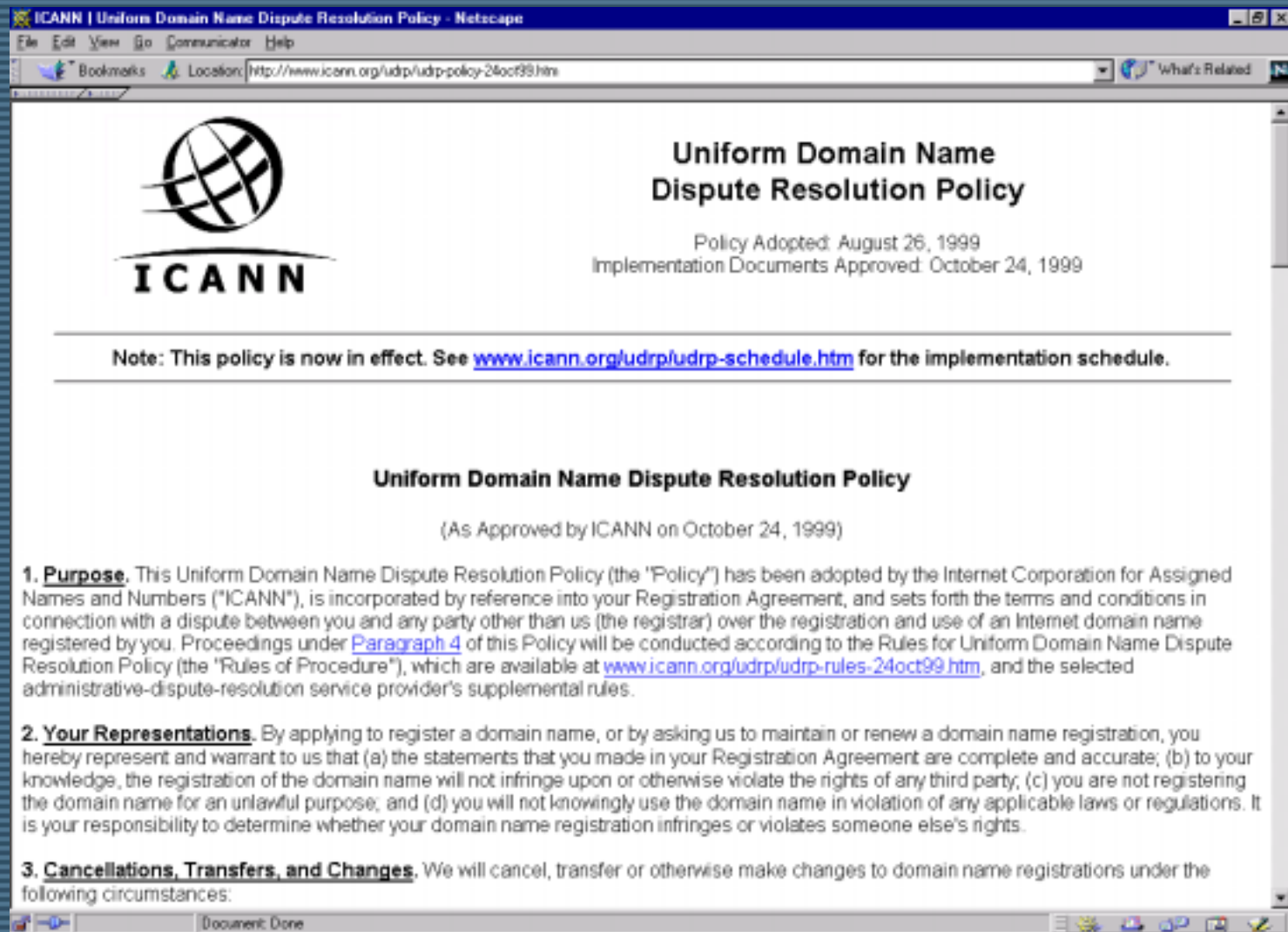
Are there grounds for resisting the choice of law?

- Most consumer protection laws will ignore consumer's acceptance of choice of law provision which chooses a foreign law
 - Japan (?), the Netherlands, Norway and the United Kingdom (?) are the exceptions
- Many jurisdictions will ignore choice of law provision if it leads to a result that is contrary to that jurisdiction's public policy
- Even if choice of foreign law is respected, local laws still apply to seller (e.g., tax, antitrust, tort law, regulatory regimes)

Are there grounds for resisting the dispute resolution provision?

- Once again, many consumer protection laws will ignore consumer's acceptance of choice of forum provision which chooses a foreign forum
- Some jurisdictions apply special formalities to arbitration clauses (e.g., Germany, Norway)
- Gateway decision: ICC arbitration too expensive in consumer context
- ICANN's new Uniform Domain Name Dispute Resolution Policy requires on-line arbitration for domain name disputes, but not e-commerce disputes

Uniform Domain Name Dispute Resolution Policy



The screenshot shows a Netscape browser window with the title "ICANN | Uniform Domain Name Dispute Resolution Policy - Netscape". The address bar shows the URL "http://www.icann.org/udrp/udrp-policy-24oct99.htm". The page content includes the ICANN logo, the title "Uniform Domain Name Dispute Resolution Policy", and the dates "Policy Adopted: August 26, 1999" and "Implementation Documents Approved: October 24, 1999". A note states: "Note: This policy is now in effect. See www.icann.org/udrp/udrp-schedule.htm for the implementation schedule." The main heading is "Uniform Domain Name Dispute Resolution Policy" followed by "(As Approved by ICANN on October 24, 1999)". The text is organized into three numbered sections: 1. Purpose, 2. Your Representations, and 3. Cancellations, Transfers, and Changes.

ICANN

Uniform Domain Name Dispute Resolution Policy

Policy Adopted: August 26, 1999
Implementation Documents Approved: October 24, 1999

Note: This policy is now in effect. See www.icann.org/udrp/udrp-schedule.htm for the implementation schedule.

Uniform Domain Name Dispute Resolution Policy

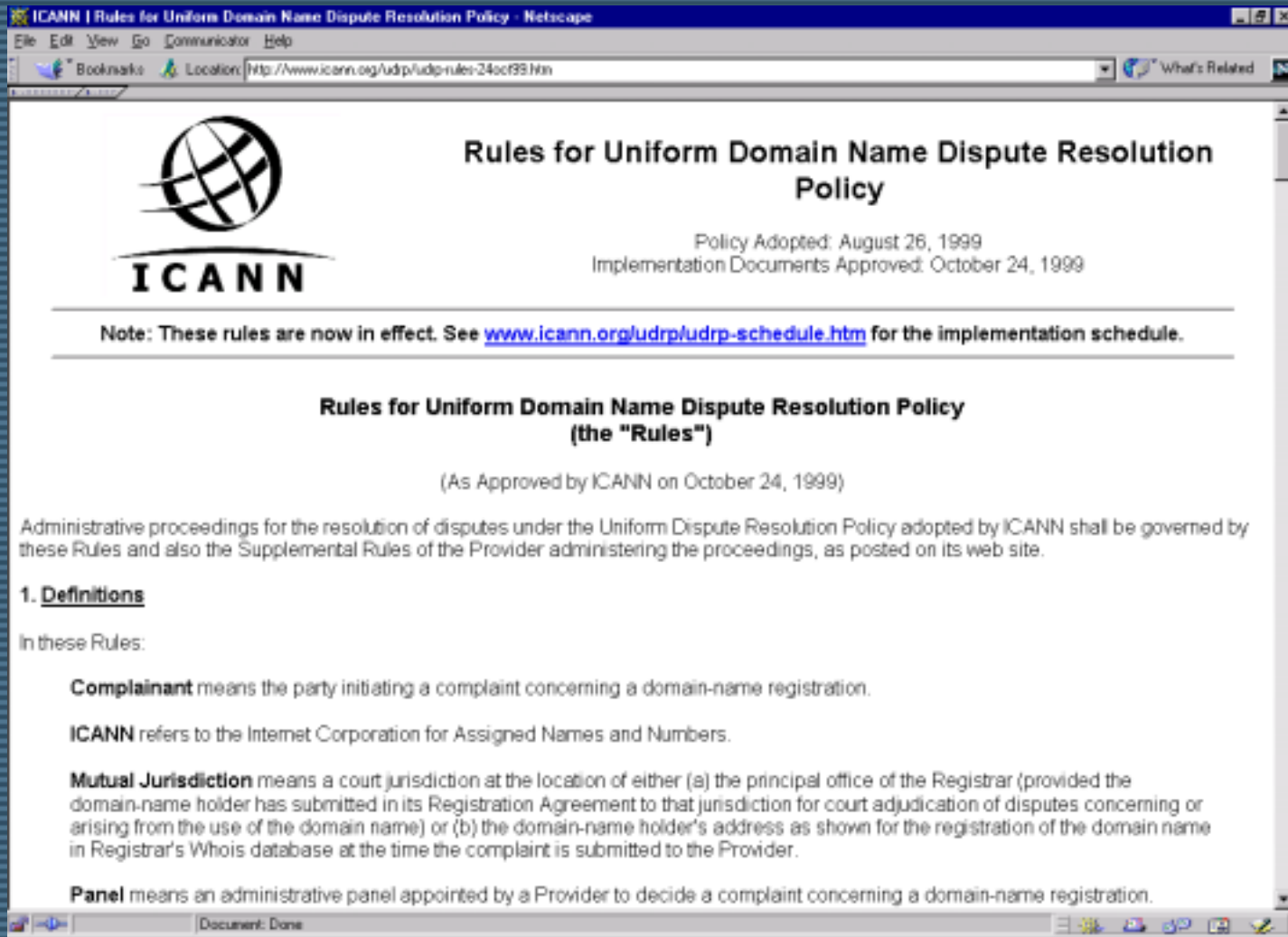
(As Approved by ICANN on October 24, 1999)

1. Purpose. This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN"), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under [Paragraph 4](#) of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at www.icann.org/udrp/udrp-rules-24oct99.htm, and the selected administrative-dispute-resolution service provider's supplemental rules.

2. Your Representations. By applying to register a domain name, or by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that (a) the statements that you made in your Registration Agreement are complete and accurate; (b) to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) you are not registering the domain name for an unlawful purpose; and (d) you will not knowingly use the domain name in violation of any applicable laws or regulations. It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights.

3. Cancellations, Transfers, and Changes. We will cancel, transfer or otherwise make changes to domain name registrations under the following circumstances:

Rules for Uniform Domain Name Dispute Resolution Policy



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ICANN

Rules for Uniform Domain Name Dispute Resolution Policy

Policy Adopted: August 26, 1999
Implementation Documents Approved: October 24, 1999

Note: These rules are now in effect. See www.icann.org/udrp/udrp-schedule.htm for the implementation schedule.

**Rules for Uniform Domain Name Dispute Resolution Policy
(the "Rules")**

(As Approved by ICANN on October 24, 1999)

Administrative proceedings for the resolution of disputes under the Uniform Dispute Resolution Policy adopted by ICANN shall be governed by these Rules and also the Supplemental Rules of the Provider administering the proceedings, as posted on its web site.

1. Definitions

In these Rules:

Complainant means the party initiating a complaint concerning a domain-name registration.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

Mutual Jurisdiction means a court jurisdiction at the location of either (a) the principal office of the Registrar (provided the domain-name holder has submitted in its Registration Agreement to that jurisdiction for court adjudication of disputes concerning or arising from the use of the domain name) or (b) the domain-name holder's address as shown for the registration of the domain name in Registrar's Whois database at the time the complaint is submitted to the Provider.

Panel means an administrative panel appointed by a Provider to decide a complaint concerning a domain-name registration.

List of ICANN Approved Providers



The screenshot shows a Netscape browser window with the title "ICANN | Approved Providers for Uniform Dispute Resolution Policy - Netscape". The address bar shows the URL "http://www.icann.org/udrp/approved-providers.htm". The browser's navigation toolbar includes buttons for Back, Forward, Reload, Home, Search, Netscape, Print, Security, and Stop. The main content area features the ICANN logo on the left and the heading "Approved Providers for Uniform Domain Name Dispute Resolution Policy" on the right. Below the heading, a horizontal line separates the header from the main text. The text states that the uniform dispute resolution policy is now in effect and provides links to the implementation schedule and the rules for uniform domain name dispute resolution. It lists three approved providers: Disputes.org/Resolution Consortium, The National Arbitration Forum, and the World Intellectual Property Organization. At the bottom, there is a footer with contact information for comments, a page update date of 03-January-00, and a copyright notice for 2000.

ICANN

Approved Providers for Uniform Domain Name Dispute Resolution Policy

The [uniform dispute resolution policy](#) is now in effect. See the [implementation schedule](#) for details.

Complaints under the policy may be submitted to any approved dispute-resolution service provider listed below. Each provider follows the [Rules for Uniform Domain Name Dispute Resolution Policy](#) as well as its own supplemental rules. To go to the web site of a provider, click on its name below:

- [Disputes.org/Resolution Consortium](#) (approved effective 1 January 2000). Click [here](#) to see its supplemental rules.
- [The National Arbitration Forum](#) (approved effective 23 December 1999). Click [here](#) to see its supplemental rules.
- [World Intellectual Property Organization](#) (approved effective 1 December 1999). Click [here](#) to see its supplemental rules.

Additional providers may be approved soon. The above approvals are in effect until further notice at this web page.

Comments concerning the layout, construction and functionality of this site should be sent to webmaster@icann.org

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Current Approach by E-Commerce Companies on Choice of Law and Dispute Resolution Provisions - #1

- As much as we might like to think contrary, concede that it is, under current law, impossible to apply a single set of contractual choice of law and dispute resolution provisions worldwide
- Develop a U.S./Canadian contract that serves as an “international default” agt.
- Have foreign counsel review that agreement for key markets

Current Approach by E-Commerce Companies on Choice of Law and Dispute Resolution Provisions - #2

- Many foreign counsel advise that choice of law and dispute resolution provisions might not be enforceable
 - Don't concede issue -- leave choice of law and dispute resolution provisions as is
 - no harm in trying to impose those provisions
 - those provisions still might be enforceable vs. pirates and with respect to IP issues
 - as a precaution, make changes in substantive provisions, so that agreement will still be enforced, even if local law is applied before local courts

Current Approach by E-Commerce Companies on Choice of Law and Dispute Resolution Provisions - #3

- A smaller group of foreign counsel advise that choice of law and dispute resolution provisions will not be enforceable, and must be changed
 - for limitations on liability to apply, must submit to local law (France)
 - attempt to choose foreign law and foreign dispute resolution may invalidate entire agreement, including substantive provisions (e.g., Sweden and Denmark)
 - stipulating a prohibited governing jurisdiction and forum for arbitration is a false or misleading representation (Quebec)
 - special case -- Germany: choice of U.S. law and forum will not invalidate agreement, but may lead to order that company cease using these provisions
- In those countries, choose local law, local courts and make substantive changes recommended by foreign counsel

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