

IRP-IOT Matters Outstanding and Next Steps on IRP Rules – 31 August 2021

IRP Rules

Issues still requiring consideration

1. Updates to the Selection of Arbitrators (Art 3):
 - a. Consider better aligning Article 3 language with the ICDR Rules, which set out a specific procedure for selection of a third panelist where there is disagreement amongst the party-appointed arbitrators.
 - b. Consider adding a specification on the nationality of arbitrators and whether one or more arbitrators may be of the same nationality or of the same nationality as ICANN or the claimant.
 - c. Consider specifying the date of when an IRP Panel is in “in place”, to give clarity to when an Emergency Arbitrator might need to be empowered.
2. Interim Measures (Art 10): Consider codifying typical arbitral practice in clarifying that Emergency Panelist or the IRP Panel has authority to modify interim relief measures; for procedural equity consider defining a page limit and right of reply for requests for Interim Measures. (N.B. may have some overlap with the work on Consolidation/Amicus)
3. Fee to initiate IRP: Review current procedure against Bylaws to determine whether any change is appropriate.
4. Procedure where ICANN elects not to respond (Bylaws 4.3(n)(iv)(F))
5. Appeals (Art 14):
 - a. Rules for Appeals – Art 14 is extremely brief. Do we need to expand Art 14, or draft separate Rules to deal with Appeals?
 - b. Limitations on Appeals – do we wish to establish any (Bylaws 4.3(w))
 - i. For example, whether non-binding IRPs (see Bylaw 4.3(x)(iv)) should be appealable
6. Non-binding IRPs and Precedent – is it within our remit to consider whether non-binding IRPs should constitute precedent
7. Is there ambiguity regarding a standing panel's ability to ‘adjudicate’ a stay of ICANN action or just to ‘recommend’ a stay? See Bylaws 4.3(o) and 4.3(p). If there is ambiguity, is there anything within our remit to help clarify?

Issues In Progress, requiring completion

8. Consolidation/Amicus (Art 7): Consider updating the rules to clarify the ability of properly intervening parties to obtain documentation so that they can participate on equal footing with the original parties to the IRP. Consider the need to confirm that requests to intervene/amicus need to be made in writing and specify the interest of the intervening party. Consider amicus access to evidentiary record and whether that should be left to the discretion of the IRP Panel.
9. Elimination of the Procedures Officer (Art 7 – part of the work on Consolidation)– Experience has shown that the designation of an individual to handle consolidation, intervention and amicus requests is a cumbersome process, and those issues are better let to the discretion of the IRP panel handling the merits of the dispute.
10. Time for filing (Art 4):
 - a. should we clarify that the rule we eventually develop is either an affirmative defense that ICANN can raise, or not, as it sees fit or, alternatively, a firm matter of standing that the panel should invoke on its own without exemption, subject only to the savings language that Sam and Liz are working on?

- b. Consider adding a clarification that the IRP is officially commenced when the ICDR Administrator actually receives a written statement dispute, as well as confirmation that ICDR Rule 36(3) governs a party's failure to pay required fees. Clarifying timing requirements is important, as that sets the cadence for the full briefing schedule.

Other Matters expressly or presumably assigned to the IOT under Bylaws

11. Recall Process for Standing Panel to be developed (Bylaws 4.3(j)(iii))
12. Standing Panel Conflicts of Interest - consider the development of additional independence requirements for members of the standing panel, including term limits and restrictions on post-term appointment to other ICANN positions (Bylaws 4.3(q)(i)(B))
13. Recommend training for Standing Panel (Bylaws 4.3(j)(i))
14. Rules for the Cooperative Engagement Process (Bylaws 4.3(e)(i))
15. Consider designing specialized rules for PTI service complaint (Bylaws 4.3(a)(v))

Other

16. Challenge to a summary dismissal of an RfR by BAMC - it appears unclear how or when such a dismissal can or must be challenged. Is this within our remit? Does this intersect with Art 4 Time for Filing?

Background

In pulling this document together I have looked back to:

1. IRP Update Document for call on 14 January 2020
2. Potential areas for IOT Consideration document (SE; circulated with agenda 10 February 2020)
3. SE annotated draft of the interim rules
4. DM email 20 July 2021
5. MR email 20 July 2021