

IRP-IOT Call 30 August 2022

IRP Supplementary Procedures: Discussion and Next Steps on Outstanding Issues

Next Topics for Sub Teams: Arbitrators

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.

Possible considerations include:

- Our rules are supplemental to the ICDR Rules, but consider whether greater clarity is needed on when the ICDR process applies
 - E.g. If two Standing Panelists cannot agree on the third, do we want the full Standing Panel, or the SP Leader to select?
 - E.g. what happens if a party does not select a panelist
- Standing Panel will be a minimum 7 people. How would nationality restrictions work?
- Are time limits for selection needed? Interim rules have none

Next Topics for Sub Teams: Arbitrators

Previous sub team volunteers:

- Flip Petillion
- David McAuley
- ICANN Legal

Next Topics for Sub Teams: ICANN Non-Response

Procedure where ICANN elects not to respond (Bylaws 4.3(n)(iv)(F)):

(n)(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(F) Procedures if ICANN elects not to respond to an IRP

Note also Bylaws 4.3(t):

Each IRP Panel shall make its decision based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its decision shall specifically designate the prevailing party as to each part of a Claim.

Possible considerations might include a review of any elements of the rules which need to be revised to address ICANN non-participation, e.g. panel selection (N.B. Arbitrators sub-team should address where either party fails to select a panelist); other?

Previous sub team volunteers:

- David McAuley
- ICANN Legal

Topics requiring further [initial] discussion in Plenary: 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? Do we leave it to Standing Panel to set the procedure if a case arises? What is the current process if a Party wishes to appeal?

Art 14: An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

- b) Limitations on Appeals – do we wish to establish any (Bylaws 4.3(w))

(w) Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision.

- c) For example, whether non-binding IRPs (see Bylaw 4.3(x)(iv)) should be appealable

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration decision may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable

Topics requiring further [initial] discussion in Plenary: Other

Items raised as potential matters for further consideration:

1. Non-binding IRPs and Precedent – is it within our remit to consider whether non-binding IRPs should constitute precedent? Purposes of the IRP under Bylaws include:

BL 4.3(a)(iv) Reduce Disputes by creating precedent to guide and inform the Board, Officers..., Staff members, Supporting Organizations, Advisory Committees, and the global internet community in connection with policy development and implementation

2. 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?

(o) Subject to the requirements of this [Section 4.3](#), each IRP Panel shall have the authority to:

(iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered

(p) A Claimant may request interim relief. Interim relief ...specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered as described in section 4.3(o)(iv), in order to maintain the status quo.