

IRP-IOT Plenary Meeting 4 October 2022

## Initiation of an IRP (Updates from previous version in red)

Initiation sub team tasked to consider:

- Whether there are issues around initiation of an IRP not adequately addressed in the Interim Supplementary Procedures (IRP Interim Rules), supplementing the ICDR Rules, and particularly:
- Items 3 and 10B of the Remaining Issues document dated 31 August 2021, as follows:
  - Item 3 Fee to initiate IRP: Review current procedure against Bylaws to determine whether any change is appropriate.
  - Item 10B Time for filing (Art 4): 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.

## Initiating Arbitration – Current Position

IRP is initiated by submitting the relevant ICDR Form, which includes the written Statement of Dispute, to ICDR, accompanied by the filing fee per the ICDR fee schedule

Relevant provisions regarding initiation:

- Bylaws section 4.3(d): An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "Claim") with the IRP Provider (described in Section 4.3(m) below)
- ICDR Rules, Article 2:
  - Art 2.2 The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.
  - Art 2.4 The Notice of Arbitration shall be accompanied by the appropriate filing fee.
- IRP Interim Rules, Rule 4:
  - An Independent Review is commenced when a Claimant files a written Statement of Dispute [n.b our proposed new text of Rule 4 does not contain this language] ...
  - In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

## Questions for the Plenary arising from Initiation sub group

Sub group was unable to reach agreement – disagreement in the sub group on interpretation of the Bylaws language, in particular Section 4.3(r). This gives rise to questions that the sub group considered were more appropriately addressed by the full plenary rather than in such a small group.

1. Is the requirement for Claimant to pay a filing fee to ICDR consistent with the Bylaws?

- ICANN Legal position, as expressed by Liz Le: Section 4.3(r) obligates ICANN to bear all the administrative costs of maintaining the IRP mechanism. The filing fee is not an “administrative cost of maintaining the IRP mechanism”; at present, in absence of a Standing Panel, there are currently no such administrative costs of maintaining the IRP mechanism.
- Alternative position of sub group members: The filing fee is an administrative cost of maintaining the IRP mechanism, and therefore should be borne by ICANN. ICDR expresses this to be an administrative cost, and it covers matters carried out by ICDR in its role as the IRP Provider. It is inconsistent with the intent of the Bylaws for there to be no administrative costs of maintaining the IRP mechanism, pending the appointment of the Standing Panel. The filing fee is thousands of dollars and therefore can have a chilling effect, which the Standing Panel requirements under the Bylaws clearly were intended to address.

## Questions for the Plenary arising from Initiation sub group

2. Whilst not strictly a matter of Initiation, is the current treatment of other costs/fees, in particular the panelist fees, but also costs such as translation, transcription, shipping, consistent with the Bylaws?

- ICANN Legal position, as expressed by Liz Le: Nothing in Bylaws that says ICANN should pay panelist compensation in absence of a Standing Panel – this does not fall within the administrative costs of maintaining the IRP mechanism. These types of costs vary from case to case, they are not costs of the IRP mechanism. **However, ICANN org has been paying the entire panelist fees in the absence of an omnibus standing panel.**
- Alternative position of sub group members: Disagree with this interpretation. There have been some cases where ICANN has paid for the panelists. Where the responsibility for such costs lies is a relevant issue for IRP Initiation because the Claimant, when they initiate, agrees a responsibility for certain costs. If the Bylaws are open to differing interpretations, and in order to file an IRP you have to accept ICANN's interpretation, then this is an issue which should be within scope of this group to clarify through the rules. Claimants should know what they are committing to.

## Additional Questions for the Plenary

Malcolm as part of the discussion in the Initiation sub group also wished the plenary to consider the following:

3. Is the fact that the Claimant must enter into a contract with ICDR in order to commence an IRP consistent with the Bylaws?
4. If, as the sub group believe, there is no contract between ICANN and ICDR with respect to the operation of the IRP does this change the nature of the IRP proceedings from the Claimant seeking resolution of their dispute under the Bylaws to the Claimant and ICANN approaching ICDR effectively as independent parties seeking arbitration under ICDR rules (which allow for ICDR to accept the bylaws as agreed terms of arbitration)? Would a contract between ICANN and ICDR assist in identifying what services ICDR provides within the meaning of maintaining the IRP mechanism?

Other issues relating to Initiation for consideration:

5. Is the procedure for how to actually initiate an IRP, and any fee, sufficiently clear for a potential Claimant? If not, is this something that ought to be addressed in the IRP Rules? Or a recommendation from this group for improvements to IRP section of ICANN website?

# Initiating Arbitration – Provisions relating to fees and costs

Relevant Bylaws provisions regarding fees and costs:

- Section 4.3(r): ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.
- Section 4.3(e)(ii): The CEP is voluntary. However, except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, if the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- **Section 4.3(y): ICANN shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.**

CCWG Accountability Workstream 1 Annex 7 para 59/60 Accessibility and Cost:

- The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries and the costs of technical experts), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants, and other complainants that would otherwise be excluded from utilizing the process.

## Initiating Arbitration – Other provisions of note

- Bylaws Section 4.3(m)(i) IRP Provider: All IRP proceedings shall be administered by a well-respected international dispute resolution provider ("IRP Provider"). The IRP Provider shall receive and distribute IRP Claims, Responses, and all other submissions arising from an IRP at the direction of the IRP Panel, and shall function independently from ICANN.
- Bylaws Section 4.3(k) IRP Panel:
  - (ii) The Claimant and ICANN shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.