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BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT plenary on the 8<sup>th</sup> of August 2023 at 18:00 UTC.

Today's meeting is recorded. Please mute your lines when not speaking and state your name for the record when you do speak. And I'll turn this meeting over to Susan Payne. Thank you very much.

SUSAN PAYNE: Hi, everyone. Thanks for joining. It's our regular plenary for the IRP-IOT. As always, we'll start with the usual kind of review of agenda and updates to Statements of Interest. So I'll start with the SOIs and then I'll go through the agenda. Does anyone have any amendments to their Statements of Interest that they need to make? I'm not hearing anything or seeing any hands so I will take that as no.

In terms of the agenda, we'll have a look at a couple of the action items, one for Bernard to circulate the ICDR text, which he did, and one for the rest of us to review it and come ready to discuss. So our agenda item three will be that discussion on the ICDR process for consolidation. I think it was raised particularly with the kind of arbitrator and the selection of the single arbitrator, consolidation arbitrator in mind in particular.

Then agenda item four, we will continue our review and discussion of the other elements of the small team proposal on Rule 7 to the extent that we haven't already covered that during our discussion on item three. And obviously, when doing so, we'll need to bear in mind that if

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we make a decision that we do think that the consolidation arbitrator is the way forward then there will be some elements of that Rule 7 that will have consequential amendments that do need to be made.

Item five is AOB. I don't have any but we will see if there is any AOB to add at the end. And then flagging our next call, as previously proposed, and then it's circulated by e-mail straight after our last call. I'm looking to have a call next Tuesday, so the 15<sup>th</sup> of August. I know a couple of people can't make it. I'm hoping that we do have enough attendance that we can go forward with that call. So I guess this is a kind of a request that if you aren't going to be able to make it, could you please flag that after this call? Because if it's clear, we're not going to get quorum, we'll have to just accept that. But there's still a hope, let's say, that we can have some kind of a Public Comment period and have something that goes out to Public Comment before the ICANN78 meeting. So if we want to try and achieve that, we have to step up the pace of it. Okay. Back to the top then.

So agenda item two. And thanks, David, for confirming your availability. Agenda item two, so yes, the action items. Just for some context for those who weren't on the last call, hopefully you've been able to listen to the recording or reviewed the transcript. But essentially, there was some reservations expressed, let's put it that way, particularly from Flip as a practitioner, but I think others were pretty persuaded by the views that Flip was expressing that there could be some significant disadvantages to leaving this decision on consolidation to the three-person IRP panel, particularly in terms of the potential for what if the dominant IRP as we're calling it delays appointing their panel possibilities of there being a race to be first, general kind of delays that

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could be caused, and so on. So it was mentioned by them that the ICDR rules in the current form do have more detail on the process for the appointment of what the ICDR call a consolidation arbitrator. So that is the reasoning for this action item. The second action item was for all of us to come to this call, basically having reviewed that ICDR text.

I will just flag that Bernard circulated the rules. I think that actually they may have been the previous rules and that there is a slightly later version, it doesn't really make any difference for the purposes of our discussion. There's one very small change in the article on consolidation that I can flag in a minute. But other than that, there is, as far as I could see, only one difference. So if you have been reviewing the slightly older version of the rule, I don't think it will make any difference for the purposes of our discussion. So yes, so that was our action items. And I am hoping that we all come ready for a discussion.

So if we move on to agenda item three, you may or may not have had time to look at what I circulated about 90 minutes or so ago, perhaps a little more, perhaps more like maybe an hour or so, which was a sort of comparison table. Initially when I was doing it, it really was for the purposes of my own preparation. And then it occurred to me as I was pulling together a kind of comparison of what ICDR says against what we have in the IRP rules, it occurred to me that it actually might be a sort of useful visual to have on the screen as we're discussing this. So if you didn't have time to look at it, I don't think that matters, the text of the rules is as in the rules. And I included some extremely high level summary text, just as I say, when I was putting it together for my own information. So I'm hoping it will help us sort of structure the

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discussion. But obviously, I'm not looking to prevent anyone raising any other points or other suggestions.

So, Brenda, would you be able to put up in the screen the sort of comparison? I think it's called ICDR Rule—yes, that one, exactly. That one. And just a mention, that's the link in that document to what I think the slightly later version of the ICDR rules. You'll notice that the article number has changed. It's now Article 9 instead of Article 8. When we get to it, I'll flag the difference that I could see but it is relatively minor. As I said, the reason that were looking at this was really to consider whether this ICDR process or something built off this ICDR process would work better for the IRP for the purposes of considering these requests for consolidation and indeed for applications for intervention and participation as amicus. So, specifically, the question I think that we have before us is whether we revert back to the notion of a single consolidation arbitrator.

So, on the first row I have just flagged, that's the process used by the ICDR. As a comparison, in the current IRP supplemental rules, we have a similar concept termed procedures officer. One of the points that the Consolidation subteam was asked to look at and reflect on was feedback about the procedures officer wasn't a well understood post or role, let's say, in the few IRPs where there had been use of the procedures officer, there was, I think, a lack of understanding about the powers of that role, and precisely what they could and couldn't do, and the sort of misunderstanding about it.

So I think, as I mentioned, on our last call, one of the first things that we did in the Consolidation subteam was we actually looked at just keeping

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that sort of role but changing the terminology and kind of beefing up some of the descriptions of the role if needed. And it was only later in our discussions in the subteam that we moved on to the alternative which we have in our current subteam proposal, which is that these decisions be considered and decided on by the full three-person IRP panel, and specifically the IRP panel from the first commenced of the relevant affected IRPs involved in this.

So, the question for us to review these ICDR rules with in mind is do we revert back to that single arbitrator concept? It's probably worth us getting down to the bottom of this first page then I'll take some hands. So yeah, so the second row I just highlighted who can request a consolidation in the ICDR rules, and that is it's expressed to be either a party or the administrator on their own initiative. That is the change from the version of the rules that you may have been looking at, where it didn't include this initiative of the IRP administrator. That, as far as I could tell, was the only change. And the idea is that the arbitration administrator, so the ICDR administrator, may appoint a consolidation arbitrator who has the powers to consolidate two or more arbitrations into a single one. So, my reading of that would be because it says that the request of a party that would mean that it could be ICANN or it could be the claimant in the first arbitration, it could be the claimant in the second arbitration. If there are more than two arbitrations being considered for consolidation, it could be the third claimant or whatever, so any party. In the IRP supplementary procedures in the current rules and indeed in our small team proposal, I would say that we have the same concept of it being any party to an IRP who has the right to make an application for consolidation. But I would say it's more implied rather

than expressly stated. One of the suggestions that came out from my reviewing of this was that perhaps it does make sense for there to be a slight amendment to our rules to expressly state that.

Then moving on to the process for appointment of the consolidation arbitrator, which is in the third row. The process is set out in subparagraph two of that Article 9. It's essentially that the parties can agree on the process or rather than the parties are asked to agree a process, and if they fail to do so, then the administrator makes the appointment. So it sets out there in 9.2 and I think it's about a four stage process. If we could maybe scroll up a little bit, Brenda, so we could see the next couple of paragraphs. Yeah, I think that's it.

I won't read it out in full. You've all reviewed this. But I'll paraphrase. So the administrator notifies the parties in writing and invites them to agree on the procedure for appointing a consolidation arbitrator. They have 15 days of getting that notice to agree a procedure. And absent agreement, then the administrator from the ICDR goes ahead and appoints a consolidation arbitrator. Unless there's agreement from all the parties, the consolidation arbitrator shouldn't be someone who's already an arbitrator in one of the underlying arbitrations that are subject to this request for consolidation. And then paragraph D applies some of the other provisions of the rules and they deal specifically with matters of arbitrator impartiality, challenging of an arbitrator and replacement of arbitrator, and it just as for the avoidance of doubt says that those provisions apply to the appointment of the consolidation arbitrator as well as to the arbitrator for the actual consideration of the actual case.

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Then on our right-hand column, just to summarize what the situation is, we basically don't really have a process because we don't have the same concept. So in the current rules, the procedures officer gets appointed from the Standing Panel. And it does say that if there's no Standing Panel, then the ICDR process would be followed. But there's not really any flesh on how the procedures officer gets appointed, like how the selection is made.

In our small team proposal that we've brought to the group, because our proposal is that the decision gets made by the full three-person IRP panel, we don't have a process that we've proposed. And so if we do revert back to this concept of a single arbitrator, a consolidation arbitrator, then we'll need to, I think, develop a process for how that's handled with and without a Standing Panel. For example, we could look at a process that sort of aligns with the current rules. So someone's appointed from the Standing Panel unless there's no Standing Panel still in place or there are no eligible standing panelists left, which could be a possibility. In which case, we use the ICDR process. We could consider having some provisions about standing panelists being sort of taking it in turn to be appointed as the consolidation arbitrator as when one's required, obviously subject to any of those provisions relating to conflict. If any of the standing panelist is already appointed to the IRP panel of one of the affected IRPs then just as the ICDR rules have, we would probably think to include a provision that they wouldn't be appointed as the consolidation arbitrator unless everyone agrees and to retain those kinds of impartiality challenge and replacement provisions that ICDR refers to.

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I'm hoping the point at which there are some perspectives from the group. I am looking in the chat and just noting that a little exchange between David and Flip, with David just asking Flip to just check his understanding that Flip had suggested a single arbitrator makes more sense in deciding these consolidation questions. Flip's response being that the question is whether the single arbitrator would be inactive in the pending cases or the first to be appointed. Inactive ones may have a more neutral view.

I think my understanding from what you're saying, Flip, is that you're aligning with what I was suggesting, which is reflected also in the ICDR rules, the idea that if there's already one or more IRP panel in place, then we wouldn't use one of those panelists to be the consolidation arbitrator just to give that sort of neutrality in decision-making. Because they're outside of the two cases, they've got no skin in the game in terms of continuing with their arbitration role, and so on. I'm really hoping that perhaps Flip or David or others can come to the mic and expand if that would be helpful. Thanks, David.

DAVID MCAULEY:

Thank you, Susan. Hi, everybody. I guess I have questions. And I was part of the small team but I'm not sure I really—I have questions even about what we did in the small team. So I'm happy that Flip is here as a practitioner. So the questions I have, if we're looking for the three-member arbitration panel to make the decision, I take it that that panel that we're looking to make a decision. And let's assume for a minute that when the consolidation request is made that there are two IRPs ongoing, each of which has a panel in place. And so I'm assuming that

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the receiving panel is the one that we're talking about that would make the decision, that is the panel into which a request for consolidation is made. I just wanted to clarify if that's true. And secondly—and as I say, I'm not a practitioner—I'm guessing that once a decision on consolidation is made between two cases, there can't be a second request to the other panel to make the consolidation. So I see Flip's hand is up. Those are some of my questions. If I'm not clear, I'd be happy to discuss. But thanks, Susan, and thanks, Flip.

SUSAN PAYNE:

If you don't mind, Flip, I'll just quickly answer at least the first part, which was as we drafted it in the small team or as the proposal from the small team reflects currently, it's envisaging that the decision is made by the IRP panel of the older IRP, and that the consolidation would be into the older IRP. So in that sense, it is the receiving panel who's making the decision. But it is theoretically possible that the request for consolidation could have come from a party in that case rather than in the other case, I guess. But that was the suggestion.

Okay. So I've got a couple of other hands now. So Flip and then we'll come to Kristina. Flip?

FLIP PETILLION:

Thank you, Susan. Hello, everybody. Thanks, David for the great question, actually. But in practice, I've never seen it. It would indeed be the first panel who decides. We should make the difference between a panel of three or a panel of a single panelist. That makes a difference. But in practice, it is the first appointed panel that makes that decision. A

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second one will never be able to make that decision because its decision would in a certain way already be influenced by the earlier decision, which would in theory be negative. So, in practice is the first one that is appointed that makes a decision. I made the observation that it would be more neutral to have a non-appointed panelist making that decision. Maybe that could take some more time. People, parties wouldn't allow that or wouldn't be pleased by that, but that would be the impact. Of course, that panelist who would not be involved in the first or the second case would have to dig into the case, would have to get familiar with the claims, with the parties. So economically speaking, as it's done in practice now, it's actually better to we leave that with the first appointed panel. Frankly, if you need to make a decision, I can perfectly live with what is done in practice, and that is the first appointed panel takes that decision. Everything else may theoretically be interesting or had to neutrality, but in practice it makes things more complex.

SUSAN PAYNE:

Okay. Thanks, Flip. I'll ask you a quick question, but I'll come to Kristina and then perhaps if you have comments. I would love to drill down on what you mean by first appointed panel just in terms of does that mean that the IRP that is commenced first, or is it possible that an IRP was commenced second but got its panel selection sorted out earlier? But I'll come to Kristina first. Kristina?

KRISTINA ROSETTE:

Hi. I unfortunately had to miss our last meeting. I think it would be helpful for me to understand—and perhaps this is a question directed to

Flip—is the concern motivating the proposal of having a separate arbitrator consider the consolidation? Is the concern that having a single arbitrator who’s not already involved in either of the proceedings that that would create greater neutrality? Or is the concern that there may not yet be a Standing Panel appointed in the proceeding that if consolidated would become the dominant one? Or is it both? Because I think having a better understanding on what the problem we’re trying to solve, it will help me in trying to figure out where I am on this issue. Thanks.

FLIP PETILLION:

Hi. Let me step in here, if you allow me, Susan.

SUSAN PAYNE:

Apologies. Yes. Thank you, Flip. That would be great.

FLIP PETILLION:

Very, very good observations that you both made over the last five minutes. Ten minutes ago, my answer to Kristina would have been yes, neutrality. We are five minutes later and I have to nuance my answer a bit because it’s true. A panel could not be in place for an earlier started pace. So what would then be the best approach? If you would then have the second already installed panel decide on the question whether there should be consolidation with the first case started earlier but which does not have a panel yet, then I think neutrality would really be important. Because, of course, that panel may well say, “Well, we pull the first case to the second and we will handle both cases.” Maybe

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there may be good reasons to do that. But of course, it would give the impression that the decision is actually made in favor of the already installed panel in the second case. So I think we open the issue. I don't have a 100% good answer here, but at least we've seen the problem.

SUSAN PAYNE:

Okay. Thanks, Flip. I think I was going to add that as I understood it from our last call, it was indeed partially about neutrality, but also concerns that had been expressed about what happens if there's no IRP panel in place. And that could be not specifically because there's no Standing Panel but just whether it's from the Standing Panel or from the other process. If we have this situation with no IRP panel in place in our small team proposal we called the dominant IRP, the way we'd address this was to say that it may be that the request for consolidation had to be suspended and be pending until that first commenced IRP has put its panel in place and that could lead to quite significant delay. Now, I think there are there are things one could do about that, we could build in a process whereby if the later commenced IRP has their IRP panel in place, they could be the ones that make the decision instead if we felt that that was the way to deal with this. Or as I said in the discussion last time, sort of moved on to a suggestion from Sam that perhaps it would help us to look at this ICDR rule and how they handle these kinds of decisions by means of us using the single consolidation arbitrary to process and whether that would address more of whether that would address the concerns that had been raised and be a better solution.

I'm really kind of looking to the group to express strong views. I mean, if there are not strong views to moving back to this concept of a single

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arbitrator, I'm kind of minded to stick with the three-person panel and the process that we've already built in the small team. But having been a member of the small team, along with Kristina and David, one tends to feel that once spent time developing a workable process and obviously it's one that if people who weren't in that small team can recognize real flaws in, then I certainly don't want us to stick with something that we've built if that's flawed. All right. I'm not hearing strong views. David?

DAVID MCAULEY:

Thank you, Susan. And you're right. As I said just a few months ago, I was part of the small team, but it seems to me that we're uncovering some practical nuances. And when that happens, my view as a non-practitioner sort of naturally gravitates to listening to what the practitioners tell us. And that would include, in my thinking, ICDR rules because the ICDR sees these things probably routinely or at least on a recurring basis from time to time. My themes recently had been let's trust the Standing Panel to handle a lot of this, but when we come to rules that we want to write, let's make sure we have some practical input, and that includes from people like Flip and Mike when he's here, and also ICDR. Thank you.

SUSAN PAYNE:

Thanks, David. Flip?

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FLIP PETILLION:

Thank you, Susan. Thanks, David. If I may add to that, it's my experience that arbitration centers who administer cases in general. So ICDR there are others do not necessarily dig into the case sufficiently to make a reasoned decision on the consolidation. So insofar as we can keep the decision with the parties and the panel, I would favor that approach to a center like ICDR making that decision. That is my input from my experience.

I still need to read Kristina's comment, but if you would like to stick to the original approach of the small team, which is to keep it with the panel, I would be comfortable with that. And the observations we made with a view to nuancing the answer, interesting. But I would say let's see. And if ever that happens, practice will then show how it's resolved and we can learn from it, but it's probably going to be impossible to regulate this beforehand so we need to be realistic.

SUSAN PAYNE:

Okay. Thanks, Flip. Kristina? Sorry, Kristina, I think you're still on mute.

KRISTINA ROSETTE:

There we go. Apologies. I was going to say my mouse died right before the call so it's taking me a little longer to do everything without it. I understand Flip's point that the consolidation arbitrator may not be as fully familiar with the facts. But as a practical matter, the request for consolidation should come early enough in what would be the dominant proceeding if there's consolidation that you wouldn't necessarily have, I don't think, a significant variation between what the full three-person IRP panel and the consolidation arbitrator. And then it occurred to me

that I don't recall if we set a deadline by which a request for consolidation would have to be submitted. In other words, did we pick a time after which a request for consolidation simply could not be submitted because the dominant proceeding is too far along for it to even be entertained? And if we haven't done that, I think we probably need to do that. Thanks.

SUSAN PAYNE:

Thanks, Kristina. I can answer that second part first perhaps, that's slightly easier. We set a time subject to actual agreement of the full working group on what that time should be, but we suggested a time of within 21 or perhaps 28 days of the publication of the later IRP because obviously there were only two IRPs to consolidate once there is a later one. So there is some time limit but that doesn't address how long the first IRP, the older IRP, has been running specifically, so we didn't set a cut-off. But what we did do was that it was proposed to be a factor or part of the consideration that would be engaged in by when deciding whether to allow the application or not, which we can obviously come on to. So they look at various circumstances, including progress made in the respective IRPs, including whether the request might require previous decisions to be reopened or steps to be repeated or for duplication, and whether there was an IRP panel already appointed in more than one of the cases. And if so, whether there was overlap of panelists which might make things more easier, and so on. So, it wasn't an outright bar certainly as currently drafted. We didn't set a time after which no consolidation would be available but we certainly could consider doing that if we stuck with the current process or indeed whoever is making the decision.

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I would say, like you, Kristina, my assumption had been that these requests for consolidation would come quite early. And so there wouldn't be that much difference in the knowledge level of the consolidation arbitrator versus the IRP panel because we spent much more of our time sort of thinking about what happens if there's no panel at all already in place. We, I think, spent less of our time thinking about what if when IRP is already quite advanced. So yes, I am going to have a quick look at the chat and see.

Time after which the consolidation can be available I think David is mentioning. Kristina is talking about preferring a function of time because at a certain point, it wouldn't be fair to the first file complainant to allow consolidation. I think that's a point that is worth us certainly considering and which we, I think, didn't.

Again, I guess I'm seeing obviously were weighing this up both ways. There are sort of arguments both ways. There I think seems to be a good argument that if there are panelists who might understand the case best, then that would be preferable to them having the control of these decisions as against putting in place some third party single arbitrator who then has to get up to speed. But yeah, I don't know. I'm really struggling to follow what everyone's putting in the chat, I have to say. And I'm not quite sure where we go with this. I'm not getting a good sense from what I've seen of everyone coalescing around one option rather than the other. I guess I'm also feeling that since I think we went down this path as a result of comments that Flip perfectly rightly made as a practitioner. But actually, I think Flip is also somewhat favoring sticking with the three-person panel as we're discussing this. I think that actually it probably makes sense for us to consider to



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continue with what the small team had originally proposed, which is that we do have the three-person panel make this decision. I know some in the small team, it was a small team, but one of the things that we did discuss was the importance of these decisions and the impact they could have on outcomes and the impact on the fact that IRPs becoming precedential and so on. So I think that was part of our thinking in coming to the conclusion that we actually felt more comfortable suggesting that these decisions were made by a three-person panel.

So actually, sort of last call for disagreement, but I think I'm getting a sense that there's certainly support for keeping this decision with the three-person panel, and perhaps we should do that. I'm going to say last call for disagreement on that. And if possible, if you want to disagree, could you put your hand up? Because I am not managing to follow the chat at all. I apologize for that, but I can't keep track of it. All right. Okay. I think then let's stay with where we are. But we will bear in mind that we may need to make some tweaks to what the small team has proposed to address some of the kind of considerations that we've just been talking about, for example, an outside time limit or something like that. David?

DAVID MCAULEY:

Thank you, Susan. I just wanted to mention that I tend to agree with Kristina's last point. I, too, am somewhat neutral on this. I think I just sort of suffer from lack of being a practitioner in this area. I think we've talked about maintaining a log of suggestions we make to the Board. Maybe we should keep a log of suggestions to make the Standing Panel

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once it's in place to say with respect to the question of consolidation, we would invite them after they gathered some experience if it happens to take a look at the rule because we struggled with its formation. Anyway, it's just an idea. Thank you.

SUSAN PAYNE:

Okay. Thanks for that suggestion, David. I'm going to ask Bernard to add it to the list. I'm quite sure we have such a list already. It's probably not very long. But I think we have had other points that we felt were worth flagging to the Standing Panel when it's sort of in place and operational for further consideration over time. All right then. If you'll bear with me, because I think it does make sense for us, although it is slightly backtracking. I think it still makes sense for us to just look at the rest of the ICDR rules just to see whether there's anything else in the ICDR rules that we feel we need to be capturing in our IRP supplementary procedures.

So if we could scroll down to that Eligibility for Consolidation, Brenda, that would be super. I can't remember if that goes over into—no, that's right. It sticks on one page so that's quite good. I'm not suggesting we make a change here but I wanted to flag it because it seemed to me that there was some slight different approach in the ICDR rules in terms of which cases are eligible for consolidation. The ICDR Rule 9.1 talks about the situation, the circumstances being where the parties have expressly agreed to appoint a consolidation arbitrator to consider the case at least, they still then make a decision. So whether the parties have agreed, and so effectively the parties want to consolidate. If all of the claims and counterclaims in the arbitration are made under the

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same arbitration agreement—and I think in our case, in the case of IRPs, we don't strictly have an arbitration agreement except that you we follow the Bylaws and we follow the IRP rules. So by that account, all IRPs are following the same rules. So I'm not sure that there's much help from that one.

Then Alternative C is that the claims, counterclaims or set-offs in the arbitrations are made under more than one arbitration agreement. But the arbitrations involve the same or related parties. The disputes in the arbitration arise in connection with the same legal relationship and the arbitration agreements may be compatible. It seems to me that those are cumulative and not alternatives. So again, I don't see a huge amount of assistance from that provision but I just wanted to make sure that we looked at it. In contrast, we have in our IRP proceedings or in our small team proposal and indeed also in the current rules something that's a bit more specific to the nature of the IRP. And so our draft rule talks about consolidation of disputes. Obviously, we know dispute is a term defined under the Bylaws where it's concluded that there's a sufficient common nucleus of operative facts amongst multiple IRPs such that the joint resolution of the disputes would foster a more just and efficient resolution of disputes rather than addressing them individually. So I think we owe, and just to flag, we also do have a presumption or proposed presumption in Rule 7.2 that consolidation would be permitted if the parties all agree. So my feeling is that 9.1 isn't particularly helpful to us in terms of the eligibility for requesting consolidation and that what we have in 7.5 is more appropriate. I'm seeing agreement on that from David and Kristina. So I think unless I see

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any hands, I think we can accept that and move on. Then if we could keep going down, please, Brenda, to the next line.

Okay. Then in terms of factors to be taken into consideration when consolidating or when considering an application to consolidate. ICDR Rule 9.3 talks about applicable law, subparagraph A. B is whether one or more arbitrators have been appointed, and if so, whether the same or different people have been appointed. Paragraph C talks about the progress already made in the arbitrations. D talks about whether arbitrations raise common issues of law or fact. And E, whether the consolidation would serve the interests of justice and efficiency.

The current rules are silent. And so one of the things that the small team did when we were working on this Rule 7 was to review what's actually in the ICDR rule and to make some proposals as to what we feel were the appropriate considerations for the panelists to consider when deciding. So there's a certain amount of overlap. We haven't included the applicable law because I think our feeling was that that's not so relevant, given the nature of the IRP and the fact that all of these IRPs are proceeding under essentially the same legal basis.

We don't specifically call out in the factors having common issues of fact or fostering the more just an efficient resolution. Because in our view, they were actually requirements for consolidation, so they're not simply factors to be taken into consideration amongst other factors in making the decision. They're actually requirements; otherwise, you don't get consolidation. So that's why they're not included in the list of circumstances. So, in 7.10, our list of circumstances includes the views of the parties, the progress being made in the respective IRPs, and

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whether, as I mentioned, that might result in some reopening or repetition or duplication, and see whether an IRP panel has been appointed in one or more of the cases, and if so, whether there's any overlap in panelists, where the granting the request would create a conflict of interest for an already appointed panelist, and also how consolidation better furthers the purposes of the IRP generally as compared to the proceedings continuing independently.

Again, I think, as I said, there's a certain amount of overlap, we certainly drew on what it said in the ICDR Rule 9.3 when we were coming up with this. When we're going through our version of the rule, we want to talk about 7.10 and reflect on whether we're happy with paragraphs A to E. But in general terms, unless there's strong disagreement, I think it's preferable for us to have an IRP-specific rule here rather than falling back on ICDR Rule 9.3 here.

I'm noting some approval from David. Again, I'm not seeing hands. So I think in the interest of time, we can take this one on and move on to—I think we've got a few more paragraphs, but hopefully we can run through them really quickly. So if you could scroll down again, please, Brenda, that would be super.

So the stay of proceedings. This is one actually on which we're silent. In the ICDR Rule 9.4, it refers to the consolidation arbitrator having the power to order any of the arbitrations be stayed pending a decision on the consolidation. We don't have anything in the IRP in our proposal for IRP-specific rules covering this. I think, given the way the IRP rules are supplementary, it's arguable that anything that's in ICDR that hasn't been specifically contradicted does still apply. But I think this is one

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where we could consider whether we think that actually it's appropriate for us to include a specific reference to this if we think it's appropriate to suggest that we have something comparable so that if the decisions being made by the primary, the dominant IRP panel, but still is it appropriate to give them that power to order a stay if they think it's appropriate whilst they're making their decision. David?

DAVID MCAULEY:

Thank you, Susan. I think that this could be suitable language. But I also think if we do include it, we should add that the consolidation arbitrators should let all parties know that he or she is considering that and give them a chance. It could be an expedited chance, to give them a chance to say why or why not. That would be a good thing to do. Thank you.

SUSAN PAYNE:

Okay. So some opportunity for parties to express their own views on this is I think what you're suggesting, David?

DAVID MCAULEY:

Yes, that's correct. Thanks.

SUSAN PAYNE:

Sorry. I'm talking while on mute. Kristina?

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KRISTINA ROSETTE:

Hi. Although, overall, I've been supporting the stay of proceeding language, picking up on the point David just made, I do think that the only party that would have the ability to object to a stay would be the complainant. Or I guess, rather, both of the parties in the proceeding that would become the dominant proceeding. Because from my perspective, if a party is taking the steps and seeking to consolidate, they're generally later commenced proceeding with an earlier filed one, then that's the whole point of the consolidation, that's the whole point of that request, namely, to go through the process for the panel to make a determination at consolidation. I guess another way to put it is that if a party is going to seek consolidation, then "the price they pay for that," the tradeoff is that their own proceeding is stayed while that's being considered. Thanks.

SUSAN PAYNE:

Thanks, Kristina. I think what you may have said was two slightly different things. I think we tend to assume that the later filed IRP will be the one seeking to consolidate. And I feel like that's probably going to be generally the case. But I guess it's conceivable that the first filed IRP, the one that's more advanced in theory, could be the one that sees a later IRP being commenced and it's the first filed IRP that wants to consolidate. In that sense, because that was that first filed one, it would be their panel making the decision. But arguably, those who are moving for consolidation have to live with a stay as opposed to necessarily the second.

Thank you. Kristina, I think, is phrasing it much better than I was managing to do. Only the parties in the nonmoving proceedings should

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be able to object to a stay while consolidation has been considered. I think that is reflected also by David in his comments. I'm just making a note of that so that I don't lose sight of that. Thank you. All right. Then again, we can keep going down.

How is the consolidation effected? I think this is one—there's probably not a great deal of difference actually but just to cover off for completeness. In the ICDR Rules in 9.5, when they consolidated, the consolidation is into the arbitration that's commenced first. And it says unless all the parties agree differently or the consolidation arbitrator decides otherwise. In our current rules, I believe it's silence. In the small team proposal, we effectively proposed the same thing. We proposed what we called the dominant IRP—I know Kavouss took issue with that terminology—but the first filed IRP is the one where the panel are making the decision and that's the one into which the proceedings are consolidated if there's a decision to do so. I think they're very comparable.

Okay, impact on the IRP panel appointment. This is quite different and that's why I did want to flag this. We have in the ICDR Rules, in Rule 9.6, where there's a decision to consolidate, then it states that each party in those arbitrations shall be deemed to have waived its rights to appoint an arbitrator. The consolidation arbitrator may revoke the appointment at any arbitrators and may select one of the previously appointed tribunals to serve in the consolidated proceedings. The administrator shall, as necessary, complete the appointment of the tribunal in the consolidate proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceedings.



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We've obviously reverted back away from this consolidation arbitrator concept. But the small team proposal was that the IRP panel for the first commenced IRP would continue in place subject to anyone having to withdraw for a conflict of interest or similar. And that's reflected in Rule 7.12 as set out there in that document. I think it's one that, again, we should just pause and reflect on. I'm not suggesting that I think that the ICDR processes is the right one, the idea of removing all the panelists and going down a completely different route for now appointing a new arbitral panel for the consolidated case doesn't seem ideal to me. I think as a small team, certainly we felt the way forward was to continue with the IRP panel that's appointed for the first commenced case. But because there is quite a difference, I felt we should reflect on that before we just assume that we continue with Rule 7.12 as it's been drafted.

David is supporting the small team approach. I mean, to some extent, that's not that surprising since David, Kristina and I were in the small team. But let me just pause and see whether there's any concern about us moving away from the kind of process that ICDR rules envisage. And if I'm not seeing any, which I don't, let's move on.

Timing of the decision, ICDR does have a specific provision in 9.7 that holds the decision as to consolidation should be made pretty promptly within 15 days of the date of final submissions. So it doesn't give an overall timeline for how long these decisions take. Because that could very much depend on circumstances. But it's essentially giving that panelist who's hearing this application 15 days and then they must make their decision. And it does also indicate that they're not required to include a statement of reasons, which I think is interesting.

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Both the current rules and the small team proposal are silent on that. And this is another one where we might want to consider if we specifically include something to this effect. Both the timing and also whether we think we want to carry over this concept of not needing to give any kind of statement of reasons or whether we actually feel that it's appropriate that there should be a statement of reasons of at least some form for why the panel's reached the decision they have about consolidation. Kristina?

KRISTINA ROSETTE:

I would say that I do believe we need to include some timeline or deadline by which the decision on consolidation should be issued. I think 15 is probably a little short. Given that overall IRP decisions are intended to be precedential, I realized, of course, that the actual decision on consolidation would not be. But I think it would be useful in terms of providing guidance to other parties in the future if there was a requirement of a statement of reasons.

SUSAN PAYNE:

Thanks, Kristina. I must say I'm of similar mind, really. Any other views? Any disagreements to that? Plus one from David for a brief statement of reasons. I think that seems reasonable. I'm quite sure that in cases to date, then I'd be astonished if there weren't some reasons given from the decision-maker on this kind of application, to be honest.

Okay. I'm not sure if that is the end. That may be the end. Brenda, is there any more? Super. All right, so we're at the end of the quick review of the ICDR rules, which is great. I think we've got a little time. I do think

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we could perhaps just start back on the small team's proposal for Rule 7 and spend 5 to 10 minutes at least, just perhaps covering a couple of the questions that the small team had for the working group if that's okay. Brenda, could you pull up—thank you. Is that the version with—

KRISTINA ROSETTE:

Susan, it's Kristina. Apologies for interrupting. But before we move on to this, I don't know if this is the right time to address it, but I do think we need to consider putting a restriction, basically setting the outer time limit by which a motion for consolidation will be untimely.

SUSAN PAYNE:

That's a really good point. Thank you for reminding me. We did start talking about that, and this is a good time for us to address that. So thanks. That's a really good suggestion. Because it isn't captured in our Rule 7 at the moment, and so we might actually overlook it.

KRISTINA ROSETTE:

Susan, apologies again. I do have a suggestion. My recollection, although it's been a while, and perhaps it's in the—generally, it's my understanding that under these new rules, in theory, the IRP proceeding is supposed to go from start to finish in 180 days. Is that right?

SUSAN PAYNE:

It is indeed, yes. It maybe six months, but I think that's the same thing.

KRISTINA ROSETTE:

Okay. I would suggest then in that context that one limit we could adopt would be 60 days. Because at that point, in theory, the first file proceeding should be a third of the way done. I think the disruption to that proceeding at a certain point outweighs the benefit of consolidation.

SUSAN PAYNE:

That's a good suggestion. I guess we could also consider do we think that we allow the panel to also have some kind of discretion to allow a late consolidation application notwithstanding—generally speaking, 60 days would be viewed as the outer limit. Obviously, I'm noting Flip's comment about the 180 days and how that's not realistic. And I think we all agree on that, Flip. But that is what the Bylaws say. So we should at least attempt to meet the Bylaws' intended timeline by when we're setting our rules rather than setting rules which completely undermine that, I guess is the best way to put it that I can think of. David?

DAVID MCAULEY:

Thank you, Susan. I raised my hand because you made a point about giving the panel some discretion. I liked Kristina's idea of 60 days, but I think there needs to be a clause that says in exceptional circumstances, the panel can allow more time. I guess the 60 days would be measured from the date that there is a second—I don't know what you call it—perfecting of an IRP or a third. But anyway, 60 days from the later to be consolidated. Thank you.

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SUSAN PAYNE:

Thanks, David. Actually, just to touch on that, I think we're thinking here about timing from the first, from the earlier one. Because I think we already had had a proposed time limit from the later IRP. In fact, you can see it at the bottom of this page at Rule 7, subparagraph 6. We already were envisaging a much shorter time limit of maybe 21 or 28 days from the second IRP. But what we're also seeking to address is that point that we were talking about a little earlier that the first IRP may have been wanting for some significant period of time and would it really be appropriate. So there isn't to be an application considered if they were 180 days or whatever, if they've been running for months. Then the later IRP starts and they immediately start trying to join into that case. So I think that's why we were talking about from the first one. I'm not sure if that changes your thinking at all.

I'm also just noting from what Becky says about wanting to have a high bar to any kind of late consolidation. Kristina is reiterating that she was having the clock run from the first filed. Flip, I've seen your comment in the chat. I mean, I really do appreciate that. I mean, 180 days for an IRP, certainly I don't think we're seeing any IRPs currently that are being wrapped up in that kind of time period. But again, we have the Bylaws and that's what they say, and we should at least attempt to create rules that would be crafted in such a way as to help meet that deadline rather than to positively prevent it from ever being possible, if you know what I mean. I think we all appreciate that it would be a wonderful situation if they actually were being decided in that shorter period of time. David?

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DAVID MCAULEY:

Thank you, Susan. You asked a question and yes, I had confused myself. I agree with you on running from the first one and what Kristina put in chat. Thank you.

SUSAN PAYNE:

Okay. That sounds good. All right. So we have a high bar after 60 days, an expectation that in ordinary course of events, there's a cutoff of 60 days from the publication of the first IRP for these requests for consolidation. Perhaps before we wrap up then, it's worth us touching on publication and the reference to publication. In the current IRP rules, as I think mentioned in the extensive comments on this document that you all have seen, timings run from initiation rather than publication. We did talk about this in the small group. We did feel that there is a real challenge. If timings for when you can do something run from the initiation of a case that you're not involved in, then there are real issues with you in terms of knowing that your clock has started to run. So we felt that we needed to have this happen from publication instead. We also felt that there didn't need to be something that we built in at the end to make sure that it's clear that there is a requirement for publication. I think it's at a minimum implied from the Bylaws that all of these IRP proceedings are published on the ICANN website. But, at least that way, if it took two months for the IRP to be published, well, the party is not being disenfranchised because they didn't even know the IRP existed. In actual fact, these things are published, obviously, a lot quicker than that. And we do know that they get published really pretty promptly.

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Now, Flip did make some comments about the impact of that is that a party has to be keeping an eye on what gets published in order to see when something happens and that they want to get notified by ICANN. I can see some challenges with that. In terms of how does ICANN know who they need to notify and who has an interest and who doesn't. I think we're 23 minutes past, so happy to have any initial thoughts on that. But otherwise, that might be want to leave with people to think about. Certainly, in the case of consolidation, maybe it's not so difficult because there are only a certain number of IRPs in existence. We could make a recommendation that IRP notifies all other parties in IRPs that are existing. But I think once you get on to intervention, that does come unstuck because I don't see how ICANN could possibly know who might want to intervene in a case.

I'm rambling a little. I am not seeing any hands on this. David's saying he can see the point on notification. Maybe there could be some annual reminders that people should keep an eye on the IRP page or something like that. I mean, in the case of consolidation, I think if you're already in an IRP yourself or you've just launched one, I'm quite sure you're looking at that page pretty regularly to see what everyone else is doing and how everyone else's cases are proceeding. So I do think in practice, you're probably going to see a new publication of the case pretty promptly.

I think at this point, perhaps it's time to leave it here rather than us move on with the rule at this point, given that we're now 25 past the hour. Reverting back to our agenda, just pause and see if anyone has any other business they want to raise. And if not, noting again, with thanks for your flexibility, those who are able to do so, the next call is

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this time next week, basically. Given the real progress we've made today, I would really hope that we could knock this Rule 7 on the head and get through the outstanding issues if we come back to it with only a short delay rather than a two-week pause. Malcolm?

MALCOLM HUTTY: Just to say, Susan, that I'm afraid I won't be able to make this time next week. My apologies.

SUSAN PAYNE: Okay. Thanks, Malcolm. If you don't mind then I'll ask Bernard if he could put out an e-mail as well.

MALCOLM HUTTY: I'm sorry. I meant to be clear. I beg your pardon to interrupt. I wasn't objecting to the time at all. I'm in a bit of a problem with maintaining a quorum.

SUSAN PAYNE: Exactly. It is actually causing me to think that maybe it's worth Bernard putting out a reminder and maybe I could ask you all, if you didn't already indicate on this call, a few of you did, if you could indicate one way or the other. Because if it's clear, we won't have quorum. I don't want to waste people's time but I am hoping we will have quorum. Would that be okay, Bernard, if you could send out a reminder and ask people to let you know one way or the other?



BERNARD TURCOTTE: Will do.

SUSAN PAYNE: Thank you. All right. Then I am going to call it then for now. Thanks very much for this. Good call. I think we will make some good progress, I hope next week. I hope we can get the quorum. Kristina, if we don't have quorum, I'd like to know it in advance too. Because, frankly, this is my evening and I'd really rather enjoy it. But I also want to get through the work.

Thanks, everyone. And thanks to Becky for joining yet another call when you're on holiday. It's very appreciated. All right. We can stop the recording and wrap up.

**[END OF TRANSCRIPTION]**