

IRP-IOT

Rule 3 Composition of the IRP Panel – Mark Up 12 November 2023 against current Interim Rules

1. The IRP PANEL will comprise three panelists, and the IRP PANEL will not be considered to have been convened until all three panelists have been appointed.
2. The three panelists for the IRP PANEL will be selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the relevant IRP PANEL must be convened, or is in place but does not have capacity ~~due to other IRP commitments or the requisite diversity of skill and experience needed for the particular IRP proceeding~~. 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.
 - a. If one party has not selected a panelist within 30 days of the initiation of the IRP then, at the request of the other party, the STANDING PANEL shall make the selection from within its ranks. If the STANDING PANEL has not made such appointment within 5 days of the request the IRP Provider's Administrator (**Administrator**) shall make the selection from the STANDING PANEL within [14/21] days.¹
 - b. If the two party-selected panelists cannot agree on the third panelist from the STANDING PANEL, within 21 days of the appointment of the later of the two such panelists, then, at the request of either party, the STANDING PANEL shall make the selection from within its ranks. If the STANDING PANEL has not made such appointment within 5 days of the request, the ~~IRP Provider's~~ Administrator shall make the selection from the STANDING PANEL within [14/21] days.²
3. If the STANDING PANEL, in its discretion, does not have capacity to seat any or all of the panelists necessary to comprise an IRP PANEL for a DISPUTE, the STANDING PANEL must notify the Claimant and ICANN in writing as soon as possible, and in any event within 14 days.³ In the event that a STANDING PANEL is not in place when the relevant IRP PANEL must

¹ IOT considers that once the Standing Panel is in place then it should be responsible for resolving panelist appointment issues, but that the IRP Provider's (ICDR) Administrator should act as a fallback where the Standing Panel is unable to reach agreement for some reason.

² See footnote 1

³ Bylaws 4.3(k)(ii) refers to the possibility of not using the Standing Panel because it "does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding". The IOT understands the intent to be that the Standing Panel will be used, except in exceptional circumstances. The proposed rule therefore leaves it to the Standing Panel to raise issues of lack of capacity (of any form). The IOT concluded that, so far as panelist "diversity of skill and experience" is concerned this is likely to be an exceptional situation. There is not a general expectation in judicial and arbitral proceedings for the adjudicator(s) themselves to have detailed subject-matter expertise, and that Bylaws 4.3 (k)(iv) specifically allows for the IRP Panel to have access to independent skilled technical experts where required. Therefore the consensus of the IOT, is not to propose a specific process for a Party to make representations about lack of capacity, but assumes that a Party will nevertheless raise this if this is a genuine concern. Feedback is welcome on whether a specific challenge process is necessary.

be convened, or is in place but does not have capacity , IRP panelists shall be selected on the following basis:

- a. ~~If the STANDING PANEL lacks capacity for seating one, two or all three members of the IRP PANEL the STANDING PANEL Chair may propose a process for completing the IRP PANEL selection. Absent this, in situations where selection of all three members of the IRP PANEL is necessary, paragraphs b-e shall apply. If the STANDING PANEL lacks capacity for seating one or two members of the IRP PANEL, the parties shall try to agree a process for the selection of suitably qualified IRP panelists utilising, as far as possible, the available STANDING PANEL members. If the parties are unable to reach agreement, or where selection of all three members of an IRP PANEL is necessary, paragraphs b-e shall apply.~~
 - b. 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.
 - c. If one party has not selected a panelist within 30 days of the commencement of the IRP then, at the request of the other party, the ~~IRP Provider's~~ Administrator shall make the selection
 - d. If the two party-selected panelists cannot agree on the third panelist, within 21 days, the ~~IRP Provider's~~ Administrator shall make the selection of the third panelist using the list method as described in (e) below.
 - e. The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as panelist(s). The parties are encouraged to agree to a panelist from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon a panelist, each party shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite a panelist to serve. If the parties fail to agree on any of the persons listed, or if acceptable panelists are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding panelist in consultation with the tribunal.
4. In the event that an IRP panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Supplementary Procedures.
 5. Conflict of Interest

- a. A STANDING PANEL member's appointment to an IRP PANEL will not take effect unless and until the STANDING PANEL member signs, within 7 days⁴ of appointment, a Notice of STANDING PANEL Appointment confirming their compliance with the Conflict of Interest requirements at Bylaws Article 4.3(q)(i) and making any disclosures of material relationships so required. If the STANDING PANEL member is unable or unwilling to do so within the timeframe, an alternative IRP panelist will be selected, following the procedures set out in this Rule 3.
- b. Where an IRP panelist is to be appointed from outside of the STANDING PANEL, their appointment will not take effect unless and until the proposed panelist signs, within 7 days of appointment, a Notice of Panelist Appointment confirming their compliance with the same Conflict of Interest requirements as apply to a STANDING PANEL, as set out at Bylaws Article 4.3(q)(i) and making any disclosures of material relationships so required. If the proposed panelist is unable or unwilling to do so within the timeframe, an alternative IRP panelist will be selected, following the procedures set out in this Rule 3.
- c. Prior to accepting any appointment, potential IRP panelists are also expected to consider whether other circumstances of the relevant IRP are liable to influence their decision such that they would be considered to have a conflict of interest. An example of such a circumstance would be where considerations of nationality are material to the matters in dispute.
- d. Where, at any time, an IRP panelist develops a conflict of interest, they must recuse themselves.

⁴ IOT welcomes input on this timing. IOT proposes a time limit of 7 days for panelists to confirm they have no COI, in order to keep things moving and bearing in mind that there is a Bylaws expectation that IRPs should be concluded in 6 months. However depending on the make-up of the Standing Panel some IOT members expressed concern that this may be insufficient to do conflict checks across a large law firm, for example. On the other hand, once an IRP is commenced Standing Panel members could begin their conflict checks immediately, and there will generally be advance notice on a potential IRP since Claimants are encouraged to enter into CEP first.