

Reviewing the CEP WS2 subgroup

Meeting 1
October 26, 2016

AGENDA

- Introduction, Attendance, Regrets, SOI's
- CEP: The Basics
- Discuss: Areas and Topics of Interest
- Division of Tasks / Work Plan
- AOB

Purpose of CEP

- Pre-IRP filing
- Narrow dispute
- Resolve dispute

Changes to the CEP: Old Bylaws vs. New Bylaws

Incentive for Participation: Old

- Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees. (Old Bylaws, Article IV §3-16)

Incentive for Participation: New

- 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. (New Bylaws, §4.3(e)(ii))

Incentive Changes

- Addition of EC IRP's
- Deletion of conciliation incentive

Old Bylaws

- Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws (Bylaws, Article IV, §3-14)

Old Bylaws

- All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
(Bylaws, Article IV, §3-17)

New Bylaws

- Except for Claims brought by the EC in accordance with this Section 4.3 and Section 4.2 of Annex D, prior to the filing of a Claim, the parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (“CEP”) for the purpose of attempting to resolve and/or narrow the Dispute. CEPs shall be conducted pursuant to the CEP Rules to be developed with community involvement, adopted by the Board, and as amended from time to time. (New Bylaws, §4.3(e) (i))

New Bylaws

- Either party may terminate the CEP efforts if that party: (A) concludes in good faith that further efforts are unlikely to produce agreement; or (B) requests the inclusion of an independent dispute resolution facilitator (“IRP Mediator”) after at least one CEP meeting. (New Bylaws, §4.3(e)(iii))

Old vs. New Bylaws

- Purpose generally is the same (narrow / resolve disputes)
- Creation of CEP Rules (replace Process guidelines)
- Deletion of 1) confidentiality and 2) discovery / evidence rules / exemptions

Current CEP Processes

- Form for requesting a CEP
- Deadlines for filing (15 days) and Responses (initial - 3 business days; appointment of ICANN rep - 3 business days; initial meeting - 2 business days following ICANN appointment; further meeting, if needed - 7 business days)
- Rules for disposition of proceedings; further deadlined
- (<https://www.icann.org/en/news/irp/cep-11apr13-en.pdf>)

Old Bylaws: Conciliation (IRP)

- Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review. (Bylaws, Article IV, §3-15)

New Bylaws: Conciliation (IRP)

- After a Claim is referred to an IRP Panel, the parties are urged to participate in conciliation discussions for the purpose of attempting to narrow the issues that are to be addressed by the IRP Panel. (New Bylaws, §4.3 (h))

Conciliation: New vs. Old

- Conciliation specifics to be developed in IRP Implementation Oversight Team
- Relationship with CEP

Discuss

- Overlap with Conciliation
- Bylaws
- Procedures

Overlap with Conciliation

- ?
- Need to liaise with IRP Implementation Oversight Team
- Both CEP and Conciliation are intended to frame and narrow issues of Dispute
- Mediation clause in CEP related to Conciliation?

Bylaws

- Is it appropriate to exempt EC from CEP?
- Are the Bylaws sufficient for our purposes?
- Do we agree that confidentiality / discovery / evidence processes and exemptions should be deleted from Bylaws and placed in CEP Rules?
- Role of mediator in CEP (automatic discharge)?

Procedures /CEP Rules

- Principle task of this group
- Among Policy Issues:
- Confidentiality / Transparency paradigm
- Disclosure / Evidence Exemption
- Time scale
- Third party rights / involvement / notification
- Mediation rights / rules?
- Procedure / process issues
- Other?

Work Plan

- Relationship with Conciliation (outreach to IRP group)
- Bylaws
- Procedures / CEP Rules

AOB

Thank you!