

Frequently Asked Question Regarding Approach for Community Enforceability

Q1: What is the Multistakeholder Enforcement Mechanism?

A1: The proposed Multistakeholder Enforcement Mechanism (MEM) is a mechanism that will empower the community by allowing ICANN's Supporting Organizations and Advisory Committees to challenge a decision or action of the Board that they believe violates the Fundamental Bylaws and, where found to be the prevailing party, to obtain a binding arbitration decision that is enforceable in California courts.

Q2: Has binding arbitration been tested within ICANN?

A2: Yes. ICANN and its contracted parties have used binding arbitration to resolve disputes. ICANN's standard contracts with registrars and registries call for resolution of any disputes relating to registrar or registry agreements to be resolved through a binding arbitration process.

Q3: What type of conduct can be challenged through the MEM?

A3: The MEM may be used to challenge a Board decision or action that is argued to violate ICANN's Fundamental Bylaws. Consideration should be given to the point raised in the Sidley/Adler 20 April 2015 memorandum, which provides that any enforceable arbitration mechanism must "be limited to those areas that are outside of the core powers reserved to the board or members ... so that [the] Board continues to exercise its fiduciary responsibilities to manage ICANN."

Q4: Can the MEM be used to challenge policy recommendations from Supporting Organizations or advice from Advisory Committees?

A4: The MEM can only be used to challenge Board actions.

Q5: Does the MEM replace the existing IRP procedures as provided in Article IV of the Bylaws?

A5: No. The MEM is not intended to replace existing IRP procedures as provided in Article IV of the ICANN Bylaws. The MEM is separate from and in addition to the IRP procedures; the MEM will allow the community to obtain enforceable arbitration decisions for violations of ICANN's Fundamental Bylaws. The IRP will remain in place for individual party claims that ICANN violated its Bylaws or Articles of Incorporation by taking a particular action (or inaction).

Q6: Does the MEM require any change to ICANN existing corporate structure?

A6: No. ICANN would remain a public benefit non-profit corporation, organized under California and U.S. Federal laws.

Q7: Who has the ability to initiate a MEM proceeding?

A7: Any single SO or AC, by consensus, may initiate a petition process to commence MEM arbitration, followed by notice to the other SOs and ACs. To initiate a MEM proceeding, the agreed number of SOs and/or ACs must each, by consensus, support the initiation of MEM arbitration. The SOs and ACs that wish to pursue MEM arbitration are collectively known as the MEM Issue Group.

Q8: Who reviews and decides complaints brought through this MEM process?

A8: A Standing Panel will be tasked with reviewing and deciding complaints brought through the MEM. Members of the Standing Panel will possess significant, advanced legal expertise, particularly in the fields of international law, corporate governance, and judicial systems/dispute resolution/arbitration. The Standing Panel will have diversity requirements and must be independent from ICANN, its SOs and ACs and without any conflict of interest.

Q9: What is the standard of review in a MEM arbitration?

A9: The standard of review shall be an objective examination as to whether the complained-of Board decision violates ICANN Fundamental Bylaws.

Q10: What are the possible outcomes of a MEM arbitration?

A10: A MEM arbitration will result in a decision declaring that the challenged Board decision or action either complied, or did not comply, with ICANN's Fundamental Bylaws. The arbitration decision shall be binding on ICANN. If ICANN is found to have violated a Fundamental Bylaw, the Board must remedy that violation. The specific nature of the remedial action is within the Board's discretion.

Q11: Can the arbitration decision be appealed?

A11: In certain circumstances. Either the MEM Issue Group or ICANN may appeal any decision to the full Standing Panel: (i) based on clear error of judgment or the application of an incorrect legal standard; (ii) where a full Standing Panel consideration is necessary to secure or maintain uniformity of the MEM arbitral decisions; (iii) the proceeding involves a question of exceptional importance; or (iv) to ensure that the arbitral decision does not infringe on the Board's statutory obligations or fiduciary duties.

Q12: The MEM Issue Group prevailed in the MEM arbitration but the Board has not remedied the violation. Now what?

A12: The MEM Issue Group may enforce the arbitration decision in the California courts.

Q13: Who has the ability to enforce a MEM arbitration decision?

A13: The MEM Issue Group.

Q14: Does the MEM Issue Group possess the right to sue ICANN in order to enforce the MEM arbitration decision in court? If so, is there a risk that the MEM Issue Group can be sued?

A14: The capacity to sue comes along with the capacity to be sued, although it is highly unlikely that the MEM Issue Group would engage in any conduct that would be subject to litigation. In any event, ICANN will indemnify the MEM Issue Group, and will bear the fees and expenses that might be incurred in any lawsuit arising out of the enforcement of a MEM final arbitration decision.

Q15: Who will pay for the MEM arbitrations?

A15: ICANN.

Q16: How long will a MEM arbitration take?

A16: MEM Arbitration Panels should strive to issue decisions within six months.

Q17: How will the MEM be implemented?

A17: MEM provisions should be adopted as Fundamental Bylaws.

Q18: Will the MEM be subject to periodic community review?

A18: Yes.

Q19: How is the MEM less subject to capture than the Sole Member Model?

A19: The Sole Member Model requires a change to ICANN's governance structure, without a set composition of participants within the Sole Member and no requirement that the participation be reflective of the multistakeholder model. The Sole Member Model would bring with it statutory rights that could impact ICANN and its operations, without any fiduciary duty to ICANN. The MEM is a mechanism that would work within ICANN's governance structure, and would be initiated through multistakeholder input and not on a more limited voting design. The use of the MEM does not introduce any significant additions to the potential for capture within the ICANN governance structure.

Q20: Is there injunctive relief in the MEM?

A20: Yes. An injunction is an emergency order compelling someone to do something or not to do something while a dispute is being dealt with. In certain circumstances, the MEM Issue Group could request an injunction from the MEM panel before the conclusion of a MEM proceeding in order to either stop the ICANN Board from going ahead with a course of conduct or compelling the Board to continue a course of conduct until the MEM arbitration has concluded. That injunction could be made permanent if the MEM panel ultimately sides with the community. If the MEM arbitration is decided in favor of ICANN, the injunction will be dissolved or dismissed.