Rule 7 of the IRP Supplementary Procedures provide for intervention and amicus participation whereas the ICDR rules do not. The ICDR rules provide for joinder whereas the IRP Supplementary Procedures do not. ICDR Articles 7 and 8 state:

Article 7: Joinder

1. A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The party wishing to join the additional party shall, at that same time, submit the Notice of Arbitration to the additional party and all other parties. The date on which such Notice of Arbitration is received by the Administrator shall be deemed to be the date of the commencement of arbitration against the additional party. Any joinder shall be subject to the provisions of Articles 12 and 19.

2. The request for joinder shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

3. The additional party shall submit an Answer in accordance with the provisions of Article 3.

4. The additional party may make claims, counterclaims, or assert setoffs against any other party in accordance with the provisions of Article 3.

Article 8: Consolidation

1. At the request of a party, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:

a. the parties have expressly agreed to consolidation; or

b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or

c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same parties; the disputes in the arbitrations arise in connection with the same legal relationship; and the consolidation arbitrator finds the arbitration agreements to be compatible.

2. A consolidation arbitrator shall be appointed as follows:

a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.

b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.

c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.

d. The provisions of Articles 13-15 of these Rules shall apply to the appointment of the consolidation arbitrator.

3. In deciding whether to consolidate, the consolidation arbitrator shall consult the parties and may consult the arbitral tribunal(s) and may take into account all relevant circumstances, including:

a. applicable law;

b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;

c. the progress already made in the arbitrations;

d. whether the arbitrations raise common issues of law and/or facts; and

e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency.

4. The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.

5. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator finds otherwise.

6. Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceeding.

7. The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

(<https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf>.)

**Joinder – Notes for Consideration**

The IRP Supplementary Procedures do not contain any rules akin to ICDR Article 7 regarding one of the two parties to the IRP (ICANN or the Claimant) moving to include another party to participate in the IRP. Under the IRP, there could not be another party joined as a respondent, as IRPs are limited under the ICANN Bylaws to challenging ICANN’s conduct. Similarly, it may not be feasible for a Claimant or ICANN to move to include another party that has not yet filed an IRP under the premise that that other person or entity should join in a challenge that ICANN engaged in a violation of its Bylaws/Articles and was harmed.

Early drafts of Updated Supplementary Procedures Rule 7 addressed “Consolidation, Intervention, *and Joinder*” (emphasis added), but the IOT deleted the references to joinder from the 25 September 2018 draft of the procedures. *See* REDLINE 24 September to 8 May 2018 Versions Interim Supplementary Procedures, at Pg. 8.[[1]](#footnote-1) Indeed, the IOT appears to have agreed that the IRP Supplementary Rules should not allow joinder generally; as a result, the IOT drafted and agreed on processes for “joining as amicus and joining as an intervening party” to replace the joinder provisions in the ICDR’s Rules. *See*, *e.g.*, Transcript, 17 August 2017 IOT Meeting, at Pg. 4 (“there's obviously a significant distinction between joining as amicus and joining as an intervening party. And it needs to be clear in that we're essentially that there are two different statuses.”); Transcript, 9 October 2018 IOT Meeting, at Pg. 15 (referring to intervention provision as “joinder intervention, whatever we are going to call it”).

**Consolidation – Notes for Consideration**

The following are differences between the ICDR Articles 7 and 8 and IRP Supplementary Procedures Rule 7:

* ICDR sets prerequisites for consideration of consolidation request (Art. 8 § 1.a-c); IRP Supplementary Procedures Rule 7 does not.
* Under the ICDR, the Consolidation Arbitrator has the power to stay the pending arbitrations subject to potential consolidation until the Consolidation Arbitrator decides whether or not to consolidate. (ICDR Art. 8, § 4)
* ICDR offers a much more detailed process for appointing the consolidation arbitrator, adjudicating the consolidation request, and for the mechanics of the consolidation. (ICDR Art. 8, §§ 2, 5-6). For example:
  + Consolidated arbitrations are consolidated into the arbitration commenced first unless the parties agree otherwise (ICDR Art. 8, § 5);
  + If the arbitrations had already selected panelists before consolidation, the parties waive their rights to those panelists. Instead, the consolidation arbitrator may revoke the appointment of any of arbitrators and select one of the previously-appointed tribunals to handle the consolidated proceeding.
  + By contrast, it’s not clear who is responsible for selecting the Procedures Officer from the Standing Panel once the Standing Panel is in place. (See IRP Supplementary Procedures Rule 7.)
* ICDR factors for determination include, but are broader than, the IRP Supplementary Rules standard (overlapping text is **blue)**:

|  |  |
| --- | --- |
| IRP Supplementary Procedures, Rule 7 | ICDR Article 8, § 3: |
| Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually | In deciding whether to consolidate, the consolidation arbitrator shall consult the parties and may consult the arbitral tribunal(s) and may take into account all relevant circumstances, including:  a. applicable law;  b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;  c. the progress already made in the arbitrations;  d. whether the arbitrations raise common issues of law and/or facts; and  e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency. |

**Intervention and Amicus – Notes for Consideration**

The ICDR rules do not provide for intervention or *amicus* participation; IRP Supplementary Procedures do. ICANN’s IRP is a unique version of arbitration, which is normally a closed or confidential process amongst parties that agreed to be bound to arbitration. Therefore, it is not surprising that the ICDR did not make allowances for third party attempts to intervene into an arbitration or allow for amicus status on issues posed in a private dispute resolution forum.

**Takeaways for the IOT**

As the IOT considers updating the IRP Supplementary Procedures Rule 7, the IOT may wish to consider the scope of Rule 7 and purposes served by the IRP. As a general rule, the IRP Supplementary Procedures supplement the ICDR’s international arbitration rules. In the event that there is any inconsistency between the Supplementary Procedures and the ICDR rules, the Supplementary Procedures will govern. The ICDR rules are designed to provide set of rules that govern arbitrations between parties that have agreed to privately resolve their disputes in this forum, therefore as noted above, may not be the perfect fit for the more public nature of IRPs. If the intent is for the IRP to provide for a full and fair hearing adjudication for all parties involved, the IOT may want to consider incorporating additional aspects in the Supplementary Procedures that are not addressed by ICDR Articles 7 and 8 that would effectuate this intent, while keeping in mind the purpose of the IRP is for challenges of alleged violations of the Bylaws or Articles of Incorporation by the ICANN Board or Org.

1. Available at <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home?preview=/96211302/96212610/REDLINE%2025%20September%20to%208%20May%202018%20Versions%20Interim%20Supplementary%20Procedures%20for%20Internet%20Corporation%20for%20Assigned%20Names%20and%20Numbers.pdf>. [↑](#footnote-ref-1)