
FW: IRP-IOT Consolidation Group 22 Dec 2020

1 message

Susan Payne <susan.payne@comlaude.com>
To: Bernard Turcotte <turcotte.bernard@gmail.com>

Fri, Nov 5, 2021 at 10:30 AM

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From: Susan Payne
Sent: 22 December 2020 18:14
To: Elizabeth Le <elizabeth.le@icann.org>; Flip Petillion <fpetillion@petillion.law>; Lee, Helen <hjlee@verisign.com>; Samantha Eisner <Samantha.Eisner@icann.org>; saustin@vlplawgroup.com; MSSI Secretariat <mssi-secretariat@icann.org>; Bernard Turcotte <turcotte.bernard@gmail.com>
Cc: Kristina Rosette <krosette@gmail.com>
Subject: IRP-IOT Consolidation Group 22 Dec 2020

Hi all

For those able to join the call later today, I am updating the summary from 8 December of the points we've reached agreement on and recirculating:

Liz's questions:

1. To whom may a request may be made in the absence both of an IRP Panel and the Standing Panel? The Interim Supplementary Procedures are currently silent as to where such a request must be made. The underlying ICDR Rules require the request to be made to the ICDR as Administrator.^[3] **We believe we should follow the ICDR rules, i.e. the request should be made to ICDR as Administrator in absence of an IRP Panel or Standing Panel. We did not specifically discuss what the process should be if there is a Standing Panel, but my assumption would be that, since the ICDR administers the process, the request would be submitted to ICDR who would then appoint the Emergency Panelist from the within the Standing Panel.**

For further consideration, what should be the process if we are following the ICDR Rules? For an Emergency Panelist (for emergency, ie injunctive, relief) there is an expedited process to appoint; for a Consolidation Arbitrator, the process takes longer and the parties are afforded an opportunity to input into the process. Do

we apply the Emergency Arbitrator process for applications for emergency relief, consolidation, translation services, or make a distinction between urgent applications and non-urgent ones? See extracts from the ICDR Rules attached. I think the latter approach has merit, but makes rules a little more complex.

2. Once a Standing Panel is appointed, how should the Emergency Panelist be selected from the Standing Panel? The Interim Supplementary Procedures state that “an Emergency Panelist *shall be selected* from the Standing Panel . . .” but do not further elaborate.^[4] **The Standing Panelists should take it in turns to be appointed as the Emergency Panelist (unless the next in line has a conflict of interest). Being the Emergency Panelist on one IRP would not preclude a Standing Panelist from serving as the IRP Panelist in a different IRP at the same time.**

3. Are Emergency Panelists empowered to modify or vacate their orders? The Interim Supplementary Procedures are silent on this issue. The underlying ICDR Rules grant Emergency Arbitrators this authority.^[5] **We believe we should follow the ICDR rules, i.e. the Emergency Panelist should be able to modify and vacate orders. Although the ICDR Rules do not specifically require a rationale, there is a general expectation that reasons be given – we think it would be beneficial to make this a clearer requirement.**

4. When is the Emergency Panelist’s authority terminated? The Interim Supplementary Procedures are silent on this issue. The underlying ICDR Rules terminate the Emergency Arbitrator’s authority once the arbitral tribunal has been constituted. Thereafter, the tribunal assumes responsibility for modifying or vacating interim relief as necessary.^[6] **The EP should stay in place until the IRP Panel is fully constituted (ie all 3 panelists are in place).**

The full panel should be able to reconsider, modify, or vacate a decision regarding emergency relief from the EP, as per the ICDR rules.

For further consideration: Should the same be the case for decisions relating to consolidation/interventions/amicus, or should they only be open to reconsideration where fraudulent?

5. May the Emergency Panelist may serve on the IRP Panel? The ICDR Rules prohibit this unless all parties consent.^[7] The Interim Supplementary Procedures are silent on this issue with respect to Emergency Panelists. **Only if all parties agree. We considered that there might be some concern (or perceived concern) that an EP might be influenced by financial considerations if able to serve on the full panel (i.e. there might be an incentive to decide in a particular way in hopes of being retained for the full panel), however, after discussion, we also felt that the ICDR process, whereby they can only serve if both/all parties agree, provided the necessary safeguard.**

I’m also attaching the Rule 7 mark-up that I circulated last time, and repeating below the summary of issues that I’d identified as needing to be addressed:

6. Timing – what should be the time limits for applications for Consolidation, Intervention and participation as Amicus. Is the same time limit appropriate? I think an application to Intervene, or as Amicus, may realistically need more time to prepare than an application to consolidate two already existing actions. There is a discretion to allow applications out of time, should there be any cut off to this?

View of the group was that we should have the same time limit, for simplicity and to try to avoid manipulation on the timing

15 days probably too short (wouldn’t really allow sufficient time to reach out to the other party, for example). We were undecided between 21 and 28 calendar days – we should put both options to the full WG

7. When should the timing run from? I think it has to be publication, but open to suggestions

Timing should run from the publication on the ICANN website of the IRP with which the requester wishes to join

8. Setting rules for appointment of the panel, including whether an existing panel stays in place and if not, what would be the circumstances where the panel is replaced. Just conflict of interest, or are there other circumstances? Need to particularly bear in mind that once we have a Standing Panel there will be a limited pot of available panellists.
9. Do we need to specify additional factors for consideration whether to allow the application, and what needs to be included in the application?
10. Who should be able to participate as an amicus as of right?
11. What access to documents/evidence etc should an Amicus, in particular, be given?

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From: Susan Payne
Sent: 08 December 2020 16:38
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Subject: IRP-IOT Consolidation Group 8 Dec 2020

Hi all

We have our next consolidation group call shortly. I suggest the following agenda:

- Review and complete the discussion from last time on the questions Liz posed regarding the Emergency Panelist role
- Consider the rule 7 mark up and other open issues (6-11 below). For convenience I have also attached Liz's Consolidation Research, and here is a link to the Bylaws: <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>
- Next call

As a recap, last time we went through the questions Liz posed – I've captured, at a high level, what we agreed. Let's quickly go through this on the call to confirm this is an accurate reflection and to fill in any gaps:

1. To whom may a request may be made in the absence both of an IRP Panel and the Standing Panel? The Interim Supplementary Procedures are currently silent as to where such a request must be made. The underlying ICDR Rules require the request to be made to the ICDR as Administrator.^[3] **We believe we should follow the ICDR rules, i.e. the request should be made to ICDR as Administrator in absence of an IRP Panel or Standing Panel. We did not specifically discuss what the process should be if there is a Standing Panel, but my assumption would be that, since the ICDR administers the process, the request**

would be submitted to ICDR who would then appoint the Emergency Panelist from the within the Standing Panel.

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4. When is the Emergency Panelist’s authority terminated? The Interim Supplementary Procedures are silent on this issue. The underlying ICDR Rules terminate the Emergency Arbitrator’s authority once the arbitral tribunal has been constituted. Thereafter, the tribunal assumes responsibility for modifying or vacating interim relief as necessary.^[6] **I don’t think we came to a clear conclusion on this as we began talking about 5. There seemed to be support for the EP staying in place until the IRP Panel is constituted, but someone raised the question of what happens if there are two panelists selected but the 3rd has not yet been agreed. It seems to me that, in this scenario, the IRP panel is not yet properly constituted and so the EP continues to act (to the extent that decisions are required).**

Also a question of whether we need to address when a party can challenge a decision of the EP to the full panel.

5. May the Emergency Panelist may serve on the IRP Panel? The ICDR Rules prohibit this unless all parties consent.^[7] The Interim Supplementary Procedures are silent on this issue with respect to Emergency Panelists. **After some discussion I think we agreed that there might be some concern (or perceived concern) that an EP might be influenced by financial considerations if able to serve on the full panel (i.e. there might be an incentive to decide in a particular way in hopes of being retained for the full panel), however we also felt that the ICDR process, whereby they can only serve if both/all parties agree, provided the necessary safeguard.**

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[3] ICDR Rules Art. 6 §1.

[4] ICANN IRP Interim Supplementary Procedures Rule 10.

[5][5] ICDR Rules Art. 6 §4.

[6] Id. Art. 6 §5.

[7] Id.

[3] ICDR Rules Art. 6 §1.

[4] ICANN IRP Interim Supplementary Procedures Rule 10.

[5][5] ICDR Rules Art. 6 §4.

[6] Id. Art. 6 §5.

[7] Id.

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2 attachments



Emergency Arbitrator vs Consolidation Arbitrator.docx

13K



Rule 7 markup v3.docx

39K