Exhibit A

Rodenbaugh
LAW

January 24, 2020

Mr. Tom Simotas
Administrator, ICDR

<u>Via email</u>

Re: Fegistry LLC *et al.*, v. ICANN -- 011900040808

Mr. Simotas,

We are in receipt of your email order dated Jan. 6, and we have several objections we must raise.

First, we believe the Emergency Panelist must be selected from a provider other than ICDR, because ICDR has a clear and direct conflict of interest in this particular matter. As the exclusive provider of IRP arbitration services to ICANN and the entire global ICANN Community, ICDR has profited from ICANN's failing to provide a Standing Panel for more than six years since its Bylaws required it to do so. ICDR has a direct financial interest in concluding that the Standing Panel is not "really" required, ever. For once that Standing Panel is in place, ICDR would no longer have IRP cases to adjudicate, losing millions of dollars per year in fees.

We intend to complain to ICANN's Ombudsman about this clear conflict of interest, and demand that another provider be retained by ICANN to provide the Emergency Panelist in this matter. Meanwhile, we respectfully request the ICDR: 1) to disclose to Claimants and the ICANN Ombudsman all details as to ICDR's relationship with ICANN, so that the conflict can be fully analyzed by all; 2) to analyze and recognize this conflict of interest; 3) to recuse itself from further administration of this matter at least as to Interim Measures of Protection; and 4) to stay the IRP proceeding until the Interim Measures of Protection sought by Claimants are adjudicated, first by ICANN per the Ombudsman process, and then by the ultimate Emergency Panelist.

Second, we object to the notion that Claimants must file a Request for Interim Measures of Protection before ICANN submits its Response to Claimants' opening brief. Some issues are intertwined procedurally and substantively, such as with regard to the Ombudsman and with regard to document discovery issues, such that ICANN's Response will be relevant to Claimants' forthcoming Request and the Emergency Panelist's consideration thereof. Regardless, ICANN is bound by the Rules to provide its Response within 30 days of Claimant's Request. ICDR has no authority to alter that deadline, giving ICANN yet another tactical advantage. Note that in the highly analogous Dot Registry IRP, for example, Claimants' Request for Interim Measures was filed 23 days after ICANN's Response. Claimants herein would agree to a similar schedule. But first, ICDR, ICANN and its Ombudsman must consider the conflict of interest issue that we are raising.

548 Market Street, Box 55819, San Francisco, CA 94104
Tel/Fax: +1 (415) 738-8087 Email: mike@rodenbaugh.com

Rodenbaugh
LAW

Third, we demand that ICANN pay all costs of such Emergency Panelist, and of all panelists appointed in this matter, because that is clearly required by the ICANN Bylaws. They state that "ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members." Obviously, ICANN has intentionally refused to implement the Standing Panel, as it then would be required to pay millions of dollars in fees annually to the Standing Panel members, much of which is paid by Claimants to the ICDR now -- and for the past six years since the Standing Panel was to be implemented. ICANN cannot be allowed to blatantly ignore its Bylaws commitments, and concomitant financial obligations, for so long and at such great cost to the broader community and to Claimants in this case.

Fourth, it is unreasonable to proceed with panelist selection, unless and until Claimants' demand for implementation of a Standing Panel is adjudicated. If the Emergency Panelist agrees with Claimants' position that they are entitled to an experienced, trained panel selected from the Standing Panel as provided by ICANN's Bylaws more than six years ago, then the parties, ICDR and the ICDR panelists all will have wasted effort and money on panel selection, conflicts checking, etc. There is no reason to rush to select a panel, when it may not be needed. ICANN cannot claim any urgency whatsoever in this matter, as they themselves have delayed it for many years; indeed, ICANN did not even claim any urgency, or provide any other rationale whatsoever for proceeding with a panel now, except to predict that my clients will lose their Request for Interim Measures. We respectfully disagree, and ask that you reconsider the order to proceed with panelist selection at this time.

Finally, we object to the process you propose for panel selection, as both parties' selections should be due at the same time, not thirty days apart -- as that would give ICANN a patent advantage that is not allowed by any rule or Bylaw. In a previous IRP my former client won against ICANN (re .Islam/.halal), ICANN agreed to exchange panelist names at the same time. You were also the administrator in that proceeding. So I have a hard time understanding why you agree with ICANN's unilateral proposal in this case, without even requesting any response from me and my clients before issuing your order. Indeed you did not give us a chance to respond to ICANN's arguments at all, prior to issuing your order.

Please reconsider the matter in light of our response to your and ICANN's last correspondence, which frankly should have been requested from us before you issued your order. We respectfully request that, in the future, you provide us an opportunity to respond to ICANN's missives before you accept them. And please note, there are four Claimants in this matter, spread all over the world. As and if the matter continues, we will need appropriately ampe time to coordinate our responses.

Kind regards,

548 Market Street, Box 55819, San Francisco, CA 94104
Tel/Fax: +1 (415) 738-8087 Email: mike@rodenbaugh.com

By:

Mike Rodenbaugh
RODENBAUGH LAW

Cc: Jeff LeVee, Esq. (by emai)
Sarah McGonigle, Esq. (by email)
independentreview@icann.org
ombudsman@icann.org

548 Market Street, Box 55819, San Francisco, CA 94104
Tel/Fax: +1 (415) 738-8087 Email: mike@rodenbaugh.com

Rodenbaugh LAW

Marie Richmond <marie@rodenbaugh.com>

RE: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

Mike Rodenbaugh <mike@rodenbaugh.com> Fri, Feb 14, 2020 at 1:09 PM
To: Tom Simotas Contact nformationRedacted
Cc: "LeVee, Jeffrey A." <jlevee@jonesday.com>, "marie@rodenbaugh.com" <marie@rodenbaugh.com>, "Podmaniczky McGonigle, Sarah" <smcgonigle@jonesday.com>, ombudsman@icann.org, Independent Review <independentreview@icann.org>

Mr. Simotas,

As stated previously, Claimants object to ICDR proceeding to adjudicate the pending Request for Interim Measures, due to obviously apparent and material conflict of interest. Claimants have requested documents from ICDR and ICANN so that the conflict can be fairly analyzed by Claimants and the ICANN Community. ICDR is bound by international arbitration guidelines to both provide disclosure of the requested documents, and conduct an internal review to decide whether to recuse. ICDR has not addressed those requests, or those obligations as far as we are aware.

Instead, you as the Finance Manager seem intent to steamroll the matter without requisite disclosure and proper consideration from others in your organization. You seem to act merely at ICANN's nonsensical behest to rush things, without even requesting Claimants' views. ICANN has no reason whatsoever to rush this matter, other than to avoid public spotlight on its obvious failures to implement basic procedural requirements of its Bylaws, for more than six years and counting..

You also continue to maintain that Claimants must pay for an Emergency Panelist, but the ICANN Bylaws clearly require that ICANN have a Standing Panel to adjudicate such requests, and that all costs should be paid by ICANN -- including specifically panelists' fees. Neither ICDR nor ICANN have yet addressed that argument. Claimants should not have to pay fees to an obviously conflicted organization, particularly when a neutral and specially trained panel was required to be implemented more than six years ago, and operating at ICANN's cost.

Until that disclosure is fully made by ICDR and ICANN, the conflict of interest properly analyzed by ICDR and ICANN, and the payment arrangements agreed by ICANN, it is premature to schedule anything with Mr. Gibson or anyone else at ICDR. It is doubtful those things will be resolved by Feb. 28th at 2:30 EST, but we will hold that date and time open as you and ICANN have requested. Meanwhile, we look forward to the required disclosure from ICANN and from ICDR of documents related to ICDR financial interests in ICANN matters, and then to receiving a reasoned opinion from ICANN and from ICDR as to the apparent conflict of interest.

Kind regards,
Mike

Mike Rodenbaugh
RODENBAUGH LAW
tel/fax: +1.415.738.8087
http://rodenbaugh.law

[Quoted text hidden]

Exhibit B

IBA Guidelines on Conflicts of Interest in International Arbitration

Adopted by resolution
of the IBA Council
on Thursday 23 October 2014

IBA Guidelines on Conflicts of Interest in International Arbitration

Adopted by resolution
of the IBA Council
on Thursday 23 October 2014
Updated, 10 August 2015

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the global voice of
the legal profession®

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD
United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

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IBA Guidelines on Conflicts of Interest in International Arbitration 2014

Since their issuance in 2004, the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the 'Guidelines')[1] have gained wide acceptance within the international arbitration community. Arbitrators commonly use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators. As contemplated when the Guidelines were first adopted, on the eve of their tenth anniversary it was considered appropriate to reflect on the accumulated experience of using them and to identify areas of possible clarification or improvement. Accordingly, in 2012, the IBA Arbitration Committee initiated a review of the Guidelines, which was conducted by an expanded Conflicts of Interest Subcommittee (the 'Subcommittee'),[2] representing diverse legal

1 The 2004 Guidelines were drafted by a Working Group of 19 experts: Henri Alvarez, Canada; John Beechey, England; Jim Carter, United States; Emmanuel Gaillard, France; Emilio Gonzales de Castilla, Mexico; Bernard Hanotiau, Belgium; Michael Hwang, Singapore; Albert Jan van den Berg, Belgium; Doug Jones, Australia; Gabrielle Kaufmann-Kohler, Switzerland; Arthur Marriott, England; Tore Wiwen Nilsson, Sweden; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Klaus Sachs, Germany; Nathalie Voser, Switzerland (Rapporteur); David Williams, New Zealand; Des Williams, South Africa; and Otto de Witt Wijnen, The Netherlands (Chair).

2 The members of the expanded Subcommittee on Conflicts of Interest were: Habib Almulla, United Arab Emirates; David Arias, Spain (Co-Chair); Julie Bédard,

cultures and a range of perspectives, including counsel, arbitrators and arbitration users. The Subcommittee was chaired by David Arias, later co-chaired by Julie Bédard, and the review process was conducted under the leadership of Pierre Bienvenu and Bernard Hanotiau.

While the Guidelines were originally intended to apply to both commercial and investment arbitration, it was found in the course of the review process that uncertainty lingered as to their application to investment arbitration. Similarly, despite a comment in the original version of the Guidelines that their application extended to non-legal professionals serving as arbitrator, there appeared to remain uncertainty in this regard as well. A consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator.

The Subcommittee has carefully considered a number of issues that have received attention in international arbitration practice since 2004, such as the effects of so-called ‘advance waivers’, whether the fact of acting concurrently as counsel and arbitrator in unrelated cases raising similar legal issues warrants disclosure, ‘issue’ conflicts, the independence and impartiality of arbitral or administrative secretaries and third-party funding. The revised Guidelines reflect the Subcommittee’s conclusions on these issues.

United States (Co-Chair);José Astigarraga, United States; Pierre Bienvenu, Canada (Review Process Co-Chair); Karl-Heinz Böckstiegel, Germany; Yves Derains, France; Teresa Giovannini, Switzerland; Eduardo Damião Gonçalves, Brazil; Bernard Hanotiau, Belgium (Review Process Co-Chair); Paula Hodges, England; Toby Landau, England; Christian Leathley, England; Carole Malinvaud, France; Ciccu Mukhopadhaya, India; Yoshimi Ohara, Japan; Tinuade Oyekunle, Nigeria; Eun Young Park, Korea; Constantine Partasides, England; Peter Rees, The Netherlands; Anke Sessler, Germany; Guido Tawil, Argentina; Jingzhou Tao, China; Gäetan Verhoosel, England (Rapporteur); Nathalie Voser, Switzerland; Nassib Ziadé, United Arab Emirates; and Alexis Mourre. Assistance was provided by: Niuscha Bassiri, Belgium; Alison Fitzgerald, Canada; Oliver Cojo, Spain; and Ricardo Dalmaso Marques, Brazil.

The Subcommittee has also considered, in view of the evolution of the global practice of international arbitration, whether the revised Guidelines should impose stricter standards in regard to arbitrator disclosure. The revised Guidelines reflect the conclusion that, while the basic approach of the 2004 Guidelines should not be altered, disclosure should be required in certain circumstances not contemplated in the 2004 Guidelines. It is also essential to reaffirm that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator. Indeed, the standard for disclosure differs from the standard for challenge. Similarly, the revised Guidelines are not in any way intended to discourage the service as arbitrators of lawyers practising in large firms or legal associations.

The Guidelines were adopted by resolution of the IBA Council on Thursday 23 October 2014. The Guidelines are available for download at: **www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx**

Signed by the Co-Chairs of the Arbitration Committee
Thursday 23 October 2014

Eduardo Zuleta

Paul Friedland

Introduction

1. Arbitrators and party representatives are often unsure about the scope of their disclosure obligations. The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues. Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.

2. Parties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure. In addition, institutions and courts face difficult decisions when an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing.

3. It is in the interest of the international arbitration community that arbitration proceedings are not hindered by ill-founded challenges against arbitrators and that the legitimacy of the process is not affected by uncertainty and a lack of uniformity in the applicable standards for

disclosures, objections and challenges. The 2004 Guidelines reflected the view that the standards existing at the time lacked sufficient clarity and uniformity in their application. The Guidelines, therefore, set forth some 'General Standards and Explanatory Notes on the Standards'. Moreover, in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Such lists, designated 'Red', 'Orange' and 'Green' (the 'Application Lists'), have been updated and appear at the end of these revised Guidelines.

4. The Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Standards below. The General Standards and the Application Lists are based upon statutes and case law in a cross-section of jurisdictions, and upon the judgement and experience of practitioners involved in international arbitration. In reviewing the 2004 Guidelines, the IBA Arbitration Committee updated its analysis of the laws and practices in a number of jurisdictions. The Guidelines seek to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international arbitration. Both the 2004 Working Group and the Subcommittee in 2012/2014 have sought and considered the views of leading arbitration institutions, corporate counsel and other persons involved in international arbitration through public consultations at IBA annual meetings, and at meetings with arbitrators and practitioners. The comments received were reviewed in detail and many were adopted. The IBA Arbitration Committee is grateful for the serious consideration given to its proposals by so many institutions and individuals.

5. The Guidelines apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrators.

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, as was the case for the 2004 Guidelines and other sets of rules and guidelines of the IBA Arbitration Committee, the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation.

7. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be. Nevertheless, the IBA Arbitration Committee is confident that the Application Lists provide concrete guidance that is useful in applying the General Standards. The IBA Arbitration Committee will continue to study the actual use of the Guidelines with a view to furthering their improvement.

8. In 1987, the IBA published *Rules of Ethics for International Arbitrators*. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the *Rules of Ethics* as to the matters treated here.

Part I: General Standards Regarding Impartiality, Independence and Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

Explanation to General Standard 1:

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable.

The question has arisen as to whether this obligation should extend to the period during which the award may be challenged before the relevant courts. The decision taken is that this obligation should not extend in this manner, unless the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law or relevant institutional rules. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests may be necessary.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

Explanation to General Standard 2:

(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.

(b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.

(b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

(c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. Accordingly, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations that, such as those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator under General Standard 2.

The duty of disclosure under General Standard 3(a) is ongoing in nature.

(b) The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.

(c) A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

(d) In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.

(e) Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. As a practical matter, arbitration institutions may make a distinction depending on the stage of the arbitration. Courts may likewise apply different standards. Nevertheless, no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) If, within 30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection based on such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.

(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator, or continue to act as an arbitrator, if the following conditions are met:

(i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and

(ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest.

(d) An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

Explanation to General Standard 4:

(a) Under General Standard 4(a), a party is deemed to have waived any potential conflict of interest, if such party has not raised an objection in respect of such conflict of interest within 30 days. This time limit should run from the date on which the party learns of the relevant facts or circumstances, including through the disclosure process.

(b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

(c) Notwithstanding a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, the parties may wish to engage such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. Certain jurisdictions may require such consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.

(5) Scope

(a) These Guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed.

(b) Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

Explanation to General Standard 5:

(a) Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards do not distinguish between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrators appointed by an institution.

(b) Some arbitration institutions require arbitral or administrative secretaries and assistants to sign a declaration of independence and impartiality. Whether or not such a requirement exists, arbitral or administrative secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration. Furthermore, this duty applies to arbitral or administrative secretaries and assistants to either the Arbitral Tribunal or individual members of the Arbitral Tribunal.

(6) Relationships

(a) The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case.

(b) When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

(7) Duty of the Parties and the Arbitrator

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.

(c) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide any relevant information available to it.

(d) An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.

Explanation to General Standard 7:

(a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

(b) Counsel appearing in the arbitration, namely the persons involved in the representation of the parties in the arbitration, must be identified by the parties at the earliest opportunity. A party's duty to disclose the identity of counsel appearing in the arbitration extends to all members of that party's counsel team and arises from the outset of the proceedings.

(c) In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence.

(d) In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.

Part II: Practical Application of the General Standards

1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today's arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.

2. The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.

5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

6. Situations not listed in the Orange List or falling outside the time limits used in some of the

Orange List situations are generally not subject to disclosure. However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure.

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated

whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as ‘significant’ and ‘relevant’. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator’s direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.

2.2.2 A close family member[3] of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate[4] of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2 3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

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3 Throughout the Application Lists, the term 'close family member' refers to a: spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.

4 Throughout the Application Lists, the term 'affiliate' encompasses all companies in a group of companies, including the parent company.

2.3.7 The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.[5]

5 It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to

3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

3.2 Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

3.2.3 The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.

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frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.

3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.

3.4 Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5 Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

4.2 Current services for one of the parties

4.2.1 A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.

4.3 Contacts with another arbitrator, or with counsel for one of the parties

4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.

4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.

4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.

4.3.4 The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.

4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.

4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.

4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.

4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

INTERNATIONAL BAR ASSOCIATION

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the legal profession®

Exhibit C

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International Bar Association

From Wikipedia, the free encyclopedia

The **International Bar Association** (**IBA**), founded in 1947, is a bar association of international legal practitioners, bar associations and law societies. The IBA currently has a membership of more than 80,000 individual lawyers and 190 bar associations and law societies.[1] Its global headquarters are located in London, England, and it has regional offices in Washington, D.C., United States, Seoul, South Korea and São Paulo, Brazil.[2]

International Bar Association

the global voice of the legal profession

Logo of the International Bar Association

Motto	The Global Voice of the Legal Profession
Formation	February 1947
Type	International professional association for the legal sector
Headquarters	London, EC4 United Kingdom
Location	London, Sao Paulo, Seoul, Washington
President	Horacio Bernardes Neto (2018-2019)
Key people	Mark Ellis, Executive Director
Website	www.ibanet.org

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History of the IBA [edit]

Representatives of 34 national bar associations gathered in New York City, New York on 17 February 1947 to create the IBA. Initial membership was limited to bar associations and law societies, but in 1970, IBA membership was opened to individual lawyers. Members of the legal profession including barristers, advocates, solicitors, members of the judiciary, in-house lawyers, government lawyers, academics and law students comprise the membership of the IBA.[3][4]

Relationships with other international organisations [edit]

The IBA has held Special Consultative status before the UN General Assembly and the UN Economic and Social Council (ECOSOC) since 1947.[5] On 9 October 2012, the IBA signed a memorandum of understanding with the Organisation for Economic Co-operation and Development (OECD).[6][7] The IBA also partners with the OECD and United Nations Office on Drugs and Crime (UNODC) in the Anti-Corruption Strategy for the Legal Profession, an anti-corruption initiative for lawyers.[8][9] The IBA has also partnered with other organisations including the International Federation of Accountants (IFAC)[10] and the International Organisation of Employers (IOE).[11]

Structure of the IBA [edit]

The IBA is divided into two divisions – the Legal Practice Division (LPD) and the Public and Professional Interest Division (PPID). Each Division houses various committees and fora that are dedicated to specific practice areas. These committees and fora issue regular publications that focus on international legal practice.[12]

The PPID houses the Bar Issues Commission (BIC) and Human Rights Institute (IBAHRI). The BIC was established in 2004 and consists of representatives from bar associations and law societies around the world.[13]

The current Executive Director of the IBA is Mark Ellis.

Human Rights Institute (IBAHRI) [edit]

The International Bar Association's Human Rights Institute (IBAHRI) was established in 1995 under the honorary presidency of Nelson Mandela. The mission statement of the IBAHRI is "to promote, protect and enforce human rights under a just rule of law". IBAHRI undertakes a variety of projects in the field of human rights and rule of law, particularly concerning the independence of the judiciary and fair trial rights.[14][15]

Codes and guidance on legal practice [edit]

The IBA issues codes and guidance on international legal practice. The IBA Rules on the Taking of Evidence in International Arbitration, adopted in 1999 and revised in 2010, are used by parties in international commercial arbitration.[16][17][18]

The IBA has also issued: IBA Guidelines on Conflicts of Interest in International Arbitration, IBA Guidelines for Drafting International Arbitration Clauses, and IBA Principles on Conduct for the Legal Profession (2011).[19]

Task forces and action groups [edit]

- Rule of Law Action Group[20]
- Task Force on the Financial Crisis[21]
- Task Force on International Terrorism[22]

- Task Force on International Terrorism[22]

IBA Outstanding International Woman Lawyer Award [edit]

The IBA has an award that is given to an outstanding female lawyer judged to be most deserving of that recognition. It is awarded every other year and is sponsored by LexisNexis. It includes a US$5,000 donation to a charity of the winner's choice.

Past recipients of the award include the following:[23]

- Helvi Sipilä of Finland in 2001
- Navi Pillay of South Africa in 2003
- Dianna Kempe of Bermuda in 2006
- Anne-Marie Hutchinson of England in 2010
- Olufolake Solanke of Nigeria in 2012
- Tukiya Kankasa-Mabula of Zambia in 2014
- Carol Xueref of France in 2016[24]
- Eloísa Machado de Almeida of Brazil in 2018[25]

Recent IBA presidents [edit]

- 2018–2019: Horacio Bernardes Neto, Brazil
- 2017–2018: Martin Šolc, Czech Republic
- 2015–2017: David W. Rivkin, United States[26]
- 2013–2014: Michael Reynolds, United Kingdom [27][28]
- 2011–2012: Akira Kawamura, Japan
- 2009–2010: Fernando Pelaez-Pier, Venezuela
- 2007–2008: Fernando Pombo, Spain
- 2005–2006: Francis Neate, United Kingdom
- 2003–2004: Emilio Cardenas, Argentina
- 2001–2002: Dianna Kempe, Bermuda
- 1999–2000: Klaus Böhlhoff, Germany
- 1997–1998: Desmond Fernando, Sri Lanka

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External links [edit]

- International Bar Association official website

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Exhibit D

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Independent Review Process Documents

This page collects documents from Independent Review Proceedings filed in accordance with Article IV, section 3 of the ICANN Bylaws. They are arranged by initial filing date in descending order.

- CEP and IRP Status Update – 4 March 2020 [PDF, 279 KB]
  - Archive

Namecheap, Inc. (.ORG/.INFO/.BIZ)

Fegistry, LLC, Minds + Machines Group, Ltd., Radix Domain Solutions Pte. Ltd., and Domain Ventures Partners PCC Limited (.HOTEL)

Afilias Domains No. 3 Limited (.WEB)

Amazon EU S.à.r.l. v. ICANN (.AMAZON)

Commercial Connect, LLC v. ICANN (.SHOP)

Commercial Connect, LLC v. ICANN (.SHOP) - CLOSED

Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. v. ICANN (.ISLAM/.HALAL)

Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (.RADIO) - WITHDRAWN

Corn Lake, LLC v. ICANN (.CHARITY)

dot Sport Limited v. ICANN (.SPORT)

Little Birch LLC and Minds + Machines Group Limited v. ICANN (.ECO) & Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC v. ICANN (.HOTEL)

Gulf Cooperation Council (GCC) v. ICANN (.PERSIANGULF)

Donuts Inc. v. ICANN (.SPORTS/.RUGBY)

Dot Registry, LLC v. ICANN (.INC/.LLC/.LLP)

Merck KGaA v. ICANN (.MERCK/.MERCKMSD)

Vistaprint Limited v. ICANN (.WEBS)

Better Living Management Co, Ltd. v. ICANN (.THAI)

Booking.com v. ICANN (.HOTELS)

DCA Trust v. ICANN (.AFRICA)

Manwin Licensing International v. ICANN

ICM v. ICANN

Exhibit E

Mike Rodenbaugh <mike@rodenbaugh.com>

RE: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

1 message

Tom Simotas Contact n ormationRedacted — Wed, Apr 1, 2020 at 9:10 AM
To: Mike Rodenbaugh <mike@rodenbaugh.com>
Cc: "LeVee, Jeffrey A." <jlevee@jonesday.com>, "Podmaniczky McGonigle, Sarah" <smcgonigle@jonesday.com>, Tom Simotas Contact n ormationRedacted

Dear Mr. Rodenbaugh,

The procedure to bill the entire deposit for emergency arbitrator compensation to the party filing an emergent relief application is an internal, universal policy of the ICDR. It was developed after many years of processing emergency applications in an effort to insure payment of the emergency arbitrator. As this policy was implemented post-2014 it is not currently not outlined in the rules but it will be addressed it in our next revision. It is not specific in any way to IRP cases but applies to all commercial disputes involving an emergency application that the ICDR manages under its rules.

ICANN was not involved in any way with our discussions and decisions surrounding the implementation of this policy.

In addition, we confirm receipt of confirmation of payment by Claimants for the initial 30 hours deposit of the Emergency Panelist.

Absent any objections to the continued service of Emergency Panelist Gibson, we will schedule the initial conference call for 1:00 PM Pacific time on April 3, 2020 and send notice in a separate email.

Thank you for your attention to this matter.

Best,

Tom Simotas

Tom Simotas
Finance Manager
International Centre for Dispute Resolution
American Arbitration Association
120 Broadway, 21st Floor
New York, NY 10271
www.icdr.org
T: +1 212 484 4077
F: +1 212 246 7274

NPT's BEST NONPROFITS TO WORK FOR ★2020★

From: Mike Rodenbaugh <mike@rodenbaugh.com>
Sent: Tuesday, March 31, 2020 3:10 PM
To: Tom Simotas Contact Informat onRedacted

Cc: LeVee, Jeffrey A. <jlevee@jonesday.com>; Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>
Subject: Re: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

***** External E-Mail – Use Caution *****

Mr. Simotas,

You had already mentioned that an "ICDR procedure" required claimant to pay the sole cost of the so-called Emergency Panel. I asked, and now ask again, what procedure is that exactly? I do not see it anywhere in the ICDR Rules or ICANN Bylaws. So is it a written procedure? Approved by ICANN? Or is it just a secret that my clients have no right to know?

Thanks,

Mike

Mike Rodenbaugh

address: 548 Market Street, Box 55819
San Francisco, CA 94104

email: mike@rodenbaugh.com

phone/fax: +1 (415) 738-8087

On Tue, Mar 31, 2020 at 11:17 AM Tom Simotas <Contact nformationRedacted> wrote:

> Dear Counsel,
>
> The ICDR will proceed with the scheduling of the initial call with the Emergency Panelist and will offer him April 2 and April 3 at 1:00 PM Pacific time.
>
> If the Panelist is available a call will be scheduled and proceed upon confirmation that payment by Claimants of the initial deposit has been made.
>
> As previously noted, unless the parties agree otherwise, the ICDR's procedure requires the filing party submit the full initial deposit of the emergency panelist. Application can be made to the Emergency Arbitrator for the allocation of these costs. Unless the parties agree otherwise, the deposits for the main Tribunal will be split between the Claimants and Respondents.
>
> Thank you for your attention to this matter.
>
> Best,
>
> Tom Simotas
>
> **Tom Simotas**

Finance Manager

International Centre for Dispute Resolution
American Arbitration Association
120 Broadway, 21st Floor
New York, NY 10271
www.icdr.org
T: +1 212 484 4077
F: +1 212 246 7274

From: Mike Rodenbaugh <mike@rodenbaugh.com>
Sent: Monday, March 30, 2020 7:25 PM
To: LeVee, Jeffrey v.com>
Cc: Tom Simotas Contact nformationRedacted; Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>
Subject: Re: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

***** External E-Mail – Use Caution *****

No, that question has not been answered, except by vague reference to some unspecified "ICDR procedure". I have asked for details about that, and my clients are entitled to know what procedure is referenced.

Mike Rodenbaugh

address: 548 Market Street, Box 55819
San Francisco, CA 94104

email: mike@rodenbaugh.com

phone/fax: +1 (415) 738-8087

On Mon, Mar 30, 2020 at 4:19 PM LeVee, Jeffrey A. <jlevee@jonesday.com> wrote:

Mike:

Tom has already answered your question – twice. Please pay the money the ICDR has asked you to pay, and let's get the call scheduled. If you do not pay, you will have no basis to complain when your request for interim relief is dismissed and ICANN proceeds with the delegation.

Jeff LeVee

JONES DAY® - One Firm Worldwide℠

Telephone: (213) 243-2572

From: Mike Rodenbaugh <mike@rodenbaugh.com>
Sent: Monday, March 30, 2020 4:09 PM
To: LeVee, Jeffrey A. <jlevee@JonesDay.com>
Cc: Tom Simotas Contact nformationRedacted; Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>
Subject: Re: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

We stand ready to pay the fee, but await an explanation as to why ICANN does not also have to pay half the cost of the so-called Emergency Panelist -- particularly since ICANN unilaterally caused the "emergency".

Mike Rodenbaugh

address: 548 Market Street, Box 55819
San Francisco, CA 94104

email: m ke@rodenbaugh.com

phone/fax: +1 (415) 738-8087

On Mon, Mar 30, 2020 at 2:45 PM LeVee, Jeffrey A. <jlevee@jonesday.com> wrote:

Tom:

Any update on a date this week for our call? Has Claimant paid the fee yet? If not, I trust the request for interim measures will be dismissed by Friday.

Thanks,

Jeff LeVee

JONES DAY® - One Firm WorldwideSM

Telephone: (213) 243-2572

From: LeVee, Jeffrey A.
Sent: Tuesday, March 24, 2020 5:19 PM
To: 'Mike Rodenbaugh' <mike@rodenbaugh.com>; Tom Simotas Contact nformationRedacted
Cc: Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>
Subject: RE: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

Tom:

I write to confirm my availability at the two time slots that Mr. Rodenbaugh has made available next week.

I am not responding to the remainder of the email, as I believe you have answered the questions previously.

Regards,

Jeff LeVee

JONES DAY® - One Firm WorldwideSM

Telephone: (213) 243-2572

From: Mike Rodenbaugh <mike@rodenbaugh.com>
Sent: Tuesday, March 24. 2020 3:47 PM
To: Tom Simotas Contact nformationRedacted

Cc: LeVee, Jeffrey A. <jlevee@JonesDay.com>; Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>
Subject: Re: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

Mr. Simotas,

Please clarify what "ICDR procedure" you reference here: "With respect to emergency requests, unless the parties agree otherwise, the ICDR's procedure requires the filing party submit the full initial deposit of the emergency panelist." What justification does ICDR have for imposing this entire cost on Claimant's rather than equally?

Has the ICDR decided that it has no conflict of interest in adjudicating Claimant's Request for Interim Measures, specifically with respect to the Standing Panel issues? Will ICDR share its reasoned analysis of that conflict of interest, so it can be evaluated by Claimants and the ICANN community?

Assuming the ICDR has decided to carry on, noting our protest of any such decision (and not waiving any rights of my clients), I am available for a call late next week, April 2 or 3 at 1pm Pacific, if either of those times work?

Thanks,

M ke

Mike Rodenbaugh

address: 548 Market Street, Box 55819
San Francisco, CA 94104

email: mike@rodenbaugh.com

phone/fax: +1 (415) 738-8087

On Fri, Mar 20, 2020 at 4:15 PM Tom Simotas Contact n ormationRedacted wrote:

Dear Counsel,

In furtherance to our email of February 28, 2020 and pursuant to our fee schedule found here, filing fees are paid by the party that brings a claim before the ICDR. Should a Respondent file a counterclaim, they would be responsible for the appropriate filing fees at the time of filing.

With respect to emergency requests, unless the parties agree otherwise, the ICDR's procedure requires the filing party submit the full initial deposit of the emergency panelist. Unless the parties agree otherwise, the deposits for the main Tribunal will be split between the Claimants and Respondents.

The final allocation of ICDR fees and panel compensation/expenses are subject to the final decision of the full tribunal once appointed and pursuant to the International Arbitration Rules and

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) that are in effect.

The compensation and expenses for the Panelist are disclosed and set at the time of appointment. The ICDR will process invoices upon receipt and disburse payment to the Arbitrator from the deposits made by the parties. The itemized invoices will be available for the parties to view online through AAAWebfile. The ICDR does not withhold or receive any portion of the compensation paid to the panelists. The ICDR's only revenue is the amounts described in the above-reference fee schedule or possibly a room rental fee for a hearing conducted in one of our facilities.

Lastly, in 2006, the ICDR was designated by ICANN as the Independent Review Panel Provider (IRPP) pursuant to their bylaws. There were no payments made by ICANN to the ICDR in relation to this designation.

The Parties are requested to provide us with their availability for the week of March 30, 2020 so that we may schedule a call with the Emergency Panelist.

Please note that the scheduling of the call will be subject to the satisfaction of the initial 30 hour deposit ($18,000.00) for potential compensation of the Emergency Panlist.

Thank you for your attention to this matter.

Best,

Tom S

Tom Simotas
Finance Manager

International Centre for Dispute Resolution
American Arbitration Association
120 Broadway, 21st Floor
New York, NY 10271
www.icdr.org
T: +1 212 484 4077
F: +1 212 246 7274

From: LeVee, Jeffrey A. <jlevee@JonesDay.com>
Sent: Friday, March 20, 2020 5:50 PM
To: Mike Rodenbaugh <mike@rodenbaugh.com>
Cc: Tom Simotas Contact nformationRedacted ; Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>
Subject: RE: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

***** External E-Mail – Use Caution *****

Tom:

Can we please schedule the call with the Emergency Panelist so that matter can proceed via the scheduling of the briefing and oral argument? If Mr. Rodenbaugh participates in the call, and pays his fees, we can get that going. If not, the emergency application should be dismissed. We should also be selecting the regular panelists for the IRP.

Thanks,

Jeff LeVee

Jones Day - Los Angeles

Phone: (213) 243-2572

From: Mike Rodenbaugh <mike@rodenbaugh.com>

Date: Friday, Mar 20, 2020, 2:32 PM

To: LeVee, Jeffrey A. <jlevee@JonesDay.com>

Cc: Tom Simotas Con ac nforma ionRedac ed, Podmaniczky McGonigle, Sarah <smcgonigle@jonesday.com>

Subject: Re: Fegistry, LLC; Minds + Machines Group Limited v. ICANN - Case 01-19-0004-0808

We will be responding to the Ombudsman, and expect that dialogue to continue. Regardless, his decision has no impact on the substance of our Request for Interim Relief. Indeed, he is saying he won't make any decision because some issues are pending in this IRP, specifically within the Request for Interim Measures. What justification does ICANN have for requesting dismissal of that Request?

Mike Rodenbaugh

address: 548 Market Street, Box 55819
San Francisco, CA 94104

email: mike@rodenbaugh.com

phone/fax: +1 (415) 738-8087

On Mon, Mar 16, 2020 at 1:44 PM LeVee, Jeffrey A. <jlevee@jonesday.com> wrote:

> Tom:
>
> In a recent email, Mr. Rodenbaugh asked that the ICDR hold off proceeding with Claimants' request for interim measures pending a resolution by the ICANN Ombudsman of Mr. Rodenbaugh's complaint to him. (Mr. Rodenbaugh copied the Ombudsman on his email.)
>
> Below is the Ombudsman's response, in which he denies Mr. Rodenbaugh's request and states: "Under ICANN Bylaws Article 5, for IRP matters, I clearly do not have jurisdiction to act with regard to the assistance requested in your letter/complaint."
>
> Accordingly, ICANN again asks that the ICDR dismiss Claimant's request for interim measures.
>
> Regards,
>
> Jeff LeVee
>
> **JONES DAY® - One Firm Worldwide℠**
>
> Telephone: (213) 243-2572
>
> ---
>
> **From:** Herb Waye <herb.waye@icann.org>
> **Date:** Monday, March 16, 2020 at 1:00 PM
> **To:** Mike Rodenbaugh <mike@rodenbaugh.com>
> **Cc:** ombudsman <ombudsman@icann.org>
> **Subject:** Complaint to ICANN Office of the Ombudsman

Mr. Rodenbaugh, you recently wrote the Office of the Ombudsman asking for assistance.

> *We request your assistance in all of these ways, with respect to ICANN's apparently willful failure to implement basic procedural rights required by Bylaws since 2013.*
>
> *We are not asking for your assistance as to the substantive matters in any specific IRP, but only as to the 'delays within ICANN' and 'unfair procedure' provided by ICANN with respect to the IRP in general.*

Your request for my assistance goes beyond my remit under the ICANN Bylaws. You ask for my assistance of behalf of four claimants in the active IRP you have filed as their counsel with ICDR, styled *Fegistry, et al. v. ICANN*, (regarding .HOTEL a top-level domain that remains in contention).

Despite your insistence that you write to me "as an individual," this is not a grievance or complaint where assistance of the Office of the Ombudsman is sought by an individual for some action or inaction or interaction with the Community, or a member or members thereof. It is related to an open IRP (Independent Review Process).

By Charter the ICANN Bylaws Article 5 empowers me to become involved in the unfair treatment of individuals—specifically interactions between ICANN Staff and the Board, toward individuals, including when ICANN groups have issues relating to behavior by people in such groups. The ICANN Bylaws state with regard to my "portfolio":

Section 5.2. CHARTER

> The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.
>
> The Office of Ombudsman shall:
>
> (a) facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either a Reconsideration Request or Independent Review Process; [ICANN Bylaw 5.3]

Note that my powers end where IRPs begin. I do have the requirement of analyzing, and then recusing myself from or evaluating, a Request for Reconsideration under Bylaw 4.2.

Your complaint on its face concerns the treatment of a specific domain of interest to your clients: that domain (.HOTEL) is part of an ongoing IRP (which could become a Request for Reconsideration).

Under ICANN Bylaws Article 5, for IRP matters, I clearly do not have jurisdiction to act with regard to the assistance requested in your letter/complaint.

Sincerely,

Herb Waye

ICANN Ombudsman

https://www.icann.org/ombudsman

https://www.facebook.com/ICANNOmbudsman

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf

Community Anti-Harassment Policy

https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman.The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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Exhibit F

2012-12-20 - Accountability Structures Expert Panel Recommendations

Created by admin, last modified on Jun 12, 2013

- **Category:** Administration and Budget
- **Topic:** Accountability Structures Expert Panel Recommendations
- **Board meeting date:** 20 December 2012
- **Resolution number:** 2012.12.20.17 – 2012.12.20.19
- **URL for Board minutes/resolution:** http://www.icann.org/en/groups/board/documents/resolutions-20dec12-en.htm#2.c
- **Status:** Completed

Summary

Accountability Structures Expert Panel Recommendations

Text

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures.

Whereas, under the guidance of the Board Governance Committee (BGC), ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution.

Whereas, after research and review of ICANN's Reconsideration and Independent Review processes, as well as multiple opportunities for public input, the ASEP produced a report in October 2012.

Whereas, the report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report.

Whereas, after review and consideration of the public comment received, including consideration by the ASEP, the Board has determined that it is appropriate to proceed to implementation of the ASEP's recommendations.

Whereas, additional implementation work is required prior to launching ICANN's revised Independent Review and Reconsideration processes as recommended by the ASEP.

Resolved (2012.12.20.17) the Board accepts the report by Accountability Structures Expert Panel issued in October 2012 in fulfillment of Recommendations 23 and 25 of the Accountability and Transparency Review Team.

Resolved (2012.12.20.18), the Board approves the Bylaws amendments to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as posted for public comment, with an effective date to be determined by the Board after receiving a report from the President and CEO on the status of implementation.

Resolved (2012.12.20.19), the Board directs the President and CEO to develop and execute implementation plans necessary to implement the ASEP recommendations and report to the Board in Beijing on the status of the implementation work, including a recommended effective date for the Bylaws. In the event that, during implementation, the President and CEO determine that issues raised during the public comment regarding the creation of a standing panel for the IRP require modification to the Bylaws, those limited modifications are to be provided to the Board for adoption prior to the recommended effective date for the Bylaws revisions.

Implementation Actions

- Develop and implement plans to implement the Accountability Structures Expert Panel recommendations
  - Responsible entity: President and CEO
  - Due date: None provided
  - Completion date: 11 April 2013
- Report to the Board in Beijing on the status of the implementation
  - Responsible entity: President and CEO
  - Due date: 11 April 2013
  - Completion date: 11 April 2013

Rationale

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations arising out of the President's Strategy Committee's work on Improving Institutional Confident, is directly aligned with the review requested by the ATRT.

The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review Processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and the ability to bring collective requests. A new grounds for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making it clearer when a decision is capable of being reviewed.

The Board is adopting the Bylaws revisions today to allow for certainty as the President and CEO moves forward with implementation work to effectuate the ASEP's recommendations. Because additional documentation and processes must be developed and finalized, the Bylaws revisions to Article VI, Sections 2 and 3 will not go into effect until the implementation work has proceeded sufficiently. The President and CEO is therefore tasked with a report to the Board on the status of implementation, and a date for the Bylaws to go into effect, by the ICANN meeting in Beijing, China in April 2013. The Board expects that the President and CEO will consider the issues raised in public comment to determine if they need to be or can be addressed in implementation. In the event limited revisions of the Bylaws are necessary to address public comment addressing the creation of a standing panel for the IRP, the Board expects those revisions to be provided to the Board for approval in advance of the identified effective date. The potential for limited modification of the Bylaws prior to the effective date is appropriate in this instance because of the concerns raised in public comment as well as the past challenges faced when trying to create a standing panel for independent reviews.

The adoption of these recommendations will have a fiscal impact on ICANN, in that additional work is required for implementation, including the development of new documentation and the identification of a standing panel to hear requests for independent review. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS.

This is an Organizational Administrative Function for which the Board received public comment at http://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm.

Other Related Resolutions

- Resolution 2013.04.11.06, determining the Bylaws effective date for the posted revisions, at http://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm#1.d
- Other resolutions TBD

Additional Information

- Additional information about the Accountability Structures Expert Panel is available at: http://www.icann.org/en/news/in-focus/accountability/asep
- Public comment regarding the Accountability Structures Expert Panel Recommendations is available at: http://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm
- The Accountability Structures Expert Panel Report is available at: http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf
- Information on the updates to the Reconsideration Process is available at http://www.icann.org/en/groups/board/governance/reconsideration
- The resolution does not address funding for the items identified therein.

Explanatory text does not modify or override Resolutions. See Board Resolutions Page for more information.

Note: The "Add Comment" box below is for sharing information about implementation of this resolution. Off-topic comments will be removed.

No labels

Exhibit G

Report by Accountability Structures Expert Panel (ASEP)

October 2012

Basis for ASEP Review

- ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments, calling for:
  - Open and transparent governance
  - Accountability to multi-stakeholder community
  - Effective, efficient, open and inclusive reconsideration and review of ICANN decisions

Scope of ASEP Review

- ATRT Recommendations 23/25
  - Researched development and use of Reconsideration & Review structures
  - Reviewed Improving Institutional Confidence (IIC) Recommendations and community comment
  - Understood community concern and lack of consensus on IIC recommendations

Guiding Principles

The Four Es:

- Enhancing **effectiveness** of structures
- **Efficiency** in process
- Allowing **expeditious** resolution
- Enhancing community's **ease of access** to accountability structures

The Board must always act with objectivity and fairness in the best interests of ICANN, but in doing so take account of the legitimate needs, interests and expectations of stakeholders material to the issue being decided. Staff must act in same manner.

Guiding Principles (cont.)

- Bring fresh perspective to ICANN, accounting for today's circumstances
- Build on prior recommendations where possible
- Make improvements; give ICANN a base for future consideration & improvement
- Focus on enhancement and clarifications to structures, not restrictions

Guiding Principles

- Create stability through building of precedent
- Where possible, reduce burden and costs to those accessing structures
- Accountability structures should not preclude any party from filing suit against ICANN in court of competent jurisdiction

Current Accountability Structures

- <u>Ombudsman</u>, Bylaws, Art. V
- <u>Reconsideration Request</u> - considered by Board Governance Committee (BGC), Bylaws, Art IV, Section 2
- <u>Independent Review</u> - administered by International Centre for Dispute Resolution, Bylaws, Art IV, Section 3

Current Accountability Structures

- No change recommended to role of Ombudsman
  - Ombudsman undertaking own review of work in line with international standards
  - Ability to bring claims of unfairness across ICANN community seems to be working well
- Reconsideration and Independent Review processes to remain, but improvement required

Key Recommendations

Summary of Recommendations

RECONSIDERATION

- Improve access - add claims for consideration of inaccurate material information
- Define key terms, such as "material information", "materially harmed"
- Modify time limits for submissions
- Include terms and conditions in request form
- Allow for urgent review in place of stay
- Allow for summary dismissal when warranted
- Allow "class" filings/consolidation
- Require allegations of standing

INDEPENDENT REVIEW

- Create omnibus standing panel
- Define key terms
- Introduce optional cooperative engagement and conciliation phases to narrow issues and improve efficiency
- Require submission form with terms and conditions
- Introduce: (i) time limits for filing and decision; (ii) and page limitations for argument
- Eliminate in-person proceedings absent real need
- Allow "class" filings/consolidation
- Require allegations of standing

Reconsideration Process

Reconsideration Process Recommendations

Form of Reconsideration Model

- BGC to continue reconsideration of Board's prior decisions.
- The full BGC, and not a subset, should remain as the body considering Reconsideration Requests.

Reconsideration Process Recommendations

What May Be Reconsidered?

- Staff action: Policies that can be basis for challenging staff action/inaction should be those that are approved by the Board (after community input) that will impact the community in some way.
  - For those processes/procedures that are not policies, complaints regarding staff action/inaction are more appropriately addressed to ICANN management, or the Ombudsman if unfairness can be alleged.

Reconsideration Process Recommendations

What May Be Reconsidered?

- Board action: Grounds for Reconsideration should be expanded to include both:
  - If information was available at time of Board decision, but not presented to Board, except where the requestor could have submitted but did not submit the information, and the information could have formed the basis for the decision.
  - If the requestor can demonstrate that inaccurate/false/misleading information was presented to, and formed the basis for, the challenged Board action or inaction, if it materially and adversely affected a party.
    - Requires more than allegation of inaccuracy; requestor must demonstrate inaccuracy and the causal connection between the inaccuracy and the challenged Board decision.

Reconsideration Process Recommendations

What May Be Reconsidered?

- Standard for "materially harmed" and "adversely impacted"
  - Aggrieved party must demonstrate: a loss or injury suffered (financial or non-financial) that is directly and causally connected to challenged Board or staff action or inaction.
  - Aggrieved party must set out the loss or injury and the direct nature of that harm in specific and particular details.
  - The relief requested must be capable of reversing the alleged harm.
  - Injury or harm caused by third parties as a result of acting in line with the challenged decision is not a sufficient ground for reconsideration.
  - The impact of the injury or harm must be in itself of sufficient magnitude to justify the reconsideration and not exacerbated by the actions or omissions of a third party.
  - The request may be summarily dismissed, with due notice in the request form, if the facts relied on do not evidence "harm" or "impact".

Reconsideration Process Recommendations

What May Be Reconsidered?

- Define "Material Information"
  - "Material information" = Facts that are material to the Board's decision.
- Revise Reconsideration Request Form to Incorporate Definitions
  - The Reconsideration Request form should include terms and conditions and be modified to call for information specific to the definitions laid out here.

Reconsideration Process Recommendations

Clarification of Process - New Time Limitations

- For Board actions, Requests must be filed within 15 days of posting of the resolution at issue, or from the initial posting of the rationale (if rationale is not posted with resolution).
- For staff actions, requests should be received within 15 days of the staff action/inaction taking effect.
- The BGC must issue recommendation on the Request within 30 days of filing, or as soon thereafter as feasible. The feasibility of time limits depend on issues such as the complexity of the request, the number of requests pending simultaneously, or similar situations.
- The Board to issue determination on the BGC recommendation within 60 days of receipt or as soon thereafter as feasible; circumstances that delay the Board action should be published on the website.

Reconsideration Process Recommendations

Clarification of Process - Page Limitations

- Incorporating a page limitation for the submission of argument is not anticipated to curtail any of the principles identified.
- Efficiency, expeditiousness and ease of access will be enhanced by limiting argument (legal submissions) to no more than 25 pages of double-spaced, 12-point font.
- Requestors may submit all facts necessary in the request form, without limitation, to demonstrate why the decision should be reconsidered.

Reconsideration Process Recommendations

Clarification of Process - BGC Role in Considering Staff Action/Inaction

- When a reconsideration request is brought to challenge a staff action/inaction, BGC should have delegated authority from the Board to make the final determination.
- In these situations, as the staff action/inaction was not initially a matter before the Board, there is no need for the Board as a whole to review these recommendations.
- The BGC may determine if is appropriate to take a recommendation of this type to the Board, and the BGC retains the authority and discretion to do so.
- This vesting of responsibility to the BGC may necessitate a modification to the BGC Charter.

Reconsideration Process Recommendations

Clarification of Process - Summary Review and Dismissal

- The BGC should have the power to dismiss a reconsideration request summarily; there is no benefit to continue process when there is no substance to request or if it is frivolous, querulous or vexatious.
- Reconsideration Request form should be modified to put requestors on notice of the potential for a summary dismissal.
    - A question similar to the following must be included in the form: "Please state specifically the grounds under which you have the standing and the right to assert this claim." This question may be tailored to address the definition of "materiality" that will be incorporated into the Request Form.

Reconsideration Process Recommendations

Clarification of Process - "Stay" Not Feasible; Provide for Urgent Review Instead

- A stay adds – not diminishes – uncertainty to the process. ICANN is not able to grant the relief to third parties that normally accompany a stay in other scenarios, such as a right to a bond in the event the stay is improperly taken.
- Many people or entities, not just a Requestor, rely upon the Board's action. The ASEP does not view this lightly; it is important to note that ICANN is to be accountable to all, not just those aggrieved by a particular decision.

Reconsideration Process Recommendations

Clarification of Process - "Stay" Not Feasible; Provide for Urgent Review Instead (cont.)

- Provide a right to apply to the BGC for urgent reconsideration.
- An request for urgent consideration must be made within two business days (calculated at ICANN's headquarters in Los Angeles, California) of posting of the resolution at issue; must set out why the matter is urgent for reconsideration; and must demonstrate a likelihood of success in the resolution of a request for reconsideration.
- The BGC must respond in two working days or as soon as feasible thereafter as to whether the matter is urgent.
- If the matter is deemed as urgent, the requestor will be given an additional two business days to complete the submission of a Reconsideration Request. The BGC must consider this issue as a matter of urgency within seven days thereafter.

Reconsideration Process Recommendations

Clarification of Process - Hearings Not Required

- No hearing is required in the Reconsideration Process. However, the BGC retains the absolute discretion to call people before it to provide additional information.
- Complainants may request an opportunity to be heard by the BGC; the BGC decision on such a request to be heard is final.
- This should be included in the Request form.

Reconsideration Process Recommendations

Clarification of Process - Combined/Consolidated Request

- "Class" type filings may be appropriate within the reconsideration process. The definition of the standard for review of the feasible of "class" treatment should be "Is the alleged causal connection and the resulting harm the same for all of the complaining parties?"
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has been materially harmed and adversely impacted by the action/inaction giving rise to the request.
- As needed, the BGC shall have the ability to consolidate the consideration of reconsideration requests if they are sufficiently similar.

Reconsideration Process Recommendations

Clarification of Process - Third Party Participation in Process

- All material information relevant to the request should be provided through the requestor.
- However, if information comes to the BGC through another channel the BGC should provide that information to the requestor and post it on the ICANN website.

Reconsideration Process Recommendations

Effect Of Outcomes - No Right to "Appeal" Decisions on Reconsideration

- The Board's decision on the BGC's recommendation is final (i.e., not subject to a Reconsideration Request).
- In the event the matter is about Staff action/inaction, the BGC's determination is final.
- Notice of this should be made clear to those seeking reconsideration through the introduction of a Terms and Conditions section in the form provided for the submission of Reconsideration Requests.

Reconsideration Process Recommendations

Effect Of Outcomes - Precedential Value of Decision

- Board Action: When a reconsideration request is about Board action, the concept of "precedent" is not relevant, as the question focuses on whether or not the Board considered material information in a specific instance.
- Staff Action: When the request is about staff action, the BGC consideration of violation of the policy should have precedential value. The fact of precedential value carried by prior recommendations on Reconsideration should be noted in the Reconsideration Request form.

Reconsideration Process Recommendations

Metrics to Identify Effectiveness

- It is difficult to identify metrics to show that the Reconsideration process adds value, as it should not be based solely upon how many requests are filed or how many requests succeed. The fact of use of the process may show that the availability of the process as means to make sure the Board and staff act appropriately is of value. When the process is invoked, it will be important to evaluate if the BGC/Board performed the process in a consistent and transparent manner.
- For complaints of staff action, a proposed metric is: If the BGC determines that staff did not follow a policy, did staff properly re-evaluate and follow policy thereafter?

Independent Review Process (IRP)

Independent Review Process Recommendations

Independent Review - Omnibus Standing Panel

- The ASEP recommends establishing an omnibus standing panel of six-to-nine members, taking account of geographic diversity. Each member should receive an annual retainer, and a small per-diem fee as they are called for service.
- Each IRP panel will be selected from among the omnibus standing panel members.
- The expertise desired on the standing panel include jurisprudence, judicial experience, alternative dispute resolution, and knowledge of ICANN's mission and work.
- For consistency in IRP panel decisions and administration of proceedings, due care must be given in the selection of panelists to assure a broad range of experience and meeting of objective criteria for service.

Independent Review Process Recommendations

Independent Review Panel – Omnibus Standing Panel (cont.)

- The standing panel should have a Chair that may, at his/her discretion, serve on any or all selected panels during his/her tenure (not to exceed three years) as another measure of continuity throughout the proceedings. There should be administrative support for the standing panel.
- Appointment periods for the panelists should be staggered to allow for continued review of whether the panel has the correct number of members and the required skills and capacity.

Independent Review Process Recommendations

Independent Review - Size of IRP Panel

- While the parties can request that an IRP be heard by a one- or three-member panel, the Chair of the standing panel retains the right to decide on the size of the panel and make recommendations on who will be on the panel, based upon issues such as the complexity of the matter alleged and whether any particular expertise is called for.
- The terms and conditions section of IRP submission form will describe the panel selection process.

Independent Review Process Recommendations

What May Be Subject of IRP? – Complainant must be "materially harmed":

- The complainant must demonstrate, in specific and particular details, the injury or harm suffered (financial or non-financial) that is a directly and causally connected to the Board's alleged violation of the Bylaws or Articles of Incorporation.
- The decision of the panel (as reviewed and acted upon by the Board) must be capable of reversing the injury alleged by complainant.
- Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for independent review.
- The impact of the injury or harm must be in itself of sufficient magnitude to justify the review and not exacerbated by the actions or omissions of a third party.
- The request may be summarily dismissed, with due notice in the IRP submission form, if the facts relied on do not evidence "injury" or "harm" as defined.

Independent Review Process Recommendations

What May Be Subject of IRP? - Material Standing Requirement:

- There has to be some definition of locus to ICANN. The person or entity bringing an IRP against ICANN must be able to specifically identify how it has been directly impacted by an ICANN Board decision, and not by the actions of third parties.
- This will be called for in the IRP submission form.

Independent Review Process Recommendations

Clarification of Process – Time Limitations

- A reasonable but not excessive limitation must be imposed. The request must be filed within 30 days of the posting of approved minutes (and accompanying Board Briefing Materials) that demonstrate the requestor's contention that ICANN violated its Bylaws or Articles of Incorporation. If the request is not filed within that time, the requestor is time barred.

Independent Review Process Recommendations

Clarification of Process - Time Limitations (cont.)

- It is generally recommended that an IRP conclude to determination within four-to-six months of filing.
- The IRP Panel will retain ultimate responsibility and control of the timing of each IRP and the schedule for the parties to follow.
- The form for requesting an IRP should include a term and condition that the IRP Panel sets the timetable for the proceeding and violations of the IRP Panel's timetable may result in an appropriate order.

Independent Review Process Recommendations

Clarification of Process - Cooperative Engagement

- It is recommended that the complainant initiate a period of cooperative engagement with ICANN prior to seeking independent review.
- The cooperative engagement mechanism will be an opportunity for ICANN and the complainant, in good faith and without outside counsel, to discuss the ways in which the party alleges the Board has violated ICANN's Bylaws or Articles of Incorporation and to determine if the issue can be resolved without an IRP, or if the issues can be narrowed.
- When the cooperative engagement is initiated, ICANN will designate a representative for the discussions, and in-person consultation is recommended, if reasonable.

Independent Review Process Recommendations

Clarification of Process - Cooperative Engagement (cont.)

- The cooperative engagement period should last for approximately 14 days.
- Cooperative engagement is not mandatory, but recommended.
- All matters discussed during cooperative engagement 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.
- Cooperative engagement period should be initiated prior to a requestor incurring fees for preparing filings for an IRP.

Independent Review Process Recommendations

Clarification of Process – Conciliation

- Upon the filing of an IRP a period of good faith conciliation is recommended, to resolve or narrow the remaining issues.
- A conciliator will be appointed by Chair of the omnibus standing panel from among the standing panel members (if the creation of a standing panel is adopted).
- The conciliator will receive a limited per-diem fee.
- The conciliator will not serve on the IRP panel.
- The IRP panel chair may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues.
- The conciliation period should last for approximately three weeks.
- All matters discussed during conciliation 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.

Independent Review Process Recommendations

Clarification of Process - Effect of Not Using Cooperative Engagement or Conciliation

- Neither cooperative engagement nor conciliation is required, but if IRP complainant does not avail itself in good faith of cooperative engagement or conciliation AND the IRP complainant is not successful, the IRP panel must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.
- ICANN is expected to participate in the cooperative engagement and conciliation processes, as requested, in good faith.
- This should be included as a term and condition in the IRP submission form.

Independent Review Process Recommendations

Clarification of Process - Summary Review and Dismissal

- An IRP should be summarily dismissed for lack of standing, lack of substance., being frivolous or vexatious.
  - Allowing a claim to proceed and use community resources when there is no merit to the claim is not an enhancement to accountability and is not in the interest of the community.
- Notice of the option of summary dismissal must be in the IRP Form. A question similar to the following must be included: "Please state specifically the grounds under which you have the standing and the right to assert this claim and the specific grounds on which you rely."
- A question may be tailored to address the definition of "materiality" that will be incorporated into the IRP.

Independent Review Process Recommendations

Clarification of Process - Page Limitations

- Written submissions of legal argument to the IRP Panel should be limited to 25 pages, double spaced and in 12-point font (both requestor and ICANN are subject to the same limits). This does not include evidence.
- All necessary evidence to demonstrate the claims that ICANN violated its Bylaws or Articles of Incorporation should be submitted in the IRP form.

Independent Review Process Recommendations

Clarification of Process - Expert Submissions Allowed

- The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence by exchange of the written objections with written rebuttals filed within 14 days of receipt of the written expert evidence.

Independent Review Process Recommendations

Clarification of Process - In-Person Hearings Not Authorized

- The nature of the IRP panel is to determine if ICANN followed its Bylaws or Articles of Incorporation, which does not seem to lend to hearings.
- In general, there should not be an in-person hearing. The parties should maximize electronic communication in their submissions.
- If there is need for a hearing, in the discretion of the IRP Panel, the hearing should be limited to argument only; all evidence (including witness statements, expert statements, etc.) shall be submitted in writing.

Independent Review Process Recommendations

Clarification of Process – Panel Selection

- Once the size of the panel is determined, the parties may agree on panel selection process.
- Panelist selection must be completed within 21 days after the completion of the conciliation phase (or if no conciliation phase, the filing of the IRP).
- If the parties have not agreed on the selection at that time, the Chair of the standing panel shall complete selection of panelists within seven days.
- This will be identified in the IRP filing terms and conditions.

Independent Review Process Recommendations

Clarification of Process –
Combined/Consolidated Proceedings

- "Class" type filings may be appropriate within the IRP process. The definition of the standard for review of the feasible of "class" treatment should be "Is the causal connection between the circumstances of the complaint and the harm the same for all of the complaining parties?"
- Representational complaints, such as those brought by a trade group on behalf of membership, may only be submitted if the requestor itself can demonstrate that it has standing and has been materially impacted by the Board action in violation of the Articles of Incorporation or Bylaws that gives rise to the request.
- As needed, the IRP Panel shall have the ability to consolidate IRP requests if they are sufficiently similar.

Independent Review Process Recommendations

Clarification of Process - Third Party Participation

- If third parties believe that they have information to provide to the IRP, that information should be provided through the claimant.

Independent Review Process Recommendations

Clarification of Process - A Defined Standard of Review Must Be Incorporated

- The IRP should be subject to a defined standard of review, including: (i) did the Board act without conflict of interest in taking its decision; (ii) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; (iii) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
- If a complainant demonstrates that the Board did not make a reasonable inquiry to determine it had sufficient facts available, Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the complainant will have properly stated grounds for review.

Independent Review Process Recommendations

Effect of Outcomes - Outcomes of the IRP Process are Final

- The declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value.
- If an IRP is later initiated on the same issue, the prior decision may serve as grounds for a summary dismissal.
- The terms and conditions within the submission form must note that the ultimate Board decision following on from the IRP determination is final and creates precedent.

Future Work & Next Steps

Next Steps

- The ASEP recommends that ICANN Community carefully consider the recommendations.
- If comments are received that suggest modifications to these recommendations would further ICANN's accountability and transparency, the ASEP will take those into consideration.
- The ASEP encourages a further schedule of review of the accountability structures once there is experience with the structures as modified.
- The ASEP also encourages future consideration of adoption of new accountability structures as would serve the global public interest.

The Experts

Accountability Structures Expert Panel

Mervyn King

- Senior Counsel and former Judge of the Supreme Court of South Africa
- Professor Extraordinaire at the University of South Africa on Corporate Citizenship
- Chair of King Committee on Corporate Governance (S.A.)
- Former Chair, UN Committee on Governance and Oversight
- Chairman of the International Integrated Reporting Council

Accountability Structures Expert Panel

Graham McDonald

- 40 year legal career
- Inaugural Australian Banking Ombudsman
- Served 22 years as a Presidential Member of Australia's Administrative Appeals Tribunal
- On board of AuDA

Accountability Structures Expert Panel

Richard Moran

- CEO and Vice Chair, Accretive Solutions
- Director on several Boards
- Active with the National Association of Corporate Directors, working with boards to improve effectiveness
- Business author and radio host

Exhibit H

Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel

Article IV, Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

~~3.~~4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

   a. ~~The IRP~~ did the Board act without conflict of interest in taking its decision?;
   b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
   c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

5. Requests for independent review shall ~~be operated~~not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN's response shall not exceed that same length. Parties may submit documentary evidence

supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel.

~~4.~~7. All IRP proceedings shall be administered by an international ~~arbitration~~dispute resolution provider appointed from time to time by ICANN ("the IRP Provider~~") using arbitrators under contract with or nominated~~"), The membership of the standing panel shall be coordinated by ~~that provider~~the IRP Provider subject to approval by ICANN.

~~5.~~8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

~~6.~~9. Either party may ~~elect~~request that the ~~request for independent review~~IRP be considered by a one- or three-member panel; ~~in~~ the ~~absence~~Chair of ~~any such election,~~ the ~~issue~~ standing panel shall ~~be considered by a one-member panel~~make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

~~7.~~10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels~~; provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims~~.

~~8.~~11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

~~a.~~b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

~~b.~~c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

~~c.~~d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP~~.~~;

~~9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.~~

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

~~10.~~12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by ~~e-mail~~email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.

~~11.~~13. ~~The IRP~~All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

14. ~~Declarations of the IRP shall be in writing. The IRP~~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.

15. 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.

16. 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.

17. 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.

~~12.~~18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

~~13.~~19. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on ~~the Website~~ICANN's website when they become available.

~~14.~~20. The IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

~~15.~~21. Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.