

JONES DAY

Contact Information Redacted

February 26, 2015

VIA EMAIL

Mr. Babak Barin
Prof. Catherine Kessedjian
Judge William J. Cahill

Re: DCA and ICANN; ICDR Case No. 50-20-1300-1083

Dear Mr. Chairman and Members of the Panel:

On behalf of ICANN, we are delighted that the Panel is operational again, and we look forward to working with you to complete this Independent Review proceeding in a timely fashion.

In conjunction with the hearing scheduled for May 22-23, 2015 in Washington, D.C., and given the replacement of Justice Neal by Judge Cahill, ICANN respectfully draws the attention of the Panel to Article 15.2 of the International Centre for Dispute Resolution (“ICDR”) Arbitration Rules, which provides:

“if a substitute arbitrator is appointed under this Article, unless the parties otherwise agree, the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.”

As the panelists are aware, the ICDR Arbitration Rules govern these proceedings together with the “Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process” (hereinafter, the “Supplementary Procedures”). Paragraph 2 of the Supplementary Procedures states that “[i]n the event there is any inconsistency between these Supplementary Procedures and the [ICDR’s International Arbitration] RULES, these Supplementary Procedures will govern.” The Supplementary Rules are silent with respect to the replacement of panelists and the possibility to repeat all or part of the case.

While ICANN does not see the necessity to repeat all of this IRP, ICANN respectfully suggests that this Panel, now re-constituted, should at a minimum consider whether to revisit the part of the case relating to the issue of hearing witnesses,

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addressed in the Panel's procedural declaration dated 14 August 2014 ("14 August Order").¹

It goes without saying that panelists derive their powers and authority from the relevant applicable rules, the parties' requests, and the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, which establish the process of independent review). The authority of panelists is limited by such rules, submissions and agreements.

Here, the Panel exceeded its authority under the Supplementary Procedures when it held in its 14 August Order that it could "order" live testimony of witnesses despite the Panel's acknowledgment that the Supplementary Procedures expressly limit any closing argument to argument only. When DCA submitted its application to ICANN for the right to operate the .AFRICA TLD, DCA agreed that its remedies would be limited to the accountability mechanisms provided for in ICANN's Bylaws, which include the Independent Review process that DCA has invoked.² The ICDR is the administrator of that process, and it has issued Supplementary Procedures that govern these proceedings. Paragraph 4 of the Supplementary Procedures provides:

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephone hearings are subject to the same limitation.

Of course, the ICDR did not create this limitation out of thin air: the limitation is based on virtually identical language in Article IV, Section 3, Paragraph 12 of ICANN's Bylaws.

¹ ICANN may also request that the reconstituted Panel address the issue of whether an IRP Declaration procedure is advisory or binding. If so, we will address the issue separately.

² As the Panel noted in its August 14 Order, and as DCA itself acknowledged in its submissions, DCA accepted ICANN's offer to resolve through Independent Review, based on the Supplementary Procedures and the ICDR Arbitration Rules, any and all disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws. *See* Declaration at ¶ 22-23.

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Courts have routinely recognized that parties may agree to various limitations to the procedural rules for adversary proceedings. For instance, in *Nat'l Hockey League Players' Assoc. v. Nat'l Hockey League*, 30 F. Supp. 2d 1025, 1029 (N.D. Ill. 1998), the court vacated an award when the arbitrator considered evidence the parties had specifically agreed to exclude. In *CBA Indus., Inc. v. Circulation Mgmt., Inc.*, N.Y.S.2d 234, 235 (N.Y. App. Div. 1992), the court held that an award of counsel fees and costs was properly eliminated from an arbitration award where the arbitration clause provided that each party would bear its own costs and legal expenses. And in *Muskegon Central Dispatch 911 v. Tiburon Inc.*, 462 Fed. App'x 517 (6th Cir. 2012), an arbitrator's award was vacated after the reviewing court found that the arbitrator disregarded the underlying contract, which related to the implementation of an integrated public safety computer system.

Dispute resolution rules can also limit the power of the panelists. As pointed out by the AAA in a recent White Paper, the ICDR Arbitration Rules “have a number of unique provisions which include an express waiver to punitive damages.”³ Accordingly, no panel appointed under the ICDR Rules would think of awarding punitive damages, even if a panel could find such award justified by a party's behavior. Courts have also held that where an arbitration agreement unequivocally excludes punitive damages claims from the scope of arbitration, arbitrators are prohibited from awarding such damages. *See Pyle v. Secs. U.S.A., Inc.*, 758 F. Supp. 638 (D. Colo. 1991); *Porush v. Lemire*, 6 F. Supp. 2d 178, 185 (E.D.N.Y. 1998).⁴

Luis M. Martinez, the Vice-President of the ICDR, specifically noted in the aforementioned White Paper that dispute resolution rules such as arbitration rules do not happen in a vacuum and can be adapted and modified by users:

Users have numerous options available to them to customize their arbitration agreement and enhance predictability. They may reduce the number of arbitrators to a sole arbitrator, or include provisions to

³ Time and Costs – Taking Control of your International Arbitration, by Luis M. Martinez, American Arbitration Association, available at <https://www.adr.org>.

⁴ Another example can be found in the UNCITRAL arbitration rules, which provide that there should be no hearing if the parties have agreed so. Article 24 of the UNCITRAL arbitration rules provides: “Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, *unless the parties have agreed that no hearings shall be held*, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.” (Emphasis added.)

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control or limit the document exchange. They may include a mediation phase prior to the arbitration or scheduled concurrently; time frames may be specified, and hearings may be waived with the matter proceeding on documents only.”

Here the Supplementary Procedures—issued by the ICDR and based on language in ICANN’s Bylaws authorizing these proceedings—provide that in-person hearings shall occur only in exceptional circumstances, and that if such hearings do occur, they shall be limited to argument only. This language is not ambiguous. When accepting their appointments in this proceeding, the members of the Panel agreed to faithfully and fairly hear and decide the matters in controversy between the parties in accordance with the rules established for this proceeding. Deciding to hear witnesses is not in accordance with the Supplementary Procedures or ICANN’s Bylaws, and is in fact in direct conflict with both.

The language limiting any hearing to “argument only” with “all evidence, including witness statements [to be] submitted in writing in advance” was added after ICANN recognized the importance of limiting costs for both ICANN (a not-for-profit public benefit corporation) and applicants for new top-level domains. Indeed, many potential applicants criticized the costs associated with the new gTLD program during public consultations preceding the launch of the new gTLD program. Notably, the amendment to the Supplementary Procedures followed the only live hearing that has been conducted in an IRP, the 2009 hearing in the *ICM* IRP, which related to ICM’s application for the .XXX string. The *ICM* hearing involved live witness testimony over a five-day period, cost the parties millions of dollars in fees, and resulted in ICANN’s decision, with the support from the Internet community, to avoid a repeat of that hearing (i.e., exactly the sort of lengthy and expensive proceeding that DCA has been requesting for this matter).

While ICANN continues to stress that compliance with the Supplementary Procedures is critical to ensure predictability for ICANN, applicants for and objectors to gTLD applications, and the entire ICANN community, ICANN wants to make clear that it is confident that a hearing of witnesses in this matter would not result in any finding adverse to ICANN. Indeed, the documents that have been provided to the Panel demonstrate the weakness of DCA’s case.⁵

⁵ The most relevant evidence in these proceedings now consists of contemporaneous documents disclosed by the GAC after DCA’s documents requests, which completely contradict DCA’s contention that the GAC was not authorized to issue, or did not in fact issue, “consensus advice” opposed to DCA’s application. The evidence further confirms that DCA’s allegations

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ICANN's request to limit the scope of any hearing to "argument only" is also fully consistent with the concerns that have been repeatedly expressed by many corporations and practitioners regarding increased costs and delays in international arbitral proceedings, which are coming to resemble full-fledged, common-law trials. A "scorched earth" policy is said to taint many proceedings,⁶ with a frequent criticism that arbitrations have become infected with "Americanized" pre-hearing discovery.⁷ And, of course, Independent Review proceedings are not even arbitrations and are intentionally designed to be even more streamlined.

It goes without saying that ICANN is committed to fairness and accessibility, but ICANN is also committed to predictability and the like treatment of all applicants. For this Panel to change the rules for this single applicant does not encourage any of these commitments.

Even so, DCA has argued that would be "unfair" not to allow DCA to cross-examine ICANN's witnesses, thereby admitting witness declarations into evidence "untested." But DCA's arguments cannot overcome the plain language of the Supplementary Procedures. First, and as DCA has conceded repeatedly in its previous pleadings, DCA specifically agreed to be bound by the Supplementary Procedures when it submitted its application. Accordingly, DCA has already agreed that hearings, if any, would be limited to argument only.

Second, the Supplementary Procedures apply to both ICANN and DCA. ICANN is in the same position as DCA when it comes to testing witness declarations, specifically the lengthy declaration of Ms. Sophia Bekele that DCA submitted with its last memorial.

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that two ICANN Board members had conflicts of interest when they voted to accept the GAC advice are simply false. In short, the witnesses would simply confirm what the documentary evidence already reveals, which is that DCA's claims should fail.

⁶ See discussion in Klaus Peter Berger, *The Need for Speed in International Arbitration*, 25(5) J. INT'L ARB 595 (2008), commenting on the new DIS Supplementary Rules for Expedited Proceedings. Professor Berger goes on to note that arbitration may well be more suited than court proceedings to the resolution of complex cross-border business disputes, but that the complexity can add time and cost.

⁷ See Roger Alford, *The American influence on International Arbitration*, 19 Ohio State J. Disp. Resolution 69 (2003); Bernard Audit, *L'Américanisation du droit*, 45 Arch. philosophie du droit 7 (2001).

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Third, parties in alternative dispute resolution proceedings where examination of witnesses is allowed often waive cross-examination. In such cases, the panel usually will not insist on hearing witness, and rather will assess the weight of the evidence without assuming the truth of the contents of the witness statements.

DCA has also argued that the IRP is the “only remedy” with respect to DCA’s application because it cannot file suit against ICANN, and that due process and procedural fairness therefore require that it be afforded the opportunity to cross-examine witnesses. DCA is correct that it cannot file suit against ICANN with respect to its application, but that does not mean that it should get the equivalent of a lawsuit as an alternative. The IRP is a very specific process, adopted following years of consultation with both experts and the Internet community and aimed at assessing whether decisions of ICANN’s Board of Directors were consistent with ICANN’s Bylaws and Articles of Incorporation. ICANN is not aware of any other corporations that offer such an opportunity to third parties, who do not ordinarily have standing to challenge a board’s decisions. ICANN has done so because of its unique role vis-a-vis the Internet community. That said, it is even clearer that third parties should not be in a position to challenge the procedural rules that ICANN has established for these proceedings.

In sum, the Independent Review process is an alternative dispute procedure adapted to the specific issues to be addressed pursuant to ICANN’s Bylaws. The process cannot be transformed into a full-fledged trial without amending ICANN’s Bylaws and the Supplementary Procedures, which specifically provide for a hearing that includes counsel argument only. Accordingly, ICANN strongly urges the Panel to follow the rules for this proceeding and to declare that the hearing in May will be limited to argument of counsel.

We thank the Panel for its attention to this matter. We suggest that DCA be given an opportunity to respond in writing, and that the Panel hold a short telephonic hearing if it has any further questions.

Very truly yours,

/s/

Jeffrey A. LeVee

cc: Counsel to DCA