

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

dot Sport Limited)
6A Queensway Gibraltar)
GX11 1AA GI)
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Claimant)
)
v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

ICDR Case No.01- 15-0002-9483

**SUBMISSION
REGARDING PROCEDURAL QUESTION: IN-PERSON HEARING**

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I. THE PANEL'S QUESTION

1. On January 26, 2016, the Panel sent the following message to the parties:

We note that the hearing in this matter is scheduled for 17 February 2016. The Applicant had previously indicated a preference for an in-person hearing. However the applicable By-Laws and procedures do encourage the parties and Panel to be as efficient as possible. Given the distance between parties and Panel members, and the nature of this case, it is our current view that the most efficient way to proceed is with a hearing by telephone.

To accommodate the US attendees, we propose to commence the hearing at 3.30pm CET. We anticipate it will take approximately two hours. Please inform the Panel of any concerns or objections, together with reasons, to this approach by Friday 5 February 2016.

Regards

*Wendy Miles
On behalf of the Panel*

II. CLAIMANT'S VIEWS

2. Claimant respectfully requests that the Panel exercise its authority to allow an in-person hearing in this case. Not only does the Panel have the authority to hold in-person hearings, it is also vital for the reasons set forth below that an in-person hearing be held in this particular case in order to allow Claimant a fair opportunity to present its case. Claimant asks the Panel to maintain the procedural balance between the parties.

A. As a general rule, the Panel must conduct in-person hearings

3. In the words of Gary Born, "*the opportunity to present its case, in person and in the physical presence of the tribunal, is a basic, irreducible aspect of the adjudicative process which ought in virtually all cases be fully respected. There is contrary authority, but it is limited and unpersuasive.*"¹

¹ G. Born, *International Commercial Arbitration: Volume II, International Arbitral Procedures*, 2nd ed. 2014 Wolters Kluwer Law & Business, p. 2266.

4. One must bear in mind that the “*principal exception to the parties’ ultimate procedural autonomy is where the parties’ agreement on arbitral procedures violates mandatory rules of procedural fairness and equality, denying one party the opportunity to be heard.*”²

B. The ICDR rules expressly authorize the Panel to conduct the IRP in the manner the panel finds appropriate, provided that mandatory rules of procedural fairness and equality are respected

5. The above principles are confirmed in the rules that apply to this arbitration, and the limitations on the format of the hearing, that ICANN seeks to impose on Claimant through its Bylaws and Supplementary Procedures, must be considered within the context of these principles.

6. Article 20.1 of the ICDR Rules provide that the Panel may “*conduct the arbitration in whatever manner it finds appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.*”³ Thus, the Panel has broad discretion to structure the proceedings in the manner best suited to provide each party the right to be heard and a fair opportunity to present its case.

7. Neither the Supplementary Procedures nor the Bylaws contain a provision to the contrary. ICANN’s Bylaws were amended on 11 April 2013, *i.e.*, almost two years after the application round was approved and one year after Claimant had filed applications under the then existing and known regulatory framework. Importantly, all procedural rules were, and still are, unilaterally imposed by ICANN. Claimant has always emphasized the importance of an in-person hearing and it will do so below as it maintains its position.

² G. Born, *International Commercial Arbitration: Volume II, International Arbitral Procedures*, 2nd ed. 2014 Wolters Kluwer Law & Business, p. 2142.

³ International Centre for Dispute Resolution, *International Arbitration Rules*, Art. 20.1 (1 June 2014).

8. In contrast with the previous Bylaws, the current Bylaws explicitly provide for the possibility of in-person hearings but limited to arguments only (*i.e.*, without live witness testimony).⁴ (**RM 2**, Article IV(3)(12))

9. It is worth mentioning that in-person hearings have been held under the current rules.⁵ In one case parties not only discussed the possibility to organize an in-person hearing. They also discussed the possibility to allow a live witness testimony. The panel in that case determined that it had the “*the power to interpret and determine the IRP Procedure*” (**RM 32**, paras. 20, 129) and that “[*n*]othing in the *Supplementary Procedures* either expressly or implicitly conflicts with or overrides the general and broad powers that . . . the *ICDR Rules* confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.” (**RM 32**, paras. 50)⁶ That panel decided to organize an in-person hearing with live witness testimony despite the fact that the Bylaws limit the hearing to arguments only (*i.e.*, without witness testimony). (**RM 32**, para. 84)

10. Moreover, even though the possibility of in-person hearings was not explicitly provided for in the previous version of the Bylaws, it has not prevented panels from

⁴ The new Bylaws also introduced a time bar for initiating an IRP and a twenty-five page limit for submitting a request for an IRP. Compare Article IV(3)(3) of the previous Bylaws (**RM 3**) with Article IV(3)(3) of the amended Bylaws of 11 April 2013 (**RM 2**).

The time bar can only apply to actions taken after 11 April 2013 (See [United States v. Security Indus. Bank, 459 U.S. 79 \(1982\)](#)), and Claimant has timely challenged the ICANN’s Board actions taken after 11 April 2013 with respect to its application.

⁵ See: <https://www.icann.org/en/system/files/files/procedural-order-8-04may15-en.pdf> ; <https://www.icann.org/en/system/files/files/procedural-order-4-07sep15-en.pdf>.

⁶ See also **RM 32**, para. 51: “*To the contrary, the Panel finds support in the ‘Independent Review Process Recommendations’ filed by ICANN, which indicate that the Panel has the discretion to run the IRP proceedings in the manner it thinks appropriate.*”

organizing in-person hearings. In the *ICM Registry Services v. ICANN* case (an IRP of the previous round that was conducted from 2008 until 2010), the hearings lasted five days.

C. Procedural fairness and equality require that an in-person hearing be organized

1. An in-person hearing would contribute to preserving the procedural balance between the parties

11. ICANN has had an opportunity to express its view about recent new case law and it was able to do so in writing. In view of the Panel's earlier decision of 14 January 2016 not to allow additional submissions on the merits, Claimant submits that it is essential that it is fully heard during oral argument, and that a record is kept of Claimant's pleas in fact and law.

2. The nature of the case justifies an in-person hearing

12. The case at stake is about a delicate issue including political decisions and contacts between ICANN and the sports world, the latter being under discussion on several different levels. Claimant wishes to avoid discussing such a case over the phone. The case relates to the result (strongly contested) of an expensive application procedure in which the ICANN application fee of USD 185,000.- represents only a fraction of the overall cost that applicants incurred when demonstrating that they are able to run a registry. The outcome of the application may have a major financial impact, especially for Claimant, possibly in an amount of several millions of Euros of immediate loss. Some companies have turned their registry-related services into a multi-billion business. Most recently, the TLD application for .shop was auctioned for USD 41,501,000.- (the proceeds have been allocated to ICANN).⁷ Previously, the application for .app was auctioned for USD 25,001,000.- (the proceeds have

⁷ <https://gtldresult.icann.org/application-result/applicationstatus/auctionresults>.

also been allocated to ICANN).⁸ These amounts give an indication of the market value that a highly sought-after generic word can have as a TLD. In view of the issues at stake, Claimant cannot accept the idea that this case be handled in a two-hour telephone hearing.

3. Procedural fairness is better served with an in-person hearing and a court reporter

13. In previous cases where oral arguments were presented during a telephone hearing, Claimant's counsel have noted mischaracterization of elements of facts and party's claims, and Claimant wishes to avoid that in this case. As was done in other cases, we strongly suggest that the Panel Members not only allow the organization of an in-person hearing but call upon a court reporter, the costs of which should be advanced by both parties in equal parts.

14. Transcripts improve transparency and enhance accountability. Information and views developed in every single IRP in the current round are very important for the ICANN community which is in the process of reviewing the accountability mechanisms. Also, this current round remains a test for ICANN, who must show that it is able to cope with disputes if it wants to fulfil its ambition to install a general permanent window for the application of new gTLDs. ICANN is making a great effort to evaluate the current new gTLD round and should welcome this opportunity to share all developments regarding transparency. We would find it impossible to understand any attitude to the contrary and the community at large will question any opposition by ICANN to such improved transparency.

4. ICANN's unilaterally imposed rules cannot impede a fair procedure

15. It must be reminded that ICANN envisioned the IRP as an alternative to court dispute resolution. For ICANN, the IRP must be seen as ICANN's final accountability mechanism.

⁸ <https://gtldresult.icann.org/application-result/applicationstatus/auctionresults> .

16. Supposedly, ICANN has had in mind an equal treatment of all parties and all applicants when it developed the IRP. The Panel Members should be aware that ICANN is presently working on the nomination and appointment of a standing panel that ICANN would like to see handling all future cases. The underlying idea of a standing panel has some merit: to appoint a small group of people who are fully educated in the relevant regulatory framework and case law. This approach would justify the “new” procedural rules, which impose page limits and encourage a more streamlined procedure allowing parties to go straight to the core of a case, since everybody involved in the case would already be familiar with the context and regulatory framework.

17. A standing panel is currently not in place. And previous cases have shown how important it is for a panel that was appointed on an *ad hoc* basis to be afforded the opportunity to grasp the debate fully.

18. Despite its supposed good intentions regarding equal treatment, ICANN remains the only party involved in the establishing of this standing panel;⁹ its search for panel members is not transparent, and its thinly veiled ambition to install an ICANN-minded standing panel is worrying. In contrast, there are numerous industries (energy, media, ...) for which no standing panel has been required nor installed and relating to which many cases were handled to the satisfaction of the parties in the market. Any merits that such a standing panel may have will be inherently limited and not in line with the free market spirit that distinguishes arbitration from other adjudicative processes. Other typical issues that might arise, such as possible conflicts of interest and natural limitations to lives and careers, also raise the question of the efficiency of such panel.

⁹ ICANN may submit the list of proposed panelists for public comment. However, its Board will ultimately decide. And, as experienced with the Ombudsman’s recommendation in the current case, the Board sometimes refuses to consider reasoned advice.

D. Efficiency would be best served with an in-person hearing

19. Claimant also strives for efficiency and appreciates the willingness of the Panel to do the same. In this respect, Claimant would like to remind the Panel of the technical problems that occurred during our introductory hearing in September 2015 and that resulted in one of the Panel Members being off-line for several minutes. An in-person hearing would avoid this problem and any procedural ramifications.

E. The distance between the parties should not preclude an in-person hearing

20. The distance between the parties and the Panel Members does not seem of relevance to Claimant. This case is sufficiently important for Claimant that the traveling time and costs related to attending an in-person hearing are fully justified. ICANN is a global organization with a global presence. Its nearest hub to all the Panel Members is Brussels. To represent it, ICANN has hired a global law firm with offices all over the world, including London, Brussels and some cities in Germany as well. Claimant is located in Gibraltar. Both Claimant and Claimant's lawyers are willing to make the effort to travel to an in-person hearing. Claimant does not see any negative practical implication.

F. The limited additional cost of an in-person hearing should not preclude its being held

21. ICANN has reserved an amount of one third of all 2012 Application fees (almost USD 118,000,000.-) to cover costs, which costs consist mainly of legal defense costs in disputes regarding new gTLD applications. Most applications have proceeded without any issues arising. Out of 1,930 new gTLD applications, 15 matters have so far led to litigation including 5 matters in which Claimant's counsel have been legal representatives of 10 applicants involved. It is fair to say that matters have to date been handled efficiently, and that only a fraction of the anticipated costs has been spent. In-person hearings have been held in both delicate and less delicate cases. In a recent IRP, involving similar issues with the

application for .sports (as opposed to .sport in the present case), the panel decided to hold an in-person hearing with transcripts.

G. Practical issues should not prevent an in-person hearing

22. Parties were informed well in advance of the hearing date and as an in-person hearing was and is still possible, they have had the opportunity to take all necessary preparatory measures to organize themselves in order to be able to attend an in-person hearing.

III. CONCLUSION

23. In conclusion, Claimant reiterates its request for the Panel's support for an in-person hearing with a court reporter at a place and time of convenience to all relevant persons involved in this case.

Respectfully submitted,



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