INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
Independent Review Panel

CASE # 50 117 T 1083 13

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

Between: DotConnectAfrica (DCA) Trust;
("Claimant")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at Contact Information Redacted

Contact Information Redacted

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at Contact Information Redacted

Claimant and Respondent will together be referred to as "Parties".

DECLARATION ON ICANN'S REQUEST FOR REVISITING OF THE 14 AUGUST 2014 DECLARATION ON THE IRP PROCEDURE FOLLOWING THE REPLACEMENT OF PANEL MEMBER

Prof. Catherine Kessedjian
Hon. William J. Cahill (Ret.)
Babak Barin, President

24 MARCH 2015

BACKGROUND & PARTIES' POSITIONS

1. In its 26 February 2015 letter, following the replacement of the Hon. Richard C. Neal (now deceased), and in conjunction with the upcoming hearing of this matter, ICANN requests that this Panel consider *revisiting* the part of this IRP relating to the issue of hearing witnesses addressed in the Panel's Declaration on the IRP Procedure of 14 August 2014 ("2014 Declaration"). In that same letter, ICANN advises in a footnote that it may in the future "request that the reconstituted Panel address the issue of whether an IRP Declaration procedure is advisory or binding."

2. ICANN submits that given the replacement of Justice Neal, Article 15.2 of the ICDR Rules together with ICANN's Supplementary Procedures for IRP ("Supplementary Procedures") permit this IRP to in its sole discretion, determine "whether all or part" of this IRP should be repeated.

3. According to ICANN, while ICANN "does not see the necessity to repeat all of this IRP", here, the Panel exceeded its authority under the Supplementary Procedures when it held in its 2014 Declaration that it could order live testimony of witnesses, and as such, it should at a minimum consider revisiting that issue.

4. According to ICANN, "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."

5. ICANN stresses 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...", and while "ICANN is committed to fairness and accessibility...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."

6. ICANN pleads that, DCA specifically agreed to be bound by the Supplementary Procedures when it initially submitted its application, the Supplementary Procedures apply to both ICANN and DCA alike, ICANN is now in the same position when it comes to testing witness declarations and finally, in alternative dispute resolution proceedings where cross examination of witnesses is allowed, parties often waive cross-examination.

7. Finally, ICANN advances that:

> [T]he Independent Review process is an alternative dispute resolution 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.

8. In order to presumably bolster its case, and in response to DCA Trusts response letter of 5 March 2015, ICANN filed with this Panel a copy of the final declaration in the Booking.com v. ICANN ("Booking.com") IRP issued on 3 March 2015. According to ICANN, that "IRP was resolved without any witness testimony" and "the final argument of counsel was two and a half hours by conference call."

9. In its March 5 response to ICANN's letter of February 26, DCA Trust submits that, "it is neither appropriate nor necessary to rehear and reconsider the procedural matters decided by the original IRP Panel in August 2014." According to DCA Trust, "ICANN's request for the reconstituted Panel to reconsider the decision of the original Panel is just that – a request for reconsideration (or partial reconsideration) of the original Panel's decision – not a request to repeat a portion of the proceedings to ensure that a newly appointed decision-maker is on equal footing with the existing Panel members to decide the merits of the case."

10. DCA Trust argues that while this IRP is governed by the 2010 version of the ICDR Rules, and that Article 11(2) of those Rules "ensures that a substitute arbitrator – particularly a party-appointed arbitrator – has a sufficient understanding of the proceedings to date, to continue forward on a more or less equal footing with the rest of the tribunal", Rule 11(2) is "not intended to be an appeal mechanism for final decisions."

11. According to DCA Trust, "absent some sort of impropriety on the part of the arbitrator who was replaced that can be remedied by the substitute arbitrator, there is no rationale under Article 11(2) to reconsider final decisions. ICANN has not suggested any sort of impropriety on the part of Justice Neal. It is simply dissatisfied with what was decided by all of the members of the Panel that included Justice Neal and is now opportunistically seeking to revisit the procedural framework that was put in place in a detailed reasoned decision based on extensive written and oral submissions by the parties."

12. DCA Trust also submits that even if Article 11(2) "provided for reconsideration of final decisions [...], it was entirely appropriate for the Panel to structure this proceeding so as to assure both parties a full and fair opportunity to present their case and be heard. Although the

Supplementary [Procedures] provide that an 'in-person hearing shall be limited to argument only', the Bylaws also require ICANN to act in a manner that ensures transparency and accountability [...]. The Panel was entirely within its mandate to conduct the arbitration so as to balance the efficiency and expediency sought by ICANN with the right of applicants to be heard."

13. DCA Trust also submits that, "this Panel has already considered one reconsideration request from ICANN and found that there is nothing in the Bylaws, the Supplementary Procedures or the ICDR Rules that grants the Panel the authority to reconsider its decisions."

14. Finally, and in response to ICANN's email of 5 March 2015, on March 12, DCA Trust submits that the Booking.com final declaration on the merits is not relevant to the Panel's consideration of ICANN's request filed on February 26. According to DCA Trust, the ICDR Rules do not provide for reconsideration of this Panel's 2014 Declaration.

15. Additionally, DCA Trust submits that, "even if it was appropriate for this Panel to reconsider the original Panel's Declaration [...], the fact that there was a telephonic hearing in Booking.com...without witness testimony is of little relevance to this IRP. There is no evidence in the Booking.com final declaration (nor any other public document associated with that IRP) that the Booking.com panel considered its authority to grant an in-person hearing or live witness testimony or weighed whether the particular facts of that case and due process rights articulated in the ICDR [...] Rules demanded that such procedure be part of the Booking.com proceedings. Moreover, there is no evidence that Booking.com requested such procedures. Without knowing what facts, request and/or agreements between the parties informed the procedural framework in Booking.com, the mere facts that the Booking.com panel conducted the proceedings a certain way is irrelevant to this IRP."

THE PANEL'S REASONS & CONCLUSIONS

16. After deliberation and careful consideration by all three Panel members of the Parties' respective submissions and supporting authorities, the Panel is unanimously of the view that it is not necessary for it to reconsider or revisit its 2014 Declaration.

17. That Declaration which in relevant parts read as follows, finally decided that:

> 84) While the Supplementary Procedures appear to limit both telephonic and in-person hearings to "argument only", the Panel is of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for accountability and for decision making with objectivity and fairness.

> 85) Analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. ICANN should not be allowed to rely on written statements of these officers and employees attesting to the propriety of their actions without an appropriate opportunity in the IRP process for DCA Trust to challenge and test the veracity of such statements.

18. First, the Panel is of the view that the above reproduced passages in the 2014 Declaration are unambiguous and do not require reconsideration. Second, the Hon. William J. Cahill (Ret.), who was appointed to this Panel following the resignation, and shortly thereafter, passing away of the Hon. Richard C. Neal (Ret.), has carefully read and considered the various submissions of the Parties and the decisions rendered in this IRP, including the original panel's 2014 Declaration, and he is in full agreement with the Declaration's content and conclusions. There is consequently no need for this Panel to reconsider or revisit its 2014 Declaration.

19. In passing and not at all as a result of any intended or inadvertent reconsideration or revisiting by the Panel of its 2014 Declaration, the Panel refers to Articles III and IV of ICANN's Bylaws. Under the general heading, Transparency, and title "Purpose", Section 1 of Article III states: "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Under the general heading, Accountability and Review, and title "Purpose", Section 1 of Article IV reads: "In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws." In light of the above, and again in passing only, it is the Panel's unanimous view, that the filing of fact witness statements (as ICANN has done in this IRP) and limiting telephonic or in-person hearings to argument only is inconsistent with the objectives setout in Articles III and IV setout above.

20. Finally, and without venturing at this stage into any detailed analysis concerning the Booking.com final declaration, the Panel is of the view that the facts of that case are different and distinguishable from this IRP, and therefore, at least on the hearing of the fact witnesses' issue before this Panel, the Booking.com final declaration is of no consequence.

THE PANEL'S DECISION

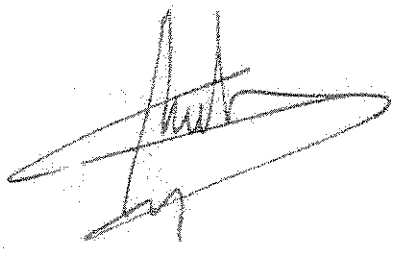
21. The Panel considers that no reconsideration or revisiting of the 2014 Declaration on the IRP Procedure on the hearing of the witnesses issue is warranted.

22. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the decision on the merits.

This Declaration has five (6) pages.

Place of IRP: Los Angeles, California.

Dated: 24 March 2015



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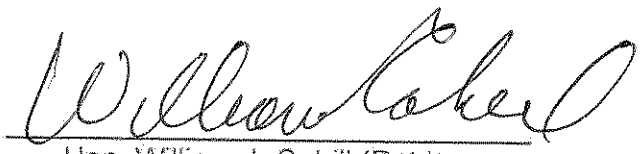
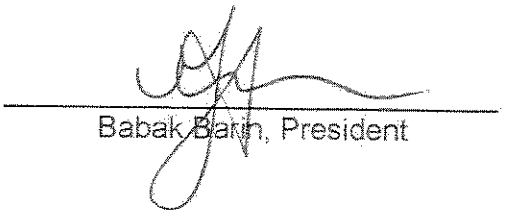


Hon. William J. Cahill (Ret.)



Babak Barin, President