

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GCCIX, W.L.L.,) ICDR CASE NO. 01-21-0004-1048
)
Claimant,)
)
v.)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)
_____)

**GCCIX'S APPLICATION TO REVIEW
EMERGENCY PANELIST'S INTERIM ORDER**

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I. INTRODUCTION

Claimant hereby seeks review of the Emergency Panelist's order ("Interim Order") granting ICANN's Application for Emergency Measures of Protection ("Emergency Request"). The Interim Order has temporarily struck certain allegations and three evidentiary Annexes from Claimant's IRP Complaint ("Excised Material"), only until such time as this panel could review whether the allegations are properly stated, and the evidence properly admitted.

II. THE INTERIM ORDER & THE EXCISED MATERIAL

The Interim Order (p.6) adopts ICANN's definition of the Excised Material as follows: "the portions of pages 3, 15–17, 18, 19, and 26 of Claimants IRP Request that refer to the parties' confidential CEP as well as annexes 11 through 13 to Claimant's IRP Request." The excised text from the IRP Complaint states Claimant's allegations that ICANN engaged in the so-called Cooperative Engagement Process ("CEP") in bad faith, by refusing to substantively respond to Claimant's communications or otherwise take any steps to narrow the issues in the IRP, despite three detailed written requests. Even the Table of Contents heading is excised.

The excised text further describes the three evidentiary Annexes supporting those allegations, proving that Claimant repeatedly sought in writing to try to narrow the issues in this IRP, and never got a substantive response from ICANN in some eight years. It also includes allegations directly related to ICANN's Request for Stay, including the allegation that ICANN has never provided any rationale whatsoever for the rejection of the .GCC application, despite

Redacted - Confidential Information . Indeed, this evidence is directly relevant in opposition to ICANN's stay motion.

Despite ICANN’s repeated protestations that it does not seek to dismiss Claimant’s claim of bad faith, it has succeeded in temporarily striking the heading and almost the entirety of the two pages of textual allegations that state that claim – and also the claim itself from Claimant’s specified Requests for Independent Review (p. 19, #13): Redacted - Confidential Information

Since submitting that excised document to the Emergency Panelist, ICANN has repeatedly admitted in the Emergency Hearing and thereafter that Claimant can raise this as a valid claim. Yet still it has been temporarily stricken from the operative IRP Complaint.

Stricken Annex 11 is the formal Request for Cooperative Engagement sent to ICANN via 3-page letter from GCCIX’ counsel dated February 15, 2014. In accordance with the CEP Rules, that letter described in detail how ICANN was alleged to have violated its Bylaws up to that time, expressly “for the purpose of resolving or narrowing the issues that [GCCIX] contemplates to be brought to an Independent Review Panel.”

Stricken Annex 12 is an 8-page letter from GCCIX’s own counsel to ICANN dated May 6, 2016, which was in response to Redacted - Confidential Information

That letter sets forth clearly and concisely, over the first six pages, the Factual and Procedural Background of the matter as of then, expressly Redacted - Confidential Information

Claimant also requested Redacted - Confidential Information

The letter also contained eight document requests and closed by identifying at least five

potential issues to be raised in an IRP – at least four of which are squarely presented in the IRP Complaint.

Stricken Annex 13 is a 4-page letter from GCCIX’s counsel to ICANN dated August 19, 2019. Claimant’s stricken letter initially noted Redacted - Confidential Information

. The stricken letter first Redacted - Confidential Information

The last three pages of the letter describe Redacted - Confidential Information

Those three letters each Redacted - Confidential Information

But ICANN never substantively responded to any of Claimant’s attempts to engage ICANN, and never took any other action to address Claimant’s concerns or otherwise narrow the issues in this IRP. ICANN’s failure to substantively communicate with Claimant over an eight-year period, or otherwise work cooperatively to narrow the issues, constitutes bad faith. Claimant respectfully requests this tribunal to recognize that and to fashion an appropriate remedy. Claimant requests that the tribunal reject ICANN’s attempt to prevent Claimant from describing or proving this valid claim that ICANN’s CEP Rules and Bylaws have been violated, via evidence of Claimant’s unanswered correspondence to ICANN or any other competent evidence.

III. THE CEP RULES

While the 2013 CEP Rules do not govern the procedure of this IRP, they do govern the CEP between ICANN and GCCIX, because they were in effect when GCCIX submitted its CEP request in 2014 -- and remain in effect today.¹ The CEP Rules provide that “ICANN is expected to participate in the cooperative engagement process in good faith.” They do not contain any mention, much less any requirement of confidentiality in any respect, nor any hint that any, much less all, CEP discussions or communications not only must be shielded from IRP review, but also must be forever hidden from public record.

IV. THE THREE SOURCES OF IRP PROCEDURES

In addition to the CEP Rules that govern the CEP, the three sources of procedures for this IRP are the ICDR Rules, the Interim Supplementary Procedures, and the ICANN Bylaws which were adopted on November 19, 2019 (the “Current Bylaws”).

A. ICDR International Dispute Resolution Procedures

The ICDR International Dispute Resolution Procedures, adopted on March 1, 2021 (the “ICDR Rules”) are the first source of procedures that govern this IRP. That version of the ICDR Rules is applicable to this IRP, rather than any prior version, because “arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration.”

(Art. 1, Sec. 1.)

¹ Annex 1, CEP Rules.

B. Interim Supplementary Procedures for ICANN IRP

The Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process were adopted on the 25th of October 2018 and are applicable to this IRP because they were in effect on the date that this IRP was filed.² The Interim Supplementary Procedures provide (Art. 1, Sec. 1) that “[t]hese procedures apply to all independent review process proceedings filed after 1 May 2018.”

C. The Current ICANN Bylaws

Until repealed in 2016, the February 7, 2014, ICANN Bylaws (the “Repealed Bylaws”)³ Subsection 13 provided: “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” (the “Repealed CEP Language”).

On October 1, 2016, ICANN modified Article 4.3 of the Bylaws.⁴ The Repealed CEP Language was deleted. As expressly and repeatedly admitted by ICANN, the 2016 (or later equivalent) Bylaws are applicable to this IRP because they were in effect at the time that the IRP was initiated: “IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016 [... and] IRP proceedings initiated on or after 1 October 2016 are subject to the Bylaws as of 1 October 2016”.⁵

² Annex 2, Interim Supplementary Procedures. <https://www.icann.org/en/system/files/files/irp-interim-supplementary-procedures-25oct18-en.pdf>.

³ Annex 3, February 2014 ICANN Bylaws. <https://www.icann.org/resources/pages/bylaws-2014-10-06-en>.

⁴ Annex 4, October 2016 ICANN Bylaws. <https://www.icann.org/resources/pages/bylaws-2016-09-30-en>.

⁵ *E.g.*, Annex 5, Cooperative Engagement and Independent Review Processes Status Update (20 Nov 2019), n.4. <https://www.icann.org/en/system/files/files/irp-cep-status-20nov19-en.pdf>.

The most recent ICANN Bylaws were adopted on the 28th of November 2019 (the “Current Bylaws”), and the Repealed CEP Language remains absent. Neither the CEP Rules, the Interim Supplemental Rules, nor the ICDR Rules have changed in any material way (as to this application) during the pendency of the parties’ dispute.

V. NONE OF THOSE RULES CALL FOR SECRECY OF CEP DISCUSSIONS, NOR FOR EXCLUSION OF NECESSARY EVIDENCE OF A CLAIM

First, ICANN has no authority nor justification for claiming confidentiality as to anything after October 1, 2016. But anyway, Claimant is only seeking to prove that ICANN never responded in any substantive way to Claimant’s CEP Request of February 2014. Nor to Claimant’s letter of May 2016. Nor to Claimant’s letter of August 2019. Claimant has not sought to use evidence of any responsive ICANN statement made to Claimant, Redacted - Confidential Information

Claimant could choose to publicize its own letters at any time in any forum, and so certainly ought to be able to use them to prove a valid legal claim in this IRP.

A. ICANN Must Always Act with Maximum Transparency

The Current Bylaws, Article 3 Section 1 provide a clear mandate to ICANN to always act in maximum transparency: “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 ... ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies.”⁶ The former Bylaws were not materially different as to ICANN’s transparency obligations. The

⁶ Current Bylaws, Art. III, Section 1.

Current Bylaws also require that all IRP proceedings and evidence be “on the record”, which can only mean “the public record.”⁷

B. ICANN Published a Significant Portion of Content It Seeks to Exclude

Claimant’s May 2016 letter (Stricken Annex 12) set forth in great detail over several pages the procedural history and underlying factual background as of that time, a series of pointed questions, a request for documents, and a list of issues to be raised in an IRP.

Redacted -
Confidential
Information

In response

to this letter, ICANN published a highly significant portion of content from the letter to its website, where it still remains.⁸ Yet, this letter is one of the documents that ICANN is requesting to be stricken, shielded from the IRP tribunal, and forever hidden from public view. ICANN can hardly argue that Claimant’s communications to ICANN during the CEP are confidential, when ICANN has unilaterally published a significant portion of them.

VI. THE INTERIM ORDER MUST BE REVERSED BECAUSE THE EMERGENCY PANELIST DID NOT RULE ON THE MERITS

A. The IRP Panel Has the Authority to Review and Reverse Interim Decisions

The authoritative ICDR Rules specifically state that “[o]nce the tribunal has been constituted, the tribunal may affirm, reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator.”⁹ Moreover, it is the sole responsibility of

⁷ Current Bylaws, Art. IV, Section 4.3(u).

⁸ Annex 6, ICANN DIDP Response (<https://www.icann.org/en/system/files/files/didp-20160509-1-gccix-request-response-08jun16-en.pdf>).

⁹ ICDR Rules Article 7, Section 5.

the IRP Panel (not the Emergency Panelist) to rule on the admissibility of evidence: “[t]he tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.”¹⁰

In this case, the Interim Order is overbroad on its face, as it defines (at #3, p.6) the Excised Material as follows: “the portions of pages 3, 15–17, 18, 19, and 26 of Claimants IRP Request *that refer to the parties’ confidential CEP* as well as annexes 11 through 13 to Claimant’s IRP Request.” (Emphasis added.) The Interim Order further refers (#31, p. 12) to the version of Claimant’s IRP Complaint unilaterally redacted by ICANN. ICANN has admitted during the Emergency Hearing and thereafter that Claimant can state a valid claim of ICANN’s bad faith CEP conduct. Thus, the excision is clearly overbroad as it includes *all allegations and evidence* that even “**refer to**” the CEP. ICANN made no effort to narrowly tailor the excision only to references to anything truly confidential – they excised nearly all mention of the claim.

B. The Emergency Panelist Expressly Declined to Rule on the Merits

The Emergency Panelist made it clear that the Interim Order is merely temporary and will have “no binding or even influential consequence for the tribunal (to be formed in due course) which will hear and determine this dispute.” (Interim Order, Page 2, Paragraph 1). Indeed, it is clear that the Emergency Panelist did not evaluate the substantive arguments surrounding whether the CEP Emails should be suppressed: “While the Emergency Arbitrator might go through all the substantive arguments in either direction as presented by the Parties and subject them to detailed scrutiny, he does not consider that to be of assistance, whether for present purposes or indeed for the subsequent proceedings before the yet-to-be-constituted tribunal.”

The Emergency Panelist declined to consider the question on the merits because he determined that all that was necessary was for Respondent to have shown “sufficiently serious

¹⁰ ICDR Rules Article 22, Section 7.

question related to the merits. An applicant does not have to show, in addition, a likelihood of success on the merits. The Emergency Arbitrator, for the reasons set out in the foregoing paragraph, chooses not to examine whether the Respondent has a likelihood of success on the merits of the issue.” (Interim Order, Pg. 8, Paragraph 13).

VII. THE EXCISED MATERIAL IS NOT EXCLUDABLE UNDER APPLICABLE RULES, AND IS NECESSARY TO PROVE ICANN’S BAD FAITH IN CEP

A. Current Bylaws & CEP Rules Refute ICANN’s Position

In its Emergency Request, ICANN stated that “[a]ll references to ICANN's Bylaws are to the 7 February 2014 Bylaws (‘Bylaws’), which were the operative Bylaws at the time Claimant instituted the Cooperative Engagement Process”. ICANN continued: “Claimant is likely to argue that the language regarding CEP confidentiality in the current Bylaws is different than that in the 2014 Bylaws. This argument, however, is irrelevant.”

However, the Current Bylaws are controlling, not irrelevant. ICANN has explicitly admitted that IRP proceedings are subject to the ICANN Bylaws in effect at the time that the IRP is initiated: “IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016”, while “IRP proceedings initiated on or after 1 October 2016 are subject to the Bylaws as of 1 October 2016.”¹¹ ICANN ignores the fact that the IRP Procedures from the Repealed Bylaws are not applicable to this IRP.

In fact, both the CEP Rules and the controlling Current Bylaws plainly must permit the consideration of evidence that the parties did not engage in the CEP in good faith. “[I]f the Claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in

¹¹ *E.g.*, Annex 5, CEP Status Update, *supra* Footnote 5 (emphasis added).

the IRP, including legal fees.”¹² The operative Bylaws make no mention of confidentiality. Neither do the 2013 CEP Rules, which require ICANN to participate in the CEP in good faith.

It is impossible to prove good faith or bad faith in any negotiation, without referring to the parties’ communications. Thus, the controlling ICANN Bylaws and CEP Rules assume IRP panel review of CEP communications to determine whether the parties engaged in “good faith”. To this point, in the recent *Afilias v. ICANN* IRP decision, substantial CEP discussion emails were admitted to prove ICANN’s bad faith in the CEP process.¹³ In the Final Declaration, that IRP tribunal excoriated ICANN for its bad faith litigation tactics, including during the CEP, and awarded all of claimant’s attorneys’ fees (to that point in the matter) to be paid by ICANN.¹⁴

Yet here, ICANN argues that the Repealed Bylaws should govern the admissibility of CEP evidence because the CEP was initiated while the Repealed Bylaws were in effect. This ignores the fact that the Bylaws provide IRP procedures, while the CEP Rules provide CEP procedures. And anyway, ICANN’s theory could not preclude anything that happened after the language was repealed in 2016, including its repeated refusal to respond to Claimant or otherwise cooperate. The CEP Rules do not provide for the confidentiality for CEP discussions or emails. In fact, ICANN’s own, unilaterally developed and imposed CEP Rules explicitly provide for the IRP Panel to review whether either party participated in bad faith.¹⁵ That is not possible without review of the parties’ CEP communications -- likely why that Bylaw provision was repealed.

¹² Current Bylaws, Section 4.3(e)(2).

¹³ Annex 7, *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702 (12 Feb 2019), “LIST OF EXHIBITS TO AFILIAS DOMAINS NO. 3 LIMITED’S SUR-REPLY” -- Exhibit 315, pp. 153-170. Included are emails detailing specific negotiation points during the Afilias CEP, including the July 23 Email from Alexandre de Gramont to ICANN. Use of this evidence in the CEP was neither objected to nor redacted by ICANN.

¹⁴ Annex 8, *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702 (15 Jul 2021), (“Afilias Final Decision”), p. 124.

¹⁵ Annex 1, CEP Rules, p. 2.

B. ICANN Relies on Inapposite California Evidence Code

The California Evidence Code Sec. 1152, under which ICANN sought to exclude the Claimant's evidence from the IRP tribunal and to forever shield it from public view, states that: “[e]vidence that a person has, in compromise ..., furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained ... loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”¹⁶

Even if it were applicable to this matter, which it is plainly not, ICANN has made no effort to apply this California law to exclude anything in particular. ICANN generally stated that everything they want stricken consists of “settlement discussions”. But, ICANN has not argued how any individual statement was made “in compromise,” nor has ICANN argued that anything consists of an offer or a promise. Nor has ICANN argued how anything would be used to prove ICANN's “liability for the loss or damage” -- all as clearly required by that particular statute from one U.S. state, upon which ICANN heavily has relied.

To that point, the thrust of Claimant's argument is that ICANN never has made any semblance of any offer in compromise, nor any attempt to narrow issues, nor otherwise engaged in the CEP in good faith. To the extent there were any conversations that might remotely be deemed as such, if any, they are not contained in any of Claimant's allegations or evidence to date. ICANN's argument fails fundamentally because the California litigation rules are not applicable to this proceeding. And even if they were, any analysis of whether a particular statement is inadmissible under the California statute is highly fact-specific and would require a showing that ICANN has thus far wholly failed to even allege, much less prove.

¹⁶ Annex 9, California Evidence Code, Sec. 1152.

ICANN has admitted in its Emergency Request that the ICDR Rules, the Interim Supplementary Procedures, and the Bylaws are the relevant procedures for this IRP.¹⁷ Their citations to California and US federal litigation rules have no applicability here, in a special IRP arbitration brought by a Bahrain company, under ICANN's own rules as a global gatekeeper of the DNS.

C. ICDR Mediation Rules Are Not Applicable; There Was No Mediation

ICANN has suggested that the admissibility of CEP emails is proscribed by the ICDR Mediation Rules. However, ICDR Mediation is a formal process based on agreement of the parties. There is no question that the CEP was not an ICDR Mediation – nor any form of mediation at all -- and so was not subject to the ICDR Mediation Rules. Instead, they were subject to ICANN's own CEP Rules, which require an IRP panel to consider allegations that a party failed to engage in CEP in good faith. A party could never do that unless it could use the parties' CEP communications as evidence. Thus, the IRP Panel should reject ICANN's argument that the Excised Material should be excluded under the ICDR Mediation Rules.

VIII. CONCLUSION

The Emergency Panelist's Interim Order granting ICANN's Application for Emergency Measures of Protection should be reviewed because the order expressly declined to take a position on the merits, and these allegations and evidence are necessary to prove Claimant's claim that ICANN acted in bad faith during the CEP – a claim they very clearly have every right to prove to this tribunal, and for the public record. The Emergency Panelist's Interim Order

¹⁷ ICANN and GCCIX agree that the Bylaws govern this IRP. As discussed above, there is disagreement over whether the Repealed Bylaws or the Current Bylaws are applicable, at least as pertaining to CEP communications and non-responses that ICANN alleges should be kept secret.

should be reversed because the content that has been stricken from the original IRP notice is relevant, necessary and admissible under the Current Bylaws and all other applicable rules.

Therefore, Claimant respectfully requests that its original IRP Complaint and supporting evidentiary Annexes be entered into the record, and that ICANN be ordered to post it on the IRP page of ICANN's website, unredacted. Moreover, Claimant requests that ICANN be ordered to post the briefing, evidence and Interim Order from the Emergency Panelist proceeding on the IRP page of its website, as its Bylaws require all IRP proceedings to be conducted on the public record.

Respectfully Submitted,

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List of Annexes

Annex 1 – ICANN CEP Rules

Annex 2 –Interim Supplementary Procedures for ICANN IRP

Annex 3 – 2014 ICANN Bylaws

Annex 4 – 2016 ICANN Bylaws

Annex 5– ICANN CEP Status Update

Annex 6 – ICANN DIDP Response

Annex 7 – *Afilias v. ICANN* Exhibits (12 Feb 2019)

Annex 8 – *Afilias v. ICANN* Final Order

Annex 9 – California Evid. Code Section 1152